Singapore Journal of Legal Studies
[2002] 30 - 55

TERRORISM AND THE CRIMINAL LAW: SINGAPORE'S SOLUTION

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Singapore's legal system has always made provision for dealing with terrorism directed at Singapore – this is its historical heritage. The centre-piece is the Internal Security Act which confers the power of indefinite detention without trial. Singapore was traditionally indifferent towards terrorism targeted outside of Singapore. This stemmed from the principle of territoriality. Things changed with the enactment of the United Nations (Anti-Terrorism) Regulations 2001 – a legislation which creates extra-territorial crimes for the funding and assisting of terrorist activities outside of Singapore. This discussion considers and compares both the old and the new.

I. TERRORISM AND THE LAW IN SINGAPORE

Many will not remember the arrest and detention of the alleged "Marxist Conspirators" associated with the Catholic Church in the late 1980s.[1] Those who do will recall the groundswell of protest, both domestic and international, against the use of the "draconian" or "tyrannical" device of indefinite detention without trial under the (then infamous) Internal Security Act.[2] Few, if any, have forgotten the shattering events of September 11 in New York, and in Singapore, the arrest and detention some 3 months after of members of the Jemaah Islamiyah, an alleged Islamic terrorist group.[3] The same device of detention without trial was used, but the response, both inside and outside Singapore, was dramatically different – the Singaporean public heaved a sigh of relief,[4] the United States sent congratulatory

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1 The debates in Parliament give most of the significant details and make fascinating reading, as far as Parliamentary proceedings go: *eg* Vol 49 Singapore Parliamentary Debates, 29 July 1987, cols 1431-1514.

2 Cap 143, Singapore Statutes, 1985 Rev Ed.

3 Singapore Government Press Releases, Ministry of Information, Communications and the Arts, 5 Jan 2002, 24 Jan 2002, 26 Jan 2002: http://www.gov.sg/singov/news&pr.htm.

4 See *eg*, a survey conducted by the local daily, Straits Times, reported in: http://app.internet.gov.sg/data/mcds/mcdsfeedback/media/media100.htm.

messages[5] and the usual human-rights related gadflies were strangely silent.[6] Has the rest of the world come to appreciate Singapore's position?

Singapore's birth as an independent nation was attended to by two feuding mid-wives locked in mortal combat – the party which eventually won (and which rules the country to date) and the faction that lost – considered by the victors as "communist terrorists".[7] The fight was bitter and long-drawn with the communist terrorists resorting at some stage to organised violence against the government of the day. Legislation departing from the norms of a liberal democracy was passed by the British colonial government to deal with this.[8] This set of terrorist-inspired legislation was carried over into independent Singapore, enshrined by special provision in the Constitution.[9] There they have remained. Terrorism has never been far from the Singaporean psyche and its laws bear testimony to that.

While the rest of the liberal democratic world scrambled to enact massive terrorism legislation in the aftermath of September 11,[10] Singapore had only to perform a relatively minor tweaking of its laws, primarily through the enactment of the United Nations (Anti-Terrorism Measures) Regulations 2001.[11] It is nonetheless sufficiently unusual to deserve a degree of attention. The ensuing discussion has two focal points – the new terrorism regulations of 2001, and the historical and existing legislation on detention without trial. The object is two-fold. The Regulations of 2001 are fresh from the mint – the burden is to try to anticipate the kind of problems that are likely to accompany any attempt to put them into practice. The Internal Security Act is a mature piece of legislation which is likely to be here to stay. The theoretical assumption is that there are circumstances which might conceivably justify the use of detention without trial – the

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5 See, *eg*, the response of United States Defense Secretary, Donald Rumsfeld, reported in: http://www.emergency.com/2002/Singapore_terror02.htm.

6 A search of the Amnesty International website (http://www.amnesty.org/) reveals no entry for this round of detentions.

7 There are many accounts, most notably, that of Singapore's Senior Minister, Lee Kuan Yew in *The Singapore Story: Memoirs of Lee Kuan Yew*, 1998, Singapore Press Holdings Times Editions. The Senior Minister led the ruling People's Action Party at the birth of the Republic and for many years thereafter.

8 The Internal Security Act was originally a piece of Malayan legislation. It was extended to Singapore, when it joined the Federation of Malaysia in 1963. It was continued in force in Singapore when the island was ousted from the Federation to become an independent republic. These momentous constitutional changes were apparently part of an elaborate strategy to deal with the communist threat: predominantly Chinese Singapore needed the Malay population of Malaya (who were largely unsympathetic to the communist cause). With the addition of Singapore, Malaya needed the Malay and indigenous peoples of Sabah and Sarawak to counterbalance the addition of Chinese people into Malaya. Hence the birth of Malaysia, comprised of Malaya, Singapore, Sabah and Sarawak.

9 Art 149, Constitution of the Republic of Singapore, 1999 Rev Ed.

10 As the other articles in this volume will no doubt illustrate.

11 S561/2001, which came into force on 13 Nov 2001. An amendment was made on 12 Mar 2002 (S118/2002) to reflect Security Council Resolution 1390 (2002) concerning the prohibition of arms sales and technical assistance thereof.

project here to try to explore the kinds of real life situations which might be thought to justify its use, drawing upon Singapore's extensive experience with such a measure.

II. The United Nations (Anti-Terrorism Measures) Regulations 2001

A. *Constitutional Law Concerns: Excessive Delegation?*

What is immediately striking about the Regulations is that it is subsidiary or delegated legislation. Although the creation of criminal offences in subsidiary legislation is in itself certainly not unprecedented, the breadth of the power to do so under the parent United Nations Act 2001 probably is.[12] The only pre-condition is the existence of a Security Council resolution calling upon governments to give effect to measures (not amounting to the use of armed force) under Article 41 of the United Nations Charter. The Minister then has a discretion to make regulations "as appear to him to be necessary or expedient for enabling those measures to be effectively applied".[13] The power to create criminal offences is explicitly provided for, as is the punishment thereof, which though not of the most significant order by Singapore standards, is not inconsequential.[14] Two issues arise from this. First, has the Legislature by delegating such a wide discretion exceeded its constitutional powers to delegate legislative decision-making to the Executive?[15] That the Legislature has the competence to delegate some of its legislative power is not in doubt, notwithstanding the rather exclusive wording of provision vesting legislative authority in the Legislature.[16]

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[12] Act 44 of 2001, Singapore Acts Supplement. See the debate in Parliament when the Bill was discussed: Vol 73 Parliamentary Debates, 15 Oct 2001, cols 2436-2448. More typical of the power to create offences in subsidiary legislation is found in, *eg*, the Environmental Public Health Act, Cap 95, 1999 Rev Ed, Singapore Statutes. S 113 confers discretion on the Minister to create offences "necessary for carrying out" the purposes of the Act, which are quite specific. Such offences are punishable only by fine to the maximum of S$10 000 plus S$500 per day for continuing offences.

[13] *Ibid*, s 2.

[14] A maximum of S$100 000 or 5 years imprisonment, or both. Compare this with the punishment for trafficking in cannabis in the Misuse of Drugs Act, Cap 185, 1998 Rev Ed, Singapore Statutes, Second Schedule: more than 500 gm gets death; 330 to 500 gm gets between 30 years imprisonment plus 15 strokes of the cane, and 20 years plus 15 strokes; less than 330 gm gets between 20 years plus 15 strokes, and 5 years plus 5 strokes. Also, the "default" power to create criminal liability allows the Minister to prescribe no more punishment than S$2000 or 12 months imprisonment: s 20(a)(1), Interpretation Act, Cap 1, 1999 Rev Ed, Singapore Statutes.

[15] The point has never arisen in the courts. It is, nonetheless, fairly clear that some constitutional limit must surely flow from the vesting of "executive authority" in the Cabinet (art 23), and the conferment of "legislative power" in Parliament (art 38). The office of the President straddles both the executive and legislative, but, with a few significant exceptions, he must act on the advice of the Cabinet (art 21).

[16] Art 38, Constitution of the Republic of Singapore, 1999 Rev Ed.

Neither is the proposition that there must be some limit to the power to delegate. Exactly where the line between permissible and impermissible delegation is drawn is the crux of the issue, but here we are in virgin territory.[17] I can do no more than to sketch the contours of the potential debate. It must tell against the delegation in question that the particular legislative power has to do with the *creation* of offences of a not insignificant order. Save for the most technical of offences of the lowest rank, the idea that the Legislature creates crimes, the Executive prosecutes,[18] and the Judiciary applies the law to individuals is a strongly-entrenched one.[19] The classic rationale is the institutionalisation of a separation of powers which in turn guards against abuse by any one of these arms of government. Exceptions are made to this order of things, and the Executive given the power to create offences only in confined circumstances where the subject matter and legislative policy is clearly defined. The United Nations Act 2001, however, does not seem to fit this description – the only limiting factor is existence of a Security Council resolution requesting nations to act in a certain way – what is essentially a procedural rather than substantive limitation.

