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**REMEDIES AND PROCEDURES ON THE RIGHT OF  
ANYONE DEPRIVED OF HIS OR HER LIBERTY BY  
ARREST OR DETENTION TO BRING  
PROCEEDINGS BEFORE A COURT**

*A Comparative and Analytical Review of State Practice*

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# EXECUTIVE SUMMARY

1. This is a report prepared by Oxford Pro Bono Publico ('OPBP') for the United Nations Special Rapporteur on Arbitrary Detention. The Special Rapporteur has been tasked by the United Nations Human Rights Council with preparing a set of principles and guidelines on 'remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court'.
2. The report provides a comparative study of relevant domestic law across 21 jurisdictions (as well as the jurisprudence of the European Court of Human Rights ('ECtHR')). It focuses on the legal frameworks governing the following types of detention:
  - administrative detention for counter-terrorism, national security or intelligence-gathering purposes;
  - immigration detention;
  - detention of persons with a mental illness;
  - military detention;
  - police detention (particularly in crowd-control situations or following arrest without warrant); and
  - preventive detention (particularly detention imposed alongside or subsequent to a sentence of imprisonment).
3. In relation to each, the report considers what constitutes 'detention'; the procedural safeguards which govern the decision to detain; the avenues for review or appeal; and the availability of compensation for unlawful detention.
4. On the basis of this analysis, the report identifies trends in State practice across the jurisdictions under study (including the ECtHR). Based on the strength of these trends, it offers tentative conclusions regarding the potential content and development of customary international law in the relevant areas.
5. A number of important qualifications in relation to these conclusions are set out in the Introduction. Most significantly, the report does not set out to describe the current state of customary international law, but rather to identify State practice which might support an argument for the emergence or existence of particular customary norms and to provide insight into the types of norms which might one day develop. The report also provides evidence of subsequent State practice which may be relevant in interpreting the obligations of parties to the International Covenant on Civil and Political Rights under art 9.
6. Some of the strongest trends identified in the report relate to:

- the nature of the individual or body empowered to order detention;
- the specific circumstances in which or purposes for which detention is lawful;
- the right to be heard in relation to the decision to detain;
- the right of detainees to appeal their detention to, or have their detention reviewed by, a judicial body;
- the establishment of a maximum total period of detention and/or automatic periodic review of detention; and
- the right to claim monetary compensation in respect of unlawful detention.

7. The overall picture presented in the report is of a conception of lawful detention as detention which is targeted and certain; limited in time; and overseen by an independent judiciary. OPBP hopes the report will assist the Special Rapporteur in the development of the principles and guidelines, and will constitute a useful resource for the Working Group on Arbitrary Detention and for other bodies working on the rights of detainees.

# INTRODUCTION

8. The Special Rapporteur on Arbitrary Detention has been tasked by the United Nations Human Rights Council with completing two projects:
  - an analytical survey of sources of law on ‘remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court’; and
  - a set of ‘principles and guidelines’ on the same topic.
9. As part of the process of preparing these documents, the Special Rapporteur requested that OPBP provide a submission:
  - making a comparative study of domestic law governing key issues related to remedies and procedures on the right of anyone deprived of his or her liberty by arrest or detention to bring proceedings before a court; and
  - offering tentative conclusions regarding the possible content and development of customary international law in these areas.
10. Accordingly, OPBP’s research was divided into two phases. The first phase considered and analysed the legal regimes of a variety of jurisdictions covering certain types of detention in relation to which States’ obligations under international law are particularly unclear or controversial. The types of detention considered, selected in consultation with the Special Rapporteur, were:
  - administrative detention for counter-terrorism, national security or intelligence-gathering purposes;
  - immigration detention;
  - detention of persons with a mental illness;
  - military detention;
  - police detention (particularly in crowd-control situations or following arrest without warrant); and
  - preventive detention (particularly detention imposed alongside or subsequent to a sentence of imprisonment).
11. The research covered 21 jurisdictions: Argentina, Australia, Austria, Belgium, Canada, China, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Russia, Singapore, South Africa, Sri Lanka, Switzerland, the United Kingdom (‘UK’), the United States of America (‘US’)

and Uruguay.<sup>1</sup> The jurisprudence of the European Court of Human Rights ('ECtHR') was also considered.

12. In each case, the research considered the following questions:
  - Are there any threshold questions as to what constitutes 'detention' in this context?
  - Under what circumstances is detention lawful, and what procedural safeguards govern the decision to detain?
  - What avenues are available for review of or challenges to detention?
  - Is compensation available if a person is found to have been unlawfully detained?
13. It is hoped that the jurisdictions considered provide a reasonable approximation of the practice of the international community: notably, they include States from a range of geographical regions (including Africa, the Asia-Pacific, Eastern Europe, Latin America and Western Europe); States from both the developed and the developing world; and States with both common and civil law systems. A Country Report for each jurisdiction is included in Appendix II.
14. The second phase of research involved analysing the information collected in the first phase in order to identify points of commonality or divergence in the laws of the jurisdictions under study. The analysis was structured around the same questions addressed in the primary research: threshold questions, the decision to detain, review of and challenges to detention, and Compensation for unlawful detention. This allowed us to draw some tentative conclusions regarding trends in State practice and the potential content and development of customary international law.
15. As noted above, the analysis in this report is broken down into thematic areas: that is, it considers trends in State practice in relation to particular types of detention. It may also be possible to observe higher-level trends in State practice *across* different types of detention; this possibility is considered in the report's concluding section, but is not discussed in detail in the body of the report.
16. Obviously, some of the trends identified are stronger than others. The thematic summaries aim to be as specific as possible in assessing the proportion of the jurisdictions under study which conform to each identified trend. As a rule of thumb, consistency in the practice of around half the jurisdictions under study has been described as a 'significant' trend; consistency in the

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<sup>1</sup> Two qualifications should be made here. The first is that, in relation to some jurisdictions (notably Argentina, Canada, Belgium, and Switzerland), not all types of detention were considered due to limited volunteer availability. The second is that the Country Reports for China and Russia are based on primary research conducted by – but are not completely drafted by – volunteers who were able to access, translate and summarise the underlying legal materials. As a result, these Country Reports in particular are not, and do not purport to be, absolutely comprehensive. Finally, we would also like to acknowledge Chelsea Han, MSc in Refugee and Forced Migration Studies Candidate, University of Oxford, for her additional research work.

practice of around two-thirds as a ‘strong’ trend; and near-uniformity as a ‘very strong’ trend. The total number of jurisdictions under study differs across each of the six thematic sections.

17. In many cases, the trends identified are not sufficiently strong enough to found any conclusions regarding the potential content of customary international law. However, where there is a strong or very strong trend, we identify this as potentially supporting an argument for the existence or emergence of a norm of customary international law. Similarly, where there is a significant or growing trend, we identify this as relevant in considering the potential development of customary international law in the relevant area. A background note on the formation of customary international law, which was used by our volunteers when preparing this report, is provided in Appendix I.
18. Where statements regarding customary international law are made, they are subject to three important qualifications:
  - First, the assessment is based on just two sources (albeit two important sources) of evidence of State practice, namely domestic legislation and judicial decisions (with the exception of the jurisprudence of the ECtHR). Other sources, such as press releases, the opinions of government legal advisers, executive decisions and practices, and the resolutions of international organisations, are not considered.<sup>2</sup> Any definitive conclusions regarding the content of customary international law would need to be supported by reference to all relevant evidence of State practice.
  - Secondly, as noted above, the assessment is based on the practice of only a limited number of States (though, again, it is hoped that the sample is reasonably representative). Any conclusions regarding the content of customary international law would need to be supported by reference to the practice of the international community as a whole.
  - Thirdly, this report does not consider evidence of the existence of *opinio juris*. Such evidence would, of course, be critical to any conclusions regarding the content of customary international law.
19. In identifying these qualifications, we are conscious of the debate which exists regarding the formation of custom in areas covered by widely ratified treaties (such as the International Covenant on Civil and Political Rights (‘ICCPR’)). In particular, we are aware that there is a live question as to whether, in identifying evidence of customary international law in these areas, the practice of States party to the relevant treaty is of diminished significance due to the influence of

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<sup>2</sup> To the extent that the legal regimes described in this report may be imperfectly observed in practice in some jurisdictions, we think it important to note that this would not negate the relevance of the regime in question in determining the current or potential content of customary international law.

their treaty obligations – or, conversely, whether this is relevant only to the identification of evidence of *opinio juris*. Without taking a position on these complex issues, we wish to acknowledge their relevance to the use which may be made of this report, and to note that if the former view is taken then the laws and judicial decisions of States which are not party to the ICCPR – such as China and Singapore – will be central in assembling evidence of relevant State practice.

20. In light of the above qualifications, it is important to stress that the report does not itself offer any conclusions regarding the present state of customary law in relation to detention. What it seeks to do is identify State practice which might, in conjunction with evidence drawn from other relevant sources, provide support for such conclusions.<sup>3</sup>
21. The focus on State practice and customary international law differentiates this project from other research on arbitrary detention, such as the Human Rights Committee's recent General Comment No. 35 on art 9 of the ICCPR.<sup>4</sup> In this regard, we note that, for the States considered that are parties to the ICCPR, the report may also provide evidence of subsequent practice which is useful in interpreting the scope of State Parties' obligations under art 9.<sup>5</sup>
22. It is therefore hoped that the report will make a valuable contribution to the Special Rapporteur's analytical survey and help lay the groundwork for the eventual development of his principles and guidelines.

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<sup>3</sup> We note that the fact that some State practice does not conform to a particular trend is not in itself sufficient to negate an argument regarding the content of customary international law: this practice may, for example, constitute a breach of a customary norm. In these cases, evidence of *opinio juris* may be particularly significant, as States may, through (for example) their statements and voting in international bodies, and their support for the work of treaty bodies and special procedures such as the Working Group on Arbitrary Detention, contribute to the formation or declaration of customary international law in these areas.

<sup>4</sup> Another document taking a customary international law approach to issues surrounding detention is the Working Group on Arbitrary Detention's 'Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law' (2012). We note that the present report – which is primarily concerned with remedies and procedures available to persons deprived of their liberty by arrest or detention – may supplement the more general findings regarding the prohibition on arbitrary detention set out in Deliberation No. 9.

<sup>5</sup> See Vienna Convention on the Law of Treaties, art 31(3)(b).

# ADMINISTRATIVE DETENTION

## I PRELIMINARY REMARKS

23. This section concerns administrative detention for counter-terrorism, national security, or intelligence-gathering purposes.
24. A number of the States whose practice is considered in this report do not appear to have a legal regime which deals specifically with administrative detention on these grounds.<sup>6</sup> In these States, any such detention must be effected pursuant to more general powers, many of which are considered in the section on police detention.
25. Accordingly, references below to ‘the States under study’, ‘the States examined’ or similar are references to the following States: Australia, Canada, China,<sup>7</sup> India, Russia,<sup>8</sup> Singapore, South Africa,<sup>9</sup> Sri Lanka, the UK, and the US. The law of Belgium and Switzerland is considered in relation to threshold questions only. The jurisprudence of the ECtHR is considered in relation to threshold questions, review of and challenges to detention, and compensation for unlawful detention.

## II THRESHOLD QUESTIONS

26. The majority of the States examined have no express legal threshold for determining whether a person has been ‘detained’. The formulation of such a threshold is particularly relevant in the counter-terrorism or national security context because, in relation to several of the regimes

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<sup>6</sup> Specifically Argentina, Austria, Belgium, Germany, Greece, Hong Kong, Italy, Kenya, New Zealand, Switzerland, and Uruguay. Note that New Zealand does provide under the Immigration Act 1987 for the detention of non-citizens who are considered to constitute a security threat; as this forms part of the broader immigration detention regime, it is discussed in the section on immigration detention.

<sup>7</sup> Note that the regime governing administrative detention in China relates to specific violations of the ‘Public Order Management and Punishment Law of the People’s Republic of China’, and includes not only national security-related incidents but also serious infringements of personal or property rights. As a result, the Chinese regime is also considered in the section on police detention.

<sup>8</sup> Similarly, the regime governing administrative detention and arrest in Russia relates to a specified category of ‘administrative offences’, which includes terrorism- and national-security related offences (in relation to which longer periods of detention apply) but also other offences relating to, for example, violations of personal or property rights. As a result, the Russian regime is also considered in the section on police detention.

<sup>9</sup> Note that the South African State practice is not based on any currently existing power, but on the capacity of Parliament to declare a state of emergency and suspend constitutional and legal limits on administrative detention. See Country Report for South Africa, ‘Administrative detention – Preliminary remarks’. Under other circumstances, South Africa does not provide for administrative detention outside the framework of the general criminal law.

considered in the Country Reports – for example, control orders in Australia<sup>10</sup> or the proposed Enhanced Terrorism Prevention and Investigation Measures regime in the UK<sup>11</sup> – arguments may well arise as to whether ‘detention’ is involved.

27. In Switzerland and under the European Convention on Human Rights (‘ECHR’), the question of whether a person has been detained depends upon assessment of a number of factors, including the nature, duration, and impact of the restrictions on their liberty.<sup>12</sup>
28. Two other States, namely the Belgium and the US, have clearer standards for determining whether a person has been detained. In these countries, a person has been detained where they are prevented from leaving a place.<sup>13</sup>
29. Thus, due to the absence of State practice in most of the jurisdictions considered, and the divergence in that State practice which does exist, it is difficult to draw any conclusions regarding the possible content of customary international law with respect to the threshold question of precisely when a person has been ‘detained’ for reasons of counter-terrorism or national security.

### **III DECISION TO DETAIN**

#### **a) Preliminary remarks**

30. A number of different types of safeguards appear in various forms throughout the State practice examined. These will be considered under the following general categories: the need for warrants or prior authorisation for detention; the factual standard for authorising detention; and the maximum duration of detention.

#### **b) Warrants or prior authorisation for detention**

31. At least four of the States examined require some form of warrant or prior authorisation enabling the detention of a specified person:<sup>14</sup> that is, a person cannot be detained in the

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<sup>10</sup> This issue was specifically considered in the case of *Thomas v Mowbray* (2007) 233 CLR 307, where the High Court of Australia appeared to distinguish the type of deprivation of liberty imposed by a control order from ‘detention in custody’. See Country Report for Australia, ‘Administrative detention – Threshold questions – Detention pursuant to a control order issued under Div 104 of the Criminal Code Act 1995 (Cth)’.

<sup>11</sup> Country Report for the United Kingdom, ‘Administrative detention – Specific counter-terrorism provisions – Terrorism prevention and investigation measures’.

<sup>12</sup> Country Report for Switzerland, ‘Administrative detention – Detention pursuant to criminal procedure law – Threshold questions’.

<sup>13</sup> Country Report for Belgium, ‘Administrative detention – Detention on remand – Threshold questions’; Country Report for the United States of America, ‘Administrative detention – Threshold questions’.

<sup>14</sup> Australia, Canada, China, and India. Russia is an intermediate case (see below). The following States require a warrant or prior authorisation for some types of detention, but not for others: Singapore, Sri Lanka, and the United States of America. While a warrant does not appear to be required in South Africa, it should again be emphasised that these provisions relate only to declared states of emergency.



discretion of an ordinary police officer or government security agent in the course of their normal duties.<sup>15</sup>

32. For those States that do permit detention at the discretion of an ordinary police officer or government security agent,<sup>16</sup> detention is for a strictly limited period of time; if there is scope for extension of the detention, it must be by authorisation of a senior executive officer or a judge. For instance, officers of the UK border police can arrest a person at a port or border without a warrant, but can detain the person for no more than nine hours.<sup>17</sup> Similarly, police officers can arrest a person on suspicion of involvement in terrorism, but can detain the person for no more than 48 hours; extension of the detention must be authorised by a judge.<sup>18</sup> In the US, police officers are permitted to stop and question a person (which is considered to amount to having been ‘seized’, and hence to constitute detention under US law<sup>19</sup>). However, as there is no power to arrest the person and take them to a police station except under the normal criminal justice processes, detention under these powers is necessarily of short duration.<sup>20</sup> In Sri Lanka, a senior police officer may arrest a person without a warrant, but must produce them to a magistrate within 72 hours.<sup>21</sup> In Singapore the power of police officers to arrest and detain a person under the Criminal Law (Temporary Provisions) Act is limited to sixteen days before the detention must be sanctioned by ministerial order.<sup>22</sup>
33. In South Africa, even during a state of emergency, a person detained without trial must be brought before a judge no later than ten days after the commencement of their detention.<sup>23</sup>
34. Russia is an intermediate case. ‘Administrative arrest’, which is a penalty for committing an ‘administrative offence’, must be imposed by a judge. However, a number of different types of government officials – including the police – are authorised to effect short-term ‘administrative

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<sup>15</sup> See the section on police detention for a discussion of police powers to arrest without a warrant under the general criminal law.

<sup>16</sup> Singapore, Sri Lanka, the United Kingdom, the United States of America, and Russia (in the case of ‘administrative detention’).

<sup>17</sup> Country Report for the United Kingdom, ‘Administrative detention – Specific counter-terrorism provisions – Detention at ports or border controls on suspicion of terrorism’.

<sup>18</sup> Country Report for the United Kingdom, ‘Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism’.

<sup>19</sup> Country Report for the United States of America, ‘Administrative detention – Threshold questions’; Country Report for the United States of America, ‘Administrative detention – Decision to detain – Temporary stops’.

<sup>20</sup> Country Report for the United States of America, ‘Administrative detention – Decision to detain – Temporary stops’.

<sup>21</sup> Country Report for Sri Lanka, ‘Administrative detention – Decision to detain’.

<sup>22</sup> Country Report for Singapore, ‘Administrative detention – Decision to detain – Criminal Law (Temporary Provisions) Act – Authorisation procedure and criteria for initial making of the order’.

<sup>23</sup> Country Report for South Africa, ‘Administrative detention – Preliminary remarks’.

detention' (for a maximum of 48 hours) for the purposes of ensuring the timely consideration of proceedings relating to an administrative offence.<sup>24</sup>

35. For those States that do require a warrant or prior authorisation for detention,<sup>25</sup> there are three different categories of actor who might provide such authorisation: senior police officers or members of the security services; judges or courts; and ministers.
36. States that empower senior police officers or officers of the security services to provide the prior authorisation for detention are: China;<sup>26</sup> the Australian states of Victoria,<sup>27</sup> Queensland,<sup>28</sup> South Australia (though this results in a shorter maximum detention period than where the prior authorisation comes from a judicial body),<sup>29</sup> and Tasmania (though only in cases of urgent need);<sup>30</sup> Canada, in the case of urgent (that is, exceptional) preventive arrests;<sup>31</sup> and Australia's federal jurisdiction, in the case of urgent (that is, exceptional) preventive detention under the Commonwealth Criminal Code.<sup>32</sup> However, it should be noted that Canadian and Australian urgent preventive detention, although initially authorised by a senior police officer, must be confirmed by a judge within 24 hours in Canada,<sup>33</sup> within 24 hours in Australia's federal jurisdiction<sup>34</sup> and the Australian states of Queensland<sup>35</sup> and Tasmania,<sup>36</sup> and as soon as practicable in the Australian state of South Australia.<sup>37</sup>

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<sup>24</sup> Country Report for Russia, 'Administrative detention – Threshold questions'; Country Report for Russia, 'Administrative detention – Decision to detain'.

<sup>25</sup> Australia, Canada, China, India; also potentially Russia (see *ibid* and accompanying text).

<sup>26</sup> Country Report for China, 'Administrative detention – Decision to detain'.

<sup>27</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Victoria'.

<sup>28</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Queensland'.

<sup>29</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Tasmania'.

<sup>30</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – South Australia'.

<sup>31</sup> Country Report for Canada, 'Administrative detention – Decision to detain – Investigative hearings and preventive arrest'.

<sup>32</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Preventative detention under Div 105 of the Criminal Code Act 1995 (Cth)'.

<sup>33</sup> Country Report for Canada, 'Administrative detention – Decision to detain – Investigative hearings and preventive arrest'.

<sup>34</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Preventative detention under Div 105 of the Criminal Code Act 1995 (Cth)'.

<sup>35</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Queensland'.

<sup>36</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Tasmania'.

<sup>37</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – South Australia'.

37. States that empower ministers or other government officials to provide the prior authorisation for detention are: Canada, in the case of security certificates for non-citizens;<sup>38</sup> India;<sup>39</sup> Singapore (under both the Internal Security Act and the Criminal Law (Temporary Provisions) Act);<sup>40</sup> and Sri Lanka (although Sri Lanka also permits a parallel procedure of arrest by a police officer without warrant).<sup>41</sup>
38. States that empower judges or courts<sup>42</sup> to provide the prior authorisation for detention are: Australia in its federal jurisdiction (except in the case of urgent preventive detention);<sup>43</sup> the Australian states of New South Wales,<sup>44</sup> Tasmania (except in the cases of urgent need),<sup>45</sup> Western Australia,<sup>46</sup> and the Australian Capital Territory;<sup>47</sup> Canada, in the case of investigative hearings and preventive arrest (except in the case of urgent preventive arrest);<sup>48</sup> and Russia (in the case of ‘administrative arrest’).<sup>49</sup>
39. Another way of conceptualising the relevant State practice is to say that four of the States whose practice was reviewed in this area require some form of judicial involvement in authorising detention. These States are: Australia (prior judicial authorisation for most forms of detention, and automatic judicial review for urgent preventive detention); Canada (prior judicial authorisation for most forms of detention, and automatic judicial review for urgent preventive detention and for security certificates); India (automatic judicial review);<sup>50</sup> and Russia (temporally limited police power to detain pending a judicial hearing). Additionally, a further two States require judicial involvement for some forms of detention, but not for others: in the UK, there is no judicial involvement in detention for up to nine hours at ports and borders,<sup>51</sup> but there is a

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<sup>38</sup> Country Report for Canada, ‘Administrative detention – Decision to detain – Security certificates’.

<sup>39</sup> Country Report for India, ‘Administrative detention – Counter-terrorism – Decision to detain’.

<sup>40</sup> Country Report for Singapore, ‘Administrative detention – Decision to detain – Internal Security Act – Procedure and criteria for initial making of an order’; ‘Decision to detain – Criminal Law (Temporary Provisions) Act – Authorisation procedure and criteria for initial making of the order’.

<sup>41</sup> Country Report for Sri Lanka, ‘Administrative detention – Decision to detain’.

<sup>42</sup> This includes former or retired judges and members of tribunals.

<sup>43</sup> Country Report for Australia, ‘Administrative detention – Decision to detain’.

<sup>44</sup> Country Report for Australia, ‘Administrative detention – Decision to detain – Detention under various state laws – New South Wales’.

<sup>45</sup> Country Report for Australia, ‘Administrative detention – Decision to detain – Detention under various state laws – Tasmania’.

<sup>46</sup> Country Report for Australia, ‘Administrative detention – Decision to detain – Detention under various state laws – Western Australia’.

<sup>47</sup> Country Report for Australia, ‘Administrative detention – Decision to detain – Detention under various state laws – Australian Capital Territory’.

<sup>48</sup> Country Report for Canada, ‘Administrative detention – Decision to detain – Investigative hearings and preventive arrest’.

<sup>49</sup> Country Report for Russia, ‘Administrative detention – Decision to detain – Administrative arrest’.

<sup>50</sup> Country Report for India, ‘Administrative detention – Counter-terrorism – Decision to detain’.

<sup>51</sup> Country Report for the United Kingdom, ‘Administrative detention – Specific counter-terrorism provisions –

requirement of judicial authorisation for extending detention on suspicion of involvement in terrorism beyond 48 hours;<sup>52</sup> and in Sri Lanka, a person arrested without a warrant on terrorism grounds must be brought before a magistrate within 72 hours, but a person detained by ministerial order need not be brought before the judiciary.<sup>53</sup> Again, in South Africa, automatic judicial review is required even during a state of emergency.

40. In Singapore and China, by contrast, no form of administrative detention considered for the purposes of this section requires automatic judicial involvement.
41. As a result, there is a slight trend in the State practice considered toward requiring some form of prior authorisation for detention and/or some form of judicial involvement in the detention process. However, based on the degree of divergence between jurisdictions, it is difficult to draw any conclusions regarding the potential content of customary international law on this issue.

### **c) Factual standard for authorising detention<sup>54</sup>**

42. First, a brief note on the analysis of this category of safeguard. Many of the States whose practice has been examined in this section provide for a number of different types of administrative detention for counter-terrorism, national security, or intelligence-gathering purposes. The analysis in this section focuses on the avenue of detention within a particular legal system that has the least onerous factual standard for authorising detention. Even if a State also provides for some more onerous factual standard for alternative forms of detention, the fact that the State adopts a less onerous standard in other contexts is most relevant for the purposes of investigating State practice.
43. The only three legal systems that require a reasonable suspicion of actual involvement of the detained person in a planned or completed terrorist attack are China,<sup>55</sup> the ECHR,<sup>56</sup> and Sri Lanka.<sup>57</sup>

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Detention at ports or border controls on suspicion of terrorism?.

<sup>52</sup> Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism'.

<sup>53</sup> Country Report for Sri Lanka, 'Administrative detention – Decision to detain'.

<sup>54</sup> Note that South Africa was not considered for the purposes of this subsection, as the standard for authorising detention without trial during a state of emergency was not considered in the Country Report.

<sup>55</sup> Country Report for China, 'Administrative detention – decision to detain'. Note again that the administrative detention regime in China is not limited to the counter-terrorism context; the standard is a suspected violation of the 'Public Order Management and Punishment Law of the People's Republic of China', which includes provisions relating to public order and security.

<sup>56</sup> Report for the European Court of Human Rights, 'Administrative detention – Decision to detain'.

<sup>57</sup> Country Report for Sri Lanka, 'Administrative detention – Decision to detain'.

44. Two States provide as the least onerous standard for detention that the person must present some form of general danger to security or to the maintenance or administration of counter-terrorism or national security laws: Russia<sup>58</sup> and Singapore (under the Internal Security Act).<sup>59</sup>
45. The remaining States allow for some forms of administrative detention simply on the basis that the detention will assist in the collection or preservation of evidence, or will prevent a witness from absconding: Australia,<sup>60</sup> Canada,<sup>61</sup> India,<sup>62</sup> the UK,<sup>63</sup> and the US.<sup>64</sup> Importantly, detention in these States can be authorised in respect of a person who is not themselves suspected of any involvement in a terrorist attack, but who simply possesses relevant information or evidence.
46. To the extent that a trend in State practice can be detected, there may be a slight trend in favour of permitting administrative detention for, as a minimum standard, the purposes of securing evidence, gathering intelligence, or ensuring the availability of witnesses. However, the divergence in the practice of the jurisdictions under study makes it difficult to draw any conclusions regarding the potential content of customary international law on this issue.

#### **d) Maximum duration of detention**

47. As noted above in relation to the factual standard for authorising detention, many of the States whose practice is examined in this section provide for multiple forms of administrative detention for counter-terrorism, national security or intelligence-gathering purposes. Again, and for the same reasons, the following analysis will focus on the form of detention with the longest maximum duration.

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<sup>58</sup> Note that the standard for ‘administrative arrest’ is higher, requiring actual commission of an ‘administrative offence’. See Country Report for Russia, ‘Administrative detention – Decision to detain- Administrative detention’.

<sup>59</sup> Country Report for Singapore, ‘Administrative detention – Introduction to both regimes – Internal Security Act’; Country Report for Singapore, ‘Decision to detain – Internal Security Act – Procedure and criteria for the initial making of an order’.

<sup>60</sup> Country Report for Australia, ‘Administrative detention – Decision to detain – Detention under a questioning and detention warrant under ASIO Act (Cth) 1979 s 34G’; Country Report for Australia, ‘Administrative detention – Decision to detain- Detention by direction of a prescribed authority under s 34K of ASIO Act 1979’; Country Report for Australia, ‘Administrative detention – Decision to detain- Preventative detention under division 105 of the Criminal Code Act (Cth) 1995’.

<sup>61</sup> Country Report for Canada, ‘Administrative detention – Decision to detain – Investigative hearings and preventive arrest’.

<sup>62</sup> Specifically, for entering a designated place. See Country Report for India, ‘Administrative detention – Counter-terrorism – Decision to detain’.

<sup>63</sup> Country Report for the United Kingdom, ‘Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism’.

<sup>64</sup> Country Report for the United States of America, ‘Administrative detention – Decision to detain – Material witnesses’.

48. The following two States allow for an initial period of administrative detention of 14 days or less: Australia (except if control orders are considered a form of detention)<sup>65</sup> and the UK.<sup>66</sup> The following States further provide for an initial period of administrative detention of 30 days or less: China;<sup>67</sup> India;<sup>68</sup> Russia;<sup>69</sup> and South Africa (even during a state of emergency).<sup>70</sup> By contrast, Sri Lanka provides for an initial period of detention of three months;<sup>71</sup> Australia's control orders, if they constitute detention, have an initial period of twelve months;<sup>72</sup> and Singapore (under the Internal Security Act) has an initial period of detention of two years.<sup>73</sup>
49. The following States do not permit extension or renewal of administrative detention: Australia (except if control orders are considered a form of detention, and possibly except for the state of Victoria)<sup>74</sup> and Russia.<sup>75</sup>
50. The following States provide for a maximum period of administrative detention (including extension or renewal) of fourteen days: Australia (except if control orders are considered a form of detention)<sup>76</sup> and the UK.<sup>77</sup> The following States provide for a maximum period of administrative detention (including extension or renewal) of up to 18 months: China (20 days);<sup>78</sup> Russia (30 days);<sup>79</sup> India (180 days);<sup>80</sup> and Sri Lanka (18 months).<sup>81</sup>

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<sup>65</sup> Country Report for Australia, 'Administrative detention – Decision to detain'.

<sup>66</sup> Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Detention at ports or border controls on suspicion of terrorism'; Country Report for the United Kingdom, 'Administrative detention - Detention without charge on suspicion of terrorism'.

<sup>67</sup> Country Report for China, 'Administrative detention – Decision to detain'.

<sup>68</sup> Country Report for India, 'Administrative detention – Counter-terrorism – Decision to detain'.

<sup>69</sup> Country Report for Russia, 'Administrative detention – Threshold questions – Administrative arrest'; Country Report for Russia, 'Administrative detention - Decision to detain – Administrative arrest'.

<sup>70</sup> Note that the South African State practice is based not on any currently existing power, but on the capacity of Parliament to declare a state of emergency and suspend constitutional and legal limits on administrative detention. This said, as an initial period for a state of emergency is 21 days, any initial period of detention would also be for 21 days. See Country Report for South Africa, 'Administrative detention – Preliminary remarks'.

<sup>71</sup> Country Report for Sri Lanka, 'Administrative detention – Decision to detain'.

<sup>72</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention pursuant to a control order issued under Div 104 of the Criminal Code Act 1995 (Cth)'.

<sup>73</sup> Country Report for Singapore, 'Administrative detention – Decision to detain – Internal Security Act – Procedure and criteria for the initial making of an order'.

<sup>74</sup> Country Report for Australia, 'Administrative detention – Decision to detain'.

<sup>75</sup> Country Report for Russia, 'Administrative detention – Decision to detain – Administrative detention'; Country Report for Russia, 'Administrative detention – Decision to detain - Administrative arrest'.

<sup>76</sup> Country Report for Australia, 'Administrative detention – Decision to detain'.

<sup>77</sup> Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism'.

<sup>78</sup> Country Report for China, 'Administrative detention – Decision to detain'.

<sup>79</sup> Country Report for Russia, 'Administrative detention – Threshold questions – Administrative arrest'; Country Report for Russia, 'Administrative detention - Decision to detain – Administrative arrest'.

<sup>80</sup> Country Report for India 'Administrative detention – Counter-terrorism – Decision to detain'.

<sup>81</sup> Country Report for Sri Lanka, 'Administrative detention – Decision to detain'. Note, however, that this time limit pertains only to detention authorised by a Minister; in relation to detention without a warrant on suspicion

51. The following States have no limit on the maximum duration of a renewed or extended period of administrative detention: Australia's control orders, if they constitute detention;<sup>82</sup> Singapore (under both the Internal Security Act and the Criminal Law (Temporary Provisions) Act);<sup>83</sup> and South Africa (during a state of emergency).<sup>84</sup>
52. As a result, there is a strong trend amongst the jurisdictions under study toward setting a maximum time limit on detention. Subject to the qualifications outlined in the Introduction, this trend may support an argument for the emergence of a norm of customary international law forbidding administrative detention on counter-terrorism, national security or intelligence-gathering grounds that has no maximum duration. Due to the diversity of the practice considered, it is difficult to draw any further conclusions concerning the possible permissible length of detention.

#### IV REVIEW OF AND CHALLENGES TO DETENTION

53. Almost all States whose practice was examined for the purposes of this section provide for some method of challenging administrative detention for counter-terrorism, national security or intelligence-gathering purposes.<sup>85</sup> One possible exception is the UK, which permits as one form of detention arresting a person at a port or border and holding them for no more than nine hours: there is no statutory capacity to challenge this form of detention.<sup>86</sup>
54. The majority of States provide for some method of *judicial* challenge:<sup>87</sup> only Sri Lanka<sup>88</sup> and the UK (in the context of detention on suspicion of involvement in terrorist activities, not exceeding 48 hours in duration)<sup>89</sup> permit challenges to executive bodies alone.

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of terrorism, the implicit maximum time limit is the suspect being brought to trial.

<sup>82</sup> Country Report for Australia, 'Administrative detention – Decision to detain – Detention pursuant to a control order issued under Div 104 of the Criminal Code Act 1995 (Cth)'.

<sup>83</sup> Country Report for Singapore, 'Administrative detention – Introduction to both regimes'; Country Report for Singapore, 'Administrative detention – Decision to detain – Internal Security Act'; Country Report for Singapore, 'Administrative detention – Decision to detain – Criminal Law (Temporary Provisions) Act'.

<sup>84</sup> As noted above, the South African State practice is based not on any currently existing power, but on the capacity of Parliament to declare a state of emergency and suspend constitutional and legal limits on administrative detention. However, as the state of emergency can be renewed for three-months periods without limit, there is also, in theory, no legal limit on the duration of administrative detention. See Country Report for South Africa, 'Administrative Detention – Preliminary remarks'.

<sup>85</sup> Australia, Canada, China, the European Court of Human Rights, India, Russia, Singapore, South Africa, Sri Lanka, and the United States of America.

<sup>86</sup> Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Detention at ports or border controls on suspicion of terrorism'. Note that an application for a writ of *habeas corpus* is likely to be technically, though perhaps not practically, available.

<sup>87</sup> Australia, Canada, China, the European Court of Human Rights, India, Russia, Singapore, South Africa, and the United States of America.

<sup>88</sup> When a person is arrested by a police officer without a warrant on reasonable suspicion of involvement in a specified offence under the Prevention of Terrorism (Temporary Provisions) Act 1979, they must be brought

55. Of those States in which judicial bodies hear challenges to detention, a small number provide for them to be heard automatically, without requiring the detainee to take positive steps.<sup>90</sup> The majority of States require that the detainee themselves apply for the challenge to be heard.<sup>91</sup>
56. Thus, it may be concluded – subject to the qualifications outlined in the Introduction – that the sample of State practice examined could support an argument for the existence of a norm of customary international law requiring that all persons administratively detained for counter-terrorism, national security, or intelligence-gathering purposes be entitled to appeal their detention to, or have their detention reviewed by, a judicial body.
57. It should be noted that the primary research on State practice does not include enough consistently detailed information to draw conclusions about trends regarding procedural rights or standards of review or challenge.

## V COMPENSATION FOR UNLAWFUL DETENTION

58. Most of the States whose practice was surveyed for the purposes of this section provide both for release where detention is found to be unlawful,<sup>92</sup> and for monetary compensation.<sup>93</sup> These remedies might be grounded in legislation, constitutional provision, or the practice of courts. For instance, in Australia, a person subjected to unlawful administrative detention might (depending on the particular regime under which they were detained) apply for release by means of statutory

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before a magistrate; however, the magistrate can only release the person if the Attorney General so orders. See Country Report for Sri Lanka, ‘Administrative Detention – Decision to detain’.

<sup>89</sup> Country Report for the United Kingdom, ‘Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism’. As noted above, judicial authorisation is required for an extension of detention beyond this initial 48-hour period.

<sup>90</sup> In Australia, this includes control orders under the federal jurisdiction (see Country Report for Australia, ‘Administrative detention – Decision to detain – Detention pursuant to a control order issued under Div 104 of the Criminal Code Act 1995 (Cth)’) and preventive detention in South Australia, Western Australia, and the Northern Territory (see Country Report for Australia, ‘Administrative detention - Decision to detain – Detention under various state laws’; Country Report for Australia, ‘Administrative detention - Review of and challenges to detention – Detention under various state laws’). In Canada, this includes all types of administrative detention (see Country Report for Canada, ‘Administrative detention – Review of and challenges to detention – Security certificates’; Country Report for Canada, ‘Administrative detention - Investigative hearings and preventive arrest’). In South Africa, this applies even during a state of emergency (see Country Report for South Africa, ‘Administrative detention – Preliminary remarks’).

<sup>91</sup> Australia (those jurisdictions not specified immediately above), China, India, Russia, Singapore, and the United States of America.

<sup>92</sup> Australia, Canada, the European Court of Human Rights, India, South Africa, and the United States of America. The Country Reports for China and Russia do not expressly mention release as a remedy for a finding of unlawful detention, though this is likely implicit in the availability of judicial challenge.

<sup>93</sup> Australia, Canada, China, the European Court of Human Rights, South Africa, Russia, and the United States of America. In addition, it appears that compensation may be available in India in conjunction with a successful application for *habeas corpus* (see Country Report for India, ‘Military detention – Compensation for unlawful detention’) or, in egregious cases involving torture or death while unlawfully detained, under arts 32 and 226 of the Constitution (see Country Report for India, ‘Preventive detention – Compensation for unlawful detention’).



challenge, a common-law action for *habeas corpus*, or the constitutional entitlement to seek an injunction against federal officers; they might also apply for monetary compensation using the tort of false imprisonment or, in some jurisdictions, under specific statutory provisions for compensation.<sup>94</sup>

59. The only States in respect of which the availability of monetary compensation is unclear are Singapore<sup>95</sup> and Sri Lanka.<sup>96</sup> In addition, the UK does not yet have any law expressly providing for compensation for unlawful detention in these contexts. However, in the absence of a statutory bar on such compensation, it seems likely that if a case were brought before a court then monetary compensation for unlawful detention would be granted.<sup>97</sup>
60. Thus, there is a strong trend amongst the jurisdictions under study toward making compensation available to a person whose administrative detention for counter-terrorism, national security or intelligence-gathering purposes is found to have been unlawful. Subject to the qualifications outlined in the Introduction, the trend might support an argument for the emergence of a norm of customary international law to this effect.

## VI CONCLUDING REMARKS

61. In summary, it may be tentatively concluded – always subject to relevant qualifications – that the sample of State practice considered could support an argument for the emergence or existence of the following norms of customary international law:
  - a prohibition on administrative detention for counter-terrorism, national security or intelligence-gathering purposes which has no maximum duration;
  - a requirement that all persons administratively detained for counter-terrorism, national security, or intelligence-gathering purposes be entitled to appeal their detention to, or have their detention reviewed by, a judicial body; and
  - a requirement that all persons whose administrative detention for counter-terrorism, national security, or intelligence-gathering purposes is found to have been unlawful be granted monetary compensation.

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<sup>94</sup> Country Report for Australia, ‘Administrative detention – Compensation for unlawful detention’.

<sup>95</sup> Due in large part to the very limited avenues for obtaining a finding of unlawful detention. See Country Report for Singapore, ‘Administrative detention – Review of and challenges to detention’ and Country Report for Singapore, ‘Administrative detention – Compensation for unlawful detention’.

<sup>96</sup> Country Report for Sri Lanka, ‘Administrative detention – Compensation for unlawful detention’. However, it is possible that small sums of money may be available as compensation for violations of fundamental rights. See Country Report for Sri Lanka, ‘Preventive detention – Compensation for unlawful detention’.

<sup>97</sup> Country Report for the United Kingdom, ‘Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism’; United Kingdom, ‘Administrative detention – General criminal law – Compensation for unlawful detention’.

# IMMIGRATION DETENTION

## I PRELIMINARY REMARKS

62. This section considers State practice from the following jurisdictions: Argentina, Australia, Austria, Belgium, the ECtHR, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Singapore, South Africa, Sri Lanka, the UK, the US, and Uruguay.<sup>98</sup>

## II THRESHOLD QUESTIONS

63. With the exception of Austria (discussed below), for all jurisdictions considered in this section there is no controversy as to whether the threshold for ‘detention’ has been met. However, the extent to which ‘detention’ is defined (if at all) varies.
64. In many jurisdictions,<sup>99</sup> there is no guidance on what constitutes the threshold for immigration detention. According to the ECtHR, the difference between deprivation of and restriction upon liberty is one of degree or intensity rather than one of nature or substance.<sup>100</sup> Whether someone is considered to be detained depends on a variety of factors such as the type, duration, effects, and manner of the implementation of the measures restricting a person’s liberty.<sup>101</sup>
65. In other jurisdictions where detention is defined,<sup>102</sup> there is a significant degree of variation in the types of restriction considered to constitute detention. Argentina appears to have the most far-reaching definition of detention, including all types of procedures in which a person’s freedom of movement is restricted.<sup>103</sup> Similarly, in Australia, detention for immigration purposes includes when a person is ‘restrained by’ an officer or ‘other people directed by the Secretary to accompany and restrain them’.<sup>104</sup> Further, in Australia there are a number of ‘unlawful non-citizens’ who are in low-security facilities or within the community. These people still subject to

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<sup>98</sup> The Country Reports for Canada, China and Switzerland did not address immigration detention. In Russia, immigration detention was addressed as part of administrative detention.

<sup>99</sup> Germany, Greece, India, Sri Lanka, the United Kingdom and Uruguay.

<sup>100</sup> See Report for the European Court of Human Rights, ‘Background information’.

<sup>101</sup> See Report for the European Court of Human Rights, ‘Background information’.

<sup>102</sup> Country Report for Argentina, ‘Immigration detention – Threshold questions’; Country Report for Australia, ‘Immigration detention – Threshold questions’; Country Report for Austria, ‘Immigration detention- Threshold questions’; Country Report for Italy, ‘Immigration detention – Threshold questions’; Country Report for New Zealand, ‘Immigration detention – Threshold questions’; Country Report for the United States of America, ‘Immigration detention – Threshold questions’.

<sup>103</sup> This definition is part of the general habeas corpus procedure, and is not limited to immigration detention. See Country Report for Argentina, ‘General *habeas corpus* procedure’.

<sup>104</sup> Migration Act 1958 (Cth), s 5, cited in Country Report for Australia, ‘Immigration detention – Threshold questions’.

the same regulations ‘as if the person were being kept in immigration detention’<sup>105</sup> under the Migration Act 1958, so such restrictions may also constitute ‘detention’.

66. In other countries, detention refers more explicitly to custody. For instance, in New Zealand, detention refers to custody in a police station or prison<sup>106</sup> or, for persons under 18 years old, detention in the home<sup>107</sup> – but it does not include the situation where a person has agreed with an immigration officer to reside at a specified place and report to an officer in lieu of custody.<sup>108</sup> In the US, an ‘alien’ is considered to be detained where they have been taken into custody on the basis of a warrant issued by the Attorney General.<sup>109</sup>
67. Threshold issues are also likely to arise in Austria, where asylum seekers are obliged to stay in refugee reception centres for a maximum period of 120 hours from the submission of their asylum request to completion of certain initial procedural and investigative steps within their asylum proceedings.<sup>110</sup> If an asylum seeker decides to leave the refugee reception centre despite the obligation to be present, it is not foreseen that they can be forced to stay by coercive means. However, leaving of the refugee reception centre constitutes a ground to be taken into account in relation to deportation detention under certain circumstances.<sup>111</sup> Another uncertain situation arises where foreigners are turned away at border control, but cannot leave immediately and are instructed to stay in a particular location within the border control area.<sup>112</sup> In both cases, questions remain as to whether detention has occurred.

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<sup>105</sup> Migration Act 1958 (Cth), s 197AC(1), Country Report for Australia, ‘Immigration detention – Threshold questions’.

<sup>106</sup> Immigration Act 2009, s 331(b), cited in Country Report for New Zealand, ‘Immigration detention – Threshold questions’.

<sup>107</sup> Immigration Act 2009, s 331(a), cited in Country Report for New Zealand, ‘Immigration detention – Threshold questions’.

<sup>108</sup> Immigration Act 2009, s 315, cited in Country Report for New Zealand, ‘Immigration detention – Threshold questions’.

<sup>109</sup> Title 8 US Code Section 1226, cited in Country Report for the United States of America, ‘Immigration detention – Threshold questions’.

<sup>110</sup> Bundesgesetz über die Gewährung von Asyl BGBl. I Nr. 100/2005 (Asylgesetz 2005) cited in Country Report for Austria, ‘Immigration detention – Threshold questions – Particular obligation of asylum seekers to cooperate and be present in the refugee reception centre’.

<sup>111</sup> §24 Abs 4 Z1 Asylgesetz 2005 iVm §76 Abs 2a Z6 Fremdenpolizeigesetz 2005, cited in Country Report for Austria, ‘Immigration detention – Threshold questions – Particular obligation of asylum seekers to cooperate and be present in the refugee reception centre’.

<sup>112</sup> Section 42(1) of the Foreigners’ Police Act, cited in Country Report for Austria, ‘Immigration detention – Threshold questions – Particular obligation of asylum seekers to cooperate and be present in the refugee reception centre’.

### III DECISION TO DETAIN

#### a) Circumstances under which a foreign national can be detained

##### i) *General considerations*

68. Jurisdictions differ as to the grounds upon which a foreign national can be detained.
69. Most jurisdictions considered in in this section<sup>113</sup> explicitly allow detention pending expulsion. For example, the ECHR permits the detention of a person against whom action is being taken with a view to deportation or extradition.<sup>114</sup> In Sri Lanka, a person may be detained on the basis of a failure to comply with a deportation order against them as a result of illegally entering or overstaying.<sup>115</sup> In Argentina there is a clause limiting detention to people whose expulsion has already been consented to.<sup>116</sup>
70. Other jurisdictions considered allow for the detention of anyone found to be or suspected of being an unlawful immigrant. For instance, in Australia, if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer *must* detain the person. Once an officer has reasonable suspicion to this effect, detention is lawful throughout the whole process of assessing whether the Minister should exercise the power to allow a visa application.<sup>117</sup> In South Africa, if an immigration or police officer is not satisfied on reasonable grounds that a person is entitled to be in the Republic as a citizen, permanent resident or allowed foreigner, they may be taken to be detained.<sup>118</sup>

##### ii) *Asylum seekers*

71. The Country Reports for several jurisdictions explore specific provisions governing the decision to detain asylum seekers.<sup>119</sup> In the US and Australia it is mandatory to detain asylum seekers while their claims are being processed.<sup>120</sup> In Australia, this is particularly controversial as there is

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<sup>113</sup> Argentina, Austria, Belgium, the European Court of Human Rights, Germany, Greece, Hong Kong, Italy, Kenya, New Zealand, Singapore, Sri Lanka, the United Kingdom, and the United States of America.

<sup>114</sup> See Report for the European Court of Human Rights, 'Immigration detention – Decision to detain'.

<sup>115</sup> See Immigrants and Emigrants Act 1948, cited in Country Report for Sri Lanka, 'Immigration detention – Decision to detain'.

<sup>116</sup> Law 25,871, art 70, cited in Country Report for Argentina, 'Immigration detention'.

<sup>117</sup> Country Report for Australia, 'Immigration detention – Decision to detain'.

<sup>118</sup> Country Report for South Africa, 'Immigration detention – Decision to detain – Immigration Act'.

<sup>119</sup> Country Report for Australia, 'Immigration detention – Decision to detain'; Country Report for Austria, 'Immigration detention – Threshold questions – Particular obligation of asylum seekers to cooperate and be present in the refugee reception centre'; Country Report for Belgium, 'Immigration detention – Decision to detain'; Country Report for Hong Kong, 'Immigration detention – Decision to detain – Detention of individuals seeking asylum based on torture claims'; Country Report for the United States, of America 'Immigration detention – Decision to detain'.

<sup>120</sup> Country Report for Australia, 'Immigration detention – Decision to detain'; Country Report for the United

provision for such detention and processing to occur offshore (in Nauru and Papua New Guinea) in the case of ‘unauthorised maritime arrivals’, although Australia appears to be alone among the jurisdictions studied in conducting this practice.<sup>121</sup> Asylum seekers in Austria are obliged to stay in refugee reception centres for a maximum period of 120 hours from the submission of their asylum request to completion of certain initial procedural and investigative steps relating to their asylum proceedings.<sup>122</sup> In Belgium, asylum seekers may be detained while their claim is being processed.<sup>123</sup> Hong Kong allows detention of individuals seeking asylum on the basis of torture claims.<sup>124</sup>

72. In South Africa, when the Minister withdraws an asylum permit, they may cause the individual to be arrested and detained pending final adjudication of their asylum claim in the manner and place determined by them.<sup>125</sup> Otherwise, asylum seekers in South Africa have the right to remain free from detention pending the outcome of their asylum application.<sup>126</sup> In Greece, the detention of an asylum seeker is only permissible where it is necessary to determine the identity and origin of the applicant, the applicant presents a risk to national security or public order, and detention is deemed necessary for speedy completion of the examination of the asylum claim.<sup>127</sup>
73. In other countries, asylum seekers may be detained under broader immigration detention powers, including detention for the purposes of determining identity<sup>128</sup> or where a person is suspected of travelling without valid documents.<sup>129</sup> There are also provisions for the detention of people (including asylum seekers) at the border to discover whether they have the right to enter in Belgium,<sup>130</sup> Australia,<sup>131</sup> Hong Kong,<sup>132</sup> and the UK.<sup>133</sup>

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States, of America ‘Immigration detention – Decision to detain’.

<sup>121</sup> Country Report for Australia, ‘Immigration detention – Decision to detain’ and Country Report for the United States of America, ‘Immigration detention – Decision to detain’

<sup>122</sup> Although we note the controversy, discussed above, as to whether this constitutes ‘detention’. See Country Report for Austria, ‘Immigration detention – Threshold questions – Particular obligation of asylum seekers to cooperate and be present in the refugee reception centre’.

<sup>123</sup> Country Report for Belgium, ‘Immigration detention – Decision to detain’.

<sup>124</sup> Country Report for Hong Kong, ‘Immigration detention – Decision to detain – Detention of individuals seeking asylum based on torture claims’.

<sup>125</sup> Refugees Act (No 130 of 1998), s 23, cited in Country Report for South Africa, ‘Immigration detention – Decision to detain’.

<sup>126</sup> *Arse v Minister of Home Affairs* (25/10) [2010] ZASCA 9, cited in Country Report for South Africa, ‘Immigration detention – Decision to detain – Refugees Act’.

<sup>127</sup> Presidential Decree 114/2010, art 13(2); Presidential Decree 113/2013, art 12(2), cited in Country Report for Greece, ‘Immigration detention – Decision to detain – Legal framework – Detention of asylum seekers’.

<sup>128</sup> Country Reports for Belgium, Greece, Italy, and New Zealand. Note that in New Zealand, this must be shown to have the aim of effecting removal.

<sup>129</sup> Country Report for Sri Lanka, ‘Immigration detention – Decision to detain’.

<sup>130</sup> Country Report for Belgium, ‘Immigration detention – Preliminary remarks – Legal framework’.

<sup>131</sup> Country Report for Australia, ‘Immigration detention – Decision to detain’.

<sup>132</sup> Country Report for Hong Kong, ‘Immigration detention – Decision to detain’.

*iii) Persons refused or not entitled to entry*

74. In the UK<sup>134</sup> and Singapore<sup>135</sup> there are provisions to detain people refused entry. In Hong Kong, immigration authorities are empowered to detain individuals for a maximum of 48 hours on their arrival if there is a reasonable cause for belief that the individual's landing in Hong Kong was illegal.<sup>136</sup> In Austria, as noted above, foreigners refused leave of entry and not able to leave immediately may be instructed to stay in a particular location within the border control area. The ECHR permits the lawful detention of a person to prevent their effecting an unauthorised entry into the country.<sup>137</sup> Detention is mandatory for those aliens identified at a US border who lack proper immigration documentation or have committed fraud or wilful misrepresentation to attempt to gain admission to the US.<sup>138</sup>

*iv) Detention of particular nationalities*

75. Hong Kong contains provisions relating to the power to detain any Vietnamese national who arrives in Hong Kong without a valid visa,<sup>139</sup> unless exempted from requiring one by the Director of Immigration.<sup>140</sup> Detention for individuals seeking asylum on the basis of torture claims is also allowed.<sup>141</sup> Both provisions were aimed at controlling the entry of Vietnamese refugees into Hong Kong.

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<sup>133</sup> Country Report for the United Kingdom, 'Immigration detention – Decision to detain – Circumstances under which detention may be ordered'.

<sup>134</sup> Immigration and Asylum Act 1999, s 10(1)(a), (b), (ba) and (7). See Country Report for the United Kingdom, 'Immigration detention – Decision to detain – Circumstances under which detention may be ordered'.

<sup>135</sup> Country Report for Singapore, 'Immigration detention'.

<sup>136</sup> Section 26, Immigration Ordinance (Cap 115, Ordinances of Hong Kong, Revised edition 2012) and *A v Director of Immigration* HCAL 100/2006, cited in Country Report for Hong Kong, 'Immigration detention – Decision to detain – Detention pending examination and decision as to landing'.

<sup>137</sup> Article 5(1)(f), cited in Report for the European Court of Human Rights, 'Immigration detention – Decision to detain'.

<sup>138</sup> Country Report for the United States of America, 'Immigration detention – Decision to detain'.

<sup>139</sup> Section 13D Immigration Ordinance (Cap 115, Ordinances of Hong Kong, Revised edition 2012). See Country Report for Hong Kong, 'Immigration detention – Decision to detain'.

<sup>140</sup> Section 61 Immigration Ordinance (Cap 115, Ordinances of Hong Kong, Revised edition 2012). See Country Report for Hong Kong, 'Immigration detention – Decision to detain – Detention of Vietnamese refugees'.

<sup>141</sup> Section 13D Immigration Ordinance (Cap 115, Ordinances of Hong Kong, Revised edition 2012). See Country Report for Hong Kong, 'Immigration detention – Decision to detain'.

*v) Persons identified as constituting a threat to national security or as being involved in criminal activities*

76. Belgium,<sup>142</sup> Greece,<sup>143</sup> and New Zealand<sup>144</sup> allow for the detention of foreign nationals under immigration powers on the basis of national security concerns. The US provides for mandatory detention for suspected terrorists.<sup>145</sup>
77. In addition, a number of the States considered allow for the detention of foreign nationals under immigration powers on the basis of their involvement in criminal activities.<sup>146</sup> For instance, Hong Kong permits detention where the Secretary for Security has reasonable grounds to inquire as to whether a person ought to be deported, which occurs where it is suspected that the person has been found guilty of an offence or where the Secretary considers their deportation to be conducive to the public good.<sup>147</sup> Similarly, in the UK, where a recommendation for deportation made by a court is in force a person must be detained pending the making of a deportation order unless a court directs otherwise or the Secretary of State directs that they be released pending further consideration of their case.<sup>148</sup> In India, foreigners can be detained if they are accused of a criminal offence.<sup>149</sup> In the US, the Immigration and Customs Enforcement (I.C.E.) is required to detain aliens who have previously committed specific crimes, thus allowing for mandatory detention in these circumstances.<sup>150</sup> In Italy, detention is possible when an immigrant has committed a crime and a criminal judge has ordered them to leave the country.<sup>151</sup>
78. In Singapore, persons may be detained pending their removal for being prohibited immigrants (for example, beggars, prostitutes, those unable to show sufficient means of support or suffering from a contagious disease).<sup>152</sup>

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<sup>142</sup> See Aliens Act 1980, cited in Country Report for Belgium, 'Immigration detention – Decision to detain – Legal framework'.

<sup>143</sup> Country Report for Greece, 'Immigration detention – Decision to detain – Legal framework – Detention for the Purposes of Return'.

<sup>144</sup> Country Report for New Zealand, 'Administrative Detention – Decision to detain – Detention pursuant to immigration powers'.

<sup>145</sup> Country Report for the United States of America, 'Immigration detention – Decision to detain'.

<sup>146</sup> Country Reports for Hong Kong, India, Italy, Singapore, United States of America.

<sup>147</sup> Section 20, Immigration Ordinance (Cap 115, Ordinances of Hong Kong, Revised edition 2012), cited in Country Report for Hong Kong, 'Immigration detention – Decision to detain – Removal orders'.

<sup>148</sup> Immigration Act 1971, Schedule 3, para. 2(1), as amended by the Immigration and Asylum Act 1999, section 54(3), cited in Country Report for the United Kingdom, 'Immigration detention – Decision to detain – Circumstances under which detention may be ordered'.

<sup>149</sup> Country Report for India, 'Immigration detention'.

<sup>150</sup> Country Report for the United States of America, 'Immigration detention – Decision to detain'.

<sup>151</sup> Country Report for Italy, 'Immigration detention – Decision to detain – Circumstances in which detention may be ordered'.

<sup>152</sup> Immigration Act (Cap 133, 2008 Rev Ed), cited in Country Report for Singapore, 'Immigration detention'.

*vi) Detention of large groups*

79. New Zealand is unusual in that it has special provisions for the detention of large groups.<sup>153</sup> An immigration officer may apply for a ‘mass arrival warrant’ to detain a group for up to six months. A ‘mass arrival group’ is one with more than 30 people who arrived on board the same craft or group of craft.<sup>154</sup> The warrant to detain such a group must be necessary to ‘effectively manage’ the group, to manage any threat to security, to ‘uphold the integrity of the immigration system’, or to maintain the ‘efficient functioning’ of the District Court.<sup>155</sup>

*viii) No detention*

80. Finally, in Uruguay, there is no provision in the law with regards to detaining individuals suspected of visa violations, illegal entry or unauthorised arrival.

*ix) Additional limitations on detention, including detention as a last resort*

81. Five of the jurisdictions under study impose further limitations on the circumstances in which detention may be effected. Three European states have a proportionality or ‘last resort’ clause, wherein detention is only to be implemented if other possibilities are not available.<sup>156</sup> In Hong Kong, detention must be done in a proportionate and legal manner, based on several non-exhaustive factors.<sup>157</sup> In the UK, there is a presumption in favour of temporary release.<sup>158</sup>
82. In addition, both the UK and Hong Kong have provisions pertaining to limitations of the detention of certain types of people. In Hong Kong, the decision to detain must take into consideration the existence of circumstances favourable to release (for example, where a person is under 18, elderly, pregnant, ill, disabled, or a torture survivor).<sup>159</sup> However, as noted above, Hong Kong does allow the detention of individuals seeking asylum on the basis of torture claims.

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<sup>153</sup> Country Report for New Zealand, ‘Immigration detention – Overview of the Legal framework’.

<sup>154</sup> Immigration Act 2009, s 9A, cited in Country Report for New Zealand, ‘Immigration detention – Overview of the legal framework’.

<sup>155</sup> Immigration Act 2009, s 317<sup>a</sup>, cited in Country Report for New Zealand, ‘Immigration detention – Overview of the legal framework’.

<sup>156</sup> See ‘Immigration detention – Decision to detain’ sections of the Country Reports for Austria, Germany and Greece.

<sup>157</sup> Country Report for Hong Kong, ‘Immigration detention – Decision to detain – Detention to be lawful, proportionate and within a reasonable time period’.

<sup>158</sup> *Minteh (Lamin) v Secretary of State for the Home Department* [1996] EWCA Civ 1339, cited in Country Report for the United Kingdom, ‘Immigration detention – Decision to detain – General presumptions and limitations’.

<sup>159</sup> Country Report for Hong Kong, ‘Immigration detention – Decision to detain – Detention to be lawful, proportionate and within a reasonable time period’.



*x) Conclusion: circumstances under which a foreign national can be detained*

83. It is notable that only two States (the US and Australia) impose mandatory detention in an immigration context. A small number of States have laws providing for detention in an immigration context as a measure of *last resort*, but the limited number of States sampled makes it difficult to draw any conclusions about the development of customary international law in this area.
84. However, there appears to be a significant trend in the State practice of the jurisdictions under study toward setting out in some measure of detail the circumstances under which a foreign national may be detained. This could, therefore, point the way forward toward the future development of customary international law in this area.
85. In terms of precisely which circumstances trigger the power to detain, there is a strong trend in the practice of the jurisdictions under study toward allowing for detention pending expulsion. In other circumstances, while a small number of States allow for the detention of asylum seekers, persons who are not entitled to entry, or persons who are considered threats to security or suspected of involvement in criminal activity, the limited number of States sampled makes it difficult to draw any conclusions regarding trends in this area.

**b) Procedural safeguards**

*i) Initial decision to detain*

86. The key question at this level is whether judicial oversight of the decision to detain is mandatory, either prior to detention or within a certain period thereafter. In two countries (Argentina<sup>160</sup> and Germany<sup>161</sup>), judicial oversight must generally occur before the decision to detain. In contrast, Germany allows some scope for detention without judicial order, although in such instances a judicial order must be obtained retrospectively as soon as possible.<sup>162</sup>
87. In most other jurisdictions considered,<sup>163</sup> it is possible to detain without judicial consent. In certain countries within this group, the case needs to be taken to the judiciary within a specified time period: India (24 hours); Italy (48 hours); Kenya (24 hours); New Zealand (96 hours); South Africa (48 hours).
88. In the US, immigration judges are precluded from reviewing I.C.E. custody decisions for ‘arriving immigrants’, including asylum seekers. For those aliens who have not committed a

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<sup>160</sup> Country Report for Argentina, ‘Immigration detention – Decision to detain’.

<sup>161</sup> Country Report for Germany, ‘Immigration detention – Decision to detain’.

<sup>162</sup> Country Report for Germany, ‘Immigration detention – Decision to detain’.

<sup>163</sup> See ‘Immigration detention – Decision to detain’ sections of the Country Reports for Austria, Belgium, Greece, Hong Kong, India, Italy, Kenya, New Zealand and South Africa.

crime and who are identified within the US, the decision to detain is made at the discretion of the Attorney General. The detainee is not entitled to make representations at this point and the decision to detain cannot be judicially reviewed or challenged in any court. After 72 hours, a hearing will take place before an Immigration Judge, where the government must prove that the person detained is not a citizen of the US, and also that the alien has breached immigration law in a manner which permits removal.<sup>164</sup>

89. In the other jurisdictions, there appears to be no automatic judicial oversight of the initial decision to detain made by administrative authorities.

*ii) Periodic review of detention*

90. In some jurisdictions, provisions are in place for automatic periodic review of detention in certain cases. In particular:

- In Austria, the Federal Agency on Foreigners' and Asylum Affairs must consider *ex officio* at least every four weeks if an imposed deportation detention is still proportionate.<sup>165</sup>
- In Greece, detention decisions for the purposes of return are reviewed every three months by the body ordering the decision. Decisions extending detention are reviewed by the Administrative Court.<sup>166</sup>
- In New Zealand, where a large group of persons (more than 30) is detained, a judge may order that an immigration officer report to the judge on the 'continuing applicability' of a mass arrival warrant during the period of detention.<sup>167</sup>
- In South Africa, any detention of asylum seekers longer than 30 days must be reviewed by a judge of the High Court.<sup>168</sup>
- In the US, the certification by the Attorney General that an alien must be detained because they are a suspected terrorist must be reviewed every six months.<sup>169</sup>

91. In the UK there is no periodic judicial review as such, but there is a requirement to give reasons for immigration detention at the time of detention and thereafter monthly.<sup>170</sup>

92. By contrast, in the US and Australia there are no provisions for automatic periodic review of the decision to detain (except for detention of suspected terrorists, noted above). In Australia, once

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<sup>164</sup> Country Report for the United States of America, 'Immigration detention – Decision to detain'.

<sup>165</sup> Country Report for Austria, 'Immigration detention – Review of and challenges to detention'.

<sup>166</sup> Country Report for Greece, 'Immigration detention – Review of and challenges to detention – Legal framework – Detention for the purposes of return'.

<sup>167</sup> Country Report for New Zealand, 'Immigration detention – Decision to detain'.

<sup>168</sup> Country Report for South Africa, 'Immigration detention – Decision to detain – Refugees Act'.

<sup>169</sup> Country Report for the United States of America, 'Immigration detention – Decision to detain'.

<sup>170</sup> Country Report for the United Kingdom, 'Immigration detention -Decision to detain – Provision of reasons and monthly review'.

an officer forms a ‘reasonable suspicion’ and detains a person, the detention is lawful for the duration of the person’s legal claim being assessed. There is no provision for periodic review.<sup>171</sup> In the US, immigration detainees may be detained for as long as a case is under review (although they are entitled to a bond hearing while appeals are being decided).<sup>172</sup>

93. In India, no person can be arrested and detained in custody beyond 24 hours without the authority of a magistrate.<sup>173</sup> However, there are no provisions for the review of continuing detention.
94. Thus, State practice is not sufficiently uniform to draw any conclusions with respect to providing for automatic periodic review of immigration detention.

*ii) Maximum length of detention and review on expiration of period*

95. In eight of the jurisdictions considered, when a detainee has been detained for the ‘maximum period’ of detention, special permission is required to extend detention.<sup>174</sup>
96. Of the jurisdictions that stipulate a maximum period, the length of this period (prior to any extension) varies: Argentina (15 Days);<sup>175</sup> Austria (two months for minors, four months for adults or six months in exceptional circumstances);<sup>176</sup> Belgium (two months);<sup>177</sup> Greece (six months);<sup>178</sup> Germany (six weeks for detention preparing for deportation, six months for detention in order to prevent a foreigner from frustrating their expulsion);<sup>179</sup> Italy (180 days);<sup>180</sup> Hong Kong (28 days);<sup>181</sup> New Zealand (28 days for individuals, up to 6 months for large groups upon consent of a judge).<sup>182</sup>
97. All of these maximum periods may be extended in certain circumstances. The length of any period of extension varies. The jurisdictions under consideration also differ in terms of the reasons for which detention can be extended beyond the maximum period: examples include

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<sup>171</sup> Migration Act 1958 (Cth), s 189, cited in Country Report for Australia, ‘Immigration detention – Review of and challenges to detention’.

<sup>172</sup> *Casa-Catillon v Dep’t of Homeland Security*, 535 F.3d 942 (9<sup>th</sup> Cir 2008), cited in Country Report for the United States of America, ‘Immigration detention – Review of and challenges to detention’.

<sup>173</sup> Excluding the time necessary for the journey from the place of arrest to the court of the magistrate. See Country Report for India, ‘Immigration detention’.

<sup>174</sup> See ‘Immigration detention- Review of and challenges to detention’ sections of the Country Reports for Argentina, Austria, Belgium, Greece, Germany, Italy, Hong Kong, and New Zealand.

<sup>175</sup> Country Report for Argentina, ‘Immigration detention – Decision to detain’.

<sup>176</sup> Country Report for Austria, ‘Immigration detention – Decision to detain’.

<sup>177</sup> Country Report for Belgium, ‘Immigration detention – Decision to detain – Duration of detention’.

<sup>178</sup> Country Report for Greece, ‘Immigration detention – Decision to detain – Legal framework’.

<sup>179</sup> Country Report for Germany, ‘Immigration detention – Decision to detain’.

<sup>180</sup> Country Report for Italy, ‘Immigration detention – Decision to detain’.

<sup>181</sup> Country Report for Hong Kong, ‘Immigration detention – Decision to detain – Removal orders’.

<sup>182</sup> Country Report for New Zealand, ‘Immigration detention – Decision to detain’.

because the foreigner cannot be expelled,<sup>183</sup> pending the result of the asylum application,<sup>184</sup> or because the detainee has frustrated the removal process.<sup>185</sup> Certain countries contain stipulations that detention can only be extended if removal is possible in a certain period of time.<sup>186</sup> Argentina and Austria require periodic review of detention once the maximum period is reached.<sup>187</sup>

98. Therefore, there appears to be a slight trend in the jurisdictions under study toward providing for a maximum detention period, after which judicial authorisation is required if detention is to be extended. However, there is no uniformity of practice as to the length of the maximum period or the length of subsequently extended periods.

*iii) Proportionality in continuing detention rather than maximum periods*

99. Four countries have included provisions explicitly limiting the length of detention without specifying a maximum period. In the UK, the power to detain is limited to a duration and circumstances which are ‘reasonable and consistent’ with the statutory purpose of the power.<sup>188</sup> Otherwise, there is no statutory time limit on administrative detention. In Greece, detention is mandated strictly for the time period necessary for the preparation of return.<sup>189</sup> In Hong Kong, detention in the case of the Vietnamese must be for a ‘reasonable’ time period; all other types of immigration detention must be only of a reasonable time period and cannot be excessive.<sup>190</sup> In South Africa, asylum seekers may not be detained longer than is ‘reasonable and justifiable’ and any detention longer than 30 days must be reviewed by a judge of the High Court.<sup>191</sup>
100. Thus, of those States that do not identify a maximum period, there is a slight trend towards identifying some limits to the length of detention using language of ‘reasonableness’ and ‘proportionality’; however, there is no uniformity of practice on this point.

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<sup>183</sup> See ‘Immigration detention – Decision to detain’ sections of Country Reports for Argentina, Belgium and Italy.

<sup>184</sup> Country Report for Greece, ‘Immigration detention- Decision to detain – Legal framework’.

<sup>185</sup> See ‘Immigration detention- Decision to detain’ sections of Country Reports for Greece, Germany.

<sup>186</sup> See ‘Immigration detention – Decision to detain’ sections of Country Reports for Belgium, Germany.

<sup>187</sup> Country Report for Austria, ‘Immigration detention – Decision to detain’ and Country Report for Argentina, ‘Immigration detention – Decision to detain’.

<sup>188</sup> *R v Governor of Durham Prison; Ex parte Singh* [1984] All E.R. 983, cited in Country Report for the United Kingdom, ‘Immigration detention – Decision to detain’.

<sup>189</sup> Law 3386/2005, art 76(2), cited in Country Report for Greece, ‘Immigration detention – Review of and challenges to Detention’.

<sup>190</sup> *Tan Te Lam v Tai A Chau Detention Centre* [1997] AC 97, cited in Country Report for Hong Kong, ‘Immigration detention – Decision to detain - Detention to be lawful, proportionate and within a reasonable time period’.

<sup>191</sup> Country Report for South Africa, ‘Immigration detention – Decision to detain – Refugees Act’.

#### *iv) Conclusion: Procedural Safeguards*

101. There is thus a significant trend in the practice of the jurisdictions under study toward limiting the period of immigration detention either by specifying a maximum period<sup>192</sup> or by limiting detention to periods that are proportionate or reasonable.<sup>193</sup> As such, and subject to the qualifications outlined in the Introduction, this practice could support an argument for the emergence of a norm of customary international law to this effect.

## **IV REVIEW OF AND CHALLENGES TO DETENTION**

### **a) Type and basis of challenge**

102. Merits review of immigration detention is available in Australia<sup>194</sup> and Austria.<sup>195</sup> A limited ‘objections application’ is available through an Administrative Court in Greece, a procedure which has been criticised by the ECtHR.<sup>196</sup>
103. In the US, under the immigration practice of ‘expedited removal’, persons found inadmissible at the border and those who have committed fraud to gain admission to the US can be removed from the US without any judicial hearing or reviews (and be detained during this process), unless they wish to claim asylum. For detention of suspected terrorists, challenge can occur via a limited *habeas corpus* proceeding.<sup>197</sup> For other immigration cases, appeals from the US Immigration Court may be appealed to a Board, and following that review, it is possible to appeal to the relevant Federal Circuit Court.<sup>198</sup>

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<sup>192</sup> See ‘Immigration detention- Review of and challenges to detention’ sections of the Country Reports for Argentina, Austria, Belgium, Greece, Germany, Italy, Hong Kong, and New Zealand.

<sup>193</sup> See ‘Immigration Detention’ sections of the Country Reports for the United Kingdom, Hong Kong, Greece and South Africa.

<sup>194</sup> In the case of the continuing detention throughout assessment of their claim. See *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 and *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53, cited in Country Report for Australia, ‘Immigration detention – Review of and challenges to detention’.

<sup>195</sup> §43 Allgemeines Verwaltungsverfahrensgesetz 1991 BGBl. Nr. 51/1991 (AVG) iVm §11 Bundesgesetz über das Verfahren der Verwaltungsgerichte BGBl. I Nr. 33/2013 (Verwaltungsgerichtsverfahrensgesetz), cited in Country Report for Austria, ‘Immigration detention- Review of and challenges to detention’.

<sup>196</sup> Country Report for Greece, ‘Immigration detention – Review of and challenges to detention – Legal framework’.

<sup>197</sup> Country Report for the United States of America, ‘Immigration detention – Review of and challenges to detention’.

<sup>198</sup> Country Report for the United States of America, ‘Immigration detention – Review of and challenges to detention’.

104. The vast majority of jurisdictions under study allow for some possibility of detainees challenging detention via judicial review,<sup>199</sup> a judicial procedure such as *habeas corpus*,<sup>200</sup> or challenges pursuant to human rights legislation.<sup>201</sup>
105. In those jurisdictions which allowing for challenges to a judicial body, the challenge generally relates to the lawfulness or adequacy of the initial decision to detain. The basis of complaint varies across these jurisdictions, from allowing the detainee to allege that the original decision to detain was unlawful,<sup>202</sup> to complaints that the decision was ‘tainted with illegality, irrationality and procedural impropriety’,<sup>203</sup> to appeal on points of law only.<sup>204</sup> In Singapore, judicial review is limited to allegations of procedural impropriety.<sup>205</sup>
106. Further, in Australia and Italy, detainees are allowed to base their challenge on the lawfulness of continuing detention, although in Italy judicial review in this area is on points of law only.<sup>206</sup>
107. In South Africa, the grounds are broader: detainees may challenge the detention decision on the basis that the circumstances under which the Immigration Act or Refugees Act provide for the use of the detention power have not been made out.<sup>207</sup>
108. There is thus a strong trend among the jurisdictions under study to allow for some kind of challenge to the lawfulness of immigration detention, which could support an argument for the emergence of a norm of customary international law to this effect.

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<sup>199</sup> See ‘Immigration detention – Review of and challenges to detention’ sections of the Country Reports for Australia, Austria, Belgium, Germany, Hong Kong, Italy, India, Kenya, New Zealand, South Africa, Sri Lanka, the United Kingdom, and the European Court of Human Rights. In India, the Foreigners Act 1946 makes no provision for appeals. However, the writ jurisdiction of the courts is not ousted. In Singapore, judicial review has been ousted except on the grounds of procedural impropriety. There are no procedures specific to immigration detention set out in Sri Lanka, although writ remedies are available.

<sup>200</sup> Country Report for Hong Kong, ‘Immigration detention – Review of and challenges to detention’; Country Report for the United Kingdom, ‘Immigration detention – Review of and challenges to detention’; Country Report for Argentina, ‘General *habeas corpus* procedure’; Country Report for Sri Lanka, ‘Immigration detention – Review of and challenges to detention’.

<sup>201</sup> Country Report for the United Kingdom, ‘Immigration detention – Review of and challenges to detention’; Report for the European Court of Human Rights, ‘Immigration detention’.

<sup>202</sup> See ‘Immigration detention – Review of and challenges to detention’ sections of the Country Reports for Australia, Austria, Belgium, the European Court of Human Rights, Hong Kong, Italy, and New Zealand.

<sup>203</sup> Country Report for Kenya, ‘Immigration detention – Review of and challenges to detention’; Country Report for the United Kingdom, ‘Immigration detention – Review of and challenges to detention – Habeas corpus and judicial review’.

<sup>204</sup> Country Report for Germany, ‘Immigration detention – Review of and challenges to detention’; Country Report for Italy, ‘Immigration detention – Review of and challenges to detention’; Country Report for the United States of America, ‘Immigration detention – Review of and challenges to detention’.

<sup>205</sup> Country Report for Singapore, ‘Immigration detention – Review of and challenges to detention’.

<sup>206</sup> See ‘Immigration detention – Review of and challenges to detention’ sections of the Country Reports for Australia and Italy.

<sup>207</sup> Bill of Rights, s 38, cited in Country Report for South Africa, ‘Immigration detention – Review of and challenges to detention – Bill of Rights’.

## **b) Access to legal representation**

109. Across the Country Reports which considered the issue of legal representation, there is considerable variation regarding the extent of this entitlement.<sup>208</sup> Italy, New Zealand and Australia offer free access to legal services.<sup>209</sup> In Germany and the UK, an immigration detainee is not generally entitled to legal aid in relation to challenges to their detention.<sup>210</sup> In the ECtHR, the recent case of *Musa v Malta*<sup>211</sup> noted that the lack of a system enabling immigration detainees to access legal aid raised issues of the accessibility of a remedy under Art 5(4) of the ECHR.<sup>212</sup> In the US, the Sixth Amendment does not guarantee a right to counsel in immigration proceedings.<sup>213</sup>
110. Therefore, the diversity of State practice evident in the jurisdictions under study, combined with the limited number of Country Reports that considered this point, makes it difficult to draw any conclusions with respect to the potential content or development of customary international law.

## **d) Linguistic assistance**

111. Of the jurisdictions under study, only Italy<sup>214</sup> and Germany<sup>215</sup> explicitly guarantee access to an interpreter. In South Africa, a detainee must be informed of their rights in language understood by the individual ‘where possible, practicable and reasonable’.<sup>216</sup> For all other jurisdictions in relation to which the Country Report mentioned access to linguistic assistance,<sup>217</sup> there is no guaranteed access to linguistic help. Again, it is therefore difficult to draw any conclusions with respect to trends in State practice in this area.

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<sup>208</sup> The issue is discussed in the Country Reports for Germany, the United Kingdom, the United States of America, Australia, Italy and New Zealand, and the Report for the European Court of Human Rights.

<sup>209</sup> However, the remote locations of many of Australia’s immigration detention facilities means that accessing legal services or help from the UNHCR is often difficult in practice. See Country Report for Australia, ‘Immigration detention – Review of and challenges to detention’.

<sup>210</sup> In the United Kingdom, immigration detainees only receive legal aid for asylum cases, not for false imprisonment. See Country Report for the United Kingdom, ‘Immigration detention – Review of and challenges to detention’.

<sup>211</sup> (2013) Application no. 42337/12.

<sup>212</sup> *Suso Musa v Malta* (2013) Application no. 42337/12 (ECtHR, 12 July 2013) [61], cited in Report for the European Court of Human Rights, ‘Immigration detention- Review of and challenges to detention’.

<sup>213</sup> Country Report for the United States of America, ‘Immigration detention – Decision to detain’.

<sup>214</sup> Country Report for Italy, ‘Immigration detention – Review of and challenges to detention’.

<sup>215</sup> Country Report for Germany, ‘Immigration detention – Review of and challenges to detention’.

<sup>216</sup> Country Report for South Africa, ‘Immigration detention – Decision to detain – Immigration Act’.

<sup>217</sup> See ‘Immigration detention – Review of and challenges to detention’ sections of Country Reports for Greece, and the United States of America.

### e) Discretionary release

112. It is worth noting that three of the jurisdictions under study allow for some form of discretionary release from detention.
113. In Argentina, once a person is detained, they may be granted provisional liberty under bail or oath.<sup>218</sup>
114. In the UK, a person liable to detention under the Immigration Acts may be granted temporary admission or release on restrictions or, if they have already been detained, bail.<sup>219</sup>
115. For those aliens who have not committed a crime and who are identified within the US, the I.C.E. can either release on a cash bond (minimum \$1500) or detain and release on parole. Further, once a removal order has been granted and the appeals process exhausted, after six months the I.C.E. is required to release an alien on parole if there is not a 'significant likelihood of removal in the reasonably foreseeable future'.<sup>220</sup>
116. The other Country Reports do not consider the question of discretionary release, so it is difficult to draw any conclusions as to trends in State practice in this area.

## V COMPENSATION FOR UNLAWFUL DETENTION

117. In all countries whose practice is considered in this section, where appeals against or reviews of immigration detention are possible and detention is found unlawful, the release of the detainee is mandated.
118. In addition, many of the jurisdictions under study<sup>221</sup> offer some form of Compensation for unlawful detention in an immigration context. In two jurisdictions (Argentina and the ECtHR) compensation is available when a breach has been established.<sup>222</sup> In Hong Kong,<sup>223</sup> the UK,<sup>224</sup> the US<sup>225</sup> and Australia,<sup>226</sup> detainees may claim for damages specifically on the basis of false

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<sup>218</sup> Law 25,871, art 71 cited in Country Report for Argentina, 'Immigration detention – Review of and challenges to detention'.

<sup>219</sup> Country Report for the United Kingdom, 'Immigration detention – Review of and challenges to detention – Temporary Admission/ Release with Restrictions/ Bail'.

<sup>220</sup> Country Report for the United States of America, 'Immigration detention – Decision to detain'.

<sup>221</sup> Argentina, Austria, Belgium, Germany, Hong Kong, Italy, South Africa, the United Kingdom, the United States of America, the European Court of Human Rights, Australia and Kenya. In contrast, Greece and Singapore do not appear to have statutory provisions for remedies.

<sup>222</sup> See art 488 of the Criminal Procedure Code, cited in Country Report for Argentina, 'Immigration detention – Remedies for unlawful detention'; Art 41 ECHR, cited in Report for the European Court of Human Rights, 'Immigration detention – Remedies for unlawful detention'.

<sup>223</sup> *A v Director of Immigration* HCAL 100/2006; in *Pbam Van Ngo v Attorney General* HCA 4895/1990, cited in Country Report for Hong Kong, 'Immigration detention – Compensation for unlawful detention'.

<sup>224</sup> *ID v Home Office* [2005] EWCA Civ 38, cited in Country Report for the United Kingdom, 'Immigration detention – Compensation for unlawful detention'.

<sup>225</sup> Country Report for the United States of America, 'Immigration detention – Remedies for unlawful detention'.



imprisonment; South Africa allows a claim under the law of delict.<sup>227</sup> In Germany,<sup>228</sup> Austria<sup>229</sup> and Italy,<sup>230</sup> compensation is based explicitly on the protections contained in the constitution. In Kenya, asylum seekers and refugees who have been detained and sent back in contravention of the principle of non-refoulement will have both the arbitrary detention and the refoulement calculated in their compensation.<sup>231</sup>

119. Thus, while the basis of the action and the legal grounds upon which it is made out varies, there is a significant trend among the jurisdictions under study that where immigration detention is found to have been unlawful, compensation can be awarded.

## VI CONCLUDING REMARKS

120. Subject to the qualifications outlined in the Introduction and the discussion within this section, the sample of State practice considered reveals trends which may support an argument for the emergence of the following norms of customary international law:
- a requirement to set out in some measure of detail the circumstances under which a foreign national may be detained;
  - a limit on the period of immigration detention, either by specifying a maximum period or limiting detention to periods that are proportionate or reasonable; and
  - a right to receive compensation if immigration detention is found to have been unlawful.
121. There is also a strong trend toward allowing a detainee to challenge the lawfulness of their detention, which may support the existence of a customary international law norm to this effect.

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<sup>226</sup> Damages are available on the basis of false imprisonment for a successful claim that detention is or was unlawful – although if a decision by a Minister to refuse to grant a visa is later quashed, this does not render detention unlawful. In some cases, declaratory relief may also be available. See Country Report for Australia, ‘Immigration detention – Remedies for unlawful detention’.

<sup>227</sup> There is a private law action for delict – the *actio iniuriarum* – which may be used to vindicate rights to liberty by giving the aggrieved party compensation in the form of monetary compensation. A private law action for compensation in this manner may be brought against public authorities. See Country Report for South Africa, ‘Immigration detention – Remedies for unlawful detention’.

<sup>228</sup> Unlawful detention entitles the aggrieved to compensation which follows from the basic rule of state liability in the German Constitution in conjunction with the rules on liability in cases of breach of an official duty. See Country Report for Germany, ‘Immigration detention – Remedies for unlawful detention’.

<sup>229</sup> Damages claims can be raised based directly on art 7 of the Constitutional Law on Liberty in analogous application of the principles of the Public Liability Compensation Act before the competent civil law court. If detention is found to have been unlawful, compensation is to be granted based on principles of strict liability and includes damages for the immaterial harm implied in detention. See Country Report for Austria, ‘Immigration detention – Remedies for unlawful detention’.

<sup>230</sup> Article 28 of the Italian Constitution makes clear that the State is liable for harming an individual breaking the law. As a consequence, government is subject to art 2043 of the Civil Code, which states that any act committed with fault or intention obliges the wrongdoer to pay compensation. See Country Report for Italy, ‘Immigration detention – Compensation for unlawful detention’.

<sup>231</sup> Country Report for Kenya, ‘Immigration detention – Compensation for unlawful detention’.

122. Furthermore, while the sample of State practice considered is too small to observe any significant trends with respect to treating detention in the immigration context as an option of last resort, the existence of some support for this position may be of interest in considering the future development of customary international law, particularly in light of the very limited number of States that allow for mandatory detention.

# DETENTION OF PERSONS WITH A MENTAL ILLNESS

## I PRELIMINARY REMARKS

123. This section considers State practice from the following jurisdictions: Argentina, Australia, Austria, Canada,<sup>232</sup> China, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Russia, Singapore, South Africa, Sri Lanka, Switzerland, the UK, the US, and Uruguay. Accordingly, references below to ‘the jurisdictions under study’, ‘the States examined’ or similar are references to these States.
124. It is pertinent to point out that India,<sup>233</sup> Uruguay<sup>234</sup> and the state of Victoria in Australia<sup>235</sup> have new mental health bills pending before their respective Parliaments. Furthermore, the US has different statutes for each state; consequently, research has focused on US Supreme Court decisions.
125. In Singapore, in addition to the general provisions regarding the detention of mentally ill persons under the Mental Health (Care and Treatment) Act, this report has also considered detention under the Misuse of Drugs Act. This is because the Misuse of Drugs Act empowers the Director of the Central Narcotics Bureau to commit and detain suspected drug users to a Rehabilitation Centre for treatment for a maximum of three years.<sup>236</sup>
126. Since the focus of this section is on involuntary detention of persons with a mental illness, provisions regarding voluntary hospitalisation have only been pointed out, and have not been analysed in detail.

## II THRESHOLD QUESTIONS

127. There is a clear consensus amongst the States examined that detention involves involuntary confinement of individuals, thus depriving them of their liberty.<sup>237</sup>
128. In Australia<sup>238</sup> and New Zealand,<sup>239</sup> a person with a mental illness may be subjected to compulsory community treatment, which requires them to attend specific treatment facilities at

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<sup>232</sup> Research for Canada has only been targeted to certain specific provisions, referred to in this section. Hence, the fact that Canada is not cited as evidence of State practice in the various sub-sections in this report, is not indicative of the absence of any provision. It is merely a result of the limitation of the research.

<sup>233</sup> Country Report for India, ‘Detention of persons with a mental illness – Note 1’.

<sup>234</sup> Country Report for Uruguay, ‘Detention of persons with a mental illness’.

<sup>235</sup> Country Report for Australia, ‘Detention of persons with a mental illness – Decision to detain- Victoria’.

<sup>236</sup> Country Report for Singapore, ‘Detention of persons with a mental illness – Preliminary remarks’.

<sup>237</sup> Australia, Austria, Canada, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, South Africa, Singapore, Sri Lanka, Switzerland, United Kingdom, United States of America, and Uruguay.

<sup>238</sup> Country Report for Australia, ‘Detention of persons with a mental illness – Threshold questions’.

<sup>239</sup> Country Report for New Zealand, ‘Detention of persons with a mental illness – Threshold questions’.

reasonably prescribed times in accordance with a treatment plan. However, since these programmes do not involve a total restriction on a person's liberty, they are not treated as amounting to detention. Hence, they have not been included in the analysis in this section.

129. In Switzerland, on the other hand, compulsory psychiatric treatment, as well as forced hospitalisation for a few days, is defined as detention.<sup>240</sup>
130. In the UK, the threshold of detention is not as straightforward. Pursuant to s 2(1)(a) of the Human Rights Act 1998, courts in the UK have to take into account decisions of the ECtHR. The ECtHR in *HL v United Kingdom* held that the question as to whether someone is being 'detained' depends on 'a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.'<sup>241</sup> However, it is clear that if someone is being held involuntarily, they are 'detained'.<sup>242</sup> Notably, in March 2014, the UK Supreme Court held that the key question was whether there was 'continuous supervision and control'. In determining this, the person's compliance or lack of objection, or the relative normality of the placement (whatever the comparison made) was not relevant.<sup>243</sup>
131. In China, it is unclear whether compulsory medical treatment procedures include or involve detention.<sup>244</sup>
132. In the absence of State practice in most of the jurisdictions considered, and given the divergence in that State practice which does exist, it appears that no conclusions can be drawn about the content of customary international law with respect to the threshold question of whether measures such as compulsory community or psychiatric treatment constitute 'detention'.

### III DECISION TO DETAIN

#### a) Voluntary detention

133. States that have provisions for voluntary detention are Austria, Hong Kong, Kenya, India, Singapore and Sri Lanka. In order for persons to voluntarily commit themselves to hospitalisation, they must be able to understand the meaning of placement and what it entails. There are different provisions regarding the maximum period persons can be 'voluntarily detained' for, but it generally ranges from a 28 days (in case the patient becomes incapable of expressing willingness or unwillingness to continue receiving treatment)<sup>245</sup> to (a maximum period

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<sup>240</sup> Country Report for Switzerland, 'Detention of persons with a mental illness – Threshold questions?.'

<sup>241</sup> *HL v United Kingdom* [2004] ECHR 471 [89].

<sup>242</sup> Country Report for the United Kingdom, 'Detention of persons with a mental illness – Threshold questions?.'

<sup>243</sup> *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council; P and Q (by their litigation friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19 [50] (Lady Hale).

<sup>244</sup> Country Report for China, 'Detention of persons with a mental illness – Threshold questions?.'

<sup>245</sup> Country Report for Sri Lanka, 'Detention of persons with a mental illness – Decision to detain?.'

of) ten weeks.<sup>246</sup> Before leaving the facility, Kenya<sup>247</sup> and Sri Lanka<sup>248</sup> require the patient to give a 72 hours' notice to the hospital personnel or chief.

134. The jurisdictions under study differ in their approach to persons who cease to agree or revoke their decision to be voluntarily detained. Thus, in India, the discharge of the voluntarily admitted patient depends on the medical officer's assessment of whether it is in the best interests of the patient to continue with the treatment.<sup>249</sup> In Austria, in cases of revoked consent, a person may be kept in placement if the original requirements of the placement continue to be met. The guarantees governing involuntary detention are to be applied in these cases.<sup>250</sup> In Kenya, a voluntary patient can be detained until an order of discharge is made by the Kenyan Board of Mental Health, or until the medical practitioner in charge of the patient orders discharge.<sup>251</sup> However, these provisions have not been examined in detail in this report.

#### **b) Time period for detention**

135. The period for which a person can be detained varies amongst States, as outlined below.<sup>252</sup> This sub-section addresses the issue of timeframes in two parts: the initial period of detention (for assessment), and continued detention.

##### *i) Initial period of detention*

136. Information on the initial period of detention of a mentally ill person for assessment is only available for some States and varies from 24 hours to five days. Thus, in the five Australian jurisdictions of Queensland,<sup>253</sup> Western Australia,<sup>254</sup> the Australian Capital Territory,<sup>255</sup> Tasmania<sup>256</sup> and the Northern Territory,<sup>257</sup> the initial assessment period can be no longer than 24

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<sup>246</sup> Country Report for Austria, 'Detention of persons with a mental illness – Review of and challenges to detention- The Act on the placement of mentally ill persons in hospitals'.

<sup>247</sup> Country Report for Kenya, 'Detention of persons with a mental illness – Decision to detain'.

<sup>248</sup> Country Report for Sri Lanka, 'Detention of persons with a mental illness – Decision to detain'.

<sup>249</sup> Country Report for India, 'Detention of persons with a mental illness – Decision to detain'.

<sup>250</sup> Country Report for Austria, 'Detention of persons with a mental illness – Review of and challenges to detention- The Act on the placement of mentally ill persons in hospitals'.

<sup>251</sup> Country Report for Kenya, 'Detention of persons with a mental illness – Decision to detain'.

<sup>252</sup> Austria, Australia, India, New Zealand, South Africa, and the United Kingdom.

<sup>253</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Queensland'.

<sup>254</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Western Australia'.

<sup>255</sup> In the Australian Capital Territory, the chief psychiatrist must record the authorisation and reasons for the use of force to apprehend and detain a person and must notify the public advocate in writing within 24 hours. See Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Australian Capital Territory'.

<sup>256</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Tasmania'.

<sup>257</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Northern Territory'.

hours. In India, too, the detained person must be produced before a magistrate within 24 hours.<sup>258</sup>

137. In Austria, a person cannot be detained for longer than 48 hours without a medical certificate.<sup>259</sup>
138. In the UK,<sup>260</sup> the assessment period for patients on community treatment orders who have been recalled to the hospital lasts a maximum of 72 hours. In Kenya, a person is admitted for 72 hours for examination by the person or official in charge of the mental hospital. After examination, if the official in charge thinks fit, the person admitted into the mental hospital is sent to the care of any relative or is detained as an involuntary patient.<sup>261</sup> In Singapore, a person may be detained by a designated medical practitioner at a psychiatric institution as an inpatient for 72 hours, within which another designated medical practitioner has to conduct a second examination.<sup>262</sup> In South Africa, too, persons can initially be detained for 72 hours, after which the head of the health establishment must decide within 24 hours whether further involuntary care is needed.<sup>263</sup>
139. In New Zealand the initial detention period for assessment can be no more than five days.<sup>264</sup>
140. While this sample is too small to draw any conclusions regarding trends in State practice, to the extent that there is a trend, it points towards an initial period of detention between one to five days for assessment of mental illness.

## *ii) Continued detention*

141. After the initial order for detention is given, State practice varies on the time for which persons can be detained.<sup>265</sup> In Australia, the period of detention also varies amongst states and territories. For instance, in Queensland<sup>266</sup> there is no maximum period and the treatment order is valid until revoked. In the Northern Territory,<sup>267</sup> the maximum time period for detention is 28 days, while

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<sup>258</sup> Country Report for India, 'Detention of persons with a mental illness – Decision to detain'.

<sup>259</sup> Country Report for Austria, 'Detention of persons with a mental illness – Decision to detain – The Act on the protection of personal liberty in homes and other institutions of care'.

<sup>260</sup> Country Report for the United Kingdom, 'Detention of persons with a mental illness – Decision to detain – Orders for discharge'.

<sup>261</sup> Note that the police have to take a person to a mental hospital within 24 hours of taking them into custody or as soon as possible. Country Report for Kenya, 'Detention of persons with a mental illness – Review of and challenges to detention'.

<sup>262</sup> Country Report for Singapore, 'Detention of persons with a mental illness – Decision to detain – Detention for a further one month'.

<sup>263</sup> Country Report for South Africa, 'Detention of persons with a mental illness – Decision to detain'.

<sup>264</sup> Country Report for New Zealand, 'Detention of persons with a mental illness – Decision to detain – Compulsory assessment and detention'.

<sup>265</sup> Argentina, Austria, Australia, Germany, Greece, Hong Kong, India, Kenya, New Zealand, Sri Lanka, Switzerland, and Uruguay.

<sup>266</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Queensland'.

<sup>267</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Northern

in Western Australia<sup>268</sup> it is 28 days with rolling re-examination. In Tasmania,<sup>269</sup> persons can be detained for six months, renewable on an application, whereas in South Australia,<sup>270</sup> a 'level 3' inpatient treatment order can last up to 12 months.

142. In Hong Kong, after a single judicial extension, patients under observation can be detained for 28 days in total.<sup>271</sup> In India, a Magistrate can order detention for up to 30 days, pending the removal of the patient to a psychiatric hospital.<sup>272</sup>
143. In Austria, a court can order the placement of a mentally ill person in hospital for a maximum period of three months.<sup>273</sup> In New Zealand, the duration of the compulsory treatment order, including an inpatient order, lasts six months. This is renewable on application to a court of law.<sup>274</sup> In Greece, too, the detention period should not exceed six months, but may be prolonged indefinitely under exceptional circumstances.<sup>275</sup>
144. In Kenya, a person cannot be detained for more than a year.<sup>276</sup> In Sri Lanka, too, temporary patients (either voluntary patients or those incapable of expressing themselves as willing or unwilling to receive medical treatment) can only be detained for a year. However, if they become capable of expressing their willingness or unwillingness to continue to receiving treatment, they cannot be detained for longer than 28 days after that.<sup>277</sup> In Germany, involuntary commitment in exceptional circumstances can last for a maximum of two years,<sup>278</sup> whereas in Argentina, the court's declaration on the status of a person as mentally ill is valid for a maximum period of three years.<sup>279</sup>
145. In Switzerland, detention cannot be longer than six weeks, unless prolonged by an enforceable hospitalisation order from the adult protection authority. These orders are passed if the required treatment or care for the mentally ill person cannot be provided otherwise. Hence, there is no

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Territory'.

<sup>268</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Western Australia'.

<sup>269</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Tasmania'.

<sup>270</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – South Australia'.

<sup>271</sup> Country Report for Hong Kong, 'Detention of persons with a mental illness – Decision to detain – Detention of patients under observation'.

<sup>272</sup> Country Report for India, 'Detention of persons with a mental illness – Decision to detain'.

<sup>273</sup> Country Report for Austria, 'Detention of persons with a mental illness – Decision to detain'.

<sup>274</sup> Country Report for New Zealand 'Detention of persons with a mental illness – Decision to detain – Compulsory treatment orders – Key provisions (Part 2)'.

<sup>275</sup> Country Report for Greece, 'Detention of persons with a mental illness – Decision to detain – Period of detention'.

<sup>276</sup> Country Report for Kenya, 'Detention of persons with a mental illness – Decision to detain'.

<sup>277</sup> Country Report for Sri Lanka, 'Detention of persons with a mental illness – Decision to detain'.

<sup>278</sup> Country Report for Germany, 'Detention of persons with a mental illness – Decision to detain'.

<sup>279</sup> Country Report for Argentina, 'Detention of persons with a mental illness – Decision to detain'.

maximum period of detention.<sup>280</sup> Similarly, in Italy, a person with a mental illness who has been convicted of a crime can be detained indefinitely, for as long as they are considered ‘socially dangerous’.<sup>281</sup>

146. It is important to note that Uruguay’s allows for indeterminate measures of detention, and does not stipulate the maximum (or minimum) duration of detention. This grant of judicial discretion has raised concerns and, as a result, the new bill under consideration seeks to modify this provision.<sup>282</sup>
147. There is therefore a significant trend amongst the jurisdictions under study toward placing a maximum time limit on the detention of a person with a mental illness, after the initial order for detention has been given. Based on the divergence in the practice of the jurisdictions under study, however, it is difficult to draw any conclusions regarding the potential content of customary international law with respect to the periods for which a person can actually be detained.

### **c) Requesting an assessment of mental illness**

148. There is a high degree of uniformity between States in identifying the people who can request the hospitalisation of a mentally ill person. All States under consideration allow a spouse, a relative, someone associated in any way with the person concerned, or a medic to request hospitalisation.
149. In Argentina, Sri Lanka<sup>283</sup> and New Zealand however,<sup>284</sup> any person is allowed to file an assessment request. Additionally, in Argentina, the *consule* (in respect of foreigners suspected of being mentally ill) and the Ministry of Minors are also entitled to request a mental illness assessment.<sup>285</sup>
150. To conclude, there is very strong trend in State practice permitting a spouse, a relative, someone associated in any way to the person concerned or a medic to request the hospitalisation of the mentally ill person.

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<sup>280</sup> Country Report for Switzerland, ‘Detention of persons with a mental illness – Decision to detain – Identity of decision maker’.

<sup>281</sup> Country Report for Italy, ‘Detention of persons with a mental illness – Detention of persons convicted of a crime – Preliminary remarks – Detention for social dangerousness’.

<sup>282</sup> Country Report for Uruguay, ‘Detention of persons with a mental illness’.

<sup>283</sup> Country Report for Sri Lanka, ‘Detention of persons with a mental illness – Decision to detain’.

<sup>284</sup> Country Report for New Zealand, ‘Detention of persons with a mental illness – Decision to detain – Compulsory assessment and detention’.

<sup>285</sup> Country Report for Argentina, ‘Detention of persons with a mental illness – Decision to detain’.



#### **d) Grounds for detention and the assessment of mental illness**

151. The States under study exhibited strong trends in identifying the general grounds for committing a person to involuntary detention. 16 of the 20 States whose practice was reviewed require the involuntary detention of persons based on the existence of a mental illness, which raises reasonable concerns as to their safety, and/or the welfare of others.<sup>286</sup> In six States, the police is vested with the power to take into custody any person they reasonably suspect of suffering from a mental illness, and committing or having committed an offence, or likely to cause harm to themselves or others, or not under proper care or whom the police regard taking as beneficial.<sup>287</sup>
152. In addition to considering the risks persons pose to themselves or others, Australia,<sup>288</sup> Austria (for detention in institutions other than psychiatric hospitals),<sup>289</sup> Germany (under its civil, as opposed to criminal law)<sup>290</sup> and South Africa<sup>291</sup> prescribe involuntarily detention only when it is in the person's best interests or when treatment cannot be provided in any other less restrictive way. In Greece, involuntary detention is prescribed when a lack of treatment would result in more suffering for the person detained.<sup>292</sup>
153. Notably, further research in Canada shows that in four provinces (Saskatchewan, Nova Scotia, and Newfoundland and Labrador), the Mental Health Acts specify that a fully capable person

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<sup>286</sup> Argentina, Australia, Austria, Canada, China (during a criminal investigation) Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Singapore, South Africa, United Kingdom, and the United States.

<sup>287</sup> Australia, Austria, India, Kenya, New Zealand, Russia, and Singapore.

<sup>288</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Northern Territory'; Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – New South Wales'; Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Victoria'; Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Queensland'; Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – Australian Capital Territory'; Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain – South Australia'. All these laws focussed on the 'least restrictive method' requirement to detain.

<sup>289</sup> The law here requires the detention to be absolutely necessary and proportionate to the perceived danger and to be the least restrictive measure. Country Report for Austria, 'Detention of persons with a mental illness – Preliminary remarks'.

<sup>290</sup> The law here focuses on the 'benefit of the detainee'. Country Report for Germany, 'Detention of persons with a mental illness – Decision to detain'.

<sup>291</sup> The Mental Health Care Act 2002 states that care, treatment and rehabilitation on an inpatient or outpatient basis is required only if it considered necessary for the protection of the financial interests or reputation of the persons detained. Furthermore in their summary to the Review Board, the head of the health establishment must state whether other care, treatment or rehabilitation is less restrictive on the patient's right to movement, privacy and dignity. Country Report for South Africa, 'Detention of persons with a mental illness – Decision to detain'; Country Report for South Africa, 'Detention of persons with a mental illness – Review of and challenges to detention – Periodic review'.

<sup>292</sup> Country Report for Greece, 'Detention of persons with a mental illness – Decision to detain – Circumstances in which detention may be ordered'.

cannot be involuntarily hospitalised regardless of how dangerous they may be to the society or to themselves.<sup>293</sup>

154. In Italy, a mentally ill person, having been convicted of a crime, is detained for being ‘socially dangerous’: that is, where, having committed a crime, they are likely to commit others. Since principles of retributive justice do not apply, such a person can be detained for as long as the social danger persists.<sup>294</sup>
155. There is a significant trend in State practice requiring the continued detention of a mentally ill person pursuant to an assessment of mental illness by a judicial proceeding on the advice/decision of a medical practitioner(s). Thus, in 11 States (Argentina, China, Germany (under special ‘mental health courts’),<sup>295</sup> Greece, Hong Kong, India, Italy (for convicted criminals),<sup>296</sup> Singapore (only for detention longer than six months),<sup>297</sup> Sri Lanka, Uruguay and the US), mental illness can only be determined by a court of law, which draws upon medical expertise in order to make an informed decision. State practice also evidences some consensus around the duty of the police to ensure that a medical practitioner assesses those detained for being mentally ill as soon as possible.<sup>298</sup>
156. In the UK, however, judicial decisions do not play as important a role as in most other States. Here, the manager of the hospital decides whether or not to detain a person and the court’s involvement is limited to hearing appeals from the Mental Health Tribunal (where the original detention can be challenged) or judicial review proceedings.<sup>299</sup> Similarly, in Switzerland, the

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<sup>293</sup> John E Gray et al., ‘Australian and Canadian Mental Health Acts Compared’ (2010) 44(12) *Aus and NZ J of Psy* 1128.

<sup>294</sup> Country Report for Italy, ‘Detention of persons with a mental illness – Detention of persons convicted of a crime – Preliminary remarks – Detention for social dangerousness’.

<sup>295</sup> Country Report for Germany, ‘Detention of persons with a mental illness – Decision to detain’.

<sup>296</sup> Mentally ill persons who have not been convicted of a crime can be detained via ‘mandatory medical treatment’. This is ordered by the mayor of the city, who is also the highest local health authority, on the proposal of a doctor. The treatment must be administered in a civil hospital, where the person has the right to communicate with the people outside. The decision to detain requires additional medical examination and must be confirmed by a Judge. See Country Report for Italy, ‘Detention of persons with a mental illness – Internment of other persons with a mental illness – Decision to detain’.

<sup>297</sup> Note that in the case of detention of drug addicts, the Director of the Central Narcotics Bureau on their subjective satisfaction that a person may be a drug addict, may require their medical examination or observation. If, as a result of these examinations or observations, the Director thinks it is necessary for the person to undergo treatment or rehabilitation at a Rehabilitation Centre, they can be so ordered for an initial period of six months. See Country Report for Germany, ‘Detention of persons with a mental illness – Initial admission’.

<sup>298</sup> Australia (Victoria, Queensland, Northern Territory, Western Australia), Austria, India, Kenya, New Zealand, and Singapore.

<sup>299</sup> Country Report for the United Kingdom, ‘Detention of persons with a mental illness – Decision to detain – Circumstances in which detention may be ordered’; Country Report for the United Kingdom, ‘Detention of persons with a mental illness – Review of and challenges to detention’.

doctors or the adult protection authority (an administrative cantonal authority) decide on issues of detention and not the courts.<sup>300</sup>

157. Detention in Singapore has four stages and a judicial authorisation is not required for the first three. Detention can be for 72 hours, and then prolonged for a month, and then further prolonged for six months, where the decision to detain is based on the opinion of designated medical practitioners at a psychiatric institution. Only after that period of time, a magistrate's order is required for a further extension up to a maximum of one year. However, further applications can be made to the magistrate if visitors believe that it so required. Thus, detention can be continued indefinitely.<sup>301</sup>
158. Another exception the practices outlined above may be Russia. The Country Report for Russia shows no indication of the role of the court (except to authorise compulsory medical measures or coercive educational measures) or of medical practitioners in relation to the detention of mentally ill individuals.<sup>302</sup>
159. The Kenyan Country Report also presents a counter-example by vesting the eventual decision to detain a mentally ill person in criminal proceedings with the President. A person who is believed to have been mentally ill, but is now deemed capable of making their defence in trial, may be detained during the proceedings in a safe place (as considered by the court). The court shall then transmit the court record to the Minister for consideration by the President. If the President believes that person should be in custody or in a mental hospital, the President will, by order addressed to the court, direct the detention of the accused. Accordingly, the court shall issue a warrant.<sup>303</sup>
160. To conclude, subject to the qualifications outlined in the Introduction, the sample of State practice examined would support an argument for the emergence of a norm of customary international law requiring the identification of specific grounds for detention of mentally ill persons, namely their safety and/or the safety and welfare of others.

#### **e) Rights of persons detained**

161. States examined in this report reveal a significant trend in terms of certain rights protections to persons detained for mental health reasons. Twelve of the 20 States surveyed (Argentina, Australia, Austria, Germany, Greece, Hong Kong, India (in the existing law and the pending

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<sup>300</sup> Country Report for Switzerland, 'Detention of persons with a mental illness – Decision to detain – Identity of decision makers'.

<sup>301</sup> Country Report for Singapore, 'Detention of persons with a mental illness – Decision to detain'.

<sup>302</sup> Country Report for Russia, 'Detention of persons with a mental illness'.

<sup>303</sup> Country Report for Kenya, 'Detention of persons with a mental illness – Decision to detain'.

Mental Health Care Bill), New Zealand, South Africa (during the review process),<sup>304</sup> Switzerland, Uruguay and the US) have provisions regarding the right to information. The person detained needs to be informed about the detention and its underlying reasons, as well as further possible steps. It is important to note that the fact that these States have been identified as providing for the right to information does not necessarily imply that such protections are absent in the other States under consideration. These other States may well have provisions regarding the right to information; however, such provisions have not been expressly identified in the relevant Country Reports.

162. Furthermore, Austria, Germany (unless it severely endangers the patient's medical condition),<sup>305</sup> Greece, Hong Kong, New Zealand, Switzerland, Uruguay and the US provide that a mentally ill person who has been involuntarily detained has the right to be heard in court at every step of the proceedings. In South Africa, if the head of the health establishment believes that further detention of a person is required, such a person has the right to be heard before the Review Board.<sup>306</sup>
163. State practice also reveals a significant trend in providing the detainee the right to legal representation.<sup>307</sup> It is important to note that the fact that these States have been identified as providing for the right to legal representation does not necessarily imply that such protections are absent in the other States (Greece, Italy, Kenya, Russia, Singapore, South Africa and Sri Lanka) under study. Again, these States may well provide the right to legal representation; however, such a provision has not been expressly identified in their Country Reports and hence has not been included in the analysis here.
164. Notably, New Zealand and Argentina give important rights protections to their detainees. New Zealand expressly provides for circumstances in which involuntary detention should not take place. Thus, involuntary detention should not be arbitrary and should not be based on political, religious or cultural reasons, because of a person's sexual preferences or criminal behaviour, substance abuse or intellectual disability. The powers under the Mental Health (Compulsory Assessment and Treatment) Act are to be exercised with proper respect for cultural identity and

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<sup>304</sup> The country report for South Africa only provides information requiring the Review Board to give written reasons to the patient, for its decision to continue hospitalisation or discharge the patient. There is no specific information on the right to information at the initial stage of detention. See Country Report for South Africa, 'Detention of persons with a mental illness – Review of and challenges to detention – Periodic review'.

<sup>305</sup> In Germany, the hearing must be conducted in the normal environment of the affected individual such as their home or the institution where the person is located. Country Report for Germany, 'Detention of persons with a mental illness – Decision to detain'.

<sup>306</sup> Country Report for South Africa, 'Detention of persons with a mental illness – Decision to detain'.

<sup>307</sup> Argentina, Australia, Austria, Canada, China, Germany, India, New Zealand, Switzerland, United Kingdom, United States of America, and Uruguay.

personal beliefs. Furthermore, the Act guarantees the patient rights to information, treatment, independent psychiatric advice, legal advice, company and seclusion.<sup>308</sup>

165. In Argentina, involuntary detention should not take place based on the person's political and socio-economic status, cultural, racial or religious group, sexual identity, or the mere existence of previous treatments or hospitalisation.<sup>309</sup>
166. Thus, subject to the qualifications outlined above, there is a significant trend in State practice guaranteeing the right to information and the right to legal representation, which might provide guidance as to the potential future development of customary international law in this area.

## **IV REVIEW OF AND CHALLENGES TO DETENTION**

### **a) Review of detention**

167. Amongst the 12 States that have provisions regarding review of detention, there is complete consistency on the detainee's right to periodic review (Argentina, Australia, Austria (up to a total period of one year, after which detention is based on the reports of two experts who as far as possible did not participate in the prior proceedings),<sup>310</sup> Greece, Kenya, Italy, New Zealand, South Africa, Switzerland, Uruguay, UK and the US). State practice amongst these jurisdictions is fairly consistent in requiring periodic review every three and/or six months, although in South Africa after the initial review within six months, subsequent reviews take place every 12 months.<sup>311</sup>
168. However, there are some exceptions:
  - Although Kenya provides for periodic review under s 166 (4) of its Criminal Procedure Code, the review is conducted in a substantially different manner. Here, the officer in charge of a mental hospital submits a report to the Minister of Health for the President's consideration at the expiration of three years from the date of the President's detention order, and every two years thereafter.<sup>312</sup>

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<sup>308</sup> Country Report for New Zealand, 'Detention of persons with a mental illness – Decision to detain – General rules'; Country Report for New Zealand, 'Detention of persons with a mental illness – Decision to detain – Rights of patients'.

<sup>309</sup> Country Report for Argentina, 'Detention of persons with a mental illness – Decision to detain'.

<sup>310</sup> Country Report for Austria, 'Detention of persons with a mental illness – Review of and challenges to detention – The Act on the placement of mentally ill persons in hospitals'.

<sup>311</sup> The head of the establishment submits a summary of the patient's condition to the Review Board which makes a decision within 30 days as to continued hospitalisation or immediate discharge. Country Report for South Africa, 'Detention of persons with a mental illness – Review of and challenges to detention'.

<sup>312</sup> Country Report for Kenya, 'Detention of persons with a mental illness – Review of and challenges to detention'.

- In Argentina, a mentally ill person who has been involuntarily detained has a right to periodic supervision by the revision agency.<sup>313</sup>
- In Italy, there is a fixed minimum period of detention for a mentally ill person convicted of a crime. After this, a judge has to review the social danger posed by the detainee. The judge can extend the detention by a further fixed period; at the end of which the case will be reviewed again, resulting in either a release or a further detention period.<sup>314</sup> For other persons with a mental illness, physicians must inform the mayor about the therapy (under mandatory medical treatment) of the patient on an ongoing basis, who must in turn inform the judge. The judge keeps track of the improvement of the patient and if they are not informed regularly, the patient will be released.<sup>315</sup>
- In India, periodic review will be introduced in a slightly different form under the new Mental Health Care Bill. The Bill provides for monthly reports to be sent to the Mental Health Review Board regarding measures of physical restraint used against the person concerned to prevent immediate and imminent harm to them.<sup>316</sup>

169. Thus, subject to the qualifications outlined in the Introduction, it may be concluded that the trend toward guaranteeing the detainee the right to periodic review could prove useful in identifying future emerging norms of customary international law.

## **b) Challenges to detention**

170. There is relatively strong consistent and uniform State practice in the jurisdictions under study requiring that all persons detained involuntarily due to mental illness be entitled to challenge their detention. The only exception is Russia, where no information is available.<sup>317</sup> In the vast majority of States under review, involuntary detention can be appealed in a court of law.<sup>318</sup>

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<sup>313</sup> Country Report for Argentina, 'Detention of persons with a mental illness – Decision to detain'.

<sup>314</sup> Country Report for Italy, 'Detention of persons with a mental illness – Detention of persons convicted of a crime – Review of and challenge to detention – Review of detention'. As explained earlier, Italian law does not prescribe a maximum, since it is concerned with the dangerousness of the detainee.

<sup>315</sup> Country Report for Italy, 'Detention of persons with a mental illness – Internment of other persons with a mental illness – Decision to detain'.

<sup>316</sup> Country Report for India, 'Detention of persons with a mental illness – Note 1'.

<sup>317</sup> Country Report for Russia, 'Detention of persons with a mental illness'.

<sup>318</sup> Argentina, Australia, Austria, Canada, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Singapore (only for detention relating to drug addiction where a complaint can be made on oath to a magistrate), South Africa, Sri Lanka, Switzerland, United Kingdom, and the United States of America.

171. The nature of the appellate body can also be medical. The two are, however, interlinked as States that have a medical review in the first instance allow for a judicial review thereafter.<sup>319</sup> This section focuses on States that provide for both medical and judicial review.

- In Argentina, it is not necessary to obtain judicial authorisation for the release of a patient from a mental health institution unless the person has been accused in a criminal case and considered psychologically incapable of being guilty of the crime.<sup>320</sup> Such a person requires a court order to be released from their detention in a mental institute. Additionally, *habeas corpus* is available as a judicial remedy to all persons whose freedom of movement has been restricted.<sup>321</sup>
- In Austria, the law states that in cases of involuntary detention, on request, a second qualified doctor must examine the patient and issue a medical certificate in respect of the conditions of the placement, before notifying the competent District Court.<sup>322</sup>
- Australia<sup>323</sup> and South Africa<sup>324</sup> allow detainees to apply for review to a Mental Health Review Board, before resorting to judicial review.
- In New Zealand, the law states that before proceeding with the case in court, a person may apply to a Review Tribunal in addition to the mandatory review by the responsible clinician.<sup>325</sup>
- In the UK, in addition to judicial review proceedings, detainees can appeal to the Mental Health Tribunal under s 6 of the Human Rights Act 1998 claiming a breach of Art 5(1) of the ECHR (right to liberty and security) by a public authority. Decisions of the Mental

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<sup>319</sup> Argentina, Australia, Austria, Canada, Hong Kong, New Zealand, South Africa, and United Kingdom.

<sup>320</sup> In China similarly, if it is found that the suspect suffers from a mental illness but should bear criminal responsibility for their actions, they will be subject to compulsory medical treatment as part of the outcome of the judicial process. However, if their mental illness is of an 'intermittent nature', they will be sentenced and detained in the usual way. The country report does not provide any information on the procedures to appeal and challenge this assessment or the compulsory measures and hence, has not been included above. See Country Report for China, 'Detention of persons with a mental illness – Decision to detain'.

<sup>321</sup> Country Report for Argentina, 'Detention of persons with a mental illness – Decision to detain'; Country Report for Argentina, 'General *habeas corpus* procedure'.

<sup>322</sup> Country Report for Austria, 'Detention of persons with a mental illness – Review of and challenges to detention – The Act on the placement of mentally ill persons in hospitals'.

<sup>323</sup> Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain' for states of New South Wales, Victoria, South Australia, Western Australia; Country Report for Australia, 'Detention of persons with a mental illness- Review of and challenges to detention'.

<sup>324</sup> Country Report for South Africa, 'Detention of persons with a mental illness – Review of and challenges to detention – Appeal to Review Board and High Court'.

<sup>325</sup> Country Report for New Zealand, 'Detention of persons with a mental illness – Decision to detain – Review'; Country Report for New Zealand, 'Detention of persons with a mental illness – Review of and challenges to detention – Review by Judge'.

Health Tribunal may (with leave) be appealed to the Upper Tribunal's Administrative Appeal Chamber on a point of law.<sup>326</sup>

- Hong Kong has created a Guardianship Board, which looks after the direct welfare of the patient. The Board appoints guardians and has a duty to supervise them to ensure they do not abuse their powers. Orders made by the Board can then be appealed in a court of law. These provisions are viewed as adding to the judicial safeguards for detaining mentally ill individuals.<sup>327</sup>

172. In order to understand the full spectrum of State practice pertaining to the different methods of challenging detention, it is instructive to consider the following different and contrasting examples:

- In New Zealand, there are different methods available for challenging detention, as mentioned in the Country Report. Detainees can apply for review by a judge at any time during the assessment of their mental illness. They can also apply for review by a tribunal, judicial review, *habeas corpus*, and review by the High Court. Additionally, detainees in New Zealand may also contest their detention via an action for the tort of false imprisonment.<sup>328</sup>
- Switzerland also stands out in terms of its provisions pertaining to challenging detention. The court can overturn previous medical decisions or orders and is bound to decide on a case as soon as possible, 'normally' within five days. The decision to detain can be altered or reversed on various grounds such as infringement of the law, an incomplete or incorrect finding of a legally relevant fact or an inappropriate decision. Furthermore, the judicial appellate authority usually sits as a panel of judges. Swiss law also prescribes, if necessary, the appointment of a deputy (a person experienced in care-related and legal matters) to assist the detained person.<sup>329</sup>
- In Germany, apart from the patient ('ward') whose rights have been restricted, others who can object to the higher courts in their interest (if they took part in the proceedings) are: the ward's spouse or partner; parents and children, provided they live with the ward;

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<sup>326</sup> Country Report for the United Kingdom, 'Detention of persons with a mental illness – Review of and challenges to detention – Appeal from decision of Mental Health Tribunal'.

<sup>327</sup> Country Report for New Zealand, 'Detention of persons with a mental illness – Decision to detain – Guardianship Boards'.

<sup>328</sup> Country Report for New Zealand, 'Detention of persons with a mental illness – Review of and challenges to detention'.

<sup>329</sup> Country Report for Switzerland, 'Detention of persons with a mental illness – Review of and challenges to detention – Right of appeal'; Country Report for Switzerland, 'Detention of persons with a mental illness – Review of and challenges to detention – Rights to an oral hearing and to representation'.



a person whom the ward has nominated as their person of confidence; or the head of the institution at which the ward lives.<sup>330</sup>

- On the other hand, in Singapore, detention in a mental institution cannot be legally challenged. Patients can only be discharged by orders of medical practitioners, although they have remedies in criminal law for a breach of the procedures laid out in the Mental Health (Care and Treatment) Act. Persons detained in a Rehabilitation Centre for drug addiction may lodge a complaint against their improper detention on oath to a magistrate, who then conducts a private inquiry. The order of the magistrate is final.<sup>331</sup>

173. There was insufficient information regarding the provisions for challenging detention in the Country Reports of China,<sup>332</sup> Russia and Uruguay.

174. Thus, it may be concluded – subject to the qualifications outlined in the Introduction – that the sample of State practice examined would support an argument for the existence of a norm of customary international law requiring that all persons detained due to mental illness be entitled to challenge their detention in a court of law.

## V COMPENSATION FOR UNLAWFUL DETENTION

175. 16 of the 20 Country Reports provided information regarding the States' provisions for monetary compensation.<sup>333</sup> Of these, Hong Kong, India, Singapore and Sri Lanka<sup>334</sup> do not provide for statutory compensatory remedies for the wrongful detention of mentally ill persons. However, the Mental Health Care Bill 2013 in India provides for 'redressal or appropriate relief' for persons with mental illness whose rights have been violated or who feel aggrieved by the decision of any mental health establishment. This can potentially include monetary compensation.<sup>335</sup>

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<sup>330</sup> Country Report for Germany, 'Detention of persons with a mental illness – Review of and challenges to detention'.

<sup>331</sup> Country Report for Singapore, 'Detention of persons with a mental illness – Review of and challenges to detention'.

<sup>332</sup> The only information available in the country report for China was that both the suspect and their defence lawyer have the right to apply for an expert assessment as to whether they in fact suffer from a mental illness. The Procuratorate and the public organ also have a duty to institute this procedure in appropriate cases.

<sup>333</sup> Argentina, Australia, Austria, China, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Singapore, South Africa, Sri Lanka, Switzerland, United Kingdom, and the United States of America.

<sup>334</sup> In Sri Lanka, although no compensatory remedies seem to be provided for under the Mental Disease Ordinance, the Protection of the Rights of Persons with Disabilities Act empowers the High Court to grant 'just and equitable' relief. Country Report for Sri Lanka, 'Detention of persons with a mental illness – Compensation for unlawful detention'.

<sup>335</sup> Country Report for India, 'Detention of persons with a mental illness – Compensation for unlawful detention'.

176. Australia, Austria, China, Greece, Italy, Kenya, New Zealand, Switzerland, the UK<sup>336</sup> and the US have clear provisions giving mentally ill persons who have been wrongfully or unlawfully detained the right to begin proceedings for compensation. Argentina,<sup>337</sup> Germany<sup>338</sup> and South Africa<sup>339</sup> also support the provision of monetary compensation.
177. In terms of challenges to detention and remedies, Singapore stands out as a State where detention is not open to challenge, and therefore no remedies can be awarded.<sup>340</sup>
178. Thus, subject to the qualifications outlined above, the significant trend in State practice toward guaranteeing monetary compensation for wrongful or unlawful detention might provide guidance as to the potential future development of customary international law in this area.

## VI CONCLUDING REMARKS

179. Thus, it may be concluded – subject to the qualifications outlined in the Introduction – that the sample of State practice examined would support an argument for the emergence or existence of the following norms of customary international law:
- a requirement that a mentally ill person only be hospitalised and/or assessed on request by their spouse, a relative, someone associated in any way to the person concerned or a medic;
  - a requirement that involuntary detention of a mentally ill person be based on the specific grounds of their safety and/or the safety and welfare of others; and
  - a right to challenge involuntary detention to a court of law.

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<sup>336</sup> Although there is no direct and enforceable right to compensation before the national courts, Art 5(5) ECHR provides that provides that ‘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.’ Country Report for the United Kingdom, ‘Detention of persons with a mental illness – Compensation for unlawful detention’.

<sup>337</sup> In Argentina, general compensation may be available only for those criminal cases involving a mentally ill person where innocence has been determined under art 488 of the Criminal Procedural Code. Country Report for Argentine, ‘Immigration detention – Compensation for unlawful detention’.

<sup>338</sup> In Germany, compensation is usually granted under the basic rule of state liability in the German Constitution and occasionally under Art 5(5) ECHR. Country Report for Germany, ‘Administrative Detention – Compensation for unlawful detention’.

<sup>339</sup> In South Africa, damages for the tort of ‘wrongful’ or ‘unlawful’ detention are generally available, and the High Court has jurisdiction over quantum of damages. Furthermore, s 38 of the Bill of Rights allows anyone whose rights (under the Bill of Rights) have been infringed or threatened to go to the court for ‘appropriate relief’. Although these provisions have not been mentioned with respect to detention of persons with a mental illness, they are likely to apply as well. Country Report for South Africa, ‘Administrative Detention – Compensation for unlawful detention’; Country Report for South Africa, ‘Military Detention – Compensation for unlawful detention’.

<sup>340</sup> Country Report for Singapore, ‘Detention of persons with a mental illness – Review of and challenges to detention’.

180. In addition, and again subject to the relevant qualifications, there is a significant trend in the practice of the jurisdictions under study requiring:

- a right to judicial assessment (relying on medical expertise) of the mental illness of a person, preceding any order for involuntary detention;
- a limitation on the maximum period for which a mentally ill person can be detained, after their initial period of detention (for assessment of mental illness) is over;
- a right to information and to legal representation during detention proceedings;
- a right to periodic review of involuntary detention; and
- a right to receive monetary compensation for wrongful or unlawful detention.

181. These trends might provide guidance as to the potential future development of customary international law in these areas.

182. Based on the divergent and/or inadequate State practice considered, it is difficult to draw any conclusions regarding the content of customary international law with respect to:

- the determination of whether measures such as compulsory community or psychiatric treatment for a person with a mental illness constitute ‘detention’; and
- the exact time periods for which a mentally ill person can initially be detained, and continue to remain in detention - however, to the extent there is a trend, it points towards an initial period of detention between one to five days for assessment of mental illness.

# MILITARY DETENTION

## I INTRODUCTION

183. 'Military detention' is not a simple, unitary concept. There are several different potential scenarios in which military forces may be given the authority to detain individuals. As such, this section has been divided into two parts. Part II of this section concerns situations where the military detains its own members as part of its own justice or disciplinary system. Part III of this section concerns situations where the military detains individuals other than its own members for security or public order reasons.

## II DISCIPLINARY DETENTION

184. The following Country Reports contain material relevant to 'disciplinary' military detention (that is, when the military detains its own members as part of its own justice or disciplinary system): Australia, Austria, Kenya, Greece, India, New Zealand, Singapore, South Africa, Sri Lanka, and the UK.
185. All of these States have a specialised system of military justice which applies to service members, prohibiting specific military offences such as mutiny or desertion, and outlining procedures for when military members can be arrested and placed in detention pending trial or as punishment for committing a military offence.

### a) Threshold questions

186. Of the jurisdictions that considered disciplinary detention, the threshold question is only considered in two of the Country Reports. The ECtHR noted in the case of *Engel v Netherlands* that:

[a] disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman.<sup>341</sup>

187. This would suggest, at least in an ECtHR context, that confinement to quarters and other similar forms of punishment may not be considered to constitute detention.<sup>342</sup>
188. In South Africa, there is provision for the establishment of 'detention barracks' both inside and outside South Africa where persons charged with offences under the Military Discipline Code

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<sup>341</sup> (1976) 1 EHRR 647, [59] cited in Report for the European Court of Human Rights, 'Military Detention'.

<sup>342</sup> However, confinement or restrictions of liberty of this type were not considered in any of the other Country Reports that considered disciplinary detention.

may be detained awaiting trial or confirmation of sentence.<sup>343</sup> Limited information is available about the functioning of these barracks; however, it is possible that questions may arise as to whether and under what circumstances confinement there would amount to detention.

189. For the other States that considered this type of military detention, there did not appear to be any threshold questions.

#### **b) Decision to detain**

190. The Country Reports indicate that the decision to arrest a serviceman may be taken by a superior officer or by the military police. Most Country Reports that considered disciplinary detention identified grounds on which a person may be detained pending trial:<sup>344</sup>

- In Australia, the service member must be reasonably suspected of an offence, or arrest must be necessary to preserve evidence of the offence.<sup>345</sup>
- Similarly, in New Zealand, the service member must be found committing the offence, or suspected on reasonable grounds of having committed the offence.<sup>346</sup>
- In Austria, arrest is usually left to civil authorities. In time of war, a service member can be detained by order of the commanding officer for up to 14 days.<sup>347</sup> The service member must be given an opportunity to be heard before the decision is taken.<sup>348</sup>
- In India, Kenya, South Africa and Sri Lanka and the UK, any person charged with<sup>349</sup> or who commits<sup>350</sup> a civil or military offence may be taken into military custody and detained pending trial.

191. The UK additionally has provisions governing detention without charge and detention for the purposes of stop and search. A service policeman may arrest a person they reasonably suspect of being about to commit a service offence, and may keep the person in custody until such a time as a service policeman is satisfied that their risk of committing the relevant offence has passed.<sup>351</sup> Further, service policemen (and persons authorised by a commanding officer) may stop any

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<sup>343</sup> Country Report for South Africa, 'Military Detention – Threshold questions'.

<sup>344</sup> The Country Reports for Greece and Singapore do not specifically address the question of pre-trial detention.

<sup>345</sup> Defence Force Discipline Act 1982 (Cth) ss 89, 90, cited in Country Report for Australia, 'Military Detention – Decision to detain'.

<sup>346</sup> Armed Forces Discipline Act 1971 (NZ), s88, cited in Country Report for New Zealand, 'Military Detention – Decision to detain'.

<sup>347</sup> Heeresdisziplinargesetz 2002 BGBl. I Nr. 167/2002, s 83, cited in Country Report for Austria, 'Military Detention – Preliminary remarks'.

<sup>348</sup> Country Report for Austria, 'Military Detention – Preliminary remarks'.

<sup>349</sup> Country Report for India, 'Military Detention – Decision to detain'; Country Report for South Africa, 'Military Detention – Threshold questions'; Country Report for Kenya, 'Military Detention – Decision to detain'; Country Report for the United Kingdom, 'Military Detention – Decision to detain – Custody after Charge'.

<sup>350</sup> Country Report for Sri Lanka, 'Military Detention – Decision to detain'.

<sup>351</sup> Country Report for the United Kingdom, 'Military Detention – Decision to detain – Custody without Charge'.

person who is, or whom the service policeman has reasonable grounds for believing to be, subject to service law. As part of that search process, a person may be detained for the duration of a search. The search may only be conducted if there are reasonable grounds for suspecting the search will reveal stolen or prohibited articles, unlawfully obtained service stores, or drugs. Additionally, detention is limited to such time as is reasonable required to permit a search to be carried out.<sup>352</sup>

### **c) Review of and challenges to detention**

#### *i) Length of detention pre-charge*

192. There is a strong trend among the jurisdictions that considered this type of detention suggesting that a military defendant must be charged or released within certain period of time. The limit varies across jurisdictions between 24 and 96 hours:

- In Australia, the service member must be charged or released within 24 hours.<sup>353</sup>
- In New Zealand, the service member must have been charged and informed of the offence within 24 hours.<sup>354</sup> Within 48 hours proceedings must be commenced, or the detainee must be released, unless neither course is practicable.<sup>355</sup>
- In India, a service member must be charged or released within 48 hours, unless it is impracticable.<sup>356</sup>
- In the UK, the service member must be charged or released after 48 hours, unless a Judge advocate authorises further custody for up to a maximum of 96 hours.<sup>357</sup> Such an authorisation requires that the detainee be provided with written reasons for the extended detention and a hearing be held before the Judge advocate, at which the detainee is entitled to legal representation.
- In Austria, the general limit is 24 hours, but this can be extended to 14 days when the army is actually deployed in time of armed conflict.<sup>358</sup>
- In South Africa, there is a more specific requirement that the detainee be produced before a military court within 48 hours of arrest.<sup>359</sup>

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<sup>352</sup> Country Report for the United Kingdom, 'Military Detention – Decision to detain – Stop and Search Powers'.

<sup>353</sup> Defence Force Discipline Act 1982 (Cth) s95(2), cited in Country Report for Australia, 'Military Detention – Decision to detain'.

<sup>354</sup> Armed Forces Discipline Act 1971 (NZ), s101(3), cited in Country Report for New Zealand, 'Military Detention – Decision to detain'.

<sup>355</sup> *ibid*, s 91, cited in Country Report for New Zealand, 'Military Detention – Decision to detain'.

<sup>356</sup> India: Army Act 1950 (Ind), s 102, cited in Country Report for India, 'Military Detention - Decision to detain'.

<sup>357</sup> Armed Forces Act 2006 (UK), ss99, 101, cited in Country Report for the United Kingdom, 'Military Detention – Decision to detain'.

<sup>358</sup> Country Report for Austria, 'Military Detention – Preliminary remarks'

- In Sri Lanka, in contrast, there is a less onerous requirement that the servicemen be produced before the officer ordering custody within 24 hours.<sup>360</sup>

*ii) Length and review of detention pending trial*

193. Several Country Reports also indicate that there is some restriction on the length of time a defendant can be held after being charged, but before the military trial begins:

- In South Africa, a fresh order for detention must be given by a military court every seven days.<sup>361</sup>
- In the UK such an order must be made every eight days.<sup>362</sup>
- In Australia, if the charge is not dealt with within 30 days, the superior is to order release unless satisfied continuing detention proper.<sup>363</sup>
- In contrast, in Greece, detention pending trial (which is governed by the same set of norms, whether the detention is military or civilian) is only automatically reviewed by a court after six months.<sup>364</sup>

194. In India, by contrast, there is no provision for bail for military detainees.<sup>365</sup> In Kenya there is no apparent time limit for detention, although there is a constitutional right to bail unless there is a compelling reason against it may be applicable.<sup>366</sup>

195. In South Africa and New Zealand, a report has to be made to the Advocate-General or Judge advocate to inform them of the reasons for the delay at set periods (in South Africa after 14 days,<sup>367</sup> in New Zealand initially after four days and then every subsequent 8 days<sup>368</sup>) until proceedings are commenced or the defendant is released. It is unclear whether the detainee has a right to access and respond to these reports.

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<sup>359</sup> Military Discipline Supplementary Measures Act (16 of 1999) (SA), s 29(1), cited in Country Report for South Africa, 'Military Detention -Decision to detain – Pre-trial Procedures'.

<sup>360</sup> Army Act 1949 (SL) s 38, cited in Country Report for Sri Lanka, 'Military Detention – Decision to detain'.

<sup>361</sup> Military Discipline Supplementary Measures Act (16 of 1999) (SA), s 29(3), cited in Country Report for South Africa, 'Military Detention – Decision to detain – Pre-trial Procedures'

<sup>362</sup> Armed Forces Act 2006 (UK), ss 108, cited in Country Report for the United Kingdom, 'Military Detention – Review of and challenges to detention – Custody After Charge'.

<sup>363</sup> Defence Force Discipline Act 1982 (Cth) ss 95(8) and 95(9), cited in Country Report for Australia, 'Military Detention – Decision to detain – Pre-trial procedures.'

<sup>364</sup> Criminal Procedure Code, art 287(1), cited in Country Report for Greece, 'Preventative Detention – Decision to detain' (cross-referenced in the 'Military Detention' section).

<sup>365</sup> Country Report for India, 'Military Detention – Review of and challenges to detention'.

<sup>366</sup> Country Report for Kenya, 'Military Detention – Review of and challenges to detention'.

<sup>367</sup> Military Discipline Supplementary Measures Act (16 of 1999) (SA), s 29(3), cited in Country Report for South Africa, 'Military Detention – Decision to detain – Pre-trial Procedures'.

<sup>368</sup> Armed Forces Discipline Act 1971 (NZ), s101(4)-(5), cited in Country Report for New Zealand, 'Military Detention – Decision to detain'.

196. Systems which allow detention for breaches of discipline or summary offences by order of a superior officer may also generally subject this power to some procedural requirements, although the only Country Report to provide specifics is that on Singapore. In Singapore, the accused who is tried summarily by a disciplinary officer is entitled to an oral hearing, and has the right to hear and give evidence, to cross-examine, and to call witnesses.<sup>369</sup>
197. There are obviously some commonalities in this practice, but there is a wide diversity in the details. It is thus difficult to draw any conclusions about the position in customary law.

### *iii) Challenges to lawfulness of detention*

198. Of the jurisdictions that considered this type of detention, almost all allow for some type of challenge and appeal.<sup>370</sup> However, those that do allow for challenge to lawfulness of detention differ in terms of the scope and avenue they provide for such review:
- In Sri Lanka, the Supreme Court and Court of Appeal are empowered to exercise writ jurisdiction for the enforcement of fundamental rights and may grant writs of *habeas corpus* in the case of imprisonment. However, they cannot substitute their discretion for that of the officers, and will only determine if the decision to make an arrest was exercised reasonably.<sup>371</sup>
  - In the UK, there is an appeal procedure for service persons dealt with summarily and service persons sentenced by court martial, as well as the rights of detainees to challenge their detention via the Human Rights Act 1998.<sup>372</sup>
  - In India, the legislation does not detail procedures to challenge detention; however, the Supreme Court in *Naga People's Movement*<sup>373</sup> has highlighted the importance of ensuring that complaints of misuse or abuse are thoroughly investigated by the Central Government.
199. In the remaining jurisdictions that consider this type of detention, it is not clear whether a detainee has a right to challenge the lawfulness of their detention distinct from their general rights of appeal against decisions and sentence. However, to the extent that lawfulness of detention may fall within such an appeal, there is a distinction between those jurisdictions that allow for an appeal only through internal military structures, and those that allow for some form

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<sup>369</sup> Singapore Armed Forces (Summary Trials) Regulations, s 11, cited in Country Report for Singapore, 'Military Detention - Decision to detain'.

<sup>370</sup> New Zealand does not appear to allow any type of challenge to detention.

<sup>371</sup> Country Report for Sri Lanka, 'Military Detention – Review of and challenges to detention'.

<sup>372</sup> Country Report for the United Kingdom, 'Military Detention – Review of and challenges to detention'.

<sup>373</sup> (1998) 2 SCC 109 cited in Country Report for India, 'Military Detention – Review of and challenges to detention'.



of judicial review. Greece<sup>374</sup> and Kenya<sup>375</sup> appear to allow for both types of review. In Australia,<sup>376</sup> there is no provision for a detainee to challenge their decision following arrest or charge internally, although the High Court of Australia has constitutional authority to hear all matters against the Commonwealth.

200. In contrast, other jurisdictions only appear to allow for appeals through the military court system:

- Singapore contains an appeal procedure within its military court structure, which cannot be reviewed by any of the prerogative writs or orders of the High Court.<sup>377</sup>
- In South Africa, there does not appear to be any provision concerning appeal or review of decisions to detain pre-trial; however, persons convicted of offences and sentences have the right to an appeal through the military court structure.<sup>378</sup>

201. In Austria, a detainee may request an assessment of the lawfulness of any detention order, and the outcome of that assessment may be subject to merits review, rather than judicial review.<sup>379</sup>

202. Thus, while there is a trend towards allowing for challenges of detention, it is difficult to draw any conclusions about the extent, nature and scope of any such right of challenge.

#### **d) Compensation for unlawful detention**

203. In Singapore, there is no right to compensation for wrongful detention as a service member.<sup>380</sup>

204. Other reports indicate more generally that compensation may be obtainable under human rights legislation, as in the UK<sup>381</sup> and South Africa,<sup>382</sup> or by a general damages action, for example the tort of false imprisonment in Australia<sup>383</sup> and New Zealand,<sup>384</sup> the *actio iniuriarum* in South

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<sup>374</sup> Country Report for Greece, 'Military Detention – Review of and challenges to detention'.

<sup>375</sup> Country Report for Kenya, 'Military Detention – Review of and challenges to detention'.

<sup>376</sup> Country Report for Australia, 'Review of and challenges to detention'.

<sup>377</sup> Country Report for Singapore, 'Military Detention – Review of and challenges to detention'.

<sup>378</sup> Country Report for South Africa, 'Military Detention – Review of and challenges to detention'.

<sup>379</sup> Country Report for Austria, 'Military Detention – Review of and challenges to detention'.

<sup>380</sup> Country Report for Singapore, 'Military Detention – Compensation for unlawful detention?'. Other reports, for example the Country Report for Kenya, do not provide information about whether there is a right to compensation.

<sup>381</sup> Human Rights Act 1998, s 8(3), cited in Country Report for the United Kingdom, 'Military Detention – Compensation for unlawful detention'.

<sup>382</sup> Country Report for South Africa, 'Military Detention – Compensation for unlawful detention'.

<sup>383</sup> Country Report for Australia, 'Military Detention – Remedies for unlawful detention'.

<sup>384</sup> Country Report for New Zealand, 'Military Detention – Remedies for unlawful detention'.

Africa,<sup>385</sup> an action for ‘moral damages’ under Greek law,<sup>386</sup> or a civil claim under Austrian law.<sup>387</sup>

The ECtHR also allows for compensation upon a finding of unlawful detention.<sup>388</sup>

205. There thus appears to be a strong trend towards allowing for Compensation for unlawful detention in a disciplinary detention context.

### **III DETENTION BY THE MILITARY FOR SECURITY PURPOSES**

#### **a) Preliminary remarks**

206. The following Country Reports contain information on circumstances where the military detains individuals outside of its own servicemen or women (such as civilians or opposing combatants) for national security or public order reasons: Austria, China, India, Kenya, Russia, Sri Lanka, Uruguay, and the US. Relevant information is also provided in the Report for the ECtHR.
207. We note that the regimes discussed in each jurisdiction vary in the extent to which they draw expressly upon international humanitarian law (‘IHL’) concepts such as ‘armed conflict’ (whether international or non-international). Thus, although many of the circumstances in which the relevant domestic regimes apply might constitute ‘armed conflict’ for the purposes of IHL, the regimes do not necessarily designate the scope of their application in these terms (and may in fact apply in a wider set of circumstances, such as in situations of internal disturbance which do not meet the threshold for a non-international armed conflict). For instance, Indian law contains both a Geneva Convention Act and an Armed Forces Special Powers Act.<sup>389</sup> The former expressly implements the Geneva Conventions; the latter, which gives the military special powers of arrest to maintain public order, does not use the term ‘armed conflict’ and applies where there has been a proclamation of a ‘disturbed area’.<sup>390</sup> This sub-section reflects the language contained in the underlying domestic laws, and therefore employs IHL terminology only where the domestic laws also explicitly do so, or where it considers the possible relationship between these laws and IHL. In this regard, it should also be noted at the outset that the majority of the regimes considered in this sub-section relate primarily, if not exclusively, to detention by a State’s military on its home territory; in each case, a different regime is likely to apply to detention in the context of operations abroad.

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<sup>385</sup> Country Report for South Africa, ‘Military Detention – Compensation for unlawful detention.’

<sup>386</sup> Country Report for Greece, ‘Military Detention – Compensation for unlawful detention.’

<sup>387</sup> Country Report for Austria, ‘Military Detention – Compensation for unlawful detention.’

<sup>388</sup> See the Report for the European Court of Human Rights, ‘Administrative Detention – Compensation for unlawful detention’.

<sup>389</sup> Country Report for India, ‘Military Detention – Decision to detain’.

<sup>390</sup> Country Report for India, ‘Military Detention – Decision to detain’.

