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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

April 2014

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In addition, the research co-ordinators would like to thank:

- **Professor Timothy Endicott**, Dean of the Oxford Law Faculty, for his support of this project;
- The Members of the Oxford Pro Bono Publico Executive Committee, **Professor Sandra Fredman**, **Dr Liora Lazarus, Dr Miles Jackson, Dr Jacob Rowbottom,** and the other

members of Student Committee, **Shreya Atrey**, **Tamas Szigeti**, **Lauren Dancer** and **Daniel Cashman** for their support and assistance with the project.

- **Associate Professor Dapo Akande** and **Lawrence Hill-Cawthorne** for their valuable and insightful comments on the Draft of this report.

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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.[1] 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

[1] 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.[2] 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

[2] 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.[3]

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.[4] 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.[5]

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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[3] 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.

[4] 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.

[5] 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.[6] 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,[7] India, Russia,[8] Singapore, South Africa,[9] 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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6 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.

7 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.

8 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.

9 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[10] or the proposed Enhanced Terrorism Prevention and Investigation Measures regime in the UK[11] – 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.[12]

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.[13]

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:[14] that is, a person cannot be detained in the

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[10] 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)'.

[11] Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Terrorism prevention and investigation measures'.

[12] Country Report for Switzerland, 'Administrative detention – Detention pursuant to criminal procedure law – Threshold questions'.

[13] Country Report for Belgium, 'Administrative detention – Detention on remand – Threshold questions'; Country Report for the United States of America, 'Administrative detention – Threshold questions'.

[14] 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.[15]

32. For those States that do permit detention at the discretion of an ordinary police officer or government security agent,[16] 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.[17] 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.[18] 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[19]). 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.[20] In Sri Lanka, a senior police officer may arrest a person without a warrant, but must produce them to a magistrate within 72 hours.[21] 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.[22]

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.[23]

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

16 Singapore, Sri Lanka, the United Kingdom, the United States of America, and Russia (in the case of 'administrative detention').

17 Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Detention at ports or border controls on suspicion of terrorism'.

18 Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism'.

19 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'.

20 Country Report for the United States of America, 'Administrative detention – Decision to detain – Temporary stops'.

21 Country Report for Sri Lanka, 'Administrative detention – Decision to detain'.

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

23 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.[24]

35. For those States that do require a warrant or prior authorisation for detention,[25] 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;[26] the Australian states of Victoria,[27] Queensland,[28] South Australia (though this results in a shorter maximum detention period than where the prior authorisation comes from a judicial body),[29] and Tasmania (though only in cases of urgent need);[30] Canada, in the case of urgent (that is, exceptional) preventive arrests;[31] and Australia's federal jurisdiction, in the case of urgent (that is, exceptional) preventive detention under the Commonwealth Criminal Code.[32] 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,[33] within 24 hours in Australia's federal jurisdiction[34] and the Australian states of Queensland[35] and Tasmania,[36] and as soon as practicable in the Australian state of South Australia.[37]

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

25 Australia, Canada, China, India; also potentially Russia (see ibid and accompanying text).

26 Country Report for China, 'Administrative detention – Decision to detain'.

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

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

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

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

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

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

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

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

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

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

37 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;[38] India;[39] Singapore (under both the Internal Security Act and the Criminal Law (Temporary Provisions) Act);[40] and Sri Lanka (although Sri Lanka also permits a parallel procedure of arrest by a police officer without warrant).[41]

38. States that empower judges or courts[42] to provide the prior authorisation for detention are: Australia in its federal jurisdiction (except in the case of urgent preventive detention);[43] the Australian states of New South Wales,[44] Tasmania (except in the cases of urgent need),[45] Western Australia,[46] and the Australian Capital Territory;[47] Canada, in the case of investigative hearings and preventive arrest (except in the case of urgent preventive arrest);[48] and Russia (in the case of 'administrative arrest').[49]

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);[50] 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,[51] but there is a

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38 Country Report for Canada, 'Administrative detention – Decision to detain – Security certificates'.

39 Country Report for India, 'Administrative detention – Counter-terrorism – Decision to detain'.

40 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'.

41 Country Report for Sri Lanka, 'Administrative detention – Decision to detain'.

42 This includes former or retired judges and members of tribunals.

43 Country Report for Australia, 'Administrative detention – Decision to detain'.

44 Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – New South Wales'.

45 Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Tasmania'.

46 Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Western Australia'.

47 Country Report for Australia, 'Administrative detention – Decision to detain – Detention under various state laws – Australian Capital Territory'.

48 Country Report for Canada, 'Administrative detention – Decision to detain – Investigative hearings and preventive arrest'.

49 Country Report for Russia, 'Administrative detention – Decision to detain – Administrative arrest'.

50 Country Report for India, 'Administrative detention – Counter-terrorism – Decision to detain'.

51 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;[52] 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.[53] 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[54]

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,[55] the ECHR,[56] and Sri Lanka.[57]

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

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

53 Country Report for Sri Lanka, 'Administrative detention – Decision to detain'.

54 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.

55 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.

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

57 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[58] and Singapore (under the Internal Security Act).[59]

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,[60] Canada,[61] India,[62] the UK,[63] and the US.[64] 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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58 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'.

59 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'.

60 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'.

61 Country Report for Canada, 'Administrative detention – Decision to detain – Investigative hearings and preventive arrest'.

62 Specifically, for entering a designated place. See Country Report for India, 'Administrative detention – Counter-terrorism – Decision to detain'.

63 Country Report for the United Kingdom, 'Administrative detention – Specific counter-terrorism provisions – Detention without charge on suspicion of terrorism'.

64 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)[65] and the UK.[66] The following States further provide for an initial period of administrative detention of 30 days or less: China;[67] India;[68] Russia;[69] and South Africa (even during a state of emergency).[70] By contrast, Sri Lanka provides for an initial period of detention of three months;[71] Australia's control orders, if they constitute detention, have an initial period of twelve months;[72] and Singapore (under the Internal Security Act) has an initial period of detention of two years.[73]

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)[74] and Russia.[75]

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)[76] and the UK.[77] The following States provide for a maximum period of administrative detention (including extension or renewal) of up to 18 months: China (20 days);[78] Russia (30 days);[79] India (180 days);[80] and Sri Lanka (18 months).[81]

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65 Country Report for Australia, 'Administrative detention – Decision to detain'.

66 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'.

67 Country Report for China, 'Administrative detention – Decision to detain'.

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

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

70 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'.

71 Country Report for Sri Lanka, 'Administrative detention – Decision to detain'.

72 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)'.

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

74 Country Report for Australia, 'Administrative detention – Decision to detain'.

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

76 Country Report for Australia, 'Administrative detention – Decision to detain'.

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

78 Country Report for China, 'Administrative detention – Decision to detain'.

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

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

81 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;[82] Singapore (under both the Internal Security Act and the Criminal Law (Temporary Provisions) Act);[83] and South Africa (during a state of emergency).[84]

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.[85] 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.[86]

54. The majority of States provide for some method of *judicial* challenge:[87] only Sri Lanka[88] and the UK (in the context of detention on suspicion of involvement in terrorist activities, not exceeding 48 hours in duration)[89] permit challenges to executive bodies alone.

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

82 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)'.

83 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'.

84 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'.

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

86 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.

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

88 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.[90] The majority of States require that the detainee themselves apply for the challenge to be heard.[91]

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,[92] and for monetary compensation.[93] 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'.

89 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.

90 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').

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

92 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.

93 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.[94]

59. The only States in respect of which the availability of monetary compensation is unclear are Singapore[95] and Sri Lanka.[96] 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.[97]

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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94 Country Report for Australia, 'Administrative detention – Compensation for unlawful detention'.

95 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'.

96 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'.

97 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.[98]

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,[99] 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.[100] 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.[101]

65. In other jurisdictions where detention is defined,[102] 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.[103] 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'.[104] 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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98 The Country Reports for Canada, China and Switzerland did not address immigration detention. In Russia, immigration detention was addressed as part of administrative detention.

99 Germany, Greece, India, Sri Lanka, the United Kingdom and Uruguay.

100 See Report for the European Court of Human Rights, 'Background information'.

101 See Report for the European Court of Human Rights, 'Background information'.

102 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'.

103 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'.

104 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'[105] 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[106] or, for persons under 18 years old, detention in the home[107] – 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.[108] 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.[109]

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.[110] 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.[111] 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.[112] In both cases, questions remain as to whether detention has occurred.

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[105] Migration Act 1958 (Cth), s 197AC(1), Country Report for Australia, 'Immigration detention – Threshold questions'.

[106] Immigration Act 2009, s 331(b), cited in Country Report for New Zealand, 'Immigration detention – Threshold questions'.

[107] Immigration Act 2009, s 331(a), cited in Country Report for New Zealand, 'Immigration detention – Threshold questions'.

[108] Immigration Act 2009, s 315, cited in Country Report for New Zealand, 'Immigration detention – Threshold questions'.

[109] Title 8 US Code Section 1226, cited in Country Report for the United States of America, 'Immigration detention – Threshold questions'.

[110] 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'.

[111] §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'.

[112] 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[113] 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.[114] 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.[115] In Argentina there is a clause limiting detention to people whose expulsion has already been consented to.[116]

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.[117] 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.[118]

ii) Asylum seekers

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

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113 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.

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

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

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

117 Country Report for Australia, 'Immigration detention – Decision to detain'.

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

119 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'.

120 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.[121] 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.[122] In Belgium, asylum seekers may be detained while their claim is being processed.[123] Hong Kong allows detention of individuals seeking asylum on the basis of torture claims.[124]

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.[125] Otherwise, asylum seekers in South Africa have the right to remain free from detention pending the outcome of their asylum application.[126] 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.[127]

73. In other countries, asylum seekers may be detained under broader immigration detention powers, including detention for the purposes of determining identity[128] or where a person is suspected of travelling without valid documents.[129] 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,[130] Australia,[131] Hong Kong,[132] and the UK.[133]

States, of America 'Immigration detention – Decision to detain'.

121 Country Report for Australia, 'Immigration detention – Decision to detain' and Country Report for the United States of America, 'Immigration detention – Decision to detain'

122 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'.

123 Country Report for Belgium, 'Immigration detention – Decision to detain'.

124 Country Report for Hong Kong, 'Immigration detention – Decision to detain – Detention of individuals seeking asylum based on torture claims'.

125 Refugees Act (No 130 of 1998), s 23, cited in Country Report for South Africa, 'Immigration detention – Decision to detain'.

126 *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'.

127 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'.

128 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.

129 Country Report for Sri Lanka, 'Immigration detention – Decision to detain'.

130 Country Report for Belgium, 'Immigration detention – Preliminary remarks – Legal framework'.

131 Country Report for Australia, 'Immigration detention – Decision to detain'.

132 Country Report for Hong Kong, 'Immigration detention – Decision to detain'.

iii) Persons refused or not entitled to entry

74. In the UK[134] and Singapore[135] 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.[136] 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.[137] 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.[138]

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,[139] unless exempted from requiring one by the Director of Immigration.[140] Detention for individuals seeking asylum on the basis of torture claims is also allowed.[141] Both provisions were aimed at controlling the entry of Vietnamese refugees into Hong Kong.

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

134 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'.

135 Country Report for Singapore, 'Immigration detention'.

136 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'.

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

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

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

140 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'.

141 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,[142] Greece,[143] and New Zealand[144] 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.[145]

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.[146] 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.[147] 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.[148] In India, foreigners can be detained if they are accused of a criminal offence.[149] 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.[150] In Italy, detention is possible when an immigrant has committed a crime and a criminal judge has ordered them to leave the country.[151]

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).[152]

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

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

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

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

146 Country Reports for Hong Kong, India, Italy, Singapore, United States of America.

147 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'.

148 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'.

149 Country Report for India, 'Immigration detention'.

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

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

152 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.[153] 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.[154] 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.[155]

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.[156] In Hong Kong, detention must be done in a proportionate and legal manner, based on several non-exhaustive factors.[157] In the UK, there is a presumption in favour of temporary release.[158]

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).[159] However, as noted above, Hong Kong does allow the detention of individuals seeking asylum on the basis of torture claims.

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153 Country Report for New Zealand, 'Immigration detention – Overview of the Legal framework'.

154 Immigration Act 2009, s 9A, cited in Country Report for New Zealand, 'Immigration detention – Overview of the legal framework'.

155 Immigration Act 2009, s 317ª, cited in Country Report for New Zealand, 'Immigration detention – Overview of the legal framework'.

156 See 'Immigration detention – Decision to detain' sections of the Country Reports for Austria, Germany and Greece.

157 Country Report for Hong Kong, 'Immigration detention – Decision to detain – Detention to be lawful, proportionate and within a reasonable time period'.

158 *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'.

159 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[160] and Germany[161]), 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.[162]

87. In most other jurisdictions considered,[163] 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

[160] Country Report for Argentina, 'Immigration detention – Decision to detain'.

[161] Country Report for Germany, 'Immigration detention – Decision to detain'.

[162] Country Report for Germany, 'Immigration detention – Decision to detain'.