On the other hand, there are other factors that could speak in favour of the delegation. There is after all an express requirement that all subsidiary legislation be "presented to Parliament as soon as possible" – so there is an avenue for Parliamentary scrutiny.[20] This, however, mitigates rather than justifies the delegation, for surely a similar device cannot be allowed to immunise a general delegation of all legislative powers – such powers do exist under the Emergency provisions of the Constitution, but that is quite another story.[21] Then, there is the argument that the delegation is to the extent that it allows the Executive to enact only what is required by international law – surely, it may be said, the Executive ought to have that power, in the first instance at least. Unfortunately, this runs against traditional distribution of responsibilities which is probably embodied in the Constitution.[22] The Executive conducts foreign policy, which includes the undertaking of treaty obligations, but it is the Legislature that must enact it into domestic law. Indeed, as far as international law obligations are concerned, Singapore has hitherto normally followed this traditional way of doing things. Why then was it felt that this was unsuitable here? The Minister sponsoring the Bill in Parliament explained that the delegation was

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17 At least in Singapore.

18 Prosecutorial authority rests with the Attorney-General (art 35(8)). The Attorney-General is formally part of the Executive, but there are provisions, especially those on security of tenure (art 35(6)), which appear to confer a degree of independence from the Cabinet. The nature of this independence has never been publicly explored.

19 The role of the Judiciary flows from the vesting of "judicial power" in the Courts (art 93).

20 S 2(4), United Nations Act 2001.

21 Art 150, which requires a proclamation of emergency upon the existence of "a grave emergency" whereby the security or economic life of Singapore is threatened.

22 Again, this point has never been tested.

the only way to ensure that the relevant Security Council resolutions are given effect to "effectively and promptly".[23] In other words, Parliament will not able to move fast enough. This justification wears a little thin in the context of the Legislature of Singapore which, to its credit, has demonstrated the ability to move at an incredible speed. Perhaps it boils down to expedience – it simply is not worth the cost of getting Parliament to sit specially (if it is not already in session) to enact Security Council resolutions. After all, the "Westminster model"[24] separation of powers, which appears to be the model Singapore adheres to, envisages a much smaller degree of separation between the Executive and the Legislature –[25] Parliament is most unlikely to vote down a Bill sponsored by the Executive (and indeed in its history has never done so).[26] This last argument is a dangerous one which, if carried only a little further, renders the existence of the Legislature itself redundant. In sum, the reasons for such a massive delegation of legislative powers to create criminal offences in the United Nations Act are problematic – whether or not they are enough to amount to unconstitutionality remains to be seen.

B. *Administrative Law Problems:* Ultra Vires?

We move from a constitutional problem to one in administrative law. The delegated legislative power conferred on the Minister is specifically tied to the enabling of Security Council Resolutions. The United Nations (Anti-Terrorism Measures) Regulations 2001 expressly profess to "assist in giving effect to Resolution 1373 (2001) of the Security Council".[27] The problem is with provisions in the Regulations which are not clearly sanctioned by that Resolution. The broad wording of parts of the Resolution have the potential to authorise some of these provisions. For example, Rule 10 creates a duty in criminal law to provide information concerning transactions involving property belonging to terrorists or terrorist organisations. Although nowhere in Resolution 1373 is such a duty mentioned, it could conceivably find a

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23 Vol 73, Parliamentary Debates, 15 Oct 2001, cols 2436-2448.

24 This phrase entered the constitutional lexicon of Singapore through *Ong Ah Chuan v PP* [1980-1] SLR 48 where Lord Diplock used it to describe constitutional arrangements of the newly independent Commonwealth countries modelled after the way the English governed themselves.

25 As would exist in, *eg*, the United States where it is quite possible that Congress or one of its houses is not controlled by the party to which the President belongs.

26 By art 25, the Prime Minister (the *de facto* head of the Executive, subject to a few significant exceptions where the President has personal discretion) "commands the confidence of the majority of the Members of Parliament". In practice, a "party whip" system is in place where Members must vote according to party sentiments or risk expulsion from the party, which also triggers loss of the Parliamentary seat (art 46(2)(b)).

27 Since the writing of this article, the Regulations have been amended to include a reference to Resolution 1390 (2002), a resolution concerning, *inter alia*, arms dealing and technical assistance: United Nations (Anti-Terrorism Measures) (Amendment) Regulations 2002, S 118/2002.

home in para 2(b) which says that "all States shall take necessary steps to prevent the commission of terrorist acts". The duty to report does, conceivably, play a role in the prevention of terrorist acts through the disruption of the business transactions of terrorist organisations. More difficult is the complete absence in Resolution 1373 of any definition of terrorism. The Regulations, on the other hand, contain a very detailed definition. In essence, it is action which involves serious injury or damage (the *actus reus* limb) done with the intention of influencing a Government or of intimidating the public (the *mens rea* limb).[28] There is probably no dispute that Resolution 1373 contemplates "serious" violence, damage or risk to public health and safety, or the release of harmful substances and organisms into the environment. But some other alternative limbs are potentially problematic. First is the inclusion of activity which "endangers a person's life". There is no criterion of seriousness here which is normally thought to mark out terrorism from ordinary crime. The life of just one person will do. Another limb with a similar problem is that which catches action which "involves prejudice to public security or national defence". Secondly, the "cyber-terrorism" limb which encompasses activity "designed to disrupt any public computer system" strays even further from what is normally thought of as terrorism. Sure enough, the disruption of computer systems might in some contexts involve serious injury or damage, but that is already covered by the other limbs. Moving to the "*mens rea* limb", other problems arise. First, the intention to "intimidate the public or a *section* of the public" is potentially very broad – presumably small groups of persons will suffice. Secondly, the Regulations boldly go where even the Security Council has feared to tread – the intention to influence the "Government (of Singapore) or any other government". This sweeps all activity intended to undermine all governments (whatever they might be doing) around the world into the arms of terrorism – something which the international community and the Security Council has not been willing to do.[29] Finally, the definition leaves out internal terrorism committed by governments, and has, instead, the surprising effect of making terrorists out of groups or movements fighting against governments engaged in terrorist activities.[30] Did the Minister have the power to do all this? The conferment of the discretion under the United Nations Act 2001 to "make all such regulations as appear to him to be necessary or expedient for enabling [Security Council] measures to be effectively applied" does give the Minister some leeway. It is standard administrative law that the judiciary is not to usurp

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[28] Rule 4.

[29] Presumably the more violent activities of the African National Congress in apartheid South Africa (or of the East Timorese independence fighters) would have been "terrorist" by this definition, and any funding or assistance thereof would have been criminal.

[30] In Taliban controlled Afghanistan, for example, if we assume that the Taliban government was engaged in internal terrorism, it is not the Taliban, but those who fought against them within Afghanistan who will be "terrorists" under the Regulations.

the Ministers discretion, and decide for itself whether the regulations are in fact necessary or expedient. But that latitude is not unlimited for the Minister cannot exercise that discretion unreasonably – that is, in a manner which no reasonable Minister will.[31] The outcome of any judicial review of Executive discretion is notoriously difficult to predict.[32] The reviewing court might hold that the Minister is empowered to do not only that which is necessary, but also that which is *expedient* – and this would enable the Minister to go a little beyond what was in the contemplation of the Security Council. Again, it might be held that where the Security Council has left terrorism undefined, it was reasonable for the Minister to fill in the gap.[33] On the other hand, the court might decide that the essence of terrorism is serious damage or injury (or the risk thereof) and any part of the definition which goes beyond this is ultra vires. Similarly, the court might also decide that the Security Council, by virtue of its commitment to self-determination or anti-discrimination, could not have meant to include action intending to overthrow a colonial government, or a government which practices active racial apartheid – and the definition must be limited accordingly. Notwithstanding the vagaries of judicial review, there is one part of the Regulations which is quite suspect – this is Rule 8 which criminalizes *false* threats of terrorist acts. It is, in essence, a crime under this Rule to intentionally induce a false belief that terrorist acts are going to be committed. Nothing in Resolution 1373 or 1390 enjoins states to deal with false threats. True it is that we might want to criminalize it because of the public alarm that it causes, but that cannot by any stretch of imagination be under the aegis of a power given to put into effect to Resolutions 1373 and 1390.

