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**Detention: Addressing
the human cost**

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EDITORIAL

OUT OF SIGHT, OUT OF MIND? EXPOSING THE HUMAN COST OF DETENTION

Vincent Bernard, Editor-in-Chief

The conditions in which detainees are being held and the way they are treated are worsening in several countries, while the rest of the world turns a blind eye. Life for these detainees is a nightmare. Limited resources, punitive criminal justice policies and malfunctioning judicial systems lead to a host of problems: overcrowded cells or, conversely, solitary confinement in high-security prisons; violence and drugs; torture, ill-treatment and the absence of legal safeguards; a lack of hygiene, food, care and, at the end of the day, dignity.

Although the situation varies widely between countries, the world's prison population has increased by almost 20% since 2000, to more than 10 million¹ – equivalent to the population of Portugal. At the same time, the International Committee of the Red Cross (ICRC), which visits detention facilities all over the world, is seeing conditions of detention worsen. Several recent NGO reports, along with national and international inspections, have shown that detainees are being treated badly and that minorities are over-represented in the prison population.² According to these reports, those detained in armed conflicts and other situations of violence are in a particularly worrying situation. Issues include

- 1 According to the *World Prison Population List*, “[t]he total prison population in Oceania has increased by almost 60% and that in the Americas by over 40%; in Europe, by contrast, the total prison population has decreased by 21%. The European figure reflects large falls in prison populations in Russia and in central and eastern Europe. In the Americas, the prison population has increased by 14% in the USA, by over 80% in central American countries and by 145% in south American countries.” Roy Walmsley, *World Prison Population List*, 11th ed., Institute for Criminal Policy Research (ICPR), London, 2016, available at: www.prisonstudies.org/news/more-1035-million-people-are-prison-around-world-new-report-shows (all internet references were accessed in December 2017). See also Andrew Coyle, Catherine Heard and Helen Fair, “Current Trends and Practices in the Use of Imprisonment”, in this issue of the *Review*.
- 2 See Jessica Jacobson, Catherine Heard and Helen Fair, “Prison: Evidence of Its Use and Over-Use from around the World”, ICPR, 2017, available at: www.prisonstudies.org/sites/default/files/resources/downloads/global_imprisonment_web2c.pdf; Penal Reform International, *Global Prison Trends 2017*, report, 2017, available at: www.penalreform.org/resource/global-prison-trends-2017/; Amnesty International, “Detention and Imprisonment”, available at: www.amnesty.org/en/what-we-do/detention/; Human Rights Watch, “Detention Centers”, available at: www.hrw.org/topic/health/detention-centers; Nils Melzer, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, advance edited version, UN Doc. A/HRC/34/54, 14 February 2017, available at: www.ohchr.org/Documents/Issues/Torture/A_HRC_34_54.pdf. See also the country visit reports of the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, available at: www.coe.int/en/web/cpt/visits#2017.

the detention and disappearance of minors in Afghanistan, Nigeria and Somalia,³ torture in Syria,⁴ and a disproportionate increase in the detention of women.⁵

However, few people seem to be interested in what happens to detainees, either close to home or in far-away countries. Are people immune to the slowly worsening conditions affecting one of society's most marginalized groups because their attention is dominated by a succession of high-profile disasters? Is it a general climate of fear – as well as the comfortable presumption that detainees are getting what they deserve – that makes it so easy to ignore the plight of those rotting in prison?

Unlike other categories of vulnerable people, detainees are not always regarded as human beings with rights. Their identity is reduced to the threat – real or imagined – that they might pose to society. Calls for “terrorists” and “criminals” to be treated humanely while in prison tend to fall on deaf ears at a time when our attention is constantly being drawn to the security risks they pose.

Indeed, detention is not the only area in which humanitarian fundamentals are clouded by security concerns. Migrants and refugees, whether fleeing from danger or leaving their homes in search of a better life, are also seen mainly as a threat that must be contained by barbed wire and walls, or confined within camps. The increasing use of detention as a way of dealing with migrants is an issue that will be dealt with in an upcoming issue of the *Review* focusing on migration and internal displacement.

As Amnesty International says succinctly on its website:

It is easy sometimes to think that the rights of prisoners have little to do with us – that they have somehow exchanged their rights for a life of crime. This is wrong on two counts. Firstly, everyone has the same rights and they can never be taken away, no matter where you are, or what you may have done. Secondly, just because you are in prison, it does not mean you are guilty of a crime – if you were lucky enough to have a trial, it may not have been a fair one.⁶

To overcome attitudes of denial and awaken people's consciences, we need to promote a different point of view – one that recognizes the human dignity of detainees, whatever the reason for their detention. Accordingly, the *Review* has decided to address today's detention crisis by looking at its humanitarian consequences, and to shed light on its human cost, both individual and collective.

3 See ICRC, *Children in Detention*, report, 24 February 2017, available at: www.icrc.org/en/publication/4201-children-and-detention; Human Rights Watch, “Children Detained in War Zones: Thousands Held Without Charge, Tortured”, 28 July 2016, available at: www.hrw.org/news/2016/07/28/children-detained-war-zones.

4 See Amnesty International, “End the Horror in Syria's Torture Prisons”, available at: www.amnesty.org/en/latest/campaigns/2016/08/syria-torture-prisons/.

5 See, Roy Walmsley, *World Female Imprisonment List*, 4th ed., ICPR, London, 9 November 2017, available at: www.prisonstudies.org/news/world-female-imprisonment-list-fourth-edition; Elizabeth Swavola, Kristin Riley and Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, report, Vera Institute of Justice, New York, 2016; Anita Chabria, “China: Women Prisoner Numbers Rise 10 Times Faster than Men”, International Drug Policy Consortium, 27 August 2015, available at: <http://idpc.net/alerts/2015/08/china-women-prisoner-numbers-rise-10-times-faster-than-men>.

6 Amnesty International, “Detention and Imprisonment”, available at: www.amnesty.org/en/what-we-do/detention/.

Accordingly, this issue begins with a presentation of prisoner art on display at the International Red Cross and Red Crescent Museum in Geneva. The photos convey the humanity of the people who made these works of art using whatever materials they had to hand.

The *Review* has already dedicated an issue to the subject of detention in 2005,⁷ and still publishes regular articles on the subject. Historically, the ICRC's work in places of detention has mainly concerned people being held in the context of armed conflict and other situations of violence. In many situations today, however, the ICRC takes humanitarian action to improve the welfare of all detainees, whatever the reason for their arrest or detention. In this issue of the *Review*, we take the same approach.

Over the years, new trends have emerged and certain pre-existing situations have worsened with respect to prisons: increasing overcrowding, rising drug use, an ageing population and greater use of solitary confinement. This issue of the *Review* addresses some of these trends and, as in 2005, looks at the ill-treatment and torture of detainees. There are also positive developments that need to be shared, such as the adoption in 2015 by the United Nations General Assembly of the new revised Standard Minimum Rules for the Treatment of Prisoners, also known as the Nelson Mandela Rules⁸; the professionalization of the prison service, particularly in Africa;⁹ the development of innovative prison systems;¹⁰ and efforts to reduce overcrowding in some contexts.¹¹

The costs of detention

As well as an economic cost, detention has physical, mental, emotional and moral costs. Those costs are individual and collective, direct and indirect, short- and long-term.

7 Thematic issue on "Detention", *International Review of the Red Cross*, Vol. 87, No. 857, 2005.

8 See: ICRC, "Better protection for detainees", 14 February 2016, available at www.icrc.org/en/document/better-protection-detainees and United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), UN Doc. A/C.3/70/L.3, 29 September 2015, available at: www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.3.

9 As evidence of this, in 2008, the African Correctional Services Association was formed. Formerly the Conference of Eastern, Southern and Central African Heads of Corrections, this organization holds conferences aimed at allowing penitentiary professionals in Africa to exchange ideas with one another. See: www.african Correctional Services Association.org/index.php.

10 In the United States see: Lindsey Cramer, "9 Innovative Ways to Fix Our Broken Prison System", *Mic*, 17 December 2013, available at: <https://mic.com/articles/76771/9-innovative-ways-to-fix-our-broken-prison-system#hUXNemvz8>. In Norway, see: Marianne Vollan, "Full Rights Citizens: The Principle of Normality in Norwegian Prisons", *Justice Trends*, No. 1, 2017, available at: www.eu-training.com/justicetrends/flipbook/flipbook/index.html?page=36. In Portugal, see: Celso Manata, "Challenges and Achievements of the Portuguese Correctional System", *Justice Trends*, No. 1, 2017, available at: www.eu-training.com/justicetrends/flipbook/flipbook/index.html?page=50. The New Penitentiary Model in the Dominican Republic is discussed at: Ysmael Paniagua, "Dominican Republic: An Example of Penitentiary Reform to Be Followed", *Justice Trends*, No. 1, 2017, available at: www.eu-training.com/justicetrends/flipbook/flipbook/index.html?page=138.

11 For examples in Kenya and the Democratic Republic of the Congo, see: Africa Criminal Justice Reform, "Plans to Decongest Kenyan Prisons via Clemency", available at: <http://acjr.org.za/news/plans-to-decongest-kenyan-prisons>; Graham Kajilwa, "Petty Offenders to Be Released in Bid to Decongest Kenya Prisons", *Standard Digital*, 4 October 2016, available at: www.standardmedia.co.ke/article/2000218320/petty-offenders-to-be-released-in-bid-to-decongest-kenya-prisons; "Democratic Republic of Congo to Release 2,000 Prisoners to Reduce Overcrowding in Jails", Reuters, 5 January 2016, available at: www.standardmedia.co.ke/article/2000187118/democratic-republic-of-congo-to-release-2-000-prisoners-to-reduce-overcrowding-in-jails.

Of course, the main human cost of detention is borne by the detainees themselves. As well as being deprived of their liberty and usually any kind of normal social and family life – which is the normal definition of detention – detainees often experience other types of suffering that are not justified by any reasons relating to social order or security.

For example, they may be victims of violence by other detainees or guards. Instances of sexual violence are particularly intolerable.¹² Inmates may also be deprived of health care or food because of corruption, incompetence or a lack of resources in the prison administration, among other reasons. They may be held for extended periods before they are sentenced because of the slow pace of court proceedings. Imprisonment is also a punishment that is too often used in cases where milder alternatives could be applied, particularly for less serious offences.

The individual costs of imprisonment are worse for the most vulnerable categories of prisoners, particularly minors but also the elderly. The number of older adults in prison has surged in the last few years. In the UK, for example, the total prison population grew 51% between 2000 and 2009, while the number of prisoners aged over 60 soared by 216%. There is now talk of a real crisis: prison care services are unsuited to dealing with older people, since prisons were generally designed to hold the young.¹³

Two other current phenomena, while seemingly contradictory, are particularly worrying: prison overcrowding on the one hand, and increasing use of solitary confinement on the other. Overcrowding has serious consequences in terms of hygiene, physical and mental health, and levels of violence.

Solitary confinement, which in the past was used for disciplinary purposes, is becoming more common and is sometimes the default option, with people being held in solitary for long periods in “supermax” high-security prisons. Detainees are sometimes prevented from communicating with the outside world. As Catherine Deman said with regard to solitary confinement at a conference at the Humanitarium in Geneva:

It may be because they are considered dangerous, it may be for interrogation or punishment, as a consequence of their sentence or sometimes even for their own safety. But whatever the reason, such isolation can entail enormous suffering and have very severe human consequences.¹⁴

The level of control applied to detainees’ contact with the outside world should be strictly in proportion to need, and to the real and present danger that such contact could create.

12 See thematic issue on “Sexual Violence in Armed Conflict”, *International Review of the Red Cross*, Vol. 96, No. 894, 2014, notably “Through the Eyes of a Detention Doctor: Interview with Raed Aburabi”; and Paul Bouvier, “Sexual Violence, Health and Humanitarian Ethics: Towards a Holistic, Person-Centred Approach”.

13 See Rachel Bedard, Lia Metzger and Brie Williams, “Ageing Prisoners: An Introduction to Geriatric Health-Care Challenges in Correctional Facilities”, in this issue of the *Review*.

14 In the context of the annual cycle of conferences that the ICRC organizes on certain *Review* themes, see the web page for the ICRC event on “Solitary Confinement: How to Preserve Humanity in High-Security Settings”, available at: www.icrc.org/en/event/solitary-confinement-how-preserve-humanity-high-security-settings.

Since 1787 and Jeremy Bentham's concept of the Panopticon,¹⁵ prisons have also been spaces defined by architecture and technology, which can either compound or reduce the costs of detention for individuals. Bentham conceived of the Panopticon as a building that allows the total, permanent surveillance of a large number of inmates at minimal cost. Architecture can thus serve to make prisons more oppressive and punitive or, on the contrary, to promote rehabilitation and reintegration. Today, thinking about the role of architecture in detention continues to evolve. Can an architect, in good conscience, design solitary confinement cells if using them amounts to torture? The way in which architects deal with these ethical questions is currently a matter of debate.¹⁶ Digital technology is also being used to reveal the secrets behind the most closely guarded prisons, for example as part of the Amnesty International and Forensic Architecture project to digitally reconstruct the Sadnaya prison.¹⁷

Naturally, imprisonment also has a cost for the prisoners' loved ones, who may be traumatized and stigmatized, as well as suffering a loss of income. Prisoners' children pay a particularly heavy price.¹⁸

Furthermore, economic, social and moral costs should be taken into account. For the community, the imprisonment of productive individuals creates a shortfall of resources, and there is also the cost of maintaining and developing prisons, including the huge cost of adapting prison services and infrastructure to deal with the growing number of elderly prisoners.

Often, the authorities do not allocate sufficient budgets to prison administrators. Prison services also suffer from lack of adequate management structures and planning. However, the prison system is supposed to reintegrate people into society, where other institutions such as education, the family and welfare may have failed. Without enough money to deal with inmates in a humane way, prisons become a breeding ground for violence, trafficking and indoctrination. Increasingly, detention becomes part of the problem that it is supposed to solve.¹⁹

15 Jeremy Bentham, *The Panopticon Writings*, 1798, in *The Works of Jeremy Bentham*, ed. John Bowring, Vol. 4, 1843, available at: http://oll.libertyfund.org/titles/bentham-the-works-of-jeremy-bentham-vol-4#lf0872-04_head_004.

16 See Whitney Mallett, "Is It Ethical for Architects to Build Solitary Confinement Cells?", *Motherboard*, 7 January 2015, available at: https://motherboard.vice.com/en_us/article/qkvezb/architects-code-of-ethics.

17 Forensic Architecture, "Sadnaya: Inside a Syrian Torture Prison", available at: www.forensic-architecture.org/case/saydnaya/.

18 See Megan Comfort, Tasseli McKay, Justin Landwehr, Erin Kennedy, Christine Lindquist and Anupa Bir, "The Costs of Incarceration for Families of Prisoners", in this issue of the *Review*.

19 Michel Foucault summed up the criticisms of twentieth-century prisons: (1) "Prisons do not diminish the crime rate"; (2) "Detention causes recidivism"; (3) "The prison cannot fail to produce delinquents"; (4) "The prison makes possible, even encourages, the organization of a milieu of delinquents, loyal to one another, hierarchized, ready to aid and abet any future criminal act"; (5) "The conditions to which the free inmates are subjected necessarily condemn them to recidivism"; and (6) "The prison indirectly produces delinquents by throwing the inmate's family into destitution". Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, Random House, New York, 1977 pp. 265–268.

The risk of prisoners being radicalized and recruited into criminal groups that make use of terror is one that has been highlighted in the last few years. In response, States are developing policies that aim to prevent radicalization, and to promote “de-radicalization”, in prisons. Those policies pose a series of problems: for example, certain inmates may be isolated and treated more severely, without clear criteria explaining why. The ICRC has expressed its concern about these policies in a recent document. It stated that “inhumane conditions of detention and treatment not only contradict State obligations but are highly counterproductive to any efforts to prevent ‘radicalization’ and violent extremism”.²⁰

Finally, focusing mainly on measures of detention and repression to address societal issues has an opportunity cost: it can limit the space for more effective measures and policies, especially for vulnerable populations (detained migrants, children in conflict, low-risk offenders, and so on). Generally speaking, objectively assessing the impact on individuals and society of existing detention policies is necessary to avoid further human, social, political and financial costs.

Detention in conflicts

In a conflict situation, international humanitarian law (IHL) lays down rules for the detention of people in the power of the enemy. The treaties are fairly detailed regarding international armed conflicts; the Geneva Conventions contain over 175 articles about detention. Having already published the updated commentaries on the first two Geneva Conventions, the ICRC is currently working on an update to the Commentary on the Third Geneva Convention relative to the Treatment of Prisoners of War of 1949, which is set to be published in 2019. There are significantly fewer treaty rules regarding detention in relation to non-international armed conflicts, which currently make up the majority of conflict situations. Detainees in a conflict situation are particularly vulnerable because they are in the hands of their “enemy”, be that a State, an armed group or multinational forces. While national law and international human rights rules continue to apply, they sometimes fail to take into account the reality of conflict, for example the possibility of civilians being interned for security reasons. In recent years, the European Court of Human Rights has made several rulings on the legality of extraterritorial detention practised by certain States in armed conflicts, on the basis of the European Convention on Human Rights (ECHR), without always regarding IHL as the *lex specialis* – i.e., the specific law that applies to conflicts. In the *Review*, Claire Landaïs and Léa Bass have expressed the following concern shared by many specialists regarding this European case law:

²⁰ ICRC, *Radicalization in Detention – the ICRC’s Perspective*, 2016, p. 2, available at: www.icrc.org/en/document/responding-radicalization-detention-icrc-perspective.

Yet while there is no question that the increasingly important place given to European human rights law in times of extraterritorial armed conflict extends the protections afforded to individuals, a too strict application of its rules could impose unrealistic obligations on States in this type of situation. In the long term, this could make them less inclined to comply with the law, and possibly with more basic rules of other branches of law, in particular with rules of IHL.²¹

Those authors instead suggest interpreting the ECHR in light of IHL.

The international community also clearly recognized the need to strengthen IHL rules that protect detainees in times of armed conflict, particularly non-international armed conflict, at the 31st and 32nd International Conferences of the Red Cross and Red Crescent.²² As explained in this issue's contribution by ICRC Legal Adviser Tilman Rodenhäuser, the ICRC has identified – and States have recognized – four areas in which IHL should be strengthened: (1) conditions of detention, (2) the protection of the most vulnerable persons, (3) grounds and procedures for internment, and (4) transfers of persons deprived of their liberty.²³ Unfortunately, despite major initiatives by States and international organizations, and the ICRC's own work as mentioned above, progress has been insufficient.²⁴

In armed conflict situations, detention is a legitimate way of ensuring that an enemy cannot cause harm. Once enemies have put down their weapons, they must be treated in accordance with the applicable national and international law. During hostilities, ordering that no quarter will be given, meaning that no survivors remain, is prohibited under IHL. However, there is a dangerous tendency for States to make frequent use of “targeted assassinations” – extrajudicial executions – when combating groups deemed to be terrorists, even where arresting them would be an option. The killing of suspects also deprives victims, society and history of the benefits of due process, and so denies them the possibility of establishing the facts, obtaining justice and healing wounds.

21 Claire Landais and Lea Bass, “Reconciling the Rules of International Humanitarian Law with the Rules of European Human Rights Law”, *International Review of the Red Cross*, Vol. 97, No. 900, 2015, p. 1296. In a previous issue of the *Review*, Jelena Pejic has evoked the problem posed by the jurisprudence of the European Court of Human Rights when it decided to rely not on the Geneva Conventions but rather on national law and the European Convention on Human Rights in its judgments on the legality of the detention of a civilian by British armed forces in Iraq. Jelena Pejic, “The European Court of Human Rights’ *Al-Jedda* Judgment: The Oversight of International Humanitarian Law”, Vol. 93, No. 883, 2011.

22 “31st International Conference 2011: Resolution 1 – Strengthening Legal Protection for Victims of Armed Conflicts”, available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm.

23 ICRC, “Strengthening Legal Protection for Persons Deprived of their Liberty in relation to Non-International Armed Conflict: Regional Consultations 2012–13”, Background Paper, 2013, available at: www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf.

24 See Tilman Rodenhäuser, “Strengthening IHL Protecting Persons Deprived of Their Liberty: Main Aspects of the Consultations and Discussions since 2011”, in this issue of the *Review*.

Torture and the neo-barbarians

Since the Roman Empire, each era has had its barbarians: people – always distant others – who are savage, cruel and violent. Barbarism is an affront to civilization, progress and reason. Today, it is personified by terrorists, the new *hostis humani generis*.²⁵ However, although barbarism is defined by the absence of humanity, it takes many forms and is not always as distant as we may think. Totalitarian regimes in the twentieth century showed that smooth but unscrupulous politicians, zealous public servants and innovative engineers can also be barbaric. In the era of the Internet and globalization, barbaric attitudes can now be expressed on social media. Barbarism can be cloaked by politically correct expressions such as “enhanced interrogation techniques”. Engaging in a pseudo-debate about the “effectiveness” of torture is an example of this white-collar barbarism.

We are seeing a steady stream of new apologists for torture. However, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984, now has 162 State signatories. Under the rule of law, the end never justifies the means.²⁶

As Brad Guterres *et al.* wrote in a previous issue of the *Review*, concerning the TV series *24*, the media can have a harmful influence on the popular perception of torture.²⁷ Usually, films and TV series are at best neutral and at worst complacent regarding detention conditions and torture. In the film *Zero Dark Thirty* (2013), which deals with the hunt for Osama bin Laden, the heroine looks on impassively as an agent tortures detainees, without qualms and in a “professional” manner. The film’s characters, and viewers, had probably had their consciences numbed by more than a decade of terrorist and counterterrorist activities.

A recent ICRC survey entitled *People on War*,²⁸ conducted across sixteen countries, shows that no fewer than 36% of respondents believe it is acceptable to torture captured enemy combatants in order to extract important military information from them. Only 48% of those surveyed were against the practice – down from 66% in a similar survey in 1999 – while 16% had no views on the subject.

Responding to the survey, ICRC President Peter Maurer said that

torture in any form is forbidden. We demonize our enemies at our own peril. Even in war, everyone deserves to be treated humanely. Using torture only

25 See, for example, Douglas R. Burgess Jr, “Hostis Humanis Generis: Piracy, Terrorism and a New International Law”, *University of Miami International and Comparative Law Review*, Vol. 13, No. 2, 2006, available at: <https://repository.law.miami.edu/umiclr/vol13/iss2/2/>.

26 For a discussion on the role of torture today and efforts to prevent it, see ICRC, “Old Pain, New Demons: Thinking Torture and Dignity Today”, 2017, available at: www.icrc.org/en/document/old-pain-new-demons-thinking-torture-and-dignity-today.

27 Brad Gutierrez, Sara DeCristofaro and Michael Woods, “What Americans Think of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 93, No. 884, 2012, pp. 1016–1019.

28 ICRC, *People on War: Perspectives from 16 Countries*, report, 2016, available at: www.icrc.org/en/document/people-on-war.

triggers a race to the bottom. It has a devastating impact on the victims, and it brutalizes entire societies for generations.²⁹

A recent study by the Association for the Prevention of Torture confirmed that a holistic approach to preventing torture can be effective.³⁰ In their article in this issue of the *Review*, Jonathan Austin and Riccardo Bocco look at why torture takes place and suggest new approaches to prevent people from practising torture, focusing on helping potential torturers among the police and other weapons-bearers to hold onto their humanity.³¹

The ICRC in places of detention

In the first few decades of the ICRC's existence, its activities with respect to people deprived of their liberty focused on prisoners of war and civilian internees in international conflicts, for which it eventually received a mandate from the international community enshrined in the Geneva Conventions.³² Although the ICRC visited political prisoners in Hungary for the first time in April 1919, it was not until after the Second World War that it really started working for the welfare of other types of detainees in non-international armed conflicts and other situations of violence, mainly on the basis of its recognized humanitarian "right of initiative".³³

In this issue of the *Review*, Andrew Thompson writes about a key moment in the development of the ICRC's humanitarian work in prisons: visits to Nelson

29 ICRC, "Global Survey Reveals Strong Support for Geneva Conventions but Growing Indifference to Torture", News Release, 5 December 2016, available at: www.icrc.org/en/document/global-survey-reveals-strong-support-geneva-conventions-growing-indifference-torture.

30 Association for the Prevention of Torture, "Yes, Torture Prevention Works" – Insights from a Global Research Study on 30 Years of Torture Prevention", study, September 2016, available at: www.apr.ch/content/files_res/apt-briefing-paper_yes-torture-prevention-works.pdf. See also the book review by Olivier Chow of *Does Torture Prevention Work?*, a book based on this study, in this issue of the *Review*.

31 See Riccardo Bocco and Jonathan Austin, "Becoming a Torturer: Towards a Global Ergonomics of Care", in this issue of the *Review*.

32 In 1870–71, during the Franco-Prussian war, the ICRC did this via the office of the Central Tracing Agency in Basel, which supplied prisoners of war with food and mail. This agency was the continuation of agencies in Trieste (1877–78, during the Russo-Turkish War) and Belgrade (during the 1912–13 Balkan Wars). In August 1914, the ICRC created the International Prisoners of War Agency, which remained active after the First World War. A "civilian" section was established within the Agency, largely for the benefit of civilian internees. The belligerent States generally accepted that interned enemy civilians were a subset of prisoners of war (PoWs). The first ICRC visit to prisoners of war dates back to the First World War, with ICRC president Gustav Ador's visit to German PoWs in France in December 1914. In 1921, the International Conference of the Red Cross charged the ICRC with elaborating a preliminary draft of a convention protecting PoWs, deportees, evacuees and refugees. On 27 July 1929, the Geneva Convention relative to the Treatment of Prisoners of War was adopted. See: ICRC, *The International Prisoners-of-War Agency: The ICRC in World War One*, Geneva, 2007, available at: <https://shop.icrc.org/l-039-agence-internationale-des-prisonniers-de-guerre-le-cicr-dans-la-premiere-guerre-mondiale.html>; Philippe Abplanalp, "The International Conferences of the Red Cross as a Factor for the Development of International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement", *International Review of the Red Cross*, Vol. 77, No. 815, 1995, available at: www.icrc.org/eng/resources/documents/article/other/57jmr9.htm.

33 Alain Aeschlimann, "Protection of Detainees: ICRC Action behind Bars", *International Review of the Red Cross*, Vol. 87, No. 857, 2005.

Mandela and his fellow detainees in apartheid-era South Africa.³⁴ This issue also contains a report, taken from the ICRC Archives, about the visit to Robben Island that took place on 1 May 1964, which was sent to the South African authorities and was confidential at the time.³⁵

In 2016, the ICRC visited 1,650 places of detention in ninety-eight countries. However, these figures do not reflect the painstaking work needed to obtain official authorization and to build confidence and personal relationships with detainees and prison staff, or the empathy and other human qualities of the teams that visit prisons. Vincent Ballon, Head of the ICRC's Unit for Persons Deprived of Liberty, writes about prison overcrowding in this issue, conveying the sensory experience of a prison visit.³⁶ The ICRC also works with States and groups of experts to identify solutions to today's humanitarian problems. For example, in 2016 the ICRC organized a workshop entitled "Ageing and Imprisonment: Identifying and Meeting the Needs of Older Prisoners" to discuss the needs of elderly prisoners and the steps that can be taken to meet them.

The ICRC's detention visits do not just take place in State facilities – the organization also strives to visit people detained by armed groups. For example, the filmed conversation between former US Army pilot Mike Durant and former ICRC delegate Suzanne Hoffstetter gives an insight into the role played by the ICRC. They discuss Hoffstetter's visits to Durant while he was being held by a Somali armed group: Durant was captured during the military operation in Mogadishu that was the subject of the film *Black Hawk Down*.³⁷

Minimizing the costs of detention requires a holistic response, and humanitarian action has obvious limitations. There are few organizations doing this work, and it is not their job to take the place of governments or make up for governmental shortcomings. The response must come primarily from the detaining authorities themselves.

The ICRC knows the extent of the challenges facing prison administrators, who are being asked to implement complex policies, handle increasing numbers of prisoners and meet the apparently contradictory objectives of ensuring security and reintegrating prisoners, all without always having the required resources. For this issue, we sought contributions from prison authorities in the Philippines, Peru

34 See Andrew Thompson, "'Restoring Hope Where All Hope Was Lost': Nelson Mandela, the ICRC and the Protection of Political Detainees in Apartheid South Africa", in this issue of the *Review*.

35 See the ICRC report on the visit to "Robbeneiland" (Robben Island) Prison on 1 May 1964 by Mr G. Hoffmann, Delegate-General of the International Committee of the Red Cross in Africa, reproduced in this issue of the *Review*.

36 See Vincent Ballon, "Overcrowding: Nobody's Fault? When Some Struggle to Survive Waiting for Everyone to Take Responsibility", in this issue of the *Review*. See also Paul Bouvier, "Humanitarian Care and Small Things in Dehumanized Places", *International Review of the Red Cross*, Vol. 94, No. 888, 2012.

37 "Providing Hope in Detention: Interview with Michael Durant", *Restoring Family Links Blog*, 3 September 2015, available at: <http://restoringfamilylinksblog.com/blog/providing-hope-in-detention-interview-with-michael-durant>.

and Niger. In an exceptionally candid interview, Niger's General of Police and Head of its Central Counterterrorism Agency, Abdoulaye Kaka, gives us his unvarnished opinion about his role and the challenges he faces, but also suggests some practical solutions. These matters form part of the constructive dialogue that the ICRC seeks to build with prison authorities everywhere it operates.

As Sadako Ogata said, "[t]here are no humanitarian solutions to humanitarian problems",³⁸ and the same is true of the prisons crisis. The human costs of detention, both individual and collective, are often linked to the other, financial costs that authorities are unwilling to incur on behalf of a group of people who are out of sight. This short-termist calculation has serious implications for prisoners today, and for our societies in the future.

The *Review* wants to pass on the increasing concern felt by ICRC delegates – as well as among the authorities, humanitarians and members of civil society who know first-hand what really happens in prisons – about worsening prison conditions around the world. These concerns are often shared by the prison authorities themselves: their budgets are being frozen or cut at a time when the number of inmates is constantly rising. The *Review* hopes that it can draw attention to detention as an ongoing humanitarian challenge. To achieve that, we must ensure that society sees detainees as human beings.

38 Vivian Tan, "Ogata Calls for Stronger Political Will to Solve Refugee Crises", UNHCR, News Release, 27 May 2005, available at: www.unhcr.org/news/latest/2005/5/4297406a2/ogata-calls-stronger-political-solve-refugee-crises.html.

Interview with Abdoulaye Kaka

General of the Police and Head of
the Central Counterterrorism
Agency in Niger*

The Review has chosen to open this edition with an interview with General Abdoulaye Kaka as a representative of State practice in counterterrorism detention. The journal chose to focus on Niger as a State that is affected by an ongoing armed conflict and which arrests, detains and tries suspected members of a non-State armed group under its domestic legal system.

General Abdoulaye Kaka has been working as Head of Niger's Central Counterterrorism Agency (Service Central de Lutte Contre le Terrorisme) since 2014. He previously worked for the judicial police in Niger as head of the anti-gang section before opening the first office of the judicial police in Zinder. General Kaka worked for the United Nations (UN) police forces in Ivory Coast between 2006 and 2012, when he became the Commander-in-Chief of the Niger UN police forces.

In his current role as Head of the Central Counterterrorism Agency, General Kaka oversees detention operations throughout the country, many of which involve suspected members of the group that calls itself Islamic State's West Africa Province (ISWAP), also known as Jama'atu Ahlis Sunna Lidda'awati wal-Jihad or, as it is most widely known under its former name, Boko Haram.

Niger has suffered the effects of the ongoing conflict between ISWAP and State forces in the Lake Chad region, resulting in casualties, arrests and repeated displacement among civilians. The government of Niger contributes troops to the Multinational Joint Task Force, which conducts operations against the group. At the same time, the government arrests and detains suspected members of ISWAP as part of its counterterrorism efforts. These detention operations are coordinated by the Central

* This interview was conducted on 29 June 2016 by Vincent Bernard, Editor-in-Chief of the Review, and Ellen Policinski, Managing Editor of the Review.

Counterterrorism Agency. Established in 2011, the Central Counterterrorism Agency, successor to the counterterrorism section of the judicial police, is made up of representatives from the three primary law enforcement organizations in the country – the national police, the national guard and the gendarmerie – and is principally responsible for counterterrorism investigations in Niger.

In Niger, the International Committee of the Red Cross (ICRC) helps people affected by conflict in the south-east or fleeing fighting in north-east Nigeria. With the Niger Red Cross, the ICRC delivers aid, treats the wounded, provides water and supports farmers. The ICRC also monitors compliance with international humanitarian law, visits detainees and helps them to maintain contact with their families.

The ICRC visits people held by the authorities in at least five places of detention in Niger. After the visits, the ICRC shares its findings on the treatment and living conditions of the detainees confidentially with the authorities and urges them to take steps to address concerns. The ICRC also helps bolster prison management capacities and health services for detainees through technical and material support, and round-table discussions on these topics. The ICRC helps detainees, particularly minors, maintain contact with their families. At the request of foreign detainees, the ICRC informs their families or consular representatives of their detention. Lastly, the ICRC covers transportation costs for security detainees returning home after their release.

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Can you tell us about your agency, its mission and your own role as its head?

My agency's job is to coordinate all the entities involved in counterterrorism operations, including the police, the paramilitary police, the national guard, the intelligence services, various non-governmental organizations and foreign partners – including French and American troops present in Niger. My role is that of facilitator, providing the necessary resources and instructions to the teams I work with. I also act as the face of the agency, such as in this interview, and attend talks and conferences on counterterrorism. Last but not least, I see myself as a problem solver.

Could you tell us a little about the situation in Niger and describe the counterterrorism measures taken by the government?

Prior to February 2015, Boko Haram had never set foot in Niger. They had attacked targets along the border with Nigeria and in Benin. We knew they were recruiting in

Niger and we even had a list of people – village by village – who had left their homes to join its ranks. But the recruits tended to stay in Nigeria, and Boko Haram did not come here. This was in part because many of the group's members had family in Niger. An attack on home soil would be tantamount to attacking their own families.

However, when Niger declared war on Boko Haram in 2015, everything changed. Suicide attacks were launched in the town of Diffa, along the road network and in the area around Bosso. From that point on, terrorism became a far more serious problem.

Some of the areas along Niger's northern border are controlled by Daesh. Fortunately, the zone south of Sabha, Libya, is home to the Toubou people, who are not terrorist sympathizers. In general, terrorists tend to be recruited from the Tuareg and Arab communities, who live a little farther north, towards Misrata. Members of these communities in Niger have joined the ranks of Daesh. They travel to Libya and return home with weapons. In fact, all three fronts in Niger are supplied with weapons from Libya. Even if the weapons are not destined for Niger itself, the terrorists who carry them must cross the country to reach Mali, Chad and Sudan. We know that, in such cases, arms and ammunition will certainly be brought into Niger. For that reason, we are particularly keen to set up a base in Agadez, a little to the north. Every day, people from Niger travel to Libya and return with weapons. It appears that they are trying to sell them. We are concerned that if this arms trade continues, and stocks of weapons increase, it will become a threat to public security – as it has in Mali – and could destabilize the region.

The western border with Mali is another front in the battle against terrorism. Several groups are active in Mali, with the Fulani and Tuareg groups being our main concern. A number of Fulani people have joined the Movement for Oneness and Jihad in West Africa to fight in Mali. Along the border, the villages are located very close to one another. There are clashes between the Daoussak (a Tuareg ethnic group) and Fulani communities. With the communities on either side of the border so close together, it is easy for the border to become permeable. Incursions into our territory take place on a daily basis. People cross the border to steal cattle and perpetrate killings, and then return to Mali. People also cross from Niger to Mali to launch attacks, and then come back. These cross-border crimes create a whole host of problems for us, meaning we have to closely monitor this front, too.

Consequently, our battle against terror is fought on three main fronts, not including the city of Niamey. There, suicide attacks have been reported on a regular basis – especially after the attacks in Ouagadougou. We have taken special precautions to protect the major hotels hosting Westerners or important guests. We have even had to take special measures to protect the city itself, which requires us to remain on constant alert.

How has your role changed since the conflict between Niger and Boko Haram began in February 2015? What new challenges are you facing?

My job as coordinator is to ensure that everyone involved in counterterrorism operations works together well. In the past, this was not a problem. However, since February 2015, when Niger declared war on Boko Haram, our problems have multiplied exponentially. We face greater challenges on all fronts, whether we are arresting suspects or managing human or financial resources. However, additional resources have not been forthcoming. In fact, my operating budget has been drastically cut, while my troubles have only multiplied. Our partners, including the European Union and the United States, had pledged to support Niger's battle against terrorism. Up to now, they have mainly sent us troops, but the promised financial resources have yet to materialize. The reason for this is both simple and unfortunate. As general elections were due to take place in Niger, most partners decided to suspend their donations until the new administration was formed the following year. Our problems, however, cannot wait. This situation has caused a great deal of friction and made it difficult to fund counterterrorism operations at all levels. But we have had to make do.

We face a range of challenges in our counterterrorism operations. First, we are fighting terrorism on three fronts: in the north, along the border with Libya; in the west, along the border with Mali; and in the east, along the border with Nigeria. Given that jihadist groups are active in all of these areas, we have to monitor all three fronts.

The second challenge concerns our relationship with our partners. The intelligence services, for example, tend to be very secretive. They may take a while to share information that the Central Counterterrorism Agency needs in real time. In practice, however, we do not usually make the initial arrest. In the north of the country, for example, it tends to be French, Nigerian or US forces. Occasionally the intelligence services also receive information that leads to an arrest. The law stipulates that a person may be detained or held in police custody for up to seven days following their arrest. If the team making the initial arrest holds the suspect for a week before granting me access, the statutory detention limit will have been exceeded before I can even begin my investigation.

Relations with policy-makers, who are my superiors, can also be problematic. Their decisions are sometimes at odds with the law. For example, a judge may decide to release a suspect because of a lack of evidence against them. But my superiors do not want to allow people who have been accused of posing a threat to return to a conflict zone, because they think it will heighten tensions and make the situation impossible to manage. In such cases, I have to explain that in a country which respects the rule of law, the political leadership needs to make it clear to the general public that when someone is released, it means that they have been cleared and should be treated as such.

Can you tell us how you go about capturing, arresting and transferring suspected members of Boko Haram?

We used to capture between two and five suspects at a time. However, from the moment we declared war on Boko Haram, we began arresting between fifty and 150 suspects at once, and sometimes as many as 200. In Diffa, I have a small unit, with only six investigating officers. Given the time it takes to interrogate suspects, perform searches and make neighbourhood enquiries, my small team cannot handle all this on their own. So, if we arrest fifty or 100 people in the Diffa area, in eastern Niger, we have to transfer them to our interrogation centre in Niamey – some 1,300 kilometres away. This poses a range of difficulties. For one, the Niamey team do not always know why a suspect was apprehended or who made the arrest. This often ends up in self-incrimination, as the suspect is the only source of information available to the investigating team.

Indeed, in the past, many arrests have not complied with legal standards. In order to arrest a terrorist suspect, it is necessary to gather conclusive evidence of terrorist activity, for example by following the suspect and monitoring their activities. In other words, we must be absolutely sure that the suspect is a terrorist before arresting them. These days, when an attack is carried out, especially by Boko Haram, there is a tendency to arrest anyone who raises suspicion or is found at the scene. A wide range of people and groups may make these arrests, including members of the military, the paramilitary police, the national guard, the fire brigade and any other forces in the area. However, these people are not investigating officers and in some cases, they are not aware of the legal procedures, or the need for evidence.

As a result, our investigating team often lacked the necessary evidence to move the case to trial. Detainees would be taken to Diffa, where they would subsequently be released by a judge because there was insufficient evidence against them. The public did not understand why this was happening. They would say, “These people are arrested, taken to the police station, and two days later they are free. The judges are not doing their job. They are letting terrorists go unchecked.” Some people fail to understand that a person cannot simply be detained on the basis of a suspicion, that judges need evidence.

To help shift the debate, I sent a radio message to everyone arresting terror suspects, stating that the following information must be provided to the investigating officers: the place and grounds for the arrest, the people present at the scene and the identities of the person or persons making the arrest. That is the essential information which the investigating officer must have to begin their investigation, given that they were not present at the time of the arrest. We have done our best to reconcile, together with the judges, the need to protect victims in the war zone around Diffa with the need to respect the rule of law.

The Central Counterterrorism Agency’s biggest problem is that we appear to be the only ones upholding minimum standards. People have even said to me, “Why not just kill these terrorists and put an end to it?” No. Even if we wanted

to execute these people, procedures must still be followed. Terrorist suspects still have rights. You can do anything to cannibals except eat them, or else you stoop to their level. We must not fall into that trap. I have to repeat this day in, day out, sometimes even to my superiors.

So is there a temptation to apply a form of summary justice, then?

Yes, absolutely. Here in the Diffa area, there's a tradition called *mettre le Coran* ["setting the Qur'an"]. Once the Qur'an has been set in a village, it is believed that, in the name of the Qur'an, anyone who withholds information from the authorities will be condemned to hell. This belief is deeply rooted in the Diffa region. The political authorities decided to set the Qur'an to encourage people to report terrorists. However, it quickly became excessive. Some denunciations were anonymous, so it was impossible to know the motives behind them. Allegations were bandied about that were impossible to verify, and many people ended up in custody. We had the unfortunate task of sifting through the suspects once they had been handed over to us. In view of the circumstances, we had to bring them before a judge as quickly as possible, so that they could be released.

That has not been our only problem. In order for a suspect to stand trial, the court has to have a judge. There are currently 1,255 suspected members of Boko Haram in custody, but only two judges on the special court established to deal with terrorism cases. Given that suspects cannot be held in pretrial detention for more than four years, we must find a way to expedite these cases. When the first case was brought to court, the judge ruled that there was insufficient evidence, and requested that an investigative commission be established and sent into the field to ask neighbours, acquaintances and colleagues for information on the suspect. As the area is a war zone, it was not easy to gain access. Our first attempt did not satisfy the judge. On our second attempt, we stopped at a location and send people to neighbouring villages to ask the village leaders to come and make a statement. The judge once again decided that the evidence was insufficient: the village leaders called to testify might have been involved in a dispute with the suspect. Thus, there was a possibility that instead of providing helpful evidence, the leaders were trying to get the suspect deeper into trouble. It is essential for investigating officers to ensure that the people interviewed are impartial and able to provide credible information. This lack of evidence bogs down the judicial process. In the meantime, the prisons are bursting at the seams.

Prison overcrowding and the backlog of cases are our main concerns at the moment. The committee we set up to discuss possible solutions with the public prosecutor recommended recruiting more judges. Each judge currently has more than 600 case files on their desk. This is far more than any one person can handle, especially given that cases relating to terrorism offences take a considerable amount of time to process. Although the court has at last begun processing its first batch of cases, progress is much too slow. To date, just over a

dozen of the 12,500 suspects held in custody have appeared before the court. That is nowhere near enough.

We also face another serious problem. Fifteen people have been released by the courts and are due to be sent back to Diffa, but the local population in Diffa seem unwilling to accept their return because they see them as terrorists. It is also uncertain how the former suspects might feel about those who reported them to the authorities. People need to be given explanations so that they can learn to accept one another and coexist in peace. It is important to brief everyone concerned: the detainees, the local population and the authorities.

Just imagine you are a soldier who has lost a comrade or witnessed atrocities. If you are told a suspect has been released, it might be difficult for you to accept that this person is now free to get on with their life. Instead, you might seek revenge, even if no evidence has been found to warrant that person's arrest. One solution would be for people released by the courts to remain in administrative detention, as sending them straight back to Diffa might prove extremely complicated. The locals never want to set eyes on these people again, yet the court has ruled to release them as there is no evidence against them. And I end up caught in the middle.

How have you handled the sudden influx of detainees in the detention centres that you manage? What problems have arisen?

The influx of detainees has indeed been a problem. Our detention facilities are equipped to hold between twenty and forty people, but from the outset, we have had to accommodate over 150 detainees at a time. This has had an impact on hygiene, management, food and accommodation. For example, the septic tanks had not been emptied for four years, and recently overflowed into the cells. We were obliged to empty the tanks, expand them and install new equipment. The scope of the work required is vast.

The national counterterrorism centre is located in Niamey, as is the special court set up to handle terrorism-related trials. All terrorist suspects must therefore be transferred to Niamey, first to the Central Counterterrorism Agency and then to the judiciary. We have units elsewhere in the country, but they merely serve as transit zones. This is why detainees have ended up in the Niamey area.

Initially, suspected members of Boko Haram were transported by the army to Niamey in trucks without any seating. The detainees had to stand throughout the 1,300-kilometre journey from Diffa to Niamey. There were serious problems caused by dehydration or as a result of overcrowding. Following these incidents, we changed our protocols. Now, only agency staff who have received the proper training and know how to handle detainees are allowed to be in contact with them. We have also ensured that detainees have access to water from jerry cans and have arranged several stopovers along the journey, to allow them to take a break, drink something and relieve themselves.

What specific measures have you taken to ensure proper detention conditions, apply judicial and procedural safeguards and prevent ill treatment? What internal obstacles have you faced?

Having learned from our initial experiences, we have taken measures to improve detention and transport conditions. First, we introduced medical certificates. We realized that the detainees who had serious health problems on the journey to Niamey had already been frail – either injured, elderly or sick. We have therefore appointed a nurse in Diffa to look after detainees and allocated a specific budget for health care. The nurse assesses whether detainees are fit to travel. If they are deemed unfit, they stay behind. The nurse now also travels with the detainees to provide medical care in case one of them falls ill on the journey.

A medical team covers detainees' day-to-day health-care needs. For example, it treats detainees with malaria or any injuries that might require medical attention. We have a pharmacy and all the equipment required to provide medical treatment to detainees.

We have improved the food we serve to detainees. Early on, we simply bought food from external suppliers. However, because of the influx of detainees, we were forced to set up our own catering service. Now, our in-house catering team prepares healthy food, such as beans and rice or millet porridge, to allow prisoners to regain a little of their strength. All prisoners are served at least three nutritionally balanced meals a day. We receive advice on what food to prepare from the ICRC delegates, who concur that the food we currently provide meets minimum dietary standards.

We have also improved how we manage our detention centres. Since our cells were not built to hold so many detainees, we have had to remodel and build new facilities. We emptied and repurposed our storage areas to accommodate more people and improve detention conditions. We have also tried to separate men and women, and to separate children from adults. Because we had no quarters designed for that purpose, we moved some of the detainees outside; for example, the women remain in the shade of the trees during the day, and return to the hall at night.

When interrogating suspects, your approach is to use investigative methods that comply with the law. How would you describe that approach and what are the advantages of the methods you use?

Our approach allows us to win the detainee's trust, so that they are willing to cooperate with us. First of all, we do not employ any extreme techniques – for example, we do not deprive suspects of sleep or food. On the contrary, we adapt

to their needs, for example with regard to their dietary requirements, or if they wish to have their hair cut or read a book.

We try to show terrorist suspects that we are not as bad as they might imagine – that we are, in fact, trying to uphold the law. I think that a lot of detainees, especially those who have already passed through the hands of the intelligence services before arriving on our doorstep, do notice a difference in the way that they are treated. They trust us more. This relationship of trust continues once the person goes to prison, as we continue to visit them. We bring detainees cigarettes and other small items, as this allows us to build trust. Sometimes we engage them in debate, for example on theology. We at least try to persuade them that no religion has ever commanded people to kill each other. We even engage in ideological debate because that is where the real struggle takes place: these people must be made to understand that they are on the wrong path.

For example, we asked a young Nigerian detainee about his role in Boko Haram. He told us that his job had been to guard prisoners waiting to have their throats slit. He could not sleep at night because he could still hear the screams of the victims. So we asked why he had joined Boko Haram in the first place. He said that he was promised money, a woman and a motorbike. In the end, he said, he got nothing. We told him, “You see? Boko Haram did nothing but lie to you. You have been left with nothing. You do not have the woman you were promised, the money you wanted or the bike of your dreams. Your hands are empty.” We worked with him to show him that he had wound up on a dead-end road, in order to encourage him to feel remorse and perhaps even turn his life around.

Much of our officers’ work is psychological and sociological. Indeed, one of the recommendations we recently made to the government was that detainees should be tried more quickly, as we believe that a significant number of them are essentially innocent, and merely happened to be in the wrong place at the wrong time. Innocent people need to appear before a judge as quickly as possible, so that they can return home. If we are not careful, terrorism will become an even bigger problem within a decade or two. Just imagine that you have been arrested even though you have done nothing wrong. You then spend a decade in prison. On your release, you are likely to hold a serious grudge against society and to seek revenge. What is more, after spending time in prison with real terrorists, you are likely to become even more extreme in your views, more radicalized and more difficult to deter next time around. Combating the radicalization of detainees is one of our concerns. We are also discussing ways of regenerating the economy in the region around Diffa. We were forced to ban all trade in the area, and poverty levels have soared since then.

Is there any cross-border cooperation?

Yes – we are working with Chad, Cameroon, Nigeria and Benin. More than 420 Nigerian nationals are detained in Niger, including women and children. Since

our prisons are overcrowded, we are working with our Nigerian colleagues to repatriate some of them. The Nigerian authorities have come to Niger to count the detainees and take down basic information: the suspects' place of origin and the allegations against them. The preparations have been made to return these detainees to Nigeria. However, there are certain difficulties. For example, people from settlements along the border often find that the towns to which they are meant to return have been abandoned, and their inhabitants, who frequently include the detainee's family members, have taken refuge in Niger. Thus, it can be difficult to relocate refugees, especially those from border regions.

