Topic: Can Australia's far-reaching 'anti-terror' laws be justified in terms of Australia's international human rights obligations under the *ICCPR*?

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I INTRODUCTION

The legal landscape of the post-September 11 world has been characterised by significant incursions into civil liberties, rationalised by governments worldwide on the basis of increased security. In this respect, Australia has reacted similarly to other Western governments, by enacting wide-ranging laws designed specifically to counter the perceived threat of transnational terrorism. Among the more controversial of Australia's anti-terrorism measures is the preventative detention regime, a new system of regulated orders allowing for the detention of individuals for the purpose of either preventing an imminent terrorist attack, or preserving evidence from a recent terrorist attack.

Serious and well-substantiated concerns have been raised regarding the possible human rights infringements involved in Australia's preventative detention system. In particular, as Australia has ratified the *International Covenant on Civil and Political Rights* ('*ICCPR*')[1], the effects of this new regime must be examined in terms of their compatibility with the Covenant's rights and responsibilities. This is a two-step process, requiring us first to examine whether the preventative detention regime breaches any of Australia's substantive obligations under the *ICCPR*. I will argue that the legal framework of preventative detention contravenes a number of fundamental civil and political rights, even when the allowable limitations contained within those specific rights are considered. This triggers the second aspect of analysis, which examines whether these infringements can be justified by way of an allowable derogation under the Covenant. The focus in this section will be on whether the Australian government could successfully defend the preventative detention regime on the basis of the public emergency derogation, embodied in Article 4 of the Covenant. My contention here will be that the threat posed to Australia by global terrorism, and the response to this threat in the form of the preventative detention system, do not meet the requirements of the public emergency derogation. Therefore, Australia's preventative detention regime cannot be justified in terms of Australia's human rights obligations under the *ICCPR*.

[1] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

II THE CONTEXT OF AUSTRALIA'S COUNTER-TERRORISM LEGISLATION: BALANCING SECURITY AGAINST LIBERTY

Both international and domestic responses to transnational terrorism have encountered the practical difficulty of providing greater security to the community at large, whilst preserving the civil and political rights of individuals. Thus, vigorous efforts to prevent and suppress terrorist activities worldwide have been somewhat tempered by the recognition that such anti-terrorism measures may infringe certain fundamental human rights. Although the UN has taken the clear approach that countering terrorism and respect for human rights are fully compatible,[2] in practice national governments have significantly curtailed the rights of citizens in the name of increased protection, with each State finding its own unique balance between the competing demands of liberty and security.

Australia's legislative response to terrorism since 2001 has been wide-ranging and multifaceted, with the introduction of over ten major Commonwealth Acts specifically directed towards countering terrorism.[3] These Acts in turn amend dozens of other pieces of Commonwealth legislation, with the States and Territories moving to introduce complementary legislation. The essential elements of this legislative regime are the introduction of new criminal offences related to terrorism and considerable increases in the powers of intelligence and law enforcement agencies, however the Government's comprehensive approach to anti-terrorism can also be seen in areas as diverse as aviation transport security, the interception of telecommunications and rules targeting money laundering.

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[2] See, eg, UN Secretary-General, *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism: Report of the Secretary-General*, UN Doc A/60/374 (22 September 2005) [4].

[3] These include the *Anti-Terrorism Act 2004* (Cth), the *Anti-Terrorism Act (No 2) 2004* (Cth), the *Anti-Terrorism Act (No 3) 2004* (Cth), the *Australian Security Intelligence Organisation Amendment Act 2004* (Cth), the *Australian Security Organisation Legislation Amendment (Terrorism) Act 2003* (Cth), the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) and the *Suppression of the Financing of Terrorism Act 2002* (Cth). For a comprehensive list of counter-terrorism legislation introduced since 2001, see Parliamentary Library, *Internet Resources: Terrorism Law* (2007) Parliament of Australia <http://www.aph.gov.au/library/intguide/law/terrorism.htm> at 5 November 2007.

The Australian government's justification for these significant increases in State power rests on the threat of transnational terrorism to Australia. As the Director-General of ASIO has stated:

> It is a matter of public record that Australian interests are at threat from terrorists … ASIO has assessed that a terrorist attack in Australia is feasible and could well occur … we need to continue the work of identifying people intent on doing harm, whether they are already in our community, seeking to come here from overseas or seeking to attack Australian interests overseas … the nature of the threat we face is not static.[4]

Importantly, the Government has at all times maintained that Australia's anti-terrorism legislation is consistent with its obligations under international human rights law.[5] In support of this argument, government officials have noted similarities between Australia's counter-terrorism measures and those contained in the legislation of other comparable jurisdictions, in particular the UK.[6] However, it is important to recognise that, in contrast to many of these jurisdictions, there is no entrenchment of human rights in Australia, by means of a Bill of Rights or otherwise. Therefore the Australian judiciary, unlike its UK counterpart, is not bound to interpret anti-terrorism legislation consistently with certain minimum human rights standards.[7] This means that the *ICCPR* takes on an even greater significance in the Australian context, as it represents the primary instrument used to judge the lawfulness of counter-terrorism measures in terms of their effect on civil liberties.

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[4] Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, 17 November 2005, 53 (Paul O'Sullivan). See also, in the specific context of the *Anti-terrorism Act (No 2) 2005* (Cth), the references to 'new and emerging' terrorist threats in Explanatory Memorandum, Anti-terrorism Bill (No 2) 2005 (Cth) and the Bill's Second Reading Speech; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (Phillip Ruddock).

[5] See, eg, Attorney-General's Department, *Submission No 290A to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 2005*(2005), 1.

[6] Prime Minister Howard stated on 8 September 2005 that some of the proposed measures were based on UK legislation; Department of Parliamentary Services, Parliament of Australia, *Anti-terrorism Bill (No 2) 2005 Bills Digest* (18 November 2005), 4.

[7] Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Provisions of the Anti-terrorism Bill (No 2) 2005* (2005) [2.32] ('*Senate Report*'); Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Submission No 206 to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 2005* (2005), 5; Ian Barker, 'Human Rights in an Age of Counter Terrorism' (2005) 26 *Australian Bar Review* 267, 284.