C. *Criminal Law Concerns 1:* Mens Rea

The discussion about the precise breadth of the Minister's discretion to make criminal regulations shades into the classic criminal law concern with mens rea or the mental element of the crimes created by the Regulations. The three primary crimes are the provision or collection of funds for terrorism (Rule 5), dealing with property belonging to terrorists or terrorist organisations (Rule 6), and the provision of resources and services for the benefit of terrorists or terrorist organisations (Rule 7). By a recent amendment, a fourth set of crimes concerning military aid was added – sale

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31 This is standard English administrative law and was adopted for Singapore in *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132, Court of Appeal.

32 This is true not only of Singapore.

33 The issue was raised in Parliament, *supra* note 23, when the United Nations Bill 2001 was passed. The Minister admitted that the definition of terrorism was "one of the most difficult issues", but said that the lack of "agreement" or "clarity" should not prevent collective action against terrorism.

and supply (Rule 7A), carriage (Rule 7B) and technical advice (Rule 7C).[34] Given that the formidable problems with defining terrorism are somehow surmounted, and that the potential accused has done one of these things, how much must he or she know to be guilty? Rule 5 (provision and collection of funds) says that he or she must know *or* "*have reasonable grounds to believe* that the funds *will be used*" for terrorist activity. The first thing to note is that what is required is knowledge that the funds "will be used" for terrorist activity. This is strong wording as it does not appear to leave any room for lesser mens rea like knowledge of a significant possibility or even a probability that the funds will end up in terrorist hands. Recklessness is not envisaged. On the other hand the alternative "reasonable grounds to believe" has the potential to broaden liability, perhaps beyond the injunction of Resolution 1373. That Resolution provides for "intention that the funds should be used, or … knowledge that they are to be used [for terrorist acts]". Rule 5 does not bother with intention, mentions knowledge and then provides for the alternative mens rea of "reasonable grounds to believe"- which presumably means mere negligence.[35] It does not matter that the accused did not actually know – so long as the circumstances are such that he or she ought to have known. It remains to be seen whether a reviewing court will hold that, notwithstanding the requirement of knowledge in Resolution 1373, the Minister is empowered to provide for negligence liability as well (perhaps on the ground that it is "expedient" to do so), or whether the court will strike down the attempt to impose negligence liability on grounds of inconsistency with the Resolution, and therefore with the United Nations Act. Suffice it to say that the maximum penalty of 5 years imprisonment and/or $100 000 fine does seem rather severe for an offence of negligence.[36] Curiously, Rule 6 (dealing with terrorist property), Rule 7 (provision of resources and services to terrorists), and Rule 7A (supply or carriage of arms and provision of military advice) contain no mens rea words at all. The question is whether the court will read mens rea into these offences. This throws us into the cauldron of strict liability discourse in Singapore, which has yet to yield an answer with any predictive value.[37] The possible final result ranges from giving effect to a presumption of mens rea, thus requiring knowledge that the accused is dealing with a terrorist or that terrorists will eventual beneficiaries; to a deployment of the defence of reasonable mistake under section 79 of the

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[34] United Nations (Anti-Terrorism) (Amendment) Regulations 2002, S118/2002.

[35] It is not easy to guess what else it could mean, without complete redundancy with the actual knowledge limb.

[36] In comparison, negligent homicide under s 304A, Penal Code, Cap 224, 1985 Rev Ed, Singapore Statutes, is punishable only with a maximum of 2 years imprisonment (or fine or both), while murder is punishable with death.

[37] Chan Wing Cheong, "Requirement of Fault in Strict Liability" (1999) 11 SingAcLJ 98; Michael Hor, "Strict Liability in Criminal Law – A Re-examination" [1996] Sing JLS 312; Sornarajah, "Defences to Strict Liability Offences in Singapore and Malaysia (1985) 27 MalLR 1.

Penal Code; to a position of strict liability, where no knowledge (actual or constructive) is required at all. One cannot tell whether the courts will read Rules 6, 7, and 7A in such a way as to import the mens rea requirements of Rule 5, or if the courts will say that the omission of mens rea words from Rules 6, 7, and 7A is intended by the Minister. A word of caution to those who favour strict liability – if it is thought that negligence liability is problematic in view of the clear preference of Resolution 1373 for knowledge, strict liability stands an even greater chance of being ruled ultra vires.[38]

D. *Criminal Law Concerns 2:* Actus Reus

On the actus reus front, we have come across the difficulties attending the definition of "terrorist". Some things are clear – attempters and abettors are included,[39] and so are the list of specified terrorists in the Schedule.[40] Messy line-drawing exercises are inevitable – how is "serious" violence, damage or risk to be distinguished from those which are not serious enough? The court will also have to deal with the possibility of implying a "seriousness" requirement into limbs which do not have an express requirement of intensity, the alternative being to read them literally and risk straying far from the core terrorist activities. More significantly, the court must face that apparently paradoxical animal which has bedeviled international efforts to define terrorism[41] – the "legitimate" or "justified" terrorist who resorts to terrorist acts to combat a fundamentally unjust government. The court will of course hope that the Public Prosecutor will be helpful enough not to prosecute people who assist such "technical" terrorists. Two possibilities

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[38] The new Rule 7A (supply, carriage of arms and provision of military advice) presents a different problem. Rule 7A is clearly intended to give effect to Resolution 1390(2002). Unlike Resolution 1373(2001), Resolution 1390(2002) does not contain any mens rea indication (para 2(c)). This is probably because Resolution 1390 was not explicitly call upon States to *criminalize* the listed activity – it merely enjoins them to "prevent" such activity. The underlying assumption might well have been that if States choose to criminalize them, then appropriate mens rea words would have to be added. This, the Minister did not do, and if indeed the court finds that the Minister attempted to create strict liability offences through Regulation 7A, the question of whether it is ultra vires is not as clear as it is for offences inspired by Resolution 1373(2001).

[39] Rule 4.

[40] *Ibid.* The list has been amended (S118/2002).

[41] The problem of defining terrorism appears to have become one of the principal sticking points in the enactment of terrorist legislation in Indonesia: Devi Asmarani, "Muslims Oppose Jakarta anti-terror Bill", *Straits Times*, 11 May 2002. Yet, it has been reported that ASEAN (Association of South-East Asian Nations) Ministers do not think that the absence of a consensus on the meaning of terrorism will be a problem in cooperative efforts to fight against it: "Defining Terrorism is Not Crucial, Fighting it is", *Straits Times*, 21 May 2002. ASEAN did not even try, the Organisation of Islamic Conference (OIC) tried and failed a month before: Kuala Lumpur Declaration of International Terrorism, 3 Apr 2002, Bernama, http://www3.bernama.com/cgi-bin/oicapril/oicindex1.cgi?centre2&oi0304_7. htm. How we are to "fight against" something we cannot agree on is a bit of a mystery.

are open – read the definition literally and trust that the Public Prosecutor has taken it into account, or embark on a rather tricky analysis of how the defence of necessity (or the lesser of two evils)[42] or private defence[43] under the Penal Code might justify people who assist or supply "legitimate terrorists".

The thrust of the principal offences are clear – cut off aid or support for terrorists. But what does that mean exactly? Under Rule 5, funds must be intended to be "*used to commit* any terrorist act". How close must the link between the funds and the terrorist act be? One can think of borderline situations where funds are used not for the terrorist act itself, but for basic food and medicines, perhaps out of a humanitarian motive. What is clear is that there needs to be some sort of link. Rule 7, however, says that resources and services need only be "for the *benefit* of any terrorist". The link appears to be to the terrorist and not necessarily the terrorist activity. Does this really mean that once someone is labelled a terrorist – anything you do for his or her benefit will suffice? If so, does Rule 7 not cover all situations encompassed by Rule 5, and more – funds used to commit terrorist acts must surely be to the benefit of the terrorist. The alternative is to read Rule 7 in the spirit of Rule 5 to require a closer link between the aid and the terrorist activity. Similar problems attend the new Rule 7A. The explicit use of the phrase "direct or *indirect*" (supply, carriage or advice) is only mildly helpful.[44] The nature of the arms industry is such that the supplier of arms or of technical advice can never be sure what the ultimate destination of his wares will be. Presumably suppliers sell to middlemen who do the distribution. It is quite conceivable that every such transaction will carry with it the knowledge of a significant possibility that the arms or the advice will end up in terrorist hands. It is not at all clear how far the net of liability for "indirect" supply will be cast.[45] Difficulties also attend Rule 6 which requires the court to decide what these concepts mean: property owned or controlled "*on behalf of*" a terrorist; an entity "*controlled*" by a terrorist; funds "*derived or generated from*" property owned by a terrorist. Serious line-drawing problems abound and perhaps demands much more detailed

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42 S 81, Penal Code, justifies (or excuses) something done "for the purpose of preventing or avoiding other (greater) harm to property or person". As with all necessity arguments, the problem is with showing a particular "*imminent*" harm to be avoided.