There are also various other minor problems. For example, the courts in Niger have begun to examine the case files of some of the Nigerian detainees. These people would prefer to stand trial in Niger rather than be sent back to Nigeria. However, we have to follow the procedures and send them back to Nigeria. Because the authorities in Niger are responsible for ensuring that detainees have access to a fair trial, we have obtained guarantees from the Nigerian minister of justice.

What have been your greatest achievements and failures? What lessons have you learned?

I am pleased that, in spite of everything, we have managed to shift the focus of the debate. I have argued and discussed the issues with everyone involved in counterterrorism operations and, ultimately, I feel like my voice has been heard. For example, because I wrote three letters to the minister of justice to ask for the release of people held in detention after they had been cleared by the court, he finally ordered for them to be sent back to their families. I then personally organized their return to their villages.

Another one of our successes is that our partners – the armed forces and others – are starting to see that we are capable of enforcing the law. If we are uncompromising in our efforts, we will eventually convince them that our approach is best. I think we have been more or less successful in our endeavours, and that has increased my credibility not only with my superiors, but also with the general public. People now have confidence in our judgement. If we state, at the end of our investigation, that a suspect has no links to terrorism, he or she is released. No objections are raised, and everyone supports our decision. This is only possible because we do our work properly and stick to the rules. People may say whatever they like about us, but we remain level-headed and conduct our investigations by the book – before we make an arrest, we conduct a thorough search for evidence.

My team always upholds human rights. In fact, this approach has earned me visits from the foreign ministers of Germany and France. I was the only other official they visited, apart from the president of Niger. They did not even stop by the minister of justice's office! They had heard about us and saw how hard we

work. I think that they left feeling satisfied with the work we are doing to combat terrorism, even with the scant resources at our disposal.

The fact that we have a central agency to coordinate counterterrorism operations is in itself a mark of success. When I attend conferences and seminars, I am often surprised to hear that other countries do not necessarily have an equivalent agency. As soon as a response to terrorist activity is required, everyone runs around without really knowing who should be doing what. This lack of structure becomes a major problem. In Niger, on the other hand, everyone knows that they need to turn to me in all terrorism-related cases. I am the one who issues instructions on what action must be taken, who should take it and why.

I have put into action a range of projects that have helped protect human rights and combat terrorism. There are people who believe that it is acceptable to break the law in order to combat terrorism. In fact, if you violate the law, you encourage terrorists to think that rules do not matter. The point that I always try to hammer home is that we need to hold the moral high ground. If we fail to do so, we have nothing left to say.

Rather than failures, I would prefer to talk about “struggles”. For me, the biggest problem is that I sometimes feel quite isolated. I am somewhat marginalized. To put it bluntly, there are people who treat me as if I were a terrorist. However, I am aware that these people do not understand me. I know that some people want quick, but ultimately unsustainable, solutions. I constantly have to explain that these solutions would not work in the long term, but some remain unconvinced. Thus, I often feel isolated.

What has been your experience of working with the ICRC?

I usually compare our relationship to that of sparring cousins, based on well-intentioned criticism. I do not know whether the concept of *cousinage à plaisanterie*¹ is popular in Europe, but where I come from it is very common. I like to be challenged. I do not get upset with the person making comments about me, and do not take them the wrong way. If someone challenges me, it is because they want me to improve my behaviour. It is a way of showing affection.

As far as we are concerned, our relations with ICRC staff are similar to the friendly tension between cousins. They challenge me, so that I can do better. They ask me questions such as: what do you feed the detainees? These people are not properly dressed – why is that? There are too many people in here – what are the legal provisions relating to detention conditions? Sometimes, the ICRC provides me with information about ill treatment in detention centres, and I take action to correct the problem. Thanks to the ICRC’s questioning, I have been able to

1 Editor’s note: *cousinage à plaisanterie* is a common expression in West Africa signifying a social relationship that allows members of certain groups, often ethnic groups, to speak and joke with one another in a familial way, saying things that might otherwise be considered insulting but are socially acceptable because of the relationship between the two groups.

address certain issues. The ICRC is a good partner because it is impossible to have eyes everywhere, and the ICRC's delegates sometimes help me detect problems.

On occasion, they even help me solve problems. For example, they once informed me that detainees had nowhere to sit. I replied, "Look, I have done my best, but I am running out of resources. As you are there on the ground, you too could do something to help." The ICRC's delegates then provided me with detergent to clean the cells and plastic mats so detainees would not have to sit on the bare floor. The ICRC also brought insecticide to improve hygiene conditions in overcrowded cells.

The partnership we have with the ICRC is based on honesty. What we really appreciate about our cooperation is that the ICRC's reports are not made public. They are for our eyes only, so we know that they are truthful.

Do you have any other message that you would like to share with the Review's readers?

To conclude, I would like to stress that the real problems we face here in Niger are actually malnutrition, disease and poverty. However, at the moment, the focus is exclusively on combating terrorism, to the exclusion of all other issues. This is where we need to take a look at the role of developed countries such as France and the United States. Their policies have contributed to the current situation, much like they contributed to the problem of climate change. These countries' failure to respect industrial production standards has led to global warming.

In the meantime, we in Africa are the ones who suffer the consequences. We might have all clambered into the same boat, but we are not the ones steering the vessel. Neither have we been invited to contribute to resolving major global issues. Unfortunately, in order to tackle certain problems, you need to turn to the people who have caused them in the first place.

Another reason why it is difficult for us to deal with the problems we currently face is that the battle against terrorism should never have become our priority. I would have liked to have been a teacher, helping children learn to walk, grow crops and catch fish. Instead, I am trying to work out how to stop bandits and protect hotels. Recent history has been extremely cruel to us. Events have diverted our attention away from our real priorities. We never asked for this to happen. What have we done to history to merit such a fate?

PHOTO GALLERY

Prisoners' objects: The collection of the International Red Cross and Red Crescent Museum

Roger Mayou*

Roger Mayou is Director of the International Red Cross and Red Crescent Museum.

Keywords: museum, prison, prisoners' objects, ICRC, delegates, visits.

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The International Red Cross and Red Crescent Museum has a unique collection of prisoners' objects – items made by conflict-related detainees and given to International Committee of the Red Cross (ICRC) delegates who, in keeping with the ICRC's mandate under the Geneva Conventions, were visiting the prisons.

The collection has a dedicated room in

International Red Cross and Red Crescent Museum

The International Red Cross and Red Crescent Museum first opened in 1988. It underwent a significant renovation from 2011 to 2013, and subsequently reopened to reveal a permanent exhibition that includes some of the objects depicted in this photo gallery, as well as temporary exhibitions related to humanitarian concerns. The museum, located in Geneva, Switzerland, is open to the public Tuesday through Sunday. For more information, visit: www.redcrossmuseum.ch.

* This photo gallery is based on extracts from the book *Prisoners' Objects*, International Red Cross and Red Crescent Museum and 5 Continents Editions, Geneva and Milan, 2017.

the “Defending Human Dignity” area of the permanent exhibition *The Humanitarian Adventure*, where it fascinates museum visitors.

It comprises more than 360 items. The oldest item dates from 1914, and the most recent from 2015. The collection serves as a reminder of the many situations of violence that have ravaged our planet over the last century – from Chile to Vietnam, Algeria to Yugoslavia, Rwanda to Afghanistan.

Made from the rudimentary materials available to prisoners, these objects illustrate the need for detainees to escape their confined environment. As one female detainee put it: “Creating something sets you free. It’s a way of expressing yourself when everything around you tends to silence you and make you forget who you are.”

Each object tells a unique story filled with emotion. But it also takes us on a journey through time and through our shared history.

The role of the object

As soon as it enters a museum, an object – whatever it may be – changes status. To put it bluntly, it goes from anonymity to celebrity. In a museum, people are intrigued by the originality of the material, surprised by the skill of execution and moved by the simplicity of the object’s form. This first glance skims the object’s surface, revealing the hand of the individual (in this case, the prisoner) who crafted it – but that individual remains in the background. Their personal story is part of a broader, shared history. In a museum, we can go beyond the link between the object and its creator and find many other connections that are broader and full of meaning. An object can thus be used to talk about a particular context, place of detention, conflict or point in history.

Knowledge of the context then leads us to a first level of understanding of the object and certain fundamental qualities found in all human beings: the need to create, and the power of the imagination. Confronted with the need to escape their confinement, prisoners use these universal qualities to demonstrate the strength of their resistance through these small acts of human dignity. In a similar way to the objects made in the trenches of the First World War, the prisoners’ objects tell us that the instinct for life prevails over the instinct for death.

Moving from the shadows into the light, the objects serve one last purpose: that of marking in our memories the conflicts of the last hundred years and their parade of victims, both yesterday and today.



Figure 1. Comb, Lebanon, 1983. Wood, 17 cm length. MICR/COL-1992-22-4. © Mauro Magliani and Barbara Piovan.

This comb was made out of wood from food storage pallets and boxes in Ansar Camp in southern Lebanon. It is decorated with scenes depicting food distribution, medical aid and visits to prisoners. Since the camp no longer exists, the images also evoke visions of a world slowly fading from memory.



Figure 2. Guitar, Mozambique, 1989. Metal from powdered milk cans, wood and rubber, 97 cm length. MICR/COL-1991-80-1. © Mauro Magliani and Barbara Piován.

Several detainees worked together to make this guitar at Machava Prison in Mozambique's Maputo region.



Figure 3. Figurine, Timor-Leste, 1995. Shell and rope, 15.5 cm length. MICR/COL-2002-18-12. © Mauro Magliani and Barbara Piovan.

This figurine was made by a detainee who was later employed by the ICRC.



Figure 4. Statuette, Myanmar, 1999. Soap and thread, 10 cm height. MICR/COL-1999-115-1. © Mauro Magliani and Barbara Piovani.

This sculpture of a detainee squeezed inside a cell was made by Htein Lin, an artist from Myanmar who was sentenced to seven years in prison for presumed ties to the opposition. Although he had taken part in the 1988 pro-democracy movement, he was no longer politically active at the time of his arrest in 1998, having chosen to focus on his art. He was released in 2004, when the government recognized the accusations against him as unfounded. Soap was one of the few personal items permitted in Mandalay Central Prison, apart from food, clothing and a toothbrush.

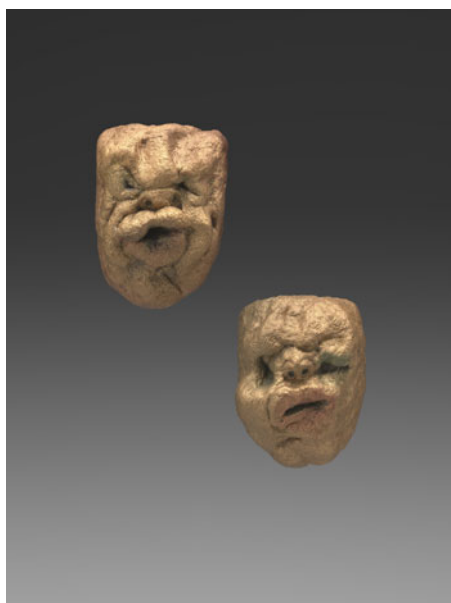


Figure 5. Pair of masks, Indonesia, 1978. Wood and paint, 9 cm height. MICR/COL-1995-49-1. © Mauro Magliani and Barbara Piovan.

These masks were made by a political prisoner and represent detainees' emotional states.



Figure 6. Eagle, Germany, 1944. Wood, 29 cm length. MICR/COL-1991-133-1. © Mauro Magliani and Barbara Piovan.

This piece was made by Soviet prisoners working at the Leweck barracks in Oldenburg-Kreyenbrück, Germany. It was traded to a guard in exchange for bread.



Figure 7. Flower bouquet, Greece, 1950. Fabric, glass and metal, 23 cm height. MICR/COL-2001-46-9. © Mauro Magliani and Barbara Piovan.

This bouquet of flowers was made by a Greek detainee.



Figure 8. Spoon, Europe, 1914–18. Wood, 15 cm length. MICR/COL-1991-100-5. © Mauro Magliani and Barbara Piovani.



Figure 9. Ciborium, Poland, 1982. Bread and cardboard, 30.5 cm height. MICR/COL-1991-98-1. © Mauro Magliani and Barbara Piovan.

The Polish detainees who made this piece were mainly workers and farmers who opposed the communist regime. Their upcoming release had already been announced while the piece was being made. The inscription, which reads “Challenge cup gifted by the detainees”, equates it to a sporting prize, awarded to the delegates in honour of the ICRC’s successful work. The eagle on the lid represents Poland and wears the crown that the communist government had removed from the national symbol in 1945.

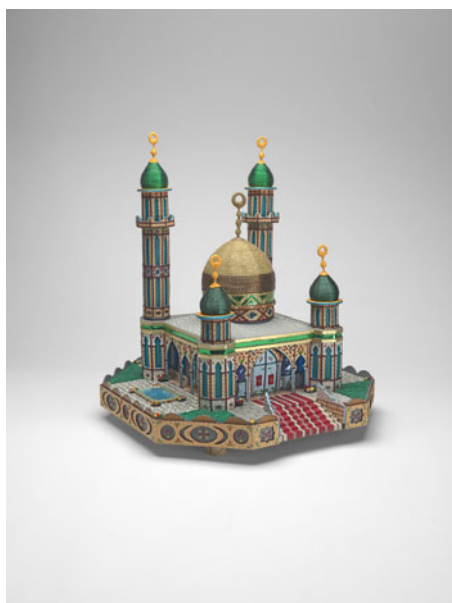


Figure 10. Mosque, Israel, c. 1999. Wood and cloth, 47 cm height. MICR/COL-1999-113-1. © Mauro Magliani and Barbara Piovani.

This miniature model of a mosque was made by Lebanese detainees in Ayalon Prison in Israel. The two taller towers can be lifted up so that the inside of the object could be examined without it being destroyed when passing through checkpoints.

Concluding remarks

Looking at these objects, a sentence from Alexander Solzhenitsyn's *The Gulag Archipelago* comes to mind: "The line dividing good and evil cuts through the heart of every human being."¹ It is hard not to think of this when one sees that behind the perfection of this ciborium made of bread lie Poland's darkest days; behind this finely crafted mosque, the Israeli–Palestinian conflict; behind this delicately sculpted soap, the dictatorship in Myanmar; behind this life-sized and functioning guitar made from boxes of powdered milk, the wars of independence and decolonialization; behind this eagle with its wings spread, the Soviet involvement in the Second World War.

These objects implicitly represent this human brutality, displaying the rich imagination of a skilled hand while reminding us of the extreme cruelty of which we are capable.

1 Alexander Solzhenitsyn, *The Gulag Archipelago 1918–1956*, Collins & Harvill Press, London, 1974, p. 17.

Current trends and practices in the use of imprisonment

Andrew Coyle, Catherine Heard and Helen Fair

Andrew Coyle is Emeritus Professor of Prison Studies at King's College, University of London, and was founding Director of the International Centre for Prison Studies, which merged with the Institute for Criminal Policy Research (ICPR) at Birkbeck, University of London, in 2014.

Catherine Heard is Director of the World Prison Research Programme at the ICPR.

Helen Fair is a Research Fellow at the ICPR working on the World Prison Research Programme and the World Prison Brief website.

Abstract

This article charts the rapid rise in the use of imprisonment in recent decades before considering some of the most pressing issues of concern in the use of imprisonment today. First among these is prison overcrowding, which continues to blight the record of many countries in their treatment of prisoners. To illustrate the potentially dire consequences of overcrowding – a problem common to many other countries and regions – an account is given of a recent visit to a prison in El Salvador. The article then provides an overview of the relevant regional and international standards on the treatment of prisoners, referring also to the role of judicial bodies in ensuring implementation.

Keywords: prison, overcrowding, conditions of detention, prison populations, women prisoners, use of imprisonment, criminal justice policy.

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Introduction

Imprisonment is used as a tool of criminal justice policy in every country of the modern world. The World Prison Brief online database¹ holds statistics on the prison populations of 223 independent countries and dependent territories.²

Levels of imprisonment have risen rapidly in the post-war period, though more dramatically in some jurisdictions and regions than in others. There is striking diversity – in terms of geographic location, national population size and levels of development – among States at the highest and lowest ends of the incarceration scale. This makes it difficult to provide clear-cut explanations for trends and variations. Several interrelated socio-political and economic pressures – variously operating at national, regional and global levels – have contributed to today’s diverse picture of global imprisonment.

This article begins by charting the rapid rise in the use of imprisonment in recent decades – a rise more dramatic in some jurisdictions and regions than in others. First, a brief account is given of prison populations worldwide. Information is broken down by continent and region to provide a general picture of geographic spread for the general global prisoner population, remand prisoners and female prisoners. Trends in prisoner population growth since 2000 are then discussed. The final section is devoted to consideration of some of the most pressing issues of concern in the use of imprisonment today, many of these being particularly relevant to the work carried out by the International Committee of the Red Cross (ICRC) to uphold international standards and promote humanitarian principles in the treatment of detainees.

Imprisonment worldwide: A diverse and changing picture

In this section, the authors give a brief account of prison populations worldwide and outline important recent statistical trends. The authors draw on data held on the World Prison Brief online database, which holds statistics on the prison populations of 223 independent countries and dependent territories.

The authors use the terms “prisoners” and “prisons” in a broad sense. The word “prisoners” is used to refer to individuals who have been placed in custody by a

1 Available at: www.prisonstudies.org (unless otherwise stated, all internet references were accessed in July 2017). The World Prison Brief was established by Roy Walmsley and launched by the International Centre for Prison Studies in September 2000. Since November 2014, the Brief has been hosted by the Institute for Criminal Policy Research at Birkbeck, University of London. Prison statistics derive largely from national prison administrations or responsible ministries.

2 This article draws from comparative data compiled for the book *Imprisonment Worldwide*, which was published in June 2016 using data accessed from the World Prison Brief in November 2015. Unless otherwise stated, this article uses the same data. See Andrew Coyle, Helen Fair, Jessica Jacobson and Roy Walmsley, *Imprisonment Worldwide: The Current Situation and an Alternative Future*, Policy Press, Bristol, 2016. Data on the World Prison Brief are updated monthly, and we would encourage readers to check the site for the most recent information available. See “World Prison Brief Data”, available at: www.prisonstudies.org/world-prison-brief-data.

competent judicial or legal authority, having been convicted of one (or more) offence(s) and sentenced to custody or, alternatively, where a criminal case against them is being pursued but they have not yet been tried and convicted or definitively sentenced. It should be noted that this generic definition of “prisoners” differs from the practice in some jurisdictions in which the word usually translated as “prisoner” is used to refer only to those in custody after sentencing, while another word such as “detainee” denotes those being held pretrial and/or pre-sentence. In the present context our use of the terms “detainee” and “detention” similarly refers to custodial deprivation of liberty in this criminal justice context, whatever stage the proceedings have reached.

Clearly there are many contexts in which individuals can be detained by the State *outside* the criminal justice system or on a borderline where distinctions are blurred. Detention might relate to a person’s immigration status, their pending deportation, or a risk that they are deemed to pose to national security or military interests.³ In some countries, notably China,⁴ relatively minor criminal offences and certain social, moral or political infractions are commonly dealt with through “administrative detention”, a system separate from mainstream criminal justice.⁵ In some States, detention is used for “treatment” for drug dependency, or “protection” due to some perceived vulnerability. All these categories of detention engage important fundamental rights questions, but are beyond the scope of the World Prison Brief database and are not addressed here.

Numbers incarcerated

Today, there are well over 10 million prisoners worldwide, of whom around half are in the United States, China, Russia and Brazil. The number is likely to be closer to 11 million, given that the World Prison Brief (a) holds no prisoner statistics for Eritrea, North Korea or Somalia, because of the difficulty of accessing data on these States,

- 3 It should be noted, however, that small numbers of non-criminal justice detainees are counted in prison statistics in some jurisdictions.
- 4 China’s system of “Re-education Through Labour”, which saw large numbers of offenders administratively detained, was formally abolished in December 2013. However, it is widely reported that various forms of (non-prison) detention of offenders remain in place – for example, in Amnesty International, *Amnesty International Report 2016/17: The State of the World’s Human Rights*, London, 2017, p. 119; UN Office of the High Commissioner for Human Rights (OHCHR), “Concluding Observations on the Fifth Periodic Report of China, Geneva, 2016, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPpRiCAqhKb7yhsIEE2YuVt8GA5WKG3GEX%2BZEXqjnsVnWP%2BkQ6f9cmzWcEPJYdFWEXvIFmDTE3WtKbIKZXAKr5OVTwnh86Q4GNZXSmrqMf55xyaMPMcFusW3o2>; US State Department, *Country Reports on Human Rights Practices for 2016: China* (includes Tibet, Hong Kong and Macau), Washington, DC, 2017, available at: www.state.gov/documents/organization/265540.pdf.”
- 5 Administrative detention is usually understood to mean detention “ordered by the executive” in which “the power of the decision rests solely with the administrative or ministerial authority, even if a remedy *a posteriori* (after the event) does exist in the courts against such a decision”. Louis Joinet, Rapporteur of the Sub-Commission on the Fight against Discriminatory Measures and Protection of Minorities, Report on the Practice of Administrative Detention, UN Doc. E/CN.4/sub.2/1989/27, 1989, cited in Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, Open Society Foundations, New York, 2014, p. 13, available at: www.opensocietyfoundations.org/publications/presumption-guilt-global-overuse-pretrial-detention.

and (b) holds no data on some States' remand or pretrial detainees – most significantly China's – as these data are not published.

This estimated 10 to 11 million does not include people detained in police or other administrative detention where there has been no formal decision to charge or prosecute. Time limits for police detention vary between jurisdictions, as do levels of compliance with them; there is often no routine recording of how many people are held in such circumstances. In view of the limited available data on this category of detainee, reporting on such data is beyond the scope of the World Prison Brief.

Breakdown by continent and region

Asia holds around 3.9 million of the world's prisoners, and the Americas about 3.8 million. In Europe there are around 1.6 million prisoners, and Africa has around 1 million. The far smaller continent of Oceania has a total prison population of about 55,000.⁶

While these numbers give a sense of how unevenly distributed prison populations are globally, greater insight can be gained from prison population rates, usually measured by the number of prisoners per 100,000 of the national population.⁷ The median rate worldwide is 142. A comparison of the median rates of geographic regions reveals that five regions have a rate of over 200: namely, Northern America, Central America, South America, the Caribbean, and Europe/Asia (encompassing Russia, Turkey, Armenia, Azerbaijan and Georgia). By contrast, the regions of Central Africa, Western Africa, Southern Asia, Northern Europe and Western Europe all have median rates of under 100.

Remand prisoners

Over a quarter of the world's prisoners are on "remand", which describes those held in detention at any of the following stages:

- Pre-court: a decision has been made to proceed but investigations are continuing or the case is awaiting trial or other court process.
- Trial: the case is being heard at court to determine guilt.
- Pre-sentence: the offender has been convicted but awaits sentence.
- Awaiting final sentence: the offender has been provisionally sentenced but the sentence and resulting custodial term will only become definitive when appeal periods have expired.

The World Prison Brief holds data on the remand populations of 216 jurisdictions. Remand data are unavailable for China and Rwanda (as well as for Eritrea, North

6 Roy Walmsley, *World Prison Population List*, 11th ed., Institute for Criminal Policy Research, London, 2016, p. 14.

7 The prison population rates calculated for the World Prison Brief – and reported in this article – are based on estimated national populations as of the date to which the latest prison population figures refer.

Table 1: *Countries with highest prison population rates*

Country	Total prison population*	National population*	Prison population rate
1. Seychelles	735	92,000	799
2. United States	2,217,000	317.8 million	698
3. St Kitts and Nevis	334	55,000	607
4. Turkmenistan	30,568	5.24 million	583
5. US Virgin Islands	577	106,700	542
6. Cuba	57,337	11.25 million	510
7. El Salvador	31,686	6.44 million	492
8. Guam	797	170,000	469
9. Thailand	311,036	67.45 million	461
10. Belize	1,545	344,000	449
11. Russia	642,470	144.4 million	445
12. Rwanda	54,279	12.5 million	434
13. UK Virgin Islands	119	28,000	425
14. Grenada	424	106,500	398
15. Panama	15,508	3.96 million	392
16. American Samoa	214	56,000	382
17. St Vincent and Grenadines	412	109,000	378
18. Cayman Islands	205	54,600	375
19. Antigua and Barbuda	343	92,000	373
20. Bahamas	1,396	385,000	363

* Figures for total prison population and estimated national population are based on data available in November 2015. See A. Coyle *et al.*, above note 2.

Korea and Somalia, in relation to which no prisons statistics are available at all, and some other very small jurisdictions). Taking into account the missing data, particularly from China, it is likely that the total worldwide remand population is around 3 million.

Among the States with the highest proportions of remand prisoners, those that have recently experienced war and conflict feature highly, notably Libya, where the available data suggest that up to 90% of the prison population are on remand.

Liberia and the Democratic Republic of the Congo have exceptionally high proportions of prisoners on remand. Another feature common among States with high remand figures is widespread poverty and inequality, often combined with overstretched and under-resourced justice systems: examples include Paraguay, Haiti, Benin and Bangladesh, which all have proportions over 70%. In India, where 67% of prisoners are on remand, Dalits, Adivasis and Muslims are disproportionately represented.⁸

In many countries, remand prisoners make up a large proportion of the total prison population. Regions with strikingly high remand figures include Central Africa (60%), Western Africa (56%) and Southern Asia (55%). The numbers are also high in the Caribbean, South America, Central America and Western Asia, regions with remand proportions of 40–50%. In contrast, in Central Asia, Eastern Asia, Northern Europe, Europe/Asia and Central and Eastern Europe, less than one fifth of prisoners are on remand. The worldwide median is 27%.

Unfortunately, data showing the lengths of time for which people are held on remand are generally not collected or published in any systematic way. Research suggests that remand prisoners are typically detained for excessive periods (often out of all proportion to the sentence they would receive if found guilty) in countries with larger proportions of remand prisoners. In India, the proportion of prisoners who have spent more than three years on remand is estimated to have doubled since 2000.⁹ In Nigeria (where nearly 70% of prisoners are awaiting trial), half the country's pretrial detainees had been detained for between five and seventeen years in 2010, with some detained for up to twenty years.

Female prisoners

The World Prison Brief has information on female prisoner numbers for all countries on which it has national prison population data except Cuba and Uzbekistan. The total number of women in prison currently stands at about 700,000, meaning that women make up less than 7% of the total worldwide prison population. The proportion grew from 5.4% in the year 2000 to 6.8% in 2015.

Of the States with the biggest proportions of women prisoners, Eastern and Southeast Asian States predominate. Hong Kong tops the list with around 21%. Also high on the list are Qatar (15%), Kuwait (14%) and the United Arab Emirates (11%). One major factor here is these States' harsh enforcement and sentencing policies for drug offences – particularly the harsh sentencing for low-level trafficking offences, which has a disproportionate impact on women offenders.¹⁰

8 Amnesty International, *Amnesty International Report 2015/16: The State of the World's Human Rights*, London, 2016, p. 185.

9 Indian National Crime Records Bureau, *Prison Statistics India 2000* and *Prison Statistics India 2015*, New Delhi, 2002 and 2016.

10 Increasingly punitive sentencing of drug offences, and particularly lower-level drug offences, is widely seen as a major driver of women's imprisonment. See United Nations Office on Drugs and Crime (UNODC), *Handbook on Women and Imprisonment*, 2nd ed., Vienna, 2014; Penal Reform International, *Penal Reform International 1989–2014: 25 Years of Promoting Fair and Effective Criminal Justice Worldwide*, London, 2015.

Trends

Between the years 2000 and 2015 the world prison population increased by almost 20%, slightly above the estimated 18% increase in the general population over that period. Europe is the only continent whose total prison population fell during this period (though Europe's share of women prisoners increased). The world's female prison population increased by 50% over this period, and its male prison population by 18%.¹¹

There are considerable differences between trends across continents, and much variation within continents, over this fifteen-year period. Some key points are discussed below.

Africa

Africa's overall prison population has increased by 15% since 2000, while its general population has increased by 44%. While having the lowest median prison population rate of all continents, 77, Africa displays great variation across its regions: by way of the starkest examples, the median rate is 52 in Western Africa and 188 in Southern Africa. The picture for Africa as a whole is complicated by the effect of Rwanda's genocide prosecutions, which pushed the number of prisoners to a peak of 145,000 in 1998 and the prison population rate to 1,947. Despite having since adopted measures to reduce prisoner numbers, Rwanda still has the second-highest prison population rate in Africa (434), after the small island nation of the Seychelles. Notable among African States for reducing prisoner numbers is Botswana, which adopted alternatives to custody in order to relieve severe prison overcrowding. Botswana's prison population rate dropped from 325 in 2008 to 190 in 2015 – its lowest recorded level in thirty years.

The Americas

The Americas have 3.8 million prisoners – nearly 40% of the world's total prison population, despite having only 14% of its general population. Since 2000, prison populations have sharply increased across the continent, most dramatically in South America.

The United States remains the starkest example of this continent's disproportionate use of prison: it has 4.3% of the world's general population but 21% of its prisoners. The upward trend started in the 1970s, and became more marked over the 1980s and early 1990s. This was followed by a period of slower growth up to 2008, when the prison population peaked at over 2.3 million. Since then the numbers have fallen year on year in the face of mounting evidence of the harms of mass incarceration and their disproportionate impact on America's black population. On 31 December 2014, 6% (or one in seventeen) of all 30- to 39-year-old black men were in prison, compared to 2% of Hispanic and 1% of white men in the same age group. Underlying the growth in levels of

11 R. Walmsley, above note 6, p. 15.

incarceration were ever tougher sentencing policies, leading to prison being used more frequently; terms becoming longer, notably for drug offences; mandatory minimum terms; and reduced opportunities for parole. Driven in part by fiscal constraints, steps have been taken towards reform over the past fifteen years. These include a loosening of mandatory sentencing provisions and the expansion of community-based alternatives to custody. Recent falls in the US prison population rate reflect large declines in prisoner numbers in the populous states of New York (from 1999), California (from 2006) and Texas (from 2010).

The total prison population of Central American countries has risen by more than 80% since 2000, led by El Salvador, whose prison population rate is now the seventh-highest in the world. The country has a very high homicide rate and significant gang-related conflict. The authors will discuss El Salvador in greater detail in the following section.

In South America, the biggest contributor to the region's increased prison population is Brazil. Now at over 600,000 (up from 230,000 in 2000), Brazil's is the world's fourth-largest total prison population. Its prison population rate has more than doubled, driven mainly by tougher drug laws. Numbers incarcerated for drug trafficking increased fourfold between 2005 and 2013 and are estimated to represent about 25% of all Brazil's prisoners.¹² The country's judicial and prisons systems exhibit various problems (by no means exclusive to Brazil): racial disparity in numbers prosecuted and sentenced, prison overcrowding, and inefficiencies in the judicial process.¹³

Asia

With around 3.9 million prisoners across the continent, Asia is on a par with the Americas, but its general population is more than four times greater. The median prison population rate of Asian jurisdictions is comparatively low, at 121. One striking feature is the high proportion of women prisoners.

The trend across most Asian States has been upwards since the 1980s. Most notably, Thailand's prison population of nearly 290,000 is the sixth-largest in the world and its prison population rate is the tenth-highest, at 428. Again, tough drugs policies underlie this, including extremely long sentences for more serious drug offences. Thailand's high proportion of female prisoners, at 13.6%, is one consequence – 85% of Thailand's women prisoners are held for drug offences.¹⁴ Thailand has recently tried to curb prisoner numbers by controlling numbers held on remand, granting royal pardons and expanding available alternatives to imprisonment.

India has the lowest prisoner population rate in Asia and this has remained fairly stable, having risen from 21 in 1993 to 33 in 2015. The country still has nearly 420,000 prisoners, though the majority are held on remand, as discussed above.

12 "Brazil's Supreme Court to Discuss Drug Decriminalization", *Telesur*, 19 June 2015.

13 US State Department, *Country Reports on Human Rights Practices for 2016: Brazil*, Washington, DC, 2017. Further discussion on the overuse of imprisonment in Brazil and in Latin America more widely can be found in Paul Hathazy and Markus-Michael Müller's contribution to this issue of the *Review*.

14 Penal Reform International, above note 10.

Europe

Europe has 15% of the world's prisoners, and 12% of the world's general population. This is the only continent whose total prison population has fallen since 2000, with the most significant reduction having been in Russia. There, criminal justice reforms were introduced in the 1990s to reduce the use of imprisonment and promote alternatives. Russia's prison population rate remains high, however, at 436. Finland, too, has brought its prison population down significantly (from a high of 187 in the 1950s to 55 today). This was the result of reforms designed to make greater use of community and suspended sentences and reduce custodial terms.

In Turkey, an increasingly punitive justice system has seen the opposite trend since 2000, leading to a threefold increase in the prison rate. In England and Wales, the years 1993 to 2012 saw the total prison population almost double from under 45,000 to almost 87,000, while the prison population rate steadily climbed to a high of 153, due largely to more convicted offenders being sentenced to immediate custody, to custodial terms growing longer and to a reduced use of early conditional release. Several European States have greatly reduced their remand populations since the 1990s, including by greater use of electronic monitoring, bail and other conditions. This has helped drive Europe's overall prison rates down.

Oceania

Oceania has approximately 55,000 prisoners, 0.5% of the world's total prison population, two thirds of whom are in Australia. However, the median prison population rate of Oceania is relatively high, at 155. Australia's prison rate has grown rapidly since 2000, due largely to "tough on crime" policies exemplified by mandatory sentencing, "three strikes" laws, longer sentences, more stringent bail conditions and reduced access to parole. Aboriginal people and Torres Strait Islanders represent over a quarter of all prisoners, but just 2% of the general population.¹⁵ In New Zealand, similarly, while only making up around 15% of the general population, Maori ethnic groups constitute almost 51% of the prison population, with another 11.3% of prisoners being Pacific People.

Current and emerging issues of concern

Having presented the data on changes in the use of imprisonment worldwide since 2000, the authors now turn to consider some of the most pressing issues of concern. Some of these are long-standing and affect many prisoners, notably overcrowding

15 Australian Bureau of Statistics, *Prisoners in Australia, 2015*, Canberra, 2015.

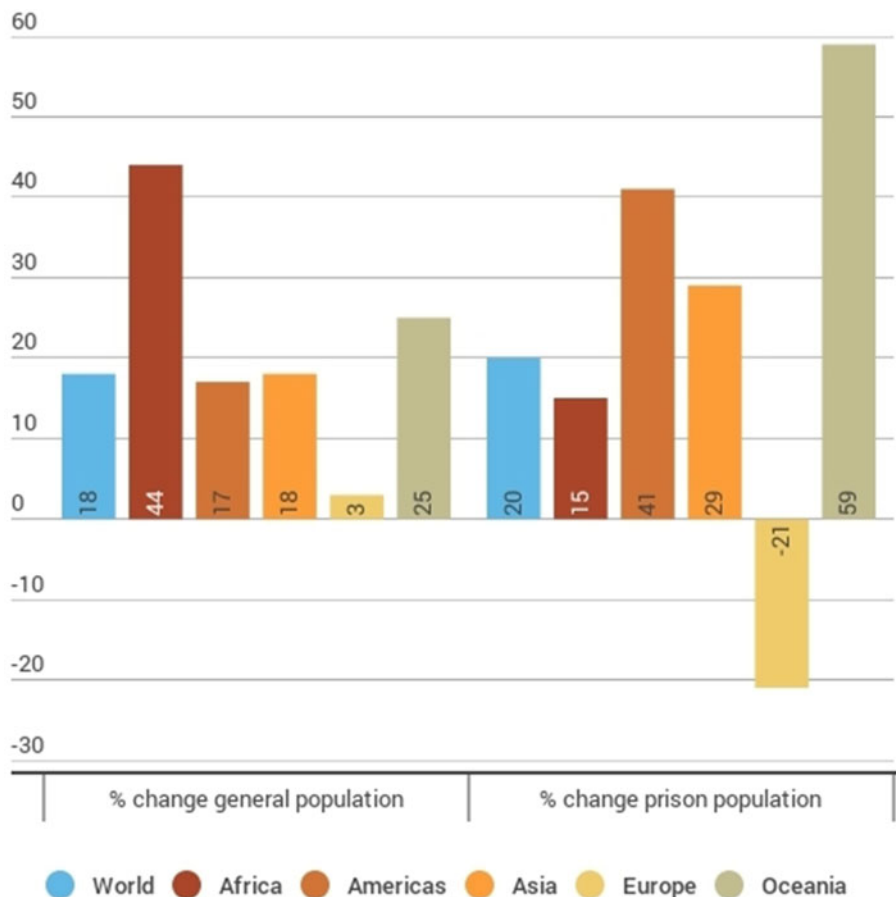


Figure 1. Percentage change in general population and prison population totals, 2000–2015: entire world and continents. Source: see A. Coyle *et al.*, above note 2.

and the resultant poor conditions and health risks, while others are more recent and affect specific groups of prisoners. These issues include the over-representation of foreign nationals and other minority groups in prison populations, and concerns about how to manage higher-risk prisoners and the need to prevent violent extremism from spreading in prisons.

We devote our attention here principally to the problem of prison overcrowding, the consequences of which are graphically illustrated by a case study describing conditions in a Salvadoran prison visited by one of us in 2016. Overcrowding continues to be a severe blight on the record of many countries in their treatment of prisoners, with 116 countries having prison occupancy rates of over 100%. Particularly concerning are Haiti, which has over 400% overcrowding, and the Philippines and El Salvador, which have over 300%.

Occupancy levels and overcrowding

Most national administrations publish details of the official capacity of their prison systems, though in many cases the figures provided are difficult to verify independently. In some countries there is a tradition of placing prisoners in single cells and the given capacity is therefore based on the number of cells available. In other countries, a number of prisoners are held in each cell and the administration will decide what it considers to be an appropriate number, based on a variety of disparate factors such as the number of sleeping spaces which can be provided in the space available. Multiple occupancy can vary from situations in which two persons share one room to conditions in which a hundred or more prisoners are held in large dormitories.

For the purposes of this article it is important to point out that while official occupancy figures may give some indication as to whether a prison is overcrowded, they are unlikely to provide a definitive measure. It is probable that a prison which holds more prisoners than its official capacity will be overcrowded. The World Prison Brief details occupancy levels for national prison systems. A prison system may have an overall occupancy rate below 100% but might include individual prisons that exceed their capacity, some of which are severely overcrowded. Similarly, a system in which the overall occupancy rate exceeds the spaces available may well include individual prisons that do not exceed their official capacity.

For the most part the official capacity of each prison system is set according to criteria determined by the country concerned, and in many instances this will not be dictated by the amount of living space available for each prisoner. There is no internationally accepted minimum standard for the physical space that each prisoner should have for living accommodation, but in recent years a number of international bodies have specified the minimum living space that should be provided for each prisoner. For example, the Council of Europe's Committee for the Prevention of Torture has published standards on "living space per prisoner in prison establishments":¹⁶ these are 6 square metres for a single-occupancy cell and 4 square metres per prisoner in a multi-occupancy cell. The ICRC has recommended that prisons should provide 5.4 square metres per person in single-cell accommodation and 3.4 square metres per person in shared or dormitory accommodation, including where bunk beds are used.¹⁷

Allowing for all these nuances, in broad terms it is generally safe to conclude that there is likely to be overcrowding in any prison system which has an occupancy rate of over 100%, and the higher the rate, the greater the level of overcrowding. According to the latest data available in the World Prison Brief,¹⁸ a

16 Committee for the Prevention of Torture, *Living Space per Prisoner in Prison Establishments: CPT Standards*, Council of Europe, Strasbourg, 2015, p. 1.

17 ICRC, *Water, Sanitation, Hygiene and Habitat in Prisons: Supplementary Guidance*, Geneva, 2012, p. 33.

18 World Prison Brief, "Highest to Lowest – Occupancy Level (Based on Official Capacity)", available at: www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All.

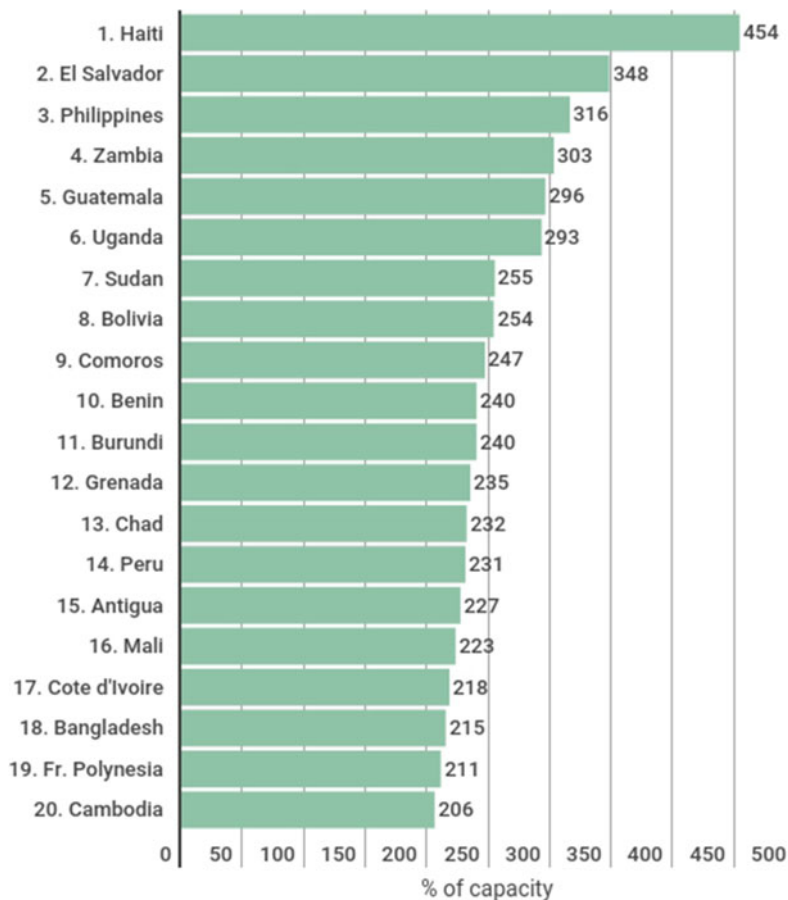


Figure 2. Countries with highest occupancy rates. Source: figures from World Prison Brief, “Highest to Lowest – Occupancy Level (Based on Official Capacity)”, available at: www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All#tabletop.

total of 116 countries have prison occupancy rates of over 100%. Haiti has the highest rate of overcrowding in the world at 454%, followed by El Salvador at 348%, the Philippines at 316% and Zambia at 303%. A further eighteen countries have over 200%, and an additional ninety-seven have over 100% overcrowding.¹⁹

19 *Ibid.*

The consequences of overcrowding: A case study

One example of what overcrowding can mean in practice is to be found in the prisons of El Salvador. El Salvador was chosen as an example because, as noted above, it now has the second-highest occupancy rate in the world, and the shocking consequences of this are clear from this case study. One of the authors of this article visited El Salvador in 1999 and again in 2016 and was therefore able to observe first-hand some of the consequences of the overcrowding and shortage of resources in the country's prisons.

In 1999 there were 7,500 prisoners in El Salvador. According to the Directorate-General of Prisons, at the end of January 2017 the number of prisoners was over 37,000, almost a fivefold increase.²⁰ None of the financial, personnel or accommodation resources in the prison system has had anything approaching a comparable increase.

As a result of the overpopulation, significant numbers of prisoners are accommodated in very large factory-like buildings with minimal facilities. Few beds are provided, and many prisoners sleep on makeshift bedding on the floor. The roof struts and upper fencing are festooned with rudimentary hammocks where prisoners perch perilously. The staff presence in the accommodation units is minimal, meaning that the gang leaders in each unit exercise their own authority over other prisoners.²¹ Prisoners have to pay for many of the basic necessities of life, including space to sleep.

For two years, the government has imposed what it terms “exceptional measures” in prisons, part of the official policy of using a “heavy hand” (*mano dura*) in its efforts to control the influence of gang members both in the prisons and in civil society.²² These measures involve holding some prisoners in particularly repressive conditions. In a prison that the author visited in 2016, one section included a number of small cells with very little natural light provided through the grilled gates onto the corridor which fronted the cells. Each cell held up to twenty prisoners, who were obliged to stand or crouch most of the day because of shortage of space. Pieces of cloth and rope were strung from the ceiling to provide makeshift hammocks. According to the prisoners, they were allowed out of the cells for a short period once every one or two weeks to walk in a tiny yard area abutting the living accommodation. Visits were not allowed.

The conditions in these cells were reminiscent of what the UN Special Rapporteur on Torture found when he paid his first visit to Russian prisons in 1994 and observed graphically that he “would need the poetic skills of a Dante or the artistic skills of a Bosch adequately to describe the infernal conditions he

20 Figures from: www.dgcp.gob.sv/index.php?option=com_content&view=article&id=123.

21 See Sonja Wolf, “Central American Street Gangs: Their Role in Communities and Prisons”, *European Review of Latin American and Caribbean Studies*, No. 96, April 2014; Chris Van der Borgh and Wim Savenije, “De-securitising and Re-securitising Gang Policies: The Funes Government and Gangs in El Salvador”, *Journal of Latin American Studies*, Vol. 47, No. 1, 2015.

22 See, for example: <https://sustainablesecurity.org/2011/03/01/mano-dura-gang-suppression-in-el-salvador/>.

found in these cells”.²³ Conditions such as these carry other serious dangers, not least as regards the health of the prisoners, and one of the greatest of these risks is the inevitability of infectious diseases. It is no surprise that this danger is now being realized in the prisons of El Salvador – there are indications that there has been a dramatic increase in the prevalence of tuberculosis in these prisons.²⁴ Infectious disease is not a respecter of prison walls, and if this epidemic is not halted urgently there will be a real danger to public health outside the prisons, as was the case with a number of prisons in countries of the former Soviet Union throughout the 1990s.

The shocking conditions in Salvadoran prisons are by no means unique. In Latin America there are similarly drastic environments to be found in prisons in Brazil,²⁵ Venezuela²⁶ and Honduras.²⁷ In Africa, inhuman detention conditions exist in countries such as South Africa,²⁸ Nigeria²⁹ and Malawi.³⁰ In Asia, there has been severe criticism of prisons in several countries. In relative terms physical conditions in European prisons are generally not so extreme, yet there can be no room for complacency, as can be seen from even a cursory study of the judgments of the European Court of Human Rights on violations of the European Convention of Human Rights in prisons in the forty-seven member States of the Council of Europe.³¹ When giving evidence to a UK parliamentary committee in January 2017, the independent chief inspector of prisons for England and Wales was asked, “What is wrong with our prisons?” His reply was trenchant: “Basically, they are unsafe; they are full of drugs; we have an ageing population; the physical environment is appalling; and there are far too many people in our prisons who are suffering from mental health issues.”³²

23 United Nations Economic and Social Council, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report Of The Special Rapporteur*, E/CN.4/1995/34, 12 January 1995.

24 Gilberto Ayala, Julio Garay, Miguel Aragon, Tom Decroo and Rony Zachariah, “Trends in Tuberculosis Notification and Treatment Outcomes in Prisons: A Country-Wide Assessment in El Salvador from 2009–2014”, *Pan American Journal of Public Health*, Vol. 39, No. 1, 2016; Ministerio de Salud, *Situación epidemiológica de la tuberculosis en El Salvador, 2015*, available at: www.salud.gob.sv/archivos/pdf/TUBERCULOSIS_DOC/Vigilancia_epidemiologica/Situacion_epidemiologica_de_la_tuberculosis_en_el_salvador_2015.pdf; Ministerio de Salud, *Plan estratégico nacional multisectorial para el control de la tuberculosis en El Salvador, 2016–2020*, April 2015, available at: www.salud.gob.sv/archivos/pdf/TUBERCULOSIS_DOC/Planes_Estrategicos/plan_estrategico_nacional_multisectorial_para_control_de_la_tb_en_el_salvador_2016_2020.pdf.

25 See, for example: www.washingtonpost.com/news/morning-mix/wp/2017/01/18/grisly-gang-massacres-sweep-brazils-prisons-100-inmates-killed-in-recent-weeks/.

26 See, for example: www.mirror.co.uk/news/world-news/prisoners-left-die-concentration-camp-9016760.

27 See, for example: www.insightcrime.org/news-analysis/honduras-prisons-put-inmates-at-risk-fuel-gang-violence-oas.

28 See, for example: www.iol.co.za/capetimes/pollsmoor-prison-conditions-declared-unconstitutional-2095712.

29 See, for example: <http://allafrica.com/stories/201609010902.html>.

30 See, for example: www.news24.com/Africa/News/hunger-reduces-prisoners-to-living-skeletons-in-malawi-20160912.

31 Available at: <http://hudoc.echr.coe.int>.

32 House of Commons Justice Committee, “Oral Evidence: Prison Reform”, HC 548, 31 January 2017, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/prison-reform/oral/46581.html>.

Other critical and topical issues

In respect of the way that imprisonment is used today in many countries, there are a number of issues which have become particularly critical in recent years.