[163] 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.[164]

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.[165]
- 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.[166]
- 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.[167]
- In South Africa, any detention of asylum seekers longer than 30 days must be reviewed by a judge of the High Court. [168]
- 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.[169]

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.[170]

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

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

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

167 Country Report for New Zealand, 'Immigration detention – Decision to detain'.

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

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

170 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.[171] 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).[172]

93. In India, no person can be arrested and detained in custody beyond 24 hours without the authority of a magistrate.[173] 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 jursdictions considered, when a detainee has been detained for the 'maximum period' of detention, special permission is required to extend detention.[174]

96. Of the jurisdictions that stipulate a maximum period, the length of this period (prior to any extension) varies: Argentina (15 Days);[175] Austria (two months for minors, four months four adults or six months in exceptional circumstances);[176] Belgium (two months);[177] Greece (six months);[178] Germany (six weeks for detention preparing for deportation, six months for detention in order to to prevent a foreigner from frustrating their expulsion);[179] Italy (180 days);[180] Hong Kong (28 days);[181] New Zealand (28 days for individuals, up to 6 months for large groups upon consent of a judge).[182]

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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171 Migration Act 1958 (Cth), s 189, cited in Country Report for Australia, 'Immigration detention – Review of and challenges to detention'.

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

173 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'.

174 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.

175 Country Report for Argentina, 'Immigration detention – Decision to detain'.

176 Country Report for Austria, 'Immigration detention – Decision to detain'

177 Country Report for Belgium, 'Immigration detention – Decision to detain – Duration of detention'.

178 Country Report for Greece, 'Immigration detention – Decision to detain – Legal framework'.

179 Country Report for Germany, 'Immigration detention – Decision to detain'.

180 Country Report for Italy, 'Immigration detention – Decision to detain'.

181 Country Report for Hong Kong, 'Immigration detention – Decision to detain – Removal orders'.

182 Country Report for New Zealand, 'Immigration detention – Decision to detain'.

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

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.[188] 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.[189] 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.[190] 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.[191]

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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183 See 'Immigration detention – Decision to detain' sections of Country Reports for Argentina, Belgium and Italy.

184 Country Report for Greece, 'Immigration detention- Decision to detain – Legal framework'.

185 See 'Immigration detention- Decision to detain' sections of Country Reports for Greece, Germany.

186 See 'Immigration detention – Decision to detain' sections of Country Reports for Belgium, Germany.

187 Country Report for Austria, 'Immigration detention – Decision to detain' and Country Report for Argentina, 'Immigration detention – Decision to detain'.

188 *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'.

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

190 *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'.

191 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[192] or by limiting detention to periods that are proportionate or reasonable.[193] 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[194] and Austria.[195] A limited 'objections application' is available through an Administrative Court in Greece, a procedure which has been criticised by the ECtHR.[196]

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.[197] 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.[198]

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[192] 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.

[193] See 'Immigration Detention' sections of the Country Reports for the United Kingdom, Hong Kong, Greece and South Africa.

[194] 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'.

[195] §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'.

[196] Country Report for Greece, 'Immigration detention – Review of and challenges to detention – Legal framework'.

[197] Country Report for the United States of America, 'Immigration detention – Review of and challenges to detention'.

[198] 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,[199] a judicial procedure such as *habeas corpus,*[200] or challenges pursuant to human rights legislation.[201]

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,[202] to complaints that the decision was 'tainted with illegality, irrationality and procedural impropriety',[203] to appeal on points of law only.[204] In Singapore, judicial review is limited to allegations of procedural impropriety.[205]

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.[206]

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.[207]

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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[199] 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.

[200] 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'.

[201] Country Report for the United Kingdom, 'Immigration detention – Review of and challenges to detention'; Report for the European Court of Human Rights, 'Immigration detention'.

[202] 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.

[203] 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'.

[204] 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'.

[205] Country Report for Singapore, 'Immigration detention – Review of and challenges to detention'.

[206] See 'Immigration detention – Review of and challenges to detention' sections of the Country Reports for Australia and Italy.

[207] 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.[208] Italy, New Zealand and Australia offer free access to legal services.[209] In Germany and the UK, an immigration detainee is not generally entitled to legal aid in relation to challenges to their detention.[210] In the ECtHR, the recent case of *Musa v Malta*[211] 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.[212] In the US, the Sixth Amendment does not guarantee a right to counsel in immigration proceedings.[213]

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[214] and Germany[215] 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'.[216] For all other jurisdictions in relation to which the Country Report mentioned access to linguistic assistance,[217] 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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208 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.

209 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'.

210 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'.

211 (2013) Application no. 42337/12.

212 *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'.

213 Country Report for the United States of America, 'Immigration detention – Decision to detain'.

214 Country Report for Italy, 'Immigration detention – Review of and challenges to detention'.

215 Country Report for Germany, 'Immigration detention – Review of and challenges to detention'.

216 Country Report for South Africa, 'Immigration detention – Decision to detain – Immigration Act'.

217 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.[218]

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.[219]

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'.[220]

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[221] 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.[222] In Hong Kong,[223] the UK,[224] the US[225] and Australia,[226] detainees may claim for damages specifically on the basis of false

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[218] Law 25,871, art 71 cited in Country Report for Argentina, 'Immigration detention – Review of and challenges to detention'.

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

[220] Country Report for the United States of America, 'Immigration detention – Decision to detain'.

[221] 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.

[222] 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'.

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

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

[225] 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.[227] In Germany,[228] Austria[229] and Italy,[230] 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.[231]

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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[226] 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'.

[227] 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'.

[228] 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'.

[229] 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'.

[230] 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'.

[231] 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,[232] 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,[233] Uruguay[234] and the state of Victoria in Australia[235] 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.[236]

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.[237]

128. In Australia[238] and New Zealand,[239] 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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[232] 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.

[233] Country Report for India, 'Detention of persons with a mental illness – Note 1'.

[234] Country Report for Uruguay, 'Detention of persons with a mental illness'.

[235] Country Report for Australia, 'Detention of persons with a mental illness – Decision to detain- Victoria'.

[236] Country Report for Singapore, 'Detention of persons with a mental illness – Preliminary remarks'.

[237] 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.

[238] Country Report for Australia, 'Detention of persons with a mental illness – Threshold questions'.

[239] 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.[240]

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.'[241] However, it is clear that if someone is being held involuntarily, they are 'detained'.[242] Notably, in March 2014, the UK Supreme Court held that the key question was whether there was 'continous 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.[243]

131. In China, it is unclear whether compulsory medical treatment procedures include or involve detention.[244]

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)[245] to (a maximum period

[240] Country Report for Switzerland, 'Detention of persons with a mental illness – Threshold questions'.

[241] *HL v United Kingdom* [2004] ECHR 471 [89].

[242] Country Report for the United Kingdom, 'Detention of persons with a mental illness – Threshold questions'.

[243] *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).

[244] Country Report for China, 'Detention of persons with a mental illness – Threshold questions'.

[245] Country Report for Sri Lanka, 'Detention of persons with a mental illness – Decision to detain'.

of) ten weeks.[246] Before leaving the facility, Kenya[247] and Sri Lanka[248] 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.[249] 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.[250] 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.[251] 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.[252] 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,[253] Western Australia,[254] the Australian Capital Territory,[255] Tasmania[256] and the Northern Territory,[257] the initial assessment period can be no longer than 24

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246 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'.

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

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

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

250 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'.

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

252 Austria, Australia, India, New Zealand, South Africa, and the United Kingdom.

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

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

255 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'.

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

257 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.[258]

137. In Austria, a person cannot be detained for longer than 48 hours without a medical certificate.[259]

138. In the UK,[260] 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.[261] 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.[262] 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.[263]

139. In New Zealand the initial detention period for assessment can be no more than five days.[264]

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.[265] In Australia, the period of detention also varies amongst states and territories. For instance, in Queensland[266] there is no maximum period and the treatment order is valid until revoked. In the Northern Territory,[267] the maximum time period for detention is 28 days, while

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

259 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'.

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

261 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'

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

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

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

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

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

267 Country Report for Australia, Detention of persons with a mental illness – Decision to detain – Northern

in Western Australia[268] it is 28 days with rolling re-examination. In Tasmania,[269] persons can be detained for six months, renewable on an application, whereas in South Australia,[270] 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.[271] In India, a Magistrate can order detention for up to 30 days, pending the removal of the patient to a psychiatric hospital.[272]

143. In Austria, a court can order the placement of a mentally ill person in hospital for a maximum period of three months.[273] 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.[274] In Greece, too, the detention period should not exceed six months, but may be prolonged indefinitely under exceptional circumstances.[275]

144. In Kenya, a person cannot be detained for more than a year.[276] 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.[277] In Germany, involuntary commitment in exceptional circumstances can last for a maximum of two years,[278] 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.[279]

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'.

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

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

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

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

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

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

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

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

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

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

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

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

maximum period of detention.[280] 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'.[281]

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.[282]

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[283] and New Zealand however,[284] 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.[285]

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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[280] Country Report for Switzerland, 'Detention of persons with a mental illness – Decision to detain – Identity of decision maker'.

[281] Country Report for Italy, 'Detention of persons with a mental illness – Detention of persons convicted of a crime – Preliminary remarks – Detention for social dangerousness'.

[282] Country Report for Uruguay, 'Detention of persons with a mental illness'.

[283] Country Report for Sri Lanka, 'Detention of persons with a mental illness – Decision to detain'.

[284] Country Report for New Zealand, 'Detention of persons with a mental illness – Decision to detain – Compulsory assessment and detention'.

[285] 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.[286] 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.[287]

152. In addition to considering the risks persons pose to themselves or others, Australia,[288] Austria (for detention in institutions other than psychiatric hospitals),[289] Germany (under its civil, as opposed to criminal law)[290] and South Africa[291] 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.[292]

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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[286] 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.

[287] Australia, Austria, India, Kenya, New Zealand, Russia, and Singapore.

[288] 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.

[289] 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'.

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

[291] 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'.

[292] 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.[293]

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.[294]

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'),[295] Greece, Hong Kong, India, Italy (for convicted criminals),[296] Singapore (only for detention longer than six months),[297] 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.[298]

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.[299] Similarly, in Switzerland, the

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293 John E Gray et al., 'Australian and Canadian Mental Health Acts Compared' (2010) 44(12) Aus and NZ J of Psy 1128.

294 Country Report for Italy, 'Detention of persons with a mental illness – Detention of persons convicted of a crime – Preliminary remarks – Detention for social dangerousness'.

295 Country Report for Germany, 'Detention of persons with a mental illness – Decision to detain'.

296 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'.

297 Note than 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'.

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

299 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.[300]

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.[301]

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.[302]

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.[303]

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

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

302 Country Report for Russia, 'Detention of persons with a mental illness'.

303 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),[304] 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),[305] 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.[306]

163. State practice also reveals a significant trend in providing the detainee the right to legal representation.[307] 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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[304] 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'.

[305] 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'.

[306] Country Report for South Africa, 'Detention of persons with a mental illness – Decision to detain'.

[307] 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.[308]

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.[309]

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),[310] 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.[311]

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.[312]

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308 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'.

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

310 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'.

311 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'.

312 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.[313]
- 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.[314] 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.[315]
- 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.[316]

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.[317] In the vast majority of States under review, involuntary detention can be appealed in a court of law.[318]

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

314 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.

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

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

317 Country Report for Russia, 'Detention of persons with a mental illness'.

318 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.[319] 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.[320] 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.[321]
- 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.[322]
- Australia[323] and South Africa[324] 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.[325]
- 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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[319] Argentina, Australia, Austria, Canada, Hong Kong, New Zealand, South Africa, and United Kingdom.

[320] 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'.

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

[322] 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'.

[323] 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'.

[324] 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'.

[325] 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.[326]

- 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.[327]

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.[328]
- 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.[329]
- 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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[326] 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'.

[327] Country Report for New Zealand, 'Detention of persons with a mental illness – Decision to detain – Guardianship Boards'.

[328] Country Report for New Zealand, 'Detention of persons with a mental illness – Review of and challenges to detention'.

[329] 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.[330]

- 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.[331]

173. There was insufficient information regarding the provisions for challenging detention in the Country Reports of China,[332] 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.[333] Of these, Hong Kong, India, Singapore and Sri Lanka[334] 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.[335]

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

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

332 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.

333 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.

334 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'.

335 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[336] 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,[337] Germany[338] and South Africa[339] 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.[340]

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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336 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'.

337 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'.

338 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'.

339 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'.

340 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.[341]

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.[342]

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

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

[342] 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.[343] 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:[344]

- In Australia, the service member must be reasonably suspected of an offence, or arrest must be necessary to preserve evidence of the offence.[345]
- Similarly, in New Zealand, the service member must be found committing the offence, or suspected on reasonable grounds of having committed the offence.[346]
- 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.[347] The service member must be given an opportunity to be heard before the decision is taken.[348]
- In India, Kenya, South Africa and Sri Lanka and the UK, any person charged with[349] or who commits[350] 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.[351] Further, service policemen (and persons authorised by a commanding officer) may stop any

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343 Country Report for South Africa, 'Military Detention – Threshold questions'.

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

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

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

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

348 Country Report for Austria, 'Military Detention – Preliminary remarks'

349 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'.