43 S 97, Penal Code clearly extends the right of private defence to the defence of other persons and their property. Again the problem is how far the courts are willing to go in finding "reasonable apprehension of danger": s 102 (defence of persons) and s 105 (defence of property).

44 The "directly or indirectly" formulation appears also for Rule 6, but not for Rule 5 or Rule 7.

45 The apparently "sloppy" wording in Resolution 1390(2002) is again explicable in that it was not meant to be directly transposed into criminal offences. This nuance seems to have escaped the attention of the draftsman of Rule 7A.

treatment from one more skilled in property and corporate law.[46] Questions of degree of control and derivation cannot be avoided.

E. *Criminal Law Concerns 3: Extraterritoriality, Complicity and Punishment*

In fact, legislation prohibiting the giving of aid to terrorists in the domestic context has been in force for a long time – an example is the provision in the Criminal Law (Temporary Provisions) Act.[47] The presupposition under older laws like this is that both the person assisting and the terrorists are in Singapore, and the terrorists are trying to influence the Government of Singapore or trying to intimidate the Singaporean public. The new Regulations are different, and according to the sponsoring Minister, was meant to be.[48] We have seen that it encompasses any target government and public – thus, anyone in Singapore who provides for or deals with a terrorist completely unconcerned with Singapore is nevertheless caught. In addition, any citizen of Singapore outside of Singapore who aids someone terrorising any government, foreign or otherwise, is also in breach of the Regulations. The idea of Singapore penal laws encompassing criminal activity targeted at a foreign state is not new – section 108A of the Penal Code expressly prohibits abetment of any offence committed (or intended to be committed) outside of Singapore. The abetment, however, must be committed in Singapore.[49] The Regulations go one step beyond and criminalizes terrorist assistance or dealing by a Singapore citizen outside of Singapore. It will be remembered that the target of the terrorist need not be Singapore. A very similar situation pertains to offences under the Prevention of Corruption Act – a Singapore citizen committing acts of corruption outside of Singapore with respect to matters which need have nothing to do with Singapore is expressly prohibited.[50] There is no doubt that such legislation is not unconstitutional – the Court of Appeal has so declared.[51] What remains to be said is that as Singapore criminal law expands beyond the territoriality principle, the question arises as to whether a Singapore court can

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[46] See, in this volume, Tham Chee Ho, "Terrorist Property Rights in Singapore: What's Left After The United Nations Act 2001? " [2002] SingJLS 176.

[47] S 3, Cap 67, 2000 Rev Ed, Singapore Statutes. Age has not been able to wither this nominally "temporary" legislation which has been in force longer than the existence of independent Singapore.

[48] *Supra*, note 23.

[49] Paradoxically, the Penal Code does not cover the abetment, outside of Singapore, of a crime intended to be committed in Singapore. See C L Lim, "Singapore Crimes Abroad" [2001] SingJLS 494. But it appears that several moves in the jurisdiction game can be made to bring the offender within jurisdiction.

[50] S 37, Cap 241, 1993 Rev Ed.

[51] *PP v Taw Cheng Kong* [1998] 2 SingLR 410. The Court of Appeal reversed a decision of the High Court [1998] 1 SLR 943 to hold that the provision did not violate the equal protection clause (art 12) of the Constitution.

meaningfully and fairly try an offence which has nothing to do with Singapore, except that the accused is a Singaporean. The essential prosecutorial tasks of investigation, interrogation and evidence gathering are that much more complicated. More importantly, the resources available to the accused to gather evidence or witnesses for the defence, already rather meagre for domestic crimes, can be expected to be diminished even further. One hopes that the prosecutorial and judicial authorities will be sufficiently aware of the dangers of extra-territorial prosecutions.

There is one other feature of note, and this is the multiplicity of complicity provisions which potentially apply to the primary offences under the Regulations. Rule 9 describes it as "knowingly … assists or promotes". Section 5 of the parent United Nations Act defines it as "counsels, procures, aids, abets, or incites … or conspires". Add to that section 107 of the Penal Code which provides for instigation, conspiracy and intentional aiding (all of which constitute abetment). There are differences in punishment – the United Nations Act, like most other modern statutes provide for the same punishment for complicity as for the primary offence,[52] while the Penal Code is more nuanced, offering a discount where the act abetted is not done.[53] The important question is whether all these words mean anything different. Is counselling and inciting in the United Nations Act any different from knowingly promoting under the Regulations, or instigation under the Penal Code? Is intentional aiding under the Penal Code the same as knowing assistance under the Regulations, or aiding and abetting under the United Nations Act? How is conspiracy under the United Nations Act different from conspiracy under the Penal Code?[54] Does procurement under the United Nations Act add anything to the concept of abetment under the Penal Code. This untidiness is annoying and it is a little disappointing that the recent legislation does nothing to settle the most important debate in the law of complicity – the extent of *mens rea* required.[55] As for inchoate liability, the United Nations Act, like some other more recent pieces of legislation, continues to show dissatisfaction with the reach of the law of attempt by creating liability for doing "any act with intent to commit" an offence.[56] It appears that the lawmakers no longer think that a would-be

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52 *Eg*, s 12, Misuse of Drugs Act, Cap 185, 1998 Rev Ed.

53 Sections 109, 115.

54 Which, incidentally contains two versions of conspiracy: s 107(b) and s 120A with some not inconsequential differences.

55 There is a perplexing decision of the Court of Appeal which seems to require a "*dominant* intention" (presumably bordering on motive) – but this is unlikely to be the last word on the matter: *Daw Aye Aye Mu v PP* [1998] 2 SingLR 64.

56 S 5(1). See also s 5, Misuse of Drugs Act, Cap 185, 1998 Rev Ed, which imposes liability for doing "any act preparatory to or for the purpose of trafficking" in narcotics. The traditional position is found in the concept of an attempt (s 511, Penal Code; s 38, Interpretation Act, Cap 1, 1999 Rev Ed) wherein the offender must do more than mere preparation.

offender must cross the line between preparation and attempt – any act done with intent to commit the offence is far enough.[57]

Yet when we look at the punishment level for breach of the Regulations, the Singapore criminal lawyer will be struck with the relatively puny maximum of imprisonment for 5 years.[58] It is (probably) knowing assistance or dealing with terrorists that we are concerned with, and rightly or wrongly, a 5 year maximum makes it a rather minor crime in Singapore. After all Resolution 1373 does call for such activity to be made "serious criminal offences". It is not characteristic of the legislature of Singapore to be parsimonious in prescribing penalties. Could it be that this is a reflection of the fact that the Regulations need only be used when the only link between the crime and the jurisdiction is nationality? There are other more potent laws to deal with assistance of terrorism which is targeted at Singapore, and to the foremost of these we now turn.

III. THE INTERNAL SECURITY ACT

It is telling that when investigations revealed the real possibility of terrorism within the shores of Singapore, the authorities did not bother with the newly enacted United Nations Act, the Anti-Terrorism Regulations, or even the formidable barrage of regular penal laws potentially applicable. Instead, they reached for the Internal Security Act, which in essence gives the power of indefinite detention without trial to the Executive.[59] This is the centre-piece of anti-terrorist legislation in Singapore. What is surprising to the uninitiated is that this is everyday law in Singapore, and has been so long before the existence of independent Singapore.[60] It was given express constitutional legitimacy[61] from the start and has been jealously guarded ever since. It has not been that long ago that a set of constitutional amendments were put in place to prevent the Judiciary from exercising any sort of meaningful review over the exercise of the power of preventive

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57 Although there does not appear to be any reported decision on the precise ambit of pre-attempt liability.

58 In comparison, the offence of causing death by dangerous or reckless driving is also punishable with a maximum of 5 years imprisonment: s 66, Road Traffic Act, Cap 276, 1994 Rev Ed. See also the punishment levels for trafficking in cannabis, *supra*, note 14.