III IS THE PREVENTATIVE DETENTION REGIME CONSISTENT WITH AUSTRALIA'S SUBSTANTIVE OBLIGATIONS UNDER THE *ICCPR*?

A *The Preventative Detention Regime*

One of the cornerstones of Australia's new counter-terrorism policy, and also one of its most controversial aspects, is the introduction of a range of preventative detention orders ('PDOs') under the *Anti-terrorism Act (No 2) 2005* (Cth) ('the Act').[8] Essentially, these orders enable the Australian Federal Police ('AFP') to take into custody and detain persons for one of two purposes:

(i) to prevent an imminent terrorist attack from occurring; or

(ii) to preserve evidence of, or relating to, a recent terrorist attack.[9]

Three types of orders can be made under the preventative detention regime; initial PDOs,[10] continued PDOs[11] and prohibited contact orders.[12] In all cases, the application for the order is made by an AFP member,[13] and the order itself is made by an 'issuing authority' appointed by the Minister.[14] Persons who may be selected as an issuing authority include serving or retired superior court judges, and for initial PDOs only, senior AFP members.[15]

The maximum period of detention under an initial PDO is 24 hours,[16] however extensions of a further 24 hours may be granted in specified circumstances.[17] Alternatively, a continued PDO may be made in relation to a person already detained under an initial

[8] The preventative detention regime is contained in a new Division 105, inserted into the *Criminal Code Act 1995* (Cth) by Schedule 4 of the *Anti-terrorism Act (No 2) 2005* (Cth).
[9] *Criminal Code Act 1995* (Cth), amended by *Anti-terrorism Act (No 2) 2005* (Cth), ss 105.1, 105.6(4) and 105.6(6).
[10] *Criminal Code Act 1995* (Cth) s 105.8.
[11] *Criminal Code Act 1995* (Cth) s 105.12.
[12] *Criminal Code Act 1995* (Cth) s 105.14A.
[13] *Criminal Code Act 1995* (Cth) s 105.41(1).
[14] *Criminal Code Act 1995* (Cth) s 105.2.
[15] *Criminal Code Act 1995* (Cth) s 105.8(1).
[16] *Criminal Code Act 1995* (Cth) s 105.8(5).
[17] *Criminal Code Act 1995* (Cth) s 105.10.

PDO, with continued PDOs enabling detention for up to 48 hours.[18] As with initial PDOs, continued PDOs may be extended upon application by an AFP member.[19] A prohibited contact order, which prevents the person detained from making contact with specified individuals, is not required by the legislation to be limited in duration.

Given the significant powers of detention and the prohibition on contact with others under the preventative detention regime, the implications for civil liberties are of grave concern. In terms of Australia's obligations under the *ICCPR*, I will argue that the preventative detention regime infringes the following fundamental rights:

(i) Article 9 – the right to liberty and security of person;

(ii) Article 14 – the right to a fair and public hearing; and,

(iii) Article 19 – the right to freedom of expression.

Although commentators have convincingly argued that other rights are violated by the preventative detention regime, including those contained in art 10 (humane treatment of detainees) and art 17 (privacy and family life),[20] the incursions into the three rights listed above are the most significant. Each will be examined individually.

B *Article 9: the Right to Liberty and Security of Person*

Article 9 of the Covenant deals with the situations in which individuals may be legitimately arrested and detained, and their resulting rights as detainees. Importantly, the Human Rights Committee ('HRC') has unequivocally stated in its General Comment regarding art 9 that the *entirety* of the article applies where 'so-called preventive detention is used, for reasons of public security'.[21]

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[18] *Criminal Code Act 1995* (Cth) s 105.12(5).
[19] *Criminal Code Act 1995* (Cth) s 105.14.
[20] Byrnes, Charleworth and McKinnon, above n 7, 3; Victorian Council for Civil Liberties, *Submission No 221 to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 2005* (2005), 23.
[21] Human Rights Committee, *General Comment No 8: Right to Liberty and Security of Persons (Art 9)* UN Doc HRI/GEN/1/Rev.7 (30 June 1982) [4].

1 *Article 9(1): Prohibition on Arbitrary Arrest or Detention*

Article 9(1) provides that 'no one shall be subjected to arbitrary arrest or detention'. The term 'arbitrary' has been given a broad interpretation in this context, referring to actions that contain elements of injustice, unpredictability, unreasonableness, inappropriateness or a lack of proportionality.[22]

One fundamental way in which the preventative detention regime is arguably arbitrary is that none of the recognised justifications for detention apply in this situation. A person may be held under a PDO although they have not committed any offence and are not suspected of committing an offence. The nature of preventative detention is that it involves detention without charge or the prospect of a judicial hearing, contrary to the principles underlying the writ of *habeas corpus.*

Further, the Act indicates that although detainees under the preventative detention regime are not afforded the same rights as a person who has been charged or convicted of an offence,[23] the scope and nature of detention under a PDO is in many respects identical to criminal incarceration. For example, a detainee under a PDO may be held at a prison or remand centre during the period of the order,[24] and police officers carrying out a PDO are expressly granted the same powers as they would possess in arresting or detaining the person for an offence.[25] This disjunction between on the one hand, the treatment of the detainee as an offender, and on the other, the absence of a charge or conviction and corresponding rights, renders the preventative detention regime a clear example of unjust and disproportionate detention.

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[22] *Van Alphen v The Netherlands*, Human Rights Committee, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [6.3]; *A v Australia*, Human Rights Committee, Communication No 560 (1993), UN Doc CCPR/C/59/D/560/1993 (30 April 1993); Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 172.

[23] For example, the preventative detention regime does not recognise fundamental guarantees and safeguards such as the presumption of innocence, the requirement that guilt be established beyond reasonable doubt, the right to a fair trial and rules restricting evidence that may be used in the decision-making process. Indeed, the Attorney-General's Department has specifically stated that applications for PDOs are not subject to the provisions of the *Evidence Act 1995* (Cth); Attorney-General's Department, above n 4, 12.