350 Country Report for Sri Lanka, 'Military Detention – Decision to detain'.

351 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.[352]

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.[353]
- In New Zealand, the service member must have been charged and informed of the offence within 24 hours.[354] Within 48 hours proceedings must be commenced, or the detainee must be released, unless neither course is practicable.[355]
- In India, a service member must be charged or released within 48 hours, unless it is impracticable.[356]
- 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.[357] 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.[358]
- In South Africa, there is a more specific requirement that the detainee be produced before a military court within 48 hours of arrest.[359]

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

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

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

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

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

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

358 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.[360]

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.[361]
    - In the UK such an order must be made every eight days.[362]
    - In Australia, if the charge is not dealt with within 30 days, the superior is to order release unless satisfied continuing detention proper.[363]
    - 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.[364]
194. In India, by contrast, there is no provision for bail for military detainees.[365] 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.[366]
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,[367] in New Zealand initially after four days and then every subsequent 8 days[368]) 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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359 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'.

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

361 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'

362 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'.

363 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.'

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

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

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

367 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'.

368 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.[369]

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.[370] 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.[371]
- 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.[372]
- In India, the legislation does not detail procedures to challenge detention; however, the Supreme Court in *Naga People's Movement*[373] 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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369 Singapore Armed Forces (Summary Trials) Regulations, s 11, cited in Country Report for Singapore, 'Military Detention - Decision to detain'.

370 New Zealand does not appear to allow any type of challenge to detention.

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

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

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

of judicial review. Greece[374] and Kenya[375] appear to allow for both types of review. In Australia,[376] 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.[377]
- 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.[378]

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.[379]

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.[380]

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

374 Country Report for Greece, 'Military Detention – Review of and challenges to detention'.
375 Country Report for Kenya, 'Military Detention – Review of and challenges to detention'.
376 Country Report for Australia, 'Review of and challenges to detention'.
377 Country Report for Singapore, 'Military Detention – Review of and challenges to detention'.
378 Country Report for South Africa, 'Military Detention – Review of and challenges to detention'.
379 Country Report for Austria, 'Military Detention – Review of and challenges to detention'.
380 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.
381 Human Rights Act 1998, s 8(3), cited in Country Report for the United Kingdom, 'Military Detention – Compensation for unlawful detention'.
382 Country Report for South Africa, 'Military Detention – Compensation for unlawful detention.
383 Country Report for Australia, 'Military Detention – Remedies for unlawful detention.
384 Country Report for New Zealand, 'Military Detention – Remedies for unlawful detention.

Africa,[385] an action for 'moral damages' under Greek law,[386] or a civil claim under Austrian law.[387] The ECtHR also allows for compensation upon a finding of unlawful detention.[388]

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.[389] 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 been a proclamation of a 'disturbed area'.[390] 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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385 Country Report for South Africa, 'Military Detention – Compensation for unlawful detention.

386 Country Report for Greece, 'Military Detention – Compensation for unlawful detention.

387 Country Report for Austria, 'Military Detention – Compensation for unlawful detention.

388 See the Report for the European Court of Human Rights, 'Administrative Detention – Compensation for unlawful detention'.

389 Country Report for India, ' Military Detention – Decision to detain'.

390 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').[391] 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.[392] 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.[393]
- 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.[394]

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

[392] 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.

[393] 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.[395] However, such a person must be handed over to the civil authorities as soon as possible, and at most within 24 hours.[396]
- 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.[397]
- 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.[398] 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.[399] 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.[400]
- 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.[401]

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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394 Federal Constitutional Law on Martial Law, dated January 30 2002, referred to in Country Report for Russia, 'Military Detention'.

395 § 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'.

396 ibid.

397 Armed Forces Act 1968 s3(2), cited in Country Report for Kenya, 'Military Detention - Overview of Legal framework'.

398 Uruguayan Constitution s 168, cited in Country Report for Uruguay, 'Military Detention'.

399 Prevention of Terrorism Act 1982, cited in Country Report for Sri Lanka, 'Military Detention – Decision to detain'.

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

401 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> 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.[402] 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.[403]

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.[404] While the Indian Constitution guarantees the right of those arrested to

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[402] 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).

[403] 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> 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'.

[404] 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.[405] 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.[406]

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'.[407] 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.[408] 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.[409]

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,[410] 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.[411]

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'.

405 Constitution of India, art 22(1) and(3) cited in Country Report for India, 'Military Detention – Decision to detain'.

406 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'.

407 Cited in country report for Sri Lanka, 'Military Detention – Decision to detain'.

408 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.

409 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> accessed 14 February 2014.

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

411 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> 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.[412] 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).[413] 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 with 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.[414] 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.[415]
- 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*.[416] While previously US law had restricted any *habeas corpus* rights for non-

[412] 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> accessed 4 March 2014.

[413] 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> accessed 4 March 2014.

[414] *Naga People's Movement for Human Rights v Union of India* (1998) 2 SCC 109.

[415] *Elasinghe v Wijewickrema and Others* [1993] LKSC 12, cited in Country Report for Sri Lanka, 'Military Decision – Review of and challenges to detention'.

[416] Country Report for the United States of America, 'Military Detention- Decision to detain – US Citizens'.

citizen 'enemy combatants' held outside the US,[417] 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.[418]

- 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.[419]

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'.[420] 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.[421] 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'.[422] In Sri Lanka, there has

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417 Country Report for the United States of America, 'Military Detention – Decision to detain – Non US Citizens'

418 *Boumedienne v Bush* 553 US 723 (2008), cited in Country Report for the United States of America, 'Military Detention- Decision to detain – Non US Citizens'.

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

420 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.

421 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> accessed 4 March 2014

422 *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.[423] 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' .[424]

225. Several other reports indicate more generally that compensation may be obtainable under human rights legislation – as in the UK[425] and South Africa[426] – or via other forms of civil action, for example the tort of false imprisonment in Australia[427] and New Zealand,[428] the *actio iniuriarum* in South Africa,[429] an action for 'moral damages' under Greek law,[430] or a civil claim under Austrian law.[431] The ECtHR also allows for compensation upon a finding of unlawful detention.[432] 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.

- Compensation for unlawful detention'.

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

424 *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'.

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

426 Country Report for South Africa, 'Military Detention – Compensation for unlawful detention.

427 Country Report for Australia, 'Military Detention – Remedies for unlawful detention.

428 Country Report for New Zealand, 'Military Detention – Remedies for unlawful detention.

429 Country Report for South Africa, 'Military Detention – Compensation for unlawful detention.

430 Country Report for Greece, 'Military Detention – Compensation for unlawful detention.

431 Country Report for Austria, 'Military Detention – Compensation for unlawful detention.

432 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'[433]);
- police detention following arrest without warrant or otherwise prior to the laying of charges;[434]
- 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;[435] 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,[436] 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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433 The term 'kettling' refers to the practice of forcibly confining demonstrators to a small physical area.

434 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.

435 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.

436 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.[437] 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;[438] relevant considerations include the area of confinement, the level of supervision, and the prospect of punishment for non-compliance.[439] Similarly, under Swiss law, criteria regarding the nature, duration, impact and modalities of police action are decisive of whether it amounts to 'detention'.[440]

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.[441] In the US, a person is considered to have been 'seized' (and hence detained) whenever a police officer 'restrains [their] freedom to walk away'.[442] In Belgium, the test for both police custody and 'judicial arrest' is whether a person has 'lost [their] freedom to come and go'.[443] 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;[444] 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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437 It should be noted that definitions of 'arrest', as opposed to 'detention', have not been considered for the purposes of this section.

438 Report for the European Court of Human Rights, 'Background information – Preliminary considerations – The meaning of the terms "arrest" and "detention"'.

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

440 Country Report for Switzerland, 'Administrative detention – Detention pursuant to criminal procedure law – Threshold questions'.

441 Country Report for Germany, 'Police detention – Threshold questions'.

442 *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'.

443 Statute on Detention on Remand, art 1, 3°. See Country Report for Belgium, 'Administrative detention – Police custody and judicial arrest'.

444 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.[445] Motive is irrelevant.[446] These guidelines have been taken into account in the UK.[447] Particular instances of kettling have been held not to constitute a deprivation of liberty by the ECtHR[448] and Swiss courts,[449] 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.[450]

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.[451] This principle is prominent in the European region. In Switzerland, kettling-type crowd control actions must have a legal basis.[452] In Germany, every deprivation of liberty (including by the police) must be based on a formal law, such as the relevant police law.[453] 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.[454] 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.[455]

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445 *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'.

446 *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'.

447 Country Report for the United Kingdom, 'Police detention – Threshold questions'.

448 *Austin v United Kingdom* (2012) 55 EHRR 14. See Report for the European Court of Human Rights, 'Police detention'.

449 BGE vom 22. January 2014, 1C_350/2013, 1C_35. See Country Report for Switzerland, 'Police detention'.

450 Austin v United Kingdom (2012) 55 EHRR 14.

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

452 Swiss Federal Constitution, arts 10 and 36. See Country Report for Switzerland, 'Police detention'.

453 Country Report for Germany, 'Police detention – Threshold question'.

454 Country Report for Austria, 'Immigration detention – Threshold questions'.

455 *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.[456] 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.[457] 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.[458] 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',[459] 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.[460]

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,[461] 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;[462] in India, art 19(1)(b) of the Constitution guarantees a similarly framed right.[463] The ECtHR, in considering the lawfulness of kettling, emphasised the 'fundamental importance of freedom of expression and assembly in all democratic societies.'[464] 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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456 India, Kenya, Sri Lanka, and the United States of America.

457 Constitution of Kenya 2010, art 24. See Country Report for Kenya, 'Police detention – Threshold questions'.

458 Country Report for the United States of America, 'Police detention – Threshold question'.

459 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'.

460 Country Report for Sri Lanka, 'Police detention'; Country Report for India, 'Police detention'.

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

462 Country Report for Sri Lanka, 'Police detention'.

463 Country Report for India, 'Police detention – Preliminary remarks'.

464 *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.[465]

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.[466] Similar judicial statements have been made in the UK.[467] 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.[468]

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;[469] China,[470] Hong Kong,[471] India;[472] Italy;[473] New Zealand;[474] Kenya,[475] Russia,[476]

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465 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').

466 *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'.

467 *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'.

468 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'.

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

470 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 Repor for China, 'Administrative detention – Decision to detain'.

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

472 Country Report for India, 'Preventive detention – Preliminary remarks'.

473 Country Report for Italy, 'Police detention – Decision to detain'.

474 Country Report for New Zealand, 'Administrative detention – Decision to detain'.

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

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

Germany;[477] South Africa;[478] Switzerland;[479] the UK;[480] and the US.[481] 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).[482]

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.[483] 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.[484] Similarly, Sri Lanka's Disaster Management Act 2005 provides immunity from legal proceedings for any action taken in good faith under its provisions.[485]

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.[486] Singapore, too,

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477 Country Report for Germany, 'Police detention – Decision to detain'.

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

479 Country Report for Switzerland, 'Administrative detention – Preliminary remarks'.

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

481 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'.

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

483 India, Singapore, and Sri Lanka.

484 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'.

485 Country Report for Sri Lanka, 'Police detention'.

486 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.[487]

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.[488] States which have expressly adopted this requirement include: Germany;[489] India;[490] Kenya;[491] New Zealand;[492] South Africa;[493] and the UK.[494]

249. Furthermore, in Kenya[495] and South Africa,[496] 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.[497] 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.[498]

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487 Criminal Procedure Code, s 62. See Country Report for Singapore, 'Police detention'.

488 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.

489 Country Report for Germany, 'Police detention – Decision to detain'.

490 Constitution of India 1950, art 22(1). See Country Report for India, 'Preventive detention – Decision to detain'.

491 Criminal Procedure Code, s 36; Constitution of Kenya 2010, art 49. See Country Report for Kenya, 'Police detention – Decision to detain'.

492 Bill of Rights Act 1990, s 23(1)(a). See Country Report for New Zealand, 'Police detention – Decision to detain'.

493 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'.

494 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'.

495 Criminal Procedure Code, s 36; Constitution of Kenya 2010, art 49. See Country Report for Kenya, 'Police detention – Decision to detain'.

496 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'.

497 Code of Administrative Offences of the Russian Federation, art 27.4. See Country Report for Russia, 'Administrative detention – Decision to detain – Administrative detention'.

498 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.[499] 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.[500]

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.[501] The following States make some provision to this effect: Belgium;[502] Hong Kong;[503] India;[504] Italy;[505] Kenya;[506] Russia;[507] South Africa;[508] Switzerland;[509] and the UK.[510] The relevant time limits vary between 24 hours and 14 days.

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499 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.

500 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.

501 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).

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

503 'As soon as practicable', and in any case within 72 hours. See Country Report for Hong Kong, 'Police Detention – Decision to detain – Arrest'.

504 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'.

505 48 hours in respect of the *fermo de poliziai*. See Country Report for Italy, 'Police detention – Decision to detain'.

506 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'.

507 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'.

508 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'.

509 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;[511] 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.[512]

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[513] and New Zealand.[514]

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.[515]

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.[516]

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510 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'.

511 20 days. See Country Report for China, 'Administrative detention – Decision to detain'.

512 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'.

513 A judicial decision on the lawfulness of police detention must be sought 'promptly'. Country Report for Germany, 'Police detention – Decision to detain'.

514 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'.

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

516 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.[517] 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,[518] Kenya,[519] and Switzerland.[520] 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 'indispensible' to achieve specified purposes.[521] 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.[522] 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.[523] 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.[524] 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'.[525]

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

518 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.

519 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'.

520 Though this does not appear to have been expressly applied to police detention. See Country Report for Switzerland, 'Police detention'.

521 Country Report for Germany, 'Police detention – Decision to detain'.

522 Country Report for the United States of America, 'Police detention – Review of and challenges to detention'.

523 *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'.