Race and ethnicity

In virtually every country of the world, minority groups are over-represented within prison walls. One obvious example of this is in respect of race and ethnicity. The situation in Australasia is illustrative: in Australia, for example, Aboriginal people and Torres Strait Islanders make up 27% of the prison population despite the fact that they constitute only 2% of the adult population.³³ This proportion varies from state to state, at 8% in Victoria in contrast to 84% in the Northern Territory.³⁴ In New Zealand, 15% of the country's population identify with Maori ethnic groups, but these individuals constitute almost 51% of the prison population, with another 11.3% of prisoners being Pacific People.³⁵ A similar disproportion is to be found in Canada, where indigenous people account for only 3% of the adult population but make up 24% of admissions to provincial and territorial correctional services and 20% of sentenced admissions to federal institutions.³⁶

Similar disparities exist in the United States. The overall rate of imprisonment in the United States is 698 per 100,000 of the population; however, within this total figure there is a considerable racial disparity. The rate of imprisonment for white males is 465 per 100,000, while that of black males is 2,724 and that of Hispanic males 1,090 per 100,000. In addition, official figures show that black females are significantly more likely to be imprisoned than white females.³⁷ In total, 13% of the national population is African-American, but 37% of the male prison population comes from this ethnic grouping. A similar phenomenon exists in England and Wales, where black, Asian and minority ethnic individuals make up 14% of the national population but account for over a quarter of all prisoners. In 2010, the UK Equality and Human Rights Commission reported that the disproportion of black people in prison in the United Kingdom is higher than that seen in the United States.³⁸

There is insufficient space in this article to analyze in detail the reasons for these striking disparities, but it is important to point out that answers will not be found solely within the world's criminal justice systems. Rather, the disparities

33 Australian Bureau of Statistics, above note 16.

34 *Ibid.*

35 OHCHR, "Statement at the Conclusion of Its Visit to New Zealand (24 March–7 April 2014) by the United Nations Working Group on Arbitrary Detention", available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14563&LangID=E.

36 Statistics Canada, "Adult Correctional Statistics in Canada, 2013/2014", available at: www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm.

37 US Department of Justice, "Prisoners in 2014", available at: www.bjs.gov/content/pub/pdf/p14.pdf.

38 Equality and Human Rights Commission, *How Fair is Britain? Equality, Human Rights and Good Relations in 2010*, London, 2010.

underline a wider reality, which is that in many countries prisons are populated largely by men and women who are at the margins of society – socially, economically, culturally and, in this case, racially and ethnically.

Foreign nationals

Given the globalized nature of the modern world and the increasing international movement of people, it is unsurprising that these phenomena are increasingly reflected in prison populations, with many countries now having a significant proportion of foreign national prisoners. Available data from the World Prison Brief show that prisoners of foreign nationality now make up over 10% of the prison population in sixty-three jurisdictions, with twenty-nine of these in the greater European region.³⁹ The term “foreign national” covers a wide range of different circumstances. It may apply to those who have come from their home country and are then convicted and imprisoned in another country. It can also apply to those who have had a long relationship with the country in which they are imprisoned and may even be permanently resident but do not have citizenship of that country. It may apply to those who are imprisoned for immigration or other civil reasons rather than under criminal law.

Special provision may have to be made for foreign national prisoners in a variety of matters. In terms of legal safeguards, they may require access to their home country’s diplomatic representatives as set out in the Vienna Convention on Consular Relations.⁴⁰ If they do not speak or understand the language of the country in which they are being held, both they and the prison administration may need assistance from interpreters. If their families remain in their country of citizenship, there may have to be special arrangements to enable them to keep in contact.

There is a variation of this issue in several countries; in Central America, for example, there are cases where prisoners have never lived in their country of citizenship but have been brought up and perhaps even born in another country, such as the United States. Having been imprisoned initially in the second country, they are then deported back to their country of citizenship even though their social and family links with that country may be tenuous at best.

Violent extremism

For the last two decades, there has been concern in a number of jurisdictions about the danger of violent extremism spreading in prisons. In recent years the focus of attention, particularly in Europe, has been on so-called Islamist extremism. In other countries there has been concern about far-right extremism, while

39 World Prison Brief, “Highest to Lowest – Foreign Prisoners (Percentage of Prison Population)”, available at: www.prisonstudies.org/highest-to-lowest/foreign-prisoners?field_region_taxonomy_tid=All (accessed in February 2017).

40 Vienna Convention on Consular Relations, 596 UNTS 561, 24 April 1963 (entered into force 19 March 1967), Art. 36.

elsewhere the concern has been for prisoners who hold political views which are at odds with the governing authorities. For centuries prisons have been used to detain persons who have been convicted of violent extremist behaviour based on political opinions or religious beliefs, and prison administrations have managed the detention of these prisoners in a variety of ways. Some of the official responses to violent extremist prisoners have themselves violated international and domestic law.

Some countries use the description “violent extremism” in preference to “radicalization”, since the latter term can be subject to different interpretations. A violent extremist is someone allied to a group which spreads radical views and justifies the use of violence or illegal conduct in pursuit of its objectives. This definition is a generic one and needs to be further distilled. At the top end it is likely to include a small number of key plotters and planners, including those whose ambition is to radicalize other prisoners. At the next level down there will be a group that includes those who facilitate the work of other extremists, who may provide or have access to finance or who are dedicated followers. A third level spreads out to include followers in the wider prison population, who may be less committed. After them come those who are on the margins of the group but open to being attracted to it. Finally, there will be some who are vulnerable, either psychologically or for other personal reasons, and who may seek companionship in the group. The distinction among these groups needs to be recognized, and different tactics need to be developed to deal with them. It is important to avoid regarding all of these groups in the same light and dealing with them as a homogenous category.

There is now extensive case law, a raft of reports from international inspection bodies and rigorous academic studies on how States and other official parties can deal with violent extremism in prisons in an efficient and humane manner.⁴¹

Increasing use of very high-security imprisonment for particular groups of prisoners

A small number of prisoners may be so dangerous and disruptive that they have to be held apart from the general prison population, even in high-security prisons. The care and control of these prisoners needs to be carefully structured in a way that observes the general principles of good prison management. Solitary confinement should be used only as a last resort and only in extreme cases. Where its use is deemed necessary it should be used for short periods and managed within established guidelines and strict safeguards.⁴² There is a growing international

41 See, for example, UNODC, *Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons*, New York, 2016; International Centre for the Study of Radicalisation and Political Violence, *Prisons and Terrorism: Radicalisation and De-radicalisation in 15 Countries*, London, 2010; Tinka Veldhuis, *Prisoner Radicalization and Terrorism Detention Policy: Institutionalized Fear or Evidence-Based Policy-Making?*, Routledge, London, 2016.

42 Sharon Shalev, *A Sourcebook on Solitary Confinement*, London School of Economics and Political Science, London, 2008, available at: http://solitaryconfinement.org/uploads/sourcebook_web.pdf.

consensus that the isolation of individuals in conditions of solitary confinement should not be imposed for longer than fifteen days.⁴³ There are generally other options for the management of prisoners, even highly dangerous ones.

As a general rule, high-security conditions should only be used where a prisoner's behaviour means that a less restrictive regime would be inappropriate and would pose a direct threat to safety and security. Time spent in such restrictive conditions should be the minimum possible and should be subject to continuous review.

In well-managed prisons there will be a balance between security, control and justice. The premise that treating prisoners in a humane and just manner will lead to a reduction in security and control is quite wrong. On the contrary, prevention of escapes and the maintenance of control and good order can best be achieved within a well-ordered environment. Prison systems which restrict the use of very high-security conditions to the minimum necessary are likely to be safer for both prisoners and staff.

In recent years it has been suggested in some quarters that there is a new type of prisoner who is so dangerous and such a threat to society that they will need to be held in isolation for a lengthy period of time, in some cases for the rest of their natural life. This is a dangerous assumption. Jurisdictions across the globe have been faced with the issue of how to deal with individuals who present a serious and continuing threat to the State over long periods of time, and they have always been required to do so within the parameters of domestic and international law. The way in which such prisoners are held and treated is one of the greatest tests of a professional prison system. Failure to treat them decently and humanely is wrong on a number of levels. It is wrong as a matter of principle and in respect of the way a professional prison administration should conduct itself. It also breaches the requirements of a democratic State.

International and regional standards

Over the last fifty or more years, a comprehensive set of standards has been established defining what is required to ensure that prisoners and other detained persons are held in conditions which are decent and humane. These standards are grounded in a set of clear principles which can be applied in all countries and which have been agreed by the international community, usually through the United Nations (UN). Key among them are the International Covenant on Civil and Political Rights⁴⁴ and the International Covenant on Economic, Social and Cultural Rights.⁴⁵ States that have ratified or acceded to these treaties are legally bound by them.

43 See, for example, "Solitary Confinement Should Be Banned in Most Cases, UN Expert Says", *UN News Centre*, 18 October 2011, available at: www.un.org/apps/news/story.asp?NewsID=40097#.WkYUJnko-M8; "Liberal Government to Impose 15-Day Limits on Solitary Confinement", *Globe and Mail*, 19 June 2017, available at: www.theglobeandmail.com/news/national/liberal-government-to-impose-15-day-limits-on-solitary-confinement/article35369982/.

44 Available at: www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

45 Available at: www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

In addition to the overarching international human rights standards, there are a number of instruments that deal specifically with prisoners and the conditions in which they are held. Key among these are the UN Standard Minimum Rules for the Treatment of Prisoners (1957), updated as the Nelson Mandela Rules (2015),⁴⁶ and the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (known as the Bangkok Rules, 2010).⁴⁷ The international standards are supported by regional instruments such as the European Prison Rules (2006).⁴⁸

The extent to which individual States implement the international standards can be seen through the work of regional judicial bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights. In addition, conditions of detention in the member States of the Council of Europe are monitored by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,⁴⁹ and in 1997 the African Commission on Human and People's Rights appointed a Special Rapporteur on Prison Conditions.⁵⁰

In 2002, the UN adopted the Optional Protocol to the Convention against Torture.⁵¹ This entered into force in 2006 and established a system of regular visits to places of detention by a sub-committee appointed by the UN Committee against Torture, complemented by sustained regular visits conducted by national independent inspection groups known as National Preventive Mechanisms.

A full list of the international and regional human rights standards relating to prisons and the use of imprisonment can be found in the recent Institute for Criminal Policy Research publication *Imprisonment Worldwide: The Current Situation and an Alternative Future*.⁵² Further details on how the standards can be practically applied in the prison setting can be found in the handbook *A Human Rights Approach to Prison Management*,⁵³ a third edition of which will be published in early 2018.

While the international and regional standards form a broad framework on how prisoners should be treated and the conditions in which they should be kept, the extent to which States comply with these standards varies widely. Pressures which can undermine a State's compliance include a lack of resources, the overuse of imprisonment, a lack of political will, outdated legislation and weak monitoring systems. The UN Office on Drugs and Crime (UNODC) notes that "[p]rison authorities have a responsibility to ensure that the supervision and

46 Available at: www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf.

47 Available at: www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.

48 Available at: <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>.

49 Available at: www.coe.int/mk/web/cpt/home.

50 See: www.achpr.org/mechanisms/prisons-and-conditions-of-detention/.

51 Available at: www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.

52 A. Coyle *et al*, above note 2.

53 Andrew Coyle, *A Human Rights Approach to Prison Management: Handbook for Prison Staff*, 2nd ed., International Centre for Prison Studies, 2009, available at: www.prisonstudies.org/sites/default/files/resources/downloads/handbook_2nd_ed_eng_8.pdf.

treatment of prisoners is in line with the rule of law, with respect to individuals' human rights, and that the period of imprisonment is used to prepare individuals for life outside prison following release", and makes it clear that the pressures detailed above are not justifications for non-compliance.⁵⁴

Concluding remarks

In many countries, prison conditions are inhuman and degrading. Despite all the efforts of intergovernmental and governmental bodies, as well as those of well-intentioned individuals and non-governmental bodies, the prison as an institution remains stubbornly resistant to reform. Nonetheless, in many countries courts continue to send more people to prison for longer periods of time, taking no account of the fact that one of the surest predictors that someone is likely to end up in prison is that he or she has been there previously, particularly if first sent there at a young age.⁵⁵

We appear to be a long way away from a world in which the practice of imprisonment becomes as unthinkable as, for example, sending people to the workhouse. It remains difficult to imagine a time when the prison will have ceased to exist, replaced by some other form of response to crime. This is so despite mounting evidence that non-custodial alternatives offer better prospects of rehabilitation, carry less risk of recidivism and provide better value for money. Perhaps there really is no alternative to prison, at least none that could provide the necessary response to – and protection from – crimes of the most serious kind.

Yet in the world's prisons today, only a minority of prisoners who are serving a custodial sentence have been convicted of a serious crime and/or present an appreciable risk to public safety.⁵⁶ As for the majority, a high proportion of them will have come to prison from lives largely spent at the margins of society as a result of poverty, abuse, neglect, mental illness, alcohol or drug dependency, or a combination of all these factors.⁵⁷ We are, it seems, just as ready as we were in the nineteenth and twentieth centuries to shut away from

54 UNODC, "Why Promote Prison Reform?", available at: www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html.

55 See, for example, Anna Aizer and Joseph J. Doyle Jr, *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, National Bureau of Economic Research, Cambridge, MA, 2013.

56 13th UN Congress on Crime Prevention and Criminal Justice, *The State of Crime and Criminal Justice Worldwide*, 2015.

57 See, for example, Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity*, Duke University Press, Durham, NC, 2009. Wacquant argues that America's neoliberal policies have replaced poor relief programmes, workhouses and debtors' prisons with modern variants – prison, probation and surveillance – which work to "regulate" (or socially exclude) populations that have become economically redundant.

view those people who represent “the other” – who appear different in some way from the majority.⁵⁸

“The increased use of imprisonment in many countries is a reflection of new insecurities in a changing world order.”⁵⁹ In looking to the future, it is likely that any hope of increased security will come only if there is a move away from seeking criminal justice solutions to deep and underlying political, social and economic problems. That is a debate which will take us beyond the parameters of this article.⁶⁰

58 As discussed in James M. Byrne, April Pattavina and Faye S. Taxman, “International Trends in Prison Upsizing and Downsizing: In Search of Evidence of a Global Rehabilitation Revolution”, *Victims and Offenders: An International Journal of Evidence-Based Research, Policy, and Practice*, Vol. 10, No. 4, 2015.

59 Andrew Coyle, “Prisons in Context”, in Yvonne Jewkes, Ben Crewe and Jamie Bennett (eds), *Handbook on Prisons*, 2nd ed., Routledge, New York, 2016.

60 Mauer reviews research literature on this topic, much of which has emerged from the United States in response to that country’s surge in incarceration rates over recent decades. See Marc Mauer, “Incarceration Rates in an International Perspective”, *Oxford Research Encyclopaedia of Criminology*, 2017, available at: <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-233?rskey=fyAxAq&result=1>.

The costs of incarceration for families of prisoners

Megan Comfort, Tasseli McKay, Justin Landwehr, Erin Kennedy, Christine Lindquist and Anupa Bir

Megan Comfort is a Senior Research Sociologist at RTI International and an Adjunct Assistant Professor of Medicine at the University of California, San Francisco. Her work focuses on the repercussive effects of justice-system involvement on relationships, health and well-being; HIV risk and prevention among justice-involved people; and health disparities among urban poor populations.

Tasseli McKay is a Research Analyst at RTI International. Her work focuses on intimate partner violence prevention and response, couple and family relationships in the context of justice-system involvement, strategies for improving health coverage and access to care among justice-involved people, and other issues at the intersection of public health and criminal justice policy.

Justin Landwehr is an Economist at RTI International. His work focuses on behavioural health and criminal justice topics, using both quantitative and qualitative methodologies.

Erin Kennedy is a Public Health Research Analyst at RTI International. Her work focuses on prisoner experiences of incarceration, re-entry and sexual assault; substance abuse prevention; and law enforcement, corrections and criminal justice.

Christine Lindquist is a Senior Research Sociologist at RTI International. Her work focuses on violence against women, victimization and offending, prisoner re-entry, and families and incarceration.

Anupa Bir is the Director of RTI International's Women, Children, and Families Program. Her work focuses on the well-being of vulnerable populations and aligning incentives with various systems, including the welfare, child welfare, corrections and health systems, to improve well-being.

Abstract

Family members of incarcerated people are often faced with financial, social and emotional costs related to the imprisonment of their loved ones. These costs can be conceptualized as investments both in the sustenance of personal relationships and in a greater social good in the form of assisting with the reintegration of former prisoners. In this article, we draw upon data from a mixed-methods study to elucidate the costs of detention on families of prisoners. We demonstrate that financial, social and emotional costs associated with imprisonment of a family member are interrelated and often compound each other, indicating the importance of addressing them in a holistic framework.

Keywords: families, prisoners, incarceration, relationships, costs.

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Introduction

Incarceration rates have risen throughout the globe over the last several decades.¹ These increases have been analyzed as stemming from a complex interplay of neoliberal governance, welfare retrenchment, racism, xenophobia and, in the US context, the “War on Drugs”.² As the number of people held in jails and prisons has grown, the importance of family ties in the lives of incarcerated people and the challenges that imprisonment presents to maintaining these connections, the scope and breadth of family member connectedness to prisoners, the importance of family ties in the lives of incarcerated people, and the challenges that imprisonment presents to maintaining these connections have become focal

1 See the Institute for Criminal Policy Research's World Prison Brief website, available at: www.prisonstudies.org/info/worldbrief/ (all internet references were accessed in June 2017).

2 James Forman Jr, *Locking Up Our Own: Crime and Punishment in Black America*, Farrar, Straus and Giroux, New York, 2017; Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America*, Oxford University Press, New York, 1995; Loïc Wacquant, “Suitable Enemies: Foreigners and Immigrants in the Prisons of Europe”, *Punishment & Society*, Vol. 1, No. 2, 1999; Franklin E. Zimring and Gordon J. Hawkins, *The Scale of Imprisonment*, University of Chicago Press, Chicago, IL, 1991.

points of research.³ Most incarcerated individuals express the desire to maintain connections with their children and their intimate partners while separated.⁴ Family contact during incarceration has been found to have positive effects, including reduced recidivism after release from prison.⁵ Indeed, if incarcerated people are able to maintain strong family ties, these relationships can be sources of emotional, financial and practical support as they serve their sentences.⁶ Likewise, family members are often a key source of “housing, emotional support, financial resources, and overall stability” during the re-entry period.⁷

When people serve time in prison, the family members they leave behind must adjust not only to the physical absence of their loved one, but also to a void in the place of the monetary and practical contributions which that person made to the household and the encumbrance of a set of challenges and costs specifically associated with maintaining a relationship with a prisoner. The financial, social and emotional costs incurred by families in their efforts to maintain contact during and after incarceration can be conceptualized as investments both in the sustenance of personal relationships and in a greater social good in the form of assisting with the reintegration of former prisoners. The burden born by non-incarcerated members of society in terms of taxpayer money and public safety should be of central importance in decisions about incarceration policies. The fact that the emotional and financial costs paid by family members of prisoners are not accounted for in these calculations is an important oversight, as they can also have profound and long-term implications for societal well-being.

- 3 Hedwig Lee *et al.*, “Racial Inequalities in Connectedness to Imprisoned Individuals in the United States”, *Du Bois Review: Social Science Research on Race*, Vol. 12, No. 2, 2015; Manuela Ivone P. da Cunha, “Closed Circuits: Kinship, Neighborhood and Incarceration in Urban Portugal”, *Ethnography*, Vol. 9, No. 3, 2008; Sara Wakefield, Hedwig Lee and Christopher Wildeman, “Tough on Crime, Tough on Families? Criminal Justice and Family Life in America”, *Annals of the American Academy of Political and Social Science*, Vol. 665, No. 1, 2016; Megan Comfort, *Doing Time Together: Love and Family in the Shadow of the Prison*, University of Chicago Press, Chicago, IL, 2008; Donald Braman, *Doing Time on the Outside: Incarceration and Family Life in Urban America*, University of Michigan Press, Ann Arbor, MI, 2004; Gwénola Ricordeau, *Les détenus et leurs proches: Solidarités et sentiments à l’ombre des murs*, Éd. Autrement, Paris, 2008.
- 4 Creasie Finney Hairston, “Family Ties during Imprisonment: Important to Whom and for What?”, *Journal of Sociology and Social Welfare*, Vol. 18, No. 1, 1991; Mary Pattillo, David Weiman and Bruce Western (eds), *Imprisoning America: The Social Effects of Mass Incarceration*, Russell Sage Foundation, New York, 2004.
- 5 Nancy G. La Vigne *et al.*, “Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners’ Family Relationships”, *Journal of Contemporary Criminal Justice*, Vol. 21, No. 4, 2005; William D. Bales and Daniel P. Mears, “Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?”, *Journal of Research in Crime and Delinquency*, Vol. 45, No. 3, 2008; Jonathon J. Beckmeyer and Joyce A. Arditti, “Implications of In-Person Visits for Incarcerated Parents’ Family Relationships and Parenting Experience”, *Journal of Offender Rehabilitation*, Vol. 53, No. 2, 2014.
- 6 D. Braman, above note 3; M. Comfort, above note 3; Christine Lindquist *et al.*, *The Experiences of Families during a Father’s Incarceration: Descriptive Findings from Baseline Data Collection for the Evaluation of Marriage and Family Strengthening Grants for Incarcerated and Reentering Fathers and Their Partners*, Office of Planning, Research and Evaluation, Administration for Children and Families, US Department of Health and Human Services, Washington, DC, 2015.
- 7 Bruce Western *et al.*, “Stress and Hardship after Prison”, *American Journal of Sociology*, Vol. 120, No. 5, 2015; Christy A. Visser *et al.*, *Baltimore Prisoners’ Experiences Returning Home*, Urban Institute, Washington, DC, 2004.

In this article, we draw upon data from a mixed-methods study conducted in the United States to elucidate the costs of detention on families of prisoners. In the United States, the increase in the use of confinement since the 1970s has been especially acute, and the phenomenon of one in every 100 US residents being held behind bars is widely referred to as “mass incarceration”.⁸ Although the nation is an outlier in terms of the number of people behind bars and thus the number of people navigating family ties with incarcerated loved ones, research from Australia, Denmark, England, France, Portugal and Russia has documented more similarities than differences in the experiences of these families.⁹ We do not claim that the findings reported in this article are generalizable within the United States, let alone globally. However, the existing literature supports the premise of many commonalities among families of prisoners, and further investigation of the challenges identified in this study is warranted in international contexts.

In the following, we begin by describing the methods for the *Multi-site Family Study on Incarceration, Parenting, and Partnering*. We then report findings from this study regarding the costs of imprisonment for relationships with partners and with children, and discuss findings about families’ needs for support during incarceration and re-entry. We conclude by reflecting on the intersection of the financial, social and emotional costs of incarceration and the potential implications for policies to mitigate the burdens borne by families.

Methods

The *Multi-site Family Study on Incarceration, Parenting and Partnering* (MFS-IP) was funded by the US Department of Health and Human Services, the Office of the Assistant Secretary for Planning and Evaluation (ASPE) and the Office of Family Assistance (OFA), with the aim of documenting the implementation and impact of relationship and family strengthening programmes for incarcerated and re-entering men and their partners.¹⁰ Although the analyses described here use quantitative data collected for the MFS-IP impact evaluation (conducted from 2008 to 2014), the findings are not about the impact of programming, but rather the experiences of the families that participated in the study.

8 David Garland (ed.), *Mass Imprisonment: Social Causes and Consequences*, Sage, London, 2001.

9 Lars Anderson, “Duration and Frequency of Paternal Incarceration and Youth Outcomes”, *Annals of the American Academy of Political and Social Science*, 2016; Rachel Condry, *Families Shamed: The Consequences of Crime for Relatives of Serious Offenders*, Willan, Cullompton, 2007; Rafaela Granja, “Beyond Prison Walls: The Experiences of Prisoners’ Relatives and Meanings Associated with Imprisonment”, *Probation Journal*, Vol. 63, No. 3, 2016; Mark Halsey and Simone Deegan, “Father and Son: Two Generations through Prison”, *Punishment & Society*, Vol. 14, No. 3, 2012; Marie Hutton, “Visiting Time: A Tale of Two Prisons”, *Probation Journal*, Vol. 63, No. 3, 2016; Dominique Moran, “Between Outside and Inside? Prison Visiting Rooms as Liminal Carceral Spaces”, *GeoJournal*, Vol. 78, No. 2, 2013; R. Gwénola, above note 3; Caroline Touraut, *La famille à l’épreuve de la prison*, PUF, Paris, 2012.

10 See: <https://aspe.hhs.gov/evaluation-marriage-and-family-strengthening-grants-incarcerated-and-reentering-fathers-and-their-partners>; see also the forthcoming special issue of the *Journal of Offender Rehabilitation* dedicated to articles describing the study and its findings.

Data collection approach

Beginning in December 2008, the MFS-IP enrolled couples participating in relationship and family strengthening programming¹¹ in five programme sites in the United States (the states of Indiana, Ohio, New York, New Jersey and Minnesota), and a set of similar non-participating couples. Couples (including 1,991 eligible men and 1,482 of their primary intimate or co-parenting partners, referred to as “survey partners” throughout this article) were interviewed at baseline and at nine- and 18-month follow-ups, and 34-month follow-up interviews were conducted with over 1,000 couples in two sites. The longitudinal interviews collected quantitative information about parenting, couple relationship experiences, family stability and re-entry. Study participants were asked about all of their minor children and were given more detailed questions about a single focal child, selected using a formula that favoured children co-parented with the study partner and children closest to the age of 8. The decision to use 8 years of age to select the focal child was made in order to (1) be able to compare focal children to each other across the sample, and (2) follow focal children longitudinally during a developmental period when a similar set of socio-emotional adjustment and behavioural outcomes could be measured (as opposed to, for example, having infants turn into toddlers). Quantitative data collection took place from December 2008 through April 2014.¹²

In addition to the longitudinal surveys, a qualitative sub-study was conducted to better understand family relationships during incarceration and re-entry. In-depth qualitative interviews were conducted with a sub-sample of MFS-IP couples: those in which the male participant was nearing release from prison (who were interviewed twice – once before and once after release) or had been released within approximately the prior year (who were interviewed once, after release). Both members of the study couple were invited to participate. Interviews lasted approximately 90 minutes and were guided by a semi-structured interview guide. The interviews, conducted from 2014 to 2015, focused on family experiences and needs during incarceration and re-entry, as well as what forms of interpersonal, programmatic and policy support were and were not helpful during the re-entry process.¹³

Sample characteristics

The analyses presented in this article use both qualitative and quantitative data from the MFS-IP qualitative study sample. Data were combined across sites and for

11 Relationship strengthening programming provided through this initiative is described in detail in “The Implementation of Family Strengthening Programs for Families Affected by Incarceration”, available at: <https://aspe.hhs.gov/pdf-report/implementation-family-strengthening-programs-families-affected-incarceration>.

12 For more details on the MFS-IP study design and sample, see Christine Lindquist, Danielle Steffey, Tasseli McKay, Megan Comfort and Anupa Bir, “The Multi-Site Family Study on Incarceration, Partnering and Parenting: Design and Sample”, *Journal of Offender Rehabilitation*, forthcoming.

13 See: <https://aspe.hhs.gov/evaluation-marriage-and-family-strengthening-grants-incarcerated-and-reentering-fathers-and-their-partners>.

treatment and comparison groups, so some sample members received grant-funded relationship and family strengthening programming and others did not. All study participants were subject to the selection criteria for the evaluation.¹⁴ Characteristics of the qualitative study sample at the time of participants' study enrolment (on average, two and a half years after the male partner's admission to prison) are shown in Table 1.

Like participants in the full MFS-IP survey sample, most couples in the qualitative study reported being in non-married intimate relationships that were exclusive and long-term at the time of study enrolment. Most participants had minor children, most couples co-parented at least one child together, and most also co-parented with other people (with men reporting on average three co-parents and women reporting an average of two co-parents). Men tended to have fairly long histories of criminal justice system involvement (beginning on average at age 17), and data suggest that many couples had been through previous cycles of incarceration and re-entry together.

Analytic approach

All qualitative interviews were digitally recorded, audio files were transcribed verbatim, and transcriptions were uploaded into ATLAS.ti, a qualitative data analysis software package. A codebook was created using deductive codes, including codes pertaining to relationships (e.g., partnership, parenting) and time period (e.g., incarceration, re-entry). Inductive codes were developed iteratively based on interviewer and analyst memos and coder meetings. All transcriptions were coded by a team of research assistants. Coded data were then queried and results were reviewed and discussed in meetings, with analytic memos written to capture themes.

Findings

Costs for relationships with partners

Although their narratives had much in common with those of contemporary families throughout the United States, participants identified many ways in which men's incarceration had distinctly shaped their intimate ties. For example, couples experienced major obstacles to maintaining contact via phone and in-person visits when the male partner was in prison. For those who could continue some form of contact, the financial costs of phone calls and visits were substantial and often drained resources that family members would have otherwise used to pay household bills or buy food. For those whose communication was greatly reduced or eliminated entirely while the male partner served his sentence, often there was both an emotional cost of the loss of contact

14 C. Lindquist *et al.*, above note 6.

Table 1. *Qualitative sample characteristics at baseline*

	Men (n = 83)	Women (n = 87)
Age		
Age at study enrolment (mean)	33.7 years	32.8 years
Relationship with survey partner		
Relationship status		
Married	25%	18%
In an intimate relationship	71%	70%
In a co-parenting relationship only	4%	12%
In an exclusive relationship	88%	85%
Duration of relationship, if married/intimate (mean)	9.1 years	7.9 years
Parenting/co-parenting characteristics		
Number of children (mean)	2.3	2.3
Number of co-parents (mean)	3.1	2.2
Age of focal child (mean)	5.8 years	6.2 years
Co-parent any children with survey partner	72%	74%
Incarceration history		
Age at first arrest (mean)	17.4 years	(not asked)
Number of previous adult incarcerations (mean)	5.3	1.8
Duration of current incarceration (mean)	3.9 years	(n/a)

Source: all data are from the MFS-IP.

and a social cost of a hiatus in the relationship. Indeed, although some respondents continued to consider themselves in an exclusive partnership during the incarceration, others incorporated these periods of separation into the characterization of their relationship, often using the phrase “off and on” when asked about their relationship status. As one man explained:

We just off and on... Yeah. It’s like we’re kind of seeing each other still... I told her at first like, “You can just go on [with your life] and go, like, I catch up with you whenever I get out [of prison].”¹⁵

Evident amid participants’ descriptions of these cycles were the distinct relationship pressures that arose during times of incarceration, pre-release and re-entry. For

15 Interview with study participant, on file with authors.

people who could maintain some form of contact during imprisonment, both male and female participants frequently understood this to be a period when men were reliant on women for emotional and practical support. However, relatively few men identified the difficulties and expense this could pose for their partners:

I didn't understand her working all the time ... because I always wanted time. I wanted her to make time for me. To answer the phone or to sit down and write a letter – a long letter to me to explain to me what is going on, how she is doing and how our daughter is doing. But with her work schedule and school and our daughter, it was just like, it was a lot on her and I didn't understand that. So I would get frustrated and upset. For me on my part, it was probably a struggle for me because I always thought like, well, if you don't have time for me now then are you ever going to have time for me when I come home?¹⁶

In addition to straining partnerships by overburdening women, prisoners' high needs for money, toiletries, extra food and emotional connection were seen as disruptive to primary relationships because the constraints on an individual woman to meet these needs encouraged men to reach out to multiple women for support. One woman who had limited time and money to dedicate to her currently incarcerated partner recalled a former partner's analysis of this phenomenon:

A lot of men that go to jail, they seem to juggle women when they're in jail, incarcerated. Because ... this one might put money on the phone all the time, this one might be able to visit all the time, and then this one might be my commissary person. So they play a lot of mind games when they're incarcerated. ... [My former partner told me,] "Every man does it, you know. Every man that can get away with it, however many [women] he can pull and get away with, that's what he's gonna do. Cause we don't have nothing but time in there, you know. So of course we want somebody to come and see us every single day that visits are allowed. We want to be able to go out to that phone and call out to whoever is gonna answer, you know."¹⁷

Distance and lack of communication also created relationship tensions by fuelling men's suspicions about their partners' activities, and particularly the possibility that women could be involved in another relationship. One woman who lived in Ohio spoke about the toll that her partner's incarceration in New York took on their relationship:

I do believe if he would have been here in Toledo, it would have been a lot different. I would have been able to visit. I would have been able to get some calls. ... There would have been communication, a line of communication [and] actual visits. It wouldn't have been a whole long period of absences ... which caused nothing but, "What were you doing? Where were you at? You

16 Interview with study participant, on file with authors.

17 Interview with study participant, on file with authors.

left me. You abandoned me. You didn't care. You had somebody else." And all the accusations that come along next. Which has done nothing but caused us problems since.¹⁸

The financial and emotional costs of incarceration on relationships continued even as men's prison sentences came to an end. The pre-release period was often described with trepidation, as men and women felt anxious about their individual and joint preparedness for post-prison life and worried that they did not have access to the necessary support structures. This was also a volatile moment in relationships because the level of support provided by women during men's imprisonment did not always correspond to plans made during the pre-release and re-entry periods. Certainly, for some couples, maintaining contact during incarceration translated into anticipation and enactment of reuniting post-release. However, some female participants described having provided robust practical and emotional support during a man's imprisonment only to have him end the relationship just before or after his release from custody, often in order to join another partner. Others found themselves a sudden object of affection when men tried to secure housing and stability for their return to society:

Female participant: Of course the first time [he was released,] he needed me. So everything was... I mean, [he did] anything that you could think of to try to woo me. Because like I say, he really needed me. He didn't have a place to go to besides his mother's house. ...

Interviewer: Any advice that you would give to a woman who is in a relationship with someone who is incarcerated?

Female participant: Beware.

Interviewer: Beware?

Female participant: Beware.

Interviewer: Now, what do you mean?

Female participant: Of all things. Don't feel like nothing isn't possible, 'cause it is. Beware of everything. Beware of being manipulated.¹⁹

Men and women often characterized the re-entry period as challenging due to the emotional and logistical awkwardness of reintegrating their partners into their lives, particularly when communication had been restricted during incarceration. The phrase "we have to get to know each other again" was used frequently by participants who were struggling to reconnect. One woman poignantly

18 Interview with study participant, on file with authors.

19 Interview with study participant, on file with authors.

illuminated how the long separation of the incarceration period had exacted costs on her partnership that were difficult to repair:

We're still separated just because I feel like me and him, we have to get to know each other again, because four and a half years is a long time to be separated from someone. And then I've gotten so used to doing things on my own, I kind of, I don't know, it seems like I get offended by the things that he does. I'm not saying that he does it on purpose, but it just almost makes me feel like he's like questioning my parenting. Which I know he probably isn't, but I'm just so guarded because I've been doing it for so long by myself that I kind of don't know how to accept his help. So we're kind of just, we're moving slow. We live separately, but he's helping me out with the kids a lot.²⁰

Costs for relationships with children

Participants described a wide array of relationships with children. Some couples only had children they conceived together, but many navigated family constellations that included children from other partnerships. Among female sample members who co-parented with other men, in communities heavily impacted by incarceration it was not uncommon for those men to be justice-involved as well, such that women might be coping with the incarceration and re-entry of multiple co-parents at once.

As in their accounts of their partnerships, men and women emphasized how distance and lack of communication made it difficult for fathers to maintain relationships with children during incarceration. When asked what was hardest about being a father in prison, many men focused simply on the physical separation from their children:

Being away, not being able to be a dad. Not being able to be there and protect my daughter from anything. Like, just being a dad. That was the hardest thing for me... [My child's greatest challenge was] getting to know me. And an attachment. Like I think she was young, so she didn't have me there, and her biggest struggle probably would have been, like, where is her dad at. So I think she just had a problem with me not being there.²¹

Women often perceived men's absence as limiting the latter's ability not only to bond with their children, but also to learn how to parent. This was sometimes portrayed as coming at the cost of the entire father-child relationship. The partner of the man quoted above commented:

[His incarceration] made him and [our daughter] fall apart. I mean, there's a whole barrier there. Like he doesn't know how to be a father. Like he doesn't understand that kids talk back, that they try to push your buttons. ... He went to jail the day after I [gave birth to her, and then] he was home for

20 Interview with study participant, on file with authors.

21 Interview with study participant, on file with authors.

maybe about a year and then he went back [to prison]. And that's when he got that seven years. So he has never really done anything more than like a year. So, I mean, he has missed everything, and because of that, they don't have that bond.²²

Nonetheless, some mothers felt that their incarcerated partners managed to be helpful co-parents. One woman described how she felt more supported by her incarcerated study partner than she did by the biological father of her child, specifically acknowledging that the man in prison managed to provide emotional and financial support that she could not obtain from her child's father:

[My incarcerated partner] was co-parenting while he was locked up. I mean, he was doing a whole lot more than what [my child's] dad was doing out here, which was, he [the biological father] was only ten minutes away. I mean, if somebody can call me that is locked up and I can get money out of this man that is locked up before I can get some money out of that man out here, that says a lot.²³

Women also articulated making difficult decisions about whether to bring children into the prison environment to visit their fathers. Some women spoke about their efforts to protect their children from the negative effects of visiting a correctional facility, while others chose not to have their children undergo this experience at all, even though that meant not seeing their fathers:

I never took them to see their own father. ... I didn't want them to be introduced to that [prison] in no kind of way. Because it's pretty hard when you go in there. You know they gotta strip search you and take off your shoes. And, you know, I kind of felt like they damn near treat you like an inmate, you know. And that was just something I didn't want my kids to experience.²⁴

Interestingly, men's and women's qualitative interview responses helped to contextualize differences in their survey reports of parenting. Initial quantitative analysis indicated that men tended to view their relationships with their children somewhat more positively than did their partners.²⁵ Comparing men's and women's responses in qualitative interviews suggested that men often wished to downplay the impact of their incarceration on their children and remain optimistic about life together after prison, while women – who had watched their children struggle during the prison period – were keenly aware of their children's sense of loss. Couples often gave factually matching accounts of the father's post-release relationships with his children, while offering these very different

22 Interview with study participant, on file with authors.

23 Interview with study participant, on file with authors.

24 Interview with study participant, on file with authors.

25 Christine Lindquist, Megan Comfort, Justin Landwehr, Rose Feinberg, Julia Cohen, Tasseli McKay and Anupa Bir, *Change in Father-Child Relationships Before, During, and After Incarceration*, Research Brief prepared for the US Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, March 2016.

emotional frames. For example, one father painted a rosy picture of his relationship with his children, even while indicating his inability to provide financial support:

Father: They love me more than their mother. ... I'm a big kid when I'm with my kids.

Interviewer: What has made it easier to be a good parent?

Father: I'm always there. It's the, that's the easiest part, just being there. And it ain't about, be about no money. It never about no money. Because my kids don't care about no money. ... But just being there, man, like, my car, I'll take the bus to go see my kids. You feel me? It's about my kids, man.

Interviewer: What has made it harder to be a good parent?

Father: Sometimes their mothers. Because they want me to do more, like we into a [romantic] relationship. And I won't allow it. ... I don't need [study partner] or [other child's] mom, I don't need neither. I got my kids. I got all the love I need. I don't need you all, period... I sit down with my kids on a daily basis, you feel me? On a daily basis. "What's going on? Talk to me. What's going on? What's up?"²⁶

In her interview, the mother of these children expressed a very different view, echoing the perspectives of other mothers who felt that the fathers' incarcerations exacted a toll on their relationships with their children:

The kids are a little reserved around him now... his relationship with the kids is what's kind of my biggest concern. Because when he can be, he's a really good father, when he's there... He has to learn, and they're just now learning each other, although they're about to be five [years old]. It's like they just now met their dad and, you know, they're just not used to having a dad or calling somebody dad. So, it's all new for them.

My oldest son, he remembers his dad being in jail and going to see him... And I think that [my son] is scared to get so attached again and then [have the father] go back to jail, is what makes him nervous.²⁷

When men were able to reflect on the impact their incarceration had on their children, their narratives were often devastating and painful. This was particularly salient when the children's mother was not able to care for them or provide the "buffer" against hardship that many women attempted to create to protect their children from overwhelming feelings of loss. One father described his efforts over the course of a long prison sentence to sustain his children emotionally, despite their difficult circumstances:

²⁶ Interview with study participant, on file with authors.

²⁷ Interview with study participant, on file with authors.

Like I said, I got twins. One of the twins, he in jail. He got [sentenced to] ten years. And I just never forget – I will always tell them, like, man, I will be home to see you graduate. This was even when they was young. Like man, by the time you graduate, I will be there. I will see you walk that stage. So finally that time came, it was 2008, which was the year that my twins would graduate. And I went to the parole board, I think in January. ... Long story short, they didn't let me out. They gave me four more years. So I had to get on the phone and I remember I called them and my son, the one that is in jail now, he was crying so bad. And he was like, he just kept, he said, "Dad, I don't care no more." I said, "What you mean?" He said, "I don't care, I don't care. Man, mommy out here on crack, you in there, you got to do four more. Man, I can't do this no more. I am done. I am done. It is over." ... And he just spiralled down after that.²⁸

Families' needs for support during incarceration and re-entry

Interview participants indicated that staying in touch was prohibitively difficult during men's incarceration. The chief barriers to communication were lack of transportation to correctional facilities, institutional policies that felt invasive or objectionable (e.g., searches, lack of child-friendly spaces), the high cost of visiting (transportation, food, child care, and long distances between the prison and the home community) and phone calls, and logistical difficulties coordinating times to connect. One man expressed the toll it took on him when he couldn't reach his family by phone:

I talked to them every day, a couple of times a day. But there would be times where I wouldn't get a hold of them and I would just be frustrated and upset. Like, you are not at work again, or why can't you answer your phone? And like, the timing of me trying to get a phone and get on the phone and the atmosphere I was in was upsetting enough as it was, and then not – hearing it ring and not getting no answer, it was like, it was like a let-down.²⁹

Another man responded to a question about what was hardest in his relationship during his incarceration by speaking to the emotional challenges he and his partner faced when she came to visit:

The visits. I used to hate it. Yeah. Like, because especially when she came, [with] my momma, like seeing them leave. And she'd leave, yeah it used to mess with me. ... It just used to hurt like, and then every time she came up here she like, "They treat me like a criminal", searching her and make her take off her shoes. ... I mean, lucky I wasn't too far from here. She didn't have to drive too far, but I just used to hate having her, making her go through that. Even though I used to want to see her, but it was always bittersweet, every time.³⁰

28 Interview with study participant, on file with authors.

29 Interview with study participant, on file with authors.

30 Interview with study participant, on file with authors.

When asked what help they wanted during the incarceration period, men and women consistently identified assistance maintaining contact as a primary need. Repeatedly voiced suggestions included financial assistance with the costs of visiting and telephone calls, including gas cards, phone cards, and transportation and food subsidies; vans, shuttles, organized carpools or other forms of collective transportation to prison facilities; lowering the costs of phone calls and providing opportunities for video calls with minor children, who had difficulty concentrating on a telephone call; and implementing family-friendly policies at the prisons, including reduced security screenings for children, longer visits, and play areas in visiting rooms.

Study participants also noted a need for emotional and psychological support. Women in particular raised this issue, frequently saying that they would welcome opportunities to participate in a support group with other partners of prisoners or in individual or couples counselling. Their narratives about their emotional suffering suggested a need for support in addressing the specific trauma each partner experienced during and after the incarceration:

I know being incarcerated isn't something easy to do. It's a whole different mindset from being in society. But then I also think it's hard for him to understand everything I went through. You know what I mean? Like, it was just something traumatic for both of us.³¹

Accounts of children's traumatized reactions to visiting their incarcerated fathers also indicated an urgent need for counselling and support specifically focused on this experience:

After the visit, like, you're allowed to sit from across each other and you're allowed to touch, but when the visit's over, you know, they stand the inmates up and put their handcuffs on and walk them out. [My son] flipped out to see his dad like that. ... He's like, "Come on daddy, we going home." He wanted him to come with him. Like, why he not coming? And when he seen the police [the correctional officers] he just, "Oh my God, daddy?" He had a big old conniption fit. And I was embarrassed 'cause I had two little babies in the car seat and he was like kicking and screaming... So the visits started getting really hard for me. Even though I know they did him good to see the kids, it was really hard for me afterwards to explain that to the boys or try to calm them down. So after a while we just agreed that we would cease the visits altogether.³²

Participants suggested that incarcerated men needed more access to education, job skills training and legal resources, as well as instruction on parenting and other topics. In one woman's words, "I feel like maybe jails could offer more 'how to' classes. How to be a dad. How to be a husband. How to be a man."

31 Interview with study participant, on file with authors.

32 Interview with study participant, on file with authors.

Participants strongly indicated that the families of incarcerated men needed relief from incarceration-related financial costs such as phone calls and putting money on prisoners' accounts, and help compensating for lost income and support from the incarcerated partner. Men and women advocated that financial assistance for housing, child care, food and transportation as well as practical support such as after-school programmes, tutoring and summer camps be made available to families to prevent what were common stories of destabilization when a father was lost to incarceration:

We moved because we had just moved and we were trying to, like, do this rent-to-own and purchase this condo, townhouse, but then he went to jail and I couldn't afford the payments so I got evicted. ... [F]inancially that [was] a big blow. So instead of two incomes, one. And then mentally, everything was on me. Just everything that I depended on him for or no, I don't have to go and pick the kids up, he'll do it. Just I'm doing everything which I wasn't used to. Cause all my parental duties were split as long as he was around. ... And then to do it with four kids was something I never did before.³³

For men re-entering the community, employment and housing assistance were repeatedly identified as dominant needs. In addition, individuals with current or previous experiences of their own or their partner's mental health challenges, substance dependency and partner violence articulated the desire for support specific to these situations. As with so many resources, the costs of rent, therapy and other treatment services were prohibitive for the men and women who expressed a need for them. In the absence of subsidized or free assistance, families were often left without the basic building blocks they needed to reconstruct their lives after incarceration.

Conclusion

Reflecting on the findings presented here from the MFS-IP, it is clear that although the costs of imprisonment resonate in the financial, social and emotional domains for justice-involved families, the edges of these categories are not sharp. For example, the expense of phone calls with an incarcerated loved one may simultaneously decrease a family's ability to pay household bills, narrow their social network by diminishing the disposable income available for after-school and weekend activities, and increase interpersonal stress by contributing to arguments about money. In a similar vein, decreased contact with a loved one might lead to depression, which could result in a lowered paycheck due to missed days of work and social isolation due to reluctance to leave the house. For people who experience the dissolution of relationships due to distance, prohibitive expenses and institutional barriers, the cost of imprisonment may be vast, extending throughout every aspect of their lives.

33 Interview with study participant, on file with authors.

This interconnection encourages us to conceptualize the costs of imprisonment to families broadly, focusing holistically on well-being rather than attempting to calculate specific costs in distinct domains. This may also be a useful approach for considering the costs of imprisonment to society: the ripple effect of having governments that spend more of their budget on prisons than on educational systems extends far beyond what is listed in an expense ledger, shaping the health, safety, opportunities and access to public resources of large groups of people, the majority of whom will never be convicted of a crime or sentenced to time in a correctional institution. That the burdens of incarceration are borne in large part by people who are entangled with the criminal justice system mainly due to a desire to remain connected to and support a family member provides grounds for re-evaluating societal definitions of and responses to lawbreaking. Indeed, for people already struggling with a loved one's substance use or mental health issues, the imposition of costs related to incarcerating their family member could be considered counterproductive and harmful.

While it is important not to be reductive in thinking about the costs of imprisonment to families as being limited to financial outlays, the provision of monetary resources or their equivalent can be a way of investing in a broader spectrum of family well-being. Free or low-cost phone calls and transportation to facilitate relationship maintenance during incarceration, subsidized housing after release, affordable mental health and medical treatment services and a continuum of care across correctional and community clinics – all are means of improving family members' ability to maintain or improve stability during a prison sentence and reunify in a supportive and supported process during the re-entry period.

“Restoring hope where all hope was lost”: Nelson Mandela, the ICRC and the protection of political detainees in apartheid South Africa

Andrew Thompson*

Andrew Thompson is Chief Executive of the UK Arts and Humanities Research Council and Professor of Modern History at the University of Exeter. He is the Director of Exeter’s Centre for Imperial and Global History, and an Honorary Professor at the University of South Africa in Pretoria. He is currently writing a new book for Oxford University Press entitled *Humanitarianism on Trial: How a Global System of Aid and Development Emerged through the End of Empire*.

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Abstract

Amidst the violent upheavals of the end of empire and the Cold War, international organizations developed a basic framework for holding State and non-State armed groups to account for their actions when taking prisoners. The International Committee of the Red Cross (ICRC) placed itself at the very centre of these developments, making detention visiting a cornerstone of its work. Nowhere was this growing preoccupation with the problem of protecting detainees more evident than apartheid South Africa, where the ICRC undertook more detention visits than in almost any other African country. During these visits the ICRC was drawn into an internationalized human rights dispute that severely tested its leadership and demonstrated the troubled rapport between humanitarianism and human rights. The problems seen in apartheid South Africa reflect today's dilemmas of how to protect political detainees in situations of extreme violence. We can look to the past to find solutions for today's political detainees – or “security detainees” as they are now more commonly called.

Keywords: detention visitation, South Africa, Nelson Mandela, ICRC, political detainees, humanitarian rights.

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Introduction

In theory, international humanitarian law and international human rights law provide protection against torture in times of war. The United Nations (UN) 1966 International Covenant on Civil and Political Rights and the 1984 Convention against Torture prohibit the practice at all times and in all places, whether in peace or war, as do the 1949 Geneva Conventions and the Additional Protocols of 1977 in situations of armed conflict. Yet the weight of evidence of illegal detention, forced disappearances and abuses of the enemy to emerge after 9/11 would suggest otherwise.¹ Disdain for international law is widely displayed by State and non-State armed groups. Indeed, today's dilemmas of how to protect political (or “security”) detainees in situations of extreme violence would have been perfectly recognizable to a post-Second World War generation of humanitarians and human rights activists. The past seems condemned to repeat itself.