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

[25] *Criminal Code Act 1995* (Cth) s 105.19(2).

Another way in which the preventative detention regime breaches art 9(1) involves the criteria for granting orders, which are arguably vague and go beyond the ends sought to be achieved. Although the legislation requires certain objective standards to be met,[26] there are still significant shortcomings in the thresholds required for PDOs to be made. These inadequacies include:

- The absence of a clear standard of proof which the issuing authority must be satisfied of;[27]
- The requirement of reasonable grounds for *suspicion*, as opposed to *belief*, in the criteria for issuing a PDO (a relatively low standard, especially considering the test for arrest or detention of a criminal suspect in normal circumstances requires a 'reasonable belief');[28]
- The fact that PDOs may be made in circumstances where there is no necessary connection between the person detained and the conscious commission of a terrorist act (for example, where a person unknowingly possesses a thing that is connected with the preparation of a terrorist attack, or where a person possesses evidence of a terrorist attack despite their lack of involvement);[29] and,
- The fact that a senior AFP member may issue an initial PDO, vesting both the authority to apply and the power to issue an order in the same law enforcement agency and thus, decreasing any guarantee of independence and rigorous scrutiny.[30]

Thus, the preventative detention regime can be seen as violating the fundamental prohibition on arbitrary detention in three major ways. Firstly, the rationales for detention disclosed by the Act go beyond the justifications for detention recognised and accepted by

[26] The Act requires that there be 'reasonable grounds' to suspect that detention will either prevent an imminent terrorist attack from occurring or preserve evidence of a recent terrorist attack, and that detention be 'reasonably necessary' to achieve these aims; *Criminal Code Act 1995* (Cth) s 105.4(4) and (6).
[27] Lex Lasry and Kate Eastman, *Anti-terrorism Bill 2005 (Cth) and the Human Rights Act 2004 (ACT)*, Memorandum of Advice to ACT Government Solicitor (27 October 2005) [64].
[28] *Senate Report*, above n 7, [3.36].
[29] Lasry and Eastman, above n 27, [67].
[30] *Senate Report*, above n 7, [3.46]; Byrnes, Charlesworth and McKinnon, above n 7, 6.

the law. Secondly, the treatment of the detainee as an offender is grossly disproportionate to their situation and rights as an uncharged and unconvicted individual. Finally, any procedural safeguards contained in the PDO process are insufficient to ensure that the detention order made is reasonable, proportionate and just in the circumstances.

2 *Article 9(2): Provision of Reasons to the Detainee*

Article 9(2) provides that a detainee 'shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him'. Section 105.32 states that the detainee must be provided with a copy of the relevant order under which they are detained, including a summary of the grounds on which the order is made, as soon as practicable after the order is made or extended. However, information is not required to be included in the summary if its disclosure is 'likely to prejudice national security'.[31] As Byrnes et al note,

> in circumstances where the person is being detained for alleged connections with terrorism it would seem likely that most relevant information might be deemed by the AFP to be prejudicial, so that summaries may contain little substance.[32]

This comment is especially accurate given the current political climate in Australia, characterised by an institutionalised fear of terrorism and consequently, a very broad notion of what security measures are necessary to combat terrorism. Further, in the case of prohibited contact orders, there is no requirement that a copy of the order (and thus the grounds for the making of the order) be given to the detainee.[33]

Therefore, although efforts are made under the preventative detention regime to inform the detainee of the reasons for their detention, the provisions are lacking in two major

[31] *Criminal Code Act 1995* (Cth) s 105.12(6A). 'Likely to prejudice national security' is defined in s 17 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) as where 'there is a real, and not merely a remote, possibility that the disclosure will prejudice national security'. Note also that in his study of Australia's human rights compliance while countering terrorism, Special Rapporteur Martin Scheinin 'expressed concern' over the withholding from the detainee of certain information used in seeking and making PDOs, canvassing this failure to disclose as potentially contrary to the right to a fair trial; Martin Scheinin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism* UN Doc A/HRC/4/26/Add.3 (14 December 2006) [39], [45].
[32] Byrnes, Charlesworth and McKinnon, above n 7, 9.
[33] *Criminal Code Act 1995* (Cth) s 105.32(10).

respects. Firstly, the requirement to provide such information does not apply to an entire category of orders (prohibited contact orders) and secondly, there is no guarantee that the reasons will be either comprehensible or comprehensive, given the ability to excise information prejudicial to national security. A major consequence of these deficiencies is that the detainee's ability to challenge a PDO is significantly impeded, due to the lack of information provided to them.[34] In light of this, the preventative detention regime cannot be seen to fulfill the requirements of art 9(2).[35]

3 *Article 9(4): Judicial Review of Detention*

Article 9(4) states that detainees 'shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'. Under s 105.51(5), a detainee may apply to the Administrative Appeals Tribunal ('AAT') to review the issuing authority's decision to make or extend a PDO. However, the exact nature and effect of this review are unclear. The AAT may declare the issuing authority's decision to be 'void' and award subsequent compensation,[36] however this is not necessarily the same as deciding the legality of the detention. The fact that the review is made by an administrative tribunal rather than a court, and that review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is expressly excluded,[37] indicate that these provisions are unlikely to fulfill the requirements of art 9(4).

Moreover, an application for review by the AAT cannot be made while the relevant PDO is in force.[38] As this is the period during which the actual infringement of rights takes place, it is arguably also the period during which review is most necessary. Coupled with the potential for unlimited extensions of orders under the preventative detention regime,

[34] Law Council of Australia, *Submission No 140 to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 2005* (2005), 11; Gilbert + Tobin Centre for Public Law, *Submission No 80 to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 2005* (2005), 12.
[35] This is supported by *Drescher Caldas v Uruguay*, Human Rights Committee, Communication No 43/1979, UN Doc A/38/40 (11 January 1979), which held that art 9(2) was violated where the only information given to the detainee was that they were 'arrested under prompt security measures without any indication of the substance'; at [13.2].
[36] *Criminal Code Act 1995* (Cth) s 105.51(7).
[37] *Criminal Code Act 1995* (Cth) s 105.51(4).
[38] *Criminal Code Act 1995* (Cth) s 105.51(5).

this raises the possibility of a detainee's application for review being indefinitely prevented by issuing repeated and consecutive extensions.