524 *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'.

525 *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';[526] 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.[527] 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'.[528] Requirements of reasonable necessity and proportionality also apply to police action in crowd-control situations in New Zealand.[529] The ECtHR in the case of *Austin v United Kingdom*[530] 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;[531] 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'.[532]

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).[533] In South Africa, they are called Public Order Policing Units, though these have been recently been modified to become Area Crime Combating Units.[534] The development of such units has the potential to become best

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526 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'.

527 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'.

528 Criminal Procedure Code 2010, s 58(1). See Country Report for Singapore, 'Police detention'.

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

530 Austin v United Kingdom (2012) 55 EHRR 14.

531 Report for the European Court of Human Rights, 'Police detention'.

532 *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'.

533 Country Report for Greece, 'Police detention'.

534 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.[535] 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.'[536] 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.'[537] 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.[538]

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no 262'.

535 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> accessed 25 February 2014.

536 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'.

537 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'.

538 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.[539] *Habeas corpus* is also expressly available in Argentina,[540] Australia,[541] Hong Kong,[542] and the UK.[543] A broadly equivalent remedy is also available in South Africa.[544]

268. In the alternative or in addition, many States allow constitutional challenges to police detention to be brought;[545] others allow for the possibility of judicial review;[546] and certain States allow for other human rights-based challenges under statutes like the UK Human Rights Act 1998[547] and/or regional instruments like the ECHR. Still others provide for more specific statutory avenues of appeal.[548]

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.

539 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'.

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

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

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

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

544 Country Report for South Africa, 'Administrative detention – Compensation for unlawful detention'.

545 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'.

546 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.

547 Another example is New Zealand's Bill of Rights Act 1990.

548 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;[549] in Kenya, the Independent Policing Oversight Authority must be notified and must consider every death that occurs in police custody.[550]

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,[551] whether via a public law action for breach of a legislatively or constitutionally guaranteed human right,[552] an action in tort for false imprisonment,[553] or another statutory or constitutional remedy.[554] 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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549 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> accessed 10 March 2014.

550 Country Report for Kenya, 'Overview of the Legal framework'.

551 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'_.

552 Austria, Germany, Kenya, New Zealand, Russia, South Africa, Switzerland, the United Kingdom and the United States of America.

553 Australia, Hong Kong, New Zealand, South Africa, and the United Kingdom.

554 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 mentally 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.[555] 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.[556] 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.[557] Under this regime, a court may impose an extended sentence of imprisonment, comprised of both the sentence the

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[555] 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.

[556] Such detention regimes can be found in the Australian states of Queensland, New South Wales, Victoria and Western Australia, Switzerland (introduced in 2007 though art 65 of the Swiss Criminal Code), the United Kingdom, the United States of America, and Uruguay.

[557] 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.[558]

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*[559] 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*,[560] 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.[561]

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.[562]

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558 Country Report for the United Kingdom, 'Preventive detention- Extended determinate sentences'.

559 CCPR/C/98/D/1629/2007 (UN Human Rights Committee, 10 May 2010).

560 App No. 19359/04 (ECHR, 17 December 2009).

561 Country Report for Germany, 'Preventive detention – Decision to detain- Compatibility with ECHR'.

562 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,[563] 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.[564]

286. Switzerland, Singapore and South Africa break from, or go beyond, this general trend. Switzerland,[565] 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[566] 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.

563 Country Report for Australia, 'Preventive detention – Decision to detain'; Country Report for Australia, 'Preventive detention – Review of and challenges to detention'.

564 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).

565 Country Report for Switzerland, 'Preventive detention – Normal indefinite incarceration – Decision to detain-Circumstances in which detention may be ordered'.

566 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[567] 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.[568] 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.[569] 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[570] and Uruguay,[571] 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;[572] and in the US, by focussing on the 'mental abnormality' of the convict.[573]

289. In most cases, despite extensive legislative guidance, judicial discretion is paramount in deciding whether to order preventive detention.[574] That said, in Belgium,[575] Germany[576] and Switzerland,[577] 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'.

567 Country Report for South Africa, 'Preventive detention – Habitual criminals'.

568 Australia, Belgium, New Zealand, South Africa (for dangerous criminals), Switzerland, the United Kingdom, and Uruguay (for homicides).

569 See n 562 and accompanying text.

570 Country Report for Switzerland, 'Preventive detention – Normal indefinite incarceration – Decision to detain – Circumstances in which detention may be ordered'.

571 Country Report for Uruguay, 'Preventive detention – Preventive detention post sentence'.

572 Country Report for New Zealand, 'Preventive detention – Overview of the legal framework'.

573 Country Report for the United States of America, 'Preventive detention – Decision to detain – Preventive detention post sentence'.

574 Australia, Austria, New Zealand, Singapore, South Africa, the United Kingdom, the United States of America, and Uruguay.

575 Country Report for Belgium, 'Preventive detention – Decision to detain – Circumstances in which "disposal" may be ordered'.

576 Country Report for Germany, 'Preventive detention – Decision to detain – Circumstances in which detention may be ordered'.

577 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.[578]

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);[579] fifteen years in Belgium,[580] South Africa[581] and Uruguay;[582] and twenty years in Singapore.[583] 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.[584]

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.[585] 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.[586] 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.[587]

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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578 Australia, Austria, Belgium, South Africa (for habitual criminals), Singapore, United Kingdom, and Uruguay.

579 Mentally ill offenders however, can potentially be detained for an indefinite period. See Country Report for Austria, 'Preventive detention – Preliminary remarks'.

580 Country Report for Belgium, 'Preventive detention – Decision to detain – Length of detention'.

581 Country Report for South Africa, 'Preventive detention – Habitual criminals'.

582 Country Report for Uruguay, 'Preventive detention – Preventive detention post sentence'.

583 Country Report for Singapore, 'Preventive detention – Preliminary remarks'.

584 Country Report for the United Kingdom, 'Preventive detention – Preliminary remarks – Extended determinate sentences'.

585 *S v Niemand* 2002 (1) SA 21 (CC) [25], cited in Country Report for South Africa, 'Preventive detention – Habitual criminals'.

586 Country Report for South Africa, 'Preventive detention – Dangerous criminals'.

587 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.[588]

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[589] and the Australian states of Victoria and Western Australia[590] 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,[591] New Zealand,[592] Singapore[593] and South Africa[594] 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.[595]

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588 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'.

589 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'.

590 Country Report for Australia, 'Preventive detention – Decision to detain'.

591 Country Report for Belgium, 'Preventive detention – Preliminary remarks – Regime for "disposal of the courts for the enforcement of penalties" and legal basis'.

592 Country Report for New Zealand, 'Preventive detention – Decision to detain'.

593 Country Report for Singapore, 'Preventive detention – Decision to detain'.

594 Country Report for South Africa, 'Preventive detention – Habitual criminals'; Country Report for South Africa, 'Preventive detention – Dangerous criminals'.

595 Country Report for the United Kingdom, 'Preventive detention – Extended determinate sentences'.

298. In New Zealand, Belgium and Switzerland,[596] 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'.[597]

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.[598]

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.[599]

302. Exceptionally, a recent legislative change in the Australian state of Queensland[600] 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.[601] 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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596 Country Report for Switzerland, 'Preventive detention – Normal indefinite detention – Decision to detain – Identity of decision maker'.

597 Country Report for Belgium, 'Preventive detention – Preliminary remarks – Regime for "disposal of the courts for the enforcement of penalties" and legal basis'.

598 Country Report for New Zealand, 'Preventive detention – Overview of the legal framework'; Country Report for New Zealand, 'Preventive detention – Decision to detain'.

599 Country Report for the United Kingdom, 'Preventive detention – Extended determinate sentences'.

600 Country Report for Australia, 'Preventive detention – Decision to detain'.

601 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[602] protect the defendant's right to make representations and to be heard in relation to the imposition of preventive detention.

305. In Australia,[603] Germany[604] and New Zealand,[605] 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,[606] 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[607] and the US,[608] 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.[609]

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.[610] 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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602 This does not include Uruguay for which no information was provided in the Country Report.

603 This objective has been achieved through judicial rulings in the Supreme Court of Queensland. See Country Report for Australia, 'Preventive detention – Decision to detain'.

604 Country Report for Germany, 'Preventive detention – Decision to detain – Time at which order may be made'.

605 Country Report for New Zealand, 'Preventive detention – Decision to detain'.

606 Country Report for Belgium, 'Preventive detention – Decision to detain – Circumstances in which "disposal" will be imposed'.

607 Country Report for South Africa, 'Preventive detention – Dangerous criminals'.

608 Country Report for the United States of America, 'Preventive detention – Decision to detain – Preventive detention post sentence'.

609 Country Report for the United Kingdom, 'Preventive detention – Parole board proceedings'.

610 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[611] 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[612] and Western Australia,[613] 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.[614] 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.[615] 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.[616]

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611 This does not include Uruguay for which no information was provided in the Country Report.

612 Country Report for Austria, 'Preventive detention – Decision to detain'.

613 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'.

614 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.

615 Country Report for Switzerland, 'Preventive detention – Normal indefinite detention – Decision to detain – Circumstances in which detention may be ordered'.

616 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.[617] 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.[618]

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*,[619] 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.[620]

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 post a risk to society. Thus, the review process is more narrowly concerned with the verdict of being untreatable,

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617 *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).

618 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.

619 CCPR/C/98/D/1629/2007 (UN Human Rights Committee, 6 November 2003).

620 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.[621]

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);[622] in the Australian states of Queensland and Western Australia,[623] Austria (for mentally ill and dangerous repeat offenders),[624] Belgium,[625] Switzerland (for eligibility for parole in normal indefinite incarceration)[626] and the UK, it must be conducted annually.[627] In Germany[628] and Switzerland (for transfer in normal indefinite incarceration to in-patient therapeutic treatment),[629] 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,[630] while others assign this duty to a cantonal administrative authority,[631] the Director of Prisons (or other similarly situated official),[632] mental health professionals,[633] or the Parole Review Board (sitting in a judicial capacity).[634]

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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621 Country Report for Switzerland, 'Preventive detention – Lifelong indefinite incarceration – Review of and challenge to detention – Review by administrative authority'.

622 Country Report for Singapore, 'Preventive detention – Decision to detain'.

623 Country Report for Australia, 'Preventive detention – Decision to detain'.

624 Country Report for Austria, 'Preventive detention – Review of and challenges to detention'.

625 Country Report for Belgium, 'Preventive detention – Review of and challenges to detention – Periodic review'.

626 Country Report for Switzerland, 'Preventive detention – Normal indefinite incarceration – Review of and challenges to detention – Periodic review by administrative authority.'

627 Country Report for the United Kingdom, 'Preventive detention – Extended determinate sentences'.

628 Country Report for Germany, 'Preventive detention – Review of and challenges to detention'.

629 Country Report for Switzerland, 'Preventive detention – Normal indefinite incarceration – Review of and challenges to detention – Periodic review by administrative authority.'

630 Austria, Belgium, Germany, and South Africa.

631 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.'

632 Singapore and the United States of America.

633 This is the case in Queenslandpursuant to s 22C of the Criminal Law Amendment Act 1945. See Country Report for Australia, 'Preventive detention – Decision to detain'.

634 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.[635] 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,[636] Austria,[637] Belgium,[638] Germany,[639] New Zealand,[640] South Africa,[641] Switzerland,[642] the UK[643] and the US[644]) either provide monetary

[635] 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.

[636] 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'.

[637] Country Report for Austria, 'Preventive detention – Compensation for unlawful detention'.

[638] Country Report for Belgium, 'Administrative detention – Remedies for unlawful detention'.

[639] Country Report for Germany, 'Administrative detention – Remedies for unlawful detention'.

[640] 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'.

[641] 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'.

[642] 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'.

[643] In 2013, the United Kingdom Supreme Court in *R (Faulkner) v SSJ; R (Sturnham) 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,[645] 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.[646]

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'.

644 Country Report for the United States of America, 'Preventive detention – Remedies for unlawful detention – Preventive detention post sentence'.

645 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'.

646 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'.[1] 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?[2]

2. Judge Read in the *Fisheries* case described customary international law as 'the generalization of the practice of States'.[3] 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.[4] 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.[5] 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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1 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.

2 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 23.

3 *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 191 (Read J).

4 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 23.

5 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.[6] Complete consistency is not needed.[7]

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,[8] but something like it is probably necessary.[9] 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.[10]

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.[11]

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."[12]

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6 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* [1969] ICJ Rep 3, 43.

7 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, 98 [186].

8 Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 Recueil des Cours 155.

9 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 25.

10 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.

11 ibid.

12 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.[13]

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 ILA 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.[14] 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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[13] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99, 122–23 [55].