208. State practice in this area has also been collected by the International Committee of the Red Cross (ICRC) in its study of customary IHL (‘ICRC study’).<sup>391</sup> This sub-section supplements the material drawn from the underlying Country Reports by including references to the ICRC study where relevant; in particular, it refers to the study in order to consider how the detention regimes covered in the Country Reports might interact with IHL. Importantly, the ICRC study does analyse State practice in terms of the IHL paradigms of international and non-international armed conflict, and the sub-section therefore adopts that language when drawing on the study.
209. It should be noted that detention of individuals by the military for security reasons may overlap with administrative detention on national security grounds, for example of suspected terrorists.<sup>392</sup> In many countries, this kind of detention will ordinarily be the responsibility of civil agencies, although in others the military may also be involved. Since the distinction may depend solely on the identity of the detaining authority (whether it is military or civil), this sub-section needs to be read in conjunction with that on administrative detention.

#### **b) Threshold questions**

210. Situations of this type generally involve clear cases of detention. Although it is possible to imagine more borderline cases, for example enforced searches by the military or ‘kettling’ carried out by the military rather than by police, this study has not found State practice on these scenarios specific to the military context.

#### **c) Decision to detain**

##### *i) Basis of detention*

211. Several of the Country Reports identify laws providing for the use of the military for law enforcement and maintenance of public order in internal emergencies.
- In India, armed forces in designated ‘disturbed areas’ (which include, for example, Kashmir) may ‘arrest, without warrant, any person who has committed a cognizable offence.’<sup>393</sup>
  - In Russia, in the case of aggression or the threat of aggression of aggression from a foreign State, the President may declare martial law, in which case the military may detain citizens, ‘if necessary’, for up to 30 days.<sup>394</sup>

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<sup>391</sup> International Committee of the Red Cross, ‘Customary IHL Database’ available online at <<http://www.icrc.org/customary-ihl>> accessed 14 February 2014.

<sup>392</sup> This may take place in situations of armed conflict or outside armed conflict. In the former case, IHL also constitutes part of the applicable law.

<sup>393</sup> Armed Forces Special Powers Act 1958 (Ind), cited in Country Report for India, ‘Military Detention - Decision to detain’. Note also that India has enacted a Geneva Conventions Act, which makes breach of the Conventions a punishable offence (see Country Report for India, ‘Military Detention’).

- In Austria, the military may arrest a person who is reasonably suspected of carrying out or intending to carry out a criminal offence directed against military officers or objectives, or against the constitutional organs of Austria or other States.<sup>395</sup> However, such a person must be handed over to the civil authorities as soon as possible, and at most within 24 hours.<sup>396</sup>
- The Kenyan armed forces are required to support the civil authorities in the maintenance of order, and may be assigned the authority to detain by the Minister of Defence.<sup>397</sup>
- In Uruguay, the military cannot generally detain individuals, but may potentially be authorised to do so by the President ‘in grave and unforeseen cases of foreign attack or internal disorder.’<sup>398</sup> Such persons may not be moved from one part of the country to another without their consent.
- In Sri Lanka, detention of persons by the army is permitted under the Prevention of Terrorism Act.<sup>399</sup> In addition, Sri Lanka’s Public Security Ordinance allows the military to be called out to maintain order in public emergencies, in which case servicemen of the rank of sergeant and above have the power of police officers, which may include the power to detain persons in the interests of public security.<sup>400</sup>
- Further research also indicates that in China, the Martial Law of 1996 allows army officers to be entrusted with the enforcement of martial law, which includes the power to detain persons endangering State security, disrupting public order, illegally assembling, or defying curfew.<sup>401</sup>

212. The remaining Country Reports did not contain material concerning detention by the military for law enforcement or the maintenance of public order in internal emergencies.

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<sup>394</sup> Federal Constitutional Law on Martial Law, dated January 30 2002, referred to in Country Report for Russia, ‘Military Detention’.

<sup>395</sup> § 11 Bundesgesetz über Aufgaben und Befugnisse im Rahmen der militärischen Landesverteidigung BGBl. I Nr. 86/2000 (Militärbefugnisgesetz, Military Powers Act), cited in Country Report for Austria, ‘Military Detention – Preliminary remarks’.

<sup>396</sup> *ibid.*

<sup>397</sup> Armed Forces Act 1968 s3(2), cited in Country Report for Kenya, ‘Military Detention - Overview of Legal framework’.

<sup>398</sup> Uruguayan Constitution s 168, cited in Country Report for Uruguay, ‘Military Detention’.

<sup>399</sup> Prevention of Terrorism Act 1982, cited in Country Report for Sri Lanka, ‘Military Detention – Decision to detain’.

<sup>400</sup> Public Security Ordinance (No 25 of 1947), ss 5, 12 cited in Country Report for Sri Lanka, ‘Administrative Detention – Counter Terrorism’ and ‘Military Detention’.

<sup>401</sup> Martial Law of the People’s Republic of China, 1996, Ch IV as identified in practice collected by the International Committee of the Red Cross, ‘Customary IHL Database’, available online at <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule99\\_sectionb](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99_sectionb)> accessed 14 February 2014.

213. As seen above, those States which specifically empower the military to detain persons in internal emergencies generally indicate some kind of limitation of the grounds on which such detention can be effected. In Austria and India the person must be reasonably suspected of a crime. However, in other cases (Russia, Sri Lanka and China) the relevant standard appears to be that the detention is necessary for security reasons.
214. It appears that each of these regimes may operate in circumstances amounting to an armed conflict, whether international (for example the Russian regime, and the Uruguayan regime insofar as it is linked to a ‘foreign attack’) or non-international (for example the Indian and Sri Lankan regimes, and the Uruguayan regime insofar as it is linked to ‘internal disorder’). In these cases, it is interesting to consider how the relevant State practice might relate to accepted or propounded rules of IHL. For example, it is notable that the Russian regime authorises detention of its own nationals only in cases of necessity in the context of an international armed conflict, in circumstances where IHL is largely silent on this point.<sup>402</sup> Similarly, it is notable that the Indian and Sri Lankan regimes take security considerations as the touchstone for authorising detention, in circumstances where IHL does not expressly regulate the circumstances in which detention is permissible in a non-international armed conflict.<sup>403</sup>
215. Also notable is the fact that, as outlined above, the majority of these regimes (with the possible exception of the Russian example) have the potential to operate outside situations of armed conflict. As a result, the tendency to limit the military’s powers of detention to specific circumstances relating to the commission of offences or the preservation of national security raises interesting questions – which far more information would be needed to answer – regarding potential trends in State practice in this type of situation.

*ii) Procedural rights available to the detainee: entitlement to reasons*

216. Two Country Reports record that reasons for the detention must be given, either to the civil authorities (India) or to the detainee (Sri Lanka).
217. In India, those arrested by the military in ‘disturbed areas’ must be handed over to the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.<sup>404</sup> While the Indian Constitution guarantees the right of those arrested to

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<sup>402</sup> For example, while the Fourth Geneva Convention contains a number of provisions regarding detention in an international armed conflict, its definition of ‘protected persons’ excludes nationals of the detaining State (art 4).

<sup>403</sup> Even the ICRC study goes no further than to posit that ‘arbitrary deprivation of liberty’ is prohibited as a matter of customary international law in both international and non-international armed conflicts. See International Committee for the Red Cross, ‘Rule 99. Deprivation of Liberty’ available <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99)> accessed 4 March 2014. Note that the section on non-international armed conflicts appears to equate this with the existence of a ‘valid [legal] reason’ for detention’.

<sup>404</sup> Armed Forces Special Powers Act 1958 s 6, cited in Country Report for India, ‘Military Detention - Decision to

be informed ‘as soon as may be’ of the grounds for their arrest, these clauses do not appear to apply to enemy aliens.<sup>405</sup> By contrast, it would seem that the right would apply to Indian citizens arrested by the military in a ‘disturbed area’ under the special powers legislation.<sup>406</sup>

218. In Sri Lanka, military detention is, like civil detention, governed by art 13 of the Constitution, which provides that ‘[a]ny person arrested shall be informed of the reason for his arrest’.<sup>407</sup> Reasons must be provided to any person arrested or detained for an offence, and the prisoner must be released if this reason for custody ceases to exist. In order to satisfy art 13(1), it is necessary that a reason for arrest be recorded prior to arrest – subsequent investigations do not suffice.<sup>408</sup> Further research suggests that the reason-giving requirement also applies in the context of an internal insurgency in Sri Lanka, whose President directed in 1997 that:

At or about the time of the arrest or if it is not possible in the circumstances, immediately thereafter as circumstances permit:...

(ii) every person arrested or detained shall be informed of the reason for the arrest.<sup>409</sup>

219. None of the other reports specifically deal with this issue. However, it may be worth noting that, while Chinese criminal procedure generally requires that a detainee’s family or work unit be provided with reasons for the detention within 24 hours,<sup>410</sup> the usual protections of Chinese criminal procedure are displaced when martial law is being applied; in these circumstances, there appears to be no requirement that either the detainee or their family or work unit be informed of the reasons for their arrest.<sup>411</sup>
220. Again, it is possible that these regimes may operate in circumstances amounting to an armed conflict for the purposes of IHL. In these circumstances, art 75(3) of Additional Protocol I to the Geneva Conventions guarantees the right of any person arrested, detained or interned for

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detain’.

<sup>405</sup> Constitution of India, art 22(1) and(3) cited in Country Report for India, ‘Military Detention – Decision to detain’.

<sup>406</sup> The Supreme Court of India has found that the requirement under s 22 of the constitution that a detainee be produced before a magistrate within 24 hours still applies in the case of military arrests in ‘disturbed areas’. See *Naga People’s Movement for Human Rights v Union of India* (1998) 2 SCC 109 cited in Country Report for India, ‘Military Detention – Decision to detain’.

<sup>407</sup> Cited in country report for Sri Lanka, ‘Military Detention – Decision to detain’.

<sup>408</sup> Country Report for Sri Lanka, ‘Military Detention – Challenges to Detention’, citing *Vinayagamoorthy, Attorney-At-Law (On Behalf of Wimalenthiran) v The Army Commander and Others* [1994] LKSC 11.

<sup>409</sup> Statement issued by the President of Sri Lanka, Directions issued by Her Excellency the President, Commander-in-Chief of the Armed Forces and Minister for Defence, Colombo, 31 July 1997, 3(ii) cited in International Committee of the Red Cross, *Customary IHL Database*, available online at <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule99\\_sectionc](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99_sectionc)> accessed 14 February 2014.

<sup>410</sup> Chinese Criminal Procedure Code, art 64, cited in Country Report for China, ‘Police Detention – Decision to detain – Rights of Detainee and Release after Interrogation’.

<sup>411</sup> Martial Law of the People’s Republic of China, art 27 as identified in practice collected by the International Committee of the Red Cross, ‘Customary IHL Database’, available online at <[http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule99\\_sectionb](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule99_sectionb)> accessed 14 February 2014.

actions related to the conflict to be informed promptly, in a language they understand, of the reasons for their detention. This requirement is widely considered to reflect customary international law in relation to international armed conflicts.<sup>412</sup> With respect to non-international armed conflicts, by contrast, the position is unclear: the ICRC study, for example, posits that a right to reasons is customary in these situations, but supports this position largely by reference to international human rights law (including the ICCPR).<sup>413</sup> The divergence in State practice in this small sample alone suggests that conclusions on this issue may be difficult to draw; the same applies to any attempt to identify trends in State practice in respect of detention by the military in situations which do not meet the threshold for a non-international armed conflict.

#### **d) Procedural avenues for challenge and review**

221. As to the procedural avenues for challenge and review, several of the Country Reports provide specific details on review of detention by the military in situations of national emergency and also more broadly of persons identified as security threats at home or abroad:

- In India, there is no formal complaints mechanism or ability to challenge or review detention where a person is arrested in a ‘disturbed area’. However, the Supreme Court of India has held that although there is no clear or formal complaint mechanism under the law, it is imperative that complaints of misuse or abuse be thoroughly investigated.<sup>414</sup> Thus, it may be argued that the Central Government is conferred with the authority to investigate complaints of unlawful detention in ‘disturbed areas’.
- In Sri Lanka, detainees have the right to make an application for *habeas corpus*. However, the review is more limited, as the court cannot substitute its discretion for that of the officer.<sup>415</sup>
- In the US, there was previously a legal regime governing detention of ‘enemy combatants’ (the Obama Administration retired the expression in 2009, although still allows the detention of persons who give substantial support to al Qaeda or the Taliban). Detained US citizens may challenge their detention in courts through an application for *habeas corpus*.<sup>416</sup> While previously US law had restricted any *habeas corpus* rights for non-

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<sup>412</sup> See International Committee for the Red Cross, ‘Rule 99. Deprivation of Liberty’ available online at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99)> accessed 4 March 2014.

<sup>413</sup> See International Committee for the Red Cross, ‘Rule 99. Deprivation of Liberty’ available online at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99)> accessed 4 March 2014.

<sup>414</sup> *Naga People’s Movement for Human Rights v Union of India* (1998) 2 SCC 109.

<sup>415</sup> *Elasingbe v Wijenickrema and Others* [1993] LKSC 12, cited in Country Report for Sri Lanka, ‘Military Decision – Review of and challenges to detention’.

<sup>416</sup> Country Report for the United States of America, ‘Military Detention- Decision to detain – US Citizens’.

citizen ‘enemy combatants’ held outside the US,<sup>417</sup> the Supreme Court in 2008 found that non-US citizens detained at Guantanamo Bay, because of the US’ de facto jurisdiction and control over this area, also had the right to take habeas corpus proceedings in the US federal courts.<sup>418</sup>

- The ECtHR jurisprudence provides that detention undertaken by a State Party’s military in the course of military action in another country is subject to the Convention, including the provisions concerning challenging the lawfulness of detention.<sup>419</sup>

222. Thus, in some of the jurisdictions under study detention by the military can be challenged via an application for *habeas corpus* or an equivalent action.

223. As regards potentially relevant rules of IHL, under the Fourth Geneva Convention aliens in the territory of a party to an international armed conflict and civilians detained in occupied territories have a right to review of their detention; in the former case, the review must be conducted by an appropriate court or administrative board, and in the latter by a ‘competent body’.<sup>420</sup> No such provisions apply in relation to a non-international armed conflict (whether in respect of civilians or combatants) – though the ICRC study, again drawing largely on international human rights law, argues that in these cases detainees have a customary law right to challenge the lawfulness of their detention.<sup>421</sup> To the extent that the regimes mentioned above may be applicable in situations of non-international armed conflict, it is interesting to note that each of them appears to provide for some form of review or oversight of detention. However, the form and scope of this provision differs widely; for this reason, it is difficult either to gauge their interaction with contested areas of IHL or – to the extent that the regimes apply in situations falling short of armed conflict – to identify any significant trends in State practice in this area.

#### **e) Compensation for unlawful detention**

224. Several Country Reports identify specific remedies for unlawful detention in a military context. In India, courts have held that compensation should be granted for misuse or abuse of the special powers granted to the military in designated ‘disturbed areas’.<sup>422</sup> In Sri Lanka, there has

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<sup>417</sup> Country Report for the United States of America, ‘Military Detention – Decision to detain – Non US Citizens’

<sup>418</sup> *Boumediene v Bush* 553 US 723 (2008), cited in Country Report for the United States of America, ‘Military Detention- Decision to detain – Non US Citizens’.

<sup>419</sup> *Cyprus v Turkey* (25781/94) (2001) 35 EHRR 30, cited in Report for the European Court of Human Rights, ‘Military Detention’.

<sup>420</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, arts 42, 43, 78.

<sup>421</sup> See International Committee of the Red Cross, ‘Rule 99. Deprivation of Liberty’ available online at <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule99](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99)> accessed 4 March 2014

<sup>422</sup> *Naga People’s Movement for Human Rights v Union of India* (1998) 2 SCC 109; *Phulo Bala Das v Union of India* (2006) 45 AIC 915; *Naren Moran v State of Assam* (2008) 63 AIC 939, cited in Country Report for India, ‘Military Detention



been a judicial finding that compensation can be obtained for unlawful detention in a military context.<sup>423</sup> In the US, a US Federal Court has recently found that it did not have jurisdiction to hear claims for damages from non citizens detained as ‘enemy combatants’.<sup>424</sup>

225. Several other reports indicate more generally that compensation may be obtainable under human rights legislation – as in the UK<sup>425</sup> and South Africa<sup>426</sup> – or via other forms of civil action, for example the tort of false imprisonment in Australia<sup>427</sup> and New Zealand,<sup>428</sup> the *actio iniuriarum* in South Africa,<sup>429</sup> an action for ‘moral damages’ under Greek law,<sup>430</sup> or a civil claim under Austrian law.<sup>431</sup> The ECtHR also allows for compensation upon a finding of unlawful detention.<sup>432</sup> However, these examples are given in the context of Compensation for unlawful detention generally (rather than specifically in the context of ‘security’ military detention), so it is difficult to draw any conclusions on this point.

#### IV CONCLUDING REMARKS

226. For disciplinary detention, based on the jurisdictions considered, and subject to the qualifications outlined in the Introduction and the discussion in this section, the sample of State practice considered reveals a strong trend toward requiring that a military defendant must be charged or released within a time range of between 24 and 96 hours, which may support an argument for the existence of a customary international law norm to this effect.
227. The sample of State practice also reveals trends which may support the existence of customary international law norms requiring that:
- a detainee may challenge disciplinary detention, although the nature and scope of any such right of challenge differs; and
  - a detainee may claim Compensation for unlawful detention.

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- Compensation for unlawful detention’.

<sup>423</sup> *Abdul Lathif v DIG of Police*, (2005)1 Sri LR 22, cited in Country Report for Sri Lanka, ‘Military Detention - Compensation for unlawful detention’.

<sup>424</sup> *Hamad v Gates*, DC No. 2:10-cv-00591-MJP (2013) cited in Country Report for the United States of America, ‘Military Detention – Remedies for unlawful detention’.

<sup>425</sup> Human Rights Act 1998, s 8(3), cited in Country Report for the United Kingdom, ‘Military Detention – Compensation for unlawful detention’.

<sup>426</sup> Country Report for South Africa, ‘Military Detention – Compensation for unlawful detention.’

<sup>427</sup> Country Report for Australia, ‘Military Detention – Remedies for unlawful detention.’

<sup>428</sup> Country Report for New Zealand, ‘Military Detention – Remedies for unlawful detention.’

<sup>429</sup> Country Report for South Africa, ‘Military Detention – Compensation for unlawful detention.’

<sup>430</sup> Country Report for Greece, ‘Military Detention – Compensation for unlawful detention.’

<sup>431</sup> Country Report for Austria, ‘Military Detention – Compensation for unlawful detention.’

<sup>432</sup> See the Report for the European Court of Human Rights, ‘Administrative Detention – Compensation for unlawful detention’.

228. In relation to detention by the military for security purposes, there is an insufficiently large sample of State practice available to identify any significant trends. However, the information provided in the underlying Country Reports and discussed in the sub-sections above may provide a useful basis for further consideration of both specific contested areas of IHL, and of the manner in which States regulate military detention in situations which do not amount to a state of 'armed conflict'.

# POLICE DETENTION

## I PRELIMINARY REMARKS

229. This section analyses State practice in relation to detention by the police force. It should be noted at the outset that there are many forms of police detention, some of which are discussed in other sections of this report. In particular, police powers of detention for counter-terrorism, national security or intelligence-gathering purposes are considered in the section on administrative detention. This section is particularly focussed on:
- police detention in crowd-control situations (via practices such as ‘kettling’<sup>433</sup>);
  - police detention following arrest without warrant or otherwise prior to the laying of charges;<sup>434</sup>
  - police detention in specific factual circumstances, such as disaster management; and
  - police detention in relation to specified administrative offences.
230. The particular context of the relevant powers is specified wherever it is necessary for the purposes of accurate comparison. It should be noted that not all types of police detention are considered in relation to each jurisdiction;<sup>435</sup> as a result, the picture of State practice provided in this section does not purport to be a completely comprehensive one.
231. Subject to these qualifications, this section considers 19 jurisdictions: Argentina,<sup>436</sup> Australia, Austria, Belgium, China, Germany, Greece, Hong Kong, India, Italy, Kenya, New Zealand, Russia, Singapore, South Africa, Sri Lanka, Switzerland, the US, and the UK. The jurisprudence of the ECtHR is also considered.

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<sup>433</sup> The term ‘kettling’ refers to the practice of forcibly confining demonstrators to a small physical area.

<sup>434</sup> Pre-trial detention following arrest with a warrant, and other forms of pre-trial detention which are effected by police only after prior authorisation by a court, are not expressly considered for the purposes of this section.

<sup>435</sup> The practice in the following jurisdictions is considered in relation to police detention in crowd-control situations: Australia, Austria, the European Court of Human Rights, Greece, Singapore, South Africa, Sri Lanka, Switzerland, and the United Kingdom. The practice of the following jurisdictions is considered in relation to various forms of police detention without a warrant or prior to the laying of charges: Belgium, China, Germany, Hong Kong, India (under the Code of Criminal Procedure 1973), Italy (in relation to the *fermo di polizia*), Kenya, New Zealand, Russia, South Africa, Switzerland, the United Kingdom, and the United States of America (under powers to stop and question, which are also considered in the section on administrative detention). The practice of India and Sri Lanka is considered in relation to detention in circumstances involving disaster management. Finally, the practice of China and Russia is considered in relation to police detention for specific administrative offences; these regimes are also considered in the section on administrative detention for counter-terrorism, national security and intelligence-gathering purposes.

<sup>436</sup> The Country Report for Argentina does not contain a separate section on police detention; however, it describes general procedures relating to review of detention which are relevant to all types of procedure in which a person’s freedom of movement is restricted.

## II THRESHOLD QUESTIONS

232. Few of the jurisdictions under study have a specific definition of what amounts to ‘detention’ by police, especially with regard to unconventional situations such as kettling.<sup>437</sup> However, the case law may provide guidance on this question. In particular, the jurisprudence of the ECtHR establishes that, as a general matter, whether a person has been ‘detained’ will depend on a combination of factors, particularly the nature of confinement and the status of the person affected;<sup>438</sup> relevant considerations include the area of confinement, the level of supervision, and the prospect of punishment for non-compliance.<sup>439</sup> Similarly, under Swiss law, criteria regarding the nature, duration, impact and modalities of police action are decisive of whether it amounts to ‘detention’.<sup>440</sup>
233. More specific definitions of ‘detention’ have been offered in Germany, the US, and Belgium. In Germany, a person is considered to have been detained when their freedom of movement has been restricted by the authorities.<sup>441</sup> In the US, a person is considered to have been ‘seized’ (and hence detained) whenever a police officer ‘restrains [their] freedom to walk away’.<sup>442</sup> In Belgium, the test for both police custody and ‘judicial arrest’ is whether a person has ‘lost [their] freedom to come and go’.<sup>443</sup> Each of these definitions would appear to cover practices such as kettling. In Germany, such practices have been found to constitute unlawful detention in several decisions of lower courts;<sup>444</sup> the issue does not appear to have been expressly considered in the US or Belgium.
234. In the specific context of police action in crowd-control situations, the ECtHR has held that in determining whether ‘detention’ has occurred account must be taken of the type, duration,

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<sup>437</sup> It should be noted that definitions of ‘arrest’, as opposed to ‘detention’, have not been considered for the purposes of this section.

<sup>438</sup> Report for the European Court of Human Rights, ‘Background information – Preliminary considerations – The meaning of the terms “arrest” and “detention”’.

<sup>439</sup> *Guzzardi v Italy* (1981) 3 EHRR 333; *Storck v Germany* (2005) 43 EHRR 96.

<sup>440</sup> Country Report for Switzerland, ‘Administrative detention – Detention pursuant to criminal procedure law – Threshold questions’.

<sup>441</sup> Country Report for Germany, ‘Police detention – Threshold questions’.

<sup>442</sup> *Terry v Ohio* 392 US 1 (1968). See Country Report for the United States of America, ‘Administrative detention – Threshold questions’; Country Report for the United States of America, ‘Police detention – Threshold questions’.

<sup>443</sup> Statute on Detention on Remand, art 1, 3°. See Country Report for Belgium, ‘Administrative detention – Police custody and judicial arrest’.

<sup>444</sup> See eg OVG Nordrhein-Westfalen decision of 2 March 2001, 5 B 273/01; LG Lüneburg decision of 12 July 2013, 10 T 39/13. Country Report for Germany, ‘Police detention – Threshold questions’. In Austria, a case where the police prevented demonstrators from leaving for around three hours was found not to involve a violation of the constitutional right to liberty, though it did not expressly consider whether a deprivation of liberty had occurred. See Country Report for Austria, ‘Police detention – Threshold questions’.

effects, and manner of implementation of the measure in question.<sup>445</sup> Motive is irrelevant.<sup>446</sup> These guidelines have been taken into account in the UK.<sup>447</sup> Particular instances of kettling have been held not to constitute a deprivation of liberty by the ECtHR<sup>448</sup> and Swiss courts,<sup>449</sup> though the ECtHR acknowledged that the inherently ‘coercive and restrictive nature’ of the measure could be capable in other circumstances of constituting such a deprivation.<sup>450</sup>

235. As such, of the three jurisdictions which have expressly considered crowd-control measures such as kettling (Germany, the ECtHR and Switzerland), two have recognised that these may amount to police detention; the definitions of detention adopted by two more States (Belgium and the US) appear capable of founding a similar conclusion.

### III DECISION TO DETAIN

#### a) Legal basis for detention

236. In many of the jurisdictions under study, there is a need for a clear legal basis for detention.<sup>451</sup> This principle is prominent in the European region. In Switzerland, kettling-type crowd control actions must have a legal basis.<sup>452</sup> In Germany, every deprivation of liberty (including by the police) must be based on a formal law, such as the relevant police law.<sup>453</sup> In Austria, deprivation of liberty is constitutional only if it serves one of the purposes expressly stated in the Federal Constitutional Law on the Protection of Personal Liberty.<sup>454</sup> Article 5 of the ECHR requires that a deprivation of liberty occur only ‘in accordance with a procedure prescribed by law’, and the ECtHR has held that such a deprivation must be underpinned by a law that is accessible, foreseeable and certain.<sup>455</sup>

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<sup>445</sup> *Austin v United Kingdom* (2012) 55 EHRR 14 [57]. See Country Report for the United Kingdom, ‘Police detention – Threshold questions’; Report for the European Court of Human Rights, ‘Police detention’.

<sup>446</sup> *Austin v United Kingdom* (2012) 55 EHRR 14. See Report for the European Court of Human Rights, ‘Police detention’. A potentially contrasting position appears to be taken in Austria, where the Constitutional Court considers the intention or purpose of a measure important in determining whether a deprivation of liberty has occurred. See Country Report for Austria, ‘Police detention – Threshold questions’.

<sup>447</sup> Country Report for the United Kingdom, ‘Police detention – Threshold questions’.

<sup>448</sup> *Austin v United Kingdom* (2012) 55 EHRR 14. See Report for the European Court of Human Rights, ‘Police detention’.

<sup>449</sup> BGE vom 22. January 2014, 1C\_350/2013, 1C\_35. See Country Report for Switzerland, ‘Police detention’.

<sup>450</sup> *Austin v United Kingdom* (2012) 55 EHRR 14.

<sup>451</sup> Austria, the European Court of Human Rights, Germany, Hong Kong, India, Kenya, Sri Lanka, Switzerland, and the United States of America.

<sup>452</sup> Swiss Federal Constitution, arts 10 and 36. See Country Report for Switzerland, ‘Police detention’.

<sup>453</sup> Country Report for Germany, ‘Police detention – Threshold question’.

<sup>454</sup> Country Report for Austria, ‘Immigration detention – Threshold questions’.

<sup>455</sup> *Amuur v France* (1996) 22 EHRR 533. See Report for the European Court of Human Rights, ‘Background information – Preliminary considerations – The lawfulness of detention’.

237. There are also expressions of this principle in non-European jurisdictions.<sup>456</sup> In Kenya, the Constitution allows limitations on liberty through detention only where there are clear legal provisions authorising them, for instance under the Criminal Procedure Code.<sup>457</sup> Similarly, US law considers restraint amounting to detention to constitute ‘seizure’ of a person under the Fourth Amendment, meaning it must occur in accordance with the law – again, a clear legal basis is required.<sup>458</sup> Hong Kong’s Bill of Rights Ordinance requires that deprivation of liberty occur only ‘on such grounds and in accordance with such procedure as are established by law’,<sup>459</sup> and India and Sri Lanka both give police detention in the disaster management context a specific legal footing through the Disaster Management Acts passed in both countries in 2005.<sup>460</sup>
238. Thus, while it is not possible on this evidence alone to draw any conclusions regarding the possible content of customary international law, there is some State practice supporting a view that police detention must have a clear legal basis. The normative justification for this is apparent: given that detention is a significant constraint on liberty (a curtailment, in many cases, of constitutional rights), there is a need for the State to be frank and legally robust in authorising such constraint. This justification closely resembles the more general principle of legality, which requires that a State only limit rights through the use of express language.

#### **b) Relevance of freedom of association**

239. In four of the jurisdictions under study,<sup>461</sup> the primary research into police detention in crowd-control situations revealed statements about the importance of freedom of assembly. In Sri Lanka, this freedom is protected by art 14 of the Constitution;<sup>462</sup> in India, art 19(1)(b) of the Constitution guarantees a similarly framed right.<sup>463</sup> The ECtHR, in considering the lawfulness of kettling, emphasised the ‘fundamental importance of freedom of expression and assembly in all democratic societies.’<sup>464</sup> Freedom of assembly or association is also protected by s 17 of the New Zealand Bill of Rights Act, the First Amendment of the US Constitution, and art 36 of the Constitution of Kenya.

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<sup>456</sup> India, Kenya, Sri Lanka, and the United States of America.

<sup>457</sup> Constitution of Kenya 2010, art 24. See Country Report for Kenya, ‘Police detention – Threshold questions’.

<sup>458</sup> Country Report for the United States of America, ‘Police detention – Threshold question’.

<sup>459</sup> Hong Kong Bill of Rights Ordinance 1997 (Cap 383, Ordinances of Hong Kong), s 8, art 5(1). See Country Report for Hong Kong, ‘Police detention – Preliminary remarks’.

<sup>460</sup> Country Report for Sri Lanka, ‘Police detention’; Country Report for India, ‘Police detention’.

<sup>461</sup> The European Court of Human Rights, India, Sri Lanka, and the United States of America.

<sup>462</sup> Country Report for Sri Lanka, ‘Police detention’.

<sup>463</sup> Country Report for India, ‘Police detention – Preliminary remarks’.

<sup>464</sup> *Austin v United Kingdom* (2012) 55 EHRR 14 [68] as discussed in Report for the European Court of Human Rights, ‘Police detention’.

240. These references are not just high-level or vague statements of principle. They are a reminder that States have sought to secure the value of freedom of assembly in all situations, and hence are inevitably of relevance to police detention in the context of crowd control. As such, they may provide the basis for a future trend toward treating freedom of association as a relevant countervailing consideration when examining the lawfulness of police action in these situations.

### **c) Need for specific purposes for detention**

241. A majority of the States under study specify in law the purposes for which, or the circumstances in which, police detention of the types considered in this section may be effected.<sup>465</sup>

242. In the context of crowd control, in New Zealand the police's common law powers (which may extend to detention under some circumstances) have been said to be for the purposes of preventing a breach of the peace.<sup>466</sup> Similar judicial statements have been made in the UK.<sup>467</sup> Police powers are also expressed similarly in Australia, with this specific purpose again articulated both in legislation relating to crowd control and in relevant case law.<sup>468</sup>

243. In relation to detention without a warrant or otherwise prior to the laying of charges, States which empower police to detain only for specified purposes or under specified circumstances include Belgium,<sup>469</sup> China,<sup>470</sup> Hong Kong,<sup>471</sup> India,<sup>472</sup> Italy,<sup>473</sup> New Zealand,<sup>474</sup> Kenya,<sup>475</sup> Russia,<sup>476</sup>

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<sup>465</sup> Australia, Austria, Belgium, China, Germany, Hong Kong, India, Italy, Kenya, New Zealand, Russia, Singapore, South Africa, Switzerland, the United Kingdom, and the United States of America. The issue was not considered in Argentina (see n 436) or Greece (where the Special Units for the Reinstatement of Order do not have the power to detain, and police detention appears to be possible only on issue of a 'temporary detention warrant').

<sup>466</sup> *Minto v Police* [1987] 1 NZLR 375 [6], [7]; *Minto v Police* [2013] NZHC 253 [25]. See Country Report for New Zealand, 'Police detention – Preliminary remarks – Common law powers'.

<sup>467</sup> *R (Laporte) v Chief Constable of Gloucester* [2007] 2 AC 105 [29] (Lord Bingham); *R (Moos and McClure) v Commissioner of Police for the Metropolis* [2012] EWCA Civ 12 [56]. See Country Report for the United Kingdom, 'Police detention – Preliminary remarks' and Country Report for the United Kingdom, 'Police detention – Decision to detain'.

<sup>468</sup> See eg Police Powers and Responsibilities Act 2000 (Qld), ss 50-51; *Moss v McLachlan* [1985] IRLR 76 (QBD); *R v Commr of Police (Tas)*; *Ex parte North Broken Hill Ltd* (1992) 1 Tas R 99. See Country Report for Australia, 'Police detention – Preliminary remarks – Common law power to keep the peace'; Country Report for Australia, 'Police detention – Decision to detain'.

<sup>469</sup> Country Report for Belgium, 'Administrative detention – Police custody and judicial arrest'.

<sup>470</sup> Country Report for China, 'Police detention – Decision to detain'. See also, in relation to administrative police detention under the 'Public Order Management and Punishment Law of the People's Republic of China', Country Report for China, 'Administrative detention – Decision to detain'.

<sup>471</sup> Police Force Ordinance, s 54. See Country Report for Hong Kong, 'Police detention – Preliminary remarks – Stop and search'.

<sup>472</sup> Country Report for India, 'Preventive detention – Preliminary remarks'.

<sup>473</sup> Country Report for Italy, 'Police detention – Decision to detain'.

<sup>474</sup> Country Report for New Zealand, 'Administrative detention – Decision to detain'.

<sup>475</sup> Criminal Procedure Code s 29. See Country Report for Kenya, 'Police detention – Decision to detain'.

<sup>476</sup> Country Report for Russia, 'Police detention – Decision to detain – Grounds for the detention'.

Germany;<sup>477</sup> South Africa;<sup>478</sup> Switzerland;<sup>479</sup> the UK;<sup>480</sup> and the US.<sup>481</sup> The most common circumstances are where a person is reasonably suspected of having committed or being about to commit an offence (often a serious offence).<sup>482</sup>

244. Thus, State practice in the jurisdictions under study displays a strong trend toward requiring that the purposes for which or circumstances under which police detention may be effected be articulated and confined by law; and, in consequence, toward treating police detention for no specified purpose, or for a purpose entirely within the discretion of the detaining authority, as unlawful. The trend may support an argument for the emergence of norms of customary international law to this effect.

#### **d) Immunisation of police from oversight**

245. It should be noted that, in several of the jurisdictions under study, there is a pattern of laws undermining judicial oversight of police detention.<sup>483</sup> In India, under s 73 of the Disaster Management Act 2005 ('IDMA', which creates a National Disaster Management Authority and sets up a process for coordinated responses to natural disasters), no suit or prosecution lies in any court against any officer or employee of the Government in respect of any work done in good faith under the provisions of the Act; this logically extends to detention by members of public authorities.<sup>484</sup> Similarly, Sri Lanka's Disaster Management Act 2005 provides immunity from legal proceedings for any action taken in good faith under its provisions.<sup>485</sup>
246. These types of provision are not confined to legislation dealing with disaster management: in Sri Lanka, no proceedings can be taken against civilian or military forces which have used force to disperse an unlawful assembly without the permission of the Attorney-General.<sup>486</sup> Singapore, too,

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<sup>477</sup> Country Report for Germany, 'Police detention – Decision to detain'.

<sup>478</sup> Country Report for South Africa, 'Police detention – Police powers relating to detention after arrest – Decision to detain'.

<sup>479</sup> Country Report for Switzerland, 'Administrative detention – Preliminary remarks'.

<sup>480</sup> Country Report for the United Kingdom, 'Administrative detention – General criminal law – Decision to detain'.

<sup>481</sup> In order to stop a person for questioning (which is considered to amount to detention – see n 442 and accompanying text) a police officer must have 'an articulable suspicion that the person has been, is, or is about to be engaged in criminal activity': *United States v Place*, 462 US 696 (1983). See Country Report for the United States of America, 'Administrative detention – Decision to detain – Temporary stops'.

<sup>482</sup> China, Hong Kong, India, New Zealand (though only on suspicion of having already committed an offence), Kenya, Russia, Germany (though only where detention is 'indispensable' to prevent the commission of an offence), South Africa, Switzerland, and the United Kingdom.

<sup>483</sup> India, Singapore, and Sri Lanka.

<sup>484</sup> Country Report for India, 'Police detention – Preliminary remarks', Country Report for India, 'Police detention – Decision to detain'; Country Report for India, 'Police detention – Review of and challenges to detention'.

<sup>485</sup> Country Report for Sri Lanka, 'Police detention'.

<sup>486</sup> Code of Criminal Procedure Act 1979, s 97. See Country Report for Sri Lanka, 'Police detention'.



immunises any officer or executive authority from prosecution for a criminal offence in respect of acts done to disperse unlawful assemblies, so long as they acted in good faith.<sup>487</sup>

247. While this is by no means a wide sample of State practice, it is worth noting because it appears to run counter to the trend requiring a lawful basis for detention.

#### **e) Provision of reasons for detention**

248. At least six of the jurisdictions under study require that detainees be given reasons for their detention by police.<sup>488</sup> States which have expressly adopted this requirement include: Germany;<sup>489</sup> India,<sup>490</sup> Kenya,<sup>491</sup> New Zealand,<sup>492</sup> South Africa,<sup>493</sup> and the UK.<sup>494</sup>

249. Furthermore, in Kenya<sup>495</sup> and South Africa,<sup>496</sup> a person detained or arrested by police must be furnished with reasons in a language they understand.

250. A slightly less stringent rule applies in Russia in respect of detention by the police or other agencies in relation to ‘administrative offences’: a record of the reasons for detention must be made, but need be provided to the detainee only on request.<sup>497</sup> Finally, a modified version of the rule exists in China: within 24 hours after a person has been detained, the person’s family must be notified of the reasons for detention, except where such notification would hinder investigations, where the offence involves endangering state security, or where there is no way of notifying them.<sup>498</sup>

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<sup>487</sup> Criminal Procedure Code, s 62. See Country Report for Singapore, ‘Police detention’.

<sup>488</sup> We note that the fact that this requirement is not mentioned in the Country Reports for other jurisdictions under study does not necessarily mean it is not in place.

<sup>489</sup> Country Report for Germany, ‘Police detention – Decision to detain’.

<sup>490</sup> Constitution of India 1950, art 22(1). See Country Report for India, ‘Preventive detention – Decision to detain’.

<sup>491</sup> Criminal Procedure Code, s 36; Constitution of Kenya 2010, art 49. See Country Report for Kenya, ‘Police detention – Decision to detain’.

<sup>492</sup> Bill of Rights Act 1990, s 23(1)(a). See Country Report for New Zealand, ‘Police detention – Decision to detain’.

<sup>493</sup> South African Constitution, s 35(2)(a). See Country Report for South Africa, ‘Police detention – Police powers relating to detention after arrest – Review of and challenges to detention’.

<sup>494</sup> Where a person is arrested and detained without a warrant. See Country Report for the United Kingdom, ‘Administrative detention – General criminal law – Decision to detain’.

<sup>495</sup> Criminal Procedure Code, s 36; Constitution of Kenya 2010, art 49. See Country Report for Kenya, ‘Police detention – Decision to detain’.

<sup>496</sup> South African Constitution, s 35(4). See Country Report for South Africa, ‘Police detention – Police powers relating to detention after arrest – Review of and challenges to detention’.

<sup>497</sup> Code of Administrative Offences of the Russian Federation, art 27.4. See Country Report for Russia, ‘Administrative detention – Decision to detain – Administrative detention’.

<sup>498</sup> Country Report for China, ‘Police detention – Decision to detain – Rights of detainee and release after interrogation’.

251. What emerges from the above is a sense of the importance of a ‘culture of justification’ in the context of police detention.<sup>499</sup> In other words, where public power is exercised, those subject to the power deserve to have explained why it is being used.
252. While this sample is too small to draw any conclusions regarding trends in State practice, the prevalence of the reason-giving requirement is significant because of the way that it conditions the relationship between citizen and the state; it could, therefore, point the way toward the future development of customary international law in this area.

#### **f) Period of detention**

253. A majority of the States whose practice was considered for the purposes of this section provide for legislative limits on the duration of police detention across a range of circumstances.<sup>500</sup>
254. The most common example is placing a maximum time limit on the period after which a person detained by police must be brought before a court in order for that court to determine the lawfulness of their detention and/or make a decision as to further detention.<sup>501</sup> The following States make some provision to this effect: Belgium;<sup>502</sup> Hong Kong;<sup>503</sup> India,<sup>504</sup> Italy,<sup>505</sup> Kenya,<sup>506</sup> Russia;<sup>507</sup> South Africa;<sup>508</sup> Switzerland;<sup>509</sup> and the UK.<sup>510</sup> The relevant time limits vary between 24 hours and 14 days.

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<sup>499</sup> The phrase is often used by South African scholar Etienne Mureinik: see eg Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 South African Journal on Human Rights 31.

<sup>500</sup> Belgium, China (in relation to administrative detention), Germany, Hong Kong, India, Italy, Kenya, New Zealand, Russia, South Africa, Switzerland, and the United Kingdom. The question was not considered in relation to Argentina (see n 436); Greece (see n 465); Austria, Singapore and Sri Lanka (which were considered in relation to crowd control only). In the United States of America, as the regime examined for the purposes of this section is limited to the power to stop and question, detention is necessarily of short duration.

<sup>501</sup> Note that in some cases this is a general guarantee, while in others it relates expressly to forms of police detention which can be effected without prior authorisation (eg detention without a warrant on suspicion of having committed an offence).

<sup>502</sup> 12 hours, or 24 if the person is caught *in flagrante delicto*. See Country Report for Belgium, ‘Administrative detention – Police custody and judicial arrest’.

<sup>503</sup> ‘As soon as practicable’, and in any case within 72 hours. See Country Report for Hong Kong, ‘Police Detention – Decision to detain – Arrest’.

<sup>504</sup> 24 hours, except in cases where specific legislation provides for preventive detention to be authorised by an administrative rather than a judicial authority. See Country Report for India, ‘Preventive detention – Preliminary remarks’; Country Report for India, ‘Preventive detention – Decision to detain’.

<sup>505</sup> 48 hours in respect of the *fermo de polizia*. See Country Report for Italy, ‘Police detention – Decision to detain’.

<sup>506</sup> As soon as possible, and no later than 24 hours after being detained; except in cases of capital offences, in which case the maximum period is 14 days. See Country Report for Kenya, ‘Police detention – Decision to detain’.

<sup>507</sup> Generally five hours, and in some cases up to 48 hours. See Country Report for Russia, ‘Administrative detention – Decision to detain – Administrative detention’; see also Country Report for Russia, ‘Police detention – Decision to detain – Procedure’.

<sup>508</sup> No later than 48 hours after arrest as per the Country Report for South Africa, ‘Police detention – Police powers relating to detention after arrest – Review of and challenges to detention’.

<sup>509</sup> Within 48 hours of arrest. See Country Report for Switzerland, ‘Administrative detention – Detention pursuant to criminal procedure law – Application for remand’.

255. An exception to this trend is China. There, a maximum time limit is placed on administrative detention by the ‘public security organs’ without the possibility of extension, whether by judicial authorisation or otherwise;<sup>511</sup> in the case of detention under the criminal law there is also a maximum time limit, but following expiry of this period further detention may be authorised by the ‘People’s Procuratorate’ rather than a judicial body. No mention is made of an upper time limit.<sup>512</sup>
256. In several States, a more flexible time limit applies: that is, a detainee must be brought before a judicial authority within a ‘reasonable period’, ‘as soon as practicable’ or similar. These States are Germany<sup>513</sup> and New Zealand.<sup>514</sup>
257. Interestingly, in some States a time limit also applies specifically to police-imposed crowd control measures. For example, in the Australian state of New South Wales, legislation requires that cordoning or roadblocks that restrict liberty be authorised for no longer than 48 hours unless sanctioned by a judge.<sup>515</sup>
258. There is therefore a significant trend amongst the jurisdictions under study toward placing a maximum time limit on police detention without judicial review or authorisation. The trend is notable in that it demonstrates a recognition that, even where other procedural safeguards apply and a detainee has the opportunity to challenge their detention, it is necessary to have some ‘bottom-line’ requirements to prevent abuses of police power. As such, it may point the way toward the future development of customary international law in this area.

### **g) Relevance of proportionality**

259. State practice in a number of the jurisdictions under study suggests that, in order for detention by police to be lawful, it must be proportionate to the aim being pursued by the State.<sup>516</sup>

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<sup>510</sup> 24 hours under normal circumstances and 72 hours under exceptional circumstances and subject to certain conditions, unless the person has been charged or brought before a magistrate. See Country Report for the United Kingdom, ‘Administrative detention – General criminal law – Decision to detain’.

<sup>511</sup> 20 days. See Country Report for China, ‘Administrative detention – Decision to detain’.

<sup>512</sup> 14 days or, in specific cases, 37 days. See Country Report for China, ‘Police detention – Decision to detain – Detention on initiative of the public security organs’.

<sup>513</sup> A judicial decision on the lawfulness of police detention must be sought ‘promptly’. Country Report for Germany, ‘Police detention – Decision to detain’.

<sup>514</sup> A person suspected of having committed an offence must be charged or released within 48 hours; if charged, they must be brought before a court ‘as soon as possible’. See Country Report for New Zealand, ‘Administrative detention – Decision to detain’.

<sup>515</sup> Law Enforcement Powers and Responsibilities Act 2002 (NSW), s 87G. See Country Report for Australia, ‘Police detention – Decision to detain – New South Wales’.

<sup>516</sup> Kenya, India, Hong Kong, Germany, Russia, South Africa, and the United States of America; potentially also Switzerland, New Zealand, the United Kingdom and the European Court of Human Rights.

260. A number of the jurisdictions under study guarantee the rights to liberty and/or to freedom of association.<sup>517</sup> In some States, limitations or restrictions on these rights – necessarily including in cases of police detention – are permissible only on application of a general proportionality test: examples include India,<sup>518</sup> Kenya,<sup>519</sup> and Switzerland.<sup>520</sup> Further examples, not specifically referenced in the relevant Country Reports, may also exist.
261. Some States have drawn more specific links between proportionality and police detention. In Germany, the police are empowered to detain without a warrant only where it is ‘necessary’ or ‘indispensable’ to achieve specified purposes.<sup>521</sup> In the US, a person’s First and Fourth Amendment rights are considered to have been violated in instances of police detention if such detention is shown to be disproportionate under the ‘balance of interests’ test in Title 42 US Code s 1983.<sup>522</sup> In Russia, courts have held that administrative detention by bodies including the police is permissible only if there are sufficient grounds to consider this ‘necessary and proportionate’ for securing proceedings in relation to the relevant administrative offence.<sup>523</sup> In Hong Kong, a proportionality analysis is used when a magistrate determines whether to authorise further detention of a criminal suspect beyond the initial 72-hour period.<sup>524</sup> New Zealand law in this area also gestures towards a proportionality test: in the case of *Zaoui v Attorney-General* it was held that detention will be arbitrary if it is ‘capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures’.<sup>525</sup>
262. There are also echoes of a proportionality test in the legislation and case law governing the exercise of police powers in crowd-control situations. South Africa’s Regulation of Gatherings

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<sup>517</sup> Examples include Austria, the European Court of Human Rights, India, Kenya, New Zealand, South Africa, Sri Lanka, Switzerland, and the United States of America.

<sup>518</sup> The right to peaceful assembly guaranteed by the Constitution of India is subject only to ‘reasonable restrictions’ for specified purposes; reasonableness has been described by some commentators as implying a proportionality analysis. See Country Report for India, ‘Police detention – Preliminary remarks’. Other jurisdictions under study which guarantee the right to liberty may also provide for a general proportionality analysis in relation to restrictions on this right.

<sup>519</sup> The relevant test is whether a restriction is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’: Constitution of Kenya 2010, art 24. See Country Report for Kenya, ‘Police detention – Threshold questions’.

<sup>520</sup> Though this does not appear to have been expressly applied to police detention. See Country Report for Switzerland, ‘Police detention’.

<sup>521</sup> Country Report for Germany, ‘Police detention – Decision to detain’.

<sup>522</sup> Country Report for the United States of America, ‘Police detention – Review of and challenges to detention’.

<sup>523</sup> *Decision of the Constitutional Court of the Russian Federation 16.06.2009 N 9-P*. See Country Report for Russia, ‘Administrative detention – Decision to detain – Administrative detention’.

<sup>524</sup> *Wong Tsz Yam v Commissioner of Police (No. 2)* [2011] 3 HKLRD 369, 381. See Country Report for Hong Kong, ‘Police detention – Decision to detain’.

<sup>525</sup> *Zaoui v Attorney-General* [2005] 1 NZLR 577 [80]. See Country Report for New Zealand, ‘Police detention – Decision to detain’.

Act 1993 provides that the degree of force which may be used to disperse a demonstration must be ‘proportionate to the circumstances of the case and the object to be attained’;<sup>526</sup> the accompanying Standing Order similarly provides that, where ‘the use of force is unavoidable’ for dispersing a demonstration, force must be aimed at de-escalating the conflict, minimal to achieve this goal, and reasonable and proportionate in the circumstances.<sup>527</sup> In Singapore, the police are empowered to disperse an ‘unlawful assembly’ or one likely to cause a disturbance of the peace, but may ‘arrest and confine’ participants only ‘if necessary’.<sup>528</sup> Requirements of reasonable necessity and proportionality also apply to police action in crowd-control situations in New Zealand.<sup>529</sup> The ECtHR in the case of *Austin v United Kingdom*<sup>530</sup> paid regard to the finding that the imposition of a cordon had been the least intrusive and most effective method of crowd control in the circumstances,<sup>531</sup> and, in the UK, the High Court has held that the police may curtail citizen’s lawful exercise of their rights by way of peaceful demonstration only where they ‘reasonably believe that there is no other means whatsoever to prevent an imminent breach of the peace’.<sup>532</sup>

263. While it is not possible on the basis of this evidence alone to draw any conclusions regarding the potential content of customary international law, it may be possible to identify a growing trend toward requiring that detention by police be proportionate to the aims being pursued through police action.

#### **h) Specialised public order policing units**

264. In some jurisdictions, specialised policing units have been set up to deal with public order situations which might involve police detention. In Greece these are called Special Units for the Reinstatement of Order (though they do not have detention powers).<sup>533</sup> In South Africa, they are called Public Order Policing Units, though these have been recently been modified to become Area Crime Combating Units.<sup>534</sup> The development of such units has the potential to become best

<sup>526</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(2)(c). See Country Report for South Africa, ‘Police detention – Police powers relating to crowd control – Regulation of Gatherings Act’.

<sup>527</sup> Standing Order (General) 262, ‘Crowd Management during Gatherings and Demonstrations’, para 11(3) (‘Execution’). See Country Report for South Africa, ‘Police detention – Police powers relating to crowd control – Standing Order No 262’.

<sup>528</sup> Criminal Procedure Code 2010, s 58(1). See Country Report for Singapore, ‘Police detention’.

<sup>529</sup> *Lavin v Albert* [1982] AC 546, 549; Crimes Act 1961, s 44. See Country Report for New Zealand, ‘Police detention – Decision to detain’.

<sup>530</sup> *Austin v United Kingdom* (2012) 55 EHRR 14.

<sup>531</sup> Report for the European Court of Human Rights, ‘Police detention’.

<sup>532</sup> *R (Moos and McClure) v Commissioner of Police for the Metropolis* [2012] EWCA Civ 12 [56]. See Country Report for the United Kingdom, ‘Police detention – Decision to detain’.

<sup>533</sup> Country Report for Greece, ‘Police detention’.

<sup>534</sup> Country Report for South Africa, ‘Police detention – Police powers relating to crowd control – Standing order’.

practice: in South Africa, Public Order Policing Units seem to have received special training and are taught about international instruments, including the ICCPR, that govern police detention.<sup>535</sup> The units are also subject to a Standing Order the express purpose of which is ‘to regulate crowd management during gatherings and demonstrations in accordance with the democratic principles of the Constitution and acceptable international standards.’<sup>536</sup> The Order provides in particular that ‘[t]he use of force must be avoided at all costs and members deployed for the operation must display the highest degree of tolerance.’<sup>537</sup> The challenge for States would be to ensure that specialised units were educated about the need for heightened sensitivity (for example, to the need to respect freedom of association – see above), and did not become units specially trained in dismantling protests.

## IV REVIEW OF AND CHALLENGES TO DETENTION

### a) Automatic review of detention

265. As noted above, a majority of the States whose practice is considered for the purposes of this section provide for a person who has been detained by police to be brought before a judicial authority within a specified period, thereby ensuring automatic judicial review of the lawfulness of the detention. Again, while this practice is not sufficiently uniform to found any conclusions regarding the content of customary international law, it suggests a significant trend in this direction.

### b) Right to appeal or otherwise challenge detention

266. A majority of the jurisdictions under study secure the right of a person subject to the types of police detention considered in this section to challenge that detention, on their own initiative, before a judicial body.<sup>538</sup>

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no 262’.

<sup>535</sup> See Independent Complaints Directorate, ‘Presentation to the Portfolio Committee on Police: Briefing on Crowd Control’ (August 2011), <[http://www.ipid.gov.za/documents/briefings\\_parliament/Crowd%20Control%20Presentation.pdf](http://www.ipid.gov.za/documents/briefings_parliament/Crowd%20Control%20Presentation.pdf)> accessed 25 February 2014.

<sup>536</sup> Standing Order (General) 262, ‘Crowd Management during Gatherings and Demonstrations’, para 1(1) (‘Background’). See Country Report for South Africa, ‘Police detention – Police powers relating to crowd control – Standing order no 262’.

<sup>537</sup> Standing Order (General) 262, ‘Crowd Management during Gatherings and Demonstrations’, para 11(1) (‘Execution’). See Country Report for South Africa, ‘Police detention – Police powers relating to crowd control – Standing order no 262’.

<sup>538</sup> Argentina, Australia, Austria, China, Hong Kong, Italy, Kenya, Germany, New Zealand, Russia, South Africa, Switzerland, the United Kingdom, and the United States of America. The issue was not considered in relation to Greece (see n 465), or to Singapore and Sri Lanka (which were considered in relation to crowd control only). There does not appear to be a separate right to institute an appeal in India, where police detention under the Code of Criminal Procedure 1973 is of a maximum of 24 hours’ duration (see n 504), though an application for

267. One avenue for such challenge is an application for *habeas corpus*. New Zealand's Bill of Rights Act 1990 secures the right to make such an application without delay.<sup>539</sup> *Habeas corpus* is also expressly available in Argentina,<sup>540</sup> Australia,<sup>541</sup> Hong Kong,<sup>542</sup> and the UK.<sup>543</sup> A broadly equivalent remedy is also available in South Africa.<sup>544</sup>
268. In the alternative or in addition, many States allow constitutional challenges to police detention to be brought;<sup>545</sup> others allow for the possibility of judicial review;<sup>546</sup> and certain States allow for other human rights-based challenges under statutes like the UK Human Rights Act 1998<sup>547</sup> and/or regional instruments like the ECHR. Still others provide for more specific statutory avenues of appeal.<sup>548</sup>
269. State practice in the jurisdictions under study therefore displays a strong trend toward guaranteeing the right of a person detained by police to challenge their detention before a judicial body. Subject to the qualifications outlined above and in the Introduction, this practice could support an argument for the emergence of a norm of customary international law to this effect.

### **c) Right of access to independent complaints bodies**

270. Alongside these avenues, some States have developed robust independent bodies to hear complaints about police detention. New Zealand has an Independent Police Complaints Authority; South Africa and Kenya maintain similar bodies. The duties incumbent upon the

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*habeas corpus* may be available.

<sup>539</sup> Bill of Rights Act 1990, s 23(1)(c). Country Report for New Zealand, 'Police detention – Review of and challenges to detention – *Habeas corpus* proceedings'.

<sup>540</sup> Law 23,098. Country Report for Argentina, 'General *habeas corpus* procedure'.

<sup>541</sup> Country Report for Australia, 'Police detention – Review of and challenges to detention – *Habeas corpus*'.

<sup>542</sup> Country Report for Hong Kong, 'Police detention – Review of and challenges to detention'.

<sup>543</sup> Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Action for *habeas corpus*'.

<sup>544</sup> Country Report for South Africa, 'Administrative detention – Compensation for unlawful detention'.

<sup>545</sup> Austria, Kenya, New Zealand, South Africa, and the United States of America. Russia also provides a right to appeal to a district court where actions of the inquirer, investigator or prosecutor in criminal proceedings inflict damage on a detainee's constitutional rights and freedoms. See Country Report for Russia, 'Police detention – Review of and challenges to detention'.

<sup>546</sup> Judicial review is specifically referred to in Country Reports for Kenya, New Zealand, South Africa, and the United Kingdom, but is likely available in other States as well.

<sup>547</sup> Another example is New Zealand's Bill of Rights Act 1990.

<sup>548</sup> China provides a right to appeal either administrative detention or detention in relation to a criminal investigation to a court. See Country Report for China, 'Administrative detention – Review of and challenges to detention'; Country Report for China, 'Police detention – Review of and challenges to detention'. Italy provides for a right of appeal against the *fermo de polizia* under the Code of Criminal Procedure. See Country Report for Italy, 'Police detention – Review of and challenges to detention'; Country Report for Italy, 'Preventive detention – Review of and challenges to detention – Appeals'. Russia also provides for a right of appeal against administrative detention by police or other agencies to 'a superior body, superior official or district court'. See Country Report for Russia, 'Administrative detention – Review of and challenges to detention – Administrative detention'.

Kenyan and South African institutions represent possible best practice: in South Africa, there is a duty for police to investigate certain cases, and records must be kept on police brutality,<sup>549</sup> in Kenya, the Independent Policing Oversight Authority must be notified and must consider every death that occurs in police custody.<sup>550</sup>

## V COMPENSATION FOR UNLAWFUL DETENTION

271. A majority of the States whose practice was considered for the purposes of this report allow for compensation for wrongful police detention,<sup>551</sup> whether via a public law action for breach of a legislatively or constitutionally guaranteed human right,<sup>552</sup> an action in tort for false imprisonment,<sup>553</sup> or another statutory or constitutional remedy.<sup>554</sup> This strong trend could support an argument for the emergence of a norm of customary international law requiring that compensation be made available in cases where police detention is found to have been unlawful.

## VI CONCLUDING REMARKS

272. In summary, it may be tentatively concluded – always subject to the qualifications outlined above and in the Introduction – that the sample of State practice considered could support an argument for the emergence of the following norms of customary international law:

- a requirement that powers of police detention be exercisable only for clearly specified purposes or in clearly specified situations, and a concomitant prohibition

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<sup>549</sup> See Independent Complaints Directorate, ‘Presentation to the Portfolio Committee on Police: Briefing on Crowd Control’ <[http://www.ipid.gov.za/documents/briefings\\_parliament/Crowd%20Control%20Presentation.pdf](http://www.ipid.gov.za/documents/briefings_parliament/Crowd%20Control%20Presentation.pdf)> accessed 10 March 2014.

<sup>550</sup> Country Report for Kenya, ‘Overview of the Legal framework’.

<sup>551</sup> Australia, Austria, Belgium, China, the European Court of Human Rights, Germany, Hong Kong, Kenya, New Zealand, Russia, South Africa, Switzerland, the United Kingdom, and the United States of America. The issue was not considered in Argentina (see n 436); Greece (see n 465); Italy; or Singapore (which was considered in relation to crowd control only). In India, it appears that compensation may be available in conjunction with a successful application for *habeas corpus* (see Country Report for India, ‘Military detention – Compensation for unlawful detention’) or, in egregious cases involving torture or death while unlawfully detained, under arts 32 and 226 of the Constitution (see Country Report for India, ‘Preventive detention – Compensation for unlawful detention’) – however, neither is specifically discussed in relation to police detention under the Code of Criminal Procedure 1973. Similarly, in Sri Lanka, it is possible that small sums of money may be available as compensation for violations of fundamental rights, though this is not discussed in the context of police detention of the types considered in this section )see Country Report for Sri Lanka, ‘Preventive detention – Compensation for unlawful detention’\_.

<sup>552</sup> Austria, Germany, Kenya, New Zealand, Russia, South Africa, Switzerland, the United Kingdom and the United States of America.

<sup>553</sup> Australia, Hong Kong, New Zealand, South Africa, and the United Kingdom.

<sup>554</sup> Belgium, China, and Russia (though only in relation to some forms of unlawful detention – in relation to others, such as ‘administrative detention’, compensation may be sought via proceedings before the European Court of Human Rights. See Country Report for Russia, ‘Administrative detention – Compensation for unlawful detention’.



on police detention for no specified purposes or for purposes entirely within the discretion of the detaining authority;

- a right to challenge the lawfulness of police detention before a judicial body; and
- a right to receive compensation if police detention is found to have been unlawful.

273. In addition, there is a significant trend amongst the jurisdictions under study toward imposing a maximum period of police detention without judicial review or authorisation. While not as strong as the trends outlined above, this could prove useful in identifying future emerging norms of customary international law.

274. Finally, in respect of the following issues there was insufficient State practice available to observe any significant trends. However, the existence of some practice in these areas may be of interest in considering the potential future development of customary international law:

- recognition that crowd-control measures such as kettling are capable of amounting to police detention;
- a requirement that police detention have a clear and certain legal basis;
- recognition that freedom of association is a relevant countervailing consideration when examining the lawfulness of police action in crowd-control situations;
- a requirement that police detention be proportionate to the aim sought to be achieved; and
- a requirement that persons detained by police be given reasons for their detention.

# PREVENTIVE DETENTION

## I PRELIMINARY REMARKS

275. This section is primarily concerned with the preventive detention of convicted criminals who are considered to pose a continued risk to the general population or to be dangerous to the public. It does not deal with preventive detention in cases of terrorism-related offences, detention of persons with a mental illness, or detention by police in order to prevent the commission of an offence. These are discussed in the sections of this report on administrative detention, detention of persons with a mental illness, and police detention respectively.
276. Assessment of State practice, canvassed through the Country Reports, reveals two broad categories of preventive detention of the type considered in this section. First, a term of preventive detention may be imposed alongside a sentence of imprisonment during the course of the main criminal proceedings.<sup>555</sup> Secondly, an additional term of detention may be imposed after the commencement of a term of imprisonment – in most instances, at the end of that term – as post-sentence preventive detention.<sup>556</sup> However, as the Country Reports reveal, the distinction between the two is not always clear-cut. Hence, both types of preventive detention have been considered together in the analysis in this section.
277. This section considers State practice from the following jurisdictions: Australia, Austria, Belgium, Germany, New Zealand, Singapore, South Africa, Switzerland, the UK, the US, and Uruguay. References in this section to ‘the jurisdictions under study’, ‘the States considered’ or similar are references to these States unless otherwise specified. It is important to note that this section only covers eleven States. Even within these, not every Country Report provides information on each of the areas discussed in this section. Hence any conclusions regarding the content or possible development of customary international law or trends in State practice must be qualified by reference to the small number of States considered.
278. It should be noted that, in 2012, the UK abolished its previous preventive detention scheme, the Imprisonment for Public Protection. This has been replaced by the ‘Extended Determinate Sentences’ (‘E.D.S.’) scheme under s 226A of the Criminal Justice Act.<sup>557</sup> Under this regime, a court may impose an extended sentence of imprisonment, comprised of both the sentence the

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<sup>555</sup> Such detention regimes can be found in Belgium (where it is confined to detention for offenders who have already served their sentence), Germany, New Zealand, and Switzerland.

<sup>556</sup> Such detention regimes can be found in the Australian states of Queensland, New South Wales, Victoria and Western Australia, Switzerland (introduced in 2007 through art 65 of the Swiss Criminal Code), the United Kingdom, the United States of America, and Uruguay.

<sup>557</sup> For a more comprehensive overview of the E.D.S. scheme, see Country Report for the United Kingdom, ‘Preventive detention – Extended determinate sentences’.

person would usually receive and an ‘extension period’, for which the person is to be subject to a licence. In cases where the custodial term is ten years or more, or the sentence is imposed in respect of certain specified offences (mainly serious violent, sexual, or terrorism-related offences), the Secretary of State cannot release a person serving an E.D.S. on licence as soon as the custodial period has expired. In such a situation, the person’s case is referred to the Parole Board. The Board must continue to detain the person unless it is satisfied that this is ‘no longer necessary for the protection of the public’. Furthermore, a person released on licence can be recalled by the Secretary of State at any time. Such a person is not eligible for ‘automatic release’ and, in fact, must not be released by the Secretary of State unless they are satisfied that the person’s detention ‘is not necessary for the protection of the public’. These two limited instances of the exercise of the Parole Board’s and the Secretary of State’s powers have been considered to constitute preventive detention for the purpose of this section.<sup>558</sup>

## II THRESHOLD QUESTIONS

279. As these regimes deal expressly with detention in the traditional sense of deprivation of liberty, no threshold issues arise in considering the preventive detention of convicted offenders.
280. The post-sentence imposition of preventive detention raises the question of whether the additional detention comprises ‘a sentence of imprisonment’, and therefore punishment. This assumes importance in light of the general criminal law prohibition of ‘double jeopardy’, as reflected in art 14(7) of the ICCPR. The Human Rights Committee in *Fardon v Australia*<sup>559</sup> indicated that post-sentence preventive detention may amount to a fresh sentence of imprisonment, potentially inconsistent with the proscription of double jeopardy under art 14(7) of the ICCPR. The ECtHR took a similar position in *M v Germany*,<sup>560</sup> following which the German Constitutional Court declared the local system of preventive detention unconstitutional. Subsequently, a legislative amendment was passed to ensure compatibility with the ECHR.<sup>561</sup>
281. In practice, however, the States under consideration have not treated preventive detention in the same way as a sentence of imprisonment. Although preventive detention is connected with a previously committed crime, it is not considered as imposed because of it. Rather, preventive detention is imposed primarily to protect the public from a perceived dangerous or habitual offender.<sup>562</sup>

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<sup>558</sup> Country Report for the United Kingdom, ‘Preventive detention- Extended determinate sentences’.

<sup>559</sup> CCPR/C/98/D/1629/2007 (UN Human Rights Committee, 10 May 2010).

<sup>560</sup> App No. 19359/04 (ECHR, 17 December 2009).

<sup>561</sup> Country Report for Germany, ‘Preventive detention – Decision to detain- Compatibility with ECHR’.

<sup>562</sup> Australia (where preventive detention is imposed where a person represents a ‘serious danger to the community’ or there is an ‘unacceptable risk that the offender will commit a serious sexual offence’), Belgium (where

### III DECISION TO DETAIN

#### a) Preliminary remarks

282. As will be seen below, State practice in the jurisdictions under study is reasonably consistent in affording basic procedural rights to offenders liable to preventive detention and in recognising certain grounds for such detention. An exception to this practice is found in the state of Queensland in Australia,<sup>563</sup> which will be discussed in the sub-sections below.
283. However, it is important to note that not all Country Reports provided the same level of detail on the different grounds for detention and the availability of procedural safeguards such as decisions by an independent judiciary, the right to be heard and to legal representation, and the provision of expert witnesses. Hence, any conclusions regarding the content and possible development of customary international law should be subject to these qualifications regarding the scope of the research.

#### b) Grounds for detention

284. All States under consideration possess legislatively imposed standards regarding making preventive detention orders.
285. Although not completely uniform, there is a strong trend in State practice toward limiting preventive detention to persons convicted of the most heinous crimes, such as serious sexual or violent offences.<sup>564</sup>
286. Switzerland, Singapore and South Africa break from, or go beyond, this general trend. Switzerland,<sup>565</sup> in addition to the identified trigger offences, also allows the indefinite preventive detention of a person convicted of *any* offence with a minimum sentence of five years, where the person caused or intended to cause some serious harm to the victim. Singapore<sup>566</sup> and South

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preventive detention relates to ‘legal recidivists’, ‘habitual offenders’, or ‘dangerous recidivists’), Germany (where the purpose of the regime is to protect society against dangerous offenders (mostly reoffenders)), New Zealand (where the purpose of the regime is ‘to protect the community from those who pose a significant and ongoing risk to the safety of its members’), Singapore (where preventive detention relates to ‘protection of public’), South Africa (where the regime is concerned with ‘habitual’ and ‘dangerous criminals’), Switzerland, the United Kingdom (where preventive detention is imposed ‘for the protection of public’), the United States of America (where the regime is concerned with persons ‘dangerous beyond their control’), and Uruguay.

<sup>563</sup> Country Report for Australia, ‘Preventive detention – Decision to detain’; Country Report for Australia, ‘Preventive detention – Review of and challenges to detention’.

<sup>564</sup> Australia, Belgium, New Zealand, South Africa (where preventive detention is imposed on ‘dangerous criminals’), Switzerland, the United Kingdom, and Uruguay (where preventive detention is applicable in cases of homicide).

<sup>565</sup> Country Report for Switzerland, ‘Preventive detention – Normal indefinite incarceration – Decision to detain- Circumstances in which detention may be ordered’.

<sup>566</sup> Additionally, Singapore requires that the person against whom an order of preventive detention is passed be at least 30 years old. See Country Report for Singapore, ‘Preventive detention – Preliminary remarks’; Country

Africa<sup>567</sup> go against the general trend by focusing on the multiplicity, rather than the gravity, of offences committed. Consequently, in these two States a habitual perpetrator of less serious offences may also be subject to preventive detention.

287. Thus, it may be concluded that in most cases the commission of serious sexual or violent offences triggers liability to preventive detention.<sup>568</sup> In addition, as noted above, the primary purpose of preventive detention in the majority of the jurisdictions under study is the protection of the public.<sup>569</sup> As a result, in ordering preventive detention, courts are also required to assess the dangerousness of the offender to society. As a result, there is a strong trend in State practice toward imposing preventive detention only on the fulfilment of the cumulative requirements of committing a serious sexual or violent offence and constituting a danger to the community.
288. In some States, dangerousness is specifically assessed by reference to the substantive risk or likelihood of the convict committing further offences. In Switzerland<sup>570</sup> and Uruguay,<sup>571</sup> this is determined by the record of the individual as a recidivist offender; in New Zealand by the likelihood of the offender re-offending if released;<sup>572</sup> and in the US, by focussing on the ‘mental abnormality’ of the convict.<sup>573</sup>
289. In most cases, despite extensive legislative guidance, judicial discretion is paramount in deciding whether to order preventive detention.<sup>574</sup> That said, in Belgium,<sup>575</sup> Germany<sup>576</sup> and Switzerland,<sup>577</sup> specific statutory provisions require the mandatory imposition of preventive detention in specific, pre-determined circumstances.
290. Thus, it may be concluded, subject to the qualifications outlined in the Introduction and in this section, that the sample of State practice examined could support an argument for the emergence of a norm of customary international law requiring that a sentence of preventive detention – if it

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Report for Singapore, ‘Review of and challenges to detention’.

<sup>567</sup> Country Report for South Africa, ‘Preventive detention – Habitual criminals’.

<sup>568</sup> Australia, Belgium, New Zealand, South Africa (for dangerous criminals), Switzerland, the United Kingdom, and Uruguay (for homicides).

<sup>569</sup> See n 562 and accompanying text.

<sup>570</sup> Country Report for Switzerland, ‘Preventive detention – Normal indefinite incarceration – Decision to detain – Circumstances in which detention may be ordered’.

<sup>571</sup> Country Report for Uruguay, ‘Preventive detention – Preventive detention post sentence’.

<sup>572</sup> Country Report for New Zealand, ‘Preventive detention – Overview of the legal framework’.

<sup>573</sup> Country Report for the United States of America, ‘Preventive detention – Decision to detain – Preventive detention post sentence’.

<sup>574</sup> Australia, Austria, New Zealand, Singapore, South Africa, the United Kingdom, the United States of America, and Uruguay.

<sup>575</sup> Country Report for Belgium, ‘Preventive detention – Decision to detain – Circumstances in which “disposal” may be ordered’.

<sup>576</sup> Country Report for Germany, ‘Preventive detention – Decision to detain – Circumstances in which detention may be ordered’.

<sup>577</sup> Country Report for Switzerland, ‘Preventive detention – Preliminary remarks’.

is available at all – be available only in respect of offenders who have committed serious sexual or violent offences and are considered to pose a continuing danger to society. Due to the diversity of the practice considered, it is difficult to draw any further conclusions regarding the circumstances in which a preventive detention order may be mandatory.

### **c) Time period for detention**

291. Nearly two-thirds of the States whose practice is considered in this section provide for legislative limits on the duration of preventive detention across a range of circumstances.<sup>578</sup>
292. However, there is a divergence on the maximum period for which preventive detention may be imposed, varying from ten years to being potentially indefinite. Thus, offenders can be preventively detained for a maximum of ten years in Austria (for dangerous repeat offenders);<sup>579</sup> fifteen years in Belgium,<sup>580</sup> South Africa<sup>581</sup> and Uruguay;<sup>582</sup> and twenty years in Singapore.<sup>583</sup> In the UK, for persons serving an E.D.S. on licence, the total E.D.S. must not exceed the maximum term permitted for the relevant offence.<sup>584</sup>
293. In South Africa, ‘habitual criminals’ could previously be detained indefinitely without review. However, pursuant to a Constitutional Court decision, the legislature amended the Correctional Services Act in 2008 to provide for a 15-year maximum period.<sup>585</sup> For ‘dangerous criminals’, however, indefinite detention is permissible as long as the court fixes a further period, at the end of which the person must again be brought before it for review.<sup>586</sup> Similarly, in the states of New South Wales and Victoria in Australia, the continuing detention of the person has to end within five years of the original order. However, further orders continuing the detention can still be made. This makes the detention period potentially indefinite.<sup>587</sup>
294. Switzerland allows for the possibility of indefinite, lifelong preventive detention for offenders considered ‘permanently untreatable’, although the offender may be granted parole if they no longer pose a risk to the public due to old age or serious illness, or on other grounds. Courts have focused on the assessment of being *permanently* untreatable: thus, the imposition of lifelong

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<sup>578</sup> Australia, Austria, Belgium, South Africa (for habitual criminals), Singapore, United Kingdom, and Uruguay.

<sup>579</sup> Mentally ill offenders however, can potentially be detained for an indefinite period. See Country Report for Austria, ‘Preventive detention – Preliminary remarks’.

<sup>580</sup> Country Report for Belgium, ‘Preventive detention – Decision to detain – Length of detention’.

<sup>581</sup> Country Report for South Africa, ‘Preventive detention – Habitual criminals’.

<sup>582</sup> Country Report for Uruguay, ‘Preventive detention – Preventive detention post sentence’.

<sup>583</sup> Country Report for Singapore, ‘Preventive detention – Preliminary remarks’.

<sup>584</sup> Country Report for the United Kingdom, ‘Preventive detention – Preliminary remarks – Extended determinate sentences’.

<sup>585</sup> *S v Niemand* 2002 (1) SA 21 (CC) [25], cited in Country Report for South Africa, ‘Preventive detention – Habitual criminals’.

<sup>586</sup> Country Report for South Africa, ‘Preventive detention – Dangerous criminals’.

<sup>587</sup> Country Report for Australia, ‘Preventive detention – Decision to detain’.

indefinite incarceration, based on psychiatrists' conclusions that the offender was untreatable for the next twenty years, has been struck down.<sup>588</sup>

295. Thus, subject to the qualifications outlined in the Introduction, it may be concluded that the sample of State practice considered could support an argument for the emergence of a norm of customary international law requiring legislative limits on the duration of preventive detention. Based on the divergence in the practice of the jurisdictions under study, however, it is difficult to draw any conclusions regarding the potential content of customary international law with respect to the maximum period for which a person may be preventively detained.

#### **d) Identity of decision-maker**

296. In all the States under study (except the state of Queensland in Australia), the decision to subject a convicted criminal to preventive detention is reserved for a competent and independent judicial organ.
297. In order to understand the full spectrum of State practice pertaining to the role of the courts in supervising and administering a preventive detention regime, it is instructive to consider different, contrasting examples. Thus, the Country Reports for Germany<sup>589</sup> and the Australian states of Victoria and Western Australia<sup>590</sup> expressly identify the relevant prosecutorial agent of the State as applying to the court for an order of preventive detention. On the other hand, the Country Reports of Belgium,<sup>591</sup> New Zealand,<sup>592</sup> Singapore<sup>593</sup> and South Africa<sup>594</sup> identify the court as also being able to make an order on its own motion. In the UK, the Parole Board may recommend a review of its own decision to continue detention.<sup>595</sup>

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<sup>588</sup> The case referred to is the Swiss Federal Court decision in BGE vom 23. November 2013, 6B\_93/2013. See Country Report for Switzerland, 'Preventive detention – Lifelong indefinite incarceration – Decision to detain – Circumstances in which detention may be ordered'.

<sup>589</sup> In Germany, in exceptional circumstances, convicts who are not considered culpable due to a mental illness can be preventively detained after having been released from a mental institution, when there is a likelihood of committing further severe offences. In such cases, the public prosecutor files the motion for subsequent preventive detention before the detainee has served their sentence fully. See Country Report for Germany, 'Preventive detention – Decision to detain – Time at which order may be made'.

<sup>590</sup> Country Report for Australia, 'Preventive detention – Decision to detain'.

<sup>591</sup> Country Report for Belgium, 'Preventive detention – Preliminary remarks – Regime for “disposal of the courts for the enforcement of penalties” and legal basis'.

<sup>592</sup> Country Report for New Zealand, 'Preventive detention – Decision to detain'.

<sup>593</sup> Country Report for Singapore, 'Preventive detention – Decision to detain'.

<sup>594</sup> Country Report for South Africa, 'Preventive detention – Habitual criminals'; Country Report for South Africa, 'Preventive detention – Dangerous criminals'.

<sup>595</sup> Country Report for the United Kingdom, 'Preventive detention – Extended determinate sentences'.

298. In New Zealand, Belgium and Switzerland,<sup>596</sup> where the decision is taken during the course of the main proceedings, the judicial organ tasked with the determination of the substantive criminal charge also takes the decision on preventive detention.
299. Belgium has a bifurcated decision-making process wherein the trial judge takes the decision as to whether a ‘secondary sentence’ should be imposed. However, the decision as to whether that secondary sentence should be continued as preventive detention (as opposed to release under supervision) is taken by the ‘court for the enforcement of penalties’.<sup>597</sup>
300. In New Zealand, the decision to impose a term of post-sentence preventive detention is reserved for the High Court. Hence, the lower District Courts must transfer all such matters for determination to the High Court.<sup>598</sup>
301. The UK presents an interesting hybrid process. Here, the initial decision to order an E.D.S. rests with the court imposing an extended sentence of imprisonment. However, as noted above, it is the Parole Board which decides whether to release the person on licence after the expiry of the custodial period.<sup>599</sup>
302. Exceptionally, a recent legislative change in the Australian state of Queensland<sup>600</sup> removes the power to continue to detain sex offenders from the judiciary and places it with the Attorney General and the Governor in Council. These members of the Executive arm of government can now order a ‘relevant person’ to continue to be detained by making a ‘public interest declaration’. This legislative prescription has been criticised as a violation of the separation of powers doctrine and for eroding the checks and balances in the legal system.<sup>601</sup> Therefore, it should not significantly detract from the general trend noted here.
303. Thus, subject to the qualifications outlined in the Introduction, it may be concluded that the sample of State practice under study could support an argument for the existence of a norm of customary international law requiring law requiring a competent, independent judicial organ to make the initial decision to preventively detain a convicted offender. However, due to the diversity of the practice considered, it is difficult to draw any further conclusions about the exact role of the court in supervising and administering the preventive detention regime.

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<sup>596</sup> Country Report for Switzerland, ‘Preventive detention – Normal indefinite detention – Decision to detain – Identity of decision maker’.

<sup>597</sup> Country Report for Belgium, ‘Preventive detention – Preliminary remarks – Regime for “disposal of the courts for the enforcement of penalties” and legal basis’.

<sup>598</sup> Country Report for New Zealand, ‘Preventive detention – Overview of the legal framework’; Country Report for New Zealand, ‘Preventive detention – Decision to detain’.

<sup>599</sup> Country Report for the United Kingdom, ‘Preventive detention – Extended determinate sentences’.

<sup>600</sup> Country Report for Australia, ‘Preventive detention – Decision to detain’.

<sup>601</sup> Country Report for Australia, ‘Preventive detention – Decision to detain’.



## e) Rights of person detained

### i) *Right to be heard*

304. All the States under consideration<sup>602</sup> protect the defendant's right to make representations and to be heard in relation to the imposition of preventive detention.
305. In Australia,<sup>603</sup> Germany<sup>604</sup> and New Zealand,<sup>605</sup> when the decision to preventively detain is taken during the main criminal proceedings, the accused must be informed about this possibility, so as to allow sufficient time to prepare submissions and make representations. In Belgium,<sup>606</sup> the decision on whether a term of preventive detention (secondary sentence or disposal) will be imposed on the offender is made by the court for the enforcement of penalties at least two months before the primary sentence expires. The offender and their lawyer are then given access to the criminal file at least four days before the hearing. In South Africa<sup>607</sup> and the US,<sup>608</sup> the person can dispute the evidence presented and confront or cross-examine relevant witnesses, and in the UK, persons are entitled to an oral hearing.<sup>609</sup>
306. It is important to note that the fact that these six States have been identified as providing additional rights to a person liable to preventive detention does not necessarily imply that such protections are absent in the other five States under study (Austria, Belgium, Singapore, Switzerland, UK and Uruguay). These States may well provide such rights; however, such a provision has not been expressly identified in the relevant Country Reports and hence has not been included in this analysis. Thus, it is difficult to draw any conclusions as to the content of customary international law regarding the additional rights given to a person to prepare for preventive detention proceedings.
307. An uncommon and exceptional practice is evident in the State practice of Australia, particularly in the states of New South Wales and Victoria.<sup>610</sup> Here, courts are allowed to impose an interim detention order pending the outcome of a post-sentence preventive detention hearing, where the current sentence of the prisoner is about to expire or has expired. In such cases, there is no

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<sup>602</sup> This does not include Uruguay for which no information was provided in the Country Report.

<sup>603</sup> This objective has been achieved through judicial rulings in the Supreme Court of Queensland. See Country Report for Australia, 'Preventive detention – Decision to detain'.

<sup>604</sup> Country Report for Germany, 'Preventive detention – Decision to detain – Time at which order may be made'.

<sup>605</sup> Country Report for New Zealand, 'Preventive detention – Decision to detain'.

<sup>606</sup> Country Report for Belgium, 'Preventive detention – Decision to detain – Circumstances in which “disposal” will be imposed'.

<sup>607</sup> Country Report for South Africa, 'Preventive detention – Dangerous criminals'.

<sup>608</sup> Country Report for the United States of America, 'Preventive detention – Decision to detain – Preventive detention post sentence'.

<sup>609</sup> Country Report for the United Kingdom, 'Preventive detention – Parole board proceedings'.

<sup>610</sup> Country Report for Australia, 'Preventive detention – Decision to detain'.

possibility for contestation and so the offender is denied any rights of natural justice in relation to this hearing. This constitutes an exception to the general practice of the States under assessment to maintain natural justice in relation to preventive detention proceedings.

*ii) Right to legal representation*

308. All the States under consideration<sup>611</sup> protect the defendant's right to legal representation – that is, the right to be represented by counsel during proceedings relating to preventive detention.
309. Notably, in Austria<sup>612</sup> and Western Australia,<sup>613</sup> the right to legal representation is considered so fundamental that the proceedings can be dismissed or annulled in the absence of legal representation.

*iii) Provision of expert evidence*

310. State practice in seven of the eleven States considered requires that the order of preventive detention be based in part on medical evidence.<sup>614</sup> This evidence is to speak to the mental state of the accused/convict and is relevant to establishing the likelihood of their reoffending. Notably, in Switzerland, the court's determination is to be based on the report of an expert who has neither treated the detainee before nor been responsible in any other way for their care. This ensures the provision of an objective and independent assessment.<sup>615</sup> Exceptionally, in Belgium, the director of the prison where the offender has served their primary sentence and the public prosecutor both give a formal and substantiated advice to court on whether detention should continue. The Country Report for Belgium does not expressly mention the provision of medical expert evidence.<sup>616</sup>

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<sup>611</sup> This does not include Uruguay for which no information was provided in the Country Report.

<sup>612</sup> Country Report for Austria, 'Preventive detention – Decision to detain'.

<sup>613</sup> Note that this conclusion is based on the decision of the Western Australian Supreme Court in *Director of Public Prosecutions for Western Australia v Paul Douglas Allen* [2006] WASC 160. Here, the offender was subject to an application for continued detention, but the Supreme Court dismissed the application and released the offender because he had no legal representation. See Country Report for Australia, 'Preventive detention – Decision to detain'.

<sup>614</sup> Australia (although some concerns have been raised regarding the dependence of the preventative detention regimes on the, often unavoidably inaccurate, testimonies provided by mental health professionals), Austria, New Zealand, Singapore, South Africa (for 'dangerous criminals'), Switzerland, and the United States of America. The Country Report for Uruguay did not provide any information on this subject.

<sup>615</sup> Country Report for Switzerland, 'Preventive detention – Normal indefinite detention – Decision to detain – Circumstances in which detention may be ordered'.

<sup>616</sup> Country Report for Belgium, 'Preventive detention – Decision to detain – Circumstances in which "disposal" will be imposed'.

#### *iv) Conclusion*

311. To conclude, subject to the qualifications outlined above and in the Introduction, the sample of State practice considered could support an argument for the existence of a norm of customary international law guaranteeing the right of a person detained to be heard and to have access to legal representation in the course of preventive detention proceedings. Similarly, the strong trend in State practice requiring expert medical evidence to inform the decision to preventively detain could support an argument for the emergence of a norm of customary international law to this effect.

### **IV REVIEW OF AND CHALLENGES TO DETENTION**

#### **a) Automatic periodic review**

312. The Human Rights Committee has taken the view, reiterated in the new General Comment No. 35, that periodic review by an independent judicial body is necessary in cases where a term of preventive detention is imposed.<sup>617</sup> There is also a strong trend in State practice in the jurisdictions under consideration requiring automatic periodic review of the decision to continue preventive detention of criminal convicts.<sup>618</sup>
313. However, New Zealand provides for a mandatory minimum period of detention without the possibility of parole, in all cases where a sentence of preventive detention is imposed. Consequently, during this period, there is no periodic review. In the case of *Rameka v New Zealand*,<sup>619</sup> the Human Rights Committee identified this practice as being inconsistent with art 9(4) of the ICCPR for failing to meet the right to periodic review standard. Consequently, New Zealand amended s 84 of its Parole Act to align the minimum non-parole period with the minimum sentence imposed.<sup>620</sup>
314. Even more striking is the practice in Switzerland in relation to the lifelong indefinite detention of offenders deemed to be permanently untreatable. In such circumstances (unlike for ‘normal indefinite incarceration’) reviews can *only* be carried out if new scientific findings lead to the expectation that the offender can be treated so that they will no longer pose a risk to society. Thus, the review process is more narrowly concerned with the verdict of being untreatable,

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<sup>617</sup> *Rameka v New Zealand*, CCPR/C/98/D/1629/2007 (UN Human Rights Committee, 6 November 2003) [7.3]; General Comment No. 35, CCPR/C/107/R.3 (UN Human Rights Committee, 28 January 2013).

<sup>618</sup> The states of Queensland and Western Australia in Australia, Austria, New Zealand (mandatory annual review by the Parole Board of sentences of persons in prison), Singapore, South Africa (for ‘dangerous criminals’), Switzerland (for normal indefinite incarceration), and the United Kingdom (for the re-release on licence). Note that no information on periodic reviews has been provided in the Country Report for Uruguay.

<sup>619</sup> CCPR/C/98/D/1629/2007 (UN Human Rights Committee, 6 November 2003).

<sup>620</sup> Country Report for New Zealand, ‘Preventive detention – Decision to detain’.

rather than the lawfulness of detention in general. Here, grounds of review are not that the offender could have changed over time, but that new scientific knowledge indicates that the offender is now treatable.<sup>621</sup>

315. Even amongst the States with provisions for periodic review, there is considerable divergence in State practice concerning the intervals at which such review should be carried out. In Singapore the review should be every three months (after the detainee is eligible for release);<sup>622</sup> in the Australian states of Queensland and Western Australia,<sup>623</sup> Austria (for mentally ill and dangerous repeat offenders),<sup>624</sup> Belgium,<sup>625</sup> Switzerland (for eligibility for parole in normal indefinite incarceration)<sup>626</sup> and the UK, it must be conducted annually.<sup>627</sup> In Germany<sup>628</sup> and Switzerland (for transfer in normal indefinite incarceration to in-patient therapeutic treatment),<sup>629</sup> reviews are provided for once every two years.
316. State practice concerning the body or individual charged with conducting the review is also widely divergent. Some jurisdictions under study provide for periodic review by the court or judicial organ that took the primary decision to detain,<sup>630</sup> while others assign this duty to a cantonal administrative authority,<sup>631</sup> the Director of Prisons (or other similarly situated official),<sup>632</sup> mental health professionals,<sup>633</sup> or the Parole Review Board (sitting in a judicial capacity).<sup>634</sup>
317. Thus, subject to the qualifications outlined in the Introduction, it may be concluded that the sample of State practice under study could support an argument for the emergence of a norm of customary international law requiring automatic periodic review of the decision to preventively

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<sup>621</sup> Country Report for Switzerland, 'Preventive detention – Lifelong indefinite incarceration – Review of and challenge to detention – Review by administrative authority'.

<sup>622</sup> Country Report for Singapore, 'Preventive detention – Decision to detain'.

<sup>623</sup> Country Report for Australia, 'Preventive detention – Decision to detain'.

<sup>624</sup> Country Report for Austria, 'Preventive detention – Review of and challenges to detention'.

<sup>625</sup> Country Report for Belgium, 'Preventive detention – Review of and challenges to detention – Periodic review'.

<sup>626</sup> Country Report for Switzerland, 'Preventive detention – Normal indefinite incarceration – Review of and challenges to detention – Periodic review by administrative authority.'

<sup>627</sup> Country Report for the United Kingdom, 'Preventive detention – Extended determinate sentences'.

<sup>628</sup> Country Report for Germany, 'Preventive detention – Review of and challenges to detention'.

<sup>629</sup> Country Report for Switzerland, 'Preventive detention – Normal indefinite incarceration – Review of and challenges to detention – Periodic review by administrative authority.'

<sup>630</sup> Austria, Belgium, Germany, and South Africa.

<sup>631</sup> In Switzerland, the cantonal administrative authority periodically reviews the detention in cases of normal indefinite incarceration. See Country Report for Switzerland, 'Preventive detention – Normal indefinite incarceration – Review of and challenges to detention – Periodic review by administrative authority.'

<sup>632</sup> Singapore and the United States of America.

<sup>633</sup> This is the case in Queensland pursuant to s 22C of the Criminal Law Amendment Act 1945. See Country Report for Australia, 'Preventive detention – Decision to detain'.

<sup>634</sup> Country Report for the United Kingdom, 'Preventive detention – Parole board proceedings'.

detain. Due to the diversity of the practice considered, it is difficult to draw any conclusions concerning the regularity of review.

## b) Appeals

318. There is widespread State practice providing the right to appeal to the higher judiciary.<sup>635</sup> Appeals are not expressly referred to in the Country Reports for South Africa and Uruguay. Thus, subject to the qualifications outlined in the Introduction, the sample of State practice considered could support an argument for the existence of a norm of customary international law providing preventively detained offenders the right to appeal to a higher court against the order of preventive detention.

## V COMPENSATION FOR UNLAWFUL DETENTION

319. A majority of the States under consideration (Australia,<sup>636</sup> Austria,<sup>637</sup> Belgium,<sup>638</sup> Germany,<sup>639</sup> New Zealand,<sup>640</sup> South Africa,<sup>641</sup> Switzerland,<sup>642</sup> the UK<sup>643</sup> and the US<sup>644</sup>) either provide monetary

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<sup>635</sup> Australia, Austria, Belgium, Germany, New Zealand, Singapore, Switzerland, and the United Kingdom. In cases where the order for preventive detention is imposed alongside the sentence, the provision for appeal and judicial review available to the convict are likely to be those applicable under the general criminal law. Additionally, in the United States of America courts grant compensation if it can be shown that improper procedure was followed in making the initial order or if a person had unlawfully been designated a risk during the periods of assessment. This seems to imply that detainees have the right to appeal.

<sup>636</sup> In Australia, if a detainee successfully brings a common law tort of false imprisonment, monetary compensation may be granted for the loss of dignity and suffering. See Country Report for Australia, 'Administrative detention – Remedies for unlawful detention'.

<sup>637</sup> Country Report for Austria, 'Preventive detention – Compensation for unlawful detention'.

<sup>638</sup> Country Report for Belgium, 'Administrative detention – Remedies for unlawful detention'.

<sup>639</sup> Country Report for Germany, 'Administrative detention – Remedies for unlawful detention'.

<sup>640</sup> In New Zealand, although there is no specific mention of compensatory remedies pertaining to preventive detention, the detainee can be awarded compensation if the court finds a deprivation of liberty in breach of the Bill of Rights Act. Damages may also be awarded for factors such as intangible harms such as distress and injured feelings, past and future economic loss and loss of opportunity. Country Report for New Zealand, 'Detention of persons with a mental illness – Remedies for unlawful detention'.

<sup>641</sup> South African courts provide monetary compensation where the tort of wrongful or unlawful detention is made out. Under s 38 of the Bill of Rights, they also award 'appropriate relief' for a violation of the rights of the person under the Bill of Rights. See Country Report for South Africa, 'Administrative detention – Remedies for unlawful detention'; Country Report for South Africa, 'Immigration detention – Remedies for unlawful detention'.

<sup>642</sup> Although the Swiss Federal Constitution does not grant a right to remedies for those unlawfully detained, art 5(5) of the ECHR and art 9(4) of the I.C.C.P.R on monetary compensation are applicable. Furthermore, art 431 para 1 of the Criminal Procedure Code allows the criminal justice authority to award 'appropriate damages and satisfaction' if it can be proved that a compulsory measure (such as preventive detention) has been applied unlawfully. See Country Report for Switzerland, 'Administrative detention – Compensation for unlawful detention'.

<sup>643</sup> In 2013, the United Kingdom Supreme Court in *R (Faulkner) v SSJ; R (Sturham) v Parole Board* [2013] UKSC 23 heard a case seeking damages in respect of administrative delay in reviewing the need for further detention of a person who had served the 'tariff' relating to an Imprisonment for Public Protection or life sentence. The Court concluded that damages should usually be awarded where it can be shown on a balance of probabilities that a

compensation or likely apply the general statutory regime for compensation in criminal or administrative matters to cases of preventive detention. Therefore, these States allow a suit to be filed before the competent courts.

320. The Country Report for Singapore does not indicate that compensatory remedies are excluded,<sup>645</sup> and only stipulates that the law does not expressly provide for monetary compensation.
321. There is no information regarding compensatory remedies in the Country Report for Uruguay.
322. Exceptionally, in the Australian state of Queensland, the relevant public officials are exempt from civil liability for any determinations made in relation to terms of preventive detention.<sup>646</sup>
323. Thus, there is near-uniform practice amongst the States considered providing monetary compensation to persons who have been wrongfully or unlawfully subjected to preventive detention.

## VI CONCLUDING REMARKS

324. It may be tentatively concluded that, subject to the qualifications outlined in the Introduction and elsewhere in this section, the State practice of the jurisdictions under study could support an argument for the existence of the following norms of customary international law:
  - a requirement that a competent, independent judicial organ make the initial decision to preventively detain a convicted offender;
  - a requirement that legislative limits be imposed on the duration of preventive detention;
  - a requirement that a sentence of preventive detention be available only in respect of offenders who have committed serious sexual or violent offences and are considered to pose a continuing danger to society;
  - a right to be heard, to legal representation and to the provision of expert (medical) evidence in the course of preventive detention proceedings;
  - a right to automatic periodic review of the decision to preventively detain;
  - a right to appeal to a higher court against an order of preventive detention; and

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violation of Art 5(4) of the ECHR resulted in the prolonged detention. If this cannot be established, but the prisoner has suffered frustration and anxiety, a more modest award is appropriate. Although this case was decided under the now-abolished IPP regime, the underlying principles are still relevant, given that the Supreme Court noted that it should be guided by the ECtHR's principles rather than common law. See Country Report for the United Kingdom, 'Preventive detention – Appeals and remedies'.

<sup>644</sup> Country Report for the United States of America, 'Preventive detention – Remedies for unlawful detention – Preventive detention post sentence'.

<sup>645</sup> In Singapore, the sentence of preventive detention is imposed in lieu of imprisonment. Therefore, if a sentence of preventive detention is found to be unlawful or unsuitable upon appeal, the appropriate criminal sentence will replace it. There is no provision for monetary compensation. See Country Report for Singapore, 'Preventive detention – Compensation for unlawful detention'.

<sup>646</sup> Country Report for Australia, 'Preventive detention – Review of and challenges to detention'.

- a right to receive monetary compensation for wrongful or unlawful preventive detention.

325. Based on the diversity and/or inadequacy of the State practice considered, it is difficult to draw any further conclusions regarding the potential content of customary international law with respect to:

- the role and relevance of mandatorily imposed preventive detention orders;
- the role of the court in supervising and administering a preventive detention regime;
- the maximum period for which a person may be preventively detained; and
- the regularity of periodic review.

# CONCLUSION

## a) General remarks

326. This report has considered and analysed the legal regimes of 21 jurisdictions and the jurisprudence of the ECtHR in relation to six different types of detention, namely:
- administrative detention for counter-terrorism, national security or intelligence-gathering purposes;
  - immigration detention;
  - detention of persons with a mental illness;
  - military detention;
  - police detention (particularly in crowd-control situations or following arrest without warrant); and
  - preventive detention (particularly detention imposed alongside or subsequent to a sentence of imprisonment).
327. In relation to each type of detention, the report examined legislation and jurisprudence across the jurisdictions under study and identified various trends in State practice. Based on these trends, it drew tentative conclusions regarding the possible content and development of customary international law in the relevant areas.
328. This section highlights the strongest trends in State practice: those which might be used to support an argument for the emergence or existence of particular norms of customary international law in relation to each type of detention. It also identifies trends which are observable across the six detention regimes. The conclusions in this section should be read subject to the qualifications outlined in the Introduction, and to any further qualifications set out in the section on the relevant type of detention.

## b) Trends in State practice in relation to each type of detention

### *i) Very strong trends*

329. The following very strong trends can be observed in the practice of the jurisdictions considered in the relevant sections.
330. In respect of administrative detention: a trend toward requiring that all persons administratively detained for counter-terrorism, national security, or intelligence-gathering purposes be entitled to appeal their detention to, or have their detention reviewed by, a judicial body.



331. In respect of military detention: a trend toward requiring that all members of the military detained as a disciplinary measure be guaranteed the right to challenge their detention, although the nature and scope of the right differs.
332. In respect of detention of persons with a mental illness, trends toward:
- requiring that a mentally ill person only be hospitalised and/or assessed on request by their spouse, a relative, someone associated in any way to the person concerned, or a medic; and
  - guaranteeing a right of challenge in relation to involuntary detention to a court of law.
333. In respect of preventive detention, trends toward:
- requiring that a competent, independent judicial organ make the initial decision to preventively detain a convicted offender;
  - guaranteeing the right to be heard and to legal representation in the course of preventive detention proceedings; and
  - guaranteeing the right to appeal to a higher court against the order of preventive detention.
334. Thus, it may be tentatively concluded, subject to the qualifications outlined in the Introduction, that the trends in State practice identified above could support an argument for the existence or emergence of corresponding norms of customary international law.

*ii) Strong trends*

335. In addition, the following strong trends can be observed in the practice of the jurisdictions considered in the relevant sections.
336. In respect of administrative detention, trends towards:
- prohibiting administrative detention for counter-terrorism, national security or intelligence-gathering purposes which has no maximum duration; and
  - requiring that monetary compensation be available to persons whose administrative detention for counter-terrorism, national security, or intelligence-gathering purposes is found to have been unlawful.
337. In respect of immigration detention: a trend toward guaranteeing the right to challenge the lawfulness of the detention.
338. In respect of detention of persons with a mental illness: a trend towards requiring that involuntary detention of a mentally ill person be based on the specific grounds of their safety and/or the safety and welfare of others.
339. In respect of military detention, trends toward:

- requiring that all members of the military detained in connection with an offence be charged or released within a time range of between 24 and 96 hours; and
- requiring that monetary compensation be available to all members of the military whose detention under the military justice system is found to have been unlawful.

340. In respect of police detention (of the types considered), trends toward:

- requiring that powers of police detention be exercisable only for clearly specified purposes or in clearly specified situations, and (consequently) regarding as unlawful police detention for no specified purposes or for purposes entirely within the discretion of the detaining authority;
- guaranteeing the right to challenge the lawfulness of police detention before a judicial body; and
- requiring that monetary compensation be available to all persons whose detention by police is found to have been unlawful.

341. In respect of preventive detention (of the type considered), trends toward:

- requiring that a sentence of preventive detention be available only in respect of offenders who have committed serious sexual or violent offences and are considered to pose a continuing danger to society;
- requiring the provision of expert (medical) evidence in the course of preventive detention proceedings;
- guaranteeing the right to automatic periodic review of the decision to preventively detain; and
- requiring that compensation be available to all persons whose preventive detention is found to have been unlawful.

342. Again, it may be tentatively concluded that the trends in State practice identified above could support an argument for the existence or emergence of corresponding norms of customary international law.

### *iii) Significant trends*

343. Finally, the following significant trends – while less strong than those set out above – are also observable in the jurisdictions under study, and may provide guidance regarding the potential future development of customary international law in the relevant areas.

344. In respect of immigration detention, trends toward:

- requiring that the circumstances under which a foreign national can be detained be set out in some measure of detail;

- limiting the period of immigration detention, either by specifying a maximum period or limiting the detention to periods that are proportionate or reasonable; and
- requiring that compensation be available to all persons whose immigration detention is found to have been unlawful.

345. In respect of detention of persons with a mental illness, trends toward:

- guaranteeing a right to judicial assessment (relying on medical expertise) of the mental illness of a person preceding an order for involuntary detention;
- providing a limitation on the maximum period for which a person with a mental illness can be detained (after their initial period of detention for the assessment of mental illness is over);
- guaranteeing a right to information and to legal representation to a person with a mental illness during detention proceedings;
- guaranteeing a right to period review of the decision to detain a person with a mental illness; and
- requiring that compensation be available to all persons whose detention in relation to their mental illness is found to have been unlawful.

346. In respect of police detention (of the types considered): a trend toward providing for a maximum period of police detention without judicial review or authorisation.

347. In respect of preventive detention (of the types considered): a trend toward requiring that legislative limits be imposed on the duration of preventive detention.

### **c) Trends in State practice across different types of detention**

348. As noted above, in recognition of the complexity of the underlying legal regimes, this report has focused on analysing State practice specifically in relation to particular types of detention. This has allowed for a more thorough and detailed analysis, and for the drawing of more accurate and nuanced conclusions. However, it may also be useful to consider the existence of trends in State practice *across* the different types of detention under study in order to ascertain whether and how these different but related strands might be woven together.

349. A higher-level analysis of the trends outlined above yields a number of key observations.

350. First, in relation to all the types of detention considered in this report, there appears to be a consistent trend toward:

- permitting detention to occur only in clearly specified circumstances or in relation to clearly specified groups of people;

- placing a maximum time limit on detention (and thereby prohibiting indefinite detention); and
- guaranteeing the right of persons whose detention is found to have been unlawful to obtain monetary compensation.

351. Secondly, in relation to all types of detention governed by civilian (as opposed to military) justice systems, there appears to be a strong or very strong trend toward guaranteeing the right of a detainee to challenge the lawfulness of their detention before a judicial body.

352. Finally, in relation to preventive detention and detention of persons with a mental illness – regimes which are unique in being based on personal characteristics (such as ‘dangerousness’) which are liable to change over time – there appears to be a trend toward requiring automatic periodic review of detention with a view to release if the basis for detention is no longer present.

353. Taken together, and without obscuring the immense variety of possible permutations, these observations present a picture of *lawful* detention – targeted and certain, limited in time, and guaranteed by the oversight of an independent judiciary – which is undoubtedly relevant in considering the potential content and future development of customary international law in this area.

# APPENDIX I:

## Note: Customary International Law and Human Rights

Prepared for OPBP's project 'Remedies and Procedures on the Right of Anyone Deprived of his or her Liberty by Arrest or Detention to bring Proceedings before a Court'

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1. Article 38 of the Statute of the International Court of Justice refers to 'international custom, as evidence of a general practice accepted as law'.<sup>1</sup> As Crawford has observed, however, this wording is *prima facie* defective:

the existence of a custom is not to be confused with the evidence adduced in its favour; it is the conclusion drawn by someone as (a legal adviser, a court, a government, a commentator) as to two related questions: (1) is there are general legal practice; (2) is it accepted as international law?<sup>2</sup>

2. Judge Read in the *Fisheries* case described customary international law as 'the generalization of the practice of States'.<sup>3</sup> That is correct. Nonetheless the reasons for making the generalizations involve an evaluation of whether the practice is fit to be accepted, and is in truth generally accepted as law.<sup>4</sup> The material sources of custom include: press releases, the opinions of government legal advisers, official manuals, executive decisions and practices, orders to military forces, legislation, international and national judicial decisions, decisions by treaty bodies, recitals in treaties and other international instruments, an extensive pattern of treaties in the same terms, the practice of international organs, resolutions relating to legal questions in UN organs. The value will depend on the circumstances.<sup>5</sup> For example statements which explicitly address customary international law will have particular weight. Statements from the International Court of Justice and UN bodies might, too, be thought to have particular weight; this applies not least to those UN bodies which have particular responsibilities beyond interpreting a particular treaty (such as the UN Special Human Rights procedures).

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<sup>1</sup> Statute of the International Court of Justice (adopted 26 June 1945) 892 UNTS 119. See also Special Rapporteur Sir Michael Wood, First Report on Formation and Evidence of Customary International Law ILC A/CN.4/663; Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 LPICT 195.

<sup>2</sup> James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 23.

<sup>3</sup> *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 191 (Read J).

<sup>4</sup> James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 23.

<sup>5</sup> *ibid* 24.

3. The question of consistency of practice is a matter of appreciation; complete uniformity in practice is not required, but *substantial* uniformity is. Provided the consistency and generality of a practice are established, the formation of a customary rule requires no particular duration.<sup>6</sup> Complete consistency is not needed.<sup>7</sup>
4. As seen above, the Statute of the International Court refers to ‘a general practice accepted as law’. Some writers do not consider this psychological element to be required for custom or, at any rate, that it is not required to prove it,<sup>8</sup> but something like it is probably necessary.<sup>9</sup> The Final Report by the Committee on Formation of Customary Law of the International Law Association (ILA), chaired by Professor MH Mendelson, observed that:

It is not so much a question of what a State really believes (which is often undiscoverable, especially since a State is a composite entity involving many persons with possibly different beliefs), but rather a matter of what it *says* it believes, or what can reasonably be implied [*sic*] from its conduct. In other words, it is a matter of what it claims.<sup>10</sup>

5. This is because:

States actively engaged in the *creation* of a new customary rule may well wish or accept that the practice in question will give rise to a legal rule, but it is logically impossible for them to have an *opinio juris* in the literal and traditional sense, that is, a belief that the practice is *already* legally permissible or obligatory.<sup>11</sup>

6. The International Law Commission’s Special Rapporteur on the Formation of Custom, Sir Michael Wood, has observed that while:

The formation and evidence of rules of customary international law in different fields may raise particular issues and it may therefore be for consideration whether, and if so to what degree, different weight may be given to different materials depending on the field in question’, ‘at the same time it should be recalled that, in the words of Judge Greenwood, “[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.”<sup>12</sup>

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<sup>6</sup> *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3, 43.

<sup>7</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, 98 [186].

<sup>8</sup> Maurice Mendelson, ‘The Formation of Customary International Law’ (1998) 272 *Recueil des Cours* 155.

<sup>9</sup> James Crawford, *Brownlie’s Principles of Public International Law* (8th edn, OUP 2012) 25.

<sup>10</sup> Committee on Formation of Customary (General) International Law, Final Report on Statements of Principles Applicable to the Formation of General Customary International Law’ in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000) 712, 744.

<sup>11</sup> *ibid.*

<sup>12</sup> International Law Commission, ‘First Report on Formation and Evidence of Customary International Law, Report of the Special Rapporteur Sir Michael Wood’ (2013) UN Doc A/CN.4/663 [19], citing *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* (Judgment) [2012] ICJ Rep 391 (Declaration by Greenwood J) [8].

7. The unified approach suggested by the Special Rapporteur must be the correct one. It seems also to be the approach taken by the International Court of Justice, to the extent that the Court has been seised of cases in which the question has arisen. Referring to its earlier ruling in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the International Court of Justice in *Jurisdictional Immunities* held that:

It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of State, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. ... In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in the context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States. While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.<sup>13</sup>

8. Following this approach we should base ourselves upon an evidentiary matrix consisting of international treaties, national legislation, judgments by domestic and international courts, statements by State officials, press releases, official manuals, executive decisions and practices, orders to military forces, the practice of international organs, resolutions relating to legal questions in UN organs. It is sufficient, but not necessary, for *opinio juris* to be deemed to exist in relation to a state where that state asserts that arbitrary detention is illegal under the law of that state because that state feels so bound by international law. Following the observation by the ILC above, it may in many cases be a matter of what it *says* it believes, or what can reasonably be inferred from its conduct; it is a matter of what the state claims.<sup>14</sup> It can reasonably be assumed that states will only with displeasure declare themselves to be bound not arbitrarily to detain; claims on the part of state that they are bound not to do so should, therefore, be taken very seriously for the purposes of ascertainment of the development of customary international law in this area.

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<sup>13</sup> *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99, 122–23 [55].

<sup>14</sup> Committee on Formation of Customary (General) International Law, Final Report on Statements of Principles Applicable to the Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000) 712, 744.





## APPENDIX II: COUNTRY REPORTS

### Country Report for Argentina

1. In Argentina, there is a general habeas corpus procedure which governs most forms of detention considered in this report. In addition to these general rules, this country report further considers the separate legal regimes concerning immigration detention and detention of persons with mental illness. No information could be located concerning separate legal regimes for police detention, preventive detention and administrative detention. In the case of military detention, the regime is largely governed by military manuals, which were analysed comprehensively by the ICRC in their 'Customary IHL Database'. The relevant provisions are considered above in the thematic summary for military detention.

#### I GENERAL HABEAS CORPUS PROCEDURE

2. There is a habeas corpus procedure which is applicable to all types of procedures in which a person's freedom of movement is restricted, Law 23,098.<sup>1</sup>
3. The habeas corpus law in Argentina is a national law, however provincial constitutions or laws may be applied when they are considered more effective.<sup>2</sup> It will be applied by national or provincial courts.<sup>3</sup> The procedure will proceed in cases of threat or limitation of movement without a written order from a competent authority or illegitimate aggravation of the forms and conditions in which detentions are carried out.<sup>4</sup> The complaint may be made by the person affected by the measure or by any other person in their favour.<sup>5</sup>
4. If a judge considers that they are incompetent in a case or they consider that the case is not one of those foreseen by the law that decision will be immediately reviewed by the appropriate Court of Appeals.<sup>6</sup> If not, and the person has been detained, the judge will order that the detaining authority immediately present the person before the judge with a report indicating the reasons for the measure, the procedure and conditions in which they were detained and the written order if there was one, if the person had been transferred, why and when the transfer was made.<sup>7</sup> If the person has not been detained, but threatened with detention, the judge will request the written

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<sup>1</sup> 'Ley 23.098, Procedimiento de Habeas Corpus' available <[http://www.infojus.gov.ar/legislacion/ley-nacional-23098-procedimiento\\_habeas\\_corpus.htm?2.](http://www.infojus.gov.ar/legislacion/ley-nacional-23098-procedimiento_habeas_corpus.htm?2.)> accessed 22 February 2014. ['Law 23.098']

<sup>2</sup> Law 23.098, art 1.

<sup>3</sup> Law 23.098, art 2.

<sup>4</sup> Law 23.098, art 3.

<sup>5</sup> Law 23.098, art 5.

<sup>6</sup> Law 23.098, art 10.

<sup>7</sup> Law 23.098, art 11.

report indicated above from the authority or their superiors.<sup>8</sup> If the judge knows that a detention exists and there is concern that the person may be taken out of his/her jurisdiction he/she may initiate the procedure *ex officio*.<sup>9</sup>

5. A hearing then takes place where both the authority and the detainee will be present. The latter may appoint his own attorney or have a public defendant. If the person was not detained and does not appear at the hearing a public defendant will be present. Both parties will participate in the hearing.<sup>10</sup> After the hearing, of which there will be a record,<sup>11</sup> the judge will come to a decision immediately.<sup>12</sup>
6. The decision may be appealed within 24 hours, if the appeal is rejected a complaint procedure before the Court of Appeals is permitted, it will be resolved within 24 hours.<sup>13</sup>
7. Upon receipt of the complaint the public prosecutor (*Ministerio Público*)<sup>14</sup> shall be notified and may participate in the proceedings,<sup>15</sup> as may the person who made the complaint.<sup>16</sup>

## II IMMIGRATION DETENTION

8. In Argentina immigration detention is regulated by the '*Ley de Inmigraciones*' (Immigration Law) No. 25,871 and its regulating Decree No. 616/10. There is also the habeas corpus procedure which is applicable to all types of procedures in which a person's freedom of movement is restricted, Law 23,098, discussed in the first section of this country report.

### a) Threshold questions

9. There does not appear to be any threshold question regarding whether immigration detention in Argentina is in fact 'detention'.

### b) Decision to detain

10. The decision to detain is made by a competent judicial authority at the request of the Ministry of the Interior (*Ministerio del Interior*) or the National Migration Direction (*Dirección Nacional de Migraciones*), this decision should only be requested once the decision on expulsion of the

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<sup>8</sup> Law 23.098, art 11.

<sup>9</sup> Law 23.098, art 11.

<sup>10</sup> Law 23.098, art 14.

<sup>11</sup> Law 23.098, art 16.

<sup>12</sup> Law 23.098, art 17.

<sup>13</sup> Law 23.098, art 19.

<sup>14</sup> In Argentina this is a separate branch of the government which does not depend on the Executive, Legislative or Juridical branch.

<sup>15</sup> Law 23.098, art 21.

<sup>16</sup> Law 23.098, art 22.

foreigner is and consented.<sup>17</sup> Once the detention has been made the local court shall be immediately notified of that fact.<sup>18</sup>

11. If the detainee claims to be the parent, child or spouse of a native Argentine (so long as the marriage was prior to the act that motivated the detention order) the National Migration Direction shall suspend the expulsion and confirm the existence of such a relationship within 48 business hours.<sup>19</sup>
12. The detention may not last more than 15 days.<sup>20</sup> If the expulsion cannot be carried out during that time for reasons which are beyond the control of the authorities and because of the particular circumstances of the case the foreigner cannot be provisionally freed, the authorities may request that the judiciary organ order that the detention be extended up to a maximum of 30 days but the migration authorities must present reports to the judiciary organ every 10 days on their advances towards the expulsion.<sup>21</sup>
13. Exceptionally, if there is evidence suggesting that the foreigner will not comply with an expulsion order, detention may be requested by the Ministry or the Direction to the competent judicial authority prior to the expulsion order.<sup>22</sup> If that is the case the authorities must notify the judiciary organ every 10 days of the advances in the administrative proceedings and the reasons why the measure should continue in the case.<sup>23</sup>
14. If there is evidence that the foreigner will comply with the expulsion order within 72 hours the detention may be waived.<sup>24</sup>
15. In certain circumstances foreigners may be granted provisional liberty, this decision must be notified to the competent judge.<sup>25</sup>
16. The detention shall be carried out by the Auxiliary Migration Police,<sup>26</sup> competent sanitary authorities shall intervene when required due to medical or psychophysical reasons.<sup>27</sup> The detainee shall be kept separate from criminal detainees.<sup>28</sup>

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<sup>17</sup> Law 25.871, art 70.

<sup>18</sup> Law 25.871, art 70.

<sup>19</sup> Law 25.871, art 70.

<sup>20</sup> Decree No. 616/10, art 70.

<sup>21</sup> Decree No. 616/10, art 70.

<sup>22</sup> Law 25.871, art 70.

<sup>23</sup> Decree No. 616/10, art 70.

<sup>24</sup> Decree No. 616/10, art 70.

<sup>25</sup> Law 25.871, art 71.

<sup>26</sup> Law 25.871, art 72.

<sup>27</sup> Decree No. 616/10, art 72.

<sup>28</sup> Decree No. 616/10, art 72.

### **c) Review of and challenges to detention**

17. The foreigner has several administrative and judicial appeals to the decision to expulse him/her from the country.<sup>29</sup> The decisions of the National Migration Direction may be appealed administratively, that means before the superior administrative organs within the executive branch, and/or judicially, that is before the competent courts. These appeals procedures suspend the effect of the original measure.<sup>30</sup> In these procedures he/she is entitled to representation and interpreters.<sup>31</sup> Additionally, once detained, he/she may be granted provisional liberty under bail or oath.<sup>32</sup>

### **d) Compensation for unlawful detention**

18. There is general compensation for cases wherein innocence is determined under article 488 of the Criminal Procedural Code.

## **III DETENTION OF PERSONS WITH A MENTAL ILLNESS**

19. Law 26.657 of Mental Health ('Law of Mental Health') has recently changed some of the provisions relating to the treatment and detention of persons with mental illness. Amongst other issues it reformed article 482 of the Civil Code, as noted below. Additionally, there is the habeas corpus procedure which is applicable to all types of procedures in which a person's freedom of movement is restricted, Law 23,098, discussed in the first section of this country report.

### **a) Threshold questions**

20. There does not appear to be any threshold question regarding whether detention of persons with mental illness in Argentina is in fact 'detention'.

### **b) Decision to detain**

21. The Law of Mental Health sets forth a number of rights for the person with the mental illness including, in situations of involuntary detention, a right to be periodically supervised by the revision agency;<sup>33</sup> a right to be informed of his/her rights and treatment, including alternatives.<sup>34</sup> In Argentina, involuntary detention should not take place based on the person's political and

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<sup>29</sup> Law 25.871, arts 74-90.

<sup>30</sup> Law 25.871, art 82.

<sup>31</sup> Law 25.871, art 86.

<sup>32</sup> Law 25.871, art 71.

<sup>33</sup> Law 26.657 of Mental Health, art 7(h).

<sup>34</sup> Law 26.657 of Mental Health, art 7(j).

socio-economic status, cultural, racial or religious group, sexual identity, or the mere existence of previous treatments or hospitalization.<sup>35</sup>

22. In accordance with the Argentine Civil Code, articles 140 to 152 ter, a person may only be considered demented, and therefore unimpeachable, if there is a judicial proceeding in which that dementia is determined. This proceeding may only be carried out at the request of a party and after an examination.<sup>36</sup> The examination must be interdisciplinary, the declaration can only be for a period of three years and must specify which functions or acts are limited.<sup>37</sup> The following people may request a declaration of dementia: the spouse, relatives, Ministry of Minors, the consulate (if a foreigner), any person in the town if the demented person is enraged or makes neighbours uncomfortable.<sup>38</sup> A person must be over 14 to be declared to have dementia.<sup>39</sup>
23. Additionally, article 482 of the Argentine Civil Code foresees that a person with mental illness cannot be deprived of their liberty unless they are a risk to themselves or to others. The person must be evaluated by an interdisciplinary team of the service carrying out the detention, and then approved and controlled by the judiciary. In those cases they must be transferred to a health facility. This may also occur in some cases without a previous declaration of incapacity.
24. In criminal cases, article 34 of the Argentine Criminal Code applies and a person considered psychologically incapable cannot be considered guilty of a crime. However, they may be ordered detained in a mental institute and they may be freed with a judicial order in which the public prosecutor (*Ministerio Público*)<sup>40</sup> and expert reports must declare that the danger to him/herself or others has disappeared.
25. In accordance with the Argentine Criminal Procedure Code if a person is accused and it is presumed that he/she has some mental illness which makes him/her unimpeachable and is a danger to him/herself or to others, that person may be provisionally detained in a special facility.<sup>41</sup> This may also occur if that becomes evident during the proceedings.<sup>42</sup>

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<sup>35</sup> Law 26.657 of Mental Health, art.3.

<sup>36</sup> Argentine Civil Code, art 143.

<sup>37</sup> Argentine Civil Code, art 152 ter.

<sup>38</sup> Argentine Civil Code, art 144.

<sup>39</sup> Argentine Civil Code, art 145.

<sup>40</sup> In Argentina this is a separate branch of the government which does not depend on the Executive, Legislative or Juridical branch.

<sup>41</sup> Argentine Criminal Procedure Code, art 76.

<sup>42</sup> Argentine Criminal Procedure Code, art 77.

### **c) Review of and challenges to detention**

26. Normally, if they are involuntarily detained they have the right to lawyer or a public defendant who may request their release at any time.<sup>43</sup> The release of the person does not require judicial authorization, except under article 34 of the Criminal Code, as explained.
27. In criminal cases the accused will then be defended by his/her curator or the public defendant or the defendant he/she had previously chosen.<sup>44</sup>

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<sup>43</sup> Law 26.657 of Mental Health, art 22.

<sup>44</sup> Argentine Criminal Procedure Code, art 77.

# Country Report for Australia

## I ADMINISTRATIVE DETENTION

1. The legal regime for administrative detention for counter-terrorism, intelligence and security grounds in Australia is provided for by a number of different statutes, and varies in its details across the different Australian jurisdictions. Australian law operates under a federal system, with certain powers vested in the federal Parliament. Each state also has legislative power.
2. The detention powers provided for in Federal (or Commonwealth) legislation are the ones most frequently used. There are four main types of such detention. The first two are authorised by the Australian Security Intelligence Organisation Act 1979 (Cth) ('ASIO Act 1979'), and the motion to detain originates from the intelligence services. The difference between these two types of detention is that the first type of detention is directly authorised by a questioning and detention warrant, while under the second type of detention the person is first the subject of a mere questioning warrant, but if the questioner determines that the person should be detained then they can so order. The third and fourth types of federal administrative detention are authorised by the Criminal Code Act 1995 (Cth) ('Commonwealth Criminal Code 1995'), and the motion to detain originates from the Australian Federal Police ('AFP'). The difference between these two types of detention is that the first must relate to an imminent or very recently occurred terrorist attack, and the detention can be only for a very short period of time. The second type of detention is imposed by a control order, which can be in place for a longer period of time and requires no imminent or very recently occurred terrorist attack.
3. Additionally, each of the Australian states and the two mainland territories has their own regime for administrative detention on terrorism, intelligence, or security grounds. As these legal regimes are used far less frequently than the Commonwealth legal regimes, these regimes will be considered in less detail. This Country Report will thus be confined to highlighting the most important ways that the state and territory regimes differ from the Commonwealth regime.
4. An important point to note is that the Commonwealth, state and territory regimes are all partially integrated; most significantly, the maximum time periods for detention in each jurisdiction are calculated by including any administrative detention that a person has already been subjected to under another Australian jurisdiction's legal regime.

### **a) Threshold questions**

*i) Detention under a questioning and detention warrant issued under ASIO Act 1979 (Cth)*

5. There is no indication that this is considered anything other than detention.

*ii) Detention by direction of a prescribed authority under s 34K of the ASIO Act 1979 (Cth)*

6. There is no indication that this is considered anything other than detention.

*iii) Preventative detention under division 105 of the Criminal Code Act 1995 (Cth)*

7. There is no indication that this is considered anything other than detention.

*iv) Detention pursuant to a control order issued under division 104 of the Criminal Code Act 1995 (Cth)*

8. A person subject to a control order will be subject to obligations, prohibitions or restrictions specified in the control order for the purpose of protecting the public from an act of terrorism. One restriction that a control order may impose (but need not impose) is a requirement that the person remain at specified premises between specified times each day, or on specified days.<sup>1</sup> There does not appear to be a statutory limitation on the length of time for which this restriction can be imposed nor on the types of premises that can be specified, leaving open the possibility that a control order could be issued requiring the subject to spend from midnight to midnight on each day that the order is current at an AFP custodial facility; that is, leaving open the possibility that a control order might impose detention.
9. There are indications that, under Australian law, this requirement is not considered to be detention. In *Thomas v Mowbray*, Chief Justice Gleeson said that:<sup>2</sup>

It may be accepted that control orders may involve substantial deprivation of liberty, but we are not here concerned with detention in custody; and we are not concerned with executive detention. We are concerned with preventive restraints on liberty by judicial order.

10. Justices Gummow and Crennan said that ‘detention in the custody of the State differs significantly in degree and quality from what may be entailed by observance of an interim control order.’<sup>3</sup>
11. However, Chief Justice Gleeson went on to point out that even if the control order were to impose detention in custody, this would be judicial detention, not executive detention, and that the judiciary has constitutional power to detain persons in custody for reasons other than consequent upon an adjudgment of criminal guilt.<sup>4</sup> Moreover, the Australian legal system contains no constitutional or human rights protection for liberty or prohibition on detention. Consequently, whether the imposition of a control order restriction is considered detention or a lesser restriction on liberty is of no practical importance.

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<sup>1</sup> Criminal Code Act 1995 (Cth) s 104.5(3)(c).

<sup>2</sup> *Thomas v Mowbray* (2007) 233 CLR 307 (High Court of Australia) [18].

<sup>3</sup> *Thomas v Mowbray* (2007) 233 CLR 307 (High Court of Australia) [116].

<sup>4</sup> *Thomas v Mowbray* (2007) 233 CLR 307 (High Court of Australia) [18].



*v) Detention under various state and territory laws*

12. There is no indication that this is considered anything other than detention.

**b) Decision to detain**

*i) Detention under a questioning and detention warrant issued under ASIO Act 1979 (Cth)*

13. Division 3 of Part III of the ASIO Act 1979 permits a person to be detained under a questioning and detention warrant issued by a designated judge at the request of the Australian Security Intelligence Organisation ('ASIO'). A person subject to a questioning and detention warrant will be taken into custody and held by a police officer, and will be brought for questioning before a designated retired or sitting judge about matters relating to terrorist offences.
14. The decision to detain under a questioning and detention warrant must be made as follows. The Director-General of ASIO determines that a person should be subject to detention. The Director-General must then seek the consent of the Commonwealth Attorney-General to the issue of a warrant for detention and questioning,<sup>5</sup> by submitting to the Attorney-General a 'draft request' made up of a draft of the proposed warrant, a statement of the facts and grounds upon which the Director-General considers a warrant necessary, and a statement detailing any previous requests made for such a warrant and the outcomes of such requests.<sup>6</sup>
15. Before the Attorney-General can grant consent to the issue of a warrant, he must be satisfied that:<sup>7</sup>
- there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence;
  - relying on other methods of collecting that intelligence would be ineffective; and
  - there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
    - may alert a person involved in a terrorism offence that the offence is being investigated;
    - may not appear before the prescribed authority; or
    - may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

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<sup>5</sup> ASIO Act 1979 s 34F(1).

<sup>6</sup> ASIO Act 1979 s 34F(3).

<sup>7</sup> ASIO Act 1979 s 34F(4).

16. Note that a person may be detained under a questioning and detention warrant even if they are neither suspected of having committed a terrorism offence, nor having involvement in a planned future terrorism offence.<sup>8</sup> An exception to this is that if the person is a child between the ages of 16 and 18, then they can only be the subject of a questioning and detention warrant if the Attorney-General when giving consent to the issue of the warrant is satisfied that the child will commit, is committing, or has committed a terrorism offence.<sup>9</sup>
17. Once the Attorney-General has given consent to the issue of a questioning and detention warrant, the Director-General must apply for the warrant to a federal magistrate or a judge, appointed for this purpose by the Attorney-General,<sup>10</sup> and acting *persona designata* (that is, acting in a personal capacity rather than acting as a judge of a court).<sup>11</sup> The federal magistrate or judge can only issue a questioning and detention warrant if she is satisfied that the Director-General has followed the procedural requirements of the ASIO Act 1979 in requesting the warrant, and that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.<sup>12</sup>
18. A person detained under a questioning and detention warrant must be immediately brought for questioning before a prescribed authority,<sup>13</sup> being a person appointed in writing by the Attorney-General who is a retired judge of a superior federal court or a serving judge of a superior state or territory court or a serving President or Deputy President of the Administrative Appeals Tribunal who is also a legal practitioner.<sup>14</sup>
19. A person may be detained under a questioning and detention warrant for a maximum of 7 days.<sup>15</sup>
20. The Director-General may seek a further questioning and detention warrant by using the same procedure.<sup>16</sup> The further detention warrant may only be issued after the person has been released from detention under the previous warrant.<sup>17</sup> The federal magistrate or judge issuing the further questioning and detention warrant can only do so if satisfied that the warrant is justified by

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<sup>8</sup> Human Rights and Equal Opportunities Commission, Submission to the Parliamentary Joint Commission on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979 (Cth) (2002) [41] <<http://www.humanrights.gov.au/asio-asis-and-dsd>> accessed 13 January 2014.

<sup>9</sup> ASIO Act 1979 s 34ZE(4)(a).

<sup>10</sup> ASIO Act 1979 s 34AB(1).

<sup>11</sup> *Grollo v Palmer* (1995) 184 CLR 348 (High Court of Australia) [13], [15].

<sup>12</sup> ASIO Act 1979 s 34G(1).

<sup>13</sup> ASIO Act 1979 s 34G(3)(a)(ii).

<sup>14</sup> ASIO Act 1979 s 34B.

<sup>15</sup> ASIO Act 1979 s 34G(4)(c).

<sup>16</sup> ASIO Act 1979 s 34F(2).

<sup>17</sup> ASIO Act 1979 s 34G(2)(b)(ii).

information additional to, or materially different from, that known to the Director-General at the time he sought the previous warrant.<sup>18</sup>

*ii) Detention by direction of a prescribed authority under s 34K of the ASIO Act 1979 (Cth)*

21. Division 3 of Part III of the ASIO Act 1979 also permits a person to be the subject of a questioning order, under which the person is required to attend a specified place at a specified time for questioning by a prescribed authority. This warrant does not of itself authorise detention of the person. A questioning warrant is issued according to the same procedures and standards as a questioning and detention warrant.<sup>19</sup>
22. The prescribed authority before whom the person is being questioned may at any time give directions that the person subject to a questioning warrant be detained.<sup>20</sup> The direction to detain must have been approved in writing by the Commonwealth Attorney-General,<sup>21</sup> or must be necessary to satisfy a concern of the Inspector-General of Intelligence and Security<sup>22</sup> about the propriety or legality of the questioning being undertaken.<sup>23</sup> Moreover, the prescribed authority may only issue a direction to detain if he is satisfied that there are reasonable grounds for believing that if the person being questioned is not detained:<sup>24</sup>
  - the person may alert a person involved in a terrorism offence that the offence is being investigated; or
  - the person may not continue to appear, or may not appear again, before a prescribed authority for questioning; or
  - the person may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.

*iii) Preventative detention under division 105 of the Criminal Code Act 1995 (Cth)*

23. Division 105 of the Commonwealth Criminal Code 1995 permits a person to be subject to preventative detention by order of an 'issuing authority', being a designated current or retired judge of a court, or legal officer serving on the Administrative Appeals Tribunal,<sup>25</sup> upon request

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<sup>18</sup> ASIO Act 1979 s 34F(6)(b).

<sup>19</sup> ASIO Act 1979 s 34D and 34E.

<sup>20</sup> ASIO Act 1979 s 34K(1)(a).

<sup>21</sup> ASIO Act 1979 s 34K(2)(b).

<sup>22</sup> ASIO Act 1979 s 34K(2).

<sup>23</sup> ASIO Act 1979 s 34Q.

<sup>24</sup> ASIO Act 1979 s 34K(4).

<sup>25</sup> Commonwealth Criminal Code 1995 s 105.2.

of the AFP;<sup>26</sup> or being a senior member of the AFP,<sup>27</sup> being an officer at or above the rank of superintendent.<sup>28</sup>

24. There are two possible bases upon which an AFP officer can apply for, and an issuing authority can issue, a preventative detention order: first, in connection with an imminent terrorist attack expected within the next 14 days;<sup>29</sup> and second, in connection with a past terrorist attack, that took place within the previous 28 days.<sup>30</sup> The first basis for a preventative detention order is if both the applying AFP officer and the issuing authority are satisfied that there are reasonable grounds to suspect that:<sup>31</sup>
- the subject of the order will engage in a terrorist acts; or
  - the subject of the order possesses something that is connected with the preparation or perpetration of a terrorist act; or
  - the subject of the order has done an act in planning or preparation for a terrorist act; and
  - making the preventative detention order would substantially assist in preventing a terrorist act from occurring.
25. The second basis for a preventative detention order is if both the applying AFP officer and the issuing authority are satisfied that:<sup>32</sup>
- a terrorist act took place within the last 28 days;
  - it is necessary to detain the subject of the order to preserve evidence; and
  - the length of detention in the order is reasonably necessary.
26. For an initial preventative detention order, an issuing authority may be a senior AFP member,<sup>33</sup> being an officer at or above the rank of superintendent.<sup>34</sup> An AFP officer must apply for the preventative detention order to the issuing authority, setting out in writing the facts and other grounds upon which the officer believes the order should be made, the period for which the order is sought and the basis for this period, and the details and outcomes of any previous applications for preventative detention orders (including those under state or territory legislation), control orders, or other detention orders sought against the subject of this

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<sup>26</sup> Commonwealth Criminal Code 1995 s 105.8(1).

<sup>27</sup> Commonwealth Criminal Code 1995 s 100.1.

<sup>28</sup> Commonwealth Criminal Code 1995 s 100.1.

<sup>29</sup> Commonwealth Criminal Code 1995 s 105.4(5).

<sup>30</sup> Commonwealth Criminal Code 1995 s 105.4(6).

<sup>31</sup> Commonwealth Criminal Code 1995 s 105.4(4).

<sup>32</sup> Commonwealth Criminal Code 1995 s 105.4 (6).

<sup>33</sup> Commonwealth Criminal Code 1995 s 100.1. Other issuing authorities for an initial preventative detention order include a designated current or retired Judge of a court, or legal officer serving on the Administrative Appeals Tribunal: Commonwealth Criminal Code 1995 s 105.2.

<sup>34</sup> Commonwealth Criminal Code 1995 s 100.1.

preventative detention order.<sup>35</sup> There is no provision for the person the subject of the order to make representations to the issuing authority.

27. An initial preventative detention order cannot authorise the detention in custody of a person for longer than 24 hours.<sup>36</sup> Moreover, the initial preventative detention order ceases to have effect 48 hours after it was issued, if the subject has not by then been detained in custody.<sup>37</sup>
28. The issuing authority for a continuation of an existing preventative detention order can only be a designated current or retired judge of a court, or legal officer serving on the Administrative Appeals Tribunal.<sup>38</sup> An AFP officer must apply for a continuation of an order by providing the issuing authority with information meeting the same criteria as those for the application for the initial preventative detention order.<sup>39</sup>
29. The continued preventative detention order cannot authorise the detention of the subject in custody for a total of more than 48 hours, including the time spent in custody under the initial preventative detention order.<sup>40</sup>
30. Division 105 places restrictions on the capacity of an issuing authority to grant successive preventative detention orders (other than continuing existing orders) with respect to the same person. Essentially, it is not permitted for successive preventative detention orders to be issued with respect to the same future or past terrorist act; and it is not permitted for successive preventative detention orders to be issued with respect to different terrorist acts that will or have occurred in the same period, unless the information upon which the second order is sought only became available after the first preventative detention order had been made.<sup>41</sup>

*iv) Detention pursuant to a control order issued under division 104 the Criminal Code Act 1995 (Cth)*

31. Division 104 of the Commonwealth Criminal Code 1995 permits a person to be detained under a control order issued by a federal court at the request of the AFP. A person subject to a control order will be subject to obligations, prohibitions or restrictions specified in the control order for the purpose of protecting the public from an act of terrorism. One restriction that a control order may impose (but need not impose) is a requirement that the person remain at specified premises between specified times each day, or on specified days.<sup>42</sup>

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<sup>35</sup> Commonwealth Criminal Code 1995 s 105.7(2).

<sup>36</sup> Commonwealth Criminal Code 1995 s 105.8(5).

<sup>37</sup> Commonwealth Criminal Code 1995 s 105.9(2).

<sup>38</sup> Commonwealth Criminal Code 1995 s 105.2.

<sup>39</sup> Commonwealth Criminal Code 1995 s 105.11(2).

<sup>40</sup> Commonwealth Criminal Code 1995 s 105.12(5).

<sup>41</sup> Commonwealth Criminal Code 1995 s 105.6.

<sup>42</sup> Commonwealth Criminal Code 1995 s 104.5(3)(c).

32. The decision to detain under a control order must be made in two stages: first, an interim control order is issued, and second, a confirmed control order is issued.
33. To obtain an interim control order, a senior member of the AFP (of or above the rank of superintendent)<sup>43</sup> must first obtain the consent of the Commonwealth Attorney-General to the interim control order,<sup>44</sup> and then apply to an issuing court, being the Federal Court of Australia, the Family Court of Australia, or the Federal Circuit Court of Australia,<sup>45</sup> to issue the interim control order.<sup>46</sup>
34. To obtain the consent of the Attorney-General to the interim control order, the AFP officer must submit to the Attorney-General a draft of the proposed interim control order, a statement of the facts and grounds upon which the AFP officer considers a control order necessary, any facts or arguments militating against the control order, a statement explaining each obligation, prohibition, and restriction in the proposed interim control order, and a statement detailing any previous instances of preventative detention or control orders imposed on the proposed subject.<sup>47</sup>
35. In ‘urgent circumstances’ a senior member of the AFP can apply to an issuing court for an interim control order without first obtaining the consent of the Attorney-General.<sup>48</sup> However, for the interim control order to have continuing validity, it must be approved by the Attorney-General within 4 hours of being issued,<sup>49</sup> and the approval must be communicated to the issuing court within 24 hours of the interim control order’s issue.<sup>50</sup>
36. The court hearing an application for an interim control order must be provided with the same information as that given by the AFP officer to the Attorney General.<sup>51</sup> The court may only issue the interim control order if it is satisfied, on the balance of probabilities, that:<sup>52</sup>
  - the interim control order would substantially assist in preventing a terrorist attack; or
  - the subject of the interim control order provided training to or received training from a terrorist organization; and
  - each obligation, prohibition, or restriction is reasonably necessary and appropriate to protect the public from a terrorist act.

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<sup>43</sup> Commonwealth Criminal Code 1995 s 100.1.

<sup>44</sup> Commonwealth Criminal Code 1995 s 104.2(1).

<sup>45</sup> Commonwealth Criminal Code 1995 s 100.1.

<sup>46</sup> Commonwealth Criminal Code 1995 s 104.3.

<sup>47</sup> Commonwealth Criminal Code 1995 s 104.2(3).

<sup>48</sup> Commonwealth Criminal Code 1995 ss 104.6-104.9.

<sup>49</sup> Commonwealth Criminal Code 1995 s 104.10.

<sup>50</sup> Commonwealth Criminal Code 1995 ss 104.7(5), 104.9(3).

<sup>51</sup> Commonwealth Criminal Code 1995 s 104.3(a).

<sup>52</sup> Commonwealth Criminal Code 1995 s 104.4(1).

37. An interim control order, when issued, must specify a date for a hearing to determine whether the interim control order should be confirmed.<sup>53</sup> This date must be no more than 72 hours after the interim control order is issued.<sup>54</sup> The subject of the interim control order may attend this hearing,<sup>55</sup> and he or his representative may make submissions to the issuing court.<sup>56</sup> Submissions may also be made by the AFP.<sup>57</sup> If the subject of the interim control order is a resident of the state of Queensland or the interim control order was issued by a court in Queensland, then the Queensland Public Monitor may also make submissions.<sup>58</sup>
38. When seeking a confirmed control order the AFP must notify the subject of the order within 48 hours before the hearing that they are seeking to have the interim order confirmed,<sup>59</sup> and provide them with the documents that were put before the court that issued the interim control order.<sup>60</sup> Nonetheless, the AFP is not obliged to provide any document if it would prejudice national security or is protected by public interest immunity, or that would put at risk the safety or operations of law enforcement or intelligence officers.<sup>61</sup>
39. An issuing court may issue a confirmed control order if it is satisfied, on the balance of probabilities, of each of the three points considered in determining whether to issue an interim control order.<sup>62</sup> Alternatively, if the court is satisfied that a control order should have been made but not satisfied that the particular restriction, prohibitions and requirements were necessary or appropriate, it may confirm and vary the order.<sup>63</sup>
40. A control order cannot be in force for longer than 12 months.<sup>64</sup> If the subject of the control order is between the ages of 16 and 18, then the control order cannot be in force for longer than three months.<sup>65</sup> A person may be subject to successive control orders, issued when the previous control order expires.<sup>66</sup>

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<sup>53</sup> Commonwealth Criminal Code 1995 s 104.5(1)(e).

<sup>54</sup> Commonwealth Criminal Code 1995 s 104.5(1A).

<sup>55</sup> Commonwealth Criminal Code 1995 s 104.5(1)(e).

<sup>56</sup> Commonwealth Criminal Code 1995 s 104.14(1)(c) and (d).

<sup>57</sup> Commonwealth Criminal Code 1995 s 104.14(1)(a) and (b).

<sup>58</sup> Commonwealth Criminal Code 1995 s 104.14(1)(e).

<sup>59</sup> Commonwealth Criminal Code 1995 s 104.12A(2)(a)(i).

<sup>60</sup> Commonwealth Criminal Code 1995 s 104.12A(2)(a)(ii).

<sup>61</sup> Commonwealth Criminal Code 1995 s 104.12A(3).

<sup>62</sup> Commonwealth Criminal Code 1995 s 104.14(7)(c).

<sup>63</sup> Commonwealth Criminal Code 1995 s 104.14(7)(b).

<sup>64</sup> Commonwealth Criminal Code 1995 s 104.5(1)(f).

<sup>65</sup> Commonwealth Criminal Code 1995 s 104.28.

<sup>66</sup> Commonwealth Criminal Code 1995 ss 104.2(5), 104.5(2), 104.16(2).

*v) Detention under various state and territory laws*

41. All the states and mainland territories of Australia have their own laws providing for administrative detention on the grounds of counter-terrorism operations or national security. However, in practice most counter-terrorism operations and investigations are undertaken by the AFP, and consequently use the federal laws. Therefore, this section will briefly note some of the major ways in which the state laws differ from the federal laws, without going into detail.

aa) New South Wales

42. New South Wales provides for administrative detention in Part 2A of the Terrorism (Police Powers) Act 2002 (NSW).

43. The issuing authority for interim and non-interim preventative detention orders is the Supreme Court.<sup>67</sup>

44. The maximum period of custody under a non-interim preventative detention order is 14 days.<sup>68</sup>

45. In determining whether to make a non-interim preventative detention order, the issuing authority must have a hearing. The subject of the proposed order or his representative is also permitted to adduce evidence and to make submissions to the issuing authority.<sup>69</sup>

46. The person the subject of the preventative detention order can apply to the issuing authority for revocation of the order.<sup>70</sup>

bb) Queensland

47. Queensland provides for administrative detention in the Terrorism (Preventative Detention) Act 2005 (Qld).

48. The maximum period for which an initial preventative detention order can run after issue, if the subject has not been taken into custody, is 72 hours.<sup>71</sup>

49. A police officer may apply to an issuing authority for a final preventative detention order. The maximum period of custody under a final preventative detention order is 14 days.<sup>72</sup>

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<sup>67</sup> Terrorism (Police Powers) Act 2002 (NSW) ss 26H and 26I. Under the Commonwealth legislation, the issuing authority for an initial preventative detention order can be a senior AFP member, and the issuing authority for a continuing preventative detention order is a retired or sitting Judge or judicial officer, personally designated as an issuing authority.