59 S 8, Cap 143, 1985 Rev Ed, Singapore Statutes. The legislation contains rather more than the regulation of executive detention, but the government has not found it necessary to use any of other measures in the recent past. There is an equivalent power of detention under s 30, Criminal Law (Temporary Provisions) Act, Cap 67, 2000 Rev Ed, Singapore Statutes – but that power, in practice, is reserved for situations of lesser import, *eg*, secret society activity. See Hor, "Singapore's Innovations to Due Process" (2001) 12 Criminal Law Forum 25, 29-31. There is, however, no technical reason why this provision could not have been used instead of the Internal Security Act.

60 By Ordinance 26 of 1955. Singapore merged with Malaysia in 1963, and achieved independence in 1965.

61 Art 149, Constitution of the Republic of Singapore, 1999 Rev Ed.

detention.[62] Technically, it is not criminal law at all, but, practically, it broods over all of society, like a super-criminal law, swooping down and dealing with those suspected of criminal activity when the Executive perceives that the normal processes of the criminal law are likely to fail or to create more problems than they solve.[63]

A. *Preventive Detention and the Criminal Process Compared*

Although preventive detention was conceived as a measure to be applied when the normal run of the criminal law is either dysfunctional or cannot be made to function without an unacceptable cost, it cannot be denied that there is a semblance of due process. The detainee must be informed of the grounds of detention and of the allegations of fact on which these grounds are based.[64] There is a right to make representations to an Advisory Board,[65] the proceedings of which are obviously derived from a criminal trial.[66] It is presided by a Judge of Appeal.[67] The detainee is entitled to all information reasonably required to make such representations.[68] The Board has the power to summon and examine witnesses.[69] Although the right to counsel is not as clearly entrenched as it perhaps ought to be, it is almost invariably

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62 The combined effect of art 149(3) of the Constitution and ss 8A, 8B of the Internal Security Act. These amendment were put in place in response to an attempt by the Judiciary to assert some sort of power to review decisions to detain under the Internal Security Act: *Chng Suan Tze v Minister of Home Affairs* [1988] SingLR 132. There is ample academic literature on the issue of judicial review: Rawlings, "Habeas Corpus and Preventive Detention in Singapore and Malaysia" (1981) 25 MalLR 324; Tan Yock Lin, "Some Aspects of Executive Detention in Malaysia and Singapore" (1987) 29 MalLR 237; Yee Chee Wai, "Judicial Review Under the Internal Security Act – A Summary of Developments" (1989) 10 SingLRev 66; Harding and Hatchard, *Preventive Detention and Security Law – A Survey* (1993), 193-208. It is not intended to cover this ground again, but the upshot is that although the speeches in Parliament (vol 52 Parliamentary Debates, 25 Jan 1989, cols 464-513) clearly indicate that any kind of meaningful scrutiny is precluded, judicial review on "procedural" grounds has been preserved – the substantive-procedural divide has never been clear-cut and it is possible that a future court might still be able to squeeze a bit of substantive review out of the amendments.

63 Although, theoretically, the targeted activity need have nothing to do with being criminal at all, it is hardly conceivable that criminal legislation would not have been enacted to deal with such nationally prejudicial activity.

64 S 9(a) and (b), Internal Security Act.

65 S 9(c), Internal Security Act.

66 S 11 and 12, Internal Security Act, and the Internal Security (Detained Persons and Advisory Board) Rules, 1990 Rev Ed, LN 23/64.

67 At the time of writing, the chairman of the Advisory Board is Judge of Appeal Chao Hick Tin who occupies the highest judicial office in the country, after the Chief Justice.

68 With the usual "against the national interest" exception: s 16, Internal Security Act. As the proceedings are secret, it is not known if this has caused any problems in the past.

69 S 14, Internal Security Act.

granted in practice.[70] The Board is empowered to make a report which will either support continued detention or recommend that the detention should cease.[71] The "crime" is activity "prejudicial to the security of Singapore". The procedure is designed to grant the detainee the right to be heard in his or her "defence". Although much of the process is unspecified, the presiding member of the Board is a very senior Judge and can be expected to inject a degree of fairness to its operation.

There are, of course, important differences. The presiding Judge can theoretically be outvoted by the other two "lay" members of the Board.[72] Beyond the grounds and allegations of fact, all other information is available to the detainee only at the discretion of the Minister (and not the Board).[73] The report of the Board does not automatically bind the Minister, and (by virtue of a relatively recent amendment) prevails only if the President throws in his or her lot with the Board.[74] Perhaps the feature most disturbing to a criminal lawyer is the secrecy of it all. An open trial, subject to the scrutiny of all, is the hallmark of legitimacy. All proceedings of the Board are "in camera".[75] The actual workings of the Board, its procedure, its thinking, and its report is a closed book. Disclosure of facts or documents cannot be compelled, and indeed voluntary disclosure will be exposed to prosecution under the Official Secrets Act.[76] Secrecy does not, in itself, mean unfairness, but it does mean that the safeguard provided by public scrutiny is lost. It also means that justice will not be manifestly seen to be done – and this has serious consequences in politically sensitive contexts. There are serious disadvantages in terms of fairness and legitimacy in every decision to invoke the powers of preventive detention. It can only be justified if the cost of letting criminal justice run its usual course can be reasonably thought to outweigh the price of preventive detention.

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70 The courts have read in the constitutional right to counsel under art 9(3): *Lee Mau Seng v Minister for Home Affairs* [1971] 2 MalLJ 137. What is less satisfactory is the stage at which the right must be granted – subsequent decisions have placed that decision squarely in the discretion of the detaining authorities: *Jasbir Singh v PP* [1994] 2 SingLR 18.

71 S 12, Internal Security Act.

72 At the time of writing, the other two members are a "businessman" and a "doctor": Singapore Government Press Release, 25 Feb 2002.

73 S 11(2)(b)(iii), Internal Security Act.

74 S 13A, Internal Security Act.

75 R 5, Internal Security (Detained Persons Advisory Board) Rules, 1990 Rev Ed.

76 Cap 213, 1985 Rev Ed, s 5.

B. *A Justification for the Use of Preventive Detention?*

For obvious reasons, formidable impediments stand in the way of any attempt to assess the use of preventive detention in Singapore.[77] The reader's indulgence must be sought for the fair dose of speculation that follows, but there does not seem to any other way of discussing it.

(i) *Difficulties of Proof*

The criminal justice system can be thought to be dysfunctional for a number of reasons. One of most enduring justifications for the use of preventive detention is the argument that the nature of terrorism and subversion is such that it would be unduly onerous, if not impossible, to prove such activity in a court of law. Witnesses, it is said, will be intimidated into silence; and the covert and clandestine *modus operandi* is such that evidence is unlikely to be forthcoming. However, there is reason to believe that the two most recent major rounds of detention cannot be so justified. In the aftermath of the detention of the Catholic "Marxist Conspirators",[78] extremely comprehensive and detailed accounts, both written and televised, were successfully extracted from the detainees – there does not appear to be any legitimate reason why they could not have been adduced in court.[79] There was no hint of witness intimidation. There must have also been voluminous investigation files kept by the Internal Security Department which would have yielded a fair amount of evidence. Similarly, in the more recent detention of the Jemaah Islamiyah, a rather damning video recording of the efforts of some of the detainees to plan a terrorist attack in several public places was discovered and televised.[80] Although one cannot be absolutely certain of this, incriminating statements must have been extracted from some, if not all, the detainees.[81] It must be borne in mind that, rightly or wrongly, the admissibility of police statements in Singapore is very liberal.[82] There is no reason why all this could not have been adduced in court and be made the foundation of a conviction. This is not the place for a comprehensive survey of the law of criminal evidence and procedure in

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77 There is a new and heartening trend of making the work of the Internal Security Department more transparent. Access to pre-War files and documents has been given: see Ban Kah Choon, *Absent History – The Untold Story of Special Branch Operations 1915-42*, (2001). The openness has, unfortunately, and perhaps understandably, not been extended to more recent records.

78 *Supra*, note 1. See also the *Report of the International Mission of Jurists to Singapore 5-9 July 1987 to Investigate the Arrest and Detention of 22 Persons in May and June 1987* (1987).

79 Unless they were extracted involuntarily, which, the government asserts, was not the case.

80 Government Press Release, 11 Jan 2002.

81 "JI Head Regrets Acting Too Soon" *Straits Times*, 21 Mar 2002.

82 The only restraint is that the statement must be "voluntary". See Hor, "The Confessions Regime in Singapore" [1991] 3 MalLJ lvii.