[14] 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.[1]
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.[2] It will be applied by national or provincial courts.[3] 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.[4] The complaint may be made by the person affected by the measure or by any other person in their favour.[5]
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.[6] 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.[7] If the person has not been detained, but threatened with detention, the judge will request the written

1 'Ley 23.098, Procedimiento de Habeeas Corpus' available <http://www.infojus.gov.ar/legislacion/ley-nacional-23098-procedimiento_habeas_corpus.htm?2.> accessed 22 February 2014. ['Law 23.098']
2 Law 23.098, art 1.
3 Law 23.098, art 2.
4 Law 23.098, art 3.
5 Law 23.098, art 5.
6 Law 23.098, art 10.
7 Law 23.098, art 11.

report indicated above from the authority or their superiors.[8] 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*.[9]

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.[10] After the hearing, of which there will be a record,[11] the judge will come to a decision immediately.[12]
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.[13]
7. Upon receipt of the complaint the public prosecutor (*Ministerio Público*)[14] shall be notified and may participate in the proceedings,[15] as may the person who made the complaint.[16]

II IMMIGRATION DETENTION

8. In Argentina immigration detention is regulated by the '*Ley de Immigraciones'* (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

8 Law 23.098, art 11.
9 Law 23.098, art 11.
10 Law 23.098, art 14.
11 Law 23.098, art 16.
12 Law 23.098, art 17.
13 Law 23.098, art 19.
14 In Argentina this is a separate branch of the government which does not depend on the Executive, Legislative or Juridical branch.
15 Law 23.098, art 21.
16 Law 23.098, art 22.

foreigner is and consented.[17] Once the detention has been made the local court shall be immediately notified of that fact.[18]

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.[19]
12. The detention may not last more than 15 days.[20] 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.[21]
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.[22] 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.[23]
14. If there is evidence that the foreigner will comply with the expulsion order within 72 hours the detention may be waived.[24]
15. In certain circumstances foreigners may be granted provisional liberty, this decision must be notified to the competent judge.[25]
16. The detention shall be carried out by the Auxiliary Migration Police,[26] competent sanitary authorities shall intervene when required due to medical or psychophysical reasons.[27] The detainee shall be kept separate from criminal detainees.[28]

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17 Law 25.871, art 70.
18 Law 25.871, art 70.
19 Law 25.871, art 70.
20 Decree No. 616/10, art 70.
21 Decree No. 616/10, art 70.
22 Law 25.871, art 70.
23 Decree No. 616/10, art 70.
24 Decree No. 616/10, art 70.
25 Law 25.871, art 71.
26 Law 25.871, art 72.
27 Decree No. 616/10, art 72.
28 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.[29] 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.[30] In these procedures he/she is entitled to representation and interpreters.[31] Additionally, once detained, he/she may be granted provisional liberty under bail or oath.[32]

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;[33] a right to be informed of his/her rights and treatment, including alternatives.[34] In Argentina, involuntary detention should not take place based on the person's political and

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29 Law 25.871, arts 74-90.
30 Law 25.871, art 82.
31 Law 25.871, art 86.
32 Law 25.871, art 71.
33 Law 26.657 of Mental Health, art 7(h).
34 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.[35]

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.[36] 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.[37] The following people may request a declaration of dementia: the spouse, relatives, Ministry of Minors, the consule (if a foreigner), any person in the town if the demented person is enraged or makes neighbours uncomfortable.[38] A person must be over 14 to be declared to have dementia.[39]

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*)[40] 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.[41] This may also occur if that becomes evident during the proceedings.[42]

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35 Law 26.657 of Mental Health, art.3.

36 Argentine Civil Code, art 143.

37 Argentine Civil Code, art 152 ter.

38 Argentine Civil Code, art 144.

39 Argentine Civil Code, art 145.

40 In Argentina this is a separate branch of the government which does not depend on the Executive, Legislative or Juridical branch.

41 Argentine Criminal Procedure Code, art 76.

42 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.[43] 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.[44]

[43] Law 26.657 of Mental Health, art 22.

[44] 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.[1] 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:[2]

> 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.'[3]

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.[4] 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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1 Criminal Code Act 1995 (Cth) s 104.5(3)(c).

2 *Thomas v Mowbray* (2007) 233 CLR 307 (High Court of Australia) [18].

3 *Thomas v Mowbray* (2007) 233 CLR 307 (High Court of Australia) [116].

4 *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,[5] 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.[6]

15. Before the Attorney-General can grant consent to the issue of a warrant, he must be satisfied that:[7]

- 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.

5 ASIO Act 1979 s 34F(1).
6 ASIO Act 1979 s 34F(3).
7 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.[8] 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.[9]

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,[10] and acting *persona designata* (that is, acting in a personal capacity rather than acting as a judge of a court).[11] 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.[12]

18. A person detained under a questioning and detention warrant must be immediately brought for questioning before a prescribed authority,[13] 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.[14]

19. A person may be detained under a questioning and detention warrant for a maximum of 7 days.[15]

20. The Director-General may seek a further questioning and detention warrant by using the same procedure.[16] The further detention warrant may only be issued after the person has been released from detention under the previous warrant.[17] 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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8 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.

9 ASIO Act 1979 s 34ZE(4)(a).

10 ASIO Act 1979 s 34AB(1).

11 *Grollo v Palmer* (1995) 184 CLR 348 (High Court of Australia) [13], [15].

12 ASIO Act 1979 s 34G(1).

13 ASIO Act 1979 s 34G(3)(a)(ii).

14 ASIO Act 1979 s 34B.

15 ASIO Act 1979 s 34G(4)(c).

16 ASIO Act 1979 s 34F(2).

17 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.[18]

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.[19]

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.[20] The direction to detain must have been approved in writing by the Commonwealth Attorney-General,[21] or must be necessary to satisfy a concern of the Inspector-General of Intelligence and Security[22] about the propriety or legality of the questioning being undertaken.[23] 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 question is not detained:[24]

- 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,[25] upon request

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18 ASIO Act 1979 s 34F(6)(b).
19 ASIO Act 1979 s 34D and 34E.
20 ASIO Act 1979 s 34K(1)(a).
21 ASIO Act 1979 s 34K(2)(b).
22 ASIO Act 1979 s 34K(2).
23 ASIO Act 1979 s 34Q.
24 ASIO Act 1979 s 34K(4).
25 Commonwealth Criminal Code 1995 s 105.2.

of the AFP;[26] or being a senior member of the AFP,[27] being an officer at or above the rank of superintendent.[28]

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;[29] and second, in connection with a past terrorist attack, that took place within the previous 28 days.[30] 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:[31]

- 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:[32]

- 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,[33] being an officer at or above the rank of superintendent.[34] 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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26 Commonwealth Criminal Code 1995 s 105.8(1).

27 Commonwealth Criminal Code 1995 s 100.1.

28 Commonwealth Criminal Code 1995 s 100.1.

29 Commonwealth Criminal Code 1995 s 105.4(5).

30 Commonwealth Criminal Code 1995 s 105.4(6).

31 Commonwealth Criminal Code 1995 s 105.4(4).

32 Commonwealth Criminal Code 1995 s 105.4 (6).

33 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.

34 Commonwealth Criminal Code 1995 s 100.1.

preventative detention order.[35] 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.[36] 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.[37]

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.[38] 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.[39]

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.[40]

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.[41]

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.[42]

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35 Commonwealth Criminal Code 1995 s 105.7(2).
36 Commonwealth Criminal Code 1995 s 105.8(5)).
37 Commonwealth Criminal Code 1995 s 105.9(2).
38 Commonwealth Criminal Code 1995 s 105.2.
39 Commonwealth Criminal Code 1995 s 105.11(2).
40 Commonwealth Criminal Code 1995 s 105.12(5).
41 Commonwealth Criminal Code 1995 s 105.6.
42 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)[43] must first obtain the consent of the Commonwealth Attorney-General to the interim control order,[44] 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,[45] to issue the interim control order.[46]

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 propose interim control order, and a statement detailing any previous instances of preventative detention or control orders imposed on the proposed subject.[47]

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.[48] However, for the interim control order to have continuing validity, it must be approved by the Attorney-General within 4 hours of being issued,[49] and the approval must be communicated to the issuing court within 24 hours of the interim control order's issue.[50]

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.[51] The court may only issue the interim control order if it is satisfied, on the balance of probabilities, that:[52]

- 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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43 Commonwealth Criminal Code 1995 s 100.1.
44 Commonwealth Criminal Code 1995 s 104.2(1).
45 Commonwealth Criminal Code 1995 s 100.1.
46 Commonwealth Criminal Code 1995 s 104.3.
47 Commonwealth Criminal Code 1995 s 104.2(3).
48 Commonwealth Criminal Code 1995 ss 104.6-104.9.
49 Commonwealth Criminal Code 1995 s 104.10.
50 Commonwealth Criminal Code 1995 ss 104.7(5), 104.9(3).
51 Commonwealth Criminal Code 1995 s 104.3(a).
52 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.[53] This date must be no more than 72 hours after the interim control order is issued.[54] The subject of the interim control order may attend this hearing,[55] and he or his representative may make submissions to the issuing court.[56] Submissions may also be made by the AFP.[57] 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.[58]

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,[59] and provide them with the documents that were put before the court that issued the interim control order.[60] 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.[61]

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.[62] 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.[63]

40. A control order cannot be in force for longer than 12 months.[64] 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.[65] A person may be subject to successive control orders, issued when the previous control order expires.[66]

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53 Commonwealth Criminal Code 1995 s 104.5(1)(e).
54 Commonwealth Criminal Code 1995 s 104.5(1A).
55 Commonwealth Criminal Code 1995 s 104.5(1)(e).
56 Commonwealth Criminal Code 1995 s 104.14(1)(c) and (d).
57 Commonwealth Criminal Code 1995 s 104.14(1)(a) and (b).
58 Commonwealth Criminal Code 1995 s 104.14(1)(e).
59 Commonwealth Criminal Code 1995 s 104.12A(2)(a)(i).
60 Commonwealth Criminal Code 1995 s 104.12A(2)(a)(ii).
61 Commonwealth Criminal Code 1995 s 104.12A(3).
62 Commonwealth Criminal Code 1995 s 104.14(7)(c).
63 Commonwealth Criminal Code 1995 s 104.14(7)(b).
64 Commonwealth Criminal Code 1995 s 104.5(1)(f).
65 Commonwealth Criminal Code 1995 s 104.28.
66 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.[67]
44. The maximum period of custody under a non-interim preventative detention order is 14 days.[68]
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.[69]
46. The person the subject of the preventative detention order can apply to the issuing authority for revocation of the order.[70]

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.[71]
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.[72]

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[67] 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.

[68] Terrorism (Police Powers) Act 2002 (NSW) s 26K(2). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

[69] 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.

[70] 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.

[71] 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,[73] except for information in the application the disclosure of which may prejudice national security or a law enforcement operation or methodology.[74] 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.[75]

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.[76]

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.[77]

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,[78] 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.[79]

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72 Terrorism (Preventative Detention) Act 2005 (Qld) s 25(6). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

73 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.

74 Terrorism (Preventative Detention) Act 2005 (Qld) s 23(3C) and (4).

75 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.

76 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..

77 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.

78 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.

79 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.[80] 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.[81] The maximum period of custody under a preventative detention order issued by a senior police officer is 24 hours.[82]

57. In determining whether to make a non-interim preventative detention order, the Supreme Court must have a hearing.[83] 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.[84]

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.[85] 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.[86] That authorisation lasts for 8 hours,[87] and may be extended to a maximum of 16 hours.[88]

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.[89]

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80 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.

81 Terrorism (Preventative Detention) Act 2005 (Tas) s 8(3).

82 Terrorism (Preventative Detention) Act 2005 (Tas) s 9(11). This is the same as the Commonwealth regime..

83 Terrorism (Preventative Detention) Act 2005 (Tas) s 7(10).

84 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.

85 Terrorism (Community Protection) Act 2003 (Vic) s 16(1).

86 Terrorism (Community Protection) Act 2003 (Vic) ss 16, 18(1)(c).

87 Terrorism (Community Protection) Act 2003 (Vic) s 19(1)(c).

88 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.[90]

64. The maximum period of custody under a preventative detention order is 14 days.[91]

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,[92] which is not to exceed 14 days.[93]

66. Multiple successive preventative detention orders can be made with respect to the same subject and the same terrorist attack.[94] However, the total period of custody under such successive orders cannot exceed 14 days.[95]

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.[96] The person the subject of the order, or their lawyer, may adduce evidence and make submissions to the Supreme Court.[97] The Supreme Court may revoke the order or reduce the period of custody.[98]

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.[99]

70. The issuing authority for preventative detention orders is the Supreme Court.[100]

71. An application for a preventative detention order must be approved by the chief police officer for the ACT.[101]

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89 Terrorism (Preventative Detention) Act 2006 (WA) s 10.

90 Terrorism (Preventative Detention) Act 2006 (WA) ss 7, 11(2).

91 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.

92 Terrorism (Preventative Detention) Act 2006 (WA) s 14.

93 Terrorism (Preventative Detention) Act 2006 (WA) s 13(3)(a).

94 Terrorism (Preventative Detention) Act 2006 (WA) s 15(2). Not so under the Commonwealth legislation.

95 Terrorism (Preventative Detention) Act 2006 (WA) s 15(4).

96 Terrorism (Preventative Detention) Act 2006 (WA) s 22(2).

97 Terrorism (Preventative Detention) Act 2006 (WA) s 22(5)(c) and (d).

98 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.

99 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.

100 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.

101 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.[102] The person the subject of the final order, or his representative, must be served with a copy of the application for the order[103] and is entitled to appear and give evidence, call witnesses, examine and cross-examine witnesses, adduce material, and make submissions.[104]

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.[105] 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.[106]

74. There is no restriction on making multiple successive preventative detention orders against the same subject with respect to the same terrorist attack.[107] However, the total period of detention under such successive orders cannot exceed 14 days.[108]

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.[109]

77. Multiple successive preventative detention orders are permitted against the same subject with respect to the same terrorist attack.[110]

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,[111] but only after the person has been brought before a prescribed

[102] Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 13(3).