<sup>68</sup> Terrorism (Police Powers) Act 2002 (NSW) s 26K(2). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

<sup>69</sup> Terrorism (Police Powers) Act 2002 (NSW) s 26I(3). Under the Commonwealth legislation, there is no provision for the subject of the order to be permitted to make representations to the issuing authority of a continuing preventative detention order.

<sup>70</sup> Terrorism (Police Powers) Act 2002 (NSW) s 26M(1). Under the Commonwealth legislation, only an AFP officer can apply to the issuing authority for revocation of a preventative detention order.

<sup>71</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 18(2). Under the Commonwealth legislation, the maximum time is 48 hours.



50. In determining whether to make a final preventative detention order, the issuing authority must have a hearing. The person the subject of the final order, or his representative, must be given a written summary of the application against them,<sup>73</sup> except for information in the application the disclosure of which may prejudice national security or a law enforcement operation or methodology.<sup>74</sup> The subject of the proposed final order or his representative is also permitted to ask questions of any person giving information at the hearing and to make representations to the issuing authority.<sup>75</sup>

cc) South Australia

51. South Australia provides for administrative detention in the Terrorism (Preventative Detention) Act 2005 (SA).

52. The maximum period of custody under a final preventative detention order is 14 days.<sup>76</sup>

53. As soon as practical after a person has been taken into custody under a preventative detention order, they must be brought by the police before the Supreme Court for review of the order. The Supreme Court may revoke the order or reduce the period of custody.<sup>77</sup>

dd) Tasmania

54. Tasmania provides for administrative detention in the Terrorism (Preventative Detention) Act 2005 (Tas).

55. The issuing authority for preventative detention orders is the Supreme Court,<sup>78</sup> but if there is an urgent need and it is not practicable to apply to the Supreme Court then the issuing authority can be a senior police officer.<sup>79</sup>

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<sup>72</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 25(6). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

<sup>73</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 23(1)(a). Under the Commonwealth legislation, there is no provision for the subject of the order to be given the application for a continuing preventative detention order.

<sup>74</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 23(3C) and (4).

<sup>75</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 23(3). Under the Commonwealth legislation, there is no provision for the subject of the order to be permitted to make representations to the issuing authority of a continuing preventative detention order.

<sup>76</sup> Terrorism (Preventative Detention) Act 2005 (SA) s 10(5)(b). Note that the issuing authority must be a Judge; if the issuing authority is a senior police officer, then the maximum period of custody is 24 hours: s 10(5)(a). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours..

<sup>77</sup> Terrorism (Preventative Detention) Act 2005 (SA) s 17. Under the Commonwealth legislation, there is no provision for judicial review and only if the subject of the order makes their own application will there be judicial review.

<sup>78</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 5(1). Under the Commonwealth legislation, the issuing authority for a continuing preventative detention order is a retired or sitting Judge or judicial officer, personally designated as an issuing authority.

<sup>79</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 5(3).

56. The maximum period of custody under a preventative detention order issued by the Supreme Court is 14 days.<sup>80</sup> The maximum period of custody under an interim preventative detention order issued by the Supreme Court before a hearing on the application is 48 hours.<sup>81</sup> The maximum period of custody under a preventative detention order issued by a senior police officer is 24 hours.<sup>82</sup>
57. In determining whether to make a non-interim preventative detention order, the Supreme Court must have a hearing.<sup>83</sup> The person the subject of the final order, or his representative, is entitled to appear and give evidence, call witnesses, examine and cross-examine witnesses, adduce material, and make submissions.<sup>84</sup>

ee) Victoria

58. Victoria provides for administrative detention in Part 2A of the Terrorism (Community Protection) Act 2003 (Vic).
59. The power to detain under this legislation is directed towards protecting people from chemical, biological, or radiological contamination following a terrorist attack.<sup>85</sup> As such, it appears to operate in a manner more closely akin to detention for the purposes of quarantine than like the other state and federal counter-terrorism regimes.
60. The procedure for detention is that a senior police officer may give an authorisation to police officers in a specified area to, *inter alia*, detain people.<sup>86</sup> That authorisation lasts for 8 hours,<sup>87</sup> and may be extended to a maximum of 16 hours.<sup>88</sup>

ff) Western Australia

61. Western Australia provides for administrative detention in the Terrorism (Preventative Detention) Act 2006 (WA).
62. An application by a police officer for a preventative detention order must be authorised by the Commissioner of Police.<sup>89</sup>

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<sup>80</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 8(3). Note that the issuing authority must be the Supreme Court; if the issuing authority is a senior police officer, then the maximum period of custody is 24 hours: s 9(1). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

<sup>81</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 8(3).

<sup>82</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 9(11). This is the same as the Commonwealth regime..

<sup>83</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 7(10).

<sup>84</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 7(10). Under the Commonwealth legislation, there is no provision for the subject of the order to be permitted to make representations to the issuing authority of a continuing preventative detention order.

<sup>85</sup> Terrorism (Community Protection) Act 2003 (Vic) s 16(1).

<sup>86</sup> Terrorism (Community Protection) Act 2003 (Vic) ss 16, 18(1)(c).

<sup>87</sup> Terrorism (Community Protection) Act 2003 (Vic) s 19(1)(c).

<sup>88</sup> Terrorism (Community Protection) Act 2003 (Vic) s 10(2).

63. A preventative detention order can only be issued by a sitting or retired judge, appointed to be an issuing authority by the Governor.<sup>90</sup>
64. The maximum period of custody under a preventative detention order is 14 days.<sup>91</sup>
65. There is no time period after which, if the person has not been taken into custody, the preventative detention order lapses. The preventative detention order continues to run for the period specified in the order,<sup>92</sup> which is not to exceed 14 days.<sup>93</sup>
66. Multiple successive preventative detention orders can be made with respect to the same subject and the same terrorist attack.<sup>94</sup> However, the total period of custody under such successive orders cannot exceed 14 days.<sup>95</sup>
67. As soon as practicable after a person is detained under a preventative detention officer they must be brought by a police officer before the Supreme Court for review of the order.<sup>96</sup> The person the subject of the order, or their lawyer, may adduce evidence and make submissions to the Supreme Court.<sup>97</sup> The Supreme Court may revoke the order or reduce the period of custody.<sup>98</sup>

gg) Australian Capital Territory

68. The Australian Capital Territory provides for administrative detention in the *Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT)*.
69. The maximum period of custody under a preventative detention order is 7 days.<sup>99</sup>
70. The issuing authority for preventative detention orders is the Supreme Court.<sup>100</sup>
71. An application for a preventative detention order must be approved by the chief police officer for the ACT.<sup>101</sup>

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<sup>89</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 10.

<sup>90</sup> Terrorism (Preventative Detention) Act 2006 (WA) ss 7, 11(2).

<sup>91</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 13(3)(a). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

<sup>92</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 14.

<sup>93</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 13(3)(a).

<sup>94</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 15(2). Not so under the Commonwealth legislation.

<sup>95</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 15(4).

<sup>96</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 22(2).

<sup>97</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 22(5)(c) and (d).

<sup>98</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 22(8). Under the Commonwealth legislation, there is no provision for judicial review and only if the subject of the order makes their own application will there be judicial review.

<sup>99</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 21(3)(a). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

<sup>100</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 16(1). Under the Commonwealth legislation, the issuing authority for an initial preventative detention order can be a senior AFP member, and the issuing authority for a continuing preventative detention order is a retired or sitting Judge or judicial officer, personally designated as an issuing authority.

<sup>101</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 16(2)(b).

72. In determining whether to make a non-interim preventative detention order, the Supreme Court must have a hearing.<sup>102</sup> The person the subject of the final order, or his representative, must be served with a copy of the application for the order<sup>103</sup> and is entitled to appear and give evidence, call witnesses, examine and cross-examine witnesses, adduce material, and make submissions.<sup>104</sup>
73. However, the Supreme Court may make an interim preventative detention order without the subject having been notified or having a right to appear at a hearing, if the Supreme Court considers this reasonably necessary for the purpose of preventing an imminent terrorist attack or preserving evidence of a terrorist attack.<sup>105</sup> An interim preventative detention order must last for no longer than 24 hours before the Supreme Court holds a hearing on whether to impose a non-interim preventative detention order.<sup>106</sup>
74. There is no restriction on making multiple successive preventative detention orders against the same subject with respect to the same terrorist attack.<sup>107</sup> However, the total period of detention under such successive orders cannot exceed 14 days.<sup>108</sup>

#### hh) Northern Territory

75. The Northern Territory provides for administrative detention in Part 2B of the Terrorism (Emergency Powers) Act 2003 (NT).
76. The maximum period of custody under a preventative detention order is 14 days.<sup>109</sup>
77. Multiple successive preventative detention orders are permitted against the same subject with respect to the same terrorist attack.<sup>110</sup>

### c) Review of and challenges to detention

#### i) *Detention under a warrant issued under ASIO Act 1979 (Cth)*

78. A person detained under a questioning and detention warrant must be permitted to contact a lawyer of their choice,<sup>111</sup> but only after the person has been brought before a prescribed

<sup>102</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 13(3).

<sup>103</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 13(2)(a).

<sup>104</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 13(6). Under the Commonwealth legislation, there is no provision for the subject of the order to be permitted to make representations to the issuing authority of a continuing preventative detention order.

<sup>105</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 20.

<sup>106</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) ss 20(6), 21(2).

<sup>107</sup> Under Commonwealth legislation, there are strict limitations on the ability to make successive preventative detention orders with respect to the same subject and same terrorist attack.

<sup>108</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 21(3)(b).

<sup>109</sup> Terrorism (Emergency Powers) Act 2003 (NT) s 21K(1). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

<sup>110</sup> Terrorism (Emergency Powers) Act 2003 (NT) s 21N(1). Under Commonwealth legislation, there are strict limitations on the ability to make successive preventative detention orders with respect to the same subject and same terrorist attack.

authority for questioning, and only after ASIO has been given the opportunity to request the prescribed authority to prevent the person from contacting the particular lawyer the person has selected.<sup>112</sup> The prescribed authority can only grant ASIO's request to prevent the detained person contacting a particular lawyer if the prescribed authority is satisfied that circumstances surrounding this lawyer show that contact with the lawyer may result in another person being alerted to the fact that a terrorism offence is being investigated, or may result in a record or thing that the detained person may be requested to produce being destroyed, damaged or altered.<sup>113</sup>

79. However, the lawyer may not address the prescribed authority on any subject except to request clarification of a question.<sup>114</sup> Consequently, the lawyer seems to not be able to assist the person detained in challenging the detention warrant or the length of time for which the person has been detained, before the prescribed authority.
80. Moreover, a person subject to a questioning warrant and subsequently detained under s 34K of the ASIO Act 1979 by order of the prescribed authority has no statutory right to contact a lawyer.<sup>115</sup>
81. A person detained under a questioning and detention warrant has a constitutional right to sue the Commonwealth government before the High Court of Australia or apply to the High Court for an injunction requiring the person to be released,<sup>116</sup> and a statutory right to apply to the Federal Court of Australia arguing that the statutory requirements for detention have not been met.<sup>117</sup> The ASIO Act does not purport to limit the jurisdiction of these courts to hear challenges to a person's detention, and indeed, requires a prescribed authority to inform the person of their right to seek remedies from these courts.<sup>118</sup> However, as noted by the Human Rights and Equal Opportunities Commission, if the prescribed authority has prevented the detained person from contacting their chosen lawyer then there will be significant obstacles to the person applying to

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<sup>111</sup> ASIO Act 1979 s 34F(5).

<sup>112</sup> ASIO Act 1979 s 34F(5).

<sup>113</sup> ASIO Act 1979 s 34ZO.

<sup>114</sup> ASIO Act 1979 s 34ZQ(6).

<sup>115</sup> ASIO Act 1979 s 34K(10) and (11).

<sup>116</sup> Commonwealth of Australia Constitution s 75 (iii) and (v), which give the High Court of Australia jurisdiction to hear any matter in which the Commonwealth government is being sued, or a person is being sued on behalf of the Commonwealth government, or in which an injunction is sought against a Commonwealth officer. Judiciary Act 1903 (Cth) s 33(1)(f) gives the High Court the power to issue a writ of *habeas corpus* when exercising its constitutionally granted jurisdiction.

<sup>117</sup> Judiciary Act 1903 (Cth) s 39B(1A)(c), which gives the Federal Court of Australia jurisdiction to hear any non-criminal matter arising under a Commonwealth statute.

<sup>118</sup> ASIO Act 1979 s 34J(1)(f).

the federal courts, and additionally, in practice it is unlikely that such an application would be heard before the person is released from detention.<sup>119</sup>

82. Finally, a person the subject of a questioning and detention warrant, or who is directed to be detained under a questioning warrant, has rights to make complaints to various bodies including an ombudsman and the Commissioner of the Federal Police.<sup>120</sup> Those bodies have no power to discontinue the detention or to provide a remedy to the person, but only to make policy and other recommendations.
83. The ASIO Act 1979 expressly excludes the jurisdiction of courts of Australian states or territories from hearing challenges to detention of this kind, while that detention is ongoing.<sup>121</sup>

*ii) Detention pursuant to a control order issued under division 105 of the Criminal Code Act 1995 (Cth)*

84. At the time a preventative detention order is made, the Commissioner of the AFP must nominate a senior AFP member, being of or above the rank of superintendent,<sup>122</sup> who was not involved in the application for the preventative detention order,<sup>123</sup> to oversee the conduct of the AFP in carrying out the preventative detention order.
85. The person the subject of the order, or their lawyer or representative, can make representations to this senior AFP member, *inter alia* with a view to having the order revoked.<sup>124</sup> However, the person the subject of the order cannot apply directly to the issuing authority to have the order revoked on the basis that the grounds for the order no longer exist; this can only be done by an AFP officer,<sup>125</sup> including the senior AFP officer nominated for oversight.
86. Additionally, a person the subject of a preventative detention order might apply directly to the Federal Court of Australia or the High Court of Australia, in the same manner and on the same grounds as those discussed concerning detention under the ASIO Act 1979. For this purpose, the person is specifically permitted to contact a lawyer while in detention.<sup>126</sup> However, given the very limited duration of preventative detention orders, it is unlikely that such an application would be heard before the period of detention had ceased.

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<sup>119</sup> Human Rights and Equal Opportunities Commission, Submission to the Parliamentary Joint Commission on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979 (Cth) (2002) [79] <<http://www.humanrights.gov.au/asio-asis-and-dsd>> accessed 13 January 2014

<sup>120</sup> ASIO Act 1979 s 34K(9) and (11).

<sup>121</sup> ASIO Act 1979 s 34ZW.

<sup>122</sup> Commonwealth Criminal Code 1995 s 100.1.

<sup>123</sup> Commonwealth Criminal Code 1995 s 105.19(6).

<sup>124</sup> Commonwealth Criminal Code 1995 ss 105.17(7), 105.19(8).

<sup>125</sup> Commonwealth Criminal Code 1995 s 105.17.

<sup>126</sup> Commonwealth Criminal Code 1995 s 105.37(1)(b).

*iii) Detention pursuant to a control order issued under division 104 of the Criminal Code Act 1995 (Cth)*

87. A person the subject of an interim control order has the right to appear and make submissions, personally or through a representative, at the hearing to confirm the control order, as detailed in the previous section.
88. Moreover, at any time after a confirmed control order has been issued, the person the subject of the control order can apply to an issuing court to revoke or vary the order.<sup>127</sup> The person or their representatives may adduce additional evidence and make additional submissions to those presented in the original confirmation hearing.<sup>128</sup> If the issuing court determines on the basis of the evidence that, on the balance of probabilities, the control order does not substantially assist in preventing a terrorist attack, or the subject of the control order did not give training to or receive training from a terrorist organisation, then the issuing court must revoke the control order.<sup>129</sup> If the issuing court determines on the basis of the evidence that the restrictions, prohibitions and requirements in the confirmed control order are not necessary or appropriate, it may vary the control order.<sup>130</sup>

*iv) Detention under various state and territory laws*

89. All of the states and mainland territories of Australia have their own laws providing for administrative detention on the grounds of counter-terrorism operations or national security. Unless the state or territory legislation provides otherwise, a person in detention will be permitted to challenge their detention before state courts under normal administrative law procedures such as the writ of *habeas corpus*.

aa) New South Wales

90. A person being detained under a preventative detention order has the right to apply to the Supreme Court to vary or revoke the order.<sup>131</sup>

bb) Queensland

91. There is no statutory power for a person the subject of a preventative detention order to apply to the Supreme Court for revocation of the order.

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<sup>127</sup> Commonwealth Criminal Code 1995 s 104.18(1) and (2).

<sup>128</sup> Commonwealth Criminal Code 1995 s 104.18(4).

<sup>129</sup> Commonwealth Criminal Code 1995 s 104.20(1)(a).

<sup>130</sup> Commonwealth Criminal Code 1995 s 104.20(1)(b).

<sup>131</sup> Terrorism (Police Powers) Act 2002 (NSW) s 26N(1).

92. At the time a preventative detention order is made, the commissioner or deputy-commissioner of the police must nominate a senior police officer who was not involved in the application for the preventative detention order,<sup>132</sup> to oversee the conduct of the police in carrying out the preventative detention order.<sup>133</sup> The person the subject of the order, or their lawyer or representative, can make representations to the police officer, *inter alia* with a view to having the order revoked.<sup>134</sup> The police officer is charged with ensuring that the police apply for revocation of the preventative detention order if the grounds for the order no longer exist.<sup>135</sup>
93. If representations made to the nominated overseeing police officer do not result in revocation of the order, the person the subject of the order must rely on general law applications to the courts, including by the writ of *habeas corpus* or equivalent.

cc) South Australia

94. As soon as practical after a person has been taken into custody under a preventative detention order, they must be brought by the police before the Supreme Court for review of the order. The Supreme Court may revoke the order or reduce the period of custody.<sup>136</sup>

dd) Tasmania

95. A person being detained under a preventative detention order has the right at any time, with the leave of the Supreme Court, to apply to the Supreme Court to vary or revoke the order.<sup>137</sup> Leave to apply may only be granted if there are new facts or materials relevant to the order that were not before the Supreme Court when it made the order.<sup>138</sup>

ee) Victoria

96. There is no special power provided in the legislation to challenge a detention.

ff) Western Australia

97. As soon as practicable after a person is detained under a preventative detention order they must be brought by a police officer before the Supreme Court for review of the order.<sup>139</sup> The person the subject of the order, or their lawyer, may adduce evidence and make submissions to the

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<sup>132</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 38(2).

<sup>133</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 38(1).

<sup>134</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 38(4).

<sup>135</sup> Terrorism (Preventative Detention) Act 2005 (Qld) s 38(3)(b).

<sup>136</sup> Terrorism (Preventative Detention) Act 2005 (SA) s 17.

<sup>137</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 16(1)(a).

<sup>138</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 16(2).

<sup>139</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 22(2).



Supreme Court.<sup>140</sup> The Supreme Court may revoke the order or reduce the period of detention.<sup>141</sup>

gg) Australian Capital Territory

98. A person the subject of a preventative detention order can apply to the Supreme Court to have the order set aside or amended.<sup>142</sup> The Supreme Court may revoke the order or reduce the period of detention.<sup>143</sup>

hh) Northern Territory

99. As soon as practicable after a person is detained under a preventative detention order they must be brought by a police officer before the Supreme Court for review of the order.<sup>144</sup> The person the subject of the order, or their lawyer, may adduce evidence, call witnesses, examine and cross-examine witnesses and make submissions to the Supreme Court.<sup>145</sup> The Supreme Court may revoke the order, declare the order void *ab initio*, or reduce the period of detention.<sup>146</sup>

#### **d) Compensation for unlawful detention**

100. The High Court of Australia has the constitutional power to issue an injunction against Commonwealth officers,<sup>147</sup> and to issue a writ of *habeas corpus* against Commonwealth officers,<sup>148</sup> and the Federal Court of Australia has statutory power to issue an injunction to discontinue actions that are unlawful under Commonwealth statutes.<sup>149</sup> If either court were to find that a person's detention under the ASIO Act 1979 or the Commonwealth Criminal Code 1995 were unlawful, while that detention were still ongoing, then the court would grant the remedy of an injunction ordering the Commonwealth officers detaining the person to release them.
101. An alternative remedy may lie in the common law tort of false imprisonment. The remedy for this tort is monetary damages to compensate for loss of dignity and suffering.<sup>150</sup>
102. If a person is detained under the Terrorism (Preventative Detention) Act 2005 (SA) there is specific statutory provision for the Supreme Court, when reviewing the detention order, to award compensation to the subject if it finds that she was improperly detained.<sup>151</sup>

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<sup>140</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 22(5)(c) and (d).

<sup>141</sup> Terrorism (Preventative Detention) Act 2006 (WA) s 22(8).

<sup>142</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 31(1).

<sup>143</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 31(3) and (6).

<sup>144</sup> Terrorism (Emergency Powers) Act 2003 (NT) s 21P(1).

<sup>145</sup> Terrorism (Emergency Powers) Act 2003 (NT) s 21P(3).

<sup>146</sup> Terrorism (Emergency Powers) Act 2003 (NT) s 21P(4).

<sup>147</sup> Commonwealth of Australia Constitution s 75 (v).

<sup>148</sup> Judiciary Act 1903 (Cth) s 33(1)(f).

<sup>149</sup> Judiciary Act 1903 (Cth) s 39B(1A)(c).

<sup>150</sup> *Myer Stores Ltd v Soo* [1991] 2 VR 597 (Supreme Court of Victoria), 603.

103. If a person is detained by order issue by a senior police officer (but not a judge) under the Terrorism (Preventative Detention) Act 2005 (Tas) there is specific statutory provision for the Supreme Court, when reviewing the detention order, to award compensation if it finds that the detention order was grossly unreasonable.<sup>152</sup>
104. If a person is detained under the Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) there is specific statutory provision for the Supreme Court to award compensation to the person. This may be done if the Supreme Court finds that, on the basis of facts or circumstances that were not before the Supreme Court at the time it made the preventative detention order, the order should never have been made.<sup>153</sup>

## II IMMIGRATION DETENTION

### a) Threshold questions

105. According to the Australian Migration Act,<sup>154</sup> ‘immigration detention’ occurs when a person is ‘restrained by’ an officer or ‘another person directed by the Secretary to accompany and restrain’ them. This can occur at a number of possible places, including detention centres, prisons, and police stations, on a vessel or another place approved by the Minister.<sup>155</sup>
106. Australia has a policy whereby ‘unlawful non-citizens’ (nationals from other countries without a valid visa) are mandatorily detained. As stated in the Migration Act:
- If an officer knows or reasonably suspects that a person in the migration zone...is an unlawful non-citizen, the officer *must* detain the person (emphasis added).<sup>156</sup>
107. There are a number of detention facilities on the mainland of Australia and Christmas Island, as well as Australian-funded facilities on Manus Island (Papua New Guinea) and Nauru.<sup>157</sup> When a person is sent to one of these detention facilities, there is clearly no question that they have been detained.
108. However, a number of ‘unlawful non-citizens’ are also in ‘alternative forms of detention’, meaning that they live in low-security facilities or within the community.<sup>158</sup> Some unlawful non-

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<sup>151</sup> Terrorism (Preventative Detention) Act 2005 (SA) s 17(3)(c).

<sup>152</sup> Terrorism (Preventative Detention) Act 2005 (Tas) s 7(11)(b).

<sup>153</sup> Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 31(5).

<sup>154</sup> Migration Act 1958 (Cth), s 5.

<sup>155</sup> Migration Act 1958 (Cth), s 5.

<sup>156</sup> Migration Act 1958 (Cth), s 189.

<sup>157</sup> Janet Phillips and Harriet Spinks, ‘Immigration detention in Australia’ (Parliament of Australia Research Publication, 20 March 2013), <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/Detention#\\_Toc351535448](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention#_Toc351535448)> accessed 28 December 2013.

<sup>158</sup> International Detention Coalition, ‘Detention reform and alternatives in Australia’ (June 2009) <<http://www.refworld.org/pdfid/4f3cc2562.pdf>> accessed 28 December 2013, p3.

citizens may have been given bridging visas to live temporarily within the community,<sup>159</sup> or may be subject to a ‘residence determination’, whereby the Immigration Minister decides that the person ‘is to reside at a specified place’ rather than being held in a detention centre.<sup>160</sup> Whilst a person who is living in the community under a ‘residence determination’ has more freedom than somebody within the walls of an immigration detention centre,<sup>161</sup> they are still subject to the same regulations ‘as if the person were being kept in immigration detention’,<sup>162</sup> so arguably community detention still constitutes ‘immigration detention’.

## **b) Decision to detain**

109. Given the mandatory nature of Australia’s immigration detention regime, many unlawful non-citizens are taken immediately into detention, before any assessment of their legal claim begins. This is highlighted by the fact that the form of detention to which asylum seekers are subjected (eg whether on a remote island or in the community) is determined not by individual assessments, but by their method of arrival – a very preliminary and rudimentary assessment criterion.<sup>163</sup>
110. The title of ‘officer’ (those who exercise the power to detain under s 189) can extend to police force members or ‘any person who is included in a class of persons authorised in writing by the Minister to be officers for the purposes of this Act’,<sup>164</sup> which can include contractors who are not officers of the Commonwealth.<sup>165</sup>
111. The power to detain under s 189 of the Migration Act is in fact only mandatory once an officer has formed a ‘reasonable suspicion’ that a person is an unlawful non-citizen. As discussed below, however, it is possible that many officers do not fully understand this. Once an officer forms a ‘reasonable suspicion’ and detains a person, the detention is lawful for the duration of the person’s legal claim being assessed.<sup>166</sup> If a decision by the Minister to refuse to grant a visa is later quashed, this does not render prior detention unlawful.<sup>167</sup>

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<sup>159</sup> Migration Act 1958 (Cth), s 73; Janet Phillips and Harriet Spinks, ‘Immigration detention in Australia’ (Parliament of Australia Research Publication, 20 March 2013), <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/Detention#\\_Toc351535448](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention#_Toc351535448)> accessed 28 December 2013.

<sup>160</sup> Migration Act 1958 (Cth), s 197AB.

<sup>161</sup> International Detention Coalition, ‘Detention reform and alternatives in Australia’ (June 2009) <<http://www.refworld.org/pdfid/4f3cc2562.pdf>> accessed 28 December 2013, p3.

<sup>162</sup> Migration Act 1958 (Cth), s 197AC(1).

<sup>163</sup> Asylum Seeker Resource Centre, ‘Australian Human Rights Commission – Asylum seekers, refugees and human rights (snapshot report 2013)’ <<http://www.asrc.org.au/wp-content/uploads/2013/07/Australian-Human-Rights-Commission-2013-snap-shot-for-web.pdf>> accessed 28 December 2013.

<sup>164</sup> Migration Act 1958 (Cth), s 5.

<sup>165</sup> *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

<sup>166</sup> *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53; *Plaintiff M47/2012*

112. The threshold of ‘reasonable suspicion’ is therefore crucial to determining whether a person is lawfully detained. According to *Ruddock v Taylor*:

...the question of what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen is to be judged against what was known or capable of being known at the time when the person was detained.<sup>168</sup>

113. The case of *Goldie v Commonwealth* further explained that it is not sufficient that a detaining officer merely thinks a person might be unlawful, they must actively make ‘efforts of search and inquiry that are reasonable in the circumstances’.<sup>169</sup>

114. The burden is on the officer to justify the reasonableness of their suspicion that a non-citizen is ‘unlawful’ before they can lawfully detain them.<sup>170</sup> Importantly, an inquiry into Australian immigration detention procedures found that many of the officers who were exercising the power to detain in fact had a very limited understanding of what actually constitutes ‘reasonable suspicion’, and their legal duty to justify reasonableness before stripping a person of their liberty.<sup>171</sup>

There did not appear to be—even at senior management level—an understanding of the distinction between the discretionary nature of the exercise of ‘reasonable suspicion’ and the mandatory nature of the detention that must follow the forming of a ‘reasonable suspicion’.<sup>172</sup>

115. Training of officers is arguably poor,<sup>173</sup> meaning that the threshold at which a person might be lawfully detained is not being accurately assessed by those who hold the power to do so. The immigration detention system lacks the external checks and balances that apply under Australian criminal law,<sup>174</sup> meaning that it can more easily fall foul of procedural fairness requirements.

116. According to the rules of procedural fairness, the validity of a decision to detain should be periodically reviewed, to ensure that suspicion is still reasonably held,<sup>175</sup> however there appears to be no provision in the Migration Act for periodic review of the decision to detain. Once detained, the assessment of a person’s legal claim to reside in Australia begins, so it is possible that the legality of the initial decision to detain would fall into the background as the claim

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*v Director-General of Security* (2012) 86 ALJR 1372.

<sup>167</sup> *Akpata v Minister for Immigration and Citizenship and Others* (2012) 206 FCR 120.

<sup>168</sup> *Ruddock v Taylor* (2005) 222 CLR 612.

<sup>169</sup> *Goldie v Commonwealth* (2002) 188 ALR 708.

<sup>170</sup> M. Palmer, ‘Inquiry into the circumstances of the immigration detention of Cornelia Rau’ (the Palmer Report), Commonwealth of Australia, (July 2005) <<http://dpl/Books/2005/PalmerReport.pdf>> accessed 28 December 2013, 22.

<sup>171</sup> *ibid* 25.

<sup>172</sup> *ibid*.

<sup>173</sup> *ibid* 28.

<sup>174</sup> *ibid* 29.

<sup>175</sup> *ibid*.

assessment process is carried out. For the case of asylum seekers who are ‘unauthorised maritime arrivals’,<sup>176</sup> a Refugee Status Assessment is carried out by officers. If the officer decides that an asylum seeker is a person to whom Australia owes protection obligations, then they will make a submission to the Minister, suggesting that the Minister allow the person to make an application for a visa.<sup>177</sup> Otherwise, unauthorised maritime arrivals are not permitted to apply for a visa. In this process, a claimant can have an officer’s decision reviewed by an independent reviewer.<sup>178</sup> However the ultimate decision of the Minister is discretionary. The Minister has no obligation to even consider allowing an unauthorised maritime arrival to apply for a visa,<sup>179</sup> and meanwhile the applicant could have spent a significant period in detention.

117. The case of *Plaintiff M61/2010E v The Commonwealth* made clear that this assessment process is subject to the settled rules of procedural fairness, given that no ‘plain words of necessary intendment’ in the statute indicate otherwise.<sup>180</sup> However, the value of this enforcement of procedural fairness is weak, given that the whole assessment process, which justifies the continued detention of unauthorised maritime arrivals, is subject to the Minister’s discretion.
118. Another aspect of procedural fairness is the provision of information to a detainee relating to the reasons for detention and the detainee’s rights.<sup>181</sup> Under ss 194 and 195 of the *Migration Act*, ‘as soon as reasonably practicable after an officer detains a person’ they are entitled to be told the consequences of their detention and their right to apply for a visa (although visa applications must be made within the very restricted time period of two working days and does not apply to unauthorised maritime arrivals).<sup>182</sup>
119. Likewise, access to legal advice is granted under s 256 of the *Migration Act*. However, the remote locations of many of Australia’s immigration detention facilities means that accessing legal services or help from the UNHCR is often difficult in practise.<sup>183</sup>
120. It should be noted that people may also be detained if it is suspected that they have been involved in offences such as people smuggling, for which it is sufficient to have merely arrived within the migration zone on a vessel used in connection with the commission of an offence

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<sup>176</sup> Migration Act 1958 (Cth), s 46A.

<sup>177</sup> Migration Act 1958 (Cth), ss 46A, 195A.

<sup>178</sup> *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

<sup>179</sup> Migration Act 1958 (Cth), s 195A(4); *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

<sup>180</sup> *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319, 352. In this case, it was held that the requirements of procedural fairness had not been observed.

<sup>181</sup> Fahamu Refugee Program, ‘Detention of Refugees’ (Grant Mitchell, undated) < <http://refugeelegalaidinformation.org/detention-refugees-0> > accessed 28 December 2013.

<sup>182</sup> Migration Act 1958 (Cth), ss 193, 194, 195.

<sup>183</sup> Refugee Council of Australia, ‘Submission to Joint Standing Committee 2008 Detention Inquiry’ (August 2008) < <https://www.refugeecouncil.org.au/r/sub/0808-Detention.pdf> > accessed 28 December 2013.

against a law.<sup>184</sup> The person can then be detained for ‘such period as is required’ for an officer to prosecute or make a decision about whether to prosecute.<sup>185</sup> This form of immigration detention would be subject to a number of the same issues of procedural fairness described above.

### **c) Review of and challenges to detention**

121. There have been cases where detainees have challenged either the initial decision to detain (the ‘reasonable suspicion’ requirement)<sup>186</sup> or their continued detention throughout the assessment of their legal claims (for example, during Refugee Status Assessment)<sup>187</sup>. The former can be challenged through judicial review, and the latter through judicial or administrative review (such as independent merits review).
122. It might be difficult to challenge continued detention during the assessment of legal claims, because it has been clearly stated that detention is lawful throughout the whole process of assessing whether the Minister should exercise the power to allow a visa application.<sup>188</sup>
123. Some cases have successfully challenged the requirement of reasonable suspicion that a person is an unlawful non-citizen. In *Commonwealth and Another v Fernando*,<sup>189</sup> it was held that the officers did not turn their minds to the ‘reasonable suspicion’ requirement of s 189, but instead evinced a ‘casual attitude’ towards the claimant’s detention, which the judge condemned. Likewise, in *Goldie v Commonwealth*,<sup>190</sup> the officer did not fulfil the duty to adequately investigate before forming a reasonable suspicion. In both cases, the detention was held to be unlawful.

### **d) Compensation for unlawful detention**

124. Damages are available for a successful claim that detention is unlawful. In *Commonwealth and Another v Fernando*,<sup>191</sup> the Full Court of the Federal Court of Australia remitted the case back to the primary judge:

...to assess the substantial damages, including, if warranted, aggravated and exemplary damages, to which Mr Fernando is entitled because of his unlawful imprisonment for 1,203 days.<sup>192</sup>

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<sup>184</sup> Migration Act 1958 (Cth), s250.

<sup>185</sup> *ibid.*

<sup>186</sup> See for example *Akpata v Minister for Immigration and Citizenship and Others* (2012) 206 FCR 120; *Commonwealth and Another v Fernando* [2012] FCAFC 18; *Goldie v Commonwealth* (2002) 117 FCR 566.

<sup>187</sup> See for example: *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] HCA 53.

<sup>188</sup> *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

<sup>189</sup> *Commonwealth and Another v Fernando* [2012] FCAFC 18.

<sup>190</sup> *Goldie v Commonwealth* (2002) 117 FCR 566.

<sup>191</sup> *Commonwealth and Another v Fernando* [2012] FCAFC 18.

<sup>192</sup> *ibid* 102.

125. In some cases, declaratory relief might also be granted. For example, in *Plaintiff M61/2010E v The Commonwealth*,<sup>193</sup> the High Court ordered a declaration stating that an error of law had been made and the requirements of procedural justice had not been observed.

### **III DETENTION OF PERSONS WITH A MENTAL ILLNESS**

#### **a) Background and preliminary comments**

126. The detention of mentally ill persons is not something that falls under exclusive federal legislative power. Each state and territory in Australia therefore has legislation regulating the treatment of mentally ill persons. There are seven legislative regimes. Since there are so many jurisdictions, each with different and detailed mental health laws, this country reports summarises key provisions.
127. This report focuses on detention of mentally ill persons in the ordinary course of things, rather than in special cases such as the detention of children, prisoners, persons unfit for trial or accused persons.

#### **b) Threshold questions**

128. Detention of mentally ill persons within mental health facilities that they cannot voluntarily leave does not appear to raise any threshold questions.
129. The threshold question of whether a person has been detained arises, however, in relation to compulsory community treatment. Persons with a mental illness may be subjected to such compulsory community treatment in all Australian states and territories.<sup>194</sup> Compulsory treatment orders require persons to attend specific treatment facilities at prescribed times in accordance with a treatment plan. While such orders evidently interfere with personal liberty, they arguably cannot be classified as detention.
130. Detention, at least for the purposes of habeas corpus, usually involves total deprivation of liberty (even if the custody or confinement involves a large space or loose degree of supervision).<sup>195</sup> Compulsory community treatment does not involve such a total restriction on liberty and consequently does not amount to detention, so will not be considered further in this report.

#### **c) Decision to detain**

131. This section summarises the laws of each state governing the detention of mentally ill persons, and the procedural safeguards that they prescribe, under the headings below. Unless otherwise

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<sup>193</sup> *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

<sup>194</sup> See eg Mental Health Act 2007 (NSW), s56.

<sup>195</sup> *Ruddock v Vadarlis* [2001] FCA 1329.

specified, references to section numbers are to sections of the Act referred to in the heading for each state and territory.

*i) New South Wales: Mental Health Act 2007 (NSW)*

132. In the state of New South Wales, involuntary admission to mental health facility is permissible if:
- person is suffering from mental illness or mental disorder; and
  - owing to that illness or disorder, there are reasonable grounds for believing that care, treatment or control of the person is necessary:
  - for the person's own protection from serious harm; or
  - for the protection of others from serious harm; and
  - no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person.<sup>196</sup>
133. There are some basic procedural safeguards. A person may be detained under this power in the following circumstances:
- on a mental health certificate given by a medical practitioner or accredited person (see s 19);
  - after being brought to the facility by an ambulance officer (see s 20);
  - after being apprehended by a police officer (see s 22);
  - after an order for an examination and an examination or observation by a medical practitioner or accredited person (see s 23);
  - on the order of a Magistrate or bail officer (see s 24);
  - after a transfer from another health facility (see s 25); or
  - on a written request made to the authorized medical officer by a primary carer, relative or friend of the person (see s 26).
134. As soon as practicable after involuntary admission, an authorised medical officer of a mental health facility must:<sup>197</sup>
- give an involuntarily admitted patient an oral explanation and a written statement of their legal rights and other entitlements under the Act, in a form prescribed by the Act;
  - inform the person that there will be an inquiry into their detention by the Mental Health Review Board.

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<sup>196</sup> Mental Health Act 2007 (NSW) ss 12, 14, 15

<sup>197</sup> Mental Health Act 2007 (NSW) s 73-77.



135. No later than 24 hours after such detention, an authorized medical officer must take all reasonably practicable steps to inform the person's primary carer of the detainee of the detention.<sup>198</sup>
136. Detention is subject to compulsory review. There are several key features. First, there must be medical examinations to determine whether continued detention is necessary must take place at least every 3 months (s 39). Further, the Mental Health Review Tribunal must:
- hold an inquiry into each person involuntarily admitted to determine whether the patient is mentally ill and no other care is appropriate and reasonably available (s 34, 35, 38).
  - inquire whether person has been given written statement of rights. (s 35(2A), (2B))
  - make one of the following decisions: (s 38)
    - the person is mentally ill and no other care is appropriate and reasonably available: detention continues;
    - the person is mentally ill but other care is appropriate/available: detention ceases and other treatment pursued;
    - the person is not mentally ill and must be discharged from involuntary admission.
137. After such a review, if the tribunal decides that detention should continue, an authorised medical officer must notify the patient of a right to appeal the tribunal's decision (s 77).
138. Pursuant to s 37, Tribunal reviews must take place at the end of the initial period of detention determined by first inquiry and then every 3 months for the first 12 months of detention and at least every 6 months thereafter.

***ii) Victoria: Mental Health Act 1986 (VIC)***

139. In the state of Victoria, mental health detention is governed by the *Mental Health Act 1986* (Victoria). It should be noted that a *Mental Health Bill 2014* is currently before the Victorian Parliament, but has not yet passed into law.<sup>199</sup>
140. The criteria for involuntary admission to a mental health facility are set out in s 8 of the *Mental Health Act 1986* (Victoria). This report considers the law as it stands in February 2014. All of the following must apply:
- the person appears to be mentally ill;
  - the mental illness requires immediate treatment and that treatment can be obtained by admission to and detention in an approved mental health service;

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<sup>198</sup> Mental Health Act 2007 (NSW) s73-77.

<sup>199</sup> See 'Victoria's Mental Health Bill 2014' (20 February 2014) available <http://www.health.vic.gov.au/mentalhealth/mhactreform/index.htm> accessed 22 February 2014.

- because of the mental illness, the person should be admitted and detained as an involuntary patient for their health and safety (whether to prevent a deterioration in your physical or mental condition or otherwise) or for the protection of members of the public;
  - the person has refused or is unable to consent to the necessary treatment for the mental illness; and
  - the person cannot receive adequate treatment for the mental illness in a manner less restrictive of their freedom of decision and necessary treatment.
141. Before imposing involuntary admission, a registered medical practitioner must make a request and in prescribed form to the person that they be voluntarily admitted. In most circumstances, there must also be a recommendation for involuntary admission by a registered medical practitioner.<sup>200</sup> An authorised psychiatrist must notify the guardian of an involuntary patient of the involuntary admission.<sup>201</sup>
142. Police have powers to apprehend a person who appears to be mentally ill and has attempted or is likely to attempt suicide, serious self-harm, or serious bodily harm to another person.<sup>202</sup> This must be as soon as practicable arrange for an examination by a medical health practitioner or an assessment by a mental health practitioner.<sup>203</sup> Police may also forcibly subject a person who appears unable to care for him or herself to assessment.<sup>204</sup>
143. There is also a procedure for internal review. Sections 12A-12C make provision for three monthly independent review of continuation of detention, by a committee of three psychiatrists. If the committee does not determine that detention should continue, the patient must be discharged. If the committee decides to continue to detain, there is no limitation to the number of times detention can be continued in this way.
144. There is further provision for review by a mental health review board. Under s 30, the mental health review board must conduct an initial review of an involuntary treatment order,<sup>205</sup> and a decision of the committee under s 12A-12C to continue detention.<sup>206</sup> The board must also conduct a periodic review of an involuntary treatment order.<sup>207</sup>

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<sup>200</sup> Mental Health Act 1986 (Victoria) s 9.

<sup>201</sup> Mental Health Act 1986 (Victoria) s12AE.

<sup>202</sup> Mental Health Act 1986 (Victoria) s 10.

<sup>203</sup> Mental Health Act 1986 (Victoria) s 10.

<sup>204</sup> Mental Health Act 1986 (Victoria) s 11.

<sup>205</sup> Mental Health Act 1986 (Victoria) s 30(1).

<sup>206</sup> Mental Health Act 1986 (Victoria) s 30(2).

<sup>207</sup> Mental Health Act 1986 (Victoria) s 30(3).

*iii) Queensland: Mental Health Act 2000 (QLD)*

145. The relevant piece of legislation in the state of Queensland is the Mental Health Act 2000 (Qld).

The basic principles of the legislation are set out in ss 8 and 9:

- Powers or functions under the Act must be exercised or performed so that the patient's liberty or rights are adversely effected only if there is no less restrictive way to protect the person's health and safety or to protect others; and such adverse effects are the minimum necessary.
- Right of all persons to same basic human rights to be taken into account.
- To the greatest extent practicable, the patient should be encouraged to take part in decisions affecting the person's life.
- Health care professionals should take into account person's views and family's views so far as possible.
- To greatest extent possible, a person should be helped to achieve maximum physical, social, psychological and emotional potential, quality of life and self-reliance.

146. The Act also sets out a power to detain for examination. A health practitioner or ambulance may forcibly take a person for whom assessment documents are in force to mental health facility, using minimum necessary and reasonable force.<sup>208</sup> Further, a magistrate or justice may make a justice's examination order if:

- he reasonably believes the person has an illness;
- the person should be examined by a doctor or mental health practitioner; and
- examination could not otherwise be carried out without the order.<sup>209</sup>

147. The Act also makes provision for emergency examination orders by ambulance or police officer,<sup>210</sup> or by a psychiatrist<sup>211</sup> and the taking of persons to mental health facility.<sup>212</sup> An examination or detention for examination must be no longer than six hours.<sup>213</sup>

148. A person may also be detained for assessment pursuant to ss 44 to 48 of the Act. A person may be detained in an authorised mental health service for an assessment for a period not longer than 24 hours, which may be extended by 24 hours. Additional extensions of 24 hours are permitted, but the total period of detention for assessment should not be longer than 72 hours. An administrator for the mental health service must notify certain persons about the assessment,

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<sup>208</sup> Mental Health Act 2000 (Qld) s 25.

<sup>209</sup> Mental Health Act 2000 (Qld) s 25.

<sup>210</sup> Mental Health Act 2000 (Qld) s 33

<sup>211</sup> Mental Health Act 2000 (Qld) s 37

<sup>212</sup> Mental Health Act 2000 (Qld) ss 34, 39.

<sup>213</sup> Mental Health Act 2000 (Qld) ss36, 40.

including the patient, the patient's 'allied person' (carer or friend), or guardian where there is one. As soon as practicable after person becomes an involuntary patient, an authorised doctor must make an assessment to decide whether the treatment criteria for involuntary treatment apply. If an authorised doctor does not make an involuntary treatment order by the end of the assessment period, the patient ceases to be an involuntary patient, and the doctor must tell them so.

149. The Act also sets out provisions governing involuntary treatment in ss 108-109 and ss 113-118. If, on the assessment of a patient, an authorised doctor for an authorised mental health service is satisfied that the following criteria apply to a patient, the doctor may make an involuntary treatment order, including an order that the patient be detained treated involuntarily as an in-patient. The relevant criteria are:

- the person has a mental illness;
- the person's illness requires immediate treatment;
- the proposed treatment is available at an authorised mental health service;
- because of the person's illness—
  - there is an imminent risk that the person may cause harm to himself or herself or someone else; or
  - the person is likely to suffer serious mental or physical deterioration;
- there is no less restrictive way of ensuring the person receives appropriate treatment for the illness;
- the person—
  - lacks the capacity to consent to be treated for the illness; or
  - has unreasonably refused proposed treatment for the illness.

150. An involuntary treatment order continues in force until it is revoked by an authorised doctor for the patient's treating health service or on review, or by a court on appeal against a review decision. The use of reasonable force for detention and treatment is authorised.<sup>214</sup>

151. An authorised doctor must tell the patient of the order and the basis on which the doctor is satisfied the treatment criteria applied. The doctor must talk to the patient about the patient's treatment plan.<sup>215</sup> Within seven days after an involuntary treatment order for a patient is made, the administrator of the patient's treating health service must give written notice of the order to:<sup>216</sup>

- the patient;

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<sup>214</sup> Mental Health Act 2000 (Qld) s 516.

<sup>215</sup> Mental Health Act 2000 (Qld) ss 111, 113.

<sup>216</sup> Mental Health Act 2000 (Qld) ss 111, 113.

- the mental health review tribunal; and
- the patient's 'allied person'

152. If an authorised doctor for an involuntary patient's treating health service, or the director, is satisfied the treatment criteria no longer apply to the patient, the doctor must revoke the involuntary treatment order for the patient.<sup>217</sup>

153. Chapter 6 of the Act sets out provisions governing a Mental Health Review Tribunal. The tribunal must review the application of the treatment criteria to a patient for whom an involuntary treatment order is in force within six weeks of the order being made and afterwards at intervals of not more than six months; and on application for the review made under s 188. However, the tribunal may dismiss an application for a review if the tribunal is satisfied the application is frivolous or vexatious.<sup>218</sup>

*iv) South Australia: Mental Health Act 2009 (SA)*

154. In South Australia, the criteria for detention of persons with mental illness is governed by the Mental Health Act 2009 (SA). Part 5 of the Act provides for three levels of involuntary in-patient treatment (which involves detention – see ss 34, 34A for power to detain and confine). For all such orders, the following criteria must be satisfied:

- A medical practitioner or authorised health professional has examined the person to be detained, and it appears to the medical practitioner or authorised health professional, after examining the person, that—
  - the person has a mental illness; and
  - because of the mental illness, the person requires treatment for the person's own protection from harm (including harm involved in the continuation or deterioration of the person's condition) or for the protection of others from harm; and
  - there is no less restrictive means than an inpatient treatment order of ensuring appropriate treatment of the person's illness.

155. The duration of detention is limited:

- A level 1 inpatient treatment order, unless earlier revoked, expires at a time fixed in the order which must be 2 pm on a business day not later than 7 days after the day on which it is made.<sup>219</sup>

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<sup>217</sup> Mental Health Act 2000 (Qld) ss 121-123.

<sup>218</sup> Mental Health Act 2000 (Qld) s 187

<sup>219</sup> Mental Health Act 2009 (SA) s 21.

- A level 2 inpatient treatment order, unless earlier revoked, expires at a time fixed in the order which must be 2 pm on a business day not later than 42 days after the day on which it is made.<sup>220</sup>
- A level 3 inpatient treatment order, unless earlier revoked, expires at a time fixed in the order which must be—
  - in the case of an order relating to a child—2 pm on a business day not later than 6 calendar months after the day on which it is made; or
  - in any other case—2 pm on a business day not later than 12 calendar months after the day on which it is made.<sup>221</sup>

156. Part 5 provides for a review by another medical practitioner. A level one inpatient treatment order must be followed within 24 hours (or as soon as practicable thereafter) by an examination by a different psychiatrist or authorised medical practitioner to confirm or revoke the order. A level two order may only be made following a further examination after the making of a level one order. A level three order may also only follow a level two order by further examination. Notice of such orders must be given to the patient, and to the mental health review board, among others.

157. Part 11 provides for a Mental Health Review Board. The board has a plenary power to review any inpatient treatment order. On completion of a review, the Board must revoke, with immediate effect, any inpatient treatment order to which the review relates if the Board is not satisfied that there are proper grounds for it to remain in operation.

*v) Western Australia: Mental Health Act 1996 (WA)*

158. In Western Australia, where a medical practitioner has referred someone for psychiatric examination, the referrer may obtain a ‘transport order’ authorising police to apprehend the person and take them for examination. The person may be detained until the examination takes place or the order lapses. The person should be taken to an authorised hospital or mental health facility as soon as practicable and in any event before the order lapses.<sup>222</sup>

159. Procedures governing examination are governed by ss 36, 37 and 40 of the Mental Health Act 1996 (WA). A person referred for examination may be detained for up to 24 hours without an order to make them an involuntary patient. An examination should not take place, however, if more than seven days have elapsed since the referral was made. A psychiatrist who examines the patient may, among other things:

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<sup>220</sup> Mental Health Act 2009 (SA) s 25.

<sup>221</sup> Mental Health Act 2009 (SA) s 29.

<sup>222</sup> Mental Health Act 1996 (WA) ss 34, 35.

- order that a person’s detention continue for further assessment,;
  - order that the person should be received into an authorised hospital for an assessment of whether the person should become an involuntary patient;
  - but the total time of detention for the purpose of examination or assessment should be no more than 72 hours from when the person was first received in the hospital.
160. The Act also provides for orders to make a person an involuntary patient. A psychiatrist may order in writing that a person be detained in an authorised hospital as an involuntary patient having regard to the criteria for making a person an involuntary patient.<sup>223</sup> Under s 26, a person should be an involuntary patient only if:
- the person has a mental illness requiring treatment; and
  - the treatment can be provided through detention in an authorised hospital or through a community treatment order and is required to be so provided in order —
    - to protect the health or safety of that person or any other person; or
    - to protect the person from certain kinds of self-inflicted harm; or
    - to prevent the person doing serious damage to any property;
  - the person has refused or, due to the nature of the mental illness, is unable to consent to the treatment; and
  - the treatment cannot be adequately provided in a way that would involve less restriction of the freedom of choice and movement of the person than would result from the person being an involuntary patient.
161. An order making a person an involuntary patient as described above must not prescribe a duration for detention of longer than 28 days.<sup>224</sup>
162. Whenever a person is detained, an explanation is to be given orally and in writing in the language in which the person is used to communicating giving an explanation of the detention/treatment in prescribed form. A copy should be given to a friend, relative, guardian specified by the patient.<sup>225</sup> When a period of detention ends, the person is to be notified in writing, and be permitted to leave.<sup>226</sup>
163. There are also provisions governing second opinions in cases of involuntary detention in s 50. The treating psychiatrist is to ensure that an involuntary patient is examined again by a psychiatrist before the end of the period specified in the order making the person an involuntary

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<sup>223</sup> Mental Health Act 1996 (WA) ss 43, 45.

<sup>224</sup> Mental Health Act 1996 (WA) s 48.

<sup>225</sup> Mental Health Act 1996 (WA) s 156.

<sup>226</sup> Mental Health Act 1996 (WA) s 54.

patient. After such an examination the examining psychiatrist may make an order for continuing detention. Such orders are subject to a limitation of 28 days with rolling re-examinations before the period of detention under the order lapses.

164. The Act provides for review by mental health review board in ss 138, 139, 144, 145 and 146. After the making of an order for a person to be detained as an involuntary patient, the mental health review board is to carry out, within 8 weeks of the order, a review of whether the order should continue to have effect. The board is to make periodic reviews at least every 6 months. The board may review the case of an involuntary patient at any time. The board may make any order it sees fit, including:
- an order that the person is no longer an involuntary patient; or
  - an order that a community treatment order be made in respect of the person, giving such directions, if any, as it thinks fit in relation to the terms of the order; or
  - if the person is the subject of a community treatment order, the board may also vary the order, and give such directions in relation to the order as it thinks fit.

*vi) Tasmania: Mental Health Act 2013 (TAS)*

165. The state of Tasmania has recently introduced the *Mental Health Act 2013* (Tasmania). That Act provides for assessment orders to detain persons with mental illness. Any medical practitioner may make an ‘assessment order’ that may result in detention. The following persons may apply, in approved form, to a medical practitioner for an assessment order:
- nurse;
  - police officer;
  - mental health officer;
  - a guardian, parent, or support person of a prospective patient; or
  - an ambulance officer.<sup>227</sup>
166. A medical practitioner may make an assessment order requiring a person’s detention for assessment in an approved hospital if satisfied that a reasonable attempt has been made to have the person assessed with informed consent, or that it would be futile to make such an attempt. The criteria for making an order are:<sup>228</sup>
- the person has or appears to have a mental illness that requires or is likely to require treatment for the person’s health or safety or the safety of other persons;

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<sup>227</sup> Mental Health Act 2013 (Tasmania) s22-27, s30-34.

<sup>228</sup> Mental Health Act 2013 (Tasmania) s22-27, s30-34.



- the person cannot be properly assessed except under the authority of an assessment order; and
  - the person does not have decision making capacity.
167. Once the order has taken effect the patient must be independently assessed within 24 hours. After 24 hours, the order ceases to have effect unless extended by a practitioner affirming it. The order is authority for any mental health officer or police officer to escort the patient in custody for assessment, and for the patient to be detained in an approved hospital for assessment.<sup>229</sup>
168. The approved medical practitioner making an assessment pursuant to an assessment order must immediately approve or discharge the assessment order. To affirm the assessment, the practitioner must be satisfied that the person meets the assessment criteria (noted above) and the order has not already been discharged.<sup>230</sup>
169. Detention may also occur pursuant to a treatment order, made by a Mental Health Tribunal.<sup>231</sup> Any approved medical practitioner may apply to the Tribunal for a treatment order in respect of a person. The application should only be made if the medical practitioner is satisfied the person meets the treatment criteria. If the person is not at the time of the application the subject of an assessment order, another medical practitioner must be satisfied that the person meets the treatment criteria.<sup>232</sup>
170. A single member of the Tribunal may, pending determination by the Tribunal of the application, make an interim treatment order, which may include an order that the person be detained, provided:
- the application has been properly made;
  - the tribunal cannot immediately determine the application;
  - the person meets the treatment criteria;
  - the delay involved in waiting for the tribunal would or is likely to cause serious harm to the person's health or safety, or the safety of other persons.<sup>233</sup>
171. The Tribunal may make a treatment order, which may include an order that the person be detained, if it is satisfied:
- the application for the treatment order has been properly made; and
  - the person meets the treatment criteria.<sup>234</sup>

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<sup>229</sup> Mental Health Act 2013 (Tasmania) s22-27, s30-34

<sup>230</sup> Mental Health Act 2013 (Tasmania) s 32.

<sup>231</sup> Mental Health Act 2013 (Tasmania) s 36.

<sup>232</sup> Mental Health Act 2013 (Tasmania) s 37(1).

<sup>233</sup> Mental Health Act 2013 (Tasmania) s 38.

<sup>234</sup> Mental Health Act 2013 (Tasmania) s 39.

172. The treatment criteria are as follows:
- the person has a mental illness; and
  - without treatment, the mental illness will, or is likely to, cause seriously harm to:
    - the person's health or safety; or
    - the safety of other persons; and
  - the treatment will be appropriate and effective; and
  - the treatment cannot be adequately given except under a treatment order; and
  - the person does not have decision-making capacity.<sup>235</sup>
173. The Tribunal should determine the application as soon as practicable after it is received. An application for a treatment order lapses and is rendered invalid if the Tribunal fails to determine the application within 10 days after it is lodged.<sup>236</sup>
174. The Tribunal is required to review:<sup>237</sup>
- the making of assessment orders
  - treatment orders
  - the placement of any involuntary patient under seclusion or restraint.
175. The duration of treatment order cannot exceed six months.<sup>238</sup> That duration is renewable on the application by an approved medical practitioner, by determination of the Tribunal.<sup>239</sup>
176. The person who makes an assessment order must give a copy of the order to the patient. The practitioner who affirms an assessment order must give notice of the affirmation to the patient, the medical practitioner who made the assessment order, the mental health tribunal, the chief civil psychiatrist.<sup>240</sup> A treatment order may be discharged by an approved medical practitioner (in consultation with the treating medical practitioner) or the Tribunal.<sup>241</sup>
177. The rights of involuntary patients are listed in s 62. Key among these are the following:
- the right to have the restrictions on, and interference with, his or her dignity, rights and freedoms kept to a minimum consistent with his or her health or safety and the safety of other persons;

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<sup>235</sup> Mental Health Act 2013 (Tasmania) s 40.

<sup>236</sup> Mental Health Act 2013 (Tasmania) s 40, 41.

<sup>237</sup> Mental Health Act 2013 (Tasmania) s 179.

<sup>238</sup> Mental Health Act 2013 (Tasmania) s 44.

<sup>239</sup> Mental Health Act 2013 (Tasmania) s 48.

<sup>240</sup> Mental Health Act 2013 (Tasmania) ss 29, 33.

<sup>241</sup> Mental Health Act 2013 (Tasmania) s 49.

- the right to have his or her decision-making capacity promoted, and his or her wishes respected, to the maximum extent consistent with his or her health or safety and the safety of other persons;
- the right to be given clear, accurate and timely information about:
  - his or her rights as an involuntary patient; and
  - the rules and conditions governing his or her conduct in the hospital; and
  - his or her diagnosis and treatment;
- the right, while in an approved hospital, to apply for leave of absence in accordance with this Act;
- the right to have contact with, and to correspond privately with, his or her representatives and support persons and with Official Visitors;
- the right, while in an approved hospital, to be provided with general health care;
- the right, while in an approved hospital, to wear his or her own clothing (where appropriate to the treatment setting);
- the right, while in an approved hospital, not to be unreasonably deprived of any necessary physical aids;
- the right, while in an approved hospital, to be detained in a manner befitting his or her assessment, treatment or care requirements.

*vii) Australian Capital Territory: Mental Health (Treatment and Care) Act 1994 (ACT)*

178. In the Australian Capital Territory (ACT), restrictions on personal freedom and derogations of dignity and self respect of patients should be kept to the minimum necessary for the proper care and protection of the person and the public.<sup>242</sup>
179. The ACT Civil and Administrative Tribunal (ACAT) may order a person's assessment. To make an assessment order the ACAT must be satisfied on the face of an application or referral that
- the person's health or safety is, or is likely to be, substantially at risk; or
  - the person is or is likely to do serious harm to others.<sup>243</sup>
180. ACAT must take reasonable steps to obtain consent to order, but consent is not required.<sup>244</sup> An assessment order authorizes a mental health assessment and anything necessary to conduct the assessment (including detention and/or removal to a facility for the assessment).<sup>245</sup> ACAT must

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<sup>242</sup> Mental Health Act 2013 (Tasmania) s 9.

<sup>243</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 16

<sup>244</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 17.

<sup>245</sup> Mental Health (Treatment and Care) Act 1994 (ACT) ss 19, 22.

notify the public advocate of an assessment order,<sup>246</sup> and the person to be assessed must be informed of the assessment.<sup>247</sup> An assessment must be conducted within seven days after the assessment order is made, unless the assessment order states otherwise.<sup>248</sup> The person in charge of the facility must ensure the person admitted to the facility has access to a friend or relative, the public advocate and a legal practitioner.<sup>249</sup>

181. A person may apply for a mental health order in relation to somebody else if they believe on reasonable grounds that person's health or safety is at risk because of their mental health.<sup>250</sup> Section 26 sets out factors to take into account when ACAT makes a mental health order. Key among these are:

- the wishes of the person so far as they can be found out;
- the wishes of those responsible for the day to day care of the person;
- the person's rights should be interfered with to the minimum extent necessary;
- the person should be encouraged to look after themselves;
- restrictions on the person should be the minimum necessary for the safe and effective care of the person.

182. ACAT may also make a psychiatric treatment order in relation to a person if:<sup>251</sup>

- the person has a mental illness;
- ACAT has reasonable grounds for believing that because of the illness the person is likely to do serious harm to himself/herself or someone else or suffer serious mental or physical deterioration unless subject to the order;
- ACAT is satisfied the treatment is likely to reduce the harm or deterioration and result in an improvement in the person's psychiatric condition; and
- The treatment cannot be adequately provided in a way that would involve less restriction of the freedom of choice and movement of the person than would result from the person being an involuntary patient.

183. The treatment order may be accompanied by a restriction order, which may prescribe detention, if ACAT is satisfied that it is in the interests of the person's health or safety or public safety.<sup>252</sup> A restriction order has effect for 3 months or a shorter period stated in the order.<sup>253</sup>

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<sup>246</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 20.

<sup>247</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 22D.

<sup>248</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 21.

<sup>249</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 22B and 22C.

<sup>250</sup> Mental Health (Treatment and Care) Act 1994 (ACT) ss 11.

<sup>251</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 28.

<sup>252</sup> Mental Health (Treatment and Care) Act 1994 (ACT) ss 30, 31.

<sup>253</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 36J.

184. The Chief Psychiatrist also has power to detain. If a person is subject to a psychiatric treatment order, the chief psychiatrist may authorise use of force to apprehend and detain a person, and take them to premises stated by the Chief Psychiatrist. The Chief Psychiatrist may also authorise confinement or restraint that is necessary and reasonable. The Chief Psychiatrist must record this authorisation and the reason for it, notify the public advocate in writing within 24 hours, and keep a register of the involuntary restraint or seclusion.<sup>254</sup>
185. Section 37 also sets out other grounds upon which a person with mental illness may be detained. A police officer, doctor or mental health officer may detain and take to a mental health facility persons they believe on reasonable grounds to be mentally ill. A police officer may only do so if he believes on reasonable grounds that the person is likely to commit suicide or inflict serious harm on himself or another person. A doctor may do so if he/she believes on reasonable grounds that the person requires care, has refused it, detention is necessary for the person's own health or safety social or financial wellbeing, or for the protection of members of the public and adequate treatment or care cannot be provided in a less restrictive environment.
186. ACAT may on application or its own initiative review a mental health order in force in relation to a person, and vary, or revoke it, or make additional orders.<sup>255</sup>

*viii) Northern Territory: Mental Health and Related Services Act 1998 (NT)*

187. Section 9 of the Mental Health and Related Services Act 1998 (NT) sets out the fundamental principles relating to treatment and care of mentally ill persons. Key among this principles are the following:
- the person is to be provided with appropriate and comprehensive information about their illness and treatment;
  - where possible, the person is to be treated near where he or she ordinarily resides or relatives or friends reside; and
  - any assessment of the person to determine whether he or she needs to be admitted to an approved treatment facility is to be conducted in the least restrictive manner and environment possible.
188. Section 10 sets out principles relating to involuntary admission. The following are key:
- the person should only be admitted after every effort to avoid admission as an involuntary patient has been taken;

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<sup>254</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 35.

<sup>255</sup> Mental Health (Treatment and Care) Act 1994 (ACT) s 36L.

- where a person needs to be taken to an approved treatment facility or into custody for assessment, the assistance of a police officer is to be sought only as a last resort; and
- involuntary treatment is to be for a brief period, reviewed regularly and is to cease as soon as the person no longer meets the criteria for involuntary admission on the grounds of mental illness, mental disturbance or complex cognitive impairment.

189. The criteria for involuntary admission for mental illness are set out in s 14:

- the person has a mental illness; and
- as a result of the mental illness:
  - the person requires treatment that is available at an approved treatment facility; and
  - without the treatment, the person is likely to:
    - cause serious harm to himself or herself or to someone else; or
    - suffer serious mental or physical deterioration; and
- the person is not capable of giving informed consent to the treatment or has unreasonably refused to consent to the treatment; and
- there is no less restrictive means of ensuring that the person receives the treatment.

190. Criteria for involuntary admission on the grounds of mental disturbance are set out in s 15. Key factors are:

- the person does not fulfil the criteria for involuntary admission or complex cognitive impairment;
- the person's behaviour is irrational, is a severe deviation from their usual behaviour, is abnormally aggressive or seriously irresponsible and this justifies a determination that the person requires a psychiatric assessment;
- unless the person receives treatment and care at an approved facility he or she:
  - is likely to cause serious harm to himself or herself or to someone else; or
  - will represent a substantial danger to the general community; or
  - is likely to suffer serious mental or physical deterioration; and
  - The person is not capable of giving reasonable informed consent.

191. The criteria for involuntary admission on grounds of complex cognitive impairment are set out in s 15A. The provisions are largely identical to the above, although there is a requirement that there is no less restrictive means of ensuring treatment and care.

192. A medical practitioner or nurse may detain for up to six hours if he or she believes that the person may fulfil the criteria for admission on the grounds of mental illness or mental

disturbance. As soon as practicable after detaining, the medical practitioner or nurse must notify an authorised psychiatric practitioner and enter the reasons for detention on the person's file. Reasonable force may be used to detain, including mechanical restraint.<sup>256</sup>

193. An ambulance officer may detain a person for up to six hours to prevent someone causing serious harm to himself or others, or further physical or mental deterioration, or to relieve acute symptomatology. The ambulance officer must convey the person to the nearest treatment facility and complete an approved form to be sent to authorised psychiatric practitioner.<sup>257</sup>
194. An apprehension of a person by police is permitted if the police officer believes on reasonable grounds that the person may require treatment or care for mental health; the person is likely to cause serious harm to themselves or someone else unless apprehended immediately; and it is not practicable in the circumstances to seek the assistance of an authorised psychiatric practitioner, medical practitioner or designated mental health practitioner. The police must bring the person to a practitioner as soon as practicable and give reasons for the apprehension.<sup>258</sup>
195. There can be an assessment of an involuntary admission, which may be requested by the person involuntarily admitted, or by a person with a genuine interest or real and immediate concern for the person's health or welfare.<sup>259</sup> The request must be to a medical practitioner, authorised psychiatric practitioner or designated mental health practitioner.<sup>260</sup> The practitioner must assess and determine whether the person is in need of treatment as soon as practicable after a request for assessment or person is brought to them.<sup>261</sup>
196. The practitioner must make a recommendation for a psychiatric examination if satisfied that the person fulfils the criteria for involuntary admission on the grounds of mental illness or mental disturbance. The recommendation authorises, among other things, detention for up to 24 hours.<sup>262</sup> A practitioner must revoke a recommendation and release the person if after further assessment, they are no longer satisfied the person fulfils the criteria for involuntary admission on the grounds of mental illness or mental disturbance.<sup>263</sup>
197. A person detained at an approved treatment facility under a recommendation, or detention by medical practitioner or nurse, must be examined and assessed by an authorised psychiatric practitioner.<sup>264</sup> If satisfied that the person fulfils the criteria for involuntary admission on the

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<sup>256</sup> Mental Health and Related Services Act 1998 (NT) s 30.

<sup>257</sup> Mental Health and Related Services Act 1998 (NT) s 31.

<sup>258</sup> Mental Health and Related Services Act 1998 (NT) s 32A.

<sup>259</sup> Mental Health and Related Services Act 1998 (NT) s 32.

<sup>260</sup> Mental Health and Related Services Act 1998 (NT) s 32.

<sup>261</sup> Mental Health and Related Services Act 1998 (NT) s 33.

<sup>262</sup> Mental Health and Related Services Act 1998 (NT) s 34.

<sup>263</sup> Mental Health and Related Services Act 1998 (NT) s 34(5).

<sup>264</sup> Mental Health and Related Services Act 1998 (NT) s 38.

grounds of mental illness or mental disturbance, the practitioner must admit the person as an involuntary patient.<sup>265</sup>

198. A person admitted as an involuntary patient on the grounds of ‘mental illness’ may be detained at the approved treatment facility for up to 24 hours, or up to 14 days after examination if an authorised psychiatric practitioner makes the recommendation for psychiatric examination before admission. An authorised psychiatric practitioner must examine the person so detained and following the examination, if satisfied the person fulfils the criteria for involuntary admission, may detain the person for a further period of 14 days. If the criteria aren’t satisfied, the practitioner must discharge the person as an involuntary patient.<sup>266</sup> An authorised psychiatric practitioner must examine the person admitted as an involuntary patient on the grounds of mental illness at least once every 72 hours, keeping a record of each examination on the person’s case notes. The person must be discharged if the authorised psychiatric practitioner is satisfied the person no longer meets the criteria.<sup>267</sup>
199. A person admitted to an approved treatment facility as an involuntary patient on the grounds of ‘mental disturbance’ may be detained for up to 72 hours on those grounds.<sup>268</sup> The person may be detained for a further 7 days if after examination, two authorised psychiatric practitioners are satisfied that:
- if the person is released, the person is likely to cause serious harm to himself or someone else, will represent a substantial danger to the general community or is likely to suffer serious mental or physical deterioration; and
  - the person is not capable of giving informed consent to the treatment or care or has unreasonably refused to consent; and
  - there is not a less restrictive way of ensuring the person receives the treatment or care.
200. Review of admission ordered pursuant to ss 39 and 42 is governed by s 44. An authorised psychiatric practitioner must examine a person admitted as an involuntary patient on the grounds of mental disturbance at least once every 24 hours (or 72 hours if the person was admitted for an additional seven days under s 42). Such a review may determine that:
- the person no longer fulfils the criteria for involuntary admission on any basis; or
  - the person fulfils the criteria for involuntary admission on the same basis or one of the other bases.

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<sup>265</sup> Mental Health and Related Services Act 1998 (NT) s 38.

<sup>266</sup> Mental Health and Related Services Act 1998 (NT) s 39.

<sup>267</sup> Mental Health and Related Services Act 1998 (NT) s 40.

<sup>268</sup> Mental Health and Related Services Act 1998 (NT) s 42.



201. Part 6, Division 4, Subdivision 1 sets out provisions for involuntary admission on grounds of complex cognitive impairment. In summary, if an authorised psychiatric practitioner and authorised officer form a view that the person satisfies the criteria for admission on the grounds of complex cognitive impairment, they must apply as soon as possible for a tribunal order for the person's involuntary admission and detention on the grounds of complex cognitive impairment. The Tribunal then assesses whether the person satisfies the relevant criteria and makes an order, which must state a date for review.
202. The Mental Health Review Tribunal must review a person's admission as an involuntary patient:<sup>269</sup>
- for a patient under a Tribunal order made on an application under Part 6, Division 4 – on the date stated in the order; or
  - otherwise within 14 days after the person's admission;
203. Following a review, if the Tribunal is satisfied the person fulfils the criteria for admission on the grounds of mental illness, it may order that the person be detained as an involuntary patient on those grounds for not longer than 3 months, and it must set a date for the order to be reviewed again.<sup>270</sup> If the person fulfils the criteria for admission on the grounds of mental disturbance, the Tribunal may order detention to continue for not longer than 14 days, and it must fix a date for the order to be reviewed again.<sup>271</sup> If the Tribunal is not satisfied, it must revoke the admission as involuntary patient: patient must be immediately discharged.<sup>272</sup>

#### **d) Review of and challenges to detention**

204. The avenues for challenging decisions to detain for mental health reasons are similar in each state's mental health legislation. After setting out the avenues referred to in the relevant legislation, this report touches briefly on judicial review generally and also habeas corpus and false imprisonment. Further information on this can be found under the summary concerning police detention for crowd control purposes.

##### ***i) Mental Health Act 2007 (NSW)***

205. A patient or primary carer may apply for discharge,<sup>273</sup> and may appeal to Mental Health Review Tribunal if not discharged.<sup>274</sup> That review may be undertaken in absence of patient in some circumstances.<sup>275</sup>

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<sup>269</sup> Mental Health and Related Services Act 1998 (NT) s 123.

<sup>270</sup> Mental Health and Related Services Act 1998 (NT) s 123.

<sup>271</sup> Mental Health and Related Services Act 1998 (NT) s 123.

<sup>272</sup> Mental Health and Related Services Act 1998 (NT) s 123.

<sup>273</sup> Mental Health Act 2007 (NSW) ss 42, 43.

206. An appeal lies from the tribunal to Supreme Court of New South Wales.<sup>276</sup>

*ii) Mental Health Act 1986 (VIC)*

207. The following are the key provisions governing appeals to the Mental Health Review Board in Victoria:<sup>277</sup>

- an involuntary patient, or any person on their behalf who satisfies the Mental Health Review Board of a genuine concern for the patient, may appeal to the Mental Health Review Board against involuntary treatment;
- the board is bound by the rules of natural justice;
- notice of hearings for reviews and appeals must be given to involuntary patients, or those making appeals for them, and to the authorised psychiatrist, 7 days before the hearing;
- if the Board considers that the criteria for detention do not, or no longer apply, the patient must be discharged. Other options include continued detention if the criteria still apply, or community treatment if such treatment would be sufficient.

*iii) Mental Health Act 2000 (QLD)*

208. The patient, or a person acting on behalf of the patient, or the director may apply in writing for review of an involuntary treatment order at any time .<sup>278</sup> The Tribunal must decide to confirm, change or revoke the involuntary treatment order.<sup>279</sup>

209. Chapter 8, Part 1 provides for a right of the patient, a person on their behalf, or the director, to appeal tribunal decisions to the Mental Health Court. Tribunal decision may be stayed pending outcome of appeal. The Mental Health Court's order is final and conclusive; cannot be impeached, appealed against, reviewed, quashed or invalidated by any court.<sup>280</sup>

*iv) Mental Health Act 2009 (SA)*

210. Under Part 11, Div 2 of the Mental Health Act 2009 (SA), any of the following persons dissatisfied with an inpatient treatment order (other than an order made by the Board) may appeal to the Board against the order:

- the person to whom the order applies;
- the Public Advocate;

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<sup>274</sup> Mental Health Act 2007 (NSW) s 44.

<sup>275</sup> Mental Health Act 2007 (NSW) s 45.

<sup>276</sup> Mental Health Act 2007 (NSW) s 163.

<sup>277</sup> Mental Health Act 1986 (VIC) ss24, 32, 36

<sup>278</sup> Mental Health Act 2000 (QLD) s 188

<sup>279</sup> Mental Health Act 2000 (QLD) s 191

<sup>280</sup> Mental Health Act 2000 (QLD) s 327.

- a guardian, medical agent, relative, carer or friend of the person to whom the order applies;
- any other person who satisfies the Board that he or she has a proper interest in the matter.

211. On hearing an appeal against an order, the Board must revoke the order, with immediate effect, if the Board is not satisfied that there are proper grounds for it to remain in operation.
212. The *Guardianship and Administration Act 1993* (SA) provides certain rights of appeal to the Administrative and Disciplinary Division of the District Court and from that court to the Supreme Court in relation to orders or decisions of the Board made under this Act.

*v) Mental Health Act 1996 (WA)*

213. An application may be made to the Mental Health Review Board requesting review of whether person should continue to be an involuntary patient. The application may be made by the patient, an official visitor or any person the board is satisfied has a genuine concern for the patient.<sup>281</sup> A person with sufficient interest in the matter may apply to the state administrative tribunal for review of the board's decision, and decisions of the state administrative tribunal may be appealed to the court on the basis of an error of law or fact.<sup>282</sup>

*vi) Mental Health Act 2013 (TAS)*

214. Any person with necessary standing may apply to the Mental Health Tribunal for a review of any decision under the Act.<sup>283</sup> A person who is a party to any proceedings of the Tribunal, or who is aggrieved by its determination, may appeal the determination to the Supreme Court. The appeal may be brought on a question of law, as of right, or on any other question with the leave of the Supreme Court.<sup>284</sup>

*vii) Mental Health (Treatment and Care) Act 1994 (ACT)*

215. ACAT may on application (or its own initiative), review a mental health order in force in relation to a person, and vary, revoke, or make additional orders. If ACAT is satisfied that a person subject to an order is no longer a person to whom ACAT could make a psychiatric treatment order, ACAT must revoke all mental health orders in force in relation to that person.<sup>285</sup> ACAT

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<sup>281</sup> Mental Health Act 1996 (WA) s 142.

<sup>282</sup> Mental Health Act 1996 (WA) ss 148-150.

<sup>283</sup> Mental Health Act 2013 (Tasmania) s 193.

<sup>284</sup> Mental Health Act 2013 (Tasmania) s 174.

<sup>285</sup> Mental Health (Treatment and Care) Act 1994 (Australian Capital Territory) s 36L.

must, on application, review the detention of a person by a doctor, police officer or mental health officer under the Act, within two days of application.<sup>286</sup>

216. The following people may appeal to the Supreme Court from a decision of ACAT:<sup>287</sup>

- the person in relation to whom the decision was made;
- someone who appeared or was entitled to appear before the ACAT in the proceeding;
- the discrimination commissioner;
- anyone else with the court's leave.

*viii) Mental Health and Related Services Act 1998 (NT)*

217. The Tribunal may review the admission of a person as an involuntary patient or an order made under the Act for a person on being requested to do so by the person or someone who has a genuine interest in, or with a real and immediate concern for the health or welfare of, the person.<sup>288</sup>

218. A person aggrieved by the decision of the Tribunal or refusal of the Tribunal to make a decision within a reasonable time may appeal to the Supreme Court. A person who in the opinion of the Supreme Court has a sufficient interest in a matter the subject of a decision or refusal of the Tribunal may, with the leave of the Court, appeal to the Court against the decision or refusal.<sup>289</sup>

*ix) Judicial Review Generally*

219. As well as the appeal provisions in state acts, the state and territory supreme courts have common law power to exercise judicial review. As with kettling (see Part VI on police detention), judicial review examines whether a statutory power was exercised for the purpose for which it was granted.<sup>290</sup> The court asks whether the person exercising the power identified a wrong issue, ignored a relevant issue, or made an erroneous finding, in exercising that power.<sup>291</sup> Further, in most cases it will be open to the court to examine whether the decision was made in accordance with procedural fairness.<sup>292</sup>

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<sup>286</sup> Mental Health (Treatment and Care) Act 1994 (Australian Capital Territory) s 37.

<sup>287</sup> Mental Health (Treatment and Care) Act 1994 (Australian Capital Territory) s141.

<sup>288</sup> Mental Health and Related Services Act 1998 (NT) s 123(4).

<sup>289</sup> Mental Health and Related Services Act 1998 (NT) s 142.

<sup>290</sup> See *R v Toobey (Aboriginal Land Commissioner); Ex Parte Northern Land Council* (1981) 151 CLR 170, especially at 219.

<sup>291</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

<sup>292</sup> *Kioa v West* (1985) 159 CLR 550. In any case most of the acts prescribe procedurally fair processes involving fair notice and hearings that detained persons can attend. See eg Mental Health Act 1986 (VIC), s24.

### **e) Remedies for unlawful detention**

220. The laws regarding habeas corpus and false imprisonment that apply to kettling also apply to mental health. Habeas corpus will lie if it can be shown that the detention is unlawful; and where detention is unlawful there may be damages for false imprisonment.

## **IV MILITARY DETENTION**

221. The law relating to detention of those serving in the military is found in the Defence Force Discipline Act 1982 (Cth) ('DFD Act').<sup>293</sup> The Act provides for military offences, military justice, police and investigatory powers, and provisions relating to different types of custody.
222. This section will not deal with detention following conviction of a service offence by court martial or other tribunal, as this constitutes detention following an exercise of judicial type power.

### **a) Threshold questions**

223. The DFD Act contains no substantive definitions for 'custody', 'detain', or 'detention'. It appears that there is no threshold question.

### **b) Decision to detain**

224. An officer has a power to arrest a member of the armed services of an inferior rank, and a member of the military police has the power to arrest any member of the armed services.<sup>294</sup>
225. Arrest may be done without a warrant if there are reasonable grounds to believe that:<sup>295</sup>
- the person has committed or is committing a service offence;
  - arrest is necessary to ensure the person appears before a tribunal hearing concerning a service offence;
  - arrest is necessary to prevent a service offence;
  - arrest is necessary to preserve evidence of a service offence; or
  - arrest is necessary for the health or welfare of the person being arrested.
226. Additionally, the Director of Military Prosecutions may issue a warrant for arrest of a person if he is satisfied upon affidavit evidence that there are reasonable grounds for believing the person has committed a service offence, and that they will not obey a summons to attend a tribunal hearing for that offence.<sup>296</sup> If a warrant for arrest is issued, then any member of the armed

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<sup>293</sup> DFD Act 1982.

<sup>294</sup> DFD Act 1982 s 89(2).

<sup>295</sup> DFD Act 1982 s 89(1).

<sup>296</sup> DFD Act 1982 s 90(1) and (2).

services or a police officer of a state or of the Australian Federal Police may arrest the person named in the warrant.<sup>297</sup>

227. Additionally, a person accused of committing a service offence who disobeys a summons to appear before a tribunal may be arrested under a warrant issued by the Registrar of the tribunal (at the direction of a judge advocate or Defence Force magistrate) or the Director of Military Prosecutions.<sup>298</sup> If a warrant for arrest is issued, then any member of the armed services or a police officer of a State or of the Australian Federal Police may arrest the person named in the warrant.<sup>299</sup>
228. Following arrest of a member of the armed services, they may be detained at a civil detention facility if necessary, before being transferred to a military detention facility.<sup>300</sup>
229. Within 24 hours after being transferred into military custody, the person arrested must be either charged with a service offence or released;<sup>301</sup> except if the person was arrested under a warrant issued for failing to appear at a tribunal hearing with respect to a service offence of which they were accused.<sup>302</sup> If, within 48 hours of the charge, proceedings have not been commenced with respect to the charge, the superior officer must report the reasons for the delay to superior officers,<sup>303</sup> and for every eight day period commencing with the charge that the person remains in custody without the charge having been dealt with, the superior officer must report the reasons for the delay to superior officers.<sup>304</sup> If the charge has not been dealt with within 30 days, then a superior officer should order the person's release unless he is satisfied that continued detention is proper.<sup>305</sup>

### **c) Review of and challenges to detention**

230. The DFD Act makes no provision for a detainee to challenge their detention following arrest and/or following charge.
231. The High Court of Australia has constitutional authority to hear all matters against the Commonwealth, or in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth. This constitutional jurisdiction cannot be excluded by

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<sup>297</sup> DFD Act 1982 s 90(5).

<sup>298</sup> DFD Act 1982 s 88(1) and (2).

<sup>299</sup> DFD Act 1982 s 88(4).

<sup>300</sup> DFD Act 1982 s 94.

<sup>301</sup> DFD Act 1982 s 95(2).

<sup>302</sup> DFD Act 1982 s 95(2).

<sup>303</sup> DFD Act 1982 s 95(4).

<sup>304</sup> DFD Act 1982 s 95(5).

<sup>305</sup> DFD Act 1982 s 95(8) and (9).

legislation. Therefore, it is possible for a member of the armed services detained under the DFD Act to challenge their detention before the High Court of Australia.

#### **d) Remedies for unlawful detention**

232. The DFD Act provides no remedies for unlawful detention. A person unlawfully detained may have a remedy in the common law tort of false imprisonment. The remedy for this tort is monetary damages to compensate for loss of dignity and suffering.<sup>306</sup>

## **V POLICE DETENTION FOR CROWD CONTROL**

### **a) Background**

233. Each state has legislative power; and thus its own criminal law, its own police force, and its own laws governing police procedure. There are also specific laws governing police procedure and powers in the NT and the ACT. The laws regarding police powers to erect cordons around an area or group in crowd control situation (sometimes known as ‘kettling’) therefore differ from state to state, between states and territories, and between state police forces and the federal police.
234. In all states and territories in Australia, police have a general common law power to keep the peace. Where there is no specific legislation regarding kettling, the common law applies. This report summarises the law in each separate jurisdiction under a separate sub-heading, with one heading for states where common law powers apply.

#### *i) New South Wales: Law Enforcement Powers and Responsibilities Act 2002 (NSW)*

235. Section 871(1) of the Law Enforcement Powers and Responsibilities Act 2002 (NSW) addresses circumstances where duly authorised police may place a cordon around a target area or any part of it or establish a road block.

#### *ii) Queensland: Police Powers and Responsibilities Act 2000 (QLD), s 50, 51*

236. Under ss 50 and 51 of the Police Powers and Responsibilities Act 2000 (Qld) Police officer may take steps they consider reasonably necessary, including detaining persons, in order to prevent a breach of the peace. A police officer may also take steps they consider reasonably necessary in order to suppress a riot.

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<sup>306</sup> Commonwealth of Australia Constitution s 75 (iii) and (v).

*iii) Victoria: Crimes Act 1958 (VIC), ss 462A, 23, 197,*

237. Under the Victorian Crimes Act 1958 (Vic), a police officer may take reasonable steps to prevent the commission of an indictable offence, which includes preventing conduct that may endanger persons or property.<sup>307</sup> There is also a general common law power to keep the peace.<sup>308</sup>

*iv) Northern Territory: Police Administration Act, s148*

238. Under s 148 of the Police Administration Act (NT), the Police Commissioner may direct that a public place be closed if 12 or more persons assembling there conduct themselves in a manner that results in unlawful physical violence or unlawful damage to property. There is no specific provision as to whether police can detain groups in a closed area by cordoning it off.

*v) Common law power to keep the peace*

239. There is no legislative regulation of kettling in Western Australia, South Australia, Tasmania, ACT, or at the Commonwealth level. By default, common law rules regarding police powers apply in these jurisdictions.

240. It is not settled whether common law police powers to keep the peace would encompass a power to use kettling in crowd control situations. The general rule (to which there are exceptions) is that police officers may not detain a person who is not under arrest.<sup>309</sup> A key exception at common law permits any person, including a police officer, to take reasonable steps to prevent another person from breaching the peace, including detaining a person without arrest.<sup>310</sup>

241. There does not appear to have been any express judicial consideration of whether that power to detain would permit the detention of persons other than the individuals breaching or threatening to breach the peace. There is some authority to the effect that a police officer may interfere in some limited ways, even with an innocent person, if that were the only way of preserving the peace.<sup>311</sup> The cases where this has been held have tended to involve confiscations of small pieces of property, rather than detention.<sup>312</sup> In crowd control situations the general power to prevent a breach of the peace has been held to extend to a power to use roadblocks, and a power to

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<sup>307</sup> Crimes Act 1958 (VIC) s 462A, 23, 197.

<sup>308</sup> see *R v Waterfield* [1964] 1 QB 164.

<sup>309</sup> See eg Crimes Act (VIC) 1958, 464I.

<sup>310</sup> *Lavin v Albert* [1982] AC 546, 549.

<sup>311</sup> *Humphrey v Connor* (1864) 17 Ir R 1; *Poiderin v Semaan* [2013] NSWCA 334, [19]; *Minto v McKay* [1987] BCL 722 (power to confiscate a protestor's megaphone).

<sup>312</sup> *ibid.*



disperse protesters, but there have not been any cases where detention of protesters in a 'kettle' was involved.<sup>313</sup>

242. Whether police steps to preserve the peace are reasonable is determined on a case-by-case basis.<sup>314</sup> Given that there is no clear common law precedent on kettling in Australia, whether, absent specific legislative provisions, police have the power to erect kettles for crowd control, will depend on the circumstances.

### **b) Threshold questions**

243. Under Australian law, kettling probably passes the threshold for detention. As noted, there does not appear to be any case law on the question of whether kettling amounts to 'detention' for the purposes of laws regarding unlawful detention such as habeas corpus and false imprisonment. Essentially the threshold questions are whether the confinement, and its duration, are sufficient to amount to detention in the eyes of the law.
244. Regarding confinement, it need not be very close to be considered detention. Confinements within a particular area without especially close custody (for example, house arrest, or confinement on a ship), have been considered to amount to detention.<sup>315</sup> As Black CJ put it in *Ruddock v Vadarlis*, 'a person might be unlawfully detained within a football field'.<sup>316</sup>
245. As for duration, detention even for a few hours may be considered detention in the context of false imprisonment.<sup>317</sup>
246. It follows that the confinement involved in kettling, even for periods of a few hours, ought also to pass the threshold for detention.

### **c) Decision to detain**

#### *i) New South Wales: Law Enforcement Powers and Responsibilities Act 2002 (NSW)*

247. In New South Wales, the cordoning or roadblock must be authorised by Commissioner of Police or Assistant Commissioner.<sup>318</sup> The authorisation must state that it is given under this Division, describe the general nature of the public disorder or threatened public disorder to which it applies (including the day or days it occurs or is likely to occur); describe the area or specify the road targeted by the authorisation; and specify the time it ceases to have effect. The authorisation

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<sup>313</sup> *Moss v McLachlan* [1985] IRLR 76 (QBD), *R v Commr of Police (Tas)*; *Ex parte North Broken Hill Ltd* (1992) 1 Tas R 99 (power to disperse picketers).

<sup>314</sup> *Poidevin v Semaan* [2013] NSWCA 334

<sup>315</sup> *Ex Parte Leong Kum* at 256-257; *Ex Parte Lo Pak*, 247-248 for confinement on board a ship held to be detention. See also *Ruddock v Vadarlis* [2001] FCA 1329, [209].

<sup>316</sup> *Ruddock v Vadarlis* [2001] FCA 1329, [68].

<sup>317</sup> *Bird v Jones* [1845] 7 QB 742 for detention at a police station for only a few hours held to be detention.

<sup>318</sup> Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87F

must be for the purpose of preventing or controlling public disorder in a particular area, or preventing travel to that area by road.<sup>319</sup> The officers exercising the power to cordon/roadblock must only exercise them for the authorised purpose.<sup>320</sup>

248. The cordoning/roadblock authorisation, including renewed authorisation, must cease to have effect within 48 hours of the first authorisation, unless otherwise ordered by a court on the application of the authorising officer.<sup>321</sup>
249. The Police Commissioner must report to the Ombudsman on any authorisation to use emergency powers within three months of the authorisation.<sup>322</sup>

*ii) Queensland: Police Powers and Responsibilities Act 2000 (QLD)*

250. In Queensland, to detain in a crowd control situation the police officer must reasonably suspect:<sup>323</sup>
- a breach of the peace is happening or has happened; or
  - there is an imminent likelihood of a breach of the peace; or
  - there is a threatened breach of the peace.

*iii) Victoria: Crimes Act 1958 (VIC)*

251. Under the Victorian *Crimes Act*, steps taken to prevent the offence must be reasonable.<sup>324</sup>

*iv) Northern Territory: Police Administration Act (NT)*

252. In the NT, the conduct prompting the closing of streets must result in unlawful physical violence or damage to property before the power to close a public place may be exercised.<sup>325</sup>

*v) Safeguards on common law power to keep the peace*

253. Kettling under common law powers to prevent a breach of the peace would only be lawful where the person exercising the power believes on reasonable grounds that:
- a breach of the peace is imminent; and
  - the steps taken to prevent a breach of the peace are necessary and reasonable.<sup>326</sup>

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<sup>319</sup> Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87E

<sup>320</sup> Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87H

<sup>321</sup> Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87G

<sup>322</sup> Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87O.

<sup>323</sup> Police Powers and Responsibilities Act 2000 (Qld) s 50.

<sup>324</sup> Crimes Act 1958 (VIC), s 462A, 23, 197

<sup>325</sup> Police Administration Act (NT), s148

<sup>326</sup> *Forbutt v Blake* (1981) 51 FLR 465; *Nilsson v McDonald* [2009] TASSC 66,

254. In some circumstances, interference with innocent persons may be reasonable. However, where such interference has been considered necessary or reasonable, it has usually been only minor interference.<sup>327</sup>
255. Presumably, the scale of a breach of the peace would have to be very serious in order to justify a conclusion that kettling was necessary and reasonable.

#### **d) Review of and challenges to detention**

##### *i) Habeas corpus*

256. Where detention is ongoing at the time a detainee seeks to challenge the detention, the most appropriate procedure available is to seek a writ of *habeas corpus*. The writ procures the release of persons from unlawful detention. The applicant has the evidentiary burden of showing he or she is detained. Once this is demonstrated, the burden then shifts to the detaining officer to demonstrate that the detention is lawful.<sup>328</sup> If the person who is detained cannot make the application by reason of his or her detention, then another person may do so on his or her behalf, relying on his own affidavit that swears to such facts.<sup>329</sup>

##### *ii) False imprisonment*

257. An action for the tort of false imprisonment may lie. In order to succeed in such an action the plaintiff would need to show:
- total deprivation of liberty of movement;
  - caused by the defendant's voluntary action;
  - which was unlawful.<sup>330</sup>

258. As noted above, the confinement involved in kettling would be sufficient to satisfy the first element. Whether it would be unlawful would depend on all the circumstances in question.

##### *iii) Unlawful deprivation of liberty (criminal)*

259. There is a common law criminal offence of false imprisonment or unlawful deprivation of liberty, which is reflected in some state legislation.<sup>331</sup> The likelihood of succeeding in a criminal prosecution against officers who confined crowds in a 'kettle' would probably be low, unless the conduct was very extreme.

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<sup>327</sup> *Humphrey v Connor* (1864) 17 Ir R 1; *Poidevin v Semaan* [2013] NSWCA 334, [19].

<sup>328</sup> *Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009, [27]ff.

<sup>329</sup> *Clarkson v R* [1986] VicRp 47.

<sup>330</sup> *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58.

<sup>331</sup> *R v Vollmer* [1996] 1 VR 95 (CCA). See also Criminal Code Act 1983 (NT), s 196; Criminal Code (Qld), s 355; Criminal Code (WA), s333.

*iv) Judicial review of exercise of powers under legislation*

260. Detainees may seek judicial review of decisions to kettle in state courts, or in the High Court or Federal Court.<sup>332</sup> In order to be successful, a detainee would need to show that the power was not exercised for the purpose for which it was granted.<sup>333</sup> A detainee might be successful, for example, where the person making a decision to use a kettle for crowd control asked itself the wrong question, identified a wrong issue, ignored a relevant issue, or made an erroneous finding, in exercising that power.<sup>334</sup> Such review may be difficult where police are exercising common law power, rather than powers granted by statute.<sup>335</sup>

*v) Constitutional challenge*

261. In some circumstances, it may be possible to mount a constitutional challenge to laws granting kettling powers, such as the Law Enforcement Powers and Responsibilities Act 2002 (NSW), s 87I(1). There is an implied constitutional guarantee of freedom of political communication.<sup>336</sup> There is also an implied guarantee of free movement and association.<sup>337</sup> These guarantees apply to state as well as federal laws.<sup>338</sup> To justify curtailing the right, a law providing for kettling must be directed to a legitimate end and be reasonably appropriate and adapted to meet that end.<sup>339</sup> Laws that interfere with rights of speech or assembly may therefore still escape invalidity.<sup>340</sup> However, where the curtailment of liberty is very severe, such as a detention for a very long period in a kettle, it may be easier to show that the law is not reasonably appropriate and adapted.
262. Constitutional guarantees are also relevant to the exercise of a discretionary power to kettle authorised by legislation, and not just to the legislation that enables it. Even if the legislative grant of power to kettle is valid, the power must be exercised in accordance with constitutional guarantees that limit the legislative grant in the first place.<sup>341</sup>

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<sup>332</sup> The High Court and Federal Courts have original jurisdiction to review decisions of officers of the Commonwealth. See s75(v), Constitution; S 39B, Judiciary Act (1903) (Commonwealth). State and territory supreme courts have common law jurisdiction to review decisions of officers of the relevant state or territory. This jurisdiction is generally formalised in the relevant Supreme Court Acts or Constitutions of each state.

<sup>333</sup> See *R v Toobey (Aboriginal Land Commissioner); Ex Parte Northern Land Council* (1981) 151 CLR 170, especially at 219.

<sup>334</sup> *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323. For a case on judicial review of a council order to ‘move on’ protesters, see *Muldoon v Melbourne City Council* [2013] FCA 994.

<sup>335</sup> See eg *Carter v Walker* [2010] VSCA 340.

<sup>336</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72

<sup>337</sup> *Kruger v The Commonwealth* (1997) 190 CLR 1;

<sup>338</sup> *Muldoon v Melbourne City Council* [2013] FCA 994.

<sup>339</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>340</sup> See eg *Muldoon v Melbourne City Council* [2013] FCA 994; *Wotton v Queensland* [2012] HCA 2.

<sup>341</sup> *Wotton v Queensland* [2012] HCA 2, [21]-[24].

#### *vi) Scrutiny and complaint*

263. In each state, there are procedures for lodging complaints against police, or subjecting police conduct to internal oversight and scrutiny.<sup>342</sup>

#### **e) Remedies for unlawful detention**

##### *i) Judicial review*

264. Relevant orders following judicial review might include an injunction or prohibition to prevent the erection of kettles, or a declaration that a decision to erect a kettle was unlawful.

##### *ii) False imprisonment or unlawful deprivation of liberty*

265. The usual remedy for the tort of false imprisonment is damages, which may be for the damages themselves but also for other harms such as embarrassment or pain and suffering.<sup>343</sup>

266. During false imprisonment, detainees also have a right to remedy their situation by self-help. They may use reasonable force to escape.<sup>344</sup> In cases of kettling, this is not usually advisable, since the detainers are the police.

##### *iii) Constitutional challenge: declaration of invalidity*

267. Where a law is found to be constitutionally invalid, the court may declare its invalidity and the law will cease to have effect.<sup>345</sup> Standard judicial review remedies will apply to exercises of statutory power that go beyond the constitutional limitations on the source of that power.

## **VI PREVENTIVE DETENTION**

268. The laws on preventive detention in Australia differ between the states and territories, so the legal framework is somewhat of a patchwork. There are three ways in which Australian law manages offenders who are seen to be ‘dangerous’ to the public:

- post-sentence preventative detention
- serious offender provisions; and
- indefinite sentences.

269. There are also provisions for preventive detention for counter-terrorism purposes, however these will be dealt with in the ‘administrative detention’ section of this Country Report.

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<sup>342</sup> See eg NSW Ombudsman, [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au); Queensland Police Service Headquarters [www.police.qld.gov.au](http://www.police.qld.gov.au), Police Conduct Unit (Victoria), [www.police.vic.gov.au](http://www.police.vic.gov.au).

<sup>343</sup> See eg *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

<sup>344</sup> *Kenlin v Gardiner* [1967] 2 QB 510.

<sup>345</sup> See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

270. The focus in this section will be on the post-sentence preventive detention provisions, however the serious offender provisions and indefinite sentences have been noted because the purpose of these laws is also to prevent ‘dangerous’ people from threatening the public, by imposing sentences that are longer than proportionate to the crime committed. The offenders are therefore arguably being arbitrarily detained in order to protect the community from harm.<sup>346</sup>

#### **a) Overview of the legal framework on post-sentence preventive detention**

271. The states of Queensland, New South Wales, Victoria and Western Australia all have post-sentencing preventive detention regimes. In Queensland, this applies to offenders in prison for a ‘serious sexual offence’, involving violence or against children.<sup>347</sup> In Western Australia a ‘serious sexual offence’ is one where the maximum penalty is seven or more years, and includes sexual offences on mentally impaired persons.<sup>348</sup> The provision in New South Wales is similar.<sup>349</sup>

272. Generally, across the states, the legitimacy of preventive detention will turn on whether the offender is a ‘serious danger to the community’ to the extent that there is an ‘unacceptable risk that the offender will commit a serious sexual offence’ if released from custody.<sup>350</sup> The courts will have regard to medical and psychiatric reports, patterns of offending and rehabilitation programs, among many other considerations.<sup>351</sup>

#### **b) Threshold questions**

273. In the case of preventive detention, this question is uncontroversial. The statutes clearly state that a person may be ‘detained’ and when this occurs, it is likely to be a clear act by the officer detaining, by putting the person in prison (or more often keeping them there). It is important to note that ‘supervision’ orders for dangerous offenders can also in fact mean full-time detention.<sup>352</sup>

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<sup>346</sup> For more information on these laws, see Sentencing Act 1991 (Vic); Habitual Criminals Act 1957 (NSW); Criminal Law (Sentencing) Act 1988 (SA); Bernadette McSherry, Patrick Keyzer and Arie Freiberg, ‘Preventive detention for ‘dangerous’ offenders in Australia : a critical analysis and proposals for policy development : report to the Criminology Research Council’ (Monash University, December 2006) <<http://www.criminologyresearchcouncil.gov.au/reports/200405-03.pdf>> accessed 29 December 2013.

<sup>347</sup> Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Schedule to the Act.

<sup>348</sup> Dangerous Sexual Offenders Act 2006 (WA) s 3; Evidence Act 1906 (WA), s 106A.

<sup>349</sup> Crimes (High Risk Offenders) Act 2006 (NSW).

<sup>350</sup> Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13.

<sup>351</sup> Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13(4).

<sup>352</sup> See for example Crimes (High Risk Offenders) Act 2006 (NSW), s 5I.

### c) Decision to detain

274. In New South Wales, the State Attorney-General may apply to the Supreme Court for the continuing detention of a high-risk sex offender or violent offender.<sup>353</sup> In Western Australia and Victoria, the DPP can apply for orders.<sup>354</sup> In all of these states, the Supreme Court decides whether a person should be detained.
275. There has been a very recent change to the legislation in Queensland which has meant that the powers which previously rested with the courts to continue to detain sex offenders are now in the hands of the Attorney-General.<sup>355</sup> The *Criminal Law Amendment (Public Interest Declarations) Amendment Act* was enacted in October 2013 and allows the Governor in Council (on advice from the Attorney-General) to order a 'relevant person' to continue to be detained, by making a 'public interest declaration'.<sup>356</sup> Once a public interest declaration is made, the *Dangerous Prisoners (Sexual Offenders) Act*, under which a person had been subject to a continuing detention order, ceases to apply and the person must then be detained at an 'institution' (which can include a corrective services facility).<sup>357</sup> A number of commentators have criticised the recent legislative change, stating that the power it gives to the Attorney-General breaches the separation of powers principle and erodes the checks and balances in the legal system.<sup>358</sup>
276. The detention of a person in Queensland is annually reviewed by two psychiatrists.<sup>359</sup> If the Governor in Council becomes satisfied that the detention is no longer in the public interest, they may order that the detention be stopped.<sup>360</sup> The legislation in Western Australia also calls for annual review.<sup>361</sup> In New South Wales and Victoria, the continuing detention will end on the date specified in the order, which must be less than five years.<sup>362</sup> Nonetheless, further continuing detention orders can subsequently be made.<sup>363</sup> Throughout the process, the New South Wales

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<sup>353</sup> Crimes (High Risk Offenders) Act 2006 (NSW), s 5H.

<sup>354</sup> Dangerous Sexual Offenders Act 2006 (WA) s 8; Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic), s 33.

<sup>355</sup> Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld).

<sup>356</sup> Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld), s 6; Criminal Law Amendment Act 1945 (Qld), Part 4.

<sup>357</sup> Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld), Division 3.

<sup>358</sup> Timebase, 'New Queensland Laws allow Attorney General to override the Courts' (18 October 2013) <<http://www.timebase.com.au/news/2013/AT729-article.html>> accessed 29 December 2013.

<sup>359</sup> Criminal Law Amendment Act 1945 (Qld), s 22C.

<sup>360</sup> Criminal Law Amendment Act 1945 (Qld), s 22F.

<sup>361</sup> Dangerous Sexual Offenders Act 2006 (WA), Part 3.

<sup>362</sup> Crimes (High Risk Offenders) Act 2006 (NSW), s 18(1).

<sup>363</sup> Crimes (High Risk Offenders) Act 2006 (NSW), s 18(3); Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) s 44.

Serious Offenders Review Council reports to the Supreme Court and the Minister about serious offenders.<sup>364</sup>

277. There have certainly been issues of procedural fairness in the way that Australia's preventative detention regimes have been carried out. A number of cases have highlighted the fact that applications for detention orders have been rushed, leaving the offender very little time to respond to them.<sup>365</sup> The cases of *Attorney-General for State of Queensland v Foy*<sup>366</sup> and *Attorney-General v Watego*<sup>367</sup> both reinforced the need for procedural fairness, particularly the importance of prisoners having sufficient time to prepare their case. In the case of *Foy*, the Attorney General notified the respondent one day before the hearing that the Attorney would be seeking the continued detention of the respondent during the period of an adjournment. This poor notice was criticised by Fryberg J, who instead released the respondent on undertakings. Similarly, in *Watego*, there was held to be a denial of procedural fairness on the basis that the respondent was not given sufficient time to respond to the applicant's material. After legal aid was approved, the respondent had only one day before he was required to respond. The short notice was compounded by the respondent's limited intellectual capacity and restrictions caused by his incarceration.
278. One issue of procedural fairness specific to the New South Wales and Victorian regimes is that interim detention orders can be made if it appears that the offender's current custody will expire before proceedings are determined, as long as the matters alleged by the Attorney-General would, if proved, justify a continuing detention order.<sup>368</sup> During this interim stage though, there is little opportunity for the detainee to bring evidence or defend themselves against the Attorney General's claims.
279. Generally, people to whom the preventative detention rules apply appear to have had access to legal representation, but this important aspect of procedural fairness will always be dependent on funding.<sup>369</sup> Notably, one offender in Western Australia was subject to an application for

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<sup>364</sup> Serious Offenders Review Council, 'Annual Report' (December 2011) <[http://www.correctiveservices.nsw.gov.au/\\_media/dcs/offender-management/sorc/SORC-Report-2011-web.pdf](http://www.correctiveservices.nsw.gov.au/_media/dcs/offender-management/sorc/SORC-Report-2011-web.pdf)> accessed 29 December 2013.

<sup>365</sup> *Attorney General for State of Queensland v Foy* [2004] QSC 428; *Welford, Attorney-General v Francis* [2004] QSC 128 [3]–[17].

<sup>366</sup> [2004] QSC 428

<sup>367</sup> [2003] QSC 367. See also *Attorney-General v Nash* [2003] QSC 377.

<sup>368</sup> Crimes (High Risk Offenders) Act 2006 (NSW), s 18A; Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) s 53.

<sup>369</sup> Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive detention for 'dangerous' offenders in Australia : a critical analysis and proposals for policy development : report to the Criminology Research Council' (Monash University, December 2006) <<http://www.criminologyresearchcouncil.gov.au/reports/200405-03.pdf>> accessed 29 December 2013, p 75.



continued detention in 2006, but the Supreme Court dismissed the application and released the person because he had no legal representation.<sup>370</sup> It is possible that the court might be able to stay proceedings until a detainee can access legal representation.<sup>371</sup>

280. A number of commentators have also taken issue with the dependence of the preventative detention regimes on testimony provided by mental health professionals, particularly in terms of unavoidable inaccuracies.<sup>372</sup>

281. Despite the aforementioned judgments which emphasised the importance of procedural safeguards in preventative detention orders, many commentators argue that the laws allow people to be imprisoned after completing their sentences, without the full procedural safeguards that the criminal justice system usually imports.<sup>373</sup> It has been stated that:

...the boundaries of procedural fairness in relation to preventive detention are still unclear. It may be that they will develop in line with general criminal proceedings.<sup>374</sup>

#### **d) Reviews of and challenges to detention**

282. As stated above, there are annual review provisions built into the legal framework in some states, to determine whether a prisoner is still a serious danger to the community. In exceptional circumstances, a Supreme Court might allow for review before the one-year mark.<sup>375</sup> Detainees are able to appeal against court decisions.<sup>376</sup> In New South Wales, a detainee can apply to the Court to vary or revoke their detention order.<sup>377</sup>

283. Public officials are in some cases protected from liability. For example, the new legislation in Queensland has a provision which specifically removes any civil liability for a public official

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<sup>370</sup> *Director of Public Prosecutions for Western Australia v Paul Douglas Allen* [2006] WASC 160.

<sup>371</sup> Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive detention for 'dangerous' offenders in Australia : a critical analysis and proposals for policy development : report to the Criminology Research Council' (Monash University, December 2006) <<http://www.criminologyresearchcouncil.gov.au/reports/200405-03.pdf>> accessed 29 December 2013, p 79; *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>372</sup> James Ogloff, Dominic Doyle, Bernadette McSherry, Jonathon Clough, 'Extended Supervision and Detention' (undated) <<http://www.med.monash.edu.au/psych/research/centres/cfbs/lawbs-esd.html>> accessed 29 December 2013.

<sup>373</sup> Patrick Keyzer and Sam Blay, 'Double Punishment-Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The Fardon Communication' (2006), 7 *Melbourne Journal of International Law* 407.

<sup>374</sup> Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive detention for 'dangerous' offenders in Australia : a critical analysis and proposals for policy development : report to the Criminology Research Council' (Monash University, December 2006) <<http://www.criminologyresearchcouncil.gov.au/reports/200405-03.pdf>> accessed 29 December 2013, p 79.

<sup>375</sup> Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 28; Dangerous Sexual Offenders Act 2006 (WA), s 30.

<sup>376</sup> Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Part 4; Dangerous Sexual Offenders Act 2006 (WA), s 34.

<sup>377</sup> Crimes (High Risk Offenders) Act 2006 (NSW), s 19.

(including the Attorney-General) 'for an act done, or omission made' in relation to the public interest declaration and detention of sex offenders.<sup>378</sup>

284. Although infringements of the ICCPR are not directly enforceable in Australian courts because of Australia's failure to incorporate the ICCPR into domestic law, detainees can nonetheless petition the UN Human Rights Committee for its views, which, although non-binding, are likely to be taken seriously.<sup>379</sup> For example, in the landmark case of *Fardon v Attorney-General*,<sup>380</sup> the High Court held that the Queensland post-sentence preventative detention regime under the Dangerous Prisoners (Sexual Offenders) Act was constitutional. The detainee, Fardon, then petitioned to the Human Rights Committee of the United Nations, arguing that the preventive detention regime in Queensland was contrary to the double jeopardy provision in art 14(7) of the ICCPR.<sup>381</sup> The Committee upheld the complaint, stating that Fardon's detention was unlawful under the ICCPR.

#### **e) Remedies for unlawful detention**

285. As stated above, Supreme Courts can revoke or vary detention orders. For example, a court could impose a post-sentence supervision order instead of a detention order, allowing the offender greater freedom of movement (this could include in the offender's community or home).<sup>382</sup>
286. Victoria has a Charter of Human Rights and Responsibilities<sup>383</sup> according to which any public authorities and public servants must demonstrate respect for the inherent dignity of all people.<sup>384</sup> However, the power of the Supreme Court of Victoria only extends to making a declaration that the interpretation of legislation has been inconsistent with the Charter, so the remedies for any breaches of rights under the Charter are limited.

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<sup>378</sup> Criminal Law Amendment Act 1945 (Qld), s 22R.

<sup>379</sup> Bernadette McSherry, Patrick Keyzer and Arie Freiberg, 'Preventive detention for 'dangerous' offenders in Australia : a critical analysis and proposals for policy development : report to the Criminology Research Council' (Monash University, December 2006) <<http://www.criminologyresearchcouncil.gov.au/reports/200405-03.pdf>> accessed 29 December 2013, p 76.

<sup>380</sup> *Fardon v Attorney-General* (Qld) (2004) 210 ALR 50.

<sup>381</sup> Patrick Keyzer and Sam Blay, 'Double Punishment-Preventive Detention Schemes under Australian Legislation and Their Consistency with International Law: The Fardon Communication' (2006), 7 Melbourne Journal of International Law 407.

<sup>382</sup> See for example Crimes (High Risk Offenders) Act 2006 (NSW), s 5I.

<sup>383</sup> Charter of Human Rights and Responsibilities Act 2006 (Vic).

<sup>384</sup> *ibid*, s 22(1).

# Country Report for Austria

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. Austria has not introduced any special form of administrative detention for counter-terrorism, intelligence gathering or security reasons in the wake of the terrorism legislation of the last decade. However, in Austria, authorities of the administrative branch already had the general power to impose detention as a sanction for administrative (non-criminal) offences for a long time. In fact, this was why Austria initially made a reservation to Art 5 of the European Convention on Human Rights ('ECHR'), when the decision in the second instance was not conferred to a tribunal.<sup>1</sup>
2. Administrative authorities today may still impose detention of a maximum period of six weeks for an administrative offence.<sup>2</sup> However, constitutional law requires that in this case there must be a guarantee that a comprehensive appeal (with suspensive effect) can be lodged with a tribunal, in the sense of Art 6 ECHR.<sup>3</sup> Thus such an administrative decision on detention can be challenged before either the Appellate Federal Administrative Court or a State's Appellate administrative court.<sup>4</sup>
3. More generally, everyone arrested or detained is entitled to take proceedings in which a court or another tribunal (in the sense of Art 6 ECHR) decides on the lawfulness of the deprivation of liberty and, if the detention is not lawful, orders their release. The decision must be issued within a week, unless the detention has already ended.<sup>5</sup> Due to the superior rank of constitutional laws in the Austrian legal order,<sup>6</sup> ordinary statutes, regulations or administrative decisions (such as introducing different forms of administrative detention) which violate these guarantees can be challenged before and invalidated by the Austrian Constitutional Court. These constitutional provisions provide the framework and limits for the introduction of administrative detention by

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<sup>1</sup> Since 1988 however, the decision in second instance has been carried out by an administrative tribunal meeting the criteria of Art 6 ECHR, and thus the problems with the ECHR have vanished or decreased.

<sup>2</sup> Verwaltungsstrafgesetz 1991 BGBl. Nr. 52/1991, s 12 ('Verwaltungsstrafgesetz'); BVG Persönliche Freiheit, art 3 abs 2.

<sup>3</sup> BVG Persönliche Freiheit, art 3 abs 3.

<sup>4</sup> Bundes-Verfassungsgesetz, art 130 abs 1.

<sup>5</sup> BVG Persönliche Freiheit, art 6 abs 1.

<sup>6</sup> The hierarchy of the Austrian legal order has constitutional law on the top, ordinary statutes below. The Supreme Administrative Court checks the violation of ordinary laws in individual administrative decisions, while the Constitutional Court checks if individual decisions or statutes or secondary legislation violates fundamental constitutional rights like liberty or other constitutional provisions. If that is the case, the court invalidates the decisions or statutes or secondary legislation.

means of ordinary statutes or delegated legislation. While new indeterminate and broad criminal offences introduced by anti-terrorism legislation and application of existing offences on criminal enterprises (eg on animal rights activists) have proven to be controversial, Austria has thus far not shown major tendencies to weaken the role of the judiciary concerning deprivations of liberty or to introduce new forms of administrative detention.

## II IMMIGRATION DETENTION

### a) Preliminary remarks

4. The central provisions in respect of immigration detention are ss 76 – 81 of the Foreigners' Police Act,<sup>7</sup> which govern detention to secure (possible) deportation. Section 76 paras 1, 2 and 2a of the Foreigners' Police Act stipulate the grounds for deportation detention of foreigners. The first paragraph of the said provision functions as general clause whereas paras 2 and 2a contain specific grounds applicable to asylum seekers under certain circumstances. According to the jurisprudence of the Supreme Administrative Court, deportation detention cannot be imposed, based on the general clause of para 1, on a foreigner who falls in the scope of application of the specific rules of paras 2 or 2a.<sup>8</sup>
5. The general rule is that foreigners may be arrested and taken into deportation detention if this is necessary in order to secure certain expulsion-related proceedings, until a final decision is reached and becomes enforceable, or to secure deportation. Foreigners who are legally residing on Austrian territory may be taken into deportation detention if it must be assumed due to certain facts that they will evade the proceeding.<sup>9</sup> Minors below the age of 14 must not be taken into deportation detention.<sup>10</sup>
6. According to the jurisprudence of the Supreme Administrative Court the assessment of the necessity and proportionality of imposing deportation detention is required. This requires balancing the public interest of securing the expulsion of a foreigner with the private interest of respect for personal liberty in each individual case.<sup>11</sup>

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<sup>7</sup> Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetiteln BGBl. I Nr. 100/2005 ('Fremdenpolizeigesetz 2005').

<sup>8</sup> Lamiss Khahkzadeh-Leileer, 'Die Schubhafttatbestände in der Judikatur des VwGH' [2010] Juridikum 220, 224.

<sup>9</sup> Fremdenpolizeigesetz 2005, § 76 abs 1.

<sup>10</sup> Fremdenpolizeigesetz 2005, § 76 abs 1a.

<sup>11</sup> Lamiss Khahkzadeh-Leileer, 'Die Schubhafttatbestände in der Judikatur des VwGH' [2010] Juridikum 220, 221; see also VwGH 27. 5. 2009, 2008/21/0036; VwGH 30. 4. 2009, 2007/21/0541; VwGH 17. 3. 2009, 2007/21/0542; VwGH 17. 7. 2008, 2007/21/0364; VwGH 28. 5. 2008, 2007/21/0246.

## b) Threshold questions

### *i) Particular obligation of asylum seekers to cooperate and be present in the refugee reception centre as deprivation of liberty?*

7. A 2011 amendment of the Asylum Act 2005<sup>12</sup> introduced a controversial ‘obligation to cooperate’, for asylum seekers, whose proceedings are conducted in an initial refugee reception centre of the Federal Agency for Foreigners’ and Asylum Affairs.<sup>13</sup> These asylum seekers have to be available in the refugee reception centre continuously for a maximum period of 120 hours from the submission of their asylum request to the completion of certain initial procedural and investigative steps within their asylum proceedings.<sup>14</sup> This period may be extended by another 48 hours in individual cases in order to allow for an interrogation by an organ of the Federal Asylum Agency, which is an administrative authority. However, the asylum seeker has to be summoned for this interrogation at least 24 hours before the expiration of the 120 hours period.<sup>15</sup> If asylum seekers decide to leave the refugee reception centre, despite the obligation to be present, it is not foreseen that they can be forced to stay by coercive means. However, leaving of the refugee reception centre then constitutes a ground to be taken into deportation detention under certain circumstances.<sup>16</sup>
8. It has been repeatedly discussed in academia and the wider public whether this obligation to cooperate constitutes a deprivation of liberty of asylum seekers and, if so, whether this deprivation of liberty can be justified under Austrian constitutional law and the ECHR (which has also been implemented in Austrian constitutional law). Deprivations of liberty are only constitutional in Austria if they serve one of the purposes explicitly stated in the Federal Constitutional Law on the Protection of Personal Liberty.<sup>17</sup> Thus it is questionable if the said obligation can be justified on the ground of art 2 para 1 fig 7 of the Federal Constitutional law which allows a deprivation of liberty ‘when necessary, to secure a proposed deportation or extradition’, or on other specified grounds. Furthermore, it is contestable whether the obligation

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<sup>12</sup> Bundesgesetz über die Gewährung von Asyl BGBl. I Nr. 100/2005 (‘Asylgesetz 2005’).

<sup>13</sup> The obligation to cooperate requires all asylum seekers whose early stages of proceedings are conducted in these centres to stay in the centres (limitation/deprivation of liberty) for these periods to facilitate the proceedings. The obligation applies generally to all asylum seekers at beginning of the proceedings, independent of considerations such as flight risks etc. The threshold question which arises is only if it is restriction or deprivation of liberty.

<sup>14</sup> Asylgesetz 2005, § 15 abs 3a.

<sup>15</sup> Asylgesetz 2005, §§ 15 abs 3a and 29 abs 6Z6.

<sup>16</sup> § 24 A Asylgesetz 2005 iVm § 76 Abs 2a Z6 Fremdenpolizeigesetz 2005; see also Gerhard Muzak, ‘Fremden- und Asylrecht’ in Hammer and others (eds), *Besonderes Verwaltungsrecht* (Facultas WUV Vienna 2012) 172.

<sup>17</sup> Bundesverfassungsgesetz vom 29. November 1988 über den Schutz der persönlichen Freiheit BGBl. Nr. 684/1988 (‘BVG Persönliche Freiheit’).

of all asylum seekers to be present in the refugee reception centre in such a generality can be brought in line with the requirement that each single deprivation of liberty must be necessary (no less restrictive means available) and proportionate.<sup>18</sup> Others have argued that the explained obligation to be present does not constitute a deprivation of liberty because it cannot be enforced by coercive power, but that it is nevertheless unconstitutional since it is arbitrary because the legal consequences do not depend on the necessity of the presence in the centre.<sup>19</sup> The Austrian debate has also repeatedly referred to the *Saadi v the UK* case<sup>20</sup> of the (‘ECtHR’), to argue that an obligation of presence for seven days for asylum seekers can be justified.<sup>21</sup>

*ii) Stay in transit area of airports as deprivation of liberty?*

9. Section 42 para 1 Foreigners' Police Act stipulates that a foreigner who has to be turned away at a border control and who is not able to immediately leave the border control area due to a matter of law or fact may be instructed to stay in a particular location within the border control area. This is ordered without prejudice to their right to immediately leave Austrian territory, for the time of this stay in order to secure their rejection (expulsion). In practice this provision is particularly relevant with regard to air travel since foreigners who have to be turned away, eg because they do not have any travel documents with them, may be instructed to stay in a particular area for rejected travellers within the transit zone of an airport. They can be made to stay for several days or even weeks, for example until the next flight back to their country of origin becomes available. At the Vienna International Airport, this zone at the time of academic inquiry consisted of a corridor, three rooms for rejected travellers and bathroom facilities, and is separated from other transit areas by locked doors. The stranded foreigners can ring a bell in order to contact the responsible officers, may use a telephone and receive assistance in order to prepare their departure.<sup>22</sup>
10. The legislators did not intend the stay in the separate area of the transit zone to constitute a deprivation of liberty in respect of Art 5 of the ECHR and the Federal Constitutional Law on Liberty. However, the advisory and independent Human Rights Council established at the Ministry of the Interior claims that it clearly amounted to such a deprivation. The threshold

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<sup>18</sup> BVG Persönliche Freiheit, art 1 abs 3; Heinz Mayer, ‘Die Anwesenheitspflicht von Asylwerbern’ [2010] migraLex 36; Bernhard Raschauer, ‘Anwesenheitspflicht im Erstaufnahmezentrum’ [2010] migraLex 38.

<sup>19</sup> Bichl and others, ‘Im Hamsterrad der Fremdengesetzgebung - ‘Rot-Weiß-Rot-Karte’, Anwesenheitspflicht für Asylwerber und Schubhaft für Minderjährige’ [2011] migraLex 49, 57.

<sup>20</sup> Reports of Judgments and Decisions 2008.

<sup>21</sup> Bernhard Raschauer, ‘Anwesenheitspflicht im Erstaufnahmezentrum’ [2010] migraLex 38.

<sup>21</sup> Bichl and others, ‘Im Hamsterrad der Fremdengesetzgebung - ‘Rot-Weiß-Rot-Karte’, Anwesenheitspflicht für Asylwerber und Schubhaft für Minderjährige’ [2011] migraLex; Heinz Mayer, ‘Die Anwesenheitspflicht von Asylwerbern’ [2010] migraLex 36.

<sup>22</sup> Nicolaus Raschauer and Wolfgang Wessely, ‘Anhaltung von Fremden im Transitbereich’ [2005] migraLex 88.

question has also been discussed in academic literature.<sup>23</sup> In its 2005 judgement in *Mabdid and Haddar v Austria*,<sup>24</sup> the ECtHR dealt with the complaint of four applicants concerning their stay in the transit zone of the Vienna International Airport. In this case the Court found that no deprivation of liberty had occurred and that the applicants' complaints based on Art 5 ECHR were manifestly ill founded. It thus declared the application inadmissible.<sup>25</sup> However, the relevance of this case for the above outlined contemporary threshold question in respect of Section 42 Foreigners Police Act is limited since the applicants were for the vast majority of the period not detained in a separate and locked area of the transit zone, but could move freely in the general transit zone. Moreover, it was based on the previous provisions of s 42 of the Foreigners Police Act and not on the legislation currently in force.

### **c) Decision to detain**

11. The imposition of deportation detention has to be ordered in the form of an administrative decision.<sup>26</sup> The competent authority to take the decision is the Federal Agency on Foreigners' Affairs and Asylum.<sup>27</sup> This means that the decision is taken by a public official of this authority. The decision is normally taken in an express proceeding, which means that the concerned foreigner does not have to be heard.<sup>28</sup> The authority must not impose deportation detention if it can be assumed that the aim can be equally achieved with a less interfering measure. The imposition of a deposit, a duty to report to an authority regularly or an order to live in a specific accommodation are explicitly mentioned as examples of such less interfering measures.<sup>29</sup>

### **d) Review of and challenges to detention**

12. The Federal Agency on Foreigners' and Asylum Affairs has to examine *ex officio* (automatically, on their initiative) at least every four weeks if an imposed deportation detention is still proportionate. This *ex officio* assessment is not to be undertaken if a proceeding initiated by a complaint (as explained in the following paragraph) is already under way.<sup>30</sup> The detainee has to be released as soon as deportation detention is not necessary anymore. The maximum length of

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<sup>23</sup> *ibid* 88.

<sup>24</sup> 2005-XIII.

<sup>25</sup> *ibid* 1ff.

<sup>26</sup> Fremdenpolizeigesetz 2005, § 76 abs 3.

<sup>27</sup> Bundesgesetz, mit dem die allgemeinen Bestimmungen über das Verfahren vor dem Bundesamt für Fremdenwesen und Asyl zur Gewährung von internationalem Schutz, Erteilung von Aufenthaltstiteln aus berücksichtigungswürdigen Gründen, Abschiebung, Duldung und zur Erlassung von aufenthaltsbeendenden Maßnahmen sowie zur Ausstellung von österreichischen Dokumenten für Fremde geregelt werden BGBI. I Nr. 87/2012 ('BFA-Verfahrensgesetz'), § 3 abs 2 Z4.

<sup>28</sup> Fremdenpolizeigesetz 2005, § 76 abs 3.

<sup>29</sup> Fremdenpolizeigesetz 2005, § 77.

<sup>30</sup> Fremdenpolizeigesetz 2005, § 80 abs 6.

deportation detention is two months for minors and normally four months, and under exceptional circumstances six months, for adults<sup>31</sup>.

13. In addition, foreigners who have been taken in deportation detention based on the Foreigners Police Act, have the right to lodge a complaint with the Appellate Federal Administrative Court if they claim that their arrest or the administrative decision ordering deportation detention is unlawful.<sup>32</sup> The Appellate Federal Administrative Court has to issue its decision regarding the prolongation of the deportation detention within one week, unless the detainee has already been released.<sup>33</sup> If a foreigner is placed in deportation detention for a continuous period of more than four months, the proportionality of this measure must be examined by the Appellate Federal Administrative Court on the day after the four month period is reached, and every four weeks thereafter. The Federal Agency for Foreigners' and Asylum Affairs has to provide the administrative files in advance in order so that the Court has a week before the expiry of these deadlines available to render its decision. The delivery of the administrative files by the agency counts *ex lege*, as if the detainee has lodged a complaint.<sup>34</sup> This means that these regular assessments of deportation detentions exceeding four months are to be conducted automatically without the initiative of the detainee. The Appellate Federal Administrative Court meets the criteria of a tribunal in accordance with Art 6 ECHR. The detainee has the right to be heard in the (merits) review proceeding.<sup>35</sup> The Court principally has to carry out a public hearing on the request of the detainee or *ex officio*, if it regards the hearing as necessary.<sup>36</sup>
14. Subsequently, the decision of the Appellate Federal Administrative Court can be challenged before the Austrian Constitutional Court based on alleged violations of constitutional law, including the right to liberty.<sup>37</sup> In rare cases and under certain circumstances, the decision can also be challenged before the Supreme Administrative Court based on alleged violations of ordinary statutes.<sup>38</sup>

#### **e) Compensation for unlawful detention**

15. As there is no specific statutory ground to claim compensation, damage claims can be raised based directly on art 7 Constitutional Law on Liberty in analogous application of the principles

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<sup>31</sup> Fremdenpolizeigesetz 2005, § 80 abs 1-2.

<sup>32</sup> BFA-Verfahrensgesetz, s 7; Bundes-Verfassungsgesetz, art 130 abs 1.

<sup>33</sup> BFA-Verfahrensgesetz, s 22a abs 2.

<sup>34</sup> BFA-Verfahrensgesetz, s 22a Abs 4.

<sup>35</sup> Allgemeines Verwaltungsverfahrensgesetz 1991 BGBl. Nr. 51/1991 (AVG) iVm § 11 Bundesgesetz über das Verfahren der Verwaltungsgerichte BGBl. I Nr. 33/2013 ('Verwaltungsgerichtsverfahrensgesetz'), § 43.

<sup>36</sup> § 24 Verwaltungsgerichtsverfahrensgesetz, § 24.

<sup>37</sup> Bundes-Verfassungsgesetz, art 144 abs 1.

<sup>38</sup> Bundes-Verfassungsgesetz, art 133 abs 1 Z1.



of the Public Liability Compensation Act<sup>39</sup> before the competent civil law court<sup>40</sup>. In case detention has been declared unlawful, compensation is to be granted based on principles of strict liability and includes damages for the immaterial harm implied in detention<sup>41</sup>.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Preliminary remarks

16. The placement of persons with mental illnesses in closed units of psychiatric hospitals is governed by the provisions of the Act on the Placement of Mentally-Ill Persons in Hospitals.<sup>42</sup> Persons may only be placed in a psychiatric hospital if they are both mentally ill, and thus seriously endanger their life or health or the life or health of others; *and* if their illness cannot be treated sufficiently in another way, eg outside of a psychiatric hospital.<sup>43</sup> Under the precondition that persons meet this basic requirement of placement, the Act then foresees both the possibility of a placement on the person's request,<sup>44</sup> and without or against the will of the person concerned.<sup>45</sup>
17. Limitations of mentally ill persons' rights to personal liberty in other institutions than psychiatric hospitals (for example in homes for handicapped people, elderly people or people in need of care) are governed by the Act on the Protection of Personal Liberty in Homes and other Institutions of Care.<sup>46</sup> Interferences with personal liberty based on this law are only allowed if the resident of the home is mentally-ill or mentally disabled and thus seriously endangers their life or health or the health or life of others; the measure is absolutely necessary and proportionate to the danger regarding its intensity and duration, and the danger cannot be avoided through other (less severe) measures<sup>47</sup>.

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<sup>39</sup> Bundesgesetz über die Haftung der Gebietskörperschaften und der sonstigen Körperschaften und Anstalten des öffentlichen Rechts für in Vollziehung der Gesetze zugefügte Schäden BGBl. Nr. 20/1949 ('Amtshaftungsgesetz').

<sup>40</sup> Theo Öhlinger and Harald Eberhard, '*Verfassungsrecht*' (Facultas WUV Vienna 2012) para 856; Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

<sup>41</sup> Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

<sup>42</sup> Bundesgesetz vom 1. März 1990 über die Unterbringung psychisch Kranker in Krankenanstalten BGBl. Nr. 155/1990 ('Unterbringungsgesetz').

<sup>43</sup> Unterbringungsgesetz, § 3.

<sup>44</sup> 4 Unterbringungsgesetz, § 4.

<sup>45</sup> Unterbringungsgesetz, § 8.

<sup>46</sup> Bundesgesetz über den Schutz der persönlichen Freiheit während des Aufenthalts in Heimen und anderen Pflege- und Betreuungseinrichtungen BGBl. I Nr. 11/2004 ('Heimaufenthaltsgesetz').

<sup>47</sup> Heimaufenthaltsgesetz, § 4.

## **b) Threshold questions**

18. The Act on the Placement of Mentally Ill Persons in Hospitals understands placement as detention of persons in closed zones of psychiatric hospitals or departments or other limitations of the liberty of movement of persons in psychiatric hospitals or departments.<sup>48</sup> The Act on the Protection of Personal Liberty in Homes and other Institutions of Care contains an explicit definition of limitation of liberty (*Freiheitsbeschränkung*) which is a wider term than deprivation of liberty (*Freiheitsentziehung*). A limitation of liberty is given if a resident is prevented from moving from one location to another (*Ortsveränderung*) without consent by physiological means like mechanic, electronic or medication measures or the threat of using them.<sup>49</sup> A review of case law and academic literature has not found any major relevant threshold issues.

## **c) Decision to detain**

### *i) The Act on the Placement of Mentally Ill Persons in Hospitals*

19. This Act distinguishes between the placement on request and without request of the person concerned. For a placement on request it is required that the general condition for a placement explained above is met and that the person has the necessary capacity of understanding and judgement to understand the meaning of a placement. The request has to be filed in writing in the presence of the head of the psychiatric department/hospital or their deputy. The request can be revoked, even implicitly, at any time and the head of the department has to inform the person concerned of this right.<sup>50</sup> Concerning the placement of persons below the age of 18 and others having a legal representative, the consent of their representative is required in addition.<sup>51</sup>
20. The head of department has to examine the potentially placed person. They may only be placed in the closed unit of the psychiatric hospital if the head of department comes to the conclusion that the general requirements of placement and the necessary capacity of judgement and understanding are met. The result of the examination is to be documented in the patient's file. Finally, the head of department has to inform the patient about their right to consult the Patient Attorney.<sup>52</sup>
21. The conditions for the placement of persons without request are set out in ss 8ff. Persons may only be put in placement after they have been examined by a medical doctor working with the public medial corps or the police, who certify that the requirements of placement are fulfilled.

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<sup>48</sup> Unterbringungsgesetz, § 2.

<sup>49</sup> Heimaufenthaltsgesetz, § 3.

<sup>50</sup> Unterbringungsgesetz, § 4.

<sup>51</sup> Unterbringungsgesetz, § 5.

<sup>52</sup> Unterbringungsgesetz, § 6.

The doctor has to outline the specific circumstances why they come to this conclusion in the certificate.<sup>53</sup> To avoid the possibility of delay, the police may bring a person into a closed psychiatric department without prior examination by a doctor.<sup>54</sup> Any person concerned has to be examined immediately by the head of the psychiatric department or hospital. They may only be put in placement if the head of department (also) finds and certifies that the conditions of the placement are met.

22. The head of department has to inform the patient about the reasons for the placement as soon as possible. Moreover, they have to notify the Patient Attorney, a relative of the patient (unless the patient does not want the notification of a relative) and if requested by the patient also their legal adviser about the placement. The Patient Attorney also has to receive a copy of the medical certificate issued by the head of department.<sup>55</sup>

*ii) The Act on the Protection of Personal Liberty in Homes and other Institutions of Care*

23. A measure limiting a resident's personal liberty may only be taken on the order of an authorised person. Interferences with liberty, which are medication-related, have to be ordered by a medical doctor, while those that occur in the field of care have to be ordered by higher personnel of the care services entrusted by the employer. Interferences in the homes for handicapped persons have to be authorised by the pedagogical head of the institution or their deputy. If a resident's liberty is limited for more than 48 hours or regularly, summing up to more than 48 hours, the head of the institution immediately has to demand a medical certificate proving the mental illness or handicap of the person concerned, and the serious danger they thus constitute to their own, or others, life or health. These documents have to be up-to-date at the moment of limitation of liberty. Measures interfering with personal liberty have to be applied in a professional manner and under maximum consideration and protection of the resident. These measures have to be repealed immediately if its pre-conditions vanish.<sup>56</sup> The reason, nature, start and duration of a measure interfering with personal liberty have to be documented together with medical certificates and the related mandatory notifications.<sup>57</sup> Residents have to be informed of the same by the authorised person ordering the measure. In addition the authorised person also has to notify the head of the institution, the resident's representative and their confident about the beginning or end of any liberty infringing measure immediately.<sup>58</sup>

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<sup>53</sup> Unterbringungsgesetz, § 8.

<sup>54</sup> Unterbringungsgesetz, § 9 abs 2.

<sup>55</sup> Unterbringungsgesetz, § 10.

<sup>56</sup> Heimaufenthaltsgesetz, § 5.

<sup>57</sup> Heimaufenthaltsgesetz, § 6.

<sup>58</sup> Heimaufenthaltsgesetz, § 7.

#### **d) Review of and challenges to detention**

##### *i) The Act on the Placement of Mentally Ill Persons in Hospitals*

24. Persons put in placement on their request may be detained for a maximum period of six weeks, or if they express a new request, for a total of 10 weeks. The provisions on the placement of persons on their request explained above are applicable to the new request. The placement on request cannot in any case exceed the period of six weeks or maximum ten weeks in total.<sup>59</sup> As already mentioned, the person concerned can at all times implicitly or explicitly revoke their consent to be kept in placement within these periods<sup>60</sup>. They then have to be released. However, in the case of revoked consent or expiry of the six or 10 weeks period, a person may further be kept in placement if it must be assumed that the requirements of a placement are still met. The guarantees of s 10 governing placements without consent outlined above are to be applied in such cases.<sup>61</sup>
25. Regarding placements without consent, a second qualified doctor has to examine the patient and to issue a medical certificate in respect of the conditions of placement on the request of the patient, their representative or the head of department. This second examination has to be conducted until noon of the next working day following the day of the request. The patient must be informed of this right. A copy of the medical certificate has to be sent to the patient's attorney immediately. If the preconditions of the placement are not met (anymore) according to this second certificate, the patient is to be released immediately.<sup>62</sup> The head of department has to notify the competent district court immediately of a placement without request. A copy of the medical certificate they produced in the course of their examination of the patient and, if conducted on request also of the medical certificate of the second independent examination, are to be sent to the court.<sup>63</sup>
26. Each person put in placement without consent is *ex lege* (automatically) supported and represented by a Patient Attorney in the court proceedings explained in the following paragraphs. The patient has the option to choose another legal adviser and representative in addition or instead of the Patient Attorney. The Patient Attorney has to consult with the patient about planned steps and has to respect the will of the patient as long as this is not obviously harmful for the patient.<sup>64</sup>

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<sup>59</sup> Unterbringungsgesetz, § 7.

<sup>60</sup> Unterbringungsgesetz, § 4 abs 3.

<sup>61</sup> Unterbringungsgesetz, § 11.

<sup>62</sup> Unterbringungsgesetz, § 10 abs 3.

<sup>63</sup> Unterbringungsgesetz, § 17.

<sup>64</sup> Unterbringungsgesetz, §§ 14ff.

27. The court has to get a personal impression of the detainee within four days of knowing of the placement. It has to inform the patient about the reason and purpose of the proceeding and to hear them on the matter. The court also has to hear the head of department, the patient attorney and, if present, another representative of the patient. It has to consider the patient's file and may call another external qualified doctor to participate in the hearing.<sup>65</sup> If the court reaches the conclusion that conditions for the placement are fulfilled it declares the placement preliminarily lawful and has to organise a public hearing which has to take place within 14 days. If the court concludes that the prerequisites for the placement are not met it declares the placement illicit. In this case, the patient is to be released immediately unless the head of department makes use of their right to appeal.<sup>66</sup>
28. In case the detention is preliminarily declared lawful, the court has to determine one or more expert witnesses (on the request of the detainee or their representative, at least two). The experts' reports are to be delivered to all parties in advance of the public hearing. The court may also conduct additional investigations and hear relatives of the patient or institutions that could possibly treat them without placement in the closed psychiatric department. The patient has to be given the possibility to be present at the court hearing. They, their representative and the head of department have to be heard. The court then renders its decision. It can either declare the placement lawful for a period of maximum three months or declare it unlawful. In the latter case the patient is to be released immediately unless the head of department makes use of their right to appeal and the court orders that the detainee may be kept in placement during the appellate proceeding.<sup>67</sup>
29. The patient, their representative, certain relatives or the head of department have the option of lodging an appeal with the second instance court. If the patient is still detained this court has to render its decision within two weeks. If it declares the placement unlawful, the detainee is to be released immediately.<sup>68</sup>
30. If the placement of a patient proves to be necessary beyond the period covered by the initial court decision (a maximum of three months), a new court decision in accordance with the presented provisions is required. Each time the placement may be prolonged for a maximum of six months. A prolongation beyond a total period of one year is only possible based on the reports of two experts who as far as possible did not participate in the prior proceedings.<sup>69</sup>

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<sup>65</sup> Unterbringungsgesetz, § 19.

<sup>66</sup> Unterbringungsgesetz, § 20.

<sup>67</sup> Unterbringungsgesetz, §§22ff.

<sup>68</sup> Unterbringungsgesetz, §§ 28f.

<sup>69</sup> Unterbringungsgesetz, § 30.

31. The lawfulness of the placement can also be questioned again within the periods it was declared lawful on request of the patient, their representative or certain relatives. Moreover, if the conditions for the placement are not met anymore, the head of department has to order the release of patient under their own authority without the necessity to wait for a court order.<sup>70</sup> In the assessment of the prolongation of placement, a balancing exercise has to be undertaken between the duration and intensity of the measure and the prevented danger.<sup>71</sup> The law also provides for the possibility of an ex-post assessment by the court if a placement was lawful in case the placement was already revoked before the court was able to render its decision on the lawfulness in accordance with the provisions explained above.<sup>72</sup>

*ii) The Act on the Protection of Personal Liberty in Homes and other Institutions of Care*

32. The provisions in ss 11 – 19a of this Act governing limitations of personal liberty in homes for handicapped persons, elderly people or people in need of care are nearly identical to the ones of the Act on the Placement of mentally-ill Persons in Hospitals just explained in detail. Thus it can be referred to these explanations. Differences are minor in nature and concern, such as different time periods. The institution of the Representative of Home Residents is comparable to the Patient Attorney foreseen in the Placement Act.

**e) Compensation for unlawful detention**

33. According to art 7 of the Federal Constitutional Law on the Protection of Personal Liberty, anybody who was unlawfully arrested or detained has the right to claim full compensation including immaterial damages. The potential damages of persons detained can be claimed from the Federal Republic of Austria in accordance with the provisions of the Act on the Liability of Public Bodies.<sup>73</sup> If an informal procedure established to facilitate the public body's acknowledgement of liability or a settlement fails,<sup>74</sup> the allegedly injured party may sue the Federal Republic of Austria before the competent ordinary civil law court.<sup>75</sup>
34. While art 7 of the Constitutional requires a right to compensation based on strict liability<sup>76</sup>, the applicable provisions of the Act on the Liability of Public Bodies explicitly foresee only liability based on fault. However, the principle of Austrian law that ordinary statutes are to be interpreted

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<sup>70</sup> Unterbringungsgesetz, §§ 31f.

<sup>71</sup> Unterbringungsgesetz, §32a.

<sup>72</sup> Unterbringungsgesetz, § 38s.

<sup>73</sup> Heimaufenthaltsgesetz, § 24; concerning the Act on the Placement of mentally-ill Persons in Hospitals there is no specific statutory ground to claim compensation, damage claims can thus be raised based directly on art 7 BVG Persönliche Freiheit.

<sup>74</sup> Amthaftungsgesetz, § 8.

<sup>75</sup> Amthaftungsgesetz, § 9.