Singapore, but suffice it to say that significant evidence which is denied to criminal courts of the "western liberal" persuasion are very available to the criminal courts of Singapore.[83]

(ii) *Prevention, not Punishment*

Another oft-repeated justification is this – the focus of the criminal law is on completed crime where the harm has been done, but the burden of preventive detention is, as the term suggests, to prevent harm from happening. While it is not entirely without logic, it significantly under-estimates the "pre-commission" reach of the criminal law in Singapore. There is the traditional concept of a criminal attempt,[84] and in some statutes, of a criminal preparation.[85] There also the complicity-related devices of instigation, conspiracy and intentional aiding, which in Singapore are not dependent on the actual commission of the primary offence.[86] There a host of other offences which implicate the criminal law long before the contemplated harm comes to pass: for example, the crime of unlawful assembly,[87] the restrictions under the Societies Act,[88] and the offences under the Sedition Act.[89] In the case of the Jemaah Islamiyah, there can surely be no doubt that the criminal law has been implicated (provided, of course, the facts can be proved). There does not seem to have been any obvious obstacles to a charge of conspiracy to commit criminal mischief (damage),[90] explosive substance offences[91] and even murder.[92] The Catholic Marxist Conspirators do, however, pose a problem. The essence of their sin was essentially that they were spreading anti-establishment (and allegedly "Marxist") ideas which in years to come might be the ideological basis of violence and disorder – there does not appear to have been any allegation that the Conspirators actually preached violence or disorder. It is true that the criminal law certainly does not reach this far, but, one would have thought, for good reason. The causative link between the promotion of an

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83 A notable example is previous inconsistent statements which in Singapore is admissible as substantive evidence and not only to impeach credibility: *Sng Siew Ngoh v PP* [1996] 1 SLR 143. See also Hor, "Singapore's Innovations to Due Process", *supra*, note 59.

84 S 511, Penal Code. See *supra*, note 56.

85 *Eg*, the United Nations Act 2001, discussed *supra*.

86 Explanation 2, s 108, Penal Code.

87 S 141-4, Penal Code.

88 S 14, Societies Act, Cap 311, 1985 Rev Ed. It is an offence to manage or be a member of an unregistered society, the "term" society including "an association of 10 or more persons whatever its nature or object" (s 2).

89 S 4, Cap 290, 1985 Rev Ed. Sedition includes activity with a tendency to "persuade the citizens of Singapore or the residents in Singapore to attempt to procure by lawful means the alteration of any matter in Singapore".

90 S 425-40, Penal Code, especially s430A (mischief with intent to obstruct trains). There was evidence that the plan was to set off explosives in a train station.

91 Explosive Substances Act, Cap 100, 1985 Rev Ed, Singapore Statutes.

92 S 300, Penal Code.

ideology (which does not in itself advocate violence) and the possibility of it playing a role in generating violence years hence is simply too tenuous. One might as well say that the promotion of Christianity or of Islam, or of any other religion in itself might lead to violence in years to come because of their propensity for extremism. There is also the need to place in the balance the value to society of the freedom of conscience, thought and speech,[93] which in Singapore is beginning to have some appeal in its capacity to create conditions conducive to independent thought and creativity; a commodity which seems to have been recently linked to national survival.[94] Quite apart from September 11th, it is this factor which perhaps explains why the domestic reception of the two rounds of preventive detention was so different – disbelief and scepticism for one, and praise and relief for the other. If the relevant facts can be proved (and, as we have seen, there seems to have been no grounds to believe that they could not be proved), there was good reason to *act* in the Jemaah Islamiyah case but not for the Catholic Marxist Conspirators. But we have not yet uncovered a good reason why *preventive detention* was used for the Jemaah Islamiyah as the normal criminal law was far from impotent.

(iii) *Enhanced Deterrence*

Travelling further afield, a rather less obvious reason for the use of preventive detention is its deterrent value. This has been held out to be one of the benefits of a very similar power of detention under the Criminal Law (Temporary Provisions) Act.[95] The logic is this – even if the normal criminal law is usable, preventive detention is preferred because it sends a message that such activity will not even be given the "luxury" of a criminal trial, and this has a deterrent value far greater than anything the normal criminal law can offer. Whether in fact the deterrent value is greater depends on several things, but the foremost consideration is the difficulty of obtaining a criminal conviction in Singapore – if it is very difficult, then preventive detention becomes a much greater deterrent; if it is not, then the deterrence differential is reduced. The question become this – is it worth all the cost that attends the use of preventive detention to buy the expected increase in deterrence. Even if we accept that preventive detention bears with it some increase in deterrence, is this a good reason for the exercise of the power? The Criminal Law (Temporary Provisions) Act is broader – a detention can be made "in the interests of public safety, peace and good

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93 This is in fact "enshrined" in art 13 and 14 of the Constitution, but art 149 allows the Internal Security Act to be in derogation thereof.

94 These "liberal" values are now thought to be necessary for the survival of Singapore in the context of a "global" and "knowledge-based" economy which thrives on inventiveness and an entrepreneurial spirit.

95 Cap 67, 2000 Rev Ed.

order".[96] The Internal Security Act is narrower – a detention must be "with a view to preventing *that person* from acting in any manner prejudicial to the security of Singapore".[97] It does appear that, at least in the context of the Internal Security Act, the use of preventive detention to deter *other people* from doing the same thing is illegitimate. There was perhaps a significant element of deterrence involved in the detention of the Catholic Marxist Conspirators – and the televised confessions[98] seem to bear witness to that. The promotion of anti-establishment ideas is not acceptable, and the point of the detention was not so much to deal with the detainees as to send a message to all similarly inclined that they too will be detained if they do not behave themselves. It is difficult to escape the conclusion that the detentions were about punishment and deterrence of "bad" ideas – but even here, the criminal law is not silent for the Sedition Act deals with precisely this situation.[99] It has never been explained why prosecution under this legislation was thought not to be preferable to preventive detention. One can only speculate that it was the supposed increase in general deterrence that was sought.

(iv) *Martyrdom and Racial Harmony*

The Jemaah Islamiyah detentions have altogether a different flavour. There is no reason to believe that preventive detention was chosen over prosecutions because of a desired deterrent effect. Tellingly, there were no televised confessions and recantations.[100] Indeed, the detentions have been played down in public in contrast to the active escalation of press coverage which followed the Catholic Marxist Conspirators. This points to yet another reason for the use of preventive detention, one which is quite the opposite of the deterrence rationale – the avoidance of a public trial and hence a public spectacle. The political calculation was probably that a criminal trial was likely to have disturbing results. Those who act out of a religious conviction, as we suppose the Jemaah Islamiyah detainees to have done, are likely to treat the trial as a platform for publicising their views. A

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96 S 30, *ibid*.

97 S 8, Cap 143, 1985 Rev Ed.

98 The detainees (still in detention) appeared (one at a time) in the context of an interview by a tele-journalist in rather informal settings (*eg*, sitting in a garden). See the account in "'Marxist Plot' Revisited", http://www.singapore-window.org/sw01/010521m3.htm. This website is one of a few set up to perform the role of an "alternative" media for Singapore news. See also the account of Francis Seow, who was himself the target of executive detention, in *To Catch a Tartar: A Dissident in Lee Kuan Yew's Prison*, (1994).

99 Cap 290, 1985 Rev Ed.

100 Indeed the government seemed rather reluctant to give details, let alone make a spectacle of it, as was done for the Catholic Marxist Conspirators. Yet some public justification was clearly necessary in view of the potential racial-religious implications of the detentions. The dissident Fateha website continues to demand proof that the detainees were in fact guilty of what they have been accused of: "Presupposition of Guilt", 12 Jan 2002, http://www.fateha.com/cgi-bin/newspro/commnews/fullnews.cgi?newsid1010808310,82628,.

public trial might also be expected to confer the honour of martyrdom. More importantly, in the context of a history of delicate racial and religious relations, the spectacle of a public trial against alleged Malay Muslims accused of extremism and terrorism might polarise the different communities in Singapore to an unacceptable degree.[101] People are bound to take sides and the side that they take are likely to follow the racial and religious divide. It would also be an uphill task to try to persuade the Malay Muslim minority that the majority are not oppressing them out of racial or religious prejudice. Also, it would not be fanciful to predict that a public trial might feed existing racial or religious prejudice on the part of the majority, or even create prejudice where it did not exist before. This justification is a potentially powerful one and it is not easy to assess its strength because of a basic imponderable – we cannot tell with any degree of certainty whether the community will treat a trial of the Jemaah Islamiyah in a racial or religious manner, or whether it will consider it to be just another criminal trial in which the accused persons happen to be Malay or Indian Muslim.[102] Although facts in the public domain are probably insufficient for us to conclude that the use of preventive detention was absolutely justified, we have to admit that, if indeed the Executive were thinking along these lines, their action cannot be said to be wholly unreasonable.[103]

Preventive detention is a potent weapon against terrorism, but it is double-edged. Any society which countenances its use must be willing to live with the possibility of the power being used wrongly. There can be mistakes as to the real danger posed by the detainee – rather like a preventive detention equivalent of convicting an innocent person. The power can also be used illegitimately – for example, as a way of crippling

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[101] Racially-based violence is not unknown to Singapore. Ministerial speeches following the detentions have always been at pains to say that the move was not against Islam or Muslims, but against extremism: *eg*, Prime Minister's Chinese New Year Message – 2002, http://www.gov.sg/singov/announce/110202pm.htm. For an account of the reasons for potential racial fault-lines in Singapore, see Lily Zubaidah Rahim, *The Singapore Dilemma – The Political and Economic Marginality of The Malay Community*, (1998).