[103] Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 13(2)(a).

[104] 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.

[105] Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 20.

[106] Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) ss 20(6), 21(2).

[107] 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.

[108] Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 21(3)(b).

[109] Terrorism (Emergency Powers) Act 2003 (NT) s 21K(1). Under the Commonwealth legislation, custody under a continuing preventative detention order cannot exceed 48 hours.

[110] 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.[112] 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.[113]

79. However, the lawyer may not address the prescribed authority on any subject except to request clarification of a question.[114] 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.[115]

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,[116] and a statutory right to apply to the Federal Court of Australia arguing that the statutory requirements for detention have not been met.[117] 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.[118] 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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111 ASIO Act 1979 s 34F(5).

112 ASIO Act 1979 s 34F(5).

113 ASIO Act 1979 s 34ZO.

114 ASIO Act 1979 s 34ZQ(6).

115 ASIO Act 1979 s 34K(10) and (11).

116 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.

117 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.

118 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.[119]

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.[120] 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.[121]

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,[122] who was not involved in the application for the preventative detention order,[123] 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.[124] 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,[125] 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.[126] 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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[119] 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

[120] ASIO Act 1979 s 34K(9) and (11).

[121] ASIO Act 1979 s 34ZW.

[122] Commonwealth Criminal Code 1995 s 100.1.

[123] Commonwealth Criminal Code 1995 s 105.19(6).

[124] Commonwealth Criminal Code 1995 ss 105.17(7), 105.19(8).

[125] Commonwealth Criminal Code 1995 s 105.17.

[126] 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.[127] The person or their representatives may adduce additional evidence and make additional submissions to those presented in the original confirmation hearing.[128] 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.[129] 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.[130]

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.[131]

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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127 Commonwealth Criminal Code 1995 s 104.18(1) and (2).
128 Commonwealth Criminal Code 1995 s 104.18(4).
129 Commonwealth Criminal Code 1995 s 104.20(1)(a).
130 Commonwealth Criminal Code 1995 s 104.20(1)(b).
131 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,[132] to oversee the conduct of the police in carrying out the preventative detention order.[133] 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.[134] 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.[135]

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.[136]

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.[137] 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.[138]

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.[139] The person the subject of the order, or their lawyer, may adduce evidence and make submissions to the

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132 Terrorism (Preventative Detention) Act 2005 (Qld) s 38(2).
133 Terrorism (Preventative Detention) Act 2005 (Qld) s 38(1).
134 Terrorism (Preventative Detention) Act 2005 (Qld) s 38(4).
135 Terrorism (Preventative Detention) Act 2005 (Qld) s 38(3)(b).
136 Terrorism (Preventative Detention) Act 2005 (SA) s 17.
137 Terrorism (Preventative Detention) Act 2005 (Tas) s 16(1)(a).
138 Terrorism (Preventative Detention) Act 2005 (Tas) s 16(2).
139 Terrorism (Preventative Detention) Act 2006 (WA) s 22(2).

Supreme Court.[140] The Supreme Court may revoke the order or reduce the period of detention.[141]

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.[142] The Supreme Court may revoke the order or reduce the period of detention.[143]

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.[144] 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.[145] The Supreme Court may revoke the order, declare the order void *ab initio*, or reduce the period of detention.[146]

d) Compensation for unlawful detention

100. The High Court of Australia has the constitutional power to issue an injunction against Commonwealth officers,[147] and to issue a writ of *habeas corpus* against Commonwealth officers,[148] and the Federal Court of Australia has statutory power to issue an injunction to discontinue actions that are unlawful under Commonwealth statutes.[149] 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.[150]

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.[151]

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140 Terrorism (Preventative Detention) Act 2006 (WA) s 22(5)(c) and (d).
141 Terrorism (Preventative Detention) Act 2006 (WA) s 22(8).
142 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 31(1).
143 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 31(3) and (6).
144 Terrorism (Emergency Powers) Act 2003 (NT) s 21P(1).
145 Terrorism (Emergency Powers) Act 2003 (NT) s 21P(3).
146 Terrorism (Emergency Powers) Act 2003 (NT) s 21P(4).
147 Commonwealth of Australia Constitution s 75 (v).
148 Judiciary Act 1903 (Cth) s 33(1)(f).
149 Judiciary Act 1903 (Cth) s 39B(1A)(c).
150 *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.[152]

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.[153]

II IMMIGRATION DETENTION

a) Threshold questions

105. According to the Australian Migration Act,[154] '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.[155]

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).[156]

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.[157] 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.[158] Some unlawful non-

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151 Terrorism (Preventative Detention) Act 2005 (SA) s 17(3)(c).

152 Terrorism (Preventative Detention) Act 2005 (Tas) s 7(11)(b).

153 Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) s 31(5).

154 Migration Act 1958 (Cth), s 5.

155 Migration Act 1958 (Cth), s 5.

156 Migration Act 1958 (Cth), s 189.

157 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> accessed 28 December 2013.

158 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,[159] 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.[160] 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,[161] they are still subject to the same regulations 'as if the person were being kept in immigration detention',[162] 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.[163]

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',[164] which can include contractors who are not officers of the Commonwealth.[165]

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.[166] If a decision by the Minister to refuse to grant a visa is later quashed, this does not render prior detention unlawful.[167]

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[159] 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> accessed 28 December 2013.

[160] Migration Act 1958 (Cth), s 197AB.

[161] International Detention Coalition, 'Detention reform and alternatives in Australia' (June 2009) < http://www.refworld.org/pdfid/4f3cc2562.pdf> accessed 28 December 2013, p3.

[162] Migration Act 1958 (Cth), s 197AC(1).

[163] 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.

[164] Migration Act 1958 (Cth), s 5.

[165] *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

[166] *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.[168]

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'.[169]

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.[170] 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:[171]

> 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'.[172]

115. Training of officers is arguably poor,[173] 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,[174] 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,[175] 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.

167 *Akpata v Minister for Immigration and Citizenship and Others* (2012) 206 FCR 120.

168 *Ruddock v Taylor* (2005) 222 CLR 612.

169 *Goldie v Commonwealth* (2002) 188 ALR 708.

170 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.

171 ibid 25.

172 ibid.

173 ibid 28.

174 ibid 29.

175 ibid.

assessment process is carried out. For the case of asylum seekers who are 'unauthorised maritime arrivals',[176] 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.[177] 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.[178] 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,[179] 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.[180] 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.[181] 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).[182]

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.[183]

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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176 Migration Act 1958 (Cth), s 46A.

177 Migration Act 1958 (Cth), ss 46A, 195A.

178 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

179 Migration Act 1958 (Cth), s 195A(4); Plaintiff M61/2010E v The Commonwealth (2010) 243 CLR 319.

180 *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.

181 Fahamu Refugee Program, 'Detention of Refugees' (Grant Mitchell, undated) < http://refugeelegalaidinformation.org/detention-refugees-0 > accessed 28 December 2013.

182 Migration Act 1958 (Cth), ss 193, 194, 195.

183 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.[184] 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.[185] 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)[186] or their continued detention throughout the assessment of their legal claims (for example, during Refugee Status Assessment)[187]. 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.[188]

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,*[189] 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,*[190] 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,*[191] 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.[192]

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184 Migration Act 1958 (Cth), s250.

185 ibid.

186 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.

187 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.

188 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.

189 *Commonwealth and Another v Fernando* [2012] FCAFC 18.

190 *Goldie v Commonwealth* (2002) 117 FCR 566.

191 *Commonwealth and Another v Fernando* [2012] FCAFC 18.

192 ibid 102.

125. In some cases, declaratory relief might also be granted. For example, in *Plaintiff M61/2010E v The Commonwealth*,[193] 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.[194] 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).[195] 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

193 *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319.
194 See eg Mental Health Act 2007 (NSW), s56.
195 *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.[196]
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:[197]
    - 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.

[196] Mental Health Act 2007 (NSW) ss 12, 14, 15

[197] 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.[198]

136. Detention is subject to compulsory review. There are several key features. First, there must be medial 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.[199]

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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198 Mental Health Act 2007 (NSW) s73-77.

199 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.[200] An authorised psychiatrist must notify the guardian of an involuntary patient of the involuntary admission.[201]

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.[202] This must be as soon as practicable arrange for an examination by a medical health practitioner or an assessment by a mental health practitioner.[203] Police may also forcibly subject a person who appears unable to care for him or herself to assessment.[204]

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,[205] and a decision of the committee under s 12A-12C to continue detention.[206] The board must also conduct a periodic review of an involuntary treatment order.[207]

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200 Mental Health Act 1986 (Victoria) s 9.
201 Mental Health Act 1986 (Victoria) s12AE.
202 Mental Health Act 1986 (Victoria) s 10.
203 Mental Health Act 1986 (Victoria) s 10.
204 Mental Health Act 1986 (Victoria) s 11.
205 Mental Health Act 1986 (Victoria) s 30(1).
206 Mental Health Act 1986 (Victoria) s 30(2).
207 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.[208] 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. [209]

147. The Act also makes provision for emergency examination orders by ambulance or police officer,[210] or by a psychiatrist[211] and the taking of persons to mental health facility.[212] An examination or detention for examination must be no longer than six hours.[213]

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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208 Mental Health Act 2000 (Qld) s 25.
209 Mental Health Act 2000 (Qld) s 25.
210 Mental Health Act 2000 (Qld) s 33
211 Mental Health Act 2000 (Qld) s 37
212 Mental Health Act 2000 (Qld) ss 34, 39.
213 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.[214]

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.[215] 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:[216]

- the patient;

[214] Mental Health Act 2000 (Qld) s 516.

[215] Mental Health Act 2000 (Qld) ss 111, 113.

[216] 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.[217]

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.[218]

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.[219]

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217 Mental Health Act 2000 (Qld) ss 121-123.

218 Mental Health Act 2000 (Qld) s 187

219 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.[220]
- 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.[221]

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.[222]

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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220 Mental Health Act 2009 (SA) s 25.

221 Mental Health Act 2009 (SA) s 29.

222 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.[223] 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.[224]

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.[225] When a period of detention ends, the person is to be notified in writing, and be permitted to leave.[226]

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

[223] Mental Health Act 1996 (WA) ss 43, 45.
[224] Mental Health Act 1996 (WA) s 48.
[225] Mental Health Act 1996 (WA) s 156.
[226] 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.[227]

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:[228]

- 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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227 Mental Health Act 2013 (Tasmania) s22-27, s30-34.

228 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.[229]

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.[230]

169. Detention may also occur pursuant to a treatment order, made by a Mental Health Tribunal.[231] 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.[232]

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 serous harm to the person's health or safety, or the safety of other persons.[233]

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.[234]

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229 Mental Health Act 2013 (Tasmania) s22-27, s30-34
230 Mental Health Act 2013 (Tasmania) s 32.
231 Mental Health Act 2013 (Tasmania) s 36.
232 Mental Health Act 2013 (Tasmania) s 37(1).
233 Mental Health Act 2013 (Tasmania) s 38.
234 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.[235]

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.[236]

174. The Tribunal is required to review:[237]

- 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.[238] That duration is renewable on the application by an approved medical practitioner, by determination of the Tribunal.[239]

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.[240] A treatment order may be discharged by an approved medical practitioner (in consultation with the treating medical practitioner) or the Tribunal.[241]

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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235 Mental Health Act 2013 (Tasmania) s 40.
236 Mental Health Act 2013 (Tasmania) s 40, 41.
237 Mental Health Act 2013 (Tasmania) s 179.
238 Mental Health Act 2013 (Tasmania) s 44.
239 Mental Health Act 2013 (Tasmania) s 48.
240 Mental Health Act 2013 (Tasmania) ss 29, 33.
241 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.[242]

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.[243]

180. ACAT must take reasonable steps to obtain consent to order, but consent is not required.[244] 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).[245] ACAT must

[242] Mental Health Act 2013 (Tasmania) s 9.
[243] Mental Health (Treatment and Care) Act 1994 (ACT) s 16
[244] Mental Health (Treatment and Care) Act 1994 (ACT) s 17.
[245] Mental Health (Treatment and Care) Act 1994 (ACT) ss 19, 22.

notify the public advocate of an assessment order,[246] and the person to be assessed must be informed of the assessment.[247] An assessment must be conducted within seven days after the assessment order is made, unless the assessment order states otherwise.[248] 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.[249]

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.[250] 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:[251]

- 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.[252] A restriction order has effect for 3 months or a shorter period stated in the order.[253]

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246 Mental Health (Treatment and Care) Act 1994 (ACT) s 20.
247 Mental Health (Treatment and Care) Act 1994 (ACT) s 22D.
248 Mental Health (Treatment and Care) Act 1994 (ACT) s 21.
249 Mental Health (Treatment and Care) Act 1994 (ACT) s 22B and 22C.
250 Mental Health (Treatment and Care) Act 1994 (ACT) ss 11.
251 Mental Health (Treatment and Care) Act 1994 (ACT) s 28.
252 Mental Health (Treatment and Care) Act 1994 (ACT) ss 30, 31.
253 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.[254]

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.[255]

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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254 Mental Health (Treatment and Care) Act 1994 (ACT) s 35.