Thus, the preventative detention regime breaches art 9(4) in that detainees are not empowered, during the course of their detention, to take proceedings before a properly constituted court to review the legality of their detention.[39] Rather, the right of review provided to detainees is of a limited and quasi-administrative nature, and can only be exercised after any infringement of rights has already occurred.

C *Article 14: Right to a Fair Trial*

Article 14(1) states that 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. The right to a fair trial has traditionally been given a 'broad and purposive interpretation',[40] with the principal focus on whether both parties have a reasonable opportunity to present their case, and whether a respondent's rights are sufficiently safeguarded in comparison to the complainant's rights.[41] As the issuing, extension and revocation of a PDO all constitute a determination of the rights and obligations of individuals, the right to a fair trial applies to the preventative detention regime.[42] Although some commentators have argued that the regime constitutes a 'de facto new criminal law system',[43] it will be assumed here that the provisions of art 14 relating specifically to criminal charges and offences do not apply.[44]

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[39] This is supported by *Hammel v Madagascar*, Human Rights Committee, Communication No 155/1983, UN Doc A/42/40 (3 April 1987), where it was held that art 9(4) was breached in the case of 'incommunicado detention for three days, during which time it was impossible for the author to access a court to challenge his detention'; at [12.2]. See also Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights, Cases and Commentary* (2nd ed, 2004) 325.
[40] Lasry and Eastman, above n 27, [97].
[41] Ibid [98]. In the words of several international cases, the right to a fair trial requires 'equality of arms'; *Avellanal v Peru*, Human Rights Committee, Communication No 202/1986, UN Doc CCPR/C/34/D/202/1986 (1988); *Robinson v Jamaica*, Human Rights Committee, Communication No 731/1996, UN Doc CCPR/C/68/D/731/1996 (2000).
[42] Human Rights and Equal Opportunity Commission, *Submission No 158 to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 2005* (2005), 13.
[43] Ibid 8.
[44] *ICCPR*, above n 1, arts 14(2), 14(3).

1 *Nature of the Application:* Ex Parte *and* In Camera

Although the Act does not expressly state the conditions of the application for a PDO, the pre-emptive purpose of the orders and the absence of any reference to the participation of the proposed detainee suggest that the application will take place as an *ex parte* and *in camera* hearing. The fact that the proposed detainee is unable to appear before the issuing authority means that they do not have an effective opportunity to contest the information upon which an order is based,[45] a fundamental condition of a fair trial. Significantly, even the UK legislation on which the Australian Act is based provides for an *inter partes* hearing for the extension of detention beyond 48 hours, with requirements that the detainee be given notice of specific facts and an opportunity to make oral or written submissions to the judicial authority.[46]

Further, the distinctly private nature of the application decreases the transparency and accountability of the decision-making process, contravening the requirement in art 14(1) that all hearings be public. The significance of this condition has been emphasised by the HRC, which has stated that 'the publicity of hearings is an important safeguard in the interest of the individual and of society at large'.[47] An important concession to note in this context is the acknowledgment in art 14(1) that the public may be excluded for reasons of national security. However, given such exclusions may occur only 'to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice', it is doubtful that the Government could successfully justify the current blanket, *in camera* approach to applications on this basis. The Act does not confer any discretion on the issuing authority to consider the necessity of excluding the public in each case, nor is there a requirement that special circumstances prejudicing the interests of justice exist.

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[45] Liberty Victoria, *Submission No 221 to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 2005* (2005), [17]; Human Rights and Equal Opportunity Commission, above n 42, 13.
[46] *Terrorism Act 2000* (UK) sch 8, ss 29, 31.
[47] Human Rights Committee, *General Comment No 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art 14)* UN Doc HRI/GEN/1/Rev.7 (13 April 1984) [6].

2 *Restrictions on Access to Legal Advice*

An essential element of a fair trial is both parties' access to competent legal representation. Although a detainee is permitted under s 105.37 to contact a lawyer for the purpose of obtaining legal advice, a significant incursion into the detainee's civil liberties is represented by the fact that such communication with a lawyer is to be monitored by a police officer.[48] This monitoring undermines the fundamental confidentiality of lawyer-client communications,[49] designed to enhance the free and honest flow of information necessary for a fair hearing. It cannot be presumed that such a flow of information would occur in the presence of an AFP member, especially where the advice relates to the treatment of the detainee by the AFP. Further, although monitored communications are not admissible as evidence in court against the detainee,[50] there is no guarantee that police officers will not use information disclosed in monitored communications for the purposes of investigation.[51] As well as violating the requirement in art 14(1) to a fair trial, these provisions may also breach international standards such as the UN *Basic Principles on the Role of Lawyers*[52] and the UN *Body of Principles for the Protection of All Persons under Any Form of Detention.*[53]

3 *The Status of the Issuing Authority: Acting in a 'Personal Capacity'*

Although issuing authorities are accorded the same protection and immunity as a judge in making various PDO decisions,[54] these powers are expressly stated to be exercised by them in a 'personal capacity and not as a court or as a member of a court'.[55] Coupled with the fact that senior AFP members and retired judges may be appointed as an issuing authority, this demonstrates a none-too-subtle effort to avoid characterising relevant PDO