It was amidst the violent upheavals of the end of empire and the Cold War that international organizations first developed a basic framework for holding State

1 On the detention practices of the United States specifically, see, for example, David P. Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11*, Cambridge University Press, Cambridge, 2011, pp. 1–10; Cheryl Benard, Edward Connell, Cathryn Thurston, Andres Villamizar, Elvira Loredó, Thomas Sullivan and Jermeiah Goulka, *The Battle Behind the Wire: U.S. Prisoner and Detainee Operations from World War II to Iraq*, RAND Corporation, Santa Monica, CA, 2011.

and non-State armed groups to account for their actions when taking prisoners.² The International Committee of the Red Cross (ICRC) placed itself at the very centre of these developments. Detention visiting – hitherto a fairly marginal activity for the world’s leading humanitarian agency – rapidly became a cornerstone of its work.³ Nowhere was this growing preoccupation with the problem of protecting detainees⁴ more evident than apartheid South Africa.⁵ Detainees lack the legal protection of prisoners of war (PoWs) – a term that refers to any person captured while fighting by a belligerent power, and is hence applied only to members of regularly organized armed forces. The ICRC’s concern with PoWs was long-standing, dating back to the late nineteenth century. Its subsequent concern with detainees – persons sentenced or detained for their political ideas or ideological beliefs – can be traced back to the interwar years of the twentieth century and was focused initially on Europe. At that time the activity was quite limited, however. Starting in a more modest way with the Hungarian insurrection in 1956, and then on a much larger scale in South Africa from the 1960s, the ICRC rapidly expanded its concern with political detainees. The first visits to prisoners detained by the apartheid State occurred in the wake of the Sharpeville massacre of 1961, a period which saw the political opposition almost destroyed and many of its leaders imprisoned or exiled.⁶ International pressure mounted, ranging from grass-roots activism of citizens, to the actions of States, to regional bodies like the Organization of African Unity, to supranational organizations like the UN, even if such pressure was not continuously or evenly applied and had yet to fully isolate the apartheid regime. As far as Nelson Mandela and other African National Congress (ANC) detainees were concerned, the assumption of the South African authorities was that they would never be released and would eventually die in prison.

More ICRC visits to prisons took place in South Africa than in any other African country, with the exception of Rhodesia-Zimbabwe. Involvement in South Africa raised in its sharpest form the question of what mandate, if any, international organizations possessed to protect those considered by their national governments to be “enemies of State”. While the South African

2 This argument is developed at greater length in my forthcoming book, *Humanitarianism on Trial. How a Global System of Aid and Development Emerged through the End of Empire*.

3 For the key works, see Alain Aeschlimann, “Protection of Detainees: ICRC Action behind Bars”, *International Review of the Red Cross*, Vol. 87, No. 857, 2005; J. D. Armstrong, “The International Committee of the Red Cross and Political Prisoners”, *International Organisation*, Vol. 39, No. 4, 1985; Jacques Moreillon, *Le Comité international de la Croix-Rouge et la protection des détenus politiques*, Institut Henry Dunant and Editions l’Age d’Homme, Lausanne, 1973.

4 “Political” rather than “security” detainees became the favoured terminology during the period under study. Political detainees were broadly defined as persons sentenced or detained for their political ideas as well as those detained for offences motivated by their political and ideological beliefs. Equally, the ICRC made it clear that the use of this term did not in any way affect the status given to detainees by the authorities and that the ICRC did not discuss with the authorities the reasons for the detention of those persons visited. See, for example, ICRC, *Annual Report 1970*, Geneva, 1971, p. 13, fn. 1.

5 Andrew Thompson, “Humanitarian Principles Put to the Test: Challenges to Humanitarian Action during Decolonization”, *International Review of the Red Cross*, Vol. 97, No. 897/898, 2015, pp. 62–71.

6 For a recent interpretation of apartheid South Africa, and why it survived so long, see Saul Dubow, *Apartheid, 1948–1994*, Oxford University Press, Oxford, 2014.

authorities insisted that no such mandate existed, and that there was no right of humanitarian initiative in a situation of collective violence that did not amount to an armed conflict, the perspective of the ANC was very different. Like other African liberation movements, the ANC regarded its liberation war as tantamount to an international armed conflict, and felt fully vindicated with the passage of the first Additional Protocol in 1977. The first Additional Protocol infused the laws of war with the politics of anti-colonialism by redefining international armed conflict to embrace all peoples fighting against “colonial domination”, “alien occupation” and “racist regimes”.⁷

For the ICRC, detention in South Africa was also the beginning of the organization’s awareness of psychological torture.⁸ From the outset it was apparent that the ultimate purpose of the apartheid State depriving its political enemies of liberty was to break their morale and to deny them any hope for the future. An elaborate system of humiliation and intimidation was ruthlessly implemented alongside the denial of even the most basic of physical needs. Prison life was organized through the bestowal of privileges and the distribution of punishments.⁹ Isolation and solitary confinement were a favoured and forbidding form of punishment, and Mandela was later to write that “nothing is more dehumanising than the absence of human companionship”.¹⁰ The disruptive effects of this disciplinary system – individually and cumulatively – were as much on the mind (e.g., depressive symptoms such as sleep difficulties, irritability and anxiety disorders) and personality (e.g., mood disturbances, shattering of confidence and even suicidal tendencies) as they were on the body.¹¹ They increased the detainee’s sense of vulnerability and reinforced feelings of dislocation and despair. Prisoners fought back, however – for example, by refusing to prepare for inspections or to take part in incentive schemes for good behaviour, or by attacking warders who abused and humiliated them. Striking the right balance between accommodating and fighting the prison system was essential to a detainee’s survival. Jailers were at times resolutely defied in order to

7 While the apartheid government did not ratify the Additional Protocols, the ANC sent its president, Oliver Tambo, to Geneva in 1980 to make a declaration that the ANC would abide by them.

8 I am grateful to Pascal Daudin for underscoring this point. For an insightful essay on the concept of psychological torture, see Hernán Reyes, “The Worst Scars Are in the Mind: Psychological Torture”, *International Review of the Red Cross*, Vol. 89, No. 867, 2007. The awareness of psychological torture was to grow further during the next decade.

9 On this point, see Natacha Filippi, “Institutional Violence and the Law in Apartheid South Africa”, *Journal of Colonialism and Colonial History*, Vol. 17, No. 3, 2016.

10 Nelson Mandela, *Long Walk to Freedom*, Abacus, London, 1995, p. 397; and see pp. 493–494. See also the discussion of the effects of long-term isolation in Breyten Breytenbach, *The True Confessions of an Albino Terrorist*, Faber & Faber, London, 1984, pp. 129–132, which speaks of the “parts of you that are destroyed” and that “will never again be revived” – “this damage is permanent even though you learn to live with it, however well camouflaged”.

11 The best study of the lives and resistance of political prisoners incarcerated in apartheid South Africa remains that by Fran Lisa Buntman, *Robben Island and Prisoner Resistance to Apartheid*, Cambridge University Press, Cambridge, 2003.

challenge the regime’s jurisdiction, yet detainees also had to learn to adapt to the system in order not to be ground down by it.¹²

Starting in 1964, there were ICRC visits to Robben Island, Victor Verster (and its outstation Bien Donne (juveniles)), Pretoria Local (whites only) and Barbeton (black women) in twenty of the following twenty-six years.¹³ During these visits the ICRC was drawn into an internationalized human rights dispute that severely tested its leadership. A fundamental challenge was to ensure that securing the cooperation of the South African authorities did not become an end in itself. If the terms of access legitimized – or even appeared to legitimize – unlawful deprivation of liberty or arbitrary State behaviour, the ICRC risked being judged complicit by the very people it sought to help. This risk was compounded by the fact that apartheid was unusual if not unique in the extent to which it challenged the existing norms around armed conflict – traditional definitions of humanitarian action were destabilized by the racialized State of South Africa, in just the same way as conceptions of human rights were reframed in a quest to combat the injustices of Afrikaner rule.

Apartheid therefore had the potential to set humanitarian and human rights organizations against each other, yet deteriorating racialized violence in Southern Africa at the same time provided a powerful impetus to make common cause. In their efforts to ameliorate the violence of apartheid, a post-war generation of humanitarians and human rights activists came together to call upon the moral force and universal quality of the concepts of “human dignity” and “humanitarian protection”.¹⁴ The ICRC, Amnesty International and the UN Commission for Human Rights were particularly prominent in the context of apartheid South Africa and the protection of detainees. For reasons of space, they form the focus of this article. There were, however, many other organizations involved, including the International Aid and Defence League, the Africa Bureau, the International League for Human Rights and the International Commission of Jurists, which are examined in greater depth in my forthcoming book. Through their combined if not always coordinated efforts, they sought to extend their mandates into states of public emergency. This is not to deny the fact that under those twin banners, assorted legions marched. It is, however, to argue that there were multiple paths from the UN’s Universal Declaration of Human Rights to the international humanitarian and human rights regimes with which we are

12 See, for example, the recent obituary of Andimba Toivo ya Toivo, the Namibian activist leader jailed for sixteen years on Robben Island, in *The Times*, 23 August 2017, p. 53; Hugh Lewin, *Bandiet: Seven Years in a South African Prison*, Penguin, Harmondsworth, 1976, p. 50.

13 A helpful study spanning the period covered by this article is Jacques Moreillon, *Moments with Madiba*, May 2005, available at: www.nelsonmandela.org/news/entry/moments-with-madiba (all internet references were accessed in October 2017). Moreillon separates the ICRC visits to Robben Island into three periods: the Hoffmann period (1964–67), the Senn-Zuger period (1967–74), and subsequent visits from 1976 to 1992. Moreillon’s own visits took place from 1973 to 1975, when the detainees on Robben Island were still engaged in hard labour.

14 For the relationship between humanitarianism and human rights, see Michael Geyer, “Humanitarianism and Human Rights: A Troubled Rapport”, and Andrew Thompson, “Humanitarian Interventions, Past and Present”, both in Fabian Klose (ed.), *The Emergence of Humanitarian Intervention: Ideas and Practice from the Nineteenth Century to the Present*, Cambridge University Press, Cambridge, 2016.

familiar today. Rather than positing a dramatic turn from humanitarian concerns to individual human rights after the end of the Second World War, I assert that there was in fact another path – that of *humanitarian rights* – forged by the many and varied groups that grappled in the post-war era with the problem of political detention.¹⁵

The first recorded ICRC interview with Nelson Mandela

Although he was first visited on 20 April 1964 by the ICRC's delegate-general in Africa, Georg Hoffmann, the first ever recorded interview with Nelson Mandela by an ICRC delegate occurred on 8 April 1967.¹⁶ (In 1965 the ICRC had requested a further round of visits, but it was not until 1 February 1967 that the South African authorities responded affirmatively to its repeated requests.) The delegate in question was the energetic, fiery Godfrey Senn. His interview with Mandela encapsulates the experiences of the many insurgent, guerrilla and liberation movement fighters detained during decolonization. Mandela later remembered Senn in his memoir, *Long Walk to Freedom*.¹⁷ He noted the improvements that had followed Senn's visit, yet lamented that Senn was not in any sense "a progressive fellow". In front of the head of the prison, Senn had dared to suggest that "mealies" – a sour-milk porridge made from coarse maize flour – were better for the teeth than the bread which Mandela had requested, a remark that has proved a source of embarrassment for the ICRC ever since. Senn's Rhodesian background likely aroused suspicion, though it should be said that several former ANC, Pan-African Congress (PAC) and (Namibian) South West Africa People's Organisation (SWAPO) prisoners on Robben Island had much more positive recollections of the man.¹⁸ Moreover, the consequences, at

15 For this argument, see also Andrew Thompson, "Unravelling the Relationships between Humanitarianism, Human Rights and Decolonization: Time for a Radical Rethink?", in Martin Thomas and Andrew Thompson (eds), *Oxford Handbook on the Ends of Empire*, Oxford University Press, Oxford, forthcoming 2018.

16 Godfrey Senn, "Note for the ICRC", 8 October 1969, ICRC Archives, D AF RHODE 2 01-009. The request for a repeat visit was made by the ICRC in 1965 but not granted by the South African authorities for a further two years, the ICRC being unable to invoke any legal texts which would have given it the mandate to undertake such visits. A summary of and brief commentary on the series of ICRC visits from 1964 to 1986 is provided in Yolanda Probst, "Detention de Nelson Mandela", 22 April 1994, ICRC Archives; and Yolanda Probst, "Les activités du CICR en Afrique du Sud de 1964 à 1984", April 1985, ICRC Archives.

17 N. Mandela, above note 10, pp. 488–489.

18 They expressed their appreciation that Senn had listened carefully to their grievances and, through his attention to detail, secured valuable improvements in their conditions. However, they also noted that he was sometimes overly defensive in his manner. See, for example, the recollections of former South African detainees Philip Silwana, Isaac Saki Mafatshe, Denis Golberg, Joantahn Makwenkwe Mathe, Eddie Daniels, Bennie Ntole, High Lewin Mark Shinnars and Ahmed Mohamed Kathrada in ICRC, *Commemorating 150 Years Since the Battle of Solferino*, 24 June 1959–24 June 2009, Geneva, 2009, pp. 9, 10, 11, 12, 16, 18, 21, 22, 27. See also the separate memoirs of Eddie Daniels, *There & Back: Robben Island, 1964–1979*, 3rd ed., CTP Book Printers, Cape Town, 2002, pp. 190–191; H. Lewin, above note 12; Helao Shityuwete, *Never Follow the Wolf: The Autobiography of a Namibian Freedom Fighter*, Kliptown Books, London, 1990, pp. 187, 194, 202–203, 205, 215, 218, 225–226.

this juncture, of a more robust engagement with the South African authorities can only be speculated upon. The risks of expulsion were real, and weighed heavily on the minds of Senn’s superiors in Geneva.

Senn was nothing if not a complex character.¹⁹ Formerly the director of a juvenile prison in a Baltic State, he later emigrated to Southern Rhodesia, where he was appointed the ICRC’s delegate for Southeast Africa in 1941; he subsequently developed relations with African nationalists such as Hastings Banda and Kenneth Kaunda while becoming increasingly critical of the attitudes and actions of the Rhodesian branch of the British Red Cross. He was short and plump in appearance, a declared atheist, and lived in a religious community in the town of Rusape in the northeast of the colony, reputedly in a room with a coffin leaning against the wall, which he used as a cupboard for his numerous whisky bottles. A fearless man, impatient with bureaucrats, he was thoroughly opposed to apartheid. He also had a reputation for breaking administrative bottlenecks. That reputation was established during the civil war that broke out in the Congo after the Belgian colonists withdrew in 1960 and left a major humanitarian crisis in their wake. Senn reacted rapidly to mobilize a massive medical relief operation under the auspices of the Red Cross and World Health Organization.²⁰

By the time Senn arrived in South Africa, however, he was an older and frailer man. He certainly defended ANC prisoners robustly, and often criticized his ICRC superiors in Geneva for not being sufficiently assertive or outspoken, especially with regard to the abuse of prisoners.²¹ Yet Senn was equally a man of his time. After years spent among East African’s settlers, he became, as Mandela – with typical restraint – observed, acclimatized to the very racism of which he was a critic.²² Senn’s racially paternalistic language meant that he did not quite look upon Africans as he would white people and that he ascribed different characteristics to them. To quote another ICRC delegate who spent several years in South Africa at this time, he “defended Africans, but as Africans”.

Senn visited Robben Island for six days from 5 to 10 April 1967, at a time when the ICRC’s standard practices and procedures for detention visiting – regular and repeated visits without witnesses present and access to all facilities – had yet to crystallize.²³ There were further visits in May, August, September and October that year, the autumn visits including the medical delegate Simon Burkhardt. Senn’s presence in South Africa was recorded as being so “hush-hush” that he did not

19 There is little biographical material on Senn in the ICRC Archives. My impressions of his character are formed from Senn’s correspondence and from the mixed recollections of some of those ICRC delegates who knew of him.

20 Richard Deming, *Heroes of the International Committee of the Red Cross*, Geneva, 1982, pp. 161–175.

21 See, for example, G. Senn, “Note for the ICRC, for the Attention of P. Gaillard (Assistant Director)”, 8 October 1969, ICRC Archives, D AF RHODE 02.001.

22 N. Mandela, above note 10, p. 489.

23 A detailed record of Senn’s visit, including a note of his interview with Nelson Mandela on 8 April 1967, can be found in “1967 Robben Island Prison Visit”, ICRC Archives, D AF RHODE 2.02.004, from which much of the detail in the rest of this and the following two paragraphs are drawn. For the records of the ICRC’s Dr Simon Burkhardt, and for the ICRC’s subsequent report to South Africa’s minister of foreign affairs, Dr Hilgard Muller, see ICRC Archives, D AF RHODE 02.005.



Figures 1 and 2. “H” block, Robben Island, 10 April 1967. ICRC Archives, Geneva. Photograph by Godfrey Cassian Senn, © ICRC.

contact the local office of the South African Red Cross. The ICRC deliberately did not ask for access to detainees still on trial. Indeed, although the ICRC later changed its policy and attempted to visit non-convicted prisoners, at no time after 1964 did the organization ever gain access to any interrogation centres, such as the notorious “Kompol” building in Pretoria where political prisoners were treated brutally and sadistically by officers of the South African Special Branch.²⁴

Days of mental and physical torture (including electric shocks and simulated drowning), regular beatings, verbal intimidation and sleep deprivation were designed to extract information and confessions from those recently captured. All of this occurred well before prisoners were transferred to Robben Island and well out of sight of any international organization. The ICRC did, however, learn of detainees’ complaints of torture after their arrest, remarking as early as 1967 that the “number and consistency” of such complaints “would seem to justify enquiries and if need be the introduction of a system of control over police interrogation”.²⁵ For their part, the South African authorities strove to keep any reference to maltreatment during interrogation out of the ICRC reports on the spurious grounds that the police belonged to another ministry to that of the prison administration, to which separate reports should therefore be submitted.²⁶

When Senn visited Robben Island there were 996 prisoners, 822 of whom were convicted “for crimes against the security of the State” – to all intents and

24 See, for example, Permanent Representative of South African Mission to Roger Gallopin, Executive Director of ICRC, 1 February 1967 (Confidential), ICRC Archives, D AF RHODE 02.001; G. Senn to A. Tschiffeli, 2 January 1969, ICRC Archives, D AF RHODE 02.002. And see interviews with Mr D. Ernst, 21 October 1966; I. Heymann, 14–15 October 1967; J. D. Mutumbula, 1 February 1966; Jatoria Hermann, undated; and J. Nashivela, 7 November 1966, ICRC Archives, D AF RHODE 02.004.

25 Director of Legal Affairs for the ICRC to P. C. Pelsler, Minister of Justice, Pretoria, 27 June 1968. See also the remarks of Senn to A. Tschiffeli, 21 January 1969, ICRC Archives, D AF RHODE 2 02.002, regarding the April 1967 visits, when “a great number of political detainees interviewed alleged mistreatments often bordering on torture by the Special Branch of the South African Police during interrogation in order to obtain confessions”.

26 G. Senn to General Steyn, 14 December 1968, ICRC Archives, D AF RHODE 2 01.009. Senn was quoting Colonel I. C. Schutte, the liaison officer of the South African Prisons Department.

purposes, political detainees. ANC members were separated in single cells in “D Section” and kept apart from the rest. Senn’s report to Geneva records a walk through the hospital, single cells, kitchen and recreation hall on the Friday morning, followed by “a long talk with Mr Mandela” on the Saturday morning, without witnesses present. This conversation focused mainly on medical complaints. There was a further talk with Mandela on the Sunday afternoon, with the Prison Department’s liaison and information officer present, which focused on the inadequacy of food rations. On the Monday morning, Senn met with the prison doctor for a second time. He later inspected three separate work parties at the stone quarry, the limestone quarry and the seaweed processing plant – hard labour in the quarries on Robben Island was not brought to an end until 1977.



Figure 3. Prisoners drying seaweed, Robben Island, 10 April 1967. ICRC Archives, Geneva. Photograph by Godfrey Cassian Senn, © ICRC.

The 1960s was a particularly punishing decade for Robben Island detainees. “We live in a legal vacuum without the slightest hope of real justice”, one detainee remarked.²⁷ Prisoners were deprived of all news and locked in their cells over weekends, and there was no pretence at rehabilitation. On numerous occasions

²⁷ Report on visit to political prisoners in maximum security prison on Robben Island by Dr P. Zuger, accompanied by Dr F. Vulliet and Mr G. C. Senn, 8–10 May 1969, ICRC Archives, D AF RHODE 2 02-005.

ICRC delegates expressed their concerns about the impact of the lack of any form of rehabilitation on the morale and mental health of detainees. Several cases of assault by prison warders were under investigation – State violence was not limited to interrogation. Family visits were scarce, and there were considerable delays in the delivery of very limited incoming and outgoing mail, much of which was in any case redacted by the authorities. Detainees regarded this as a particularly inhumane aspect of the prison system.²⁸ (Mandela wrote of his daughter, Zindzi, “She was a daughter who knew her father from old photographs rather than memory.”²⁹) Above all, as Mandela recorded in his autobiography, work regimes were known to have been extremely strenuous, contradicting the Prison Department’s own stated policy.³⁰ Quarrying lime or stone, or dragging seaweed from beaches, for seven hours a day, five days a week, had the intended effect of not only sapping the physical strength of prisoners but also beginning to break their morale.

When Senn arrived on Robben Island, Mandela and his ANC colleagues had been working in the quarries or seaweed processing plant since January 1965.



Figure 4. Stone quarry, Robben Island, 10 April 1967. ICRC Archives, Geneva. Photograph by Godfrey Cassian Senn, © ICRC.

28 See, for example, N. Mandela, above note 10, p. 474. Breytenbach recalls how a letter not arriving on time or a visit interrupted could ruin a prisoner’s entire month: see B. Breytenbach, above note 10, p. 150.

29 N. Mandela, above note 10, p. 560.

30 *Ibid.*, pp. 458–459, 479–480, 544.

They were all complaining of regular collective punishments for not meeting work quotas, and of warders charging upon them with dogs and batons. They noted how the doctor refused to treat them. Mandela’s tear glands were permanently damaged after years of smashing rocks at the quarry, a result of the dazzling glare from the stone and the lack of proper eye protection, and he later recalled how the sun’s rays, reflected into his eyes by the lime itself, had been a greater problem than the heat.³¹ Medical complaints of ANC prisoners included work- and stress-related illnesses such as hernias and hypertension, as well as cases of injury not attended to by the prison medical officer, the absence of proper medical histories, poor screening for tuberculosis, and limited dental care.³² There had been seven recorded deaths on Robben Island since May 1964, in addition to several cases of severe depression. Diet was also a major issue of contention – as no food was grown on the island, and all produce had to be shipped in, rations were highly monotonous. There were no vegetables or fresh fruit in the diet, and prisoners often went hungry and suffered from vitamin deficiency (especially skin complaints) and severe constipation. The diet, moreover, was racially discriminatory. Different amounts and types of food were given to whites, coloureds and blacks.³³



Figure 5. Stone quarry, Robben Island, 10 April 1967. ICRC Archives, Geneva. Photograph by Godfrey Cassian Senn, © ICRC.

31 *Ibid.*, p. 482: “our eyes streamed and our faces became fixed in a permanent squint”.

32 Tuberculosis and dental care remained issues of concern a decade later.

33 A good account of prison diet is provided in B. Breytenbach, above note 10, pp. 146–148.

Political detention during decolonization: A brief history

Let us step back for a moment and consider the broader context of protecting detainees during decolonization. Nowhere was the challenge of containing the violence of the end of empire more acute than with regard to the introduction of sweeping emergency security laws and the widespread resort to political detention.³⁴ Detention was a method of choice for an apartheid regime confronted by nationalist opposition.³⁵ Detainees were to be cut off from the outside world by making the world forget them, and them forget the world.³⁶ The need to provide better protection for detainees therefore emerged as one of the biggest challenges facing humanitarians and human rights activists during the post-war era.

The basic model for detention visits had of course existed for many years in the form of ICRC visits to PoWs, the modalities for which were laid down in the Third Geneva Convention of 1949. Detention work evolved by analogy to PoW work, which had defined some of the basic visiting criteria, including repeated visits and talks without witnesses.³⁷ Nevertheless, after 1945 the rapid growth of the number of those detained and the number of detaining powers was paralleled by the equally rapid growth of humanitarian and human rights activity aimed at ascertaining the facts regarding detention, monitoring the trials of those charged with offences against the State, improving the treatment of those deprived of their liberty, and bringing relief to the families they left behind. For the ICRC in particular, detention demanded a rapid and far-reaching growth in post-war programming – at a time of significant budgetary constraints.

Three successive decades of intensive lobbying on behalf of detainees by the ICRC and Amnesty International, the International Commission of Jurists and an array of other human rights groups occurred at the very moment when wars of nationalist resistance were raging and, subsequently, post-colonial States were struggling with internal security problems of their own. So weak was the legal basis for humanitarian or human rights interventions at this juncture that, in the words of a leading international lawyer, the protection of political detainees

34 For an important and influential study on the scale of the violence inflicted by decolonization and its far-reaching consequences for both colonizer and colonized, see Martin Thomas, *Fight or Flight: Britain, France and Their Roads from Empire*, Oxford University Press, Oxford, 2014.

35 For two of the most insightful case studies on detention during decolonization, see John McCracken, “In the Shadow of Mau Mau: Detainees and Detention Camps during Nyasaland’s State of Emergency”, *Journal of Southern African Studies*, Vol. 37, No. 3, 2011; Munyaradzi Bryn Munochiveyi, “The Political Lives of Rhodesian Detainees during Zimbabwe’s Liberation Struggle”, *International Journal of African Historical Studies*, Vol. 46, No. 2, 2013.

36 See, for example, the remarks of Joshua Nkomo, the leader and founder of Zimbabwe’s African People’s Union, who was jailed for ten years by Rhodesia’s white minority government: “The objective [of detention] was to cut us off from the world, to make it forget us and us forget it.” Joshua Nkomo, *The Story of My Life*, Methuen, London, 1984, p. 130.

37 I am grateful to Frank Schmidt for these points, which emerged from correspondence with the author in July–August 2017.

threatened to become a “no-man’s land in humanitarian action”.³⁸ In purely legal terms, the situation in South Africa was considered to be below the level of an armed conflict. Unlike in Algeria, or Kenya, or Rhodesia-Zimbabwe, the ICRC in South Africa did not even try therefore to appeal to Article 3 common to the four Geneva Conventions, covering situations of non-international armed conflict, but based the offer of its services on tradition and precedent and the organization’s own statutes instead.³⁹

Despite the legal limitations, as much as any other organization in the international sphere during the post-war era, the ICRC led the way in holding late-colonial and postcolonial States to account for their treatment of political detainees. From the early 1960s to the mid-1970s, the ICRC’s delegates visited an estimated 100,000 detainees in over seventy countries – a staggering number, and a massive increase on anything undertaken in the inter-war period. Data from a previously unpublished ICRC memorandum points to the scale of the transformation: from thirty visits to nineteen countries during the 1950s, to 106 visits to forty countries during the 1960s, to 243 visits to fifty-eight countries during the 1970s.⁴⁰ Previously a subsidiary feature to relief operations (the ICRC even internally questioned whether it possessed the necessary mandate to undertake detention visits), the protection of detainees was now turned into a cornerstone of its work. The ICRC, moreover, intervened in apartheid South Africa and many of Europe’s colonies in the face of considerable hostility and resistance from the detaining powers. The strength of the organization’s resolve is captured by Jacques Moreillon, delegate-general for Africa, who argued: “A fireman must be close to the fire and those people who are the main concern of ICRC, political detainees, must be within easy reach of our Delegate.”⁴¹

The ICRC and the challenge of apartheid South Africa

The ICRC’s access to political detainees

Detention visiting was an aspect of protection work that brought the ICRC into close communication with Europe’s colonial powers and African liberation movements. Indeed, the difficulty for international organizations navigating their way through the transition between colonial and postcolonial regimes is very well illustrated by the experience of the ICRC. Within barely a decade, the organization, alongside a

38 For this phrase, see Jean Pictet, “Special Study: The Need to Restore the Laws and Customs relating to Armed Conflicts”, *Review of the International Commission of Jurists*, No. 1, March 1969, p. 34.

39 Particularly as reproduced and confirmed in 1928 and 1952 by the Statutes of the International Red Cross. From 1863 until 1915 the ICRC worked without any kind of statutes, which were created for the whole Red Cross Movement after the First World War. Because States had agreed to these statutes, through the International Conference of the Red Cross, they provided a quasi-legal basis for humanitarian action, including in situations of “internal strife”.

40 ICRC Memorandum, Michel Veuthey, Geneva, 14 January 1988.

41 Jacques Moreillon to Edward Ndlovu, 16 August 1974, ICRC Archives, B AG 252, 231-002. Ndlovu was the national secretary of Zimbabwe’s African People’s Union.

number of human rights groups and churches, had swung from largely avoiding contact with liberation movements to systematically cultivating a dialogue with them. In 1962, the former Swiss army officer and future ICRC president Samuel Gonard headed the organization's first information-gathering mission to Equatorial and Central Africa, visiting British, French and Belgian colonies and ex-colonies.⁴² The ICRC had hitherto only reluctantly involved itself in the affairs of Europe's colonial empires. Gonard's mission was largely prompted by a well-founded fear among his ICRC colleagues that what had been "an essentially European organisation" would not be perceived as sufficiently independent or "free from the prejudices acquired from centuries of colonial domination" to establish itself on the continent after the end of European rule.⁴³

Initial interventions were improvised and reactive. The ICRC's delegates in Africa – of which there were forty-two in the late 1960s compared to seventy-four in the Middle East⁴⁴ – found themselves presented with situations of insurgency and counter-insurgency of a severity and on a scale for which they were ill-prepared.⁴⁵ They received limited formal training for detention visiting, provided as part of a week-long course at the ICRC's Cartigny centre, despite visiting on average between 300 and 400 South African detainees almost every year from 1967. During the 1960s, the ICRC did, however, open up regular contacts with non-State armed groups active across Angola, Rhodesia (Zimbabwe), Nyasaland (Malawi), Southwest Africa (Namibia) and South Africa. African nationalist leaders pressed the ICRC and other leading aid agencies for medical relief as well as for cooperation on the visiting of detainees. All of the ICRC's contacts with liberation movements in Southern Africa at this time were direct rather than via governments or the UN. Although the ICRC did not know exactly who in the ANC were members of Umkonkotho we Sizwe (Spear of the Nation, the ANC's armed wing, co-founded by Mandela), it was assumed that all of the leading detainees on Robben Island were. Hence, in talking to Mandela or Mbeki, the ICRC was aware that it was talking directly to the organization's military wing, though perhaps not in the first visits.

It is worth emphasizing that the ICRC was the only international institution to gain widespread access to political prisoners in apartheid South Africa. The delegates of the international Red Cross also developed a reputation for genuinely seeking to establish what was happening inside of South Africa's prisons and to form "a coherent picture of the situation and circumstances" in which detainees were held.⁴⁶ Privileged access came at a price, however – namely, that the ICRC commented on the conditions but not the causes of detention. Amnesty International's approach differed, though it was arguably complementary. It campaigned for the release of what became known as "prisoners of conscience",

42 Georges Willemin and Roger Heacock under the direction of Jacques Freymond, *The International Committee of the Red Cross*, Martinus Nijhoff, Boston, MA, 1984, pp. 46–48.

43 *Ibid.*, pp. 46–48; Pierre Gassmann, "Politique de coopération du CICR en Afrique", 23 July 1991.

44 ICRC, *Annual Report 1968*, Geneva, 1969, pp. 102–103. Many of them were "honorary delegates".

45 A. Thompson, above note 5, pp. 53–62.

46 See, for example, B. Breitenbach, above note 10, pp. 199–200.

although with the proviso that they had neither advocated nor practised the use of violence.⁴⁷ (A conflict therefore arose in 1964 over whether or not to sponsor Mandela as a prisoner of conscience. Because Mandela maintained that violence was a justifiable last resort, Amnesty decided it could not adopt him as a prisoner of conscience, however prominent in the anti-apartheid struggle he may have been.⁴⁸) In the event that Amnesty could not campaign for the release of a prisoner, it limited its concern to the conditions of detention, just like the ICRC. Amnesty's first report on prison conditions in South Africa was published in 1964–65.⁴⁹ Amnesty and the ICRC began corresponding over the protection of detainees in 1963 – the year before the first ICRC visit to Robben Island – partly in relation to a draft international code of conduct for the treatment of persons suspected of presenting a danger to the security of the State, partly in relation to a proposed project for the universal inspection of administrative detention camps. Peter Benenson, the founder of Amnesty International, was the originator of these initiatives, which he presented as ways to strengthen international humanitarian law *and* guarantee fundamental human rights during periods of transition between colonial rule and independence.⁵⁰

As already noted, the ICRC acknowledged that there was no effective legal basis for detention visiting in internal (or “non-international”) armed conflicts, let alone in situations below this threshold.⁵¹ Insofar as States were willing to accept and authorize detention visiting, it was largely on the basis of practice and precedent. Declaring the difficulty of gaining access to political detainees in such situations “a growing worry” for all those “who have humanitarian principles at heart”, the ICRC convened three Commissions of Experts in 1953, 1955 and 1962, in order to examine the problem.⁵² These Commissions were followed by a consequential seminar on political detainees that ran from May 1973 until March 1974, and which reflected at length on the experience the ICRC had hitherto acquired in this field.⁵³ Even at this stage, there continued to be significant

47 For Amnesty in this period, see Tom Buchanan, “Amnesty International in Crisis, 1966–7”, *Twentieth Century British History*, Vol. 15, No. 3, 2004; Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and the Changing of Human Rights Norms*, Princeton, NJ, 2001, pp. 3–19; Martin Ennals, “Amnesty International and Human Rights” in Peter Willetts (ed.), *Pressure Groups in the Global System*, 1982, pp. 63–74; Jonathan Power, *Like Water on a Stone: The Story of Amnesty International*, Allen Lane, London, 2001, pp. 126–132.

48 Ann Marie Clark, *Diplomacy of Conscience: Amnesty and Changing Human Rights Norms*, Princeton University Press, Princeton, NJ, 2001, p. 14.

49 Amnesty International, *Amnesty International, 1961–76: A Chronology*, London, 1976, p. 5.

50 P. Benenson to C. Pilloud, 22 January 1963, 3 April 1963 and 25 April 1963, ICRC Archives, B AG 225 006-016.

51 There is necessary qualification to this remark: at the 10th International Conference of the Red Cross in 1921, the ICRC had received a “semi-legal mandate” to act in civil wars. Yet this decision was rarely referred to later when the ICRC enquired into the legal basis of detention visiting because the situations the organization faced fell below the threshold of full-blown civil wars and were more likely to be described as “internal strife”, “public emergencies” or the like.

52 For the reports of these Expert Committees, see ICRC Archives, B AG 225 000-001/002/003/007/013/016.

53 “Etude sur les activités du CICR en faveur des détenus politiques”, 4 January 1973 to 8 March 1974, chaired by Laurent Marti, Assistant Director of Operations, with proposals delivered to the ICRC Assembly in 1974, ICRC Archives, B AG 225 000-034.01.

reservations within the ICRC about enlarging detention-related activity. How would the ICRC avoid jeopardizing its relations with States, or alternatively, becoming their instruments? Was it possible for the ICRC to preserve its ideological impartiality when assisting detainees? What were the essential and what were the desirable conditions of visits? These questions were debated at length by participants in the detention seminars, without always arriving at clear answers. The seminars – backed by the Assembly – eventually concluded that when other organizations were not in a position to provide protection to detainees, the ICRC had a moral obligation to do so, even if no satisfactory legal basis existed.

The actions of the apartheid authorities

Throughout the 1960s, the intention of the South African government could not have been clearer. Amidst a welter of race legislation, which included the infamous pass laws, the authorities imposed a highly punitive and coercive detention regime in which repression and cruelty were codified to the last detail. Study facilities were almost non-existent, contact and correspondence with relatives remained scarce (an egregious effect of which was to put many marriages and family relationships under severe strain), and every effort was made to prevent prisoners from gaining access to news of the outside world. The main aims of detention were to isolate and intimidate political prisoners and generate an atmosphere of hopelessness among them. Several measures were taken to this end.

First, the South African authorities refused to distinguish between the so-called “criminals” and the “politicals”. This was not simply to deny political detainees any special status: common-law criminals were also used by warders as informers or as part of criminal gangs to maintain order inside the prison and to harass and assault ANC members.⁵⁴ Second, control was exerted by the granting or denial of privileges. Prisoners on Robben Island were classified into four categories according to the security risk they were judged to represent. Members of the ANC, PAC and SWAPO – so-called “active extremists” – were forbidden newspapers and radios, and were only permitted to write a three-quarter-page letter every six months and to receive one half-hour visit every three months. Third, there was victimization by prison warders. For example, in his interview with Senn, Mandela referred directly to a “persecution campaign” of a particular vindictive warder, van Rensburg, who had a swastika tattooed on the back of his hand.⁵⁵ Fourth, prison authorities sought to mislead and manipulate the ICRC, which they resented for interfering with State security. A tried and tested technique was to improve the conditions of detention immediately prior to a visit. Hence Mandela’s wry remark in his first interview with Senn: “[W]e respect

⁵⁴ N. Filippi, above note 9.

⁵⁵ Van Rensburg was later removed from Robben Island when the Liberal MP Helen Suzman threatened to raise his case in parliament. See N. Mandela, above note 10, pp. 513–515: “His job was to make our lives as wretched as possible” (p. 514).

the Commissioner of Prisons very much; even before he comes for a visit, the handling of the prisoners by the Staff becomes more ‘human’.”⁵⁶ Senn himself was under few illusions on this score. He later remarked that the fact that prisoners appeared relaxed in the rock quarry was because warders did not dare risk an order to intensify work while an ICRC delegate was present. He also cautioned against any optimism regarding the results of the ICRC’s first visits to Robben Island, singling out van Rensburg and his kind – of whom Senn said there were a lot – for whipping up public hysteria against the ICRC.



Figure 6. Stone quarry, Robben Island, 10 April 1967. ICRC Archives, Geneva. Photograph by Godfrey Cassian Senn, © ICRC.

The South African authorities were even more obstructive with regard to the type of detainees that the ICRC was permitted to visit. The ICRC was able to work on behalf of two categories of prisoners: convicted security prisoners who were serving sentences, and later (from 1976) those detained under Section 10 of the Internal Security Amendment Act.⁵⁷ A long-run battle and repeated representations to see those detained under Section 6 of the Terrorism Act of 1967, which supplemented ninety- and 180-day detention orders and allowed for

⁵⁶ See above note 16.

⁵⁷ On this point, see ICRC, *Annual Report 1969*, Geneva, 1970, p. 19; *Annual Report 1970*, Geneva, 1971, p. 13; and *Annual Report 1976*, Geneva, 1977, p. 18.

unlimited periods of detention, came to nothing.⁵⁸ The Ministry of Justice and the Ministry of Foreign Affairs refused access to those detained under the Terrorism Act for the next decade, despite the ICRC president's personal intervention on the issue. Both the South African and Rhodesian authorities rejected any argument in favour of ICRC authorization to visit those who they classified as "captured terrorists" for fear of such detainees thereby qualifying as "combatants" and attaining PoW status.⁵⁹

The major flashpoint, however, was the South African government's selective and politically motivated citation of ICRC reports.⁶⁰ Senn, as already noted, was not the first ICRC delegate to visit Robben Island. An earlier visit in April 1964 by the ICRC's delegate-general for Africa, Georg Hoffmann, erupted in controversy when two years later, on 26 November 1966, the South African government published sections of Hoffmann's report in the local press (as well as publicizing them in the UN) that showed the prison authorities in a good light.⁶¹ The tone of the Hoffmann report had been very subdued – this was most likely because Hoffmann feared the South African government would otherwise prevent further visits. Not without justification, he was accused of failing to convey the seriousness of the problems.⁶² Yet his reticence was not without cause. Public denunciation ran the risk of losing the very thing the ICRC prized: proximity to the people who were in need of protection. In fact, the ICRC had very nearly been expelled from South Africa precisely at the moment when allegations of "defending and sheltering white supremacy" were surfacing with great fanfare in the UN's General Assembly.⁶³ Hence the considerable reluctance on the part of the ICRC to speak out publicly – a reluctance which nonetheless continually exposed the organization to criticism from human rights groups.

58 P. Gaillard, Assistant Director of the ICRC, to Dr Hilgard Muller, Ministry of Foreign Affairs, 23 July 1969, ICRC Archives, D AF RHODE 2 02.001.

59 See, for example, H. R. T. Oxley, Secretary of State for Foreign Affairs, Rhodesia, to F. Perez, ICRC, 3 January 1978, "Rapport Mission Moreillon Rhodesie, 16–23 avril 1978", ICRC Archives, B AG 231-001.

60 As late as 1977, the ICRC was still agonizing over the publication of reports by detaining powers which "inevitably led to public and political controversy and could only have a negative effect on the ICRC's long-standing reputation ... and ultimately its credibility and effectiveness as a neutral and impartial humanitarian organisation": see Alexandre Hay to J. T. Kruger, 10 November 1978, ICRC Archives, D AF RHODE 02.001.

61 For the unfolding conflict, see G. Senn to C. Pilloud, 21 February 1968; "Extract from ICRC letter to South African Minister of Foreign Affairs", 27 June 1968, contained in letter from G. Senn 10 July 1968; "Note on Interview with the South African Prime Minister, Cape Town, 2/5/1967", along with newspaper cuttings from the *Gazette de Lausanne*, 11 October 1967; *Cape Argus*, 8 April 1967; and *Christian Action*, 13 April 1967, ICRC Archives, D AF RHODE 02.002.

62 It is, however, worth noting that a subsequent report of the International Defence and Aid Fund – considered a more radical organization – incorporated sections of the Hoffmann report as supporting evidence of ill-treatment in South Africa's prisons. See "South African Prisons and the Red Cross Investigation", signed by Dennis Brutus, UN Human Rights Council (UNHRC) Archives, SO 234 (13–3), April 1967–July 1967.

63 For the background to the UN's involvement in South Africa's liberation struggles, see, especially, Enuga S. Reddy, "The United Nations and the Struggle for Liberation in South Africa", in South African Democracy Education Trust, *The Road to Democracy in South Africa*, Vol. 3: *International Solidarity*, Part 1, UNISA Press, Pretoria, 2008, pp. 41–120.

The decision of the South African authorities to selectively cite the report was most probably prompted by the UN's Commission on Human Rights (CHR) unprecedented break with its “no power to act doctrine”.⁶⁴ The CHR was formed in 1946 in the wake of the mass atrocities of the Second World War to promote the rights of all of the world's peoples, but it was immediately hamstrung over disagreements on the question of whether and in what ways to enforce the principles it promulgated. The CHR's decision to investigate allegations of torture and ill-treatment in South Africa's prisons broke with its doctrine not to investigate and report on abuses. It was the first time since the Universal Declaration of Human Rights (1948) that the UN's human rights machinery had been used to take on a member State in such an openly confrontational manner.⁶⁵

A UN Working Group of Experts, which the ICRC felt had set out to make as much trouble as possible for the South African government, was charged explicitly with the task of investigating the violation of human rights. It was (unsurprisingly) forbidden to enter the country, the apartheid government arguing that the UN's decision to investigate was a “flagrant breach of its internal affairs”;⁶⁶ hence the Working Group had no direct access to detainees. Instead the UN had to rely on interviews outside of the country with those already released from detention. The Working Group wrote to the ICRC on 5 June 1967 requesting “certain information”, and the ICRC's annual report for that year records that “in so far as it was able”, it had attempted to supply this information.⁶⁷

Insisting that his government had nothing to hide, South Africa's ambassador to the UN adduced the ICRC's visits – and its supposedly free access to any prison – as evidence in support of his contention. The ambassador's assertion relied on the erroneous claim that ICRC delegates had been allowed “unrestricted inspection”. He went on to insist that the ICRC was “by reason of its long tradition of objectivity” the proper body to establish the truth of the situation.⁶⁸ The Working Group, meanwhile, attacked the ICRC for its hesitation in speaking out against abuses, for delays in despatching its reports, and for “playing the game of Pretoria”. What particularly smarted in Geneva was the UN General Assembly's comparison – or, in the ICRC's words, the “slandorous accusations” – of failure to act in South Africa and the ICRC's earlier failure to condemn the Nazi concentration camps. These accusations made by UN

64 A. Thompson, above note 15.

65 CHR, “Organisation of the Work of the Ad Hoc Study Group: Note by the Secretary-General”, 1 September 1967, UNHRC Archives, SO 234 (15).

66 The Working Group was the result of a UN resolution adopted on 6 March 1967. The UN side of this story was for the first time pieced together after a special access request was granted to see the relevant archives: see UNHRC Archives, SO 234, March 1967–December 1969. As far as I am aware, this is the first time these archives have been consulted. See also G. Senn to C. Pilloud, 21 February 1968, ICRC Archives, D AF RHODE 2 02.002.

67 ICRC, *Annual Report 1967*, Geneva, 1968, p. 29.

68 Access was not in fact unrestricted at this time. See M. I. Botha, South African Ambassador and Permanent Representative to the UN, to U Thant, UN Secretary-General, 13 April 1967 and 17 April 1967, UNHRC Archives, SO 234 (13–1), March 1967–December 1969. Botha's very carefully worded letters referred to the fact that “reports have been issued and statements made by these independent persons” without saying anything about their actual contents.

delegates from Nigeria and the USSR provoked an organization usually keen to avoid the spotlight of publicity to vigorously defend itself on the public stage.

The ICRC insisted that the policy of confidentiality protected its freedom to privately criticize a detaining power. Yet the force of this argument was undermined by the highly selective citation of the ICRC's reports by the South African authorities. By the ICRC's own admission, detainee confidence in its neutrality and impartiality was seriously damaged by the Hoffmann incident.⁶⁹ If nothing else, this turn of events exposed the emerging stresses and strains between humanitarian organizations and human rights groups as they tried to put in place a more robust international framework for the protection of political detainees. The ICRC's president, Samuel Gonard, felt strongly enough to write to the UN secretary-general, U Thant, and to Marc Schreiber, director of the UN's Division of Human Rights, to say that he had been "deeply perturbed" by the allegations made in the precincts of the UN, which were "so obviously contrary to the truth".⁷⁰ In a highly unusual move, he then pressed for his letter of rebuttal to be circulated among the members of the UN's Economic and Social Committee (ECOSOC).⁷¹

A decade later, Moreillon's successor as delegate-general for Africa, Frank Schmidt, and Gonard's successor as president, Alexandre Hay, were still grappling with essentially the same problem – namely, how retain detainee confidence and trust in the ICRC, and enlarge the scope of the organization's prison visits, while not falling foul of the South African authorities. Hay had visited South Africa in 1977, the first ever ICRC president to do so.⁷² His primary purpose had been to gain access to non-convicted detainees held under the Terrorism Act. (Subsequently, in 1987, still lacking access to non-convicted detainees under interrogation and considering that there was little more to ask for in favour of convicted prisoners, the ICRC decided to suspend *sine die* its visits to the latter, for the second time in its history.⁷³) In 1978, as the ICRC sought to step up its activities in the region, Hay went so far as to write to James Kruger, South Africa's minister of justice, police and prisons, to raise the matter of very low detainee morale.⁷⁴ At the time of writing, the ICRC was submitting detailed written statements from twenty-five recently convicted prisoners about their ill-treatment and torture while they were detained and under interrogation. They were mainly young men arrested in the wake of the Soweto uprisings, and the

69 See A. Thompson, above note 5, pp. 68–71.

70 See Marc Schreiber to Curtis Roosevelt, Chief NGO Section, ECOSOC, 17 November 1967, UNHRC Archives, SO 234 (13–3), July 1967–December 1967; Samuel Gonard to U Thant, 27 June 1967, copy in Claire Howe to Charles Hogan, 11 July 1967, UNHRC Archives, SO 234 (13–3), April 1967–July 1967.

71 Curtis Roosevelt to Marc Schreiber, 17 November 1967, UNHRC Archives, SO 234 (13–3), July 1967–December 1967. C. Pilloud at the ICRC had confirmed that the Red Cross did want its letter to the secretary-general of 27 June 1967 circulated to members of the Social Committee of ECOSOC when it met in the spring of 1968.

72 J. Moreillon, above note 13, pp. 117–118.

73 The year was 1987: *ibid.*, p. 120. The first time was in Vietnam.

74 Alexandre Hay to James T Kruger, South African Minister of Justice, Police and Prisons, 10 November 1978, ICRC Archives, D AF RHODE 02.001.

statements they wrote for the ICRC were fresh evidence of ill-treatment. This infuriated Kruger, who was pressing for the publication of a relatively favourable ICRC prison report which, taken out of context, would have produced a partial and highly misleading impression of delegates’ overall findings. Many of these younger ANC detainees were also refusing to talk to the ICRC’s delegates, arguing that their visits, subject to so many limitations, “served no useful purpose” and that they simply “whitewashed” the South African authorities.⁷⁵ Hay therefore warned Kruger that the ICRC’s position in South Africa was fast becoming untenable. The risk of giving the appearance of some kind of collusion between the ICRC and the South African authorities was ever present, but all the more acute at this juncture. Kruger was told that if the government would not publish *in extenso* the reports of all ICRC visits, either the ICRC would do so or the reports would be made available to the press or other organizations upon request.

The effectiveness of humanitarian and human rights groups

Political detention brought into sharp relief the limits of humanitarian action and human rights activism. A whole new infrastructure was painstakingly built by a post-war generation of international and non-governmental organizations to defend detainees in court, to visit them and take care of the welfare of families, and to document their experiences upon release. A key aim of that infrastructure was to limit the sense of isolation of detainees; regular and repeated visits were understood to be one key part of that process, and access to education, recreation, news and family another.



Figures 7 and 8. New recreation hall for prisoners, Robben Island, 10 April 1967. ICRC Archives, Geneva. Photographs by Godfrey Cassian Senn, © ICRC.