255 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.[256]

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.[257]

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 themself 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.[258]

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.[259] The request must be to a medical practitioner, authorised psychiatric practitioner or designated mental health practitioner.[260] 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.[261]

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.[262] 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.[263]

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.[264] If satisfied that the person fulfils the criteria for involuntary admission on the

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256 Mental Health and Related Services Act 1998 (NT) s 30.
257 Mental Health and Related Services Act 1998 (NT) s 31.
258 Mental Health and Related Services Act 1998 (NT) s 32A.
259 Mental Health and Related Services Act 1998 (NT) s 32.
260 Mental Health and Related Services Act 1998 (NT) s 32.
261 Mental Health and Related Services Act 1998 (NT) s 33.
262 Mental Health and Related Services Act 1998 (NT) s 34.
263 Mental Health and Related Services Act 1998 (NT) s 34(5).
264 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.[265]

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.[266] 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.[267]

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.[268] 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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265 Mental Health and Related Services Act 1998 (NT) s 38.
266 Mental Health and Related Services Act 1998 (NT) s 39.
267 Mental Health and Related Services Act 1998 (NT) s 40.
268 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:[269]

- 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.[270] 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.[271] If the Tribunal is not satisfied, it must revoke the admission as involuntary patient: patient must be immediately discharged.[272]

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,[273] and may appeal to Mental Health Review Tribunal if not discharged.[274] That review may be undertaken in absence of patient in some circumstances.[275]

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269 Mental Health and Related Services Act 1998 (NT) s 123.
270 Mental Health and Related Services Act 1998 (NT) s 123.
271 Mental Health and Related Services Act 1998 (NT) s 123.
272 Mental Health and Related Services Act 1998 (NT) s 123.
273 Mental Health Act 2007 (NSW) ss 42, 43.

206. An appeal lies from the tribunal to Supreme Court of New South Wales.[276]

ii) Mental Health Act 1986 (VIC)

207. The following are the key provisions governing appeals to the Mental Health Review Board in Victoria:[277]

- 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 .[278] The Tribunal must decide to confirm, change or revoke the involuntary treatment order.[279]

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.[280]

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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274 Mental Health Act 2007 (NSW) s 44.
275 Mental Health Act 2007 (NSW) s 45.
276 Mental Health Act 2007 (NSW) s 163.
277 Mental Health Act 1986 (VIC) ss24, 32, 36
278 Mental Health Act 2000 (QLD) s 188
279 Mental Health Act 2000 (QLD) s 191
280 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.[281] 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.[282]

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.[283] 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.[284]

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.[285] ACAT

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281 Mental Health Act 1996 (WA) s 142.
282 Mental Health Act 1996 (WA) ss 148-150.
283 Mental Health Act 2013 (Tasmania) s 193.
284 Mental Health Act 2013 (Tasmania) s 174.
285 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.[286]

216. The following people may appeal to the Supreme Court from a decision of ACAT:[287]

- 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 an immediate concern for the health or welfare of, the person.[288]

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.[289]

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.[290] 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.[291] Further, in most cases it will be open to the court to examine whether the decision was made in accordance with procedural fairness.[292]

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286 Mental Health (Treatment and Care) Act 1994 (Australian Capital Territory) s 37.

287 Mental Health (Treatment and Care) Act 1994 (Australian Capital Territory) s141.

288 Mental Health and Related Services Act 1998 (NT) s 123(4).

289 Mental Health and Related Services Act 1998 (NT) s 142.

290 See *R v Toohey (Aboriginal Land Commissioner); Ex Parte Northern Land Council* (1981) 151 CLR 170, especially at 219.

291 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

292 *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').[293] 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.[294]

225. Arrest may be done without a warrant if there are reasonable grounds to believe that:[295]

- 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.[296] If a warrant for arrest is issued, then any member of the armed

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293 DFD Act 1982.
294 DFD Act 1982 s 89(2).
295 DFD Act 1982 s 89(1).
296 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.[297]

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.[298] 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.[299]

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.[300]

229. Within 24 hours after being transferred into military custody, the person arrested must be either charged with a service offence or released;[301] 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.[302] 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;[303] and for every eight day period commencing with the charge that the person remains in custody without the charge having ben dealt with, the superior officer must report the reasons for the delay to superior officers.[304] 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.[305]

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

297 DFD Act 1982 s 90(5).
298 DFD Act 1982 s 88(1) and (2).
299 DFD Act 1982 s 88(4).
300 DFD Act 1982 s 94.
301 DFD Act 1982 s 95(2).
302 DFD Act 1982 s 95(2).
303 DFD Act 1982 s 95(4).
304 DFD Act 1982 s 95(5).
305 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.[306]

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.

[306] 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.[307] There is also a general common law power to keep the peace.[308]

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.[309] 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.[310]

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. [311] The cases where this has been held have tended to involve confiscations of small pieces of property, rather than detention.[312] 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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307 Crimes Act 1958 (VIC) s 462A, 23, 197.

308 see *R v Waterfield* [1964] 1 QB 164.

309 See eg Crimes Act (VIC) 1958 , 464I.

310 *Lavin v Albert* [1982] AC 546, 549.

311 *Humphrey v Connor* (1864) 17 Ir R 1; *Poidevin v Semaan* [2013] NSWCA 334, [19]; *Minto v McKay* [1987] BCL 722 (power to confiscate a protestor's megaphone).

312 *ibid.*

disperse protesters, but there have not been any cases where detention of protesters in a 'kettle' was involved.[313]

242. Whether police steps to preserve the peace are reasonable is determined on a case-by-case basis.[314] 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.[315] As Black CJ put it in *Ruddock v Vadarlis*, 'a person might be unlawfully detained within a football field'.[316]

245. As for duration, detention even for a few hours may be considered detention in the context of false imprisonment.[317]

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.[318] 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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313 *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).

314 *Poidevin v Semaan* [2013] NSWCA 334

315 *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].

316 *Ruddock v Vadarlis* [2001] FCA 1329, [68].

317 *Bird v Jones* [1845] 7 QB 742 for detention at a police station for only a few hours held to be detention.

318 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.[319] The officers exercising the power to cordon/roadblock must only exercise them for the authorised purpose.[320]

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.[321]

249. The Police Commissioner must report to the Ombudsman on any authorisation to use emergency powers within three months of the authorisation.[322]

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:[323]

- 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.[324]

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.[325]

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.[326]

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319 Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87E
320 Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87H
321 Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87G
322 Law Enforcement Powers and Responsibilities Act 2002 (NSW) s 87O.
323 Police Powers and Responsibilities Act 2000 (Qld) s 50.
324 Crimes Act 1958 (VIC), s 462A, 23, 197
325 Police Administration Act (NT), s148
326 *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.[327]

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.[328] 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.[329]

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.[330]

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.[331] 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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327 *Humphrey v Connor* (1864) 17 Ir R 1; *Poidevin v Semaan* [2013] NSWCA 334, [19].

328 Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1009, [27]ff.

329 *Clarkson v R* [1986] VicRp 47.

330 R v Deputy Governor of Parkhurst Prison; Ex parte Hague [1992] 1 AC 58.

331 *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.[332] 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.[333] 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.[334] Such review may be difficult where police are exercising common law power, rather than powers granted by statute.[335]

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.[336] There is also an implied guarantee of free movement and association.[337] These guarantees apply to state as well as federal laws.[338] 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.[339] Laws that interfere with rights of speech or assembly may therefore still escape invalidity.[340] 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.[341]

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[332] 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.

[333] See *R v Toohey (Aboriginal Land Commissioner); Ex Parte Northern Land Council* (1981) 151 CLR 170, especially at 219.

[334] *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.

[335] See eg *Carter v Walker* [2010] VSCA 340.

[336] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72

[337] *Kruger v The Commonwealth* (1997) 190 CLR 1;

[338] *Muldoon v Melbourne City Council* [2013] FCA 994.

[339] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[340] See eg *Muldoon v Melbourne City Council* [2013] FCA 994; *Wotton v Queensland* [2012] HCA 2.

[341] *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.[342]

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 imprisonmen 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.[343]

266. During false imprisonment, detainees also have a right to remedy their situation by self-help. They may use reasonable force to escape.[344] 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.[345] 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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342 See eg NSW Ombudsman, www.ombo.**nsw**.gov.au; Queensland Police Service Headquarters www.police.qld.gov.au, Police Conduct Unit (Victoria), www.police.vic.gov.au.

343 See eg *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

344 *Kenlin v Gardiner* [1967] 2 QB 510.

345 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.[346]

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.[347] 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.[348] The provision in New South Wales is similar.[349]

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.[350] The courts will have regard to medical and psychiatric reports, patterns of offending and rehabilitation programs, among many other considerations.[351]

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.[352]

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346 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.

347 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Schedule to the Act.

348 Dangerous Sexual Offenders Act 2006 (WA) s 3; Evidence Act 1906 (WA), s 106A.

349 Crimes (High Risk Offenders) Act 2006 (NSW).

350 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13.

351 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 13(4).

352 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.[353] In Western Australia and Victoria, the DPP can apply for orders.[354] 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.[355] 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'.[356] 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).[357] 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.[358]

276. The detention of a person in Queensland is annually reviewed by two psychiatrists.[359] 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.[360] The legislation in Western Australia also calls for annual review.[361] 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.[362] Nonetheless, further continuing detention orders can subsequently be made.[363] Throughout the process, the New South Wales

353 Crimes (High Risk Offenders) Act 2006 (NSW), s 5H.

354 Dangerous Sexual Offenders Act 2006 (WA) s 8; Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic), s 33.

355 Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld).

356 Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld), s 6; Criminal Law Amendment Act 1945 (Qld), Part 4.

357 Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld), Division 3.

358 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.

359 Criminal Law Amendment Act 1945 (Qld), s 22C.

360 Criminal Law Amendment Act 1945 (Qld), s 22F.

361 Dangerous Sexual Offenders Act 2006 (WA), Part 3.

362 Crimes (High Risk Offenders) Act 2006 (NSW), s 18(1).

363 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.[364]

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.[365] The cases of *Attorney-General for State of Queensland v Foy*[366] and *Attorney-General v Watego*[367] 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.[368] During this interim stage though, there is little opportunity for the detainee to bring evidence or defend themself 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.[369] Notably, one offender in Western Australia was subject to an application for

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364 Serious Offenders Review Council, 'Annual Report' (December 2011) <http://www.correctiveservices.nsw.gov.au/_media/dcs/offender-management/sorc/SORC-Report-2011-web.pdf> accessed 29 December 2013.

365 *Attorney General for State of Queensland v Foy* [2004] QSC 428; Welford, Attorney-General v Francis [2004] QSC 128 [3]–[17].

366 [2004] QSC 428

367 [2003] QSC 367. See also *Attorney-General v Nash* [2003] QSC 377.

368 Crimes (High Risk Offenders) Act 2006 (NSW), s 18A; Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) s 53.

369 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.[370] It is possible that the court might be able to stay proceedings until a detainee can access legal representation.[371]

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.[372]

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.[373] 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.[374]

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.[375] Detainees are able to appeal against court decisions.[376] In New South Wales, a detainee can apply to the Court to vary or revoke their detention order.[377]

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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370 *Director of Public Prosecutions for Western Australia v Paul Douglas Allen* [2006] WASC 160.

371 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.

372 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.

373 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.

374 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.

375 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 28; Dangerous Sexual Offenders Act 2006 (WA), s 30.

376 Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), Part 4; Dangerous Sexual Offenders Act 2006 (WA), s 34.

377 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.[378]

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.[379] For example, in the landmark case of *Fardon v Attorney-General*,[380] 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.[381] 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).[382]

286. Victoria has a Charter of Human Rights and Responsibilities[383] according to which any public authorities and public servants must demonstrate respect for the inherent dignity of all people.[384] 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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378 Criminal Law Amendment Act 1945 (Qld), s 22R.

379 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.

380 *Fardon v Attorney-General* (Qld) (2004) 210 ALR 50.

381 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.

382 See for example Crimes (High Risk Offenders) Act 2006 (NSW), s 5I.

383 Charter of Human Rights and Responsibilities Act 2006 (Vic).

384 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.[1]

2. Administrative authorities today may still impose detention of a maximum period of six weeks for an administrative offence.[2] 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.[3] Thus such an administrative decision on detention can be challenged before either the Appellate Federal Administrative Court or a State's Appellate administrative court.[4]

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.[5] Due to the superior rank of constitutional laws in the Austrian legal order,[6] 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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1 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.

2 Verwaltungsstrafgesetz 1991 BGBl. Nr. 52/1991, s 12 ('Verwaltungsstrafgesetz'); BVG Persönliche Freiheit, art 3 abs 2.

3 BVG Persönliche Freiheit, art 3 abs 3.

4 Bundes-Verfassungsgesetz, art 130 abs 1.

5 BVG Persönliche Freiheit, art 6 abs 1.

6 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,[7] 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.[8]
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.[9] Minors below the age of 14 must not be taken into deportation detention.[10]
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.[11]

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7 Bundesgesetz über die Ausübung der Fremdenpolizei, die Ausstellung von Dokumenten für Fremde und die Erteilung von Einreisetitel BGBl. I Nr. 100/2005 ('Fremdenpolizeigesetz 2005').