[48] *Criminal Code Act 1995* (Cth) s 105.38. In comparison, the UK legislation on which the Act is based requires that a minimum threshold be met before lawyer-client communications may be monitored; *Terrorism Act 2000* (UK) sch 8, s 7.
[49] Byrnes, Charlesworth and McKinnon, above n 7, 10; *Senate Report*, above n 7, [3.140].
[50] *Criminal Code Act 1995* (Cth) s 105.38(5).
[51] Byrnes, Charlesworth and McKinnon, above n 7, 10.
[52] Secretariat Centre for Human Rights, *Basic Principles on the Role of Lawyers* UN Doc ST/HR/ (7 September 1990) art 22.
[53] *Body of Principles for the Protection of All Persons under Any Form of Detention*, GA Res 43/173, UN GAOR, 43rd sess, 76th plen mtg, UN Doc A/Res/43/173 (9 December 1988) art 18(3).
[54] *Criminal Code Act 1995* (Cth) s 105.18(1).
[55] *Criminal Code Act 1995* (Cth) ss 105.18(2), 105.46.

decisions as valid exercises of judicial power. Importantly, if the issuing of PDOs did constitute an exercise of judicial power, further procedural safeguards (such as a full *inter partes* hearing and a stricter onus of proof) would be required.[56] Thus, the distinctly non-judicial nature of issuing authorities and the lack of corresponding safeguards contravene of the right under art 14(1) to be brought before a 'competent, independent and impartial tribunal established by law'.

D *Article 19: Freedom of Expression*

1 *General Prohibition on Contact with the Outside World*

Article 19(2) states that everyone shall have the 'freedom to seek, receive and impart information and ideas of all kinds'. Under the preventative detention regime, detainees are subject to a general prohibition on contacting other people, and may also be actively prevented from contacting other people.[57] The only exceptions to this restriction are family members and employers,[58] the Commonwealth Ombudsman[59] and lawyers,[60] with all of these communications being limited to specific circumstances and subject matter. This general prohibition effectively amounts to keeping the detainee incommunicado, in clear breach of art 19(2).[61] Whilst art 19(3) recognises that freedom of expression may be restricted in certain circumstances for reasons of national security, the restriction must be 'necessary' and the onus is on the State Party to justify this necessity.[62] In this case, with the legislation making no reference to necessity or to assessing the security risk of

[56] Byrnes, Charlesworth and McKinnon, above n 7, 10.
[57] *Criminal Code Act 1995* (Cth) s 105.34.
[58] *Criminal Code Act 1995* (Cth) s 105.35.
[59] *Criminal Code Act 1995* (Cth) s 105.36.
[60] *Criminal Code Act 1995* (Cth) s 105.36.
[61] The general prohibition on contact with the outside world under the preventative detention regime may also constitute a violation of Rule 37 of the *Standard Minimum Rules for the Treatment of Prisoners*, which states that 'prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits'; UN Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners* (30 August 1955).
[62] Human Rights Committee, *General Comment No 10: Freedom of Expression (Art 19)* UN Doc HRI/GEN/1/Rev.7 (29 June 1983) [4].

individual cases,[63] it is highly doubtful that the Australian government would be able to so justify the incursion into the detainee's freedom of expression.

2 *Criminal Disclosure Offences*

The Act also establishes a number of 'disclosure offences', which impose a maximum penalty of five years' imprisonment for disclosing the fact of the person's detention.[64] These offences apply not only to the detainee, but to a remarkable range of persons who may come into contact with the detainee, including lawyers, parents and guardians, interpreters and monitoring police officers.[65] Significantly, the effect of the legislation here goes beyond the rights of the immediate detainee, and restricts the freedom of expression of a potentially large number of people. The imposition of criminal liability on such a scale cannot be seen as necessitated by national security, especially given the otherwise administrative nature of the preventative detention regime.[66]

3 *Prohibited Contact Orders*

The infringement of a detainee's freedom of expression is especially pronounced in the case of prohibited contact orders. These orders prevent the detainee from communicating with specified individuals,[67] the number of which appears to be unlimited. This is of particular concern given that the criteria for issuing the order are both broad and vague,[68] meaning that the circumstances in which the detainee's rights may be curtailed are extensive. When these prohibited contact orders are considered in tandem with the general restrictions on communication by the detainee and the disproportionate and draconian disclosure offences, the freedom of expression of a wide range of people – not only the detainee – is evidently violated.

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[63] Agnes Chong and Waleed Kadous, 'Freedom for Security: Necessary Evil or Faustian Pact?' (2005) 28 *University of New South Wales Law Journal* 887, 894; Byrnes, Charlesworth and McKinnon, above n 7, 9.
[64] *Criminal Code Act 1995* (Cth) s 105.41.
[65] *Criminal Code Act 1995* (Cth) s 105.41.
[66] Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, 20 November 2005, 97 (Helen Watchirs, ACT Human Rights and Discrimination Commissioner).
[67] *Criminal Code Act 1995* (Cth) ss 105.15(4), 105.16(4).
[68] For example, a prohibited contact order may be issued where the issuing authority is satisfied that it is reasonably necessary 'to prevent interference with the gathering of information about the preparation for, or planning of, a terrorist act'; *Criminal Code Act 1995* (Cth) s 105.14A(d)(ii). This is especially so given the broad definition of 'terrorist act'; *Criminal Code Act 1995* (Cth) s 100.1.

E *Conclusion*

The preventative detention regime significantly infringes a number of fundamental rights enshrined by the *ICCPR***.** The violations of the greatest concern are the breaches of the right to liberty, the right to a fair trial and the right to freedom of expression. It should be noted that in the case of all of these rights, the contraventions of Australia's obligations are not minor, inadvertent or small in number. On the contrary, they represent numerous and serious incursions into civil liberties, consciously imposed after a lengthy period of legislative consultation and deliberation. Furthermore, although the Covenant provides that several of these rights may be limited on the basis of national security, the preventative detention regime fails to meet the requirements of those limitations and so cannot be justified on this basis. Therefore, unless an allowable derogation contained in the Covenant is found to apply, the Australian government will be in breach of Australia's human rights obligations under the Covenant.