75 *Ibid.*; J. Moreillon, above note 13, pp. 118–119. The detainees in question were held under Section 10 of the Internal Security Act. After the ICRC’s visiting practices – and their advantages – were explained to them, they let the ICRC proceed.

This brings us to the question of effectiveness. Did an international presence provide the hoped-for protection, or did it create a false sense of security? To what extent did humanitarian and human rights groups operate as a restraining or challenging mechanism on late-colonial and postcolonial violence? The growth of activity on behalf of detainees certainly threatened to break down the seclusion of a late-colonial world, to open up avenues for legal redress, and to thrust the actions of detaining powers into a new and much more volatile international arena. Forced onto the back foot at the UN, where colonialism was rapidly losing much of its legitimacy, detaining powers were often cautious about bypassing external scrutiny and not allowing outside visits to go ahead, judging the price of such actions to be too high. Equally, however, they were determined not to have their emergency powers excessively curtailed or, for that matter, to be outmanoeuvred in international fora.

For the ICRC, there was always risk of falling into a trap of relatively meaningless visits in the hope of achieving slow, incremental change. To be set against that, however, are the views of many former detainees who recalled with gratitude the ICRC's work in diligently listening to their complaints, monitoring their conditions and persuading the authorities to make concessions. This takes us back to the very nature of the detention experience, marked as it was by uncertainty, deprivation and intimidation. *Any* visits to political detainees or improvements in detention conditions had a symbolic as well as substantive value – detainees knew they had not been forgotten. Such efforts undermined the “complete blackout” that Mandela saw the authorities as attempting to impose.⁷⁶ The visits of outsiders, whether from the ICRC, Liberal MPs or churches, reduced the sense of isolation from which detainees suffered. This is why so much store was set on obtaining news. Inmates would go to almost any length to obtain – and conceal – even scraps of information.⁷⁷ Newspapers, in Mandela's words, were “more valuable to political prisoners than gold or diamonds, more hungered for than food or tobacco”. To have access to news was to reconnect with the outside world.⁷⁸

We do not yet fully understand the reasons for timings of particular changes in regime policy and practice in South Africa, partly because of the difficulty of gaining access to relevant State archives. While the early years on Robben Island were particularly harsh, subsequent improvements in conditions were not always sustained. There was, for example, a notable regression in the behaviour of prison wardens on Robben Island in the early 1970s with the arrival of a new commanding officer, Colonel Badenhorst. In June 1973, the ICRC's president, Marcel Naville, wrote to the South African minister for foreign affairs, Hilgard Muller, to say that it was disappointing for all concerned that ten years after the first ICRC visits to prisoners, the most serious shortcomings in

76 N. Mandela, above note 10, p. 492.

77 For favoured techniques, see B. Breytenbach, above note 10, pp. 226–227.

78 N. Mandela, above note 10, pp. 492–493; H. Shityuwete, above note 18, pp. 229–230.

detention conditions were effectively the same.⁷⁹ Naville wrote of the “moral ordeal” inflicted on prisoners by their isolation from the outside world, which the ICRC was at a loss to “find any valid justification for”. He then went on to propose that the South African authorities thoroughly review their policies toward prisoners working, studying and having access to news.

Special access to UN and ICRC archives made the writing of this article possible, and much of the material presented here has never been seen or cited before. That said, without access to the archives of the Republic of South Africa – which may have been destroyed – it will always be difficult to explain why the authorities conceded particular things at particular moments in time, or at what level in the bureaucracy these decisions were taken. Prisoner resistance is likely to have been a major factor in many, perhaps the majority, of these concessions, as evidenced by the memoirs of detainees. Equally, such resistance was clearly bolstered by pressure from the very few outsiders who had access to prisons: the media, ex-prisoners, the UN and various local and international anti-apartheid movements (although the ICRC largely avoided contact with the latter, if only because they were always closely scrutinized, and at times even infiltrated, by the police and security services). Similarly, lack of access to State archives prevents us from establishing with any real clarity the evolution of the political situation and the shifting mentality of the authorities. When, for example, did the South African government arrive at the view that Robben Island inmates would eventually leave their cells, and even play a part in running the country, and so needed to be prepared for their release? Access to news came very late in the process of negotiations – does this signal such a shift of mentality? What arguments had carried the day? The truthful answer is that although we may hazard a guess, we do not really know.

What we do know is that just as political detainees were over time able to achieve a high degree of organization, there were decisive developments in the ICRC’s approach to detention visiting during the 1960s and 1970s. The ICRC became more alert to the apartheid regime’s tactics of improving prison conditions prior to visits, holding press briefings to discredit visits, impersonating Red Cross delegates, and selective citation of ICRC reports. Meanwhile, the confidence of detainees in ICRC delegates and the quality of their visits was gradually increased. The key factor here was the laying out of a basic framework for detention-related work: access to all detainees and to all facilities, private and unsupervised conversations, authorization for regular and repeated visits, the professionalization of the role of the delegate, and larger delegations including medical staff.⁸⁰

79 M. Naville to Hilgard Muller, 28 June 1973, ICRC Archives, D AF RHODE 02.002.

80 The premium placed by the ICRC on its proximity to victims – and whether such proximity was positive and consequential – made it vital to demonstrate results. Godfrey Senn understood this only too well, emphasizing the need for longer visits, extensive interviews and thorough inspections. He insisted that Geneva take greater care in drafting covering letters accompanying delegate reports, and he was much exercised by the loose phrasing which allowed the South African authorities to twist the contents of these letters and to charge the ICRC with not understanding the situation with which it was dealing.

There were, to be sure, limits to what could be achieved, and senior figures in the ICRC were under few illusions. In 1974, Jacques Moreillon spoke of the “crazy situation of today’s international law” where “the alien is better protected than your own national”.⁸¹ He saw the maltreatment of political detainees during their initial interrogation and subsequent detention arising principally from three factors: first, the securing of intelligence regarded as vital for State security; second, a State policy of terror; and third, the lack of checks on the behaviour of prison warders and officials. Moreillon – a fiercely intelligent and politically shrewd delegate who later rose to become the director-general of the ICRC – arrived at a sobering conclusion. He felt that regular visits of outside bodies, like the ICRC, might be of help with regard to the last of these factors – namely, curbing the ill-discipline of prison warders. However, such visits were unlikely to make much if any impression on methods of interrogation when intelligence could not be gathered in other ways.

The sad and stark truth behind Moreillon’s observation is attested to by an important and strangely neglected study undertaken for the ICRC by Laurent Marti in 1969 – a study prompted by mounting concern over the use of torture. Marti posed the question of what constituted a place of detention, and in response put forward “la doctrine des quatre murs”.⁸² According to this doctrine, a person was of legitimate concern to the ICRC regardless of whether he or she was detained in a police cell, a prison or a detention camp. Visits to prisons and camps were generally admitted at this time, but, significantly, not to police cells, where interrogation often occurred soon after a suspect’s arrest. Marti insisted that the right of visits be extended to each and every place of detention (including those currently unregulated) if the ICRC was to report satisfactorily on the treatment of all political detainees.

Marti and Moreillon were experienced ICRC delegates who were mindful of the ICRC’s lack of access to places of interrogation as well as the need to improve the methodology of prison visits to enhance their value. Nor was the ICRC the only organization grappling with the issue of detention at this time. By the early 1960s the question of the ICRC’s inspection of detention centres was closely linked to Amnesty International’s concern to establish a basic international code of conduct, adopted by the UN, for the treatment of all persons suspected of endangering the security of their States. Other options to protect political detainees that were actively canvassed at this juncture, even if they were ultimately discarded, include an international prison under UN control to be used by member governments in emergencies; international areas for the purpose of providing asylum to political refugees; the despatch of trained UN observers to

81 Address by Jacques Moreillon, Delegate-General for Africa, 23 May 1975, ICRC Archives, B AG 225 231–004.

82 The “four walls” doctrine (editor’s translation). “Etude sur les activités des détenus politiques, séminaires de mai et septembre 1973”, chaired by Laurent Marti, ICRC Archives, B AG 225 000-034.01; Séminaire “détenus politiques” à l’institut Henry-Dunant, 14 September 1973 to 4 January 1974, ICRC Archives, B AG 225 000-034.02; “La question des mauvais traitement et la doctrine dite des quatre murs”, chaired by Laurent Marti, 6 June 1969–4 December 1969, ICRC Archives, B AG 225 000-027.

trouble areas; and UN prison rules with special provisions for the treatment of “political prisoners” and “freedom fighters”.⁸³

Whatever the actual or verifiable impact of humanitarian and human rights groups, it is important to recognize that it was ultimately the detainees themselves who fought the system the hardest, and who with considerable courage negotiated the routines of their everyday lives.⁸⁴ They sought to empower themselves through education – Robben Island was later dubbed “Mandela University” – and they put pressure on and sometimes deliberately provoked prison administrations through active and passive forms of resistance. Arguably they alone could not have secured the improvements described in this article, and several detainees later stated that the privileges they secured were in large part due to the work of the ICRC.⁸⁵ Nonetheless, the influence of outside organizations, important as it may sometimes have been, always needs to be set in this wider context.

In terms of improving the conditions of detention, it is likely that the biggest breakthroughs were a product of combined prisoner resistance and outside pressure, and that outside pressure was all the more effective when carefully aligned with detainees’ own struggles. Early if modest improvements in the 1960s in diet and clothing, and later improvements in the mid-1970s including studies (where restrictions were considerably relaxed), work regimes (considerably reduced if not yet ended)⁸⁶ and medical care (better organized, with more doctors and visits), all attest to this – they were regarded as high-priority by Mandela and his ANC colleagues and hence were actively agitated for.⁸⁷ Conversely, the lack of progress over almost two decades in securing any substantive concessions on the rationing of correspondence, family visits (their length was extended and their number raised from one to two per month in 1977, but visits by children remained prohibited)⁸⁸ and access to news serves to highlight the limits of what could be achieved – yet also the persistence and tenacity required to obtain improvements when they were eventually granted. We have already noted the importance of prison visits and letters: “the only real life-line with normality” which assumed an “almost grotesque importance”, in the words of one detainee.⁸⁹ The desire to know what was happening in the outside

83 “The Rule of Law in International Affairs”, summary of a statement made by Sean MacBride, Secretary-General of the International Commission of Jurists, at a meeting of the European-Atlantic Group, London, 25 April 1966, Archive of the International Commission of Jurists, Box 97/2.

84 This is the key point to emerge from Buntman’s *Robben Island and Prisoner Resistance*, above note 11.

85 Breytenbach is among the most forthright on this point, yet by no means alone: see B. Breytenbach, above note 10, p. 206.

86 Only in 1978 was all work in the quarry finally stopped. This was announced in early 1977: see N. Mandela, above note 10, p. 581.

87 For greater detail on the securing of these concessions, see J. Moreillon, above note 13, pp. 71–97.

88 Minister of Prisons, Pretoria, to the President of the ICRC, 10 November 1977, ICRC Archives, D AF RHODE 02.001.

89 H. Lewin, above note 12, p. 86. Lewin was sentenced to seven years’ imprisonment in Pretoria in 1964 for a number of offences under the South African Sabotage Act. He went on to remark of visits: “everything seems to depend on them, everything seems to move towards them, your whole being becomes involved in the fact of the impending visit as the only point of focus”.

world remained similarly undiminished.⁹⁰ Access to news – always highly prized – did eventually come in 1979–80; the following year prisoners were permitted to receive daily newspapers without censorship, a major breakthrough.⁹¹ Two years later, further concessions were secured on correspondence (increasing the number of letters), visits by children under the age of 5, and material support to finance the trips of families from their homes, but visits by non-family members and older children remained prohibited even at this time, despite repeated protests that the latter restriction had led to an “alienation of family feelings”.⁹²

Humanitarianism and human rights: A troubled rapport

The ICRC is a humanitarian organization, Amnesty International a human rights group. This brings me to my final point: the troubled rapport between humanitarianism and human rights.⁹³ Humanitarians and human rights activists have not been averse to presenting themselves in oppositional terms;⁹⁴ the promotion of the one is often perceived to have been at the expense of the other.⁹⁵ Humanitarianism is based on a discourse of charity and suffering, and many aid agencies are cautious about speaking out against rights abuses for fear of jeopardizing access to people in need and of politicizing humanitarian action to the point of draining its moral purpose.⁹⁶ Human rights, by contrast, are based on a platform of justice and solidarity, and providing relief is considered secondary to gathering evidence about atrocities and denouncing their perpetrators.

Amnesty International and the ICRC are frequently held up as exemplars of these different *modi operandi* or working modalities – compassion and charity *versus* justice and solidarity; material support *versus* an emancipatory vocabulary of rights; and private persuasion *versus* public denunciation. The reality in the South African case was invariably more complicated, however. Whereas disputes erupted into the public arena and have attracted the attention of historians,

90 *Ibid.*, p. 88.

91 This began in 1978 with the compromise of permitting prisoners to start their own radio news service. See N. Mandela, above note 10, p. 595; J. Moreillon, above note 13, p. 119.

92 *Ibid.*, pp. 119–120. See also report on visit to political prisoners in maximum security prison on Robben Island by Dr P. Zuger, accompanied by Dr F. Vulliet and G. Senn, 8–10 May 1969, ICRC Archives, D AF RHODE 2 2.005.

93 M. Geyer, above note 14. A useful commentary on the relationship between humanitarianism and human rights, albeit more weighted toward the inherent tensions between the two concepts, is also provided in Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, Ithaca, NY, 2011.

94 For critiques of humanitarianism from a human rights perspective, see Geoff Loane and Céline Moyroud (eds), *Tracing the Unintended Consequences of Humanitarian Assistance: The Case of Sudan*, Baden Baden, Nomos, 2001; R. A. Wilson (ed.), *Human Rights, Culture and Context: Anthropological Perspectives*, London, Pluto Press, London, 1997.

95 See, for example, A. Dirk Moses, “The United Nations, Humanitarianism and Human Rights: War Crimes/Genocide Trials for Pakistani Soldiers in Bangladesh, 1971–74”, in Stefan Ludwig Hoffmann (ed.), *Human Rights in the Twentieth Century*, Cambridge University Press, Cambridge, 2011, p. 277.

96 For two of the more insightful studies of the premises of these concepts, see Joanna Bourke, *What It Means to be Human: Reflections from 1791 to the Present*, Virago, London, 2011; Richard Wilson and Richard Brown (eds), *Humanitarianism and Suffering: The Mobilisation of Empathy*, Cambridge University Press, Cambridge, 2009.

cooperation concealed itself behind closed doors and is considered to be of less interest to their readers. Privately, Amnesty did in fact share information with the ICRC’s delegates in Africa as they passed through London, although this was more on the state of Portuguese prisons than on Robben Island, of which the ICRC knew much more than Amnesty anyway. Conversely, with the possible exception of the UN Working Group, there is little evidence to suggest that the ICRC informed any outsider, including Amnesty, about the conditions of South African detention.⁹⁷

Institutional rivalry notwithstanding, it was, nonetheless, the quiet and unannounced post-war revolution in detention visitation that provided the terrain upon which the concerns of humanitarians and human rights activists converged. This is not to deny that challenges to humanitarian “minimalism” came from rights groups, development agencies and peace-building bodies. But the humanitarian agenda was itself broadening during decolonization. In making claims on behalf of victims, aid agencies, working alongside human rights groups, adopted ethical witnessing as an integral part of their work. Nowhere is this blurring of boundaries between humanitarianism and human rights more clearly seen than in relation to the fact-finding missions, gathering of personal testimony and detailed documentation of abuses from the 1960s onwards.⁹⁸ A new literary genre of human rights reporting emerged, factual and forensic, framed around stories of individual suffering. It was a type of “monitory democracy” whose aim was to validate the victim rather than search for the causes of victimization – “advocacy with footnotes”, in the words of Ron Dudai.⁹⁹ If nothing else, this seriously calls into question the presumptive human rights surges of the 1940s and 1970s that have tended to dominate the more recent historiography.¹⁰⁰ Arguably, the 1960s stake the stronger claim as the decisive decade.

In the quarter-century after 1945, what we really see is the continuous development of a network of international organizations seeking to lift the veil of secrecy over places of undisclosed detention and expose the weaknesses of international law regarding internal armed conflict and other situations of collective violence. Through their combined if not always coordinated efforts, humanitarians and human rights activists sought to gain greater recognition of the necessity of extending existing norms into states of public emergency. The

97 I am grateful to Jacques Moreillon and Frank Schmidt for advice on this point, provided during correspondence with the author in July–August 2017. The exception alluded to is hinted at yet not quite substantiated in the ICRC Archives.

98 On the literary dimensions of human rights activism, see Paul Gready, *Writing as Resistance: Life Stories of Imprisonment, Exile and Homecoming from Apartheid South Africa*, Lexington Books, Lanham, MD, 2003.

99 Ron Dudai, “A to Z of Abuses: State of the Art in Global Human Rights Monitoring”, *Development and Change*, Vol. 38, No. 6, 2007.

100 For an overview of recent debates, see Kenneth Cmiel, “Review Essay: The Recent History of Human Rights”, *American Historical Review*, Vol. 109, No. 1, 2004; Pamela Ballinger, “The History of Human Rights: The Big Bang of an Emerging Field or Flash in the Pan?”, *New Global Studies*, Vol. 6, No. 3, 2012. For the spirited if ultimately unconvincing argument that the 1970s was the “breakthrough decade” for human rights, see Samuel Moyn, *The Last Utopia: Human Rights in History*, Harvard University Press, Cambridge, MA, 2010; Jan Eckel and Samuel Moyn (eds), *The Breakthrough: Human Rights in the 1970s*, University of Pennsylvania Press, Philadelphia, PA, 2014.

post-war era was a turning point in the relationship between evolving humanitarian and human rights agendas: the concerns of the one were expanding rapidly towards those of the other. There was, moreover, great fluidity in what it meant to do human rights and humanitarian work at this time, with different approaches and ways of working as likely to be found within as they were between international organizations.¹⁰¹

Detention today: The future of the past

In late 2014, the international media poured over the redacted summary of a suppressed 6,000-page CIA report which revealed shocking details of how, in the wake of the 9/11 attacks, suspects were interrogated and tortured at secret, out-of-sight “black site” prisons around world.¹⁰² The chair of the US Senate Intelligence Committee declared this to be an “ugly stain” on his country’s history and reputation. By so-called “enhanced”, “advanced” or “coercive” interrogation techniques, call them what you will, detainees were subjected to loud noise, simulated drownings and sleep deprivation and stress positions, all of which were deemed by Barack Obama as contrary to American values. The US Senate found that information obtained from these techniques had been neither reliable nor effective, nor had it produced intelligence that could not have been obtained from conventional (non-violent) interrogation.

This begs the question of what, if anything, has actually changed since the late-colonial and apartheid era. Some forty years prior to the publication of the CIA report, the UN had passed its first resolution on “Human Rights in Armed Conflict”, and a 224-page Amnesty International report on torture had observed a growing tendency for governments to authorize and condone “inhuman or degrading treatment”. The use of torture, Amnesty then argued, was becoming a more routine part of interrogation in many parts of the world, whether to extract information or to control political dissent, with interrogation techniques constantly refined. More specifically, from its investigation of 139 countries, Amnesty claimed that sixty-three had used torture, thirty-four as “a regular administrative practice”. It went on to declare that the scale upon which torture was being used was a “disgrace to modern civilisation”, and to launch its first worldwide campaign for the abolition of torture in 1972.¹⁰³

101 On this point, see Kevin O’Sullivan, “The Search for Justice: NGOs in Britain and Ireland and the New International Economic Order, 1968–82”, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, Vol. 6, No. 1, 2015.

102 For some of the harder-hitting press coverage at the time, see “America’s Day of Shame”, *The Independent*, 10 December 2014, and accompanying articles on pp. 4–6; “UK Must Reveal Truth on Torture, Say Critics”, *The Guardian*, 11 December 2014, and accompanying articles on pp. 14–15, 41.

103 “Report on Allegations of Torture in Brazil, London, September 1972”, cited in “Human Rights in the World: Torture Continues”, *Review of the International Commission of Jurists*, No. 10, June 1973, pp. 10–12. See also Amnesty International, above note 49, p. 12; Egon Larsen, *A Flame in Barbed Wire: The Story of Amnesty International*, London, Muller, 1978, p. 71.

Precisely when torture became a taboo is a matter of open debate among historians. A new historiography on human rights is mirrored by a new literature on torture which suggests that “most citizens of the Cold War wanted to avert their gaze from torture rather than to mobilise to stop it”.¹⁰⁴ As this article has shown, over the years the ICRC had tried – and failed – to gain access to detainees under interrogation in South Africa. Publicly or privately, the exposure of assaults or torture, whether by the ICRC, Amnesty International or any international organization, shows no sign of having ever inhibited those involved. After repeated refusal of requests for access to non-convicted detainees, the ICRC decided in 1987 to suspend all visits to convicted prisoners. Meanwhile, improvements in the material conditions of detainees were from time to time secured, even if it is not always clear precisely for what reasons. These concessions had the effect of improving prisoners’ morale and reducing their sense of isolation, and many inmates clearly felt that the ICRC had been useful in voicing complaints, solving problems, restoring privileges and (later) providing financial support.¹⁰⁵ Prisoners could be harassed after ICRC visits, yet they were equally aware of positive changes. Mandela himself felt that the authorities were keen to avoid international condemnation, and that this fact alone gave the ICRC, as an independent organization “to whom the Western powers and the United Nations paid attention”, a certain degree of leverage.¹⁰⁶ Over time, ICRC delegates developed a reputation for competence, perseverance and objectivity, and of not being easily fooled by the prison authorities.¹⁰⁷ That said, the fact that all contact with the outside world remained highly constrained throughout the 1960s and 1970s – and the major breakthrough on access to news did not happen until 1979–80 – is a powerful reminder of the highly oppressive nature of the apartheid regime and the limited scope of any international organization to counter this. At the heart of the South African prison system, to recall the words of one detainee, was the denial of the humanity of “the other”, and in that sense it faithfully mirrored the wider ethos of the racialized State from which it was born.¹⁰⁸ Nor were improvements to prison conditions always sustained: “The graph of improvement in prison was never steady”, Mandela observed.¹⁰⁹ For example, a more liberal regime on study was to be considerably curtailed in the later 1960s before relaxations were later achieved, and in the early to mid-1970s, ANC detainees spoke of a “deep-freeze” or hardening of attitude on the part of

104 See, especially, Tobias Kelly, *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty*, University of Pennsylvania Press, Philadelphia, PA, 2012. The quote is from Samuel Moyn, *Human Rights and the Uses of History*, Verso, London, 2014, p. 103.

105 See, for example, H. Shityuwete, above note 18, pp. 215–216, 225–226, 229–230.

106 N. Mandela, above note 10, p. 487. Breytenbach, while in Pollsmoor Prison, similarly felt that the authorities had no choice but to make concessions as by that (relatively late) stage, “everybody was scared of the repercussions if Mandela complained to the Red Cross”: B. Breytenbach, above note 10, p. 304.

107 *Ibid.*, p. 206: “they never wavered in their commitment to justice and in their patiently pursued efforts to obtain more humane conditions for those prisoners they were allowed to see”.

108 *Ibid.*, p. 273.

109 N. Mandela, above note 10, p. 535.

prison warders whereby news of the outside world was systematically denied.¹¹⁰ Certainly, it would be difficult to claim, based on the available evidence, that the lobbying and campaigning of international organizations in the post-war era produced a fundamental attitudinal shift such that public opinion presumptively condemned either the physical or the psychological torture of political detainees. (There may be a better case for arguing for such a shift with regard to what has been called the “two worlds” approach to rights discourses, whereby what were perceived as “primitive” and “backward” societies were not regarded as ready for European or Western rights regimes.¹¹¹)

The problem of how to protect rights in armed conflict remains, as is evident in Syria, Iraq, Libya, Yemen and Ukraine, to name but a few of the more egregious cases that currently fill the pages of the press and feed social media on a daily basis. Because so many rights violations occur in the context of armed conflict, and because by far the most problematic type of protracted armed conflicts are those below the threshold of full-blown civil wars, the nexus between international humanitarian law and international human rights law continues to be of great concern.¹¹² Since the end of the last century the UN has placed greater emphasis on integrating human rights into humanitarian action, and given more recognition to the role of its own specialized agencies in assuring respect for human rights in situations when States are unwilling or unable to do so.¹¹³

The work of building a critical dialogue between the humanitarian and human rights communities extends well beyond the precincts of the UN, however. These two bodies of international law have developed in parallel; according to their respective advocates, the former, the “law of war”, is aimed at striking a balance between military necessity and the protection of humanity, while the latter is based on an individual rights paradigm and aimed at protecting people from the arbitrary behaviour of governments at all times, including war. But however much it may sometimes suit their advocates to emphasize such differences, both of these bodies of law intersect at a critical juncture – namely, the circumstances in which the international community is prepared to contemplate constraining State sovereignty in favour of stronger protection, whether we frame these circumstances in humanitarian terms as a right of “initiative” or “intervention”, or in human rights terms as non-derogable rights which can’t be suspended in any circumstances, including states of national

¹¹⁰ *Ibid.*, p. 544.

¹¹¹ See, for example, A. Thompson, above note 15.

¹¹² See, for example, Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Brookings Institution Press, Washington, DC, 2011, pp. 59 ff. For a specific manifestation of the problem, see the case surrounding the capture and detention of Mr Tarek Hassan: “This Week in Strasbourg: A Roundup of the European Court of Human Rights Case Law”, *European Courts*, 21 September 2014, available at: http://europeancourts.blogspot.co.uk/2014/09/this-week-in-strasbourg-roundup-of_21.html.

¹¹³ Karen Kenny, *When Needs Are Rights: An Overview of UN Efforts to Integrate Human Rights in Humanitarian Action*, Occasional Paper No. 38, Institute for International Studies, Brown University, Providence, RI, 2000.

emergency. Either way, what we are effectively talking about is a duty, obligation or “responsibility to protect”.¹¹⁴

The title for this article, “Restoring Hope Where All Hope was Lost”, recalls the poem “Doubletake” by Seamus Heaney.¹¹⁵ In this poem, Heaney writes movingly of human beings suffering and torturing one another – “They get hurt and get hard” – and of history telling us not to hope, at least not “on this side of the grave”. Yet in same breath Heaney goes on to conjure up an image of a “further shore” that is “reachable from here”, and to speculate how, once in a lifetime, a “longed-for tidal wave of justice can rise up” – a “great sea-change on the far side of revenge”. Hope and history, Heaney says, can then rhyme. For hope and history to rhyme for today’s political detainees – or “security detainees”, as they are now more commonly called – the complementary action of international humanitarian and human rights organizations is imperative. Humanitarianism and human rights have often existed in a state of troubled rapport. But it is, above all, in the domain of detention that we can see the concerns of one expanding towards those of other. And it is in the domain of detention that the international community now needs to crystallize a new concurrence of approaches of humanitarian norms and human rights guarantees, not by ignoring their differences but by turning them to better account.

114 There is a large literature on the notion of a “responsibility to protect”, or “R2P” as it is sometimes called. For a selection of the key texts, see Alex J. Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Polity, Cambridge, 2009; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Brookings Institution Press, Washington, DC, 2009; Manuel Fröhlich, “The Responsibility to Protect: Foundation, Transformation, and Application of an Emerging Norm”, in F. Klose (ed.), above note 14, pp. 299–230; and Aidan Hehir, *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention*, Palgrave, London, 2012.

115 Seamus Heaney, “Doubletake”, in *The Cure at Troy*, Faber & Faber, 1990.

Overcrowding: Nobody's fault? When some struggle to survive waiting for everyone to take responsibility

Vincent Ballon

Vincent Ballon has worked for the International Committee of the Red Cross (ICRC) for over ten years, predominantly in positions visiting persons deprived of their liberty. He is presently Head of the Unit for Deprivation of Liberty of the ICRC Protection Division, and the ICRC Central Tracing Agency. He has worked as a Protection Delegate in various contexts, including Afghanistan, Liberia, Zimbabwe, Pakistan, Yemen, Burundi and the Philippines. He has a background in law.

Abstract

Visiting an overcrowded prison is a journey into the private life of each person deprived of his or her freedom, into the community of the detainees and of the staff working in such a place. Using the senses of sight, hearing, smell and touch, combined with empathy and time for observation, helps ICRC delegates to explore vulnerabilities, discover how detainees and staff cope, and grasp the intricate complexity of such a prison system. Beyond what is left of human dignity in these places of detention, when coping mechanisms become survival mechanisms, the suffering shows that overcrowding is wrong. It follows that if overcrowding is “nobody’s fault”, it is the responsibility of every individual and every institution of the criminal justice system to create solutions.

Keywords: detention, overcrowding, conditions of detention, humanity, detention visitation, ICRC, sight, hearing, smell, touch.

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I mean to inquire if, in the civil order, there can be any sure and legitimate rule of administration, men being taken as they are and laws as they might be. In this inquiry I shall endeavour always to unite what right sanctions with what is prescribed by interest, in order that justice and utility may in no case be divided.

– Jean-Jacques Rousseau, 1762¹

Introduction

Two hundred, 500, 1,000, 2,000% of occupancy rate² – the reality of an overcrowded prison³ only appears once you have pushed through the doors that lead to the cells, provided one wants to undertake this journey. Beyond the statistical figures, irrespective of the status of the inmates (sentenced or not), and independently of the premises, the common factor between these places of detention is an obvious denial of human dignity. In a 20-square-metre cell, according to commonly accepted recommendations and standards, there should be a maximum of five or six people; in an overcrowded prison there can be forty, fifty, 100 or more in critical situations. At these levels one wonders how life in detention can be endured, if this can still be called life.

In ninety-eight countries, the detention delegates of the International Committee of the Red Cross (ICRC) visit people deprived of their freedom to ensure that they are being treated in a humane way. This includes checking that they are being held in acceptable living conditions, can stay in touch with their families and are being treated in accordance with humanitarian law and other applicable laws. Where necessary, detention delegates dialogue with detaining authorities to end any abuse and help them to improve detainees' living conditions.⁴

This article hopes to convey the insights gained by the author during a ten-year personal journey in detention as a Red Cross delegate.

Sensing life in detention

Following the initial talk with a prison director that always marks the beginning of a visit by the ICRC,⁵ the tour of the premises in an overcrowded place of detention compares to a great leap into an emotionally overwhelming environment. It severely confronts the preconceived notions of what human dignity is and what can be humanly tolerated, or not. Often, it deeply clouds the feelings and

1 Jean-Jacques Rousseau, *The Social Contract or Principles of Political Right*, trans. G. D. H. Cole, J. M. Dent & Sons and E. P. Dutton, London, Toronto and New York, 1782, p. 5.

2 Definition: (number of detainees present at date "t"/ideal capacity) × 100.

3 The term "prison" is used here as a generic term covering a large range of places of detention.

4 For more information, see Alain Aeshlimann, "Protection of Detainees: ICRC Action Behind Bars", *International Review of the Red Cross*, Vol. 87, No. 857, 2005, available at: www.icrc.org/eng/resources/documents/article/review/review-857-p83.htm (all internet references were accessed in October 2017).

5 On the modalities of ICRC visits in places of detention, see *ibid*.

perceptions brought from the outside, where strong community-based solidarities hold sway. Logically, the first reflex of an ICRC delegate visiting such places of detention is not – except in cases where life-saving action is required – to immediately turn toward addressing the causes of the situation. Within the ICRC's only humanitarian role, the visit consists first and foremost in offering time, attention and care, giving free rein to empathy, and exchanging the “small things in dehumanized places” so aptly described by Paul Bouvier.⁶ Initiating a diagnostic to further address the conditions of detention and treatment starts with finding the adequate prism through which the most intimate consequences can be perceived for each individual affected, primarily the detained person, in his/her body and his/her soul. Usually not constrained by time limits during a visit, a possible way to achieve this can be through activating the senses in order to feel and surreptitiously control these deeply moving emotions, and taking the necessary time to grasp the specificities resulting from severe overcrowding.

Sense of hearing

Depending on the architectural layout of the premises, the occupancy of the place and the ongoing activities during the visit (such as family visits, or educational or religious activities often powered by sound systems), the sense of hearing must adapt itself between moments of extreme noise and apathetic silence. The voice is increasingly muted when the body is flagrantly constrained, sometimes in forced positions to accommodate the crowd. A background noise of voices or the ventilation produced by individual or collective fans augmenting air renewal and cooling the place gives a feeling similar to being in a hive.

While it is important to keep the sense of hearing alert to better understand the possible trauma linked to an excessive level of noise, finding the right time and place that can offer a minimum of privacy, allowing the delegate to adopt a tone conducive to starting a group or individual discussion, can often be challenging. The sparing of a few simple words can facilitate active conversation with those for whom daily life is dictated by an acute competition for meagre resources but also for silence, quietness and a moment and space of intimacy. Progressively and patiently, smiles, looks and gestures become the small vectors of trust that square a space for a meaningful humane exchange, suspended in time from the brouhaha – a privileged moment to discuss life behind bars, including the daily routine and the more important events, as both equally form the milestones that maintain a feeling of being. This is so often an opportunity to open a window onto the outside world, where feelings, culture, the state of world affairs and mutual curiosity between two human beings shape the defining moments of work in detention.

6 Paul Bouvier, “Humanitarian Care and Small Things in Dehumanized Places”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012, available at: www.icrc.org/eng/resources/documents/article/review-2012/irrc-888-bouvier.htm.

Delegates listen to inmates, but also – with the same empathy and interest – to staff who, for the most part, are concerned about the situation in their prison, when they are not feeling overwhelmed or traumatized by a situation on which they think they have so little impact, and which challenges their self-esteem and their daily motivation as correctional officers. Beyond a certain level of crisis, prison staff are confronted with a daily powerlessness to abide by the mandate that they swore to uphold, annihilating their last feeling of pride to work as civil servants for already not-well considered correctional institutions.

Sense of sight

During the several days that an ICRC detention visit lasts, living in this exiguous atmosphere gives a unique opportunity to sharpen the sense of sight. After having identified the most suitable locations, with patience and discernment, a period of contemplation allows the delegate to form a sketch of how life is redefining itself within the prison. Indeed, a visual assessment gives access to an inexhaustible source of information on the dynamics, social system and relationships in terms of power struggle, the habits, the constraints and how each of these impact on each of the inmates in the delegate's field of vision: the texture of the detainees' skin, the shape of their bodies, the appearance of their uniforms, their sleeping rhythms, the movements and flows of inmates and staff, those that are well-off and those left apart, the work patterns, the visible enforcement of rules (or their disobedience), the flow of goods and utensils, the looks, the smiles and the tears. Observing the creative and sometimes desperate coping mechanisms of inmates, attempting to understand how balances are maintained, and for whom and why, and how and when they can be disturbed to the benefit of some and to the detriment of others – the list of things happening in front of your eyes is endless. Exploring vulnerabilities progressively enables an ICRC delegate to understand at least the tip of the iceberg, and to be in a position to bring a humble but adapted response or suggest realistic recommendations to the prison authorities. All these insights shape a new world that the delegate is to be part of. For an ICRC delegate, this requires constantly questioning perceptions, challenging understandings and shaking certainties while assuming that nothing can be taken for granted, as every prison is radically different and overcrowding expresses its consequences differently in each case.

Sense of smell

Often, the sense of smell is the first to reveal the striking indicators that a situation is going wrong. Inmates kept in overcrowded conditions emit body heat that, in cases of limited ventilation, will manifest inside the cell. Poor personal hygiene can often be perceived by the sense of smell, indicating reduced availability of water in a cell, a shower regularly inaccessible, a lack of available hygiene products and, overall, a life well below prescribed standards and recommendations. A sewage tank that is full

and never emptied (or is emptying itself into the nearest creek), a broken toilet, or overflowing trash bins often prefigure a malfunctioning system that will require dissecting each of the processes involved to find the possible root causes. Experience shows that these causes are often proportionally correlated with the discrepancies between the ideal capacity and the population that the prison actually hosts.

But the sense of smell can reveal some more positive aspects, showing that despite acute constraints, some form of equilibrium still prevails. For instance, cooking smells will indicate whether the authorities permit raw or cooked food to be procured outside or brought by the visitors to complement the frugal provisions given by the prison. Any person deprived of his/her freedom needs to recreate his/her points of reference and indisputably, in many contexts, a meal as close as possible to one that could be obtained at home diminishes stress and pacifies the mind. Interestingly, various menus prepared in different dorms will provide an indication of the lifestyle of different groups of inmates depending on their origin in the country, their beliefs and, consecutively, their segregation into cramped premises. Maintaining such a small sign of normality is a factor of collective resilience. Particularly in countries where inmates largely self-manage their daily lives and supplies, looking to the food supply chain will often give precious clues as to the formal and informal mechanisms for coping with the overcrowding situation; the type of prison management; the nature of the human relationships within the prison's community, including power structures, interests and interactions; and the osmosis between the inside and outside world.

Sense of touch

Since it is intimately connected to one's self, to both the conscious and unconscious relationship with the external environment and its limits, in addition to other anthropologic and cultural elements, the sense of touch varies with each person. The feelings of heat and cold, humidity and dryness, softness and hardness, wind or pressure, are influential on relationships with others and with surrounding objects. This often sculpts the flows and use of premises in overcrowded prisons.

In an overcrowded prison, when, in a particular location, the sense of well-being is wounded, when pain arises, it is bound to impact the allocation of space and obviously segregates the detained population between those who have the coping mechanisms and power to be somewhere else, and those, often subject to various other vulnerabilities, who do not. For example, the value attributed to a cell or a place that is particularly vulnerable to either strong winter winds or complete lack of ventilation in a tropical climate can be a significant factor of analysis of prison dynamics. It is this sense that often brings a prisoner to his limits and potentially jeopardizes security. What is it like to have to resolve to sleep each night, for years, directly on a cold concrete floor? How does it feel to have so little fresh air to breathe, or space in which to stretch? What is the effect on mental health when it becomes impossible to avoid contact with co-inmates due to lack of space? The forthcoming arrival of a dry or a rainy season or a sudden

change in weather forecast can be perceived with a sense of fear and apprehension since, in prison, it may aggravate the consequences of overcrowding. Invariably, the reality of harsh conditions often lies at the very end of the dormitory, or at the very end of the corridor, where only a few external visitors will agree to go and, in a sense, to experience pain in the same way.

The interpretation of body language, posture, physical contact, and what it means to touch – or sometimes not to touch – someone or something is an immensely rich field of knowledge and vector of communication with detained people and prison staff. In an overcrowded prison, sharing for some time the burden of involuntary and endured restrictions and being perceived as receptive and as caring about local rules invariably opens a door to being accepted. For an ICRC delegate, it implies understanding what is locally accepted and what is not, and requires navigating between what is humanly accepted and what should not be. It compels the delegate to scroll through the scale of human values, one's own and those of others, while trying to neither renounce humanitarian principles nor get used to, out of habit, an unacceptable situation.

Resilience. Patience. Renouncement. Ignorance. Faith. Transfer. Each inmate in an overcrowded prison uses introspection to find ways to cope with the days, months and, in most cases, years of inaction in a personal space reduced to a few square centimetres. Often, coping mechanisms result in the development of an *ad hoc* informal economy that redefines the notion of space, human relationships and authority within the prison's community.

A journey into a prison's community⁷

Facing a situation of acute overcrowding drastically disrupts beliefs, inevitably puts previously acquired knowledge into perspective and compels sharp insights into the cultural specificities of an overcrowded prison. When all standards become meaningless, correctional best practices often become simply impossible to implement. It is essential to observe the positioning of each individual vis-à-vis the community of co-inmates and staff, and to have a sociological analysis of how a micro-society has recreated itself in the context of the prison. Only by doing this can the delegate grasp the reality of inmates' vulnerabilities and do no harm while caring for the existing equilibrium. Adding to a systemic analysis of the root causes of humanitarian consequences related to overcrowding, elements of comparison with similar communities living outside – from which inmates may originate – can help us to better understand and gain a new perspective on this peculiar prison landscape.

In many countries, the standard in prisons is collective dormitories, sometimes with bunk beds and, in congested prisons, often using every little

7 "Community" is understood here as the overall group of people that have access to the jail: inmates, staff, authorized visitors, service providers such as the few local non-governmental organizations, and representatives of religious groups.

available space as a sleeping area. However, the basic need for individual territory – be it the smallest one available – inevitably leads to some forms of creative segregation of the space, from a basic delimitation of a floor space with any possible material (when a mattress is not available) to a makeshift mattress made of used blankets or a mosquito net, or even at times an improvised room built of wood, plastic or sheets of iron. This allows the creation of private spaces that will usually be either single or double occupancy. When the overcrowding increases, such spaces become the privilege of a few inmates aggregating themselves according to various self-determined factors. There can be so many of these spaces that an open area such as a collective dormitory transforms into a labyrinth, with places that the daylight and fresh air never reach. Human creativity has very few limits other than the prison walls. During the daytime, a makeshift space may serve as an office, a private place for a conjugal visit, a shop, or a holy place for prayer. It may also be rented on a long-term basis, with a price that depends on its location, its size, its possible comfort and its ventilation. This is often symptomatic of the outside society, recreating *intra-muros* the *extra-muros* social scale and structures, often meaning that the most wealthy or influential can afford to build, rent or buy a good space, leaving the floor and the common spaces to others. For some, photos of loved ones adorn the walls, while for others, a hanging plastic bag containing their personal effects constitutes the sole expression of privacy. Some have a tiny place to sleep, while others have to either rotate in shifts or resolve to imbricate their bodies in order to optimize the use of floor space.

As explained by Professor Raymond Narag,⁸ who was detained for seven years in Quezon City Jail in the Philippines before being acquitted, an overcrowded prison is an environment in which detainees, prison staff and visitors are navigating between two systems in order to maximize their individual benefits. The first system is composed of the institution's rules and regulations, while the second consists of an unofficial set of rules aimed at regulating and possibly improving daily life. This creates a blurred line between the duality of what is officially allowed and services, goods or favour that can be obtained to ease life with the discreet and complacent support of some of the guards. Facing overcrowding situations, within premises that have become largely unfit for the size of the population they host and with a limited staff far below the intended ratio, human beings are indeed bound to adjust. Another adjustment comes from the *de facto* delegation of certain management functions and prison services such as discipline, sometimes the first level of health care, the daily head count, some cleaning, maintenance and rehabilitation activities, or paralegal work. This is organized either through inmates' own organizational structures such as brotherhoods, gangs, ethnic affiliations or groups from geographic origins, or through prominent inmates like cell or compound leaders, and implemented by

8 Raymund E. Narag, *Freedom and Death Inside the Jail: A Look into the Condition of the Quezon City Jail*, ed. Rod P. Fajardo III, Supreme Court of the Philippines and United Nations Development Program, Manila, 21 January 2005.

trusted inmates. These powers are further delegated through a pyramid of leadership, assignment of tasks and trading of favours. This system requires means, including financial resources and territories, to exert and sustain. Importantly, these adjustments remain crucial for many to benefit from protection and services.

Reviewing the existing literature, holding meetings with key *intra-* and *extra-muros* actors, and patiently acquiring knowledge during prison visits undoubtedly allows ICRC staff to understand these binary systems of detention and to dig into what can and cannot be understood at first sight. From a humanitarian perspective, it is necessary to analyze the impact of overcrowding on the conditions of detention and treatment, as well as to identify possible consequences in terms of vulnerabilities that would not necessarily exist with a lower occupancy rate.

In several correctional systems where inmates' self-management prevails, disciplinary systems are largely administered by inmates themselves, often through a well-elaborated set of rules and functions in lieu of prison staff who, due to their small number, cannot be present at all times to administer a fair and regulated disciplinary regime. Despite all international recommendations, this *de facto* self-administered disciplinary system tends to become the "norm" in the absence of adequate resources and purposeful premises availed to the correctional institutions in line with their actual detained population and necessary to implement an official system. However, on the positive side, groups or sub-groups of the inmate community (gangs, brotherhoods or confessional groups) often substitute various social or maintenance services that are failing to reach inmates. For example, inmate groups may establish their own system of fundraising, fellowship and network of partnerships with civil society – including with outside organizations – that allow their most indigent members and their families to access a range of services within and outside of the prison. This can include paying for health care in external medical facilities when the existing mechanisms available to the detainee are not sufficient. This happens, for instance, when these mechanisms cannot, or are too slow to, be activated by a sole prison nurse who covers hundreds of inmates, or when financially uncovered medical exams are prescribed in the referral health-care facilities. When possible, it is not uncommon to see self-organized education, rehabilitation, sports or creative activities being implemented in a crowded space by an individual or a group of inmates, taught and mentored by others.

Faced with the intricate systems of an overcrowded prison and cautious about the importance of the equilibrium that a non-prejudicial approach requires, the confidential discussion between the ICRC and the detaining authorities concluding a visit can, at times, be rendered complex. An additional fan or electric cooking hotplate greatly improves living conditions, but may overburden weak electrical wiring. Accessing a private hospital to get better health care than in the referral public facility may be more efficient, but it could be against an institutional medical referral policy. Allowing more visitors than is permitted by the prison rules and regulations definitely brings relief to some inmates, but may

create inequality of treatment among them and affect their relationships with the authorities. In these situations, an ICRC delegate is frequently confronted with dilemmas between fairness and ethics, between risk management and the best interests of the detained person, between technical possibilities and systemic complexities, and sometimes even between the limit of what is allowed and the principles of humanity that stand above all. In a situation of severe overcrowding, one cannot limit community interactions to the existing applicable regulatory framework, be it hard or soft law. Social customs, local traditions, informal rules and a set of flexible and culturally sensitive interpretations of those rules by correctional staff serve to (1) create a predictable environment that allows most members of the prison community to comprehend detention more easily, (2) safeguard a precarious balance between security and human dignity, and (3) sustain the resilience of the prisoners concerned, sometimes to amazing limits.

Overcrowding: A complex notion of the modern “economy of punishment”⁹

Once the visit is completed, there comes a second great leap into an overwhelmingly complex and delicate – though fascinating – task: addressing, together with the authorities, both the causes and the consequences of overcrowding. Each context is characterized by its own specificities – including the most identity- and sovereignty-related ones such as the expression of justice and the philosophy of criminal punishment – and there are inevitably compromises to be made and sensitivities to be respected. Balancing these competing factors is even more tenuous in a situation characterized by individual, systemic and societal dimensions. The solely humanitarian nature of the ICRC's action proves to be an interesting ground of acceptance in discussing overcrowding. The ICRC's neutrality, independence and impartiality can facilitate destigmatized, relaxed and technical exchanges with concerned practitioners in the penal chain.

It may be a truism, but behind the very notion of overcrowding, behind the institutions that share liability and accountability, there are human beings. Indeed, beyond the detained person and the correctional officer, who bear most of the consequences of overcrowding, police and investigative officers, judges, court staff, defence lawyers and public prosecutors, probation and parole officers, local authorities or even someone as remote as a prisoner's neighbour or other witness are among the actors in stories of overcrowding. And these stories, unfortunately, are rarely among those with happy endings. Instead, they most commonly carry the stigma of human suffering and scars. Any analysis of the genesis, the burden and the possible measures of mitigation, leverages or solutions to overcrowding compels us to include all women and men who, along the penal chain, live its daily reality. Their history, their personalities, their professional practices and

9 Translation of “l'économie du châtiment”, from Michel Foucaud, *Surveiller et punir*, Gallimard, Paris, 1975.

capacities, their interactions and their status can be influential to the causes of overcrowding and can also be the small but essential elements that make a difference in finding remedies and ways forward. Exploring together the reality of individual day-to-day practices in the perspective of building an understanding of the larger picture allows a sharper contextualized approach and ownership of local actors.

When dealing with multilayered problems, linear thinking is bound to fail as there is no simplistic analysis or obvious solution. With a prison universe that systematically and immediately adapts itself and recalibrates its inner balances when one of its components or processes is altered, both systemic and creative thinking can offer interesting angles for approaching sustainable solutions. In an overcrowded prison, efforts to address a particular consequence have a high risk of reduced impact if the planning does not integrate other prison processes, subsystems and functions that have also become dysfunctional or are otherwise affected by the disruptive effect of overcrowding on prison systems. Indeed, in addition to the rapid deterioration of detention facilities, often with little budget elasticity to immediately adjust capacities, the daily human costs of overcrowding are mainly suffered by inmates and prison staff. Access to services is often constrained by many elements that need to be factored in to satisfy an evidence-based diagnostic and a results-based set of objectives. Therefore, fixing some of the consequences of overcrowding requires a full-fledged participatory and systemic approach to mitigate constraints and manage assumptions. Correctional best practices, among other norms, dictate that a diversified set of expertise should be articulated together. During its visits and implementation of projects, the ICRC is increasingly required to master unconventional and rather technical and multidisciplinary fields of expertise in correctional matters and prison management while, in certain extreme situations, still having to resort to an empirical approach. Improving access to sunlight by simply building or extending a dedicated recreational area may fail if the prison staff are already overwhelmed in coping with a daily schedule filled with mandatory activities for a population size much higher than they are meant to supervise. Treating some of the health consequences of overcrowding, such as tuberculosis, may be limited to short-term responsive actions if the components of a basic health-care system in detention are not prioritized, meticulously connected with other (sub)-systems either at the prison or at the correctional system level, and driven by the duty of care. Managing inmates' judicial data to foster a swift application of modes of early release to reduce congestion goes beyond the availability of software and requires that attention be paid to each and every processes of a complex information management system.

