

Counter-terrorism and the Detention of Suspected Terrorists

Preventive Detention and
International Human Rights Law

Claire Macken



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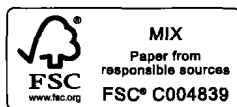
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Preface

For many years, one of the only times I could find to study was the early, quiet and small hours of the morning. On 12 September 2001, I tip-toed through to my study to avoid waking my 11-month-old son to continue studying for my Honours in Law, in Melbourne, Australia. The quiet of the morning was shattered. A news headline referring to a terrorist attack. The horrible image of a single smoking stack of the World Trade Center. The events of 11 September 2001 reverberated around the world, right to my study in Australia, and in the following year, now as a Masters student in Law and expecting my second son, my legal curiosity started to ask some interesting questions.

Of these questions, one of the most interesting initial issues was the categorisation of the persons detained in Guantanamo Bay. Were these detainees prisoners of war? Were they detained as part of the criminal law process? This topic became a lengthy research paper as part of my Masters of Law. As I searched further into the topic, I found Hatchard and Harding's 1993 book, *Preventive Detention and Security Law: A Comparative Survey*, and started to think of Guantanamo Bay detention as a form of executive detention, without criminal charge or trial, for the purposes of maintaining public order and historically used in some countries as a counter-terrorism response.

As I went further into the issue, and now expecting my third child, a daughter, I embarked on the broader topic of 'Preventive Detention in International Law'. At the time there was hardly any literature on preventive detention, and even then, such a variety of terms to describe the practice that research was long and frustrating. I spent hours in the United Nations library in Sydney researching the Special Rapporteur Louis Joinet's early work on administrative detention, reading 1970s texts on terrorism in Northern Ireland and reading judgements of the European Court of Human Rights.

The absence of State law provisions on preventive detention led to international law as the legal framework as the PhD methodology, with Article 9 of the International Covenant on Civil and Political Rights (and the related regional covenants), protecting against arbitrary arrest and detention

providing the only real guidance on whether preventive detention was a permissible deprivation of liberty.

Over time, other researchers starting publishing on the topic, initially this was particularly limited to international humanitarian law given the military action of the United States in Iraq and Afghanistan. Most of the research on preventive detention related to Article 15 of the European Convention on Human Rights Law and the declaration of a state of emergency pursuant to this Article. Over time I agreed with the views of several scholars that a state of emergency should not be declared for the purpose of introducing preventive detention as a counter-terrorism response because of the risk of having a permanent derogation from human rights, an issue explored in Chapter 3 of this monograph.

On 7 July 2005, I was in the midst of this study and heard the news of a double-decker bus exploding in Tavistock Square, London and three other bombs detonated within 50 seconds of each other on the London underground. Reeling from the shock of these terrorist attacks, Australia followed other States and introduced preventive detention laws.

From opinion pieces in the *ABC News* and interviews with the *BBC*, I embarked on running several professional development seminars for Victorian lawyers alongside a Barrister and a Solicitor who represented some of the most prominent Australian 'terrorist' suspects including Jack Thomas, a Guantanamo Bay detainee, allowing a unique insight into the topic from a defence point-of-view. In 2006, I wrote various submissions on behalf of the Law Institute of Victoria, as to Australia's intelligence detention under amendments to the Australian Security Intelligence Organisation Act 1979 (Cth) and in July 2006 appeared before an Australian Parliament Joint Committee on the questioning and detention powers in this Act. My submissions particularly related to the topic of judicial review of detention which have largely shaped the discussion in Chapters 4 and 5 of this monograph.

In 2007, I went to a counter-terrorism conference at the Gilbert + Tobin Centre for Public Law at University of NSW. After an emphatic defence of preventative detention by the Australian Attorney-General, and the debate that ensued with the audience thereafter, I turned to the person next to me and had a discussion about the issue. It turned out that the person next to me had played a role in the drafting process of Australia's preventative detention laws and in discussion, proceeded to challenge each of my PhD conclusions with intelligence, force and clarity.

Between 2007 and 2010, research and writing on counter-terrorism and the topic of preventive detention had become more prolific. By now, preventive detention laws, across countries, could be broadly categorised as detention, by executive order, and for a preventative purpose of preventing an imminent terrorist act, rather than for the purpose of criminal charge or prosecution. Preventive detention could allow intelligence and law enforcement agencies to detain for purposes other than criminal prosecution to give more time for investigation and intervention. The debate became polarised into the

imperative of preventing the next terrorist act, but the importance of protecting individual human rights. Preventive detention is a topic that crosses State boundaries, and is a topic unified by the protection for personal liberty and the principle of proportionality embodied in international human rights law, the framework for this monograph.

Acknowledgements

In many ways, writing this monograph, and the PhD thesis upon which it was based, could be seen as a lonely pursuit. Indeed, most of these words were written in the countless and early solitary hours of the morning when the house was still and my family asleep. A writer is, however, never truly alone. On reflection, the past seven years writing on this topic has been a constant conversation – with my family, friends, supervisors, colleagues and you, the reader, for whom this is written. These discussions have occurred both in formal settings (at conferences, seminars, lectures and in journal and media articles) and also in informal settings (in a taxi, on a plane or over dinner). Little by little, like a piece in a puzzle, each of these conversations has played a part in this monograph and I thank all those who participated over the past few years.

This monograph would never have been started, let alone finished, without the patience, love, support, proof-reading, child-minding duties and tolerance of my wonderful husband, Dominic Macken. I also thank our three beautiful, smart, creative and fun-loving children, Finn (aged 9), Joshua (aged 8) and Tessa (aged 7). Indeed, when I started writing on this topic, I was expecting Tessa, Josh was just 1 year old, and Finn was aged 2. For the many absent hours, interstate and overseas trips, distractions and reading journal articles as bedtime stories over the past many years, thank you Finn, Josh and Tess (lots!). For their assistance in all ways with love and thanks to my mother Colleen Gilmour and parents-in-law, Tony and Ro Macken.

From my Law School, I acknowledge and thank the Head of the School of Law, Professor Anne Rees, and the Associate Head of School (Research), Dr John Morss, and to my close colleagues who have provided support, encouragement and discussion. Thank you also to the many others who have played a part in shaping this monograph in providing reviews on journal articles and conference papers behind this monograph, the comments of which were valuable for shaping this work.

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