<sup>76</sup> Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

in line with the constitution if possible allows for damage claims based on the principle of strict liability.<sup>77</sup>

## IV MILITARY DETENTION

### a) Preliminary remarks

35. The Austrian Military Powers Act contains a legal basis for military organs to impose preliminary arrest.<sup>78</sup> This power is applicable if substantiated facts justify the suspicion that a person intends to carry out, or has just carried out, a criminal offence with a maximum penalty of at least six months imprisonment. This offence has to be directed against the life or health of military personnel, certain constitutional organs or institutions of Austria or other states, military objects or military secrets. Furthermore, persons who are caught when committing certain military-related administrative offences may, under certain circumstances, also be arrested.<sup>79</sup> The suspect is to be handed over to the (non-military) authorities competent for the prosecution of the criminal or administrative offences as soon as possible. The military arrest is limited to a maximum period of 24 hours.<sup>80</sup>
36. The Act on Disciplinary Sanctions for Military Personnel<sup>81</sup> also contains a legal basis for preliminary arrests,<sup>82</sup> in addition to a provision on military detention.<sup>83</sup> All these provisions empower military organs to take measures of arrest or detention against soldiers of the Austrian military in cases of violation of their duties as military personnel. They must not be applied to the civilian population.<sup>84</sup> The power of preliminary arrest is also limited to a maximum period of 24 hours.<sup>85</sup> In contrast, the power to impose military detention on a soldier allows for detention of up to 14 days.<sup>86</sup> However, it is only applicable to soldiers, and only to violations of military duties committed during times when the army is actually employed, such as in times of war or similar situations.<sup>87</sup> This country report will only deal with the latter provision since it constitutes the only form of military detention that may exceed the duration of 24 hours. In general, the area

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<sup>77</sup> Gudrun Strickmann, 'Neuerungen im Heimaufenthaltsgesetz' [2010] iFamZ 276, 279.

<sup>78</sup> Bundesgesetz über Aufgaben und Befugnisse im Rahmen der militärischen Landesverteidigung BGBl. I Nr. 86/2000 ('Militärbefugnisgesetz'), § 11.

<sup>79</sup> *ibid.*

<sup>80</sup> Militärbefugnisgesetz, § 1 abs 5.

<sup>81</sup> Heeresdisziplinarergesetz 2002 BGBl. I Nr. 167/2002 ('Heeresdisziplinarergesetz').

<sup>82</sup> Heeresdisziplinarergesetz, §§ 43f.

<sup>83</sup> Heeresdisziplinarergesetz, § 83.

<sup>84</sup> Heeresdisziplinarergesetz, vgl. §§ 1, 43 and 83.

<sup>85</sup> Heeresdisziplinarergesetz, § 43.

<sup>86</sup> Heeresdisziplinarergesetz, § 83.

<sup>87</sup> Heeresdisziplinarergesetz, § 81.

of military detention law can be considered to be of low practical relevance in Austria, and there is hardly any academic literature on this field.

### **b) Threshold questions**

37. Military detention in the sense outlined above<sup>88</sup> is clearly a deprivation of liberty. Further research does not seem to indicate any relevant threshold issues in the field of military detention.

### **c) Decision to detain**

38. Certain military commanders are empowered to decide on the imposition of military detention on soldiers in their troops. The proceedings are flexible (in terms of their procedural safeguards), as they are made for cases of war times or similar situations of employment of the army. Nevertheless, the suspect must be heard at least once on the suspicions or accusations, before the decision to detain is taken. Only other soldiers may provide legal representation.<sup>89</sup> The sanction of military detention may only be imposed in case of particularly severe breaches of a soldier's duties or in case of breaches of a soldier's duties in particularly aggravating situations or circumstances.<sup>90</sup>

### **d) Review of and challenges to detention**

39. Detainees put in detention during a situation of employment of the army (i.e. during war time or similar emergencies when the army is not waiting and practising in barracks but is actually fighting) have the right to request an assessment of the lawfulness of the detention order, once the time of employment of the army is over. The assessment is to be carried out either by a commander or a commission on disciplinary matters. The (former) detainee is to be heard. The request for assessment has to be filed with the competent disciplinary authority within a period of four weeks after the situation of employment of the army has ended<sup>91</sup>. Subsequently, the decision of the disciplinary authority can be challenged on a merits review before the Appellate Federal Administrative Court.<sup>92</sup>

### **e) Compensation for unlawful detention**

40. The former detainee has to be compensated if the request for assessment proves to be justified. They thus have the right to claim damages based on the provisions of the Criminal Matters

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<sup>88</sup> Heeresdisziplinargesetz, § 83.

<sup>89</sup> Heeresdisziplinargesetz, § 84.

<sup>90</sup> Heeresdisziplinargesetz, § 83 abs 5.

<sup>91</sup> Heeresdisziplinargesetz, § 85 abs 5 and 6.

<sup>92</sup> Art 130 Abs 1 Bundes-Verfassungsgesetz BGBl. Nr. 1/1920 ('Bundes-Verfassungsgesetz').



Compensation Act.<sup>93</sup> Compensation is to be granted based on principles of strict liability in the Federal Republic of Austria. The compensation includes damages for the immaterial harm suffered due to liberty deprivation of 20 to 50 Euros per day.<sup>94</sup> Immaterial harm includes not only economic losses like earnings lost or not realised while in prison, but also damages for the harm of being deprived of liberty or for being in prison itself. If an informal procedure established by law to facilitate the public body's acknowledgement of liability or a settlement fails,<sup>95</sup> then the allegedly injured party may sue the Federal Republic of Austria before the competent ordinary civil law court.<sup>96</sup>

## V POLICE DETENTION

### a) Preliminary remarks

41. The problems posed by police detention in crowd-control situations in the Austrian legal order are comparable to those raised in the ECtHR's cases of *Austin v the United Kingdom*<sup>97</sup> and *Gillan and Quinton v the United Kingdom*.<sup>98</sup> Since both Art 5 of the ECHR, which is a part of Austrian constitutional law, and art 2 of the Constitutional Law on Liberty do not include police measures in crowd-control situations as a legitimate ground for deprivations of liberty, the threshold question whether such measures constitute a deprivation of liberty is important.

### b) Threshold questions

42. The case law and literature found primarily deals with assemblies, which were dissolved by the police because they had been decided to be unlawful in advance, or because the participants had engaged in unlawful activities during the assembly. Thus, when persons have been forced to leave the location of the assembly by the police, and are thus inevitably limited in their freedom of movement during the short period of police action, the Austrian Constitutional Court has not regarded it as a deprivation of liberty.<sup>99</sup> In a recent 2012 case, the Austrian Constitutional Court did not find a violation of the right to liberty when a participant could not leave the police containment for about three hours, although it did not explicitly address the question of whether

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<sup>93</sup> Bundesgesetz über den Ersatz von Schäden aufgrund einer strafgerichtlichen Anhaltung oder Verurteilung BGBl. I Nr. 125/2004 ('Strafrechtliches Entschädigungsgesetz 2005'); para 85 Abs 7 Heeresdisziplinargesetz.

<sup>94</sup> Georg Kodek and Petra Leupold, 'Vor §§ 1 - 16' WK<sup>2</sup> StEG Online Commentary para 1ff (last updated December 2011); Strafrechtliches Entschädigungsgesetz 2005, § 5.

<sup>95</sup> Strafrechtliches Entschädigungsgesetz 2005, § 9.

<sup>96</sup> Strafrechtliches Entschädigungsgesetz 2005, § 12; Georg Kodek and Petra Leupold, '§ 12' WK<sup>2</sup> StEG Online Commentary para 3 (last updated December 2011).

<sup>97</sup> Reports of Judgments and Decisions 2012.

<sup>98</sup> Reports of Judgments and Decisions 2010.

<sup>99</sup> Theo Öhlinger and Harald Eberhard, 'Verfassungsrecht' (Facultas WUV Vienna 2012) para 836.

a deprivation of liberty had occurred. In this case, the authorities had requested the participants of an assembly to scatter and end the assembly because the assembly had been declared illegal in advance and because the participants had started to attack police forces and cars. Since this order was not complied with, the authorities announced that the participants had committed an administrative offence, and did not allow anybody to leave without prior queuing to allow the police to write down their names and data.<sup>100</sup> However, it has to be noted that the queuing itself would have taken only about half an hour and that the court also mentioned that it was the applicant's fault that he did not want to queue earlier.<sup>101</sup> In an older 1986 case, the Austrian Constitutional Court did not regard containment of about six hours in a police kettle, after protesters had previously been requested to leave the area, as a deprivation of liberty in the sense of Art 5 ECHR.<sup>102</sup> However, the domestic Austrian constitutional framework on liberty protection other than Art 5 ECHR has changed since then.

43. It has to be noted that all these cases deal with situations where assembly participants had engaged in illegal activities and thus committed administrative offences in accordance with the Assemblies Act. In these cases, the police has the power to arrest offenders if they are unknown to the police and do not reveal their identity, or are likely to evade prosecution, or continue or repeat the commission of the administrative offence.<sup>103</sup> Against this background, it has to be understood that where even an arrest is lawful, the Austrian Constitutional Court does not seem to apply a strict standard of assessment while assessing liberty infringing measures of the police in such situations. Therefore, the assessment might look different, and be stricter, in case of police crowd-control measures that are imposed upon 'innocent' assembly participants who did not commit administrative measures. However, further research has not indicated any cases or academic commentaries in this regard.
44. In general, however, the case law of the Austrian Constitutional Court regards the intention of a measure as important while examining whether a deprivation of liberty has occurred. It thus denies that such a deprivation took place if the infringement of liberty was not the purpose, but only the inevitable consequence of a measure primarily serving another purpose.<sup>104</sup> From this jurisprudence it can perhaps be derived that measures of 'kettling' and crowd-control are unlikely to be deemed a deprivation of liberty, even if they are imposed upon 'innocent' participants of assemblies who did not engage in wrongful acts.

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<sup>100</sup> Versammlungsgesetz 1953 BGBl. Nr. 98/1953 ('Versammlungsgesetz'), § 19.

<sup>101</sup> VfGH 20. 9. 2012, B 1436/10.

<sup>102</sup> VfGH 19. 6. 1986, B 80/85.

<sup>103</sup> Verwaltungsstrafgesetz, § 35; art 2 Abs 1 Z3 BVG Persönliche Freiheit.

<sup>104</sup> Theo Öhlinger and Harald Eberhard, '*Verfassungsrecht*' (Facultas WUV Vienna 2012) para 838.

### **c) Decision to detain**

45. The authorities have the obligation to protect lawful assemblies from disturbance or attacks eg by other groups (directly based on Art 11 of the ECHR). For this purpose, the authorities and police forces may rely on the powers of the Security Police Act,<sup>105</sup> the provisions of the Assemblies Act or other relevant statutes. These measures permit for example, the infringements of rights of persons to avoid more severe dangers to the rights of others,<sup>106</sup> the use of orders and coercive powers to prevent criminal offences,<sup>107</sup> prohibition of persons from certain public spaces<sup>108</sup> or the dissolution of assemblies.<sup>109</sup> Some measures can be taken by police forces under their own authority, while others must first be ordered by the competent administrative authority. Many of these orders may be enforced by coercive powers if they are not complied with.<sup>110</sup> Moreover, as already mentioned, temporary arrests of persons who committed administrative offences may be imposed by the police forces under their own authority.<sup>111</sup>

### **d) Review of and challenges to detention**

46. The lawfulness of informal acts of coercive power or command carried out by police forces under their own authority, such as not executing a prior formal, administrative decision of eg temporary arrest (in case of an administrative offence) or other forms of ‘kettling’ and crowd-control can be challenged with a complaint to the Federal or the respective state's Appellate Administrative Court.<sup>112</sup> The complaint can be raised based on an alleged violation of ordinary statutes, European law or constitutional law.<sup>113</sup>
47. Thus a complaint can be filed based on both alleged violations of the right to personal liberty and of the pertinent ordinary statutes, such as the Assemblies Act. The court has to assess the question of a liberty deprivation. However, even if a measure is not regarded as deprivation of liberty, and consequently not within the scope of application of Art 5 ECHR and the Constitutional Law on liberty, the complaint can be successful on other grounds such as the violation of rights provided under ordinary laws and statutes.

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<sup>105</sup> Bundesgesetz über die Organisation der Sicherheitsverwaltung und die Ausübung der Sicherheitspolizei BGBl. Nr. 566/1991 (‘Sicherheitspolizeigesetz’); Karim Giese, ‘Versammlungsrecht’ in Bachmann and others (eds) *Besonderes Verwaltungsrecht* (Springer Wien New York 2010) 90f.

<sup>106</sup> Sicherheitspolizeigesetz, §32.

<sup>107</sup> Sicherheitspolizeigesetz, §33.

<sup>108</sup> Sicherheitspolizeigesetz, § 36.

<sup>109</sup> Versammlungsgesetz, § 13f.

<sup>110</sup> Sicherheitspolizeigesetz, § 50.

<sup>111</sup> Verwaltungsstrafgesetz, § 35.

<sup>112</sup> Bundes-Verfassungsgesetz, art 130 Abs 1.

<sup>113</sup> Christoph Grabenwarter and Mathis Fister, ‘Die neue Verwaltungsgerichtsbarkeit’, [2013] NZ 148, 357.

48. Subsequently, the decision of the Federal or the state's Appellate Administrative Court can be challenged before the Austrian Constitutional Court based on the alleged violations of constitutional law, including the right to liberty.<sup>114</sup> In rare cases and certain circumstances, the decision can also be challenged before the Supreme Administrative Court based on the alleged violations of ordinary statutes.<sup>115</sup>

#### **e) Compensation for unlawful detention**

49. Since there is no specific statutory ground to claim compensation, damage claims can be raised directly based on art 7 of the Constitutional Law on Liberty, through an analogous application of the principles of the Public Liability Compensation Act before the competent civil law court.<sup>116</sup> In case the detention has been declared unlawful, compensation is to be granted based on principles of strict liability and includes damages for the immaterial harm implied in detention.<sup>117</sup>

## **VI PREVENTIVE DETENTION**

### **a) Preliminary remarks**

50. Sections 21-23 of the Criminal Code<sup>118</sup> foresee different forms of preventive detentions which are applicable to certain groups of offenders instead of or in addition to an ordinary criminal sentence. Section 21 Criminal Code regulates preventive detention for mentally ill offenders, Section 22 Criminal Code for drug-addict offenders and Section 23 Criminal Code for dangerous repeat offenders. The common preconditions for any of these forms of detention are that a person has already committed at least one criminal offence of certain gravity and is predicted as likely to commit one or more further serious offences. With regard to mentally ill and drug-addict offenders the already committed offence has to be related to their illness or addiction and preventive detention for dangerous repeat offenders requires that the person has already committed at least three offences of a certain gravity. The rationale of all three forms of preventive detention is to protect the general public from offenders which are predicted to be particularly dangerous and likely to commit further offences<sup>119</sup>. The preventive detention measures are ordered for an indefinite period of time and are to be enforced as long as they

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<sup>114</sup> Bundes-Verfassungsgesetz, art 144 Abs 1.

<sup>115</sup> Bundes-Verfassungsgesetz, art 133 Abs 1 Z1.

<sup>116</sup> Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (Facultas WUV Vienna 2012) para 856; Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

<sup>117</sup> Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

<sup>118</sup> Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen BGBl. Nr. 60/1974 ('Strafgesetzbuch').

<sup>119</sup> Eckehardt Ratz, 'Vor §§ 21–25' WK<sup>2</sup> StGB Online Commentary para 1 ff (last updated September 2011).

prove to be necessary. The maximum length is two years for drug-addict offenders, ten years for dangerous repeat offenders and potentially unlimited for mentally ill offenders<sup>120</sup>.

### **b) Threshold questions**

51. The detention in detention centres for mentally ill, drug-addict or dangerous repeat offenders constitutes without doubt a deprivation of liberty. This research did not find any relevant threshold issues.

### **c) Decision to detain**

52. The preventive measures are ordered by a criminal court in form of a criminal judgement<sup>121</sup>. The provisions on ordinary criminal proceedings of the Code of Criminal Procedure<sup>122</sup> are generally applicable to the proceedings concerning preventive measures. Thus the person concerned is entitled to be heard and to representation and a public hearing is to be carried out like in other criminal proceedings<sup>123</sup>. Minor differences from the ordinary criminal procedure can be found in ss 429 – 442 of the Code of Criminal Procedure. To a large extent these specific provisions concern additional guarantees as the preventive measures are severe (and potentially very long) infringements with personal liberty. For example, the court is obliged to call and consult at least one expert witness and the proceeding can be annulled if the person concerned has not been represented by a defence lawyer during the entire public hearing<sup>124</sup>.

### **d) Review of and challenges to detention**

53. Detainees may invoke the remedies of appeal and annulment proceeding (which are the ordinary remedies against judgements of criminal courts) against the order of a preventive detention measure<sup>125</sup>. The provisions and guarantees on the appellate proceedings before criminal courts are applicable<sup>126</sup>. Thus the basic conditions for imposing a preventive measure can be contested, like for example if the committed offence or offences were severe enough and fulfil all criteria, if

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<sup>120</sup> Strafgesetzbuch, §25.

<sup>121</sup> Verena Murschetz, '§ 433' WK-StPO Online Commentary para 1 (last updated November 2009); Verena Murschetz, '§ 435' WK-StPO Online Commentary para 3 (last updated November 2009).

<sup>122</sup> Strafprozeßordnung 1975 BGBl. Nr. 631/1975 ('Strafprozessordnung')

<sup>123</sup> Verena Murschetz, '§ 429' WK-StPO Online Commentary para 1 (last updated November 2009).

<sup>124</sup> §§ 430 und 439 Strafprozessordnung.

<sup>125</sup> §§ 433 und 435 Strafprozessordnung; Verena Murschetz, '§ 433' WK-StPO Online Commentary para 1 (last updated November 2009) para 1; Verena Murschetz, '§ 435' WK-StPO Online Commentary para 1 (last updated November 2009) para 4.

<sup>126</sup> *ibid.*

the mental illness or drug addiction and their link to the offence were given or the prediction of dangerousness<sup>127</sup>.

54. In addition, s 25 Criminal Code provides for an ex officio (automatic) assessment whether a preventive detention measure is still necessary. The competent court has to carry out such an assessment at least once a year in respect of mentally ill and dangerous repeat offenders and at least every six months with regard to drug-addict offenders<sup>128</sup>.

#### **e) Compensation for unlawful detention**

55. The Act on Compensation in Criminal Matters provides for a remedy to claim compensation for an unlawful deprivation of liberty caused for the purpose of criminal justice or due to a conviction by a criminal court. These provisions on compensation are also applicable to the forms of preventive detention foreseen in ss 21-23 of the Criminal Code<sup>129</sup>. Compensation is to be granted based on principles of strict liability by the Federal Republic of Austria. The compensation includes damages for the immaterial harm suffered due to liberty deprivation of 20 to 50 Euros per day<sup>130</sup>. If an informal procedure established to facilitate the public body's acknowledgement of liability or a settlement fails<sup>131</sup>, the allegedly injured party may sue the Federal Republic of Austria before the competent ordinary civil law court<sup>132</sup>.

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<sup>127</sup> Eckehardt Ratz, 'Vor §§ 21–25' WK<sup>2</sup> StGB Online Commentary para 8 ff (last updated September 2011); Verena Murschetz, '§ 433' WK-StPO Online Commentary para 1 (last updated November 2009) para 5ff; Verena Murschetz, '§ 435' WK-StPO Online Commentary para 1 (last updated November 2009)para 8ff.

<sup>128</sup> Eckehardt Ratz, '§ 25' WK<sup>2</sup> StGB Online Commentary para 1 ff (last updated September 2011).

<sup>129</sup> Georg Kodek and Petra Leupold, '§ 1' WK<sup>2</sup> StEG Online Commentary para 4 (last updated December 2011).

<sup>130</sup> Georg Kodek and Petra Leupold, 'Vor §§ 1 - 16' WK<sup>2</sup> StEG Online Commentary para 1ff (last updated December 2011); Paragraph 5 Strafrechtliches Entschädigungsgesetz 2005.

<sup>131</sup> Strafrechtliches Entschädigungsgesetz 2005, §9.

<sup>132</sup> Strafrechtliches Entschädigungsgesetz 2005, § 12; Georg Kodek and Petra Leupold, '§ 12' WK<sup>2</sup> StEG Online Commentary para 3 (last updated December 2011).

# Country Report for Belgium

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. Belgian law contains no specific provisions regarding detention for counter-terrorism, security or intelligence-gathering purposes. Detention for these purposes is governed by the ordinary law. This means that detention in the context of counter-terrorism or other national security operations can only occur where a person has been charged with an offence. This section will therefore consider the ordinary system of pre-trial detention and the possibility under Belgian law of imposing control and safety measures on prisoners. Given that the system of pre-trial detention and these control and safety measures are in place for all categories of offenders and not specifically or exclusively aimed at persons suspected or convicted of terrorist acts, this will not be discussed in detail.
2. The Statute on Detention on Remand<sup>1</sup> distinguishes the following three categories of pre-trial detention: judicial arrest; the order to bring a suspect in for questioning; and the deprivation of liberty based on a warrant of detention ('detention on remand'). The warrant of detention issued by the investigating Judge<sup>2</sup> entails a longer period of deprivation of liberty that is subject to strict judicial control. Most of the following discussion deals with detention on remand.

### b) Police custody and judicial arrest

3. This is a brief deprivation of liberty for a maximum of 24 hours. If the person is caught in *flagrante delicto*, the police can take the decision to detain. The decision to deprive a person of his liberty who was not caught in *flagrante delicto* is taken by the public prosecutor.
4. In some cases a person is first administratively detained, which is then followed by judicial detention. Administrative detention (also known as police custody) is a brief deprivation of liberty for a maximum of twelve hours unless the detention is changed to a judicial arrest, in which case the detention may last for twenty-four hours from the moment of arrest.
5. The person is mainly detained for the reasons of:
  - obstructing the police in the exercise of their task; or
  - disrupting public order or safety.<sup>3</sup>

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<sup>1</sup> 'Wet van 20 juli 1990 betreffende de voorlopige hechtenis' / 'La loi de 29 juillet 1990 relative à la détention préventive'.

<sup>2</sup> 'Onderzoeksrechter' / 'Juge d'instruction'.

<sup>3</sup> See Police Function Act of 5 August 1992, art 31.

### **c) Detention on remand**

#### *i) Threshold questions*

6. As noted above, before the warrant of detention is issued by the investigating Judge, a person can only be lawfully detained for a maximum of 24 hours. The threshold is whether the person has ‘lost [their] freedom to come and go’.<sup>4</sup> As of that moment, the period of 24 hours starts.

#### *ii) Decision to detain*

7. Within 24 hours after the arrest, the investigating Judge must issue a warrant of detention. Whether the investigating Judge can proceed to issue a warrant of detention depends on a number of substantive conditions.<sup>5</sup> First, the relevant offence must be one which is punishable by a prison sentence of at least one year. Secondly, the warrant may only be issued ‘in case of an absolute necessity for public safety’: for example, where there is a risk of escape, collusion, reoffending, or a breach of the peace. Thirdly, a warrant may only be issued when there are serious indications of guilt. Finally, a warrant cannot be issued with the purpose of coercing or imposing a sentence on the person concerned.
8. Additionally, there a number of formal conditions that need to be fulfilled.<sup>6</sup> These are:
- the investigating Judge must interrogate the detainee;
  - the investigating Judge must inform the detainee that they are entitled to assistance from a lawyer;
  - the investigating Judge must hear any submissions made by the detainee;
  - the decision to issue a warrant must be substantiated;
  - the warrant must be signed by the investigating Judge; and
  - the warrant must be served on the detainee within 24 hours.
9. The warrant of detention is valid for five days, counting from the moment of execution. Within that period, after receiving the report of the investigating Judge and having heard the public prosecutor, the accused person and their counsel, the Chambre de Conseil of the Court of First Instance will decide whether pre-trial detention must be extended.<sup>7</sup> The Chambre de Conseil checks whether the legal conditions for detention on remand have been satisfied, and whether detention should be continued in the light of the provisions of art 16 of the Statute on Detention

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<sup>4</sup> Statute on Detention on Remand, art 1, 3°.

<sup>5</sup> Statute on Detention on Remand, art 16, §1.

<sup>6</sup> Statute on Detention on Remand, art 16, §2.

<sup>7</sup> Statute on Detention on Remand, art 21.



on Remand (see above). The Chambre de Conseil can improve, supplement or modify the warrant. Irreparable nullities, such as detention based on an irregular investigation, cannot be repaired by the Chambre de Conseil. If the Chambre de Conseil decides to maintain the pre-trial detention, this decision remains valid for one month.<sup>8</sup>

### *iii) Review of and challenges to detention*

#### aa) Periodic review

10. As long as the judicial inquiry continues, the Chambre de Conseil decides from month to month (or every three months, depending on the type of crime the accused is charged with) whether the pre-trial detention may be preserved.<sup>9</sup> The Chambre de Conseil no longer needs to consider the lawfulness of the warrant of detention after this has been established in its first judgment. The periodic review is in order to check whether continuing pre-trial detention is necessary, in the light of the circumstances of the moment.

#### bb) Appeal against issuing of warrant

11. It is not possible to appeal against the decision of the investigating Judge to issue a warrant of detention. This applies both to the public prosecutor who demands a warrant of detention<sup>10</sup> and to the accused person.<sup>11</sup>

#### cc) Appeal against the decision of the Chambre de Conseil

12. As noted above, after the investigating Judge has issued the warrant of detention, the Chambre de Conseil will rule within five days on whether the pre-trial detention will remain in force. Both the accused person and the public prosecutor can appeal against this decision.<sup>12</sup> An appeal must be made to the Chamber of Indictment within 24 hours, counted as from the day of the decision (for the public prosecutor) or from the service of the warrant (for the accused person).<sup>13</sup> The Chamber of Indictment must render its judgment within fifteen days. If not, the accused person must be released.<sup>14</sup> The decision of the Chamber of Indictment authorises the deprivation of liberty for one month or three months, depending on the type of crime the person is charged with.<sup>15</sup>

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<sup>8</sup> Statute on Detention on Remand, art 21.

<sup>9</sup> Statute on Detention on Remand, art 22.

<sup>10</sup> Statute on Detention on Remand, art 17.

<sup>11</sup> Statute on Detention on Remand, art 19.

<sup>12</sup> Statute on Detention on Remand, art 30.

<sup>13</sup> Statute on Detention on Remand, art 30 para 2.

<sup>14</sup> Statute on Detention on Remand, art 30 para 3.

<sup>15</sup> Statute on Detention on Remand, art 30 para 4.

dd) Further appeal to the Court of Cassation

13. An appeal against the decision of the Chamber of Indictment can be made to the Court of Cassation. This must be done within twenty-four hours of the day on which the decision was served on the accused person.<sup>16</sup> The Court of Cassation must deliver a judgment within fifteen days. If judgment is not rendered within this period, the accused person must be released.<sup>17</sup>

*iv) Compensation for unlawful detention*

14. Compensation for unlawful pre-trial detention may be claimed under the Act of 13 March 1973 on compensation for ineffective detention on remand.<sup>18</sup> This act distinguishes between compensation for unlawful (*onrechtmatige*) detention and compensation for unnecessary (*onwerkdadige*) detention. Unlawful detention occurs when the deprivation of liberty is in violation of Art 5 ECHR. The claim for compensation that arises from this is a claim under civil law that must be submitted to the civil courts.<sup>19</sup>

**c) Control and safety measures imposed in prison**

15. A prisoner can be subject to special control measures and safety measures.<sup>20</sup> In addition, when a prisoner poses a threat to security for a long period of time, the director-general of the prison can decide to place the prisoner on an 'individual special safety regime'.<sup>21</sup> The prisoner can be placed in this regime for a maximum period of two months, with the possibility of extension. This 'individual special safety regime' entails that the prisoner is excluded from participating in communal activities and is subject to examination of letters and mail, limited visiting, limited phone contact, systemic examination of clothes, and other special safety measures.<sup>22</sup>
16. Every decision that imposes or maintains such measures must be substantiated, and the necessity of such a measure must be shown on an individual basis. The prisoner has the right to appeal against the decision of the director-general to the Appeal Commission of the Central Council.<sup>23</sup>
17. In case of a very severe threat, the prisoner can be detained in the Unit Individual Special Safety in the prison of Bruges or Lantin. However, Belgium has no specific policy regarding the detention of terrorists. There are no instructions to place prisoners suspected of or convicted for

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<sup>16</sup> Statute on Detention on Remand, art 31.

<sup>17</sup> Statute on Detention on Remand, art 31 para 4.

<sup>18</sup> 'Wet van 13 maart 1973 betreffende de vergoeding voor onwerkzame voorlopige hechtenis' / 'Loi du 13 mars 1973 relative à l'indemnité en cas de détention préventive inopérante'.

<sup>19</sup> Act of 1973, art 27.

<sup>20</sup> Basic Act of 12 January 2005 on prison institutions and the legal position of prisoners ('Basiswet van 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van gedetineerden'), arts 110-115.

<sup>21</sup> Basic Act of 12 January 2005 on prison institutions and the legal position of prisoners, art 116 and following.

<sup>22</sup> Basic Act of 12 January 2005 on prison institutions and the legal position of prisoners, art 117.

<sup>23</sup> Basic Act of 12 January 2005 on prison institutions and the legal position of prisoners, art 118, §10.

terrorist acts in special units within prison; nor is there a formal policy of spreading these prisoners across prisons.

18. In 2006, the principal of the Brussels police proposed to introduce a separate ‘terrorist’ unit within Belgian prisons. The reasoning behind this idea was that isolating Muslim fundamentalists could prevent the further radicalisation of certain parts of Muslim communities within prison. The proposal was met with heavy criticism from the League of Human Rights (*Liga voor Mensenrechten*). The League thought that isolating Muslim fundamentalists would lead to a separate regime and to severe curtailment of the rights of these prisoners. In addition, isolated detention in a separate terrorist unit might jeopardise the reintegration and rehabilitation of extremist prisoners and lead to further radicalisation.<sup>24</sup> The proposal was never put in practice.

## II IMMIGRATION DETENTION

### a) Preliminary remarks

#### *i) Legal framework*

19. The principal norms governing Belgian immigration detention practices are contained in the Aliens Act 1980.<sup>25</sup> The Aliens Act provides for the establishment of secure centres situated at the border or within Belgian territory to accommodate persons in an irregular situation.
20. There are mainly two categories of foreign nationals who may be detained. First, foreign nationals may be detained when they are staying in the country irregularly; when they pose a threat to public order and security; when they present false information regarding their situation to the authorities; when their asylum claims are being processed; or when they are awaiting the fulfilment of a removal order and are considered likely to impede the fulfilment of that order.<sup>26</sup>
21. Secondly, foreign nationals are also subject to detention when they are either refused entry or request asylum at the border.<sup>27</sup>

#### *ii) Place of detention*

22. Each category of foreign nations is detained in a different type of secure detention site. The first category of foreign nationals is detained in ‘closed centres’.<sup>28</sup> Closed centres accommodate persons who have already entered the territory but are in an irregular situation. The second

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<sup>24</sup> Report of Liga voor de Mensenrechten (2006).

<sup>25</sup> ‘Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen’/ ‘Loi de 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers’.

<sup>26</sup> Aliens Act 1980, arts 7, 8bis, §4, 25, 27, 29, para 2, 51/5, §1, para 1, en §3, para 4, 52/4, para 4, 54, 74/6 and 57/32, §2 para 2.

<sup>27</sup> Aliens Act 1980, art 74/5, §1.

<sup>28</sup> Aliens Act 1980, art 74/6.

category is detained in ‘border zones’.<sup>29</sup> Persons held at border zones are not considered to have officially entered Belgian territory.

### *iii) Compliance with ECHR*

23. Belgium has been found in violation of the ECHR several times for its practice in immigration detention.

#### aa) Detention of children

24. Belgian law provides for the controversial practice of detaining children with their parents in closed detention centres, and for the detention of unaccompanied minors until they are taken into the state’s guardianship service. These practices have been the subject of two rulings by the ECtHR.

25. In 2006, in the ‘Tabitha case’, the ECtHR condemned Belgium for violations of Arts 3 (prohibition of inhuman treatment), 5 (right to liberty and security) and 8 (right to respect for private and family life) of the ECHR.<sup>30</sup> The case concerned the decision by Belgian authorities to detain a five-year-old Congolese girl who was trying to join her mother in Canada. The girl was confined to a closed centre for two months without an appointed guardian and then deported to her country of origin.<sup>31</sup> Since the Tabitha case, Belgian authorities have created a guardianship service to help protect the rights of unaccompanied foreign minors in an irregular situation.<sup>32</sup>

26. In January 2010, the ECtHR decided a second case involving the detention of children in Belgium. In this case, *Muskhadzhiyeva and others v Belgium*, the ECtHR again found Belgium guilty of violating Arts 3 and 5 of the ECHR for confining four Chechen children along with their mother in a deportation centre.<sup>33</sup> The family had been detained at the centre with a view to returning them to Poland under the E.U.’s Dublin II Convention.<sup>34</sup> However, the court ruled that, although the mother was lawfully detained, the detention of her children was not lawful. Art 3 ECHR was violated because the centre was not designed to hold children and because of the children’s poor state of health at the time of their detention. The Art 5 violation was established on similar grounds.<sup>35</sup>

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<sup>29</sup> Aliens Act 1980, art 74/5.

<sup>30</sup> *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2008) 46 EHRR 23 [58]-[59], [82], [87], [90]-[91], [103]-[105], [113]-[114].

<sup>31</sup> *ibid* [8]-[37].

<sup>32</sup> UN Committee Against Torture, ‘Report of the Committee Against Torture’ (2009), 10 < [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f64%2f44&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f64%2f44&Lang=en) > accessed 21 February 2014.

<sup>33</sup> *Muskhadzhiyeva and others v Belgium* App no 41442/07 (ECtHR, 19 July 2010).

<sup>34</sup> *ibid* [6]-[23].

<sup>35</sup> *ibid* [63], [74]-[75].

27. Another immigration detention case involving Belgium concerned the detention of a mother and her three children, who were asylum-seekers, in a closed centre for illegal aliens pending their removal. The applicants were denied entry at the Belgian border. The Belgian authorities decided to return them on the ground that the mother was in possession of a false passport. On the same day, the Aliens Office decided to place the family in a closed transit centre for illegal aliens near the airport, pending processing of their asylum application. The Court concluded that the conditions of detention amounted to a violation of Art 3 ECHR with regard to the children, but not to the mother (on the basis that the threshold of seriousness of Art 3 had not been reached). The Court additionally found a violation of Art 5, and that the mother and her children had been unlawfully detained. The Court considered that by placing the children in a closed centre designed for adult illegal aliens, in conditions unsuited to their extreme vulnerability as minors, the Belgian authorities had not adequately safeguarded their right to liberty. With respect to the mother, the Court took account of the fact that her detention had been extended despite the fact that her second asylum application had been considered in the meantime, and that she had been detained for a long period in conditions not appropriate for a family.<sup>36</sup>

bb) Detention in border zones

28. Violations of the ECHR have also been found in relation to Belgium's practice of detaining people in border zones. In the 2008 case of *Riad and Idiab v Belgium*, the court ruled that Belgium had violated Arts 3 and 5 ECHR for confining two Palestinian nationals in the Brussels airport transit zone after the Brussels Court of First Instance had granted their release from a detention centre. In its judgment, the ECtHR highlighted the legal uncertainty caused by being 'released' into a transit zone (which effectively amounted to continued detention), as well as the poor conditions in this facility.<sup>37</sup>

29. In 2002, the ECtHR ruled that Belgian authorities had deliberately neglected to provide detainees with adequate information about their rights in order to expedite their removal.<sup>38</sup> The United Nations Committee against Torture noted that the detainees did not adequately understand their legal situation, and that this contributed to the lack of efficient recourse to appeal procedures in the country.<sup>39</sup>

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<sup>36</sup> *Kanagaratnam v Belgium* App no 15297/09 (ECtHR, 13 December 2011).

<sup>37</sup> *Riad and Idiab v Belgium* App nos 29787/03 and 29810/03 (ECtHR, 24 January 2008) [62]-[63], [106]-[111].

<sup>38</sup> *Conka v Belgium* (2002) 34 EHRR 53 [46], [55].

<sup>39</sup> UN Committee Against Torture, 'Report of the Committee Against Torture' (2009), 10 <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f64%2f44&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f64%2f44&Lang=en)> accessed 21 February 2014.

## **b) Decision to detain**

### *i) Identity of decision-maker*

30. Immigration issues fall within the competence of Federal Public Service ('FPS') Immigration and Asylum Policy and FPS Home Affairs. The decision whether or not to detain a foreign national depends solely on the power of the government, i.e. the Minister for Migration and Asylum Policy. The decision to detain is therefore an administrative decision, and no safeguards governing it are in place. A foreign national who is subject to a decision to detain cannot be heard. They can, however, challenge the decision, so there is a *post factum* judicial control (see below).

### *ii) Duration of detention*

31. Foreign nationals can be detained for a maximum of two months. The minister can however decide to prolong the detention for a further period of two months if either:
- an order to expel the detainee from the country has been served on the detainee; or
  - the necessary steps to expel the detainee from the country have been taken within seven days after the order has been served on the detainee, and expulsion can still be executed within a reasonable time.
32. In principle, the total duration of the detention may not exceed five months. However, after this period of five months has expired and in case it is necessary for public protection and security, detention can be prolonged for a further period of one month, with a maximum of eight months' detention in total.<sup>40</sup>

## **c) Review and challenges to detention**

### *i) Appeals to the 'Raadkamer'<sup>41</sup> / 'Chambre de Conseil'<sup>42</sup>*

#### aa) Appeal against a decision to detain

33. Foreign nationals who have been detained can lodge an appeal against the decision to detain with the Chambre de Conseil of the Court of First Instance. With respect to the first category of

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<sup>40</sup> Aliens Act 1980, art 74/5, §3 and art 74/6, §2.

<sup>41</sup> There is no accurate English translation for the word 'Raadkamer' / 'Chambre de Conseil'. Given that the French term is most widely known, this will be used hereafter.

<sup>42</sup> In Belgium the Chambre de Conseil is a division of the Court of First Instance, more precisely the criminal court ('correctionele rechtbank' / 'tribunal correctionnel'). The Chambre de Conseil fulfils its most important task as pre-trial court, ruling on certain aspects of criminal procedure. The Chambre de Conseil is, together with the Chamber of Indictment ('Kamer van Inbeschuldigingstelling' / 'Chambre de mises en accusation') considered an investigating court. The Chambre de Conseil consists of one Judge of the Court of First Instance. This Judge is the president and only Judge of the Chambre de Conseil. The Chambre de Conseil usually hears cases in camera.

foreign nationals, the territorially competent *Chambre de Conseil* is the one of the place where the foreign national has their habitual residence within Belgium or the place where they were found.<sup>43</sup> With respect to the second category of foreign nationals, the competent *Chambre de Conseil* of the Court of First Instance is the one of the place where the foreign national is kept in detention.<sup>44</sup> The *Chambre de Conseil* will render a decision within five days after the appeal has been lodged.

34. The basis of the appeal is that the measure to detain was not in conformity with the law. This could be because the detainee does not fall into one of the categories of foreign nationals as set out above, or because procedural irregularities have been committed (the latter will not often be the case, since, as noted above, hardly any procedural safeguards govern the administrative decision to detain). The *Chambre de Conseil* will decide on the legality of the measures of deprivation of liberty (i.e. whether they are in conformity with the law);<sup>45</sup> it cannot decide on the appropriateness of the measures.<sup>46</sup> In other words, it is up to the *Chambre de Conseil* (and the Chamber of Indictment: see below) to rule on procedural irregularities committed when taking a measure and substantial compliance of the decision with the applicable legal criteria, rather than ruling on the measure itself.<sup>47</sup> The *Chambre de Conseil* will decide whether the Minister's decision to detain can be upheld.<sup>48</sup>

bb) Appeal against decision to prolong detention

35. If the Minister for Migration and Asylum Policy decides to prolong the detention of a foreign national, the Minister must lodge an application with the *Chambre de Conseil* of the Court of First Instance of the place where the foreign national has their habitual residence within Belgium at that time, in order to obtain a decision regarding the lawfulness of the of the prolongation of the detention.<sup>49</sup> If the application is not lodged within the legal period of time, the foreign national must be released. The foreign national can appeal against the decision to prolong the

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<sup>43</sup> Aliens Act 1980, art 71 para 1.

<sup>44</sup> Aliens Act 1980, art 71 para 3.

<sup>45</sup> Juridat: Portail du pouvoir judiciaire de Belgique, <[www.cass.be](http://www.cass.be)> accessed 21 February 2014.

<sup>46</sup> Aliens Act 1980, art 72 para 2. This competence is limited in view of the separation of powers: Parlementaire Stukken Kamer 1974-75, 653/1, 59; Court of Cassation 6 March 1985, *Arresten van het Hof van Cassatie* 1984-85, 933.

<sup>47</sup> Court of Cassation 14 November 1984, *Arresten van het Hof van Cassatie* 1984-85, 371; Court of Cassation 3 April 1985, *Arresten van het Hof van Cassatie* 1984-85, 1067; Court of Cassation 24 March 1999, *Arresten van het Hof van Cassatie* 1999, 433; Court of Cassation 12 August 2003, *Arresten van het Hof van Cassatie* 2003, nr. 401; Court of Cassation 1 October 2008, *Pasicrisie belge* 2008, 2105; Court of Cassation 15 October 2008, *Pasicrisie belge* 2008, 2228; Court of Cassation 4 November 2009, *Pasicrisie belge* 2009, 2511; Court of Appeal Luik 11 April 1995, *Revue de droit pénal* 1996, 213.

<sup>48</sup> Aliens Act 1980, art 72 paras 1-2.

<sup>49</sup> Aliens Act 1980, art 74.

detention with the Chambre de Conseil as of the thirtieth day after the prolongation. The procedure is the same as for an appeal against a decision to detain (see above).

cc) Compatibility with ECHR

36. The Belgian Court of Cassation previously ruled that the sole fact that the remedies described above (laid down in arts 71-74 of the Aliens Act 1980) can only be used to challenge the measures taken against a foreign national, does not lead to a violation of Arts 5(4), 13 and 14 ECHR.<sup>50</sup>

dd) Procedure on appeal

37. The foreign national and their lawyer are given full access to the foreign national's file. However, art 12 of the Belgian Constitution<sup>51</sup> and Art 6 ECHR<sup>52</sup> are not applicable to these proceedings. Article 12 of the Belgian Constitution states that:

Individual freedom is guaranteed. No one can be prosecuted except in the cases provided for by law, and in the form prescribed by law. Except in the case of *flagrante delicto*, no-one can be arrested except by a motivated Judge's order that must be served at the moment of arrest or at the latest within twenty-four hours.

*ii) Appeal to the Chamber of Indictment ('Kamer van Inbeschuldigingstelling' / 'Chambre des mises en accusation')*<sup>53</sup>

38. A foreign national who has been detained, the public prosecutor,<sup>54</sup> and the Minister for Migration and Asylum Policy or their authorised representative can appeal against the decision of the Chambre de Conseil<sup>55</sup> to the Chamber of Indictment. Just like the Chambre de Conseil, the Chamber of Indictment will assess the legality of the measures, not their appropriateness.<sup>56</sup>

*iii) Appeal to the Belgian Court of Cassation ('Hof van Cassatie' / 'Court de Cassation')*<sup>57</sup>

39. An appeal against the decision of the Chamber of Indictment can be lodged with the Court of Cassation.<sup>58</sup>

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<sup>50</sup> Court of Cassation 14 December 2005, *Arresten van het Hof van Cassatie* 2005, 677.

<sup>51</sup> Court of Cassation 11 October 11 oktober 2005, *Arresten van het Hof van Cassatie* 2005, 1900.

<sup>52</sup> Court of Cassation 28 January 1992, *Arresten van het Hof van Cassatie* 1991-92, nr. 278; Court of Cassation 10 April 2002, *Arresten van het Hof van Cassatie* 2002, nr. 220; Court of Cassation 4 August 2009, *Arresten van het Hof van Cassatie* 2009, nr. 460.

<sup>53</sup> The Chamber of Indictment is a division of the Court of Appeal. One of its primary tasks as investigating court is hearing the appeals against a decision of the Chambre de Conseil. The Chamber of Indictment consists of three judges and usually hears cases in camera.

<sup>54</sup> Court of Cassation 31 August 1999, *Arresten van het Hof van Cassatie* 1999, 1015.

<sup>55</sup> Aliens Act 1980, art 72 para 3.

<sup>56</sup> Juridat: Portail du pouvoir judiciaire de Belgique, <www.cass.be> accessed 21 February 2014.

<sup>57</sup> This is the Belgian Supreme Court.



#### *iv) Compliance with ECHR*

40. With regard to the procedure as set out above to challenge immigration detention, the ECtHR has ruled that the case law of the Belgian Court of Cassation on this matter is settled and is sufficiently clear. The case law is not unreasonable or arbitrary. The Court has previously found that it does amount to a violation of Art 5(1) ECHR.<sup>59</sup> However, the ECtHR has ruled that, where detention was found to be unlawful but the detainee was not released within ‘a short term’, there was a violation of Art 5(4) ECHR.<sup>60</sup>

#### **d) Compensation for unlawful detention**

41. A foreign national who has been unlawfully detained in violation of Art 5 ECHR can claim damages on the basis of the Act of 13 March 1973 on compensation for ineffective detention on remand.<sup>61</sup> The claim is brought before the civil courts against the Belgian State, in the person of the Minister of Justice.<sup>62</sup> In order for such a claim to go through, it is not necessary that there be a previous decision establishing the unlawfulness of the detention.<sup>63</sup> An applicant who proves the unlawfulness, the existence of damage, and the causal connection between them, will be entitled to damages. The damage in its entirety – both material and moral<sup>64</sup> – will need to be compensated.<sup>65</sup>
42. In order to comply with Arts 6 and 13 ECHR, which guarantee fair and impartial proceedings, none of the judges who have ruled on the detention are allowed to be part of the court that rules

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<sup>58</sup> The case law deems appeals to the Court of Cassation not to be governed by art 72 of the Aliens Act 1980 (which lays out the appeal procedure against decisions of immigration detention before the *Chambre de Conseil* and appeal against the decision of the *Chambre de Conseil*), nor by art 31 of the Act of 20 July 1990 on pre-trial detention (which lays out the normal appeal procedure before the Court of Cassation against decisions on ordinary pre-trial detention), but by art 359 para 2 of the Belgian Code of Criminal Procedure (which lays out the normal appeal procedure before the Court of Cassation against decisions of the lower criminal courts and tribunals) (see Court of Cassation 21 December 2011, *Rechtskundig Weekblad* 2012-13, 1138; Court of Cassation 22 November 2011, *Pasicrisie belge* 2011, 624). The legal doctrine contradicts this on the other hand (R. Declercq, *Onderzoeksgerechten, Algemene Praktische Rechtsverzameling*, Kluwer Rechtswetenschappen België, 1993, 415). Given that a more detailed background of the Belgian criminal justice system is required in order to understand these provisions, and that the practical relevance of this discussion is limited for this research project, this issue will not be discussed further in depth.

<sup>59</sup> *M.D. v Belgium* App no 56028/10 (ECtHR, 14 November 2013).

<sup>60</sup> *ibid.*

<sup>61</sup> ‘Wet van 13 maart 1973 betreffende de vergoeding voor onwerkzame voorlopige hechtenis’ / ‘Loi du 13 mars 1973 relative à l’indemnité en cas de détention préventive inopérante’.

<sup>62</sup> Act of 13 March 1973 on compensation for ineffective detention on remand, art 27, §2.

<sup>63</sup> Court of Cassation 5 March 1980, *Arresten van het Hof van Cassatie* 1979-80, 665; Court of Appeal Luik 16 December 1980, *Revue de Jurisprudence de Liège* 1981, 294, note P. Vermeylen.

<sup>64</sup> Court of Appeal Ghent 30 October 1981, unpublished.

<sup>65</sup> *Wassink v the Netherlands* (1990), ECHR Series A no 185-A.

on the claim for damages based on art 27 of the Act of 13 March 1973 concerning compensation for ineffective detention on remand.<sup>66</sup>

### III PREVENTIVE DETENTION

#### a) Preliminary remarks

##### *i) Regime for ‘disposal of the courts for the enforcement of penalties’ and legal basis*

43. For the purpose of this report, preventive detention is confined to detention for offenders who have already served their sentence. This type of detention is regulated by arts 34bis-34quinquies of the Belgian Criminal Code. Preventive detention in Belgium is known under the concept ‘*terbeschikkingstelling van de strafuitvoeringsrechtbank*’. No entirely accurate translation for this concept is available in English, but hereafter it will be referred to as ‘disposal of the courts for the enforcement of penalties’. The ‘disposal’ is a secondary sentence, imposed by the judge at the time of sentencing in addition to the primary sentence of imprisonment, in order to allow for an extended period of custody or supervision after the primary sentence has been served.<sup>67</sup> This secondary sentence of ‘disposal of the courts for the enforcement of penalties’ entails that the offender is put at the disposal of the courts for the enforcement of penalties after they have served their primary sentence. The courts for the enforcement of penalties will at that point decide how they will enforce the disposal, either by imposing continued detention, or by releasing the offender under supervision. In other words, just because the judge who imposes the primary sentence also imposes a ‘disposal’ as a secondary sentence, this does not necessarily mean that the offender will be placed in continued detention after serving their primary sentence. This is for the courts for the enforcement of penalties to decide.
44. This system of ‘disposal of the courts for the enforcement of penalties’ replaces the old system of ‘disposal of the government’. Under the previous system, the ‘disposal’ was not considered a secondary sentence but a safety measure. Hence, the safeguards that are in place for sentences were not available to the offenders who were put ‘at disposal of the government’. This old system of ‘disposal of the government’ has been the subject of several ECtHR judgments.<sup>68</sup> The new system of ‘disposal of the courts for the enforcement of penalties’ was put in place by the law of 26 April 2007, but came into force only on 1 January 2012. It is anticipated that the new

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<sup>66</sup> E Boutmans, *Voorlopige Hechtenis*, Antwerpen, Kluwer rechtswetenschappen, 1985, 302, nr. 804.

<sup>67</sup> S Body-Gendrot et al, *The Routledge Handbook of European Criminology* (Routledge, Oxon 2014) 426.

<sup>68</sup> *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443; *De Schepper v Belgium* App no 27428/07 (ECtHR, 13 October 2009).

regime of ‘disposal of the courts for the enforcement of penalties’ will not lead to new convictions by the ECtHR.<sup>69</sup>

## **b) Decision to detain**

### *i) Circumstances in which ‘disposal’ may be ordered*

45. The ‘disposal’ aims at the protection of society against persons who have committed severe criminal actions that affect other people’s integrity.<sup>70</sup>
46. As noted above, the ordinary courts and tribunals impose the ‘disposal’ as a secondary sentence.<sup>71</sup> This secondary sentence is imposed at the same time and by the same court that imposes the primary sentence of imprisonment. The law provides that this secondary sentence is in some cases mandatory; in other cases it is left to the judge’s discretion.
47. Articles 34ter and 34quater of the Belgian Criminal Code prescribe for which criminal acts the ‘disposal’ can be imposed as a secondary sentence. The most important categories of offenders are the ‘legal recidivists’, ‘habitual offenders’, or ‘dangerous recidivists’.<sup>72</sup>
48. The disposal is mandatory:<sup>73</sup>
  - following a second conviction for specific crimes (the highest rank of offences), save when the first conviction was for a political crime; and
  - following conviction for an offence that lead to death caused by terrorism, rape, sexual assault, torture, or kidnapping of a minor.
49. Where the sentence is mandatory, it is the Assize Court<sup>74</sup> which imposes the sentence.
50. The disposal is optional:<sup>75</sup>
  - on conviction of an offender who previously has been sentenced to at least five years’ imprisonment for acts that have caused intentional severe suffering or physical damage or damage to the mental or physical health, for similar acts within a period of ten years after the first conviction is final; or
  - on conviction for heinous crimes, including violations of humanitarian law, hostage, murder, inhuman treatment, and human trafficking.

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<sup>69</sup> Y Van de Berghe, ‘De terbeschikkingstelling van de strafuitvoerings- rechtbank: alweer een nieuwe straf, alweer een nieuwe uitvoering’, *Tijdschrift voor Strafrecht* 2013, (222) 238.

<sup>70</sup> Belgian Criminal Code, art 34bis.

<sup>71</sup> Belgian Criminal Code, art 34ter.

<sup>72</sup> S Body-Gendrot et al, *The Routledge Handbook of European Criminology* (Routledge, Oxon 2014), 426.

<sup>73</sup> Belgian Criminal Code, art 34ter.

<sup>74</sup> ‘Hof van Assisen’ / ‘Court d’assises’. This is the highest Belgian criminal court and is the only court in the Belgian jurisdiction that rules with jury trial.

<sup>75</sup> Belgian Criminal Code, art 34quater.

51. Where the disposal is optional, the lower tribunals decide whether or not to impose the sentence. Neither the Belgian Criminal Code, nor any other legal text, sets out the criteria the tribunal has to apply in deciding whether or not to impose the ‘disposal’ as a secondary sentence. It is generally understood that the tribunal must take its decision in view of the general aim of the sentence, namely the protection of society against persons who have committed severe criminal actions that affect other people’s integrity.<sup>76</sup>

*ii) Length of detention*

52. The primary court or tribunal imposes ‘disposal’ for a minimum period of five years and a maximum period of fifteen years. This period starts after the primary sentence has been served.<sup>77</sup> Before the primary sentence expires, the court for the enforcement of penalties has to decide either to release the offender from prison under supervision, or to continue his detention.<sup>78</sup>

*iii) Circumstances in which ‘disposal’ will be imposed*

53. The court for the enforcement of penalties will make an order for continued detention when there is a risk that the offender will commit serious criminal acts that harm the physical or psychological integrity of others, and when this risk cannot be avoided by releasing the offender under supervision and by imposing special conditions upon release.<sup>79</sup>
54. Both the director of the prison where the offender has served their primary sentence<sup>80</sup> and the public prosecutor<sup>81</sup> give a formal and substantiated advice as to whether detention should continue. The court for the enforcement of penalties hears the case after the two advices have been given, and at least two months before the primary sentence expires. The criminal file is put at the disposal of the offender and their lawyer at least four days before the hearing.<sup>82</sup>
55. The court for the enforcement of penalties hears the offender and their lawyer, the public prosecutor, and the director of the prison.<sup>83</sup> The hearing is public, unless the offender asks for it to be in camera.<sup>84</sup>

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<sup>76</sup> Belgian Criminal Code, art 34bis.

<sup>77</sup> Belgian Criminal Code, art 34ter.

<sup>78</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty (‘Wet van 17 mei 2006 betreffende de externe rechtspositie van de veroordeelden tot een vrijheidsstraf en de aan het slachtoffer toegekende rechten in het raam van de strafuitvoeringsmodaliteiten’ / ‘Loi de 17 mai 2006 relative au statut juridique externe des personnes condamnées à une peine privative de liberté et aux droits reconnus à la victime dans le cadre des modalités d’exécution de la peine’), art 95/2, §2.

<sup>79</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/2, §3.

<sup>80</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/3.

<sup>81</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/4.

<sup>82</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/5.

<sup>83</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/6.

### **c) Review of and challenges to detention**

#### *i) Application for release under supervision*

56. During the period of continued detention, the offender may apply to the court for the enforcement of penalties for several forms of parole, such as prison leave,<sup>85</sup> limited detention, and electronic surveillance.<sup>86</sup> An offender who has been released under supervision may also ask the court for the enforcement of penalties to put an end to the period of disposal.<sup>87</sup>

#### *ii) Periodic review*

57. If the court for the enforcement of penalties orders continued detention, the court will *ex officio* after one year of detention review the possibility of granting release under supervision.<sup>88</sup> This review is effectively an annual periodic review.
58. The review occurs at a hearing of the court for the enforcement of penalties. The same procedure is followed and the same safeguards are in place as for the original decision to continue detention or release under supervision (see above).<sup>89</sup>

#### *iii) Appeal*

59. The offender can also appeal against the decision of the court for the enforcement of penalties to the Belgian Court of Cassation (*'Hof van Cassatie'* / *'Cour de cassation'*),<sup>90</sup> which will decide on the lawfulness of the decision to detain. If the Court of Cassation decides that the decision was unlawful, it will refer the case to a different court for the enforcement of penalties.<sup>91</sup> This court will render a new judgment.

### **d) Compensation for unlawful detention**

60. The Act of 13 March 1973 on compensation for ineffective detention on remand is not applicable to offenders who have been continuously detained based on a judgment of the court for the enforcement of penalties that has later been quashed by the Court of Cassation.<sup>92</sup> However, the ordinary procedures for claiming compensation are open to the offender. The offender will have to file a claim for compensation with the ordinary civil courts and tribunals.

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<sup>84</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/6.

<sup>85</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/11-95/17.

<sup>86</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/18-95/25.

<sup>87</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/29.

<sup>88</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/21.

<sup>89</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 95/22-25.

<sup>90</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 96.

<sup>91</sup> Act of 17 May 2006 on the external legal status of persons sentenced to deprivation of liberty, art 98.

<sup>92</sup> 'Wet van 13 maart 1973 betreffende de vergoeding voor onwerkzame voorlopige hechtenis' / 'Loi du 13 mars 1973 relative à l'indemnité en cas de détention préventive inopérante'.

The claimant will have to prove the existence of fault on the part of the Belgian State, that they have suffered damage, and that there is a causal connection between the fault and the damage.<sup>93</sup>

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<sup>93</sup> Belgian Civil Code, art 1382.

# Country Report for Canada

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. After 9/11, the Government of Canada undertook new measures (such as investigative hearings and preventive arrest) and began to use previously enacted mechanisms (such as security certificates) to facilitate administrative detention. These measures were undertaken for counter-terrorism, intelligence gathering and other national-security related reasons. The investigative hearing and preventive arrest mechanisms were first introduced into Canada's Criminal Code with the coming into force of the Anti-Terrorism Act<sup>1</sup> in December 2001. A sunset clause in the Anti-Terrorism Act provided that the provisions would expire by 1 March 2007, unless they were extended by a resolution passed by both houses of Parliament. Till February 2007, no investigative hearings had been held and there was no reported use of the provisions on recognizance with conditions or preventive arrest. A government motion to extend the measures without amendment for three years was defeated in the House of Commons on 27 February 2007 by a vote of 159 to 124, and the provisions ceased to have any force or effect.<sup>2</sup>

### i) Security certificates

2. Security certificates pre-dated 9/11 and the Anti Terrorism Act, and are governed by procedures under Canada's Immigration and Refugee Protection Act 2001 ('IRPA'),<sup>3</sup> as opposed to the criminal law. Security certificates are best explained in the official summary in Bill C-3 amending the IRPA in 2007 as being:

...used to remove from Canada a non-citizen who has been determined to present a high level of risk to the national security or to any person. This method may be used when the risk determination is based on secret evidence that cannot be disclosed to the person subject to removal. A security certificate may be used only in relation to a permanent resident or a foreign national – never a citizen. If such a person is believed to be inadmissible to Canada on grounds related to security, the violation of human or international rights, serious criminality or organized crime, the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness ('the two Ministers') together may sign a certificate naming the person and refer it to the Federal Court to determine whether the certificate is reasonable (section 77 of IRPA).<sup>4</sup>

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<sup>1</sup> Anti-Terrorism Act 2001 (S.C. 2001, c. 41).

<sup>2</sup> <sup>4</sup> About the *Anti Terrorism Act* (Department of Justice, Government of Canada) < <http://canada.justice.gc.ca/eng/cj-jp/ns-sn/act-loi.html>> accessed 24 February 2014.

<sup>3</sup> Immigration and Refugee Protection Act 2001 (S.C. 2001, c. 27) ('IRPA').

<sup>4</sup> Library of Parliament, 'Legislative Summary of Bill C-3: An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special advocate) and to Make a Consequential Amendment to Another Act' (*Parliament of Canada*, 2008) <[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?source=library\\_prb&ls=C3&Parl](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C3&Parl)>

3. In *Charkaoui v Canada (Citizenship and Immigration) ('Charkaoui')*,<sup>5</sup> a landmark case on security certificates, the Supreme Court decided that the security certificate regime was not in accordance with the principles of fundamental justice because the scheme denied the named person the opportunity to know the case against them and challenge it accordingly.<sup>6</sup> In particular, the legislation failed the 'minimal impairment test', largely because of the existence of the special advocate system in the United Kingdom ('UK').<sup>7</sup> Following this, the security certificate scheme was amended to ensure that both foreign nationals and permanent residents are entitled to a review of their detention within the first 48 hours,<sup>8</sup> and to include a special advocate (as exist in the UK under control orders and, now, under the Terrorism Prevention and Investigative Measures). Similar to the UK, the special advocates in Canada are security-cleared lawyers who can see the closed material in these cases, but cannot communicate with the accused, once they have seen such material.<sup>9</sup>

4. As the official summary in Bill C-3 amending the IRPA also stated:

Because some people may face a risk of torture or death if they are returned to their country of origin, Canada does not remove every person whose security certificate is found to be reasonable. IRPA provides that, while the Federal Court is considering the reasonableness of the certificate, either the Minister of Citizenship and Immigration or the person named in the certificate may request that the proceeding be suspended while the Minister makes a decision on an application for protection (also known as a pre-removal risk assessment, or PRRA) (sections 77(2), 79(1) and 112(1)). The PRRA is conducted to determine whether the person named in the certificate would be at risk of torture, death, or cruel and unusual treatment or punishment if he or she were returned to the country of origin. If the Minister determines that the person would be at risk, and that this risk outweighs the risk the person poses by staying in Canada, then the application for protection is allowed and any subsequent order that the person be removed to the country that poses the risk is stayed (sections 113 and 114).<sup>10</sup>

5. In some cases, such people are release from detention on conditions, while in others (such as in the present case of Mohammed Harkat) detention can continue for years. Although potentially, the arrested persons can be indefinitely detained if they are considered a greater risk to Canada,

=39&Ses=2&Language=E&Mode=1#apurpose> accessed 24 February 2014.

<sup>5</sup> *Charkaoui v Canada (Citizenship and Immigration)* [2007] 1 SCR 350.

<sup>6</sup> *ibid* [52]-[65].

<sup>7</sup> *ibid* [69]. The Court states that "The United Kingdom uses special counsel to provide a measure of protection to the detained person's interests, while preserving the information that must be kept secret. These alternatives suggest that the IRPA regime, which places on the Judge the entire burden of protecting the person's interest, does not minimally impair the rights of non-citizens"

<sup>8</sup> IRPA, s 83.

<sup>9</sup> IRPA, s 85.

<sup>10</sup> Library of Parliament, 'Legislative Summary of Bill C-3: An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special advocate) and to Make a Consequential Amendment to Another Act' (*Parliament of Canada*, 2008) <[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?source=library\\_prb&ls=C3&Parl=39&Ses=2&Language=E&Mode=1#apurpose](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C3&Parl=39&Ses=2&Language=E&Mode=1#apurpose)> accessed 24 February 2014.



most detainees under security certificates, such as Charkaoui and Hassan Almrei, have had their security certificates withdrawn or quashed by the courts. Some, such as Mohammed Harkat, have been released from detention but are still under conditions.

6. It should be noted that the information upon which any given security certificates may be based is often argued by the government to be security-sensitive, i.e. it cannot be heard in open court because to do so would be injurious to national security and/or international relations. As a result, this information is often considered in closed (*in camera*) hearings, in a manner similar to the operation of control orders (now Terrorism Prevention and Investigative Measures) in the UK Post-*Charkaoui*, provisions for special advocates (similar to those operating in the UK) have been inserted into the security certificate regime to represent the interests of the foreign national or permanent resident when information or other evidence is heard in their absence. Nevertheless, the claiming of national-security confidentiality privilege has, and can, complicate the procedure whereby a detainee seeks to challenge their detention because it is based on information that is security sensitive and, thus, cannot be heard in open court.<sup>11</sup> As such, challenges to the information have to be heard in closed court absent the controlee, albeit with the special advocate acting to represent their interests.

#### *ii) Investigative hearings and preventive arrest*

7. The investigative hearing and preventive arrest provisions were re-instated into Canadian Criminal law on 25 April 2013, when Bill S-7, the Combating Terrorism Act 2012 received royal assent.<sup>12</sup> Bill S-7 was passed to amend the Criminal Code, the Canada Evidence Act and the Security of Information Act. As the official legislative summary of the Bill make clear, the provisions permit:

A peace officer, with the prior consent of the Attorney General of Canada and in circumstances where a terrorism offence is under investigation, to apply to a Judge for an order to compel an individual believed to have information relating to a particular offence to appear at an investigative hearing to answer questions and produce relevant information. The bill also reinstates provisions allowing for preventive arrest, and the placing of individuals under recognizance with conditions in circumstances where there is reason to believe that doing so is necessary to prevent a terrorist act.<sup>13</sup>

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<sup>11</sup> For a full discussion of the issues associated with the use of secret evidence in the Canadian security certificate scheme (and around the world), see Oxford Pro Bono Publico, 'The Use of Secret Evidence in Judicial Proceedings: A Comparative Survey for the Joint Committee of Human Rights' (2011) <[http://denning.law.ox.ac.uk/news/events\\_files/Secret\\_Evidence\\_JCHR\\_27\\_October\\_2011\\_final.pdf](http://denning.law.ox.ac.uk/news/events_files/Secret_Evidence_JCHR_27_October_2011_final.pdf)> accessed 19 January 2014.

<sup>12</sup> Combating Terrorism Act 2012 (S.C. 2013, c.9).

<sup>13</sup> Library of Parliament, 'Legislative Summary of Bill S-7: An Act to Amend the Criminal Code, the Canada Evidence Act and the Security of Information Act' (*Parliament of Canada*, 2012) <[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?source=library\\_prb&ls=S7&Parl](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=S7&Parl)>

8. It thus re-instates provisions of the above noted Anti Terrorism Act. Clause 10 of Bill S-7, which is now law under the Combating Terrorism Act 2012, re-enacts ss 83.28 to 83.3 of the Canadian Criminal Code dealing with investigative hearings and the gathering of information. There are only minor changes to the wording and intent of the earlier provisions, derived from the Anti Terrorism Act.
9. Section 83.29 states that a person who evades service of the information-gathering order, is about to abscond, or fails to attend an examination may be subject to arrest with a warrant. The new provisions add that s 707 of the Code, which sets out maximum periods of detention for witnesses, also applies to individuals detained for a hearing under s 83.29. Section 707 of the Criminal Code 1985 stipulates:

707. (1) No person shall be detained in custody under the authority of any provision of this Act, for the purpose only of appearing and giving evidence when required as a witness, for any period exceeding thirty days unless prior to the expiration of those thirty days he has been brought before a Judge of a superior court of criminal jurisdiction in the province in which he is being detained.

**b) Threshold questions**

*i) Security certificates*

10. No threshold questions arise in the case of security certificates.

*ii) Investigative hearings and preventive arrest*

11. Preventive arrests also do not raise any threshold questions. In regards to investigative hearings, s 83.28 of the Canadian Criminal Code governs the process whereby an individual who may have information about a terrorism offence may be brought before a judge for an investigative hearing. Under the provision, such a person is compelled to attend a hearing and answer questions. If that person evades the service of the order to attend, is about to abscond, or fails to attend the examination, they may be subject to arrest with a warrant, and hence be detained.

**c) Decision to detain**

*i) Security certificates*

12. No person is detained unless both the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness issue a warrant for the person's arrest and detention. Warrants are issued if the two Ministers have reason to believe that the person is a danger to national security or to the safety of any person, or is unlikely to appear at a proceeding

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=41&Ses=1&Language=E&Mode=1#a1> accessed 24 February 2014.

or for their removal.<sup>14</sup> In the case of security certificates, the procedure for issuing warrants is different from the regular issue of warrants. The government often claims that the information upon which the security certificates are based is national security-sensitive and, as such, it can take years worth of legal challenges before the information is released. To mitigate this, the Special Advocate system was introduced.

13. Perhaps in recognition of the fact that more people subject to security certificates will be released on conditions, the post-*Charakaoui* security certificate regime sets out new rules for arresting and detaining a person on release if a peace officer has reasonable grounds to believe that the person has contravened, or is about to contravene, any condition applicable to their release.<sup>15</sup> As is the case for an original detention decision, the person must be brought before a judge within the first 48 hours of the detention.<sup>16</sup> If the judge agrees that the person has contravened, or was about to contravene a condition, the judge may vary the conditions, confirm the release order, or order that the person's detention be continued. The latter order may be made only if the judge is satisfied that the person's release under conditions would be injurious to national security or would endanger the safety of any person, or that the person would be unlikely to appear at a proceeding or for removal (new s 82.2(3) of the Immigration and Refugee Protection Act).

*ii) Investigative hearings and preventive arrest*

14. Under s 83.28 of the Canadian Criminal Code, the section governing investigative hearings, the objective is not to prosecute an individual for an offence, but to gather information. Under the provision, a peace officer,<sup>17</sup> with prior consent of the Attorney General, can apply to a superior court or a provincial court judge for an order to gather information under the following conditions:
  - if there are reasonable grounds to believe that a terrorism offence has or will be committed;
  - if there are reasonable grounds to believe that information concerning the offence or the whereabouts of the suspect is likely to be obtained as a result of the information-gathering order; and
  - if reasonable attempts have been made to obtain such information by other means.<sup>18</sup>
15. In addition, s 83.28(11) also states that any person ordered to attend an investigative hearing is entitled to retain and instruct counsel. The person will be required to answer questions, and may

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<sup>14</sup> IRPA, s 81.

<sup>15</sup> IRPA, s 82.2 (1).

<sup>16</sup> IRPA, s 82.2 (2).

<sup>17</sup> An officer of the peace is just the way that police officers are referred to in this provision of the Criminal Code.

<sup>18</sup> Criminal Code 1985 (R.S.C. 1985, c. C-46), ss 83.28(4)(a)-(b) ("Criminal Code").

only refuse to do so on the basis of laws relating to disclosure or privilege. The presiding judge will rule on any such refusal. No one called to such a hearing can refuse to answer a question or to produce something in their possession on the grounds of self-incrimination.<sup>19</sup> However, any information or testimony provided by an individual during an investigative hearing cannot be used against them in a subsequent proceeding except in relation to prosecuting them for perjury or for providing subsequent contradictory evidence in a later proceeding.<sup>20</sup>

16. Section 83.3 of the Criminal Code deals with recognizance with conditions (i.e. releasing someone back into the public with conditions such as electronic monitoring, house arrest etc.) and preventive arrest to prevent a potential terrorist attack. Under this re-enacted section, with the prior consent of the Attorney General, a peace officer may lay out the information before a provincial court judge if they believe that a terrorist act will be carried out and suspect that an arrest or the imposition of a recognizance with conditions is required to prevent it. The judge may order the person to appear before any provincial court judge. However, the original version of this section only allowed the judge to order the person to appear before them. If the peace officer suspects that immediate detention is necessary, they may arrest a person without a warrant either before laying out the information or before the person has had a chance to appear before a judge. As explained below, the arrested person has to be produced before the court within 24 hours.
17. For both the investigative hearing and recognizance with conditions or preventive arrest provisions, the Attorney General of Canada and the Minister of Public Safety are required to issue separate annual reports containing information about how frequently the provisions have been used. However, unlike the provisions on investigative hearings and recognizance with conditions or preventive arrest enacted in 2001 (where only frequency of use needed to be detailed in the annual reports,) the re-enacted provisions in the Criminal Code requires the Attorney General to explain why the operation of these provisions should be extended.<sup>21</sup>

### **c) Review of and challenges to detention**

#### *i) Security certificates*

18. A judge will commence a review of the reasons for the continued detention of any person held under a security certificate within the first 48 hours of detention and thereafter, at six-month intervals until a decision is made regarding the reasonableness of the certificate.<sup>22</sup> Pursuant to a

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<sup>19</sup> Criminal Code, s 83.28(10).

<sup>20</sup> Criminal Code, s 83.28(10).

<sup>21</sup> Criminal Code, s 83.31(1.1).

<sup>22</sup> IRPA, ss 82(1)- 82(2).

new provision, detainees now have a right to apply to the Federal Court for further reviews at six-month intervals if their security certificate is determined reasonable.<sup>23</sup>

19. Post-*Charakaoui*, the judge is required to continue the detention only if they are satisfied that releasing the person under conditions will not endanger national security, the safety of others or that the detainee is unlikely to appear at a proceeding.<sup>24</sup>
20. If a material change in the circumstances that led to an order for continued detention or release occurs, either the person subject to the order or the Minister of Public Safety and Emergency Preparedness may apply to have the order varied.<sup>25</sup> Furthermore, at six-month intervals, a person released from detention under conditions may apply to the Federal Court for a review of the reasons for continuing the conditions.<sup>26</sup> An appeal to the Federal Court of Appeal can also be made against any detention or release decision (other than an interlocutory decision), but only if the judge certifies that a ‘serious question of general importance’ is involved, and states the question.<sup>27</sup>

#### *ii) Investigative hearings and preventive arrest*

21. Any person detained under the investigative hearing/preventive arrests provisions in the Criminal Code must be brought before a provincial court judge within 24 hours, or as soon as is feasible<sup>28</sup> (the original wording referred to ‘as soon as possible’). At that time, a show cause hearing must be held to determine whether to release the person or to detain them for a further period.<sup>29</sup>
22. Moreover, although not explicitly stated in the wording of the legislation, it is likely that ongoing detention would be challengeable under the Canadian Charter of Rights and Freedoms, particularly s 7 pertaining to the right to life, liberty and security of the person and s 11, pertaining to rights such as the right to be informed of the offence, right to be presumed innocent etc.<sup>30</sup>
23. The investigative hearing and preventive arrest provisions have never been used and therefore, have not been subject to judicial interpretation. Before the original investigative hearing provisions expired in 2007, they were reviewed by the Canadian Supreme Court during the Air

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<sup>23</sup> IRPA, s 82(3).

<sup>24</sup> IRPA, s 82(5).

<sup>25</sup> IRPA, s 82.1(1).

<sup>26</sup> IRPA, s 82 (4).

<sup>27</sup> IRPA, s 82.3.

<sup>28</sup> Criminal Code, s 83.3(6)(b).

<sup>29</sup> Criminal Code, s 83.3(7)(b).

<sup>30</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (sch B to the Canada Act 1982 (UK) c. 11).

India trial.<sup>31</sup> The Crown had brought an application *ex parte* (in the absence of one or more of the parties to the hearing) seeking an order that a Crown witness attend an investigative hearing pursuant to s 83.28 of the Code. Neither the media nor the accused in the trial was aware that the application had been made. That order was appealed to the Supreme Court. The Court released companion decisions upholding the constitutionality of these provisions, stating that investigative hearings do not violate an individual's s 11 Canadian Charter of Rights and Freedoms right against self-incrimination, as evidence derived from such hearings cannot be used against the person except in perjury prosecutions.

24. To conclude, persons detained under security certificates and/or investigative hearing and preventive arrest provisions are able to challenge the constitutionality of these provisions up to the Supreme Court of Canada. This has already occurred in a number of security certificate cases including, most famously, the *Charkaoui* decision.

#### **d) Remedies for unlawful detention**

25. Persons detained under security certificates can, and have, sued the Canadian government for compensation as a remedy for their detention. Most notably, Adil Charkaoui launched a \$24.5 million dollar lawsuit in 2010 against the government agencies and representatives responsible for his detention. Others detained under security certificates that have since been withdrawn, such as Hassan Almrei, have also indicated their intention to seek reparation in civil court.

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<sup>31</sup> Application under s. 83.28 of the Criminal Code (Re), [2004] 2. SCR 248.

# Country Report for China

## I PRELIMINARY REMARKS

### a) General

1. This Country Report is based on primary research and drafting by volunteers who were able to access, translate and summarise the underlying Chinese legal materials. It is not, and does not purport to be, absolutely comprehensive. All translations provided are unofficial, and we cannot exclude the possibility that there are additional relevant materials which are either publicly available but are not discussed, or which are not available to the public.

### b) Overview of detention regimes

2. In the Chinese legal system there are three main forms of detention: administrative, judicial, and criminal. Detention of persons with a mental illness, military detention, and police detention are all governed by (general or specific) provisions of Chinese criminal law. No information was provided regarding preventive detention of persons who have already served a sentence for a criminal offence.

## II ADMINISTRATIVE DETENTION

### a) Preliminary remarks

3. The objective of administrative detention in China is to allow the government to preserve the security of society. Administrative detention is primarily executed by public organs (as the representatives of the government), and occurs where a person violates the 'Public Order Management and Punishment Law of the People's Republic of China' ('Public Order Law').<sup>1</sup> Administrative detention does not occur as a result of violation of the criminal law.

### b) Decision to detain

4. As noted above, administrative detention is the most severe administrative penalty available in China. It is imposed in severe cases involving disruptions of public order, endangerment of public security, infringement of personal rights or property rights, or detriment to social management.<sup>2</sup>

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<sup>1</sup> An alternative translation is the 'Public Security Administration Punishments of the People's Republic of China'.

<sup>2</sup> See Public Order Law, chs 2-3.

5. Since administrative detention is not consequent on the commission of a criminal offence, detention is executed by the police force responsible for public security rather than the police force responsible for investigating criminal offences.
6. Where there has been a suspected violation of the Public Order Law meeting the description given above, a member of the relevant police force must apply to the public security organ of the Chinese government (which comprises four levels) for authorisation of detention. The power to detain rests with the head of the public security organ. The public security organ must investigate the facts alleged to amount to a violation of the law, then apply to the head for a decision on detention.
7. The maximum period of administrative detention under ordinary circumstances is fifteen days. In cases involving multiple violations of the Public Order Law, detention for each violation is executed concurrently but the maximum period is extended to 20 days.

#### **c) Review of and challenges to detention<sup>3</sup>**

8. A detainee has the right to apply for administrative reconsideration of the decision to detain. An application for administrative reconsideration does not have a suspensive effect.
9. A detainee also has the right to institute administrative litigation to challenge their detention. This is a judicial process. Any unit, including State organs and organisations, and any individual, has the right to impeach and charge the public security organ or the people's Procuratorates<sup>4</sup> and administrative supervisory organs.

#### **d) Compensation for unlawful detention<sup>5</sup>**

10. If detention is found to have been unlawful, a detainee is entitled to compensation. The police may also be subject to administrative sanctions.

### **III DETENTION OF PERSONS WITH A MENTAL ILLNESS**

#### **a) Preliminary remarks**

11. This sub-section focuses on the detention of persons with a mental illness who have been convicted of criminal offences. The 'Criminal Procedural Law of the People's Republic of China'

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<sup>3</sup> See Public Order Law, Chapter 4.

<sup>4</sup> It appears from context that the 'Procuratorate' is broadly analogous to a Department of Public Prosecutions or similar, and that the 'Procurator' is the equivalent of a Public Prosecutor. See in particular 'Police detention – Decision to detain – General' (n 15).

<sup>5</sup> See Public Order Law, Chapter 5.



(‘Criminal Procedural Law’)<sup>6</sup> contains a chapter relating to ‘compulsory medical procedures of [sic] mental patients who would not bear criminal responsibility according to the law’.

12. No information was provided regarding the detention of persons with a mental illness outside the criminal law context.

#### **b) Threshold questions**

13. It is unclear whether the compulsory medical treatment/procedures discussed in this sub-section include or involve detention.

#### **c) Decision to detain**

14. During a criminal investigation, the public security organ has the power to order temporary protective measures in relation to a suspect with a mental illness so as to prevent them from harming others.
15. In addition, under the Criminal Procedural Law, if it is possible that a criminal suspect suffers from a mental illness, they will be sent to a psychiatric appraisal institution. The responsibility for initiating this appraisal lies with the investigative organ or the Procuratorate; however, the suspect and their defence lawyer also have the right to request that the public security organ make arrangements for this assessment.
16. If it is concluded that the suspect does in fact suffer from a mental illness such that they should not bear criminal responsibility for their actions, the person will be subject to compulsory medical treatment arranged either by their family or, if necessary, the government. Criminal responsibility will not lie where it is found that the person was unable to recognise or control their acts; by contrast, a person whose mental illness is of an ‘intermittent nature’ will bear criminal responsibility if the offence was committed while they were in a ‘normal mental state’.
17. If it is found that the suspect suffers from a mental illness but *should* bear criminal responsibility for their actions, they will be subject to compulsory medical treatment as part of the outcome of the judicial process – unless their mental illness is of an ‘intermittent nature’, in which case they will be sentenced and detained in the usual way.

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<sup>6</sup> Second correction, according to the decision of the 5<sup>th</sup> meeting of the 11<sup>th</sup> National People’s Congress on the modified ‘Criminal Procedure Law of the People’s Republic of China’; decision of 14 March 2012. This statute came into force on 1 January 2013.

#### **d) Review of and challenges to detention**

18. As noted above, both the suspect and their defence lawyer have the right to apply for an expert assessment as to whether they in fact suffer from a mental illness. The Procuratorate and the public organ also have a duty to institute this procedure in appropriate cases.

#### **e) Compensation for unlawful detention**

19. If detention or the ordering of compulsory medical treatment is found to have been unlawful, a detainee may seek compensation pursuant to the ‘State Compensation Law of the People’s Republic of China’ (‘State Compensation Law’).<sup>7</sup>

### **III JUDICIAL DETENTION**

#### **a) Decision to detain**

20. Judicial detention exists in order to ensure the normal order of the judicial activities of the People’s Courts during criminal, civil and administrative proceedings. It allows the judiciary to restrict, on a temporary basis, the freedom of a person whose behaviour constitutes a serious breach of the order of the court.
21. If any participant in the proceedings of a trial, or a bystander, violates an order of the court, the presiding judge will warn them to desist.<sup>8</sup>
22. If the person fails to obey, they may be forcibly removed from the courtroom; if the violation is serious, they may be fined up to 1,000 yuan or detained for no longer than fifteen days.<sup>9</sup> On expiration of this period, the person is automatically released. The fine or detention is subject to the approval of the President of the Court.<sup>10</sup>

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<sup>7</sup> ‘State Compensation Law of the People’s Republic of China’, 12 May 1994, passed by the 7<sup>th</sup> session of the standing committee of the 8<sup>th</sup> National People’s Congress, revised according to the decision on the modified ‘State Compensation Law of the People’s Republic of China’, passed by the 14<sup>th</sup> meeting of the standing committee of the National People’s Congress on 11 April 2010.

《中华人民共和国国家赔偿法》（1994年5月12日第八届全国人民代表大会第八次会议通过，2010年4月11日全国人民代表大会常务委员会第十四次会议修正。）

<sup>8</sup> 《中华人民共和国刑事诉讼法》第一百九十四条 在法庭审判过程中，如果诉讼参与人或者旁听人员违反法庭秩序，审判长应当警告制止。（Criminal Procedural Law, art 194 which states, ‘If any participant in the proceedings of a trial or any bystander violates the order of the courtroom, the presiding Judge shall warn them to desist.’）

<sup>9</sup> 对不听制止的，可以强行带出法庭；情节严重的，处以一千元以下的罚款或者十五日以下的拘留。（‘If any person fails to obey, he may forcibly be taken out of the courtroom. If the violation is serious, the person shall be fined not more than 1,000 yuan or detained not more than 15 days.’）

<sup>10</sup> 罚款、拘留必须经院长批准。（‘The fine or detention shall be subject to the approval of the president of the court.’）

### **b) Review of and challenges to detention**

23. A person who is subject to a fine or detention and is dissatisfied with the decision can apply to the People's Court at the next highest level<sup>11</sup> for reconsideration. The application does not have a suspensive effect.<sup>12</sup>

### **d) Compensation for unlawful detention**

24. If judicial detention is found to have been unlawful, the detainee can obtain compensation under the State Compensation Law.

## **IV MILITARY DETENTION**

25. 'Military detention' does not exist in China under that name. If a soldier violates the criminal law while serving in the Army, or if a criminal offence occurs in the Army, the investigation is conducted by the Army's own security departments.<sup>13</sup> These security departments exercise the power of detention just as the public security organ does in the context of a general criminal investigation. This means the security departments of the Army are effectively another investigative agency. It should be noted that, in China, whoever investigates a criminal case decides on and executes detention in relation to it (see the section on police detention for further detail).

## **V POLICE DETENTION**

### **a) Preliminary remarks**

26. This sub-section deals with detention by China's public security organs<sup>14</sup> under the Criminal Procedural Law in the context of criminal investigations and proceedings.
27. This system has evolved over the past 40 years, and significant improvements have been made over that period in terms of both procedural safeguards and rights to redress.

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<sup>11</sup> In China there are four levels of courts: the primary People's Court, the intermediate People's Court, the Higher People's Court, and the Supreme People's Court.

<sup>12</sup> 被处罚人对罚款、拘留的决定不服的，可以向上一级人民法院申请复议。复议期间不停止执行。(If the person under punishment is not satisfied with the decision on the fine or detention, he may apply to the People's Court at the next higher [sic] level for reconsideration. However, the execution of the fine or detention shall not be suspended during the period of reconsideration.)

<sup>13</sup> 《中华人民共和国刑事诉讼法》第二百九十条条 军队保卫部门对军队内部发生的刑事案件行使侦查权。(Criminal Procedural Law, art 290 which states, 'The security departments of the Army shall exercise the power of investigation with respect to criminal offences that have occurred in the Army.')

<sup>14</sup> In some places in the underlying research, the term 'public security organ' is used interchangeably with 'police'. The extent of the synonymity or overlap is unclear.

## **b) Decision to detain**

### *i) General*

28. In all criminal cases, the public security organs are responsible for investigation, detention, execution of arrests, and preliminary inquiries.<sup>15</sup>
29. The Procuratorate also has the power to order arrest and detention of criminal suspects in certain cases, but does not have the power to execute it. Thus, broadly speaking, while the public security organs are responsible for the investigation of crimes, the Procuratorate is responsible for the prosecution of crimes.
30. If the public security organs are investigating a criminal case, the power to arrest a suspect lies with them. If the Procuratorate is investigating a criminal case, the power to order an arrest lies with the leader of the Procuratorate, but the execution of the arrest and detention remains a matter for the public security organs.

### *ii) Detention on initiative of public security organs*

31. According to the Criminal Procedural Law, public security organs may initially detain an active criminal or a major suspect under any of the following circumstances:
  - if they are preparing to commit a crime, are in the process of committing a crime, or are discovered immediately after committing a crime;
  - if they are identified as having committed a crime by a victim or an eyewitness;
  - if criminal evidence is found on their body or at their residence;
  - if they attempt to commit suicide or escape after committing a crime, or if they are a fugitive;
  - if there is a likelihood of their destroying or falsifying evidence or tallying [sic] confessions;
  - if they do not provide their true name and address and their identity is unknown; or
  - if they are strongly suspected of committing crimes from one place to another, repeatedly, or in a gang.

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<sup>15</sup>《中华人民共和国刑事诉讼法》第三条 对刑事案件的侦查、拘留、执行逮捕、预审，由公安机关负责。检察、批准逮捕、检察机关直接受理的案件的侦查、提起公诉，由人民检察院负责。审判由人民法院负责。除法律特别规定的以外，其他任何机关、团体和个人都无权行使这些权力。（Criminal Procedural Law, art 3 which states, ‘The public security organs shall be responsible for investigation, detention, execution of arrests and preliminary inquiry [sic] in criminal cases. The People’s Procuratorates shall be responsible for procuratorial work, authorising approval of arrests, conducting investigations, and initiating public prosecution of cases directly accepted by the procuratorial organs. The People’s Courts shall be responsible for adjudication. Except as otherwise provided by law, no other organs, organisations or individuals shall have the authority to exercise such powers.’)

32. The normal period of detention is ten days. Within three days of detention, the public security organs must submit a request to the Procuratorate for approval of the arrest;<sup>16</sup> within the following seven days, the Procuratorate must decide whether to approve or disapprove the request.<sup>17</sup>
33. Under special circumstances, the time limit for submitting a request to the Procuratorate may be extended by one to four days.<sup>18</sup> This means the total maximum period of detention is extended to fourteen days. In practice, this may become the norm, as it is up to the public security organ to determine what constitutes ‘special circumstances’.
34. Moreover, in cases involving the arrest of a major or active suspect, if the person is suspected of committing crimes from one place to another (eg across multiple cities), repeatedly, or in a gang, the time limit for submitting a request for approval of the arrest may be extended to 30 days. In these circumstances, the total maximum period of detention becomes 37 days (30 days for the public security organ to apply for approval of the arrest, and seven days for the Procuratorate to make its decision).

*iii) Detention on initiative of Procuratorate*

35. As noted above, the Procuratorate also has the power to authorise arrest and detention of a criminal suspect where it is investigating a criminal case. It may do so where one of two conditions is met:<sup>19</sup>

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<sup>16</sup> 《中华人民共和国刑事诉讼法》第六十九条 公安机关对被拘留的人，认为需要逮捕的，应当在拘留后的三日以内，提请人民检察院审查批准。（Criminal Procedural Law, art 69, which states, ‘If the public security organ deems it necessary to arrest a detainee, it shall, within three days after the detention, submit a request to the People’s Procuratorate for examination and approval.’）

<sup>17</sup> 《中华人民共和国刑事诉讼法》第六十九条 人民检察院应当自接到公安机关提请批准逮捕书后的七日以内，作出批准逮捕或者不批准逮捕的决定。（Criminal Procedural Law, art 69, which states, ‘The People’s Procuratorate shall decide either to approve or disapprove the arrest within seven days from the date of receiving the written request for approval of arrest submitted by a public security organ.’）

<sup>18</sup> 《中华人民共和国刑事诉讼法》第六十九条，在特殊情况下，提请审查批准的时间可以延长一日至四日。（Criminal Procedural Law, art 69, which states, ‘Under special circumstances, the time limit for submitting a request for examination and approval may be extended by one to four days.’）

<sup>19</sup> 《人民检察院刑事诉讼规则》（2012年10月16日由最高人民检察院第十一届检察委员会第八十次会议通过第二次修正，自2013年1月1日起施行。）第一百二十九条，人民检察院对于有下列情形之一的犯罪嫌疑人，可以决定拘留：（一）犯罪后企图自杀、逃跑或者在逃的；（二）有毁灭、伪造证据或者串供可能的。

（‘People’s Procuratorate Criminal Procedure Rules’, according to the decision of 16 October 2012 of the 11<sup>th</sup> Procuratorial Committee of the Supreme People’s Procuratorate, 80<sup>th</sup> session of the second revision. This statute came into force on 1 January 2013. art 129, which states ‘Under any of the following circumstances the procuratorate [may/should] decide to detain the criminal suspect: (1) if there is likelihood of his destroying or falsifying evidence or tallying [sic] confessions, (2) if he does not tell his true name and address and his identity is unknown.’）

- there is a likelihood of their destroying or falsifying evidence or tallying [sic] confessions;  
or
- they do not provide their true name and address and their identity is unknown.

36. In these cases, the maximum period of detention is fourteen days.

*iv) Rights of detainee and release after interrogation*

37. As noted above, whether it is the public security organs or the Procuratorate which initiates the arrest and detention of a suspect, the power of execution remains with the public security organs. In order to protect the suspect's rights, when detaining a person the public security organ must produce a detention warrant.

38. On being detained, the person should be delivered into police custody immediately, and at the latest after a period of 24 hours (there is no requirement that the person be brought before a court).

39. In addition, within 24 hours of a person being detained, their family or the unit to which they belong should be notified of the reasons for detention and the place of custody, except in circumstances where such notification would hinder the investigation, where the crime involved endangering state security or terrorism, or where there is no way of notifying them. In the first case, notification must take place immediately once the circumstances which mean it would hinder the investigation have ceased.

40. Within 24 hours of detention, the public security organ or the Procuratorate – whichever made the decision to detain – must interrogate the detainee. If it is found that the person should not have been detained, they must be released immediately and issued with a release certificate.

41. After a criminal suspect or defendant is interrogated for the first time, or from the day on which 'compulsory measures' are adopted against them,<sup>20</sup> they may appoint a lawyer to provide them with legal advice and to file petitions and complaints on their behalf. The person must be informed of this right by the investigating organ. If the person is already detained, the court, the Procuratorate and the public security organ must convey the request of the suspect.<sup>21</sup>

**c) Review of and challenges to detention**

42. A detainee's defence lawyer has the right to file charge against and appeal the decision to detain on the basis that the detention is unlawful. The appeal is made to a court.

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<sup>20</sup> 'Compulsory measures' include issuing a warrant to compel the suspect or defendant to appear, ordering them to obtain a guarantor pending trial, subjecting them to residential surveillance, or detaining or arresting them.

“强制措施”包括□犯罪嫌疑人、被告人可以拘□、取保候□或者□□居住。

<sup>21</sup> Criminal Procedural Law, art 33. 《中华人民共和国刑事诉讼法》第三十三条。

43. The detainee or their defence lawyer also has the right to apply to the relevant organ (either the public security organ or the Procuratorate) for reconsideration of the decision to detain. The application does not have a suspensive effect.

**d) Additional information: offences committed in prison**

44. If a person commits an offence while in prison, the prison has the power to investigate the case.<sup>22</sup> The handling of criminal cases by the prison is governed by the relevant provisions of the Criminal Procedural Law.<sup>23</sup>

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<sup>22</sup> 《中华人民共和国刑事诉讼法》第二十九条条，对罪犯在监狱内犯罪的案件由监狱进行侦查。  
(Criminal Procedural Law, art 290, which states, ‘Crimes committed by criminals in prison shall be investigated by the prison.’)

<sup>23</sup> 《中华人民共和国刑事诉讼法》第二百九十条，军队保卫部门、监狱办理刑事案件，适用本法的有关规定。(Criminal Procedural Law, art 290, which states ‘The handling of criminal cases by the security departments of the Army and by prisons shall be governed by the relevant provisions of this law.’)

# Report for the European Court of Human Rights

## I BACKGROUND INFORMATION

1. This Report gives an overview of the legal principles concerning arbitrary detention as considered by the European Court of Human Rights ('ECtHR'). It aims to give a broad overview and identify key cases. Further relevant cases in the ECtHR context can be found in the Country Reports for States party to the European Convention on Human Rights ('ECHR' or 'Convention')

### a) Article 5 of the European Convention on Human Rights

2. Protection against detention of any kind is protected by Art 5 of ECHR. It reads as follows:

#### ARTICLE 5

##### *Right to liberty and security*

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 on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
    - (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 unauthorised 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 of any 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 authorised 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.
3. The importance of the right to liberty as incorporated in Art 5 has been stressed on numerous occasions by the ECtHR. Thus, in *Kurt v Turkey*<sup>1</sup> the Court stated that:

...that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are

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<sup>1</sup> *Kurt v Turkey* (1999) 27 EHRR 373 [123].



intended to minimize the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. [...] What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.

#### **b) Preliminary remarks**

4. There are some general principles emerging from jurisprudence of the ECtHR that are relevant to all aspects of arbitrary detention being considered in this report.

##### *i) The presumption of liberty*

5. The first sentence of Art 5 has been interpreted as constituting a presumption in favour of liberty.<sup>2</sup> This means that only in exceptional cases there can be lawful detention in line with the Convention. It also means that when analysing a case, the judge's starting point should be that the person affected should be free.
6. There is a burden of proof on the authorities when taking away or restricting someone's liberty. This burden includes establishing that the power under which the restriction was performed falls under one of the grounds listed in Art 5 and on top of that showing that the exercise of that power was indeed such as to fall under that heading.

##### *ii) The lawfulness of detention*

7. 'Lawfulness' of detention is a reference to both procedure and substance. Moreover, lawfulness must not only be in line with the state's national law (formal and in substance) and the Convention (which is considerably wider), but also must not be arbitrary and legal certainty must be respected.<sup>3</sup>
8. The legal basis on which the deprivation is based must continue to exist throughout the entire period of deprivation.
9. The legal provision at hand must be accessible, foreseeable and certain.<sup>4</sup>

##### *iii) The meaning of the terms 'arrest' and 'detention'*

10. The terms 'arrest' and 'detention' are used interchangeably in ECtHR jurisprudence.<sup>5</sup> The terms serve an important function as gatekeepers for claims, thus their meaning and scope needs to be

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<sup>2</sup> Council of Europe, 'A Guide to the Implementation of Article 5 of the European Convention on Human Rights' available [http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05\(2004\)\\_en.pdf](http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05(2004)_en.pdf) (accessed 23 February 2013).

<sup>3</sup> Council of Europe, 'A Guide to the Implementation of Article 5 of the European Convention on Human Rights' available [http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05\(2004\)\\_en.pdf](http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05(2004)_en.pdf) (accessed 23 February 2013).

<sup>4</sup> See for example *Amuur v France* (1996) 22 EHRR 533.

clearly outlined. Several of these threshold issues will be considered further under 'Police Detention' in this Country Report.

11. Certain elements must be established to determine whether the 'detention' threshold has been met. The first is the nature of the confinement, for which there are three relevant considerations:
  - The existence of compulsion (note that it is irrelevant whether the person surrendered himself voluntarily).<sup>6</sup> It is crucial whether the person might have another option, and the option must be a realistic one.
  - The state of awareness of the detention is irrelevant to the case; detention is a matter of fact, not a matter of state of mind.
12. The degree of liberty a person has cannot negate the fact that there is a general deprivation of liberty. An example of this might be allowing a person to leave a mental facility during the weekends or during certain times of the day.<sup>7</sup>
13. The second is the status of the person affected:
  - Certain positions, such as involvement in the military service, will inevitably lead to a lesser degree of liberty, thus the threshold to be reached for Art 5 to apply is consequently higher than for civilians.<sup>8</sup>
  - Where liberty has already been lost, it is presumably not possible to argue along the lines of Art 5 again where there is an additional deprivation of liberty (for instance, where a prisoner is being transferred to another prison). However there is a thin line and this is to be determined according to the facts of each case.
14. Another relevant factor is where actions were committed overseas (something which will be discussed further in the context of 'military detention' below). In Art 1 of the ECHR, the rights and freedoms guaranteed therein have to be secured to everyone in the State's jurisdiction. Jurisdiction for the purposes of the Convention is not restricted to a state's national territory.<sup>9</sup>

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<sup>5</sup> Council of Europe, 'A Guide to the Implementation of Article 5 of the European Convention on Human Rights' available [http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05\(2004\)\\_en.pdf](http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05(2004)_en.pdf) (accessed 23 February 2013)

<sup>6</sup> *De Wilde v Belgium (No.1)* (A/12)(1979-1980) 1 EHRR 373.

<sup>7</sup> See for example *Guzzardi v Italy* (A/39) (1981) 3 EHRR 333 and *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

<sup>8</sup> *Engel v Netherlands* (1979-1980) 1 EHRR 647.

<sup>9</sup> *Loizidou v Turkey* (1997) 23 EHRR 513.

## II ADMINISTRATIVE DETENTION

15. The starting point is that administrative detention in the fight against terrorism is treated as an exception to the guarantees in the Convention by virtue of Art 15 (derogation in time of an emergency). Article 15 reads as follows:

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

16. Anti-terror detention is nothing new to the ECtHR. In fact, its very first judgment dealt with anti-terror detention. In *Lawless v Ireland*<sup>10</sup> the applicant had been suspected of being a member of the IRA and alleged to have been detained by the Irish authorities without trial in a military detention camp situated in Ireland for six months. The background to this case was the terrorist violence connected to Northern Ireland. The detention was held to be justified given the extraordinary role of the IRA at that time.
17. A good demonstration of the current state of the law is *A and Others v United Kingdom*<sup>11</sup> which established violations of Art 5. In that case the applicants were foreign nationals detained in circumstances where the Secretary of State of the UK believed the foreign nationals presented a risk to national security and reasonably suspected the persons of ‘international terrorism’. In doing so, the Government issued a notice under Art 15 of derogation with the Convention, including the power to detain foreign nationals certified as suspected international terrorists who could not ‘for the time being’ be removed from the UK. The claimants argued violations of Arts 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 13 (right to an effective remedy) and 14 (prohibition of discrimination). The issues concerning administrative will be addressed under separate headings in light of this case.

### a) Threshold questions

18. In circumstances such as those outlined in *A and Others*, there does not appear to be any threshold issues, due to the fact that some of the applicants were kept in detention for approximately three years and the others for shorter periods.<sup>12</sup>

### b) Decision to detain

19. Article 5(1) subparagraphs (a) to (f) (extracted above) contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty. Subparagraph (c) provides for the

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<sup>10</sup> *Lawless v Ireland (No 3)* (1979-1980) 1 EHRR 15.

<sup>11</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29.

<sup>12</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29 [129].

lawful detention of a person effected for the purpose of bringing him before the competent legal authority on ‘reasonable suspicion’ of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

20. The ‘reasonable suspicion’ requirement of Art 5(1)(c) is slightly amended in the context of terrorism. While a contracting party cannot be required to establish the reasonableness by disclosing confidential sources of information, the ECtHR has held that the ‘exigencies of dealing with terrorist crime cannot justify stretching the notion of ‘reasonableness’ to the point where the safeguard secured by Art 5 is impaired’.<sup>13</sup>
21. In *A and Others*, the UK Government sought to justify the detention under subparagraph (f), which permits the State to control liberty of aliens in an immigration context. The Government argued the detention was justified and lawful as the detainees were persons ‘against whom action [was] being taken with a view to deportation or extradition’.<sup>14</sup>
22. The ECtHR in *A and Others* considered that deprivations of liberty pursuant to the second limb of Art 5(1)(f) will be justified only as far as long as deportation or extradition proceedings are in progress, and the provision does not demand that the detention be reasonably necessary.<sup>15</sup> The Court noted:

To avoid being branded as arbitrary, detention under Article 5 § 1(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued...<sup>16</sup>

23. In *A and Others*, the Court rejected the UK’s Government’s argument that the applicants’ detention fell within the exception to the right to liberty set out in Art 5(1)(f), as it could not be said the applicants were persons against whom action was being taken with a view to deportation (but rather were detained because of being suspected terrorists).
24. The Court in *A and Others* reached its decision by looking at whether the detention fell under one of the derogations outlined in Art 5. This was not found to be the case.<sup>17</sup> Thus the Court went on to see whether the UK could validly invoke Art 15. This was not found to be the case. While the Court agreed with the UK in that there was a ‘public emergency threatening the life of the nation’, the derogating measures were not strictly required by the exigencies of the situation.

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<sup>13</sup> *O’Hara v United Kingdom* (2002) 34 EHRR 32 [35]; see also *Fox, Campbell and Hartley v the United Kingdom* (1991) 13 EHRR 157; see Council of Europe, ‘A Guide to the Implementation of Article 5 of the European Convention on Human Rights’ available [http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05\(2004\)\\_en.pdf](http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-05(2004)_en.pdf) (accessed 23 February 2013)

<sup>14</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29 [163].

<sup>15</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29 [164].

<sup>16</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29 [164].

<sup>17</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29, [170]-[172].

They were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.<sup>18</sup> The Court observed:

The Court does not accept the Government's argument that Article 5 § 1 permits a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat. This argument is inconsistent not only with the Court's jurisprudence under sub-paragraph (f) but also with the principle that sub-paragraphs (a) to (f) amount to an exhaustive list of exceptions and that only a narrow interpretation of these exceptions is compatible with the aims of Article 5. If detention does not fit within the confines of the sub-paragraphs as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee.<sup>19</sup>

### **c) Review of and challenges to detention**

25. The starting point here is the text of the Article. As noted in Art 5(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 authorised 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.

26. In *Brogan and Others v the United Kingdom*,<sup>20</sup> the Court held that there had been a violation of Art 5(3) (right to liberty and security) of the Convention, finding that the requirement of 'promptness' could not be stretched to a delay of four days and six hours or more.<sup>21</sup>

27. Article 5(4) further provides:

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.

28. In *A and Others*, the avenues to challenge detention under Art 5(4) were explored. At paragraph [131], the Court observed that each detained applicant had at his disposal the remedies available to all prisoners under administrative and civil law to challenge conditions of detention, including any alleged inadequacy of medical treatment.

29. Therefore, as long as the applicant has not made use of all remedies available to him, there can be no claim made before the ECtHR (which is stipulated in Art 35 of the Convention). Also, as long as the remedies available to 'regular prisoners' are also available to prisoners in anti-terror detention, this seems to point to the fact that no violation has occurred with regard to making procedures available.

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<sup>18</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29, [190].

<sup>19</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29, [171].

<sup>20</sup> (1989) 11 EHRR 177.

<sup>21</sup> European Court of Human Rights, 'Terrorism and the European Convention on Human Rights' <[http://www.echr.coe.int/Documents/FS\\_Terrorism\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf)> accessed 24 February 2014.

30. Article 13 of the Convention also sets out a right to an effective remedy, a matter also explored in *A and Others* in light of Art 5(4). The Court noted that Art 5(4) provides a *lex specialis* in relation to the more general requirements of Art 13. The Court continued:

[Article 5(4)] entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the ‘lawfulness’ of his or her deprivation of liberty [...] Article 5 § 4 does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the ‘lawful’ detention of a person according to Article 5 § 1 ... The reviewing ‘court’ must not have merely advisory functions but must have the competence to ‘decide’ the ‘lawfulness’ of the detention and to order release if the detention is unlawful ...<sup>22</sup>

31. Proceedings to challenge detention must be adversarial and ensure ‘equality of arms’ between the parties.<sup>23</sup>

#### **d) Remedies for unlawful detention**

32. Article 5(5) provides everyone who has been the victim of detention in contravention of Art 5 shall have an enforceable right to compensation. Failure to provide such an enforceable right violates Art 5(5). Article 41 allows for an award of monetary compensation if it considers such an award to be necessary.
33. The ECtHR has a wide discretion to determine when an award of damages should be made, and frequently holds that the finding of a violation is sufficient satisfaction without any further monetary award. The decision whether to award monetary compensation in *A and Others* and the amount of any such award, took into account a number of factors. The applicants were detained for long periods, in breach of Art 5(1), and the Court has, in the past, awarded large sums in just satisfaction in respect of unlawful detention. *A and Others* was, however, different. The ECtHR considered that in the aftermath of the al-Qaeda attacks on the US of 11 September 2001, in a situation which the domestic courts and the ECtHR itself have accepted was a public emergency threatening the life of the nation, the UK Government were under an obligation to protect the population of the UK from terrorist violence.<sup>24</sup>
34. Thus it appears that underlying ‘state of emergency circumstances’ can significantly lower the amount of damages awarded, if any, by the Court.

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<sup>22</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29 [202].

<sup>23</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29 [204].

<sup>24</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29 [252].

### III IMMIGRATION DETENTION

35. A good demonstration of the main issues in the context of immigration detention is the recent case *Musa v Malta*.<sup>25</sup> Mr Musa arrived to Malta by boat and subsequently spent 546 days in immigration detention. What the case also shows is that there might be an issue with Art 3 in terms of the quality of the accommodation provided.

#### a) Threshold questions

36. Whether someone is considered to be detained depends on a variety of factors such as the type, duration, effects and manner of the implementation of the measures restricting a person's liberty.<sup>26</sup> The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.<sup>27</sup> In *Musa*, as the applicant had been detained for some 546 days, there does not appear to have been any threshold question.

#### b) Decision to detain

37. The most relevant provision in the context of immigration detention is Art 5(1)(f): the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. The discussion above (see 'Administrative Detention') with respect to the decision if *A and Others* is therefore equally relevant here.

38. In *Musa*, the Court considered that the detention of the applicant fell within Art 5(1)(f), as that Article combined with the local law authorised the detention of prohibited immigrants.<sup>28</sup> However, the Court examined whether the applicant's detention was arbitrary. In that context, the Court found it 'difficult to consider [the conditions] as appropriate for persons who have not committed criminal offences but who, often fearing for their own lives, have fled from their own country'.<sup>29</sup> This, coupled with the lengthy delay in determining the applicant's asylum claim, were considered to be not compatible with Art 5(1)(f) of the Convention.

39. In the context of immigration detention, Art 2 of Protocol No. 4 is also important which contains the right to the liberty of movement.

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<sup>25</sup> *Suso Musa v Malta* (2013) Application no. 42337/12 (ECtHR, 12 July 2013).

<sup>26</sup> *Amuur v France* (1996) 22 EHRR 533 [42].

<sup>27</sup> *ibid.*

<sup>28</sup> *Suso Musa v Malta* (2013) Application no. 42337/12 (ECtHR, 12 July 2013) [99]

<sup>29</sup> *Suso Musa v Malta* (2013) Application no. 42337/12 (ECtHR, 12 July 2013) [101].

### c) Review of and challenges to detention

40. Under Art 5(4), a detained person is entitled to review the lawfulness of his detention in light of the requirements of domestic law, and also in light of the requirements of the Convention, the general principles therein and the aims of the restrictions permitted by Art 5(1).<sup>30</sup> The considerations discussed above with respect to ‘Administrative Detention’ are equally applicable here.
41. In *Musa*, the applicant argued that the Maltese legal system had not provided him with a speedy and effective remedy, as it had taken more than a year for the immigration authorities in Malta to determine his application.<sup>31</sup> The Court considered that this failed the requirement of ‘speediness’ under Art 5(4).<sup>32</sup>
42. The Court made some specific comments in *Musa* about the accessibility of courts for immigration detainees, and how this may impact the requirements under Art 5(4). The Court noted that had the remedies in *Musa* in fact been effective in terms of scope and speed, ‘issues in relation to accessibility might also arise’.<sup>33</sup> The Court in particular noted the lack of system enabling immigration detainees to access legal aid. The Maltese government had cited only one example of a detainee under the relevant immigration law making use of legal aid ‘despite the thousands of immigrants who have reached Maltese shores and have subsequently been detained in the past decade’.<sup>34</sup> The Court did not need to rule on the question, but noted:

[A]lthough the authorities are not obliged to provide free legal aid in the context of detention proceedings ...the lack thereof, particularly where legal representation is required in the domestic context for the purposes of Article 5 § 4, may raise an issue as to the accessibility of such a remedy ...<sup>35</sup>

43. Thus, in immigration detention before the ECtHR the accessibility of legal assistance may be a factor in determining a violation of Art 5(4).

### d) Remedies for unlawful detention

44. Article 5(5) entitles everyone who has been the victim of detention in contravention of Article 5 shall have an enforceable right to compensation. Failure to provide such an enforceable right violates Art 5(5). Article 41 allows for an award of monetary compensation if it considers such an award to be necessary.

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<sup>30</sup> *ibid* [50].

<sup>31</sup> *ibid* [34].

<sup>32</sup> *ibid* [58].

<sup>33</sup> *ibid* [61].

<sup>34</sup> *ibid* [61].

<sup>35</sup> *ibid* [61].



45. In *Musa*, applying Art 41, the Court found that the multiple violations of Art 5 of the Convention meant it was equitable to award the applicant EUR 24,000 in respect of non-pecuniary damage.<sup>36</sup>

#### **IV DETENTION OF PERSONS WITH A MENTAL ILLNESS**

46. The case law on the detention of persons with a mental illness combines Art 3 (No one shall be subjected to torture or to inhuman or degrading treatment or punishment) and Art 5 (The right to liberty and security).

##### **a) Threshold questions**

47. There does not appear to be any issues with respect to the threshold question.

##### **b) Decision to detain**

48. To be in compliance with the Convention, the confinement of a person of unsound mind must comply with the following requirements:

- it must have been reliably established, through objective medical expertise, that the patient has a true mental disorder;
- the mental disorder must be of a kind or degree warranting compulsory confinement;
- the validity of continued confinement depends upon the persistence of such a disorder.<sup>37</sup>

49. To this date there has been no precise definition of the term ‘unsound mind’. The closest to a definition the Court is working with was established in *Winterwerp v the Netherlands*<sup>38</sup> and reads:

This term is not one that can be given a definitive interpretation: ... it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society’s attitude to mental illness changes ...<sup>39</sup>

50. The order to confine a person must be authorised by a judicial authority,<sup>40</sup> and can only be considered lawful for the purposes of Art 5(1) if effected in an appropriate institution.<sup>41</sup>

51. In *Johnson v the United Kingdom*,<sup>42</sup> the Court noted:

The Court stresses, however, that the lawfulness of the applicant’s continued detention under domestic law is not in itself decisive. It must also be established that his detention

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<sup>36</sup> *ibid* [127].

<sup>37</sup> *Winterwerp v the Netherlands* (1979-1980) 2 EHRR 387.

<sup>38</sup> *ibid*.

<sup>39</sup> *ibid* [37].

<sup>40</sup> *Storck v Germany* (2006) 43 EHRR 6.

<sup>41</sup> *Claes v Belgium* [2013] ECHR 34.

<sup>42</sup> *Johnson v the United Kingdom* (1999) 27 EHRR 296.

after 15 June 1989 was in conformity with the purpose of Article 5 § 1 of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion.<sup>43</sup>

52. There also appears to be a focus on proportionality. In *Enborn v Sweden*,<sup>44</sup> the Court considered proportionality when considering whether there would have been measures available that are less severe than compulsory isolation for an HIV infected person.

### **c) Review of and challenges to detention**

53. The common safeguards in Arts 5(3) and 5(4) apply.
54. In the recent case of *Claes v Belgium*, the Court noted that in cases concerning detention on the ground of mental illness, special procedural safeguards might be called for in order to protect the interests of persons who were not fully capable of acting for themselves.<sup>45</sup> Persons detained for an indefinite or lengthy period were entitled to take proceedings at reasonable intervals before a court to put in issue the lawfulness of their detention. In the Court's view, that decision had deprived the applicant of a review that was sufficiently wide for the purposes of Art 5(4), as it had not encompassed one of the essential conditions for the 'lawfulness' of his detention within the meaning of Art 5(1)(e), namely the appropriateness of the place of detention. The Court also observed that the applicant had not had access to the ordinary courts in order to obtain a ruling on the appropriateness of the psychiatric wing of Merksplas prison, as his application to the urgent-applications Judge had been dismissed for lack of jurisdiction. The Court held that there had been a violation of Art 5(4) of the Convention.

### **d) Remedies for unlawful detention**

55. Article 5(5) entitles everyone who has been the victim of detention in contravention of Art 5 shall have an enforceable right to compensation. Failure to provide such an enforceable right violates Art 5(5). Article 41 allows for the Court to award monetary compensation if it considers such an award to be necessary.
56. In *Stanev v Bulgaria*, the Court noted that Art 5(5) was complied with where it was possible to apply for compensation under national law. In that case, the Court noted that the Government hadn't produced any domestic decisions that indicated that local laws allowed claims for compensation in cases involving placement of people with mental disorders in social care homes.<sup>46</sup> This led the Court to conclude there had been a violation of Art 5(5).

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<sup>43</sup> *Johnson v the United Kingdom* (1999) 27 EHRR 296 [60].

<sup>44</sup> *Enborn v Sweden* (2005) 41 EHRR 30.

<sup>45</sup> *Claes v Belgium* [2013] ECHR 34.

<sup>46</sup> *Stanev v Bulgaria* (2012) 55 EHRR 22.

## V MILITARY DETENTION

57. To the extent that detention of military officials may occur through the ECHR framework, the section above relating to ‘administrative detention’ is relevant. There are three additional points that can be made.
58. As to the threshold question, it should also be noted that in a military context, confinement to quarters and other similar forms of punishment may not be considered to constitute detention. The ECtHR noted in the case of *Engel v Netherlands* that:

[a] disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman.<sup>47</sup>

59. Additionally, as noted above certain positions, such as involvement in the military service, will inevitably lead to a lesser degree of liberty, thus the threshold to be reached for Art 5 to apply is consequently higher than for civilians.<sup>48</sup>
60. Further, it is clear that the Court’s jurisdiction does extend to deprivations in the course of military activity. In Art 1 of the Convention, the rights and freedoms agreed to in the Convention have to be secured to everyone in a State’s jurisdiction. This was emphasized in *Loizidou v Turkey*<sup>49</sup> where the Court clearly stated that jurisdiction for the purposes of the Convention is not restricted to a State’s national territory. In *Cyprus v Turkey*, the Court noted that this includes any deprivation in the course of military action in another country.<sup>50</sup>

## VI POLICE DETENTION IN CROWD CONTROL SITUATIONS

61. The most current issue under this heading would be the concept of ‘kettling’ which can be defined as the ‘containment of a group of people carried out by the police on public-order grounds’.<sup>51</sup> *Austin and Others v United Kingdom*<sup>52</sup> is the first case before the ECtHR to touch upon this issue and will thus be used to answer the questions below. The issues in the context of the ECtHR pertain entirely to the ‘threshold questions’.
62. In *Austin*, the claimants had been subjected to measures of containment (in the form of a ‘kettle’) as a form of crowd control.
63. In order to determine whether someone has been ‘deprived of his liberty’ within the meaning of Art 5(1), the starting-point must be his concrete situation and account must be taken of a whole

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<sup>47</sup> *Engel v Netherlands* (A/22) (1979-1980) 1 EHRR 647 [59].

<sup>48</sup> *ibid.*

<sup>49</sup> *Loizidou v Turkey* (1997) 23 EHRR 513.

<sup>50</sup> *Cyprus v Turkey* (2001) 35 EHRR 30.

<sup>51</sup> *Austin and Others v United Kingdom* (2012) 55 EHRR 14 [52].

<sup>52</sup> *ibid.*

range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance.<sup>53</sup>

64. Importantly, the motive does not play a role when determining whether somebody has been detained or not. However, in *Austin* the Court was of the view that the requirement to take account of the ‘type’ and ‘manner of implementation’ of the measure in question enabled it to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell.<sup>54</sup>

65. In *Austin*, the Court noted the degree of discretion to be afforded to police in taking operational decisions. It further concluded that ‘Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness’.<sup>55</sup>

66. In *Austin*, the Court noted that it could not be ‘excluded that the use of containment and crowd control techniques could, in particular circumstances, give rise to an unjustified deprivation of liberty in breach of Article 5(1)’.<sup>56</sup> The Court continued that in each case Art 5(1):

must be interpreted in a manner which takes into account the specific context in which the techniques are deployed, as well as the responsibilities of the police to fulfil their duties of maintaining order and protecting the public, as they are required to do under both national and Convention law.<sup>57</sup>

67. On the facts of *Austin*, the Court concluded there had been no deprivation of liberty based on the specific and exceptional facts of the case.<sup>58</sup> The Court found no reason to depart from the judge’s conclusion that the imposition of the cordon was the least intrusive and most effective means to control the crowd, as opposed to having to resort to more robust measures which may have risked injuring members of the crowd.<sup>59</sup>

68. The Court continued that it was:

unable to identify a moment when the measure changed from what was, at most, a restriction on freedom of movement, to a deprivation of liberty... In these circumstances, where the police kept the situation constantly under close review, but where substantially the same dangerous conditions which necessitated the imposition of the cordon at 2 p.m. continued to exist throughout the afternoon and early evening, the Court does not consider

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<sup>53</sup> *Austin and Others v United Kingdom* (2012) 55 EHRR 14 [57].

<sup>54</sup> *ibid* [59].

<sup>55</sup> *ibid* [56].

<sup>56</sup> *ibid* [60].

<sup>57</sup> *ibid* [60].

<sup>58</sup> *ibid* [68].

<sup>59</sup> *ibid* [66].

that those within the cordon can be said to have been deprived of their liberty within the meaning of Article [5(1)].<sup>60</sup>

69. Consequently, the Court concluded that Art 5 was inapplicable as it did not reach the threshold of ‘detention’ for the purposes of the Article.
70. While on the facts of *Austin* a situation of ‘kettling’ did not satisfy the threshold question, if there were circumstances in which kettling overcame the threshold question, the discussions of the other forms of detention considered in this report with respect to the decision to detain, challenges to detention and remedies would be equally relevant here.

## VII PREVENTIVE DETENTION

### a) Preliminary remarks

71. The most relevant judgment in this respect is *M v Germany*<sup>61</sup> which can be seen as presenting the current state of the law in terms of preventive detention in the ECtHR. It will thus be used to answer the questions below.
72. In *M*, since the applicant attained the age of criminal responsibility he had been convicted at least seven times and had spent only a couple of weeks outside prison. Between 1971 and 1975 he was repeatedly convicted of theft committed jointly and burglary. He escaped from prison four times. He was later convicted of attempted murder, robbery committed jointly with others, dangerous assault and blackmail and sentenced him to six years’ imprisonment. Later, he was convicted of dangerous assault and sentenced to one year and nine months’ imprisonment and ordered his subsequent placement in a psychiatric hospital under art 63 of the Criminal Code. He was subsequently convicted of attempted murder and robbery and sentenced him to five years’ imprisonment. It further ordered his placement in preventive detention (in German: *Sicherungsverwahrung*) under art 66 §1 of the Criminal Code (para 1-12). The Federal Constitutional Court held that preventive detention based on art 67d §3 of the Criminal Code restricted the right to liberty as protected by art 2 §2 of the Basic Law in a proportionate manner.
73. The relevant provisions for preventive detention are provided for in Art 5, set out above. In addition to that, preventive detention can trigger the application of Art 7 of the ECHR:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

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<sup>60</sup> *Austin and Others v United Kingdom* (2012) 55 EHRR 14, [67].

<sup>61</sup> *M. v Germany* (2010) 51 EHRR 41.

## **b) Threshold questions**

74. There does not appear to be any threshold question with respect to preventive detention in this context.

## **c) Decision to detain**

75. In the context of preventive detention, the relevant provision is Art 5(1)(c) which allows for persons to be detained 'when it is reasonably considered necessary to prevent his committing an offence'. It is also well established in the Court's case-law under the sub paragraphs of Art 5(1) that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub paragraphs (a)-(f), be 'lawful'. The requirement of lawfulness provides that the detention must have its basis in domestic law, and also relates to the quality of the law, requiring compatibility with the rules of law.<sup>62</sup>
76. The preventive power by Art 5(1) is linked to the enforcement of criminal law; its use must be directed at forestalling the commission of specific and concrete offences.<sup>63</sup>
77. With respect to Art 7, the provision differs from Art 5 in that it cannot be derogated from under Art 15. As noted in *M*, Art 7 embodies the principle that 'only the law can define a crime and prescribe a penalty'.<sup>64</sup> In *M*, the preventive detention was considered to constitute an additional penalty which was imposed on the applicant retrospectively, under a law enacted after the applicant had committed his offence.<sup>65</sup>

## **d) Review of and challenges to detention**

78. The considerations discussed above concerning Arts 5(3) and 5(4) under 'administrative detention' are equally applicable here.

## **e) Remedies for unlawful detention**

79. The considerations discussed above concerning Arts 5(5) and 41 under 'administrative detention' are equally applicable here.

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<sup>62</sup> *M. v Germany* (2010) 51 EHRR 41, [90].

<sup>63</sup> *Ciulla v Italy* (1991) 13 EHRR 346.

<sup>64</sup> *M. v Germany* (2010) 51 EHRR 41, [118].

<sup>65</sup> *ibid* [135].

# Country Report for Germany

## I ADMINISTRATIVE DETENTION

1. German law does not provide for the detention of non-offenders for counter-terrorism, intelligence-gathering or security reasons. There are, however, measures available in the context of remand which come close to preventive detention and which may be used to pursue comparable objectives.

### a) Decision to detain

2. As a matter of constitutional law, only judges are in a position to grant measures which lead to the deprivation of liberty.<sup>1</sup> Where, for whatever reason, an individual has been deprived of their liberty without a judicial order, for instance because of urgency, such order has to be obtained retrospectively as soon as possible.
3. Before remand can be ordered, there has to be a strong suspicion that the suspect has committed a criminal offence justifying their detention.<sup>2</sup> In cases relating to the alleged formation of criminal or terroristic organisations, there is no need to show that the suspect is likely to escape proceedings before remand can be ordered.<sup>3</sup> Should there be a threat that the suspect may frustrate the order for detention if they are invited by the court to state their case before detention, no oral hearing will at first be required.<sup>4</sup> The hearing will then take place as soon as possible, once the suspect is detained.<sup>5</sup>
4. There is no stipulation as to the maximum length of the remand. However, after six months, remand can only be permitted if this is necessary due to the length and complexity of the investigations.<sup>6</sup> This requires a further order by the court to that effect.<sup>7</sup>

### b) Review of and challenge to detention

5. Individuals in remand always have the right to demand an examination of the necessity of their detention.<sup>8</sup> This examination will be conducted by the district court which ordered the remand.

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<sup>1</sup> Grundgesetz, art 104(2).

<sup>2</sup> Strafprozessordnung (StPO), §112(1).

<sup>3</sup> Strafgesetzbuch (StGB), §129-129B.

<sup>4</sup> StPO, §33(4).

<sup>5</sup> StPO, §33(1).

<sup>6</sup> StPO, §121(1).

<sup>7</sup> StPO, §121(2),

<sup>8</sup> StPO, §117.

6. There is also the possibility of objecting to the remand at the regional court.<sup>9</sup> This has to be done within one week after the order has been made.<sup>10</sup> There is no oral hearing of the detainee and only the public prosecutor may make oral submissions should this be deemed fit by the court.<sup>11</sup>

### **c) Compensation for unlawful detention**

7. Unlawful detention entitles the aggrieved to compensation, which follows from the basic rule of state liability in the German Constitution in conjunction with the rules on liability in cases of breach of an official duty.<sup>12</sup> According to this rule, if a person, in exercising a public office entrusted to them, violates their official duty towards a third party, liability in principle lies with the public body that employs them. A violation of an official duty entitles the aggrieved third person to damages. Occasional reference to Art 5(5) ECHR as a legal basis for such claims is also made in jurisprudence.

## **II IMMIGRATION DETENTION**

### **a) Decision to detain**

8. As a matter of constitutional law, only judges are in a position to grant measures which lead to the deprivation of liberty.<sup>13</sup> Where, for whatever reason, an individual has been deprived of their liberty without a judicial order, for instance because of urgency, such order must be obtained retrospectively as soon as possible.
9. Detention of foreigners without a valid visa or residence permit is possible only where no other, less intrusive, measure is available and shall not last longer than is absolutely necessary.<sup>14</sup> There are two different kinds of immigration detention.
10. First, there is so-called ‘preparation detention’, under which the immigrant is detained during the preparations for their deportation for a period which should not exceed six weeks.<sup>15</sup> The detention order, which has to be issued by a judge, is subject to the requirements that it is impossible to enforce deportation of the foreigner immediately and that without detention the deportation would be rendered significantly more difficult or would even be rendered impossible.<sup>16</sup> In case of expulsion, it is not necessary to obtain a subsequent judicial order to

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<sup>9</sup> StPO, §304(1) in conjunction with GVG, §73(1).

<sup>10</sup> StPO, §311(2).

<sup>11</sup> StPO, §309.

<sup>12</sup> Grundgesetz, art 34 in conjunction with Bürgerliches Gesetzbuch (BGB), §839.

<sup>13</sup> Grundgesetz, art 104(2).

<sup>14</sup> Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (AufenthaltsG), §62(1).

<sup>15</sup> AufenthaltsG, §62(2).

<sup>16</sup> AufenthaltsG, §62(2).



continue detention until the expiry of the period of time for which detention has originally been ordered.<sup>17</sup>

11. Second, there is the so-called ‘detention pending deportation’, which has a different purpose than preparation detention. Whereas the latter aims to give the authorities some time for the preparation of the deportation, this form of detentions aims to prevent the foreigner from frustrating their expulsion. The legislature has provided for several specific situations in which detention pending deportation can be ordered.<sup>18</sup> These are:
  - where the immigrant is required to leave the country because they have unlawfully entered it or a deportation order has already been issued but is not immediately enforceable – in the former case, no detention is required where the foreigner is able to credibly assert that they will not attempt to evade expulsion;
  - where the period of departure has expired and the immigrant has changed their place of residence without notifying the relevant authorities of an address where they are reachable;
  - where the immigrant has failed to appear at the date of their deportation;
  - where deportation has generally been evaded by any other means; and
  - where there are good reasons to believe that the immigrant will attempt to evade deportation in the future.
12. Generally speaking, detention pending deportation may be ordered for up to six months and can be extended by a period of another twelve months in cases where the foreigner has frustrated their deportation.<sup>19</sup> An exception to this rule applies in cases where the period allowed for departures has lapsed and deportation can be enforced. Under these circumstances, detention pending deportation shall not exceed two weeks.<sup>20</sup> Furthermore, detention pending deportation will be impermissible where it is established in advance that the deportation cannot be enforced within the following three months.<sup>21</sup> Any period of preparation detention, mentioned above, always counts towards the overall duration of detention.<sup>22</sup>
13. By way of exception, the relevant authorities can detain a foreigner even without a judicial order if three cumulative requirements are fulfilled:

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<sup>17</sup> AufenthaltsG, §62(2).

<sup>18</sup> AufenthaltsG, §62(3).

<sup>19</sup> AufenthaltsG, §62(4).

<sup>20</sup> AufenthaltsG, §62(2).

<sup>21</sup> AufenthaltsG, §62(2).

<sup>22</sup> AufenthaltsG, §62(3).

- there is strong suspicion that the immigrant has entered the country unlawfully and has no right to stay;
  - a judicial order cannot be obtained in advance; and
  - there are good reasons to believe that the foreigner will attempt to evade detention pending deportation.
14. As is the general rule, before detention can be ordered by the judge, immigrants have the right to orally present their case.<sup>23</sup> This requires that the immigrant is given enough time to prepare their case, has the possibility to consult a lawyer, and can make use of an interpreter should this be necessary. Should the person in question have a legal guardian, they must equally be consulted. Spouses also have the right to make oral submissions.<sup>24</sup> Where in urgent cases the detainee is not given the right to be heard, the hearing has to take place as soon as possible after detention. The immigrant must be informed about the eventual decision in full.<sup>25</sup>

#### **b) Review of and challenges to detention**

15. An order for detention becomes valid only after two weeks, within which an objection can be lodged with a regional court.<sup>26</sup> This means that within that time frame it is in fact impermissible to detain the immigrant, although this is rarely adhered to in practice. Against the decision of the regional court, a further objection can be lodged to the Higher Regional Court.<sup>27</sup> The term ‘objection’ is used because the relevant proceedings are held in courts with so-called ‘non-contentious jurisdiction’. Strictly speaking, there are no litigants in the proceedings but merely ‘persons involved’. Nonetheless, the objection itself is comparable with an appeal in courts with contentious jurisdiction and hence is restricted to points of law.
16. As noted above, in these proceedings the detainee has not only the right to be heard but also to make use of legal and linguistic assistance. Detainees are, however, not generally entitled to legal aid.

#### **c) Compensation for unlawful detention**

17. See above in relation to administrative detention.

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<sup>23</sup> Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit (FamFG), §420(1).

<sup>24</sup> FamFG, §420(3) in conjunction with §418(3).

<sup>25</sup> FamFG, §41(1).

<sup>26</sup> FamFG, §63(2).

<sup>27</sup> FamFG, §70.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Preliminary remarks

18. It should be noted from the outset that the regulation of involuntary commitment of persons with a mental illness is subject to both federal civil law and the public law of the federal states. This dualism means that different requirements may apply depending on the laws applying in the particular case.

#### b) Decision to detain

19. Involuntary commitment under civil law is only possible where this would be for the benefit of the detainee.<sup>28</sup> A mere danger to others or society is not sufficient.<sup>29</sup> This is different under public state law where the decisive criterion for detention indeed constitutes the insurance of public security and order.<sup>30</sup>
20. Irrespective of the different legal bases, the procedure leading to the commitment/detention is mainly governed by the same statute. Jurisdiction to hear this type of cases lies with specialised courts, the so-called ‘mental health courts’, which form part of the district courts.
21. It should also be noted that, as a matter of constitutional law, only judges are in a position to grant measures which lead to the deprivation of liberty.<sup>31</sup> Where, for whatever reason, an individual has been deprived of their liberty without a judicial order, for instance because of urgency, such order must be obtained retrospectively as soon as possible.
22. Since the procedure falls in the category of non-contentious jurisdiction of the courts, there are no litigants but only ‘persons involved’. ‘Persons involved’ are the person who is to be detained (the ward), their legal guardian, and their proxy.<sup>32</sup> In public law cases, the authority filing for the detention order self-evidently qualifies as a ‘person involved’ as well.<sup>33</sup> In proceedings before mental health courts, there will also be a person nominated by the court who is supposed to act in the interests of the person to be detained and who is vested with the same powers as a lawyer.<sup>34</sup> Should the person to be detained already have legal assistance, this will be deemed sufficient to ensure that their interests are represented.<sup>35</sup>

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<sup>28</sup> BGB, §1906(1); for minors, BGB §1631b applies.

<sup>29</sup> OLG Hamm R&P 2001, 109 = BtPrax 2001, 40.

<sup>30</sup> See for instance in Bavaria, Unterbringungsgesetz, art 1(1).

<sup>31</sup> Grundgesetz, art 104(2).

<sup>32</sup> FamFG, §315(1).

<sup>33</sup> FamFG, §315(3).

<sup>34</sup> FamFG, §315(1).

<sup>35</sup> FamFG, §317(4).

23. The ward has the right to be heard by the court.<sup>36</sup> Not granting a hearing would only be permissible if this severely endangered their medical condition.<sup>37</sup> There is no rule as regards where the hearing may take place, but, should it be necessary, it must be held in the normal environment of the affected individual (eg at home, at the institution where the person is located). The court also has to inform the person of the possible further course of the proceedings.<sup>38</sup> Besides consulting all other persons involved, there is furthermore a need to obtain a medical opinion on the condition of the ward before involuntary commitment can be ordered.<sup>39</sup>
24. All orders are to be made known to all persons involved including the final decision.<sup>40</sup> Should involuntary commitment be ordered, the ward has to be informed of the decision even where they do not appear to be capable of understanding it; yet if their condition does not allow it, it will be permissible to refrain from explaining the reasons for the decision.<sup>41</sup>
25. Involuntary commitment will generally only last for one year, and only in exceptional case can the order last for two years.<sup>42</sup> Every extension of the term is subject to the same rules as the first one. The only exception in this regard consists in the fact that no medical opinion is needed where the commitment lasts longer than four years.<sup>43</sup>

### **c) Review of and challenges to detention**

26. An order for involuntary commitment must be supported by reasons and the treatment allowed for must be defined as clearly as possible.<sup>44</sup> The court is furthermore under the obligation to inform the affected person of their right to object to the order, where and when any objection should be lodged, and what it has to include.<sup>45</sup>
27. Every person who has been restricted in their rights by the decision of the court can object to it to a higher court.<sup>46</sup> The objection is restricted to points of law and is therefore comparable with an appeal in courts with contentious jurisdiction.
28. On behalf of the ward, there are other persons who are entitled to lodge an objection in their interest if they took part in the proceedings. These are:

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<sup>36</sup> FamFG, §319(1).

<sup>37</sup> OLG Karlsruhe FamRZ 1999, 670.

<sup>38</sup> FamFG, §319(2).

<sup>39</sup> FamFG, §321(1).

<sup>40</sup> FamFG, §41(1).

<sup>41</sup> FamFG, §325(1).

<sup>42</sup> FamFG, §329(1).

<sup>43</sup> FamFG, §329(2).

<sup>44</sup> BayObLGZ 1993, 208 = FamRZ 1994, 721, = BtPrax 1993, 139.

<sup>45</sup> FamFG, §39.

<sup>46</sup> FamFG, §59(1).

- the ward's spouse or partner, as well as their parents and children, provided they live with the ward;
  - a person whom the ward has nominated as their person of confidence; or
  - the head of the institution at which the ward lives.<sup>47</sup>
29. By the same token, the person (legally) representing the ward equally enjoys the right to object as well as their legal guardian.<sup>48</sup> So does the relevant authority, should there be one involved.<sup>49</sup>

## IV MILITARY DETENTION

30. We were unable to find extensive information regarding military detention in Germany. The German Army does not maintain military prisons, either inside or outside the country. Military tribunals can only order disciplinary arrest for up to 21 days, which is not considered tantamount to detention. There is a special Criminal Code for soldiers, which only applies to German and not foreign soldiers; it essentially states that German soldiers are subject to German criminal law even when abroad.

## V POLICE DETENTION

### a) Threshold questions

31. A person is considered as being detained by the police the moment their freedom of movement is restricted by the authorities.<sup>50</sup> Every deprivation of one's liberty has to be based on a formal law, such as the relevant police law.<sup>51</sup> Practices such as 'kettling' are considered to restrict a person's freedom to move and have been found unlawful in several decisions of lower courts, which, however, are not of general applicability.<sup>52</sup>

### b) Decision to detain

32. The police are allowed to detain a person (*in Gewahrsam nehmen*) in a variety of circumstances:<sup>53</sup>
- if this is necessary to protect the physical integrity of the detainee (eg because he or she is intoxicated);
  - if this is indispensable to remove a person from a certain area to avert a danger; or

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<sup>47</sup> FamFG, §335.

<sup>48</sup> FamFG, §335(2 & 3).

<sup>49</sup> FamFG, §335(4).

<sup>50</sup> This follows from Grundgesetz, art 2(2).

<sup>51</sup> Grundgesetz, art 104(1).

<sup>52</sup> See eg OVG Nordrhein-Westfalen decision of 2 March 2001, 5 B 273/01; LG Lüneburg decision of 12 July 2013, 10 T 39/13.

<sup>53</sup> Bundespolizeigesetz (BPolG), §39(1).

- if this is indispensable to prevent the committing of a crime or an administrative offence which is of considerable importance for the general public.
33. The remainder of this section will only elaborate on the two latter situations. Besides these, there are further situations in which detention is justified, such as the detention of prison escapees, minors who were taken or went away from their legal custodians, or detention to execute a warrant.<sup>54</sup>
  34. Being detained by the police qualifies as an interference with a person's liberty as enshrined in the German Constitution.<sup>55</sup> This explains the requirement of 'indispensability' before the police may go through with the detention.
  35. Once detained, a person must immediately be informed about the reason for the detention and the rights and remedies at their disposal.<sup>56</sup> Generally, the detainee will also be allowed to inform a relative.<sup>57</sup> Where the detainee is brought to the police station, they must not be held in the same room as regular prisoners or persons in pre-trial detention.<sup>58</sup> They must also be given the opportunity the right to be heard on the matter.<sup>59</sup>
  36. The permissibility and continuation of police detention can only be established by a judge. A judicial decision on the matter must be sought promptly.<sup>60</sup> Promptly means that any delays which are not objectively justified will violate this rule.<sup>61</sup> The German Constitutional Court has stated that the right to be brought before a judge is a fundamental right and, accordingly, should be taken seriously, even where the police have to cope with many detainees at the same time.<sup>62</sup>

### **c) Review of and challenges to detention**

37. Although the matter is not fully clarified, in most cases the ordinary courts will have jurisdiction to hear the case and to determine the permissibility of police detention. In civil law cases, an appeal from a dispute at first instance is only possible either where the court at first instance has allowed for the possibility of appeal or where the pecuniary value of the claim exceeds 600 Euros.<sup>63</sup>

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<sup>54</sup> BPolG, §39(2)-(4).

<sup>55</sup> Grundgesetz, art 2(2) in conjunction with art 104(1).

<sup>56</sup> BPolG, §40B(1).

<sup>57</sup> BPolG, §40(2).

<sup>58</sup> BPolG, §40(3).

<sup>59</sup> Verwaltungsverfahrensgesetz, §28.

<sup>60</sup> BPolG, §40 following Grundgesetz, art 104(2).

<sup>61</sup> BVerwGE judgement of 26 February 1974 (I C 31.72).

<sup>62</sup> BVerfG, 2 BvR 447/05, 13 December 2005.

<sup>63</sup> Zivilprozessordnung, §511.

#### **d) Compensation for unlawful detention**

38. See above in relation to administrative detention.

### **VI PREVENTIVE DETENTION**

#### **a) Preliminary remarks**

39. While there is no threshold question as to whether a person is preventively detained, it needs to be mentioned that this particular form of detention is to be distinguished from normal imprisonment. The law even makes a linguistic difference between the ‘regular’ imprisoned (*Gefangener*) and the preventively detained (*Sicherungsverwahrter*). This explains why persons in the latter situation have the right to be accommodated in a separate block or institution from other prisoners, as well as enjoying certain other privileges.<sup>64</sup> In practice, however, the two are hardly distinguishable.

#### **b) Decision to detain**

##### *i) Circumstances in which detention may be ordered*

40. The legal basis for the ordering of preventive detention (*Sicherungsverwahrung*) is to be found in §66(1) German Criminal Code. The exact cumulative requirements under which such an order may be made are enumerated at length in the aforementioned sub-paragraph. Alternative conditions, stipulated in §66(2-4), apply in special situations as mentioned therein. For the purposes of this report, it suffices to say that these requirements generally relate to the quality (i.e. gravity) and/or quantity of crimes committed in the past.<sup>65</sup> Depending on which sub-paragraph applies, preventive detention is either mandatory or discretionary.

##### *ii) Time at which order may be made*

41. The purpose of preventive detention in Germany is the protection of society against dangerous offenders (mostly reoffenders) and will have to be served after the detainee has served their sentence. There are, however, different times at which preventive detention can be imposed.
42. First, preventive detention can be ordered during the main proceedings.<sup>66</sup> In this situation, the accused must be informed about the possibility of being preventively detained after having served their sentence during the main proceedings so as to ensure their right to be heard.<sup>67</sup>

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<sup>64</sup> Gesetz über den Vollzug der Freiheitsstrafe und die freiheitsentziehenden Maßregeln der Besserung und Sicherung (StVollzG), §140.

<sup>65</sup> NK-StGB-Lorenz Böllinger/Axel Dessecker §66 Rn 54.

<sup>66</sup> StGB, §66.

<sup>67</sup> StPO, §265.

43. Secondly, under certain conditions the judge is entitled to ‘reserve’ the possibility of preventive detention at a later point in their judgment.<sup>68</sup> This allows for preventive detention where the dangerousness of an offender comes to light only after the conviction or during imprisonment.<sup>69</sup> The prosecution is then able to initiate fresh proceedings for the ordering of preventive detention after the main proceedings.<sup>70</sup>
44. Thirdly, in exceptional circumstances, persons who have committed crimes whilst not being culpable due to a mental illness can be preventively detained after having been released from a mental institution when the committing of further severe offences is very likely.<sup>71</sup> The public prosecutor has to file the motion for subsequent preventive detention before the detainee has served their sentence fully.<sup>72</sup>

### *iii) Compatibility with ECHR*

45. Crucially, two decisions have recently called into question the legality of the regime of preventive detention in its current form. After a judgment of the ECtHR, deeming subsequent preventive detention contrary to Arts 5(1) and 7(1) ECHR, the German Constitutional Court declared the then-current system of preventive detention unconstitutional – mainly due to a lack of distinction between it and ordinary imprisonment.<sup>73</sup> Whether the recent amendment by the legislature can live up to the required standard is not decided yet.<sup>74</sup>
46. However, the legislature did not address another concern mentioned by the ECtHR and the German Constitutional Court. In the past there was a rule stating that preventive detention has a maximum length of ten years. Persons who were placed in preventive detention before the abolition of that rule have now been threatened to see their detention extended beyond that time span, which is seen as contrary to Art 7 ECHR. This issue has not been resolved in the recent amendments. The current rule merely states that the extension of preventive detention after ten years is still possible where the detainee would, due to their propensities, commit serious offences resulting in serious emotional trauma or physical injury to the victims when released.

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<sup>68</sup> StGB, §66a.

<sup>69</sup> NK-StGB-Lorenz Böllinger/Axel Dessecker §66a Rn 7.

<sup>70</sup> StPO, §275a.

<sup>71</sup> StGB, §66b.

<sup>72</sup> BGH 2StR 9/05, 1 July 2005.

<sup>73</sup> *M v Germany* (2010) 51 EHRR 41; German Constitutional Court, judgment of 4 May 2011, 2 BvR 2365/09.

<sup>74</sup> Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der Sicherungsverwahrung, 5 December 2013.



### **c) Review of and challenges to detention**

47. All persons who have been subject to an order for preventive detention after their sentence have the right to appeal to the Federal Supreme Court (*Bundesgerichtshof*).
48. As noted above, the duration of preventive detention is not currently limited in time. However, every two years it must be reassessed by the same court which ordered it.<sup>75</sup> The question will simply be whether or not it can be expected that the detainee will commit further offences when released.<sup>76</sup>

### **d) Compensation for unlawful detention**

49. See above in relation to administrative detention.

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<sup>75</sup> StGB, §67e(2); see also German Constitutional Court, judgement of 5 February 2004, 2 BvR 2029/01.

<sup>76</sup> StGB, §67d(2).