IV DEROGATION UNDER ARTICLE 4 OF THE COVENANT

The *ICCPR* acknowledges that in a situation of national crisis, a State may be justified in failing to respect certain of the rights contained in the Covenant. Article 4(1) states:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

In analysing the text and jurisprudence of art 4, it appears that the following seven requirements apply for a derogation to validly occur:

(i) the situation must amount to a 'public emergency which threatens the life of the nation';

(ii) the state of public emergency must be officially proclaimed;

(iii) other parties to the Covenant must be notified of the nature of and reasons for the derogation;[69]

(iv) the measures taken in derogation must be proportional to the emergency faced;

(v) the measures must be consistent with other obligations under international law;

(vi) the measures cannot be discriminatory; and,

(vii) the measures cannot involve derogation from certain fundamental rights.[70]

Consideration of all of these requirements is beyond the scope of this essay, therefore the focus here will be on the two most significant requirements; that of a state of public emergency, and the condition of proportionality.[71]

A *The State of Public Emergency*

1 *What Constitutes a Public Emergency Threatening the Life of the Nation?*

Although the concept of a public emergency may initially appear amorphous and subject to manipulation by States in their own interest,[72] specific and objective criteria have

[69] *ICCPR*, above n 1, art 4(3).
[70] Ibid art 4(2). These rights are specifically stated to be those contained in arts 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18. However, the HRC appeared to expand the category of non-derogable rights in its General Comment on states of emergency; Human Rights Committee, *General Comment No 29: States of Emergency (4)* UN Doc HRI/GEN/1/Rev.7 (31 August 1984) [13].
[71] However, this is not to say that the remaining criteria do not present a significant obstacle to the Australian government's justification of the preventative detention regime. For example, the Government's failure to officially proclaim a state of emergency has been seen by many as a major impediment to the lawfulness of its actions under the Covenant, especially as the UK (whose legislation provided the model for Australia's anti-terrorism laws) publicly declared a 'state of emergency' on 12 November 2001, and has sought to justify its derogation from the European Convention on Human Rights on this basis; Christopher Michaelsen, 'International Human Rights on Trial – the United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275, 295.
[72] This potential was recognised by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities which, in its resolution on the question of human rights and states of emergency, invited governments 'to limit the introduction of states of emergency … exclusively to situations sufficiently

emerged from international guidelines and jurisprudence concerning art 4. These requirements – enumerated consistently throughout the *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*,[73] the *Paris Minimum Standards of Human Rights Norms in a State of Emergency*[74] and several European Commission of Human Rights cases, including *Lawless*[75] and *Greece*[76] – operate to restrict the notion of a public emergency to situations possessing the following characteristics:

(i) the threat is of actual or imminent danger;

(ii) the threat is exceptional;

(iii) the threat affects the whole of the population, and either the whole or part of the territory of the State; and,

(iv) the continuity of the organised life of the community is threatened.[77]

2 *Does the Threat of Transnational Terrorism to Australia Meet this Threshold?*

International terrorism in the post-September 11 world is a complex phenomenon, essentially characterised by a number of radical organisations or cells which carry out large-scale terrorist attacks without warning. The phenomenon is global, both in the sense that the organisations thought to be responsible are not confined to or located in a single state, and in that the attacks carried out have occurred in geographically distant countries. As such, transnational terrorism necessarily differs from the geographically confined situations that have traditionally been understood by UN organs as public emergencies,

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serious and exceptional to justify them, in order to avoid making the use of states of emergency commonplace and thus, possibly, perpetuating them': UN Sub-commission on the Prevention of Discrimination and Protection of Minorities, *Question of Human Rights and States of Emergency*, UN Doc E/CN.4/Sub.2/1993/28 (25 August 1993) [4].

[73] UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985) ('Siracusa Principles').

[74] International Law Association, *Paris Minimum Standards of Human Rights Norms in a State of Emergency* (1 September 1984), reprinted at (1985) 79 *American Journal of International Law* 1073 ('Paris Minimum Standards').

[75] *Lawless v Ireland* (No 3) (1961) 1 EHRR 15.

[76] *Commission v Greece* (1969) 12 *Yearbook of the European Convention on Human Rights* 1.

[77] *Siracusa Principles*, above n 73, [39]; *Paris Minimum Standards*, above n 74, art 1(b); *Lawless v Ireland* (No 3) (1961) 1 EHRR 15, 31; *Commission v Greece* (1969) *12 Yearbook of the European Convention on Human Rights* 1, [153].

including natural catastrophes,[78] major industrial accidents[79] and internal armed conflicts.[80]

It is difficult to assess the exact nature of the threat posed by global terrorism to Australia, given its clandestine and nebulous character and the limited intelligence information available to the public. Nonetheless, it is arguable that in the context of Australia, this specific threat is neither actual nor imminent. Unlike the US and UK, Australia has not experienced a terrorist incident within its territory. Further, the National Counter-Terrorism Alert Level issued by the Government has remained unchanged at a 'medium' level since its introduction in September 2001.[81] This is the second-lowest level of threat in the four-level classificatory system, below 'high' (meaning that a terrorist attack is likely) and 'extreme' (indicating that a terrorist attack is imminent or has occurred).[82] It seems that an 'extreme' threat to national security would be required to establish a state of public emergency, given that it most closely resembles the requirement of an actual or imminent threat.

Another reason why this requirement may not be fulfilled is because the threat of transantional terrorism invoked by the Australian government is not sufficiently specific. Both the HRC and the Special Rapporteur appointed to examine human rights in states of emergency have heavily criticised governments seeking to justify derogations on vague or general grounds. For example, the Committee held in the case of Chile that arguments such as those of 'national security' or 'latent subversion' did not justify any derogation from Covenant obligations,[83] and the Special Rapporteur in his report condemned the use

[78] Human Rights Committee, *General Comment No 29: States of Emergency (Art 4)* UN Doc HRI/GEN/1/Rev.7 (31 August 1984) [5].
[79] Ibid.
[80] Leandro Despouy, Special Rapporteur on the question of human rights and states of emergency, *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*, UN Doc E/CN.4/Sub.2/1997/19 (23 June 1997) [34].
[81] Australian Government, *National Counter-Terrorism Alert Level* (2007) <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/F2ED4B7E7B4C028ACA256FBF00816AE9?OpenDocument> at 5 November 2007.
[82] Ibid.
[83] Despouy, above n 80, [76].