[102] It appears that the leader of the group was not Malay, but Indian Muslim.

[103] My colleague, Dr Victor V Ramraj, raised the possibility of a trial *in camera*, which would, theoretically at least, be a possible half way house between a public trial and preventive detention. It is not easy to assess the relative merits of such a course – a trial *in camera* would at least be a criminal trial, but the shroud of secrecy will not have the legitimacy of public scrutiny and might inflame those who are disposed to think that the prosecutions are racially or religiously motivated. A trial *in camera* might also result in criminal convictions (and hence a criminal record), while preventive detention might be thought be the less severe measure in this respect. The use of trials *in camera* is extremely rare in Singapore, and there does not appear to be any reported judicial discussion of the circumstances under which it is appropriate to conduct a trial that way. There is nonetheless explicit statutory power to conduct a trial *in camera* "if the court is satisfied that it is expedient in the interests of justice, public safety, public security or propriety, or for other sufficient reason to do so": s 8(2), Supreme Court of Judicature Act, Cap 332, 1999 Rev Ed; s 7(2), Subordinate Courts Act, Cap 321, 1999 Rev Ed.

lawful democratic opposition. Where judicial review is practically ruled out, as it is in Singapore, the chances of wrongful use being exposed and remedied is that much less.

IV. The Anti-Terrorism Regulations and the Internal Security Act Compared

It does seem that the device of "preventive detention" under the Internal Security Act will continue to be the primary weapon in dealing with internal terrorism – that which is directed at Singapore or on Singapore soil. The concern of the Anti-Terrorism Regulations will be external terrorism – that which is directed at a foreign state. The differences between the two are quite striking. The Regulations use traditional criminal law; the Internal Security Act employs preventive detention. The penalties under the Regulations are, by Singapore standards, on the lower end of the penal scale; indefinite preventive detention is about the harshest measure available. The Regulations do not bear the marks of a piece of legislation which the Government of Singapore is particularly anxious about – there are no presumptions or other alterations to the general rules of evidence, no capital or corporal punishment, and even no mandatory penalties.[104] Indeed the parent United Nations Act spells out that constitutional protections apply with full force, as it must.[105] But the point is that they were mentioned. Compare this with the Internal Security Act which does not bother with how the constitutional bill of rights does or does not apply.[106] Next to the Internal Security Act, the Anti-Terrorism Regulations look like a slap on the wrist, but a slap which is meant for the world to see nonetheless. This is not to say that when the Government wants to act strongly against terrorists targeting foreign states or governments, it is powerless to do so. Although the Internal Security Act is aimed at activity "prejudicial to the security of Singapore … or to the maintenance of public order", a link between the security of the particular foreign state, the security of the regional or international order, and the security of Singapore can, with a bit of imagination, be found. Nor is this dichotomy without reason – Singapore cannot expect any authority except itself to deal with terrorism directed at Singapore. Hence the far stronger regime intended for internal terrorism. Singapore cannot play more than a minor supporting role in the policing of terrorism which is directed at a foreign state – a "no holds barred" approach would perhaps not be warranted.

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[104] For an example of a piece of legislation which the government is anxious about see the Misuse of Drugs Act, Cap 185, 1998 Rev Ed, where all of these measures were taken.

[105] S 2(c), United Nations Act. This was not really necessary because, unlike the Internal Security Act, the United Nations Act (and its Regulations) cannot, in any event, over-ride the Constitution.

[106] Substantial portions of the Fundamental Liberties (as the Bill of Rights is called in Singapore) are expressly over-ridden by the Internal Security Act (art 149, Constitution).

UPDATE

Just as the Journal was about to go into print, the Parliament of Singapore passed the Terrorism (Suppression of Financing) Act (Bill No 18/2002) on 8 July 2002 (to be available online at http://agcvldb4.agc.gov.sg/). In the circumstances, the significant features this piece of legislation can only be very roughly sketched:

1. As it is primary legislation, it does not suffer from the problems which might have attended the earlier United Nations (Anti-Terrorism Measures) Regulations 2001 by virtue of it being subsidiary legislation.
2. The sentencing maximum of the major offences is considerably highter than in the Regulations: imprisonment for 10 years and/or fine of S$100 000. Punishment levels are halved for non-disclosure offences.
3. Activity intended to influence "any international organisation" has been included in the definition of a "terrorist act".
4. Express exemption is given to "activities undertaken by military forces of a State in the exercise of their official duties, to the extent that those activities are governed by other rules of international law".
5. Most, but not all (*eg*, section 6(b) and (c)), offences expressly require some sort of *mens rea* (*eg*, section 3 – wilfully, section 4 – intending, knowing or having reasonable grounds to believe).
6. A large portion of the legislation deals with seizure and confiscation of terrorist property (Part IV).

APPENDIX

UNITED NATIONS ACT 2001
(No 44 of 2001)

An Act to enable Singapore to fulfil its obligations respecting Article 41 of the Charter of the United Nations.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement
1. This Act may be cited as the United Nations Act 2001 and shall come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

Power to make regulations to enable effect to be given to Article 41 of Charter of United Nations
2. —(1) Subject to subsection (2), if, under Article 41 of the Charter of the United Nations signed at San Francisco on 26th June 1945 (being the Article which relates to measures not involving the use of armed force), the Security Council of the United Nations calls upon the Government to apply any measures to give effect to any decision of that Council, the Minister may, from time to time, make all such regulations as appear to him to be necessary or

expedient for enabling those measures to be effectively applied, including (without prejudice to the generality of the preceding words) provisions for —

(a) the apprehension, trial and punishment of persons offending against the regulations; and

(b) empowering any person or class of persons to exercise, when investigating any offence under this Act or any regulations made thereunder, all or any of the powers of a police officer under the Criminal Procedure Code (Cap. 68) in relation to seizable offences.

(2) The measures to be applied under subsection (1) shall not apply to any financial institution or class of financial institutions to the extent that the financial institution or class of financial institutions is or may be subject to the directions of the Monetary Authority of Singapore under section 27A of the Monetary Authority of Singapore Act (Cap. 186).

(3) No regulation made under this Act shall be deemed to be invalid because it deals with any matter provided for by any written law, or because of repugnancy to or inconsistency with any written law other than the Constitution.

(4) All regulations made under this Act shall be presented to Parliament as soon as possible after publication in the *Gazette*.

(5) All expenses incurred by the Government in applying any such measures as are mentioned in this section shall be defrayed out of moneys provided by Parliament.

Immunity from suit

3. —(1) No action, suit or other legal proceedings shall lie against —

(a) any party to a contract for failing, neglecting or refusing to carry out any act required by the contract; or

(b) any person for failing, neglecting or refusing to carry out any act under any written law, where such failure, neglect or refusal is solely attributable to, or occasioned by, the provisions of this Act or any regulations made thereunder.

(2) Nothing in this section shall affect the operation of the Frustrated Contracts Act (Cap. 115).

Protection of persons for acts done under this Act

4. No person shall be personally liable in respect of any act done by him in the execution or purported execution of this Act or any regulations made thereunder if he did it in the honest belief that his duty under this Act or any regulations made thereunder required or entitled him to do it.

Liability for breach of regulations

5. —(1) Every person who commits, or attempts to commit, or does any act with intent to commit, or counsels, procures, aids, abets, or incites any other person to commit, or conspires with any other person (whether in Singapore or elsewhere) to commit any offence against any regulations made under this Act shall be liable on conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding 5 years or to both.