# Country Report for Greece

## I ADMINISTRATIVE DETENTION

1. Detention for security, counter-terrorism or intelligence-gathering purposes is only applied pending trial for a criminal offence.
2. Specific provisions on acts of terrorism are contained in art 187A of the Criminal Code. More particularly, the commission of one or more criminal offences laid down in art 187A of the Criminal Code in such manner as to seriously harm a country or international organisation, seriously terrorise a population, compel a country or international organisation to commit any act or omission, or seriously harm or destroy fundamental constitutional policies or the economic foundations of a country, is punishable by imprisonment.<sup>1</sup> Furthermore, participation in or financing of a terrorist organisation renders a person liable to imprisonment for a period of up to 10 years.<sup>2</sup>
3. As is the case in respect of persons suspected of other offences, a terrorism suspect may not be detained unless a charge has been laid. Accordingly, the nature of detention is not administrative under Greek law. For these reasons, measures relating to detention for counter-terrorism, national security or intelligence-gather purposes are discussed in the section on preventive detention.

## II IMMIGRATION DETENTION

### a) Preliminary remarks

4. The relevant provisions on detention for the purposes of preparing and carrying out return stem from Law 3386/2005 and Law 3907/2011,<sup>3</sup> which transpose the Returns Directive<sup>4</sup> into Greek law.
5. Provisions relating to the detention of asylum-seekers are covered by the relevant instruments transposing the Asylum Procedures Directive<sup>5</sup> into Greek law. Presidential Decree 114/2010

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<sup>1</sup> Criminal Code, Presidential Decree 283/1985, FEK A' 106 (Criminal Code), art 187A(1).

<sup>2</sup> Criminal Code, art 187A(4)-(6).

<sup>3</sup> Law 3907/2011 'Establishment of Asylum Authority and First Reception Service, transposition of Directive 2008/115/EC 'on common standards and procedures in Member States for returning illegally staying third-country nationals', FEK 7 A'.

<sup>4</sup> Directive 2008/115/EC of the European Parliament and of the Council of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Returns Directive) [2008] OJ L348/98.

<sup>5</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

covers applications for international protection lodged prior to 7 June 2013,<sup>6</sup> while applications lodged following that date are governed by Presidential Decree 113/2013.<sup>7</sup>

## **b) Decision to detain**

### *i) Legal framework*

aa) Detention for the purposes of return

6. Detention is applied as a measure of last resort, where the effective application of less intrusive measures is not possible.<sup>8</sup> Alternative measures include regular reporting to the authorities, depositing a financial guarantee or travel documents, or a mandatory stay within a specified area.<sup>9</sup>
7. Given that expulsion decisions are taken by the competent Police Director,<sup>10</sup> the law's silence on the authority competent to order detention in the context of a third-country national's return implies that detention decisions are taken by police authorities.
8. Detention is only permissible on the following grounds:<sup>11</sup>
  - there is a risk of absconding;
  - the third-country national is avoiding or frustrating the return procedure; or
  - other reasons of national security.
9. Detention is mandated strictly for the time period necessary for the preparation of return.<sup>12</sup> It cannot exceed a period of six months, following which the detainee must be released if they have not been returned.<sup>13</sup> This maximum period may be extended to twelve months where a return procedure is likely to last longer due to the third-country national's refusal to cooperate or to delays in receiving necessary documents from third countries.<sup>14</sup>

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<sup>6</sup> Presidential Decree 114/2010 'Establishment of uniform recognition to third-country nationals and stateless persons of refugee status or beneficiary of subsidiary protection in accordance with Directive 2005/85/EC', FEK 195 A'.

<sup>7</sup> Presidential Decree 113/2013 'Establishment of uniform recognition to third-country nationals and stateless persons of refugee status or beneficiary of subsidiary protection in accordance with Directive 2005/85/EC 'on minimum standards on procedures in Member States for granting and withdrawing refugee status', FEK 146 A'.

<sup>8</sup> Law 3386/2005, art 76(3); Law 3907/2011, art 30(1).

<sup>9</sup> Law 3907/2011, art 22(3).

<sup>10</sup> Law 3386/2005, art 76(2).

<sup>11</sup> Law 3386/2005, art 76(2).

<sup>12</sup> Law 3386/2005, art 76(2).

<sup>13</sup> Law 3907/2011, art 30(5).

<sup>14</sup> Law 3907/2011, art 30(6).

bb) Detention of asylum-seekers

10. Presidential Decrees (PD) 114/2010 and 113/2013 lay down that an asylum-seeker may not be detained for the sole reason of seeking international protection or illegally entering the country.<sup>15</sup>
11. Under both legal frameworks, detention is only permissible where:<sup>16</sup>
  - it is necessary to determine the identity and origin of the applicant;
  - the applicant presents a risk to national security or public order; or
  - detention is deemed necessary for speedy completion of the examination of the asylum claim.
12. As regards the maximum duration of detention, PD 114/2010 lays down a six-month time limit, following the expiry of which an asylum-seeker must be released if a decision on their application is pending.<sup>17</sup> However, PD 116/2012 has controversially extended the maximum period of detention to 18 months.<sup>18</sup>

*ii) Practice*

13. Police authorities apply administrative detention to both irregular migrants and asylum-seekers without assessing alternatives to detention, grounds for detention, necessity and proportionality on a case-by-case basis.<sup>19</sup>
14. According to the Greek Council for Refugees, irregular migrants and asylum-seekers are systematically detained when apprehended at the border or without documentation on the country's territory. They are initially held in police or border guards' stations pending transfer to a detention facility. It is common, however, for migrants or asylum-seekers to be held in police stations for the full duration of their detention.<sup>20</sup>
15. Unaccompanied minors are also systematically detained in the same conditions as other migrants. The automatic application of detention is incompatible with the best interests of the child principle enshrined in the United Nations Convention on the Rights of the Child and the Reception Conditions Directive,<sup>21</sup> according to the ECtHR in *Rahimi v Greece*.<sup>22</sup>

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<sup>15</sup> PD 114/2010, art 13(1); PD 113/2013, art 12(1).

<sup>16</sup> PD 114/2010, art 13(2); PD 113/2013, art 12(2).

<sup>17</sup> PD 114/2010, art 113; PD 113/2013, art 12.

<sup>18</sup> United Nations High Commissioner for Refugees, *Current Issues of Refugee Protection in Greece* (2013), <[http://www.asylumineurope.org/files/resources/greece\\_positions\\_july\\_2013\\_en.pdf](http://www.asylumineurope.org/files/resources/greece_positions_july_2013_en.pdf)> 4, accessed 20 February 2014.

<sup>19</sup> *ibid.*

<sup>20</sup> Greek Council for Refugees, *AIDA National Country Report: Greece* (2013), <[http://www.asylumineurope.org/files/report-download/aida\\_greekreport\\_june2013\\_0.pdf](http://www.asylumineurope.org/files/report-download/aida_greekreport_june2013_0.pdf)> 48, accessed 20 February 2014.

<sup>21</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

16. Authorities often detain asylum-seekers on grounds of preparing their return. The ECtHR held in *SD v Greece* that applying this ground of detention to asylum-seekers before a final decision is taken on their application is contrary to Art 5(1) ECHR.<sup>23</sup>
17. Both the United Nations High Commissioner for Refugees and the United Nations Working Group on Arbitrary Detention have found that Greece's failure to apply alternatives to detention and the excessive length of detention may render such measures arbitrary.<sup>24</sup>
18. The ECtHR held in *Tabesh v Greece* that Greece had violated Art 5(1) ECHR by detaining an individual for a time period exceeding the necessary duration of detention to prepare their return.<sup>25</sup>
19. Moreover, detention practices have dramatically increased since the Greek government launched Operation 'Xenios Zeus' in August 2012. Xenios Zeus consists of a 'sweep' operation of mass arrests and detention of perceived irregular migrants both at the border and on the territory of the country. 2,500 police officers were deployed at the Greek-Turkish border in the Evros region and 2,000 were deployed in Athens to carry out this operation.<sup>26</sup>
20. Under this regime, over 85,000 third-country nationals were arrested and detained in police stations between August 2012 and February 2013. Detainees reportedly included asylum-seekers and unaccompanied minors. In the majority of cases, arrests for the purposes of status verification were based on criteria of ethnicity and appearance. Very often, police authorities have detained individuals for hours pending verification of their legal status.<sup>27</sup> Strikingly, only 4,811 – no more than 6% – were found to be illegally residing in Greece.<sup>28</sup>
21. No judicial process has been initiated to review the lawfulness of detention measures under Operation Xenios Zeus.

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<sup>22</sup> *Rabimi v Greece* App no 8687/08 (ECtHR, 5 February 2011) [108].

<sup>23</sup> *SD v Greece* App no 5354/07 (ECtHR, 11 June 2009) [65]-[67].

<sup>24</sup> Office of the High Commissioner for Human Rights, 'Working Group on Arbitrary Detention Statement upon the Conclusion of its Mission to Greece (21 – 31 January 2013)' (2013), <[http://www.ecoi.net/local\\_link/238325/347421\\_en.html](http://www.ecoi.net/local_link/238325/347421_en.html)> accessed 20 February 2014.

<sup>25</sup> *Tabesh v Greece* App no. 8256/07 (ECtHR, 26 November 2009) [56]-[57].

<sup>26</sup> Greek Council for Refugees, 'AIDA National Country Report: Greece' (2013), <[http://www.asylumineurope.org/files/report-download/aida\\_greekreport\\_june2013\\_0.pdf](http://www.asylumineurope.org/files/report-download/aida_greekreport_june2013_0.pdf)> 47, accessed 20 February 2014.

<sup>27</sup> *ibid.*

<sup>28</sup> Human Rights Watch, 'Unwelcome Guests: Greek Police Abuses of Migrants in Greece' (2013), <[http://www.hrw.org/sites/default/files/reports/greece0613\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/greece0613_ForUpload.pdf)> 20, accessed 20 February 2014.

## **c) Review of and challenges to detention**

### *i) Legal framework*

#### aa) Detention for the purposes of return

22. A third-country national may challenge a detention decision through an objections application (**αίτηση αντιρρήσεων**) before the Administrative Court.<sup>29</sup> This is an action peculiar to detention decisions which is not provided for in the Administrative Procedure Code. Accordingly, the objections application does not amount to a fully-fledged review of the merits of an administrative act.
23. The applicant's objections must contain specific reasons for challenging their detention.<sup>30</sup> However, neither Law 3386/2005 nor Law 3907/2011 sets out specific grounds on which an objections application may be brought.
24. Detention decisions are reviewed every three months by the same body that ordered the decision.<sup>31</sup> Decisions extending detention are reviewed by the Administrative Court.<sup>32</sup>
25. The third-country national is immediately released if detention is deemed unlawful.<sup>33</sup> Equally, where it becomes manifest that the third-country national is non-deportable for legal or other reasons, immediate release is ordered.<sup>34</sup>

#### bb) Detention of asylum-seekers

26. Detention may be challenged through the aforementioned objections procedure referred to in Laws 3386/2005 and 3907/2011.<sup>35</sup>

### *ii) Practice*

27. Challenging a detention decision meets a number of barriers in practice. As noted by the United Nations Special Rapporteur on the Human Rights of Migrants:

Although migrants may present objections to their detention (Law 3386/2005, art.76.3 and Law 3907/2011, art.76.2), this is not automatic and does not provide for a direct review of the lawfulness of the detention. Moreover, objections need to be submitted in writing and in Greek. Access to an interpreter and lawyer is not guaranteed, which makes objection to the detention decision virtually impossible, particularly as detention and deportation orders are written in Greek.<sup>36</sup>

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<sup>29</sup> Law 3386/2005, art 76(3)-(4); Law 3907/2011, art 30(2).

<sup>30</sup> Law 3386/2005, art 76(4).

<sup>31</sup> Law 3907/2011, art 30(3).

<sup>32</sup> Law 3907/2011, art 30(3).

<sup>33</sup> Law 3907/2011, art 30(2).

<sup>34</sup> Law 3907/2011, art 30(4).

<sup>35</sup> PD 113/2013, art 12(7).

<sup>36</sup> UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François

28. In *Tabesh v Greece*<sup>37</sup> and *SD v Greece*,<sup>38</sup> the ECtHR ruled that the Greek system of judicial review of detention orders infringes Art 5(4) ECHR on the ground that national courts refrain from reviewing the legality of a detention decision and merely rule whether the claimant is a threat to public order or runs the risk of absconding.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Preliminary remarks

29. Involuntary treatment, which includes involuntary placement or detention, of persons suffering from a mental illness is governed by the provisions of Law 2071/1992.<sup>39</sup>

#### b) Threshold questions

30. Confinement in a psychiatric institution (περιορισμός σε ψυχιατρικό κατάστημα) amounts to deprivation of liberty.<sup>40</sup>
31. Article 95(1) of Law 2071/1992 refers to art 69 of the Criminal Code in relation to the involuntary treatment (and placement) of persons suffering from mental illness. Accordingly, the requisite threshold of detention is satisfied.

#### c) Decision to detain

##### *i) Circumstances in which detention may be ordered*

32. An individual may be subjected to involuntary treatment under two sets of grounds. The first exists where the following criteria are cumulatively fulfilled:
- the patient suffers from a mental illness;
  - the patient has no capacity to decide on his or her health interests; and
  - the lack of treatment will result in preventing their treatment or in the deterioration of their condition.<sup>41</sup>
33. The second exists where the patient's treatment is necessary to prevent acts of violence against themselves or others.<sup>42</sup>
34. In order to assess the necessity of involuntary treatment, the public prosecutor requests evidence from two medical experts.<sup>43</sup> In the event that the two medical experts' opinions on the patient's

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Crépeau, Mission to Greece (2013) A/HRC/23/46/Add.4 [56].

<sup>37</sup> *Tabesh v Greece* App no. 8256/07 (ECtHR, 26 November 2009) [62]-[64].

<sup>38</sup> *SD v Greece* App no 5354/07 (ECtHR, 11 June 2009) [75]-[77].

<sup>39</sup> Law 2071/1992 'Modernisation and Organisation of the Health System', FEK A' 123.

<sup>40</sup> Criminal Code, arts 51(1) and 69.

<sup>41</sup> Law 2071/1992, art 95(2)(I).

<sup>42</sup> Law 2071/1992, art 95(2)(II).

<sup>43</sup> Law 2071/1992, art 96(2).

mental state diverge, the public prosecutor may request that the individual be examined by a public mental health clinic.<sup>44</sup>

35. The decision to detain is taken by the court of first instance and must include detailed reasons for detention.<sup>45</sup>

#### *ii) Period of detention*

36. The duration of detention may not exceed six months.<sup>46</sup> In exceptional circumstances, attested to by evidence provided by three medical experts, detention may exceed the six-month period.<sup>47</sup> No maximum time limit is specified by Law 2071/1992 or case law in these cases; according to a 2007 report by the Greek Ombudsman (Synigoros tou Politi), the maximum period of detention has been 540 days.<sup>48</sup>
37. Although the law does not expressly lay down alternatives to detention, the aforementioned provisions of Law 2071/1992 are interpreted in accordance with the principles of priority of out-of-hospital care (αρχή της εξωνοσοκομειακής περίθαλψης) and deinstitutionalisation (αρχή της αποασυλοποίησης).<sup>49</sup>

#### **d) Review of and challenges to detention**

38. Following the first three months of involuntary treatment, the public prosecutor reviews the detention order on the basis of a new psychiatric evaluation.<sup>50</sup>
39. The patient may request a re-examination of their case by the court of first instance (ανακοπή ερημοδικίας)<sup>51</sup> in accordance with the rules laid down in the Civil Procedure Code within a period of two months following the detention decision.<sup>52</sup> This procedure is applicable where the court has failed to comply with the rules for deciding a case *in absentia*; for instance, where the claimant has not been lawfully summoned to court.<sup>53</sup>
40. The patient may also lodge an appeal before the court of appeal within a period of two months following the detention decision. Under the Civil Procedure Code, an appeal may challenge any

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<sup>44</sup> Law 2071/1992, art 96(5).

<sup>45</sup> Law 2071/1992, art 96(6)-(8).

<sup>46</sup> Law 2071/1992, art 99(2).

<sup>47</sup> Law 2071/1992, art 99(4).

<sup>48</sup> Synigoros tou Politi, 'Investigation of the Greek Ombudsman on Involuntary Treatment of Mentally Ill Persons' (2007) <<http://www.synigoros.gr/resources/docs/206391.pdf>> 23, accessed 20 February 2014.

<sup>49</sup> Law 2071/1992, art 91(2).

<sup>50</sup> Law 2071/1992, art 91(2).

<sup>51</sup> Under Civil Procedure Code, art 21, the request is lodged before the same court whose decision is challenged.

<sup>52</sup> Law 2071/1992, art 97(1).

<sup>53</sup> Civil Procedure Code, art 501.



procedural or substantive element of the decision. The court of appeal may request further evidence to be provided by a mental health expert.<sup>54</sup>

41. Moreover, at any point during involuntary treatment, the patient and their family members or guardian may apply to the public prosecutor to order termination of the treatment. The grounds for terminating involuntary treatment are not specified in the law.

#### **e) Compensation for unlawful detention**

42. An individual may bring a civil action for moral damage (ηθικὴ βλάβη) to claim compensation for his or her unlawful detention.<sup>55</sup>

### **IV MILITARY DETENTION**

#### **a) Preliminary remarks**

43. Military detention is governed by the provisions of the Military Criminal Code.<sup>56</sup> This law establishes the Military Tribunal, a specialised judicial body ruling on matters falling within the scope of the Code. However, procedural issues relating to detention are addressed by the general legal framework set out in the Criminal Procedure Code.
44. Provisions regarding the rules binding the Greek military when holding persons captive during operations are laid down in the Military Regulations.<sup>57</sup> These provide that:
- detainees have a right to dignity and must be treated with appropriate respect, and must be protected from any form of violence and attacks or interference by the public;<sup>58</sup>
  - military officers may confiscate arms and military documents from a detainee, though detainees are entitled to retain their personal items;<sup>59</sup> and
  - detainees may not be required to disclose any information except for their name, date of birth and grade.<sup>60</sup>
45. The Military Criminal Code only governs detention of military officers who have committed an offence. The provisions on detention of military officers are discussed below.

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<sup>54</sup> Law 2071/1992, art 97(1).

<sup>55</sup> Civil Code, Presidential Decree 456/1984, FEK A' 164 (Civil Code), art 933.

<sup>56</sup> Military Criminal Code, Law 2287/1995 (Military Criminal Code).

<sup>57</sup> Military Regulations 20-1, Presidential Decree 130/2010 (Military Regulations) FEK 42 A'.

<sup>58</sup> Military Regulations, art 16.

<sup>59</sup> Military Regulations, art 16.

<sup>60</sup> Military Regulations, art 17.

### **b) Decision to detain**

46. Military crimes defined in the Military Criminal Code are punishable by imprisonment.<sup>61</sup> Where a military officer is arrested or temporarily detained, the competent prosecutor or investigating authority must immediately inform that officer's service or closest military authority.<sup>62</sup>

### **c) Review of and challenge to detention**

47. A person may challenge a decision of the military tribunal in accordance with the procedures laid down in the Criminal Procedure Code.<sup>63</sup> For challenges to preventive detention orders pending trial, see the section on preventive detention.

### **d) Compensation for unlawful detention**

48. The Military Criminal Code makes no specific provision regarding remedies. An individual may bring a civil action for moral damage (ηθικὴ βλάβη) to claim Compensation for unlawful detention.<sup>64</sup>

## **V POLICE DETENTION**

49. State powers on crowd control are not governed by a specific legislative framework in Greece. Accordingly, police authorities may not arrest a person in the absence of a criminal charge.
50. Special Units for the Reinstatement of Order (μονάδες αποκατάστασης τάξης), commonly known as 'MAT', have been instituted in the Greek police force since 1976 for crowd control purposes. These units do not have powers to detain.
51. Police detention pending trial for a criminal charge is discussed under the section on preventive detention.

## **VI PREVENTIVE DETENTION**

### **a) Preliminary remarks**

52. Detention is only applied as a pre-trial measure in Greece. There is no provision in the Criminal Code or the Criminal Procedure Code mandating preventive detention or 'remand in custody' for a person already having served their sentence on the basis that they are a threat to public order.
53. The only form of 'preventive' detention provided for by Greek law is applicable pending trial of persons charged with a criminal offence. This is referred to as 'temporary detention'

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<sup>61</sup> Military Criminal Code, art 7.

<sup>62</sup> Military Criminal Code, art 202.

<sup>63</sup> Military Criminal Code, arts 204-212.

<sup>64</sup> Civil Code, art 933.

(προσωρινή κράτηση). Temporary detention, which is relevant to cases of police detention and the counter-terrorism/national security context, therefore falls within the criminal law sphere.

54. The following sub-section covers the legal framework and practical application of pre-trial temporary detention.

#### **b) Decision to detain**

##### *i) Circumstances in which detention may be ordered*

55. Upon arrest of a suspect, the authorities examine the appropriateness of applying restraining orders. Temporary detention may only be applied where the authorities reasonably believe that restraining orders are not sufficient on one of the following grounds:
- the person is prosecuted for a crime and has no known residence in the country;
  - the person has made preparatory acts to facilitate his or her escape or has previously absconded; or
  - there are reasonable grounds to believe that the person will commit further offences, based on previous convictions for similar offences.
56. The gravity of the offence in question is not in itself sufficient to mandate temporary detention.<sup>65</sup>
57. Breach of a restraining order may result in substituting that order by temporary detention.<sup>66</sup> However, such breach is not in itself sufficient to mandate temporary detention of a minor.<sup>67</sup>
58. Detention may only be mandated by a duly motivated temporary detention warrant. A prison establishment may not admit any person prior to the issuance of such warrant.<sup>68</sup> A temporary detention warrant is jointly issued by the prosecutor and investigator in the case. Where their opinions diverge,<sup>69</sup> a warrant is only issued by the Judicial Council (δικαστικό συμβούλιο).<sup>70</sup>

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<sup>65</sup> Criminal Procedure Code, Presidential Decree 258/1986 FEK A' 228 (Criminal Procedure Code), art 282(3).

<sup>66</sup> Criminal Procedure Code, arts 282(4) and 298.

<sup>67</sup> Criminal Procedure Code, art 282(5).

<sup>68</sup> Criminal Procedure Code, art 284(2).

<sup>69</sup> Criminal Procedure Code, art 283(1).

<sup>70</sup> The judicial council is a special judicial format competent for criminal cases. It comprises the first-instance Board of misdemeanour judges ("symvoulío plimmeleiodikion") and the second-instance Board of appellate judges ("symvoulío efeton"). Contrary to ordinary courts, the judicial council's hearings are restricted to the public.

## *ii) Period of detention*

59. The period of temporary detention runs from the date of submission of the temporary detention warrant. However, where the detainee has been detained prior to that date following arrest, time runs from the date of such detention.<sup>71</sup>
60. Where temporary detention reaches a period of six months, the judicial council rules on the appropriateness of release or continuation of temporary detention.<sup>72</sup> In any event, temporary detention may not exceed the maximum period of one year, except in exceptional circumstances concerning criminal offences liable to life imprisonment or a term of imprisonment of 20 years.<sup>73</sup> It should be noted that a number of criminal offences among those referred to under the ‘terrorist acts’ provision in art 187A of the Criminal Code are punishable by life imprisonment.
61. The ECtHR held in *Nerattini v Greece* that Greece had violated Art 5(3) ECHR by failing to appropriately consider alternatives to temporary detention and to provide adequate grounds for believing that the applicant ran a risk of absconding.<sup>74</sup>

## **c) Review of and challenge to detention**

62. An individual may appeal against a temporary detention warrant before the Board of Misdemeanours judges within five days following temporary detention.
63. Appeals have no suspensive effect.<sup>75</sup> However, the Board of Misdemeanours may lift temporary detention or apply restraining orders at its discretion; it need not rule that temporary detention was unlawfully mandated.<sup>76</sup>
64. No appeal may be lodged against a temporary detention warrant issued by a decision of the Judicial Council.<sup>77</sup>
65. Further, at any point during temporary detention, an individual may apply to the investigator to lift detention measures or to substitute temporary detention by restraining orders, on the ground that the criteria for temporary detention were wrongly applied. Detainees may appeal against the investigator’s decision before the Board of Appellate Judges within five days following that decision.<sup>78</sup>

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<sup>71</sup> Criminal Procedure Code, art 284(1).

<sup>72</sup> Criminal Procedure Code, art 287(1).

<sup>73</sup> Criminal Procedure Code, art 287(2).

<sup>74</sup> *Nerattini v Greece* [2008] ECHR 43529/07, [30]-[38].

<sup>75</sup> Criminal Procedure Code, art 285(1).

<sup>76</sup> Criminal Procedure Code, art 285(4).

<sup>77</sup> Criminal Procedure Code, art 285(3).

<sup>78</sup> Criminal Procedure Code, art 286(1)-(2).

66. In *Slyti v Greece*, a recent case related to temporary detention on charges of drug trafficking, the ECtHR found that a delay of three months in rejecting an appeal against a preventive detention order was in breach of Art 5(4) ECHR.<sup>79</sup>
67. More recently, the case of Constantinos Sakkas, a terrorist suspect who went on hunger strike to protest against his temporary detention of 2.5 years, attracted considerable media attention.<sup>80</sup> Sakkas has brought his case to the ECtHR.<sup>81</sup>

#### **d) Compensation for unlawful detention**

68. An individual may bring a civil action for moral damage (ηθική βλάβη) to claim Compensation for unlawful detention.<sup>82</sup>

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<sup>79</sup> *Slyti v Greece* [2013] ECHR 990 [40]-[42].

<sup>80</sup> Xinou, 'Temporary detention lasting... 2.5 years', (2013) *ENET* 3 June, <<http://www.enet.gr/?i=news.el.article&id=367499>> accessed 20 February 2014.

<sup>81</sup> Pouliopoulos, 'Kostas Sakkas before the European Court for unlawful detention' (2013) *To Vima* 27 June, <<http://www.tovima.gr/society/article/?aid=519703>> accessed 20 February 2014.

<sup>82</sup> Civil Code, art 933.

# Country Report for Hong Kong

## I ADMINISTRATIVE DETENTION

1. There is no specific regime of administrative detention in Hong Kong per se. Rather, police detention and immigration detention as detailed here are considered as types of administrative detention.

## II IMMIGRATION DETENTION

### a) Preliminary remarks

2. Immigration control in Hong Kong is overseen by the Immigration Department and is governed under the Immigration Ordinance.<sup>1</sup> This Ordinance grants the Director of Immigration wide legal powers regarding immigration control, the enforcement of relevant laws, and the detention and deportation of suspected illegal immigrants. There are several strands of detention available to the authorities within the Immigration Ordinance. These are covered under Part VII of the Ordinance, pertaining to ‘detention’. It is important to note that in Hong Kong, all legislations equivalent to Acts are termed as Ordinances.
3. It is important to note the hierarchy of courts in Hong Kong. The High Court of Hong Kong consists of the Court of First Instance and Court of Appeal. Its status and structure is comparable to the Royal Courts of Justice in England and Wales. The High Court is superior to the District Court and Magistracies in Hong Kong, but below the Court of Final Appeal, which is the court with final adjudicatory powers.

### b) Threshold questions

4. There are no threshold questions which arise here.

### c) Decision to detain

#### *i) Detention pending examination and decision as to landing*

5. Immigration Officers are allowed to examine anyone on their arrival or prior to their departure from Hong Kong, if there is a ‘reasonable cause’ for belief that they have illegally landed in Hong Kong or that they are in Hong Kong unlawfully, or have contravened their conditions of stay at the time.<sup>2</sup> If so required, the immigration authorities can detain individuals for a maximum of 48 hours for their ‘examination’ under s 4(1)(a).<sup>3</sup> A combined reading of ss 4 and 27 reveals that

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<sup>1</sup> Immigration Ordinance 1997 (Cap 115, Ordinances of Hong Kong, Revised edition 2012) (‘Immigration Ordinance’).

<sup>2</sup> Immigration Ordinance, ss 4(1)(a) and (b).

<sup>3</sup> Immigration Ordinance, s 27. Note however, that this 48 hour period is broken down into two: the person may

detention is usually applied in cases where the individual concerned has just arrived, and an examination is deemed necessary to determine whether permission should be given to their landing. Section 4 can also be used during immigration enforcement sweeps, or at the point of departure of the individual. Individuals detained are generally detained at their port of entry or departure such as the airport. However, those individuals needing a more thorough examination are usually detained in one of the authorised immigration detention centres.<sup>4</sup> They are thus detained pending a decision regarding their eligibility to land in Hong Kong.

6. If the Immigration Service 'is satisfied' that 'inquiry for the purposes of this Ordinance' is warranted other than for deportation, and that there is a risk that the individual may abscond, detention can be ordered for an initial period of 48 hours.<sup>5</sup> This can be extended for a further five days.<sup>6</sup> This provision applies to immigrants already inside Hong Kong and suspected of violating the Immigration Ordinance, for instance by overstaying, as was in the case of *A v Director of Immigration*.<sup>7</sup>

#### ***ii) Removal orders***

7. The previous section covered those individuals who land unlawfully in Hong Kong,<sup>8</sup> while this section covers potential deportees, who are subject to more severe detention conditions.<sup>9</sup> These are individuals who can be detained if the Secretary for Security has reasonable grounds to inquire as to whether they ought be deported under s 20 of the Immigration Ordinance, and need to be detained in the interim.<sup>10</sup> This is because it is suspected that they have been found guilty of an offence or if the Secretary considers their deportation to be conducive to the public good.<sup>11</sup> For example, s 29 of the Ordinance is concerned with detention for inquiry as to deportation, which provides for more draconian measures. Thus, if it 'appears to the Secretary for Security that there are reasonable grounds for inquiry' for a person's deportation, the Secretary may issue a warrant to detain the said person for a period of 14 days. Upon the expiry of 14 days, the Secretary is entitled to issue two further detention warrants that authorise

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not be detained for more than 24 hours pending the examination; and for a further 24 hours pending a decision to give or refuse them permission to land.

<sup>4</sup> Immigration (Places of Detention) Order 1997 (Cap 115B, Ordinances of Hong Kong), sch 3.

<sup>5</sup> Immigration Ordinance, s 26.

<sup>6</sup> Immigration Ordinance, s 26(b).

<sup>7</sup> HCAL 100/2006.

<sup>8</sup> Immigration Ordinance, s 27.

<sup>9</sup> Immigration Ordinance, ss 29-35.

<sup>10</sup> Immigration Ordinance, s 29.

<sup>11</sup> Immigration Ordinance, s 19.

detention for a further period of seven days each. This means a maximum detention period of 28 days. Any police officer may arrest the person whom the warrant is in force.<sup>12</sup>

8. Another example is the existence of a suspended deportation order, with conditions attached. Police officers can arrest the individual concerned if they have ‘reason to suspect that a person has contravened any condition’.<sup>13</sup> Section 34 also allows the police to detain such an arrested person for up to 48 hours. This is followed by another detention of up to 28 days under the Secretary for Security’s authority, pending the Governor’s decision on whether the suspension of the deportation order ought be rescinded.

*iii) Detention to be lawful, proportionate and within a reasonable time period*

9. Detention on immigration grounds must be done in a proportionate and legal manner, based on several non-exhaustive factors listed below in the Immigration Department’s Detention Policy:

- Whether the person’s removal is going to be possible within a reasonable time;
- Whether that person concerned constitutes a threat/security risk to the community;
- Whether there is any risk of that person’s absconding and/or (re)offending;
- Whether that person’s identity is resolved or satisfied to be genuine;
- Whether that person has close connection or fixed abode in Hong Kong; and
- Whether there are other circumstances in favour of release.<sup>14</sup>

10. This policy is generally quite similar to the one used by the Home Office in the UK It developed in the Hong Kong context owing to the lawsuits filed against the Immigration Department’s previously opaque immigration policies by individuals detained by them. Thus, in the most recent case of *Shum Kwok Sher v HKSAR*,<sup>15</sup> Sir Anthony Mason NPJ of the Court of Final Appeal stated:

International human rights jurisprudence has developed to the point that it is now widely recognised that the expression ‘prescribed by law’, when used in a context such as art. 39 of the Basic Law, mandates the principle of legal certainty.<sup>16</sup>

11. Article 39 of the Basic Law deals with the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which remain in force in Hong Kong following the handover. These international treaties as implemented in Hong Kong through the Bill of Rights Ordinance, often refer to rights and limitations as being ‘prescribed by law’. This acts as a procedural safeguard to ensure that any

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<sup>12</sup> Immigration Ordinance, ss 29(2)-(3).

<sup>13</sup> Immigration Ordinance, s 54(3).

<sup>14</sup> The full list of criteria available here: ‘Hong Kong Immigration Department, Detention Policy’ (*Security Bureau, HKSAR*) < <http://www.sb.gov.hk/eng/special/pdfs/Detention%20policy-e.pdf> > accessed 19 January 2014.

<sup>15</sup> FACC 1/2002.

<sup>16</sup> *ibid* [60].



limitations on rights must be expressly, certainly, and clearly made out. This requirement of legal certainty was also reiterated by the ECtHR in *The Sunday Times v United Kingdom* as:

First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>17</sup>

12. In *F v Director of Immigration*,<sup>18</sup> it was held that:

Under Article 5 [of the Hong Kong Bill of Rights] detention must not be arbitrary and the grounds and procedure for detention must also be certain and accessible..... In the absence of some published policies as to the circumstances under which the power to detain would be exercised, the power of detention under [IO] is contrary to Article 5(1) of HKBOR.<sup>19</sup>

13. Generally the Hong Kong authorities have followed the English authorities, with cases like *Nadarajah v Secretary of State for Home Department*,<sup>20</sup> (where the Court of Appeal held that the detention was unlawful because the detention policy was not accessible in its entirety) playing a large part in the evolution of Hong Kong jurisprudence. Generally it is a requirement that 'it is for the Director [of Immigration] to justify detention and not for the applicant to seek release from detention'<sup>21</sup> in court in order for the detention to escape being arbitrary and therefore unlawful.

14. Furthermore, all detention must be of only of a reasonable time period and cannot be excessive. This was established in cases like *Tan Te Lam v Tai A Chau Detention Centre*,<sup>22</sup> where the Privy Council (in the context of Vietnamese refugees) held that if the Hong Kong government could not reach a decision on the status of an individual detained under the power granted to them by the Immigration Ordinance in a reasonable time period, then further detention would be unlawful. These individuals are released, but with conditions (i.e. restrictions to employment, education, social welfare). However, it must be noted that this depends on the circumstances of each case, with the Court of Final Appeal holding in *Thang Thieu-quyen v Director of Immigration*<sup>23</sup> that 'what is reasonable will again depend upon the circumstances of the particular case'.<sup>24</sup>

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<sup>17</sup> *The Sunday Times v United Kingdom* (1979–80) 2 EHRR 245 [49].

<sup>18</sup> CACV 314/2007.

<sup>19</sup> *ibid* [33].

<sup>20</sup> [2003] EWCA Civ 1768.

<sup>21</sup> *F v Director of Immigration* CACV 314/2007 [66].

<sup>22</sup> [1997] AC 97.

<sup>23</sup> [1997] 1 HKCFAR 167.

<sup>24</sup> *ibid* 188.

*iv) Detention of Vietnamese refugees*

15. In addition to the general provisions for detention, the Immigration Ordinance specifically targets Vietnamese refugees under Part IIIA and provides for the detention of the individual concerned. The provisions regarding Vietnamese refugees stem from the historic events during and after the Vietnam War in which the Communist regime's persecution of certain sectors of society, led to many refugees fleeing to Hong Kong via the sea (Vietnamese boat people). The core threshold requirement for detention is simply the status of the individual concerned. Thus:

As from 2 July 1982 any resident or former resident of Vietnam who-

(a) arrives in Hong Kong not holding a travel document which bears an unexpired visa issued by or on behalf of the Director; and

(b) has not been granted an exemption under section 61(2),

may, whether or not he has requested permission to remain in Hong Kong, be detained under the authority of the Director in such detention centre as an immigration officer may specify pending a decision to grant or refuse him permission to remain in Hong Kong.<sup>25</sup>

16. The primary purpose of the provisions regarding the detention of Vietnamese refugees was not to detain them for unreasonable periods. Instead, they were actively encouraged to apply for asylum elsewhere and to leave Hong Kong as can be seen from s 13D(2), which reads:

Every person detained under this section shall be permitted all reasonable facilities to enable him to obtain any authorization required for entry to another state or territory or, whether or not he has obtained such authorization, to leave Hong Kong.

17. Despite the Ordinance having no stipulation regarding the maximum period of detention of Vietnamese refugees, the courts have ruled in other cases that the period of detention must be of a reasonable period.

*v) Detention of individuals seeking asylum based on torture claims*

18. The Immigration Ordinance specifically targets those individuals seeking asylum on the basis of torture claims under Part VIIC of the Ordinance. The power to detain an individual claiming torture is vested 'under the authority of the Director of Immigration, the Deputy Director of Immigration or any assistant director of immigration pending final determination of the claimant's torture claim.'<sup>26</sup>

**d) Review of and challenges to detention**

19. The Bill of Rights Ordinance provides that:

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<sup>25</sup> Immigration Ordinance, s 13D(1).

<sup>26</sup> Immigration Ordinance, s 37ZK.

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.<sup>27</sup>

20. The lawfulness of any decision to detain anyone can be determined by the Hong Kong judicial system. This is done by way of judicial review or via the writ of *habeas corpus*. It was held by the courts that:

Proceedings by way either of judicial review or *habeas corpus* are capable of adequately meeting the requirements of Article 5(4)... with the liberty of the subject at stake, the courts must act as primary decision-makers, taking into account all relevant circumstances.<sup>28</sup>

### e) Compensation for unlawful detention

21. As shown by the case of *A v Director of Immigration*,<sup>29</sup> if a person has been illegally detained, they are entitled to be released and to monetary damages. Illegal detention constitutes false imprisonment and per Patrick Chan J (as he then was) of the Court of Appeal in *Pham Van Ngo v Attorney General*,<sup>30</sup> ‘false imprisonment is of course actionable per se without proof of damage...[and] always entitled to recover damages.’<sup>31</sup>
22. Thus, ‘compensation for loss of liberty; and secondly, damage to reputation, humiliation, shock, injury to feelings and so on which can result from the loss of liberty’<sup>32</sup> are taken into account in assessing the damages. The quantum of damages have generally followed English jurisprudence, with guidelines in cases such as the English Court of Appeal’s judgment in *Thompson v Commissioner of Police of the Metropolis*<sup>33</sup> having been adopted.
23. Usually, only ordinary damages seem to be given, even if the detention was excessive, for instance detention for a period of 21.5 months. Thus, in *A v Director of Immigration*, the detainee was only awarded ordinary damages. He was refused aggravated or exemplary damages because the Court held that they cannot be awarded ‘in the absence of outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like’<sup>34</sup> by the Immigration Department.

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<sup>27</sup> Hong Kong Bill of Rights Ordinance 1997 (Cap 383, Ordinances of Hong Kong), sec 8, art 5(4).

<sup>28</sup> *F v Director of Immigration* CACV 314/2007 [70].

<sup>29</sup> *A v Director of Immigration* HCAL 100/2006.

<sup>30</sup> HCA 4895/1990. The case concerned Vietnamese refugees who had been illegally detained.

<sup>31</sup> *ibid* 302-303.

<sup>32</sup> *A v Director of Immigration* HCAL 100/2006 [53].

<sup>33</sup> [1998] QB 498.

<sup>34</sup> *A v Director of Immigration* HCAL 100/2006 [96].

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Preliminary remarks

24. Detention on the ground of mental health is governed by the Mental Health Ordinance in Hong Kong.<sup>35</sup> Johnson Lam J of the High Court has described the aim of detention under the Ordinance in *LWY v Guardianship Board*<sup>36</sup> as ‘the protection of the health and welfare of [people] whom [are] unable to make decisions for [themselves]’.<sup>37</sup>
25. Detention is largely covered under Part III of the Ordinance. To be detained on mental health grounds, an individual need be evaluated and identified as a ‘mentally disordered person’, which is someone suffering from a mental disorder that is either a:
- mental illness;
  - a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;
  - psychopathic disorder; or
  - any other disorder or disability of mind which does not amount to mental handicap.<sup>38</sup>
26. This is quite different from being mentally handicapped or incapacitated, which have different definitions under the Ordinance, and are subject to different treatments. For instance mentally incapacitated persons can be ordered to be received into guardianship.<sup>39</sup> Mentally handicapped persons are those individuals that have ‘sub-average general intellectual functioning’, defined as having an ‘IQ of 70 or below’.<sup>40</sup> A mentally disordered person, as seen above, is considered more serious.

#### b) Threshold questions

27. There is no threshold question regarding detention.

#### c) Decision to detain

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<sup>35</sup> Mental Health Ordinance 1960 (Cap 136, Revised edition 1997) (‘Mental Health Ordinance’).

<sup>36</sup> [2009] 3 HKLRD 30.

<sup>37</sup> *ibid* 42.

<sup>38</sup> Mental Health Ordinance, s 2.

<sup>39</sup> Mental Health Ordinance, s 26A.

<sup>40</sup> Mental Health Ordinance, s 2.

28. Two types of patients and their detention are covered under the legislation; patients under observation<sup>41</sup> and certified patients.<sup>42</sup> Patients under observation are detained under ss 31 or 32, whilst certified patients are detained under s 36 of the Mental Health Ordinance.<sup>43</sup>

*i) Detention of patients under observation*

29. Patients under observation are detained when they are deemed to be suffering from a mental disorder warranting detention in a mental hospital, or when it is for their own health and safety, and the health and safety of others in society.<sup>44</sup> An application for the order of detention is based on the written opinion of a ‘registered medical practitioner’.<sup>45</sup> The doctor must have observed the patient within the past seven days before writing their opinion as to why detention is warranted.<sup>46</sup> An application must then be made to a magistrate or a District Court Judge, who may order the patient’s detention for not more than seven days, a timeframe that includes the date of the order.<sup>47</sup>
30. Patients detained under s 31 can be further detained via an extension of not more than 21 days.<sup>48</sup> This can only be made by a District Judge,<sup>49</sup> after the patient has been examined by two medical doctors.<sup>50</sup>
31. Thus, there is an express time limit requirement for patients under observation.<sup>51</sup> This was expressly clarified in *Re Patient L*<sup>52</sup>, that those detained under s 31, and were further detained as part of an extension under s 32, simply ‘may no longer be detained ‘after the expiration of the ... extension ... unless he has become a voluntary patient.’<sup>53</sup> They must be released. The idea behind the exception of being a voluntary patient is that if the patient becomes a voluntary patient, they can be further detained as a certified patients under s 36 of the Mental Health Ordinance. However, if the patient does not consent to, or cannot become a voluntary patient, the patient

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<sup>41</sup> Mental Health Ordinance, s 31

<sup>42</sup> Mental Health Ordinance, s 36.

<sup>43</sup> Mental Health Ordinance, s 2.

<sup>44</sup> Mental Health Ordinance, s 31(1)(a)(b).

<sup>45</sup> Mental Health Ordinance, s 31(1A). Section 2 of the Ordinance defines a ‘registered medical practitioner’ as any medical doctor registered in accordance with the Medical Registration Ordinance, rather than, say a psychiatric specialist.

<sup>46</sup> Mental Health Ordinance, s 31(1A).

<sup>47</sup> Mental Health Ordinance, s 31(1B).

<sup>48</sup> Mental Health Ordinance, s 32(3).

<sup>49</sup> Mental Health Ordinance, s 32(2).

<sup>50</sup> Mental Health Ordinance, s 32(1).

<sup>51</sup> Section 31(1B): ‘...the removal of the patient to a mental hospital for the purpose of detention and observation during the period not exceeding 7 days from and including the date of the order.’

Section 32(3): ‘Only one extension of not more than 21 days shall be made in accordance with this section to any order made in accordance with section 31.’

<sup>52</sup> [2001] HKLRD (Yrbk) 584.

<sup>53</sup> *ibid* [7].

cannot 'be re-cycled through section 31 and the section 32 of the Ordinance in order to keep him detained for treatment to his ultimate mental well being'.<sup>54</sup> To do so has been described as the courts as 'an abuse of process and blatant violation of the human rights of the patient'.<sup>55</sup>

### *ii) Detention of certified patients*

32. Similar procedures are in place for certified patients and their detention, which is governed by s 36 of the Mental Health Ordinance. The threshold for detention however, is slightly more stringent since detention can be for a much longer term than patients under observation. Here, the patient must be deemed to have a mental disorder or be a threat to their own or other's health and safety by two registered medical doctors who have examined the patient, either together or separately, rather than just one doctor.<sup>56</sup> Furthermore, their opinion and application for the patient's detention can only be forwarded to and considered by the District Court, not the magistracies.<sup>57</sup>
33. Section 36 requires that the patient being detained must either be a voluntary patient or someone liable to be detained in a manner other than under s 36. This was explained by Judge Li in *Re Patient O*:<sup>58</sup>

Before section 36 may be invoked, either consent (i.e. contractual authority for hospitalization) or liability (i.e. statutory authority for hospitalization) must be existent; in either case the authority must be independent of section 36. Put in another way, the categories of 'patient liable to be detained (otherwise than under this section)' and 'voluntary patient' are *pari passu* and indicate legislative intention that authority extraneous to section 36 for hospitalization must be found before section 36 can be invoked even though there is health or safety reason for the patient to be detained in hospital for long term treatment.<sup>59</sup>

### *iii) Guardianship Boards*

34. Section 59J provides the establishment of a Guardianship Board to appoint guardians and to supervise them to ensure they do not abuse their powers. Section 59J(2)(a) provides for a Chairperson appointed by the Chief Executive with legal experience, and up to nine other members. Of these members, three must be legal professionals (barristers or solicitors),<sup>60</sup> 3 must be doctors or social workers<sup>61</sup> and three must be individuals who have had 'personal experience' with mental patients.<sup>62</sup> The functions and powers of this Board are articulated in s 59K of the

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<sup>54</sup> *ibid* [10].

<sup>55</sup> *ibid*. See also *R v East London and The City Mental Health NHS Trust* The Independent Law Reports 1 March 2001.

<sup>56</sup> Mental Health Ordinance, s 36(1).

<sup>57</sup> Mental Health Ordinance, s 36(1).

<sup>58</sup> [2001] HKEC 509.

<sup>59</sup> *ibid* [29].

<sup>60</sup> Mental Health Ordinance, s 59J(3)(a).

<sup>61</sup> Mental Health Ordinance, s 59J(3)(b).

<sup>62</sup> Mental Health Ordinance, s 59J(3)(c).

Mental Health Ordinance, and include powers such as making guardianship orders. However, it should be noted that under s 59K(2)(b), the Board is required to take into account what the ‘the views and wishes of the mentally incapacitated person are, in so far as they may be ascertained’ and ensure that they are respected. A guardianship order is an order that appoints a guardian in respect of the patient concerned where the Board feels that the patient is in need of one.

**d) Review of and challenges to detention**

35. Safeguards from abuse are inherent in the Mental Health Ordinance. As observed in *Re Patient O*, provisions in Part II of the Ordinance allow for the invocation of the High Court’s jurisdiction as ‘a Court of Protection ... whereby the interests of mentally incapacity persons can be protected’.<sup>63</sup> This protection includes provisions which empower the detained individual to be ‘personally examined by the Court’ or by Court delegated representatives to determine whether their detention is warranted. Court delegated representatives are in practice, usually medical practitioners.
36. The Guardianship Board, as described above, ‘supervises the guardian’. Any party to the proceedings before the Guardianship Board may appeal to the High Court against an order made by the Board.<sup>64</sup> An appeal should be lodged within 28 days and pending determination of the appeal, the Board’s decision is stayed, subject to a contrary court order.<sup>65</sup> These protections have been said to provide the mental patient procedures to challenge their detention and acts as ‘more layers of judicial safeguard for the mental patient under guardianship’.<sup>66</sup>
37. Under s 70(1) of the Mental Health Ordinance, the person detained can institute civil or criminal against those that have detained them, though to detain someone on mental grounds without proper authority is an illegal act and the criminal penalty for improper detention is imprisonment up to two years.<sup>67</sup>
38. However, there is general immunity for ‘persons carrying out the provisions of [MHO]’. No civil or criminal proceedings can be brought against the detaining authority, unless they acted in ‘bad faith or without reasonable care.’<sup>68</sup> A further hurdle for a person detained unlawfully to get remedies is that under s 70(2), any proceedings under s 70(1) cannot be instituted unless with the ‘consent of the Secretary for Justice’.

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<sup>63</sup> *ibid* [33].

<sup>64</sup> Mental Health Ordinance, s 59W.

<sup>65</sup> Mental Health Ordinance, ss 59W(3)-(4).

<sup>66</sup> *Re Patient O* [2001] HKEC 509 [35].

<sup>67</sup> Mental Health Ordinance, s 70(1).

<sup>68</sup> Mental Health Ordinance, s 69.

### **e) Compensation for unlawful detention**

39. There is no statutory provision for monetary compensation.

## **IV MILITARY DETENTION**

40. Hong Kong as a Special Administrative Region of China has been guaranteed, under the Joint Sino-British Declaration and the Basic Law, a high degree of autonomy from the Central Government. The Central Government of China is responsible for the territory's defence and external affairs.
41. The military garrison of the People's Liberation Army in Hong Kong does not play any role in the local affairs of Hong Kong. It is propounded in art 14 of the Basic Law that:

The Government of the Hong Kong Special Administrative Region shall be responsible for the maintenance of public order in the Region.

Military forces stationed by the Central People's Government in the Hong Kong Special Administrative Region for defence shall not interfere in the local affairs of the Region.

42. As such, military detention is currently inapplicable in Hong Kong as there is no legislation providing for it nor are there any examples of it as such.

## **V POLICE DETENTION**

### **a) Preliminary remarks**

43. The detention of persons by the police in Hong Kong is a matter governed by its Constitution, the Basic Law, legislation, and the common law. It is stipulated under art 28 of the Basic Law that:

The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited.

44. This is elaborated by the Bill of Rights Ordinance which states:

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.<sup>69</sup>

45. Therefore, the ordinances concerning the exercise of powers of law enforcement, and relating to the police, immigration, customs and excise have to be compliant with these two constitutional documents.

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<sup>69</sup> Hong Kong Bill of Rights Ordinance 1997 (Cap 383, Ordinances of Hong Kong), sec 8, art 5(1).



### *i) Stop and search*

46. The power to stop, detain and search an individual by the police is governed by s 54 of the Police Force Ordinance ('PFO').<sup>70</sup> There are two limbs of detention here. The first grants the police the power to detain an individual, if they consider the individual to be acting in a 'suspicious manner'.<sup>71</sup> The second grants the police the power to detain someone if they 'reasonably suspect' that individual of having 'committed or of being about to commit or of intending to commit any offence'.<sup>72</sup> If an individual is detained under either provision, the police are allowed to hold them for a 'reasonable period' to conduct enquiries or to search them for anything that may be of danger to the police officer,<sup>73</sup> or for evidence that points towards the person having committed, or intending or about to commit a crime.<sup>74</sup>

### *i) Arrest*

47. If the decision is made to arrest an individual or to take them into police custody, the officer must 'reasonably believe' that the individual so arrested will be charged or guilty of an offence liable to imprisonment.<sup>75</sup> The detention following the arrest is governed under ss 51 and 52 of the PFO. Under s 51, any person detained for purpose other than for the purpose of taking names and residence shall be brought before the Duty Officer of the police station whilst investigations are made. If investigations cannot be 'completed forthwith', the Duty Officer is to discharge the person unconditionally or on bail (a reasonable sum), on a condition to report back at a specified time and date (as stated in the recognizance).<sup>76</sup> As investigations can almost never be completed forthwith, bail is generally granted in most cases. However, if it is considered that the offence is of a serious nature, or if the Duty Officer 'reasonably considers that the person ought be detained,' it is lawful for them to do so.<sup>77</sup> It is general police practice that detained individuals will be released on bail except:

- where the offence is of a serious nature;
- where you have been arrested on a warrant which does not allow bail;
- where you may abscond or where you may repeat the offence;

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<sup>70</sup> Police Force Ordinance 1950 (Cap 232, Revised Edition 1997) ('Police Force Ordinance').

<sup>71</sup> Police Force Ordinance, s 54(1).

<sup>72</sup> Police Force Ordinance, s 54(2).

<sup>73</sup> Police Force Ordinance s54(1)(c)(i).

<sup>74</sup> Police Force Ordinance, s 54(2)(c).

<sup>75</sup> Police Force Ordinance, s 50(1)(a)

<sup>76</sup> Police Force Ordinance, s 52(3).

<sup>77</sup> Police Force Ordinance, s 52(1).

- where you may interfere with witnesses, impede the investigation or attempt to obstruct the course of justice;
- where you should be detained in your own interests to protect you from acts committed by yourself or others; or
- where you cannot produce a reasonable amount of bail money in circumstances where entering into recognizance with or without sureties is not appropriate.<sup>78</sup>

## **b) Decision to detain**

### *i) Stop and search*

48. The power to detain an individual is not an indefinite one. If the detention is under s 54 of the PFO, the officer is only allowed to detain an individual for a ‘reasonable period’. This allows the officer to make enquiries about the individual and to conduct a search for dangerous articles or other evidence, pertinent to the officer’s enquiries. Thus, detention for a reasonable period is usually considered lawful.
49. The phrase ‘reasonable period’ has not been defined.<sup>79</sup> However, it is likely that any stop and search, even for two minutes, will constitute a detention, albeit a lawful one. This is because it would be of a reasonable period, especially if it is premised on the assumption that the officer has formed a reasonable suspicion that justifies the stopping and searching of a particular individual. For a large majority of people searched under this provision, a police search only means a frisk. Police General Order 44-05 (5) stipulates that any sort of strip search will require the approval of an officer at the rank of a Sergeant or above, with the superior officer having ‘ensure[d]’ the reasons for searching are ‘justified’. Any such search must be done in a police station. This ensures that the individual will almost always be escorted or arrested in order to compel their movement to the police station. In the case of a cavity search, Order 44-05 (8) stipulates that an officer can only utilise a cavity search where the search is conducted under s 52(1A) of the Dangerous Drugs Ordinance, which requires a doctor to be present and to conduct the search, when there is a reasonable suspicion (at the rank of an Inspector or above) regarding possession of articles of contraband.
50. The reasonableness requirement is considered a key procedural safeguard under Hong Kong law. The provisions in the PFO also provide for certain clear requirements, such as ‘reasonable suspicion’, which must be met before the power to detain can be exercised. The Court of Appeal has stated that the reasonable suspicion requirement prevents abuse of police power, because it

<sup>78</sup> HKSAR, ‘Guidance to an Arrested Person on Arrest and Detention’ (*Hong Kong Police Force*) < [http://www.police.gov.hk/ppp\\_en/11\\_useful\\_info/doc/Pol-1128.pdf](http://www.police.gov.hk/ppp_en/11_useful_info/doc/Pol-1128.pdf)> accessed 24 February 2014.

<sup>79</sup> Victor Ho, *Criminal Law in Hong Kong* (Kluwer Law International 2011) 206.

cannot be exercised arbitrarily.<sup>80</sup> The test for reasonable belief under s 54(1) has been held to be of a ‘purely subjective nature.’<sup>81</sup> Even so, later cases have held that it a requirement that ‘a police officer who seeks to exercise the power under s 54(1) must rely on some objective facts as the basis of his conclusion.’<sup>82</sup> Therefore, police officers must form a genuine suspicion and cannot act arbitrarily by disregarding the material facts or circumstances at the time<sup>83</sup> the power was exercised. Interestingly, and in contrast to s 54(1), to be detained under s 54(2) requires the police officer to act under an objective test for belief. This is because unlike the wording of s 54(1), there is a requirement for reasonableness in the officer’s belief.<sup>84</sup>

*ii) Arrest*

51. Persons detained in custody are required to be brought before a magistrate ‘as soon as practicable’, and always within 72 hours from the time of apprehension. To detain the person for 72 hours (from the point of apprehension), a warrant for their arrest and detention has to be applied for, within 48 hours of their apprehension.<sup>85</sup>
52. Prior to or upon the expiration of 72 hours, the detained individual must be brought before a magistrate, who shall rule on whether further detention is warranted by the available evidence. If that is not the case, the individual will be released. The decision to detain is therefore one that is aimed to be proportional – finely balanced between risk and crime prevention on one hand and ‘minimum interference’<sup>86</sup> with the freedom of the person on the other. If the magistrate does not grant bail after 72 hours, it is likely that the crime is of a serious nature and prosecution will have started with committal hearings set forth. Under s 79 of the Magistrate’s Ordinance, the Magistrate can defer any stage of the proceedings or the examination of witnesses in a preliminary inquiry by:

Remand[ing] the accused to a prison or, some place of security, for such time as the magistrate may think reasonable, not exceeding 8 clear days, unless the accused and the prosecutor consent to a longer remand

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<sup>80</sup> *Wong Tsz Yam v Commissioner of Police* (No. 2) [2011] 3 HKLRD 369.

<sup>81</sup> *Attorney General v Kong Chung-shing* [1980] HKLR 533, 535. The court noted, ‘we accept that the test under s.54 is a purely subjective one... the officer who has an intuitive suspicion may lawfully stop and search under s.54, although he may arrest and detain only where that is ‘necessary.’

<sup>82</sup> *Wong Tsz Yam v Commissioner of Police* [2009] 5 HKLRD 836 per Jeremy Poon J.

<sup>83</sup> See also, *Yeung May-wan and Others v HKSAR FACC* 19/2004.

<sup>84</sup> *Wong Tsz Yam v Commissioner of Police* [2009] 5 HKLRD 836, 844. Poon J said, ‘As regards s.54(2), the reasonableness of any suspicion that a police officer has against a person must be determined by reference to the objective facts at the material time.’

<sup>85</sup> Police Force Ordinance, s 52(1).

<sup>86</sup> *Wong Tsz Yam v Commissioner of Police* (No. 2) [2011] 3 HKLRD 369, 381.

53. If the remand does not exceed three days, it is lawful for the police officer to continue and keep the accused in their custody, and bring them before the same magistrate at the time appointed for continuing the committal proceedings.<sup>87</sup>

### **c) Review of and challenges to detention**

54. The Bill of Rights Ordinance provides that:

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.<sup>88</sup>

55. Accordingly, detained individuals are allowed to apply to the High Court for a writ of *habeas corpus* after their arrest, and before a magistrate's consideration on whether to grant or refuse bail. The granting of *habeas corpus* is considered an extraordinary remedy,<sup>89</sup> based on the court's assessment that the applicant's detention is unlawful.<sup>90</sup> The writ compels the detaining authority, such as the officer in charge of the police station, to produce the applicant and give satisfactory reasons justifying the detention. If proper reasons cannot be given, the detainee will have successfully challenged their detention and be entitled to release from custody.
56. Furthermore, unlawfully detained persons are 'entitled to use reasonable force to free themselves'<sup>91</sup> from the police. This follows the English authorities such as *Christie v Leachinsky*<sup>92</sup> in which Lord Simmonds stated:

'Putting first things first, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful.'<sup>93</sup>

### **d) Compensation for unlawful detention**

57. The general principle is that interference with the liberty of a person can only be done lawfully. If the original arrest or detention is unlawful, continued detention is said to 'perpetuate unlawfulness and constitutes a false imprisonment.'<sup>94</sup> False imprisonment allows for both civil and criminal sanctions. Hong Kong largely follows the English common law on false

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<sup>87</sup> Magistrates Ordinance 1950 (Cap 227, Revised edition 1997), s 79(1).

<sup>88</sup> Hong Kong Bill of Rights Ordinance 1997 (Cap 383, Ordinances of Hong Kong), s 8, art 5(4).

<sup>89</sup> *Re Bhardwaj Yogeshb* [2012] HKEC 144 citing *Re Ogunade* HCAL20/2005.

<sup>90</sup> *Qhuwaraezeama Emem v Superintendent of Victoria Prison* [1998] 2 HKLRD 488.

<sup>91</sup> *ibid.* The case dealt with the prosecution of the defendants who were charged with assaulting police officers in the execution of their duty, in which they were acquitted of because it was finally decided in the CFA that they were unlawfully arrested and detained, and hence were entitled to use reasonable force.

<sup>92</sup> [1947] AC 573.

<sup>93</sup> *ibid* 591.

<sup>94</sup> *Yeung May-wan and Others v HKSAR FACC 19/2004* [53].

imprisonment. Thus, the falsely imprisoned individual can pursue a civil claim against the police for monetary damages (based on tort law). The Bill of Rights Ordinance statutorily reinforces this by stating that ‘anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.’<sup>95</sup>

## **VI PREVENTIVE DETENTION**

58. There is no actual preventative detention in Hong Kong per se. Rather, police detention and immigration detention, as detailed here, are considered kinds of preventive detention in their own right.

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<sup>95</sup> Hong Kong Bill of Rights Ordinance 1997 (Cap 383, Ordinances of Hong Kong), s 8, art 5(5).

# Country Report for India

## I ADMINISTRATIVE DETENTION

### a) Counter-terrorism

1. The two main statutes dealing with terrorism in India are the Unlawful Activities (Prevention) Act 1967 ('UAPA') and the National Investigating Agency Act 2008 ('NIAA'). The former is more relevant since the NIAA does not add to the powers of the police.<sup>1</sup>
2. The NIAA sets up a National Investigating Agency ('NIA') for the investigation and prosecution of offences under the Acts specified in the Scheduled.<sup>2</sup> The NIA operates under the superintendence of the Central Government.<sup>3</sup> The NIAA also provides for the setting up of Special Courts by the Central Government for the trial of Scheduled Offences<sup>4</sup> such as hijacking, nuclear energy related offences and terrorist offences although the State Government may also set up Special Courts.<sup>5</sup> It does not provide any additional powers of detention to the members of the NIA that police officers do not already have.

#### *i) Threshold questions*

3. There is no threshold question regarding whether a person has been detained or not.

#### *ii) Decision to detain*

4. The UAPA was primarily enacted to control terrorism, particularly by controlling the illegal activities of certain individuals and associations. It does so, for instance, by empowering the Central Government to declare an association to be 'unlawful association.'<sup>6</sup> It also allows for the notification of certain places by the Central Government in connection with which it will be possible for any police officer not below the rank of a sub-inspector to search and detain any person entering or seeking to enter such a place.<sup>7</sup> This power of notification may also be delegated to the State Government.<sup>8</sup>

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<sup>1</sup> National Investigation Agency Act 2008, ss 3(2) and 3(3).

<sup>2</sup> National Investigation Agency Act 2008, s 3.

<sup>3</sup> National Investigation Agency Act 2008, s 4.

<sup>4</sup> National Investigation Agency Act 2008, s 11.

<sup>5</sup> National Investigation Agency Act 2008, s 22.

<sup>6</sup> Unlawful Activities (Prevention) Act 1967, s 3.

<sup>7</sup> Unlawful Activities (Prevention) Act 1967, s 8(6).

<sup>8</sup> Unlawful Activities (Prevention) Act 1967, s 42.

5. Further, under s 43A, any Designated Authority<sup>9</sup> may authorise the search of a building or arrest of a person (or conduct it themselves) if they know of a design to commit any offence under the UAPA, or have reason to believe that such commission has or will happen:
- from personal knowledge or
  - from information given by any person and taken in writing that any person has committed such an offence, or
  - from any document, article or any other thing which may furnish evidence of the commission of such offence; or
  - from any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture is kept or concealed
6. Such a person, when arrested, will be informed as soon as possible about the grounds of arrest,<sup>10</sup> and will be taken without unnecessary delay to the officer in charge of the nearest police station.<sup>11</sup>
7. In addition, the provisions of the Code of Criminal Procedure 1973 that are not in conflict with the UAPA continue to apply.<sup>12</sup> In some cases, the provisions of the Code are modified. So while an arrested person in respect of whom the investigation cannot be completed in 24 hours will need to be forwarded to a Magistrate, with a record of the same being maintained, the total duration of police detention allowed is 30 days under the UAPA (this duration is 15 days under the Code of Criminal Procedure 1973). This duration might extend to 90 days if the detention is not in police custody, i.e. is in judicial custody under the UAPA (usually 60 days under the Code of Criminal Procedure 1973, unless the offence is punishable by death or imprisonment for at least ten years).<sup>13</sup> In fact, under the UAPA this period is further extendable to 180 days upon sufficient proof of progress in investigation being furnished by the Public Prosecutor, and the conversion of judicial custody into police custody is also allowed if the police shows reason to do so.<sup>14</sup>

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<sup>9</sup> Section 2(e) defines the Designated Authority as ‘such officer of the Central Government not below the rank of Joint Secretary to that Government, or such officer of the State Government not below the rank of Secretary to that Government, as the case may be, as may be specified by the Central Government or the State Government, by notification published in the Official Gazette.’

<sup>10</sup> Unlawful Activities (Prevention) Act 1967, s 43B(1).

<sup>11</sup> Unlawful Activities (Prevention) Act 1967, s 43B(2).

<sup>12</sup> Unlawful Activities (Prevention) Act 1967, s 43C.

<sup>13</sup> Unlawful Activities (Prevention) Act 1967, s 43D(2)(a).

<sup>14</sup> Unlawful Activities (Prevention) Act 1967, s 43D(2)(b).

8. It has been held that the Magistrate cannot retrospectively extend the period of detention of the detainee.<sup>15</sup> Further, under the UAPA, both the State and Central Governments have the discretion to exclude people from the Court's power to require their attendance.<sup>16</sup> This decision is to be made upon a consideration of the nature of the offence allegedly or actually committed by the detainee, the impact their removal from prison will have on public order, and public interest generally.<sup>17</sup> No anticipatory bail is allowed in case of offences covered by the UAPA,<sup>18</sup> and no person shall be granted bail upon furnishing their own bond without hearing from the Public Prosecutor first.<sup>19</sup> If the Court feels that the allegations against the person are *prima facie* true, then bail shall be refused.<sup>20</sup>

*iii) Review of and challenges to detention*

9. According to the UAPA, no proceeding taken under it by any officer shall be called into question in any court in any suit or application or by way of appeal or revision.<sup>21</sup> There is further protection to all actions undertaken in good faith, intended to be in pursuance of the UAPA.<sup>22</sup> Only the writ of *habeas corpus* is available for those who challenge unlawful detention,<sup>23</sup> unless they allege bad faith.
10. No prosecution can rest against any member of the NIA for anything done or purported to be done by them in pursuance of the NIAA without the sanction of the Central Government.<sup>24</sup>

*iv) Compensation for unlawful detention*

11. There is no mention of any compensation being available to the detainees.

**b) Intelligence gathering and security**

12. There seems to be no statutory framework surrounding intelligence gathering in India, which works entirely on the basis of executive orders.<sup>25</sup> At present, there is just a cursory reference in the Police Act 1861 positing that it is the duty of every police officer to collect and communicate

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<sup>15</sup> Sayed Muhammad Kazmi v State AIR 2012 SC 660.

<sup>16</sup> Unlawful Activities (Prevention) Act 1967, s 43D(3).

<sup>17</sup> Code of Criminal Procedure 1973, s 268(2).

<sup>18</sup> Unlawful Activities (Prevention) Act 1967, s 43D(4).

<sup>19</sup> Unlawful Activities (Prevention) Act 1967, s 43D(5).

<sup>20</sup> Unlawful Activities (Prevention) Act 1967, s 43(D)(5).

<sup>21</sup> Unlawful Activities (Prevention) Act 1967, s 47.

<sup>22</sup> Unlawful Activities (Prevention) Act 1967, s 49.

<sup>23</sup> Sapmawia v Deputy Commissioner, Aijal (1970)2SCC399.

<sup>24</sup> National Investigation Agency Act 2008, s 18.

<sup>25</sup> Arun Bhagat, 'Legal Cover for Intelligence Units Long Overdue' (*The New Indian Express*, 6 October 2013) <<http://www.newindianexpress.com/magazine/Legal-cover-for-intelligence-units-long-overdue/2013/10/06/article1820449.ece>> accessed 19 January 2014.



intelligence affecting public peace.<sup>26</sup> This role is usually played by the Crime Investigation Department of each state. The period of limitation to bring all actions against police officers in respect of anything done under the Police Act 1861 or the general doctrine of police powers, is 90 days under this Act.<sup>27</sup>

13. The Central Bureau of Investigation ('CBI') also plays the role of collecting intelligence regarding certain offences.<sup>28</sup> It covers such offences as are notified by the Central Government<sup>29</sup> including company offences,<sup>30</sup> offences relating to benami transactions,<sup>31</sup> dacoity,<sup>32</sup> and property offences<sup>33</sup>.
14. In a Gauhati High Court judgment in 2013, the CBI was declared to be without any statutory backing, and the Resolution that set it up was declared unconstitutional.<sup>34</sup> However, the operation of this order has been stayed for the time being.<sup>35</sup>
15. There are no specific powers for detention for the purpose of intelligence gathering for these agencies, and they must therefore be viewed in conjunction with the powers of the police for preventive detention as have been specified in the section relating to preventive detention.
16. India has a whole host of intelligence agencies, though the regulation surrounding them seems inaccessible. The most recent security related agency seems to be the National Technical Research Organisation ('NTRO') set up in 2004.<sup>36</sup> The Intelligence Bureau ('IB') is responsible for internal intelligence, while the Research and Analysis Wing ('RAW') collects external intelligence. The 'G' Branch of the Border Security Force also provides intelligence. The Directorate General of Military Intelligence is also important, although it focuses more on data analysis rather than data collection. The Joint Intelligence Committee, whose functions have been subsumed in the National Security Council Secretariat assesses the information from various intelligence agencies (including the Directorate of Air Intelligence and the Directorate of Naval Intelligence) at a strategic level. Other major intelligence agencies include those related to tax,<sup>37</sup> revenue<sup>38</sup> and signals.<sup>39</sup> None of these specify what role detention plays in intelligence

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<sup>26</sup> Police Act 1861, s 23.

<sup>27</sup> Police Act 1861, s 42.

<sup>28</sup> Ministry of Home Affairs Resolution Number 4/31/61T.

<sup>29</sup> Delhi Special Police Establishment Act 1946, s 3.

<sup>30</sup> Ministry of Law, Justice and Company Affairs Notification No. SO3803.

<sup>31</sup> Ministry of Home Affairs Notification No. SO280.

<sup>32</sup> Ministry of Personnel, Public Grievances and Pensions Notification No. SO910(E).

<sup>33</sup> Ministry of Personnel, Public Grievances and Pensions Notification No. SO1822.

<sup>34</sup> Navendra Kumar v Union of India 2013 CriLJ 500.

<sup>35</sup> Union of India v Navendra Kumar 2013 (13) SCALE 537.

<sup>36</sup> Margaret Rouse, 'National Technical Research Organisation' (*Search Security*, September 2012) <<http://searchsecurity.techtarget.in/definition/National-Technical-Research-Organisation-NTRO>> accessed 19 January 2014.

<sup>37</sup> More information on the Directorate Generals related to intelligence collection is available under the 'About Us' Tab on the website of the Income Tax Department < <http://www.incometaxindia.gov.in/home.asp> > accessed

gathering.<sup>40</sup> No information seems to be publicly available on what the scope of their power is, and what procedure they follow, if any, when they have to detain someone.

17. To fill in this vacuum, the Intelligence Services (Powers and Regulation) Bill 2011 was introduced in Parliament, though no law has been enacted based on the same. The Bill seeks to give a statutory foundation to the RAW,<sup>41</sup> IB<sup>42</sup> and NTRO.<sup>43</sup> It provides that any action taken must be authorised by a Designated Authority, but such warrants can only be issued in respect of entry into property or interference with communication.<sup>44</sup> It sets up the National Intelligence and Security Oversight Committee to monitor compliance with the provisions of the Bill,<sup>45</sup> and a National Intelligence Tribunal to which complaints can be made against the RAW, IB and the NTRO.<sup>46</sup> Remedies before the National Intelligence Tribunal include, compensation, restitution, quashing of warrant, destruction of wrongfully intercepted information and institution of proceedings under the relevant statutes against the persons responsible.<sup>47</sup> An appeal from an order of the Tribunal can be made to the Supreme Court in a period of 90 days.<sup>48</sup>

## II IMMIGRATION DETENTION

18. India has a number of statutes authorising the detention of foreigners in specific circumstances. The Foreigners Act, 1946 allows for the detention of foreigners accused of criminal offences. There are no statutes dealing with the treatment of asylum seekers or refugees expressly and hence, these categories of immigrants is dealt with under the Foreigners Act. The Act permits the Central Government to make orders for detention and deportation of foreigners.<sup>49</sup>

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19 January 2014.

<sup>38</sup> 'Charter of the Organisation' (*Directorate of Revenue Intelligence*) < <http://dri.nic.in/home/charter> > accessed on 19 January 2014.

<sup>39</sup> 'Joint Cipher Bureau' (*Global Security*) < <http://www.globalsecurity.org/intell/world/india/jcb.htm> > accessed 19 January 2014.

<sup>40</sup> A summary of their powers is found in Chapter 7 of the following: Kargil Review Committee, *From Surprise to Reckoning: The Kargil Review Committee Report* (Sage Publications 1999) 108-117 <<http://www.scribd.com/doc/152396717/Kargil-Review-Committee-Report-1999#download>> accessed on 19 January 2014; Standing Committee on Defence (2006-2007), Ministry of Defence, *Review of Implementation Status of Group of Ministers (GoMs) Report on Reforming National Security System in Pursuance to Kargil Review Committee Report—A Special Reference to Management of Defence* (Lok Sabha Secretariat 2007) 42-46 <<http://idsa.in/system/files/Standing%20Committee%20on%20Defence%2022nd%20Report%202006%202007.pdf>> accessed on 19 January 2014.

<sup>41</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 3.

<sup>42</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 4.

<sup>43</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 6.

<sup>44</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 8(1).

<sup>45</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 12.

<sup>46</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 23.

<sup>47</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 34.

<sup>48</sup> Intelligence Services (Powers and Regulation) Bill 2011, cl 35.

<sup>49</sup> Foreigners Act 1946, s 3 provides for the Power to make orders.

19. Further provisions on detention are elaborated in s 4:

4. Persons on parole.

(1) ] Any foreigner (hereinafter referred to as an internee) in respect of whom there is in force any order made under clause (g) of sub- section (2) of section 3, directing that he be detained or confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time by order determine.

20. It is to be noted that the Foreigners Act does not provide for a specific authority to deal with matters of immigration.

#### **a ) Threshold questions**

21. There is no threshold question regarding whether a person has been detained or not.

#### **b) Decision to detain**

22. The Foreigners Act does not provide for specific procedural safeguards. However, the general rules on deprivation of life and liberty (discussed in the preventive detention section below) continue to apply.

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- (1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.
- (2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner-...
- (e) shall comply with such conditions as may be prescribed or specified-
- (i) requiring him to reside in a particular place;
- (ii) imposing any restrictions on his movements;
- (iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;
- (iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified
- (v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified; prohibiting him from association with persons of a prescribed or specified description;
- (vi) prohibiting him from engaging in activities of a prescribed or specified description;
- (vii) prohibiting him from using or possessing prescribed or specified articles;
- (ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;
- (f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions
- (g) 1[ ] shall be arrested and detained or confined;] and may make provision 2[ for any matter which is to be or may be prescribed and] for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

### c) Review of and challenges to detention

23. In 1983, the Parliament enacted the Illegal Migrants (Determination by Tribunals) Act. This provided for the creation of tribunals determining the status of the illegal migrants entering through Assam (a North-Eastern state) and ordering their deportation. This was struck down as being arbitrary and unconstitutional by the Supreme Court in 2005.<sup>50</sup> The Court found that it violated the principle of equality, as it applied only to immigration from Assam. The Supreme Court also noted that the Foreigners' Act, 1946 was far more effective in identifying and deporting foreigners in the same judgment.
24. The Foreigners Act, 1946 makes no provision for appeals, or indeed, for consideration by a judicial authority. However, the writ jurisdiction of Courts is not ousted.

### d) Compensation for unlawful detention

25. There does not seem to be any information available on this.

## III DETENTION OF PERSONS WITH A MENTAL ILLNESS

26. The Mental Health Act 1987 ('MHA') is the key legislation dealing with the rights of the mentally ill, although there is a Mental Health Care Bill 2013 currently pending in Parliament. Most Supreme Court litigation on the issue has tended to focus on the conditions of the medical facilities,<sup>51</sup> rather than admission into them. This is particularly because in recent times, some shocking cases have come to light—including the charring to death of 25 inmates in Tamil Nadu, who were chained for immobility and thus, could not escape when the medical facility caught fire.<sup>52</sup>
27. Also notable is the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999 which sets up a Trust<sup>53</sup> to promote independent living for certain categories of mentally disabled people, and recognises the importance of not uprooting them from their community.<sup>54</sup> The Rights of Persons with Disabilities Bill 2014 (RPDB) also recognises the right of disabled people to community living.<sup>55</sup>

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<sup>50</sup> *Sarbananda Sonowal v Union of India* (2005) 5 SCC 665.

<sup>51</sup> For instance, the Supreme Court has passed specific directions dealing with the state of affairs at the Agra Mental Asylum (*Aman Hingorani v Union of India* AIR 1995 SC 215), Gwalior Mental Asylum (*Supreme Court Legal Aid Committee v State of MP with Kamini Devi v Union of India* AIR 1995 SC 204) and the Ranchi Mental Asylum (*Rakesh Chandra Narayan v State of Bihar* AIR 1995 SC 208).

<sup>52</sup> In Re: Death of 25 Chained Inmates in Asylum Fire in Tamil Nadu AIR 2002 SC 979.

<sup>53</sup> National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999, s 3.

<sup>54</sup> National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act 1999, s 10.

<sup>55</sup> Rights of Persons with Disabilities Bill 2014, cl 4,

### a) Threshold questions

28. There is no threshold question as to whether a person has been detained or arrested.

### b) Decision to detain

29. Admission to a psychiatric nursing facility under the MHA can be voluntary,<sup>56</sup> or, in the case of a minor, on request of the guardian.<sup>57</sup> The minor has no say in the process. The medical officer of such a facility must conduct an inquiry within 24 hours of such a request being made for admission, and accordingly reach a decision on whether or not to admit the person concerned.<sup>58</sup> Once admitted, an application of discharge can be made by the patient, or the guardian of the patient, but the medical officer in charge may decide it is in the best interests of the patient to continue with the treatment. Thus, to clarify for voluntary admissions, the application can be made whenever the patient/guardian of minor wants, and discharge will be ordered *unless* it is decided the patient is unfit for discharge. In such a case an inquiry is to be conducted within 72 hours of an application for discharge, with the aid of at least 2 medical officers.<sup>59</sup> Treatment can only be ordered by the medical officer if the practitioners opine favourably in respect of the treatment. Treatment can only be extended 90 days at a time.<sup>60</sup> If a mentally ill person does not, or is unable to make a request for admission, he or she can still be admitted as a voluntary patient on an application made by a friend or relative, if the medical officer in charge so deems fit.<sup>61</sup>
30. There is also a mechanism for applying for 'reception orders', which are orders passed under the MHA for the admission and detention of mentally ill persons.<sup>62</sup> An application for the same can be made to a Magistrate by the medical officer in charge of a psychiatric hospital or nursing home, or by a spouse or other relative of the mentally ill person.<sup>63</sup> Every such application must be accompanied by two medical certificates.<sup>64</sup> The Magistrate is also ordinarily required to

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<<http://www.prsindia.org/uploads/media/Person%20with%20Disabilities/The%20Right%20of%20Persons%20with%20Disabilities%20Bill.pdf>> accessed 19 February 2014.

<sup>56</sup> Mental Health Act 1987, s 15.

<sup>57</sup> Mental Health Act 1987, s 16.

<sup>58</sup> Mental Health Act 1987, s 17.

<sup>59</sup> Mental Health Act 1987, s 18(3).

<sup>60</sup> Mental Health Act 1987, s 18.

<sup>61</sup> Mental Health Act 1987, s 19.

<sup>62</sup> Mental Health Act 1987, s 2(v).

<sup>63</sup> Mental Health Act 1987, s 20.

<sup>64</sup> Mental Health Act 1987, s 20(6).

personally examine the patient, but may record his reasons for not doing so in writing.<sup>65</sup> The Magistrate bases his decision on an examination of<sup>66</sup>

- the nature and degree of the illness
- the necessity of detention keeping in mind the interests of the mental and personal safety of the mentally ill person or the protection of others
- whether a temporary measure would suffice.

31. It is also the duty of every police officer to take into protection any person they have reason to believe is dangerous to others because of their mental illness. The officer is also empowered to take such a measure if they have reason to believe that the person concerned is incapable of taking care of themselves.<sup>67</sup> In such a case, the person must be informed as soon as possible of the grounds for detention, or, in case of a person unable to understand the grounds, such information must be relayed to his or her relatives or friends.<sup>68</sup> Such a mentally ill person must be produced before a Magistrate within 24 hours, without which they cannot be detained further.<sup>69</sup> The Magistrate will decide upon a personal examination, as well as examination by a medical officer, whether or not a reception order can be passed.<sup>70</sup> If such an order is passed, and a friend or relative of the mentally ill person enters into a bond for such amount as the Magistrate might determine, the Magistrate may choose to hand him over to such a friend or relative.<sup>71</sup> In other cases, the Magistrate can order detention for up to 30 days, pending their removal of the person concerned to a psychiatric hospital.<sup>72</sup> Where a Commissioner of Police has been appointed, the Magistrate's powers can also be exercised by them.<sup>73</sup>
32. A Magistrate can also authorise temporary detention of a person suspected of mental illness, ten days at a time (with the total period not exceeding thirty days), for observation by a medical officer before they comes up with his report.<sup>74</sup>
33. Discharge is by the medical officer in charge, upon the recommendation by two medical practitioners,<sup>75</sup> but can also be ordered upon application by the mentally ill person,<sup>76</sup> or by a

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<sup>65</sup> Mental Health Act 1987, s 22.

<sup>66</sup> Mental Health Act 1987, s 22.

<sup>67</sup> Mental Health Act 1987, s 23(1).

<sup>68</sup> Mental Health Act 1987, s 23(2).

<sup>69</sup> Mental Health Act 1987, s 23(3).

<sup>70</sup> Mental Health Act 1987, s 24.

<sup>71</sup> Mental Health Act 1987, s 24.

<sup>72</sup> Mental Health Act 1987, s 29.

<sup>73</sup> Mental Health Act 1987, s 36.

<sup>74</sup> Mental Health Act 1987, s 28.

<sup>75</sup> Mental Health Act 1987, s 40.

<sup>76</sup> Mental Health Act 1987, s 41.

friend or relative.<sup>77</sup> The mentally ill person has the additional option of applying to the Magistrate for discharge, with his application being supported by either the medical officer in charge of the psychiatric facility, or a psychiatrist.<sup>78</sup> Similarly, leave of absence can be ordered by the medical officer in charge,<sup>79</sup> or the Magistrate.<sup>80</sup> As explained in the next section, all magisterial orders are appealable.

34. Additionally, admission<sup>81</sup> to a psychiatric facility, as well as discharge,<sup>82</sup> can be based on an order of the District Court<sup>83</sup> following an inquest.
35. Medical officers cannot issue certificates under the MHA unless they have personally examined the person in respect of whom they are being issued, and where two certificates are required, they can only be issued upon independent examination by both practitioners.<sup>84</sup>

### **c) Review of and challenges to detention**

36. The orders of the Magistrate can be appealed before the District Court within a period of sixty days, and the decision of the District Court will be final.<sup>85</sup> There is also a provision for legal aid for the mentally disabled person, if so needed.<sup>86</sup> Further, two members of the Legal Aid Board of each State are required to make a monthly visit to psychiatric facilities under the MHA to disseminate information to the mentally ill about their right of discharge upon recovery.<sup>87</sup>
37. If any person has reason to believe that a mentally ill person is not under proper care or control, or is being ill-treated or neglected, they may approach the Magistrate.<sup>88</sup> If these allegations are found to be true, the Magistrate can either require the person legally bound to be in charge of the mentally ill person to treat them well—and fine the person to the extent of INR 2000 in case of

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<sup>77</sup> Mental Health Act 1987, s 42.

<sup>78</sup> Mental Health Act 1987, s 43.

<sup>79</sup> Mental Health Act 1987, s 45.

<sup>80</sup> Mental Health Act 1987, s 46.

<sup>81</sup> Mental Health Act 1987, s 26 r/w ch VI.

<sup>82</sup> Mental Health Act 1987, s 44.

<sup>83</sup> According to s 2 of the Mental Health Act 1987, the words ‘District Court’ are used to refer to ‘in any area for which there is a city Civil Court, that Court, and in any other area the principal Civil Court of original jurisdiction, and includes any other Civil Court which the State Government may, by notification, specify as the Court competent to deal with all or any of the matters specified in this Act.’ A Magistrate ‘means

1) In relation to a metropolitan area within the meaning of Cl (k) of Sec. 2 of the Code of Criminal Procedure, 1973 (2 of 1974), a Metropolitan Magistrate;

2) In relation to any other area, the Chief Judicial Magistrate, Sub-Divisional Judicial Magistrate or such other Judicial Magistrate of the first class as the State Government may, by notification, empower to perform the functions of a Magistrate under this Act.’

<sup>84</sup> Mental Health Act 1987, s 30.

<sup>85</sup> Mental Health Act 1987, s 49.

<sup>86</sup> Mental Health Act 1987, s 91.

<sup>87</sup> Sarthak Registered Society v Union of India AIR 2002 SC 3693 [2].

<sup>88</sup> Mental Health Act 1987, s 25.

non-compliance—or, if the Magistrate considers it more appropriate, conduct proceedings to determine if a reception order should be passed.<sup>89</sup>

38. In case the admission to a psychiatric facility is based on a District Court order, an appeal against the same lies to the High Court.<sup>90</sup>
39. Detention of a mentally disabled person in violation of the provisions of the MHA is a punishable offence.<sup>91</sup>
40. Notably, no suit can lie against anyone in respect of anything done in good faith under the MHA<sup>92</sup> and under the Mental Health Care Bill 2013.<sup>93</sup>
41. The RPDB provides for a comprehensive judicial mechanism to enforce the rights of disabled people, and envisages the setting up of Special Disability Rights Courts in every district for this purpose.<sup>94</sup> The State Government may also choose to appoint a Special Public Prosecutor for each of these Courts.<sup>95</sup>

#### **d) Compensation for unlawful detention**

42. There is no mention of any compensatory remedies under the MHA, the Mental Health Care Bill or the RPDB. However, the Mental Health Care Bill provides for ‘redressal or appropriate relief’ (from the Mental Health Review Board) for persons with mental illness whose rights have been violated or who feel aggrieved by the decision of any mental health establishment.<sup>96</sup>
43. **Note 1:** The Mental Healthcare Bill 2013 is currently pending before the Parliament. This seeks to recognise the rights of mentally disabled persons to choose their own course of treatment,<sup>97</sup> or to issue an advance directive authorising someone else to control their course of treatment.<sup>98</sup> It also recognises the right to community living of a disabled person,<sup>99</sup> as well as the right to information<sup>100</sup> regarding their admission to a medical facility, and the right to legal aid.<sup>101</sup> Accordingly, the Bill encourages voluntary, independent admissions regarding admission to mental health establishments.<sup>102</sup> However, a Magistrate may order that the mentally ill person be

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<sup>89</sup> Mental Health Act 1987, s 25.

<sup>90</sup> Mental Health Act 1987, s 76.

<sup>91</sup> Mental Health Act 1987, s 83.

<sup>92</sup> Mental Health Act 1987, s 92.

<sup>93</sup> Mental Health Care Bill 2013, cl 128.

<sup>94</sup> Rights of Persons with Disabilities Bill 2014, cl 98.

<sup>95</sup> Rights of Persons with Disabilities Bill 2014, cl 99.

<sup>96</sup> Mental Health Care Bill 2013, cl 85.

<sup>97</sup> Mental Health Care Bill 2013, cl 4.

<sup>98</sup> Mental Health Care Bill 2013, cls 5-13.

<sup>99</sup> Mental Health Care Bill 2013, cl 19.

<sup>100</sup> Mental Health Care Bill 2013, cl 22,.

<sup>101</sup> Mental Health Care Bill 2013, cl 27.

<sup>102</sup> Mental Health Care Bill 2013, cl 94.



sent to a mental health establishment for assessment and treatment if he so deems fit.<sup>103</sup> Admissions in extreme cases might also be allowed for a period of 30 days on the application of the nominated representative<sup>104</sup> of the disabled person if this is the least restrictive option and if this is supported by the recommendation of a psychiatrist as well as a mental health officer.<sup>105</sup> Thereafter, subject to ratification by the Board, and the provision of recommendations by at least two psychiatrists, this period might be extended first by 90 days, then by 120 days, and then by 180 days at a time.<sup>106</sup> Perhaps most significant for our purposes is an express provision of law, stating that physical restraint cannot be used unless it is the only means available to prevent immediate and imminent harm to the person concerned, and it is authorised by a psychiatrist.<sup>107</sup> It cannot be used for a period longer than is absolutely necessary.<sup>108</sup> If it is applied, then the nominated representative of the person needs to be informed within 24 hours.<sup>109</sup> Monthly reports must be sent to the Mental Health Review Board ('the Board')<sup>110</sup> regarding any such measures taken and the Board may order the establishment to desist from the use of such practices.<sup>111</sup> This provision is much more specific than the general prohibition on cruelty under the MHA.<sup>112</sup>

44. Further, the Mental Health Review Board (which includes a District Judge, a representative of the District Magistrate, two mental health professionals and two persons with mental illness or their caregivers) operates as the body before which applications can be made by the mentally disabled person or their nominated representative, or a registered NGO in case the right guaranteed under the Bill are violated.<sup>113</sup> The Board is to deal with these in a time bound manner,<sup>114</sup> through *in camera* proceedings.<sup>115</sup> There are comprehensive procedural safeguards for such proceedings, including holding the proceedings at the establishment where the mentally disabled person has been admitted,<sup>116</sup> and granting the person with the mental illness a right to give oral evidence.<sup>117</sup> Where a rights violation is brought to the notice of the Board, it can order

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<sup>103</sup> Mental Health Care Bill 2013, cl 111.

<sup>104</sup> Appointed under cls 14 to 17.

<sup>105</sup> Mental Health Care Bill 2013, cl 98.

<sup>106</sup> Mental Health Care Bill 2013, cl 99.

<sup>107</sup> Mental Health Care Bill 2013, cl 106(1).

<sup>108</sup> Mental Health Care Bill 2013, cl 106(2).

<sup>109</sup> Mental Health Care Bill 2013, cl 106(5).

<sup>110</sup> Mental Health Care Bill 2013, cl 80.

<sup>111</sup> Mental Health Care Bill 2013, cl 106(9).

<sup>112</sup> Mental Health Act 1987, s 81.

<sup>113</sup> Mental Health Care Bill 2013, cl 85.

<sup>114</sup> Mental Health Care Bill 2013, cls 88(1) to 88(4).

<sup>115</sup> Mental Health Care Bill 2013, cl 88(5).

<sup>116</sup> Mental Health Care Bill 2013, cl 88(8).

<sup>117</sup> Mental Health Care Bill 2013, cl 88(10).

the Central Mental Health Authority<sup>118</sup> or the State Mental Health Authority<sup>119</sup> to conduct an investigation and then take appropriate action to protect the rights of the mentally ill person.<sup>120</sup> Non-compliance with the orders of the Board may lead to imposition of a fine, or even cancellation of license to run the mental facility.<sup>121</sup> An appeal from the orders of the Board lies to the High Court, within 30 days of the impugned order.<sup>122</sup> Apart from this, civil courts are barred from exercising jurisdiction over any matter that falls within the ambit of the Board, or the Mental Health Review Commission<sup>123</sup>.<sup>124</sup> No suit can lie against a government officer or a member of an authority set up under the Bill for any action undertaken by him in good faith, in pursuance of the Bill.<sup>125</sup>

45. Further, the Bill too has provisions mandating that police officers arrest mentally ill persons found wandering at large, or those who pose a risk to themselves or others by virtue of their mental illness.<sup>126</sup> Such persons must be informed of the grounds of his detention as soon as possible,<sup>127</sup> and must be taken to a medical facility within 24 hours for an assessment of their healthcare needs.<sup>128</sup>

## **IV MILITARY DETENTION**

### **a) Threshold questions**

46. No information is available.

### **b) Decision to detain**

47. The only provision available on military detention in India is in the Armed Forces Special Powers Act 1958 ('AFSPA'). The relevant provision allows the army to detain persons to maintain public order.<sup>129</sup>

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<sup>118</sup> Mental Health Care Bill 2013, cl 33.

<sup>119</sup> Mental Health Care Bill 2013, cl 45.

<sup>120</sup> Mental Health Care Bill 2013, cl 91(2).

<sup>121</sup> Mental Health Care Bill 2013, cl 91(4).

<sup>122</sup> Mental Health Care Bill 2013, cl 92.

<sup>123</sup> Set up under cl 73, Mental Health Care Bill 2013.

<sup>124</sup> Mental Health Care Bill 2013, cl 125.

<sup>125</sup> Mental Health Care Bill 2013, cl 128.

<sup>126</sup> Mental Health Care Bill 2013, cl 109(1).

<sup>127</sup> Mental Health Care Bill 2013, cl 109(2).

<sup>128</sup> Mental Health Care Bill 2013, cl 109(3).

<sup>129</sup> Section 4 provides that, "Special powers of the armed forces.—Any commissioned officer, warrant officer, non commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area:

(a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force; even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of

48. The AFSPA is operational in certain parts of the country such as Assam, Manipur and Jammu and Kashmir. Despite several calls for its repeal,<sup>130</sup> the Act continues to be in operation. The words of the AFSPA makes no specific exclusion for good faith. However, it does provide that there can be no prosecution without the sanction of the Central Government.<sup>131</sup> Currently, there are no reported decisions on prosecutions under the Act.<sup>132</sup>
49. There has been some discussion of the procedural requirements to be complied with when making arrests under the AFSPA. These have been set out by the Supreme Court in *Naga People's Movement for Human Rights v Union of India*<sup>133</sup> and include for instance, restrictions on searching houses occupied only by a woman. Further, art 22 of the Indian Constitution (dealing with protection against arrest and detention) applies even under the Act, and the accused must be produced before a magistrate within twenty-four hours.
50. The Geneva Convention Act, 1960 makes the Geneva Convention applicable to India. This provides for punishment for breach of the Convention.<sup>134</sup> There are no specific safeguards that apply here, other than the constitutional protections for detention discussed here.
51. With respect to the detention of military personnel by the military, the Army, Navy and Air Force Acts each provide for arrest and detention of personnel in the Armed Forces for the commission of certain offences such as desertion or aiding the enemy.

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weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;

- (b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made or any structure used as a training camp for armed volunteers or utilised as a hideout by armed gangs or absconders wanted for any offence;
- (c) arrest without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;
- (d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained and confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.”<sup>129</sup>

<sup>130</sup> ‘India: Call for Repeal or Review of the Armed Forces (Special Powers) Act, 1958’ (*Amnesty International*, 11 August 2004) <<http://www.amnesty.org/en/library/asset/ASA20/090/2004/en/de329a4a-d59e-11dd-bb24-1fb85fe8fa05/asa200902004en.html>> accessed 18 February 2014; Aarti Dhar, ‘UN Asks India to Repeal AFSPA’ (*The Hindu*, 31 March 2012) < <http://www.thehindu.com/news/national/article3263687.ece>> accessed 18 February 2014.

<sup>131</sup> Armed Forces Special Powers Act 1958, s 6.

<sup>132</sup> ‘No Sanction for Prosecution under AFSPA’ (*The Indian Express*, 29 February 2012) < <http://archive.indianexpress.com/news/no-sanction-for-prosecution-under-afspa/918128/>> accessed 18 February 2014.

<sup>133</sup> (1998) 2 SCC 109.

<sup>134</sup> Geneva Convention Act 1960, s 3.

52. Under the Army Act, any person charged with an offence may be taken into military custody.<sup>135</sup> Investigation must be undertaken in forty-eight hours, unless this is impractical under the circumstances and having regard to the public service.<sup>136</sup> Arrests of army officials suspected of a crime may be made by civil authorities who aid in the apprehension and delivery to military custody upon receipt of a written application by the commanding officer.<sup>137</sup> Further, the Army Act makes it an offence for any person to detain another unnecessarily, or fail to comply with safeguards pertaining to arrest under the Army Act.<sup>138</sup> Identical provisions exist under the Air Force Act.<sup>139</sup>
53. Under the Navy Act, persons serving in the navy or on the property of the navy are subject to naval law and are under the Act.<sup>140</sup> Warrants of arrest may be issued by the Chief of Naval Staff or any officer in charge of a fleet.<sup>141</sup> Arrests may also be made without warrant by any superior officer for any offence triable under the Act.<sup>142</sup> After arrest, the person must be informed 'as soon as may be' of the grounds of arrest, and must be produced before the commanding officer within forty-eight hours.<sup>143</sup>

### **c) Review of and challenges to detention**

54. There is no information available on procedures to challenge detention under the AFSPA, 1958. In *Naga People's Movement*, the Supreme Court held that although there was no clear or formal complaint mechanism under the Act, it was imperative that complaints of misuse or abuse be thoroughly investigated.<sup>144</sup> Thus, it may be argued that the Central Government is conferred with the authority to investigate complaints under the Act.
55. There is no provision for bail in any of the Acts pertaining to the Armed Forces. Further, there is limited scope for the application of fundamental rights. Article 33 to the Indian Constitution provides that the Parliament may limit application of fundamental rights to members of the armed forces for offences committed under the Army Act. For instance, trade unions are prohibited in the army<sup>145</sup> and exceptionally, the Supreme Court is not permitted to grant special

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<sup>135</sup> Army Act 1950, s 101. Military custody has been defined in s 3(xiii) to mean the arrest or confinement of a person according to the usages of the service and includes naval or air force custody.

<sup>136</sup> Army Act 1950, s 102.

<sup>137</sup> Army Act 1950, s 104, s 105(2).

<sup>138</sup> Army Act 1950, s 50.

<sup>139</sup> The Air Force Act 1950, ss 102-108.

<sup>140</sup> The Navy Act 1957, s 2.

<sup>141</sup> The Navy Act 1957, s 83.

<sup>142</sup> The Navy Act 1957, s 84.

<sup>143</sup> The Navy Act 1957, s 85.

<sup>144</sup> *Naga People's Movement for Human Rights v Union of India* (1998) 2 SCC 109.

<sup>145</sup> *Prithvi Pal Singh Bedi v Union of India* (1982) 3 SCC 140.

leave to appeal against any judgment or order passed under a law relating to the Armed Forces as per art 136(2) of the Constitution.

56. The Parliament has provided for two types of proceedings for offences under the Army Act, 1950 - before the Courts, and by Court Martial. If it is the latter, there is only a power of judicial review under art 226 - in other words, a determination of *Wednesbury* unreasonableness.<sup>146</sup>

#### **d) Compensation for unlawful detention**

57. The High Court at Gauhati (of the seven North-Eastern states) has been willing to grant compensation to victims of unlawful detention while granting a writ of *habeas corpus*.<sup>147</sup> The Supreme Court too, in *Naga People's Movement* held that if a complaint of misuse or abuse of the powers conferred under the AFSPA were validated, compensation must be awarded for violations of safeguards.<sup>148</sup>

### **V POLICE DETENTION IN CROWD CONTROL SITUATIONS**

58. The right of Indian citizens to assemble peacefully without arms is protected under art 19(1)(b) of the Constitution of India, although this is subject to reasonable restrictions in the interests of the sovereignty and integrity of India, or for public order.<sup>149</sup> For instance, the police might regulate the organisation of assemblies through licenses.<sup>150</sup> Further, the right to movement,<sup>151</sup> including the right to locomotion has also been granted, subject to reasonable restrictions being made in the interests of the general public, or in the interests of Scheduled Tribes.<sup>152</sup> Reasonableness implies proportionality, and a balancing of interests between the rights provided under art 19(1), and the restrictions allowed in its following clauses.<sup>153</sup>
59. Membership of an 'unlawful' assembly,<sup>154</sup> may, however lead to imprisonment for 6 months, or a fine, or both.<sup>155</sup> To prevent unlawful assemblies, in a 'proclaimed area' meetings can be prohibited<sup>156</sup> or monitored.<sup>157</sup> Dispersal of a lawful meeting can also be ordered if there is a threat to public order, and non-compliance in that case is a punishable offence.<sup>158</sup> Rioting,<sup>159</sup>

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<sup>146</sup> *Union of India v Himmat Singh Chabar* (1999)4 SCC 521.

<sup>147</sup> *Phulo Bala Das v Union of India* (2006) 45 AIC 915; *Naren Moran v State of Assam* (2008) 63 AIC 939.

<sup>148</sup> *Naga People's Movement for Human Rights v Union of India* (1998) 2 SCC 109.

<sup>149</sup> Constitution of India 1950, art 19(3).

<sup>150</sup> Police Act 1861, s 30.

<sup>151</sup> Constitution of India 1950, art 19(1)(d).

<sup>152</sup> Constitution of India 1950, art 19(5).

<sup>153</sup> MP Singh (ed), *VN Shukla's Constitution of India* (Eastern Book Company 2010) 120 – 121.

<sup>154</sup> Indian Penal Code 1860, s 144.

<sup>155</sup> Indian Penal Code 186, s 143; Prevention of Seditious Meetings Act 1911, s 6.

<sup>156</sup> Prevention of Seditious Meetings Act 1911, s 5.

<sup>157</sup> Prevention of Seditious Meetings Act 1911, s 4.

<sup>158</sup> Indian Penal Code 1860, s 151.

affray<sup>160</sup> and the prejudicing of national integration<sup>161</sup> are specifically punishable under Indian law.

60. In recent years, various man-made and natural disasters have led to the passing of the Indian Disaster Management Act 2005 ('IDMA'), which covers situations where crowds that pose threats to public order need to be brought into control. Crowd control could thus be regarded as a form of disaster mitigation. The Central Government has extensive powers under this statute, including the authority to deploy naval, military and air forces, and providing assistance to State governments when requested to do so.<sup>162</sup> Detention is not really provided for, except in the limited way discussed below (controlling inflow and outflow of people).

**a) Threshold questions**

61. The procedures specified are not referred to as 'detention' or 'arrest.'

**b) Decision to detain**

62. The implementing, coordinating and monitoring body under the IDMA is the State Executive Committee.<sup>163</sup> In the event of a threatening disaster situation, the State Executive Committee is empowered to 'control and restrict vehicular traffic to, from or within, the vulnerable or affected area' and to 'control and restrict the entry of any person into, his movement within and departure from, a vulnerable or affected area.'<sup>164</sup> The National Disaster Management Authority<sup>165</sup> has also recommended controlling inflow and outflow of crowds in case a crowd gets unruly.<sup>166</sup> This practice incorporates a sort of 'kettling' as has been carried out in other jurisdictions as a crowd management strategy. There are no additional safeguards, although the State Executive Committee may require authentication of its orders by an officer authorised to do the same (or may not specify an officer for this purpose).<sup>167</sup>

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<sup>159</sup> Indian Penal Code 1860, s 147. Section 146 defines rioting as 'Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.'

<sup>160</sup> Indian Penal Code 1860, s 160. Section 159 provides that when two or more persons, by fighting in a public place, disturb the public peace, they are said to commit an affray.

<sup>161</sup> Indian Penal Code 1860, s 153B. Section 153A lays down an elaborate definition of this offence, defining it to cover a host of ways in which the harmony between various religious, racial, language or regional groups or castes or communities is adversely impacted.

<sup>162</sup> Disaster Management Act 2005, ss 35(d)-(e).

<sup>163</sup> Set up under Disaster Management Act 2005, s 20.

<sup>164</sup> Disaster Management Act 2005, ss 34(b)-(c).

<sup>165</sup> Set up under Disaster Management Act 2005, s 3.

<sup>166</sup> Core Group, Crowd Management in Places of Mass Gathering, *Position Paper on Crowd Management in Places of Mass Gatherings* (NDMA September 2013) 18.

<sup>167</sup> Disaster Management Act 2005, s 68.

### **c) Review of and challenges to detention**

63. The IDMA provides that no suit or prosecution shall lie in any court against any officer or employee of the Government, or an authority set up under the IDMA in respect of any work done or purported to have been done or intended to be done in good faith by them under the provisions of the Act.<sup>168</sup> Further, a challenge to action undertaken under the IDMA can only rest before the Supreme Court or High Court.<sup>169</sup>

### **d) Compensation for unlawful detention**

64. No compensatory remedies have been mentioned in the IDMA.

## **VI PREVENTIVE DETENTION**

### **a) Preliminary considerations**

65. The Indian Code of Criminal Procedure, 1973 allows the police to take action to prevent a cognisable offence from being committed.<sup>170</sup> However, there must be credible information of a design to commit a crime.<sup>171</sup> Detention is for a maximum of 24 hours, unless there is further authorisation under law.<sup>172</sup>
66. The following statutes authorise preventive detention in India. Preventive detention may be authorised by administrative authorities under these statutes.

#### ***i) National***

- Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974 – s 3 provides that the Central Government (i.e., an officer not below the rank of a Joint Secretary) may authorise the detention of any person to prevent acts prejudicial to the conservation of foreign exchange, or to prevent smuggling.
- Prevention of Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act, 1985 – s 3 provides that an officer of the State or Central Government, specifically authorised for the purpose, may authorise the preventive detention of any person to prevent them from engaging in trafficking prohibited substances.
- National Security Act, 1980 – s 3 provides that the Central or State Government may make orders for prevent detention of any person suspected of committing acts prejudicial to the security or defence of India.

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<sup>168</sup> Disaster Management Act 2005, s 73.

<sup>169</sup> Disaster Management Act 2005, s 71.

<sup>170</sup> Code of Criminal Procedure 1973, s 149.

<sup>171</sup> Code of Criminal Procedure 1973, s 150.

<sup>172</sup> Code of Criminal Procedure 1973, s 151.

## *ii) State specific*

- Andhra Pradesh Prevention Of Dangerous Activities Of Boot-Leggings, Dacoits, Drug-Offenders, Goon-Das, Immoral Traffic Offenders And Land-Grabbers Act, 1986
- Assam Preventive Detention Act, 1980
- Jammu & Kashmir Public Safety Act, 1978
- Maharashtra Prevention of Dangerous Activities of Slum-lords, Bootleggers and Drug offenders Act, 1981
- Maharashtra Preventive Detention Act, 1970
- Meghalaya Preventive Detention Act, 1995
- Orissa Prevention Of Dangerous Activities Of Communal Offenders Act, 1993
- Tamil Nadu of Bootleggers, Drug-Offenders, (Forest-Offenders), Goondas, Immoral Traffic Offenders and Slum-Grabbers for Preventing their Dangerous Activities Prejudicial to the Maintenance of Public Order, Act, 1982
- Prior to 1969, the Preventive Detention Act, 1950 was in force. It permitted the detention of persons on suspicion of activities prejudicial to the country.<sup>173</sup> This expired in 1969.
- The Central Bureau of Investigation is empowered to gather intelligence.<sup>174</sup> This, however, does not extend to a right of arrest or preventive detention of itself.

## **b) Threshold question**

67. No information is available.

## **c) Decision to detain**

68. The Indian Constitution expressly refers to protections under art 22.<sup>175</sup> This sets out various rights of an arrested person – the right to be informed of the reason for arrest, the right to be represented by legal counsel and the right to be produced before a magistrate.

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<sup>173</sup> Preventive Detention Act 1950.

<sup>174</sup> 'Central Bureau of Investigation', <<http://cbi.nic.in/aboutus/aboutus.php>> accessed 18 January 2014.

<sup>175</sup> Article 22: Protection against arrest and detention in certain cases

- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice
- (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the



69. Thus, the Constitution authorises preventive detention in certain circumstances. Individual statutes can provide for advisory boards (such as under the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974), as does the Constitution. Although Indian law recognises a right to the presence of a lawyer under art 22(1), this does not extend to representation before the Advisory Board in cases of preventive detention.<sup>176</sup> This implies that the detainee must represent their own case without assistance.
70. Other relevant provisions under the Constitution are as follows:

**Article 21 Protection of life and personal liberty:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Article 19: Protection of certain rights regarding freedom of speech etc**

- (1) All citizens shall have the right
- (a) to freedom of speech and expression;
  - (b) to assemble peaceably and without arms;
  - (c) to form associations or unions;
  - (d) to move freely throughout the territory of India;
  - (e) to reside and settle in any part of the territory of India; and
  - (f) omitted
  - (g) to practise any profession, or to carry on any occupation, trade or business

71. The Indian Supreme Court has traditionally accorded a wide reading to fundamental rights to detainees, Indian and foreign.<sup>177</sup> Any order of preventive detention must clearly communicate the grounds for detention, otherwise such an order is void.<sup>178</sup> Orders may also be quashed if a detainee is denied the opportunity to make a representation to the advisory board.<sup>179</sup> Further,

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authority of a magistrate

- (3) Nothing in clauses ( 1 ) and ( 2 ) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention
- (4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
- (5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order
- (6) Nothing in clause ( 5 ) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose
- (7) Parliament may by law prescribe
  - (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause ( 4 );
  - (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
  - (c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause.

<sup>176</sup> *Nand Lal Bajaj v State of Punjab* (1981) 4 SCC 327.

<sup>177</sup> *Francis Coralie Mullin v Union of India* AIR 1981 SC 746.

<sup>178</sup> *Moti Lal Jain v State of Bihar* AIR 1968 SC 1509

<sup>179</sup> *Nazir Ahmed v State of J&K* (2005) 12 SCC 501.

procedural requirements for preventive detention – such as the three-month limit - must be read strictly, and any failure to comply with these requirements invalidates the order.<sup>180</sup> Additionally, the Supreme Court has held that preventive detention cannot be resorted to when ordinary laws would suffice.<sup>181</sup> For instance, if law and order, and the security of the State are not threatened, the ordinary laws are sufficient to deal with the crime.<sup>182</sup>

72. Prior to the 44<sup>th</sup> Amendment to the Constitution, these rights could be suspended in times of emergency.<sup>183</sup> Presently, all fundamental rights may be suspended in times of emergency *except* those relating to the right to life and the rights with respect to criminal procedure.<sup>184</sup> It is observed that the rights specifically in relation to preventive detention are suspended during an emergency.<sup>185</sup>

#### **d) Review of and challenges to detention**

73. The procedures to challenge an order of preventive detention include appearing before the advisory board or filing a writ of *habeas corpus* before the High Court under art 226, or the Supreme Court under art 32. This would enable the immediate release of a prisoner if procedural requirements of preventive detention have not been complied with.<sup>186</sup> The Supreme Court has expressed its willingness to overlook technical irregularities in applications for *habeas corpus*, in order to grant this remedy.<sup>187</sup>

#### **e) Compensation for unlawful detention**

74. Monetary compensation may be awarded while granting a writ, however, this may only be granted in exceptional circumstances.<sup>188</sup>

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<sup>180</sup> *Union of India v Paul Manickam* (2003) 8 SCC 342.

<sup>181</sup> *Munagala Yadamma v State of AP* (2012) 2 SCC 386.

<sup>182</sup> *ibid.*

<sup>183</sup> *ADM Jabalpur v Shivakant Shukla* (1976) 2 SCC 522.

<sup>184</sup> Constitution of India 1950, art 359.

<sup>185</sup> *Union of India v Bhanudas Krishna Gawde* (1977) 1 SCC 834.

<sup>186</sup> *Rushikesh Tanaji Bhoite v State of Maharashtra* (2012) 2 SCC 72.

<sup>187</sup> *Ummu Sabeena v State of Kerala* (2011) 10 SCC 781.

<sup>188</sup> *Sube Singh v State of Haryana* (2006) 3 SCC 178.

# Country Report for Italy

## I ADMINISTRATIVE DETENTION

1. Terrorism is a crime in the Italian legal system,<sup>1</sup> and is punishable by imprisonment. However, there are no special rules regarding detention in the context of counter-terrorism operations. The general criminal law applies and, as a consequence, so do the normal criminal procedural guarantees. Some of these are discussed below in the section on preventive detention. In addition, the preventive measures enacted in order to curb the *mafia* phenomenon also apply to terrorism.<sup>2</sup> However, among these preventive measures there is no form of detention.

## II IMMIGRATION DETENTION

### a) Preliminary remarks

2. The law (*decreto legislativo*) n 286 of 25 July 1998 (*Testo Unico dell'Immigrazione*, 'TUI') gathers together all the previous laws regulating immigration in Italy. The law n 129 of 2 August 2011 modifies art 14 of the TUI, which regulates immigration detention. By 'immigration detention', the Italian legislation refers to temporary detention in an administrative structure (Centres for Identification and Expulsion); this form of detention is assumed to precede the removal of an illegal immigrant from the territory of the State.

### b) Decision to detain

#### *i) Circumstances in which detention may be ordered*

3. Article 14 TUI sets out the circumstances under which immigration detention is lawful. It must be noted that, on one view, immigration detention is not 'detention' because it is not the consequence of a crime. In practice, however, Centres for Identification and Expulsion are almost comparable to prisons – with the exception of contact with the people outside – and they strictly limit the freedom of detainees.
4. First of all, immigration detention is a residual measure, which cannot be preferred over expulsion of the illegal immigrant. Therefore, the *questore* (the provincial chief of the state-run police) orders detention when it is not possible to proceed to immediate expulsion or to repel the person at the national border (which is almost always the case considering the duty to rescue immigrants, very often in precarious boats at sea).
5. Of course, the simple fact that it is not possible to immediately expel an illegal immigrant is not alone sufficient for a detention order. The law sets out further conditions which must be

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<sup>1</sup> See Criminal Code, art 270.

<sup>2</sup> Law of 6 September 2011, n 159.

satisfied in order for the *questore* to order detention. These are alternative rather than cumulative,<sup>3</sup> and include:<sup>4</sup>

- where the immigrant does not have a passport or an equivalent document;
- where the immigrant does not have any documents stating their temporary residence while in Italy;
- where the immigrant has falsified their personal details;
- where an immigrant who has been ordered to leave the country by a certain date did not obey the order; or
- where the immigrant committed a crime and the criminal judge ordered them to leave the country.

### *ii) Role of the judge*

6. The *questore*, after having ordered the detention of an immigrant, must immediately inform a justice of the peace (*giudice di pace*: the lowest level of courts in the Italian court system), who is called to ensure the lawfulness of the detention. It should be noted that a justice of the peace is only an honorary judge, usually with reduced powers for petty crimes and small-scale litigation.
7. The order of the *questore* must be confirmed by the justice of the peace after a hearing with the mandatory presence of a defence lawyer (or, if the immigrant cannot afford a lawyer, a public defender). The immigrant has the right to be present at the hearing, assisted by an interpreter; and the judge must confirm or annul the order of the *questore* within 48 hours.
8. Detention, if confirmed by the justice of the peace, cannot last for more than 30 days. If the identification of the immigrant or the preparation of documentation concerning expulsion is particularly difficult, the deadline may be extended for a further 30 days; on expiry of this period, the *questore* is entitled to ask for a further 60-day extension. The justice of the peace must confirm all these decisions.
9. In any event, the maximum detention time is 180 days. However, if expulsion is not possible within this period without any fault of the Italian State, the *questore* is entitled to ask for further periods of detention of maximum 60 days each up to a total maximum of 12 months. At the end of this time, the detainee must be released.

### **c) Review of and challenges to detention**

10. As noted above, the detainee has the right to be heard by a justice of the peace, assisted by a defence lawyer and an interpreter.

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<sup>3</sup> TUI, art 13 para 4bis.

<sup>4</sup> See TUI, arts 15-16.

11. The law is not clear and it might seem that the detainee has the right to appeal only against the first decision of the justice of the peace. However, the Court of Cassation has made it clear that the detainee has the right to be present, with a lawyer and an interpreter, for any further hearing concerning the extension of the detention period.<sup>5</sup>
12. An appeal against the decision of a justice of the peace is available to the Court of Cassation. The appeal is on grounds of violation of the law only.

#### **d) Compensation for unlawful detention**

13. There are no express provisions regarding compensation for unlawful immigration detention. However, art 28 of the Italian Constitution makes it clear that the State is liable for harming an individual by acting unlawfully. As a consequence, the State is subject to art 2043 of the Civil Code, which states that any act committed with fault or intention obliges the wrongdoer to make compensation. There is no legal reason to exempt immigration detention from this general rule.

### **III DETENTION OF PERSONS WITH A MENTAL ILLNESS**

#### **a) Detention of persons convicted of a crime**

##### *i) Preliminary remarks*

##### aa) Punishment for commission of a crime

14. The Italian Criminal Code (*codice penale*, 'CP') provides in art 85 that nobody can be punished for having committed a crime if, when the crime was committed, they were not 'imputable' (*imputabile*). A person is not *imputabile* when, for reasons of mental illness, they were not able to understand and want the commission of the crime.<sup>6</sup> The ability to understand requires having a clear appreciation of the gravity of the crime. The ability to want the crime requires the ability to control one's instincts. The meaning of mental illness, in terms of the fundamental requirement to be unable 'to understand and want', implies not being able to clearly understand reality; hallucinations; alterations of personality; or delirium. Neurosis and paraphilia are not considered a cause of exclusion of the ability 'to understand and want'.<sup>7</sup> Emotional alterations due to one's personal circumstances are not considered mental illness.<sup>8</sup>
15. Furthermore, the mental illness must be the cause of the crime.<sup>9</sup>

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<sup>5</sup> Cass, I sez, 24 February 2010, n 4544.

<sup>6</sup> Criminal Code, art 88.

<sup>7</sup> Cass, sez III, 23 April 2013, n 38896.

<sup>8</sup> Criminal Code, art 90; Cass, sez V, 16 January 2013, n 9843.

<sup>9</sup> Cass, sez II, 27 March 2013, n 17086.

16. A person with a mental illness who was able at least partially to understand the gravity of their behaviour will be detained, but the duration of the detention will be reduced.<sup>10</sup>
17. A person who committed a crime due to non-culpable drunkenness will not be punished, unless they were at least partially able to understand the gravity of their actions. In this case, the duration of detention is reduced.<sup>11</sup> The same applies to a person who acted under the influence of drugs;<sup>12</sup> and also to a person whose alcoholism or drug addiction is chronic and pathological.<sup>13</sup>
18. A person who is deaf-mute cannot be punished, unless they are partially able to understand the gravity of their behaviour.<sup>14</sup> A person younger than 14 years old cannot be punished,<sup>15</sup> and other underage persons are punishable but the punishment must be reduced.<sup>16</sup>

bb) Detention for social dangerousness

19. None of the provisions above mean that a person who is mentally ill and has been convicted of a crime will not be detained. If such a person is considered to be socially dangerous they can be subject to ‘security measures’ under art 202 CP. The law defines a person who is socially dangerous as one who, having committed a crime, is likely to commit others.<sup>17</sup>
20. Importantly, as detaining persons with mental a mental illness who have been convicted of an offence is not related to retributive justice – but only to the social dangerousness of the offender – detention can last as long as the social danger persists. While, indeed, the detention has always a fixed minimum, it does not have a fixed maximum.

*ii) Decision to detain*

21. The body which orders the detention of persons with a mental illness who have committed an offence is always judicial in character. In this respect there is no particular procedure, different from the general criminal procedure, for persons with a mental illness: the order forms part of judgment in the ordinary course, as the sentence or any ‘security measures’ imposed are regulated by the CP.

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<sup>10</sup> Criminal Code, art 89.

<sup>11</sup> Criminal Code, art 91.

<sup>12</sup> Criminal Code, art 93.

<sup>13</sup> Criminal Code, art 95.

<sup>14</sup> Criminal Code, art 96.

<sup>15</sup> Criminal Code, art 97.

<sup>16</sup> Criminal Code, art 98.

<sup>17</sup> Criminal Code, art 203.

## *ii) Review of and challenge to detention*

### aa) Appeal against conviction and sentence

22. As for all other persons convicted of and sentenced for an offence, a person with a mental illness has an automatic right to appeal to the Court of Appeal and then to the Court of Cassation.
23. All decisions related to ‘security measures’ can also be appealed against, following the general procedure.<sup>18</sup> The decision on detention is to be made by a judge (*magistrato di sorveglianza*) who is also the judge of the trial.<sup>19</sup>

### bb) Review of detention

24. In addition, after the minimum period of detention has passed, the judge of the execution (*magistrato di sorveglianza*) re-examines the social danger posed by the detainee. If, at the end of the exam, the judge has reason to believe that the detainee is still socially dangerous, they can extend the detention for a fixed period. At the end of this period, the judge will re-examine the social danger and, again, may end or extend the detention period.<sup>20</sup>

## *iii) Compensation for unlawful detention*

25. There are no specific laws regarding the unlawful detention of a person with a mental illness. However, as a general principle, the State is liable for violating the rights of the individual. The Supreme Court of Cassation, indeed, has clearly stated that the art 314 of the Italian Code of Criminal Procedure (*codice di procedura penale*, ‘CPP’), which specifically points out the duty of the State to compensate unlawful preventive detention, must be extended to all forms of detention and, in particular, to detention in a psychiatric hospital. In particular, the fact that the psychiatric hospital has also a curative end does not affect the fact that it is a privation of liberty.<sup>21</sup>

## **b) Internment of other persons with a mental illness**

### *i) Threshold questions*

26. All medical treatments in Italy are and must be voluntary. However, there might in exceptional circumstances be cases where one can be subject to medical treatment without consent. These are called mandatory medical treatments (*trattamento sanitario obbligatorio*).
27. A person who is subject to mandatory treatment must be treated with respect for their political and civil rights. Furthermore, their dignity must be protected.

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<sup>18</sup> Criminal Code, art 680.

<sup>19</sup> Criminal Code, art 665.

<sup>20</sup> Criminal Code, art 208.

<sup>21</sup> Cass, sez IV, 14 January 2009, n 5001.

28. Mandatory medical treatment is ordered by the mayor of the city – who is also the highest local health authority – on the proposal of a doctor. The treatment must be administered in a civil hospital, where the person has the right to communicate with the people outside.
29. Mandatory treatment for mental illness involves internment or detention only if there is such a great mental alteration as to necessitate an urgent medical intervention, and only if the person otherwise refuses the intervention.

#### *ii) Decision to detain*

30. As noted above, the internment of persons with a mental illness in a civil hospital can be mandatory when these persons refuse to consent to necessary treatment; mandatory treatment must be ordered by the mayor of the city on the request of a doctor. When the treatment involves detention, there an additional medical examination is required.<sup>22</sup> In addition, the internment must be confirmed by a judge (*giudice tutelare*), who is the judge called to protect the legal rights of those people who are not able to take care of themselves.
31. When the treatment must be longer than seven days, the physician must formulate a therapy plan and provide it to the mayor, who must immediately communicate it to the aforementioned judge. The physician must keep the mayor informed about the therapy on an on-going basis and, in particular, about any improvement in the health of the person which might mean internment is no longer necessary. The mayor must in turn inform the judge, who is also responsible for the preservation of the economic wealth of the internee. If the judge is not informed, the person must be immediately released. Failure to keep the judge informed is a crime.

#### *iv) Compensation for unlawful detention*

32. See above in relation to detention of persons with a mental illness who have been convicted of an offence.

## **IV POLICE DETENTION**

### **a) Preliminary remarks**

33. The police can arrest a person who presumably committed a crime – including, therefore, riot crimes – without the authorisation of a judge if there is a risk of escape. This form of arrest (*fermo di polizia*) is intended to entail detention for short period of time only and must be, as soon as possible, validated by a judge.

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<sup>22</sup> Law 23 December 1978, n 833, art 33.



## **b) Decision to detain**

34. All persons can be temporarily detained provided the following conditions are met:
- there is a risk of escape; and
  - the offence in question is punishable by a minimum of two years' detention, is related to war weapons or the subversion of the democratic order, or is a terrorism-related offence.
35. On arrest, the police must immediately inform the public prosecutor (who, in the Italian legal system, is a magistrate and not dependent on executive power). The detainee must be informed of their defence rights, including the right to nominate a defence lawyer. The police must then inform any nominated defence lawyer<sup>23</sup> and the family members of the detainee.<sup>24</sup>
36. The public prosecutor can interrogate the detainee, but the defence lawyer must be present.<sup>25</sup> If it is evident that the conditions for the arrest and temporary detention are not met, the public prosecutor must immediately order the detainee's release.<sup>26</sup>
37. Within 48 hours of the arrest, the public prosecutor – if the person remains in detention – must apply for the validation of the arrest to the judge in charge of ensuring the legality of the investigations (*giudice per le indagini preliminari*).
38. The judge, in a hearing with both the public prosecutor and the defence lawyer, may either confirm the arrest – and convert it into preventive detention (see the section immediately below) – or order the release of the detainee.<sup>27</sup>

## **c) Review of and challenge to detention**

39. The same procedural guarantees discussed below in relation to preventive detention apply to the *fermo di polizia*.

# **V PREVENTIVE DETENTION**

## **a) Decision to detain**

### *i) General*

40. Articles 272-280 of the CPP describe the procedures which regulate any form of preventive detention, regardless of the conditions of the detained person.
41. Preventive detention is subject to two main conditions:

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<sup>23</sup> Code of Criminal Procedure, art 386.

<sup>24</sup> Code of Criminal Procedure, art 387.

<sup>25</sup> Code of Criminal Procedure, art 388.

<sup>26</sup> Code of Criminal Procedure, art 389.

<sup>27</sup> Code of Criminal Procedure, art 391.

- evidence of guilt; and
  - specific needs which impose preventive detention.
42. There are also additional conditions specific to the case of persons under the age of 18, persons with a mental illness, and persons chronically addicted to alcohol and drugs. These are discussed separately below.

*ii) Evidence of guilt*

43. Preventive detention is not allowed when there is no evidence (*indizi*) of guilt.<sup>28</sup> With regard to preventive detention, ‘evidence’ has a ‘soft meaning’, different from the evidence which must convince the judge beyond any reasonable doubt in determining the case. Rather, preventive detention follows a ‘probability test’, and a high probability that the accused person is guilty is sufficient to subject them to preventive detention: again, there is no need that the judge be persuaded ‘beyond any reasonable doubt’.<sup>29</sup>
44. When called to ascertain this ‘probable guilt’, the judge is also required to check if the accused person acted under a justification: the CPP excludes from preventive detention persons who committed a crime because of *force majeure*, non-culpable mistake, consent of the right-holder, self-defence and necessity.<sup>30</sup>

*iii) Specific needs which impose preventive detention*

45. The probable guilt of the accused person is a necessary, but not sufficient, condition for preventive detention. Indeed, preventive detention does not aim to punish the guilty: rather, it has the objective of ensuring the correct procedure of the trial and avoiding a certain level of social danger. As a result, at least one of the following conditions must be satisfied in order to detain a person prior to judgment.
46. The first is where the person would unduly interfere with the collection of evidence: examples of this interference could be forgery, destruction, or the hiding of evidence.<sup>31</sup> The second is where there is a concrete risk that the accused will escape from judgment.<sup>32</sup> The third – included in the CPP to facilitate the detention of *mafiosi* – is where there is a danger that the accused person will commit serious and violent crime. Examples of violent crimes are acts against the state (eg

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<sup>28</sup> Code of Criminal Procedure, art 273 para 1.

<sup>29</sup> Cass, sez IV, 22 June 2012, n 40061; Cass, sez II, 10 January 2003, n 18103.

<sup>30</sup> Code of Criminal Procedure, art 273 para 2.

<sup>31</sup> Code of Criminal Procedure, art 274 para A.

<sup>32</sup> Code of Criminal Procedure, art 274 para B.

terrorism), against other persons (eg family crimes), or felonies which can be considered connected to organised crime.<sup>33</sup>

*iv) Further conditions*

47. In addition to the above, a person cannot be preventively detained unless the CP punishes the crime, in the maximum, with at least five years' imprisonment; however, in case of illegal funding to a political party, even when the crime is punished with less than five years, the judge is allowed to order preventive detention.<sup>34</sup>

*v) Procedural safeguards*

48. Only a judge can order preventive detention:<sup>35</sup> this means that preventive detention is not an administrative measure. If preventive detention is ordered during the investigations preceding the process, the judge is the one in charge of ensuring that the investigation is legal; if preventive detention must be ordered during the process, the judge is the one in charge of presiding over the process.
49. When the accused person is arrested, they must immediately be informed of their right to a defence lawyer; the defence lawyer chosen by the accused person must be immediately informed.<sup>36</sup>
50. The judge, within five days of the arrest, must personally inquire as to whether the conditions for preventive detention (which are alleged by the prosecutor) are actually met; the presence of a defence lawyer is required, and the prosecutor can be present but their presence is not required. The prosecutor cannot interrogate the accused person before the judge.<sup>37</sup>
51. If the judge does not interrogate the accused person within five days of the arrest, the preventive detention ends immediately.<sup>38</sup>

*vi) Specific situations*

52. Article 206 para 1 of the CP provides that, during the investigations which precede a criminal trial and during the trial itself, a person under the age of 18, a person with a mental illness, or a person chronically addicted to alcohol or drugs, can be detained in a reformatory, in a criminal

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<sup>33</sup> Code of Criminal Procedure, art 274 para C.

<sup>34</sup> Code of Criminal Procedure, art 289 para 2.

<sup>35</sup> Code of Criminal Procedure, art 279.

<sup>36</sup> Code of Criminal Procedure, art 293.

<sup>37</sup> Code of Criminal Procedure, art 294.

<sup>38</sup> Code of Criminal Procedure, art 302.

psychiatric hospital (*ospedale psichiatrico giudiziario*), or in a *casa di cura e custodia* (which is a psychiatric hospital with low level of security).<sup>39</sup>

53. This preventive detention – which is independent of the definite ascertainment of the guilt of the detainee – must be ordered by the trial judge and must be linked to the social danger presented by the detainee. Indeed, although the regime forms part of the criminal procedure law, the avoidance of social danger is its main objective. The law defines a person who is socially dangerous as one who, having committed a crime, is likely to commit others.<sup>40</sup>
54. The Italian Constitutional Court, by its decision n 324 of 24 July 1998, declared the constitutional illegitimacy of art 206 para 1 to the extent that it does not exclude underage persons with a mental illness from detention in a criminal psychiatric hospital.
55. In addition, in its decision n 367 of the 29 November 2004, the Constitutional Court declared the constitutional illegitimacy of the same article to the extent that it does not allow the judge to adopt ‘softer’ preventive measures than detention. Thus a judge will now evaluate the social danger presented by the person in question, and will consider whether they should be subjected to any of the following measures:
  - a prohibition on leaving the country (art 281 CPP);
  - the duty of regular presentation to the police (art 282 CPP);
  - a prohibition on living in a specific place/a duty to live in a specific place (art 283 CPP); or
  - house arrest (art 284 CPP).
56. The judge will order the release of the detainee when they no longer present a social danger.<sup>41</sup>
57. However, the judge, having regard to the concrete circumstances of the case, can also order the preventive detention of a person with a mental illness in a psychiatric hospital of the National Health Service, rather than a criminal psychiatric hospital.<sup>42</sup>

## **b) Review of and challenges to detention**

### *i) Change of circumstances*

58. The accused person and the prosecutor have the right to request at any time the modification or revocation of preventive detention if the conditions of the case change.<sup>43</sup>

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<sup>39</sup> See also Criminal Code, art 215, making similar provision for persons with a mental illness who have been convicted of an offence.

<sup>40</sup> Criminal Code, art 203.

<sup>41</sup> Criminal Code, art 206.

<sup>42</sup> Code of Criminal Procedure, art 286.

<sup>43</sup> Code of Criminal Procedure, art 299.

## *ii) Appeals*

59. In addition to this, a detained person has the right to appeal the detention order three times.
60. As noted above, preventive detention must be ordered by a judge. A detainee has the right to request re-examination of the circumstances which led to the order; the decision is taken by a board of three judges (*tribunale della libertà*) within ten days from the application.<sup>44</sup>
61. A detainee then has the right to appeal this decision to the Court of Appeal. The appeal will be decided by three judges again, and this judgment will still be on the merits.<sup>45</sup>
62. Finally, the detainee has the right to appeal – on grounds of violation of the law only – to the Supreme Court of Cassation (*Suprema Corte di Cassazione*).<sup>46</sup>
63. The defence lawyer must be present at the re-examination, the appeal and the Court of Cassation judgements, as they are all in the form of art 127 CPP.

## **c) Compensation for unlawful detention**

64. A person who has been acquitted with a definitive sentence because the crime did not exist, or because they did not commit it, or because the act they committed is not a crime punished by the law, has a right to compensation. However, even a person who has been found guilty has a right to compensation if the conditions for preventive detention were not met.<sup>47</sup>

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<sup>44</sup> Code of Criminal Procedure, art 309.

<sup>45</sup> Code of Criminal Procedure, art 310.

<sup>46</sup> Code of Criminal Procedure, art 311.

<sup>47</sup> Code of Criminal Procedure, art 314.

# Country Report for Kenya

## I IMMIGRATION DETENTION

### a) Overview of the legal framework

1. Section 33 of the Kenya Citizenship and Immigration Act 2011<sup>1</sup> ('Immigration Act') defines 'Prohibited Immigrants' and 'inadmissible persons' and makes their entry into and residence in Kenya unlawful. Section 43(1) of the Act gives power to the Minister (Cabinet Secretary) to remove persons who are unlawfully in Kenya.

### b) Threshold questions

2. Under the Immigration Act, a person declared to be a prohibited or unlawful immigrant may, if the Cabinet Secretary so directs, be kept and remain in police custody, prison or immigration holding facility until their departure from Kenya. While so kept, they are deemed to be in lawful custody whether or not they have commenced any legal proceedings in court challenging the decision until the suit is finally disposed of.<sup>2</sup> However, art 49(1)(h) of the Constitution of Kenya 2010 requires that the arrested person be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

### c) Decision to detain

3. Owing to the fact that the decision to deport and detain while awaiting deportation is made by the Cabinet Secretary/Minister of State for Immigration and Registration of Persons, a detained immigrant is entitled to fair administrative action and the right to a fair hearing as provided for under art 47 and art 50 of the Constitution respectively. This was as relied upon in the court's decision in *Peter Sessy v The Minister of State for Immigration and Registration of Persons*.<sup>3</sup>
4. Suspicion that a person is an unlawful immigrant should be reasonable.<sup>4</sup> The detainee should within 24 hours after detention, or without delay afterwards, be produced by the arresting officer before a judicial officer to review the reasons for the continued detention.<sup>5</sup> In *Salim Awadh Salim & 10 Others v The Commissioner of Police & 3 Others*,<sup>6</sup> the Constitutional Court held that the

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<sup>1</sup> Kenya Citizenship and Immigration Act 2011 (Cap. 172, Laws of Kenya) (Immigration Act).

<sup>2</sup> Immigration Act 2011, ss 43 (1)-(2).

<sup>3</sup> Nairobi High Court Misc. App. No. 361 of 2012; see also similar holdings in *Alfred Sparman v Gilbert Greaves and Attorney General Barbados*, High Court Civil Case No. 529 of 2003; *Attorney General and Sikunda v Government of the Republic of Namibia* [2001] NR 181 as well as *Ali Mahfoudh Salim v The Federal Bureau of Investigation Mombasa* Miscellaneous Criminal Application No. 6 of 1999.

<sup>4</sup> Immigration Act 2011, s 49(2).

<sup>5</sup> Immigration Act 2011, s 49.

<sup>6</sup> Nairobi High Court, JR Petition No. 822 of 2008

detention of the petitioners in Kenya for a period longer than 24 hours without being arraigned in a court of law in Kenya was unconstitutional and in violation of their fundamental rights to personal liberty and the protection of law guaranteed by ss 70 and 72 of the previous Constitution (now art 49 of the Constitution of Kenya 2010).<sup>7</sup>

5. The Minister is to give reasons for detention while the detainee is awaiting deportation. In the case of *Republic v Minister of State for Immigration and Registration of Persons* before the Constitutional Court division of the High Court,<sup>8</sup> Justice Odunga, in relation to the Minister's decision to detain stated that:

The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. Similarly where the reason given by the Minister is not one of the reasons upon which the Minister is legally entitled to act, the Court is entitled to intervene since the action by the Minister would then be based an irrelevant matter.<sup>9</sup>

6. Lucy Kiama and Dennis Likule in their assessment of the risks for refugees and asylum seekers in Kenya note that Kenya hosts large numbers of refugees, internally displaced persons ('IDPs'), stateless persons, economic migrants and victims of human trafficking and smuggling.<sup>10</sup> Thus, they argue that:

One of the challenges in mixed migration and refugee protection in Kenya has been the failure by law enforcement officers and other actors to draw a distinction between criminals, illegal immigrants and asylum seekers. All categories of persons are detained in the same prisons yet they are supposed to be held in immigration holding facilities and are thus subjected to the same standards of confinement; asylum seekers end up being treated as criminals, which goes against the concept of asylum being of a civil character. Prison conditions expose asylum seekers and refugees to assault, sexual abuse, torture, ill-health, lack of counseling support, limited legal assistance and a poor diet. The situation is often made worse by lack of translation services in the prisons which means that asylum seekers are not able to talk about the challenges they are facing or report any violations to authorities.<sup>11</sup> Furthermore there is no express provision dealing with access to a lawyer.

7. Moreover, under Kenya's Refugee Act 2006, all asylum seekers have 30 days upon entering Kenya to travel to the nearest refugee authorities to register as refugees, regardless of how or where they entered the country.<sup>12</sup> As Kiama and Likule note:

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<sup>7</sup> It is important to understand the hierarchy of courts in Kenya. At the bottom of the hierarchy are the subordinate courts, which include the Magistrates Courts and the court martial. This is followed by the High Court, which has unlimited original jurisdiction, then the Court of Appeal and finally, the Supreme Court. As shall be discussed below, appeals from the court martial can only be to the High Court, and no further appeal can be lodged to the Court of Appeal.

<sup>8</sup> JR Misc. Civil Application No. 5 of 2013.

<sup>9</sup> *ibid* [26].

<sup>10</sup> Lucy Kiama and Dennis Likule, 'Detention in Kenya: Risks for Refugees and Asylum Seekers' (2013) *Forced Migration Rev* 34.

<sup>11</sup> *ibid*.

<sup>12</sup> Refugee Act 2006, s 11.

Law enforcement officers routinely ignore these rights and more often than not refugees end up being prosecuted – wrongly – because law enforcement officers tend to lack proper knowledge of how to handle asylum seekers and because of language barriers catalysed by a shortage of interpreters.

Asylum seekers have been made more vulnerable since the issuance of a directive on 18 December 2012 by the Government of Kenya, through the Department of Refugee Affairs, requiring all refugees in urban centres to move to camps. The directive also issued a notice to stop registration of all refugees and asylum seekers in urban areas and accordingly directed that all agencies including UNHCR should stop providing direct services to refugees. This opened serious protection gaps, limiting access to services for refugees and exposing them to arrest, detention and deportation. It is worth noting that since the issuance of the directive, harassment of refugees by law-enforcement officers in Nairobi and other urban areas has dramatically increased. Instances of arbitrary arrests and illegal detention of refugees have been reported; furthermore, detainees are not arraigned in court within the constitutionally sanctioned time of 24 hours after arrest, thus denying them their rights.<sup>13</sup>

8. The directive was however held to be unconstitutional in the July 2013 Constitutional Court judgment in *Kituo Cha Sheria & 7 Others v the Attorney General*<sup>14</sup> delivered by Majanja J. It was considered to threaten the rights and fundamental freedoms of urban refugees and was also held to be against the principle of *non-refoulement* incorporated by s 18 of the Refugee Act 2006. The court therefore quashed the Government directive.

#### **d) Review of and challenges to detention**

9. The detainee may bring an application for judicial review. In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety as was stated in *Republic v Minister of State for Immigration and Registration of Persons*.<sup>15</sup>
10. In *Salim Awadh Salim & 10 Others v The Commissioner of Police & 3 Others*,<sup>16</sup> the petitioners sought a declaration from the Constitutional and Judicial Review Division of the High Court in Nairobi that their arrest and detention in Kenya without charge was arbitrary, unlawful, illegal and in violation of their fundamental rights to personal liberty and due process of the law as guaranteed by the Constitution of Kenya. They also sought a similar declaration in relation to being kidnapped and removed from Kenya instead of being arraigned in courts of law in Kenya as required by law.
11. The Court held that their detention for more than 24 hours without being arraigned in court and forcible removal from Kenya was unconstitutional and against their right to security of the person. It proceeded to grant them damages.

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<sup>13</sup> Lucy Kiama and Dennis Likule, 'Detention in Kenya: Risks for Refugees and Asylum Seekers' (2013) *Forced Migration Rev* 34.

<sup>14</sup> Nairobi High Court, consolidated Petitions No. 19 and 115 of 2013.

<sup>15</sup> JR Misc. Civil Application No. 5 of 2013.

<sup>16</sup> Nairobi High Court, JR Petition No. 822 of 2008.



12. Thus, the remedy available for judicial review is an order of *certiorari*. This is sought to quash the decision of the Immigration Cabinet Secretary of Officer to detain persons awaiting deportation, if the decision is tainted with irrationality and procedural impropriety. As *Salim Awadh Salim* demonstrates, the unlawful detention and forcible return of refugees and asylum seekers, at a threat to their lives, is against the principle of *non-refoulement* and will be declared unconstitutional.

**e) Compensation for unlawful detention**

13. Damages have been judicially awarded to petitioners who have been unlawfully detained or forcibly returned. This was the case in *Salim Awadh Salim*.<sup>17</sup> The lump sum global award, which included a combined compensation for all claims (eg arbitrary detention and return in violation of *non-refoulement*), was made to each of the petitioners, taking into account their respective periods of unlawful detention and the evidence available to the court with regard to the violation of their rights.

## **II DETENTION OF PERSONS WITH A MENTAL ILLNESS**

**a) Overview of the legal framework**

14. Mental illness detention is provided for under the Criminal Procedure Code<sup>18</sup> and the Mental Health Act of 1989.<sup>19</sup>

**b) Threshold questions**

15. There is no threshold question as to whether this constitutes detention.

**c) Decision to detain**

16. Under the Mental Health Act 1989, a patient may voluntarily submit themselves to treatment for mental disorder if they are above 16 years by making a written application to the person in charge of a mental hospital. If the patient is below 16 years and their parent or guardian desires to submit them to treatment for mental disorder, the parent or guardian may make a written application to the person in charge to receive the person with mental illness as a voluntary patient.<sup>20</sup> In cases of voluntary admission, the patient may leave the mental hospital, upon giving to the person in charge 72 hours notice in writing of their intention to leave or if they have not attained the age of 16 years, upon such notice being given by their parent or guardian.<sup>21</sup> The

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<sup>17</sup> *ibid.*

<sup>18</sup> Criminal Procedure Code 1930 (Cap 75, Laws of Kenya, Revised Edition 2009) ('Criminal Procedure Code').

<sup>19</sup> Mental Health Act 1989 (Cap 248, Laws of Kenya, Revised Edition 2012) ('Mental Health Act').

<sup>20</sup> Mental Health Act, ss 10(1)-(2).

<sup>21</sup> Mental Health Act, s 10.

person in charge shall review the condition of the voluntary patient within 72 hours of the patient being received in the hospital.<sup>22</sup>

17. However, a voluntary patient is not to be detained for more than 42 days after becoming incapable of expressing themselves as willing or unwilling to continue to receive treatment.<sup>23</sup> Though if the person in charge, in consultation with the District Mental Health Council, considers that the voluntary patient's continued stay in the mental hospital may be of benefit, they may detain the patient until an order of discharge is made by the Kenya Board of Mental Health or if the medical practitioner in charge of the patient orders discharge.<sup>24</sup>
18. On the other hand, persons suffering from mental illness, who are likely to benefit from treatment in a mental hospital but are incapable of expressing themselves as willing or unwilling to receive treatment, may be admitted as involuntary patients. This is contingent upon a written application by a spouse, relative or any other person who has to explain their connection with the patient. The application is to be accompanied by a recommendation from a medical practitioner attending the person.<sup>25</sup>
19. A person received as an involuntary patient into a mental hospital may be admitted in the hospital for a period not exceeding six months, which may be extended by the person in charge for a further period not exceeding six months. However, the involuntary patient is not to be admitted in a mental hospital for any continuous period exceeding twelve months.<sup>26</sup>
20. A person may be detained for mental illness under the Criminal Procedure Code when they claim the defence of lunacy in criminal proceedings against themselves.<sup>27</sup> Similarly, according to s 16 of the Mental Health Act, any police officer of or above the rank of inspector, officer in charge of a police station, administrative officer, chief or assistant chief has the power to take a person he believes to be suffering from mental disorder into custody.
21. This may include:
  - any person whom he believes to be suffering from mental disorder and who is found within the limits of his jurisdiction; and
  - any person within the limits of his jurisdiction whom he believes is dangerous to himself or to others, or who, because of the mental disorder acts or is likely to act in a manner offensive to public decency; and

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<sup>22</sup> Mental Health Act, s 11.