of 'speculative or abstract purposes'[84] such as 'a threat to State security or public order' or 'acts of violence, subversion or terrorism'.[85]

It is also questionable whether the threat of international terrorism can be seen as satisfying the remaining criteria of a public emergency. The notion of an 'exceptional' threat was defined in the ECHR case of *Greece* to mean that 'the ordinary measures or restrictions permitted by the Convention are clearly inadequate'.[86] This issue is discussed under the proportionality requirement below, however it is sufficient to note here that many legal commentators have questioned the necessity of anti-terrorism provisions given the existing powers of police and intelligence bodies.[87] Moreover, based on the consistent pattern of terrorist attacks over the last six years, it would be difficult for the government to argue that the continuity of the organised life of the community is endangered, as countries targeted by terrorist incidents have all been able to preserve the functioning of essential institutions in the wake of such attacks. Indeed, the nature of terrorist attacks is to cause death or injury to a substantial number of private individuals, rather than to target the national government, as in a conventional war. In view of the terms 'life of the nation' and 'organised life of the community', which focus on the State as the entity under threat rather than individual citizens, it is strongly arguable that transnational terrorism does not constitute the situation of 'public emergency' to which art 4 was intended to apply.[88]

B *Proportionality*

Article 4(1) emphasises that any derogation from the obligations contained in the Covenant must only be 'to the extent strictly required by the exigencies of the situation'. This proportionality requirement is a fundamental safeguard against the abuse by

[84] Ibid.
[85] Ibid [36].
[86] *Commission v Greece* (1969) 12 *Yearbook of the European Convention on Human Rights* 1, [153].
[87] *Senate Report*, above n 7, [3.39]; Lasry and Eastman, above n 27, [8].
[88] Interestingly, the majority of the Council of Europe states have not regarded the threat of transnational terrorism to be of sufficient gravity to meet the public emergency criteria: see Parliamentary Assembly of the Council of Europe, *Combatting Terrorism and Respect for Human Rights*, Resolution 1271 (2002) [9], [12].

governments of the emergency derogation provision. The *Siracusa Principles* explain the content of term 'strictly required by the exigencies of the situation' as follows:

> The severity, duration and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.[89]

These three aspects of proportionality – severity, duration and geographic scope – have been confirmed by the HRC's General Comment on states of emergency[90] and by the Special Rapporteur's approach to proportionality.[91] As the threat of transnational terrorism is not specific in its geographic application (unlike public emergencies such as a natural disaster or internal disturbances), the spatial scope of the preventative detention regime will not be examined. However, the severity and duration of the regime raise considerable doubt as to whether the Australian government's response has been proportionate, as demonstrated below.

1 *Duration*

UN bodies and legal commentators have repeatedly emphasised the importance of derogating measures being temporary in nature, and remaining in force only as long as is necessary.[92] Although the Act stipulates that the operation of the preventative detention regime will be reviewed by the Council of Australian Governments after five years,[93] the sunset provisions of the Act mean that the substantive provisions are in force for a minimum period of ten years.[94] This ten-year period appears grossly disproportionate to the current, ill-defined threat of transnational terrorism in Australia which, as mentioned

[89] *Siracusa Principles*, above n 73, [51].
[90] Human Rights Committee, *General Comment No 29: States of Emergency (Art 4)* UN Doc HRI/GEN/1/Rev.7 (31 August 1984) [4].
[91] Despouy, above n 80, [83].
[92] UN Secretary-General, *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism: Report of the Secretary-General*, UN Doc A/60/374 (22 September 2005) [1]; Despouy, above n 80, [69]; Michaelsen, above n 71, 291. The *Siracusa Principles* also appear to envisage a limited duration of the state of emergency and corresponding measures, as it imposes an obligation on the stated to notify other parties 'of the date of the imposition of the state of emergency and the period for which it has been proclaimed'; *Siracusa Principles*, above n 73, [45].
[93] *Anti-Terrorism (No 2) Act 2005* (Cth) s 4(1).
[94] *Criminal Code Act 1995* (Cth) s 105.53.

above, has been classed as moderate for the past six years. Further, as Williams, Lynch and Saul have argued:

> The nature and extent of the terrorist threat cannot possibly be predicted over the forthcoming ten-year period, and the government has not presented evidence to suggest that the threat to Australia will remain constant or will increase over that period. The uncertainty and speculation involved in such predictions point to the need for sunset clauses of reasonably short periods.[95]

The disproportionate nature of the regime's duration is reinforced by the fact that such a lengthy period breaches other ancillary requirements set out by the principles governing states of emergency. For example, the *Siracusa Principles* state that the national government 'shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures'.[96] The prospect of the Government not having to show a demonstrated threat of terrorism for at least a further five years, despite the significant incursions into civil liberties, is of grave concern here. The lack of legislative review before 2010 may also contravene the Government's continuing obligation to 'provide careful justification, not only for their decision to proclaim a state of emergency, but also for any specific measures based on such a proclamation'.[97]

2 *Severity*

The preventative detention regime is undoubtedly severe in its application to individuals, providing for a means of detaining people without trial, possibly in prison or remand centres, and with very limited contact with the outside world. In these respects, it resembles the most severe form of punishment in the Australian penal system – imprisonment or incarceration. Arguably, such a rigorous method of dealing with those potentially associated with terrorist activities goes beyond what is required by the unspecific and admittedly moderate threat of terrorism in Australia. Commentators have

[95] Gilbert + Tobin Centre of Public Law, above n 34, 24.
[96] *Siracusa Principles*, above n 73, [55]. The *Paris Minimum Standards* confirm this approach , by requiring every extension of the initial period of emergency to be supported by a new declaration, and subject to the prior approval of the legislature: *Paris Minimum Standards*, above n 74, arts 3(c), 3(d).
[97] Human Rights Committee, *General Comment No 29: States of Emergency (Art 4)* UN Doc HRI/GEN/1/Rev.7 (31 August 1984) [4].