Finally, in various countries where the ICRC works, but certainly not only in those, one can contemplate the worsening trends and wonder with great lucidity what solutions to overcrowding are to be implemented. Beyond individuals and correctional systems, we now see the complex notion of a modern "economy of punishment"¹⁰ with deep ramifications throughout society, impacting a large

10 See above note 9.

spectrum of institutions and patterned after convoluted systemic schemes. For instance, increases in pre-trial overcrowding – one of the leading prison trends currently observed worldwide¹¹ – are often symptomatic of unbalanced flows of inmates and shortcomings that affect one or more of the following: (1) inflow (arrests by law enforcement agencies, the use of incarceration and the lack of alternative dispute resolution mechanisms), (2) outflow (fast disposal of cases by judicial actors, the procedural rules of courts, the (harsh) interpretation of criminal laws), (3) the lack of meaningful and sizeable alternatives to detention and probation systems, and (4) in last resort, insufficient prison capacity to abide by penal philosophy and practices or societal trends.

It is essentially at the societal level that it should emerge that overcrowding is wrong and certainly not inevitable. This, in turn, should result in community engagement and a set of policies and strategies energized with long-term political and financial commitments. Addressing consequences solely at the prison level is bound to fail if sustained and rooted trends continuously fuel the inflow of inmates, or if cases are not disposed faster, irrespective of their outcome. Therefore, the prerequisite of any action is to scrupulously define the scope of the problem and its constitutive parts in the penal chain, but also in the society as a whole. Succeeding in reducing the causes of overcrowding starts by collectively acknowledging the problem and by strategizing the optimal short-, middle- and long-term answers between the pillars of the judicial system and beyond, to secure the support of society. By nature, correctional science covers a very large spectrum of disciplines, and so too should the endeavour to address both the causes and consequences of overcrowding. Undoubtedly, this can only happen when there is a momentum of two important factors through which can be developed the best coordinated expressions of governance: on the one hand, a critical mass of both small and large initiatives coordinated together, and on the other, action at the local level, voluntarily and efficiently coordinated and evaluated to have a long-lasting impact.

Final remarks

There is a plethora of literature on the bookshelves related to addressing overcrowding. Numerous countries have produced a wide range of policies, pilot projects, good practices and rules of governance that attempt to tackle this growing problem. Along the penal chain in many countries, there are numerous projects, pilot projects, fora and initiatives, an exhaustive list of which would be too long to provide here. There is no lack of creative thinking or champions for this cause. The statement that the problem “cannot be addressed only at the level of prisons but requires a holistic and coordinated response from a broad range of authorities, including at the policy level and in society at large”,¹² seems to

11 Penal Reform International, *Global Prison Trends 2016*, London, 2016.

12 Yves Daccord, in United Nations Office on Drugs and Crime (UNODC) and ICRC, *Handbook on Strategies to Reduce Overcrowding in Prisons*, UNODC Criminal Justice Handbook Series, Vienna, 2013, p. iv.

compel an assessment of what is currently being done. Looking at numerous countries' figures, the trends and the daily reality of detained persons deprived of human dignity in overcrowded prisons, the legitimate and obvious question remains: is there anything missing, and if so, what is it?

In an interview with the Swiss daily newspaper *Le Temps* on 17 August 2012, Robert Badinter, former French minister of justice, explained:

In the course of my studies, I understood that there is an Iron Law that governs the condition of detainees: you cannot, in a democracy, make the condition of detainees progress faster than that of the most underprivileged worker outside detention. Public opinion cannot stand it. For public opinion, it is inconceivable that those in prison who have, it believes, committed an offense, can live better than the proletarian worker who wakes up in the morning to go to work in the factory. Therefore, you cannot make the conditions of incarceration progress if the society as a whole does not progress at the same time, and I would say faster.¹³

Today, however, it remains the case that in severely overcrowded prisons, beyond being an incredibly rich moment of humanity and field of work for ICRC staff, the gap in the duty of care for human beings inevitably widens and triggers a sense of helplessness and powerlessness. As in many countries, the situation inside worsens inexorably even as outside economies grow year after year.

Ensuring respect for the life and dignity of persons deprived of their liberty: ICRC detention activities

Since 1870, the ICRC has endeavoured to improve the humanitarian situation of people deprived of their liberty.

The ICRC is well known for its work on behalf of people held in connection with international and non-international armed conflicts and other situations of violence. In other circumstances too, the ICRC takes action whenever it can to improve the treatment and conditions of people deprived of their liberty.

The ICRC aims to secure humane treatment and conditions of detention for all those deprived of their liberty, regardless of the reasons for their arrest and detention. It also seeks to alleviate the suffering of their families, particularly by restoring communication between detainees and their relatives.

The ICRC endeavours, as a priority, to prevent torture and other forms of ill-treatment, to prevent and resolve disappearances, to improve conditions of detention (for example access to food, water and health services), to restore and maintain family contacts, and to ensure respect for legal safeguards. In some cases, the ICRC also supports former detainees, facilitating their return to society.

13 Author's translation. See "Robert Badinter: 'Justice, que d'injustices commises en ton nom!'", *Le Temps*, 17 August 2012, available at: www.letemps.ch/culture/2012/08/17/robert-badinter-justice-injustices-commises-nom.

The ICRC's detention-related work is based upon a comprehensive assessment of the situation both inside and outside places of detention. This assessment is facilitated by constructive dialogue with the detaining authorities and visits to detainees, which are subject to five basic conditions.

The ICRC must be given: 1) access to all detainees within its field of interest; 2) access to all premises and facilities used by and for the detainees; 3) authorization to repeat visits; 4) the possibility to speak freely and in private with the detainees of its choice; and 5) assurance that the authorities will provide the ICRC with a list of all detainees within its field of interest or authorize it to compile such a list.

A subsequent analysis of the information gathered enables the ICRC to identify the key risks faced by the detainees and other factors influencing their situation, including the challenges that confront the detaining authorities in attempting to address humanitarian concerns.

In all situations, the ICRC works with the detaining authorities and expects them to take the necessary steps to ensure humane treatment and conditions of detention. To that end, it undertakes confidential, bilateral dialogue with them concerning its findings, relevant national and international standards, and the action and resources required to improve the situation of persons deprived of their liberty.

On the basis of its assessment and analysis of each situation, the ICRC develops a specific strategy to meet the needs of the detainees most effectively. The strategy may include ICRC action regarding individual detainees, structures, institutions and regulatory frameworks, as well as various material or technical interventions to help meet humanitarian needs. Throughout its implementation, the ICRC monitors and amends the strategy to ensure that its actions have a tangible impact on the situation of detainees.

Glimmers of hope: A report on the Philippine Criminal Justice System

Roy Panti Valenzuela

Attorney Roy Panti Valenzuela is Jail Superintendent at the Bureau of Jail Management and Penology (BJMP) in the Philippines. He heads the BJMP's paralegal programme, the objective of which is to decongest jails through the application of early release in the interest of maintaining humane conditions.

Abstract

There is a saying: "Justice delayed is justice denied." The perception of a continuing failure of the Philippine criminal justice system to deliver fast and efficient justice has inevitably led to the erosion of public trust in the government. As a consequence, citizens are laden with anxiety because of unabated criminality and violence in their communities. The type of justice that leads to peace and prosperity continues to be elusive in the Philippines as the worsening scenario of jail congestion continues to manifest its malevolent implications for the human rights of prisoners. It appears that the culprit is an overwhelmed machinery of criminal justice that has not been able to keep pace with growing rates of population, urbanization and criminality. There is also an apparent imbalance in the justice structure where there are too few judges, prosecutors and public defence attorneys to process the cases filed by the numerous law enforcers who file criminal cases. This leads to bottlenecks in criminal justice procedures and has resulted, in not a few instances, in human rights crises in jails. However, emerging developments give some hope to Filipinos.

Keywords: detention, pretrial detention, overcrowding, conditions of detention, the Philippines, criminal justice system.

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Delia Israel was pregnant when first detained on a murder charge at Manila City Jail in 1995. She ended up giving birth to a daughter who was taken away from her immediately. By the time she was released, her daughter had already celebrated her 18th birthday. Her case was finally terminated after she pleaded guilty to the lesser offence of homicide and was consequently released, having been deemed to have served the maximum penalty for the offence.

What makes Delia's story distinctive is that it took the court eighteen years before a decision was rendered, during which she was detained because she could not afford bail amounting to 30,000 pesos, or \$600. Delia's protracted trial and more than eighteen years of preventive imprisonment show a bleak picture of the justice system in the Philippines.

Delia's story was published by a leading media outlet, *GMA News Online*, on 25 June 2013,¹ in an article that highlighted the glaringly slow grind of the Philippine Criminal Justice System, with many more facing the same predicament that she went through. When her story was circulated, the approximate number of prisoners detained by the Bureau of Jail Management and Penology (BJMP) in either pretrial detention or under a conviction of three years or less was 78,836, with a congestion rate of 292.73% of intended occupancy. By the end of 2016, the number of prisoners was 127,339, with an exacerbated jail congestion rate of 511% of capacity.²

One of the grim consequences of prison overcrowding, and the deteriorating living conditions that come with it, is the associated increase in illnesses and, consequently, the number of deaths among detainees during their preventive imprisonment. The BJMP reported that in 2013, 221 prisoners died, followed by 261 deaths in 2014. There were 319 deaths among 105,647 prisoners in 2015.³ The total number of deaths compared to the mortality rate of the entire population in the Asia-Pacific region appears modest. However, the picture substantially changes as soon as one discovers that the deaths happen in the most congested jails that are increasingly becoming vulnerable to crisis.

It is axiomatic that when the court dockets are filled to the brim, the jails are filled with detainees beyond capacity. The current congestion rate in Philippine jails is now 600%, based on the National Building Code Standard of 4.7 square metres per inmate. Currently, an average of seven prisoners inhabit a 4.7-square-metre space. In some jails the congestion rate is even higher, going up to as much as 2,000%.⁴

The Philippine Criminal Justice System is made up of five "pillars": the Community, Law Enforcement, Prosecution, Court, and Correction. On the

1 Mark Merueñas, "Too Poor to Post Bail, Thousands Spend Years in Jail without Conviction", *GMA News Online*, 25 June 2013, available at: www.gmanetwork.com/news/news/specialreports/314386/too-poor-to-post-bail-thousands-spend-years-in-jail-without-conviction/story/.

2 For current figures, see the "Data and Statistics" section of the BJMP website, available at: www.bjmp.gov.ph/datstat.html. Data for earlier periods are available upon request from BJMP Directorate for Operations, 144 Mindanao Avenue, Quezon City, Philippines, Trunkline No. (0632) 9276383, email: itu@bjmp.gov.ph.

3 See above note 2. Similar data for 2012 were made part of the Third Periodic Report of the Philippines to the United Nations Committee against Torture, UN Doc. CAT/C/PHL/3, 2015, available at: www.refworld.org/publisher,CAT,,PHL,56bae76c4,0.html.

4 See above note 2.

surface it appears that the slow grind of justice is the fault of one pillar, but a closer look at the situation reveals that the entire scenario is actually a consequence of an overwhelmed Philippine Criminal Justice System, affecting each of the five pillars. The common challenge each pillar faces is that it is operating beyond its ideal capacity. Ostensibly, while the general population has increased significantly during the past few decades, there has been no concurrent rise in public investment towards the improvement of the Philippine criminal justice machinery in order to meet the demands of justice in the country – such as the hiring and allocation of equivalent resources for more judges, prosecutors and public attorneys – or to provide ample space for the increasing number of detainees. The situation is overwhelming, and has made Philippine jails susceptible to humanitarian crisis.

As early as 1993, a modest but effective decongestion approach was launched by the BJMP. The decongestion programme consisted of (a) a system of legal assistance, with a pool of paralegals trained to help inmates apply for various legal modes of release and follow up with the courts to ensure the expeditious resolution of their cases; (b) lobbying for funds for the construction of additional jail space; and (c) a legislative agenda programme aimed at the enactment of laws that will provide enhanced and/or additional modes of legal release. For the year 2016 alone, more than 70% of all inmates released were assisted by the paralegal officers of the BJMP.

A glimmer of hope is on the horizon, as the new administration has approved a budget of almost 1.7 billion Philippine pesos for the BJMP to build additional jails in 2017. These will add around 85,000 square metres of living space, enough to accommodate 18,000 inmates, potentially reducing the congestion rate to around 420% from the current 500%. An additional estimated amount of 10 billion pesos would be needed to reduce the congestion rate to zero – and sustaining a zero congestion rate would be another formidable challenge, unless the pending bill on alternatives to imprisonment, among other measures, is enacted.⁵

Interestingly, in the recently approved Philippine Development Plan,⁶ a new chapter was devoted to the administration of justice. Having been integrated into the national development plan, considerable public investment in the pillars of the criminal justice system and agencies of the Philippine Criminal Justice System can now be reasonably expected. One particularly interesting programme in the Philippine Development Plan is the expansion of the use of alternatives to litigation (also known as alternative dispute resolution or ADR) in the adjudication of criminal cases. The idea is to use ADR in every stage and pillar of

5 The original draft bill was pending during the 16th Philippine Congress. Currently, a modified version proposing community services in lieu of imprisonment is a priority bill. See Mara Cepeda, “List: 14 Bills the 17th Congress Aims to Pass by May 31”, *Rappler*, 2 May 2017, available at: www.rappler.com/.../168632-philippines-17th-congress-bills-pass-by-may-31.

6 See Republic of the Philippines, National Economic and Development Authority, *Philippine Development Plan 2017–2022*, 2017, available at: www.neda.gov.ph/2017/07/26/philippine-development-plan-2017-2022/.

the Criminal Justice System and to expand its scope in the Court and Community pillars where it is already implemented. In the pillars where ADR is currently used, a high 70% resolution rate is the norm, compared to a mere 25% conviction rate for litigated criminal cases. This expansion programme is part of a strategy for the eventual mainstreaming of ADR in the Criminal Justice System. This would not only tame the highly retributive Criminal Justice System but would also, and more importantly, provide an additional cost-effective and expeditious avenue for conflict resolution. ADR has extremely high potential for improving access to justice for citizens, and for decongesting court dockets and consequently reducing overcrowding of jails.

Another noteworthy development is the refiling of the legislative bill on alternatives to imprisonment in the Philippine 17th Congress.⁷ The bill was patterned after the United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), which are expected (if passed into law) to rationalize or reduce the use of custodial or restraining measures and to provide alternative penalties for those convicted of crimes by granting judges the leeway to impose non-custodial measures in lieu of imprisonment.

In addition, a plan to propose a revision of the *Bail Bond Guide*, issued by the Department of Justice in 2000, is on the agenda of the BJMP paralegal program.⁸ The revision would aim to increase the availability and reach of bail, especially with respect to non-violent, non-recalcitrant, sick and/or financially constrained offenders.

In the Philippines, the Rules of Court enumerate at least ten factors in determining bail, whether it is to be granted – in those cases where bail is discretionary – and the proper amount of bail in each case. Rule 114, section 9, provides:

Amount of bail; guidelines. – The judge who issued the warrant or granted the application shall fix a reasonable amount of bail considering primarily, but not limited to, the following factors:

- (a) Financial liability of the accused to give bail;
- (b) Nature and circumstances of the offense;
- (c) Penalty for the offense charged;
- (d) Character and reputation of the accused;
- (e) Age and health of the accused;
- (f) Weight of the evidence against the accused;
- (g) Probability of the accused appearing at the trial;
- (h) Forfeiture of other bail;
- (i) The fact that the accused was a fugitive from justice when arrested; and
- (j) Pendency of other cases where the accused is on bail.

⁷ Senate Bill No. 1452 and House Bill No. 335.

⁸ Department of Justice, National Prosecution Service, *The 2000 Bail Bond Guide*, 2000, available at: <https://legalhawk.files.wordpress.com/2007/12/bailbond-guide.pdf>.

Excessive bail shall not be required.⁹

Ideally, these factors need to be determined *before* the prosecutor will recommend the granting or denial of bail, and there should be an automatic bail hearing before the judge to determine the propriety of the bail recommendation, including the appropriate amount, at the outset before the trial. In practice, however, the sole consideration made in determining the propriety and amount of bail rests solely on one factor: the gravity of the offence. When an accused is arrested, the complaint filed provides a bail recommendation based solely on the gravity of the offence allegedly committed. If, for example, the charge is murder, the prosecutor will recommend no bail. It follows that when an accused is charged for murder or drug-pushing, almost automatically no bail will be recommended. If the accused wishes to be released on bail, he or she needs to file a petition for bail and ask for one or more hearings where the prosecutor must show strong evidence of guilt requiring that bail be denied. During this time, the accused is detained. This is in contradiction with section 13 of Article III of the 1987 Constitution, which states that “[a]ll persons, except those charged with offenses punishable by reclusion perpetua when evidence of guilt is strong, shall, before conviction, be bailable by sufficient sureties, or be released on recognizance as may be provided by law”.¹⁰

In the current practice, only when the accused invokes his right to bail or asks for a reduction of the amount of bail recommended will the court consider the other bail factors, such as the strength of the evidence, the possibility of flight or the financial capacity of the accused, to mention a few. This process effectively deprives many of their right to bail and/or unwittingly delays the grant of temporary liberty to a number of accused. Perhaps the more troubling aspect is the delay in the trial of the criminal cases pending, as bail hearings tend to take away from the court more of its precious time that could be used for the trial of cases on their merits.

Society must address drivers of criminality in order to reduce the size of prison populations and make a giant leap towards mitigating or, even better, eradicating the egregious threat of humanitarian and human rights crises in jails. After all, the Philippine Criminal Justice System was never meant to become a mechanism of oppression, but rather was intended as an instrument of restorative justice – the kind of justice that leads to lasting peace.

9 Rules of Court of the Philippines, Rule 114, § 9, available at: www.lawphil.net/courts/rules/rc_110-127_crim.html.

10 Constitution of the Republic of the Philippines, Article III, § 13, available at: www.officialgazette.gov.ph/constitutions/1987-constitution/.

Overcrowding in the Peruvian prison system

Julio César Magán Zevallos

Julio César Magán Zevallos is an attorney who holds a law degree from the National University of San Marcos. He is the former President of the Peruvian National Penitentiary Institute.

Abstract

In this contribution the author examines overcrowding, one of the chronic problems that affect the prison system in Peru. First, the topic of the growth of the prison population during a determined period of years is addressed. Then, the author discusses three options for avoiding or controlling overcrowding in prisons: sending fewer people to prison, increasing the release of prisoners, and expanding existing prisons or building new ones. Finally, the article presents alternative measures of limiting freedom other than sending people to prison, and proposes a long-term solution which includes the participation of different sectors of the Peruvian government.

Keywords: Peru, overcrowding, detention, prison, offenders, INPE, crime.

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More than just a question of numbers

The Peruvian press regularly publishes articles on prison conditions, focusing in particular on security failures, corruption and health risks. However, these articles very rarely – if ever – examine or highlight the issue of serious overcrowding in the majority of Peruvian prisons, or take into account the destabilizing impact it has on efforts to maintain order. Overcrowding is perhaps the most serious of the many obstacles that prison authorities must tackle on a daily basis, given its aggravating influence on a host of other detention-related problems.

The intuitive solution would be to build more prisons, and to build them faster. That approach would certainly alleviate overcrowding in the short term. However, a coherent policy cannot rely solely on progressively building more prisons throughout Peru. Instead, it is vital to get to the root of the problem. In Peru, and in Latin America as a whole, incarceration has become the punitive measure of choice, in preference to alternative measures and sentences.

Growth of the prison population (August 2011–June 2016)

Figure 1 shows the steady growth of the prison population in Peru. It indicates that the prison population grew by almost 30,000 people in less than five years, a 60.9% increase. In other words, during this period the Peruvian prison system has had to accommodate 6,000 additional inmates each year. Although prison capacity has also increased over the same period, it has not expanded at the same rate as the prison population; the percentage difference amounts to 128%, according to data from the Unit of Statistics at the Peruvian National Penitentiary Institute (Instituto Nacional Penitenciario, INPE).¹ Just to maintain overcrowding at a stable level, the prison service would have to build a new 500-bed prison every month. From a budgetary point of view, that approach would be unsustainable, even without taking into account the staff required to deal with administrative and security issues and manage these hypothetical new inmates.

Increase in prison capacity (August 2011–June 2016, Figure 2)

Efforts to expand prison capacity face a financial stumbling block: marginal cost, meaning the additional cost of increasing production by one unit. For the purposes of this analysis, marginal cost is the cost of accommodating one additional inmate. While the marginal cost might not be significant in cases where there is spare infrastructure capacity (as is the case in the Netherlands, for example), the situation becomes more complicated in prison facilities already operating at full capacity. In the short term, the marginal cost of the rising numbers of prisoners translates into the overuse of prison facilities. This results in substandard detention conditions that are not only harmful to prisoners, but also have a negative impact on everyone directly or indirectly connected to the penitentiary system: officials, family members, lawyers, providers of goods and services, and so on. In the long term, in order to absorb marginal costs, overcrowding must be reduced, either by increasing the capacity of existing penitentiary facilities or, if that is not possible, by building new ones. However, it might take a number of years for these new facilities to be built and become operational.

1 The Unit of Statistics at INPE provides information on different characteristics of the prison population. This information is contained in the monthly statistical reports prepared by INPE, available at: www.inpe.gob.pe/informe_estadistico.html (all internet references were accessed in November 2017).

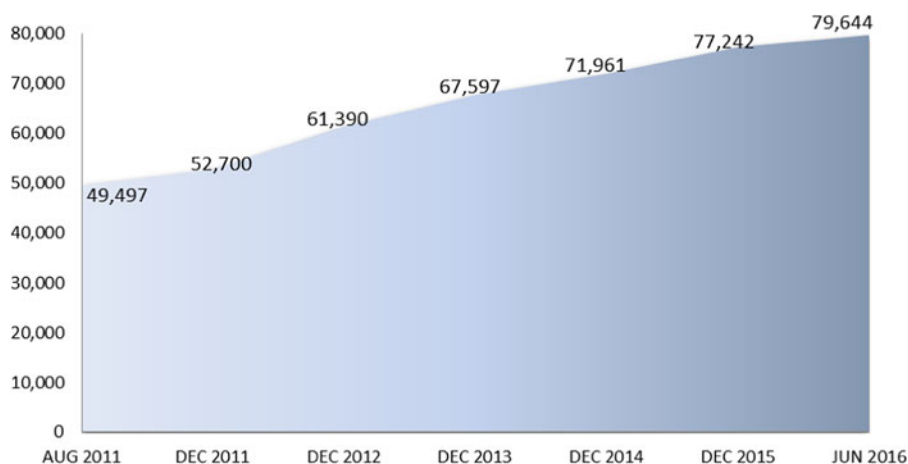


Figure 1. Growth in prison population between August 2011 and June 2016. Source: data from the Unit of Statistics at INPE.

Three ways to reduce overcrowding

It may seem obvious, but in order to reduce overcrowding, the following steps must be taken: (1) fewer people must be sent to prison, (2) more prisoners must be released, and (3) efforts must be made to expand the prison infrastructure. Of these measures, only the third falls within the competence of the Peruvian prison service, INPE. The prison service cannot legally disregard a judicial detention order, release prisoners unilaterally before they have served their sentence or curtail a period of pretrial detention. Furthermore, the construction of new prison facilities is subject to the availability of budgetary resources, which are proposed by the executive and ultimately approved by the legislative branches of government.²

In Peru, an increase in crime has contributed to the growth of the prison population as more prison sentences are handed down, new criminal offences are created, fast-track legal proceedings are regularly used to deal with offenders caught *in flagrante delicto*, prison privileges enabling early release have gradually been eliminated, and there is a significant drop in the number of presidential pardons issued. Although these measures may have been necessary, they did not take into account the extent to which the prison population would increase, nor the budgetary resources that the prison service would require to absorb the impact of that growth. Although prisons form part of the criminal justice system, they have long been viewed as its least important element. Public opinion is more concerned with capturing criminals (the job of the National Police of Peru) and prosecuting them (a task that falls to the judiciary).

² This situation may change following the implementation of Legislative Decree No. 1229, which sets out conditions for private investment in the penitentiary system. For more on Legislative Decree No. 1229, see: <http://busquedas.elperuano.com.pe/normaslegales/decreto-legislativo-que-declara-de-interes-publico-y-priorid-decreto-legislativo-n-1229-1292138-8/> (in Spanish).

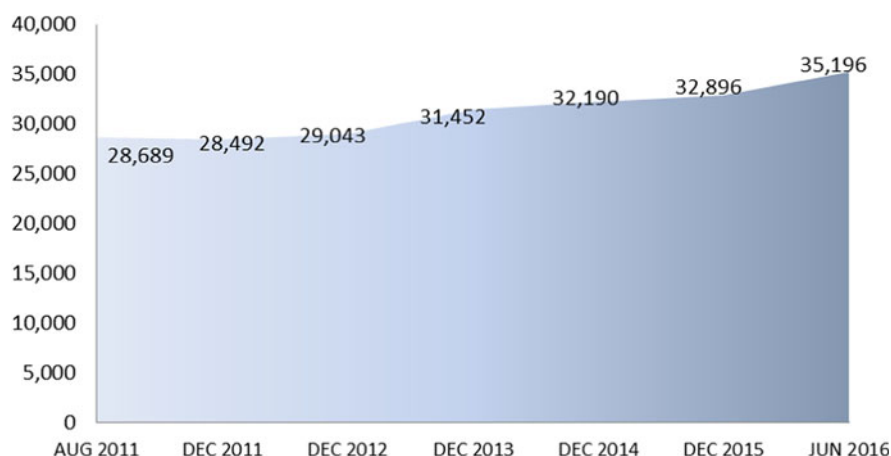


Figure 2. Increase in prison capacity between August 2011 and June 2016. Source: data from the Unit of Statistics at INPE.

Previously, offender programmes included, for example, “Building Routes of Hope and Choices” (“Construyendo rutas de esperanza y oportunidades”, or CREO) and “Strengthening of Social Competences for the Non-Criminal Re-offending of Those Released” (“Fortalecimiento de competencias sociales para la no reincidencia delictiva de liberados”, or FOCOS). Now, given the lack of resources for implementing offender programmes essential for rehabilitation, prison sentences have almost exclusively become a means of retribution and confinement, disregarding the principles of rehabilitation and socialization.

To be more accurate, although offender programmes exist, their effectiveness is undermined by the conditions in prisons. Furthermore, one cannot assume that all prisoners want to improve their behaviour and become law-abiding citizens. Thus, whatever clear goals the prison service might set for prisoner rehabilitation, overcrowding has a significant impact on the success of any such programmes. This is because, among other things, overcrowding:

- reduces the areas available for workshops and classrooms;
- reduces the space available for providing health care;
- leads to arguments and fights among prisoners over cells and prison blocks;
- limits facilities for visits by family members, friends or defence lawyers;
- provides an incentive for prison staff to make a profit by granting prison privileges; and
- imposes a need for heightened security and inmate-monitoring measures.

Alternative sentencing measures

The principle of using criminal law as a last resort, or *ultima ratio*, is increasingly falling out of favour. Society demands tangible results, and prisons are viewed

as an ideal means of exerting social control over undesirable behaviour. In high-profile cases,³ the State has been exercising its *ius puniendi* – its “right to punish” – in response to public outrage, and cases are speedily dealt with by the courts. But this is the exception rather than the rule. This approach proves somewhat less effective in court cases that do not garner media coverage.

In such cases, even when legislation has been adopted to alleviate overcrowding,⁴ the criteria applied have not produced a significant drop in the prison population. Even minor offences, such as failure to pay child or spousal support, carry a possible prison sentence,⁵ in spite of the fact that the criminal profiles of these offenders bear no resemblance to those of murderers, rapists or violent thieves. In other words, people who should never have been put in prison end up being detained with extremely dangerous and professional criminals.

When handing down sentences, judges are often reluctant to use conditional release under supervision or to impose community service, even though the Criminal Code provides some alternatives to prison sentences when incarceration is not required by law, as seen, for example, in Article 28 of the Peruvian Criminal Code regarding types of sanctions.⁶ At the pretrial stage, the socioeconomic status of the defendant plays a decisive role in determining whether he or she is placed in pretrial detention. Someone with a degree and a steady job is less likely to be imprisoned than someone who never finished school and has no regular employment. Biased judicial decisions have led to a large number of detainees being released after only a few months, owing, for example, to insufficient grounds for incarceration or a failure to meet the specific legal criteria for placing a suspect in pretrial detention. Figure 3 illustrates this trend by contrasting the number of individuals who were first incarcerated with the number of individuals released, both during the year 2015.

However, in previous years the number of people sent to prison and the number of detainees released was similar, as is illustrated in Figure 4.

3 For example, Aurelio Pastor Valdivieso’s case for the alleged commission of the crime of influence peddling (see Colin Post, “Former Justice Minister under Alan Garcia Sentenced to Four Years”, *Peru Reports*, 18 May 2015, available at: <https://perureports.com/2015/05/18/former-justice-minister-under-alan-garcia-sentenced-to-four-years/>), or Eva Bracamonte Fefer’s case for the alleged commission of the crime of parricide (see Hillary Ojeda, “Eva Bracamonte Acquitted from the Murder of Myriam Fefer”, *Living in Peru*, 29 December 2015, available at: <http://mobi.peruthisweek.com/news-eva-bracamonte-acquitted-from-the-murder-of-myriam-fefer-108479/>).

4 For example, Law No. 29499 on the electronic monitoring of persons, otherwise known as “electronic tagging”; see: http://historico.pj.gob.pe/CorteSuprema/ncpp/documentos/Ley_29499.pdf (in Spanish).

5 As of June 2016, there were 1,872 persons serving prison sentences for this offence. See INPE, *Informe estadístico penitenciario: Junio 2016*, Lima, June 2016, p. 33, available at: www.inpe.gob.pe/concurso-a-estad%C3%ADstica/86-junio-2016/file.html.

6 For the Peruvian Criminal Code (in Spanish), see: https://apps.contraloria.gob.pe/unetealcontrol/pdf/07_635.pdf.

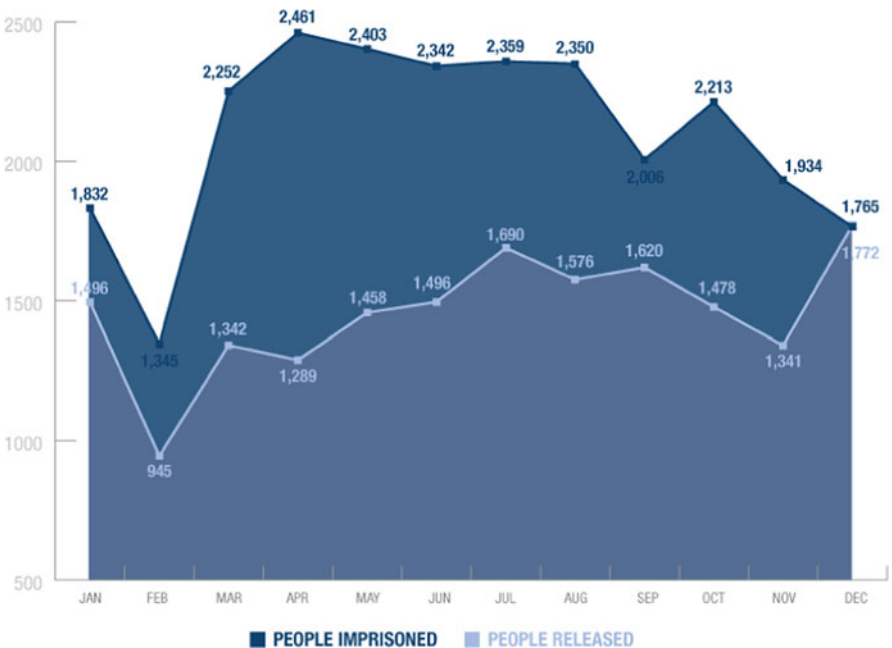


Figure 3. Prisoners detained and released in 2015, by month. Source: data from the Unit of Statistics at INPE.

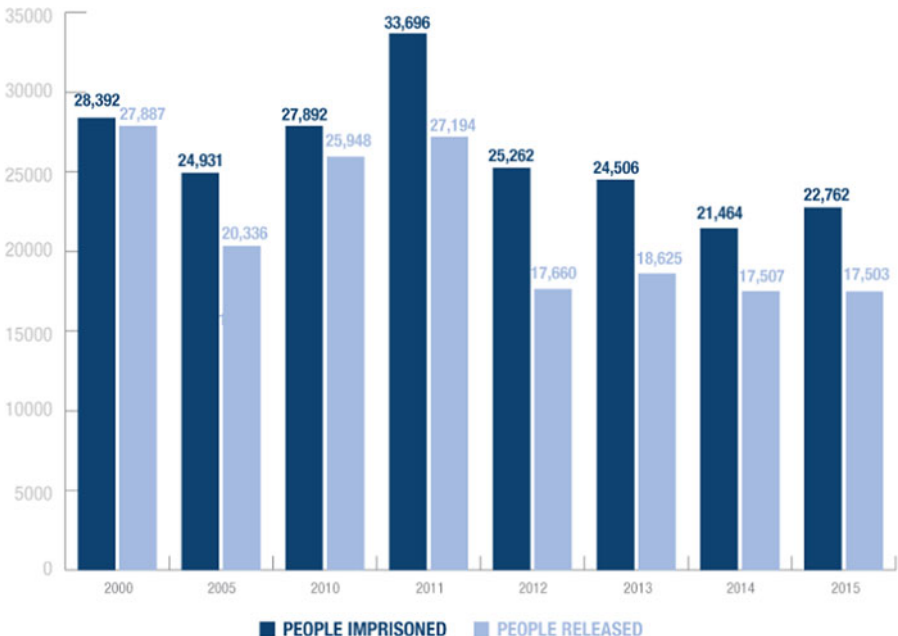


Figure 4. Prisoners detained and released between 2000 and 2015, by year. Source: data from the Unit of Statistics at INPE.

A long-term solution

Although the prison service does, if given appropriate resources, have the means to reduce overcrowding and its ill effects by building new detention facilities, this is obviously a short-term solution as the influx of inmates remains impossible to predict. In August 2011, for example, there was no indication that the prison population would increase by 30,000 over the following five years.

To put it another way, the prison population between 1997 and 2011 grew at a slower rate than during the 2011–16 period, albeit with an upward trend. The only reasonable conclusion to be drawn, based on the circumstances described above, is that the numbers will continue to rise. Indeed, with the exception of the 2001–02 period, the prison population has continued to increase year on year.

Some of the reasons why the prison population has tended to increase since 2011 are the normative changes made to the Peruvian Criminal Code and Code of Criminal Execution, in which penalties have increased and new crimes have been included, and penitentiary benefits have been eliminated.⁷

If we take [Figure 5](#) as a guide, it seems likely that the prison population will exceed 100,000 by 2019. These statistics indicate that it is necessary to reassess the

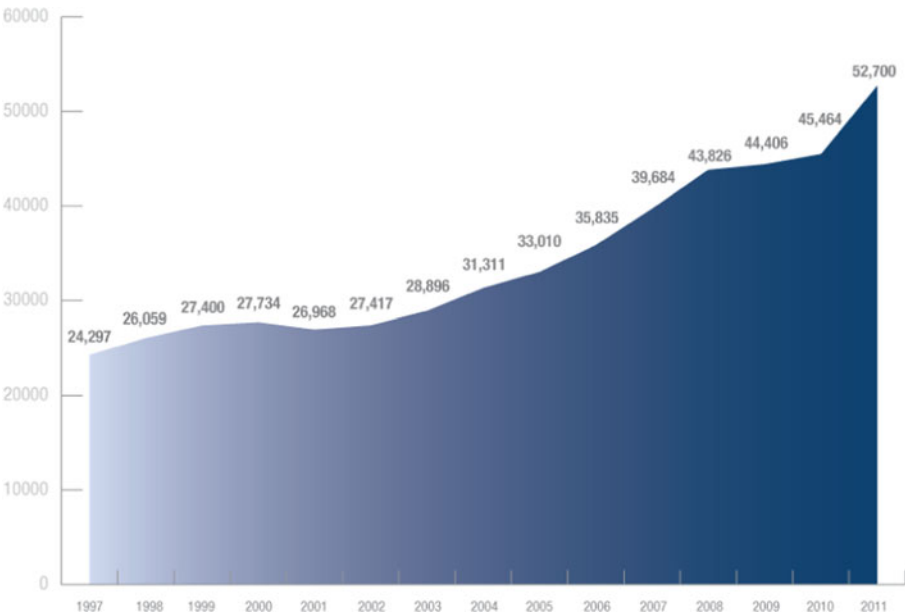


Figure 5. Growth in the prison population between 1997 and 2011. Source: data from the Unit of Statistics at INPE.

7 For example, Law No. 30076 modifies the Peruvian Criminal Code, the Code of Criminal Execution and the Code of Children and Teenagers, and creates a registry and protocol with the purpose of combating citizen insecurity.

kind of penitentiary system that Peru needs. Even with private investment, the State will not be able to cope with the influx of inmates, and the time will come when the disparity between prison capacity and the size of the prison population will make it physically impossible to accommodate more inmates.

There are various options for avoiding this scenario; for example, crime prevention programmes to be implemented by all levels of government (local, regional and national), with a specific focus on children and adolescents at risk. Additionally, this author suggests that alternatives to detention be used so that not all offenders are sent to prison, and that there is a need to end the excessive use of pretrial detention. Furthermore, although one cannot hope to fully eliminate the problem of crime, if violence ceases to be a regular part of educational, family and urban environments, fewer people may be tempted into a life of crime in the first place.

Becoming a torturer: Towards a global ergonomics of care

Jonathan Luke Austin and Riccardo Bocco

Jonathan Luke Austin is Lead Researcher at the Violence Prevention Initiative (www.vipre.ch) and Postdoctoral Fellow at the Centre on Conflict, Development and Peacebuilding of the Graduate Institute of International and Development Studies, Geneva. Contact: jonathan.austin@graduateinstitute.ch or www.jonathanlukeaustin.com.

Riccardo Bocco is a Professor at the Graduate Institute of International and Development Studies, Geneva.

Abstract

How do people become torturers? And how do we stop that transformation? This article addresses these questions by calling on academics and practitioners to consider caring for – expressing sympathy, understanding, and working with – the figure of the “not-quite-yet” torturer. We begin by noting the globality of torture across space and regime type, and suggest that this globality indicates how torture is – very frequently – not the result of any decision or order. This is followed by a discussion of the “consciousness” of the torturer vis-à-vis (1) their paradoxical emotional scarring by their own actions, and (2) their frequent descriptions of having, indeed, never themselves “intended” to torture someone. Drawing on recent developments in the theory of consciousness, we then argue that this non-purposeful enaction of torture can be understood in terms of certain somatic markers that lead, in particular material-situational settings, to people slipping towards violence. Drawing on the theory of the emergence of violence put forward by Jonathan Luke Austin, we then sketch out more fully the process of becoming a torturer in terms of the situational and material dynamics that encourage these slippages, as well as a global circulatory system of violent knowledges through various sources that become activated in particular settings. We thus suggest that

becoming a torturer is more a process of transition than of decision, before noting that this distinction is often lost in the cultural cycle of torture that emerges once torture has begun. Finally, we move to outlining the implications of this non-purposeful understanding of torture by arguing for a new preventive strategy based on the principles of ergonomics and modifying the training regimes of the most common professions from which torturers emerge (the military, the police, etc.) in order to make it harder to slip towards violence. We suggest, ultimately, that this strategy of prevention requires placing ourselves in the uncomfortable position of working to care for both the becoming-torturer and the torturers themselves, in order to help them both preserve their own humanity.

Keywords: political violence, torture, material-semiotics, prevention, rehabilitation.

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In Carlos Liscano's *Truck of Fools*, an account of his imprisonment and torture in Uruguay between 1972 and 1985, the figure of the torturer is noted to paradoxically be "the same as oneself". They are someone who usually "speaks the same language [and] shares the same values and prejudices [as us]", and yet is also utterly Other than oneself.¹ To this paradox, Liscano asks three questions:

When *they* go home, what do *they* [the torturers] tell their wives, their girlfriends, children, parents, and friends? ... Where do *they* come from? How does an individual become *that*?²

This question – how does someone become a torturer? – is the question we ask in this article. It is a question posed by the many survivors of torture themselves – the question of those who have come face to face with the torturer but can still only imagine this figure as an incomprehensible "blank" whose actions mark the "total inversion" of the social world or the "unmaking" of reality.³ The torturer is a figure who neither social science nor wider society has yet been able to adequately conceptualize. While many theories do exist seeking to explain this transformation, none quite overcome the sense of "shock" that we all still feel in witnessing that metamorphosis from good to evil.⁴ We still don't know how someone becomes *that*. Incongruously, the body of the torturer stands in symmetry with that of the tortured in being – to speak with Judith Butler – "unnamable and ungrievable" in her socio-political positionality or – to turn to Giorgio Agamben – an "unnamable and *unclassifiable* being" in our

1 Carlos Liscano, *Truck of Fools*, Vanderbilt University Press, Nashville, TN, 2004, p. 71.

2 *Ibid.*, emphasis added.

3 See Jean Améry, *At the Mind's Limit*, Shocken Books, New York, 1986; Elaine Scarry, *The Body in Pain*, Oxford University Press, Oxford, 1985.

4 See, *inter alia*, Hannah Arendt, *The Human Condition*, University of Chicago Press, Chicago, IL, 1958; Hannah Arendt, *The Origins of Totalitarianism*, Shocken Books, New York, 2004; Francoise Sironi, *Bourreaux et victimes*, Odile Jacob, Paris, 1999; Stewart R. Clegg, David Courpasson and Nelson Phillips, *Power and Organizations*, Sage, London, 2005; Ronald D. Crelinsten, "The World of Torture", *Theoretical Criminology*, Vol. 7, No. 3, 2003.

thought and imagination.⁵ The torturer is *that* which we cannot reconcile our *selves* with. To one degree or another, the torturer remains the classic personification of nightmare, monstrosity and evil.

In this article, we attempt to undo this image of the torturer as a radically Other subject. To do so, we lay out a micro-sociological theory of the process of becoming a torturer that demystifies the means by which torturers emerge. This theory draws from recent developments in sociological thought focusing on everyday *practices*, which ask how sets of actions happen in a very granular sense: in technical terms, this line of thinking seeks to ascertain the quiddity of social practices, whether crossing a road, cutting down a tree or torturing a body. We combine these theories with recent work in the study of consciousness to show how the process of becoming a torturer is rarely entirely purposeful⁶ or decided upon, yet neither is it usually forced. Instead, becoming a torturer is shown to be related – largely – to *situational* factors that make it possible for *anyone* to become a torturer in particular circumstances. This situational theory of torture will, moreover, offer new ways to think about preventing torture.

To achieve this, we combine our work to form a holistic portrait of the torturer and their becoming. Specifically, we base our argument heavily on the work of Jonathan Luke Austin, which lays out the theory of torture glossed above in theoretical and empirical depth.⁷ Austin describes torture as emerging through a circulatory system of knowledges (“inscriptions”), materials (“objects”) and humans (persons). He argues that torture emerges because alongside the *jus cogens* norm *against* torture – that which is legally codified and/or morally supported – there exists a historically deeper norm *of* torture, preserved in knowledges, materials and human persons. This norm *of* torture, Austin suggests, emerges at particular times due to *situational* dynamics that see individuals just like you or me carrying out torture, very frequently *non-purposefully*. According

- 5 Judith Butler, *Precarious Life*, Verso, London, 2004, p. 150; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford University Press, Stanford, CA, 1998, p. 3, emphasis added.
- 6 As we will see below, drawing a distinction between *purposefulness* and *intentionality* is very important in discussions of political violence. While most human actions are in some sense *intentional*, many – including violence – are not necessarily *purposeful*.
- 7 See, *inter alia*, Jonathan Luke Austin, “Torture and the Material-Semiotic Networks of Violence Across Borders”, *International Political Sociology*, Vol. 10, No. 1, 2016; Jonathan Luke Austin, *Guarantees of Non-Recurrence and the Violence Prevention (VIPRE) Initiative*, Centre on Conflict, Development and Peacebuilding, Geneva, 2016; Jonathan Luke Austin, “We Have Never Been Civilized: Torture and the Materiality of World Political Binaries”, *European Journal of International Relations*, Vol. 23, No. 1, 2017; Jonathan Luke Austin, *Small Worlds of Violence: A Global Grammar for Torture*, Graduate Institute Geneva, 2017; Jonathan Luke Austin, “A Visual Ethnomethodology of Torture in Action: Boys in Tyres, Biopolitics, and Locally Ordered Violences”, available on request, 2017; Jonathan Luke Austin, “Hot Tea with Sugar and the Translation(s) of Torture”, in Trine Villumsen Berling *et al.* (eds), *Translations of Security*, Cambridge University Press, Cambridge, forthcoming 2017; Jonathan Luke Austin and Anna Leander, “Visibility: Practices of Seeing and Overlooking”, in Christian Bueger and Alena Drieschova (eds.), *Mapping International Practice: Concepts, Debates, and Borders of International Practice Theory*, forthcoming 2018; Jonathan Luke Austin, “The Chair Sits on the Man: The Non-Human Perpetration of Violence”, in Susanne C. Knittel and Zachary J. Goldberg (eds), *Routledge Handbook of Perpetrator Studies*, Routledge, London, forthcoming 2018. See also: www.jonathanlukeAustin.com/small-worlds-of-violence and www.vipre.ch (all internet references were accessed in October 2016).

to Austin, the idea of torture emerging non-purposefully implies that torture is often an *unthought* practice, just like dancing, walking or having a conversation. Austin's thought here fits within a wider shift to studying violence through micro-sociological lenses.⁸ This literature, however, has rarely focused on *political* violences – as Austin does – nor implicated a specifically “global” element into the study of violence and its circulation across borders. Alongside Austin's theory, a central source of empirical material in this paper is derived from Riccardo Bocco's work on memory, violence and cinema, which explores the (cultural) shaping of collective memories in post-conflict environments across Latin America and the Middle East.⁹

Before proceeding, it is important to note that the definition and general understanding of torture used in this article is quite distinct from the legal definitions used in most studies of its violence. We take up a broadly sociological view of torture as one form of violence among many, and which thus cannot be *a priori* encapsulated in the legal definition found in, say, the 1984 United Nations (UN) Convention Against Torture. That legal definition stresses the importance of torture being understood as an *intentionally* inflicted form of harm. In this paper, we question the degree to which intentionality can be fully supported from a sociological and psychological perspective. In doing so, our goal is not to undermine the importance of legal definitions and understandings of torture; rather, it is to broaden our perspectives on the pathways by which torture becomes possible.

This paper now proceeds in five parts. First, we describe torture as a global practice that cannot be studied within the borders of a single State or attributed to any “type” of State. This step justifies refocusing our attention on the individual torturer as an object of inquiry, as opposed to assuming her actions to be dictated from above by military or political superiors. Second, we move to describing the *conscience* and *consciousness* of the figure of the torturer. We do so by noting how individuals find it very hard to torture – very few people are pathologically predisposed to its use – and that torturers are severely emotionally and psychologically damaged by torturing. Thirdly, we then describe how torturers – in their own words – rarely claim to have “chosen” to become torturers but, rather, that they more often slipped towards torture (with or without explicit orders to take this step). We thus argue that because torture is hard to carry out, is psychologically damaging and is not always ordered or chosen, we must pay greater attention to how these obstacles are overcome. In other words, we need to understand the “non-purposeful” emergence of torture. We do so by turning to state-of-the-art insights from the study of consciousness and noting how it is now recognized that subconscious knowledges are often enacted by individuals without them choosing or desiring to do so. It is this, we suggest, that often lies behind the non-purposeful phenomenon of torture today.

8 See Randall Collins, *Violence: A Micro-Sociological Theory*, Princeton University Press, Princeton, NJ, 2007.

9 For more information, see: Graduate Institute Center on Conflict Development and Peacebuilding, *Films, Collective Memories and National History in Political Transitions, Conflict and Post-Conflict Contexts*, available at: <http://graduateinstitute.ch/home/research/centresandprogrammes/ccdp/ccdp-research/clusters-and-projects-1/films-collective-memories-and-na.html>.

In the fourth section, we offer a detailed outline of Austin's theory of the material-semiotic emergence of torture in particular situations. Austin's theory focuses on seeing torture – or any social practice – as emerging through the webs of “relations” in which torturers, objects used in torture, and knowledge about torture are enmeshed. Essentially, Austin's theory focuses on what makes torture *possible* – in a practical sense – rather than the specific cause of torture in any one case (its “why”).¹⁰ This approach incorporates a consideration, for example, of the growth in electrical torture in the twentieth century not only in terms of its capacity to hide bodily sequela of torture (a reason *why* it is used) but also in terms of *how* electric torture makes violence in general more possible by reducing contact between perpetrator and victim and providing a simple script for inflicting violence that makes torture “easier” than it would otherwise be.¹¹ We suggest that Austin's theory of torture compels us to see the becoming of a torturer as involving not a “decision” point of action but, rather, a “transition” point of slow transformation. The section closes by noting how this non-purposeful transition towards becoming a torturer can also create a cultural spiral of torture which, although being more evident in non-democratic States, is possible in all polities.

The final section discusses the practical implications of Austin's theory of torture and argues that we must construct a global ergonomics of care that alters the situational, material and human elements that lead to torture's non-purposeful emergence. This is complemented with a discussion of how to end cultural spirals of torture and a detailed description of a project of which the present authors are a part, the Violence Prevention Initiative, which seeks to operationalize Austin's theory and its novel mode of prevention.¹² We conclude by discussing the ethical and political implications of this jarring demand to care for the torturer.

The globality of torture

Torture is a global phenomenon.¹³ We can see this by aggregating together all types of torture. In doing so, we move away from focusing attention on accusations of torture and ill-treatment made by “people held in connection with armed conflict and other situations of violence”.¹⁴ Particularly in the twenty-first century, restricting our focus to such cases of detention risks creating an assumption that torture (or the most serious kinds of torture) is carried out principally within the borders of non-democratic States in the global South. This assumption tends to lead to this correlation (torture *often* occurs in non-democratic States) being mistaken for a causal mechanism that sees the emergence of torturers attributed

10 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence Across Borders”, above note 7.