<sup>23</sup> Mental Health Act, s 13.

<sup>24</sup> Mental Health Act, ss 15-21.

<sup>25</sup> Mental Health Act, s 14.

<sup>26</sup> Mental Health Act, s 14 (6).

<sup>27</sup> Criminal Procedure Code, s 166.

- any person whom he believes to be suffering from mental disorder and is not under proper care and control, or is being cruelly treated or neglected by any relative or other person having charge of him.<sup>28</sup>
22. Section 162 of the Criminal Procedure Code applies when the court in criminal proceedings has reason to believe that due to unsoundness of mind, the accused is rendered incapable of understanding the proceedings or making their defence. After a medical examination confirming the unsoundness of mind has been conducted, the proceedings shall be postponed. Upon a finding by a medical officer in charge of the mental hospital that the accused is capable of making their defence, the court may at any time resume trial and require the accused to appear or be brought before the court.<sup>29</sup>
  23. If the case is one in which bail may not be ordered, or if sufficient security is not given, the court orders the detention of the accused in safe custody in such place and manner as it may think fit. Thereafter, it must transmit the court record or a certified copy thereof to the Minister for consideration by the President.<sup>30</sup>
  24. Upon consideration of the record, the President may direct to the court that the accused be detained in a mental hospital or other suitable place of custody. The court shall issue a warrant in accordance with that direction. The warrant shall be sufficient authority for the detention of the accused, until the President makes a further order in the matter or until the court orders the person considered incapable of making their defence, to be brought before it again.<sup>31</sup>

**d) Review of and challenges to detention**

25. If a person detained in a mental hospital or other place of custody is found by the medical officer in charge of the mental hospital or place to be capable of making their defence, the medical officer shall forward a certificate to that effect to the Director of Public Prosecutions. The Director shall then inform the court, which recorded the finding of unsoundness, whether the Republic intends to continue proceedings against that person.<sup>32</sup>
26. The court shall thereupon order the removal of the person from the place where they are detained and shall cause them to be brought in custody before it to defend themselves. Otherwise, the court may issue an order that the person be discharged in respect of the proceedings brought against them, and be released from custody. However, the discharge and

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<sup>28</sup> Mental Health Act, s 16.

<sup>29</sup> Criminal Procedure Code, ss 163-164.

<sup>30</sup> Criminal Procedure Code, s 162 (4).

<sup>31</sup> Criminal Procedure Code, s 162 (5).

<sup>32</sup> Criminal Procedure Code, ss 163 (1)-(2).

release shall not operate as a bar to any subsequent proceedings against the person on account of the same facts.<sup>33</sup>

27. Under the Mental Health Act,<sup>34</sup> the police or chief shall take a person to a mental hospital within 24 hours of taking that person into custody, or within a reasonable time. The burden of proving that the person was taken to a mental hospital within a reasonable time shall lie on the person taking them into custody. The person or official in charge of the mental hospital shall admit the person for a period not exceeding 72 hours for the purpose of enabling them to be examined and to make any necessary arrangements for their treatment and care. After examination, if the person in charge thinks fit, the person admitted into the mental hospital is sent to the care of any relative or is detained as an involuntary patient.<sup>35</sup>
28. The Code also provides for periodic review under s 166(4). The officer in charge of a mental hospital, prison or other place in which a person is detained by an order of the President, is to submit a written report to the Minister of Health for the consideration of the President in respect of the condition, history and circumstances of the person detained. This is to be done at the expiration of a period of three years from the date of the President's order and thereafter, at the expiration of each period of two years from the date of the last report.
29. Section 389 of the Criminal Procedure Code provides for the remedy of *habeas corpus*. It states that the High Court may, whenever it thinks fit, direct that any person illegally or improperly detained in public or private custody within those limits, be set at liberty.

#### **e) Compensation for unlawful detention**

30. Article 23 of the Constitution of Kenya 2010 provides that the court should grant appropriate relief for the violation of rights (such as the right to liberty and security within art 29) under the Bill of Rights. This relief may include, but is not limited to, a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights; an order of judicial review or an order for compensation.

### **III MILITARY DETENTION**

#### **a) Overview of the legal framework**

31. Detention by the military is mostly carried out according to its mandate under the Armed Forces Act 1968.<sup>36</sup> Section 3(2) of Act provides that:

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<sup>33</sup> Criminal Procedure Code, s 163 (3).

<sup>34</sup> Mental Health Act, s 16 (2).

<sup>35</sup> Mental Health Act, ss 16 (3)-(4).

<sup>36</sup> Armed Forces Act 1968 (Cap 199, Laws of Kenya, Revised Edition 2009) ('Armed Forces Act').

The Kenya Army, The Kenya Air force and the Kenya Navy are charged with the defence of the Republic and the support of the civil power in the maintenance of order, and with such other duties as may from time to time be assigned to them by the Minister after consultation with the Defence Council.

32. The Armed Forces Act therefore also allows for military aid to civil authority limited to the maintenance of order or other duties as may be assigned by the Minister after consultation with the Defence Council. Thus arrest and detentions of civilians and foreigners may also be carried out in such instances of joint police or military operations.
33. Under Part VIII of the Armed Forces Act explained below, a court martial, convened by the Chief of General Staff or Commander, shall have the power to try any person subject to the Act, for any offence triable under the Act by court martial.

#### **b) Threshold questions**

34. There is no threshold question as to whether military detention constitutes detention.

#### **c) Decision to detain**

35. Persons alleged to have committed offences under the Armed Forces Act are to be detained or confined in a prison, police station or by a subordinate court, until they are delivered in accordance with the directions of the court into service custody.<sup>37</sup> Offences under the Armed Forces Act include aiding the enemy, mutiny, desertion, treachery, cowardice, spying, malingering, irregular arrests and confinement among others.<sup>38</sup>
36. An officer of the armed forces is to commit a person accused of any of the offences mentioned above to the custody of a provost officer,<sup>39</sup> another officer, a warrant officer or a non-commissioned officer and to submit a written report of the offence alleged to have been committed. Failure to do this without reasonable cause at the time of the committal; or if it is not practicable so to do at the time of the committal, then within 24 hours thereafter amounts to an offence.<sup>40</sup>
37. Furthermore, according to s 48(1), any member of the service who carries out irregular arrests and confinement against military officers or other persons subject to the Act, including civilians, is guilty of an offence. This includes unnecessarily delaying taking such steps, as is their duty for investigating the allegations against the accused, or for having the allegations investigated by their commanding officer or appropriate superior authorities or tried by court martial. It also covers

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<sup>37</sup> Service custody has been defined under s 2 as ‘the holding of any person under arrest or in confinement by any of the armed forces, including confinement in a service prison.’ Service prisons are premises set aside by any of the Service Commanders as places of imprisonment for persons serving a service sentence of imprisonment.

<sup>38</sup> Armed Forces Act, Part V.

<sup>39</sup> A provost officer is a senior military police official usually in charge of a prison.

<sup>40</sup> Armed Forces Act, s 48(2).

cases when members of the service fail to release, or effect the release of, the accused when it is their duty to do so.

38. Part V of the Armed Forces Act provides for service offences such as aiding the enemy, misconduct, cowardice, looting, mutiny, and desertion among others. Persons alleged to have committed such offences are to be detained by a provost officer as mentioned above or other officer or of a warrant officer or non-commissioned officer in a service prison<sup>41</sup> until they are delivered in accordance with the directions of the court martial into service custody.
39. An accused person about to be tried by a court martial is entitled to object, on any reasonable grounds to any member of the court, whether appointed originally or in place of another member.<sup>42</sup> If found guilty, the accused is convicted by the court martial and may be sentenced to death, subject to approval by the President (although there is currently a moratorium in force against the death penalty), life imprisonment, or dismissal from the armed forces or given a lesser punishment under the Act.<sup>43</sup> There is no provision stipulating the maximum time limit, within which a court martial should be concluded.

#### **d) Review of and challenges to detention**

40. Trial by court martial is provided for under Part VIII of the Armed Forces Act. The court has power to try any person subject to the Act for any offence, triable under the Act by court martial.<sup>44</sup> Upon conviction, a person may present a petition against the conviction, the sentence or both.<sup>45</sup> A further appeal can be made to the High Court within 40 days of the promulgation of the conviction.<sup>46</sup> Leave to appeal to the High Court shall not be given unless an application is made by or on behalf of the appellant, and lodged with the registrar of the High Court, within 40 days of the promulgation of the conviction.<sup>47</sup>
41. The High Court may allow the appeal against conviction and quash the conviction if it considers that it is unreasonable having regard to the evidence, involves a wrong decision on a question of law, or that on any ground, there was a miscarriage of justice.<sup>48</sup>
42. However, the High Court is the final appeal court in relation to offences under the Armed Forces Act.<sup>49</sup> In *Major Hesbon Onyango v Republic*,<sup>50</sup> a court martial convicted the appellant, a

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<sup>41</sup> This means premises set aside by any of the Service Commanders as a place of imprisonment for persons serving a service sentence of imprisonment; Armed Forces Act 1963, s 2.

<sup>42</sup> Armed Forces Act, s 90(1).

<sup>43</sup> Armed Forces Act, s 102.

<sup>44</sup> Armed Forces Act, s 84.

<sup>45</sup> Armed Forces Act, s 106.

<sup>46</sup> Armed Forces Act, s 115.

<sup>47</sup> Armed Forces Act, s116 (1).

<sup>48</sup> Armed Forces Act, s 118 (1).

soldier with the Kenyan Army, of theft charges. He unsuccessfully appealed to the High Court against the conviction. He then appealed further to the Court of Appeal. The court, on its own motion, raised the issue as to whether a person convicted by a court martial has the right to appeal to the Court of Appeal and invited counsel for both parties to submit arguments on the issue. After hearing the submissions, the court held that a person convicted by a court martial could *only* appeal to the High Court in accordance with s 115 (3) of the Armed Forces Act. In this regard the High Court acts as a court martial appeals court.

43. There is no provision for release pending appeal in the Armed Forces Act, even upon the payment of a bail bond. However, art 49(1)(h) of the Constitution of Kenya 2010 provides that an arrested person is to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

#### **e) Compensation for unlawful detention**

44. There is no provision regarding monetary compensation in the Armed Forces Act.

### **IV POLICE DETENTION**

#### **a) Overview of the legal framework**

45. Police officers are bound by virtue of the National Police Service Act 2011,<sup>51</sup> which was enacted under the Constitution of Kenya 2010 and consolidates the now repealed Police Act<sup>52</sup> and Administration Police Act.<sup>53</sup> The police are tasked with law enforcement and the duty to maintain law and order in society and thus in the normal course of their duty they carry out arrests with or without arrest warrants.<sup>54</sup> The Criminal Procedure Code largely covers powers of police officers regarding arrest, prevention of crime and investigations.<sup>55</sup>
46. The Kenyan Police Force has in the recent past been criticised for its lack of accountability as well as its record for arbitrary detentions, extra-judicial killings and torture.<sup>56</sup> This led to calls for police reforms, which was sought to be achieved through the adoption of the Kenyan Constitution 2010 and the National Police Service Act in 2011. Together they aim at increasing

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<sup>49</sup> Armed Forces Act, s 115(3).

<sup>50</sup> Criminal Appeal No. 69 of 1982, Court of Appeal, Nairobi (Unreported).

<sup>51</sup> National Police Service Act 2011 (Cap 84, Laws of Kenya, Revised Edition 2012).

<sup>52</sup> Previously Cap 84, Laws of Kenya.

<sup>53</sup> Previously Cap 85, Laws of Kenya; many laws have been repealed since 2010 with the coming into force of the Constitution of Kenya 2010 which brought about major reforms in the major institutions in the country such as the Judiciary, the Kenya Police Force and the Kenya Defence Forces.

<sup>54</sup> National Police Service Act 2011, ss 27 and 49.

<sup>55</sup> Criminal Procedure Code.

<sup>56</sup> Joshua N, Auerback, 'Police Accountability in Kenya' (2003) 3 Afr. Hum. Rts. L.J. 275, 277.

internal police accountability through the introduction of a new internal accountability regime that became operational in 2013.

47. Frameworks such as police vetting and the Independent Policing Oversight Authority, which began work in June 2013, are the key feature of this new internal oversight system. The system is mandated to investigate complaints and disciplinary or criminal offences committed by any member of the National Police Service. It is especially mandated to receive complaints from detainees in police custody. The Independent Policing Oversight Authority Act<sup>57</sup> creates an independent, external, civilian body to oversee the Kenyan police. The Preamble of the Act states that it is ‘an Act of Parliament to provide for civilian oversight of the work of the police; to establish the independent Policing Oversight Authority and to provide for its functions and powers and for connected purposes.’ The formation of this independent oversight authority is one of the most important steps taken in the movement to achieve democratic oversight over the security forces. Under the Act, the Authority may conduct inspections of police premises, including detention facilities under the control of the Service.<sup>58</sup> Furthermore, when a detained person dies in police custody, the officer in charge of the station must notify the Authority for the purpose of investigation.<sup>59</sup>
48. Section 7(2) of the National Police Service Act additionally provides that all officers appointed before and after the commencement of the Act are to undergo vetting by the National Police Service Commission to assess their suitability and competence.
49. Recently however, there have been alarming reports, especially by Amnesty International, of arbitrary arrests and ill-treatment of persons in police detention.<sup>60</sup> The Anti-Terrorism Police Unit has been reported to have arbitrarily detained many people, especially in Mombasa (a city with a large Muslim population), following the aftermath of the September 2013 Westgate Mall terror attacks by the Somali Islamist group, al-Shabab. The police is said to have targeted members of particular communities, particularly people of Somalian origin, across Kenya.<sup>61</sup>

## **b) Threshold questions**

50. The issue of kettling has not arisen in Kenya.

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<sup>57</sup> Independent Policing Oversight Authority Act No 35 of 2011.

<sup>58</sup> Independent Policing Oversight Authority Act 2011, s 6(e).

<sup>59</sup> National Police Service Act 2011, s 61(2) r/w Sixth Schedule(A)(5).

<sup>60</sup> Amnesty International, ‘Annual Report 2013: Kenya’ (*Amnesty International*, 2013) <<http://www.amnesty.org/en/region/kenya/report-2013>> accessed on 10 January 2014.

<sup>61</sup> ‘Kenya Police Accused of Counter-Terror Abuses’ *BBC* (Mombasa, 20 November 2013) <<http://www.bbc.co.uk/news/world-africa-25023445>> accessed on 13 January 2014.



### c) Decision to detain

51. Police arrest and detention occurs when a police officer restrains the freedom of movement of another person, depriving them of their freedom of personal liberty. Under Kenyan law, enjoyment of fundamental rights and freedoms is subject to limitations under art 24 of the Constitution of Kenya 2010. Thus the right to personal liberty can be limited under the Criminal Procedure Code, as long as the limitations are reasonable and justifiable in an open and democratic society.
52. An arrest may be conducted by a police officer who is required when conducting an arrest to:
- State the terms of the arrest; or when an officer uses force to restrain the individual concerned, or when by words or conduct the officer makes it clear that he will use force if necessary to restrain the individual from going where he wants to go. An arrest does not however occur when a Police Officer stops an individual to make an inquiry.<sup>62</sup>
53. Section 29 of the Criminal Procedure Code sets out circumstances in which a police officer may arrest a suspect without a warrant being issued by the court. These include:
- any person suspected upon reasonable grounds of having committed a cognisable offence;
  - any person who commits a breach of the peace in the presence of the police officer;
  - any person who obstructs an officer in the exercise of their duty;
  - any person who escapes or attempts to escape from lawful custody;
  - any person who is suspected upon reasonable ground of being a deserter in the armed forces;
  - any person found in a street or in public place at night and suspected reasonably of being there for an illegal purpose or unable to give a reasonable explanation or account of themselves;
  - any person in possession of an instrument of housebreaking without reasonable excuse;
  - any person in possession of anything suspected to be stolen property;
  - any person reasonably suspected of having committed an extraditable offence (offence committed in another country by the suspect or an offence where one may be extradited from Kenya); and
  - any person for whom the officer has reasonable cause to believe a warrant of arrest has been issued.

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<sup>62</sup> The provisions relating to arrest are found in ss 21 –40 of the Criminal Procedure Code. The courts also follow the procedure laid out by Lord Devlin in *Hussein v Chang Fook* [1970] 2 WLR 441.

54. Under s 30 a police officer may arrest without a warrant persons who are vagabonds, habitual robbers and thieves.
55. A person arrested without a warrant should be taken to a magistrate or officer in charge of police station as soon as possible, and within the constitutional requirement of 24 hours, and thereafter, taken to court.<sup>63</sup> The arresting officer may draw up the formal charge signed by the officer in charge of the police station against the detainee and present them to the magistrate. Alternatively the accused may be presented to the court where the magistrate may draw up and sign the same, or may decline to admit the charge if the charge does not disclose any offence. The charge should be based on an offence known in written law.<sup>64</sup>
56. It is a requirement of a lawful arrest that the arrested person be informed of the reasons for their arrest. The main procedural safeguards governing the decision to detain can be found under s 36 of the Criminal Procedure Code and art 49 of the Kenyan Constitution. They require that a person who has been detained or arrested be furnished with reasons for their arrest in a language that they understand. The accused has a right to communicate with an advocate, and other persons whose assistance is necessary. Free legal aid is usually provided for those accused of capital offences such as murder and robbery with violence. The arrested person also has a right not to be compelled to make any confession or admission.
57. Consequently, the arrested person is to be arraigned in court as soon as reasonably possible, but not later than twenty-four hours after being arrested, to be charged or informed of the reason for the detention continuing, or to be released. The arrested person is to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.<sup>65</sup> The detainee in cases of a capital offence such as murder, attempted murder or robbery with violence, is to be arraigned in court within 14 days of arrest.
58. The position of the High Court on the right of an accused person to be brought before a court within a period of 24 hours by the police for a non-capital offence was articulated in *Ann Njogu & 5 Others v Republic*<sup>66</sup> as:

I dare add that the said section is very clear and specific – that the applicants can only be kept in detention or cells for up to 24 hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants...upon determination that the constitutional rights of the applicants have been violated, any prosecution against them, or any of them, on the basis of the events for which attempted charges were being made this morning is null

<sup>63</sup> Criminal Procedure Code, s 33 r/w Constitution of Kenya 2010, art 49(1)(f)(i).

<sup>64</sup> Criminal Procedure Code, s 89.

<sup>65</sup> Constitution of Kenya 2010, art 49.

<sup>66</sup> [2007] eKLR, Misc Crim Appli 551 of 2007.

and void. And that is so and will remain so irrespective of the weight of the evidence that the police might have in support of their case. This is for the simple reason that such a prosecution would be based on an illegality and a null and void case.

#### **d) Review of and challenges to detention**

59. The detainee may make an application directly to the Constitutional and Judicial Review Division of the High Court alleging contravention of their constitutional rights under art 29 of the Constitution on the right to personal security together with any other accompanying rights that may have been violated. The application is to be supported by an affidavit listing the contraventions.
60. The court may grant judicial review orders such as *certiorari* or may quash the decision to detain altogether. An application for judicial review must be served on the Attorney General who has a right of reply within 14 days of service. Where the Attorney General does not respond within 14 days of service, the court may set the matter down for hearing. The judge may also give interim orders. A further appeal may be filed in the Court of Appeal.

#### **e) Compensation for unlawful detention**

61. In addition to judicial review orders, the court may grant damages to the person who has been unlawfully detained. In the case of *Joseph Mumo v Attorney General & Another*,<sup>67</sup> the High Court awarded damages to the plaintiff on a claim of malicious and unlawful arrest to the tune of Kshs. 300,000 as compensation for wrongful suffering. In that case, the plaintiff was arrested on the basis of false information by the defendant, who was a police Chief Inspector. The plaintiff was subsequently arrested and imprisoned for five days and arraigned in court for criminal charges, after which he was acquitted for lack of evidence.

## **V PREVENTIVE DETENTION**

### **a) Overview of the legal framework**

62. Preventive detention in the Kenyan context means, the internment of a person solely by dint of executive orders, outside the framework of the judicial process—at least as far as all matters of substance are concerned. The Kenyan scheme of preventive detention is considered by some<sup>68</sup> to be very opaque, given that preventive detentions during the past three decades had become synonymous with the detention of politicians and activists agitating for democratic and

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<sup>67</sup> [2008] eKLR, Civil Suit 250 of 2004.

<sup>68</sup> JB Ojwang, 'Kenya' in Andrew Harding and John Latchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993) 105.

constitutional reforms in the country. Some of these detentions were carried out during the 1982 coup attempt.

63. Most of the detainees who were arbitrarily detained were alleged to be members of the *Mwakenya* movement, which was accused of spreading anti-government ideals in the early 1980s and also planning to overthrow former President Moi's government. The police launched a vigorous crackdown against members of this group. Those arrested without a valid reason were allegedly falsely accused of grave crimes such as robbery with violence. Arbitrary detention is said to continue even in multi-party Kenya. Some commentators while raising these concerns have also pointed out that there is little justice for those who are arbitrarily detained, as there is often interference with evidence.<sup>69</sup>
64. Preventive detentions are carried out under the Preservation of Public Security Act 1960.<sup>70</sup> This Act was originally intended to apply only in the context of a state of emergency. However, amendments to s 29 of Kenya's previous Constitution<sup>71</sup> enabled the President at any time, by order published in the Kenya Gazette, to bring into operation, generally or in any part of Kenya, Part III of the Preservation of Public Security Act on 'Special Public Security Measures'. This empowered the President under the previous s 85 to make 'special public security regulations' in respect of a number of matters, including detention of persons.<sup>72</sup> However, the old Constitution has now been repealed and the new 2010 Kenyan Constitution does away with s 85 and these amendments. Thus, the Preservation of Public Security Act can now only be operationalized in a state of emergency, which is currently not the case.
65. 'Preservation of public security' is a general concept justifying prevention detention. This concept has been defined to include:
  - the defence of the territory and people of Kenya;
  - the securing of the fundamental rights and freedoms of the individual;
  - the securing of the safety of persons and property;
  - the prevention and suppression of rebellion, mutiny, violence, intimidation, disorder and crime, and unlawful attempts and conspiracies to overthrow the Government or the Constitution;
  - the maintenance of the administration of justice;

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<sup>69</sup> See Korwa G Adar and Isaac M Munyae, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978-2001' (2001) African Studies Q 2 < <http://asq.africa.ufl.edu/v5/v5i1a1.htm> > accessed 20 February 2014.

<sup>70</sup> Preservation of Public Security Act 1960 (Cap 57, Laws of Kenya).

<sup>71</sup> Constitution of Kenya Amendment Act No. 18 of 1966 and Act No. 45 of 1968.

<sup>72</sup> Repealed Independence Constitution 1963, s 85 (1).

- the provision of a sufficiency of the supplies and services essential to the life and well-being of the community, their equitable distribution and availability at fair prices; and
  - the provision of administrative and remedial measures during periods of actual or apprehensible national danger or calamity, or in consequence of any disaster or destruction arising from natural causes.
66. The Minister of Home Affairs can also order preventive detentions. According to the Public Security (Detained and Restricted Persons) Regulations (under the Act), if the Minister of Home Affairs is satisfied that it is necessary for the preservation of public security to exercise control, beyond that afforded by a restriction order, they can order that that person be detained.<sup>73</sup> Thus, indefinite detention is permissible as authorised by the Minister.<sup>74</sup> The legal basis for detention is usually the protection of national security. This position has however been criticised, as it does not address the appropriate mode of exercise of the Minister's discretion and the constitutional effect of a ministerial error in the carrying out of the procedures relating to detention.<sup>75</sup>
67. Special branch officers conduct arrests under the Preservation of Public Security Act. In the past, suspects have been detained in chambers in the administrative *Nyayo* House building in Nairobi, where they were interrogated pending trial.<sup>76</sup>
68. Under s 43 of the Criminal Procedure Code, a magistrate may also carry out preventive detention in order to prevent offences that threaten the peace and good behaviour as will be explained further below.

### **b) Threshold questions**

69. There is no threshold question as to whether this constitutes detention.

### **c) Decision to detain**

70. The main procedural safeguards governing the decision to detain can be found in art 49 of the Constitution of Kenya 2010, which requires that a person detained or arrested is to be furnished with reasons for the arrest in a language that they understand and have a right to communicate with an advocate, and other persons whose assistance is necessary. The arrested person has a right not to be compelled to make any confession or admission.

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<sup>73</sup> Public Security (Detained and Restricted Persons) Regulations 1978, reg 6. These regulations have been made under the Preservation of Public Security Act, s 4 (2).

<sup>74</sup> Regulation 6(2) states, 'Where a detention order has been made in respect of any person, that person shall be detained in a place of detention in accordance with these Regulations, for as long as the detention order is in force, and, while so detained, shall be deemed to be in lawful custody.'

<sup>75</sup> JB Ojwang, 'Kenya' in Andrew Harding and John Latchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993) 114.

<sup>76</sup> Frederick W. Jjuuko, *The Independence of the Judiciary and the Rule of Law: Strengthening Constitutional Activism in East Africa* (Kituo Cha Katiba 2005) 135.

71. Consequently, the arrested person is to be arraigned in court as soon as reasonably possible, but not later than—24 hours after being arrested (else they will be automatically released). At the first court appearance, the accused is to be charged or informed of the reason for the detention continuing, or to be released. The High Court when faced with a question relating to violation of this provision, has held in many cases for example in *Ann Njogu & 5 Others v Republic*<sup>77</sup> that:

At the tick of the 60<sup>th</sup> minute of the 24<sup>th</sup> hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants...upon determination that the constitutional rights of the applicants have been violated, any prosecution against them, or any of them, on the basis of the events for which attempted charges were being made are null and void.

72. Also, under art 49 (1)(h), the arrested person is to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons why they should not be released. Any detention outside this threshold is considered arbitrary with the exception of detention without trial during a state of emergency, in which case the detention is subject to art 58 of the Constitution. This especially relates to art 58 (6)(a), which provides that any legislation enacted in consequence of a declaration of a state of emergency may limit a right or fundamental freedom in the Bill of Rights.

73. As explained above in para 64, preventive detention under the Preservation of Public Security Act and ss 83 and 85 of the previous Constitution were originally meant to be operational only during a state of emergency and hence mostly fall within the exception now in art 58 (6)(a) of the Constitution of Kenya 2010. However, as stated at the beginning of this section, the Preservation of Public Security Act was amended to apply not only during a state of emergency but in other situations requiring ‘Special Public Security Measures’ as declared by the President. Thus it applied both in cases of an emergency, and in other non-emergency situations with effect from 1966.

74. The required procedure for all detentions under the Preservation of Public Security Act (not currently operational) is that a person detained should be furnished with reasons for the detention within five days of the detention taking effect, in writing and in a language that they understand.<sup>78</sup> Within fourteen days of the detention taking effect, notice of the detention is to be published in the Kenya Gazette. Within one month of the commencement of detention, the detainee is required to be taken before a review tribunal. After the first review, the detainee is to be taken before the tribunal at intervals of not more than six months while they remain in detention, although the detention can potentially be indefinite.

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<sup>77</sup> *Anne Njogu and 5 others v Republic* [2007] eKLR, Misc Crim Appli 551 of 2007.

<sup>78</sup> Public Security (Detained and Restricted Persons) Regulations 1978, reg 10(1).

75. In s 43 of the Criminal Procedure Code, a magistrate can carry out preventive detention when they have reason to believe that a person is likely to commit a breach of the peace or disturb public tranquillity, and that the breach of peace or disturbance cannot be prevented otherwise than by detaining the person in custody.
76. The magistrate may, after recording reasons for detention, issue a warrant for the arrest (if the person is not already in custody or before the court), and may send the accused before another magistrate empowered to deal with the case, with a copy of his reasons. The magistrate before whom the person is sent may detain that person in custody until the completion of the inquiry.<sup>79</sup>

#### **d) Review of and challenges to detention**

77. Section 83(2) of the previous Constitution in relation to preventive detention under the Preservation of Public Security Act required that the detainee be taken before an independent and impartial review tribunal established by law and appointed by the President within one month of the commencement of detention. The composition of the tribunal included a chairman (being a person qualified to be appointed to the High Court Bench); a person who was or had been a magistrate of the high class; and between two and four other members (qualifications not specified).<sup>80</sup> The detainee was to be afforded reasonable facilities to consult a legal representative of their own choice and would be permitted to appear in person or by a legal representative of their own choice. After the first review, the detainee was to be brought before the tribunal at intervals of not more than six months while they remained in detention. No such provision exists in the Constitution of Kenya 2010.
78. The review tribunal was then supposed to make recommendations concerning the necessity or expediency of continuing the detention to the authority (the Minister) by which it was ordered. However, unless otherwise provided by law, the authority was not obliged to act in accordance with any such recommendations.<sup>81</sup> The tribunal merely acted as an advisory to the Minister who took the original policy decisions to detain. Therefore, the real value of the tribunal to the detainee was that it would function as a forum of relatively informal communication through which the Minister could gain a better understanding of the detainee's plight, needs or sentiments; factors which may have a bearing on their release.<sup>82</sup> These tribunals were however seen as lacking independence and as far as the substantive issues were concerned affecting

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<sup>79</sup> Criminal Procedure Code, s 43(3).

<sup>80</sup> The Public Security (Detention and Restricted Persons) Regulations 1978, reg 8 (2).

<sup>81</sup> Repealed Independence Constitution 1963, s 83 (3).

<sup>82</sup> JB Ojwang, 'Kenya' in Andrew Harding and John Latchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993) 119.

preventive detention, the most material decision was that of the Minister and the review tribunal only acted as an advisory organ of the Executive.

79. Also, charges against such persons were not necessarily revealed and an individual could be held for five days without reasons for detention as seen in the detention procedure above. There was no guarantee of recourse to the courts which only had a passive role as in relation to the substantive issues affecting preventive detention, the most material decision was that of the Minister as stated above and also the length of detention was not limited by law.<sup>83</sup> This was highlighted in the case of *PP Ooko v Republic of Kenya*<sup>84</sup> before the High Court on preventive detention. Rudd J. stated here that he had limited jurisdiction in the case as the plaintiff's continued detention was a matter for the review tribunal and ultimately for the Minister rather than for the court.
80. Most of the recent cases challenging preventive detention in Kenya are on detentions without trial in the late 1980s and early 1990s. This is because previously, before the post-2010 judicial reforms such as the Judges and Magistrates Vetting Board and the transformative provisions in the Constitution of Kenya 2010, the public lacked confidence in the independence of the institution as it was mostly seen as a buttress to Executive powers. Furthermore, it was difficult to institute cases of violation of fundamental rights, caused for instance by arbitrary detention as the courts declared the previous Constitution inoperable in 1988, because the rules required to be made regarding procedures for enforcement of rights had not been made by the Chief Justice.<sup>85</sup> These rules were later made in 2001 and now by the Constitution of Kenya 2010, which has elaborate rules on the enforcement of the Bill of Rights. It is also important to note that ss 83 and 85 of the previous Constitution no longer apply and the new Constitution does not have provisions similar to these. For this reason, most of the recent cases challenging preventive detention have been instituted after the promulgation of the Constitution of Kenya 2010.
81. Owing to this fact, preventive detention carried out under the Preservation of Public Security Act are currently being challenged before the Constitutional and Judicial Review Division of the High Court. Most of the petitioners have in general challenged the initial decision to detain and also their continued incarceration. In the case of *Jaoko Noo Ooro & 5 others v Attorney General*<sup>86</sup> decided by Lenaola J, the petitioners alleged various violations of their human rights during their detention in the infamous 'Nyayo House Torture Chambers'. The petitioners alleged that they

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<sup>83</sup> 'Kenya—Human Rights' (*African Studies Centre, University of Pennsylvania*), <<http://www.africa.upenn.edu/NEH/khumanrights.htm>> accessed on 13 January 2014.

<sup>84</sup> High Court, Nairobi, Civ. Cas. No. 1159 of 1966 (unreported).

<sup>85</sup> Frederick W. Jjuuko, *The Independence of the Judiciary and the Rule of Law: Strengthening Constitutional Activism in East Africa* (Kituo Cha Katiba 2005) 133.

<sup>86</sup> High Court at Nairobi Petition No's 35, 37, 39, 40 of 2010; 68 of 2011, 133 of 2013 (Consolidated).



had been arrested, tortured, kept in custody for varying periods of time and released without charge. The Court held that the petitioners' arrest with no reason and detention for more than 24 hours without being arraigned in court to be charged was against their constitutional right not to be deprived of their personal liberty, except as was authorized by law under s 72 of the previous Constitution, now under art 49 of the new Constitution.

82. Moreover, no reasonable cause was shown (as required) by the respondent as to why they were not produced in court within twenty-four hours. This was in breach of the petitioners' rights and thus their petitions were allowed.
83. A person who is thus detained or held in custody is entitled to petition for an order of *habeas corpus*.<sup>87</sup>

#### **e) Compensation for unlawful detention**

84. Most of the preventive detentions conducted under the Preservation of Public Security Act were coupled with torture and thus courts granted compensation with regard to both arbitrary detention and torture. The case that best highlights the issues of compensation is that of *Gitobu Imanyara & 2 others v Attorney General*<sup>88</sup> decided by Lenaola J. In this case, the petitioners were at various dates and times in the 1990s unlawfully detained and tortured by state agents at request of the Government due to their involvement in agitation for democratic and constitutional reforms in Kenya. The respondent expressly admitted liability and the issue for determination was the compensation payable to the petitioners.
85. In considering the issue of compensation in general and the quantum of damages, the High Court in this case was confronted with questions including:
- the damages payable to the petitioners for the admitted violations of their fundamental rights and freedoms as provided for under art 23(3) of the Constitution of Kenya, 2010;<sup>89</sup>
  - whether exemplary and aggravated damages were payable to the petitioners for the admitted violations of their fundamental rights and freedoms;
  - what was the liability of the respondents in instances where the petitioners were taken to court, tried, sentenced and later released either on appeal or upon an executive order; and
  - whether the court could make an order on the liabilities incurred by petitioners as a result of or during their unlawful detention?

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<sup>87</sup> Constitution of Kenya 2010, art 51 (2).

<sup>88</sup> Nairobi High Court Petition No. 78, 80 and 81 of 2010 (consolidated).

<sup>89</sup> Article 23 (3) provides that, 'In any proceedings brought under Article 22 (on enforcement of the Bill of Rights), a court may grant appropriate relief, including— (a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review.'

86. The Court held that awarding exemplary and aggravated damages in cases where an unconstitutional action had been challenged would be inappropriate. This was in noting the fact that exemplary damages are sought not for compensation of the victim but to punish and serve as an example to the wrongdoer and ultimately act as a deterrent. In this case, exemplary damages would not be an effective deterrent because the same would be paid from public funds and not be obtained from the perpetrator directly thus placing a heavy burden on the innocent tax payer. The Court also stated that, further notice had to be taken of the improved political environment in Kenya, and the attempts that had been made to deal with human rights violations. The Kenyan Government had learnt from its past and the deterrent effect was alive and obvious.<sup>90</sup>
87. In relation to general damages, the Court held that in awarding these, monetary compensation had to be reasonable and fair taking into account all the circumstances of each case. A global sum was awarded to the petitioners for breach of their fundamental rights and suffering in relation to the differing periods and circumstances of their unlawful detention. The 1<sup>st</sup> petitioner was awarded general damages of Kshs.15 Million; the 2<sup>nd</sup> petitioner, Kshs.10 Million; and the 3<sup>rd</sup> petitioner, Kshs.7 Million. All petitioners were granted the costs of their petitions and interest at court rates on damages from the date of the judgment until payment had been made in full.

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<sup>90</sup> In highlighting the deterrent effect of exemplary damages, the court highlighted the case of *Benedict Munene Kariuki & 14 Others v The Attorney General* Petition (2011) KLR and that of *Wachira Waibere v the Attorney General* HC Misc. App.No.1184 of 2003.

# Country Report for New Zealand

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. The Terrorism Suppression Act 2002, enacted to provide extraordinary powers for dealing with terrorist groups, contains no special powers to detain a person. Therefore, a person suspected of committing or planning a terrorism offence must be treated the same way as a person suspected of committing any other offence – including the same standards and procedures for arrest and detention.<sup>1</sup>
2. Alternatively, a person may be detained pursuant to Part 4A of the Immigration Act 1987, if they are not a citizen of New Zealand and are suspected of being a terrorist or considered a threat to national security. For further detail on immigration powers, see section II of this Country Report below.

### b) Threshold questions

3. There is no indication of a threshold question.

### c) Decision to detain

#### *i) Detention following arrest on suspicion of committing an offence*

4. If a police officer believes that a person has committed an offence, the officer may arrest the person, without a warrant.<sup>2</sup> Thereafter, the person must be either charged promptly, being within 48 hours, or released.<sup>3</sup>
5. After being charged, an arrested person must be brought before a court as soon as possible.<sup>4</sup> The court will order the person released on bail unless there is just cause for continued detention,<sup>5</sup> the onus being on the State to show such just cause.<sup>6</sup> Just cause can only be constituted by a genuine and specific flight risk, a genuine and specific risk of interference with witnesses, and the risk of commission of further offences.<sup>7</sup>

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<sup>1</sup> Liberty, 'Charge or Release: Terrorism Pre-Charge Detention Comparative Law Study' (July 2010), p 27, <http://www.liberty-human-rights.org.uk/policy/reports/comparative-law-study-2010-pre-charge-detention.pdf> accessed 20 January 2014.

<sup>2</sup> Crimes Act 1961, s 32.

<sup>3</sup> New Zealand Bill of Rights Act 1990, s 23(2).

<sup>4</sup> Crimes Act 1961 s 316(5).

<sup>5</sup> New Zealand Bill of Rights Act 1990, s 24(b).

<sup>6</sup> *B v Police (No 2)* [2000] 1 NZLR 31, 34 (New Zealand Court of Appeal).

<sup>7</sup> Bail Act 2000, s 8(1).

*ii) Detention pursuant to immigration powers*

6. If the Director of Security receives or holds credible information relevant to the question of whether a non-citizen within or resident in New Zealand has engaged in terrorism in or outside New Zealand,<sup>8</sup> is a member of a group that has engaged in terrorism in or outside New Zealand,<sup>9</sup> is likely to engage in or facilitate the commission of an act of terrorism,<sup>10</sup> or is likely to constitute a danger to the security and public order of New Zealand,<sup>11</sup> then the Director may provide a security risk certificate about that person to the Minister for Immigration.<sup>12</sup> If the Minister chooses to rely on that certificate, then the police must arrest the person, without a warrant, and detain them in custody.<sup>13</sup>
7. A person arrested under a security risk certificate must be brought before a District Court Judge as soon as possible for a warrant of commitment,<sup>14</sup> but if a warrant of commitment is not issued within 48 hours then they must be released.<sup>15</sup> The District Court Judge must issue a warrant of commitment authorising continued detention unless satisfied on the balance of probabilities that the person before them is not the person named in the security risk certificate.<sup>16</sup> Once a warrant of commitment is issued the person must be detained until removed or deported, until the Inspector-General of Intelligence and Security makes an adverse review of the security risk certificate, until there is another order for the person to be released, or until the High Court issues a writ of *habeas corpus*.<sup>17</sup>
8. A person arrested under a security risk certificate must not be detained for longer than 48 hours unless a judge issues a warrant of commitment for continued detention.<sup>18</sup>
9. After the Inspector-General of Security and Intelligence has completed his review of a security risk certificate and upheld the certificate, or alternatively after five days have elapsed since the person's arrest so that they no longer have an entitlement to apply for such review, the Minister must within three days make a final decision about how to act in reliance on the security risk

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<sup>8</sup> Immigration Act 1987 s 114C(3), referring to s 7(1)(e)(i) and (1)(f)(i); s 114C(4)(b), referring to s 73(1)(b) and (1)(c)(ii).

<sup>9</sup> Immigration Act 1987 s 114C(3), referring to s 7(1)(e)(ii) and (1)(f)(ii); s 114C(4)(b), referring to s 73(1)(a) and (1)(c)(i).

<sup>10</sup> Immigration Act 1987 s 114C(3), referring to s 7(1)(g)(i); s 114C(4)(b), referring to s 73(1)(d).

<sup>11</sup> Immigration Act 1987 s 114C(3), referring to s 7(1)(h); s 114C(4)(a), referring to s 72.

<sup>12</sup> Immigration Act 1987 s 114D(1).

<sup>13</sup> Immigration Act 1987 s 114G(5).

<sup>14</sup> Immigration Act 1987 s 114G(6).

<sup>15</sup> Immigration Act 1987 s 114G(6).

<sup>16</sup> Immigration Act 1987 s 114O(1).

<sup>17</sup> Immigration Act 1987 s 114O(2).

<sup>18</sup> Immigration Act 1987 s 114O.

certificate.<sup>19</sup> This may mean a decision to cancel any right to remain in New Zealand and to deport the person,<sup>20</sup> but if deportation is not possible then the person must be released from custody.<sup>21</sup>

#### **d) Review of and challenges to detention**

##### *i) Detention following arrest on suspicion of committing an offence*

10. A person arrested must be brought before a court as soon as possible after being arrested and charged, to determine whether to be released on bail or retained in custody.<sup>22</sup>

##### *ii) Detention pursuant to immigration powers*

11. A person detained under a security risk certificate may seek a review by the Inspector-General of Intelligence and Security of the decision of the Director of Security to issue the certificate.<sup>23</sup> The person may be represented by counsel in her dealings with the Inspector-General, have access to information used to issue the certificate unless it is classified, and make written submissions to the Inspector-General.<sup>24</sup>
12. If the Inspector-General determines that the security risk certificate was not properly made, the person must be released from detention immediately.<sup>25</sup>
13. If the Inspector-General of Intelligence and Security determines that the security risk certificate was properly made and confirms it, then the person named in the certificate may, with the leave of the Court of Appeal, appeal to the Court of Appeal on points of law.<sup>26</sup> This appeal must be brought within 3 days of the Inspector-General's decision.<sup>27</sup>
14. The decision of the Director of Security to issue a security risk certificate may not be reviewed in any court.<sup>28</sup> Moreover, if the Minister decides to rely on a security risk certificate in making an order, the certificate is to be considered conclusive evidence of the matters detailed therein (subject to review by the Inspector-General),<sup>29</sup> and the Minister need not and cannot be compelled to provide reasons for his decision to rely on the certificate.<sup>30</sup> So, although there is

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<sup>19</sup> Immigration Act 1987 s 114K(1).

<sup>20</sup> Immigration Act 1987 s 114K(4)(a) and (4)(b).

<sup>21</sup> Immigration Act 1987 s 114K(4)(c).

<sup>22</sup> See the 'Decision to detain' section above.

<sup>23</sup> Immigration Act 1987 s 114H(1).

<sup>24</sup> Immigration Act 1987 s 114H(2).

<sup>25</sup> Immigration Act 1987 s 114J(1).

<sup>26</sup> Immigration Act 1987 s 114P(1).

<sup>27</sup> Immigration Act 1987 s 114P(2)(a).

<sup>28</sup> Immigration Act 1987 s 114H(4).

<sup>29</sup> Immigration Act 1987 s 114F(1).

<sup>30</sup> Immigration Act 1987 s 114F(2).

statutory provision for a person in detention to be released upon the High Court issuing a writ of *habeas corpus*,<sup>31</sup> in practice, this makes it effectively impossible for the decision of the Minister to issue an order to be challenged in court. Consequently, in practice, the detention of a person under Part 4A of the Immigration Act 1987 cannot be challenged in court.

### **e) Remedies for unlawful detention**

15. Upon appeal against the decision of the Inspector-General of Intelligence and Security to confirm a security risk certificate, the Court of Appeal may ‘give such directions and make such orders as it thinks appropriate.’<sup>32</sup> Presumably, this would include the power to order that the government pay compensation to the person for their wrongful detention.

## **II IMMIGRATION DETENTION**

### **a) Overview of the legal framework**

16. The Immigration Act 2009 regulates immigration detention in New Zealand, and was amended in 2012 to give greater power to immigration officers to detain.<sup>33</sup> The Act allows for the detention of people who are ‘liable for turnaround or deportation’, unable to provide adequate identity documentation, or who are ‘on reasonable grounds, suspected by an immigration officer or a constable of constituting a threat or risk to security’.<sup>34</sup>
17. However, the power of an immigration officer to detain is limited to four hours maximum – enough time to deliver the detainee into the custody of the police, or place them aboard a flight out of New Zealand.<sup>35</sup> If delivered to the police, the person may then be detained up to 96 hours.<sup>36</sup> Beyond this point, an immigration officer must apply for a warrant of commitment in order to detain the person longer.<sup>37</sup> With a warrant of commitment, a person may be detained for up to 28 days, and then further warrants can be sought if required.<sup>38</sup>
18. A person who is a refugee or has protection status cannot be detained, unless their deportation is not prohibited under the Refugee Convention.<sup>39</sup>

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<sup>31</sup> Immigration Act 1987 s 114O(2)(c).

<sup>32</sup> Immigration Act 1987 s 114P(3).

<sup>33</sup> Before 3 September 2012, only police officers could detain a person under the *Immigration Act* 2009: New Zealand Government, ‘Immigration Act 2009: Immigration officers’ powers’ (August 2012) < <http://www.immigration.govt.nz/NR/rdonlyres/8C33D56E-47D4-457E-99AF-3103B94017DC/0/PowersofIOsfactsheetSep2012.pdf> > accessed 29 December 2013.

<sup>34</sup> Immigration Act 2009, s 309.

<sup>35</sup> Immigration Act 2009, s 312.

<sup>36</sup> Immigration Act 2009, s 313.

<sup>37</sup> Immigration Act 2009, s 316, 319.

<sup>38</sup> Immigration Act 2009, s 323.

<sup>39</sup> Immigration Act 2009, s 309(2).

19. When a person has been arrested because an immigration officer suspects them to be a ‘threat or risk to security’, a judge may issue a warrant to detain them for 28 days unless the judge decides that it would not be contrary to the public interest to release them.<sup>40</sup>
20. Under the Immigration Act, large groups of people are dealt with differently and can be detained for much longer. An immigration officer may apply for a ‘mass arrival warrant’, to detain a group for up to 6 months. A ‘mass arrival group’ is one with more than 30 people who arrived on board the same craft or group of craft.<sup>41</sup> The warrant to detain such a group must be necessary to ‘effectively manage’ the group, to manage any threat to security, to ‘uphold the integrity of the immigration system’ or to maintain the ‘efficient functioning’ of the District Court.<sup>42</sup> After the 6-month period, an immigration officer can apply to the Court for a further warrant of 28 days.<sup>43</sup>

#### **b) Threshold questions**

21. When a person is taken into custody in a police station or prison by an immigration officer or police constable, they are clearly being detained, so this question is largely uncontroversial. The Immigration Act does specify the forms of detention that can be imposed. In the case of people under the age of 18, custody at a ‘residence’ (as defined by the Children, Young Persons, and Their Families Act 1989) or another premises agreed to by the immigration officer and the child’s guardian constitutes detention under the Immigration Act.<sup>44</sup> In any other case, when a person is kept in custody at any premises approved by the chief executive for the purposes of the provisions in Part 9 (the detention provisions), this will constitute ‘detention’ under the Act.<sup>45</sup>
22. However, the Act provides that, instead of detaining a person, an immigration officer can agree with the person liable to be detained that they will reside at a specified place and report to the officer.<sup>46</sup> In this case, the person would not have been arrested or detained as such, although the agreement is at the discretion of the immigration officer - it can be cancelled at any time and the person taken into detention.
23. A District Court may also release a person ‘on conditions’,<sup>47</sup> which would no longer constitute detention.

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<sup>40</sup> Immigration Act 2009, s 318.

<sup>41</sup> Immigration Act 2009, s 9A.

<sup>42</sup> Immigration Act 2009, s 317A.

<sup>43</sup> Immigration Act 2009, s 317E.

<sup>44</sup> Immigration Act 2009, s 331(a).

<sup>45</sup> Immigration Act 2009, s 331(b).

<sup>46</sup> Immigration Act 2009, s 315.

<sup>47</sup> Immigration Act 2009, s 320.

### c) Decision to detain

24. The Immigration Act sets out clear procedural requirements to which detaining officers must adhere. They must inform the person of the reasons for detention, its duration and the right to contact a lawyer.<sup>48</sup> The officer must also produce their warrant, and a badge if they are not in uniform.<sup>49</sup> The Act makes it clear that access to a lawyer, parent or other responsible adult should be facilitated for the detainee.<sup>50</sup> The power of a constable or immigration officer to detain is also constrained to a list of specific purposes outlined in the Act.<sup>51</sup>
25. To obtain a warrant of commitment to detain a person for 28 days, an immigration officer must apply to a District Court Judge. This will be possible where there is no transport yet available, or for any other reason the person cannot leave New Zealand, their identity cannot be verified, the Minister is still in the process of determining whether the person is a risk to security or the judge perceives a warrant to be in the public interest.<sup>52</sup> If the judge is not satisfied that a warrant is necessary, they may order that the person be released from custody. However, if the person fulfils certain criteria (such as their identity being unknown), release will be highly unlikely.<sup>53</sup>
26. In an order for a mass arrival warrant, a judge is required to state the reasons why the warrant is necessary.<sup>54</sup> A judge may also order that an immigration officer report to the judge on the 'continuing applicability' of a mass arrival warrant, during the period of detention.<sup>55</sup> This safeguard thus helps to prevent unnecessarily long detention periods, as the judge may then decide to shorten or vary the warrant:

...if, after receiving a report, he or she is satisfied that those reasons will no longer apply after the expiry of the shortened period.<sup>56</sup>
27. Whether or not a person is a 'risk to security' is a question determined by the Minister, and the case must be referred 'as soon as is practicable' to the Minister for determination.<sup>57</sup>
28. Given that detention for mass groups may extend for a significant period of time (longer than 6 months), there are more specific procedural safeguards built into the law for mass arrival warrants. The Act specifies that an application for a further warrant of commitment must be

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<sup>48</sup> Immigration Act 2009, s 327.

<sup>49</sup> Immigration Act 2009, s 327.

<sup>50</sup> Immigration Act 2009, s 333.

<sup>51</sup> Immigration Act 2009, s 310.

<sup>52</sup> Immigration Act 2009, s 316.

<sup>53</sup> Immigration Act 2009, s 317.

<sup>54</sup> Immigration Act 2009, s 317A(2)(c)(i).

<sup>55</sup> Immigration Act 2009, s 317D(1).

<sup>56</sup> Immigration Act 2009, s 317D(2).

<sup>57</sup> Immigration Act 2009, s 314.



supported by evidence, include a statement as to why a further warrant is required, and the judge may require an immigration officer to attend a hearing to give evidence and be cross-examined.<sup>58</sup>

29. Overall, however, there is no firm limit on the length of time a person can be in immigration detention in New Zealand. If a person has been taken into custody and applies for refugee status, the person will continue to be detained until a decision is made.<sup>59</sup>
30. When the Immigration Act was re-written in 2009, it incorporated access to legal aid for people challenging their detention, which was not provided for in the previous act.<sup>60</sup>
31. Procedural safeguards were considered in the case of *Attorney-General v Udompun*.<sup>61</sup> The detainee, Mrs Udompun, had a low level of English, so the immigration officer was communicating with a member of the group in which she arrived, who then passed the message onto Mrs Udompun and relayed her answers. The High Court held that this was sufficient, and that the reasons for Mrs Udompun's detention had been made clear to her. The Court noted that:

...it was not desirable to lay down rigid rules as to what the natural justice obligations required of immigration officials are in all circumstances.<sup>62</sup>

#### **d) Review of and challenges to detention**

32. During the 96-hour period in which a person may be detained by police officers, there is no access to judicial review.<sup>63</sup>
33. After this period, the Immigration Act allows a detained person who is subject to a warrant of commitment to apply at any time to a District Court Judge to have their warrant varied, or to be released on conditions.<sup>64</sup> Such an application must be made with leave of a District Court Judge, which will only be granted if the judge is satisfied that fresh material has become available.<sup>65</sup>
34. In the case of mass arrival groups, only immigration officers can apply to vary a warrant for detention, either to shorten the period of detention or to separate one person from the group such that their case is dealt with on an individual basis.<sup>66</sup>

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<sup>58</sup> Immigration Act 2009, s 323(3),(5).

<sup>59</sup> Global Detention Project, 'New Zealand Detention Profile' (Jan 2011) <<http://www.globaldetentionproject.org/countries/asia-pacific/new-zealand/introduction.html>> accessed 30 December 2013.

<sup>60</sup> *ibid.*

<sup>61</sup> *Attorney-General v Udompun* [2005] 3 NZLR 204.

<sup>62</sup> *ibid.*, 205.

<sup>63</sup> Global Detention Project, 'New Zealand Detention Profile' (Jan 2011) <<http://www.globaldetentionproject.org/countries/asia-pacific/new-zealand/introduction.html>> accessed 30 December 2013.

<sup>64</sup> Immigration Act 2009, s 324(3).

<sup>65</sup> Immigration Act 2009, s 324(5).

<sup>66</sup> Immigration Act 2009, s 324A.

35. Detained asylum seekers may appeal negative asylum decisions but if they are in prison they have only five days in which to appeal, instead of the standard 10 days in all other cases.<sup>67</sup> Generally, they will continue to be detained until the final decision is made on their asylum application, although they may be released on conditions or reporting and residential requirements.<sup>68</sup>

#### **e) Remedies for unlawful detention**

36. In *Thomas v Ministry of Immigration*,<sup>69</sup> the High Court indicated that a writ of habeas corpus may be available. On the facts of this case, it was decided that detention was lawful, so there was no basis for the Court to grant a writ of habeas corpus; however the very fact that the Court considered this option implies that it would be possible if detention were found to be unlawful.
37. In *Yadegary v Manager, Custodial Services, Auckland Central Remand Prison*,<sup>70</sup> the question before the court was 'how long a person who deliberately obstructs his removal can lawfully be detained'.<sup>71</sup> The detainee could not be repatriated to Iran as he had destroyed his passport and refused to apply for another. The court held that the purpose of detention under the Immigration Act was to enable removal of the detainee, and given that removal could no longer be carried out, the detention was no longer serving the purpose set out in the Act. Continued detention was therefore not justifiable, as the Act did not show clearly and unambiguously that unlimited detention could be a possibility. The detainee was therefore released on conditions.

### **III DETENTION OF PERSONS WITH A MENTAL ILLNESS**

38. This section provides an overview of the law regarding the detention of mentally ill persons in New Zealand.

#### **a) Threshold questions**

39. Detention of mentally ill persons within mental health facilities and health facilities is obviously detention.

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<sup>67</sup> Immigration Act 2009, s 194(2).

<sup>68</sup> New Zealand Ministry of Justice, 'Asylum Seekers' (undated) <<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/international-human-rights-instruments/international-human-rights-instruments-1/convention-against-torture/united-nations-convention-against-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-new-zealand-periodic-report-6/article-3/9-asylum-seekers>> accessed 31 December 2013.

<sup>69</sup> *Thomas v Ministry of Immigration* [2012] NZHC 2513.

<sup>70</sup> *Yadegary v Manager, Custodial Services, Auckland Central Remand Prison* [2007] NZAR 436.

<sup>71</sup> *ibid*, 437. Note that the court was interpreting a superseded version of the Immigration Act, but the similarity in the provisions mean that the judgment is nonetheless relevant.

40. Persons with a mental illness may be subjected to compulsory community treatment.<sup>72</sup> In these circumstances, a person is required by law to attend specific treatment facilities at reasonably prescribed times in accordance with a treatment plan. Detention, at least for the purposes of habeas corpus, usually involves total deprivation of liberty (even if the custody or confinement involves a large space or loose amount of supervision).<sup>73</sup> Compulsory community treatment does not involve such a total restriction on liberty and consequently does not amount to detention.

#### **b) Decision to detain**

41. There are numerous kinds of mental health detention and procedural safeguards governing them. The key provisions in the Mental Health (Compulsory Assessment and Treatment) Act 1992 are summarised below. Unless otherwise specified, references to provisions are to provisions of that Act. As there are many detailed considerations, the summary below should be considered as an overview of key provisions only, rather than a comprehensive review of the law.

##### *i) General rules*

42. The procedures for assessment and involuntary treatment should not be invoked in respect of any person by reason only of:<sup>74</sup>

- that person's political, religious, or cultural beliefs; or
- that person's sexual preferences; or
- that person's criminal or delinquent behaviour; or
- substance abuse; or
- intellectual disability.

43. The powers under the Act are to be exercised with proper respect for cultural identity and personal beliefs.<sup>75</sup>

##### *ii) Bill of Rights Act*

44. There are broadly applicable safeguards governing detention made under a statutory power (but not a common law power) that apply under the New Zealand Bill of Rights Act 1990. Among these, the following are key restrictions on detention:

- detention must not be arbitrary: s 22;

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<sup>72</sup> See, eg Mental Health (Compulsory Assessment and Treatment) Act 1992 (NZ), s 27.

<sup>73</sup> *Craig v Attorney-General* [1986] NZHC 151; *Howley v Attorney-General* (High Court Auckland. A 586/85, 16 January 1989).

<sup>74</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 4.

<sup>75</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 5

- police officers must also inform those detained of the reason for the detention: s 23(1)(a);
- those detained must be treated with respect for their dignity: 23(5).

45. See the section on Police Detention in this Country Report for details on these provisions.

*iii) Compulsory assessment and detention*

46. Anyone who believes that a person may be suffering from a mental disorder may at any time fill out an application form asking the Director of Area Mental Health Services for an assessment of the person.<sup>76</sup> The Director or a duly authorized person must make arrangements for the person to attend a hospital or mental health service.

47. A psychiatrist approved by the Director of Area Mental Health Services for the purposes of the assessment examination or of assessment examinations generally shall conduct every assessment examination. If no such psychiatrist is reasonably available, the assessment must be conducted some other medical practitioner who, in the opinion of the Director of Area Mental Health Services, is suitably qualified to conduct the assessment examination or assessment examinations generally.<sup>77</sup> The practitioner must record his or her findings in a certificate of preliminary assessment stating either that the proposed patient is not mentally disordered or there are reasonable grounds for believing the proposed patient is mentally disordered and it is desirable that the proposed patient undergo further assessment and treatment.<sup>78</sup> In the latter case, the practitioner must:<sup>79</sup>

- require the patient to undergo further assessment and treatment; and
- give notice to the patient of this requirement

48. The medical practitioner may direct that the patient be admitted to and detained in a specific hospital for not more than 5 days for the purposes of assessment if the medical practitioner considers the patient cannot be further assessed and treated adequately as an outpatient.<sup>80</sup>

49. If in the first assessment period the responsible clinician decides that there remain reasonable grounds for believing that the patient is mentally disordered and that it is desirable that the patient be required to undergo further assessment and treatment, the clinician may require the detention of the patient to undergo further assessment and treatment for no more than 14 days, with notice to the patient.<sup>81</sup> However, if at any time during assessment the responsible clinician

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<sup>76</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 8.

<sup>77</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 9(3).

<sup>78</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 10.

<sup>79</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 11.

<sup>80</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 11(2)(b).

<sup>81</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 12, 13.

considers the patient can be adequately treated and assessed as an outpatient, the person must be discharged.<sup>82</sup>

50. Before the second assessment period of 14 days expires, the clinician must give a final assessment either stating the patient is fit to be released or should remain compulsorily.<sup>83</sup> If the latter, the clinician must apply to the court for the making of a compulsory treatment order under part 2.
51. Pending the finding of the court, the patient shall remain liable to treatment and assessment until the end of the second assessment period (14 days), unless the judge is of the opinion that it is not practicable to determine the application within that time. In that case, the period may be extended for not more than 1 month.<sup>84</sup>

*iv) Compulsory treatment orders – key provisions*

52. A judge shall examine patient as soon as practicable on application.<sup>85</sup> As well as examining the patient, the judge shall consult with the responsible clinician and with at least one other health professional involved in the case, and may also consult with such other persons as the judge thinks fit, concerning the patient's condition.<sup>86</sup> If the judge is satisfied that the patient is fit to be released from compulsory status, the judge shall order that the patient be released from that compulsory status forthwith.<sup>87</sup>
53. The patient is entitled to be heard by the court either through a barrister or solicitor or in person.<sup>88</sup>
54. If the court considers that the patient is mentally disordered, it shall determine whether or not, having regard to all the circumstances of the case, it is necessary to make a compulsory treatment order,<sup>89</sup> which may be an inpatient order (or a community treatment order).<sup>90</sup>
55. An inpatient order requires the admission and/or continued detention of the patient in the hospital specified in the order. If, at any time during the currency of the inpatient order, the responsible clinician considers that the patient can continue to be treated adequately as an

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<sup>82</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 11(4), 13(4).

<sup>83</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 14.

<sup>84</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 15.

<sup>85</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 18.

<sup>86</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 18.

<sup>87</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 18.

<sup>88</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 20.

<sup>89</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 27.

<sup>90</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 28.

outpatient, that clinician must, by notice in writing, direct that the patient be discharged from the hospital.<sup>91</sup> Inpatients may be granted leave of absence under certain conditions.<sup>92</sup>

56. The duration of compulsory treatment order (including inpatient order) is six months, renewable by application to the court.<sup>93</sup>
57. Under s 109, any constable may take any person found wandering at large in a public place and acting in a manner that gives rise to a reasonable belief that they may be mentally disordered to a police station, hospital, surgery and arrange for an examination by a medical practitioner. Detention pending this examination must be no longer than the shorter of six hours or the time taken to make the assessment. If the medical practitioner does not consider that there are reasonable grounds for believing the person may be mentally disordered the person must be released.
58. If the practitioner believes that there are reasonable grounds, and it is desirable for the person to have an assessment examination urgently in the person's own interests or the interests of any other person, the practitioner must make an application for assessment (see summary of s 8 above). In that case, the person may continue to be detained until the assessment examination has been conducted. Detention pending an assessment examination must be no longer than the shorter of six hours or the time taken to make the assessment examination.<sup>94</sup>
59. Police also have a power to detain persons when called to the assistance of medical practitioners for the purpose of conducting an examination or administering a sedative or drug. Detention must be no longer than six hours, or the time take to make the examination, or administer the drug or sedative if that is shorter than six hours.<sup>95</sup>

#### *v) Rights of patients*

60. Part 6 of the Act enumerates numerous patient rights, including: rights to information, treatment, independent psychiatric advice, legal advice, company and seclusion.

#### *vi) Review*

61. The responsible clinician must review patients the subject of compulsory treatment order no later than 3 months after the date of the order and then at intervals of 6 months. If he or she is

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<sup>91</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 30.

<sup>92</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 31.

<sup>93</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, ss 33,34.

<sup>94</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 109.

<sup>95</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 110C.

satisfied they are fit to be released, they patient is to be discharged.<sup>96</sup> The Review Tribunal may review any patient who is subject to a compulsory treatment order by its own motion.<sup>97</sup>

### **c) Review of and challenges to detention**

#### *i) Review by a judge*

62. At any time during assessment period the patient, or certain other persons may apply to the court to have the patient's condition reviewed.<sup>98</sup> If the judge is satisfied that the patient is fit to be released from compulsory status, the judge shall order that the patient be released from that status forthwith.<sup>99</sup>

#### *ii) Tribunal review*

63. The patient, and certain other persons including any welfare guardian, the principal caregiver, the patient's usual medical practitioner (before assessment and treatment) may apply to the Review Tribunal for a review of the patients condition and any compulsory treatment order relating to them.<sup>100</sup> The Tribunal must review not later than 21 days unless extended under s 6.
64. If the Tribunal considers the patient is fit to be released, the patient must be discharged.<sup>101</sup> If not, the Tribunal must give notice to various persons including the director, director of mental health services, responsible clinician and patient, a district inspector. The notice must include a statement of the legal consequences of the tribunal decision and of the right to appeal. The district inspector may appeal to the court.<sup>102</sup> Any of the persons to whom notice is given (among others) may appeal to court under s 83.

#### *iii) High Court review*

65. Under s 84, a judge of the High Court may whenever the judge thinks fit, whether of the judge's own motion or on the application of any person, make an order:
- directing a district inspector or any one or more persons whom the judge may select in that behalf to visit and examine any person who the judge has reason to believe is being detained in a hospital as a patient and to inquire into and report on such matters relating to that person as the judge thinks fit; or

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<sup>96</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 76.

<sup>97</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 79.

<sup>98</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, ss11(7), 12(7), 12(2).

<sup>99</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 16.

<sup>100</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, ss35, 79.

<sup>101</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 83.

<sup>102</sup> Mental Health (Compulsory Assessment and Treatment) Act 1992, s 83.

- directing the responsible clinician to bring any person who is being detained as a patient in the hospital before the judge in open court or in chambers, for examination at a time to be specified in the order.

66. If the judge is satisfied that the person is detained unlawfully or fit to be discharged, the judge must order the person be discharged from hospital (unless the person is legally detained for some other reason).

*iv) False imprisonment (tort)*

67. An action for the tort of false imprisonment may lie if the detention is found to be involuntary and unlawful.<sup>103</sup> Whether the apprehension or detention of a person is unlawful turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is considered arbitrary, and therefore unlawful, if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.<sup>104</sup>

*v) Judicial review*

68. As well as reviews available under the Mental Health (Compulsory Assessment and Treatment) Act, detainees may seek judicial review of any decision made under statute pursuant to the Judiciary Amendment Act.<sup>105</sup>

*vi) Habeas corpus*

69. Given the many statutory avenues for a judicial order to release a person, a writ of habeas corpus is unlikely to be necessary. Nonetheless, the writ is still available. For details, the summary in this Country Report of the law regarding police detention in crowd control situations.

**d) Remedies for unlawful detention**

70. The remedies for false imprisonment are:

- damages;<sup>106</sup> and
- self help: which is to say that resisting such imprisonment with force by way of self-defence is lawful (though usually not advisable, given the other avenues to challenge detention).<sup>107</sup>

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<sup>103</sup> *Caie v Attorney-General of New Zealand HC Auckland CP334-SD99* [2001] NZHC 259, [80].

<sup>104</sup> *Neilsen v Attorney-General* [2001] 3 NZLR 433 at [34].

<sup>105</sup> Judicature Amendment Act 1972.

<sup>106</sup> *Caie v Attorney-General of New Zealand HC Auckland CP334-SD99* [2001] NZHC 259.

<sup>107</sup> *Caie v Attorney-General of New Zealand HC Auckland CP334-SD99* [2001] NZHC 259.



71. Under s 4 of the Judiciary Amendment Act the remedies available where review reveals an exercise of statutory power to be unlawful are flexible and include, relevantly, mandamus (an order requiring a particular action), a declaration of the unlawfulness of a particular detention or an injunction against certain detentions or kinds of detention.
72. There are remedies available for breach of provisions of the Bill of Rights Act, though the Act does not prescribe specific remedies. There is precedent for the principle that a deprivation of liberty in breach of the Bill of Rights Act entitles the detainee to compensation.<sup>108</sup> Damages may also be awarded for other factors such as:
- physical Damage;<sup>109</sup>
  - intangible Harm such as distress and injured feelings;<sup>110</sup>
  - economic loss (including both past and future earnings);<sup>111</sup>
  - loss of opportunity.<sup>112</sup>

## IV MILITARY DETENTION

### a) Preliminary remarks

73. The law relating to detention of those serving in the military is found in the Armed Forces Discipline Act 1971 ('AFD Act').<sup>113</sup> The Act provides for military offences, military justice, police and investigatory powers, and provisions relating to different types of custody.
74. This section will not deal with detention following conviction of a service offence by court martial or other tribunal, as this constitutes detention following an exercise of judicial type power.

### b) Threshold questions

75. The AFD Act 1971 contains no substantive definitions for 'custody', 'detain', or 'detention'. It appears that there is no threshold question.

### c) Decision to detain

76. An officer has a power to arrest, without warrant, a member of the armed services of an inferior rank.<sup>114</sup> An officer may arrest such a person without a warrant if he finds that person committing

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<sup>108</sup> *Manga v Attorney-General* [2002] 2 NZLR 65 and *Dunlea v Attorney-General* [2000] 3 NZLR 136.

<sup>109</sup> *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 678.

<sup>110</sup> *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 678.

<sup>111</sup> *J v Attorney-General* (1995) 2 HRNZ 311.

<sup>112</sup> *Upton v Green (No 2)* (1996) 3 HRNZ 179.

<sup>113</sup> AFD Act 1971.

<sup>114</sup> AFD Act 1971 s 88(2).

a military offence<sup>115</sup> or if there are reasonable grounds to suspect that the person is committing or has committed a military offence.<sup>116</sup>

77. Additionally, any member of the armed forces may arrest without a warrant any person outside New Zealand if he has reasonable grounds for suspecting the person has or will commit the offences of spying or seduction of a member of the armed forces from allegiance to New Zealand.<sup>117</sup>
78. Additionally, a police officer may arrest without a warrant any member of the armed services if there are reasonable grounds for suspecting the person has escaped from detention or is in breach of conditions of release from detention,<sup>118</sup> or is a deserter.<sup>119</sup> The police officer should deliver the person arrested into military custody as soon as possible.<sup>120</sup>
79. A commanding officer or a person superior to that commanding officer may issue a warrant for arrest of a person under their command, if there are reasonable grounds to suspect the person has committed a military offence.<sup>121</sup> If a warrant for arrest is issued, then any police officer may arrest the person named in the warrant.<sup>122</sup> The police officer should deliver the person arrested into military custody as soon as possible.<sup>123</sup>
80. Following arrest of a member of the armed services, they may be detained at a civil detention facility if necessary, before being transferred to a military detention facility.<sup>124</sup>
81. Within 24 hours of being arrested, the person must be informed of the offence for which they were arrested.<sup>125</sup> Within 24 hours of the person being placed in military detention, the person who placed her in military detention must report to the person in charge of the detention the offence for which she was arrested.<sup>126</sup>
82. Within 48 hours after being placed into military custody, either proceedings for a hearing about the offence must be set in motion or the person must be released, unless neither is practicable.<sup>127</sup> If, within 4 days of arrest, proceedings have not been commenced or the allegation has not been dealt with, the arrested person's commanding officer must report to the Judge Advocate General

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<sup>115</sup> Offences defined in Part 2 of the AFD Act 1971.

<sup>116</sup> AFD Act 1971 s 88(1).

<sup>117</sup> AFD Act 1971 s 90(1).

<sup>118</sup> AFD Act 1971 s 91(1) and (2).

<sup>119</sup> AFD Act 1971 s 92(1).

<sup>120</sup> AFD Act 1971 s 91(3) and 92(2).

<sup>121</sup> AFD Act 1971 s 89(1).

<sup>122</sup> AFD Act 1971 s 89(3).

<sup>123</sup> AFD Act 1971 s 89(4).

<sup>124</sup> AFD Act 1971 s 93(1).

<sup>125</sup> AFD Act 1971 s 100.

<sup>126</sup> AFD Act 1971 s 101(3).

<sup>127</sup> AFD Act 1971 s 91.

the reasons for the delay;<sup>128</sup> and for every 8 day period commencing with the charge that the person remains in custody without the allegation of an offence having been dealt with, the commanding officer must report the reasons for the delay to the Judge Advocate General.<sup>129</sup> If the Judge Advocate General receives a report about delay in dealing with an allegation of an offence against a person in custody, then the Judge Advocate General may grant bail subject to any conditions he thinks fit,<sup>130</sup> but only if he is satisfied on the balance of probabilities that it is in the interests of justice to do so.<sup>131</sup>

#### **d) Review of and challenges to detention**

83. The AFD Act 1971 makes no provision for a detainee to challenge their detention following arrest and/or following charge.

#### **e) Remedies for unlawful detention**

84. The AFD Act 1971 provides no remedies for unlawful detention. A person unlawfully detained may have a remedy in the common law tort of false imprisonment.

## **V POLICE DETENTION IN CROWD CONTROL SITUATIONS**

### **a) Background**

85. In New Zealand there is no specific provision giving police a power to use ‘kettling’ for crowd control. However, there are arguably at least two sources for a police power to kettle: common law police powers, and police riot powers.

#### *i) Common law powers*

86. New Zealand police have a common law power to prevent a breach of the peace. This power extends to detaining a person breaching the peace against their will, and on some occasions to impounding property.<sup>132</sup> Where there is some countervailing consideration to balance the impingement on liberty, such as the reasonable need for highways or roads to be usable, this will tend to give legitimacy to detention.<sup>133</sup> In some circumstances this common law police power might be used to justify kettling.

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<sup>128</sup> AFD Act 1971 s 101(4).

<sup>129</sup> AFD Act 1971 s 101(5).

<sup>130</sup> AFD Act 1971 s 101A(3).

<sup>131</sup> AFD Act 1971 s 101A(4)(c).

<sup>132</sup> *Minto v Police* [1987] 1 NZLR 375, [6]-[7]; *Minto v Police* [2013] NZHC 253, [25].

<sup>133</sup> *Minto v Police* [2013] NZHC 253, [25].

### *ii) Suppression of riot powers*

87. Police have, subject to certain conditions, the power to use necessary force to suppress a riot.<sup>134</sup> The use of a kettle might sometimes be properly seen as necessary force in the context of a riot.

### **b) Threshold questions**

88. The threshold questions that kettling raises are whether:
- the amount of time in which liberty is restricted, and
  - the degree of confinement,
89. are sufficient to amount to detention for the purposes of New Zealand habeas corpus, false imprisonment and rights law.
90. The periods of confinement likely to be involved in kettling are certainly sufficient to amount to detention. Confinement, even for a relatively short period of 2-3 hours has been considered detention for the purposes of false imprisonment.<sup>135</sup>
91. As for the degree of confinement, while close custody has generally been required in order for there to be detention for the purposes of a habeas corpus order, there are indications that restrictions on liberty that do not amount to close confinement still detention for the purposes of habeas corpus orders.<sup>136</sup> That is the effect of obiter dicta in *Zaoui v AG* (where the court appears, by adopting a statement from a textbook on habeas corpus in the Pacific, to adopt the principles in Australian and other jurisdictions regarding custody and confinement in habeas corpus actions).<sup>137</sup>

### **c) Decision to detain**

92. There are broadly applicable safeguards governing detention made under a statutory power (but not a common law power) that apply under the New Zealand Bill of Rights Act 1990. Among these, the following are key restrictions on detention:
- detention must not be arbitrary: s 22;
  - police officers must also inform those detained of the reason for the detention: s 23(1)(a);
  - those detained must be treated with respect for their dignity: 23(5).

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<sup>134</sup> Crimes Act 1961 (NZ), s 44.

<sup>135</sup> *Craig v Attorney-General* [1986] NZHC 151; *Howley v Attorney-General* (High Court Auckland. A 586/85, 16 January 1989.

<sup>136</sup> D Clark and G McCoy, *Habeas Corpus: Australia, New Zealand, the South Pacific* (Federation Press 2000), adopted in *Zaoui v Attorney-General* [2005] 1 NZLR 577, [80].

<sup>137</sup> *ibid.*

93. Whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. An arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.<sup>138</sup>
94. In addition to these safeguards, there are also specific safeguards governing the exercise of specific police powers to detain. An officer detaining persons (in a kettle) using the common law power to keep the peace must:
- apprehend an immediate or imminent breach of the peace; and
  - the steps taken to prevent a breach of the peace (i.e. kettling) must be reasonably necessary.<sup>139</sup>
95. Police officers using force to suppress a riot under s 44 of the Crimes Act must have:
- a good faith belief;
  - on reasonable and probable grounds;
  - that the amount of force used is necessary to suppress the riot; and
  - is not disproportionate.

#### **d) Review of and challenges to detention**

##### *i) Habeas corpus proceedings*

96. The quintessential procedure for challenging detention is to seek a habeas corpus order, which provides for release from unlawful detention. This common law right is enshrined in s 23(1)(c) of the Bill of Rights Act 1990 and the Habeas Corpus Act 2001.
97. Section 23(1)(c) of the Bill of Rights Act 1990 relevantly provides that everyone who is arrested or is detained under any enactment shall have the right to have the validity of the arrest or detention determined without delay by way of habeas corpus and to be released if the arrest or detention is not lawful.
98. The Habeas Corpus Act 2001 stipulates procedural requirements for dealing with habeas corpus applications. Among these are:
- a requirement that any person has standing to seek the writ,<sup>140</sup> which means that persons other than the detainee may apply for the writ on the detainee's behalf;
  - a rule that any requirement that hearing and judgment in habeas corpus applications and appeal proceedings take priority over other matters before the court,<sup>141</sup> and

<sup>138</sup> *Zaoui v Attorney-General* [2005] 1 NZLR 577, [80]

<sup>139</sup> *Lavin v Albert* [1982] AC 546, 549, approved in *Minto v Police* [1987] 1 NZLR 375, [6]-[7]; *Minto v Police* [2013] NZHC 253.

<sup>140</sup> Habeas Corpus Act 2001, s 7.

- a rule that the court may make interim orders for release from detention, and impose appropriate conditions, pending final determination of an application.<sup>142</sup>

99. In habeas corpus proceedings, the onus of establishing that a detention is lawful lies throughout on the respondent. If the respondent does not satisfy that onus, the applicant is entitled to an order for release.<sup>143</sup>

*ii) False imprisonment (tort)*

100. An action for the tort of false imprisonment may lie if the detention is found to be unlawful and without the consent of the detainee.<sup>144</sup> Whether an arrest or detention is unlawful turns on the nature and extent of any departure from the substantive and procedural standards involved. As noted above, an arrest or detention is considered arbitrary, and therefore unlawful, if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures.<sup>145</sup> In the case of kettling these would be the principles and procedures relevant to the exercise of common law police powers to keep the peace, and statutory riot powers.

*iii) Judicial review*

101. Where the power to kettle is based on a statutory power, as in the case of police riot powers, detainees may seek judicial review of decisions to kettle under the Judiciary Amendment Act.<sup>146</sup> Where the power exercised is not statutory, judicial review is still available at common law.<sup>147</sup>

*iv) Scrutiny and complaint*

102. A non-litigious option for detainee's litigation is to complain to the Independent Police Conduct Authority or the police force itself. This may prompt internal reviews and scrutiny.<sup>148</sup>

**d) Remedies for unlawful detention**

103. The remedies for false imprisonment are:

- damages;<sup>149</sup> and

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<sup>141</sup> Habeas Corpus Act 2001, ss 9 and 17.

<sup>142</sup> Habeas Corpus Act 2001, ss 10.

<sup>143</sup> *Zaoui v Attorney-General* [2005] 1 NZLR 577, [79]

<sup>144</sup> *Caie v Attorney-General of New Zealand HC Auckland CP334-SD99* [2001] NZHC 259, [80].

<sup>145</sup> *Neilsen v Attorney-General* [2001] 3 NZLR 433 at [34].

<sup>146</sup> Judicature Amendment Act 1972

<sup>147</sup> *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385, at 388 (PC).

<sup>148</sup> See 'Praise and complain' available <http://www.police.govt.nz/contact-us/praise-and-complain> (accessed 17 February 2014)

<sup>149</sup> *Caie v Attorney-General of New Zealand HC Auckland CP334-SD99* [2001] NZHC 259.

- self-help: which is to say that resisting such imprisonment with force by way of self-defence is lawful (though not advisable when the detainer is a police officer).<sup>150</sup>
104. Under s 4 of the Judiciary Amendment Act the remedies available where review reveals an action to be unlawful are flexible and include, relevantly, mandamus (an order requiring a particular action), a declaration of the unlawfulness of kettles, or injunction against keeping a kettle up. The same prerogative writs or orders are available at common law.
105. There are remedies available for breach of provisions of the Bill of Rights Act, though the Act does not prescribe specific remedies. There is precedent for the principle that a deprivation of liberty in breach of the Bill of Rights Act entitles the detainee to compensation.<sup>151</sup> Damages may also be awarded for other factors such as:
- physical damage;<sup>152</sup>
  - intangible harm such as distress and injured feelings;<sup>153</sup>
  - economic loss (including both past and future earnings);<sup>154</sup>
  - loss of opportunity.<sup>155</sup>

## VI PREVENTIVE DETENTION

### a) Overview of the legal framework

106. New Zealand's Sentencing Act 2009 provides for a 'sentence of preventive detention', the purpose of which is to 'protect the community from those who pose a significant and ongoing risk to the safety of its members'.<sup>156</sup> Unlike in Australia, a preventive detention sentence can only be imposed at the time the sentence is ordered, so a person cannot be held in detention once their finite sentence has expired.<sup>157</sup>
107. A preventive detention sentence will only be imposed if a person over the age of 18 has committed a 'qualifying sexual or violent offence', which are defined in the Crimes Act 1961 (NZ). In the case of a sexual crime, it must be one which carries a minimum sentence of 7 years' imprisonment.<sup>158</sup> The court must also be satisfied that the offender is likely to re-offend if

<sup>150</sup> *Caie v Attorney-General of New Zealand HC Auckland CP334-SD99* [2001] NZHC 259.

<sup>151</sup> *Manga v Attorney-General* [2002] 2 NZLR 65 and *Dunlea v Attorney-General* [2000] 3 NZLR 136.

<sup>152</sup> *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 678.

<sup>153</sup> *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 678

<sup>154</sup> *J v Attorney-General* (1995) 2 HRNZ 311

<sup>155</sup> *Upton v Green (No 2)* (1996) 3 HRNZ 179

<sup>156</sup> Sentencing Act 2002, s 87.

<sup>157</sup> New Zealand Ministry of justice, 'Sentencing 'Dangerous' Offenders' (undated) <<http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/7.-sentencing-dangerous-offenders#7.2>> accessed 30 December 2013.

<sup>158</sup> Sentencing Act 2002, s 87(5).

released.<sup>159</sup> It is mandatory for the court to first consider the offender’s criminal history, information relating to likelihood of future crime, and any efforts by the offender to address the causes of their crime.<sup>160</sup> Notably, it is specifically stated in the Act that ‘a lengthy determinate sentence is preferable if this provides adequate protection for society’.<sup>161</sup>

108. When a court orders preventive detention, it must include a minimum period of imprisonment (of at least 5 years) without parole.<sup>162</sup>

#### **b) Threshold questions**

109. The very nature of a preventive detention sentence is to keep a person imprisoned, so this question is uncontroversial.

#### **c) Decision to detain**

110. Under the provisions in the Sentencing Act, it is only the High Court that has jurisdiction to impose a preventive detention sentence, either on its own motion or on the application of the prosecutor.<sup>163</sup> If a District Court Judge believes the case is appropriate for a preventive detention sentence, they must transfer the case to the High Court for sentencing.<sup>164</sup>
111. Certain procedural safeguards are set out in the Act. The offender must be notified that a sentence of preventive detention will be considered by the court, and must also be given ‘sufficient time’ to prepare submissions in relation to such a sentence.<sup>165</sup> The court must also consider reports from ‘at least 2 appropriate health assessors’ in relation to the likelihood of re-offending.<sup>166</sup> These reports are wide in scope, and can include any statement made by the offender or anyone else.<sup>167</sup>
112. Any preventive detention sentence order must also align with New Zealand’s Bill of Rights Act 1990, which has a section enforcing the principles of natural justice,<sup>168</sup> although the rights enumerated in this Act are not absolute.<sup>169</sup>

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<sup>159</sup> Sentencing Act 2002, s 87(2).

<sup>160</sup> Sentencing Act 2002, s 87(4). In *R v Brown* [2006] NZHC 725 at [79], the court stated that the offender ‘narrowly avoided preventive detention’ because they showed a ‘glimmer of an indication’ that they were changing their behaviour and so-operating with counselling programmes.

<sup>161</sup> Sentencing Act 2002, s 87(4). In the following cases, the court has replaced preventive detention sentences with lengthy determinate sentences: *R v Pratt* [1978] BCL, 792; and *R v K* (1990) 6 CRNZ 210, 212.

<sup>162</sup> Sentencing Act 2002, s 89, Parole Act 2002, s 84.

<sup>163</sup> Sentencing Act 2002, s 87(3).

<sup>164</sup> Sentencing Act 2002, s 90.

<sup>165</sup> Sentencing Act 2002, s 88(1)(a).

<sup>166</sup> Sentencing Act 2002, s 88(1)(b).

<sup>167</sup> Sentencing Act 2002, s 88(3).

<sup>168</sup> Bill of Rights Act 1990, s 27.

<sup>169</sup> Bill of Rights Act 1990, s 5.



113. The New Zealand Law Commission and other commentators have argued that there are currently insufficient procedural safeguards built into the legislation for preventive detention orders.<sup>170</sup> The Commission has developed its own guidelines that should be taken into account by judges considering preventive detention sentences.<sup>171</sup> One suggestion has been that judges should need to explicitly show how each criterion has been considered and provide reasons for whether the criterion has been met.<sup>172</sup> Another suggestion has been automatic referral to the Court of Appeal for sentencing review.<sup>173</sup>
114. Issues relating to New Zealand's preventive detention regime were taken to the UN Human Rights Committee in *Rameka v New Zealand*, Communication 1090/2002, in which it was argued that the laws contravened the ICCPR. Four arguments were made, relating to i) arbitrary detention, ii) presumption of innocence, iii) the absence of sufficient periodic review and iv) cruel, unusual, inhuman or degrading punishment.<sup>174</sup>
115. Whilst most of the complaint was set aside, the Committee did partially agree with the argument that the New Zealand law fails to give adequate right to review under article 9(4) of the ICCPR, because of the mandatory minimum non-parole period.<sup>175</sup> The prisoners argued that their cases were not sufficiently regularly reviewed, and relied on case law from the ECtHR.<sup>176</sup>
116. The Committee held that there was a period of two and a half years during which one of the complainants was being preventively detained and the Parole Board was not carrying out reviews of their situation, which amounted to a breach of article 9(4). The Committee decided that New Zealand must provide the offender in question with the possibility of challenging their preventive detention and must also prevent any such violations happening again in the future.<sup>177</sup> To achieve this, the Committee decided that any minimum non-parole period must be accompanied by a finite sentence of imprisonment that is no longer than the non-parole period.<sup>178</sup> At the time of the Communication, New Zealand law had a minimum non-parole period of 10 years, however this has now been changed such that it aligns with the minimum sentence imposed,<sup>179</sup> so another similar violation of the ICCPR should be unlikely.

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<sup>170</sup> New Zealand Ministry of justice, 'Sentencing 'Dangerous' Offenders' (undated) <<http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/7.-sentencing-dangerous-offenders#7.2>> accessed 30 December 2013.

<sup>171</sup> *ibid.*

<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.*

<sup>174</sup> Alex Conte, 'Human rights, non-parole periods and preventive detention' [2004] NZLJ 202.

<sup>175</sup> *ibid.*

<sup>176</sup> *Van Droogen-boeck v Belgium* (1982) 4 EHRR 443; *Weeks v United Kingdom* (1988) 10 EHRR 293.

<sup>177</sup> Alex Conte, 'Human rights, non-parole periods and preventive detention' [2004] NZLJ 202.

<sup>178</sup> *ibid.*

<sup>179</sup> Parole Act 2002, s 84.

#### **d) Review of and challenges to detention**

117. Preventive Sentences are subject to the standard parole laws under the New Zealand Parole Act 2002, meaning that the Parole Board conducts mandatory annual reviews of the sentences of people in prison.<sup>180</sup> The Parole Board may also review an offender at any other time, on its own motion or at the request of an offender.<sup>181</sup> Otherwise, standard judicial appeal processes apply.<sup>182</sup>
118. A detainee may also make a complaint to the UN Human Rights Committee if they believe their preventive detention is contrary to the ICCPR, as was the case in *Rameka v New Zealand* (above).

#### **e) Remedies for unlawful detention**

119. Habeas corpus is available as a possible remedy for unlawful preventive detention.<sup>183</sup> Preventive detention sentences may also be quashed and replaced with determinate sentences.<sup>184</sup>

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<sup>180</sup> Parole Act 2002, s 21.

<sup>181</sup> Parole Act 2002, s 26.

<sup>182</sup> As utilised, for example, in the following cases: *R v Pratt* [1978] BCL, 792; *R v K* (1990) 6 CRNZ 210, 212.

<sup>183</sup> *Palmer v Superintendent of Auckland Prison* [2007] NZAR 62.

<sup>184</sup> *R v Pratt* [1978] BCL, 792; *R v K* (1990) 6 CRNZ 210, 212.

# Country Report for Russia

1. This Country Report is based on primary research and drafting by volunteers who were able to access, translate and summarise the underlying Russian legal materials. It is not, and does not purport to be, absolutely comprehensive. All translations provided are unofficial, and we cannot exclude the possibility that there are additional relevant materials which are either publicly available but are not discussed, or which are not available to the public.

## I BACKGROUND

2. The Russian Constitution<sup>1</sup> sets a number of fundamental principles guaranteeing the right to liberty and security of person<sup>2</sup>, judicial protection<sup>3</sup>, right to qualified legal assistance<sup>4</sup>, right to a state compensation for damages caused by unlawful actions (inaction) of bodies of state authority and their officials<sup>5</sup>.

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<sup>1</sup> The Constitution of the Russian Federation (Adopted at National Voting on December 12, 1993). The Constitution came into force on the day of its official publication. The text of the Constitution was published in Rossiiskaya Gazeta newspaper as of December 25, 1993. An English translation is available at <http://www.constitution.ru/en/10003000-01.htm> (accessed 17 February 2014)

<sup>2</sup> *ibid*, art 22:  
Article 22

1. Everyone shall have the right to freedom and personal immunity.
2. Arrest, detention and remanding in custody shall be allowed only by court decision. Without the court's decision a person may be detained for a term more than 48 hours

<sup>3</sup> *ibid*, art. 46:  
Article 46

1. Everyone shall be guaranteed judicial protection of his rights and freedoms.
2. Decisions and actions (or inaction) of bodies of state authority and local self-government, public associations and officials may be appealed against in court.
3. Everyone shall have the right to appeal, according to international treaties of the Russian Federation, to international bodies for the protection of human rights and freedoms, if all the existing internal state means of legal protection have been exhausted

<sup>4</sup> *ibid*, art 48:  
Article 48

1. Everyone shall be guaranteed the right to qualified legal assistance. In cases envisaged by law the legal assistance shall be free.
2. Any person detained, taken into custody, accused of committing a crime shall have the right to receive assistance of a lawyer (counsel for the defence) from the moment of detention, confinement in custody or facing charges accordingly

<sup>5</sup> *ibid*, art 53:  
Article 53

- Everyone shall have the right for a state compensation for damages caused by unlawful actions (inaction) of bodies of state authority and their officials

3. Russian law differentiates between administrative procedure (governing administrative offenses) and criminal law procedure. Consequently, there are two types of detention: ‘administrative detention’ and ‘detention of a person suspected of committing a crime’. Similarly, administrative arrest under the Russian *Code of Administrative Offences*<sup>6</sup> is different from the imprisonment (taking into custody) under the *Code of Criminal Procedure*.
4. Another line of demarcation should be drawn between detention and imprisonment as measures of ‘legal coercion’ at the prejudicial stage, and arrest as a punishment based on the judicial decision - conviction.
5. One of the most disputable issues in practice is the ‘factual detention’ in the circumstances when no criminal proceedings have been started. For example, in the case when a person is caught red-handed when committing the crime, or immediately after committing it. Presumably, the proceedings should be initiated within the shortest term possible, however, it leaves the question of the procedural safeguards left to the detainee as far as he has no official status of a suspect. There has been recent international attention drawn to this issue in light of the ‘Bolotnaya trial’, in which twelve activists were detained on the eve of President Putin’s inauguration.<sup>7</sup> It is not clear precisely the grounds upon which the decision to detain is based, and what legal regime applies to these circumstances. This report considers a variety of legal regimes (including ‘measures of restriction’ as a preventive measure, discussed below) which may be relevant to the question, but the legal framework for this type of case is very unclear.

## II ADMINISTRATIVE DETENTION

6. In Russia, there is a regime governing detention for what are described as ‘administrative offences’. An ‘administrative offence’ is defined as a wrongful action of a natural person or legal entity which is administratively punishable under the *Code of Administrative Offences*.<sup>8</sup> The nature of the offences within this Code include offences encroaching upon citizens’ rights,<sup>9</sup> endangering the health and sanitary-and epidemiological wellbeing of the population,<sup>10</sup> offences in the area of property protection,<sup>11</sup> offences concerning taxes,<sup>12</sup> and offences encroaching upon State power institutions.<sup>13</sup>

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<sup>6</sup> Discussed in Section II of this Report below.

<sup>7</sup> ‘Russian activists in court as ‘Bolotnaya trial’ begins’ available <<http://www.theguardian.com/world/2013/jun/06/russia-activists-bolotnaya-trial-begins>> accessed 22 February 2014. See also <http://www.newsru.com/russia/06may2012/marsh.html>.

<sup>8</sup> Code of Administrative Offences of The Russian Federation, NO. 195-FZ of December 30, 2001, 2.1(1).

<sup>9</sup> Code of Administrative Offences of The Russian Federation, Chapter 5.

<sup>10</sup> Code of Administrative Offences of The Russian Federation, Chapter 6.

<sup>11</sup> Code of Administrative Offences of The Russian Federation, Chapter 7.

7. Administrative detention for the intelligence gathering is most likely governed by the internal instructions of the Ministry of Internal Affairs. There was no information available on this, possibly because there is no public access.

**a) Threshold questions**

8. There are two types of detention contemplated by the *Code of Administrative Offences* – ‘administrative detention’ and ‘administrative arrest’.

*i) Administrative detention*

9. According to art 27.3(1) of the *Code of Administrative Offences*, ‘administrative detention’ is a short-term restraint on the freedom of a natural person, and may be enforced in exceptional instances where it is necessary for securing correct and timely consideration of a case concerning an administrative offence.
10. Detainees are required to be detained at ‘specially assigned premises’ of bodies authorized to detain (see (b) below) and such premises must ‘exclude the possibility of unauthorized exit therefrom’.<sup>14</sup> There thus does not appear to be any difficulty characterizing this as detention.

*ii) Administrative arrest*

11. In contrast, ‘Administrative arrest’ is a form of penalty for committing an administrative offence’.<sup>15</sup> According to art 3.9 of the *Code of Administrative Offences*, ‘administrative arrest’ is consists of keeping an offender isolated from society and shall be established for the term up to fifteen days, and up to 30 days for violating the demands of a state of emergency or of the regime of conducting an anti-terrorist operation. So, detainees caught in the counter-terrorism operations can be held for up to 30 days.
12. An administrative arrest shall only be established and imposed in exceptional cases for individual types of administrative offences, and it may not be enforced in respect of pregnant women, or women having children of fourteen years or less, or in respect of persons who have not attained the age of eighteen years, or certain groups of disabled persons.
13. Notwithstanding it is described as ‘arrest’ and not ‘detention’, there does not appear any issue with characterizing ‘administrative arrest’ as ‘detention’.

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<sup>12</sup> Code of Administrative Offences of The Russian Federation, Chapter 15.

<sup>13</sup> Code of Administrative Offences of The Russian Federation, Chapter 17.

<sup>14</sup> Code of Administrative Offences of The Russian Federation, art 27.6

<sup>15</sup> Code of Administrative Offences of The Russian Federation, arts 3.1 and 3.2.

## **b) Decision to detain**

### *i) Administrative detention*

14. As noted earlier, 'administrative detention' is imposed where it is necessary to secure the correct and timely consideration of the case.
15. Administrative detention can be effected by a number of governmental officials, an authorised list of which must be drawn up by an appropriate federal executive body.<sup>16</sup> The persons entitled to effect an administration include: the police, a senior official of a departmental security guard agency; military servicemen of internal affairs troops and border guard agencies; and members of the transport inspectorate.<sup>17</sup>
16. Under the *Code of Administrative Offences*, a detained persons' relatives, place of employment and defence counsel shall only be notified of their location upon the detained persons' request and within the shortest term possible.<sup>18</sup> However for minors, this notification must occur 'without fail'.<sup>19</sup> Additionally, the detainee must have their rights and duties explained to him.<sup>20</sup>
17. Under the code, the general rule is that the term of administrative detention cannot exceed three hours,<sup>21</sup> however an exception to this is where a person is on trial in connection with an administrative offence punishable by administrative detention as a penalty, the person may be subjected to an administrative detention for a term of up to 48 hours<sup>22</sup>.
18. According to the *Decision of the Constitutional Court of the Russian Federation 16.06.2009 N 9-P*, an administrative detention for a term of 48 hours at most is permitted if there are sufficient grounds to consider it necessary and proportionate for securing proceedings in a case concerning an administrative offence.
19. With respect to the administrative detention, there are limited procedural safeguards governing the decision to detain by the government official. However, under art 27.4 of the Code, there must be a record drawn up of an administrative detention, specifying the date and place of drawing it up, the office, family name and initials of the person who has drawn up the record, as well as information about the detainee, about the time, place of the detention and the reasons for it. This must be signed by both the official and the detainee (and it must be noted if the detainee refuses to sign), and shall be provided to the detainee upon their request.<sup>23</sup>

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<sup>16</sup> Code of Administrative Offences of The Russian Federation, art 27.3(2).

<sup>17</sup> Code of Administrative Offences of The Russian Federation, art 27.3(1).

<sup>18</sup> 'Shortest term possible' does not appear to be defined.

<sup>19</sup> Code of Administrative Offences of The Russian Federation, art 27.3(4).

<sup>20</sup> Code of Administrative Offences of The Russian Federation, art 27.3(5).

<sup>21</sup> Code of Administrative Offences of The Russian Federation, art 27.5(1).

<sup>22</sup> Code of Administrative Offences of The Russian Federation, art 27.5(3).

<sup>23</sup> Code of Administrative Offences of The Russian Federation, art 27.4.

### *ii) Administrative arrest*

20. As noted earlier, ‘administrative arrest’ is a punitive measure reserved for exceptional circumstances. According to the *Code of Administrative Offences*, administrative arrest shall only be imposed by a judge.<sup>24</sup>
21. The length of administrative arrest is longer than administrative detention. The general term is up to 15 days, but may be up to 30 days for violating the demands of a state of emergency or of the regime of conducting an anti-terrorist operation. The term of any administrative detention shall be included into the term of the administrative arrest<sup>25</sup>.
22. There are no procedural safeguards set out in the Code governing the decision to detain, although there is a general proviso under the ‘Aims of an Administrative Penalty’ that such administrative penalties shall not be ‘aimed at the abasement’ of human dignity of natural persons, or inflict physical suffering, or damage the business reputation of a legal entity.<sup>26</sup>

### **c) Review of and challenges to detention**

#### *i) Administrative detention*

23. Pursuant to art 30.1 of the Code of Administrative Offences, a person subject to a decision issued by an official has a right of appeal to a superior body, superior official or district court.

#### *ii) Administrative arrest*

24. As noted earlier, ‘administrative arrest’ is one of the penalties available for committing an administrative offence. Where a decision is made in a case concerning an administrative offence that was rendered by a judge (such as administrative arrest), the person may appeal to a superior court.<sup>27</sup> Appeals against decisions to impose a penalty of administrative arrest must be submitted to the superior court on the day of receipt of the appeal,<sup>28</sup> and must be subject to consideration within 24 hours.<sup>29</sup> When a decision is made, it must be brought to the attention of the official required to carry out the decision and to the alleged victim on the day of rendering it.<sup>30</sup>

### **d) Compensation for unlawful detention**

25. As noted by the ECtHR in *Makhmudov v Russia*, the Russian Civil Code provides for strict liability for unlawful detention, but this is restricted to certain forms of deprivation of liberty, including

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<sup>24</sup> Code of Administrative Offences of The Russian Federation, art 3.9(1).

<sup>25</sup> Code of Administrative Offences of The Russian Federation, art 3.9

<sup>26</sup> Code of Administrative Offences of The Russian Federation, art 3.1.

<sup>27</sup> Code of Administrative Offences of The Russian Federation, art 30.1

<sup>28</sup> Code of Administrative Offences of The Russian Federation, art 30.2(2)

<sup>29</sup> Code of Administrative Offences of The Russian Federation, art 30.2(5)

<sup>30</sup> Code of Administrative Offences of The Russian Federation, art 30.8(3)

deprivations in criminal proceedings and administrative arrest, but excluding administrative detention.<sup>31</sup> In order to obtain an award of compensation for unlawful administrative detention, a claimant must prove State officials were at fault.<sup>32</sup>

26. The ‘administrative detention’ provisions were considered by the ECtHR in *Makbمودov v Russia*.<sup>33</sup> In that case, the applicant had been detained for 21 hours and later charged with disobeying lawful police orders and organising an unauthorised assembly. A local judge ordered their release, and later concluded there was insufficient material for finding the applicant guilty of an administrative offence, and proceedings were later discontinued. The applicant unsuccessfully brought proceedings in local courts, and subsequently brought proceedings before the ECtHR alleging a violation of Art 5. The government argued that the period of administrative detention in the case (21 hours) was not in violation of Art 5(1) of the Convention, as the offence for which the applicant had been charged (disobedience of a lawful police order) allowed for up to 48 hours detention. The Court found a violation of Art 5(1)(c) of the Convention, noting that it could not ‘discern any facts or information which could satisfy an objective observer that the applicant might have committed the offence of disobedience which was invoked as the basis for their arrest’,<sup>34</sup> so their detention was not based on any reasonable suspicion and was therefore arbitrary.

### III IMMIGRATION DETENTION

27. The detention procedure for immigration detention is not distinct from ‘administrative detention’ discussed above. There is, however, an ‘administrative deportation procedure’ set out in art 3.10 of the Code of Administrative Offences. That allows for deportation from Russia, as imposed by a judge. In order to perform the penalty, a judge may subject persons to detention in special institutions intended for foreign citizens and stateless persons.<sup>35</sup>

### IV DETENTION OF PERSONS WITH A MENTAL ILLNESS

28. According to article 14 (7), (8) of the Federal law on Police, the Police is entitled to detain:

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<sup>31</sup> *Makbمودov v Russia*, App. No. 35082/04, 26 July 2007, [47]-[48], [104]; See also Civil Code of the Russian Federation, art 1070. It should be noted that this case uses the language of ‘administrative arrest’ and ‘administrative detention’ differently to this report, occasionally interchangeably. We have maintained our distinction in light of the two different regimes expressed in the current version of the Russian Code of Criminal Procedure.

<sup>32</sup> *Makbمودov v Russia*, App. No. 35082/04, 26 July 2007, [104].

<sup>33</sup> *Makbمودov v Russia*, App. No. 35082/04, 26 July 2007.

<sup>34</sup> *Makbمودov v Russia*, App. No. 35082/04, 26 July 2007, [85].

<sup>35</sup> Code of Administrative Offences, art 3.10(5).



- persons avoiding execution of compulsory medical measures or coercive educational measures assigned to them by the court - before handing them to the institutions to enforce such measures;
- persons avoiding proceeding to the specialized medical institutions to perform the compulsory medical measures assigned by the court - on the grounds, in the manner and for the period provided for by federal law<sup>36</sup>.

29. There was no information available as to whether there were any safeguards governing this decision to detain, or whether there was any right of challenge or entitlement to damages for wrongful detention.

## **V MILITARY DETENTION**

30. Military detention appears to be governed by the general rules of administrative detention. The distinction lies in the maximum term of detention. Under the *Federal Constitutional Law on Military Situation*, in a case of aggression or the threat of aggression from a foreign State, the President may declare martial law, in which case the military may detain citizens 'if necessary' for the term up to 30 days.

## **VI POLICE DETENTION**

### **a) Threshold questions**

31. In Russia, there is a distinction between 'detention of a suspect' and being 'taken into custody (imprisonment)'.  
 32. Detention of the suspect is a measure of the procedural coercion, applied by the body of inquiry, by the inquirer, the investigator for a term of not over 48 hours as from the moment of the actual detention of the person on the suspicion of having committed a crime<sup>37</sup>.

### **b) Decision to detain**

#### *i) Grounds for detention*

33. Article 91 of the *Code of Criminal Procedure* sets the grounds for the Detention of the Suspect.  
 34. The detention can be permitted on several grounds, including when the person is caught committing the crime or immediately thereafter, where victims or witnesses identify the person detained as the perpetrator, or when traces of the crime are found on the person to be detained..<sup>38</sup>  
 35. Other grounds for detention of suspects are included under art 91(2), which translates as:

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<sup>36</sup> Federal Law on the Police, NO 3-FZ of February 7, 2011

<sup>37</sup> Code of Criminal Procedure, NO 174-FZ of December 18, 2001, art 5.

<sup>38</sup> Code of Criminal Procedure, art 91(1)

If there exist other data, providing grounds for suspecting the person of the perpetration of the crime, he may be detained if he has made an attempt to flee, or if he does not have a permanent place of residence, or if his person has not been identified, or if the investigator with the consent of the chief of and investigatory agency or the inquirer with the consent of the prosecutor, has directed a petition to the court on selecting with respect to the said person a measure of restriction in the form of taking into custody.

36. The decision to detain is made by the body of inquiry (inquest), the inquirer or the investigator (professional consideration).

*ii) Procedure*

37. The procedure for the detention of the suspect is regulated by article 92 of the Code of Criminal Procedure. Under that article, after the suspect is brought to the body of inquiry or to the investigator, a custody report must be compiled within a term of not over three hours, in which shall be made a note that the rights of the suspect have been explained to the him.<sup>39</sup> The rights of a suspect are set out in art 46 of the Code of Criminal Procedure, and include a right to counsel, and the right to lodge complaints against the actions (or lack or action) and decisions of the court, of the prosecutor, of the investigator or of the inquirer.
38. The body of inquiry, the inquirer or the investigator must report to the public prosecutor about the detention in writing within twelve hours from the moment of detaining the suspect.<sup>40</sup>
39. Under article 92(4), the suspect shall be interrogated within 24 hours of being detained and subject to the rules and protocols governing interrogation in arts 189 and 190 of the Code of Criminal Procedure. Pursuant to art 92(4), before the interrogation starts the suspect at their request shall be provided with an opportunity to meet their defence counsel in private and confidentially. Where it is necessary to commit procedural actions with the participation of the suspect, the duration of a meeting exceeding two hours may be limited by the inquirer, investigator with obligatory preliminary notification of the suspect and their defence counsel on it. In any case the duration of the meeting may not be less than 2 hours. The suspect may be subjected to a personal search in accordance with the procedure, established by law.
40. Under art 94, a suspect must be released by the decision of the inquirer or of the investigator, if:
- 1) the suspicion of his committing a crime has not been confirmed;
  - 2) there are no grounds to apply towards him a measure of restriction in the form of taking into custody;
  - 3) the detention was made with a violation of the demands setting the grounds for the detention.

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<sup>39</sup> Code of Criminal Procedure, art 92(1).

<sup>40</sup> Code of Criminal Procedure, art 92(3).

41. After an expiry of 48 hours from the moment of detention, the suspect shall be released, unless with respect to him is selected a ‘measure of restriction’<sup>41</sup> in the form of taking into custody or the court has extended the term of detention.

*iii) Notification*

42. The inquirer or the investigator shall be obliged, not later than in twelve hours from the moment of detaining the suspect, to notify one of his close relatives, and if there are no such relatives – the other relations, or shall provide an opportunity for making such notification to the suspect himself.<sup>42</sup> In case of the detention of the suspect who is a serviceman, the command of the military unit shall be informed and in case of detention of a worker of a body of internal affairs – the chief of the body at which such worker is employed.<sup>43</sup> If the suspect is a citizen or a subject of another state, the Embassy or the Consulate of this state shall be notified within the term, pointed out in the first part of the present Article.<sup>44</sup>
43. Under art 96(4), if in the interests of the investigation it is necessary to keep the fact of the detention in secret, the notification with the public prosecutor's consent may be withheld, with the exception of the cases when the suspect is a minor.

**c) Review of and challenges to detention**

44. Under art 46 of the Code of Criminal Procedure, one of the rights of a suspect is to lodge complaints against the actions (the lack of action) and decisions of a court, of the prosecutor, of the investigator or of the inquirer.<sup>45</sup>
45. Complaints are dealt with under Section V of the Code of Criminal Procedure. Article 123 gives a right of appeal against decisions of bodies of inquiry, the inquirer, investigators, the head of the investigatory body, the public prosecutor and of the court. In particular, a complaint may be lodged with a public prosecutor or head of an investigatory agency in the event of failure to observe a reasonable time of criminal court proceedings in the course of pre-trial proceedings.<sup>46</sup>
46. Where the complaint is to a prosecutor or investigatory agency, such complaints must be considered in the course of three days from the day of its receipt, although in exceptional circumstances (such as the need to obtain additional materials) this can be extended to up to 10 days.<sup>47</sup> One the result of the complaint, the prosecutor, chief of an investigatory agency shall pass

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<sup>41</sup> See ‘Preventive Detention’ in this Country Report, below.

<sup>42</sup> Code of Criminal Procedure, art 96(1).

<sup>43</sup> Code of Criminal Procedure, art 96(2).

<sup>44</sup> Code of Criminal Procedure, art 96(3).

<sup>45</sup> Code of Criminal Procedure art 46(10)

<sup>46</sup> Code of Criminal Procedure art 123(2).

<sup>47</sup> Code of Criminal Procedure, art 124(1).

a resolution on complete or partial satisfaction of complaint, or on refusal to satisfy it.<sup>48</sup> If the complaint was filed because of failure to observe a reasonable time, the resolution must identify procedural actions made to speed up the cases.<sup>49</sup> The applicant must be informed immediately of the outcome of the complaint.<sup>50</sup>

47. Participants in criminal proceedings also have a right of appeal to a district court where decisions and actions (or omissions to act) made by an inquirer, investigator, head of investigatory agency and prosecutor inflict damage upon the participant's constitutional rights and freedoms with their access to administration of justice.<sup>51</sup> A judge must check the legality and substantiation of the actions within five days of receipt of the complaint, at a court session with the participation of the applicant and their counsel.<sup>52</sup>
48. The Code of Criminal Procedure sets out the procedures which must be followed at the court session. In particular, the applicant is given an opportunity to set out their grounds of complaint, after which others are given the chance to respond.<sup>53</sup> Upon considering the complaint, a judge must either determine the claim has not been satisfied, or recognise the action or decision of the official to be illegal or unsubstantiated, and decide on 'liability to eliminate the committed violation'.<sup>54</sup>

#### **d) Compensation for unlawful detention**

49. The right for compensation for the unlawful actions of the governmental officials can be claimed through civil proceedings under articles 1069 and 15 of the *Civil Code*.

### **VII PREVENTIVE DETENTION**

50. Article 97 of the Code of Criminal Procedures allows for 'measures of restriction' as a preventive measure, if there are sufficient grounds to consider that a defendant would flee investigation or trial, or would continue criminal activity, or could threaten a witness or obstruct proceedings.<sup>55</sup>

#### **a) Threshold questions**

51. Measures of restriction that may be applied include being taken into custody.<sup>56</sup> In such circumstances, there does not appear to be a threshold question of whether such measures constitute detention.

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<sup>48</sup> Code of Criminal Procedure, art 124(2).

<sup>49</sup> Code of Criminal Procedure, art 124(2.1).

<sup>50</sup> Code of Criminal Procedure, art 124(3).

<sup>51</sup> Code of Criminal Procedure, art 125(1).

<sup>52</sup> Code of Criminal Procedure, art 125(3).

<sup>53</sup> Code of Criminal Procedure, art 125(4).

<sup>54</sup> Code of Criminal Procedure, art 125(5).

<sup>55</sup> *Malofeyeva v Russia* (2013) Application No. 36673/04.

## **b) Decision to detain**

52. Under art 99 of the Code of Criminal Procedure, in determining whether a measure of restriction should be imposed, account shall be taken of the degree of gravity of the crime, information on the suspect's personality, their age, condition of health, marital status, occupation and other circumstances. The measures of restriction should only be taken in 'exceptional circumstances', and the charge must be brought against the suspect no later than 10 days from the moment of application of the measure of restriction, or if the person was first detained and taken into custody, within the same term as from the moment of detention.<sup>57</sup> Thus, a person may be detained for the period while waiting for the charge to be brought.
53. The decision to take into custody must be applied through a court.<sup>58</sup> It can only be taken towards suspects or those accused of committing crimes for which the criminal court envisages the punishment in the form of deprivation of freedom for a term of over two years, and only if it is impossible to apply a different, milder, measure of restriction.<sup>59</sup> The following circumstances must also be considered:
- (a) The suspect or the accused has no permanent place of residence on the territory of the Russian Federation;
  - (b) His person is not identified;
  - (c) He has violated an earlier selected measure of restriction;
  - (d) He has fled from the bodies of the preliminary investigation or from the court.<sup>60</sup>
54. A minor may only be taken into custody as a measure of restriction if accused of committing a 'grave or especially grave crime', or for ordinary crimes in exceptional cases.<sup>61</sup>
55. The procedure for detention of the suspect must be in accordance with arts 91 and 92 of the Code of Criminal Procedure, discussed above under 'police detention'.
56. A petition to put into custody as a measure of restriction must be considered by a judge of a district court or of a military court of the corresponding level, and participation of the suspect is obligatory.<sup>62</sup> Once the petition has been considered, a judge must pass one of the following resolutions:<sup>63</sup>
- (a) Upholding the measure of restriction in the form of taking into custody;
  - (b) Refusal to satisfy the petition;
  - (c) Extending the term of detention

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<sup>56</sup> Code of Criminal Procedure, art 98.

<sup>57</sup> Code of Criminal Procedure, art 100.

<sup>58</sup> Code of Criminal Procedure, art 108.

<sup>59</sup> Code of Criminal Procedure, art 108(1).

<sup>60</sup> Code of Criminal Procedure, art 108(1).

<sup>61</sup> Code of Criminal Procedure, art 108(2).

<sup>62</sup> Code of Criminal Procedure, art 108(5).

<sup>63</sup> Code of Criminal Procedure, art 108(6).

57. The general rule is that holding a person in custody as a measure of restriction shall not exceed two months.<sup>64</sup> However, if it is impossible to complete a preliminary investigation within the term of two months and if there are no grounds for cancelling the measure of restriction, the term may be extended for a term of up to six months.<sup>65</sup> A further extension of time for up to 12 months may be effected with respect to persons accused of committing grave crimes, but only if the case is of particular complexity and if there are grounds for selecting this measure of restriction. This may be effected by a judge of the same court upon the application of an investigator, and must be filed with consent of the head of the appropriate investigative agency.<sup>66</sup>
58. In art 190(4) of the Code of Criminal Procedure, it provides that no further extension of time is admissible.<sup>67</sup> If the time period expires and the person is still held in custody, a person must be immediately released unless the judge is considering an extension on the term of holding until the moment where the accused and their counsel are acquainted with the materials, and when the public prosecutor directs the case to the criminal court.<sup>68</sup> However, if after the end of the preliminary investigation the materials of the case were not presented to the accused or their counsel later than 30 days prior to the expiry of the term for holding in custody, the accused shall be subject to immediate release after the term expires.<sup>69</sup>
59. However, the Code of Criminal Procedure later provides that upon the expiry of this maximum time, when it is necessary to hold a preliminary investigation, the court is entitled to extend the term of holding a person in custody for six months at the most.<sup>70</sup>

### **c) Review of and challenges to detention**

60. Under art 108(11) of the Code of Criminal Procedure, a resolution of detention (or refusal to detain) as a measure of restriction may be appealed to the court of cassation within three days of the resolution being made. The court of cassation must take the decision not later than three days from the day of receipt, and an award reversing the judge's ruling to impose detention as a measure of restraint must be immediately executed. The cassational court award may also be appealed in the exercise of supervisory powers.
61. It is not allowable for a court to consider a petition for the extension of the term of the accused's persons holding in custody, save for instances of the accused person's passing a stationary

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<sup>64</sup> Code of Criminal Procedure, art 109(1).

<sup>65</sup> Code of Criminal Procedure, art 109(2).

<sup>66</sup> Code of Criminal Procedure, art 109(2), 109(3).

<sup>67</sup> Code of Criminal Procedure, art 109(4).

<sup>68</sup> Code of Criminal Procedure art 109(8).

<sup>69</sup> Code of Criminal Procedure art 109(6).

<sup>70</sup> Code of Criminal Procedure, art 109(11).

forensic examination and for circumstances making it impossible to convey him/her to the court.<sup>71</sup>

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<sup>71</sup> Code of Criminal Procedure, art 109(13).

# Country Report for Singapore

## I ADMINISTRATIVE DETENTION

1. Administrative detention is used in Singapore under two main regimes: the Internal Security Act ('ISA')<sup>1</sup> and the Criminal Law (Temporary Provisions) Act ('CLTPA')<sup>2</sup>. Both allow for indefinite detention without trial and are similar in the authorisation and review procedures and the safeguards enacted.

### a) Introduction to both regimes

#### *i) The Internal Security Act*

2. Section 8 of the ISA confers upon the Minister of Home Affairs the power to order the detention without trial of any person in order 'to prevent 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', if the President is satisfied that it is necessary to detain them.<sup>3</sup>
3. Initially used to deal with alleged threats of communist subversion and political violence until the 1980s, the ISA has been justified as an instrument that adapts to evolving security threats and is today used primarily against terrorists, particularly members of the Jemaah Islamiyah terrorist organisation and self-radicalised individuals.<sup>4</sup> The government maintains that the use of preventive detention under the ISA enables it to anticipate, pre-empt and prevent security incidents in a timely and effective manner.<sup>5</sup> In particular, it enables the government to uncover the wider terrorist network (based on evidence that would be unsuitable for prosecution in a criminal court because no incident has occurred yet and the action is preventive) using highly secretive information.

#### *ii) The Criminal Law (Temporary Provisions) Act*

4. Prevention detention under the provisions of the Criminal Law (Temporary Provisions) Act has been used to deal with secret societies and triads, drug trafficking syndicates and unlicensed money-lending syndicates. In October 2013, it was used to deal with five persons in their involvement in global soccer match-fixing activities, four of whom were issued Detention

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<sup>1</sup> Internal Security Act (Cap 143, 1985 Rev Ed) (ISA).

<sup>2</sup> Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) (CLTPA).

<sup>3</sup> ISA, s 8(1).

<sup>4</sup> *Singapore Parliamentary Debates, Official Report* (19 October 2011) vol 88 270-276 (Teo Chee Hean, Minister for National Security and Minister for Home Affairs) [21]-[24], [27]-[32].

<sup>5</sup> *ibid* [40].



Orders.<sup>6</sup> The government maintains that prosecution of offenders is the first and preferred course of action, but preventive detention may have to be used where the syndicates have complex and layered structures and extensive networks, and witnesses – victims or fellow syndicate members – are unwilling to testify in open court for fear of reprisal from other members of the triads or syndicates. As such, preventive detention is used particularly to detain the top echelons of leadership in these syndicates, who hide behind complex hierarchies and are uninvolved in the day-to-day criminal operations that are easier to police and prosecute.<sup>7</sup>

## **b) Threshold questions**

5. Under both regimes, the Acts expressly empowers the government to preventively detain persons.

## **c) Decision to detain**

### *i) Internal Security Act*

aa) Procedure and criteria for the initial making of an order

6. Detention under s 8 is for a period not exceeding two years,<sup>8</sup> and may be extended by the President for a further period(s) not exceeding two years at a time, with no maximum period of detention.<sup>9</sup> Detention may at any time be conditionally suspended,<sup>10</sup> but the Minister may revoke the suspension if they are satisfied that the conditions were breached or that it is necessary in the public interest to do so.<sup>11</sup> The alternative to detention is the imposition of an order restricting the person's activities, residence, employment and movement.<sup>12</sup>
7. Under s 8(1) of the ISA, before a person may be detained without trial, the President must be satisfied that such detention is necessary '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'. At this stage, the President does not act in their personal discretion, but must act in accordance with the advice of the Cabinet, including the Prime Minister, on whether the person constitutes a security risk.<sup>13</sup> Hence, here the President acts only as a formal check on the executive's decision.

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<sup>6</sup> The case is still being examined by an Advisory Committee.

<sup>7</sup> *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90, 31-34, 59-65 (S Iswaran, Minister in Prime Minister's Office and Second Minister for Home Affairs and Trade & Industry), [8]-[13].

<sup>8</sup> ISA, s 8(1)(a).

<sup>9</sup> ISA, s 8(2).

<sup>10</sup> ISA, s 10, which also enumerates the conditions that the Minister may attach to the suspension.

<sup>11</sup> ISA, s 10.

<sup>12</sup> ISA, s 8(1)(b).

<sup>13</sup> The President, except where the Constitution expressly provides for him to act in his personal discretion, is

8. Once the President has expressed their formal satisfaction, the Minister of Home Affairs is empowered to make an order for the person's detention for up to two years ('Order of Detention'), or alternatively to impose restrictions on the person's movements, residence, employment and involvement in political and other activities ('Restriction Order').<sup>14</sup> As shown above however, this two-year period is renewable.
9. In practice, a person may be arrested and held in custody under the ISA for up to 30 days before an Order of Detention or Restriction Order is issued; if no order is issued within 30 days, the person must be released unconditionally.<sup>15</sup>

bb) Right to be informed and to make representations before confirmation

10. Upon being issued an Order of Detention, a detainee has the following rights under the ISA:
  - They must be informed of the grounds of detention as soon as possible.<sup>16</sup>
  - They must be informed of the factual allegations upon which the Order of Detention is based as soon as possible. However, this is subject to art 151(3) of the Constitution, which provides that no authority may be required to disclose facts, the disclosure of which would in its opinion be against the national interest.<sup>17</sup>
  - They must be given the opportunity of making representations against the order as soon as possible.<sup>18</sup> They have the right to be represented by legal counsel in the hearing before the advisory board. Additionally, *Lee Mau Seng* confirmed that detainees under the ISA retains their constitutional right to have access to legal counsel within a reasonable time after their arrest.<sup>19</sup>
11. To achieve this in practice, a copy of the Order of Detention is to be served on the detainee as soon as possible,<sup>20</sup> and in any case within 30 days of being arrested under the ISA.<sup>21</sup> To enable them to make representations, the detainee is entitled, within 14 days of being served, to:

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bound by the Constitution (art 5(1)) to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. This was affirmed for the ISA in *Lee Mau Seng v Ministry of Home Affairs* [1971-1973] SLR(R) 135.

<sup>14</sup> ISA, s 8(1).

<sup>15</sup> 'Ministry of Home Affairs Press Statement on ISA' (*Ministry of Home Affairs*, 16 September 2011) <[www.webcitation.org/62v2pdhHB](http://www.webcitation.org/62v2pdhHB)> accessed 14 January 2014. Note, however, that this does not prevent the re-arrest of the person under a fresh 30-day period or a fresh Order of Detention.

<sup>16</sup> ISA, s 9(a).

<sup>17</sup> ISA, s 9(b).

<sup>18</sup> ISA, s 9(c).

<sup>19</sup> *Lee Mau Seng v Ministry of Home Affairs* [1971] SGHC 10, [1971-73] SLR(R) 135 [14]-[17]; Constitution of the Republic of Singapore (1999 Reprint), art 5(3).

<sup>20</sup> ISA, s 11(1).

<sup>21</sup> Ministry of Home Affairs Press Statement on ISA' (*Ministry of Home Affairs*, 16 September 2011) <[www.webcitation.org/62v2pdhHB](http://www.webcitation.org/62v2pdhHB)> accessed 14 January 2014.

- Be informed of their right to make representations to an advisory board;<sup>22</sup>
  - Be furnished by the Minister with a written statement containing the grounds on which the order is made and the allegations of fact on which the order is based and any other particulars that, in the Minister's opinion, are reasonably required to enable them to make representations.<sup>23</sup>
12. Procedural compliance with the 14-day period is renewable. It is interesting to note that the Minister's opinion has never been challenged in courts. Although it could possibly be challenged as a violation of the principles of natural justice (which remains a ground for review under the ISA since it deals with compliance with statutory procedure), it is unlikely to be granted (given the court's interpretation of the ISA and the CLTPA).
13. The following safeguards surrounding the right to be heard are in place:
- Advisory Board's composition: Representations against the Order of Detention are made to an advisory board. As a safeguard against the executive's arbitrary use of the power of detention, the President, in his *personal* discretion, appoints all members of the advisory board.<sup>24</sup>
  - Advisory Board's procedure: The advisory board has all the powers of a court of law in summoning and examining witnesses, administration of oaths and compelling the production of documents.<sup>25</sup> Responding to allegations by ex-detainees (from detention up to the 1980s) that inquiries by the advisory board were a 'farce' and were crippled by the non-disclosure of grounds/facts<sup>26</sup> and a failure to rigorously examine witnesses and evidence, the government defended that these allegations are 'baseless and unwarranted' and the board 'scrutinises every detention case to satisfy itself [that] there are valid security grounds which warrant detention'<sup>27</sup> and has declined to gather a Commission of Inquiry to conduct a review.<sup>28</sup>

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<sup>22</sup> ISA, s 11(2)(a).

<sup>23</sup> ISA, s 11(2)(b).

<sup>24</sup> Constitution of Singapore, art 151. Article 151(2) lays down the requirements for the constitution of the advisory board: 'An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the President and who shall be or have been, or be qualified to be, a Judge of the Supreme Court, and 2 other members, who shall be appointed by the President after consultation with the Chief Justice.'

<sup>25</sup> ISA, s 14.

<sup>26</sup> Permitted by ISA, s 9(3).

<sup>27</sup> 'Ministry of Home Affairs Press Statement on ISA' (*Ministry of Home Affairs*, 23 September 2011) <[http://www.mha.gov.sg/news\\_details.aspx?nid=MjEwMw%3d%3d-%2f7PvT0v%2fGAI%3d](http://www.mha.gov.sg/news_details.aspx?nid=MjEwMw%3d%3d-%2f7PvT0v%2fGAI%3d)> accessed 3 January 2014.

<sup>28</sup> 'Ministry of Home Affairs Response to Media on ISA' (*Ministry of Home Affairs*, 29 September 2011) <[http://www.mha.gov.sg/news\\_details.aspx?nid=MjEwNw%3d%3d-tD7VArPBqP8%3d](http://www.mha.gov.sg/news_details.aspx?nid=MjEwNw%3d%3d-tD7VArPBqP8%3d)> accessed 3 January 2014. MHA's reasons for declining are that the relevant government action had been fully explained and justified

- Timeliness of review: Within three months of being detained, a detainee who is a citizen of Singapore is entitled under the Constitution to have an advisory board consider their representations and make recommendations to the President on their detention or release within three months.<sup>29</sup>

14. Foreigners are detained under the Essential (Detained Non-Citizens) Regulations, which gives them all the above rights *except* that that they do not make representations to an advisory board. Instead, they make representations directly to the Minister, who may refer the case to an advisory board for recommendations back to them. The Minister's decision on the detention is final and shall not be called into question in any court. Furthermore, extensions of detention of non-citizens is not reviewable by an advisory board.<sup>30</sup>

cc) Confirmation or release by President on advisory board's recommendation

15. A final safeguard surrounding the final decision to detain is the requirement of the elected President's concurrence. Upon receiving the advisory board's recommendation, the President considers the recommendations and directs the Minister to detain or release the detainee. In this decision, the Elected President possesses a *veto power*, which they may exercise in their *personal* discretion. This is an important check where the Minister disagrees with the recommendations of the advisory board.<sup>31</sup> The President's decision shall thereafter be final and shall not be called into question before a court.<sup>32</sup>

dd) Procedure for extension of period of detention and periodic review

16. A single period of detention must not exceed 2 years. However, the President, acting on the Cabinet's advice, may direct that the detention period be extended for a further period(s) of up to two years at a time,<sup>33</sup> with no maximum cap.<sup>34</sup>

17. Detentions are subject to periodic reviews by an advisory board at intervals of not more than 12 months, accompanied by written reports and recommendations.<sup>35</sup> The Ministry of Home Affairs

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and debated in Parliament at that time and there is no reason to conduct a review 20 years after the event.

<sup>29</sup> ISA, s 12(1), in accordance with art 151(1)(b) of the Constitution.

<sup>30</sup> Essential (Detained Non-Citizens) Regulations (1990 Rev Ed) (delegated legislation made under Emergency (Essential Powers) Act (Cap 90), ss 3, 6, 7.

<sup>31</sup> ISA, s 13A, in accordance with the Constitution of Singapore, art 151(4).

<sup>32</sup> ISA, s12(2).

<sup>33</sup> ISA, s 8(2).

<sup>34</sup> The longest periods of detention have been 26 years (Dr Chia Thye Poh) and 19 years 8 months (Dr Lim Hock Siew). More recent detainees have been detained for up to 8 years, eg Jahpar bin Osman (2005-2013) and Ishak s/o Mohamed Noohu (2006-2012). It is unknown how long those presently detained have already been detained for, because the MHA only issues press statements on releases, initial detentions and re-detentions (revocation of suspensions), but not on extensions of detention. Detailed statistics on preventive detention are unavailable.

<sup>35</sup> ISA, s 13.

issues periodic press releases on decisions to detain, release or restrict the activities of named individuals. These press releases provide brief details on the background of the detainees, the grounds for their detention under the ISA and updates on their progress and cooperation (or otherwise) in rehabilitation.<sup>36</sup>

ee) Suspension of the period of detention

18. Detention may at any time be conditionally suspended<sup>37</sup> but the Minister may revoke the suspension and reinstate detention if the Minister is satisfied that the conditions were breached or that it is necessary in the public interest to do so.<sup>38</sup>

*i) Criminal Law (Temporary Provisions) Act*

aa) Authorisation procedure and criteria for initial making of the order

19. The Criminal Law (Temporary Provisions) Act confers upon the Minister of Home Affairs the power to order the detention without trial of any person ‘in the interests of public safety, peace and good order’, for up to 12 months.<sup>39</sup> The Order must be confirmed by the President.<sup>40</sup> At the expiry of the 12-month period, the President may indefinitely extend the detention order for a further period not exceeding 12 months.<sup>41</sup> As an alternative to detention, the Minister may subject a person to police supervision for up to three years,<sup>42</sup> which is likewise open to indefinite extension by the President.<sup>43</sup>
20. The police have powers to arrest and detain a person under CLTPA s 44 for investigations with a view to obtaining a Detention Order from the Minister. There is a strict 16-day time limit between the time when a person is arrested under the Act and the time when the Minister issues a Detention Order. This ensures that investigations are carried out and concluded promptly.<sup>44</sup> On the expiration of the 16-day period, the detainee will be released.

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<sup>36</sup> For an example of past press releases, see ‘Update on Terrorism-Related Detention And Releases Under The Internal Security Act’ (*Ministry of Home Affairs*, 12 September 2013) <[http://www.mha.gov.sg/news\\_details.aspx?nid=MjkwMg%3d%3d-Q0dZu7%2ftcoQ%3d](http://www.mha.gov.sg/news_details.aspx?nid=MjkwMg%3d%3d-Q0dZu7%2ftcoQ%3d)> accessed 20 February 2014.

<sup>37</sup> ISA, s 10, which also enumerates the conditions that the Minister may attach to the suspension.

<sup>38</sup> ISA, s 10.

<sup>39</sup> CLTPA, s 30(1)(a).

<sup>40</sup> CLTPA, s 31.

<sup>41</sup> CLTPA, s 38(1).

<sup>42</sup> CLTPA, s 30(1)(b).

<sup>43</sup> CLTPA, s 38(2).

<sup>44</sup> CLTP, s 44, which provides for an escalating level of police authorisation for further detention for investigation purposes, for up to 16 days. A breach of the s 44 procedure of police authorisation will not impeach the detention if the Minister eventually made a valid s 30 Detention Order. See *Shamm bin Sulong v Minister for Home Affairs* [1996] 2 SLR(R) 350, [1996] SGHC 125 and *Re Wong Sin Yee* [2007] 4 SLR(R) 676 [22]-[25].

21. Every case that the enforcement agencies<sup>45</sup> propose to handle under the Act is scrutinised by senior officials from the Ministry of Home Affairs.<sup>46</sup>
22. Before issuing a new Detention Order (or Police Supervision Order), the Minister must seek the Public Prosecutor's consent.<sup>47</sup> This is to ensure that the Public Prosecutor is also of the opinion that this case is better handled by preventive detention than by prosecution.<sup>48</sup>

bb) Right to be informed of grounds of detention

23. Unlike the ISA, the CLTPA does not give the detainee an express right to be informed of the grounds of detention. However, it appears that a brief statement of the allegations made against the detainee will accompany the Detention Order,<sup>49</sup> though it seems that the detailed evidence upon which the allegations are based will not be furnished.
24. Similar to the non-disclosure under the ISA, the CLTPA s 41 provides that the Minister or any other public servant is not required at any stage to disclose facts which he considers it to be against the public interest to disclose (although see below for a successful challenge by a detainee for the provision of insufficient information about the case).
25. There are further restrictions on the detainee's right to know the case against them, which are related to the administrative hearing, described below.

cc) Right to be heard before confirmation of the order

26. Like the ISA regime, the CLTPA regime also involves administrative hearings prior to confirmation of the detention order. Within 28 days after issuing an order, the Minister must refer the case to an independent advisory committee,<sup>50</sup> called a Criminal Law Hearing Committee ('CLHC').
27. Safeguards at this hearing stage include:
  - Right to be heard in person and be represented by legal counsel: The Criminal Law (Advisory Committees) Rules<sup>51</sup> require the detainee to appear in person before the

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<sup>45</sup> In practice, these are the Crime Investigation Department (CID) of the Singapore Police Force and/or the Central Narcotics Bureau (CNB).

<sup>46</sup> *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90, 31-34, 59-65 (S Iswaran, Minister in Prime Minister's Office and Second Minister for Home Affairs and Trade & Industry) [18].

<sup>47</sup> CLTPA, s 30.

<sup>48</sup> Inferring from the Minister's justification for the Act's renewal before Parliament, a case is probably thought to be better handled under the Act due to the nature of the evidence and the difficulty of obtaining witness testimony in open court.

<sup>49</sup> This surmise is based on the contents of the Detention Order and the accompanying letter that were reproduced almost in full by the High Court in *Re Wong Sin Yee* [2007] SGHC 147, [2007] 4 SLR(R) 676 [4]-[5] and excerpted in *Kamaljit Singh v MHA* [1992] SGCA 72, [1992] 3 SLR(R) 352 [3].

<sup>50</sup> CLTPA, s 31(1).

<sup>51</sup> Criminal Law (Advisory Committees) Rules (Cap 67, 1990 Rev Ed) (Criminal Law Advisory Committee Rules).

CLHC, and allow them to make representations in respect of the Detention Order. The detainee may, with the leave of the CLHC, be represented by a lawyer;<sup>52</sup> or if so rejected, appear in person.

- Composition of each advisory committee: The Minister appoints the advisory committee, consisting of at least two persons. The Second Minister for Home Affairs has described the CLHC as ‘independent’, ‘compris[ing] prominent private citizens, including Justices of the Peace, former High Court and District Court Judges, and senior lawyers’.<sup>53</sup>

28. The procedure at the hearing involves a mix of safeguards and compromises. The hearing attempts to emulate a judicial hearing. Every CLHC has all the powers of a court for summoning and examination of witnesses, the administration of oaths or affirmations and for compelling the production of documents.<sup>54</sup> However, the rules provide that it shall sit in private.<sup>55</sup>
29. Every CLHC has the power to regulate its own procedure (subject to the Criminal Law (Advisory Committees) Rules) and shall have regard to the requirements of public safety, protection of individuals (witnesses) and the safeguarding of sources of information.<sup>56</sup> It shall have regard to any written or other report, information, and document or evidence which the Minister places before it.<sup>57</sup> It has the ‘discretion to hear any witness and may admit or reject any evidence adduced, whether oral or documentary and whether admissible or inadmissible under the law in force’ relating to the admissibility of evidence in a court.<sup>58</sup> The wide discretion over procedure and evidence effectively immunises the advisory committee from a challenge on the grounds of procedural impropriety.
30. In order to protect witnesses, the CLHC is empowered to take the evidence of any witness in the *absence* of the detainee (and their counsel (if any)) and anyone except the members and staff of the CLHC.<sup>59</sup> Moreover, unless authorised by the Minister, ‘no written or other report, information, document or evidence, or part thereof... placed before an advisory committee shall... be disclosed to any person’ apart from the advisory committee.<sup>60</sup> Taken together, this means that, while the detainees know the nature of the criminal activities alleged against them, they may have very limited knowledge of the evidence and findings that gave rise to the

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<sup>52</sup> Criminal Law (Advisory Committees) Rules, s 7A.

<sup>53</sup> *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90, 31-34, 59-65 (S Iswaran, Minister in Prime Minister’s Office and Second Minister for Home Affairs and Trade & Industry) [18].

<sup>54</sup> CLTPA, s 40(1).

<sup>55</sup> Criminal Law (Advisory Committees) Rules, s 9.

<sup>56</sup> CLTPA, s 40(3).

<sup>57</sup> Criminal Law (Advisory Committees) Rules, s 10(1).

<sup>58</sup> Criminal Law (Advisory Committees) Rules, s 13.

<sup>59</sup> Criminal Law (Advisory Committees) Rules, s 11.

<sup>60</sup> Criminal Law (Advisory Committees) Rules, s 10(2).

allegations. There is also no equivalent to the UK's Special Advocate system where no person acting in the detainee's defence has access to the material.

dd) Confirmation or release by President on advisory committee's recommendation

31. After reviewing the case and evidence, the committee submits a written report and recommendations to the President, who, acting on the advice of the Cabinet, shall consider the report and then cancel, confirm or vary the Detention Order.<sup>61</sup> The Criminal Law (Advisory Committees) Rules provide that the report 'shall be secret and shall not be disclosed to any person other than an officer of the Government who has the express or implied authority of the Government to prepare, see or comment on the report of the advisory committee.'<sup>62</sup>

ee) Extensions and annual reviews of Detention Orders

32. Similar to the ISA regime, every Detention Order is reviewed annually by a Criminal Law Review Committee ('CLRC'). '[T]o ensure independent decision-making',<sup>63</sup> this review committee comprises different members from the initial Hearing Committee. They submit recommendations to the President on whether to extend or vary the Detention Order. The President then acts on the advice of the Cabinet to approve an extension of up to 12 months or annul the order.<sup>64</sup> This decision has to be taken before the lapse of the current order.
33. In any case where detention extends beyond 10 years, *another* separate Criminal Law Review Board must scrutinise the case prior to making recommendations.<sup>65</sup>

ff) Parliamentary approval to extend the Act every 5 years

34. A final safeguard that operates on the entire regime is that the CLTPA has not been drafted as a permanent fixture in the law: its validity expires every five years. The government must seek Parliamentary approval to extend the Act for a further five years, justifying to Parliament why the Act is still relevant and necessary. Parliament has recently unanimously extended the Act on 11 November 2013, granting it validity from 21 October 2014-2019.<sup>66</sup>

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<sup>61</sup> CLTPA, ss 31(2)-(3).

<sup>62</sup> Criminal Law (Advisory Committees) Rules, s 12.

<sup>63</sup> *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90, 31-34, 59-65 (S Iswaran, Minister in Prime Minister's Office and Second Minister for Home Affairs and Trade & Industry) [21].

<sup>64</sup> CLTPA, s 38(1).

<sup>65</sup> *Singapore Parliamentary Debates, Official Report* (11 November 2013) vol 90, 31-34, 59-65 (S Iswaran, Minister in Prime Minister's Office and Second Minister for Home Affairs and Trade & Industry) [21].

<sup>66</sup> CLTPA, s 1(2).



## d) Review of and challenges to detention

### i) *Internal Security Act*

35. There is limited scope for an ISA detainee to challenge their detention judicially using habeas *corpus* proceedings.

#### aa) Judicial review of *substantive* decision to detain

36. The decision to detain rests on the *President* being satisfied (in accordance with the Cabinet's advice) that the person poses a risk to national security<sup>67</sup> or that it is in the public interest to reinstate detention.<sup>68</sup> As explained below, this has been interpreted as a requirement of *subjective satisfaction* of the executive only, which therefore precludes review by the courts. Furthermore, s 8B of the ISA, inserted in 1989, has been read to preclude judicial review on the merits.

37. In 1971, in *Lee Mau Seng v Minister of Home Affairs*,<sup>69</sup> the High Court held that the sufficiency and relevancy of the grounds upon which the executive detained the applicant were matters for the *subjective satisfaction* of the President, acting on the advice of the Cabinet. In other words, a court may not examine if there are objective grounds for the executive to be satisfied that the detainee poses a risk to national security.

38. In 1988, the question of the judicial reviewability arose again in *Chng Suan Tze v Minister of Home Affairs*.<sup>70</sup> The Court of Appeal, the highest court in the country, voided the detention orders on a technical point.<sup>71</sup> More significantly, it went further to hold that the court could *objectively* review whether the matters relied on by the executive fell within the scope of s 8 of the ISA, for the following reasons:

39. The court's role to ensure national security was engaged: Although the court will not question the executive's decision as to what national security requires and whether detention was necessary, the court can examine whether the executive's decision was in fact based on national security considerations and whether the matters relied on by the executive fall within the scope of s 8.<sup>72</sup>

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<sup>67</sup> ISA, s 8 (initial detention).

<sup>68</sup> ISA, s 10 (revocation of suspension, i.e. re-detention).

<sup>69</sup> [1971] SGHC 10, [1971-73] SLR(R) 135.

<sup>70</sup> [1988] SGCA 16, [1988] SLR(R) 525. This was one case in a slew of detentions by the Internal Security Department as part of its 1987 Operation Spectrum, targeted at alleged Marxist conspirators.

<sup>71</sup> The executive had failed to produce evidence that the President was himself satisfied that there were sufficient grounds for detention since the signature was the Permanent Secretary's: *Chng Suan Tze v Ministry of Home Affairs* [1988] SGCA 16 [30]-[41].

<sup>72</sup> *ibid* [89], [93].

40. Other jurisdictions: Discretion in preventive detention on grounds of national security was judicially reviewable in other jurisdictions, including appeals to the Privy Council from Commonwealth countries.<sup>73</sup>
41. Natural justice: If the discretion were subjective, the executive would have arbitrary powers of detention inconsistent with art 12(1) of the Constitution.<sup>74</sup> Though art 149 of the Constitution provided for derogation from some fundamental liberties,<sup>75</sup> this must be narrowly construed. The exercise of these powers would only be constitutional if the courts could review their exercise.<sup>76</sup>
42. Rule of law: The notion of a subjective or unfettered discretion is contrary to the rule of law. ‘All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power and hold it to be *ultra vires* if it exceeded the boundaries set by Parliament.’ There was no ouster clause.<sup>77</sup>
43. Reviewable on *Wednesbury* principles: As there was no jurisdictional fact in ISA s 8 or s 10, the court could not decide for itself if the evidence justified the decision and substitute its own decision, but it could review the ISA discretion on grounds of illegality, irrationality or procedural impropriety.<sup>78</sup>
44. However, in 1989, the government inserted s 8B, which is good law to date:

**8B.**—(1) Subject to the provisions of subsection (2), the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the President or the Minister by the provisions of this Act shall be the same as was applicable and declared in Singapore on the 13th day of July 1971 [the date *Lee Mau Seng* was decided]; and no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply.

(2) There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the 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.

45. Following the amendments, in *Vincent Cheng v Minister of Home Affairs*,<sup>79</sup> the High Court held that once it could be said that at least some evidence existed relating to national security, it was for the executive alone to examine and decide on the sufficiency or relevancy of the evidence.<sup>80</sup>

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<sup>73</sup> *ibid* [70].

<sup>74</sup> Equal protection before the law, which includes the principle of natural justice.