recognised this lack of proportionality in suggesting numerous ways in which the effects of the preventative detention regime could be lessened, including increasing the thresholds and procedural safeguards involved in applying for and making orders, providing judicial review to avoid unlawful detention and improving the conditions of detention and standards of treatment.[98]

Further evidence that the regime is disproportionately severe in its operation is provided by the fact that, in the opinion of many legal experts, the existing criminal law and accompanying powers of law enforcement and intelligence agencies are adequate to deal with the situation of terrorism.[99] For example, the Commonwealth Criminal Code already provides for a number of very broad offences involving conduct antecedent to a terrorist act, including doing 'any act in preparation for, or planning, a terrorist act'[100] or possessing things connected with terrorist acts.[101] The Code also criminalises a wide range of conduct involving connections to terrorist organisations, whether or not it is related to a specific terrorist attack.[102] Given the striking breadth of these provisions, it is difficult not to agree with commentators such as Emerton and Tham, who have argued that it is near impossible

> to envisage a situation in which the grounds for a preventative detention order would be satisfied, but there would not be a sufficient basis to arrest the person for an offence already established by the Criminal Code.[103]

Therefore, the system of preventative detention cannot be seen as proportionate to the threat of terrorism presently facing Australia, as neither the ten-year duration of the

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[98] See, eg, Lasry and Eastman, above n 27; Byrnes, Charlesworth and McKinnon, above n 7; *Senate Report*, above n 7.
[99] Byrnes, Charlesworth and McKinnon, above n 7, 4.
[100] *Criminal Code Act 1995* (Cth) s 101.6.
[101] *Criminal Code Act 1995* (Cth) s 101.4.
[102] *Criminal Code Act 1995* (Cth) ss 102.2-102.8 .
[103] Patrick Emerton and Joo-Cheong Tham, *Submission No 152 to the Senate Inquiry into Provisions of the Anti-terrorism Bill (No 2) 200* (2005), 24.

regime nor the severity of the detention itself are 'strictly required by the exigencies' of the current risk of terrorism.[104]

C *The Right to a Fair Trial: a Non-Derogable Right?*

A final issue to consider briefly is the special status of the right to a fair trial. Whilst this right is not expressly included as a non-derogable right in art 4(2) of the Covenant, or in the supplementary list of the HRC's General Comment on states of emergency, it appears to have nonetheless taken on a non-derogable character in the opinion of several UN bodies. For example, in its General Comment, the HRC stated that 'the principles of legality and the rule of law require that fundamental requirements of a fair trial must be respected during a state of emergency',[105] as the right to take proceedings before a court to decide on the lawfulness of detention is essential to protect other non-derogable rights.[106] It appears that by virtue of this ancillary role, the rights in art 14 assume a type of non-derogable status, in the opinion of the HRC. This is confirmed by the Secretary-General's *Report on Protecting Human Rights and Fundamental Freedoms while Countering Terrorism*,[107] which stated that:

> General Comment 29 is especially valuable because it outlines rights other than those explicitly listed in Art 4(2) that cannot be derogated from, including … deviating from fundamental principles of fair trial. Even in a state of emergency, the right to be tried by an independent and impartial tribunal should be upheld, as well as the right to be heard and to challenge the legality of one's detention; the right to a defence; and the presumption of innocence.[108]

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[104] This is supported by the fact that 15 out of 25 security experts interviewed by the Senate Committee, including former senior government advisors, regarded the *Anti-terrorism (No 2) Act 2005* (Cth) as disproportionate to the terrorist threat in Australia; *Senate Report*, above n 7, [2.12].
[105] Human Rights Committee, *General Comment No 29: States of Emergency (Art 4)* UN Doc HRI/GEN/1/Rev.7 (31 August 1984) [16].
[106] Ibid.
[107] Secretary-General, Protecting Human Rights and Fundamental Freedoms while Countering Terrorism: Report of the Secretary-General, UN Doc A/60/374 (22 September 2005).
[108] Ibid [14]. This approach is confirmed by the inclusion of the right to a fair trial in the *Paris Minimum Standards*' list of non-derogable rights and freedoms: *Paris Minimum Standards*, above n 74, art 7.

Therefore, the violations of the right to a fair trial constituted by Australia's preventative detention regime may be doubly inappropriate. Not only can such infringements not be justified under the derogation provisions of the Covenant (due to the absence of a state of emergency and a lack of proportionality), but they may also be unlawful per se, as contraventions of a non-derogable right.

F Conclusion

The introduction of a system of preventative detention, under Australia's recent counter-terrorism laws, raises significant problems in terms of Australia's obligations under the *ICCPR*. Specifically, the substantive rights to liberty, to a fair trial and to freedom of expression are contravened by numerous aspects of the preventative detention regime. These aspects include inadequate procedural safeguards and thresholds in the decision-making process, a lack of judicial review and the highly restrictive conditions of the detention itself. Although the Australian government has not yet sought to justify these incursions into civil liberties under the Covenant, it is likely that the only basis on which it could do so is the public emergency derogation contained in art 4. However, in the case of Australia's preventative detention regime, neither of the two most significant requirements of this derogation provision is satisfied. Firstly, the current threat of transnational terrorism to Australia does not meet the criteria for a state of public emergency, given its unspecific and moderate nature, and the fact that the threat is not directed towards the State itself, but towards individual citizens. Further, Australia's system of preventative detention does not fulfil the test of proportionality to the threat faced, in light of the regime's ten-year sunset clause and the severity of the nature of detention. Therefore, as substantive obligations under the Covenant have been breached and no relevant derogation applies, the Australian government will be unable to justify the preventative detention system under the *ICCPR*. The inconsistency of Australia's anti-terrorism measures with its international human rights obligations should be a matter of grave concern to the Government, which could profit from the ominous wisdom of Benjamin Franklin, in

warning that ‘any society that would give up a little liberty to gain a little security will deserve neither and lose both’.[109]

[109] Benjamin Franklin, *Historical Review of Pennsylvania* (1759).

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