11 See *ibid.* and J. L. Austin, *Small Worlds of Violence*, above note 7.

12 See: www.vipre.ch.

13 On the globality of torture, see J. L. Austin, “Torture and the Material-Semiotic Networks of Violence across Borders”, above note 7.

14 See: ICRC, “What We Do for Detainees”, available at: www.icrc.org/en/document/what-we-do-detainees.

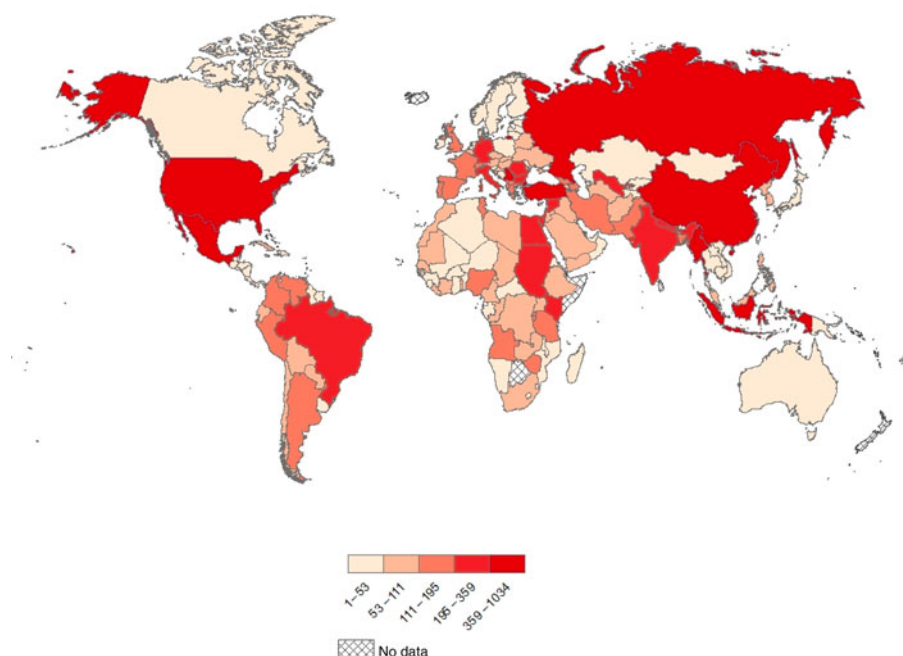


Figure 1. Global Amnesty International torture allegations, 1995–2005.

to regime type. Political scientists, for example, have spoken of non-democratic States as being “pro-torture” regimes that use this violence strategically as a means of solidifying power by crushing opposition and spreading terror amongst a wider population.¹⁵ However, if we broaden our scope to include all allegations of torture, irrespective of whether or not the State in question was peaceful, engaged in armed conflict (at home or abroad) or somewhere in between, we reveal the true globality of the practice of torture. To do so, we can take the recently created Ill-Treatment & Torture Data Collection Project dataset, which codes Amnesty International data on the incidences, perpetrators, motives, and judicial responses to torture and ill-treatment *allegations*.¹⁶ As the map shown in Figure 1 suggests, it would appear that “all major states engaged in torture at some point between 1995 and 2005”.¹⁷ Visualized spatially, these data thus reveal both the remarkable scope of torture allegations and practice across borders and that the occurrence of torture is *not necessarily correlated with regime type*.

15 James Raymond Vreeland, “Political Institutions and Human Rights”, *International Organization*, Vol. 62, No. 1, 2008, p. 65.

16 For full details, see: the Ill-Treatment and Torture Data Collection Project website, available at: http://faculty.ucmerced.edu/cconrad2/Academic/ITT_Data_Collection.html.

17 Rick Noack, “Most Countries Are against Torture — but Most Have Also Been Accused of It”, *Washington Post*, 12 December 2014, available at: www.washingtonpost.com/news/worldviews/wp/2014/12/12/most-countries-are-against-torture-but-most-have-also-been-accused-of-it/?utm_term=.d0aa68ea464f.

Democracies and dictatorships *both* produce torturers. Of course, there are possible structural differences between democracies and dictatorships that affect how torture specifically emerges, is authorized and/or is allowed to continue over time. Nonetheless, there remains a striking symmetry to justifications for torture, as enunciated by State or military leaders, whether democratic or autocratic. This is not to say, of course, that there is an equality in the *frequency* of torture as it is carried out in democratic or autocratic States. Indeed, as Austin puts it, it appears that democratic States more frequently “oscillate” in their employment of torture – seeing the practice *returning* in jumps and starts, over time – whereas autocratic States are often more “endemically” afflicted with torture, as it becomes part of everyday politics.¹⁸ But given that torture is employed in both types of political structure, it is likely that these differences relate to something other than State type. And we see this possibility, also, in the frequency of torture in other diverse sites, such as care homes for the elderly or children.

More than this, Austin has demonstrated how torture is also global at a “micro-practical” level. Across the world, very similar torture techniques are employed. These are sometimes grouped into patterns or clusters of techniques favoured in one area of the world or another, but even taking this into account, “whatever the circumstances, whatever the culture, the words” of both victims and perpetrators “are astonishingly standard”.¹⁹ Austin gives the example here of stress positions, noting how one technique described by the United States as the “prolonged stress standing position” can be found *in identical form* in the prisons of North Korea, albeit there being known as the “pigeon torture”.²⁰ Similar patterns are evident with regard to torture practices such as waterboarding and the use of electricity, among many others.²¹ Torturers across the world, and across regime types, draw on a very narrow repertoire of techniques to cause harm: a global convergence in torture practices thus exists, with most States not only employing torture but also frequently employing the same types of tortures. And this is especially surprising because, as Darius Rejali notes, and contrary to what is commonly thought,²² “there is little evidence of

18 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence Across Borders”, above note 7.

19 Francoise Sironi and Raphael Branche, “Torture and the Borders of Humanity”, *International Social Science Journal*, Vol. 54, No. 174, 2002, p. 539.

20 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence Across Borders”, above note 7, p. 3. See, for many additional examples, J. L. Austin, “We Have Never Been Civilized” and *Small Worlds of Violence*, both above note 7.

21 See Darius Rejali, *Torture and Democracy*, Princeton University Press, Princeton, NJ, 2007; Darius Rejali, “Modern Torture as a Civic Marker”, *Journal of Human Rights*, Vol. 2, No. 2, 2003; and, again, J. L. Austin, *Small Worlds of Violence*, above note 7.

22 The common view that torture is trained is largely espoused by critical scholars within history, anthropology and political science. These perspectives argue that several famous instances of people having been trained under particular programmes (typically run and funded by France or the United States) who then went on to torture in their respective theatres of operations are evidence of a deliberate attempt to distribute torture techniques across borders. The classic example here is the operation of the US Army School of the Americas at Fort Benning near Columbus, Georgia. Graduates of the school from States located in the Southern Cone of Latin America went on to torture during the so-called Dirty Wars of the 1970s and 1980s. As Austin explains, however, there is little evidence of direct training to torture at this facility, and such training is largely assumed based on what came

top-down systematic training in specific techniques in the history of modern torture”.²³

Torture is, then, a *globalized* phenomenon, and this fact is critical to understanding the *local* production of torturers. The globality of torture means we cannot *solely* explain the “becoming-torturer” in terms of her training, indoctrination or being ordered to torture by a chain of command within “bad” political regimes. This is not to deny that concrete instances of torturers claiming to have been ordered to torture exist. Indeed, in some cases – the post-9/11 Central Intelligence Agency (CIA) extraordinary rendition programme, the “five techniques” used by the British Army, the torture carried out by the Khmer Rouge, etc.²⁴ – the emergence of torture was hierarchically structured. Nonetheless, assuming that torture is *always* ordered from above is not tenable given that political leaders often claim to have also been following orders themselves, and many torturers note the reasons for their actions to have been unclear even to themselves (see below).²⁵ Assuming torture always to be ordered would rely on seeing certain political *leaders* as intrinsically bad in the means they are willing to employ. For democratic States, this is often seen in terms of “exceptionalism” whereby a state of emergency leads political leaders to employ torture.²⁶ Nonetheless, it is generally not believed that this “exceptional” employment of torture reveals anything larger about the validity of democratic forms of political rule.²⁷ Paradoxically, however, this belief is contradicted by the popular (even scientific) view that autocratic States are intrinsically predisposed to torture and are led absolutely from a centre of power commanding its subordinates’ every action.²⁸ It is notable, however, that reports on torture in autocratic States are rarely able to find evidence of the direct ordering of torture.

afterwards. There is evidence in this case and others of interrogation resistance training which involves mock torture later being used as a knowledge source for actual torture, but this is not the principle point made by advocates of this thesis. For the accounts of those who support this thesis, see Laleh Khalili, *Time in the Shadows*, Stanford University Press, Stanford, CA, 2012; Noam Chomsky and Edward. Herman, *The Washington Connection and Third World Fascism*, Black Rose Press, Montreal, 1979; and for the critique, see J. L. Austin, “We Have Never Been Civilized”, above note 7.

23 D. Rejali, *Torture and Democracy*, above note 21, p. 11.

24 On all these cases see Alfred W. McCoy, *Torture and Impunity: The U.S. Doctrine of Coercive Interrogation*, University of Wisconsin Press, Madison, WI, 2012; A. T. Williams, *A Very British Killing*, Vintage Books, London, 2013; Ruth Blakeley and Sam Raphael, “British Torture in the ‘War on Terror’”, *European Journal of International Relations*, Vol. 23, No. 2, 2017; US Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program*, Washington, DC, 2014; David Chandler, *Voices from S-21*, University of California Press, Berkeley, CA, 1999.

25 See below for real-world examples of this.

26 See Jeff Huysmans, “The Jargon of Exception”, *International Political Sociology*, Vol. 2, No. 2, 2008.

27 Except in a broader philosophical sense which stresses the historical genealogy of the modern democratic State as maintaining aspects of a “sovereign” form of political rule under the guise of a more civilized form of order. See G. Agamben, above note 5; Francois Debrix and Alexander D. Barder, *Beyond Biopolitics*, Routledge, London, 2012.

28 While this is an exaggeration, of course, the basic thesis underlying much political science studying non-democratic regimes retains such a hierarchical view of power (albeit noted as being constrained by interests, institutions, identities, etc.). See, for examples, Christian Davenport, “State Repression and Political Order”, *Annual Review of Political Science*, Vol. 10, No. 1, 2007; Conway W. Henderson, “Conditions Affecting the Use of Political Repression”, *Journal of Conflict Resolution*, Vol. 35, No. 1, 1991.

For example, one UN Human Rights Council report on torture and deaths in detention in Syria notes how “the entrenched systematic nature of violations taking place within Government detention centres” makes “the giving of ... orders superfluous”.²⁹ This begs the question, explored further below, of *why* or *how it is possible* that orders are superfluous. In addition, the frequency of torture’s emergence in the military, police, and prison services of democratic States where such an “entrenched” torture culture does not exist in the same manner poses the same problem: *why* or *how it is possible* that torture emerges without orders in these contexts, and why – so often – are the *same techniques* used in these cases as in non-democratic ones? These are the questions with which we start our own inquiry now.

Torturers, conscience and consciousness

Questioning the centrality of the State or the party or the organization or the leader as the figure who ultimately *decides* on when and where torture will occur creates an immediate problem. Because torturers have previously been studied only at a distance, we lack a firm understanding of the torturer as an individual herself. The general public, social scientists and wider civil society have tended to consider the minds and bodies of those who become torturers as being in a subordinate role to superiors. Removing those superiors as the *sole* analytical variable thus returns us to “square one” in finding an explanation for how someone becomes a torturer – and so we are compelled to analyze not the torture system of any particular country or type of State but, rather, individual torturers themselves. Much as we cannot explain racism, patriarchy or socio-economic inequality without considering *both* systemic (macro)-level factors *and* individual (micro)-level factors, so the lack of attention to the figure of the individual torturer and her task is a key obstacle to our understanding of this issue.

Nonetheless, there is a difficulty in understanding the mind and body of the torturer. This problem was alluded to earlier, along with our focus on how torture has been seen as something alien to most people. The problem here is what Lawrence Keeley has described as the psychic unity of humanity:

All members of our species have within rather narrow limits of variation the same basic physiology, psychology, and intellect. This concept does not exclude individual variations in temperament or even the various components of intellect, but finds that such variations have no value in explaining social or cultural differences between groups. ... Anthropologists have long recognized that the many and profound differences in technology, behaviour and political organization, and values found among societies and

29 UN Human Rights Council, “Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic”, Geneva, 2016, p. 12.

cultures can be best explained by reference to ecology, history, and other material and social factors.³⁰

One central aspect of this psychic unity is what Keeley calls a universal distaste for violence.³¹ Violence is (almost) everywhere, but it is also seen as a bad thing (almost) everywhere. Moreover, very few people find it easy to be violent. Only 2% of soldiers will shoot their guns to kill, for example, without extensive military drilling of this action.³² Most people shoot to miss, in order to avoid killing – and this is true *even with a highly dehumanized (or radically “Othered”) enemy*.³³ This general distaste for violence has been extensively empirically evidenced by microsociologists. As Randall Collins writes, “[m]icro-situational evidence ... shows that *violence is hard*. No matter how motivated someone may be, if the situation does not unfold [in a certain way,] violence will not proceed.”³⁴

Most people do not want to torture others, even if they might hypothetically support it. The act is somehow *incomprehensible*, and hence the figure of the torturer is always radically Othered. It is thus the case that once the State or leader is removed as a causal variable ordering violence, most explanations turn towards finding psychological *pathology* within individuals. This is what occurred at Abu Ghraib, for example, where perpetrators were seen as “bad apples”.³⁵ But there is no evidence that interrogators, guards and soldiers who torture in detention facilities are uniformly pathological.³⁶ The great majority are born normal in their disinclination to violence. Indeed, the pathology explanation is folklore.³⁷ If this is the case, however, then torture should be *impossible*. If torturers are not pathological, nor always ordered and find it hard to torture, torture should not happen. But, of course, it does. To understand how torturers emerge, we therefore suggest, we now need to consider them first as fully human subjects who, at one time, were exactly like you or me. We need to listen to their voices and understand how normal people become torturers. So let’s begin listening.

Conscience and the torturer’s voice

Following Austin,³⁸ two main types of statement reoccur in the voices of torturers. First, an extreme psychological derangement of the torturer *once they begin*

30 Lawrence H. Keeley, *War before Civilization*, Oxford University Press, Oxford, 1996, p. 180.

31 *Ibid.*, p. 180.

32 Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Back Bay Books, New York, 1996.

33 On dehumanization, see Adam Waytz, Nicholas Epley and John T. Cacioppo, “Social Cognition Unbound: Insights into Anthropomorphism and Dehumanization”, *Current Directions in Psychological Science*, Vol. 19, No. 1, 2010).

34 R. Collins, above note 8, p. 20, emphasis added.

35 Alex Danchev, “Bad Apples, Dead Souls: Understanding Abu Ghraib”, *International Affairs*, Vol. 84, No. 6 2008.

36 On the perpetrators at Abu Ghraib, see, in particular, Phillip G. Zimbardo, *The Lucifer Effect*, Random House, New York, 2007.

37 F. Sironi, above note 4.

38 J. L. Austin, *Small Worlds of Violence*, above note 7.

torturing is evident. This includes the expression of an array of contradictory, and always negative, emotions: fear, envy, despair, etc. For example, victims often remark of their torturer:

How little he values himself. He envies the prisoner for his ideas, his relationships, his political loyalty. He envies his knowledge, his culture, the books he's read. He envies the woman who is his partner and also in prison.³⁹

In extreme cases, where the torturer is forced to live alongside his victims, this lack of self-worth extends into a substantial disruption of his wider life. As one Argentinian torturer is reported to have stated to his victims, with whom he was living in close quarters and met on a daily basis, coming to communicate with them more frequently than his own family:

Don't you realize that you are to blame for the fact that we don't want to go to our homes? With you one can talk about cinema, theatre, it is possible to talk about any topic. It is possible to talk about politics ... You are the women that we believed would exist only in novels or in films, and this has destroyed our families!⁴⁰

These personal emotional and psychological difficulties in coming face to face with the victims of torture are found in many fictional and documentary cinematic accounts emerging from Latin America. In *Carne de perro*, for instance, we follow the life of a former torturer during the Pinochet dictatorship in Chile as he searches for a new "identity" after the erasure of becoming a torturer.⁴¹ This fictional account echoes the documentary *El mocito* by Marcela Saïd, which follows a man looking for redemption after serving in an illegal detention centre while a very young man and having worked closely with torturers.⁴² Beyond the more banal feelings of frustration, envy and alienation from ordinary life, torturers can be dramatically affected in other ways. Frantz Fanon, for example, wrote of the mental disorders created by the predations of colonial violence *within their perpetrators*. He spoke of a European police inspector who smoked five packs of cigarettes a day and had recurrent nightmares. The inspector was involved in the daily torture of Algerians, but what troubled him was the way in which that violence escaped the interrogation room and saw him start to beat his wife and children. The inspector was seeking treatment from Fanon "to help him [continue to] torture Algerian patriots without having a guilty conscience".⁴³ Violence here is shown not to be containable "in the mold of an instrument" but instead as bleeding "beyond the limits imposed by a given task and [becoming] a reality, an opacity or inertia that inevitably saturates all relations".⁴⁴ This

39 C. Liscano, above note 1, p. 27.

40 Carlo Tognato, "Performing 'Legitimate' Torture", *Thesis Eleven*, Vol. 103, No. 1, 2010, p. 94.

41 Fernando Guzzoni, *Carne de perro*, 2012.

42 Marcela Saïd, *El mocito*, 2010. See, for similar accounts, Carlos Bustamante, *El vecino*, 2000; Gonzalo Justiniano, *Amnesia*, 1995.

43 Frantz Fanon, *The Wretched of the Earth*, Grove Press, New York, 2004, p. 199.

44 James Dodd, *Violence and Phenomenology*, Routledge, New York, 2009, p. 75.

finding is unsurprising, of course, if we consider the similar mental illnesses suffered by regular soldiers carrying out legitimate forms of violence (shooting, bombing, etc.).⁴⁵ And these disturbances also echo those of the survivors of torture: in clinical terms, being tortured often results in psychological dissociation, “a structured separation of such processes as memory, identity, emotions, and thoughts” punctuated by “intrusions of horror in which [victims] experience themselves as detached from the self” and from reality “in unreal or distorted ways”.⁴⁶ It is the case, then, not only that doing violence is hard, but also that it works to profoundly traumatize the perpetrator: it destroys the world of tortured and torturer alike.

The second recurrent type of statement found in the voices of torturers is a self-perplexed confusion over how torture began. Take the words of an interrogator who admitted to torturing detainees in US-occupied Iraq, and who described a

[m]echanism of many interlocking parts that pushes the thing forward. It grows like an ink stain and spreads like a disease, and along the way its face changes, so you end up in a place totally unlike where you started.⁴⁷

Alternatively, consider Kenneth Bell, a US Army platoon leader operating in Afghanistan in 2008. Bell describes how “on the ride home after a particularly long mission, we drove into a near ambush that killed my gunner and left me bloody and shaken. Going on with life was the hardest thing I ever did, but the mission demanded it.”⁴⁸ A few days later, Bell received information from an informant that he believed identified the man responsible for that ambush. He planned a raid on the village where the man was thought to be. Bell notes that although he “was long used to the mechanics of these sorts of operations”, “[e]verything happened so quickly once we arrived at the village that there was no time to stop and consider where I really wanted the mission to end”.⁴⁹ Finally coming face to face with his suspect outside the suspect’s home, he details his emotional state as he began questioning the man:

I felt the bile of hatred rising ... inside of me. I slowly realized what I had wanted to do all along. I was tired of playing by the rules. He was in my grasp and with him the facts about the local attacks. ... My interpreter and I could find a way into the home with the suspect, and he could either tell me everything about the networks in the area or he could bleed. ... The bold words that I had long ago spoken to my soldiers about the importance of morality in combat were

45 David Ronald Laing, *The Divided Self*, Penguin, London, 1990; K. M Fierke, “Whereof We Can Speak, Thereof We Must Not Be Silent: Trauma, Political Solipsism and War”, *Review of International Studies*, Vol. 30, No. 4, 2004; D. Grossman, above note 32.

46 William J. Ray *et al.*, “Decoupling Neural Networks from Reality”, *Psychological Science*, Vol. 17, No. 10, 2006, p. 825. Also see Yochai Ataria, “I Am Not My Body, This Is Not My Body”, *Human Studies*, Vol. 39, No. 2, 2015.

47 Tony Lagouranis and Allen Mikaelian, *Fear Up Harsh: An Army Interrogator’s Dark Journey through Iraq*, Penguin, London, 2007, p. 244.

48 Kevin Bell, “How Our Training Fails Us When It Counts”, *ARMY*, November 2011, p. 42.

49 *Ibid.*

forgotten. ... Just as I turned to my interpreter to suggest that we dip inside the home for a private chat with our host, my hatred caught in my throat like a bone. In that pause, I scrambled for the right reason to make a decision. *Torture. Don't torture.* Where there should have been an answer there was only darkness. *It would be wrong to say that I made a choice.*⁵⁰

Choice does not produce torture here; choice or decision is, in fact, entirely absent. Torture always seems to “make no sense” to the torturers themselves. Instead, a whole set of as yet unknown elements seem to constitute that “mechanism of interlocking parts” propelling individuals into the act of torture. In Algeria, conscripts described this process in terms of a *glissement* – a slippage – towards violent interrogation:

We let ourselves slip [*on se laissait glisser*]. And then we became indifferent, the slaps, the insults, the blows we inflicted on the prisoners, it didn't affect us anymore. We were caught in a dirty game, everything seemed natural.⁵¹

Such *glissements* are not what we usually think about when torture occurs. But they appear to agree with the earlier mentioned fact that torture does not need to be ordered but, rather, is often like a habitual reflex that people “slip” towards. Again, however, describing torture in terms of *glissements* poses a problem. If neither the individual torturer nor the system of which they are but one part necessarily *decides* to torture (in many cases), how does torture occur nonetheless? Where does the figure of the torturer emerge from if she herself does not desire to become this figure? Coming to this question now requires us to move away from the *conscience* of the torturer and towards her *consciousness*.

Consciousness beyond the autobiographical self

When considering torturers, attention is normally focused on studying their *autobiographical self*. The autobiographical self “is the narrated self, which is created, recognised and confirmed through social performances” and which appears “in the stories we tell about ourselves to ourselves and to others.”⁵² It is from these stories that most analyses of the figure of the torturer have derived. Broadly speaking, these narratives create explanations for torture that do not *require* a focus on the individual themselves. For example, the frequent use of dehumanization as an explanation for torture connects an individual's actions to an ideological discourse held by wider society.⁵³ This ideology is posited to enable

50 *Ibid.*, p. 43, emphasis added.

51 Debarati Sanyal, “Crabwalk History: Torture, Allegory, and Memory in Sartre”, *Yale French Studies*, No. 118/119, 2010, p. 64.

52 Erik Ringmar, “How the World Stage Makes Its Subjects”, *Journal of International Relations and Development*, Vol. 19, No. 1, 2016, p. 8, emphasis added. For details, see Leslie Brothers, *Friday's Footprint*, Oxford University Press, Oxford, 1997; Antonio R. Damasio, *Self Comes to Mind*, Vintage Books, New York, 2012.

53 On dehumanization, see Herbert C. Kelman, “Violence without Moral Restraint”, *Journal of Social Issues*, Vol. 23, No. 4, 1973.

torture because victims are not regarded as human.⁵⁴ While there is surely truth in this assessment, it does not follow that dehumanization is a *sufficient* cause for torture. As we saw above, microsociological evidence of violence demonstrates that people are unwilling to be violent against even highly dehumanized populations. Likewise, Austin has shown the same for torture by analyzing videos of its use.⁵⁵ While dehumanization may make demonized groups vulnerable, it is doubtful that it alone is sufficient to lead directly to violence. Beyond dehumanization, one usually finds “strategic” explanations for torture as also being enunciated by the autobiographical self of torturers. These strategic explanations are usually interrogational in form and draw on tropes like that of the “ticking time bomb” as justifications for torturing in the name of a greater good.⁵⁶ Again, these micro-level strategic explanations (“I tortured him in order to get information”) are echoes of macro-level State or military policy (“We torture only in order to get information”). They are based on abstractions away from studying the individual torturer and her practices. Most commonly, these autobiographical explanations for action are given by wider society or individual torturers when they are asked *why* they did something and are given *time* to reflect on this and build a self-reassuring narrative. But when pressed, or not given time to reflect, as we saw above, the equally common answer is: “I don’t know.”⁵⁷

The puzzlement of torturers at their own actions must be explored, therefore, beyond the autobiographical self. Today, both neuroscientists and philosophers are coming to the firm conclusion that the autobiographical self is only one part of a broader set of “inter-communicating layers” that make up human consciousness and – therein – determine how practices are carried out with greater or lesser levels of “deliberation” (i.e., “decision”).⁵⁸ The autobiographical self is the *last* level of human consciousness, and many of its explanations for what the body actually does in practice are made *post-hoc*. They are self-justifications for action rather than being reliable indicators of the causes of violence or other social practices. Typically, by the time – for example – a criminal reaches a courtroom, they have established a more-or-less plausible and more-or-less consistent narrative that will, if not justify, at least mitigate their actions. But their statements immediately following a crime or violent incident are usually far more confused: they are non-linear, fragmentary and often without clear justification.⁵⁹ An analogy can be drawn here with police shootings in the United States, which will help “de-

54 For the classic use of this claim to discuss the crimes of the Nazi regime in Germany, see Christopher R. Browning, *Ordinary Men*, HarperCollins, London, 1993.

55 J. L. Austin, “A Visual Ethnomethodology of Torture in Action” and *Small Worlds of Violence*, both above note 7.

56 See, *inter alia*, Richard Matthews, “An Empirical Critique of ‘Interrogational’ Torture”, *Journal of Social Philosophy*, Vol. 43, No. 4, 2012; A. M. Dershowitz, *Why Terrorism Works*, Yale University Press, New Haven, CT, 2002.

57 J. L. Austin, *Small Worlds of Violence*, above note 7; R. Collins, above note 8.

58 A. R. Damasio, above note 52.

59 Judith Lewis Herman, “Crime and Memory”, *Bulletin of the American Academy of Psychiatry Law*, Vol. 23, No. 1, 1995.

dramatize” our claims by distancing us from the socio-political complexities of torture. In one recent police shooting, an African-American man named Charles Kinsey was non-fatally shot by police while assisting an autistic man whom police incorrectly feared was holding a gun and had thus surrounded. Kinsey recounts:

I thought it was a mosquito bite, and when it hit me I had my hands in the air, and I’m thinking, “I just got shot!” I’m saying, “Sir, why did you shoot me?”, and his words to me were, “*I don’t know*.”⁶⁰

The policeman who shot Kinsey is reported as also having been asked by another officer, “Why did you shoot this guy?”, to which the shooter replied again, “*I don’t know*.”⁶¹ However, police later claimed that the officer shot because the autistic man was not obeying commands and that the officer had fired in order to “save Kinsey’s life”.⁶² This later explanation is that of the autobiographical self: it creates a justificatory narrative. And that narrative is not necessarily (though it may be) deliberately imagined with malfeasance but is, rather, a cognitive necessity for any individual to understand their actions in and on the world and to provide a coherent narrative of self. To remain with the answer “*I don’t know*” is to potentially dramatically undermine a person’s sense of self. Nonetheless, the theory of consciousness we are outlining here echoes, in some ways, the basic idea of psychoanalysis that many of our actions are dictated by an “unconscious” element of which we are rarely cognitively aware.⁶³ The very point of “therapy” or “analysis” is, indeed, to introduce an awareness of this unconscious into our autobiographical self and allow it to be productively molded into part of our self-identity. Today, this perspective has support from neuroscience and, indeed, we sometimes *act before thinking* or *act without knowing why*.⁶⁴ Sometimes, “*I don’t know*” is the correct answer to a question. The answer is correct because the autobiographical level of consciousness – which manifests our self-identity – is often *not* the source of action. Instead, it is another of those “inter-communicating” layers of consciousness which prompts action. Specifically, these more basic layers of consciousness often prompt human action through what are called “somatic markers”. As Erik Ringmar explains:

A somatic marker attaches an affective value to an event, a person or a situation, telling us not what the event, person or situation mean in general but what they mean to us. Once provided by an affective marker, the green marzipan coating on a creamy bun can suddenly recreate the memory of a visit to a fashionable café as a child in the last century. Our bodies rely on such *madeleine* effects for

60 Bill Chappell, “North Miami Officer Was Aiming at Man with Autism, Union Chief Says”, *National Public Radio*, 22 July 2016, available at: <http://tinyurl.com/j6esy5a>.

61 Marissa Bagg, “New Video Shows Moments Before and After Man Was Shot by North Miami Police Officer”, *NBC Miami*, 21 July 2016, available at: <http://tinyurl.com/j43ecfg>.

62 B. Chappell, above note 60.

63 Erik Ringmar, “Outline of a Non-Deliberative, Mood-Based, Theory of Action”, *Philosophia*, Vol. 44, No. 4, 2016.

64 *Ibid.*; A. R. Damasio, above note 52.

the “*anticipation of situations, previewing of possible outcomes, navigation of the possible future, and invention of management solutions.*”⁶⁵

A somatic marker is a cue for action, but these cues operate without conscious deliberation. They result in *non-deliberative action*. They are *thoughtless*, resulting in *actions without decisions*. The self simply *does not know* what is happening when these cues (somatic markers) are activated. A simple example:

Consider the proverbial case of a theater in which a fire suddenly breaks out. In this state of emergency *there is no time to think* but luckily *we do not have to*. Instead of interpreting the situation we react to the mood of panic which quickly spreads throughout the building. *We begin by acting, as it were, and only later will we become consciously aware of what we are doing.*⁶⁶

The examples of torturers slipping towards violence cited earlier are, we want to suggest, evoked through similar cues, similar non-conscious – or, rather, pre-conscious – forms of action, that see violence merge non-purposefully at particular times and places. And this, we argue, is key to understanding how torture often begins. Several questions emerge from this claim, however. The first and most problematic is the difficulties it poses to legal understandings of torture that recognize it as an *intentional* act under the 1984 Convention Against Torture. For some, speaking of torture as non-purposeful in form will risk occluding individual or collective responsibility for its emergence. While this is a real concern, we refer our readers back to the introduction of this article and the important caveat that our discussion focuses, broadly speaking, on a general sociological definition/understanding of torture distinct from the concerns of legal definitions and fields of practice. Although we acknowledge that taking such a definition is not unproblematical, we believe its use serves to productively make the picture surrounding our understanding of political violences like torture more complicated and – potentially (see below) – allows for new understandings of preventing political violence that cannot be obtained through ideational or legal approaches.⁶⁷ However, the question remains: *where* do cues for violence come from, and in which situations are they activated to produce a torturer in action?

Becoming a torturer

The process of unintentionally becoming a torturer can now be unpacked. Following Austin, torture emerges through the entanglement of an individual in *material-semiotic* webs of relations that activate – at particular points in time and space – latent cues (somatic markers) for action which *we all possess* to one degree or

65 Erik Ringmar, “The Search for Dialogue as a Hinderance to Understanding”, *International Theory*, Vol. 6, No. 1, 2014, p. 9, emphasis in original.

66 E. Ringmar, above note 63, p. 5, emphasis added.

67 See the discussion in Jonathan Luke Austin and Oliver Jütersonke, *Understanding the Grammar of the City*, Geneva Peacebuilding Platform, Geneva, 2016.

another.⁶⁸ The term “material-semiotics” is a specialized one drawn mainly from the field of science, technology and society studies, where it is commonly employed in order to study social practices in action and to ascertain the “quiddity” or “just-whatness” of those practices.⁶⁹ As John Law puts it, material-semiotic approaches “treat everything in the social and natural worlds as a continuously generated effect of the webs of relations within which they are located”.⁷⁰ The perspective stresses that no individual person (or material object) can be said to have an essence which dictates their actions. There is no “natural” torturer. Instead, the *tendencies* of individuals are generated through our relationships with other individuals, material objects, and forms of knowledge. These relationships give us certain capacities to act in one way or another,⁷¹ and among those tendencies and capacities, Austin argues, is torture. Indeed, Austin goes so far as to describe there being a norm *of* torture that sits alongside the norm *against* torture.⁷² This norm, he asserts, is founded on the relationships that all humans maintain with knowledges and objects that circulate across borders and preserve the global possibility of torture, in spite of a human tendency to find violence difficult. These theoretical specificities aside, Austin also lays out this material-semiotic theory of torture in simpler terms by constructing a model of torture made up of (1) situations, (2) materials and (3) knowledges.⁷³

Let’s start with *situations* and begin by considering the individuals most likely to carry out torture in contemporary society. A majority of these individuals – guards, soldiers, interrogators, etc. – are already engaged in forms of legitimate violence. To prepare them to use legitimate violence, these individuals are trained in ways that, to some degree, reduce the general human disinclination to violence. As Françoise Sironi has shown, a *pédagogie noire* is employed here.⁷⁴ This involves processes of desensitization and rituals of violence amongst groups of violence workers themselves (e.g. initiation rituals for new recruits) that increase their capacities for acting violently against others.⁷⁵ Importantly, however, while such a *pédagogie noire* might be a necessary condition for torture, it cannot be said to be a *sufficient* one. Again, it is important here to recall the globality of torture and that torture frequently is *not* carried out by violence workers subjected to such a *pédagogie noire*. It is not claimed, for example, that *all* members of the US military tortured bodies in Iraq or Afghanistan, despite all being subject to a *pédagogie noire*. The question becomes – as Sironi would no

68 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence across Borders” and *Small Worlds of Violence*, both above note 7.

69 See Bruno Latour, *Reassembling the Social*, Oxford University Press, Oxford, 2005; John Law, *After Method*, Routledge, London, 2004.

70 John Law, “Actor Network Theory and Material Semiotics”, in Bryan S. Turner (ed.), *The New Blackwell Companion to Social Theory*, Blackwell, London, 2009, p. 141.

71 Manuel De Landa, *A New Philosophy of Society*, Continuum, London, 2006.

72 J. L. Austin, *Small Worlds of Violence*, above note 7.

73 *Ibid.*

74 F. Sironi, above note 4.

75 On these rituals see Aaron Belkin, *Bring Me Men*, C. Hurst & Co, London, 2012.

doubt agree – what pushes individuals subjected to this *pédagogie noire* into carrying out violence at any particular time.

It appears – when we turn to psychology – that it is a combination of a *pédagogie noire* and situational dynamics that leads to torture. A situation can be considered in material-semiotic terms as a particular context or setting in which an individual comes to be related with new objects, environments and people.⁷⁶ Because situations are constantly in flux, it has long been known that being placed in certain situations can prompt unexpected behaviour. The classic example here is the Stanford Prison Experiment, in which “ordinary” university students were placed in a mock prisoner–guard scenario and where the guards very quickly began acting cruelly towards the prisoners.⁷⁷ It appeared that it was the situation that was driving behaviour, rather than decision, thought or psychological traits: situations create unexpected behaviours by providing “cues” for types of actions. Violence workers like soldiers or intelligence professionals are often placed in such scenarios, and particular situational dynamics within these settings may encourage torture. Such dynamics might include a lack of hierarchical oversight (command structure), a lack of communicative capacity between violence workers and a population (e.g., nobody speaks the same language), or an intensity of emotion (anger, desire for vengeance etc.). These factors can overcome normal “ethics” training against human rights abuses and lead to torture even when it has not been ordered. However, situations *alone* are not enough to explain how someone “becomes” a torturer without explaining how these situational *cues* are converted into “appropriate” *scripts* for action (i.e., torture). The question becomes how people know how to torture once they are placed into a particular situation. Indeed, the situational perspective is often – in psychology – placed in contrast with a “trait theory” perspective, discussed above, which implies that people are more or less inclined towards violence. However, the situational perspective itself relies on implying “universal” traits for human beings when placed in particular situations. The reason? If a particular situation acts as a cue for certain actions, individuals must know what those actions are when prompted, and because most situational theories of violence do not specify the origins of those scripts, it is implied that these are somehow “natural” to human beings.

It is thus that Austin’s second focus is on *materials* (or “objects”).⁷⁸ Austin has shown how the presence of particular material objects in a situation can encourage or discourage torture. To understand this point, Austin draws on a different, more readily relatable form of violence. Opponents of gun control in the United States claim that “guns don’t kill people, people kill people”. By contrast, advocates of gun control argue that the simple presence of a gun increases the likelihood of violence in certain situations. This so-called “weapons

76 See, for example, Randall Collins, *Interaction Ritual Chains*, Princeton University Press, Princeton, NJ, 2004; R. Collins, above note 8.

77 P. G. Zimbardo, above note 36.

78 See J. L. Austin, “We Have Never Been Civilized” and *Small Worlds of Violence*, both above note 7.

effect” can be applied to torture.⁷⁹ Austin draws on several examples here, but the most compelling is that of electrical torture. The spread of portable objects like the Taser stun gun or cattle prods has resulted in electrical torture becoming one of the most common forms of torture across the world.⁸⁰ These objects “encourage” violence in two ways. First, they make torture easier by reducing its infliction to the press of a button. This form of torture is not fatiguing and does not require the perpetrator to touch the victim. Second, the device intrinsically provides a script for action to be followed when a particular situational cue makes torture more possible. Because the device is intended – in legitimate settings – to produce harm, it already provides a script of “how to torture” that is readily available to violence workers. Another example provided by Austin is that of the chair.⁸¹ Chairs are commonly used in torture across the world. This practice is referred to in Syria as the “German Chair”, in Brazil as the “Dragon Chair”, and in Iran as the “Apollo Chair”.⁸² Most commonly, chairs are used in order to construct specific stress positions whereby the victim will be placed in a chair in a particular way that hurts their spine, their arms or another part of their body. The presence of a chair in an interrogation situation can be said to encourage torture, Austin says, because – like the Taser – it makes torture easier by aiding the construction of stress positions that do not require intervention from the torturer or contact with the victim’s body. When it comes to the chair, however, which is an everyday object, it is not immediately clear *per se* where the script for its use in this manner comes from. While a situation may cue torture (i.e., act as a somatic marker), and the chair may provide a material direction or capacity for action, a more precise “script” for action is still required to make torture possible. It is for this reason that Austin’s model for the becoming of a torturer has its third element: what he refers to either as “inscriptions” or, more simply, “knowledges”.

Scripts for torture emerge, Austin notes, from culture.⁸³ Let’s return to the Stanford Prison Experiment, which has been very heavily criticized amongst psychologists for the inclusion of extensive “demand characteristics” in the set-up of the experiment.⁸⁴ Essentially, the scientists *told* the subjects of the experiment how to behave. As one later claimed:

What came over me was not an accident. It was planned. I set out with a definite plan in mind, to try to force the action, force something to happen, so that the researchers would have something to work with. After all, what could they possibly learn from guys sitting around like it was a country club? So I

79 Leonard Berkowitz and Anthony Lepage, “Weapons as Aggression-Eliciting Stimuli”, *Journal of Personality and Social Psychology*, Vol. 7, No. 2, 1967; Bruno Latour, *Pandora’s Hope*, Harvard University Press, Cambridge, MA, 1999.

80 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence across Borders”, above note 7.

81 *Ibid.*; J. L. Austin, *Small Worlds of Violence*, above note 7.

82 UMAM, *Mafāṭih Al-Sijn Al-Sūrī*, UMAM Documentation & Research, Beirut, 2012, p. 64; D. Rejali, *Torture and Democracy*, above note 21, p. 187.

83 J. L. Austin, *Small Worlds of Violence*, above note 7.

84 Ali Banuazizi and Siamak Movahedi, “Interpersonal Dynamics in a Simulated Prison”, *American Psychologist*, Vol. 30, 1975.

consciously created this persona [of a “bad cop” or torturer]. I was in all kinds of drama productions in high school and college. It was something I was very familiar with: to take on another personality before you step out on the stage.⁸⁵

Being cued by the experimental situation towards acting violently, the subject of this experiment constructed a torturous personae based on scenes he had seen in the then recent film *Cool Hand Luke* that involved torture.⁸⁶ And while this individual claimed to have done this deliberately, Austin notes how this also occurs very frequently within torture as a non-deliberative process.⁸⁷ Cued into action by situational and material dynamics, individuals follow scripts that may be fictional, scientific or otherwise constructed. These scripts are peripheral knowledges that are not absorbed into the store of information held by an individual consciousness as directly related to torture *per se*, but when cued towards torture by particular situations or objects can be drawn upon as direct knowledge of “how to” torture.⁸⁸ As Sironi has noted, some of these scripts come from the *pédagogie noire* of violence workers – but they can also be more basic. The famous images of Abu Ghraib, for example, include naked detainees placed in the intrinsically violent American football positions that many perpetrators had learned from playing the sport and/or forms of violence found in frat party hazing rituals.⁸⁹ Likewise, amongst the most common forms of torture across the Middle East is the *falaqa* (also known elsewhere as the *bastinado*), which involves foot whipping. This form of torture is simply an intensified version of corporal punishment commonly used against children in the region.⁹⁰ Experiencing this form of punishment creates a peripheral script for action that can be employed when the individual is cued to do so by situational dynamics. Consider another description given by Austin drawing on a story told by a Lebanese fighter of his actions during the civil war:

We had barely started shaving. We were children in love with war. We copied the style of shooting in films like *Gun Smoke*, and *Rin Tin Tin* films, and Westerns. We thought people would get back up again. We didn’t understand that we’d really killed them.⁹¹

In this example it is – again – cinematic scripts for violence that individuals draw upon when placed in particular situations, and indeed, others have reported the same phenomenon in conflicts across the world.⁹² Beyond cinema, Austin notes how similar scripts are derived from texts including training manuals describing

85 Romesh Ratnesar, “The Menace Within”, *Stanford Alumni*, July/August 2011.

86 *Ibid.*

87 J. L. Austin, *Small Worlds of Violence*, above note 7.

88 On peripheral knowledges, see Martine R. Haas and Wendy Ham, “Microfoundations of Knowledge Recombination”, *Advances in Strategic Management*, Vol. 32, 2015.

89 Peggy Reeves Sanday, *Fraternity Gang Rape*, New York University Press, New York, 2007.

90 J. L. Austin, *Small Worlds of Violence*, above note 7.

91 Monika Borgmann, Lokman Slim, and Hermann Theissen (dir.), *Massaker*, UMAM Productions, 2004.

92 Joram Ten Brink and Joshua Oppenheimer, *Killer Images*, Columbia University Press, New York, 2012. Also see Marie-Monique Robin, *Escadrons de la mort*, 2003.

techniques that are *prohibited*, fictional novels, scientific articles, and personal memoirs of violence workers, as well as from television and paintings, alongside what he terms cultural knowledges, including – yes – children’s games, sporting activities and initiation rites.⁹³ These sources of knowledge are all mundane and banal. They are sources of knowledge of “how to” torture that are possessed by torturers and non-torturers alike. But when placed into a situation that provides a cue for violence, alongside material objects that encourage and provide capacities for its enaction, these knowledges come to be instantiated in the real world, often thoughtlessly and automatically. And, importantly, both these knowledges and the aforementioned material objects *circulate across borders*. It is this, Austin suggests, that has led to the globalization of torture in terms of its second component: the convergence in torture practices across borders. Because many materials used in torture are either everyday objects, like chairs, or objects that can be legitimately circulated, like stun guns, and because many knowledges used in torture are not designed for that purpose, like films, books, novels or scientific texts, they flow unobstructed around the world and lead to the emergence of very similar torture practices across time and space. It is, then, this dynamic between situations, materials and knowledges that, according to Austin, frequently leads an individual to first becoming a torturer, without intention, purpose or any decision point.

To conclude our discussion of this model, let us consider another example – one which neatly contains each of its elements within a single story. It begins with a US soldier called Chris who is deployed to Iraq.⁹⁴ Quickly, he realizes that abuse and torture of Iraqi detainees has become normalized. He recounts his first instance of becoming involved in such torture as occurring when his squad was sent on an intelligence-gathering assessment intended to capture a suspected insurgent and question him. His squad was told to use any means necessary to capture the insurgent. A target was located after a sustained firefight with the suspect and others inside the house where he was captured:

The man was bound to a chair and interrogated. During the course of the interrogation the team beat him, shocked him at various places on his body with the electrical cord torn from a lamp. That technique was suggested by a squad member who claimed to have seen it used in a movie.⁹⁵

Within this story we find (1) a situation that “cues” torture – a lack of hierarchical oversight, a command to meet the objectives by any means, and a sustained firefight resulting in high emotional tension; (2) a material object with the capacity to be used for torture (the lamp) and which suggests a particular (electrical) script for torture; and (3) a script for torture derived from a popular-cultural cinematic source that employs the aforementioned material object. This particular example comes from

93 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence across Borders” and *Small Worlds of Violence*, both above note 7.

94 See John K. Tsukayama, “By Any Means Necessary”, unpublished PhD dissertation, St Andrews, 2014.

95 *Ibid.*, p. 186.

an individual who was initiated into these events entirely by “surprise”.⁹⁶ He was – before going to Iraq – a normal individual who became a torturer through the dynamics described by the model we are introducing in this paper. And the consequences for his self-worth and psyche were substantial: he describes how, whilst in Iraq and after his return to the United States, he “kept telling [him]self it was somebody else [who tortured], it wasn’t me ... I just kept believing that it was somebody else that did it”, because “I ... thought that they [that second person] were a monster. (Pause) That that person had no place back in the States. I had no place back in the States.”⁹⁷

Becoming such a monster, in this case and those described earlier, as well as countless others, did *not* involve a specific decision to do so, or a specific order to do so. Instead, this model of torture compels us to think about the process of becoming a torturer in terms of *transition points*. One becomes a torturer through a transition that occurs when a situation cues the possibility of torture through a somatic marker, torture is encouraged through the presence of particular material objects, and appropriate scripts fitting these situations and material objects can be found within the peripheral knowledges of individuals. This completed model is depicted in [Figure 2](#).

Beyond the basic version of Austin’s model depicted in [Figure 2](#), it is important to add a further *human* element to this discussion. In one way, this model can be seen as an “ideal-type” in which the (re-)emergence of torture in societies in which it does not exist can be understood and envisaged. The closest real-world case to this model is a democratic, wealthy and stable State that has no recent history of torture (examples would include certain Scandinavian states, perhaps). In these States, torture is most likely to occur through this model: legitimate violence workers are placed into a situation that provides a cue for torture alongside supporting materials and knowledges that provide scripts for action. In such cases, torture can emerge entirely without decision, desire or thought. In most cases, however, there is already likely to be a culture of torture – to some degree – that further encourages the emergence of torture at a very human level. It is thus important to understand that the process of becoming a torturer outlined here is one of a non-deliberate initiation into this act. Once enough people have been thusly initiated, however, it becomes critical to think of a continuum of types of torturers in terms of their level of experience in this activity. Austin thus distinguishes between initiates and specialists in torture.⁹⁸ Specialists in torture are those who “innovate” in this practice and deliberately think through specific ways to torture and/or are able to use the procedure for more or less strategic ends. Importantly, such specialists also circulate across borders quite freely. For example, it is reported that many interrogation and/or torture techniques used by the Syrian State were “imported” by a man named Alois Brunner. Brunner was an Austrian Schutzstaffel (SS)

96 *Ibid.*, p. 162.

97 *Ibid.*, p. 212.

98 J. L. Austin, *Small Worlds of Violence*, above note 7.

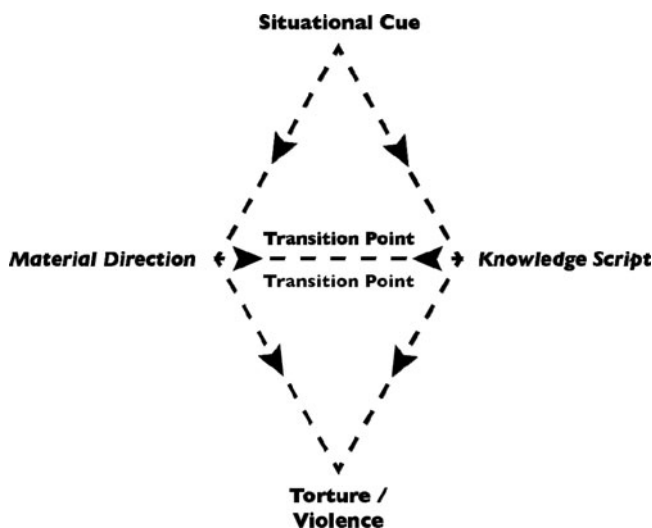


Figure 2. Model for non-purposefully becoming a torturer. Reproduced from J. L. Austin, *Small Worlds of Violence*, above note 7, p. 394.

officer during the Second World War and is believed to be responsible for thousands of deportations of European Jews to gas chambers as part of the Holocaust. He fled to Syria after the war and resided in Damascus, where he is reported to have collaborated with the *mukhabarat* (intelligence agencies) on interrogation practices.⁹⁹ For a more recent example, in 2004 US Colonel James Steele was sent as a civilian adviser to US-occupied Iraq, where he trained paramilitary units of the Iraqi security forces. Previously, Steele had served in Vietnam and as an “adviser” during the Dirty War in El Salvador. He is personally implicated in torture in Iraq, and in training Iraqis to torture.¹⁰⁰ Similar stories of such “specialists” circulating knowledge can be found in French Algeria, wider Latin America, the Soviet Union and far beyond. Here, it is humans who are spreading knowledge across borders.¹⁰¹

When considering such specialists in torture, however, it must be kept in mind that they are very likely to have begun torturing much as any other torturer: without intending or wanting to. The capacity to become such a specialist in torture might be seen, for example, in the European police officer serving in Algeria that Fanon described. This officer recounted how torture – for him – became “a matter of personal success” and how among torturers “we’re sort of competing” because “you need to use your head in this kind of work. You need to know when to tighten your grip and when to loosen it. *You have to have*

99 Adam Chandler, “Eichmann’s Best Man Lived and Died in Syria”, *The Atlantic*, 1 December 2014.

100 Mona Mahmood *et al.*, “Revealed: Pentagon’s Link to Iraqi Torture Centres”, *The Guardian*, 6 March 2013.

101 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence across Borders”, above note 7.

a feel for it."¹⁰² This kind of "feel" for torture comes after long years of practice in its form and results in the kind of "competition" and "pride" in the activity that the officer demonstrates. But this does not negate the overall psychological harm it causes to the perpetrator: the officer was visiting Fanon for his services as a physician in order to help him go on torturing because he felt that the violence he was exercising was getting out of control. Indeed, specialists in torture must be seen as psychologically damaged individuals, as being afflicted by an illness and needing *care*. This is the point made by Françoise Sironi and buttressed by Austin's theory which suggests that *first* "becoming" a torturer is only rarely a conscious choice. But more than care for the torturer in and of himself, this act of care is also critical for wider society: as Sironi notes, and Fanon's example of the officer beating his wife and children demonstrates, even when war or hostilities provoking torture in a particular setting halt, these specialists continue to exist in society (only rarely are all held accountable for their actions), exercising forms of violence on different subjects – their families, domestic prison populations, etc. Caring for the torturer is thus part of caring for wider society as a whole, and indeed, failure to do this often results in what Austin terms a cultural "spiral" of torture taking hold.¹⁰³ Because specialists in torture continue life as normal after periods of high political conflict, they can infect or transmit their knowledge to other initiate torturers and so make torture even more likely to emerge amongst other individuals. This additional model of the cultural spiral of torture is seen in Figure 3, which shows how as time progresses, more and more individuals become caught in the spiral and are initiated into torture. It is, then, both this spiral and the wider transition points which lead to people becoming torturers that we need to disrupt in order to prevent torture. And so we now move to describing how *caring for the torturer* is, perhaps jarringly, the best way to prevent torture.