<sup>75</sup> Article 149 of the Constitution provides that laws protecting, *inter alia*, national security were valid notwithstanding that they would otherwise be inconsistent with arts 9, 11, 12, 13 and 14 of the Constitution.

<sup>76</sup> *Chng Suan Tze v Ministry of Home Affairs* [1988] SGCA 16 [79], [82].

<sup>77</sup> *ibid* [56], [86].

<sup>78</sup> *ibid* [108]-[119].

<sup>79</sup> [1990] SGHC 4, [1990] 1 SLR(R) 38. The case also affirms that the ISA is valid and constitutional: [14].

<sup>80</sup> *ibid* [18], [28]-[31].

Allegations of bad faith or abuse of powers were not justiciable issues in the context of the ISA.<sup>81</sup> Any right of judicial review on grounds of illegality, irrationality and unconstitutionality were excluded by ss 8B(1) and 8B(2).<sup>82</sup>

46. The Court of Appeal in *Teo Sob Lung v Minister of Home Affairs*<sup>83</sup> affirmed that, following the 1989 amendments, the reviewability of decisions under the ISA was pegged to the law as stated in *Lee Mau Seng*. This excluded any common law principles of natural justice existing in other Commonwealth countries that was at variance with it.<sup>84</sup>
47. The restored holding of *Lee Mau Seng* included the following propositions:
  - The sufficiency and relevancy of the consideration upon which the executive detained the person were matters for the *subjective satisfaction* of the President, acting on advice of the cabinet.<sup>85</sup>
  - Detention could not be challenged on the ground of *mala fides* or bad faith of the executive, in the sense of want of care, irresponsibility, or vague/incorrect/irrelevant grounds and facts. Parliament has made the *President's satisfaction* the sole condition of the lawfulness of detention. To examine for bad faith would be to substitute the court's own judgment for the subjective satisfaction of the President, whereas Parliament's intention was for the President's decision to be final and not called into question in any court.<sup>86</sup>
48. There was a final question on whether the detainee could challenge a detention order on the ground that it fell outside the scope of the ISA, because it was unrelated to national security. The court found that it was unnecessary to decide this legal question since, on the facts, it was based on facts and grounds relating to national security and/or the public interest.
49. In determining that a factual basis existed, the court held that the government was entitled to draw inferences and perceptions from the facts, once the appellant did not deny the primary facts from which the government made factual allegations and inferences of the appellant's Marxist involvement. Here, the Marxist threat being in view, national security was relevant, and hence the facts and grounds were within the scope of the ISA. This was similar to the approach in *Vincent Cheng*: the court was willing only to ascertain that some facts existed to properly relate the detainee to national security. Thereafter, it left the judgment and inferences on the facts to the executive, once the express ground appeared to be related to national security. This approach

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<sup>81</sup> *ibid* [32].

<sup>82</sup> *ibid* [32].

<sup>83</sup> [1990] SGCA 5, [1990] SLR(R) 347.

<sup>84</sup> *ibid* [20].

<sup>85</sup> *ibid* [24].

<sup>86</sup> *ibid*.

leaves the government with substantial leeway to draw conclusions from the facts that are not subject to the court's scrutiny, not even on an irrationality standard.

50. Strictly speaking, since the facts disposed of the case in *Teo Sob Lung*, the Court of Appeal has left open the following *legal* issues:

- Whether *Lee Mau Seng* precludes judicial review if the facts and grounds are in fact unrelated to national security and outside the ISA's scope;
- Whether s 8B(2) precludes the court from reviewing a detention order which is demonstrably made for a purpose(s) other than national security;
- Whether s 8B is outside the scope of the legislative powers conferred by the Constitution (art 149 or the basic structure of the Constitution).<sup>87</sup>

51. However, since 1990, there have been no judicial challenges to detentions under the ISA.

52. Finally, it should be noted that, under s 8B(2), not only the initial decision to detain but also decisions to revoke suspensions and to extend detentions are also not amenable to judicial review.

53. In 2011, Mr Teo Chee Hean, Deputy Prime Minister and Coordinating Minister for National Security and Minister for Home Affairs, justified the preclusion of judicial review of decisions taken under the ISA on several grounds:

- Procedure and time: The judicial process is not amenable to the timely and effective preventive action that needs to be taken against security threats.<sup>88</sup>
- Type of evidence: It is impossible or extremely difficult to obtain the kind of evidence that would enable a conviction in court on a specific charge against conspirators or covert operators, whereas the ISA allows an overall assessment based on the best available information.<sup>89</sup>
- Judicial expertise: Judges are ill equipped to investigate or decide whether there are suspicious circumstances warranting some restraint.<sup>90</sup>
- Responsibility for national security lies with the government: To give the final say on what constitutes a serious threat to national security to a judge would effectively mean that the judge, rather than the government, becomes responsible and answerable for decisions affecting national security.<sup>91</sup>

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<sup>87</sup> *ibid* [43]-[44].

<sup>88</sup> *Singapore Parliamentary Debates, Official Report* (19 October 2011) vol 88 270-276 (Teo Chee Hean, Minister for National Security and Minister for Home Affairs) [40].

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid* [40]

<sup>91</sup> *ibid* [41]-[42]

- Safeguards are adequate: The procedures and safeguards, especially the Advisory Board and the Elected President's veto powers, are sufficient to prevent the government from acting arbitrarily.<sup>92</sup>

bb) Judicial review of *procedural* breach

54. Under s 8B(2), detainees have a right to seek judicial review of 'any question relating to compliance with any procedural requirement of [the ISA] governing such act or decision'.

*i) Criminal Law (Temporary Provisions) Act*

55. Detainees under the CLTPA have no right of appealing the decision of the CLHC or CLRC. However, they may seek judicial review of the decision to detain them. *Re Wong Sin Yee*<sup>93</sup> confirms that the Minister's discretion under s 30 (to issue a Detention Order) and the President's discretion under s 31 (to confirm the Order) are reviewable on the grounds of illegality, procedural impropriety and irrationality in the *Wednesbury* sense.<sup>94</sup> It added that:

What cannot be overstressed is that this court is *not* determining whether or not the applicant is guilty of the criminal activities he is alleged to have participated in. The role of the court is merely to determine whether or not the exercise of the discretion given by Parliament to the authorities to issue and extend the Detention Order may be faulted on the basis of illegality, procedural impropriety or irrationality in the *Wednesbury* sense.<sup>95</sup>

cc) Judicial review on the grounds of illegality

56. A detainee may allege that their detention is outside the scope of the Act. Detention under s 30 is 'dependent upon the Minister's satisfaction that (a) the detainee has been associated with activities of a criminal nature; and (b) that it is necessary that the person be detained in the interests of public safety, peace and good order'.<sup>96</sup> To invoke the powers of detention under the Act, the matters must fall within the scope of these criteria.
57. In *Re Wong Sin Yee*, it was alleged that the grounds of detention fell outside the scope of the CLTPA because the Act did not authorize the detention of a person for criminal activities *outside* Singapore. The court held that, while the Minister must be satisfied that a detention order is required in the interests of public safety, peace and good order *in* Singapore, it does not follow

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<sup>92</sup> *ibid* [43].

<sup>93</sup> *Re Wong Sin Yee* [2007] SGHC 147.

<sup>94</sup> *ibid* [12]-[13]. The High Court had no scope to review the decision on a correctness standard (determining itself whether the evidence justifies the decision) because the discretion under the CLTPA did not depend on the establishment of an objective jurisdictional or precedent fact.

<sup>95</sup> *ibid* [49].

<sup>96</sup> *Kamaljit Singh* [1992] SGCA 72, [1992] 3 SLR(R) 352 [20].

that the threat must result from criminal activities in Singapore.<sup>97</sup> It can be seen that the Minister has a wide scope for deciding that a person is a threat.

dd) Judicial review on the grounds of procedural impropriety

58. Only procedural impropriety on the part of the Minister will vitiate the Detention Order. Procedural impropriety on the part of the police or Central Narcotics Bureau officers will not.<sup>98</sup> Procedure can be improper for the following reasons:

- Deviation from statutory procedure: What matters for legality is the existence of a valid Minister's Detention Order. Any deviation by the police or Central Narcotics Bureau from the statutory procedure in the early stages of authorising detention will not affect the legality of the detention, because s 30 ultimately allows a Minister to order the detention of any person whether 'at large or in custody'.<sup>99</sup>
- Right to be informed of grounds: Once again, it is irrelevant whether the police or Central Narcotics Bureau has informed the detainee of the grounds of their arrest at the outset.<sup>100</sup> However, the court will review whether the *Minister* had adequately informed the detainee of the grounds of detention. The detainee must not be 'in the dark' about the grounds of detention' or be 'so embarrassed, through ignorance of the ground for his detention that he was unable to make proper representations regarding his case'.<sup>101</sup> This is a question of fact. In *Re Wong Sin Yee*, the court found on the facts that, from the detail of his affidavits, the detainee had a sufficiently clear picture of what had been alleged against him.<sup>102</sup> The adequacy of disclosure, and whether the grounds were vague or unclear, were judged by reviewing the detainee's representations to the court and the advisory committee, rather than by reviewing what the authorities did or did not disclose.
- Right to make representations – no right to an oral hearing: The CLTPA provides for an opportunity for the detainee to make written representations prior to appearing in person before the advisory committee. This procedure must be followed.<sup>103</sup> Beyond this minimal requirement, it may be recalled that the advisory committee has the discretion to regulate

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<sup>97</sup> *Re Wong Sin Yee* [2007] SGHC 147 [21].

<sup>98</sup> The reasoning of the court is that, since the CLTPA empowers a Minister to order to detain anybody whether they are presently at large or already in custody, the Minister's order is valid even if the person should not have been detained by the police, because the Minister could have ordered for detention even if the person were freed.

<sup>99</sup> *ibid* [32]. The Minister's Order is independently valid.

<sup>100</sup> *ibid* [24]-[25].

<sup>101</sup> *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 [26].

<sup>102</sup> *Re Wong Sin Yee* [2007] SGHC 147 [34]-[36].

<sup>103</sup> *ibid* [39].

its own proceedings and to admit or reject any evidence with full discretion,<sup>104</sup> such that the court is unlikely to impeach the proceedings before the advisory committee. Hence, the advisory committee may refuse to allow oral representations at the hearing. In *Re Wong Sin Yee*, the detainee argued that the advisory committee had violated his rights by refusing to allow him to make oral representations, such that he was unable to include ‘detailed factual arguments’ which had not been included in the written submissions tendered by his counsel. The court held that there was no breach of his rights because:

- the detainee had had opportunity to include whatever he wanted in his counsel’s written submissions;<sup>105</sup>
- in any case, the advisory committee has full discretion to admit or reject any evidence adduced;<sup>106</sup>
- the right to a hearing does not invariably connote an oral hearing, so it was sufficient that the detainee had had opportunity to make written representations;<sup>107</sup>
- the detainee had not been deprived of the opportunity to have evidence presented by his counsel.<sup>108</sup>

ee) Judicial review of the merits of the decision

59. A detainee may allege that the Minister had acted irrationally in ordering their detention. In *Kamaljit Singh*,<sup>109</sup> the Court of Appeal noted, *obiter*, that the validity of detention did not depend on the subjective satisfaction of the authorities alone.<sup>110</sup> This opens up the possibility that the court can objectively review whether the grounds for ordering detention have been satisfied, at least on an irrationality standard (not a correctness standard).
60. Nonetheless, in *Re Wong Sin Yee*, where the detainee challenged the decision as irrational, the court effectively deferred to the Minister’s full and unfettered discretion. It referred to *Teo Soh Lung* (under the ISA) to highlight that ‘[w]hilst a court of law must be vigilant to ensure that there is no unlawful exercise of discretionary powers which affect the liberty of persons, a court of law must be equally punctilious in giving effect to legislation, in not behaving as though it is a

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<sup>104</sup> CLTPA, s 40(3); Criminal Law (Advisory Committees) Rules (Cap 67, 1990 Rev Ed), s 13.

<sup>105</sup> *Re Wong Sin Yee* [2007] SGHC 147 [38].

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid* [39].

<sup>109</sup> *Kamaljit Singh* [1992] SGCA 72 [22].

<sup>110</sup> It noted that *Chng Suan Tze v MHA* (a case under the ISA, above) applied to detention under the CLTPA. It is good law for preventive detention apart from the ISA, where there is no equivalent of ISA s 8B that ousts judicial review.

Court of Appeal'.<sup>111</sup> It thus held that, the decision having been statutorily left to the Minister and being of a subject matter that the court was institutionally unsuitable to decide upon, it was in no position to find the Minister's exercise of discretion irrational:

In the present case, the Minister had asserted that the applicant had been involved in criminal activities and that it was in the interests of public safety, peace and good order that he be detained. As for whether the alleged activities endangered public safety, peace and good order, it was pointed out by the Court of Appeal in *Chng Suan Tze* ([12] supra) at [118] that '[i]t hardly needs any emphasis that the judicial process is unsuitable for reaching decisions on national security'. The same rule applies to questions of public safety, peace and good order. In the light of the evidence adduced in this case, I am in no position to hold that it has been established that the Minister's exercise of discretion was irrational in the *Wednesbury* sense, namely, that it was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.<sup>112</sup> (emphasis added)

61. It appears that the court will be satisfied that the order was, on its face, made for reasons of public safety, peace and good order. It will not rigorously inquire into whether the facts justify the finding that the detainee had been involved in activities of a criminal nature and that detention is necessary for public safety, peace and good order.
62. Finally, although a tortious remedy of false imprisonment exists in Singapore, it can only be used if there were no grounds for arrest.<sup>113</sup> Hence, its applicability in such cases is suspect as long as the ostensible ground for detention is fulfilled.
63. There are no precedents of judicial review for procedural breaches of the ISA, so it is unclear whether the executive will merely be required to cure the breach or whether the breach of procedure invalidates the detention altogether, requiring the detainee to be released.
64. As for judicial review of detention under the CLTPA, if detention has been found to be unlawful, the detainee will be released.

#### **e) Compensation for unlawful detention**

65. Under both regimes, there is no statutory provision for remedies such as compensation in cases where detention is found to be unlawful.

## **II IMMIGRATION DETENTION**

66. Under the Immigration Act,<sup>114</sup> persons may be detained pending their removal for (a) being prohibited immigrants (for eg beggars, prostitutes, those unable to show sufficient means of support or suffering from a contagious disease); (b) illegal entry (those without valid entry

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<sup>111</sup> *Re Wong Sin Yee* [2007] SGHC 147 [45].

<sup>112</sup> *Re Wong Sin Yee* (2007) SGHC 147 [46].

<sup>113</sup> *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858; [1996] SGCA 47.

<sup>114</sup> Immigration Act (Cap 133, 2008 Rev Ed).



permits); (c) illegally remaining in Singapore beyond their permitted period,<sup>115</sup> after an order of removal has been made against them by the Controller of Immigration.<sup>116</sup> Detention is permitted ‘for such period as may be necessary for the purpose of making arrangements for his removal’.<sup>117</sup>

#### **a) Threshold questions**

67. There is no threshold issue as to whether this constitutes detention. It is expressly termed ‘detention in custody’ in Immigration Act s 34, which also provides that the person ‘may be lawfully detained on board that vessel, aircraft or train, so long as [it] is within the limits of Singapore’,<sup>118</sup> or ‘may be detained in any prison, police station or immigration depot, or in any other place appointed for the purpose by the Controller’.<sup>119</sup>

#### **c) Decision to detain**

68. Detention is for expediency pending removal of the illegal immigrant, hence it depends on the decision to order removal. Therefore, the procedural safeguards are those that apply to the order of removal.
69. The making of an order is usually preceded by an examination upon arrival or an inquiry at any other time by the immigration authorities.<sup>120</sup> An order of removal served by the Controller will state the grounds for removal. However, the Minister, Controller or any other public officer is not required to disclose any fact, produce any document or assign any reason for the making of any order of removal which they consider to be against the public interest to do so.<sup>121</sup> For the purpose of any inquiry under the Immigration Act, the Controller has the power to summon and examine witnesses on affirmation and may require the production of relevant documents.<sup>122</sup>
70. There is a right of appeal against the order of removal itself or the refusal of permission to remain that grounds the order of removal to the Minister.<sup>123</sup> The Immigration Regulations<sup>124</sup> provide that:

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<sup>115</sup> These offences are prescribed by the Immigration Act s.5, 6, 8, 9, 15, 62. These offences are tried separately in a criminal court, which may sentence the illegal or prohibited immigrant to a fine or imprisonment.

<sup>116</sup> Made under Immigration Act, ss 31-33.

<sup>117</sup> Immigration Act, s 34(1).

<sup>118</sup> Immigration Act, s 34(3).

<sup>119</sup> Immigration Act, s 34(4).

<sup>120</sup> Part IV of Immigration Act provides for examination upon arrival, which includes the power to detain persons for inspection at the immigration depot. As for persons already in Singapore who are liable to be removed, an immigration officer authorised by the Controller or a police officer may arrest without warrant a person reasonably believed to be liable to removal from Singapore under the Act, and detain them for up to 14 days pending a decision on ordering removal.

<sup>121</sup> Immigration Act, s 33(6).

<sup>122</sup> Immigration Act, s 39.

<sup>123</sup> Immigration Act, s 33(2).

<sup>124</sup> Immigration Regulations (Cap 133, S.55(1), 1998 Rev Ed).

(1) Any person wishing to appeal under –

- s 8(6) of the Act against refusal of permission to enter Singapore [as a prohibited immigrant];
  - s 14(6) of the Act against cancellation of a permit or certificate or the making of a declaration; or
  - s 33(2) of the Act against an order of removal made by the Controller [for overstaying in Singapore or, hence committing offences under s 15 or s 62],
- shall, within 7 days of receiving notice of such refusal, cancellation, declaration or order, as the case may be, appeal by petition in writing to the Minister.<sup>125</sup> As explained in the next section, post-1993 judicial review is excluded for immigration decisions altogether.

71. A person who appeals under s 33(2) (i.e. an overstayer who appeals the order of removal) may be released pending the determination of the appeal, on such conditions for security as the Controller thinks fit.<sup>126</sup>
72. These and other immigration offences (such as illegal entry under s 5 or s 6), the conviction of which can form the basis of an order of removal and detention, are tried as criminal offences in the criminal court and are therefore subject to the same procedural protections and appeal rights as any other offence.<sup>127</sup> There is no special statutory right of appeal against the particular order of detention made on the basis of these convictions.

### **c) Review of and challenges to detention**

73. Prior to 1993, it was the case that a detainee may seek a writ of *habeas corpus*. In *Lee Seng Poh v Controller of Immigration*,<sup>128</sup> the High Court held that the mere production of the removal and detention order, which are *ex facie* valid and regular, is *not* a complete answer in response to a writ of *habeas corpus*. To hold otherwise would be to practically preclude judicial review of the executive's decision on such a draconian power of removal and detention, which Parliament cannot have intended and which the Act does not justify. The court can go further to examine the facts that form the basis of the detention, to see if the Controller was in fact justified in making the orders.<sup>129</sup>
74. Relying on *R v S of S of Home Department, ex p Khawaja*,<sup>130</sup> the High Court held that (a) 'it was the duty of the court to inquire whether there had been sufficient evidence to justify the immigration

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<sup>125</sup> Immigration Regulations, s 29(1).

<sup>126</sup> Immigration Act, s 34(2).

<sup>127</sup> Immigration Act, s 60.

<sup>128</sup> [1985] SGHC 14, [1985-86] SLR(R) 180.

<sup>129</sup> *ibid* [11].

<sup>130</sup> [1984] AC 74, [1983] 2 WLR 321.

officer's decision that the entry of the person concerned had been illegal'; and (b) 'it was for the Executive to prove to the satisfaction of the court on the balance of probabilities the facts justifying the detention.'<sup>131</sup> On the facts, the court was satisfied on the balance of probabilities that there was an absence of any fact or circumstances indicating that the applicant had entered Singapore unlawfully, hence ordering his release.

75. However, an amendment in 1993 inserted a new provision in the Immigration Act, which reads:

**39A.**—(1) There shall be no judicial review in any court of any act done or decision made by the Minister or the Controller under any provision of this Act except in regard to any question relating to compliance with any procedural requirement of this Act or the regulations governing that act or decision. [*Emphasis supplied*]

(2) In this section, 'judicial review' includes proceedings instituted by way of —

- (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
- (b) an application for a declaration or an injunction;
- (c) any writ of habeas corpus; or
- (d) any other suit or action relating to or arising out of any decision made or act done in pursuance of any power conferred upon the Minister or Controller by any provision of this Act.

76. Judicial review has therefore been ousted except on the grounds of procedural impropriety. There has been no subsequent case determining the effect of the new provision, but it is likely that the court will accept that an express exclusion of judicial review by Parliament prevents the court from examining the substance of the decision.<sup>132</sup> As there are only limited provisions in the Immigration Act and Regulations concerned with procedural requirements, it is probable that the court will be satisfied with the production of a removal and detention order that is on its face valid and regular.

#### **d) Compensation for unlawful detention**

77. There is no statutory provision for remedies and judicial review has been excluded.

### **III DETENTION OF PERSONS WITH A MENTAL ILLNESS**

#### **a) Preliminary remarks**

78. A person may be ordered by court to be admitted into a psychiatric institution for detention and treatment under the Mental Health (Care and Treatment Act) 2008 ('MHCTA').<sup>133</sup>

79. A regime in Singapore that is similar to this, but unrelated to mental illnesses, is the Misuse of Drugs Act,<sup>134</sup> which empowers the Director of the Central Narcotics Bureau to commit

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<sup>131</sup> *Lee Seng Poh v Controller of Immigration* [1985] SGHC 14, [1985-86] SLR(R) 180 [12].

<sup>132</sup> Similar to the approach under the Internal Security Act, mentioned above in Administrative Detention.

<sup>133</sup> Mental Health (Care and Treatment Act) No. 21 of 2008 (MHCTA).

<sup>134</sup> Misuse of Drugs Act (Cap 185, 2008 Rev Rd).

suspected drug users to a Rehabilitation Centre for treatment. This is often used in tandem with sentences for drug consumption offences.

### **b) Threshold questions**

80. There is no threshold question because the MHCTA's preamble provides for the 'admission, detention, care and treatment of mentally disordered persons in designated psychiatric institutions.' Likewise, the Misuse of Drugs Act provides that a person admitted to a Rehabilitation Centre under s 34 is 'detained'.

### **c) Decision to detain**

81. There are a number of routes by which a person suffering from mental illness may be referred to a mental hospital, so as to lead to detention:
82. A police officer may apprehend a person who is reported to be mentally disordered and believed to be dangerous to themselves or other persons by reason of mental disorder and take the person to a medical practitioner (who may then refer the person to a psychiatric institution<sup>135</sup>) or a designated medical practitioner at a psychiatric institution;<sup>136</sup>
83. A Magistrate may, on the report of a police officer or any other information that a person who is mentally disordered is not under proper care and control or is ill-treated or neglected by any relative or person in charge of them, undertake an inquiry and thereafter order them to be sent to a medical officer at a mental hospital;<sup>137</sup>
84. A medical practitioner who believes that a person under their care is mentally disordered and requires psychiatric treatment may send the patient to a designated medical practitioner at a psychiatric institution.<sup>138</sup>
85. The decision to detain is taken at first by medical practitioners at a psychiatric institution, but further extensions require a Magistrate's authority. It occurs in four stages that ensure due examination and confirmation by medical opinion. These provisions apply where the patient refuses voluntary admission and treatment. It is important to note that in cases of consent, the statutory procedure is not invoked at all. Nor is there any specific statutory provision dealing with the role of guardians.

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<sup>135</sup> MHCTA, s 9.

<sup>136</sup> MHCTA, s.7.

<sup>137</sup> MHCTA, s 8(1).

<sup>138</sup> MHCTA, s 9.

*i) Detention for 72 hours*

86. A designated medical practitioner at a psychiatric institution examines the person suffering from a mental disorder. If they are of the opinion that the person should be treated as an inpatient at the mental hospital, they admit the person, who may be detained for 72 hours from the time of the order.<sup>139</sup>

*ii) Detention for a further one month*

87. A second designated medical practitioner examines the person within the first 72 hours. If they are of the opinion that the patient requires further treatment at the psychiatric institution and sign the relevant order, the patient may be detained for a further period of one month from the expiration of the first 72 hours.<sup>140</sup>

*iii) Detention for a further six months*

88. Within that one month, the patient may be brought before two designated medical practitioners working at the psychiatric institution, one of whom is a psychiatrist. If both examine the patient separately and are each satisfied that the patient requires further treatment at the psychiatric institution, their signed orders are sufficient authority to detain the patient for up to 6 months from the date of the order.<sup>141</sup>

*iv) Magistrate's order for further detention*

89. A visitor of the psychiatric institution<sup>142</sup> may be satisfied by the report of the principal officer of the institution and by their personal inspection that any patient already detained for a year under s 10(3) should be further detained for care and treatment. If so, it is the visitor's *duty* to apply to a Magistrate for an order of detention.<sup>143</sup> In the interim period pending the Magistrate's order, the Visitor's endorsement is sufficient authority to continue detaining the patient.<sup>144</sup>
90. The Magistrate has the discretion to make further inquiry or not. They may then sign a detention order for the patient to be detained in a psychiatric institution for up to 12 months.<sup>145</sup>

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<sup>139</sup> MHCTA, s 10(1).

<sup>140</sup> MHCTA, s 10(2).

<sup>141</sup> MHCTA, s 10(3)-(4).

<sup>142</sup> Section 4 of the MHCTA says 'The Minister shall appoint for every psychiatric institution not fewer than 12 visitors, 6 of whom shall be medical practitioners.' Under s 5 the visitors are also responsible for periodically inspecting the psychiatric institution they are visitors of; seeing and examining any patient and ordering admission of any patient since the last visitation; reporting to the Director of Medical Services with regards to the management and condition of the psychiatric institution and the patients therein.

<sup>143</sup> MHCTA, s 13(1).

<sup>144</sup> MHCTA, s 13(4)-(5).

<sup>145</sup> MHCTA, s 13(2)-(3).

91. The visitor may make one or more applications to the Magistrate for further detention if they are satisfied by the report of the principal officer and their personal inspection that it is needed.<sup>146</sup> Hence, the detention period is indefinite.
92. At all stages, the grounds for detaining a person at a mental hospital for treatment are that:
- They are suffering from a mental disorder which warrants the detention of that person in a psychiatric institution for treatment; and
  - It is necessary in the interests of the health or safety of the person or for the protection of other persons that the person should be so detained.<sup>147</sup>
93. Therefore, if the patient refuses voluntary admission and treatment, then the decision to detain for treatment depends exclusively on the judgment of medical practitioners and the Magistrate.
94. Patients have the right to apply to temporarily leave the hospital, with the permission of two of the visitors, for as long as the visitors think fit.<sup>148</sup> This may lead to a discharge if, in that period, two designated medical practitioners working for the institution certify that detention is no longer necessary.<sup>149</sup> Additionally, the principal officer may also permit a patient to be absent for up to 6 months.<sup>150</sup> In all other circumstances, any person who escapes or fails to return from leave is liable to be retaken within 28 days of the end of the period of leave.<sup>151</sup>
95. As for detention of drug addicts, the procedural safeguards are the medical examinations and periodic reviews. This also occurs in stages:

*v) Initial admission*

96. The Director of the Central Narcotics Bureau may require ‘any person whom he reasonably suspects to be a drug addict to be medically examined or observed by a Government medical officer or a medical practitioner.’<sup>152</sup>
97. Additionally or alternatively, a Central Narcotics Bureau/police/immigration officer may require a person reasonably suspected of possessing/consuming drugs<sup>153</sup> to undergo urine tests.<sup>154</sup> In *Daud bin Salleh v Superintendent, Sembawang Drug Rehabilitation Centre*, the court held that the condition precedent for requiring a person to be *medically examined* was the *subjective satisfaction* of the director. The court could not undertake an investigation as to the sufficiency of the material

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<sup>146</sup> MHCTA, s 13(6). The same procedure before the Magistrate applies.

<sup>147</sup> MHCTA, s 10(6).

<sup>148</sup> MHCTA, s 15(1).

<sup>149</sup> MHCTA, s 15(2).

<sup>150</sup> MHCTA, s 15(4).

<sup>151</sup> MHCTA, s 15(3).

<sup>152</sup> Misuse of Drugs Act, s 34(1).

<sup>153</sup> An offence under Misuse of Drugs Act, s 8(b).

<sup>154</sup> Misuse of Drugs Act, s 31.

which made the director of Central Narcotics Bureau ‘reasonably suspect and the only question was whether the director had exercised his power in good faith.’<sup>155</sup>

98. If, as a result of the examination or observation or both urine tests, the Director thinks it is necessary for the person to undergo treatment or rehabilitation at a Rehabilitation Centre, the Director may make an order requiring them to be admitted.<sup>156</sup> Such detention for treatment or rehabilitation in a Rehabilitation Centre will last for an initial 6 months, unless the Director or the Centre’s Review Committee discharges the detainee early.<sup>157</sup>

*vi) Extension of detention*

99. If the Review Committee is of the view that the detainee requires further treatment or rehabilitation, it may issue a written order that the detainee be held for a further period(s) of up to six months at a time, up to a maximum of three years in total.<sup>158</sup> The Review Committee is appointed by the Minister, and is chaired by a certified medical practitioner.<sup>159</sup>

**d) Review of and challenges to detention**

100. There is no way that a detainee in a mental institution may challenge their detention and there is no statutory provision on the role played by guardians of the patient. However, the Act makes it an offence to detain a mentally disordered person in breach of the procedures laid out in it, or to detain two or more such persons at any place that is not a psychiatric institution,<sup>160</sup> so persons in such situations can seek redress using the criminal law. A patient may only be discharged by the written order of the principal officer, or a psychiatrist of a psychiatric institution, or two of the visitors of the mental hospital, one of whom shall be a medical officer.<sup>161</sup>
101. As for detention in a Rehabilitation Centre for drug addiction, s 39 of the Misuse of Drugs Act allows a person improperly detained in a Rehabilitation Centre ‘by reason of any misconduct or breach of duty on the part of any officer in the discharge of his function pursuant to [the MDA]’ to lodge a complaint on oath to a Magistrate.<sup>162</sup> The Magistrate may inquire into the complaint themselves or direct a police officer to inquire and report to them.<sup>163</sup> The inquiry is done in private,

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<sup>155</sup> *Daud bin Salleh v Superintendent, Sembawang Drug Rehabilitation Centre* [1979-80] SLR 747, [1980] SGHC 32 at [11]-14], [19]-[21]. Also see *Subramaniam s/o Marie and others v Superintendent, Selarang Park Drug Rehabilitation Centre* [1981-82] SLR(R) 30, [1981] SGHC 3 [14], [21].

<sup>156</sup> Misuse of Drugs Act, s 34(2).

<sup>157</sup> Misuse of Drugs Act, s 34(3).

<sup>158</sup> Misuse of Drugs Act, ss 34(4), (5).

<sup>159</sup> Misuse of Drugs Act, s 37.

<sup>160</sup> MHCTA, s 26.

<sup>161</sup> MHCTA, ss 12, 13.

<sup>162</sup> Misuse of Drugs Act, s 39(1).

<sup>163</sup> Misuse of Drugs Act, s 39(1).

but for its purposes the Magistrate or police officer have all the powers conferred by the Criminal Procedure Code in relation to the attendance and examination of witnesses, the taking of evidence and the production of documents.<sup>164</sup>

102. To conclude, in respect of the detention for mental health, no remedies apply since detention is not open to challenge. As for complaints regarding detention for drug rehabilitation and treatment, if, pursuant to the complaint procedure set out in s 39, the Magistrate is satisfied that the detainee ought not to be detained, they may order for the discharge of the detainee.<sup>165</sup> This decision or order is final.<sup>166</sup>

#### **e) Compensation for unlawful detention**

103. There is no provision for monetary compensation.

### **IV MILITARY DETENTION**

104. Under the Singapore Armed Forces Act,<sup>167</sup> a person guilty of a military offence<sup>168</sup> or a civil<sup>169</sup> offence may be sentenced by a disciplinary officer or subordinate military court to detention in detention barracks or disciplinary barracks, or imprisonment in a military or civil prison. The most common use of such detention is for being Absent Without Leave ('AWOL') (typically from compulsory National Service), desertion of national service, and for drug offences.

#### **a) Threshold questions**

105. There is no threshold question as to whether this constitutes detention.

#### **b) Decision to detain**

106. Accused persons have the opportunity to appear before a court. For all offences, accused persons may be tried by a subordinate military court, more commonly known as General Court Martial ('GCM').<sup>170</sup> For the (lesser) offences specified in the Schedule such as insubordinate behaviour or AWOL, the accused persons may be tried in summary trial by a disciplinary officer

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<sup>164</sup> Misuse of Drugs Act, ss 39(2)-(3).

<sup>165</sup> Misuse of Drugs Act, s 49(4).

<sup>166</sup> Misuse of Drugs Act, s 39(5).

<sup>167</sup> Singapore Armed Forces Act (Cap 295, 2000 Rev Ed) (SAF Act).

<sup>168</sup> The range of offences is listed in Part III of the Singapore Armed Forces Act. The offences stipulated in Part III of the SAF Act each state the maximum term that can be imposed for detention, depending on the type of offence committed.

<sup>169</sup> Civil is in contradistinction to military, so for these purposes it includes criminal offences specified outside the SAF Act.

<sup>170</sup> SAF Act, s 4 r/w s 2(1).



of a rank suited to the accused's rank and offence.<sup>171</sup> However, before the sentence is passed, the accused have the right to elect for trial before the GCM.<sup>172</sup>

*i) Summary trials*

107. In summary trials, the relevant disciplinary officer may decide to dismiss the charge or to try the accused summarily. In serious cases, the charge may be referred the charge to the Director of Legal Services of the SAF,<sup>173</sup> who decides whether to remit the case to trial before a GCM or trial before an officer of specified rank, or take no action.<sup>174</sup>
108. The procedure in summary trials is set out in the Singapore Armed Forces (Summary Trial) Regulations.<sup>175</sup> The accused is entitled to an oral hearing where they have the right to:
- Hear the evidence given by prosecution witnesses;
  - Cross-examine prosecution witnesses;
  - Give their own evidence on oath;
  - Call witnesses in defence, who shall give oral evidence in their presence.<sup>176</sup>
109. Upon finding the accused guilty, the disciplinary officer may there and then convict and sentence the accused to punishment, including detention.<sup>177</sup> However, before conviction and sentencing, they must afford the accused an opportunity to elect to have be tried again by a GCM.<sup>178</sup> The summary trial proceedings are recorded in a charge form and forwarded to the Director of Legal Services of the Singapore Armed Forces.<sup>179</sup>

*ii) Subordinate military court trials*

110. Trials before a GCM take place before a panel courts martial consisting of not less than three persons, of whom at least two are of ranks not below captain.<sup>180</sup> Usually, the presiding officer is a legally qualified person but when none of the members of a panel court martial is a qualified person, a judge advocate designated by the convening authority may officiate in the trial.<sup>181</sup> The

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<sup>171</sup> SAF Act, Part IV.

<sup>172</sup> SAF Act, s 77.

<sup>173</sup> SAF Act, ss 63-65.

<sup>174</sup> SAF Act, s 67.

<sup>175</sup> Singapore Armed Forces (Summary Trials) Regulations (Cap 295, S.205, 2001 Rev Ed).

<sup>176</sup> Singapore Armed Forces (Summary Trials) Regulations, s 11.

<sup>177</sup> Singapore Armed Forces (Summary Trials) Regulations, ss 11(f)-(g).

<sup>178</sup> SAF Act, s 77.

<sup>179</sup> SAF Act, s 79.

<sup>180</sup> SAF Act, s 81(2).

<sup>181</sup> SAF Act, s 82.

accused has a right to object for reasonable cause to a member of the court presiding over their case.<sup>182</sup> The accused is entitled to an oral trial in open court where they have the right to:

- be represented by an advocate and solicitor provided by themselves or, more commonly, by an officer in the SAF;<sup>183</sup>
- be informed of the charges against them and the constitution of the panel hearing their case and have the charges explained to them;<sup>184</sup>
- object to a charge, or else plead guilty or claim trial;<sup>185</sup>
- give evidence on oath or affirmation as a witness, being liable to cross-examination, or else remain silent;<sup>186</sup> and
- call witnesses both as to the facts and to their character.<sup>187</sup>

111. If the accused is found not guilty, the GCM may order their release.<sup>188</sup> If the GCM finds the accused guilty, it may hear pleas of mitigation prior to awarding the sentence, which shall be delivered in open court and may be accompanied by a written judgment.<sup>189</sup> The proceedings shall be recorded.<sup>190</sup> The accused must be tried within 6 months of the commission of the offence, or if they were operationally ready national servicemen/women when they committed the offence, then within 3 years of the offence, unless the circumstances of the case warrant a summary trial after.<sup>191</sup> Section 111 dealing with subordinate military trials requires the trial to be conducted within 3 years, unless it deals with offences relating to misconduct in action, assisting the enemy, mutiny, absence without leave or desertion.

112. To ensure that hearings are impartial, in addition to the constitution of the GCM, the SAF Act provides for the independence of the GCM. It frees the members of the court from being subject to the authority of their commanders or any other authority in matters of adjudication.<sup>192</sup> Any persons who attempt to coerce or influence the proceedings or action of the GCM commits an offence.<sup>193</sup>

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<sup>182</sup> SAF Act, s 88.

<sup>183</sup> SAF Act, s 102.

<sup>184</sup> Singapore Armed Forces (Subordinate Military Courts) Regulations 2004 (Cap 295, S.724), s 12 (SAF Regulations).

<sup>185</sup> SAF Regulations, ss 21, 25.

<sup>186</sup> SAF Regulations, s 34.

<sup>187</sup> SAF Regulations, s 34.

<sup>188</sup> SAF Regulations, s 43.

<sup>189</sup> SAF Regulations, ss 44-49.

<sup>190</sup> SAF Act, s 86.

<sup>191</sup> SAF Act, ss 78(1)-(2).

<sup>192</sup> SAF Act, s 107(1)

<sup>193</sup> SAF Act, ss 107(2)-(3).

### c) Review of and challenges to detention

#### i) Appeals under military procedure

113. A person who has been tried summarily may elect to be tried again by a GCM,<sup>194</sup> the procedure of which is described above. Besides this, the Armed Forces Council, upon the advice of the Director of Legal Services of the Singapore Armed Forces, has the power to quash any finding, sentence or order of a disciplinary offer, substitute a new finding or sentence and/or refer the case to be retried.<sup>195</sup> The Council is comprised of Ministers, Permanent Secretaries, the Chiefs of Army Staff and 4 nominees of the President.<sup>196</sup>
114. As for a person who was sentenced to detention by a GCM, the Armed Forces Council acts as a reviewing authority and may review the finding or sentence of the GCM, at any time on its own motion or upon receipt of a petition by a person found unfit to stand trial or held to be not guilty by reason of insanity.<sup>197</sup>
115. More importantly, a person sentenced by the GCM has a right of appeal to the Military Court of Appeal and may be granted bail pending appeal. The Military Court of Appeal is presided over by a person qualified to be a Supreme Court Judge, appointed by the Chief Justice, and includes two other qualified persons.<sup>198</sup>
116. The Military Court of Appeal has the power to allow an appeal against conviction on the ground that it was wrong in law. Specifically, this entails:
- that the finding of the subordinate military court under all the circumstances of the case is unsafe or unsatisfactory;
  - that the finding involves a wrong decision of a question of law; or
  - that there was a material irregularity in the course of the trial [...] <sup>199</sup>
117. Before the Military Court of Appeal, the appellant has the right to:
- Present their case orally or in writing or by a legal counsel or a defending officer;<sup>200</sup>
  - Be present at the hearing of their appeal.<sup>201</sup>
  - Tender any document or call any witness, at the order of the Military Court of Appeal.<sup>202</sup>

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<sup>194</sup> SAF Act, s 77.

<sup>195</sup> SAF Act, s 75.

<sup>196</sup> SAF Act, s 8.

<sup>197</sup> SAF Act, s 116.

<sup>198</sup> SAF Act, s 127.

<sup>199</sup> SAF Act, s 142.

<sup>200</sup> SAF Act, s 151; Singapore Armed Forces (Military Court of Appeal) Regulations (Cap 195, 2001 Rev Ed) s 27.

<sup>201</sup> Singapore Armed Forces (Military Court of Appeal) Regulation, s 27(2).

<sup>202</sup> SAF Act, s 152.

118. The Military Court of Appeal has the power to quash a conviction, which would entail the release of the detainee. Alternatively, it may alter the finding or reduce the sentence, or exceptionally order retrial.<sup>203</sup>
119. No appeal shall lie from any decision of the Military Court of Appeal.<sup>204</sup>

*ii) No judicial review*

120. In *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks*,<sup>205</sup> the High Court (an independent non-military court) held that, as the Military Court of Appeal was a superior court of record, its jurisdiction and the exercise of its powers to hear and determine appeals from a subordinate military court were matters that could not be reviewed by any of the prerogative writs or orders of the High Court. Therefore, warrants or orders enforcing its decision could not be challenged in the High Court, and a writ of *habeas corpus* could not lie in respect of the applicant's detention.

**d) Compensation for unlawful detention**

121. There is no provision for compensatory remedies.

**V POLICE DETENTION**

122. Police detention in crowd control situations has generally not been of an issue in Singapore because there are close to no such incidents. Nonetheless, statutorily, the police have preventive powers to disperse unlawful assemblies under ss 57-62 of the Criminal Procedure Code. The criterion is that it must be an 'unlawful assembly or an assembly of 5 or more people likely to cause a disturbance of the public peace.'<sup>206</sup>
123. The police may order them to disperse, and if they refuse, officers 'may disperse the assembly by force and, if necessary, arrest and confine the participants, and may require any male civilian to help.'<sup>207</sup> If this fails, the Minister or Commissioner of Police or Deputy Commissioner of Police may cause it to be dispersed by military force, but in doing so every officer 'shall obey such requisition in such manner as he thinks fit, but [...] shall use as little force and do as little injury to person and property as is consistent with dispersing the assembly and arresting and confining those persons.'<sup>208</sup>

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<sup>203</sup> SAF Act, ss 142(5), 149.

<sup>204</sup> SAF Act, s 160.

<sup>205</sup> [1985] SGHC 2, [1985-86] SLR(R) 7.

<sup>206</sup> Criminal Procedure Code 2010, s 57.

<sup>207</sup> Criminal Procedure Code 2010, s 58(1).

<sup>208</sup> Criminal Procedure Code 2010, s 60.

124. Section 62 immunises any officer or executive authority from prosecution for a criminal offence for acts done under these provisions, so long as they acted in good faith.
125. As has occurred recently in the Little India riots on 8 December 2013, which is the first riot in Singapore in about 40 years, the police acted to disperse the riot and arrested its participants.<sup>209</sup> There was no issue of kettling; the participants were simply under arrest and subsequent dealings with them would presumably be in accordance with the ordinary rules on custody and prosecution laid out in the Criminal Procedure Code.<sup>210</sup>

## VI PREVENTIVE DETENTION

### a) Preliminary remarks

126. Detention by the Executive under the Internal Security Act and the Criminal Law (Temporary Provisions) Act are treated in Singapore as the most salient methods of preventive detention. These have been detailed in the section relating to Administrative Detention.
127. In addition, the courts have power under the Criminal Procedure Code to order the preventive detention of a person convicted of multiple offences. Section 304 reads:

- (2) Where a person of the age of 30 years or above —
- i. is convicted before the High Court or a District Court of an offence punishable with imprisonment for 2 years or more, and has been convicted in Singapore or elsewhere at least 3 times since he reached the age of 16 years of offences punishable with such a sentence, and was on at least 2 of those occasions sentenced to imprisonment or corrective training; or
  - ii. is convicted at one trial before the High Court or a District Court of 3 or more distinct offences punishable with imprisonment for 2 years or more, and has been convicted and sentenced in Singapore or elsewhere to imprisonment for at least one month since he reached the age of 16 years for an offence punishable with imprisonment for 2 years or more,
  - iii. then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial period of time, followed by a period of supervision if released before the expiration of his sentence, the court, unless it has special reasons for not doing so, shall sentence him to preventive detention for a period of 7 to 20 years in lieu of any sentence of imprisonment.<sup>211</sup>  
(*Emphasis added*)

128. Juvenile offenders are tried before a separate Juvenile Court (provided for in the Children and Young Persons Act). They may be placed in juvenile detention centres or juvenile rehabilitation centres (Boys' / Girls' homes) and will not be mixed with adult offenders. The words 'conviction' and 'sentence' are not to be used by the Juvenile Court but essentially these are their sentences for their offences – it is not a preventive detention term. If they are dissatisfied with a

<sup>209</sup> Unlawful assembly offences are provided for in Part VIII of the Penal Code (Cap 224, 2007 Rev Ed).

<sup>210</sup> Criminal Procedure Code 2010, Part IV.

<sup>211</sup> Criminal Procedure Code (No. 15 of 2010), s 304(2).

Juvenile Court judgment, they have a right of appeal to the High Court as per the usual procedure for appeals from the Subordinate (Magistrate's) courts to the High Court.<sup>212</sup>

129. Those between 16-30 are sentenced according to normal sentencing guidelines, with preventive detention not being an option. This age requirement is meant to be a safeguard to ensure that preventive detention is used against the most recalcitrant of offenders who are beyond reform.
130. The sentence of preventive detention is intended for habitual offenders, aged more than 30 years, who are considered to be too recalcitrant for reformation: *PP v Wong Wing Hung*.<sup>213</sup>

#### **b) Threshold questions**

131. There is no threshold question. S 304(2) expressly provides for 'preventive detention', which is sentenced 'in lieu of any sentence of imprisonment'.

#### **c) Decision to detain**

132. The sentence of preventive detention is imposed by the High Court or District Court that convicts the offender, or as an enhanced sentence following an appeal by the prosecution. Hence it is accompanied by all the procedural protections attached to a criminal hearing before an independent court, including disclosure, the right to be represented by legal counsel and the right to make submissions on sentencing and mitigation pleas.<sup>214</sup> The court will deliver its judgment in open court, orally or by written grounds, explaining its reasons for issuing the sentence. The jurisprudence developed from grounds of decisions and appeals of sentences have generated clearer criteria and enhanced accountability for preventive detention sentencing.
133. Particular safeguards for the sentence of preventive detention are:
  - The offender must be of 30 years of age or above;<sup>215</sup>
  - The statutory requirement to consider the offender's physical and mental suitability for lengthened detention:

Before sentencing any offender to corrective training or preventive detention, the court must call for and consider any report submitted by the Director of Prisons, or any person authorised by the Director of Prisons to submit the report on his behalf, on the offender's physical and mental condition and his suitability for

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<sup>212</sup> Children and Young Persons Act, s 48.

<sup>213</sup> [1999] SGHC 234, [1999] 4 SLR 329 [10]. Habitual offenders are not defined with respect to the number of offences they have committed. But it must be obvious that they have committed many offences and have a high risk of re-offending. E.g. in this case, the 35 year old accused had been charged, convicted and sentenced 16 times (of offences ranging from criminal intimidation, theft to rape) but the Court felt that it had no deterrent effect on him and he would not likely change. Also see [2013] 2 SGCA 831 for a better understanding of habitual offenders.

<sup>214</sup> Procedure in Criminal Procedure Code 2010.

<sup>215</sup> Criminal Procedure Code 2010, s 304(2).

such a sentence and if the court has not received such a report, it must remand the offender in custody for a period or periods, not exceeding one month in the case of any single period, to enable the report to be made.<sup>216</sup>

(Thus, the accused can be remanded for another month, if the report has not been received.)

134. Detention itself is governed by the Criminal Procedure Code (Corrective Training and Preventive Detention) Regulations 2010. The Regulations provide for periodic reports to the Director and progression through three different stages of detention with increasing privileges (eg more access to other prisoners, possibility of being paid for work) and training (eg vocational training), if the detainee is suitable to progress.<sup>217</sup>
135. A detainee is eligible for release on license when they have served five-sixths of the sentence of preventive detention. The Director will consider the case every 3 months (after the detainee is *eligible* for release), having regard to their conduct in the third stage of detention and their prospects on release. The Director shall recommend release if they are satisfied that there is a reasonable probability that the detainee will not revert to a criminal life.<sup>218</sup>

#### **d) Review of and challenges to detention**

136. The offender may appeal against their sentence using the normal process of criminal appeals to the High Court or Criminal Court of Appeal.
137. The sentence must be appropriate to the overarching aim that it is ‘expedient for the protection of the public’: it is suited essentially for habitual offenders, whom the court considers to be beyond redemption and too recalcitrant for reformation.<sup>219</sup> This depends on whether the offender poses such a menace to society that it would be expedient for the protection of the public to subject him to a substantial period of incarceration. As *PP v Perumal s/o Suppial*<sup>220</sup> makes clear, this inquiry focuses on the danger which the offender poses to the community at large. This may not be restricted to persons with a history of violent crimes and behaviour, but is instead focused on whether the degree of propensity towards any type of criminal activity at all is such that the offender ought to be taken out of circulation altogether so that they are not given even the slightest opportunity to give sway to their criminal tendencies again.<sup>221</sup>
138. The court held in *Wong Wing Hung* that the propriety of the sentence is not to be adjudged by comparing the minimum term of preventive detention with the maximum term of imprisonment

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<sup>216</sup> Criminal Procedure Code 2010, s 304(3).

<sup>217</sup> Criminal Procedure Code (Corrective Training and Preventive Detention) Regulations 2010, ss 16-22.

<sup>218</sup> Criminal Procedure Code (Corrective Training and Preventive Detention) Regulations 2010, s 25.

<sup>219</sup> *PP v Wong Wing Hung* [1999] SGHC 234 [10]; *PP v Rosli bin Yassin* [2013] SGCA 21, [2013] 2 SLR 831 [10]-[11].

<sup>220</sup> [2000] SGHC 103, [2000] 2 SLR(R) 145 [40].

<sup>221</sup> *Tan Ngjin Hai v PP* [2001] 3 SLR 161 [163].

for the convicted offence. The normal limitations on sentencing do not apply when the court is considering a sentence of preventive detention, which is in lieu of any imprisonment sentence and is not aimed at being proportionate to the offence committed. The judge is only limited by s 304 of the Criminal Procedure Code.<sup>222</sup>

**e) Compensation for unlawful detention**

139. As the sentence of preventive detention is in lieu of imprisonment, if a sentence of preventive detention is found to be unlawful or unsuitable upon appeal, the appropriate criminal sentence will replace it. There is no provision for monetary compensation.

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<sup>222</sup> *PP v Wong Wing Hung* [1999] SGHC 234 [9]-[10].



# Country Report for South Africa

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. Although there is a long history of counter-terrorism detention in respect of apartheid, the Protection of Constitutional Democracy against Terrorist and Related Activities Act (No 33 of 2004) does not contain any provision for detention without trial of terrorist suspects. Several prior draft Bills contained such a provision, but this clause was ultimately rejected.<sup>1</sup> This has led to South Africa's counter-terrorism law being classified as 'among the least restrictive'.<sup>2</sup>
2. As a result, detention only occurs in conformity with the principles and procedures of the criminal law. There is a general provision in the South African Constitution prohibiting detention without trial in s 12(1)(b). In addition, the Constitutional Court in *De Lange v Smuts*<sup>3</sup> set its face clearly against detention without trial:

When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1)(b) is the notorious administrative detention without trial for purposes of political control.<sup>4</sup>

3. However, there is some provision for limited detention without trial following the declaration of a 'state of emergency' in s 37 of the South African Constitution. A state of emergency can be declared by an Act of Parliament<sup>5</sup> only when two conditions are satisfied: 'the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and...the declaration is necessary to restore peace and order.'<sup>6</sup> Since the Constitution was enacted in 1997, a state of emergency has not been declared in South Africa.<sup>7</sup> Should such a state of emergency be declared, s 12(1)(b) is *not* listed as one of the 'non-derogable rights', so detention without trial could theoretically be instituted in a state of emergency.

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<sup>1</sup> For an historical review see M Cowling, 'The Return of Detention without Trial? Some Thoughts and Comments on the Draft Anti-Terrorism Bill and the Law Commission Report' (2000) 13 South African Journal of Criminal Justice 344. See also K Roach, 'A Comparison of South African and Canadian Anti-Terrorism Legislation' (2005) 127 South African Journal of Criminal Justice 127.

<sup>2</sup> A Hubschle, 'South Africa's Anti-Terror Law: Among the Least Restrictive?' (2005) 14(4) African Security Review 105.

<sup>3</sup> *De Lange v Smuts* NO 1988(3) SA 785 (CC).

<sup>4</sup> *ibid*, Ackerman J.

<sup>5</sup> State of Emergency Act (No 64 of 1997).

<sup>6</sup> Constitution of South Africa, s 37(1)(a)-(b).

<sup>7</sup> KL Scheppele, 'Exceptions that Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life' in JK Tullis (ed), *The Limits of Constitutional Democracy* (Princeton University Press, New Jersey 2010), 132.

4. The rights of those detained without trial under such circumstances are laid down in s 37(6)-(7). There are two constitutionally mandated opportunities for judicial review of the detention. Section 37(6)(e) requires judicial review no later than ten days after the commencement of detention. Thereafter, the detainee may commence proceedings for a further judicial review pursuant to s 37(6)(f). The right to review includes the right of the detained person to appear before the court in person and to make representations against continued detention.<sup>8</sup> The detainee must be furnished with written reasons for detention two days prior to any hearing.<sup>9</sup> Once a person has been detained without trial in a state of emergency, and their release is ordered by a court, they cannot be re-detained.<sup>10</sup>
5. States of emergency are temporally finite, lasting for 21 days in the first instance, and can only be extended by the National Assembly for a maximum period of three months at a time.<sup>11</sup>
6. The remainder of this section deals with the general provisions on arrest and detention under South African criminal law.

#### **b) Threshold questions**

7. The law and procedure of arrest is governed by ss 39-53 of the Criminal Procedure Act (No. 51 of 1977). Arrest can occur with or without a warrant. Arrest (in physical terms) occurs when either the arrestee submits to arrest or, alternatively, when their body is 'forcibly confined'.<sup>12</sup> The effect of an arrest is that the arrestee is 'in lawful custody and... shall be detained in custody until he is lawfully discharged or released from custody.'<sup>13</sup> An arrested person must be immediately informed verbally of the reason for arrest (where arrest is without warrant) or furnished with a copy of the warrant on demand (where arrest occurs with a warrant).<sup>14</sup>
8. Section 35 of the South African Constitution sets out further specific rights for 'arrested, detained, and accused persons'. Section 35(1) sets out the rights of arrested persons, and s 35(2) sets out the rights of detained persons. In procedural terms, arrested persons have the right to remain silent and to be brought before a court within 48 hours, whereas detained persons have the right to legal counsel of their own choosing, to prompt information regarding the reason for detention, to challenge the lawfulness of the detention before a court, and to be released where their detention is unlawful.

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<sup>8</sup> Constitution of South Africa, s 37(6)(g).

<sup>9</sup> Constitution of South Africa, s 37(6)(h).

<sup>10</sup> Constitution of South Africa, s 37(7).

<sup>11</sup> Constitution of South Africa, s 37(2)(b).

<sup>12</sup> Criminal Procedure Act (No 51 of 1977), s 39(1).

<sup>13</sup> Criminal Procedure Act (No 51 of 1977), s 39(3).

<sup>14</sup> Criminal Procedure Act (No 51 of 1977), s 39(2).

### **c) Compensation for unlawful detention**

9. Damages for the tort of ‘wrongful’ or ‘unlawful’ detention are generally available, and the High Court has jurisdiction over quantum of damages. In the case of *Freeman*<sup>15</sup> Jones J followed the approach in *Seria v Minister of Safety and Security*<sup>16</sup> and held that:

the awards of the courts should reflect the value which our society places on rights to liberty and dignity and the seriousness of exposing a person to humiliation, degradation and diminution of his or her sense of personal worth, insofar as it is possible to do so in monetary terms.

10. The South African Constitution also provides mandatory safeguards and remedies (such as release).
11. Finally, the common law of South Africa recognises a general right not to be unlawfully detained: ‘*interdictum de libero homine exhibendo*, the common-law remedy used to release a person being unlawfully detained’. This is broadly equivalent to *habeas corpus*.<sup>17</sup>

## **II IMMIGRATION DETENTION**

### **a) Preliminary remarks**

#### *i) Immigration Act and Refugees Act*

12. The Immigration Act (No. 13 of 2002) and the Refugees Act (No. 130 of 1998) now make up the legal framework governing immigration detention in South Africa. Both have been subject to amendment in recent years, but the provisions governing immigration detention remain the same.

#### *ii) Bill of Rights*

13. The majority of the provisions of the South African Bill of Rights apply to all persons in the country, regardless of nationality. Section 12(1)(a) protects the ‘right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause’. Section 35(2) targets arbitrary detention and sets out basic protections that apply to all detained individuals; in addition, administrative detention (including immigration detention) is subject to the requirements in s 33 regarding lawful, reasonable and procedurally fair administrative action. The courts consider that any interference with personal liberty is therefore *prima facie* unlawful,<sup>18</sup> with the burden resting on the State to justify detention.

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<sup>15</sup> *Freeman v Minister of Safety and Security and Minister of Justice and Constitutional Affairs* [2006] ZAECHC 9 (3 March 2006).

<sup>16</sup> *Seria v Minister of Safety and Security and Others* 2005 (5) SA 130 (C).

<sup>17</sup> *Coetzee v National Commissioner of Police and Another* 2013 (11) BCLR 1227 (CC) (29 August 2013), [14].

<sup>18</sup> *Arse v Minister of Home Affairs (25/10)* [2010] ZASCA 9.

## **b) Decision to detain**

### *i) Immigration Act*

14. The South African Supreme Court of Appeal has held that the Department of Home Affairs has a discretionary power to detain under the Immigration Act;<sup>19</sup> however, as a result of the protections contained in the Bill of Rights, this discretion ought to be construed in favour of liberty where possible.<sup>20</sup>
15. Foreigners must fulfil the prescribed conditions for entry to South Africa, or they will have entered illegally (the term used is ‘illegal foreigner’) and will be automatically subject to detention and removal – to this end, they must obtain either a temporary or a permanent residence permit. An asylum permit falls under the former category.
16. Section 34(1) of the Immigration Act provides that, without need for a warrant, an immigration officer may arrest an illegal foreigner and cause them to be deported; they may also detain the foreigner pending deportation. Similarly, s 41(1) of the Immigration Act provides that if an immigration or police officer is not satisfied on reasonable grounds that a person is entitled to be in the Republic as a citizen, permanent resident or allowed foreigner, they may be interviewed and subsequently detained under s 34.
17. The Immigration Act and accompanying Immigration Regulations provide for a number of further rules and procedural safeguards regarding the decision to detain suspected illegal foreigners. In particular:
  - detention pursuant to s 34(1) must be pursuant to a warrant issued by an immigration officer;<sup>21</sup>
  - police and immigration officers may detain an individual for up to 48 hours to verify their immigration status;<sup>22</sup>
  - however, no one may be detained for longer than 48 hours for purposes other than deportation;<sup>23</sup>
  - a detainee may at any time request that their detention be confirmed as lawful by a court warrant – if a warrant is not issued within 48 hours of the request, they must be released;<sup>24</sup>

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<sup>19</sup> *Jeebhai v Minister of Home Affairs* (139/08) [2009] ZASCA 35.

<sup>20</sup> *Ulde v Minister of Home Affairs* (320/08) [2009] ZASCA 35.

<sup>21</sup> Immigration Regulations (2005), r. 28(1).

<sup>22</sup> Immigration Act (No 13 of 2002), ss 34, 41.

<sup>23</sup> Immigration Act (No 13 of 2002), s 34.

<sup>24</sup> Immigration Act (No 13 of 2002), s 34. Note that this requirement seems to go simply to the lawfulness of the detention decision itself under the Immigration Act – it does not appear necessary to consider alternatives to detention, etc.

- a detainee must be informed of these rights in language understood by the individual where possible, practicable and reasonable;<sup>25</sup>
- detention must not exceed 30 days without a warrant of the court – the court may extend the period for a maximum of 90 days ‘on good and reasonable grounds’; and
- a detainee must be notified of the intention to extend their detention and given an opportunity to make representations as to why it should not be extended.<sup>26</sup>

## *ii) Refugees Act*

18. The Refugees Act establishes a legal framework detailing separate procedures for the detention of asylum-seekers and refugees, who do not fall within the scope of the Immigration Act. Despite this, a report on immigration detention practice in South Africa has raised concerns that in practice the Immigration Act is often applied to asylum-seekers and refugees, resulting in some detainees being deported to countries where they may face persecution contrary to the prohibition on refoulement.<sup>27</sup>
19. Asylum-seekers are not subject to the same discretionary powers of detention under South African law as suspected illegal foreigners, and may (in theory, and subject to the qualification above) only be detained in the circumstances set out in the Refugees Act. In terms of detention regulation, the relevant provisions are as follows.
20. When the Minister withdraws an asylum permit, they may cause the relevant individual to be arrested and detained pending final adjudication of the asylum claim.<sup>28</sup> Again, a person in possession of a valid asylum permit cannot be arrested and detained under Immigration Act powers as they are not an ‘illegal foreigner’. The withdrawal of an asylum permit is therefore crucial to enlivening the power to detain. Importantly, this means asylum-seekers cannot be lawfully detained pending determination of their application. Thus, in *Arse v Minister of Home Affairs*,<sup>29</sup> the Supreme Court of Appeal held that asylum-seekers have the right to remain free from detention pending the outcome of their asylum applications, and ordered the immediate release of the applicant along with an asylum-seeker permit. Furthermore, the Court in *Bula v Minister of Home Affairs*<sup>30</sup> held that persons otherwise liable to detention as illegal foreigners who make (or evince an intention to make) an application for asylum engage the protective provisions of the Refugees Act and must accordingly be released.

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<sup>25</sup> Immigration Act (No 13 of 2002), s 34.

<sup>26</sup> Immigration Regulations (2005), r. 28(4).

<sup>27</sup> Gina Snyman, *Monitoring Immigration detention in South Africa* (Johannesburg: Lawyers for Human Rights, 2010).

<sup>28</sup> Refugees Act (No 130 of 1998), s 23.

<sup>29</sup> *Arse v Minister of Home Affairs* [2010] ZASCA 9.

<sup>30</sup> 2012 (4) SA 560 (SCA).

21. An asylum-seeker may not be detained for longer than is ‘reasonable and justifiable’, and any detention of longer than 30 days must be reviewed by a judge of the High Court.<sup>31</sup>

### **c) Review of and challenges to detention**

#### *i) Specific statutory provisions*

22. Under the Refugees Act, following the initial review by a High Court Judge, an asylum-seeker’s detention must be further reviewed every 30 days.<sup>32</sup> No other provision appears to exist for challenging the decision to detain.
23. Under the Immigration Act, there is a procedure for requesting a review by the relevant Minister of a finding that a person is an illegal foreigner.<sup>33</sup> This does not in terms cover the subsequent decision to detain; however, the section goes on to provide that a person aggrieved by any other decision under the Immigration Act that ‘materially and adversely affects [their] rights’ may make an application to the Director-General for review or appeal of that decision.<sup>34</sup> The Director-General will then confirm, reverse or modify the decision; an applicant aggrieved by this further decision may apply to the Minister for review or appeal.<sup>35</sup> While s 34 (the section detailing detention powers) refers to the need to inform an illegal foreigner of their right to appeal the decision to deport them, it does not refer to the right to appeal the decision to detain. It is therefore possible, though by no means clear, that a statutory right of appeal to the Director-General and hence to the Minister exists in relation to this decision.

#### *ii) Bill of Rights*

24. As noted above, detainees also enjoy the protections in the Bill of Rights of the South African Constitution, including just administrative action,<sup>36</sup> access to the courts,<sup>37</sup> and a list of due process rights under s 35. Section 35(2)(d) in particular contains a codified version of the writ of *habeas corpus* – everyone detained has the right to ‘challenge the lawfulness of the detention before a court and, if the detention is unlawful, to be released’. Detainees may therefore challenge their detention on this basis, alleging that the circumstances under the relevant statute providing for use of the detention power have not been made out.

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<sup>31</sup> Refugees Act (No 130 of 1998), s 29.

<sup>32</sup> Refugees Act (No 130 of 1998), s 29.

<sup>33</sup> See Refugees Act (No 130 of 1998) as amended in 2004, s 8(1).

<sup>34</sup> Refugees Act (No 130 of 1998) as amended in 2004, s 8(3)-(4).

<sup>35</sup> Refugees Act (No 130 of 1998) as amended in 2004, s 8(4)-(7).

<sup>36</sup> Constitution of South Africa, s 33.

<sup>37</sup> Constitution of South Africa, s 34.

25. Where a detainee alleges that one of the requirements under the Immigration Act or Refugees Act has been breached, it is for the Department of Home Affairs to either justify the detention or release the individual.<sup>38</sup>
26. It has been reported that in practice many detainees are unaware of the procedural safeguards under the Immigration Act or of the availability of judicial review.<sup>39</sup> The same report raises concerns regarding widespread disregard for the procedural protections under the Immigration Act. It is therefore possible that the availability of remedial procedures in principle does not match their availability in practice.
27. Where a constitutional challenge to detention is successful, it appears that the usual remedy is an order for immediate release. For example, in the cases of *Aruforse v Minister of Home Affairs*<sup>40</sup> and *Hassani v Minister of Home Affairs*,<sup>41</sup> the court ordered the immediate release of individuals who had been detained for more than 120 days in breach of Immigration Act safeguards. Similarly, in *A v Minister of Home Affairs*<sup>42</sup> the High Court found that the applicant's detention had been rendered unlawful by the failure of the immigration officer to obtain a warrant to extend detention beyond 30 days; a warrant obtained later than this was inadequate, and immediate release was ordered.

#### **d) Compensation for unlawful detention**

28. Section 38 of the Bill of Rights provides that detainees have the right to allege before a court that one of their rights has been infringed or threatened, and that the court may consequently grant 'appropriate relief'. Appropriate relief in detention cases appears generally to consist of an order for immediate release; however, it is possible that compensation is also available under this provision.
29. There is also a private law action for delict – the *actio iniuriarum* – which may be used to vindicate rights to liberty by giving the aggrieved party monetary compensation. Such an action may be brought against public authorities.<sup>43</sup>

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<sup>38</sup> *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

<sup>39</sup> Gina Snyman, *Monitoring Immigration detention in South Africa* (Johannesburg: Lawyers for Human Rights, 2010).

<sup>40</sup> 2010 (6) SA 579 (GSJ).

<sup>41</sup> (01187/10) SGHC (5 February 2010).

<sup>42</sup> (101/10) SGHC (17 March 2010).

<sup>43</sup> *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Decision to detain

30. The ability to detain a person with mental illness is governed by the Mental Health Care Act (No. 17 of 2002). Pursuant to s 32, a person may be ‘provided with care, treatment and rehabilitation services without [their] consent... on an outpatient or inpatient basis’ only if there is a reasonable belief that they have a mental illness of such a nature that:
- they are likely to inflict seriously harm on themselves or others, or their care, treatment and rehabilitation is necessary for the protection of their financial interests or reputation; and
  - the person is incapable of making an informed decision on the need for care, treatment and rehabilitation and is unwilling to receive the treatment required.
31. For persons to be taken into involuntary care, an application must be made to the head of the health establishment. An application may be made by the spouse, next of kin, partner, associate, parent or guardian of the person concerned (unless these parties are unwilling, incapable or unavailable, in which case the health care provider may make the application).<sup>44</sup>
32. The person will then be examined by two medical practitioners to decide whether the criteria identified above are met.<sup>45</sup> If the practitioners confirm that the person meets these requirements and the head of the health establishment grants the application for involuntary care, the person may be detained for care, treatment or rehabilitation – along with further assessment by medical practitioners – for a 72-hour period.<sup>46</sup>
33. After the 72-hour period, the head of the health establishment must decide within 24 hours whether further involuntary care is needed.<sup>47</sup> If not, the patient must be discharged immediately unless they consent to further care.<sup>48</sup> Conversely, if it is decided that the patient warrants further involuntary care, a request must be submitted to the Review Board within seven days.<sup>49</sup> The Review Board will then have 30 days to decide whether or not to grant the request based on the same criteria set out above.<sup>50</sup>
34. If the person is to be cared for, treated and rehabilitated on an inpatient basis (i.e. detained), they must be either kept in or transferred to a psychiatric hospital until the Review Board makes its

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<sup>44</sup> Mental Health Care Act (No 17 of 2002), s 33(1)(a). Note that if the patient is under the age of 18 then the application must be made by the parent or guardian of the user: s 33(2)(a)(i).

<sup>45</sup> Mental Health Care Act (No 17 of 2002), s 33(4).

<sup>46</sup> Mental Health Care Act (No 17 of 2002), s 34(1).

<sup>47</sup> Mental Health Care Act (No 17 of 2002), s 34(2).

<sup>48</sup> Mental Health Care Act (No 17 of 2002), s 34(3)(a).

<sup>49</sup> Mental Health Care Act (No 17 of 2002), s 34(3)(c).

<sup>50</sup> Mental Health Care Act (No 17 of 2002), s 34(7).



decision.<sup>51</sup> However, inpatient care is effectively a measure of last resort: if at any time the head of the health establishment comes to the view that the person is fit to be an outpatient, they must discharge them and inform the Review Board in writing.<sup>52</sup>

35. The person subject of the application has the right to be heard before the Review Board.<sup>53</sup> If the Review Board grants the request, it must submit a written notice for consideration by a High Court.<sup>54</sup>

## **b) Review of and challenges to detention**

### *i) Appeal to Review Board and High Court*

36. The patient or their representative may lodge an appeal to the Review Board within 30 days of the decision of the head of the health establishment.<sup>55</sup> The patient has the right to make written and oral representations on the merits of the appeal.<sup>56</sup>
37. The Review Board must give written notice of the reasons for its decision to the patient.<sup>57</sup> If the Review Board upholds the appeal then all treatment will be stopped and the patient discharged.<sup>58</sup> If the Review Board does not uphold the appeal then it must submit its decision and the relevant documents to the Registrar of a High Court for review, which must take place within 30 days.<sup>59</sup> The High Court may order further hospitalisation of the patient, or their immediate discharge.<sup>60</sup>

### *ii) Periodic review*

38. There is also compulsory periodic review of patients in involuntary care.<sup>61</sup> Six months after they were taken into care and every 12 months thereafter the head of the health establishment must review the patient's case and submit a summary to the Review Board, which must make a decision within 30 days as to whether to allow the continued hospitalisation of the patient or order their immediate discharge.<sup>62</sup> The head of the health establishment must, in their summary, state whether other care, treatment or rehabilitation that is less restrictive on the right of the

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<sup>51</sup> Mental Health Care Act (No 17 of 2002), s 34(4).

<sup>52</sup> Mental Health Care Act (No 17 of 2002), s 34(5).

<sup>53</sup> Mental Health Care Act (No 17 of 2002), s 34(7).

<sup>54</sup> Mental Health Care Act (No 17 of 2002), s 34(7).

<sup>55</sup> Mental Health Care Act (No 17 of 2002), s 35(1).

<sup>56</sup> Mental Health Care Act (No 17 of 2002), s 35(2)(b).

<sup>57</sup> Mental Health Care Act (No 17 of 2002), s 35(2)(d).

<sup>58</sup> Mental Health Care Act (No 17 of 2002), s 35(3).

<sup>59</sup> Mental Health Care Act (No 17 of 2002), ss 35-36.

<sup>60</sup> Mental Health Care Act (No 17 of 2002), s 36.

<sup>61</sup> Mental Health Care Act (No 17 of 2002), s 37.

<sup>62</sup> Mental Health Care Act (No 17 of 2002), s 36(c).

patient to movement, privacy and dignity is available. The Review Board must give written reasons for its decision to the patient.

## **IV MILITARY DETENTION**

### **a) Preliminary remarks**

39. South Africa's military law is found in the South African Defence Act (No. 44 of 1957) – primarily in its first schedule, the Military Discipline Code, which provides for the military criminal law (as amended by numerous subsequent Acts). The Military Discipline Supplementary Measures Act (No. 16 of 1999) enacts amendments to the military court system as well as providing for the pre-trial and post-trial procedural framework.

### **b) Threshold questions**

40. Sections 120-121 of the Military Discipline Code provide for the establishment of detention barracks both inside and outside South Africa and the formulation of regulations to manage such facilities.<sup>63</sup> Persons charged or to be charged with an offence under the Code may be detained there while awaiting trial or confirmation of sentence.<sup>64</sup> Detention barracks are not subject to independent oversight, but only to an internal complaints mechanism.<sup>65</sup> There is not a great deal of information available about the functioning of these barracks; however, it is possible that questions may arise as to whether and under what circumstances confinement there would amount to detention.

### **c) Decision to detain**

#### ***i) Pre-Trial procedures***

41. Any person arrested under the relevant sections of the Military Discipline Code must be brought before a military court within two days of their arrest.<sup>66</sup> The military court must ensure that the accused understands their rights to legal representation and a disciplinary hearing. Every person subject to the Military Code has the right to legal representation when appearing before a military court.<sup>67</sup>

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<sup>63</sup> See Defence Act (No 44 of 1957), s 120 and following.

<sup>64</sup> Defence Act (No 44 of 1957), s 121.

<sup>65</sup> Lucas Mutingh, *Guide to the UN Convention against Torture in South Africa* (2<sup>nd</sup> ed, Civil Society Prison Reform Initiative, Community Law Centre, 2011) <<http://cspri.org.za/publications/legal-guides/Guide%20to%20UN%20Convention%20Against%20Torture%20in%20South%20Africa.pdf>> accessed 21 February 2014.

<sup>66</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 29(1).

<sup>67</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 23.

42. In the alternative, a person subject to the Military Code – other than an officer or warrant officer – may elect to be heard by a commanding officer for any military disciplinary offence. The commanding officer then has the power to sentence the offender to a limited range of punishments.<sup>68</sup>
43. The court may remand the case, subject to the condition that it must release the detainee if the interests of justice so permit. Reasons must be given for deciding that a detainee is to remain in custody, and the remand limit may not exceed seven days unless a fresh order for remand is issued by the court.<sup>69</sup> Where a person is brought before a commanding officer rather than a court, the commanding officer has the same powers and duties in relation to remand.<sup>70</sup>
44. If an accused is not tried, heard or otherwise dealt with within fourteen days after the date of the first remand and remains in custody, this fact must be reported by a commanding officer or senior prosecution counsel to the local representative of the Adjutant General.<sup>71</sup> It is not clear what the Adjutant General may do on receiving such a report.
45. A military court may direct that a preliminary investigation be held in respect of allegations against the accused. Before any evidence is recorded in a preliminary investigation, the accused must be informed of the offence in respect of which the investigation is being held, of the investigatory and disclosure nature of the proceedings, of the fact that the proceedings will not constitute a trial, and of their right to cross-examine witnesses, call witnesses, and give evidence.<sup>72</sup> A preliminary investigation does not affect the rules governing the accused's detention in any way.

*ii) Trial procedures*

46. Trials conducted in a military court will generally be conducted in open court, subject to certain exceptions.<sup>73</sup>
47. Where the trial has commenced and is adjourned, if the interests of justice allow, the accused must be released; if they are to be kept in custody, reasons must be given and remand shall not exceed fourteen days. The senior prosecution counsel must report the fact of an accused's detention in custody to the local representative of the Adjutant General where this exceeds fourteen days.<sup>74</sup>

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<sup>68</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 11.

<sup>69</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 29(3).

<sup>70</sup> Military Discipline Supplementary Measures Act (16 of 1999), s 29(4).

<sup>71</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 29(8).

<sup>72</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 30(4).

<sup>73</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 33(3).

<sup>74</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 33(4), (6).

#### **d) Review of and challenges to detention**

48. There does not appear to be any provision for review or appeal of the decision to remand a person subject to the Military Code in custody prior to trial.
49. A person who is convicted of an offence under the Military Code and sentenced has the right to ‘automatic, speedy and competent review of the proceedings’.<sup>75</sup> Section 26 sets out the duties of the reviewing authority, which include drawing attention to matters requiring comment and recommending to the appropriate authority the taking of any remedial action required.
50. Where a military court has convicted an accused, it must inform them of the review authority to whom the record of proceedings will be submitted for review; of their right to make written representations to that authority; and of their right to approach the Court of Military Appeals or the High Court.<sup>76</sup>
51. Every sentence of imprisonment must be reviewed by a Court of Military Appeals and shall not be executed until that review has been completed.<sup>77</sup>
52. In imprisonment cases, where an offender has been convicted by a military court, the presiding judge or commanding officer shall as soon as possible submit the record of the trial proceedings to the Director: Military Judicial Reviews.<sup>78</sup> A convicted person may as soon as possible, but not later than 14 days after the announcement of sentence, provide the Director: Military Judicial Reviews with representations in writing concerning the facts or law of the case.<sup>79</sup> Where the 14-day period is impractical, it may be extended, with reasons, by the local representative of the Adjutant General.<sup>80</sup>
53. Subject to exceptions, every person convicted and sentenced by a military court shall be detained in custody pending the review of their case.<sup>81</sup> However, the local representative of the Adjutant General may order release subject to conditions.<sup>82</sup>

#### **e) Compensation for unlawful detention**

54. The majority of the provisions of the Bill of Rights in the South African Constitution apply to all persons in the country, regardless of nationality. Section 12(1)(a) protects the ‘right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause’. Section 35(2) targets arbitrary detention and sets out basic protections that

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<sup>75</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 25.

<sup>76</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 33.

<sup>77</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(2).

<sup>78</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(6).

<sup>79</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(7).

<sup>80</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(8).

<sup>81</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(9).

<sup>82</sup> Military Discipline Supplementary Measures Act (No 16 of 1999), s 34(11).

apply to all detained individuals, in addition to which administrative detention (including immigration detention) is subject to the s 33 requirements regarding lawful, reasonable and procedurally fair administrative action. Section 38 further provides that detainees have the right to allege before a court that one of their rights under the Bill of Rights has been infringed or threatened, and that the court may consequently grant ‘appropriate relief’, including a declaration of rights.

55. There is also a private law action for delict – the *actio iniuriarum* – which may be used to vindicate rights to liberty by giving the aggrieved party monetary compensation.

## **V POLICE DETENTION**

### **a) Preliminary remarks**

56. Some powers of detention by police are set out in the section on administrative detention above. The following section provides information about two other relevant regimes: police powers relating to crowd control, and police powers relating to detention after arrest (with a particular focus on detention without charge).

## **POLICE POWERS RELATING TO CROWD CONTROL**

### **a) Regulation of Gatherings Act**

57. The relevant legislation appears to be the Regulation of Gatherings Act (No. 205 of 1993). This provides for the notification of intended demonstrations to designated liaison officers, and for meetings prior to the occurrence of the demonstration to ensure that both police and participants are aware of the intended purposes, scale and scope of the gathering.
58. Section 9 of the Act details the powers of police. It empowers police to prevent people participating in a gathering from proceeding to a different place or deviating from the route specified,<sup>83</sup> and to ‘take such steps, including negotiations with the relevant persons, as are in the circumstances reasonable and appropriate to protect persons and property.’<sup>84</sup> If the police officer has reasonable grounds to believe that danger to persons or property resulting from the demonstration cannot be avoided by these steps, they may also order the participants to disperse within a specified (and reasonable) time<sup>85</sup> and then, if they fail to comply, order officers under their command to disperse the participants, including by the use of force but excluding the use of ‘weapons likely to cause serious bodily injury or death.’<sup>86</sup> The degree of force which may be

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<sup>83</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(1)(b).

<sup>84</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(1)(e).

<sup>85</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(2)(a).

<sup>86</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(2)(b).

used must not be greater than is necessary for dispersing the persons gathered, and must be ‘proportionate to the circumstances of the case and the object to be attained.’<sup>87</sup> It is interesting to consider whether the link made between the use of force and the dispersal of the demonstration suggests that force could *not* be used under the Act to contain protesters in a ‘kettle’.

#### **b) Standing Order No. 262**

59. One South African commentator has suggested that it was only in the year following the passage of the Act that the ‘transformation’ of the South African police force began in earnest.<sup>88</sup> A critical turning point with respect to crowd control was the introduction in 1997 of a South African Police Service (‘SAPS’) policy document which aimed to emphasise ‘crowd management’ rather than ‘crowd control’.<sup>89</sup> In 2002 the policy document became Standing Order (General) 262, ‘Crowd Management during Gatherings and Demonstrations’.<sup>90</sup> The stated purpose of the Order, which operates in tandem with the Regulation of Gatherings Act, is ‘to regulate crowd management during gatherings and demonstrations in accordance with the democratic principles of the Constitution and acceptable international standards.’<sup>91</sup>
60. The Order emphasises the avoidance of conflict by pro-active community engagement, and the importance of ensuring that crowd management is approached with a clear plan and clear structures for communication and command. In particular, the Order provides that ‘[t]he use of force must be avoided at all costs and members deployed for the operation must display the highest degree of tolerance’.<sup>92</sup> It further provides that, where ‘the use of force is unavoidable’ following multiple warnings, it must be aimed at de-escalating the conflict, minimal to achieve this goal, and reasonable and proportionate in the circumstances.<sup>93</sup> The Order also emphasises the importance of reporting and debriefing. Nothing specific is said in the Order in relation to arrest or detention.
61. Interestingly, at around the same time the Order was put in place, the units in the SAPS responsible for crowd management – Public Order Police Units – were restructured into Area

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<sup>87</sup> Regulation of Gatherings Act (No 205 of 1993), s 9(2)(c).

<sup>88</sup> Bilkis, Omar (Institute for Security Studies), ‘Crowd Control: Can our police service still deliver?’ (2006) 15 South African Crime Quarterly 7, <<http://www.issafrika.org/uploads/CQ15OMAR.PDF>> accessed 19 February 2014.

<sup>89</sup> *ibid.* A copy of the document can be found at <[https://web.up.ac.za/sitefiles/file/47/15338/SKMBT\\_28311061513201.pdf](https://web.up.ac.za/sitefiles/file/47/15338/SKMBT_28311061513201.pdf)> accessed 19 February 2014.

<sup>90</sup> A copy of the document can be found at <[http://web.up.ac.za/sitefiles/file/47/15338/SKMBT\\_28311061513210.pdf](http://web.up.ac.za/sitefiles/file/47/15338/SKMBT_28311061513210.pdf)> accessed 19 February 2014.

<sup>91</sup> Standing Order (General) 262, para 1(1) (‘Background’).

<sup>92</sup> Standing Order (General) 262, para 11(1) (‘Execution’).

<sup>93</sup> Standing Order (General) 262, para 11(3) (‘Execution’).

Crime Combating Units, with a core focus on crime prevention and combating. This raised concerns about the loss of specialist crowd management skills.<sup>94</sup>

## **POLICE POWERS RELATING TO DETENTION AFTER ARREST**

### **a) Threshold questions**

62. See above in the section on administrative detention.

### **b) Decision to detain**

63. A police officer may make an arrest without a warrant only under the circumstances set out in s 40 of the Criminal Procedure Act (No. 51 of 1977). These include (but are not limited to):

- where the person commits or attempts to commit an offence in the officer's presence;
- where the person is reasonably suspected of having committed one of a list of specified offences, including murder, rape, robbery, kidnapping, theft, fraud, or other offences the punishment for which may be imprisonment exceeding six months without the option of a fine;
- where the person is in possession of something reasonably suspected to be stolen property, and is reasonably suspected of having committed an offence in relation to it; and
- where the person is found in any place by night 'in circumstances which afford reasonable grounds for believing that such person has committed or is about to commit an offence'.

### **c) Review of and challenges to detention**

64. A person who has been arrested must be informed of their right to apply for bail.<sup>95</sup> If a person is not released because no charge is brought against them or bail is denied, they must be brought before a court no later than 48 hours after the arrest.<sup>96</sup> This conforms with the provisions of s 35(1) of the South African Constitution, which provide that a person who has been arrested has the right to be brought before a court no later than 48 hours after their arrest.<sup>97</sup> In addition, s 35(2) guarantees to 'everyone who is detained' the right to be informed promptly of the reasons

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<sup>94</sup> Bilkis, Omar (Institute for Security Studies), 'Impact of SAPS Restructuring on Public Order Policing' (2006) South African Crime Quarterly 31. In 2006, the ACCUs were geographically restructured into 'Crime Combating Units' or CCUs.

<sup>95</sup> Criminal Procedure Act (No 51 of 1977), s 50(1)(b).

<sup>96</sup> Criminal Procedure Act (No 51 of 1977), s 50(1)(c).

<sup>97</sup> Constitution of South Africa, s 35(1)(d).

for detention,<sup>98</sup> to access legal representation<sup>99</sup> and to challenge the lawfulness of detention in person before a court.<sup>100</sup>

65. At their first court appearance, the person has the right to be charged or to be informed of the reasons for their continued detention.<sup>101</sup> If they are not so charged or informed, they must be released.<sup>102</sup> A person who has been arrested otherwise than in connection with a committed offence also has the right to have the court adjudicate on the cause for their arrest.<sup>103</sup>
66. If the person is charged, they have the right to apply to be released on bail.<sup>104</sup> The court may postpone the ability to apply for bail for a period not exceeding seven days at a time if it is of the opinion that it is necessary to provide the State with a reasonably opportunity to procure material evidence which may be lost if bail were granted, or if it is necessary in the interests of justice to do so.<sup>105</sup>
67. Once charged, an accused must be released on bail if the interests of justice so permit.<sup>106</sup> This condition will *not* be satisfied in circumstances where it is likely that that the accused would endanger the safety of the public or a particular person; commit an offence; attempt to evade trial; interfere with witnesses or evidence; or undermine the functioning of the criminal justice system.<sup>107</sup> The court must make its decision by ‘weighing the interests of justice against the right of the accused to his or her personal freedom’.<sup>108</sup>
68. An appeal against a decision to deny bail may be brought to a superior court, which may set aside the decision only if satisfied that it was wrong.<sup>109</sup>

#### **d) Compensation for unlawful detention**

69. An action for damages for unlawful arrest and detention can be brought either at common law or under s 12(1)(a) of the Constitution. A common-law case is based on interference with the liberty of the individual;<sup>110</sup> a constitutional case is based on ‘the unreasonable and unjustifiable

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<sup>98</sup> Constitution of South Africa, s 35(2)(a).

<sup>99</sup> Constitution of South Africa, s 35(2)(b)-(c).

<sup>100</sup> Constitution of South Africa, s 35(d).

<sup>101</sup> Constitution of South Africa, s 35(1)(e); Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>102</sup> Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>103</sup> Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>104</sup> These provisions accord with s 35(1)(f) of the Constitution, which provides that a person brought before the court after arrest must be released ‘if the interests of justice so permit’; see also Criminal Procedure Act (No 51 of 1977), s 60(1).

<sup>105</sup> Criminal Procedure Act (No 51 of 1977), s 50(6).

<sup>106</sup> Criminal Procedure Act (No 51 of 1977), s 60(1).

<sup>107</sup> Criminal Procedure Act (No 51 of 1977), s 60(4).

<sup>108</sup> Criminal Procedure Act (No 51 of 1977), s 60(9).

<sup>109</sup> Criminal Procedure Act (No 51 of 1977), s 65.

<sup>110</sup> *Duarte v Minister of Police* [2013] ZAGPJHC 51, [3], referring to *Minister van Wet en Orde v Mtshoba* 1990 (1) SA 280.



infringement of an individual's right not to be arbitrarily deprived of freedom or to be so deprived without just cause'.<sup>111</sup> In either case, the defendant bears the burden of establishing the lawfulness of both the arrest and the detention.<sup>112</sup> In constitutional cases it is more broadly established that the defendant bears the burden of justifying the deprivation of liberty, whatever form it might have taken.<sup>113</sup> The police officer is then liable for the damage caused by their unlawful act, subject to any specific provisions which might exempt them from liability in particular circumstances.<sup>114</sup>

## VI PREVENTIVE DETENTION

### a) Preliminary remarks

70. There are schemes of preventive detention for convicted and non-convicted persons available under South African law. The regime relating to non-convicted persons is described in the section on administrative detention above; as a result, the remainder of this section is concerned with the preventive detention of persons already convicted of an offence.
71. There are two forms of indeterminate preventive sentences for convicted persons which have been available pursuant to the Criminal Procedure Act 1977: the first relates to 'habitual criminals' and the second to 'dangerous criminals'.

### b) Habitual criminals

72. Pursuant to s 286 of the Criminal Procedure Act, a superior court may declare a person to be a 'habitual criminal'. The declaration may be made if the court is satisfied that the person 'habitually commits offences and that the community should be protected against [them].'
73. Under s 73(6)(c) of the Correctional Services Act (No. 111 of 1998), a person declared a 'habitual offender' may be detained for a period of fifteen years and is ineligible for parole for the first seven. Importantly, the previous version of the Correctional Services Act (being No. 8 of 1959) provided that a 'habitual criminal' could be *indefinitely* detained (with the same seven-year non-

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<sup>111</sup> *Zeeland v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC).

<sup>112</sup> See eg *Duarte v Minister of Police* [2013] ZAGPJHC 51, [3].

<sup>113</sup> See *Zeeland v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC), [24], holding that once the applicant has pleaded unlawful detention under the Constitution the respondent bears the burden of 'justify[ing] the deprivation of liberty, whatever form it may have taken.'

<sup>114</sup> See eg *Minister of Safety and Security v Kruger* [2011] ZASCA 7, dealing with a provision exempting police officers from liability where they unknowingly made an arrest pursuant to a defective warrant. The court held that the effect of the provision was not to preclude an award of damages: the arrest remained unlawful and, 'in accordance with ordinary principles', the officer's employer remained vicariously liable for its consequences.

parole period).<sup>115</sup> The length of imprisonment was therefore a question for the Parole Board, not a judicial authority. Unlike the status of ‘dangerous criminal’ (see directly below) there was no provision for review of the detainee’s status.<sup>116</sup> According to Anderson:

The crime of which the person is convicted is not important, but the list of previous convictions. The cumulative effect of all his crimes, and the threat it holds for the community are the factors which will sway the court. The actual length of time spent in prison then becomes a matter of his conduct whilst being incarcerated and a favourable finding of the Parole Board.<sup>117</sup>

74. In the case of *S v Niemand*, decided in 2001, the Court noted that s 73(6)(c) of the 1998 Act had yet to come into force, meaning that the relevant provisions of the 1959 Act remained operational. The Court found that these provisions were unconstitutional, as they constituted a disproportionate interference with his constitutional right to freedom and security of the person and not to be subjected to cruel, inhumane or degrading punishment.<sup>118</sup> The Court therefore ordered that the words ‘provided that no such prisoner shall be detained for a period exceeding 15 years’ be read into the 1959 Act.<sup>119</sup>
75. It appears that s 73(6)(c) was enacted in its present form by the Correctional Services Amendment Act (No. 25 of 2008).

### **c) Dangerous criminals**

76. Section 286A of the Criminal Procedure Act allows a superior court to declare a person a ‘dangerous criminal’ following conviction if the court is ‘satisfied that the person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him.’<sup>120</sup> The aim of this provision is to protect the public from individuals who suffer from psychopathy or related conditions. Notably, there is no specified list of ‘trigger offences’: as the Supreme Court of Appeal has itself noted, ‘[i]n theory any conviction can do’.<sup>121</sup>
77. Before such a status is imposed on a convicted person the sentencing court must direct an inquiry as to the suitability of imposing the status.<sup>122</sup> The inquiry is conducted by a medical superintendent of a psychiatric hospital, or a psychiatrist of the convicted person’s own choosing, who must compile a report, including as to whether the accused represents a danger to

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<sup>115</sup> *S v Niemand* 2002 (1) SA 21 (CC), [10].

<sup>116</sup> *ibid*, [19].

<sup>117</sup> A Anderson, ‘Preventative Detention in Pre-and Post-Apartheid South Africa: From a Dark Past to a Brighter Future’ (2008), <<http://www.isrcl.org/Papers/2008/Anderson.pdf>> accessed 13 January 2014.

<sup>118</sup> *S v Niemand* 2002 (1) SA 21 (CC).

<sup>119</sup> *ibid*, [32].

<sup>120</sup> A Anderson, ‘Preventative Detention in Pre-and Post-Apartheid South Africa: From a Dark Past to a Brighter Future’ (2008), <<http://www.isrcl.org/Papers/2008/Anderson.pdf>> accessed 13 January 2014.

<sup>121</sup> *S v Bull* [2001] ZASCA 105 (26 September 2001), [7].

<sup>122</sup> Criminal Procedure Act (No 51 of 1977), s 286A(2).

the wellbeing of others.<sup>123</sup> The convicted person is entitled to dispute the findings of the report made in judicial proceedings, and may call and cross-examine relevant witnesses.<sup>124</sup> In the case of *S v Bull* (*'Bull'*),<sup>125</sup> Supreme Court of Appeal ruled that 'in making a predictive judgment of dangerousness the court must consider... the personal characteristics of the accused, as revealed by psychiatric assessment, the facts and circumstances of the case and the accused's history of violent behaviour, particularly the accused's previous convictions.'<sup>126</sup>

78. The result of such a declaration is that the individual is subject to an indeterminate sentence.<sup>127</sup> However, there are procedural safeguards. The court must order that the person be brought before it again on the expiry of a period determined by it to re-assess the prisoner.<sup>128</sup> The court will adopt the same procedure and apply the same criteria as on the initial imposition of the sentence.<sup>129</sup> It may confirm the sentence of imprisonment for an indefinite period, or order the person's release unconditionally or under supervision.<sup>130</sup> If the sentence of indefinite detention is confirmed, the court must fix a further period at the end of which the person must again be brought before it for review. In *Bull*, the Court held that in fixing this period regard should be had to the sentence which would have been imposed as a determinate sentence for the relevant offence. The Court suggested that a period in excess of half this term, or in excess of 20 years if a sentence of life imprisonment would have been imposed, might be unlawful as it 'would deprive the accused of the right to be considered for parole when he might no longer be dangerous.'<sup>131</sup>
79. The constitutionality of the 'dangerous offender' provisions was upheld in *Bull*.

#### **d) Detention for treatment**

80. Section 296 of the Criminal Procedure Act permits a court to detain an individual upon conviction for the purposes of medical treatment. Such a measure would usually be taken 'in addition to or in lieu of any sentence in respect of an offence committed by a person', and would involve detention at a treatment centre established under the Prevention and Treatment of Drug

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<sup>123</sup> Criminal Procedure Act (No 51 of 1977), s 286A(3)(a)(i)-(ii).

<sup>124</sup> Criminal Procedure Act (No 51 of 1977), s 286A(4)(a)-(c).

<sup>125</sup> *S v Bull* [2001] ZASCA 105 (26 September 2001).

<sup>126</sup> *ibid*, [18].

<sup>127</sup> Criminal Procedure Act (No 51 of 1977), s 286B(1)(a).

<sup>128</sup> Criminal Procedure Act (No 51 of 1977), ss 286B(1)(b)-(2).

<sup>129</sup> Criminal Procedure Act (No 51 of 1977), s 286B(4).

<sup>130</sup> Criminal Procedure Act (No 51 of 1977), s 286B(4).

<sup>131</sup> *S v Bull* [2001] ZASCA 105 (26 September 2001), [28].

Dependency Act. It will usually occur where the offender's criminal behaviour is considered to have resulted from their substance addiction.<sup>132</sup>

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<sup>132</sup> A Anderson, 'Preventative Detention in Pre-and Post-Apartheid South Africa: From a Dark Past to a Brighter Future' (2008), <<http://www.isrcl.org/Papers/2008/Anderson.pdf>> accessed 13 January 2014.

# Country Report for Sri Lanka

## I ADMINISTRATIVE DETENTION

### a) Counter-terrorism

1. Terrorism is regulated by the Prevention of Terrorism (Temporary Provisions) Act 1979 ('PTA'), which was made permanent in 1982.
2. Also notable is the Public Security Ordinance 1947 ('PSO') under which, a proclamation of emergency can be made.<sup>1</sup> This is particularly important since the fundamental rights that can be restricted on grounds of public security under the Sri Lankan Constitution, can *only* be restricted under this Ordinance, or the regulations made thereunder.<sup>2</sup> The Governor General may make such emergency regulations as they think necessary, to authorise and provide for the detention of persons.<sup>3</sup> Under the PSO, the Prime Minister may order that public areas be blocked for use,<sup>4</sup> and if anyone violates, or is reasonably suspected of violating such an order, they may be arrested by the police without a warrant.<sup>5</sup> Armed forces may be granted the same powers of arrest as the police during an emergency,<sup>6</sup> in which case they must deliver the person arrested to a police officer within twenty-four hours.<sup>7</sup> No criminal proceedings can be initiated by anyone (including the detainee) without the permission of the Attorney General and no civil proceedings can be initiated at all for anything done in good faith under the emergency regulations,<sup>8</sup> or under the PSO itself.<sup>9</sup> However, this does not take away the right to question regulations or orders made under the PSO, before the Supreme Court.<sup>10</sup>
3. Emergency regulations were finally lifted from Sri Lanka in August 2011 and it is the PTA that is currently used to counter terrorism in the State.

### i) Threshold questions

4. There is no threshold question regarding whether a person has been detained or arrested.

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<sup>1</sup> Public Security Ordinance 1947, s 2.

<sup>2</sup> *Thavaneethan v Dayananda Dissanayake Commissioner of Elections and Ors* (2003) 1 Sri LR 74.

<sup>3</sup> Public Security Ordinance 1947, s 5(2)(a).

<sup>4</sup> Public Security Ordinance 1947, s 16.

<sup>5</sup> Public Security Ordinance 1947, s 18.

<sup>6</sup> Public Security Ordinance 1947, s 12.

<sup>7</sup> Public Security Ordinance 1947, s 20.

<sup>8</sup> Public Security Ordinance 1947, s 9.

<sup>9</sup> Public Security Ordinance 1947, s 23.

<sup>10</sup> *Wicremabandu v Herath and Ors* (1990) 2 Sri LR 348.

*ii) Decision to detain*

5. There is no safeguard under the PTA to inform the detained person of the grounds of their arrest, or to provide them with a lawyer. However, art 13 of the Sri Lankan Constitution, which requires that everyone charged with a crime will have a right to be heard, to be informed of the reasons for their arrest and to be provided with an attorney, continues to apply.
6. The powers under the PTA have been granted in relation to the series of offences specified thereunder,<sup>11</sup> ranging from causing the death of a specified person<sup>12</sup> to criminal intimidation of a witness.<sup>13</sup> Section 6(1) dealing with the investigation into any of these offences provides:

Any police officer not below the rank of Superintendent or any other police officer not below the rank of Sub-Inspector authorised in writing by the Superintendent in that behalf may, without a warrant and with or without assistance and notwithstanding anything in any other law to the contrary, arrest a person.<sup>14</sup>

7. The officer may do so based on a reasonable suspicion. However, this is an objective standard, and the subjective opinion of the police officer is not enough.<sup>15</sup> Obstructing a policeman trying to make such an arrest is a punishable offence.<sup>16</sup> While there is no statutory obligation to provide the detainee with the grounds of their arrest, this is required under article 13(1) of the Sri Lankan Constitution and failure to do so will render the arrest arbitrary.<sup>17</sup>
8. The detainee must be produced before the magistrate within 72 hours, who, upon application by the police will order their remand under trial unless the Attorney General consents to the release of such a person.<sup>18</sup> The Attorney General must therefore be informed as soon as possible of every detention, so that they can make the determination of whether or not to order release.<sup>19</sup>
9. Even otherwise, s 7(2) provides that:

Where any person connected with or concerned in or reasonably suspected to be connected with or concerned in the commission of any offence under the PTA appears or is produced before any court, such court shall order the remand of such person until the conclusion of the trial.

10. However, if the police applies, the Magistrate shall authorise the detention of such a person for a period not exceeding 72 hours.<sup>20</sup> It is important to note that there is no concept of bail here and

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<sup>11</sup> For a complete list, refer to Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, ss 2-3 (‘Prevention of Terrorism Act 1979’).

<sup>12</sup> Prevention of Terrorism Act 1979, s 2(1)(a).

<sup>13</sup> Prevention of Terrorism Act 1979, s 2(1)(c).

<sup>14</sup> Prevention of Terrorism Act 1979, s 6(1).

<sup>15</sup> *Channa Perris and Ors v Attorney General and Ors* (1994) 1 Sri LR 1.

<sup>16</sup> Prevention of Terrorism Act 1979, s 6(2).

<sup>17</sup> *Padmanathan v Sub Inspector Paranagama* (1999) 2 Sri LR 225.

<sup>18</sup> Prevention of Terrorism Act 1979, s 7(1).

<sup>19</sup> *Sukummar v Officer-in-Charge, Joseph Army Camp, Vavuniya and Ors.* (2003) 1 Sri LR 399.

<sup>20</sup> Prevention of Terrorism Act 1979, s 7(2).

only the Attorney General can authorise the release of a person before the conclusion of the trial. Section 3(1) of the Bail Act 1997 excludes the application of provisions of the Bail Act in relation to all PTA offences. Notably, a police officer conducting an investigation in respect of any person so arrested or remanded:

- shall have the right of access to such person and the right to take such person during reasonable hours to any place for the purpose of interrogation and from place to place for the purposes of investigation; and
- may obtain a specimen of the handwriting of such person and do all such acts as may reasonably be necessary for fingerprinting or otherwise identifying such person.<sup>21</sup>

11. Additionally, where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity,<sup>22</sup> the Minister may order that such person be detained for a period not exceeding three months in the first instance, in such place and subject to such conditions as may be determined by the Minister. Any such order may be extended from time to time for a period not exceeding three months at a time, up to 18 months.<sup>23</sup> If such an order is obtained within 72 hours of the arrest, then this dispenses with the need of producing the detainee before a judicial officer.<sup>24</sup> Furthermore, the order will lapse automatically after three months, unless specifically extended. This order may be suspended at any time by the Minister,<sup>25</sup> who can then revoke the suspension if a condition of the order has been violated, or there is a threat to public safety.<sup>26</sup> Similarly, the Minister may also order measures short of detention such as placing restrictions of travel and movement,<sup>27</sup> for a period of three months, extendable three months at a time up to 18 months.<sup>28</sup> This order can be varied or cancelled at the Minister's pleasure.<sup>29</sup> Violation of the Minister's order is a punishable offence under the PTA.<sup>30</sup>

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<sup>21</sup> Prevention of Terrorism Act 1979, s 7(3).

<sup>22</sup> 'Unlawful activity' is defined as 'any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provisions of this Act in the commission or in connection with the commission of any offence under this Act or any act committed prior to the date of passing of this Act, which act would, if committed after such date, constitute an offence under this Act.' Prevention of Terrorism Act 1979, s 31. This definition was inserted by Amending Act 10 of 1982, w.e.f. 24 July 1979.

<sup>23</sup> Prevention of Terrorism Act 1979, s 9(1).

<sup>24</sup> *Weerawansa v the Attorney General and Ors* (2000) 1 Sri LR 387.

<sup>25</sup> Prevention of Terrorism Act 1979, s 9(2)(a).

<sup>26</sup> Prevention of Terrorism Act 1979, s 9(2)(b).

<sup>27</sup> Prevention of Terrorism Act 1979, s 11(1).

<sup>28</sup> Prevention of Terrorism Act 1979, s 11(3).

<sup>29</sup> Prevention of Terrorism Act 1979, s 11(4).

<sup>30</sup> Prevention of Terrorism Act 1979, s 12.

12. If a person commits an offence under the PTA, they will be tried before the High Court which will necessarily remand them till the end of the trial.<sup>31</sup> In the interests of national security or public order, the Secretary to the Ministry of the Minister in charge of Defence may order that the accused be kept in the custody of any authority, in such place and subject to such conditions as may be determined by the Secretary having regard to such interests. This is subject to directions given by the High Court to ensure fair trial.<sup>32</sup>

*iii) Review of and challenges to detention*

13. An order of suspension or revocation in respect of a detention ordered by the Minister is final and cannot be challenged before any Court by way of writ or otherwise.<sup>33</sup> Similarly, an order by the Minister restricting the movement of a person is also final.<sup>34</sup> These orders can however be challenged before an Advisory Board set up under the PTA, consisting of not less than three persons appointed by the President.<sup>35</sup> Similarly, writs in respect of detention ordered by the Minister are barred.<sup>36</sup>
14. In case an appeal is made on conviction, the convicted person must be kept in remand till the determination of the appeal.<sup>37</sup> The Court of Appeal may in ‘exceptional circumstances’ grant bail to the convicted person subject to such conditions as it deems fit.<sup>38</sup>

*iv) Compensation for unlawful detention*

15. There is no mention of any compensatory remedies under the PTA.

**b) Intelligence gathering**

16. The main intelligence agencies in Sri Lanka are the State Intelligence Service and the Directorate of Military Intelligence and Naval Intelligence.<sup>39</sup> The legal framework for intelligence gathering seems inaccessible. Sri Lanka has been under heavy criticism in the recent past for using ‘rehabilitation’ as a pretext to detain and interrogate people for the purpose of intelligence gathering.<sup>40</sup>

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<sup>31</sup> Prevention of Terrorism Act 1979, s 15.

<sup>32</sup> Prevention of Terrorism Act 1979, s 15A.

<sup>33</sup> Prevention of Terrorism Act 1979, s 10.

<sup>34</sup> Prevention of Terrorism Act 1979, s 11(5).

<sup>35</sup> Prevention of Terrorism Act 1979, s 13.

<sup>36</sup> Prevention of Terrorism Act 1979, s 10.

<sup>37</sup> Prevention of Terrorism Act 1979, s 19.

<sup>38</sup> Prevention of Terrorism Act 1979, s 19.

<sup>39</sup> ‘Role of Intelligence Services’ (*Ministry of Defence and Urban Development of Sri Lanka*, 30 December 2010) < [http://www.defence.lk/new.asp?fname=20100517\\_02](http://www.defence.lk/new.asp?fname=20100517_02) > accessed 21 January 2014.

<sup>40</sup> ‘Beyond Lawful Constraints: Sri Lanka’s Mass Detention of LTTE Suspects’ (*International Commission of Jurists*, September 2010) 32 - 37 <



## II IMMIGRATION DETENTION

### a) Threshold questions

17. There is no threshold question regarding whether a person has been detained or arrested.

### b) Decision to detain

18. The Immigrants and Emigrants Act 1948 prohibits entry without valid travel documents. To this extent, authorised officers may arrest persons on suspicion of travelling without valid documents.<sup>41</sup> A deportation order may also be issued against a person illegally entering or overstaying, and detention on failure to comply with this.<sup>42</sup>
19. The Immigration and Emigration Act provides for the following in s 21(1):

(1)The master of any ship arriving at any place in Sri Lanka shall, at the request of an authorized officer, detain on board the ship any person who has been refused an endorsement by that officer, or any person who enters Sri Lanka from that ship in contravention of the provisions of section 10.

20. There is no provision for a separate set of courts or challenge procedures in case of immigration detention. However, s 41 of the Immigrants and Emigrants Act provides that any person detained under the Act is deemed to be in legal custody.

### c) Review of and challenges to detention

21. There are no procedures specific to immigration detention set out. However, the right against arbitrary detention extend to foreigners as well as to citizens – the words read ‘*all persons*’ in article 13 as opposed to ‘citizens’.<sup>43</sup> They would therefore be susceptible to writ remedies. There may be a writ of *habeas corpus* in case there is prolonged detention of prisoners.<sup>44</sup>

### d) Compensation for unlawful detention

22. There are no specific provisions for monetary compensation.

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[http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6-Full\\_Report.pdf?bcsi\\_scan\\_76859af71b923077=0&bcsi\\_scan\\_filename=28738E40D73D48AB492577AF000B5BD6-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf?bcsi_scan_76859af71b923077=0&bcsi_scan_filename=28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf) > accessed 21 January 2014.

<sup>41</sup> *Veeradas v Controller of Immigration and Emigration and Others* [1989] LKSC 21; *Avaummab* [1962] LKSC 16

<sup>42</sup> Immigration and Emigration Act 1948, Part V r/w s 45.

<sup>43</sup> Constitution of Sri Lanka 1978 (Revised edition 2011), art 13.

<sup>44</sup> *Sumanadasa And 205 Others v Attorney General* [2006] LKSC 7.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

23. The main provision of law governing detention of persons of unsound mind seems to be the Mental Diseases Ordinance 1873,<sup>45</sup> which is discussed in detail below.
24. The Protection of the Rights of Persons with Disabilities Act 1996 is also pertinent for people with mental disabilities.<sup>46</sup> It provides that no person with a disability shall, on the ground of such disability, be subject to any restriction or condition with regard to access to, or use of, any building or place which any other member of the public has access to or is entitled to use.<sup>47</sup> While this could have been read as being in conflict with the rather harsh detention scheme provided under the Mental Diseases Ordinance, in the absence of an overriding clause, the Ordinance continues to be valid law.
25. The Mental Health Policy of Sri Lanka (2005 to 2015) proposes the idea of a new Act that recognises the need to respect the autonomy of persons with mental disabilities, but this has not culminated in the passing of any law.<sup>48</sup> There are some scholastic references to a pending Bill on the issue of disability rights, but no law has so far been enacted.<sup>49</sup>

#### a) Threshold questions

26. There is no threshold question as to whether a person has been detained or arrested. The deprivation of liberty of mentally unsound persons has been recognised as detention by the Supreme Court.<sup>50</sup>

#### b) Decision to detain

27. The Mental Diseases Ordinance allows for an application by a police officer, a *gram seva niladbari* (central government employee) or any private person to inquire into the state of a person suspected to be of unsound mind.<sup>51</sup> If an application is made by a private person, it must be accompanied by a certificate from a medical practitioner stating that they suspect the person in

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<sup>45</sup> This was later passed as a statute in 1956 as the Mental Diseases Act 1956 (Act No. 27 of 1956) but the researcher has been unable to locate the text of this statute.

<sup>46</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 37.

<sup>47</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 23(2).

<sup>48</sup> See para 7 of the Mental Health Directorate, *The Mental Health Policy of Sri Lanka 2005 – 2015* (2005) <[http://209.61.208.233/LinkFiles/On-going\\_projects\\_mhp-slr.pdf](http://209.61.208.233/LinkFiles/On-going_projects_mhp-slr.pdf)> accessed 17 January 2014.

<sup>49</sup> Fiona Kumari Campbell, 'The Terrain of Disability Law in Sri Lanka; Obstacles and Possibilities for Change', in S Rao and M Kalyanpur (eds), *South Asia and Disability Studies: Redefining Boundaries and Extending Horizons* (Peter Lang Publishers, forthcoming).

<sup>50</sup> *Channa Perris and Ors v Attorney General and Ors* (1994) 1 Sri LR 1; *Wicremabandu v Herath and Ors* (1990) 2 Sri LR 348.

<sup>51</sup> Mental Diseases Ordinance 1873, s 2.

respect of whom the application has been made is of unsound mind.<sup>52</sup> The District Court shall accordingly adjudicate whether or not such person is of unsound mind.<sup>53</sup> The District Court is obliged to adjudicate the matter with as little delay as possible.<sup>54</sup> The adjudication must be carried out in the presence of the suspected person,<sup>55</sup> except if, following an inquiry it determines their presence to be undesirable.<sup>56</sup> During this process, it is lawful to remand the person to custody for observation once or more often, for such time as shall be specified in the order.<sup>57</sup> It is also the duty of the Court to remand such a person if two medical practitioners certify that the person is of unsound mind (notwithstanding the Court's contrary opinion).<sup>58</sup> During such remand, they may be expected to submit to inspection by persons nominated by the Minister.<sup>59</sup> If, following this, the Court rules that the suspected person is of unsound mind, and a fit relative or friend of the person is willing, proper custody, care and maintenance of the person may be entrusted with such person.<sup>60</sup> In the absence of such a friend or relative, the person of unsound mind will continue to remain in custody at the Minister's pleasure, who may later make orders for their removal to a mental hospital using their discretion.<sup>61</sup> It is significant to note that the Court is entitled to 'hear evidence' under s 3 but there is not mandatory procedure to draw upon expert testimony in making the determination of soundness of mind.

28. An immediate emergency order for the removal of a person to a house of observation<sup>62</sup> can also be made by any Justice of Peace for the person's own sake, or for the sake of the public.<sup>63</sup> (Justices of Peace are appointed under s 37 of the Administration of Justice Law 1973 and can function as 'unofficial magistrates' which means they can exercise all powers of a magistrate except the power to try civil or criminal cases). In case of an emergency order being passed, the suspected person cannot be detained for over a period of 2 weeks, and notification of the detention must be given to the relevant District Court when such a suspected person is admitted

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<sup>52</sup> Mental Diseases Ordinance 1873, s 2.

<sup>53</sup> Mental Diseases Ordinance 1873, s 3(2).

<sup>54</sup> Mental Diseases Ordinance 1873, s 3(1).

<sup>55</sup> Mental Diseases Ordinance 1873, ss 3(1), 4(3).

<sup>56</sup> Mental Diseases Ordinance 1873, s 4(3).

<sup>57</sup> Mental Diseases Ordinance 1873, s 3(2).

<sup>58</sup> Mental Diseases Ordinance 1873, s 3(2).

<sup>59</sup> Mental Diseases Ordinance 1873, s 3(4).

<sup>60</sup> Mental Diseases Ordinance 1873, s 5(1). Note that a relative or friend can be, but does not have to be, a guardian. However, in case of children below 16, the phrase used is 'parent or guardian'. Hence the powers of the guardian of a mentally ill child to commit such a child to a facility are quite broad.

<sup>61</sup> Mental Diseases Ordinance 1873, s 5(1).

<sup>62</sup> Section 33(b) defines a house of observation as a building or a part of a building appointed by the Minister as a place for the observation of the behaviour of persons suspected to be of unsound mind.

<sup>63</sup> Mental Diseases Ordinance 1873, s 7(1).

to a house of observation.<sup>64</sup> The District Court shall then proceed to determine whether or not such person is of unsound mind, as it would in the case of any other application (given the application of s 3).<sup>65</sup> Discharge of a person is upon recovery as certified by the medical officer in charge of the mental hospital.<sup>66</sup>

29. A person voluntarily seeking to admit themselves to a mental hospital for treatment can apply to the Superintendent of the hospital.<sup>67</sup> Such a person is entitled to leave the hospital after giving the Superintendent a 72-hour notice of their intention to do so.<sup>68</sup> If a voluntary patient becomes incapable of expressing willingness or unwillingness to continue receiving treatment, they must be discharged within 28 days.<sup>69</sup> Discharge is also mandated upon a determination by the Superintendent that treatment is no longer required.<sup>70</sup> Additionally, the Superintendent may also decide to treat the voluntary patient as a temporary patient<sup>71</sup> (procedures governing temporary patients are discussed below).
30. Persons under sixteen years of age can be admitted to a mental hospital by their parents or guardians without any need for their consent upon furnishing a medical recommendation.<sup>72</sup> Similarly, persons incapable of expressing themselves as willing or unwilling to receive medical treatment can be admitted to a mental hospital as temporary patients on an application made to this effect by their relative or spouse to the Superintendent of the hospital, when it is accompanied by the recommendations of two medical practitioners.<sup>73</sup> Such an application may also be made by some other person, but in such a case it must be accompanied by an explanation of the applicant's connection with the patient.<sup>74</sup> A temporary patient cannot be detained for longer than a year.<sup>75</sup> If they become capable of expressing willingness or unwillingness to continue to receive treatment, detention for longer than 28 days after that is impermissible.<sup>76</sup>

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<sup>64</sup> Mental Diseases Ordinance 1873, s 7(5).

<sup>65</sup> Mental Diseases Ordinance 1873, s 7(7).

<sup>66</sup> Mental Diseases Ordinance 1873, s 8(2).

<sup>67</sup> Mental Diseases Ordinance 1873, s 23(1).

<sup>68</sup> Mental Diseases Ordinance 1873, s 24.

<sup>69</sup> Mental Diseases Ordinance 1873, s 27(1).

<sup>70</sup> Mental Diseases Ordinance 1873, s 27(2).

<sup>71</sup> Mental Diseases Ordinance 1873, s 27(3).

<sup>72</sup> Mental Diseases Ordinance 1873, s 23(2).

<sup>73</sup> Mental Diseases Ordinance 1873, s 28.

<sup>74</sup> Mental Diseases Ordinance 1873, ss 28 and 28(2)(c).

<sup>75</sup> Mental Diseases Ordinance 1873, s 30(1).

<sup>76</sup> Mental Diseases Ordinance 1873, s 30(2).

### **c) Review of and challenges to detention**

31. In case of the Mental Disease Ordinance, all decisions of the District Court are appealable before the Court of Appeal.<sup>77</sup> Such an appeal can be made by the suspected person, a relative or a friend, the Attorney General or any state counsel, the Inspector General of Police, the Director of Health Services, Commissioner of Prisons, or any testifying medical practitioner.<sup>78</sup>
32. It also seems possible to directly invoke the *habeas corpus* jurisdiction of the Court of Appeal to deal with cases of illegal or improper detention.<sup>79</sup>
33. As regards the rights under the Protection of the Rights of Persons with Disabilities Act, a person who is the victim of a discriminatory detention order may apply to the High Court for the Province in which the person affected by such contravention resides, for relief or redress.<sup>80</sup>

### **d) Compensation for unlawful detention**

34. No compensatory remedies seem to be provided for under the Mental Disease Ordinance. Under the Protection of the Rights of Persons with Disabilities Act, the High Court has the power to grant such relief or make such directions as it may deem just and equitable in the circumstances.<sup>81</sup>

## **IV MILITARY DETENTION**

### **a) Threshold questions**

35. There is no threshold question here.

### **b) Decision to detain**

36. Article 13 of the Sri Lankan Constitution 1978 reads as follows:

13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.  
(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the Judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such Judge made in accordance with procedure established by law...

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<sup>77</sup> Mental Diseases Ordinance 1873, s 19.

<sup>78</sup> Mental Diseases Ordinance 1873, s 20.

<sup>79</sup> Constitution of Sri Lanka 1978, art 141.

<sup>80</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 24(1).

<sup>81</sup> Protection of the Rights of Persons with Disabilities Act 1996, s 24(3).

37. The Sri Lankan Code of Criminal Procedure 1979 provides that any person arrested must be produced before a Magistrate within twenty-four hours.<sup>82</sup> There is no information available on the right to representation by a lawyer in court.
38. The Sri Lankan Army Act provides for a number of persons to be subject to military law. These include persons serving in the Army and in the reserve forces.<sup>83</sup> Any person subject to military law who commits a civil or a military offence may be taken into military custody<sup>84</sup> and must be produced before the officer ordering such custody within twenty-four hours.<sup>85</sup> Detention in the barracks of the Army may be ordered as a punishment for offences by a competent military authority.<sup>86</sup> The Sri Lankan Army Act does not provide for the detention of civilians.
39. In practice, under a large number of emergency regulations, there have been records of arrest by the army. *Vinayagamoorthy* cites a 1994 Amnesty International report<sup>87</sup> which refers to numerous instances of Tamils detained by the army in various locations. These are predominantly under the preventive detention provisions, or under the Prevention of Terrorism Act, 1982.<sup>88</sup>
40. Furthermore, it is noted that fundamental rights may only be enforced against the State,<sup>89</sup> and only in cases where the act in question is attributable to the State.<sup>90</sup> This would mean that in the event that an act is done by a soldier in their personal capacity, no remedy will lie against the State.<sup>91</sup> It is uncertain whether criminal proceedings can be invoked against the individual soldier under the Army Act.

### c) Review of and challenges to detention

41. Sri Lanka appears to make no distinction in the absolute standards required for military detention and those of civilian forces.<sup>92</sup>
42. In both cases, art 13(1) must be satisfied, and may be enforced by way of writ of *habeas corpus*. Reasons must be provided to any person arrested or detained for an offence, and the prisoner

<sup>82</sup> Code of Criminal Procedure 1979, s 37.

<sup>83</sup> Army Act 1949 s 34.

<sup>84</sup> Army Act 1949, s 35.

<sup>85</sup> Army Act 1949, s 38.

<sup>86</sup> Army Act 1949, Part XVII.

<sup>87</sup> Amnesty International, 'Sri Lanka: Balancing human rights and security: abuse of arrest and detention powers in Colombo' (*Amnesty International*, 1 February 2004), <<http://www.amnesty.org/fr/library/info/ASA37/010/1994/en>> accessed 10 January 2014.

<sup>88</sup> Amnesty International, 'Locked Away: Sri Lanka's Security Detainees' (*Amnesty*, March 2012), <<http://files.amnesty.org/archives/asa370032012eng.pdf>> accessed 2 February 2014.

<sup>89</sup> Constitution of Sri Lanka 1978, art 17.

<sup>90</sup> *Velmurugu v The Attorney General* [1981] LKSC 32.

<sup>91</sup> *ibid.*

<sup>92</sup> See *Wimal Vidyamani v Jayatileke, Lt. Col and Others* [1992] LKSC 24); *Machchavallavan v Oic, Army Camp, Plantain Point, Trincomalee and Others* [2005] LKSC 6.

must be released if this reason for custody ceases to exist.<sup>93</sup> In order to satisfy art 13(1), it is necessary that a reason for arrest be recorded prior to arrest – subsequent investigations do not meet the test of art 13(1).<sup>94</sup>

43. The Sri Lankan Supreme Court<sup>95</sup> and Court of Appeal are empowered to exercise writ jurisdiction for the enforcement of fundamental rights,<sup>96</sup> and may grant writs of *habeas corpus* in case of imprisonment. However, in exercising writ jurisdiction, the Court will not substitute its

<sup>93</sup> *Channa Peris and Others v Attorney General and Others* [1994] LKSC 38.

<sup>94</sup> *Vinayagamoorthy, Attorney-At-Law (On Behalf of Wimalenthiran) v The Army Commander and Others* [1994] LKSC 11.

<sup>95</sup> Section 126 states: Fundamental rights jurisdiction and its exercise.

- (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.
- (2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.
- (3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of *habeas corpus*, *certiorari*, prohibition, *procedendo*, *mandamus* or *quo warranto*, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such Court shall forthwith refer such matter for determination by the Supreme Court.
- (4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.
- (5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

<sup>96</sup> Section 141 deals with Power to issue writs of *habeas corpus* and states that:

141. The Court of Appeal may grant and issue orders in the nature of writs of *habeas corpus* to bring up before such Court -

- a. the body of any person to be dealt with according to law ; or
  - b. the body of any person illegally or improperly detained in public or private custody, and to discharge or remand any person so brought up or otherwise deal with such person according to law :
- (a) Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the Judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision for the interim custody of the body produced as to such court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into immediate effect, the order so pronounced or made by the Court of Appeal:
  - (b) Provided further that if provision be made by law for the exercise by any court, of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such court, direct the parties to make application in that court in respect of the custody of such minor child.

discretion for that of the officer's,<sup>97</sup> and will only determine if the decision to make an arrest was exercised reasonably.<sup>98</sup> The Sri Lankan Supreme Court has also held that wider discretion to detain persons under the Emergency Regulations may be exercised in times of Emergency.<sup>99</sup>

#### **d) Compensation for unlawful detention**

44. Monetary compensation may be awarded to the victim.<sup>100</sup>

### **V POLICE DETENTION**

45. Article 14 of the Constitution of Sri Lanka 1978 guarantees to its citizens the freedom of peaceful assembly, the freedom of movement and the freedom of speech and expression. Article 15 provides that the freedom of assembly is subject to restrictions in the interest of religious and racial harmony. Similarly, the freedom of movement can also be curbed in the interests of the national economy. However, the dispersal of an unlawful assembly can only be ordered by a magistrate or a police officer not below the rank of an Inspector.<sup>101</sup> The use of civil force,<sup>102</sup> as well as military force<sup>103</sup> is permissible for dispersing an unlawful assembly. Proceedings cannot be instituted concerning such action, except with the permission of the Attorney General.<sup>104</sup> Notably, to organise a procession, notice must be given to the police,<sup>105</sup> who can then regulate the conduct of the procession as they so deem fit.<sup>106</sup> Permission to conduct the procession can be denied in only if there is a threat public order.<sup>107</sup> Denial of license to conduct the procession can be challenged before the Magistrate of the division within a period of five days.<sup>108</sup> The Magistrate's order can be challenged within ten days before the Court of Appeal.<sup>109</sup>

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<sup>97</sup> *Elasinghe v Wijewickrema and Others* [1993] LKSC 12

<sup>98</sup> *ibid.*

<sup>99</sup> *Joseph Perera v Attorney-General* (1992) 1 Sri L. R. 199.

<sup>100</sup> *Abdul Latif v DIG of Police* (2005)1 Sri LR 22.

<sup>101</sup> Code of Criminal Procedure 1979, s 95(1).

<sup>102</sup> Code of Criminal Procedure 1979, s 95(2).

<sup>103</sup> A Magistrate, or the Government Agent of the District, or a police officer not below the rank of a Superintendent may order this step to be taken if the assembly cannot otherwise be dispersed, if it is necessary for public security: Section 95(3), Code of Criminal Procedure 1979. If the Magistrate, Government Agent or police officer not below the rank of a Superintendent cannot be reached, a commissioned officer can use military force without their authorisation, if it is necessary for public security: Section 96, Code of Criminal Procedure 1979.

<sup>104</sup> Code of Criminal Procedure 1979, s 97.

<sup>105</sup> Police Ordinance 1866, s 77.

<sup>106</sup> Police Ordinance 1866, s 78.

<sup>107</sup> Police Departmental Order E5, cited in JC Weliamuna, 'Judicial Intervention to Control Lawful Rallies: Subverting Democratic Rights' (*Groundviews*, 2 December 2012) < <http://groundviews.org/2012/02/12/judicial-intervention-to-control-lawful-rallies-subverting-democratic-rights/> > accessed 15 January 2014.

<sup>108</sup> Police Ordinance 1866, s 97(1).

<sup>109</sup> Police Ordinance 1866, s 97(4).



46. While concerns regarding Sri Lanka's poor human rights record have been raised when it comes to the freedom of assembly,<sup>110</sup> it seems that this is normally done through the use of force as specified in the Code of Criminal Procedure 1978 rather than through practices such as kettling.
47. Arguably, an unruly crowd could fall within the ambit of a 'disaster' as defined under the Sri Lanka Disaster Management Act 2005, which includes the occurrence of a man made event which endangers the health and safety of people or property.<sup>111</sup> In such a case, measures of disaster management could include kettling although the Act itself is silent on the issue. Such a measure would then need to be established as being in furtherance of religious or racial harmony, as well as the protection of the national economy. Scope for redress in this scenario is limited, since the Act provides immunity from legal proceedings for any action taken under it in good faith.<sup>112</sup> However, such invocation itself is unlikely, since in the past the Act seems to have been understood as being primarily directed towards ecological disasters.<sup>113</sup>

## VI PREVENTIVE DETENTION

### a) Threshold questions

48. There is no threshold question here.

### b) Decision to detain

49. Sri Lankan statutes may provide for preventive detention. This has been held to be within the scheme of the Constitution, during Emergency and under normal circumstances.<sup>114</sup>
50. A range of authorities have the discretion to order preventive detention under various statutes and regulations. The Prevention of Terrorism (Temporary Provisions) 1979 (made permanent in 1982) allows for preventive detention of up to 3 months if the Minister 'has reason to believe or suspect that any person is connected with or concerned in any unlawful activity.'<sup>115</sup> An 'unlawful activity' is defined as:

...any action taken or act committed by any means whatsoever, whether within or outside Sri Lanka, and whether such action was taken or act was committed before or after the date of coming into operation of all or any of the provisions of this Act in the commission or in connection with the commission of any offence under this Act or any act committed prior to

<sup>110</sup> For instance, Austria's comments before the Human Rights Council: Human Rights Council, *Report of the Working Group on the Universal Periodic Review A/HRC/22/16* (18 December 2012) [38].

<sup>111</sup> Sri Lanka Disaster Management Act 2005, s 25.

<sup>112</sup> Sri Lanka Disaster Management Act 2005, s 23.

<sup>113</sup> For instance, refer to: Ministry of Disaster Management, *Draft National Policy on Disaster Management* (February 2013) <<http://www.disastermin.gov.lk/web/images/pdf/draft%20dm%20policy.pdf>> accessed 16 January 2014.

<sup>114</sup> *Wicremabandu v Herath and Others* [1990] LKSC 19.

<sup>115</sup> The Prevention of Terrorism (Temporary Provisions) 1979, s 9.

the date of passing of this Act, which act would, if committed after such date, constitute an offence under this Act.<sup>116</sup>

51. These offences are listed in ss 2 to 5 of the same Act.<sup>117</sup> It would appear here that the Sri Lankan statute permits retrospective criminal legislation under these circumstances. This is a matter for some concern.

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<sup>116</sup> The Prevention of Terrorism (Temporary Provisions) 1979, s 31(1).

<sup>117</sup> Section 2 provides that (1) Any person who -

- (a) causes the death of any specified person, or kidnaps or abducts a specified person, or commits any other attack upon any such person, which act would, under the provisions of the Penal Code, be punishable with death or a term of imprisonment of not less than seven years; or
  - (b) causes the death of any person who is a witness to any offence under this Act, or kidnaps or abducts or commits any other attack upon any such person, which act would, under the provisions of the Penal Code, be punishable with death or a term of imprisonment of not less than seven years; or
  - (c) commits criminal intimidation of any special person or a witness referred to in paragraph (b); or
  - (d) commits the offence of robbery of the property of the Government, any department, statutory board, public corporation, bank, co-operative union or co-operative society; or
  - (e) commits the offence of mischief to the property of the Government, any department, statutory board, public corporation, bank, cooperative union or co-operative society or to any other public property; or
  - (f) without lawful authority imports, manufactures or collects any firearms, offensive weapons, ammunition or explosives or any article or thing used, or intended to be used, in the manufacture of explosives; or
  - (g) possesses without lawful authority, within any security area, any firearms or any offensive weapon, ammunition or explosives or any article or thing used, or intended to be used, in the manufacture of explosives; or
  - (h) by words either spoken or intended to be read or by signs or by visible representations or otherwise causes or intends to cause commission of acts of violence or religious, racial or communal disharmony or feelings of ill-will or hostility between different communities or racial or religious groups; or
  - (i) without lawful authority erases, mutilates, defaces or otherwise interferes with any words, inscriptions, or lettering appearing on any board or other fixture on, upon or adjacent to, any highway, street, road or any other public place; or
  - (j) harbours, conceals or in any other manner prevents, hinders or interferes with the apprehension of, a proclaimed person or any other person, knowing or having reason to believe that such person has committed an offence under this Act, shall be guilty of an offence under this Act.
- (2) Any person guilty of an offence specified in -
- (i) paragraph (a) or (b) of subsection (1) shall on conviction be liable to imprisonment for life, and
  - (ii) paragraphs (c), (d), (e), (f), (g), (h), (i) or (j) of subsection (1) shall on conviction be liable to imprisonment of either description for a period not less than five years but not exceeding twenty years.
- (3) In this section -
- (i) 'proclaimed person' means any person proclaimed by the Inspector-General of Police by Proclamation published in the Gazette to be a person wanted in connection with the commission of any offence under this Act; and
  - (ii) 'security area' means any area declared by the Minister by Order published in the Gazette to be a security area if he is satisfied that by reason of any unlawful activity there is in such area a reasonable apprehension of organised violence.
- 3.** Any person who -
- (a) does any act preparatory to the commission of an offence; or
  - (b) abets, conspires, attempts, exhorts or incites the commission of an offence; or

52. The Emergency Regulations 2005 have also been enacted under the Public Security Ordinance 1947 which, during the period of Emergency, allowed for preventive detention during the period of emergency. These provisions were widely worded, and allowed for detention on several grounds including national security, the maintenance of public order and maintenance of essential services.<sup>118</sup> These allow for detention if the Secretary to the Ministry of Defence is satisfied that they may act in a manner prejudicial to ‘national security.’<sup>119</sup> The regulations provide for the detainee to approach an Advisory Committee – as opposed to a magistrate - however, this is to be appointed by the President.<sup>120</sup> There is no provision in the Statute for extension of detention beyond 3 months. However, the Sri Lankan courts are willing to award compensation for prolonged arrest. This is set out below. Powers are also conferred on the police to arrest any person suspected of an offence under the Emergency Regulations without warrant.<sup>121</sup>
53. The Emergency Regulations also provide that ss 36, 37 and 38 of the Code of Criminal Procedure, 1979 do not apply to persons detained under orders of preventive detention.<sup>122</sup> These provide that a person must be produced before a Magistrate within 24 hours, and that any arrest

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(c) causes the death of any person, or commits any attack upon any person whomsoever in the course of committing any offence under this Act, which act would, under the provisions of the Penal Code, be punishable with death or with a term of imprisonment of not less than seven years, shall be guilty of an offence and shall on conviction be liable to imprisonment of either description for a period of not less than five years but not exceeding twenty years where the offence is one specified in paragraph (a) or (b), or to imprisonment for life where the offence is one specified in paragraph (c).

4. Where any person is convicted by any court of any offence under section 2 or section 3, then, in addition to any other penalty that the court shall impose for such offence -

(a) all property movable and immovable, of that person shall, by virtue of such conviction, be deemed to be forfeited to the Republic; and

(b) any alienation or other disposal of such property effected by such person after the date of coming into operation of this Part shall be deemed to have been, and to be, null and void.

5. Any person who -

(a) knowing or having reasonable cause to believe that any person -

(i) has committed an offence under this Act, or

(ii) is making preparation or is attempting to commit an offence under this Act, fails to report the same to a police officer; or

(b) having in his possession any information relating to the movements or whereabouts of any person who has committed or is making preparations or is attempting to commit an offence under this Act fails to report the same to a police officer, shall be guilty of an offence and shall, on conviction be liable to imprisonment of either description for period not exceeding seven years.

<sup>118</sup> Emergency Regulations 2005, reg 18.

<sup>119</sup> Emergency Regulations 2005, reg 18.

<sup>120</sup> Emergency Regulations 2005, reg 19.

<sup>121</sup> Emergency Regulations 2005, reg 20.

<sup>122</sup> Emergency Regulations 2005, reg 21.

by the police is to be reported to the Magistrate.<sup>123</sup> The regulations provide no procedure for challenge.

54. It is noted that there has been widespread criticism of the manner and the scale of preventive detention in Sri Lanka. The International Commission of Jurists has observed that this is on an unprecedented scale, and contravenes art 9(3) of the ICCPR.<sup>124</sup> Further, concerns are expressed that ‘surrendees’ and ‘rehabiltees’ under the Regulations may be clubbed with those under preventive detention.<sup>125</sup> These Emergency Regulations are no longer in force after the lifting of the Emergency in 2011.<sup>126</sup> Nevertheless, the Prevention of Terrorism Act continues to remain in force.

### c) Review of and challenges to detention

55. Case law on preventive detention requires an examination of the grounds of detention, and the release of the prisoner where these grounds cease to exist.<sup>127</sup> The Court of Appeal or the Supreme Court may further determine whether the order for preventive detention satisfies the test of *Wednesbury* unreasonableness<sup>128</sup> - in other words, an order may be struck down if it such that no reasonable person would have made it.<sup>129</sup> Courts are willing to strike down orders of

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<sup>123</sup> The provisions read as follows:

How person arrested is to be dealt with

36. A peace officer making an arrest without warrant shall without unnecessary delay and subject to the provisions herein contained as to bail take or send the person arrested before a Magistrate having jurisdiction in the case.

Person arrested not to be detained more than twenty-four hours

37. Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate.

Police to report arrests

38. Officers in charge of police stations shall report to the Magistrates' Courts of their respective districts the cases of all persons arrested without warrant by any police officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise.

<sup>124</sup> ICJ Briefing Note ‘Beyond Lawful Constraints: Sri Lanka’s Mass Detention of LTTE Suspects’ (*International Committee of Jurists*, September 2010) <[http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6Full\\_Report.pdf?bcsi\\_scan\\_76859af71b923077=0&bcsi\\_scan\\_filename=28738E40D73D48AB492577AF000B5BD6-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/28738E40D73D48AB492577AF000B5BD6Full_Report.pdf?bcsi_scan_76859af71b923077=0&bcsi_scan_filename=28738E40D73D48AB492577AF000B5BD6-Full_Report.pdf)> accessed 10 January 2014.

<sup>125</sup> *ibid* 28-30.

<sup>126</sup> Shihar Aneez, ‘Sri Lanka President Lifts Wartime Laws’ *Reuters* (Colombo, 25 August 2011) <<http://in.reuters.com/article/2011/08/25/idINIndia-58967520110825>> accessed 17 January 2014.

<sup>127</sup> *Wicremabandu v Herath and Others* 1990] LKSC 19.

<sup>128</sup> *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

<sup>129</sup> *Sunil Rodrigo (On Behalf of B. Sirisena Cooray) v Chandananda De Silva and Others* [1997] LKSC 36; *Chandra Kalyanie Perera and Another v Captain Sirwardena and Others* [1990] LKSC 22.

detention where the material submitted is found inadequate or tenuous' - for instance, a single letter is insufficient for an order of detention.<sup>130</sup> Thus, Sri Lankan courts exercise writ jurisdiction over the violation of fundamental rights, and grant a declaration that there has been a violation of fundamental rights.

**d) Compensation for unlawful detention**

56. Sri Lankan Courts also grant compensation for the violation of these rights. These are often small sums of money (from Sri Lankan Rs. 35,000<sup>131</sup> to Rs 50,000).<sup>132</sup>

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<sup>130</sup> *Jayarathne and Others v Chandrananda De Silva, Secretary, Ministry of Defence and Others* [1998] LKSC 36.

<sup>131</sup> *Wimal Vidyamani v Jayatileke, Lt. Col and Others* [1992] LKSC 24.

<sup>132</sup> *Jayarathne and Others v Chandrananda De Silva, Secretary, Ministry of Defence and Others* [1998] LKSC 36.

# Country Report for Switzerland

## I ADMINISTRATIVE DETENTION

1. Remand and preventive detention for security reasons that do not follow a criminal conviction are governed under different regimes, including immigration law, (cantonal) police law, and criminal procedure law. There is no separate regime of administrative detention relating to counter-terrorism operations in Swiss law. As a result, the following section refers only to criminal procedure law and police law (immigration detention is covered in a separate section below).

### a) Detention pursuant to Criminal Procedure Law

#### *i) Preliminary remarks*

2. Traditionally, criminal procedure law is applicable a person is suspected of having committed a criminal offence. However, Swiss criminal procedure law is not clear on this point. On the one hand, art 197 of the Criminal Procedure Code ('CrimPC')<sup>1</sup> provides that preventive detention under this law may only be imposed if 'there is reasonable suspicion that an offence has been committed'. On the other hand, art 221 para 2 CrimPC permits preventive detention if 'there is serious concern that a person will carry out a threat to commit a serious felony.'<sup>2</sup> This latter provision allows preventive detention in order to prevent a person from committing a serious offence, rather than to secure a criminal procedure or conviction. The Swiss Federal Court has confirmed this possibility. The Swiss government maintains that art 221 para 2 is consistent with 5(1)(c) ECHR.<sup>3</sup> In this case, arts 222-228 CrimPC apply *mutatis mutandis*.<sup>4</sup>
3. In Swiss law, preventive detention under criminal procedure law operates in three stages. The first follows the initial arrest (arts 217-220 CrimPC); secondly, there is the possibility of preventive detention ('remand') being ordered by a specialised court (a 'compulsory measures court') (arts 222-228 CrimPC); and third, preventive detention may be ordered by a criminal court after a criminal conviction (arts 229-233 CrimPC). This last stage takes place before an offender is transferred to a prison or during an appellate proceeding. The discussion below relates only to the first and second stages.

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<sup>1</sup> Schweizerische Strafprozessordnung vom 5. Oktober 2007 (SR. 311.0).

<sup>2</sup> Note that the crimes related to terrorism are either felonies or misdemeanours. See especially Title Twelve of the Swiss Criminal Code: Felonies and Misdemeanours against Public Order.

<sup>3</sup> Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechtes vom 21. Dezember 2005, 1229.

<sup>4</sup> *ibid*.

*ii) Threshold questions*

4. Arrest by the police under art 217 CrimPC is regarded as detention.<sup>5</sup> Generally, in Swiss law, criteria regarding the nature, the duration, the impact and the modalities are decisive.<sup>6</sup>

*iii) Decision to detain*

aa) Initial arrest by police

5. The police may arrest a person under the following circumstances:
- where there is a strong suspicion that the person has committed a serious crime (a felony or misdemeanour);
  - where there is a warrant for the person's arrest; or
  - where there is a suspicion that the person will commit a serious crime (a felony or misdemeanour).
6. If a person is caught in the act of committing a *contravention*, or the police encounter them immediately after committing such an offence, arrest is also possible in the event that:
- the person refuses to provide his or her personal details;
  - the person does not live in Switzerland and fails to provide security for payment of the anticipated fine immediately; or
  - the arrest is necessary in order to prevent the person from committing further contraventions.
7. The maximum duration of detention following arrest is in every case 24 hours; note that 'if the person was stopped before the arrest, then the period while stopped shall be taken into account when calculating the time limit'.<sup>7</sup> After 24 hours, the person must be released or the case must be handed over to the public prosecutor, who must be informed about the arrest 'immediately' after it takes place.<sup>8</sup> A further period of preventive detention (called 'remand') is only possible in the event of a serious crime (felony or misdemeanour: see art 221 para 1 CrimPC), not if only a contravention is at stake.

bb) Application for remand

8. If the grounds for detention are confirmed after an interrogation by the public prosecutor, they may apply to the compulsory measures court (which is a specialised cantonal court concerned

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<sup>5</sup> Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechtes vom 21. Dezember 2005, 1226.

<sup>6</sup> BGE 136 I 87 E. 6.5.3.; 134 I 140 E. 3.2. p. 143 f., see also BGE 123 II 193 E. 3c p.197 ff.

<sup>7</sup> CrimPC, art 219 para 4.

<sup>8</sup> CrimPC, art 219 para 1.

exclusively with decisions about compulsory measures) within 48 hours of the arrest.<sup>9</sup> The written application for remand must contain a brief statement about the reasons for detention and the most relevant files. Otherwise, the prosecutor must order the detainee's immediate release.<sup>10</sup>

9. The compulsory measures court makes its decision on the application for remand after a private hearing with the prosecutor, the accused and their defence agents.<sup>11</sup>
10. As noted above, under Swiss criminal procedure law there are two main reasons to order remand. The first is where there is a strong suspicion that the accused has committed a criminal offence (felony or misdemeanour) and the detention is necessary due to the danger of absconding, compromising efforts to secure a criminal conviction, or posing a 'considerable risk' of reoffending. The second is where there is a 'serious concern that a person will carry out a threat to commit a serious felony'.<sup>12</sup> In the latter case, it is enough that the commission of a serious felony is 'highly probable' considering all circumstances; in contrast to the rules regarding attempt, the person does not have to make any concrete steps or make any arrangements.<sup>13</sup>
11. The compulsory measures court must make its decision within 48 hours of receipt of the application.<sup>14</sup> If it decides in favour of the detainee, they must be released immediately.<sup>15</sup>

cc) Right to be heard in relation to application for remand

12. The detainee and their lawyer have a right to inspect the files before the hearing.<sup>16</sup> However, this right covers only the documents that are submitted by the prosecutor to substantiate the application for remand.<sup>17</sup>
13. The detainee and their lawyer also have a right to attend the hearing before the compulsory measures court.<sup>18</sup> However, the detainee can waive the right to a hearing. In this case, the compulsory measures court must decide in written proceedings according to the application made by the public prosecutor and the submissions made by the detainee.<sup>19</sup>

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<sup>9</sup> CrimPC, art 224 para 2.

<sup>10</sup> CrimPC, art 224 para 3.

<sup>11</sup> CrimPC, art 225 para 1.

<sup>12</sup> See also BGE 125 I 361, 366 E.4c.

<sup>13</sup> Marc Foster, Kommentar zu Artikel 221 StPO' Marcel A. Niggli, Marianne Heer and Hans Wiprächtler (Basel 2010), art 221 n 17.

<sup>14</sup> CrimPC, art 226 para 1.