(2) Nothing in this Act or any regulations made thereunder shall prevent any person from being prosecuted under any other written law for any act or omission which constitutes an offence under this Act or any regulations made thereunder, or from being liable under that other written law to any punishment or penalty higher or other than that provided by this Act or the regulations, but no person shall be punished twice for the same offence.

Liability of citizens of Singapore for offences committed outside Singapore

6. —(1) The provisions of this Act have effect, in relation to citizens of Singapore, outside as well as within Singapore, and where an offence under this Act or any regulations made thereunder is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.

(2) Any proceedings against any person under this section which would be a bar to subsequent proceedings against that person for the same offence, if the offence had been committed in Singapore, shall be a bar to further proceedings against him, under any written law for the time being in force relating to the extradition of persons, in respect of the same offence outside Singapore.

UNITED NATIONS (ANTI-TERRORISM MEASURES) REGULATIONS 2001

In exercise of the powers conferred by section 2 (1) of the United Nations Act 2001, the Minister for Law hereby makes the following Regulations:

Citation and commencement

1. These Regulations may be cited as the United Nations (Anti-Terrorism Measures) Regulations 2001 and shall come into operation on 13th November 2001.

Object

2. The object of these Regulations is to assist in giving effect to Resolution 1373 (2001) and Resolution 1390 (2002) of the Security Council of the United Nations.

Application

3. These Regulations shall not apply to any financial institution or class of financial institutions to the extent that the financial institution or class of financial institutions is or may be subject to the directions of the Monetary Authority of Singapore under section 27A of the Monetary Authority of Singapore Act (Cap. 186).

Definitions

4. —(1) In these Regulations **—**

"arms and related material" means any type of weapon, ammunition, military vehicle or military or paramilitary equipment, and includes their spare parts;

"funds" includes cheques, bank deposits and other financial resources;

"property" means real or personal property, moveable or immovable, including a lease of immovable property as well as a right or interest in such property;

"Singapore ship" means a ship registered under Part II of the Merchant Shipping Act (Cap. 179);

"terrorist" means any person who —

(a) commits, or attempts to commit, any terrorist act; or

(b) participates in or facilitates the commission of any terrorist act, and includes any person set out in the Schedule;

"terrorist act" means the use or threat of action —

(a) where the action **—**

(i) involves serious violence against a person;

(ii) involves serious damage to property;

(iii) endangers a person's life;

(iv) creates a serious risk to the health or the safety of the public or a section of the public;

(v) involves the use of firearms or explosives;

(vi) involves releasing into the environment or any part thereof, or distributing or otherwise exposing the public or any part thereof to **—**

(A) any dangerous, hazardous, radioactive or harmful substance;

(B) any toxic chemical; or

(C) any microbial or other biological agent, or toxin;

(vii) is designed to disrupt any public computer system or the provision of services directly related to communications infrastructure, banking and financial services, public utilities, public transportation or public key infrastructure;

(viii) is designed to disrupt the provision of essential emergency services such as the police, civil defence and medical services; or

(ix) involves prejudice to public security or national defence; and

(b) where the use or threat is intended or reasonably regarded as intending to —

(i) influence the Government or any other government; or

(ii) intimidate the public or a section of the public.

(2) For the purposes of paragraph (1) **—**

(a) "action" includes action outside Singapore; and

(b) a reference to the public includes a reference to the public of a country or territory other than Singapore.

(3) In these Regulations, unless the context otherwise requires, any reference to "terrorist act" shall include any act referred to in regulation 8 (2) or (3).

Prohibition against provision or collection of funds for terrorists

5. No person in Singapore and no citizen of Singapore outside Singapore shall —

(a) provide funds to any person by any means, directly or indirectly; or

(b) collect funds for any person by any means, directly or indirectly, if he knows or has reasonable grounds to believe that the funds will be used to commit any terrorist act or facilitate the commission of any terrorist act.

Prohibition against dealing with property of terrorists

6. No person in Singapore and no citizen of Singapore outside Singapore shall —

(a) deal, directly or indirectly, in any property that is owned or controlled by or on behalf of any terrorist or any entity owned or controlled by any terrorist, including funds derived or generated from property owned or controlled, directly or indirectly, by any terrorist or any entity owned or controlled by any terrorist;

(b) enter into or facilitate, directly or indirectly, any financial transaction related to a dealing in property referred to in paragraph (*a*); or

(c) provide any financial services or any other related services in respect of any property referred to in paragraph (*a*), to or for the benefit of, or on the direction or order of, any terrorist or any entity owned or controlled by any terrorist.

Prohibition against provision of resources and services for benefit of terrorists

7. —(1) No person in Singapore and no citizen of Singapore outside Singapore shall —

(a) make available any funds or other financial assets or economic resources; or

(b) make available any financial or other related services, for the benefit of any prohibited person.

(2) In paragraph (1), "prohibited person" means —

(a) any terrorist;

(b) any entity owned or controlled by any terrorist; or

(c) any person or entity acting on behalf of or at the direction of any person referred to in sub-paragraph (*a*) or (*b*).

Prohibition against sale, supply, etc., of arms and related material to terrorists

7A. No person in Singapore and no citizen of Singapore outside Singapore shall, directly or indirectly, export, sell, supply or ship any arms and related material, wherever situated, to any terrorist.

Prohibition against carriage of arms and related material by Singapore ships and aircraft for terrorists

7B. No owner or master of a Singapore ship and no operator of an aircraft registered in Singapore shall, directly or indirectly, carry or cause or permit to be carried any arms and related material, wherever situated, for any terrorist.

Prohibition against provision of technical advice, assistance, etc., related to military activities of terrorists

7C. No person in Singapore and no citizen of Singapore outside Singapore shall, directly or indirectly, provide any terrorist with technical advice, assistance or training related to military activities.

Prohibition against false threats of terrorist acts

8. —(1) No person in Singapore and no citizen of Singapore outside Singapore shall communicate or make available by any means any information which he knows or believes to be false to another person with the intention of inducing in him or any other person a false belief that a terrorist act has been, is being or will be carried out.

(2) No person in Singapore and no citizen of Singapore outside Singapore shall place any article or substance in any place whatsoever with the intention of inducing in some other person a false belief that —

(a) the article or substance is likely to explode or ignite and thereby cause personal injury or damage to property; or

(b) the article contains or the substance consists of —

(i) any dangerous, hazardous, radioactive or harmful substance;

(ii) any toxic chemical; or

(iii) any microbial or other biological agent, or toxin,

that is likely to cause death, disease or personal injury or damage to property.

(3) No person in Singapore and no citizen of Singapore outside Singapore shall despatch any article or substance by post, rail or any other means whatever of sending things from one place to another with the intention of inducing in some other person a false belief that —

(a) the article or substance is likely to explode or ignite and thereby cause personal injury or damage to property; or

(b) the article contains or the substance consists of —

(i) any dangerous, hazardous, radioactive or harmful substance;

(ii) any toxic chemical; or

(iii) any microbial or other biological agent, or toxin,

that is likely to cause death, disease or personal injury or damage to property.

(4) For the purposes of paragraphs (1), (2) and (3), a reference to a person inducing in any other person a false belief does not require the first-mentioned person to have any particular person in mind as the person in whom he intends to induce the false belief.

General prohibition

9. No person in Singapore and no citizen of Singapore outside Singapore shall knowingly do anything that causes, assists or promotes, or is intended to cause, assist or promote, any act or thing prohibited by regulation 5, 6, 7, 7A, 7B, 7C or 8.

Duty to provide information

10. Every person in Singapore and any citizen of Singapore outside Singapore who —

(a) has possession, custody or control of any property belonging to any terrorist or any entity owned or controlled by any terrorist; or

(b) has information about any transaction or proposed transaction in respect of any property belonging to any terrorist or any entity owned or controlled by any terrorist,

shall immediately inform the Commissioner of Police or such other person as the Minister may designate of that fact or information and provide such further information relating to the property, or transaction or proposed transaction, as the Commissioner or designated person may require.

Offences

11. Any person in Singapore or any citizen of Singapore outside Singapore who contravenes regulation 5, 6, 7, 7A, 7B, 7C, 8, 9 or 10 shall be guilty of an offence.

THE SCHEDULE

Regulation 4 (1)

PART I

LIST OF INDIVIDUALS AND ENTITIES IDENTIFIED PURSUANT TO RESOLUTION 1267 (1999)

[List of Names Omitted]