8 Lamiss Khahkzadeh-Leileer, 'Die Schubhafttatbestände in der Judikatur des VwGH' [2010] Juridikum 220, 224.

9 Fremdenpolizeigesetz 2005, § 76 abs 1.

10 Fremdenpolizeigesetz 2005, § 76 abs 1a.

11 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[12] 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.[13] 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.[14] 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.[15] 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.[16]

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.[17] 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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12 Bundesgesetz über die Gewährung von Asyl BGBl. I Nr. 100/2005 ('Asylgesetz 2005').

13 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.

14 Asylgesetz 2005, § 15 abs 3a.

15 Asylgesetz 2005, §§ 15 abs 3a and 29 abs 6Z6.

16 § 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.

17 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.[18] 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.[19] The Austrian debate has also repeatedly referred to the *Saadi v the UK* case[20] of the ('ECtHR'), to argue that an obligation of presence for seven days for asylum seekers can be justified.[21]

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.[22]

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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18 BVG Persönliche Freiheit, art 1 abs 3; Heinz Mayer, 'Die Anwesenheitspflicht von Asylwerbern' [2010] migraLex 36; Bernhard Raschauer, 'Anwesenheitspflicht im Erstaufnahmezentrum' [2010] migraLex 38.

19 Bichl and others, 'Im Hamsterrad der Fremdengesetzgebung - 'Rot-Weiß-Rot-Karte', Anwesenheitspflicht für Asylwerber und Schubhaft für Minderjährige' [2011] migraLex 49, 57.

20 Reports of Judgments and Decisions 2008.

21 Bernhard Raschauer, 'Anwesenheitspflicht im Erstaufnahmezentrum' [2010] migraLex 38.

21 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.

22 Nicolaus Raschauer and Wolfgang Wessely, 'Anhaltung von Fremden im Transitbereich' [2005] migraLex 88.

question has also been discussed in academic literature.[23] In its 2005 judgement in *Mahdid and Haddar v Austria*,[24] 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.[25] 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.[26] The competent authority to take the decision is the Federal Agency on Foreigners' Affairs and Asylum.[27] 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.[28] 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.[29]

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.[30] The detainee has to be released as soon as deportation detention is not necessary anymore. The maximum length of

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23 ibid 88.

24 2005-XIII.

25 ibid 1ff.

26 Fremdenpolizeigesetz 2005, § 76 abs 3.

27 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 BGBl. I Nr. 87/2012 ('BFA-Verfahrensgesetz'), § 3 abs 2 Z4.

28 Fremdenpolizeigesetz 2005, § 76 abs 3.

29 Fremdenpolizeigesetz 2005, § 77.

30 Fremdenpolizeigesetz 2005, § 80 abs 6.

deportation detention is two months for minors and normally four months, and under exceptional circumstances six months, for adults[31].

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.[32] 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.[33] 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.[34] 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.[35] 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.[36]

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.[37] 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.[38]

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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31 Fremdenpolizeigesetz 2005, § 80 abs 1-2.

32 BFA-Verfahrensgesetz, s 7; Bundes-Verfassungsgesetz, art 130 abs 1.

33 BFA-Verfahrensgesetz, s 22a abs 2.

34 BFA-Verfahrensgesetz, s 22a Abs 4.

35 Allgemeines Verwaltungsverfahrensgesetz 1991 BGBl. Nr. 51/1991 (AVG) iVm § 11 Bundesgesetz über das Verfahren der Verwaltungsgerichte BGBl. I Nr. 33/2013 ('Verwaltungsgerichtsverfahrensgesetz'), § 43.

36 § 24 Verwaltungsgerichtsverfahrensgesetz, § 24.

37 Bundes-Verfassungsgesetz, art 144 abs 1.

38 Bundes-Verfassungsgesetz, art 133 abs 1 Z1.

of the Public Liability Compensation Act[39] before the competent civil law court[40]. 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[41].

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.[42] 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.[43] 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,[44] and without or against the will of the person concerned.[45]

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.[46] 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[47].

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[39] 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').

[40] Theo Öhlinger and Harald Eberhard, '*Verfassungsrecht*' (Facultas WUV Vienna 2012) para 856; Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

[41] Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

[42] Bundesgesetz vom 1. März 1990 über die Unterbringung psychisch Kranker in Krankenanstalten BGBl. Nr. 155/1990 ('Unterbringungsgesetz').

[43] Unterbringungsgesetz, § 3.

[44] 4 Unterbringungsgesetz, § 4.

[45] Unterbringungsgesetz, § 8.

[46] Bundesgesetz über den Schutz der persönlichen Freiheit während des Aufenthalts in Heimen und anderen Pflege- und Betreuungseinrichtungen BGBl. I Nr. 11/2004 ('Heimaufenthaltsgesetz').

[47] 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.[48] 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.[49] 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.[50] 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.[51]

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.[52]

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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48 Unterbringungsgesetz, § 2.

49 Heimaufenthaltsgesetz, § 3.

50 Unterbringungsgesetz, § 4.

51 Unterbringungsgesetz, § 5.

52 Unterbringungsgesetz, § 6.

The doctor has to outline the specific circumstances why they come to this conclusion in the certificate.[53] To avoid the possibility of delay, the police may bring a person into a closed psychiatric department without prior examination by a doctor.[54] 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.[55]

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.[56] 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.[57] 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.[58]

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53 Unterbringungsgesetz, § 8.
54 Unterbringungsgesetz, § 9 abs 2.
55 Unterbringungsgesetz, § 10.
56 Heimaufenthaltsgesetz, § 5.
57 Heimaufenthaltsgesetz, § 6.
58 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.[59] As already mentioned, the person concerned can at all times implicitly or explicitly revoke their consent to be kept in placement within these periods[60]. 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.[61]

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.[62] 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.[63]

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.[64]

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59 Unterbringungsgesetz, § 7.
60 Unterbringungsgesetz, § 4 abs 3.
61 Unterbringungsgesetz, § 11.
62 Unterbringungsgesetz, § 10 abs 3.
63 Unterbringungsgesetz, § 17.
64 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.[65] 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.[66]

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 kept in placement during the appellate proceeding.[67]

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.[68]

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.[69]

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65 Unterbringungsgesetz, § 19.
66 Unterbringungsgesetz, § 20.
67 Unterbringungsgesetz, §§22ff.
68 Unterbringungsgesetz, §§ 28f.
69 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.[70] 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.[71] 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.[72]

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. [73] If an informal procedure established to facilitate the public body's acknowledgement of liability or a settlement fails,[74] the allegedly injured party may sue the Federal Republic of Austria before the competent ordinary civil law court.[75]

34. While art 7 of the Constitutional requires a right to compensation based on strict liability[76], 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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70 Unterbringungsgesetz, §§ 31f.

71 Unterbringungsgesetz, §32a.

72 Unterbringungsgesetz, § 38s.

73 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.

74 Amthaftungsgesetz, § 8.

75 Amthaftungsgesetz, § 9.

76 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.[77]

IV MILITARY DETENTION

a) Preliminary remarks

35. The Austrian Military Powers Act contains a legal basis for military organs to impose preliminary arrest.[78] 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.[79] 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.[80]

36. The Act on Disciplinary Sanctions for Military Personnel[81] also contains a legal basis for preliminary arrests,[82] in addition to a provision on military detention.[83] 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.[84] The power of preliminary arrest is also limited to a maximum period of 24 hours.[85] In contrast, the power to impose military detention on a soldier allows for detention of up to 14 days.[86] 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.[87] 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

77 Gudrun Strickmann, 'Neuerungen im Heimaufenthaltsgesetz' [2010] iFamZ 276, 279.

78 Bundesgesetz über Aufgaben und Befugnisse im Rahmen der militärischen Landesverteidigung BGBl. I Nr. 86/2000 ('Militärbefugnisgesetz'), § 11.

79 ibid.

80 Militärbefugnisgesetz, § 1 abs 5.

81 Heeresdisziplinargesetz 2002 BGBl. I Nr. 167/2002 ('Heeresdisziplinargesetz').

82 Heeresdisziplinargesetz, §§ 43f.

83 Heeresdisziplinargesetz, § 83.

84 Heeresdisziplinargesetz, vgl. §§ 1, 43 and 83.

85 Heeresdisziplinargesetz, § 43.

86 Heeresdisziplinargesetz, § 83.

87 Heeresdisziplinargesetz, § 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[88] 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.[89] 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.[90]

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[91]. Subsequently, the decision of the disciplinary authority can be challenged on a merits review before the Appellate Federal Administrative Court.[92]

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

88 Heeresdisziplinargesetz, § 83.

89 Heeresdisziplinargesetz, § 84.

90 Heeresdisziplinargesetz, § 83 abs 5.

91 Heeresdisziplinargesetz, § 85 abs 5 and 6.

92 Art 130 Abs 1 Bundes-Verfassungsgesetz BGBl. Nr. 1/1920 ('Bundes-Verfassungsgesetz').

Compensation Act.[93] 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.[94] 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,[95] then the allegedly injured party may sue the Federal Republic of Austria before the competent ordinary civil law court.[96]

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*[97] and *Gillan and Quinton v the United Kingdom*.[98] 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.[99] 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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93 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.

94 Georg Kodek and Petra Leupold, 'Vor §§ 1 - 16' WK^2 StEG Online Commentary para 1ff (last updated December 2011); Strafrechtliches Entschädigungsgestz 2005, § 5.

95 Strafrechtliches Entschädigungsgestz 2005, § 9.

96 Strafrechtliches Entschädigungsgestz 2005, § 12; Georg Kodek and Petra Leupold, '§ 12' WK^2 StEG Online Commentary para 3 (last updated December 2011).

97 Reports of Judgments and Decisions 2012.

98 Reports of Judgments and Decisions 2010.

99 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.[100] 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.[101] 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.[102] 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.[103] 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.[104] 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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100 Versammlungsgesetz 1953 BGBl. Nr. 98/1953 ('Versammlungsgesetz'), § 19.

101 VfGH 20. 9. 2012, B 1436/10.

102 VfGH 19. 6. 1986, B 80/85.

103 Verwaltungsstrafgesetz, § 35; art 2 Abs 1 Z3 BVG Persönliche Freiheit.

104 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,[105] 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,[106] the use of orders and coercive powers to prevent criminal offences,[107] prohibition of persons from certain public spaces[108] or the dissolution of assemblies.[109] 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.[110] Moreover, as already mentioned, temporary arrests of persons who committed administrative offences may be imposed by the police forces under their own authority.[111]

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.[112] The complaint can be raised based on an alleged violation of ordinary statutes, European law or constitutional law.[113]

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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105 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.

106 Sicherheitspolizeigesetz, §32.

107 Sicherheitspolizeigesetz, §33.

108 Sicherheitspolizeigesetz, § 36.

109 Versammlungsgesetz, § 13f.

110 Sicherheitspolizeigesetz, § 50.

111 Verwaltungsstrafgesetz, § 35.

112 Bundes-Verfassungsgesetz, art 130 Abs 1.

113 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.[114] 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.[115]

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.[116] 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.[117]

VI PREVENTIVE DETENTION

a) Preliminary remarks

50. Sections 21-23 of the Criminal Code[118] 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[119]. 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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114 Bundes-Verfassungsgesetz, art 144 Abs 1.

115 Bundes-Verfassungsgesetz, art 133 Abs 1 Z1.

116 Theo Öhlinger and Harald Eberhard, '*Verfassungsrecht*' (Facultas WUV Vienna 2012) para 856; Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

117 Monika Hinteregger, 'Die Bedeutung der Grundrechte für das Privatrecht' [1999] ÖJZ 741.

118 Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen BGBl. Nr. 60/1974 ('Strafgesetzbuch').

119 Eckehardt Ratz, 'Vor §§ 21–25' WK^2 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[120].

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[121]. The provisions on ordinary criminal proceedings of the Code of Criminal Procedure[122] are generally applicable to the proceedings concerning preventive measures. Thus the person concerned is eg entitled to be heard and to representation and a public hearing is to be carried out like in other criminal proceedings[123]. 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[124].

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[125]. The provisions and guarantees on the appellate proceedings before criminal courts are applicable[126]. 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

120 Strafgesetzbuch, §25.

121 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).

122 Strafprozeßordnung 1975 BGBl. Nr. 631/1975 ('Strafprozessordnung')

123 Verena Murschetz, '§ 429' WK-StPO Online Commentary para 1 (last updated November 2009).

124 §§ 430 und 439 Strafprozessordnung.

125 §§ 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.

126 ibid.

the mental illness or drug addiction and their link to the offence were given or the prediction of dangerousness[127].

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[128].

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[129]. 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[130]. If an informal procedure established to facilitate the public body's acknowledgement of liability or a settlement fails[131], the allegedly injured party may sue the Federal Republic of Austria before the competent ordinary civil law court[132].

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[127] Eckehardt Ratz, 'Vor §§ 21–25' WK^2 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.

[128] Eckehardt Ratz, '§ 25' WK^2 StGB Online Commentary para 1 ff (last updated September 2011).

[129] Georg Kodek and Petra Leupold, '§ 1' WK^2 StEG Online Commentary para 4 (last updated December 2011).

[130] Georg Kodek and Petra Leupold, 'Vor §§ 1 - 16' WK^2 StEG Online Commentary para 1ff (last updated December 2011); Paragraph 5 Strafrechtliches Entschädigungsgestz 2005.

[131] Strafrechtliches Entschädigungsgestz 2005, §9.

[132] Strafrechtliches Entschädigungsgestz 2005, § 12; Georg Kodek and Petra Leupold, '§ 12' WK^2 StEG Online Commentary para 3 (last updated December 2011).