<sup>15</sup> CrimPC, art 226 para 5.

<sup>16</sup> CrimPC, art 225 para 2.

<sup>17</sup> Botschaft des Bundesrates zur Vereinheitlichung des Strafprozessrechtes vom 21. Dezember 2005, 1231.

<sup>18</sup> CrimPC, art 225 para 1.

<sup>19</sup> CrimPC, art 225 para 4.



*ii) Review of and challenge to detention*

aa) Contesting decisions of the compulsory measures court

14. A detainee may contest decisions of the compulsory measures court about the ordering, extension, or ending of their detention.<sup>20</sup> The decision-making body is a cantonal court designated by the cantonal legislator.

bb) Periodic review of detention

15. In making its decision, the compulsory measures court can limit the period of preventive detention. If it does not do so, an automatic review takes place after three months.<sup>21</sup> An extension of the period of detention may (on the application of the prosecutor) be granted for a maximum of three months or, in exceptional cases, for a maximum of six months.<sup>22</sup> The law does not prescribe an explicit absolute maximum duration; however, the detention must be lawful within the limits of the principle of proportionality.<sup>23</sup> Note that the absence of a maximum duration could be especially problematic if the preventive detention is ordered under art 221 para 2 CrimPC (which, as noted above, provides for detention on the basis of a serious concern that a person will carry out a threat to commit a serious felony).

cc) Application to public prosecutor and reconsideration by compulsory measures court

16. According to art 228 CrimPC, a detainee can also apply to the public prosecutor at any time for release from remand unless the compulsory measures court has set a time period (of a maximum of one month) within which the accused is not allowed to apply for release.<sup>24</sup> The public prosecutor can order the detainee's immediate release. If they do not, the compulsory measures court must receive the files within three days, during which time the detainee and their lawyer must have the possibility to respond. The compulsory measures court must decide within five days of receiving this response.<sup>25</sup> The application will be granted if the criteria for detention set out above (i.e. a strong suspicion that the person has committed a criminal offence and that detention is necessary due to the danger of absconding etc., or a serious concern that the person will carry out a serious felony) are not found to be met.

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<sup>20</sup> CrimPC, art 222.

<sup>21</sup> CrimPC, art 227 para 1.

<sup>22</sup> CrimPC, art 227 para 7.

<sup>23</sup> Marc Foster, *Kommentar zu Artikel 226 StPO* Marcel A. Niggli, Marianne Heer and Hans Wiprächtler (Basel 2010), art 221 n 17, art 226 n 10.

<sup>24</sup> CrimPC, art 228 para 5.

<sup>25</sup> CrimPC, art 228 para 4.

### *iii) Compensation for unlawful detention*

17. The Swiss Federal Constitution of the Swiss Confederation ('SFC') stipulates no right to remedies for people who are unlawfully detained. However, Art 5(5) ECHR as well as art 9(5) of the International Covenant on Civil and Political Rights are applicable. Furthermore, art 431 para 1 CrimPC provides that if a compulsory measure (i.e. preventive detention) has been applied unlawfully, the criminal justice authority will award 'appropriate damages and satisfaction'. The unlawfulness of preventive detention is established if 'the permitted period of detention is exceeded' and 'the excessive deprivation of liberty cannot be not accounted for in sanctions imposed in respect of other offences.' Note that there are exceptions from that right.<sup>26</sup>

### **b) Detention pursuant to police law**

#### *i) Decision to detain*

18. Preventive detention for counter-terrorism reasons could also be carried out under the general provisions of police law. However, there are 26 different cantonal laws governing police detention.
19. According to the police law of the Canton Berne as well as Canton Zurich, a person can be detained for a maximum duration of 24 hours (see art 34 para 1 lit c PolG BE; § 27 PolG ZH)<sup>27</sup>. But in the Canton Bern, for example, police detention can be prolonged for a maximum of 7 days if a person poses a serious danger to others.<sup>28</sup> However, police detention must always be restricted to a minimum.<sup>29</sup> Furthermore, police detention that lasts longer than three hours is only lawful if a special police officer authorised to do so by the Confederation or the canton gives the order.<sup>30</sup>

#### *ii) Review of and challenge to detention*

20. Since police detention is effected by a body other than a court, the detainee has a constitutional right to 'have recourse to a court at any time' (art 31 para 4 of the SFC). The decision-making body is designated by the cantonal law.
21. Regarding the period of the court's decision, the SFC provides in art 31 para 4 that the court 'shall decide as quickly as possible on the legality of their detention.' In any case, the court has to

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<sup>26</sup> CrimPC, art 431 para 3.

<sup>27</sup> Polizeigesetz Kanton Bern vom 8. Juni 1997 (551.1); Polizeigesetz Kanton Zürich vom 23. April 2007 (550.1.)

<sup>28</sup> PolG BE, art 34 para 2.

<sup>29</sup> PolG BE, art 34 para 2.

<sup>30</sup> See CrimPC, art 219 para 5.

decide within the maximum duration of the permitted police detention (eg 24 hours in Berne and Zurich); practice indicates a maximum of four hours.<sup>31</sup>

22. An appeal may be brought on the basis that detention is unlawful because the grounds for detention under the relevant cantonal law (eg that the person poses a serious danger to themselves or others) are not present, or that the conditions for the initial arrest by police under art 217 CrimPC were not met.

### *iii) Compensation for unlawful detention*

23. See above in relation to detention under criminal procedure law.

## **II DETENTION OF PERSONS WITH MENTAL ILLNESS**

### **a) Preliminary remarks**

24. The regulation on the detention of persons with a mental illness has been subject to a broad reform which became law on 1 January 2013. The principles and safeguards are legally consolidated on a federal level whereas the details about the procedure before the cantonal authorities are left to the cantonal law. This research will consider federal law and will only make some remarks on cantonal law where appropriate.

### **b) Threshold questions**

25. The Swiss Federal Court decided that the compulsory psychiatric assessment of a person with an alleged mental illness in a psychiatric clinic must be qualified as detention (*Freiheitsentziehung*) and not just a restriction on liberty.<sup>32</sup> The same ruling was made in the case of a forced hospitalisation for a period of a few days.<sup>33</sup>

### **c) Decision to detain**

#### *i) Identity of decision-maker*

26. An order for the hospitalisation of a mentally ill person is made by the adult protection authority (art 428 Swiss Civil Code),<sup>34</sup> which is an administrative cantonal authority. Cantonal law (26 different regimes) governs the legal organisation of these authorities. According to art 429 para 1 Swiss Civil Code, 'the cantons may designate doctors who in addition to the adult protection authority are authorised to order hospitalisation for a period specified by cantonal law.' However, the period may not be longer than six weeks.

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<sup>31</sup> Markus Mohler, *Grundzüge des Polizeirechts in der Schweiz*, Basel 2012, n 1371.

<sup>32</sup> BGE 124 I 40 E. 3c.

<sup>33</sup> BGE 90 I 29 E. 5.

<sup>34</sup> Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907 (SR. 210).

27. Pursuant to art 429 para 2 of the Swiss Civil Code, ‘hospitalisation may not continue beyond the specified period at the latest unless an enforceable hospitalisation order from the adult protection authority applies.’
28. The adult protection authority can make a hospitalisation order if the person is suffering from a mental disorder or mental disability or serious neglect and the required treatment or care cannot be provided otherwise. The burden that the patient places on family members and third parties, and their protection, must be taken into account.<sup>35</sup>
29. There is no absolute time limit on detention. Instead, art 426 para 3 of the Swiss Civil Code holds that ‘[t]he patient shall be discharged as soon as the requirements for hospitalisation no longer are fulfilled.’

*ii) Circumstances in which detention may be ordered*

30. Article 430 of the Swiss Civil Code (paras 1-4) set out the procedure for a hospitalisation order. The patient must be interviewed and examined by a doctor. The patient is also entitled to receive a copy of the hospitalisation order, which must contain at least the place and date of the examination; the name of the doctor; the diagnosis, reasons therefor and the purpose of hospitalisation; and instructions on rights of appeal.

*iii) Right to be heard*

31. Article 447 of the Swiss Civil Code stipulates that the detainee ‘shall be heard in person unless to do so appears inappropriate.’ Apart from the hearing, the detainee is entitled to inspect the case files ‘unless legitimate interests require otherwise’.<sup>36</sup> However, the detainee and other persons participation in the proceedings are ‘obliged to cooperate in the enquiries into the circumstances’.<sup>37</sup>

*iv) Right to representation*

32. Regarding the proceedings before the administrative authority, according to art 432 of the Swiss Civil Code ‘[a]ny person committed to an institution may appoint a person that he or she trusts as a representative to support him or her during their stay and until the conclusion of all related procedure.’

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<sup>35</sup> See Swiss Civil Code, art 426 paras 1-2.

<sup>36</sup> Swiss Civil Code, art 449b para 1.

<sup>37</sup> Swiss Civil Code, art 449b para 2.

## **d) Review of and challenges to detention**

### *i) Periodic review*

33. According to art 431 para 1 of the Swiss Civil Code, the detainee has a ‘right to review at the sixth month after hospitalization at latest’ by the protection authority itself. Article 431 para 2 holds that a second review has to take place within the following six months, and thereafter the protection authority ‘shall conduct a review as often as necessary, but at least once every year.’ The decision to detain can be altered or reversed if the requirements for hospitalisation are not met or the institution does not seem to be suitable anymore.<sup>38</sup>

### *ii) Right of appeal*

#### aa) Instruction on right to appeal

34. According to art 430 para 2.4 of the Swiss Civil Code, the hospitalisation order must instruct the detainee of their rights of appeal.

#### bb) Constitutional right to a legally constituted, competent, independent and impartial court

35. Since the hospitalisation order is made by a body other than a court, the detainee has a constitutional right to ‘have recourse to a court at any time’ (art 31 para 4 of the SFC).<sup>39</sup> The authority must be a body in the sense of art 30 para 1 SFC, meaning a ‘legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.’
36. Regarding the time of the recourse, the Swiss Federal Court has ruled that the right of appeal must be given at ‘appropriate’ (*angemessen*) and ‘reasonable’ (*vernünftigen*) intervals; what this exactly means must be decided in each individual case. With respect to the review of hospitalisation orders, it ruled that the intervals could be longer than in the case of prisoners awaiting trial.<sup>40</sup>
37. Furthermore, the Swiss Federal Court has ruled that blocking periods for fresh requests for release (in the form of either a review by the adult protection authority or an appeal to a court) are only lawful if they do not extend to more than one month or, exceptionally, between one and three months.<sup>41</sup>
38. Regarding the period of the court’s decision, the SFC provides in art 31 para 4 that the court ‘shall decide as quickly as possible on the legality of their detention.’ According to art 450e para 5

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<sup>38</sup> Swiss Civil Code, art 431 para 1.

<sup>39</sup> Schweizerische Bundesverfassung vom 18. April 1999 (SR. 101). Note that art 31 para 4 SFC is equivalent to Art 5(4) ECHR

<sup>40</sup> BGE 130 III 729 E. 2.1.2.

<sup>41</sup> BGE 126 I 26.

of the Swiss Civil Code, in the case of the challenge of a hospitalisation order the court ‘normally’ decides within five working days of the appeal being filed.

39. According to art 430 para 4 of the Swiss Civil Code, ‘an appeal does not have suspensive effect unless the doctor or the competent court orders otherwise.’<sup>42</sup>

cc) Grounds of appeal

40. Pursuant to art 450a para 1 of the Swiss Civil Code, the grounds on which the decision to detain can be altered or reserved are:

- ‘an infringement of the law’;
- ‘an incorrect or incomplete finding of legally relevant fact’; or
- ‘an inappropriate decision’.

41. According to art 450a para 2 of the Swiss Civil Code, ‘an appeal is also competent on the grounds of denial of justice or unjustified delay.’

*iii) Rights to an oral hearing and to representation*

42. In proceedings before the appellate authority, art 450 para 4 of the Swiss Civil Code stipulates that the ‘judicial appellate authority shall normally hear the client as a panel of judges.’ Furthermore, art 449a and 450e of the Swiss Civil Code both prescribe that ‘if necessary’ the adult protection authority as well as the court shall ‘order that the client is represented’ and ‘appoint a person experienced in care-related and legal matters as deputy.’

**e) Compensation for unlawful detention**

43. Article 454 para 1 of the Swiss Civil Code sets out the ‘right to damages’ of ‘any person who is injured by an unlawful act or omission related to official adult protection measures.’ If the injury is serious, the person is entitled to satisfaction.
44. The canton is liable for the damage, whereas the ‘injured party has no right to damages against the person who caused the injury’.<sup>43</sup> The canton’s right of recourse against the person that caused the injury is then governed by cantonal law.<sup>44</sup>

### **III POLICE DETENTION**

45. Two types of detention by police – under criminal procedure law and under cantonal police law – are discussed in the section on administrative detention above. We were not able to locate any additional specific provisions regarding practices such as ‘kettling’ in crowd-control situations (if

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<sup>42</sup> See also Swiss Civil Code, art 450e para 2.

<sup>43</sup> Swiss Civil Code, art 454 para 3.

<sup>44</sup> Swiss Civil Code, art 454 para 4.

they exist, it would be in the context of cantonal police law). However, cantonal police statutes do contain general rules about the compulsory measures which may be exercised by police.

46. In terms of relevant case-law, the Swiss Federal Court decided on the 22 January 2014<sup>45</sup> that the ‘kettling’ of three participants in an unauthorised demonstration for two hours did not amount to a deprivation of liberty. However, after the ‘kettling’ the participants were brought to the police station (hand-cuffed) and held in custody for another 3-5 hours. The Swiss Federal Court concluded that the handcuffing, the transportation, and the fact that the applicants were held in a cell, amounted not to a mere restriction on liberty but to a deprivation of liberty for the purpose of art 31 para 4 of the SFC (which provides that any person who has been deprived of their liberty by a body other than a court has the right to have recourse to a court at any time). The result is that the participants have had a constitutional right to have the lawfulness of the police arrest reviewed by the Cantonal Measure Court as soon as possible.
47. Another relevant question under Swiss law could be whether the interference with personal liberty (guaranteed by art 10 SFC) constituted by practices such as ‘kettling’ could be justified under the provisions of art 36 SFC (which deals with restrictions on fundamental rights). According to the framework of analysis provided for by art 36, ‘kettling’ would need to have a legal basis (most likely in police law); to be justified in the public interest; and to be proportionate. Within the balancing test required by art 36, significant factors might include whether the demonstration was authorised in advance and whether it proceeded peacefully. Furthermore, questions about the duration of ‘kettling’ might be scrutinised with respect to the principle of proportionality (especially ‘necessity’) in the context of the individual case.

## **IV PREVENTIVE DETENTION**

### **a) Preliminary remarks**

48. This section considers the most severe preventive detention of a person after serving a sentence, namely indefinite incarceration (*Verwahrung*). There are two different types of indefinite incarceration in Swiss law: ‘normal indefinite incarceration’ (art 64 para 1 of the Swiss Criminal Code)<sup>46</sup> and ‘lifelong indefinite incarceration’ (art 64 para 1bis of the Swiss Criminal Code).
49. Lifelong indefinite incarceration became law in 2004 after the people’s initiative on ‘life sentences for highly dangerous and ‘untreatable’ sexual or violent offenders.’ A new art 123a SFC was added:

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<sup>45</sup> BGE vom 22. Januar 2014, 1C\_350/2013, 1C\_352.

<sup>46</sup> Schweizerisches Strafgesetzbuch vom 21 December 1937 (SR. 311.0.).

1 If a sex offender or violent offender is regarded in the reports required for sentencing as being extremely dangerous and his or her condition assessed as untreatable, he or she must be incarcerated until the end of his or her life due to the high risk of reoffending. Early release and release on temporary license are not permitted.

2 Only if new scientific findings prove that the offender can be cured and thus no longer represents a danger to the public can new reports be drawn up. If the offender is released on the basis of these new reports, the authorities granting his or her release must accept liability if he reoffends.

3 All reports assessing sex offenders or violent offenders must be drawn up by at least two experienced specialists who are independent of each other. The reports must take account of all the principles that are important for the assessment.

50. The main difference between the two preventive measures is the provision for review. Where periodic reviews are available in respect of normal indefinite incarceration, in the case of lifelong indefinite incarceration a review can only be carried out if there are ‘new scientific findings that lead to the expectation that the offender can be treated so that he will no longer pose a risk to the public.’<sup>47</sup>

#### **b) Normal indefinite incarceration**

##### *i) Decision to detain*

aa) Identity of decision-maker

51. An order for either normal or lifelong indefinite incarceration is made by the court which imposes the original sentence.<sup>48</sup>
52. Normally, the order is made at the time of the conviction. However, since 2007, Swiss criminal law allows also order to be made retrospectively, after the offender has served their sentence (*nachträgliche Verwahrung*). Article 65 of the Swiss Criminal Code provides that ‘[i]f during the execution of the custodial sentence, *new* information or evidence comes to light to the effect that the requirements for indefinite incarceration are fulfilled and already applied at the time of conviction although the court could not have had knowledge of this, the court may order indefinite incarceration retrospectively.’

bb) Circumstances in which detention may be ordered

53. Normal indefinite incarceration can be considered on conviction for one of the following trigger offences: murder, intentional homicide, serious assault, rape, robbery, hostage taking, arson, or endangering life. It may also be imposed in relation to any other offences with a minimum

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<sup>47</sup> Swiss Criminal Code, art 64c para 1.

<sup>48</sup> Swiss Criminal Code, art 64.



sentence of five years' imprisonment<sup>49</sup> if the offender 'has caused or intended to cause serious detriment to the physical, psychological or sexual integrity of another person.'<sup>50</sup>

54. Importantly, an order for indefinite incarceration can only be imposed if the offender is at substantive risk of reoffending. According to art 64 para 1 lit b of the Swiss Criminal Code, a danger of recidivism is established if:

(a) 'due to the personality traits of the offender, the circumstances of the offence and his general personal circumstances', 'it is seriously expected that he will commit further offences of the same type'; or

(b) 'due to a permanent or long-term mental disorder of considerable gravity that was a factor in the offence, it is seriously expected that the offender will commit further offences of the same type.'

55. In the latter case, indefinite incarceration according to art 64 para 1 of the Swiss Penal Code is only inflicted if measures taken in a closed psychiatric institution or therapeutic institution do not promise any success.

56. According to art 56 para 4 of the Swiss Criminal Code, the court must base its decision on the report of an expert who has neither treated the offender before nor been responsible in any other way for their care.

57. It is important to note that the psychiatric reports play a key role. An order for indefinite incarceration can therefore be inflicted even though there is scientific evidence that the error rate is considerably high.<sup>51</sup> In the literature, it is therefore stressed that only a high probability of reoffending can justify an order for indefinite incarceration.<sup>52</sup> However, in the opinion of many experts, indefinite incarceration raises serious human rights concerns since it is not limited and can factually mean whole-life confinement.<sup>53</sup>

## *ii) Review of and challenges to detention*

### aa) Annulment of order during custodial sentence

58. Generally, the execution of the custodial sentence takes priority over indefinite incarceration. The execution of the order for indefinite incarceration can be annulled by the court that made it if, during the execution of the custodial sentence, it is 'highly probable'<sup>54</sup> that the offender will

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<sup>49</sup> See Swiss Criminal Code, art 64 paras 1-2.

<sup>50</sup> Swiss Criminal Code, art 64 para 1.

<sup>51</sup> Günter Stratenwerth, *Schweizerisches Strafrecht Allgemeiner Teil II: Strafen und Massnahmen* (2nd ed, Bern 2006), para 12 n 8.

<sup>52</sup> *ibid*, para 12 n 9.

<sup>53</sup> *ibid*, para 12 n 10.

<sup>54</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuche (Allgemeine Bestimmungen,

not reoffend when at liberty (art 64 para 3 Swiss Criminal Code).<sup>55</sup> The earliest possible time of release is the ‘time when the offender has served two thirds of a specific custodial sentence or 15 years of a life sentence.’

bb) Periodic review by administrative authority

59. The lawfulness of indefinite incarceration is subject to different mechanisms of automatic and periodic review. The competent body concerned with the review is a cantonal administrative authority; the formation of the authority is in the competence of each canton.
60. After serving the sentence and before the indefinite incarceration takes effect, the cantonal authority considers whether the offender should be transferred into an in-patient therapeutic treatment.<sup>56</sup> This review takes place every second year.
61. Furthermore, the detainee is entitled to an automatic and periodic review of their eligibility for parole: art 64b of the Swiss Criminal Code prescribes that the competent authority shall consider either ‘on request or ex officio’ ‘at least once annually, and for the first time after two years’ (...) ‘whether and when the offender may be released on parole from indefinite incarceration.’
62. The cantonal authority must base its decision on a report from the institution board; an independent specialist assessment (by an expert who has neither treated the offender nor been responsible in any other way for their care);<sup>57</sup> a hearing of a committee comprising representatives of the prosecution services, the execution authorities and one or more psychiatrists;<sup>58</sup> and a hearing of the offender.<sup>59</sup> The specialists and psychiatrists concerned must not be those responsible for the treatment or care of the offender.

cc) Appeal to a court

63. Since the order for indefinite incarceration is made by a body other than a court, the offender has constitutional right to ‘have recourse to a court at any time’.<sup>60</sup> As noted before, the authority must be a body in the sense of art 30 para 1 SFC, that means a ‘legally constituted, competent, independent and impartial court. Ad hoc courts are prohibited.’ Multiple appeals are permitted,

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Einführung und Anwendung des Gesetzes) und des Militärstrafgesetzes sowie zu einem Bundesgesetz über das Jugendstrafrecht vom 21. September 1998, 2098.

<sup>55</sup> Swiss Criminal Code, art 64 para 3.

<sup>56</sup> Swiss Criminal Code, art 64b para 1 lit b.

<sup>57</sup> Swiss Criminal Code, art 56 para 4; see also Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 901.

<sup>58</sup> Swiss Penal Code, art 62d para 2; see eg the detailed rules about the representatives in the Canton Berne, <[http://www.prison.ch/images/stories/pdf/konkordat\\_nw\\_ch/052\\_Konkordatlische\\_Fachkommission.pdf](http://www.prison.ch/images/stories/pdf/konkordat_nw_ch/052_Konkordatlische_Fachkommission.pdf)> accessed January 2014.

<sup>59</sup> Swiss Criminal Code, art 64b para 2.

<sup>60</sup> SFC, art 31 para 4.

and an appeal must be allowed if the conditions specified in art 64 para 1 lit b of the Swiss Criminal Code are no longer met.

### **c) Lifelong indefinite detention**

#### *i) Decision to detain*

aa) Identity of decision-maker

64. As noted above order for either normal or lifelong indefinite incarceration is made by the court which imposes the original sentence.<sup>61</sup>

bb) Circumstances in which detention may be ordered

65. Similar to the normal indefinite incarceration, lifelong indefinite incarceration can only be considered on conviction for one of the following trigger offences: murder, intentional homicide, serious assault, robbery, rape, indecent assault, false imprisonment or abduction, hostage taking, trafficking in human beings, genocide, or a felony under the heading of crimes against humanity or war crimes (Title Twelve).<sup>62</sup> The threshold is higher than for normal indefinite incarceration, as there is no additional provision relating to offences with a specified minimum sentence of imprisonment.

66. Furthermore, an order for lifelong indefinite incarceration may be made only where:

- ‘the offender, by committing the offence, caused or intended to cause serious detriment to the physical, psychological or sexual integrity of another person’;
- ‘there is a high probability that the offender will commit one of these felonies again’; and
- ‘the offender is assessed as being permanently untreatable, as the treatment offers no long-term prospect of success.’<sup>63</sup>

67. Article 56 para 4bis of the Swiss Criminal Code provides that the court must ‘base its decision on reports from at least two experienced specialists who are independent of each other and who have neither treated the offender nor been responsible in any other way for his care.’ However, it is not necessary that both experts conclude in favour of detention; in these cases the court is free to commission a third report.<sup>64</sup>

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<sup>61</sup> Swiss Criminal Code, art 64.

<sup>62</sup> Swiss Criminal Code, art 64 para 1bis.

<sup>63</sup> Swiss Criminal Code, art 64 para 1bis, a-c.

<sup>64</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 900.

68. The third criterion – that the offender must be regarded as permanently untreatable – has given rise to human rights concerns since such a verdict at the time of the conviction was criticised as erroneous, unscientific and suspicious.<sup>65</sup>
69. In November 2013, the Swiss Federal Court annulled a decision of the Appeal Court which ruled that the lifelong indefinite incarceration can be imposed if the psychiatrists come to the conclusion that the offender is untreatable *for the next twenty years*. The Swiss Federal Court rejected this ruling on the basis that lifelong indefinite incarceration can only be imposed if the court regards the offender as permanently untreatable at the time of the conviction. Since the two psychiatric reports in the case at hand both concluded that it could not be assessed whether the offender was permanently untreatable in the sense of lifelong untreatable (*lebenslänglich untherapierbar*), the measure could not be inflicted.<sup>66</sup>
70. It is an open question whether psychiatrists can ever assess someone as permanently untreatable in the sense of lifelong untreatable.

## *ii) Review of and challenge to detention*

### aa) Parole

71. According to art 64c para 4 of the Swiss Criminal Code, the court that ordered lifelong indefinite incarceration may grant the offender parole from indefinite incarceration if they no longer pose a risk to the public due to old age, serious illness or on other grounds. Parole is governed by art 64a of the Swiss Criminal Code. The court bases its decision on reports from at least two experienced specialists who are independent of each other and who have neither treated the offender nor been responsible in any other way for his care.<sup>67</sup>

### bb) Review by administrative authority

72. Most concerns about the new provisions regarding lifelong indefinite incarceration related to the insufficient mechanisms for considering a detainee's release. According to art 64 para 1bis, the competent authority must consider (ex officio or on application) whether there is new scientific knowledge establishing that the offender is treatable so that they will no longer pose a risk to society. The authority must decide on the basis of a report from the Federal Commission for the

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<sup>65</sup> See [http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU ni\\_ger.pdf](http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU ni_ger.pdf); see also Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 903.

<sup>66</sup> BGE vom 23. November 2013, 6B\_93/2013.

<sup>67</sup> Swiss Criminal Code, art 64c para 5.

Assessment of the Treatability of Offenders.<sup>68</sup> The Commission is constituted of ten forensic-psychiatric experts.<sup>69</sup>

73. Apparently, the review is not concerned with the lawfulness of the person's detention in general, but more narrowly with the verdict of being untreatable. In this regard, it is important to note that the ground of review is not that the offender could have changed over time,<sup>70</sup> but that new scientific knowledge (such as new forms of therapy or new medication) indicates that the offender could now be treatable. Various experts have expressed the view that the content of the review in case of the lifelong indefinite incarceration is a violation of Art 5(4) ECHR because it is not about the lawfulness of the detention but the treatability of the offender.<sup>71</sup> Following the decision in *Vinter v UK*<sup>72</sup> it is more than questionable whether this rule violates the right to periodic review (Art 5(4) ECHR) or is even a breach of Art 3 ECHR.
74. If the administrative authority concludes that an offender is treatable, a therapy can be ordered.<sup>73</sup> The offender cannot be forced to undertake the therapy;<sup>74</sup> however, this is the only avenue to possible release. If the therapy proves to be successful, a court can transform this special detention into a stationary treatment in a psychiatric facility.<sup>75</sup>

cc) Appeal to a court

75. See above in relation to normal indefinite incarceration. Note that the court can assess the dangerousness of the offender and can order a release.<sup>76</sup> However, the reports on recidivism and dangerousness made by psychiatrists and the Federal Commission for the Assessment of the

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<sup>68</sup> See Verordnung über die Eidgenössische Fachkommission zur Beurteilung der Behandelbarkeit lebenslänglich verwahrter Straftäter vom 26. Juni 2013 (This law came into force on 1 January 2014.); see also Verordnung über die Eidgenössische Fachkommission zur Beurteilung der Behandelbarkeit lebenslänglich verwahrter Straftäter. Erläuterungen zum Entwurf.

<sup>69</sup> Verordnung über die Eidgenössische Fachkommission zur Beurteilung der Behandelbarkeit lebenslänglich verwahrter Straftäter vom 26. Juni 2013, art 3.

<sup>70</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 906.

<sup>71</sup> See [http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU\\_ni\\_ger.pdf](http://www.krim.unibe.ch/unibe/rechtswissenschaft/isk/content/e2464/e2469/files2473/VernehmlassungU_ni_ger.pdf) accessed 20 February 2014.

<sup>72</sup> *Vinter v United Kingdom* (2012) 55 EHRR 34.

<sup>73</sup> Swiss Criminal Code, art 64c para 2.

<sup>74</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 905.

<sup>75</sup> Swiss Criminal Code, art 64c para 3.

<sup>76</sup> Botschaft des Bundesrates zur Änderung des Schweizerischen Strafgesetzbuches in der Fassung vom 13. Dezember 2002 (Umsetzung von Artikel 123a der Bundesverfassung über die lebenslängliche Verwahrung extrem gefährlicher Straftäter vom 23. November 2005), 905.

Treatability of Offenders are not disputable.<sup>77</sup> The court is obliged to decide within a short period of time (Art 5(4) ECHR); in this respect, Swiss law refers to the case law of the ECHR.<sup>78</sup>

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<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

# Country Report for the United Kingdom

## I ADMINISTRATIVE DETENTION

### a) Preliminary remarks

1. Although there is a general criminal justice procedure for arrest (governed by the Police and Criminal Evidence Act 1984, discussed below), counter-terrorism cases have been generally dealt with in the realm of either detention without trial (which was abolished in the *Belmarsh* case, discussed below), or by various preventative regimes which, in some cases, may have the cumulative effect of amounting to detention without trial. This section discusses all such regimes.

### b) General criminal law

#### i) *Decision to detain*

2. The law of arrest is detailed in the Police and Criminal Evidence Act 1984 ('PACE'), Part III. A police constable may make an arrest with a warrant, or without a warrant in certain specified circumstances. Warrants are issued by a court.<sup>1</sup> Circumstances where arrest without a warrant is permissible include where the constable reasonably suspects a person to be committing an offence<sup>2</sup> or about to commit an offence;<sup>3</sup> or where a person is committing an offence<sup>4</sup> or is about to commit an offence.<sup>5</sup> A person must be provided with specific information upon arrest to render the arrest lawful.<sup>6</sup>
3. Where a person is arrested without a warrant, the custody officer at the police station must determine whether there is sufficient evidence to charge them and may detain them for as long as is necessary to enable them to do so.<sup>7</sup> If this evidence is not available, the person must be released (on or without bail) unless there are reasonable grounds for believing that detention without charge is necessary to secure or preserve evidence relating to the offence, or to obtain such evidence by questioning;<sup>8</sup> in this case detention may be authorised.<sup>9</sup> The detainee must be informed of the grounds for detention, and a written record must be made in their presence.<sup>10</sup>

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<sup>1</sup> Criminal Procedure Rules, Part 18.

<sup>2</sup> Police and Criminal Evidence Act 1984, s 24(1)(c).

<sup>3</sup> Police and Criminal Evidence Act 1984, s 24(1)(a).

<sup>4</sup> Police and Criminal Evidence Act 1984, s 24(1)(b).

<sup>5</sup> Police and Criminal Evidence Act 1984, s 24(1)(d).

<sup>6</sup> Police and Criminal Evidence Act 1984, s 28.

<sup>7</sup> Police and Criminal Evidence Act 1984, s 37(1).

<sup>8</sup> Police and Criminal Evidence Act 1984, s 37(2).

<sup>9</sup> Police and Criminal Evidence Act 1984, s 37(3).

<sup>10</sup> Police and Criminal Evidence Act 1984, s 37(4), (5).

Once a determination regarding the available evidence has been made, the person must generally be charged or released.

4. A person can only be detained without charge for a period of 24 hours.<sup>11</sup> However, a senior police officer may authorise the extension of detention for up to 36 hours (renewable once) if they have reasonable grounds for believing that detention without charge is necessary to secure or preserve evidence relating to the offence for which the person is under arrest, or to obtain such evidence by questioning them.<sup>12</sup> The authorising officer is required to inform the person of the grounds for their continued detention, and to give the person or any solicitor representing them an opportunity to make representations about the detention.<sup>13</sup> They are also required to inform the person of the right to have someone informed of their detention and to access legal representation.<sup>14</sup>
5. On expiration of the 36-hour period, the person must be released from detention (on or without bail) unless either they have been charged, or a warrant for continued detention has been obtained from a magistrate.<sup>15</sup> A warrant will be issued only where the magistrate is satisfied that there are reasonable grounds for believing that the further detention is justified by the need to secure, preserve or obtain evidence; the offence for which they are under arrest is an indictable offence; and the investigation is being conducted diligently and expeditiously.<sup>16</sup> The detainee must be provided with a copy of the information before the court and must be brought before the court for the hearing, at which they are entitled to legal representation.<sup>17</sup> The further detention may be for a maximum of 36 hours, but may be extended by a further 36 hours (to a maximum of 96 hours) if an application for an extension is made and granted.<sup>18</sup>
6. A person who has been charged with an offence but not granted bail (due to ineligibility)<sup>19</sup> may be held in prison to await trial. This is known as being remanded in custody.

### *ii) Review of and challenges to detention*

7. Reviews of detention without charge must be carried out by an officer of at least the rank of inspector who has not been directly involved in the investigation.<sup>20</sup> Reviews of detention where the person has been charged must be carried out by the custody officer.<sup>21</sup>

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<sup>11</sup> Police and Criminal Evidence Act 1984, s 41(1).

<sup>12</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>13</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>14</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>15</sup> Police and Criminal Evidence Act 1984, s 42.

<sup>16</sup> Police and Criminal Evidence Act 1984, s 43.

<sup>17</sup> Police and Criminal Evidence Act 1984, s 43.

<sup>18</sup> Police and Criminal Evidence Act 1984, ss 43, 44.

<sup>19</sup> Bail Act 1976, Sch 1.



8. In each case, the review must be carried out no later than six hours after detention was first authorised, and the second must be no later than nine hours after the first. Subsequent reviews must be at intervals of not more than nine hours.<sup>22</sup>
9. For persons who have been detained without charge, the task of the reviewing officer is substantively the same as that of the custody officer at the beginning of the detention period.<sup>23</sup> Thus, if the conditions which initially justified detention without charge are no longer met, the person must be released (on or without bail) or charged. Before determining whether to authorise a person's continued detention, the review officer must give the person or their legal representative an opportunity to make submissions about the detention.<sup>24</sup>
10. In addition, a decision to remand a prisoner in custody is a judicial one, and is subject to judicial review.<sup>25</sup>

*iii) Compensation for unlawful detention*

11. Wrongful arrest is an actionable tort at common law. It is also actionable as a breach of Art 5(5) ECHR (which provides that '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') pursuant to Schedule I of the Human Rights Act. A court seized of the matter may make an award of damages on the basis of 'just satisfaction' for breach of the rights in the Human Rights Act if it is a court with the power to award damages.<sup>26</sup> Awards of damages are generally in line with awards made by the ECtHR, and are typically less than awards made in common law tort cases.

**c) Specific counter-terrorism provisions**

*i) Context: rejection of 'indefinite detention without trial'*

12. The decision of the House of Lords in *A v Home Secretary (No. 1) Belmarsh*<sup>27</sup> ('*Belmarsh* decision') is authority for the proposition that although the government can lawfully derogate from Art 5 ECHR in a time of 'war or public emergency threatening the life of the nation',<sup>28</sup> it cannot use such a lawful derogation to institute a regime of 'indefinite detention without trial' of foreign

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<sup>20</sup> Police and Criminal Evidence Act 1984, s 40(1).

<sup>21</sup> Police and Criminal Evidence Act 1984, s 40(1).

<sup>22</sup> Police and Criminal Evidence Act 1984, s 40(3).

<sup>23</sup> Police and Criminal Evidence Act 1984, s 40(8) and (9) with s 37(1)-(6).

<sup>24</sup> Police and Criminal Evidence Act 1984, s 40(12).

<sup>25</sup> *SR v Nottingham Magistrates Court* [2001] EWHC (Admin) 802.

<sup>26</sup> Human Rights Act 1998, s 8(4).

<sup>27</sup> *A v Home Secretary (No. 1) Belmarsh* [2004] UKHL 56.

<sup>28</sup> *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.

nationals suspected of terrorism. In the *Belmarsh* decision, the British government claimed that it was unable either to institute criminal proceedings against the claimants (who were detained without trial at HMP Belmarsh) or to lawfully deport them. The regime under s 21 of Part IV of the Anti-Terrorism Crime and Security Act 2001 was held to be in violation of Art 5 ECHR read together with Art 14 ECHR. The regime allowed the Home Secretary to certify and detain a foreign national on the ‘reasonable suspicion’ that he or she was an international terrorist. This power did not apply to British citizens. Following the *Belmarsh* decision, Parliament enacted a new regime of preventive anti-terrorism measures revolving around ‘control orders’; these and their successor provisions are discussed below.

*ii) Special Immigration Appeals Commission: detention and bail*

13. Foreign nationals certified as terrorist suspects by the Home Secretary under various statutory procedures can be detained pending deportation. The Home Secretary has an obligation of ‘due diligence’ to expedite removal, but there is no statutory time limit on immigration detention in these circumstances. However, compensation (of £1) was paid to two persons detained for a period of two years under an undisclosed Home Office policy which sought to detain all foreign nationals awaiting deportation.<sup>29</sup> Relevant limits on immigration detention are discussed in the section on ‘Immigration Detention’ below.
14. The Special Immigration Appeals Commission Act 1997 gives the Special Immigration Appeals Commission (‘SIAC’) jurisdiction over bail hearings where the Home Secretary certifies that detention is ‘necessary in the interests of national security’.<sup>30</sup> The SIAC comprises two High Court judges, and one ‘lay member’ who is generally a former diplomat or intelligence official. The lay member ‘is there to advise his judicial colleagues on how much weight should be given to the various kinds of secret information submitted in evidence’.<sup>31</sup> Bail hearings before the SIAC can involve closed material (secret evidence) which neither the appellant nor their own counsel can access. In *Cart v Upper Tribunal R (U) and (XC) v Special Immigration Appeals Commission (Cart)*,<sup>32</sup> the Divisional Court held that this entitled detainees at bail hearings to the level of procedural protection laid down in *A v UK*<sup>33</sup> In *Cart*, the SIAC’s decision to revoke XC’s bail had been based *wholly* on closed evidence. Although the court acknowledged that immigration detention was essentially temporary in nature, Laws LJ considered the executive to be bound by

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<sup>29</sup> *WL (Lumba) v Home Secretary* [2011] UKSC 23.

<sup>30</sup> Special Immigration Appeals Commission Act 1997, s 3(2).

<sup>31</sup> B Barber, ‘On SIAC’ (2004) 26(6) London Review of Books 40-41, <<http://www.lrb.co.uk/v26/n06/brian-barber/on-siac>> accessed 5 December 2013.

<sup>32</sup> *Cart v Upper Tribunal R (U) and (XC) v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin).

<sup>33</sup> *A and Others v United Kingdom* (2009) 49 EHRR 29.

the decision in *A v UK* to disclose a ‘core irreducible minimum’ of the reasons for detention, because detention engaged Art 5(4) ECHR.<sup>34</sup>

### *iii) Terrorism Prevention and Investigation Measures*

15. As noted above, following the *Belmarsh* decision, Parliament enacted a regime of preventive anti-terrorism measures known as ‘control orders’,<sup>35</sup> which were subsequently replaced with ‘terrorism prevention and investigation measures’ (‘TPIMs’).<sup>36</sup> These measures apply to nationals and non-nationals alike.
16. Ordinary TPIMs allow for various restrictions to be placed upon terrorism suspects; these include electronic tagging, surveillance, obligations to report to a police station, restrictions on work and education, restrictions on association, and curfews. None of the preventative measures available under the ordinary TPIMs regime can be said to amount to ‘detention’ contrary to Art 5 ECHR; as a result, it is not discussed further. However, it may be worth noting that the TPIMs regime is in this respect notably more liberal than the regime of control orders it replaced: in particular, unlike the control orders regime, it does not provide for forcible location; strictly limits powers in connection with TPIMs to those specified in Sch 1 to the Act; and ensures that TPIMs are time-limited.<sup>37</sup>
17. Importantly, there also exists a draft Bill making ‘enhanced’ terrorism prevention and investigation measures (‘ETPIMs’) available should the perceived need for their institution arise.<sup>38</sup> It is envisaged that this Bill will be introduced as ‘emergency legislation’ if necessary in the future.<sup>39</sup> Importantly, the measures provided for under the ETPIMs regime would include restrictions on movement (including the imposition of a curfew for up to 16 hours on an individual), residence (including possible forced relocation), communication and association. In this respect, the ETPIMs regime (if enacted) would constitute a move back toward the type of measures provided for under the old regime of control orders.
18. The TPIM Act foreshadows the possible future introduction of the ETPIM Bill, and in particular addresses the situation where the Secretary of State would wish to introduce the

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<sup>34</sup> *Cart v Upper Tribunal R (U) and (XC) v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin), [109]-[112]; *Home Secretary v AF* (No. 3) [2009] UKHL 28, [81].

<sup>35</sup> Prevention of Terrorism Act 2005, now repealed.

<sup>36</sup> Terrorism Prevention and Investigations Measures Act 2011.

<sup>37</sup> See Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, ‘Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report’ (21 November 2012) HL Paper 70/HC 495.

<sup>38</sup> Draft Enhanced Terrorism Prevention and Investigation Measures Bill. See also Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, ‘Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report’ (21 November 2012) HL Paper 70/HC 495.

<sup>39</sup> Explanatory Note to the Terrorism Prevention and Investigations Measures Act 2011.

ETPIM Bill into law, but could not do so because it is during the period between the dissolution of one Parliament and the first Queen's Speech of the new Parliament. If, during this period, the Secretary of State considers that it is necessary to do so by reason of urgency, the Secretary may make a temporary enhanced TPIM.<sup>40</sup> The temporary enhanced TPIM is the same in substance to the ETPIM envisaged under the ETPIM Bill, although it is limited to a maximum of 90 days.<sup>41</sup>

19. Unlike ordinary TPIMs, temporary enhanced TPIMs (if made under s 26) or ETPIMs (if legislated for via the present Bill) might raise questions regarding the threshold of detention. The House of Lords has previously held that a curfew confining a suspect to their home for 18 hours a day as part of the (now discontinued) control order regime did in fact amount to detention in violation of Art 5 ECHR.<sup>42</sup> Furthermore, the ECtHR has authority on *inter alia* the length of curfews (in conjunction with other restrictions) amounting to a deprivation of liberty can be as low as 12 hours.<sup>43</sup> Such precedents apply equally to the TPIMs and (should it be enacted) the ETPIMs regime. The Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill noted the concerns raised by a witness before the Committee, Professor Helen Fenwick, of the risk of the ETPIMs regime to violate Art 5 ECHR where there was a 'particularly stringent' ETPIM.<sup>44</sup> Similarly, the Joint Committee noted the Government's acknowledgement that the compliance of the proposed ETPIMs regime with Art 5 ECHR represents a 'grey area' which could be open to challenge, although the Government ultimately expressed confidence that the ETPIMs were ECHR compliant.<sup>45</sup>
20. In light of this 'grey area' surrounding the threshold question, it is worth briefly considering the procedural safeguards and review process governing the ETPIMs regime. Before imposing an ETPIM, five conditions must be met:

(1) Condition A is that the Secretary of State is satisfied on the balance of probabilities that the individual is, or has been, involved in terrorism-related activity (the "relevant activity").

(2) Condition B is that some or all of the relevant activity is new terrorism-related activity.

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<sup>40</sup> Terrorism Prevention and Investigations Measures Act 2011, s 26

<sup>41</sup> Explanatory Note to the Terrorism Prevention and Investigations Measures Act 2011, [136].

<sup>42</sup> *Home Secretary v JJ* [2007] UKHL 45.

<sup>43</sup> H. Fenwick, 'Designing ETPIMs around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?' (2013) 76(5) *Modern Law Review* 876–908, 892; see also *Trijonis v Lithuania* App no 2333/02 17 March 2005, *Ciancimino v Italy* (1991) 70 DR 103 and *Raimondo v Italy* (1994) 18 EHRR 237, [39].

<sup>44</sup> Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill', First Report (21 November 2012) HL Paper 70/HC 495, [89].

<sup>45</sup> Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report' (21 November 2012) HL Paper 70/HC 495 [87]-[89].

(3) Condition C is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, for terrorism prevention and investigation measures to be imposed on the individual.

(4) Condition D is that:

(a) the Secretary of State reasonably considers that it is necessary, for purposes connected with preventing or restricting the individual's involvement in terrorism-related activity, for the specified terrorism prevention and investigation measures to be imposed on the individual, and

(b) some or all of the specified terrorism prevention and investigation measures are measures that may not be imposed by a standard TPIM notice.

(5) Condition E is that:—

(a) the court gives the Secretary of State permission under section 6 of TPIMA 2011 (as it applies to this Act by virtue of section 3), or

(b) the Secretary of State reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission.

21. The ETPIMs (if the bill comes into law) are subject to the same approval and review process as the existing TPIM legislation.<sup>46</sup> Thus, as with ordinary TPIMs, any decision by the Secretary of State to impose an ETPIM (if the bill comes into law) must first be permitted by the High Court.<sup>47</sup> The function of the Court on hearing the application is to determine whether the Secretary of State's decision is 'obviously flawed', and to determine whether to give permission to impose measures on the individual or, if certain conditions are not satisfied, to give directions in relation to the measures to be imposed.<sup>48</sup> However, if the Secretary of State reasonably considers that the urgency of the case requires TPIMs to be imposed without obtaining such permission, the Secretary of State is not required to seek the Court's permission but must immediately refer the notice to the Court.<sup>49</sup> In such circumstances, the function of the Court is to consider whether the decision of the Secretary of State was 'obviously flawed' (applying principles applicable to judicial review), and has the power to quash the TPIM notice if it concludes the decision was obviously flawed.<sup>50</sup>
22. Once the decision has been either permitted or confirmed, it is subject to an automatic hearing to review the decisions of the Secretary of State that the relevant conditions were met and

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<sup>46</sup> Draft Enhanced Terrorism Prevention and Investigation Measures Bill 2011, s 3.

<sup>47</sup> See TPIM Act 2011 s 6 and Joint Committee on the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, 'Draft Enhanced Terrorism Prevention and Investigation Measures Bill, First Report' (21 November 2012) HL Paper 70/HC 495 [40] and [51].

<sup>48</sup> TPIM Act 2011, ss 6(3) and (9).

<sup>49</sup> TPIM Act 2011, Sch 2.

<sup>50</sup> TPIM Act 2011, Sch 2.

continue to be met.<sup>51</sup> As part of this review process, the Court has the power to quash the notice, quash particular measures within the notice, and give power to the Secretary of State to revoke the notice or vary measures specified within the notice.<sup>52</sup>

*iv) Detention without charge on suspicion of terrorism*

aa) Decision to detain

23. The Terrorism Act 2000, as amended by the Terrorism Act 2006 and the Protection of Freedoms Act 2012, provides for the detention of a terrorist suspect without criminal charge for a maximum of 14 days. This form of detention without charge is regulated by Sch 8 of the Terrorism Act 2000, and is authorised when a person is arrested without a warrant on suspicion of being a terrorist pursuant to s 41 of that Act.<sup>53</sup>
24. A person detained under the Sch 8 has the right to have someone informed of their detention and to access legal representation.<sup>54</sup> A delay in allowing these rights to be exercised may be authorised by an officer of at least the rank of Superintendent where they have reasonable grounds for believing there is a risk of (inter alia) interference with evidence, injury to a person, the altering of persons suspected of having committed a serious offence, the hindering of the recovery of property obtained as a result of a serious offence, interference with the gathering of information about acts of terrorism, or the altering of a person making it more difficult to prevent or apprehend people in connection with acts of terrorism.<sup>55</sup> Provision is also made for an officer to be present at consultations between the detainee and their legal representative under certain circumstances.<sup>56</sup>

bb) Review of and challenge to detention

25. Detention must be 'be periodically reviewed by a review officer.'<sup>57</sup> A review must be carried out as soon as practicable after a person's arrest, then at 12-hourly intervals thereafter.<sup>58</sup> A review officer in this context may be a police officer, but the officer cannot be directly concerned in the criminal investigation.<sup>59</sup> During a review of detention, the review officer must give the detainee (or their solicitor) the opportunity to make written or oral representations regarding the

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<sup>51</sup> TPIM Act 2011, ss 8 and 9.

<sup>52</sup> TPIM Act 2011, s 9(5).

<sup>53</sup> See Terrorism Act 2000, s 41(2).

<sup>54</sup> Terrorism Act 2000, Sch 8, paras 6-7.

<sup>55</sup> Terrorism Act 2000, Sch 8, para 8.

<sup>56</sup> See eg Terrorism Act 2000, Sch 8, para 17.

<sup>57</sup> Terrorism Act 2000, Sch 8, para 21(1).

<sup>58</sup> Terrorism Act 2000, Sch 8, para 21(2)-(3).

<sup>59</sup> Terrorism Act 2000, Sch 8, para 24.

detention.<sup>60</sup> If the review officer holds a rank lower than Superintendent, the detention must be checked (at least once) by an officer holding the rank of Superintendent or higher.<sup>61</sup>

26. A review officer may authorise a person's continued detention only if satisfied that it is necessary to obtain or preserve relevant evidence; pending the result of an examination or analysis of relevant evidence; pending a decision whether to apply to the Secretary of State for a deportation notice, or pending the outcome of such an application; or pending a decision whether the detained person should be charged with an offence.<sup>62</sup> A written record of the decision must be made, and if detention is reauthorized the detainee must be informed of the grounds.<sup>63</sup>
27. A person detained under s 41 with Sch 8 must be released no more than 48 hours from the time of their arrest unless a warrant for further detention is obtained.<sup>64</sup>
28. Schedule 8 Part III covers extension of detention without charge beyond 48 hours. An application must be made to a judicial authority for a warrant to extend detention.<sup>65</sup> The application must be made by either a Crown Prosecutor or a police officer having at least the rank of Superintendent.<sup>66</sup> The initial extension is for a period of seven days from the time of the person's arrest under s 41.<sup>67</sup> The judicial authority must satisfy itself that there are reasonable grounds for believing continued detention without charge is necessary (again) to preserve or obtain relevant evidence, or pending the result of an examination or analysis of relevant evidence.<sup>68</sup> A further extension may be made on application to a total period of 14 days.<sup>69</sup>
29. The Joint Committee on Human Rights ('JCHR'), reporting in parliamentary session 2005-2006, expressed concerns that judicial control of this type was investigative, and not in line with the adversarial judicial control demanded by Art 5 ECHR.<sup>70</sup> The JCHR made a further recommendation of an 'enforceable right to compensation' for those detained and released without charge under the Terrorism Act, but the law has not been amended to reflect this.<sup>71</sup> There have been no actions in the common law of tort, or damages claims under the Human Rights Act 1998, to date.

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<sup>60</sup> Terrorism Act 2000, Sch 8, para 26.

<sup>61</sup> Terrorism Act 2000, Sch 8, para 25(2).

<sup>62</sup> Terrorism Act 2000, Sch 8, para 23.

<sup>63</sup> Terrorism Act 2000, Sch 8, para 28.

<sup>64</sup> Terrorism Act 2000, s 41(3), (5) and (7).

<sup>65</sup> Terrorism Act 2000, Sch 8, para 29(1).

<sup>66</sup> Terrorism Act 2000, Sch 8, para 29.

<sup>67</sup> Terrorism Act 2000, Sch 8, para 29.

<sup>68</sup> Terrorism Act 2000, Sch 8, para 32.

<sup>69</sup> Terrorism Act 2000, Sch 8, para 36 (as amended by the Protection of Freedoms Act 2012, s 57).

<sup>70</sup> Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention', 24<sup>th</sup> Report (2005/2006) HL Paper 240/HC 1576, [138].

<sup>71</sup> *ibid* [143].

*v) Detention at ports or border controls on suspicion of terrorism*

30. Schedule 7 of the Terrorism Act 2000 relates to the powers of police and immigration officials to detain persons at ports and border controls. Under the Schedule, an official may question a person at UK ports and border controls in order to determine whether they are a terrorist within the meaning of s 40(1)(b).<sup>72</sup> For the purposes of this questioning an official has the power to detain a person for a maximum of nine hours.<sup>73</sup> The power may be exercised whether or not the officer has grounds for suspecting that the person falls under s 40(1)(b).<sup>74</sup>
31. There is limited jurisprudence on the legality provision to date. In *Beghal v DPP*<sup>75</sup> the Court rejected claims by way of judicial review that Sch 7 violated Arts 5, 6, and 8 ECHR. The Court dealt with the Art 5 issue as follows:

In our judgment, the argument under Art 5 can be dealt with summarily. On the facts of this case, the Respondent accepts that there was interference with the Appellant's Art 5 rights... [But] the Appellant accepts that she cannot contend that the interference was other than 'in order to secure the fulfilment of any obligation prescribed by law'. Thus, provided that the interference was 'lawful' the interference was justified. Our conclusion under Art 8 that the Schedule 7 powers of examination are lawful, accordingly determines the Art 5 debate as well.<sup>76</sup>

*vi) Action for habeas corpus*

32. The remedy of *habeas corpus* is available at common law for any form of detention. When relief is granted using a writ of *habeas corpus*, the decision cannot be reversed on appeal to a higher court (although appeal may be made on a point of legal principle). According to s 15(4) of the Administration of Justice Act 1960, which deals with *habeas corpus* appeal proceedings, an appeal brought by virtue of this section does not 'affect the right of the person restrained to be discharged in pursuance of the order under appeal'.

## II IMMIGRATION DETENTION

### a) Decision to detain

*i) Identity of decision-maker*

33. The power of immigration officers to detain was introduced in para 16(2) Sch 2 of the Immigration Act 1971 and has been maintained in subsequent Acts. Section 62 of the Nationality, Immigration and Asylum Act 2002 extended this power to the Secretary of State,

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<sup>72</sup> Terrorism Act 2000, Sch 7, para 2(1).

<sup>73</sup> Terrorism Act 2000, Sch 7, para 6.

<sup>74</sup> Terrorism Act 2000, Sch 7, para 2(4).

<sup>75</sup> *Beghal v DPP* [2013] EWHC 2573 (Admin).

<sup>76</sup> *ibid*, [113].



who may authorise detention in cases where they have the power to set removal directions. The Secretary of State's powers of detention were further extended by s 36(1) of the UK Border Act 2007 to cases where they are considering whether the provisions on automatic deportation apply.

*ii) Circumstances under which detention may be ordered*

34. Immigrations officers have a power to detain in the following key cases:
- persons arriving in the UK may be detained pending examination by an immigration officer to determine whether they should be granted leave to enter;<sup>77</sup>
  - persons seeking to leave the UK may be detained for 12 hours in order to see if they are British citizens and whether they entered lawfully;<sup>78</sup>
  - persons refused leave to enter and those reasonably suspected of having been refused leave to enter may be detained pending the giving of directions for their removal from the UK;<sup>79</sup>
  - illegal entrants and those suspected of being illegal entrants may be detained, pending a decision on whether to issue removal directions and pending removal in pursuance of such directions;<sup>80</sup> and
  - persons who do not abide by a condition of their leave to enter or remain, or who have obtained such leave by deception, or whose leave has been revoked, may be detained pending a decision to remove them or pending removal.<sup>81</sup>
35. The Secretary of State has a power to detain in the following key cases:
- pending a decision whether to direct removal pursuant to the Secretary of State's powers under Schedule 2 to the Immigration Act, and pending removal;
  - in the case of people seeking to leave the UK who have made an asylum or human rights claim or who have sought departure from the immigration rules, pending the Secretary of State's examination and decision whether to grant leave to enter or to remove;<sup>82</sup>
  - where the Secretary of State has reasonable grounds to suspect that the person may make one of the specified decisions above;<sup>83</sup>

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<sup>77</sup> Immigration Act 1971, Sch 2, para 16(1).

<sup>78</sup> Immigration Act 1971, Schedule 2, para 16(1A), inserted by the Immigration and Asylum Act 1999, Schedule 14, para. 60

<sup>79</sup> Immigration Act 1971, Schedule 2 paras 8, 16(2), as amended by the Immigration and Asylum Act 1999, section 140(1); and the Nationality, Immigration and Asylum Act 2002, section 73(5)

<sup>80</sup> Immigration Act 1971, Schedule 2, paras 9, 16(2) as amended

<sup>81</sup> Immigration and Asylum Act 1999, s 10(1)(a), (b), (ba) and (7).

<sup>82</sup> Nationality, Immigration and Asylum Act 2002, s 62(2) and (3)(a).

<sup>83</sup> Nationality, Immigration and Asylum Act 2002, s 62(7).

- where a person who makes a claim for asylum has leave to enter or remain and fails to comply with the conditions attached thereto;<sup>84</sup>
- where a recommendation for deportation made by a court is in force a person must be detained pending the making of a deportation order unless a court otherwise directs or the Secretary of State directs that he or she be released pending further consideration of their case;<sup>85</sup>
- when a notice has been given to a person of the decision to deport them, the Secretary of State may detain them pending the making of the order;<sup>86</sup> and
- persons against whom a deportation order has been made may be detained by the Secretary of State pending their removal or departure from the UK.<sup>87</sup>

### *iii) General presumptions and limitations*

36. In *Minteh (Lamin) v Secretary of State for the Home Department*,<sup>88</sup> it was held that there is a presumption in favour of temporary release. This presumption was then confirmed in the 1998 White Paper: *Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum*.<sup>89</sup> The presumption reflects the courts' broader duty to guard the liberty of the person in the absence of express legislative direction.<sup>90</sup>
37. Article 5(1)(f) ECHR provides a relevant exception to the prohibition on deprivations of liberty – the immigration detention regime is justified by the UK as falling within this exception.
38. If the Secretary of State fails to follow their own policy in making a detention decision, it is established that this would constitute an error of law rendering the decision liable to challenge.<sup>91</sup>

### *iv) Provision of reasons and monthly review*

39. In the 1998 White Paper, the UK Government stated that the reasons for detention should be provided at the time of detention and that this process should be repeated once a month. An Immigration Officer will therefore usually complete Form IS 91, under which he or she must specify the power under which the person has been detained, the reasons for detention and the basis on which the decision was made. The detainee must also be informed of their bail rights

<sup>84</sup> Nationality, Immigration and Asylum Act 2002, s 71(1)-(3).

<sup>85</sup> Immigration Act 1971, Sch 3, para 2(1), as amended by the Immigration and Asylum Act 1999, s 54(3).

<sup>86</sup> Immigration Act 1971, Sch 3, para 2(2), as amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, s 34(2).

<sup>87</sup> Immigration Act 1971, Sch 3, para 2(3), as amended by the Asylum and Immigration (Treatment of Claimants) Act 2004, s 54(3).

<sup>88</sup> [1996] EWCA Civ 1339.

<sup>89</sup> Secretary of State for the Home Department (White Paper, Cm 4018, 1998) ch 12.

<sup>90</sup> See eg *Tam Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] A.C. 97.

<sup>91</sup> *R v Secretary of State for the Home Department, ex parte Khan (Asif Mahmood)* [1984] 1 WLR 1337.

upon completion of the form. The requirement that reasons for detention be provided at the time detention and thereafter monthly is also set out in Rule 9 of the Detention Centre Rules 2001.

40. The monthly provision of reasons also acts as a form of periodic review of detention. In *R (Kambadzi) v Secretary of State for the Home Department*,<sup>92</sup> the Supreme Court held that the failure to conduct regular reviews as provided for rendered the detention of the applicant unlawful.

***v) Time limits on detention***

41. There is no express time limit placed on immigration detention in the UK. However, there have been a number of cases in which UK courts have considered the relevance of time to the scope of the power to detain. For example, Dyson LJ in *R (on the application of I) v Secretary of State for the Home Department*<sup>93</sup> stated that the length of the period of detention was relevant to the question of how long it was reasonable for the Secretary of State to detain a person pending deportation pursuant to para 2 Sch 3 of the Immigration Act 1971. Similar, in the case of *R v Governor of Durham Prison; Ex parte Singh* [1984] All E.R. 983, Woolf J considered that:

- this power could only be used pending the individual's removal and not for any other purpose;
- while there is no statutory time limit on administrative detention, the power is impliedly limited to a duration and circumstances which are reasonable and consistent with the statutory purpose of the powers; and
- a failure by the immigration authority responsible to take the action it should take, or to take it sufficiently promptly, would render the detention unlawful.

42. The passage of time may therefore be considered relevant in challenging the lawfulness of detention (see below).

**b) Review of and challenge to detention**

***i) Habeas corpus and judicial review***

43. In addition to the monthly reviews described above, a detainee may challenge their detention in the High Court either through an application for *habeas corpus* or judicial review. *Habeas corpus* concerns the power to detain and judicial review the broader exercise of discretion to detain. In the former case, the Secretary of State has the burden of proving that the power to detain exists and that the detention is for a purpose authorised by the statute.<sup>94</sup> In the latter, the applicant

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<sup>92</sup> [2011] UKSC 23.

<sup>93</sup> [2002] EWCA Civ 888, [48].

<sup>94</sup> *Hicks v Faulkner* (1881) 8 QBD 167.

must show that the decision to detain was illegal, irrational, or subject to some procedural impropriety. Possible remedies on judicial review include an order quashing the decision to detain, an order preventing an authority from acting beyond the scope of its powers, a mandatory order compelling an authority to fulfil its duties, or a declaration setting out the rights and obligations of the parties.

44. In addition, an action may be brought under s 7 of the Human Rights Act, alleging a breach of Art 5 ECHR.
45. There does not appear to be any provision for a merits-based review of the decision to detain – but an equivalent avenue may be provided by the Temporary Admission/Bail proceedings discussed below.

### *ii) Temporary admission/Release with restrictions/Bail*

46. A person liable to detention under the Immigration Acts may be granted temporary admission or release on restrictions or, if they have already been detained, bail. The power to grant this is set out in paras 21(1) and (2) of Sch 2 of the Immigration Act 1971. In theory an immigration officer is able to exercise this power in relation to an illegal entry or administrative removal case liable to detention under para 16, apart from where the person is detained on embarkation.<sup>95</sup>
47. A detainee may apply to the First-Tier Tribunal (Immigration and Asylum Chamber) for bail. An Immigration Judge will then hear their submissions before ruling on whether bail should be granted. Bail may be applied for on multiple occasions, though policy guidance suggests that a fresh application be made only where there is a change in the detainee's circumstances, which may include the lapse of time. If bail is refused, written reasons will be given.

### **c) Compensation for unlawful detention**

48. A person who has been unlawfully detained may sue Home Office officials for damages for false imprisonment.<sup>96</sup>
49. In addition, if the Court finds a breach of a Convention right as set out above, it may grant such relief or remedy as it considers 'just and appropriate'.<sup>97</sup> This may include an award of damages.<sup>98</sup>
50. Finally, in *BA & Ors v Secretary of State for the Home Department*<sup>99</sup> the Court of Appeal held that it was not an abuse of process for the claimant failed asylum-seekers – who had been refused

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<sup>95</sup> O Richards, *British Immigration Practice Handbook*, vol 1, (2<sup>nd</sup> ed, Oakley Press 2012) 469.

<sup>96</sup> *ID v Home Office* [2005] EWCA Civ 38.

<sup>97</sup> Human Rights Act 1998, s 8(1).

<sup>98</sup> Human Rights Act 1998, s 8(3).

<sup>99</sup> [2012] EWCA Civ 944 (11 July 2012).

permission to bring judicial review proceedings of removal directions – to subsequently bring a private law claim for damages for unlawful detention.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

#### a) Threshold questions

51. Whether a mentally ill person is held to be ‘detained’ will depend on the circumstances of the case, in particular the degree of control and supervision they are under and whether, in practice, they would be free to leave.
52. In *HL v United Kingdom*<sup>100</sup> the applicant, a severely autistic adult, was informally admitted to hospital. He did not resist admission and so the doctors did not consider detaining him compulsorily under the Mental Health Act 1983.
53. The applicant complained his time in the hospital as an ‘informal patient’ amounted to a ‘deprivation of liberty’ within the meaning of Art 5(1). The ECtHR agreed and noted that:

in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question.<sup>101</sup>

54. Here the court found that situation amounted to ‘detention’ as the applicant was under ‘continuous supervision and control’ and, in reality, was not free to leave.<sup>102</sup> This led to the introduction of the deprivation of liberty safeguards in the Mental Capacity Act 2005. The UK Supreme Court March 2014 held that any deprivation of liberty on account of living arrangements, requires authorisation by the court or through these safeguards. Notably, it held that the key question was whether there was ‘continuous supervision and control’ and in determining this, the person’s compliance or lack of objection, or the relative normality of the placement (whatever the comparison made) was not relevant.<sup>103</sup>

#### b) Decision to detain

##### *i) Circumstances in which detention may be ordered*

55. Under the Mental Health Act 1983 (as amended by the Mental Health Act 2007) a person may be detained if they are suffering from a mental disorder, defined in s 1(2) as ‘any disorder or disability of the mind’.

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<sup>100</sup> *HL v United Kingdom* [2004] ECHR 471.

<sup>101</sup> *ibid*, [89].

<sup>102</sup> *ibid*, [91].

<sup>103</sup> *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council; P and Q (by their litigation friend the Official Solicitor) v Surrey County Council* [2014] UKSC 19 [50] (Lady Hale).

56. Sections 2-4 of the Mental Health Act provide for compulsory admission to hospital for assessment or treatment. Section 2 provides for compulsory admission to hospital for 28 days if a person is ‘suffering from mental disorder of a nature or degree which warrants the detention of the patient in a hospital for assessment (or for assessment followed by medical treatment)’<sup>104</sup> and the detention is ‘in the interests of [their] own health or safety or with a view to the protection of other persons.’<sup>105</sup>
57. Section 3 provides for compulsory admission for an initial six month period for treatment if the patient is ‘suffering from a mental disorder of a nature or degree which makes it appropriate for him to receive medical treatment in hospital’;<sup>106</sup> it is necessary for health and safety of the patient or for the protection of others; treatment cannot be provided unless the patient is detained;<sup>107</sup> and there is appropriate medical treatment available.<sup>108</sup>
58. Section 4 allows for detention for assessment in urgent cases pending the completion of an application under s 2.<sup>109</sup>
59. All applications need to be made to the managers of the hospital by an approved mental health professional or by the patient’s nearest relative<sup>110</sup> and must be supported by the written recommendations of two registered medical practitioners<sup>111</sup> (save an emergency application under s 4 which requires only one medical recommendation).<sup>112</sup> Of these recommendations, one must be given by a practitioner with special experience in mental disorders, and one must if practicable be given by a practitioner who knows the patient.<sup>113</sup>
60. The application constitutes sufficient authority for the managers of the hospital to detain the patient in accordance with the provisions of the Mental Health Act.<sup>114</sup>

*ii) Orders for discharge*

61. The clinician responsible for the patient may subsequently order their discharge under a ‘community treatment order’ if the treatment the patient needs can be provided without their being detained in a hospital.<sup>115</sup> Patients on community treatment orders are subject to recall to

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<sup>104</sup> Mental Health Act 1983, s 2(2)(a).

<sup>105</sup> Mental Health Act 1983, s 2(2)(b).

<sup>106</sup> Mental Health Act 1983, s 3(2)(a).

<sup>107</sup> Mental Health Act 1983, s 3(2)(c).

<sup>108</sup> Mental Health Act 1983, s 3(2)(d).

<sup>109</sup> Mental Health Act 1983, s 4.

<sup>110</sup> Mental Health Act 1983, s 11.

<sup>111</sup> Mental Health Act 1983, ss 2(3) and 3(3).

<sup>112</sup> Mental Health Act 1983, s 4(3).

<sup>113</sup> Mental Health Act 1983, s 12(2).

<sup>114</sup> Mental Health Act 1983, s 6.

<sup>115</sup> Mental Health Act 1983, s 17A.

the hospital if, in the opinion of the responsible clinician, they require treatment in hospital and there would be a risk of harm to their health or safety (or the health or safety of others) if they were not recalled to hospital for that purpose.<sup>116</sup> Once the person has been recalled, they must be released within 72 hours unless the community treatment order is revoked.<sup>117</sup>

62. A general order discharging a patient who is liable to be detained may also be made in writing by the clinician responsible for the patient, the managers of the hospital, or – significantly – by the nearest relative of the patient.<sup>118</sup> However, the order cannot be made by the nearest relative except after giving at least 72 hours’ notice to the managers of the hospital. If, within this time, the responsible clinician gives the managers a report certifying that the patient if discharged ‘would be likely to act in a manner dangerous to other persons or to himself’, the order for discharge is of no effect.<sup>119</sup>

### **c) Review of and challenge to detention**

#### *i) Periodic review by responsible clinician*

63. As noted above, the authority to detain for treatment under s 3 of the Mental Health Act only lasts for an initial period of six months. A person may only be detained for longer if the authority is renewed.<sup>120</sup> This may occur for an initial further period of six months, and for further periods of one year thereafter.<sup>121</sup> The clinician responsible for the patient has the power to authorise renewal and can only do so if, after examining the patient, reports to the managers of the hospital that they are satisfied that the conditions in s 3 continue to be met.<sup>122</sup> The report cannot be made unless a person who has been ‘professionally concerned’ with the patient’s treatment, but belongs to a different profession than the responsible clinician, agrees in writing that the conditions are satisfied.<sup>123</sup>
64. The patient must be informed of the renewal and the reasons for it.<sup>124</sup>

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<sup>116</sup> Mental Health Act 1983, s 17E.

<sup>117</sup> Mental Health Act 1983, s 17F.

<sup>118</sup> Mental Health Act 1983, s 23(1)-(2).

<sup>119</sup> Mental Health Act 1983, s 25.

<sup>120</sup> Mental Health Act 1983, s 20(1).

<sup>121</sup> Mental Health Act 1983, s 20(2).

<sup>122</sup> Mental Health Act 1983, s 20(3)-(4).

<sup>123</sup> Mental Health Act 1983, s 20(5A).

<sup>124</sup> Mental Health Act 1983, s 20(3).

*ii) Review by Mental Health Tribunal*

65. Detention may be challenged by making an application to the Mental Health Tribunal,<sup>125</sup> which may discharge the patient if it is not satisfied that the patient meets the statutory criteria for compulsory admission.
66. If no application has been made, the managers of a hospital where a person must also refer their case to the Mental Health Tribunal after the first six months of detention.<sup>126</sup> They must also refer the case to the Mental Health Tribunal if a period of more than three years has passed since the case was last considered by the Tribunal.<sup>127</sup>

*iii) Appeal from decision of Mental Health Tribunal*

67. Decisions of the Mental Health Tribunal may (with leave) be appealed to the Upper Tribunal's Administrative Appeal Chamber on a point of law.<sup>128</sup>

*iv) Judicial review*

68. The patient may also challenge a detention decision via judicial review proceedings. However, they must be granted leave to bring such proceedings and it should be noted that the ECtHR in *HL v United Kingdom* criticised the Government's reliance on judicial review and did not consider it to be an adequate safeguarding procedure.<sup>129</sup>

*v) Claim under Human Rights Act*

69. The detained person may also bring a case under s 6 the Human Rights Act 1998, claiming a breach of Art 5(1) by a public authority.

**d) Compensation for unlawful detention**

70. If there is found to be a breach of Art 5 ECHR, Art 5(5) provides that '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.
71. This is a direct and enforceable right to compensation before the national courts.<sup>130</sup>

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<sup>125</sup> See Mental Health Act 1983, ss 66 and 72-75.

<sup>126</sup> Mental Health Act 1983, s 68.

<sup>127</sup> Mental Health Act 1983, s 68(6).

<sup>128</sup> Tribunals Courts and Enforcement Act 2007, s 11.

<sup>129</sup> *HL v United Kingdom* [2004] ECHR 471, [138].

<sup>130</sup> See *A v United Kingdom* (2009) 49 EHRR 29, [229] and *Storck v Germany* (2005) 43 EHRR 96, [122].



## IV MILITARY DETENTION

### a) Preliminary remarks

72. The law relating to servicemen and women is found primarily in the Armed Forces Act 2006, as amended by the Armed Forces Act 2011. The Acts detail offences, court jurisdiction, police and court powers, and provisions on various types of custody.

### b) Decision to detain

#### *i) Stop and search powers*

73. Part 3 Chapter 2 of the Armed Forces Act 2006 empowers service policemen (and persons authorised by a commanding officer) to stop and search any person who is, or whom the service policeman has reasonable grounds for believing to be, subject to service law. The provisions explicitly allow a person searched to be ‘detained’ for the duration of a search.<sup>131</sup> A ‘service policeman’ means a member of one of the Royal Navy Police, the Royal Military Police, or the Royal Air Force Police.<sup>132</sup>
74. In order to exercise the power to detain under the stop and search provisions, the service policeman must have reasonable grounds for suspecting that the search will reveal:
- stolen or prohibited articles;
  - unlawfully obtained service stores; or
  - drugs.<sup>133</sup>
75. In addition, the power may only be used in:
- any place to which the public has access;
  - any other readily accessible place but which is not a dwelling or service accommodation;
- or
- any premises which are permanently or temporarily occupied or controlled for service purposes, but are not service accommodation.<sup>134</sup>
76. Finally, the time for which a person may be detained for the purposes of a search is limited to ‘such time as is reasonably required to permit a search to be carried out’.<sup>135</sup>
77. Various additional limitations apply under the Armed Forces (Powers of Stop and Search, Search, Seizure and Retention) Order 2009. Under s 3, an officer exercising the powers under s

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<sup>131</sup> See eg Armed Forces Act 2006, s 75(3).

<sup>132</sup> Armed Forces Act 2006, s 375.

<sup>133</sup> Armed Forces Act 2006, s 75(2).

<sup>134</sup> Armed Forces Act 2006, s 78.

<sup>135</sup> Armed Forces Act 2006, s 80.

75 of the Armed Forces Act 2006 must comply with certain notification requirements, including giving documentary evidence of their status as a police officer. If they conduct a search, they must also leave a notice setting out specified personal information and stating that claims for compensation for damage done to vehicles searched may be made to the officer's unit. Section 4 requires a full written record of the search to be made unless it is not practicable to do so. Persons who have been stopped and searched may request copies of these records.

*ii) Custody without charge*

78. A service policeman may arrest a person they reasonably suspect of being about to commit a service offence. Where this occurs, the arrest must be as soon as practicable to the arrested person's commanding officer, and the person may be kept in service custody until such time as a service policeman is satisfied that the risk of their committing the relevance offence has passed.<sup>136</sup>
79. In addition, a person who is reasonably suspected of being engaged in committing, or of having committed, a service offence may be arrested by (depending on the circumstances) an officer of superior rank, a service policeman, or a person lawfully exercising authority on behalf of a provost officer.<sup>137</sup>
80. In these cases, there are limits on the circumstances in which the arrested person may be detained without charge.<sup>138</sup> A commanding officer may authorise that the person be held for up to 48 hours,<sup>139</sup> but only where they have reasonable grounds for believing detention is necessary:
- to secure or preserve evidence relating to a service offence for which the suspect is under arrest; or
  - to obtain evidence through questioning.<sup>140</sup>
81. During the 48-hour period, the commanding officer must review and re-authorise the detention without charge every 12 hours.<sup>141</sup>
82. After the 48-hour limit, the person must either be released or further custody up to a maximum of 96 hours must be authorised by a Judge advocate.<sup>142</sup> The person must receive written grounds for the application and be brought to a hearing before the Judge advocate, where they are entitled to legal representation.<sup>143</sup> Again, the order for detention without charge may be made

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<sup>136</sup> Armed Forces Act 2006, s 69.

<sup>137</sup> Armed Forces Act 2006, s 67.

<sup>138</sup> See Armed Forces Act 2006, s 98.

<sup>139</sup> Armed Forces Act 2006, s 99(6).

<sup>140</sup> Armed Forces Act 2006, s 99(2).

<sup>141</sup> Armed Forces Act 2006, ss 99(5), 100.

<sup>142</sup> Armed Forces Act 2006, ss 99(6), 101.

<sup>143</sup> Armed Forces Act 2006, s 101.

only where it is necessary to secure, preserve, or obtain evidence.<sup>144</sup> At the end of the extended period, the person must be charged or released.

*iii) Custody after charge*

83. When a person ('the accused') has been charged, the commanding officer may decide to release them if they were already in custody (this can be subject to administrative conditions on the accused). If the accused is to be kept in custody, the commanding officer must bring the accused before a Judge advocate as soon as is practicable.<sup>145</sup>
84. The accused is entitled to legal representation at the custody hearing. These are usually conducted by video-link.
85. The Judge advocate may order that the accused be detained for up to eight days; they must give reasons for the decision and sign a written certificate setting these out. Permissible reasons include:<sup>146</sup>
  - the Judge advocate is satisfied that there are substantial grounds for believing that the accused, if released, would fail to attend a hearing, commit an offence, or interfere with witnesses or otherwise obstruct the course of justice;
  - the Judge advocate is satisfied that the accused should be kept in custody for his own protection or, if he is under 17, for his own welfare or interests; or
  - the Judge advocate is satisfied that, because of the lack of time since the accused was charged, it has not been practicable to obtain sufficient information for the purpose of deciding whether either of the first two conditions has been met.
86. Alternatively, the Judge advocate may order the accused's release from custody. This may be subject to similar conditions as in a grant of civilian bail, such as reporting or residence requirements.<sup>147</sup> The accused may be arrested and brought back before the Judge advocate if they fail to comply with these conditions.

*iv) Detention after summary hearing*

87. In certain circumstances a commanding officer may hear a charge against a service person summarily.<sup>148</sup> The punishments available include detention for up to 28 days.<sup>149</sup>

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<sup>144</sup> Armed Forces Act 2006, s 101(6).

<sup>145</sup> Armed Forces Act 2006, s 105(1).

<sup>146</sup> Armed Forces Act 2006, s 106.

<sup>147</sup> Armed Forces Act 2006, s 107.

<sup>148</sup> Armed Forces Act 2006, s 131.

<sup>149</sup> Armed Forces Act 2006, s 132-133.

### **c) Review of and challenges to detention**

#### *i) Custody without charge*

88. As noted above, during any period (up to 48 hours) for which a person is detained without charge prior to being brought before a Judge advocate, the person's commanding officer must review and re-authorise the detention without charge every 12 hours.<sup>150</sup>
89. There does not appear to be any mechanism for review of the decision of a Judge advocate to extend custody without charge for up to 96 hours.

#### *ii) Custody after charge*

90. When custody after is authorised by a Judge advocate, the person's commanding officer has an ongoing duty to consider whether the continuation of custody is necessary and must either release the accused or request a review before the Judge advocate if the grounds no longer exist.<sup>151</sup>
91. The Judge advocate at the custody hearing must also set a date for review no more than eight days after the hearing, and custody must then be reviewed every eight days thereafter (unless the accused, with legal advice, consents to a longer period of up to 28 days).<sup>152</sup> Review must be at a hearing before a Judge advocate unless the accused consents, with legal advice, to a paper review.
92. At the first review, the accused may support an application for release with any arguments of fact or law, whether or not they were advanced previously; at subsequent reviews, the Judge advocate need not hear arguments which have already been made.<sup>153</sup>

#### *iii) The Summary Appeal Court*

93. A service person who has been dealt with summarily by their commanding officer has a right of appeal to the Summary Appeal Court ('SAC').<sup>154</sup> At the hearing, they have the right to legal representation.<sup>155</sup>
94. An appeal to the SAC against an initial finding is by way of (a) a rehearing of the charge, and (b) a rehearing as respects punishment (unless a finding is quashed, in which case the sentence is automatically quashed also). An appeal may also be made in respect of sentence alone.<sup>156</sup> As the

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<sup>150</sup> Armed Forces Act 2006, ss 99(5), 100.

<sup>151</sup> Armed Forces Act 2006, s 108.

<sup>152</sup> Armed Forces Act 2006, s 108(7).

<sup>153</sup> Armed Forces Act 2006, s 108(5)-(6).

<sup>154</sup> Armed Forces Act 2006, s 141.

<sup>155</sup> Armed Forces (Summary Appeal Court) Rules 2009 r. 41.

<sup>156</sup> Armed Forces Act 2006, s 146.

appeal is by way of rehearing, there is no need to prove that the original finding was unsafe or that the punishment was manifestly wrong.

95. The SAC may quash a finding that a charge has been proved, in which case it may also quash any related punishment.<sup>157</sup> It may also vary any punishment provided that the punishment given is no more severe than that originally awarded.<sup>158</sup>
96. The service person may also apply for a decision of the SAC to be subject to an opinion of the High Court if it is considered wrong in law or *ultra vires*.<sup>159</sup>

#### *iv) Court Martial Appeal Court*

97. Where a service person has been sentenced by a Court Martial, they may appeal to the Court Martial Appeal Court against their conviction or sentence.<sup>160</sup>
98. The Court Martial Appeal Court may quash a conviction or sentence and pass another sentence, no more severe than the one quashed.
99. The High Court has no jurisdiction to consider judicial review applications in order to make orders relating to the jurisdiction of the Court Martial.<sup>161</sup>

#### *v) Human Rights Act 1998*

100. The military law system is still subject to the Human Rights Act 1998. An action may therefore be brought under s 7 of the Human Rights Act, alleging a breach of Art 5 ECHR.

#### **d) Compensation for unlawful detention**

101. Under the Human Rights Act, if the Court finds a breach of a Convention right, it may grant such relief or remedy as it considers 'just and appropriate'.<sup>162</sup> This may include damages.<sup>163</sup>

#### **e) Detention of foreign nationals**

102. It is not entirely clear what law governs the detention of foreign nationals by the military abroad.<sup>164</sup> Capture and detention of foreign nationals by the British forces has become commonplace since 2004 in the course of the conflicts in Iraq and Afghanistan. No statutory power to arrest and detain civilians has been given to British forces conducting military operations in these areas. However, in Iraq, UN Security Council Resolution 1546 (2004) did

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<sup>157</sup> Armed Forces Act 2006, s 147.

<sup>158</sup> Armed Forces Act 2006, s 147(3).

<sup>159</sup> Armed Forces Act 2006, s 149.

<sup>160</sup> Court Martial Appeals Act 1968, s 1.

<sup>161</sup> Supreme Court Act 1981, s 29.

<sup>162</sup> Human Rights Act 1998, s 8.

<sup>163</sup> Human Rights Act 1998, s 8 (3).

<sup>164</sup> Peter Rowe, 'Is there a right to detain civilians by foreign armed forces during a non-international armed conflict?' (2012) 61 *International and Comparative Law Quarterly* 697.

authorise the Multi-National Force to intern civilians for imperative reasons of security. Security Council Resolutions relating to Afghanistan also allow participating forces to ‘take all necessary measures’, presumably including detention.

103. Guidance to Intelligence Officers and Service Personnel on detention and interviewing practice has been issued by the UK government. Emphasis is placed on ensuring that there is no suspicion that detainees are or will be subject to torture and ensuring compliance with domestic and international law standards for due process and detention.<sup>165</sup>
104. What is clear is that the ECHR, along with the safeguards provided for thereunder, still applies to the military’s overseas detention practices.<sup>166</sup> In addition, the remedy of *habeas corpus* is available at common law for any form of detention, including detention overseas by British forces in conjunction with the ‘war on terror’.<sup>167</sup>

## V POLICE DETENTION

### a) Preliminary remarks

105. English common law permits preventive police detention. Such detention occurs for the purposes of preventing ‘by arrest or other action short of arrest, any breach of the peace occurring in [police] presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur.’<sup>168</sup> According to the Court of Appeal, this common law power is ‘unapologetically, a preventative power.’<sup>169</sup>

### b) Threshold questions

106. Whether being held by the police as part of crowd control measures will count as ‘detention’ will depend on the circumstances, including the area of confinement, the level of supervision, and the prospect of punishment for non-compliance.<sup>170</sup>
107. The current authority in this area in England and Wales is the ECtHR’s Grand Chamber decision in *Austin v United Kingdom*.<sup>171</sup> The case involved 3,000 people held within a cordon (or ‘kettled’) in Central London in 2001. Police held the crowd for up to seven hours in cold, wet weather without providing food and drink, toilet facilities or shelter. The majority of the court

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<sup>165</sup> Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees (July 2010) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62632/Consolidated\\_Guidance\\_November\\_2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf)> accessed January 2014.

<sup>166</sup> See *Al-Jedda v UK* (2011) 53 EHRR 23; *Al-Skeini and Others v UK* (2011) 53 EHRR 18.

<sup>167</sup> *Foreign Secretary and Another (Appellants) v Rabmatullah (Respondent)* [2012] UKSC 48.

<sup>168</sup> *R (Laporte) v Chief Constable of Gloucester* [2007] 2 AC 105, [29] (Lord Bingham).

<sup>169</sup> *R (On Application of Hicks and Others) v Metropolitan Police Commissioner* [2014] EWCA Civ 3 [27].

<sup>170</sup> See *Guzzardi v Italy* (1981) 3 EHRR 333 and *Storck v Germany* (2005) 43 EHRR 96.

<sup>171</sup> *Austin v United Kingdom* (2012) 55 EHRR 14.

held that this police cordon did not amount to detention within the meaning of Art 5 ECHR. The court held that ‘Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public’<sup>172</sup> and that, in determining whether someone has been detained or ‘deprived of his liberty’ within the meaning of Art 5, ‘the starting-point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.’<sup>173</sup>

108. Here the court appears to have added additional criteria to the definition of ‘detention’, extraneous to the restriction of the liberty of the person involved, by asking whether the ‘type’ and ‘manner of implementation’ of the police action was ‘necessary’ or ‘unavoidable’.<sup>174</sup>
109. It should be noted that the court emphasised that the finding of no deprivation of liberty was ‘based on the specific and exceptional facts of this case’<sup>175</sup> and that the decision is difficult to reconcile with previous authorities such as *Gillan and Quinton v UK*<sup>176</sup> and *A v UK*<sup>177</sup> which found breaches of Art 5(1) in comparable circumstances. There was also a strong dissenting judgement which argued that:

the majority’s position can be interpreted as implying that, if it is necessary to impose a coercive and restrictive measure for a legitimate public-interest purpose, the measure does not amount to a deprivation of liberty. This is a new proposition which is eminently questionable and objectionable.<sup>178</sup>

### c) Decision to detain

110. In *R (Moos and McClure) v Commissioner of Police for the Metropolis*<sup>179</sup> the High Court laid down guidelines for when ‘kettling’ may be used. The court held that the police may curtail citizens’ lawful exercise of their rights ‘only when the police reasonably believe that there is no other means whatsoever to prevent an imminent breach of the peace’.<sup>180</sup>
111. A case relating to detention outside the context of ‘kettling’ is that of *Hicks*.<sup>181</sup> In this case, several groups of protestors (Republican campaign groups, members of LGBTQ groups and groups opposed to public-spending cuts, and some persons dressed as zombies) were detained

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<sup>172</sup> *ibid*, [56].

<sup>173</sup> *ibid*, [57].

<sup>174</sup> *ibid*, [59].

<sup>175</sup> *ibid*, [68].

<sup>176</sup> *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 1105.

<sup>177</sup> *A v United Kingdom* (2009) 49 EHRR 29.

<sup>178</sup> *Austin v United Kingdom* (2012) 55 EHRR 14, [3].

<sup>179</sup> *R (Moos and McClure) v Commissioner of Police for the Metropolis* [2012] EWCA Civ 12.

<sup>180</sup> *ibid*, [56].

<sup>181</sup> *R (On Application of Hicks and Others) v Metropolitan Police Commissioner* [2014] EWCA Civ 3.

on the day of the Royal Wedding by police. The purpose of the detention was recorded as to prevent the group members from participating in activities designed to disrupt the celebrations. This detention was found to be lawful at common law.<sup>182</sup>

112. A further appeal to the Court of Appeal was made regarding the applicability of Art 5(1)(c) ECHR to the detention. Article 5(1) reads: ‘No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.’ The appellants argued that their detention was contrary to Art 5(1)(c) because it was not for the purpose of bringing them ‘before a competent legal authority’ (i.e. a magistrate).
113. Strasbourg case law was conflicted as to whether the two limbs of Art 5(1)(c) (‘necessary to prevent an offence’ and ‘for the purposes of bringing and individual before a judicial authority’) should be read together or separately. The most recent case, *Ostendorf v Germany*,<sup>183</sup> favours a conjoined reading, whereas previous case law<sup>184</sup> permits detention for either purpose. Using their power under s 2(1) of the Human Rights Act 1998, the Court of Appeal disregarded the ruling in *Ostendorf v Germany* and dismissed Hicks’ appeal, choosing instead to interpret Strasbourg case law in a manner that compatible with the existing English common law. It therefore upheld the decision that the detention of the protesters had been lawful.<sup>185</sup>

#### **d) Compensation for unlawful detention**

114. Those detained in police cordons may challenge the lawfulness of their detention under s 6 of the Human Rights Act 1998 arguing that the police acted in breach of Art 5 ECHR. It is also possible that the decision to use a cordon could (with leave) be challenged via judicial review proceedings.
115. If a court were to find that a Convention right had been breached, it could ‘grant such relief or remedy, or make such order within its powers as it considers just and appropriate’ under s 8(1) of the Human Rights Act. This includes a power to award damages where the court is satisfied that to do so is necessary in order to afford just satisfaction to the claimant.<sup>186</sup>

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<sup>182</sup> *ibid*, [2].

<sup>183</sup> *Ostendorf v Germany* [2013] ECHR 197.

<sup>184</sup> *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.

<sup>185</sup> *R (On Application of Hicks and Others) v Metropolitan Police Commissioner* [2014] EWCA Civ 3, [96].

<sup>186</sup> Human Rights Act 1998, s 8(3).



116. In *A v United Kingdom*<sup>187</sup> the Grand Chamber found a breach of Art 5(1) and ordered the state to pay damages of between EUR 1,700 and EUR 3,900 to each applicant. The court held that it had a ‘wide discretion to determine when an award of damages should be made, and frequently holds that the finding of a violation is sufficient satisfaction without any further monetary award.’<sup>188</sup>

## VI PREVENTIVE DETENTION

### a) Imprisonment for Public Protection

117. This type of detention was imposed after the ‘tariff’ (punishment) period of a sentence imposed upon conviction of a criminal offence. The sentence of Imprisonment for Public Protection (‘IPP’) was abolished in 2012.<sup>189</sup> IPP was imposed when a court considered that an offender posed a ‘significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences’.<sup>190</sup> The scheduled offences included violent offences and sexual offences, and an IPP sentence required that a minimum custodial sentence of 2 years be imposed.<sup>191</sup>
118. The ECtHR held in *James, Wells and Lee v The United Kingdom*<sup>192</sup> that although the IPP framework was not unlawful in and of itself, the regime of IPP failed to provide for rehabilitation of offenders and this in turn rendered the detention arbitrary in nature. According to the Court:

Where a Government seeks to rely solely on the risk posed by offenders to the public in order to justify their continued detention, regard must be had to the need to encourage the rehabilitation of those offenders. In the applicant’s case, this meant that they were required to be provided with reasonable opportunities to undertake courses aimed at helping them to address their offending behaviour and the risks they posed.

119. According to Bettinson and Dingwall, ‘[t]he IPP sentence, therefore, failed to ensure that the execution of the ‘applicants’ post-tariff detention conformed to the objective of rehabilitation... Consequently, the Court found that the post-tariff detention was arbitrary and unlawful for the purposes of Art 5(1) ‘until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses’.’<sup>193</sup>
120. The IPP scheme was replaced by provisions for a regime of Extended Determinate Sentences (‘EDS’) and ‘mandatory’ life sentences for second serious offences under the Criminal Justice

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<sup>187</sup> *A v United Kingdom* (2009) 49 EHRR 29.

<sup>188</sup> *ibid*, [250].

<sup>189</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 123.

<sup>190</sup> Criminal Justice Act 2003, s 225(1).

<sup>191</sup> Criminal Justice Act 2003, s 225(3B) (repealed).

<sup>192</sup> *James, Wells and Lee v The United Kingdom* [2012] ECHR 1706.

<sup>193</sup> *ibid*, [232] discussed in V Bettinson and G Dingwall, ‘Challenging the Ongoing Injustice of Imprisonment for Public Protection: *James, Wells and Lee v The United Kingdom*’ (2013) 76(6) *Modern Law Review* 1094-1105, 1102.

Act 2003 (as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012). Both have a preventive element and are discussed immediately below.

### **b) Extended Determinate Sentences**

121. Under s 226A of the Criminal Justice Act, a court may impose an extended sentence of imprisonment: one comprised of both the sentence the person would usually receive, and an ‘extension period’ for which the person is to be subject to a licence.
122. The power to order an EDS is enlivened where:<sup>194</sup>
  - a person has been convicted of a specified violent or sexual offence;
  - the court considers that ‘there is a significant risk to the members of the public of serious harm occasioned by the commission by the offender of further specified offences’;
  - the court is not otherwise required to impose a sentence of imprisonment for life (see below); and
  - either the person has previously been convicted of an specified offence, or a custodial period of at least 4 years is considered appropriate for the present offence.
123. The extension period must be ‘of such length as the court considers necessary for the purpose of protecting members of the public from serious harm occasioned by the commission by the offender of further specified offences’.<sup>195</sup> It must not exceed five years for a specified violent offence, or eight years for a specified sexual offence.<sup>196</sup> The total EDS must not exceed the maximum term permitted for the relevant offence.<sup>197</sup>
124. The Secretary of State is required to release a person serving an EDS on licence as soon as the custodial period has expired, unless either the custodial term is ten years or more, or the sentence was imposed in respect of particular specified offences (mainly serious violent, sexual, or terrorism-related offences).<sup>198</sup> In either of these cases, the person’s case must instead be referred to the Parole Board; if the Parole Board is satisfied that ‘it is no longer necessary for the protection of the public’ that the person be detained, they must then be released on licence.<sup>199</sup> Parole Board proceedings are discussed in more detail below.
125. When a person serving an EDS is released on licence, they – like other persons released on licence – may be recalled to prison at any time by the Secretary of State.<sup>200</sup> However, unlike other

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<sup>194</sup> Criminal Justice Act 2003, s 224A(1)-(3).

<sup>195</sup> Criminal Justice Act 2003, s 224A(7).

<sup>196</sup> Criminal Justice Act 2003, s 224A(8).

<sup>197</sup> Criminal Justice Act 2003, s 224A(9).

<sup>198</sup> Criminal Justice Act 2003, s 246A(1)-(2).

<sup>199</sup> Criminal Justice Act 2003, s 246A(3)-(7).

<sup>200</sup> Criminal Justice Act 2003, s 254.

offenders, a person serving an EDS who is recalled is not eligible for ‘automatic release’; in fact, the Secretary of State *must* not release them after recalling them to prison unless satisfied that ‘it is not necessary for the protection of the public’ that they remain in prison.<sup>201</sup> The person’s case need only be referred to the Parole Board on the expiry of 28 days, or if the person makes written representations regarding the recall before that time.<sup>202</sup> If the Parole Board does not order the person’s re-release on licence, it is not required to set a fixed release date;<sup>203</sup> however, the person’s case must be referred again to the Parole Board after a maximum of one year.<sup>204</sup> Before that date, the Parole Board may recommend a review on its own motion.<sup>205</sup>

126. A defendant may appeal against an EDS, including the court’s assessment of dangerousness, as for any other sentencing decision. A decision of the Secretary of State to recall a person released on licence may be challenged only via judicial review.<sup>206</sup> Mechanisms for review of Parole Board decisions are discussed below.

### **c) Parole Board proceedings**

127. The Parole Board comprises members from a variety of backgrounds, including: judicial, psychiatrist, psychologist, probation and independent members.<sup>207</sup> Most Parole Board reviews engage Art 5(4) ECHR. Where Art 5(4) is engaged, the Parole Board sits in a judicial capacity as a court for this purpose.<sup>208</sup> According to its Guidance on the interpretation of the above provisions:

In order to direct release, [the Board must be satisfied that] it is no longer necessary for the prisoner to be detained in order to protect the public from serious harm (to life and limb). It is not a requirement to balance the risk against the benefits to the public or the prisoner of release.<sup>209</sup>

128. In the case of *Osborn v Parole Board*,<sup>210</sup> the Supreme Court held that an oral hearing is required to satisfy common law standards of procedural fairness (which, according to the Supreme Court, meet the standard of Art 5(4) EHCR) whenever fairness to the prisoner requires a hearing in the

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<sup>201</sup> Criminal Justice Act 2003, s 255C(1)-(3).

<sup>202</sup> Criminal Justice Act 2003, s 255C(4).

<sup>203</sup> Criminal Justice Act 2003, s 256.

<sup>204</sup> Criminal Justice Act 2003, s 256A.

<sup>205</sup> Criminal Justice Act 2003, s 256A(2)-(3).

<sup>206</sup> *Osborn v Parole Board* [2013] UKSC 61, [4].

<sup>207</sup> UK Government, ‘Who are the members of the Parole Board?’ <<http://www.justice.gov.uk/about/parole-board/parole-board-members>> accessed 19 February 2014.

<sup>208</sup> Parole Board, Litigation Strategy (April 2013), <[www.justice.gov.uk/downloads/.../parole-board/litigation-strategy.doc](http://www.justice.gov.uk/downloads/.../parole-board/litigation-strategy.doc)> accessed January 2014.

<sup>209</sup> Parole Board for England and Wales, ‘Guidance to members on LASPO Act 2012 – test for release’ (Revised Guidance, December 2013) p 4, <<http://www.justice.gov.uk/downloads/offenders/parole-board/guidance-on-laspo.pdf>> accessed 2 February 2014.

<sup>210</sup> *Osborn v Parole Board* [2013] UKSC 61.

light of the facts of the case and the importance of what is at stake.<sup>211</sup> By doing so, it will act compatibly with Art 5(4) ECHR.<sup>212</sup> As the decision related specifically to persons recalled from release on licence by the Secretary of State (as well as to prisoners serving an IPP sentence), it is now significantly more likely that these persons will be granted an oral hearing.<sup>213</sup>

#### **d) Appeals and remedies**

129. There is no legal route of appeal against Parole Board decisions, but as a public body its decisions are open to challenge by judicial review; private law actions for damages can also be brought in respect of administrative decisions. Judicial review could proceed on either common law grounds, or pursuant to human rights grounds.
130. In the 2013 case of *Sturnham and Faulkner*<sup>214</sup> the Supreme Court dismissed an appeal for damages sought for administrative delay in reviewing the need for further detention of a person who has served the ‘tariff’ relating to an IPP or life sentence. The Supreme Court rejected the argument that the detention of a life prisoner constitutes false imprisonment if it continues beyond the point at which the prisoner would have been released, had a hearing been held. Regarding remedies, the Court concluded that damages should usually be awarded where when it can be shown on the balance of probabilities that a violation of Art 5(4) has resulted in prolonged detention. If this cannot be established, but the prisoner has suffered frustration and anxiety, a more modest award is appropriate. The Court also noted that when awarding damages in such cases courts should be guided primarily by ECtHR principles, as opposed to common law tort principles.<sup>215</sup>

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<sup>211</sup> *ibid*, [81].

<sup>212</sup> *ibid*, [103].

<sup>213</sup> See Ministry of Justice, ‘Parole Board: Practice Guidance for Oral Hearings’ <<http://www.justice.gov.uk/offenders/parole-board/oral-hearings>> accessed 14 January 2014.

<sup>214</sup> *R (Faulkner) v SSJ; R (Sturnham) v Parole Board* [2013] UKSC 23.

<sup>215</sup> Matrix Legal Information Team, ‘*R (Faulkner) v SSJ; R (Sturnham) v Parole Board* [2013] UKSC 23’, United Kingdom Supreme Court Blog, <<http://uksblog.com/new-judgment-r-faulkner-v-secretary-of-state-for-justice-anor-r-faulkner-v-secretary-of-state-for-justice-the-parole-board-and-r-sturnham-v-the-parole-board-2013-uksc-23/>> accessed 14 January 2014.

# Country Report for the United States of America

## I ADMINISTRATIVE DETENTION

1. Following 9/11, there was a massive increase in detention for the purposes of counter-terrorism, intelligence gathering and reasons of national security. As there is no general preventive detention law in America, the US government has used various different mechanisms and areas of law to achieve this, including temporary stops, immigration detention, detention as a material witness, and criminal law detention, and these have been outlined below.

### **a) Threshold questions**

2. In *Terry v Ohio*, it was held that ‘whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person’<sup>1</sup> and they are considered to be detained. This is important as stopping people for questioning before detaining them on the basis of this has been an important tactic used by police and immigration officials in investigating terrorism since 9/11.

### **b) Decision to detain**

#### *i) Temporary stops*

3. Where a person is stopped for questioning, police or immigration officials must have grounds for ‘seizing’ the person. For police officers, they must have ‘an articulable suspicion that the person has been, is, or is about to be engaged in criminal activity’.<sup>2</sup> In the case of immigration officials, they must have a ‘reasonable suspicion’ that the person is an illegal alien.<sup>3</sup>

#### *ii) Immigration detention*

4. Under 8 United States Code (‘USC.’) § 1182 (a)(3)(b), aliens can be removed from the US or refused entry based on involvement in terrorist activities, the definition of which is described in detail in the statute.<sup>4</sup> However, it also should be noted that media reports have criticised this regime, asserting that where the government has suspected a person’s involvement in terrorist activities but had insufficient evidence, it has often filed pretextual or minor immigration charges against suspects as a way of effecting their detention and subsequent removal from the US.<sup>5</sup>

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<sup>1</sup> *Terry v Ohio*, 392 US 1 (1968).

<sup>2</sup> *United States v Place*, 462 US 696 (1983).

<sup>3</sup> *United States v Brignoni-Ponce*, 422 US 873 (1975).

<sup>4</sup> 8 USC. § 1182 (a)(3)(b).

<sup>5</sup> MB Sheridan, ‘Immigration Law as an Anti-Terrorism Tool’, *Washington Post* (Washington DC, 13 June 2005).

### *iii) Material witnesses*

5. The practice of detaining material witnesses has been used extensively in combating terrorism, and material witnesses are defined as those whose testimony is ‘material in a criminal proceeding’.<sup>6</sup> Under 18 USC. § 3144 it is possible to detain material witnesses where it is ‘impracticable’ to secure their testimony by other means.<sup>7</sup> It does appear however, that this process is being used to detain those who the government suspect of terrorist involvement but do not yet have enough evidence on to find the ‘probable cause’ necessary for a criminal charge, nor the immigration violations to detain or remove on immigration grounds (for example if the person concerned is a US citizen). The reason behind this is that the standard of ‘impracticability’ is a lower standard than ‘probable cause’, and so it is easier for the government to detain on that basis. An investigation by Human Rights Watch found that many material witnesses were essentially held as suspects as opposed to witnesses.<sup>8</sup>

### *iv) Criminal law*

6. A related strategy to the use of ‘pretextual’ immigration detention is the charging of relatively minor criminal offences in order to detain terror suspects. A Washington Post study found that government investigations into terrorism had led to criminal charges for large numbers of suspects that were unconnected to terrorist offences.<sup>9</sup> This strategy relies on prosecutors use of their discretion to oppose bail, and also of judges to support the security efforts and refrain from granting bail.

## **c) Review of and challenges to detention**

### *i) Temporary stops*

7. Even if they are only stopped temporarily, persons stopped and questioned may still challenge their detention as an infringement of their Fourth Amendment Rights, under Title 42 US Code §1983.<sup>10</sup>

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<sup>6</sup> 18 USC. § 3144 (2000).

<sup>7</sup> 18 USC. § 3144 (2000).

<sup>8</sup> Human Rights Watch, ‘Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11’ (27 June 2005) available < <http://www.hrw.org/reports/2005/06/26/witness-abuse> > accessed 5 March 2014.

<sup>9</sup> A Goldstein, ‘A Deliberate Strategy of Disruption; Massive Secretive Effort Aimed Mainly at Preventing More Terror’, *Washington Post* (Washington DC, 4 November 2001).

<sup>10</sup> 42 USC. § 1983.

*ii) Immigration detention*

8. For those suspected of terrorist activities and detained under 8 USC. § 1182 (a)(3)(b) subject to removal from the US,<sup>11</sup> they are able to challenge their detention under 8 USC. § 1227(d) through filing an application for non-immigrant status. However, they do not have a general appeal right against the decision.<sup>12</sup>
9. In terms of those detained on the pretext of a minor immigration charge, it was held in *Turkmen v Ashcroft* that the fact that the US government had an ulterior motive would not affect the legality of the detention if it was made under valid immigration law. They would however be entitled to the normal rights and protections afforded to immigrant detainees, which have been outlined in the section above entitled ‘immigration detention’.

*iii) Material witness*

10. Those detained as material witnesses are entitled to a detention hearing and subsequent appeal.<sup>13</sup>

*iv) Criminal law*

11. In this instance those charged with pretextual criminal offences in order to facilitate their detention would be entitled to a full criminal trial and would have appeal rights, just like any normal criminal defendant. The fact the charge was a pretext would not affect whether or not they were convicted.

**d) Remedies for unlawful detention**

*i) Temporary stops*

12. If the stop was found to be an unlawful infringement on their right to be free from ‘unreasonable’ seizures, the person detained would be entitled to damages under 42 USC. § 1983 on the ground that they had been deprived of their constitutional rights under the Fourth Amendment.<sup>14</sup>

*ii) Immigration detention*

13. The remedies would be the same as was stated in the section on ‘Immigration Detention’, discussed below.

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<sup>11</sup> 8 USC. § 1182 (a)(3)(b).

<sup>12</sup> 8 USC. § 1227(d).

<sup>13</sup> 18 USC. § 3142.

<sup>14</sup> 42 USC. § 1983.

*iii) Material witnesses*

14. It may be possible to recover damages as compensation, although in practice it would be difficult as US government bodies have immunity under many circumstances. The primary case in this area is *Ashcroft v Al-Kidd*, where Al-Kidd attempted to sue the Attorney General personally for his role in Al-Kidd's detention as a material witness in connection with the trial of an Islamic terror suspect. The Supreme Court held that the Attorney General, whom at the time was Ashcroft, had qualified immunity, and could only be personally sued if it was possible to demonstrate that he was personally involved or had direct knowledge of the events, a very high standard of proof.

*iv) Criminal law*

15. If the person could prove that their detention was unlawful they could seek damages on the basis of the infringement of their constitution rights, under Title 42 USC. § 1983.<sup>15</sup>

## **II IMMIGRATION DETENTION**

16. The Immigration and Customs Enforcement (ICE) enforce immigration procedures in the United States, which is a bureau within the Department of Homeland Security. Previously, it was known as the Immigration and Naturalization Service (INS).

**a) Threshold questions**

17. Under Title 8 USC. § 1226, an 'alien' (to use the US terminology) is considered to be detained where they have been taken into custody on the basis of a warrant issued by the Attorney General<sup>16</sup>.

**b) Decision to detain**

18. For aliens who have previously committed a crime listed under the 8 USC. § 1226 (c), the ICE is *required* to detain them once they have been identified<sup>17</sup>. Thus, there is a regime of mandatory detention in such cases. In practical terms, the Attorney General is required to issue a warrant to detain under these circumstances.
19. Additionally, for those aliens identified at a US border either because they lack proper immigration documentation or have committed fraud or wilful representation to attempt to gain admission to the US, they are subject to 'expedited removal'. Again, the ICE must detain them

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<sup>15</sup> 42 USC. § 1983.

<sup>16</sup> 8 USC. § 1226.

<sup>17</sup> 8 USC. § 1226 (c).



until they are removed from the country.<sup>18</sup> In these circumstances, Immigration Judges do not have the authority to review these detentions unless the alien indicates an intention to apply for asylum.<sup>19</sup>

20. There is also provision for mandatory detention of asylum seekers pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.<sup>20</sup> If the fear of persecution is deemed to be not credible, this cannot be subject to administrative review.<sup>21</sup>
21. There is similarly a regime for mandatory detention of suspected terrorists (as certified by the Attorney General), who must within seven days of commencement of the detention be charged with a criminal offence for be subject to removal proceedings.<sup>22</sup> The certification must be reviewed every six months.<sup>23</sup> Where a person in such circumstances has not been removed, and whose removal is unlikely in the reasonably foreseeable future, there is a limitation on indefinite detention such that the person may be detained for additional periods of up to six months only 'if the release of the alien will threaten the national security of the United States or the safety of the community or any person'.<sup>24</sup>
22. For those aliens who have not committed a crime and who are identified within the US, the ICE can either detain, detain and release on a cash bond (minimum \$1500) or detain and release on parole.<sup>25</sup> This decision is made at the discretion of the Attorney General, who issues the warrant to arrest and detain.<sup>26</sup> The detainee would not be entitled to make representations at this point and the decision to detain cannot be judicially review or challenged in any court.<sup>27</sup> Only the government's basis for removal can be challenged, and this will be outlined below.

### **c) Review of and challenges to detention**

23. Under the immigration practice of 'expedited removal', certain categories of non-citizens, including those found inadmissible at the border and those who have committed fraud to gain admission to the US, can be removed from the US without any judicial hearing or reviews, unless they wish to claim asylum.<sup>28</sup>

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<sup>18</sup> 8 USC. § 1225 (b)(1)(A)(i).

<sup>19</sup> 8 USC. §1225(b)(1)(A).

<sup>20</sup> 8 USC. § 1226(b)(1)(B)(IV).

<sup>21</sup> 8 USC. § 1226(b)(1)(C).

<sup>22</sup> 8 USC. § 1226a(a)(5).

<sup>23</sup> 8 USC. § 1226a(7).

<sup>24</sup> 8 USC. § 1226a(a)(6).

<sup>25</sup> 8 USC. § 1226.

<sup>26</sup> 8 USC. § 1226.

<sup>27</sup> 8 USC. § 1226 (e).

<sup>28</sup> 8 USC. §1225(b)(1)(A).

24. For other types of immigration detention, there is a review process. Upon detention the ICE must provide the alien with a Notice to Appear.<sup>29</sup> Following this, a hearing will take place before an Immigration Judge, where the government must prove that the person detained is not a citizen of the United States, and also that the alien has breached immigration law in a manner which permits removal. If the government fails to prove its case, the Immigration Judge will order the detainee's release, although the ICE can file an appeal within 30 days of the decision, and under these circumstances will often continue to detain pending its outcome.<sup>30</sup> Normal practice under these circumstances is that the Department for Homeland Security will continue to detain while deciding whether or not to appeal.
25. For asylum seekers, if the fear of persecution is deemed to be not credible, this cannot be subject to administrative review.<sup>31</sup> As the detention for asylum seekers is mandatory in nature, there does not appear to be any avenue to challenge the lawfulness of that detention.
26. For suspected terrorists, judicial review of any decisions in relation to removal (including review of the merits of any determinations made) is available exclusively in habeas corpus proceedings. The merits of the Attorney General's certification that the alien is a security threat cannot be otherwise reviewed.<sup>32</sup> The law sets out in detail the limited nature of the habeas corpus procedure, including limitation on rights of appeal.<sup>33</sup>
27. Where the Immigration Court finds in favour of the US government and issues a removal order, there is access to an appeals process. After the case has been decided by the Immigration Court, an appeal can be made to the Board of Immigration Appeals (BIA) by filing a Notice to Appeal within 30 days of the initial decision.<sup>34</sup> In *Casas-Castrillon* it was held that detention is not authorised indefinitely during this period, and the detainees are entitled to a bond hearing while their appeal is being decided.<sup>35</sup> However, if the hearing is unsuccessful then they may be detained for as long as the case is under review, which in some occasions has been as long as 7 years.<sup>36</sup> Following the BIA review, it is possible to appeal to the Federal Circuit Court with jurisdiction over the Immigration Court in which the case was decided for judicial review.<sup>37</sup> This must be done within 30 days of the BIA's decision. Additionally, this appeal is restricted to certain

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<sup>29</sup> 8 USC. §1229.

<sup>30</sup> 8 USC. §1229.

<sup>31</sup> 8 USC. § 1226(b)(1)(C).

<sup>32</sup> 8 USC. §1226a(b)

<sup>33</sup> 8 USC. §1226a(b).

<sup>34</sup> 8 USC. §1229; 8 C.F.R. §1003.3.

<sup>35</sup> *Casa-Catrillon v Dep't of Homeland Security*, 535 F.3d 942 (9<sup>th</sup> Cir 2008).

<sup>36</sup> *Prieto-Romero v Clark*, 534 3Fd 1053 (9<sup>th</sup> Cir. 2008).

<sup>37</sup> 8 USC. § 1225; US Department of Justice, 'Board of Immigration Appeals' available <<http://www.justice.gov/eoir/biainfo.htm>> accessed 5 March 2014.

questions of law, including whether the decision was ‘manifestly contrary to law’, however the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude the contrary.<sup>38</sup>

28. Once a removal order has been granted and the appeals process has either been exhausted or the alien has chosen not to appeal, the ICE has a duty to instigate removal within a ‘reasonable time’, which in *Zadvydas v Davis*<sup>39</sup> was held to be six months. After six months, ICE are required to release the alien on parole if there is not a ‘significant likelihood of removal in the reasonably foreseeable future’, and can recall them once removal has been arranged. If the ICE fails to do this, the alien may file a habeas corpus writ in the federal district court with jurisdiction, in order to challenge their continued detention.<sup>40</sup>
29. In these proceedings, other than in the case of expedited removal, those detained receive the rights contained in the Due Process Clause. This is due to the fact that, in the United States, non-citizens, regardless of the legality of their immigration status, are generally given due process rights under the 5<sup>th</sup> and 14<sup>th</sup> Amendments.<sup>41</sup> However, many of these can be difficult to access. For example, the Due Process Clause guarantees the opportunity to be represented by counsel, but as immigration proceedings in the US are civil as opposed to criminal, the 6<sup>th</sup> Amendment does not guarantee a right to counsel in immigration proceedings. While representation is allowed, the US government will not fund or subsidise this.
30. Despite this however, a related problem which can still occur is that, while in the initial immigration hearing translators can be provided, in the paper based appeals system, appeals must be made to the BIA in English. This means that a detainee who does not have access to an attorney and does not speak English, or is illiterate, may not actually be able to exercise their right to an appeal.

#### **d) Remedies for unlawful detention**

31. Generally the primary remedy where detention is found to have been unlawful is release from custody. However, it is also possible file an action for false imprisonment and claim damages. A current example of this is *Roy v County of Los Angeles*, where six petitioners have brought a class action lawsuit against the Los Angeles County Sheriff’s Department on the basis that they were illegally detained by the Department on the instructions of the ICE.<sup>42</sup>

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<sup>38</sup> 8 USC. § 1252(b)(4); B Lonegan, ‘Immigration Detention and Removal’ available <[www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center](http://www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center)> accessed 19 January 2014, 26.

<sup>39</sup> 533 US 678 (2001).

<sup>40</sup> *Ly v Hansen*, 351 F.3d 263 (6<sup>th</sup> Cir. 2003).

<sup>41</sup> *Phyller v Doe*, 457 US 202, 210 (1982).

<sup>42</sup> *Roy v County of Los Angeles*, 2:12-cv-09012 (C.D. Cal.) a copy of the claim can be found at Civil Rights Litigation

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

32. In the United States, procedures for the detention of persons with a mental illness are provided through legislation enacted at the state level. For reference, a link is enclosed below to the procedures for each individual state and the federal district of Washington, D.C.<sup>43</sup> However, instead of outlining 51 separate statutes, the answer below will focus on the US Supreme Court decisions in this area which create the framework which states are required to adhere to when drafting legislation.

#### a) Threshold questions

33. A person would be considered to be detained for the purposes of US mental health law if they are held involuntarily in a designated mental facility.

#### b) Decision to detain

34. In *O'Connor v Donaldson*, the Supreme Court held that States may not 'commit' a person (to use the US terminology) solely because they are mentally ill.<sup>44</sup> Four years later in *Addington v Texas*, it held that, although involuntary commitment is a civil procedure, the standard of proof which the government must adhere to is 'clear and convincing evidence', as opposed to on 'preponderance of the evidence'.<sup>45</sup> In order to detain, the government must offer clear and convincing evidence that:

- i) The person suffers from a mental illness
- ii) They are a danger to themselves or others.

35. The hearing to determine this (civil commitment hearing) will be held in the Probate Division of the civil court with original jurisdiction for the area in which the person concerned is resident. Other than the higher standard of proof, the hearing follows the normal rules of civil procedure and is adversarial. The person detained will have the opportunity to instruct counsel, present evidence and cross-examine witnesses.

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Clearing House, 'Case Profile: Roy v Los Angeles County' < <http://www.clearinghouse.net/chDocs/public/IM-CA-0064-0001.pdf> > accessed 5 March 2014.

<sup>43</sup> 'Summary of State Laws Governing Emergency Detention of Mentally Ill Adults' available < [www.aapa.org/uploadedFiles/content/The\\_PA\\_Profession/Federal\\_and\\_State\\_Affairs/Resource\\_Items/Emergency%20Detention%209-12.pdf](http://www.aapa.org/uploadedFiles/content/The_PA_Profession/Federal_and_State_Affairs/Resource_Items/Emergency%20Detention%209-12.pdf) > accessed 19 January 2014.

<sup>44</sup> 422 US 563 (1975).

<sup>45</sup> 441 US 418 (1979).

### **c) What procedures are available for detainees to challenge their detention?**

36. In *Jones v the United States* it was held that confinement was only authorised for as long as the required mental illness and dangerousness to the person's self or others persisted.<sup>46</sup> In practical terms this created a necessity for periodic review of the person's condition in order to fully comply with the court's ruling. The period of review varies between states, although common practice is that a detainee's condition will be reviewed for these purposes at a minimum of every 30 days.
37. The person committed does also have the right to file an appeal against the initial decision to commit, but the grounds for appeal vary between different states.

### **d) Remedies for unlawful detention**

38. If the person is successful during the civil commitment hearing or appeal then they will be released from the detention facility.
39. In terms of compensation, in *O'Connor v Donaldson*, the petitioner successfully sued the state hospital he had been confined in for damages, on the ground that the staff had deprived him of his constitutional right to liberty under the 5<sup>th</sup> Amendment.<sup>47</sup> This type of action is available to those subject to unlawful civil commitment under 42 USC. § 1983.<sup>48</sup> The person detained can seek compensation based on the initial detention, or any period of the confinement as a whole, for example if their health improved but they were still not released. Additionally, the state civil commitment statutes also each have a provision for compensation on this basis.

## **IV MILITARY DETENTION**

### **a) Decision to detain**

40. Prior to the Obama Administration's retirement of the expression in 2009,<sup>49</sup> the United States Government detained 'enemy combatants', who it defined as individuals who are 'part of or supporting forces hostile to the United States or coalition partners' and who 'engaged in an armed conflict against the United States'.<sup>50</sup> This original power to detain enemy combatants was contained in the Authorization for Use of Military Force (AUMF) resolution, which was passed

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<sup>46</sup> 463 US 354, 368 (1983).

<sup>47</sup> 422 US 563 (1975).

<sup>48</sup> 42 USC. § 1983.

<sup>49</sup> Department of Justice, 'Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees' (13 March 2009) available < <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>> accessed 5 March 2014.

<sup>50</sup> *Hamdi v Rumsfeld* 542 US 507 (2004).

by Congress in the wake of 9/11.<sup>51</sup> In 2009, the Obama Administration submitted a new standard for the government's authority to hold detainees at Guantanamo Bay, providing that 'individuals who supported al Qaeda or the Taliban are detainable only if the support was substantial'.<sup>52</sup> The authority to hold detainees under this new regime at Guantanamo Bay was based on the AUMF, which itself was informed by principles of the laws of war.<sup>53</sup>

#### **b) Review of and challenges to detention**

41. The background to the process has differed depending on whether the detainee is a US citizen or non-US citizen, and these backgrounds and current procedures are outlined below.

##### *i) US citizens*

42. US citizens detained under the AUMF are required to be detained within the United States. Under the US Constitution, every individual detained within the United States is entitled to a *habeas corpus* petition to challenge their detention.<sup>54</sup> This *habeas corpus* petition would be filed under 28 USC. § 2241 and would be heard in the federal court with jurisdiction for the district where the person is in custody<sup>55</sup>. In the federal habeas review, the 'person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts'.<sup>56</sup> This evidence can be presented orally in court.<sup>57</sup>

##### *ii) Non-US citizens*

43. Until recently the majority of non-US citizens detained under the former 'enemy combatants' regime were transferred to the US Naval Base at Guantanamo Bay, Cuba. In the case of *Rasul v Bush*, it was held that these prisoners had a right to file a habeas corpus petition in order to challenge their detention.<sup>58</sup> Following this however, the US Government passed the Detainee Treatment Act of 2005<sup>59</sup> and Military Commissions Act of 2006<sup>60</sup>, which restricted any future habeas rights of those non-citizens held outside the United States. However, in the case of *Boumediene v Bush*, it was held by the US Supreme Court that not only did Guantanamo detainees

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<sup>51</sup> Pub L 107-40, 115 Stat 224.

<sup>52</sup> Department of Justice, 'Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees' (13 March 2009) available < <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>> accessed 5 March 2014

<sup>53</sup> *ibid.*

<sup>54</sup> United States Constitution, art 1, s 9, cl.2.

<sup>55</sup> 28 USC. § 2241(d).

<sup>56</sup> 28 USC. § 2243.

<sup>57</sup> 28 USC. § 2246.

<sup>58</sup> 542 US 466 (2004).

<sup>59</sup> Pub L No. 109-148, 119 Stat 2739.

<sup>60</sup> Pub L No. 109-366, 120 Stat 2600.

have the right to file a habeas corpus petition in US federal court, but they were also extended the fundamental rights afforded by the US Constitution.<sup>61</sup> Therefore, it seems that non-US citizens detained under this power have the same habeas petition process outlined above with regards to US citizens.

### **c) Remedies for unlawful detention**

44. Where the habeas petition is successful, the court will order the release of the detainee.
45. In terms of compensation for Guantanamo detainees, the recent decision of the Ninth Circuit of Appeals in *Hamad v Gates* concluded that it did not have jurisdiction to hear the petitioner's claim for damages.<sup>62</sup> The petitioner had been detained in Guantanamo for five years before eventually being transferred back to his home country of Sudan. The court's decision was based on s 2241(e)(2) of the Detainee Treatment Act of 2005 (which it held had not been invalidated by the decision in *Boumediene*).<sup>63</sup> That section provides that 'no court, justice or Judge' could hear 'any other action' relating to detention (including a claim for damages).<sup>64</sup> This suggests that former Guantanamo detainees may not have a mechanism to seek damages for their detention.
46. Furthermore, it should also be noted that s 2241(e)(2) does not apply to US citizens but only to aliens, meaning that US citizens could seek damages for infringement of their constitutional rights, were they able to demonstrate that their detention was unlawful.

## **V POLICE DETENTION**

47. This summary will particularly focus on the practice of 'kettling' in the United States, where police corral large crowds during demonstrations or protests, leaving them only one choice of exit or in many occasions, no exit at all.

### **a) Threshold questions**

48. Under the 4<sup>th</sup> Amendment to the US Constitution, a person has the right to be free from 'unreasonable searches and seizures'. In the landmark case of *Terry v Ohio*, it was held that 'whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person'.<sup>65</sup> Therefore, this is what constitutes police detention in US law, and if an individual is seized (detained) through kettling or any other police procedure, the restraint on their freedom must be in accordance with the law.

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<sup>61</sup> *Boumediene v Bush*, 553 US 723 (2008) .

<sup>62</sup> *Hamad v Gates*, DC No. 2:10-cv-00591-MJP (2013) .

<sup>63</sup> This provision was codified in 28 USC. § 2241(e)(2).

<sup>64</sup> 28 USC. § 2241(e)(2).

<sup>65</sup> 392 US 1 (1968).

## **b) Decision to detain**

49. Under the 10<sup>th</sup> Amendment to the US Constitution, ‘police power’ is conferred upon the individual states, allowing them to enact measures to preserve and protect the safety, health, welfare and morals of the community within those states. The key case in this area was *Jacobson v Massachusetts*, where the Supreme Court officially recognised state’s police powers for the first time, upholding a state law providing for compulsory vaccinations against smallpox in Boston, despite the fact that this was an infraction against the right to liberty guaranteed under the 1<sup>st</sup> Amendment.<sup>66</sup>
50. Essentially, based on the *Jacobson* holding, the states’ police powers allow them to restrict constitutional freedoms where the restrictions are in pursuance of the goals noted above.
51. Under the 1<sup>st</sup> Amendment, the public has the right to freedom of assembly, but each state can restrict this freedom by declaring the assembly unlawful and detaining those involved, if it does so in pursuance of public safety, health, welfare and morals of the community, although in this context it is most likely to be on the ground of public safety. It appears that this decision would normally be made by the police commander in charge of the state or county police force that is policing the event where the crowd has gathered.<sup>67</sup>

## **c) Review of and challenges to detention**

52. Where the state utilises its police power, for example to use the tactic of kettling to restrict a group’s 1<sup>st</sup> Amendment Rights, those detained will not have a direct mechanism to challenge their detention during the time they are detained at the scene of the protest. If they are then taken into custody in the form of a holding facility or jail, they will have to be charged with a crime within a time period which varies between states (the longest being 72 hours) before being automatically brought before a judge to determine the legality of the detention.
53. If they are released after the detention without charge or without being brought into custody however, detainees may still challenge their detention as an infringement of their 1<sup>st</sup> and 4<sup>th</sup> Amendment Rights, under 42 USC. § 1983.<sup>68</sup> In these circumstances the court will conduct a ‘balance of interests test’ to determine whether the goals served by the state’s use of its police powers was proportionate to the restriction to the detainees civil rights. In the case of kettling, the court would assess whether the nature of the police confinement and length of confinement were proportionate to the perceived threat to public safety.

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<sup>66</sup> 197 US 11 (1905).

<sup>67</sup> Eric Daigle, ‘Crowd Management and Civil Rights Protection’ (September 2012) available <[http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=2744&issue\\_id=92012](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2744&issue_id=92012)> accessed 5 March 2014.

<sup>68</sup> 42 USC. § 1983.



#### **d) Remedies for unlawful detention**

54. If the state's actions were found to be disproportionate to the threat, those detained would be entitled to damages under 42 USC. §1983 on the ground that they had been deprived of their constitutional rights under the 1<sup>st</sup> and 4<sup>th</sup> Amendments.<sup>69</sup>

### **VI PREVENTIVE DETENTION**

55. This section will focus on the practice where those charged with a crime and convicted criminals are detained in custody, both before their original trial and following the end of their sentence, based on perceptions of their future dangerousness to the public. Academic commentary in this area seems to suggest that preventive detention is less commonly written about than other areas of US criminal law.

#### **a) Threshold questions**

56. As preventive detention takes place when an individual is in custody, either after the initial arrest and prior to trial, or after serving a prison sentence, then this is not generally an issue.

#### **b) Decision to detain**

##### *i) Pre-trial detention*

57. US law authorises a federal judicial officer (federal judge) to order detention until trial, at a detention hearing.<sup>70</sup> Detention pending trial is permitted where there is 'a serious risk the person will flee', 'a serious risk that such person will obstruct ... justice' or attempt to intimidate witnesses or jurors,<sup>71</sup> and it is the judge's decision as to whether one or more of these factors exist. There is also a rebuttable presumption in favour of detention where the defendant has been charged with certain serious crimes, or has been charged with any felony and has previously been convicted of other serious crimes, which are defined in the statute.<sup>72</sup> Additionally, the judicial officer has the power to order pre-trial detention where they find that no condition or combination of conditions will assure both the appearance of the person at trial and the safety of the public.<sup>73</sup> In making this decision the judge will assess the nature of the charged offence, weight of evidence against the defendant, and the defendant's personal circumstances.<sup>74</sup>

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<sup>69</sup> 42 USC. § 1983.

<sup>70</sup> 18 USC. § 3142(e).

<sup>71</sup> 18 USC. § 3142(e)-(f).

<sup>72</sup> 18 USC. § 3142(f)(1).

<sup>73</sup> 18 USC. § 3142(g).

<sup>74</sup> *ibid.*

58. At the detention hearing the defendant has a right to instruct counsel, to testify, to present witnesses, cross-examine witnesses who appear at the hearing, and present information. In relation to this final aspect, admissibility of evidence rules do not apply to pre-trial detention hearings.<sup>75</sup> Where the judge orders detention, they must issue written findings of fact. Where they release the defendant on bail, they must not impose ‘a financial condition that results in the pre-trial detention of that person’, in other words set bail so high that it acts as a de facto preventive regime.<sup>76</sup>
59. It should be noted that the above describes federal detention procedures for those charged with federal crimes, and that for those charged by states, the state detention procedures may vary.

*ii) Preventive detention post sentence*

60. In *Kansas v Hendricks*, the US Supreme Court upheld the preventive detention of individuals who had completed their sentences, but had been shown to be dangerous as the result of a ‘mental abnormality’.<sup>77</sup> In the case the Supreme Court specifically stated that the mental abnormality did not need to be one which would normally be considered extreme, provided it made the person ‘dangerous beyond (their) control’.<sup>78</sup> In a later decision in *Kansas v Crane*, the Court stressed that ‘lack of control’ is not intended to have a ‘particularly narrow or technical meaning’, but simply requires ‘proof of serious difficulty in controlling behaviour’.<sup>79</sup> While this case was decided in relation to a state statute (from Kansas), the court’s rationale provided a framework for wider state practice and has been codified into federal law.<sup>80</sup> Importantly, this is considered to be a civil procedure, and so due to this does not violate the double jeopardy rule, and other aspects of criminal due process.
61. In terms of procedure, as it is a civil procedure then it is subject to civil due process as opposed to criminal due process, which offers less protection for the person subject to proceedings. Whether the person who has completed their sentence is dangerous or not is certified by the Attorney General, or any person authorized by him,<sup>81</sup> and where this is the case the individual will be referred to the court with jurisdiction for the district where they are confined.<sup>82</sup> They will then receive a psychiatric assessment and participate in a hearing where the decision regarding their detention will be made. At the hearing the individual concerned has the opportunity to

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<sup>75</sup> 18 USC. § 3142(f)(2).

<sup>76</sup> 18 USC. § 3142(c)(2).

<sup>77</sup> 521 US 346 (1997).

<sup>78</sup> 521 US 346, 358.

<sup>79</sup> 534 US 407 (2002).

<sup>80</sup> 18 USC. § 4248.

<sup>81</sup> 18 USC. § 4246.

<sup>82</sup> 18 USC. § 4246.

instruct counsel, present evidence, and confront and cross-examine witnesses who appear at the hearing.<sup>83</sup>

62. Once again, the above is based on federal procedure and individual states may differ, but as was noted, in this instance the federal statute was based on a Supreme Court decision focusing on state practice.

### **c) Review of and challenges to detention**

#### *i) Pre-trial detention*

63. Where the judge has ordered detention pending trial at the detention hearing, the defendant is entitled to appeal the decision under 18 USC. § 3145.<sup>84</sup>

#### *ii) Preventive detention post sentence*

64. Once the decision has been made to detain, the person will be held until the person's condition is such that their release would not create 'a substantial risk of bodily injury to another person', or 'serious damage to property of another'.<sup>85</sup> This decision will be determined by the Director of the facility in which the individual is resident in.<sup>86</sup>

### **d) Remedies for unlawful detention**

#### *i) Pre-trial detention*

65. If the detention is found to be unlawful on appeal then the defendant is entitled to be released from custody until trial.<sup>87</sup> Provided that the detention was in accordance with the procedures described above, it is not normally possible to claim compensation. If detention was not in accordance with this process, the defendant may be able to bring an action for damages for wrongful arrest, false imprisonment, or malicious prosecution under 42 USC. § 1983.<sup>88</sup>

#### *ii) Preventive detention post sentence*

66. If it is found that the person's release would not create 'a substantial risk of bodily injury to another person' or 'serious damage to the property of another' by the facility Director as stated above, they will be either discharged unconditionally<sup>89</sup> or discharged on condition of ongoing

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<sup>83</sup> 18 USC. § 4247.

<sup>84</sup> 18 USC. § 3145.

<sup>85</sup> 18 USC. § 4246(d)(2).

<sup>86</sup> 18 USC. § 4246(e).

<sup>87</sup> 18 USC. § 3145.

<sup>88</sup> 42 USC. § 1983.

<sup>89</sup> 18 USC. § 4246(e)(1).

treatment.<sup>90</sup> As they are assessed on an ongoing basis, it does not appear that after discharge they could then bring an action for compensation under 42 USC. § 1983, unless they could show that in the initial detention decision following their sentence, procedure as stated above was not correctly followed, or that they had unlawfully been designated a risk during the periods of assessment.<sup>91</sup>

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<sup>90</sup> 18 USC. § 4246(e)(2).

<sup>91</sup> 42 USC. § 1983.

# Country Report for Uruguay

## I ADMINISTRATIVE DETENTION

1. There is no specific provision under Uruguayan Law with regards to the possibility to detain a person on grounds of counter-terrorism, intelligence gathering or security reasons. As a general rule, arrests in Uruguay only proceed in cases of flagrante delicto or with a written judicial order. And in either case, the order of detention needs to be issued by a competent judge who should see the detainee, and take their statement within 24 hours, and begin the criminal proceeding within 48 hours.<sup>1</sup> These guarantees can only be limited in very exceptional circumstances especially established in the Constitution. It is the case of what is call ‘medidas prontas de seguridad’<sup>2</sup> that functions as a ‘state of exception’ and allows the Executive Branch to limit certain rights upon informing the General Assembly. These measures are provisional and only proceed in case of serious unexpected events of external attack or internal unrest.<sup>3</sup> Under this ‘state of exception’ the Executive Branch can deprive the liberty of a person and allocate her/him in a facility that is not originally designated as a reclusion facility—such as military facility—and to move a person within the limits of the country, only when the person has not opted to abandon the country.<sup>4</sup>

## II IMMIGRATION DETENTION

2. Uruguayan immigration law doesn’t regulate explicitly this matter.<sup>5</sup> There is no provision on the law with regards to detain individuals suspected of visa violations, illegal entry or unauthorised arrival. As a developing country with very slow rate of population growth, Uruguay has historically adopted an immigration-friendly policy and immigrants have normally found little requirements or bureaucratic obstacles to enter and settle in the country.
3. The sanctions provided in the immigration law are only pecuniary<sup>6</sup> and the immigrant can challenge all definitive decisions regarding their status before the immigration authority according to s 317 of the Uruguayan Constitution and this shall have suspensive effect.<sup>7</sup>

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<sup>1</sup> Uruguayan Constitution, ss 15 and 16.

<sup>2</sup> A possible translation would be ‘immediate measures of security’.

<sup>3</sup> Uruguayan Constitution, s 168.

<sup>4</sup> Uruguayan Constitution, s168,

<sup>5</sup> Law 18.250.

<sup>6</sup> Law 18250, Chapter XIII.

<sup>7</sup> Law 18.250 s 49.

### III DETENTION OF PERSONS WITH A MENTAL ILLNESS

4. The legal framework for the detention of persons with mental illness is established in ss 92 to 101 of the Criminal Code. When the crime is committed by a person with mental illness (including alcoholics or a drug addicts) ‘curative measures’ should be adopted and the person shall be detained in a mental institution. These measures are taken after the judge has assessed the mental situation of the subject — with the advisory opinion of a mental health professional — and decided that the subject is unable to comprehend and/or control their behaviour and therefore cannot be held criminally responsible. The analysis of the subject unimputability is ought to be made by the Court and shall have its scientific basis on a report issued by the ‘Instituto Técnico Forense’ (or Forensic Investigation Office) that will interview the subject. This Office shall re-evaluate the situation of the patient every six months<sup>8</sup> and this evaluation can result in a review of the measures.
5. The law establishes that these patients shall be detained in a Criminal Sanatorium. However, this type of institution was never established and, in fact, they are detained in ordinary asylums under the care of the State.
6. The subject ought to be assisted and represented by an attorney and by their tutor/curator/legal representative and should be heard in every stage of the proceedings.
7. These regulations had been widely criticized due to the fact that, according to s 94 of the Criminal Code, these measures have no minimum or maximum duration. Therefore, the judge has absolute discretion in deciding the extension in time of these measures. There is a bill under consideration of the Parliament of a new Criminal Code that will modify this indetermination of the curative measures.<sup>9</sup>

### IV MILITARY DETENTION

#### a) Threshold questions

8. There does not appear to be any threshold question as to whether ‘military detention’ in Uruguay constitutions ‘detention’.

#### b) Decision to detain

9. As a general rule, arrests in Uruguay only proceed in cases of *flagrante delicto* or with a written judicial order. And in either case, the order of detention needs to be issued by a competent judge

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<sup>8</sup> Decision 245/2013, Criminal Court of Appeal, Second Circuit, 2013, Available at <[www.bjn.poderjudicial.gub.uy](http://www.bjn.poderjudicial.gub.uy)> accessed 15 January 2014.

<sup>9</sup> Cairoli, ‘M Por qué y cómo debe reformarse el Código Penal - online code UY/DOC/217/2011’ available <<http://www.laleyonline.com.uy/>> accessed 15 January 2014.

who should see the detainee, and take their statement within 24 hours, and begin the criminal proceeding within 48 hours.<sup>10</sup> Furthermore, under Uruguayan law, no measure resulting in deprivation of liberty can be ordered without legal text allowing it and written judicial order.

10. Under Uruguayan law no detention can be ordered by military personnel or under military custody or at any other military facility. These guarantees can only be limited in very exceptional circumstances especially established in the Constitution. It is the case of what is called ‘medidas prontas de seguridad’<sup>11</sup> that functions as a ‘state of exception’ and allows the Executive Branch to limit certain rights upon informing the General Assembly. These measures are provisional and only proceed in case of serious unexpected events of external attack or internal unrest.<sup>12</sup> Under this ‘state of exception’ the Executive Branch can deprive the liberty of a person and allocate her/him in a facility that is not originally designated as a reclusion facility — such as military facility — and to move a persons within the limits of the country, only when the person has not opted to abandon the country.<sup>13</sup>
11. According to the Military Criminal Code and Military Procedure Code — that applies exclusively to the armed forces of Uruguay — military personnel found guilty of a crime shall be judged by specialised military Courts and shall be detained in military facilities as long as they provide satisfactory reclusion conditions.<sup>14</sup>

## **V POLICE DETENTION**

12. Information regarding any issues concerning police detention, particularly with respect to ‘kettling’ in crowd control situations, could not be located. Some aspects may be considered ‘police detention’ concerning pre-trial preventive decision, which are dealt with in Section VI below.

## **VI PREVENTIVE DETENTION**

13. The relevant legal instruments on this matter are International Covenant on Civil and Political Rights, American Convention on Human Rights, ss 26 and 27 of the Uruguayan Constitution, Law 17.726, Law 16.058, Law 15.859 and ss 71 and 72 of the Criminal Procedure Code.

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<sup>10</sup> Uruguayan Constitution, ss 15 and 16.

<sup>11</sup> A possible translation would be ‘immediate measures of security’.

<sup>12</sup> Uruguayan Constitution, s 168.

<sup>13</sup> Uruguayan Constitution, s 168.

<sup>14</sup> Military Procedure Code, ss 10 and 11.

### a) Pre-trial detention

14. The Uruguayan pre-trial detention framework is established in the Criminal Procedure Code, especially ss 71 and 72. According to this domestic regulation, during any stage of the criminal proceeding the judge can order preventive detention. This law authorises the judge who is analysing the case to order this kind of detentions; the judge must be competent according to the law.
15. Some material limits are established in s 72: preventive detention only proceeds when there are reasonable grounds to suspect (a) that the subject will attempt to evade the proceeding; (b) that the subject's freedom will endanger the investigation and/or the recollection of evidence; or (c) is consider to be necessary for 'public security' reasons or (d) if the subject have been indicted or convicted previously.<sup>15</sup> Also, preventive detention can be ordered in those cases where the crime committed caused or has the potentiality to cause 'social alarm'.<sup>16</sup>
16. However, the majority of the case law in Uruguay considered that preventive detention should be mandatory according to a narrow interpretation of s 27 of the Constitution.<sup>17</sup> This section was construed strictly as establishing that preventive detention of the indictee is the general rule, and that freedom during the proceedings can only be granted in exceptional cases when (i) the subject has no previous indictment and (ii) the proceedings will not result in an imprisonment for 24 months or more.<sup>18</sup> This interpretation results in Uruguay being one of the countries with the highest proportion of pre-trial detainees among the total prison population; 64.6 per cent of the detainees have no conviction whatsoever.<sup>19</sup>

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<sup>15</sup> Section 72 of the Uruguayan Criminal Procure Code provides:

'...el Juez podrá decretar la prisión preventiva: A) Si hubiere motivo fundado para presumir que el imputado tratará de sustraerse a la acción de la justicia; B) Si fuere igualmente presumible que la libertad del prevenido obstaculizará la eficacia de la instrucción; C) Si fuere necesario, por razones de seguridad pública; D) Si se tratase de procesado reincidente o que tuviera causa anterior en trámite. En la consideración de este extremo el Juez estará, provisoriamente, a los dichos del imputado y, en definitiva, a las resultancias de la planilla de antecedentes judiciales que el Instituto Técnico Forense deberá expedir dentro de la veinticuatro horas de serle solicitada'.

<sup>16</sup> Law 15.859, s 3.

<sup>17</sup> Section 27 f the Uruguayan Constitution provides:

'En cualquier estado de una causa criminal de que no haya de resultar pena de penitenciaría, los Jueces podrán poner al acusado en libertad, dando fianza según la ley'.

<sup>18</sup> Law 17.726. See also Camano, D. 'Límites normativos a la duración de la prisión preventiva' available <[http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera\\_0.pdf](http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera_0.pdf)> accessed 9 December 2013.

<sup>19</sup> Aborn, R. and Canon, 'H. Prisons: in jail but not sentenced' available <<http://www.americasquarterly.org/aborn-prisons>> accessed 9 January 2014.



17. For this detention to be legitimate it should be requested by the Public Prosecutor and ordered by a competent judge. The detainee can challenge the order of preventive detention in accordance to s 132 of the Criminal Procedure Code and needs to be represented and assisted by an attorney in all opportunities before the Court.<sup>20</sup>
18. This law and its interpretation have been widely criticized because it confuses the procedural non-punitive measure of preventive detention with the imprisonment as a criminal punishment.<sup>21</sup> It is a widely spread practice, enabled by domestic law—in evident contradiction with international human rights obligations assumed by Uruguay—to consider factors as ‘the nature of the crime’, ‘the previous conviction or indictment of the subject’ and ‘the potential punishment established for the offence’ to determine the order of preventive imprisonment. Therefore, preventive detention in Uruguay functions as an ‘anticipated punishment’.<sup>22</sup>
19. In the cases where the detainee was detained preventively but (1) there was no conviction whatsoever or (2) the conviction resulted in a sanction of imprisonment for a period shorter than the one already been served by the detainee, the detainee is entitled under Law 15.859 to compensation by the State for the material and moral damages that preventive detention have caused.<sup>23</sup>

#### **b) Preventive detention post sentence**

20. Under Uruguayan Law, the judge can impose ‘eliminative measures’<sup>24</sup> after the convict has served the time. These kinds of measures can only be applied to recidivist offenders and homicides and where because of the exceptional gravity of the fact, derived from the nature of the motives, the way of execution and other related circumstances, the subject is demonstrated to be ‘dangerous’. These ‘measures’ can result in a new reclusion period that can last for fifteen years.<sup>25</sup>

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<sup>20</sup> Law 15.032, s132.

<sup>21</sup> Gelsi Bidart, A. ‘Pre sumario y garantías procesales’ available <<http://www.laleyonline.com.uy>> accessed 10 January 2014.

<sup>22</sup> Camano, D. ‘Límites normativos a la duración de la prisión preventiva’ available <[http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera\\_0.pdf](http://new.pensamientopenal.com.ar/sites/default/files/2011/10/41viera_0.pdf)> accessed 9 December 2013.

<sup>23</sup> Law 15.859, s 4.

<sup>24</sup> Uruguayan Criminal Code.

<sup>25</sup> Uruguayan Criminal Code, ss 92 and 95.