Towards a global ergonomics of care: Prevention without intention

Traditionally, efforts to prevent torture have followed one of several *rights-based* approaches. Generally, these approaches follow what Hagan, Schoenfeld and Palloni describe as "largely separate lines conceived in terms of health and crime".¹⁰⁴ For example, claims of torture resulting from psychological pathology (the "bad apples" thesis) have led to a desire to prevent individuals so afflicted from taking up positions of authority in political or military institutions.¹⁰⁵ By contrast, security sector governance programmes have sought to improve State,

102 F. Fanon, above note 43, p. 198, emphasis added.

103 J. L. Austin, *Small Worlds of Violence*, above note 7.

104 John Hagan, Heather Schoenfeld and Alberto Palloni, "The Science of Human Rights, War Crimes, and Humanitarian Emergencies", *Annual Review of Sociology*, Vol. 32, 2006, p. 329.

105 Rose McDermott and Peter K. Hatemi, "The Study of International Politics in the Neurobiological Revolution", *Millennium: Journal of International Studies*, Vol. 43, No. 1, 2014.

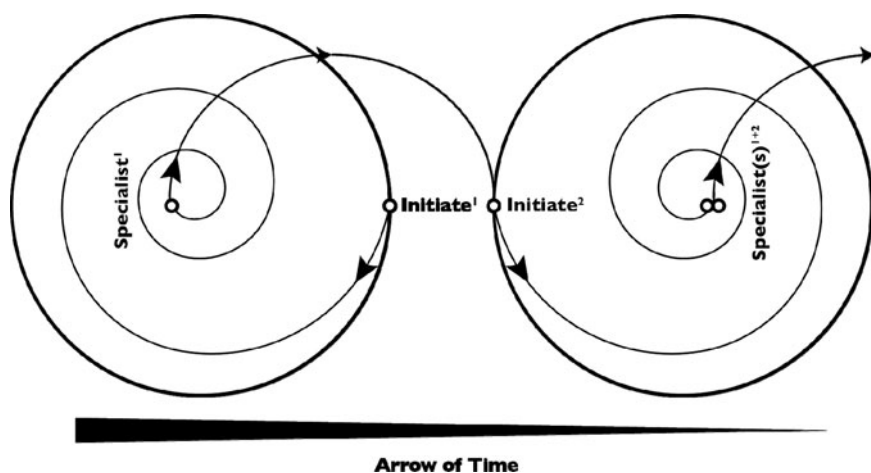


Figure 3. The cultural spiral of torture. Reproduced from J. L. Austin, *Small Worlds of Violence*, above note 7, p. 287.

society and military relations by following a modified Hippocratic oath to “do no harm while promoting human rights” and so to restore the health of the chronically abuse-prone non-democratic or otherwise afflicted State institution by promoting democracy, accountability, transparency, legal compliance, public legitimacy and so on.¹⁰⁶ Likewise, the wider human rights literature sees instilling respect for rights and norms against violence in political and military institutions as eventually leading to the internalization of these ideas to the degree that the possibility of abuse reduces.¹⁰⁷ These basic ideas – institutional reform and the dissemination of norms – are at the centre of most peacebuilding and conflict prevention schemes.¹⁰⁸

In addition, rights-based approaches supplement their focus on institutional health with prosecuting the crime of abuses that do emerge, thus giving teeth to their ideational components. Kathryn Sikkink, for example, has theorized the emergence of a global “justice cascade” whereby human rights prosecutions substantively reduce the potential for further abuses by increasing costs on political and military leaders.¹⁰⁹ The threat of being held to account for the crime of violent human rights abuses is postulated to gradually lead to prevention, and States and organizations working in this field are thus

106 Mark Sedra, *The Future of Security Sector Reform*, Centre for International Governance Innovation, Waterloo, CA, 2010.

107 See, *inter alia*, Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*, W. W. Norton, New York, 2011; Kathryn Sikkink and Maragret E. Keck, *Activists Beyond Borders*, Cornell University Press, New York, 1998.

108 Christopher P. Ankerson, “Praxis Versus Policy: Peacebuilding in the Military”, in Tom Keating and W. Andy Knight (eds), *Building Sustainable Peace*, University of Alberta Press, Edmonton, AB, 2004; Charles T. Call and Susan E. Cook, “On Democratization and Peacebuilding”, *Global Governance*, Vol. 9, No. 2, 2003; Vincent Chetail and Oliver Jutersonke, *Peacebuilding*, Routledge, London, 2014.

109 K. Sikkink, above note 107.

encouraged to implement mechanisms of human rights monitoring and accountability.¹¹⁰ By way of practical example, attention has recently been focused on Nepal, where advocates of the rights-based approach have developed a novel means of creating a financial disincentive to carrying out torture among the State's security forces. By pushing for the improved vetting of police and military forces who serve in UN peacekeeping missions, to which Nepal and other States are large contributors, and excluding all those who have been implicated in torture and other human rights abuses, the claim is that the prospect of losing the (relative to national standards) high wages of serving in a peacekeeping force will deter perpetrators from carrying out abuses at home.¹¹¹

These rights-based models of prevention, as depicted in Figure 4, can be described as relying on conceptualizing a decision point of violence at which a non-torturer becomes a torturer. Particular push factors for this decision might include pathology, emotion, dehumanization or ideology. Preventive measures are thus designed to push back against these factors by introducing disincentives (i.e. punitive punishments), legal prohibitions, human rights monitoring, etc., so as to prevent a decision to become a torturer being made. At first glance, the model of becoming a torturer that we have sketched above may well seem worrying for advocates of this preventive model. If torture can emerge without being ordered or desired, or without any decision being taken, then prevention might seem impossible. We should therefore clarify that we do not deny that torture is *sometimes* decided and ordered, and that the rights-based approaches are critical in these cases. Moreover, the rights-based approach is critical in dismantling the cultural spiral of torture described above. Nonetheless, Austin argues strongly that the rights-based approach alone is insufficient in tackling the norm of torture that he identifies as surrounding its non-purposeful emergence.¹¹² Indeed, if much torture besides these intentional instances is in fact non-intentional, then we require an entirely different and complementary mode of prevention. For example, while it would be desirable to see legal repercussions for the US government and CIA officials who authorized the CIA's extraordinary rendition programme, it is notable that less than 200 people were detained by the CIA, and only a fraction of those tortured, whereas – by contrast – there are thousands of allegations of torture against US soldiers in Afghanistan and Iraq whose actions *were not contained within this decisionist framework of action but, instead, seemed to occur without any deliberate purposefulness*.¹¹³ Likewise, torture in many settings other than war or conflict (domestic prison systems, police stations, etc.) is more likely to occur through this non-purposeful means than to be ordered or desired. We may go so far as to suggest, then, that without a new kind of preventive strategy for torture we are “missing the target” vis-à-vis the social

110 Manfred Nowak, “The Need for a World Court of Human Rights”, *Human Rights Law Review*, Vol. 7, No. 1, 2007.

111 Advocacy Forum Nepal, “Vetting in Nepal: Challenges and Issues”, Kathmandu, 2014.

112 J. L. Austin, “Torture and the Material-Semiotic Networks of Violence across Borders”, above note 7.

113 US Senate Select Committee on Intelligence, above note 24; Open Society Foundation, “Globalizing Torture”, New York, 2013.

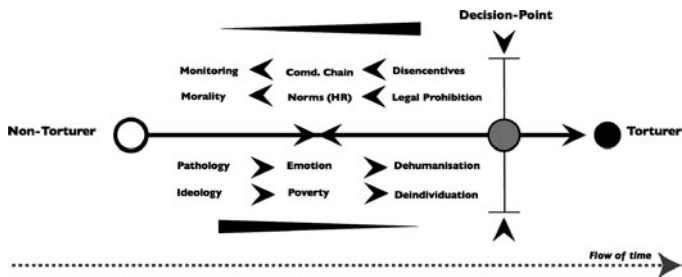


Figure 4. The classical model of preventing torture. Reproduced from J. L. Austin, *Small Worlds of Violence*, above note 7, p. 392.

origins of a majority of cases of torture. The challenge then becomes imagining a form of prevention operating outside intention, deliberation and/or desire – that is, *prevention without intention*.

Imagine a traffic accident. One thinks of one or more vehicles, in a collision, with deaths or injuries; crumpled crash barriers, ambulances and so on. Note, first, how unlike vis-à-vis torture, our thinking about the context of such a traffic accident *already includes* preventive measures; that is to say, we may think of the crash barrier or the deployed airbags, or any number of other safety features used by modern vehicles. Those elements represent an entirely different type of prevention to the classical (rights-based) one outlined above. Consider, for example, the case of a

4 A.M. [car] crash that was classified by police as caused by a drowsy driver. Yes, if the driver in question did not drive past his or her “bedtime” (driver factor) the crash would not have occurred. However, the crash could have also been prevented by a drowsy-driver detection system (a vehicular factor), a road-departure warning system (a vehicular factor), or an effective rumble strip that alerts the driver if leaving the lane (environmental factor).¹¹⁴

Preventing deaths in traffic accidents involves both an ideational component (countering the view that it is socially acceptable to decide to drive excessively fast, fatigued or intoxicated) and the introduction of material and semiotic elements (crash barriers, clearly legible road signage, etc.) that prevent harm without relying on tackling (human ideational) causes *per se*. The ideational component here involves affecting human decisions: do not decide to drive while drunk. The material and semiotic elements represent a form of “indirect” or “non-causal” prevention that will operate irrespective of any human decision and so also work to prevent (or at least reduce the harm caused by) traffic accidents that are not caused by any decision. These “indirect” means of prevention are, in essence, forms of *care*. Crash barriers “care” for the general public passively, in the background, and in a way we don’t notice, as do technologies built into cars over the years to increase their safety during crashes. All these factors form part

114 Michael Sivak and Omer Tsimhoni, “Improving Traffic Safety”, *Journal of Saftey Research*, Vol. 39, 2008.

of the *ergonomics of safety*. Ergonomics is about the study and design of products, systems, processes or structures that manage the interactions between objects and structures in the most functional, comfortable and safe manner possible. The lids on medicines are ergonomically designed to prevent children opening them, for example. Ergonomics is a form of care.

At the Centre on Conflict, Development, and Peacebuilding at the Graduate Institute, Geneva, a new research project entitled the Violent Prevention (VIPRE) Initiative is working precisely to develop a global ergonomics of care vis-à-vis violent human rights abuses and, more specifically, torture.¹¹⁵ This model was designed based on Austin's theory of torture and the model of prevention he lays out for that theory.¹¹⁶ If we return to Figure 2, above, which depicts Austin's model of the non-purposeful emergence of torture, we can now identify two sites of intervention into the ergonomics of torture that were not previously noticed. Specifically, the challenge becomes finding ways of actively intervening in and preventing the situational cues of torture and/or the material directions and knowledge scripts that make up the transition (as opposed to decision) point of torture. The approach to this task taken by the VIPRE Initiative is to identify entry points into what Tim Ingold has described as the taskscape of violent practices.¹¹⁷ This concept is drawn in analogy to that of a landscape, and affirms that:

One of the outstanding features of human technical practices lies in their embeddedness in the current of sociality. ... Just as the landscape is an array of related features, ... the taskscape is an array of related activities. And as with the landscape, it is qualitative and heterogeneous.¹¹⁸

Ingold makes this claim to counter the idea that "tasks are suspended in a vacuum" and argues that we must not separate "the domains of technical and social activity".¹¹⁹ For the VIPRE Initiative, this notion of a *taskscape* serves as a holistic means of combining the situations, materials and knowledges that Austin's theory conceptualizes as leading to the non-purposeful emergence of torture. The concept suggests that we must connect human motivation with a whole landscape of other supporting elements. In doing so, the VIPRE Initiative model of prevention proposes that we may be able to locate elements in this taskscape which can be altered so as to stop the emergence of violent human rights abuses. This novel understanding of preventing State-led violence is schematized in Figure 5, which depicts Austin's more technical model of the trajectories by which an individual "becomes" a torturer. In this model, the taskscape of any military or intelligence practitioner likely to carry out torture is depicted in the right-hand two quadrants of the schematic. These two quadrants

115 The VIPRE Initiative is an international collaboration led by Jonathan Luke Austin, who conceived, designed and is implementing the project. For more details, see: www.vipre.ch.

116 J. L. Austin, *Small Worlds of Violence*, above note 7.

117 Tim Ingold, *The Perception of the Environment*, Routledge, London, 2000, p. 195.

118 *Ibid.*

119 *Ibid.*

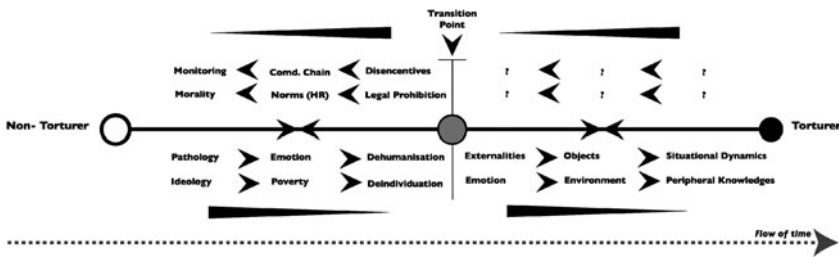


Figure 5. The VIPRE model of preventing torture. Reproduced from J. L. Austin, *Small Worlds of Violence*, above note 7, p. 393.

effectively double, as compared to the classical model outlined in Figure 4, the social spaces that must be of both scientific and public policy concern – but in doing so, they also double the effective length of the flow of time between a person transitioning from a “non-torturer” to a “torturer”. This doubling of time provides the possibility of constructing a set of potential preventive measures against violent human rights abuses (the question marks in the top right-hand quadrant), the present-day absence of which from training regimes, human rights discourse and wider policy-making discourses is – the VIPRE Initiative and Austin contend – one of the principal reasons for the continued (re-)emergence of torture and other violent human rights abuses across borders. These question marks, we suggest, are the points at which a kind of “road traffic safety scheme” for political violence must be built; a set of material and semiotic preventive measures. It is thus that rather than marking the distinction between prior or pre-existing causes of violence (ideology, pathology, etc.) and the moment of becoming a torturer as a decision point, Figure 5 describes it as a transition point. This transition point marks the start of a practical sequence of acts that in the majority of cases do not begin with the decision “I will torture.” Instead, the taskscape of the emergence of violent human rights abuses like torture may begin with an innocuous task – such as manning a checkpoint – or using a legitimate violence – interrogating a prisoner, for example. The presence of particular situational dynamics, peripheral (subjectifying) knowledges, material objects and many other aspects may then render the taskscape more or less likely to enable the emergence of violent human rights abuses.

The VIPRE Initiative takes as its challenge reducing these risks by seeking to construct a global ergonomics of care for the person becoming a torturer. This act of care is currently focused on drawing on the insights of the Initiative in order to radically reframe human rights training within advanced military forces. The training model being developed by the VIPRE team does not focus on disseminating rules, ideas or laws about human rights or legal obligations to violence workers; rather, it draws on Austin’s theory of prevention in order to increase the ability of violence workers to “resist” the pull of situational cues that lead to torture and the use of knowledges found in popular-cultural artefacts as scripts for torture. In addition, the project seeks to ergonomically redesign

particularly problematic military material objects – handcuffs, blindfolds, etc. – in ways that reduce their capacity to be used for torture.¹²⁰ In short, the project envisages refocusing the attention of humanitarian and human rights organizations away from being placed entirely on rights-based approaches and towards building up an invisible form of care for the figure of the “not-quite-yet” torturer that will, slowly but surely, reduce the number of people making that transformation.

Closing the cycle of torture

Let us conclude where we started, with Carlos Liscano and his personal reflections on the figure of the torturer. Liscano remarks:

There is the soldier who follows orders one after another The soldier is not responsible, his superiors are the ones who turn him into a villain. But one can find a soldier doing things that were not ordered. The hooded prisoner is always led, so sometimes as a joke, a soldier has a prisoner run head-on into a wall The soldier says, “Ah, pardon.” ... *One asks, therefore, why does the soldier do what was not ordered, what is not even torture for information, but plain evil, with no point, no objective* One has been used to thinking that all human beings are alike, and now has to ask, how is it that this particular human being, the soldier, can make a totally defenseless individual bang his head against the wall? ... *That is also the human being.*¹²¹

A torturer is, first and foremost, a human being, like you and me. In this article, we have shown how torturers nonetheless often become Other than ourselves without choosing or desiring to do so. Torture, we have suggested, is often non-purposeful. Drawing on Austin’s theory of the material-semiotic emergence of torture, we have described how this becomes possible through cues and scripts for action that are embedded in situations, material objects and knowledges. But, more than this, we began by discussing the psychological impact of “becoming a torturer” for the torturer themselves and noting how this impact is substantial and deleterious. It is thus that the model of prevention we have outlined here is founded on an ethic of care: care for the fact that torturers are human beings who express – yes – the dark side of humanity and civilization, but who nonetheless might be recovered as fully human subjects or prevented from making that transformation if we approach the topic with a willingness to overcome our traditional demonization of these figures. The challenge is to be open to the prospect of caring for torturers across the world.

120 J. L. Austin, *Small Worlds of Violence*, above note 7.

121 C. Liscano, above note 1, p. 71, emphasis added.

The crisis of detention and the politics of denial in Latin America

Paul Hathazy and Markus-Michael Müller

Paul Hathazy is a Researcher at the National Scientific and Technical Research Council of Argentina, working at the Center for the Study of Culture and Society, Universidad Nacional de Cordoba.

Markus-Michael Müller is an Assistant Professor of Political Science at the ZI Lateinamerika-Institut, Freie Universität Berlin.

Abstract

This article assesses the causes of the crisis of detention in Latin America. It is argued that this crisis, which manifests itself in overpopulation of the region's prison systems, deficient infrastructure, prison informality and violence propelled ultimately by political processes, is mostly related to, on the one hand, disastrous human rights conditions inside Latin American prisons, and on other, the political denial of these conditions. This denial produces a state of institutional abandonment that is preserved by the interests of politicians and bureaucrats, who are engaged in denying prison violence and human rights abuses while simultaneously calling for more punishment and imprisonment.

Keywords: prison conditions, Latin America, violence, denial, human rights, internationalization strategies.

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Introduction

On Sunday, 1 January 2017, the Brazilian city of Manaus witnessed an outbreak of violence. It was, however, not on the streets of the city that the violence – lethal violence, consuming the lives of at least fifty-six people – erupted. Rather, it happened behind the walls of the Anísio Jobim Penitentiary Complex, which was inaugurated in 1999 to replace a semi-open prison farm 30 kilometres away from the downtown area, and which was privatized in 2014. As news agencies reported, the violence began with a prison riot that, “with decapitated bodies thrown over prison walls”, culminated in the “bloodiest prison revolt in more than two decades in Brazil’s overcrowded penitentiary system”.¹ The violence that broke out in the prison, and which was not stopped by the police – who were still in charge of order and security – for more than seventeen hours, resulted from turf wars between two rival drug gangs, the Família do Norte and the Primeiro Comando da Capital. In the aftermath of the riot it became apparent that the violence had been planned in a systematic way. A network of tunnels was discovered, and during “the days before the uprising, prison guards had come to believe that drug trafficking groups were smuggling in firearms, some of which were collected by police after the violence subsided”.² All responsibility was put on the prisoners themselves. The private contractors involved in managing the prison complex claimed that public authorities were responsible for internal discipline, order and security, including riot control.³ Brazil’s minister of justice, Alexandre de Moraes, in turn blamed the victims, telling the press one day after the riot ended through negotiations: “The inmates had established with the [public] administration [of the prison] a promise that everything would run smoothly throughout the holidays and there wouldn’t be any problems. They didn’t keep their promise, but you can’t expect much from criminals, can you?”⁴

Far from being a sporadic and isolated incident, this episode of prison violence and the structural conditions that allowed it to happen – including the non-intervention by the police and informal deals between inmates and the prison administration, as well as the denial of the responsibility by the latter – reflect, in a paradigmatic way, the situation in Brazil’s contemporary prison system. It is a system where violence in its manifold manifestations – structural, institutional, physical and symbolic – is the norm rather than the exception:

- 1 Alonso Soto, “Brazil Drug Gangs Spark Prison Riot, 56 Dead”, *Reuters*, 2 January 2017; Nátalia Lucas, “Detentos foram esquartejados e decapitados em briga de facções em presídio de Manaus”, *O Globo*, 2 January 2017.
- 2 Jill Langlois, “126 Inmates Still at Large in Brazil after a Prison Riot that Left 56 Dead”, *Los Angeles Times*, 6 January 2017.
- 3 “Umanizzare esclarece o seu papel”, available at: www.umanizzarebrasil.com.br/noticias/umanizzare-esclarece-o-seu-papel/ (all internet references were accessed in October 2017).
- 4 Euan McKirdy and Jay Croft, “At Least 56 Killed in Brazil Prison Riot over Drug Turf, Officials Say”, *CNN*, 3 January 2017, available at: <http://edition.cnn.com/2017/01/02/americas/brazil-prison-riot/>.

Part of the reason prison violence is so common in Brazil is that conditions in most of the country's penitentiaries are barbarous. There are an estimated 656,000 incarcerated people in state prisons, where there is officially space for less than 400,000. Yet roughly 3,000 new inmates are added to overcrowded penitentiaries each month. The prison population has increased by more than 160 percent since 2000. It's for good reason that a former justice minister reportedly said he'd rather die than spend time in a Brazilian prison. Brazil's state prisons are overseen by drug gangs that act as judges, jurors and executioners. Most prisons are divided up among competing gangs. The government is only nominally in control. Experts describe drug factions as a "parallel state." Gangs have long recruited their rank and file from prisons and organize trafficking and racketeering businesses from within their walls. Research has found that 70 percent of inmates who leave prison find their way back.⁵

While in light of this scenario it would be fair to say that the contemporary Brazilian prison system is in crisis, when seen from a more regional perspective, neither (lethal) prison violence nor the structural features that contribute to its normalization are unique to Brazil. Rather, throughout the continent, prison systems can be described as being "in crisis", a fact to which we refer in this article as the *crisis of detention in Latin America*. It is the purpose of this article to assess the causes and consequences of this crisis.

This article argues that the crisis of detention in Latin America, which manifests itself most clearly in the overpopulation of the region's prison systems, deficient infrastructure and prison violence, is mostly related to, on the one hand, disastrous human rights conditions inside Latin American prisons, and on the other, the *political denial* of these conditions. As the latter produces a state of institutional abandonment that is preserved by the interests of politicians and the judiciary who are engaged in denying prison violence and human rights abuses while promoting more punishment, the two sides of the crisis of detention in the region are deeply linked. They fuel a mutually reinforcing cycle of crisis-as-denial that, so far, has been crucial to limiting the impact of prison reform efforts in the region. To break out of this cycle, we claim that a politics of non-denial is needed which restores the human (and legal) rights of prisoners without relegating inmates to passive objects of increasingly securitized "humanitarian interventions".

We elaborate this argument in three steps. First, we offer an overview of the Latin American crisis of detention by highlighting the growth of the region's inmate populations, the prevailing informality and violence inside Latin American prisons, and the social composition of the prison population. Next, we situate these developments in their political and penal bureaucratic context. Specifically, we highlight the somewhat paradoxical role of democratization, party politics and neoliberalization in triggering a "punitive turn" in the region that led to the emergence of criminal justice reform and penal State expansion combined with

5 Robert Muggah and Ilona Szabó de Carvalho, "Brazil's Deadly Prison System", *New York Times*, 4 January 2017.

penal populism, and gave rise both to an upsurge in incarceration rates and to the political, judicial and expert denial of prison violence and human rights violations in Latin American institutions of confinement. In a third step, we turn to the crucial obstacles of and for prison reform by pointing towards sites of contestation and denial of human rights abuses inside Latin American prisons, thereby demonstrating how under conditions of politically and judicially produced abandonment, human rights and international fora become elements of last resort for inmates and human rights activists, transforming prisons into targets for humanitarian interventions. These interventions, however, operate according to the tensions of national penal fields, which in most cases leads to a denial of the structural violence of Latin American prison conditions, while still demonstrating a “will to improve”.⁶ In some cases, however, international human rights strategies contribute to policy changes, going beyond a predominantly symbolic concern. This article briefly analyzes how these international actions have been backed or resisted by the efforts of Latin American politicians, judges and even criminal justice reform experts in different national scenarios, leading to the recognition or denial of human rights violations inside the region’s prison system and to changes or continuities in some prison policies. In conclusion, we summarize the main findings of the article and highlight the implications and contributions of social-scientific studies for a possible way out of the Latin American crisis of detention, starting with recognizing the social sources and political effects of its denial.

Inside Latin America’s carceral archipelago

For a better understanding of the scope and severity of the crisis of detention in contemporary Latin America, it makes sense to move beyond more spectacular, yet far from exceptional, outbreaks of prison violence, such as the Anísio Jobim riot mentioned above. To this end, this section will analyze the more mundane and “routinized” manifestations of the crisis of the region’s prison systems by highlighting three defining features of Latin America’s carceral landscape: (a) overcrowding, (b) informality and (c) the social composition of the inmate population.

Regarding the first issue, *overcrowding*, it has been widely documented that the last two decades witnessed a dramatic increase in the regions’ prison population,⁷ reflecting what Darke and Karam have termed “the expanding

6 This term is borrowed from Murray Li, *The Will to Improve: Governmentality, Development and the Practices of Politics*, Duke University Press, Durham, NC, 2007.

7 Lucia Dammert and Liza Zúñiga, *Prisons: Problems and Challenges for the Americas*, FLACSO, Santiago de Chile, 2008, pp. 41–66; Sacha Darke and Maria Lúcia Karam, “Latin American Prisons”, in Yvonne Jewkes, Ben Crewe and Jamie Bennett (eds), *Handbook on Prisons*, 2nd ed., Routledge, Abingdon, 2012, p. 462; Manuel Iturralde, “Colombian Prisons as a Core Institution of Authoritarian Liberalism”, *Crime, Law and Social Change*, Vol. 65, No. 3, 2016, pp. 139–140; Paul Hathazy and Markus-Michael Müller, “The Rebirth of the Prison in Latin America: Determinants, Regimes and Social Effects”, *Crime, Law and Social Change*, Vol. 65, No. 3, 2016, p. 114–121; Markus-Michael Müller, “The Rise of the Penal State in Latin America”, *Contemporary Justice Review*, Vol. 15, No. 1, 2012, pp. 64–67.

power of punishment” in Latin America.⁸ While the political and economic context factors that triggered this development will be assessed in the next section, before turning to the causal factors behind this process, it is important to take a closer look at some numbers to better illustrate how powerful and pervasive this trend has been – and how much it has contributed to the crisis of detention in the region.

The rise of the region’s prison population is most evident when putting Latin American developments in a global perspective. As the most recent edition of the *World Prison Population List*, the most comprehensive publicly available data on prison population trends, states, while at the global scale the prison population has grown by nearly 20% since 2000, this trend unfolds unevenly, with notable regional differences:

The total prison population in Oceania has increased by almost 60% and that in the Americas by over 40%; in Europe, by contrast, the total prison population has decreased by 21%. The European figure reflects large falls in prison populations in Russia and in central and eastern Europe. In the Americas, the prison population has increased by 14% in the USA, by over 80% in central American countries and by 145% in south American countries.⁹

Seen from a global perspective, Latin America is the world region that witnessed the highest growth rates of its prison population in the new millennium. When breaking these numbers down to the ratio of prisoners per 100,000 inhabitants, Latin America witnessed an increase from 161 at the beginning of the millennium¹⁰ to 288 in 2015.¹¹ With the exceptions of Guatemala (121), Haiti (97) and Bolivia (122),¹² all Latin American countries by far exceed the global median of 144, including extreme cases such as Cuba (510), El Salvador (492), Belize (449), Panama (392) and Brazil (302).¹³

This massive prisoner intake, however, has not been matched by a simultaneous expansion of the region’s prison facilities, prison budgets and existing institutional infrastructures, thus leading to serious overcrowding. In fact, “[o]vercrowding has reached unprecedented levels because the increase in incarceration has far outstripped any increase in physical capacity” of the region’s penitentiaries.¹⁴ Currently, *all* Latin American prisons are overcrowded,

8 S. Darke and M. L. Karam, above note 7, p. 462.

9 Roy Walmsley, *World Prison Population List*, 11th ed., Institute for Criminal Research Policy, Birkbeck, University of London, 2016, p. 2, available at: www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf.

10 Mark Ungar and Ana Laura Magaloni, “Latin America’s Prisons: A Crisis of Criminal Policy and Democratic Rule”, in Marcelo Bergman and Laurence Whitehead (eds), *Criminality, Public Security and the Challenge to Democracy in Latin America*, University of Notre Dame Press, Notre Dame, IN, 2009, p. 224.

11 This number is based on data provided by the *World Prison Population List*, above note 9, including Caribbean countries.

12 In the case of Haiti, this extremely low number should mostly be seen as a reflection of the near-total destruction of all public infrastructure, including all the country’s prisons, after the 2010 earthquake.

13 *World Prison Population List*, above note 9, pp. 5–7.

14 M. Ungar and A. L. Magaloni, above note 10, p. 226.

and “all of them, with only one single exception, [suffer] from critical overcrowding (a density of 120 per cent or more)”.¹⁵

Informality, the second defining feature of the region’s prison systems and their crisis, is a direct consequence of overcrowding. Informality, to be sure, has long been a defining feature of Latin American prisons, but the increase in the region’s inmate population during the last two decades has triggered a veritable institutionalization of informality. In contemporary Latin America, it seems, informality is the norm rather than the exception regarding how prisons function – and this functioning is therefore dominated by the existence of “socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels”.¹⁶ Although the actual degree of informality is context-dependent, and some of the region’s prison systems, such as those of Argentina and Chile, have witnessed a strengthening of their formal-institutional capacities to impose and enforce order,¹⁷ it is nonetheless undeniable that informality is part and parcel of the way most prisons in the region operate. Taking a closer look at this topic is therefore indispensable for understanding the crisis of detention in the region.

Existing research has documented how the precarious infrastructural conditions in the region’s prison systems mean that inmates and their families have to develop informal strategies for getting access to basic services such as food, clothing or hygiene products. Usually this implies bribing prison guards.¹⁸ In fact, to satisfy their basic everyday needs, prisoners are dependent upon prison black markets “that are protected, ‘taxed’ and operated by the prison personnel, in collaboration with inmates, who additionally manage the illegal trafficking of weapons, cell phones, alcohol, drugs or prostitution inside the prisons as well as the systematic extortion of prisoners”.¹⁹ It is telling, in this regard, that Venezuelans, for instance, refer to a prison sentence as “*pagando condena*” (literally, “paying [a] sentence”).²⁰

15 Elías Carranza, “Prisons in Latin America and the Caribbean: What to Do, What not to Do”, United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, Resource Material Series No. 94, Fuchu, 2014, p. 193, available at: www.unafei.or.jp/english/pdf/RS_No94/No94_VE_Carranza.pdf.

16 Gretchen Helmke and Steven Levitsky, “Informal Institutions and Comparative Politics: A Research Agenda”, *Perspectives on Politics*, Vol. 2, No. 4, 2004, p. 727.

17 Paul Hathazy, “Remaking the Prisons of the Market Democracies: New Experts, Old Guards and Politics in the Carceral Fields of Argentina and Chile”, *Crime, Law and Social Change*, Vol. 65, No. 3, 2016; P. Hathazy and M.-M. Müller, above note 7, p. 122.

18 See, for instance, Jim Cavallaro, Jacob Kopas, Yukyan Lam, Timothy Mayhle and Soledad Villagra de Biedermann, *Security in Paraguay: Analysis and Responses in Comparative Perspective*, Harvard Law School, Human Rights Program, Cambridge, MA, 2008; L. Dammert and L. Zúñiga, above note 7; Lirio Gutierrez Rivera, *Territories of Violence: State, Marginal Youth, and Public Security in Honduras*, Palgrave Macmillan, Basingstoke, 2013; P. Hathazy and M.-M. Müller, above note 7, p. 130; M.-M. Müller, above note 7; Mark Ungar, “Prisons and Politics in Contemporary Latin America”, *Human Rights Quarterly*, Vol. 25, No. 4, 2003.

19 Markus-Michael Müller, “The Universal and the Particular in Latin American Penal State Formation”, in Peter Squires and John Lea (eds), *Criminalisation and Advanced Marginality: Critically Exploring the Work of Loïc Wacquant*, Policy Press, Bristol, 2012.

20 Christopher Birkbeck and Neelie Pérez-Santiago, “The Character of Penal Control in Latin America: Sentence Remissions in a Venezuelan Prison”, *Criminology and Criminal Justice*, Vol. 6, No. 3, 2006, p. 290.

Informal relations between prison authorities and inmates (and their families), however, extend beyond the realm of black markets. They also define the way many prisons in the region are governed. As we have argued elsewhere, the “‘numerical’ imbalance between guards and inmates has produced a form of prison governance in which public officials systematically enlist prisoners as auxiliaries to perform basic prison functions”. This implies that “the reproduction of the internal social order is left to prisoners’ organizations that govern cell-blocks, cells and/or dormitories”. As a consequence of this, it is often not the State but inmates themselves who govern Latin American prisons (including the use of force and the application of punishment), in particular those inmates endowed with substantial access to political and economic power and influence.²¹

One important consequence of this way of informally co-produced prison governance in Latin America is that many prisons in the region contribute to the reproduction of the basic security problem they are expected to solve: organized criminality and the violence related to it. In fact, criminal organizations and organized criminal actors in the region, such as drug trafficking organizations or gangs, use their control over carceral spaces to strengthen their organizations and keep their businesses running beyond the walls of the prisons, often with the explicit consent of the prison authorities. Thus, overpopulated and, at least from a formal perspective, ungoverned prisons have turned into an important element of the criminal infrastructure. They allow for the reproduction and even strengthening of criminal organizations and the maintenance of their illicit activities,²² while simultaneously fuelling the cycle of rising prison rates stemming from the ongoing presence of organized crime and drug trafficking throughout most of Latin America, and the harsher criminal polices meant to suppress these activities (see below).

The third feature of contemporary prison systems in Latin America that is illustrative of the crisis of detention in the region is the *social composition* of the inmate populations. It is here that the crisis of the region’s prison systems probably becomes most visible (at least when seen from a broader macro-social perspective), as the region’s prisons are actively contributing to and reflecting the social, economic and political inequality found in the world’s most unequal region. We should recall at this point that

Latin America remains the most unequal region in the world. In 2014 the richest 10% of people in Latin America had amassed 71% of the region’s wealth. If this trend continues, according to Oxfam’s calculations, in just six

21 P. Hathazy and M.-M. Müller, above note 7, p. 121. See also Camila Nunes Dias and Sacha Darke, “From Dispersed to Monopolized Violence: Expansion and Consolidation of the Primeiro Comando da Capital’s Hegemony in São Paulo’s Prisons”, *Crime, Law and Social Change*, Vol. 65, No. 3, 2016; L. Gutierrez Rivera, above note 18; M.-M. Müller, above note 7, pp. 69–70; Roy D. King and Bruna Valensia, “Power, Control, and Symbiosis in Brazilian Prisons”, *South Atlantic Quarterly*, Vol. 113, No. 3, 2014.

22 José Miguel Cruz, “Central American Maras: From Youth Gangs to Transnational Protection Rackets”, *Global Crime* Vol. 11, No. 4, 2010; L. Gutierrez Rivera, above note 18; Graham Denyer Willis, *The Killing Consensus: Police, Organized Crime, and the Regulation of Life and Death in Urban Brazil*, University of California Press, Oakland, CA, 2015.

years' time the richest 1% in the region will have accumulated more wealth than the remaining 99%.²³

This inequality, in turn, is both contributing to and reflecting what has been termed the “unrule” or “misrule” of law in Latin America – that is, people’s capacity to influence the law in their favour according to access to political, social and economic power. “In such circumstances, law has little to do with notions of neutral or fair regulation. Rather, it ensures a different norm: the maintenance of privilege among those who possess extra-legal powers to manage politics [and] bureaucracy.”²⁴ This transforms the “misrule of law” into an “effective, though perverse, means of rule”,²⁵ and implies that the formal and informal “privileges” in Latin American prisons are “reserved” for more powerful and influential prisoners. The latter, however, is a relative category as most inmates, due to the socio-economic selectivity of the misrule of law outside the prison, “where the possession of substantial amounts of economic, social and political capital guarantees that more powerful actors can take advantage of high levels of judicial impunity and therefore the evasion of prison sentences”,²⁶ are usually not the most dangerous and powerful criminals but the poorest – often those who have committed minor street crimes or drug-related offences.²⁷

The latter aspect, social composition, already indicates that the structural features and manifestation of the crisis of detention in the region are inseparable from the broader political context in which the region’s prison systems are embedded. The analysis of this context and how it has contributed to the crisis of detention in contemporary Latin America will be the focus of the next section.

Tracing the politico-institutional origins of the Latin American prison crisis and its denial

How can the constant violations of basic civil and human rights in the overcrowded, informal and discriminatory prisons of Latin America coexist with the region’s turn toward democratic politics, including the related democratic criminal justice and prison reforms efforts of the last three decades? Understanding this relationship between post-authoritarian political development and the crisis of detention in

23 Alicia Bárcena, “Latin America is the World’s Most Unequal Region. Here’s How to Fix It”, Economic Commission for Latin America and the Caribbean, 2016, available at: www.cepal.org/en/articles/2016-latin-america-worlds-most-unequal-region-heres-how-fix-it.

24 Paulo Sergio Pinheiro, “The Rule of Law and the Underprivileged in Latin America: Introduction”, in Juan E. Mendez, Guillermo O’Donnell and Paulo Sergio Pinheiro, *The (Un)Rule of Law and the Underprivileged in Latin America*, University of Notre Dame Press, Notre Dame, IN, 1999.

25 James Holston, *Insurgent Citizenship: Disjunctions of Democracy and Modernity in Brazil*, Princeton University Press, Princeton, NJ, 2008, pp. 228–229.

26 M.-M. Müller, above note 7, p. 68.

27 Elena Azaola and Marcelo Bergman, “The Mexican Prison System”, in Wayne A. Cornelius and David A. Shirk (eds), *Reforming the Administration of Justice in Mexico*, University of Notre Dame Press, Notre Dame, IN, 2007, p. 112; Fernando Carrión “¿Por qué todos los caminos conducen a la miseria del panóptico?”, *URVIO: Revista Latinoamericana de Seguridad Ciudadana*, Vol. 1, No. 1, 2007, pp. 1, 5–9.

the region is crucial, considering that, paradoxically, the same processes of political liberalization and democratic prison reform contributed decisively to expanding prison systems, to the deterioration of prison conditions in the region, and to the political, judicial and administrative denial of the crisis of detention. As noted by Stanley Cohen, in the context of the Latin American crisis of detention, the “social conditions from which atrocities originate fuse with official techniques of the denial of those realities”.²⁸ To understand the continuity of denial and the crisis of detention produced by it, we will now re-examine the political, legal and administrative conditions that contributed to the atrocious prison conditions in Latin America and the ways in which they converge with official techniques of denial. Expanding on an analysis that we started elsewhere, we will argue that the increasing “power of punishment” and the resulting deterioration of prison conditions are directly related to (a) political regime changes in the region, (b) democratic criminal justice reform processes, and (c) international drug control policies.

The dark side of political democratization and criminal justice reform: Prison expansion and deterioration

As we have argued elsewhere,²⁹ *political regime change*, such as the democratic transition processes that started in the 1980s in Peru (1980), Argentina (1983), Brazil (1985) and Chile (1990), and which continued during the 1990s, was accompanied by an increase in the region’s prison population, leading to overpopulation, the exacerbation of internal violence, and a general deterioration of prison conditions. Prison expansion and deteriorating prison conditions also accompanied transitions from one-party rule to multi-party systems, as in the case of Mexico,³⁰ and the turns to post-neoliberal regimes, such as those of Venezuela and Ecuador.³¹ These political upheavals (re)constituted the electoral political systems of the affected countries. And, in combination with structural economic transformation processes towards, or away from, neoliberalism, they gave rise to new political economies which, in turn, impacted the ways in which the transformations of the party systems and the distribution of power in the political system at large unfolded. In general, political regime change coincided with the politicization of common and violent crime that was in turn magnified by the growing “discovery” of these topics by the liberalized press after democratic transitions, the concentration of media groups under neoliberalism

28 Stanley Cohen, *Estados de negación: Ensayo sobre atrocidades y sufrimiento*, trans. Mary Bellof, 1st ed., Univesidad de Buenos Aires, Buenos Aires, 2005, p. 11.

29 P. Hathazy and M.-M. Müller, above note 7.

30 Markus-Michael Müller, “Penalizing Democracy: Punitive Politics in Neoliberal Mexico”, *Crime, Law and Social Change*, Vol. 65, No. 3, 2016.

31 Maximo Sozzo (ed.), *Postneoliberalismo y penalidad en América del Sur*, CLACSO, Buenos Aires, 2016.

and the insistence of right-wing civil society groups on the persistence, if not worsening, of high crime rates under democratic or leftist governments.³²

Political regime change and the growing centrality of crime issues in the media and politics allowed new parties and politicians to capitalize on the growing public concerns – to a large extent fuelled by sensationalist media coverage – by promoting punitive politics as the “solution” to the crime problem.³³ In the federal systems of Argentina, Mexico and Brazil – the most populous Latin American countries – for instance, changes in the political system, along with neoliberal policies of State downsizing and decentralization, substantially enhanced the powers and responsibilities of governors and majors.³⁴ In turn, this exposed these political actors to even more citizen pressure to deal with crime and violence, as it was now their duty – along with federal governments – to address such problems.³⁵ In cases of neoliberal structural adjustments, highly punitive politics led to an increase in sanctions and the diffusion of harsh law and order policies, often articulated in the language of “strong hand” (*mano dura*) or “zero tolerance” (*tolerancia cero*), and frequently as a means to deal with the social and economic consequences of neoliberal policies, such as the growing informalization of many Latin American economies through the *de facto* criminalization of the economic survival strategies of growing parts of the population that were left behind by neoliberal policies.³⁶ Moreover, these punitive policies also served the symbolic purposes of preserving State authority and compensating for the reduction of public spending and economic deregulation.³⁷ Law and order rhetoric, calling for penal-exclusion, “tough on crime” politics, paradoxically also emerged in countries that have veered toward post-neoliberal policies of State-led redistribution and the expansion of social services. A case in point is Venezuela, where after an initial reduction of its prison population, the Bolivarian Revolutionary Government resorted to a highly punitive political agenda in order to deal with its more recent

32 Paul Hathazy, “Entre la ‘represión’, la ‘prevención’ y la ‘seguridad interior’: Categorías y políticas de seguridad en la pos-transición Argentina”, study presented at workshop on “Estudios sociales sobre delito, policía y violencia: La seguridad en cuestión”, Universidad Nacional de La Plata, 10 April 2017; Guillermo Sunkel, “Medios de comunicación y violencia en la transición Chilena”, *Cuadernos del Foro* ’90, No. 3, 1992; Paul Chevigny, “The Populism of Fear: Politics of Crime in the Americas”, *Punishment and Society*, Vol. 5, No. 1, 2003, p. 79; Yolanda Salas, “Imaginary and Narratives of Prison Violence”, in Susana Rotker (ed.), *Citizens of Fear: Urban Violence in Latin America*, Rutgers University Press, New Brunswick, NJ, 2000.

33 P. Chevigny, above note 32.

34 Marcelo Cavarozzi, *Autoritarismo y democracia (1955–2006)*, Ariel, Buenos Aires, 2006, p. 56, Victoria Rodríguez, “Centralizing Politics vs. Decentralizing Policies in Mexico”, in Menno Vellinga, *The Changing Role of the State in Latin America*, Westview Press, Boulder, CO, 1998.

35 P. Hathazy and M.-M. Müller, above note 7.

36 Markus-Michael Müller, *The Punitive City: Privatised Policing and Protection in Neoliberal Mexico*, Zed Books, London, 2016.

37 P. Chevigny, above note 32; Loïc Wacquant, “The Militarization of Urban Marginality: Lessons from the Brazilian Metropolis”, *International Political Sociology*, Vol. 2, No. 1, 2008; Paul Hathazy, “(Re)Shaping the Neoliberal Leviathans: The Politics of Penalty and Welfare in Argentina, Chile and Peru”, *European Review of Latin American and Caribbean Studies*, No. 95, October 2013.

economic crisis, the resulting social dislocations as well as new socio-political tensions stemming from a new regime of political exclusion.³⁸

The massive process of *penal State-building* is another, and in fact related, contributing factor to the regional trend of prison expansion, notably in the form of police and criminal justice reform initiatives during the last few decades. Police and criminal justice reform efforts in the name of confronting crime in the region's "violent democracies",³⁹ despite their framing in the language of "democracy" or "citizen security", in practice turned into a process of "perverse state formation"⁴⁰ that transformed the region's democratic regimes into "securitizing democracies".⁴¹ These processes expanded the penal powers of Latin American States, increased their sentencing capacities and fueled a process that we have termed *rule through law*, considered as the transformation of the "impartial character of law and legal processes into political means that, by criminalizing certain practices most often associated with people at society's margins, aim at enhancing the legitimacy of political actors through practices of legal-political exclusion".⁴² The overall consequence of this has been the dramatic expansion of the region's prison population discussed above.

These penal State-building efforts are the result of several convergent developments: first, the widely shared *political* assumption that crime constitutes a core problem of Latin American societies that is best addressed not by, for instance, enhancing social welfare, but by punitive law and order policies; second, the related strengthening of judicial capacities after the return of democracy and processes of regime change; and third, proposals made by a new class of criminal justice reformers that preached for the creation (and expansion) of new police forces and criminal courts procedures as solutions for the region's crime and violence problems. In fact, the transitions to democracy and processes of political regime change opened windows of opportunity for police and criminal procedure reform.⁴³ These reforms, reflecting the attempts of new political elites to gain control over police forces and/or judicial bureaucracies, and to address citizen demands for security, substantially expanded policing and judicial processing capacities. Governors and presidents eager to demonstrate their commitment to "citizen security" and their leadership capacity as successful crime fighters enhanced the

38 Andres Antillano, "Crimen y castigo en la revolución bolivariana", *Cuestiones de Sociología: Revista de Estudios Sociales*, No. 10, 2014; Jorge Paladines, "La 'mano dura' de la Revolución Ciudadana (2007–2014)", in M. Sozzo (ed.), above note 31; Martha Lia Grajales and Maria Lucrecia Hernandez, "Chavismo y política penal (1999–2014)", in M. Sozzo (ed.), above note 31.

39 Enrique Desmond Arias and Daniel M. Goldstein (eds), *Violent Democracies in Latin America*, Duke University Press, Durham, NC, 2010.

40 Jenny Pearce, "Perverse State Formation and Securitized Democracy in Latin America", *Democratization*, Vol. 17, No. 2, 2010.

41 M.-M. Müller, above note 36, pp. 5–9.

42 P. Hathazy and M.-M. Müller, above note 7, p. 116.

43 Paul Hathazy, "Democratizing Leviathan: Politics, Experts and Bureaucrats in the Transformation of the Penal State in Argentina and Chile", PhD dissertation, Department of Sociology, University of California, Berkeley, CA, 2013, pp. 260–274; Paul Hathazy, "Punitivism with a Human Face: Criminal Justice Reformers' International and Regional Strategies and Penal-State Making in Argentina, Chile and Beyond", *Kriminologisches Journal*, Vol. 48, No. 4, 2016.

numerical strength of police forces, as well as their resources and powers.⁴⁴ Judicial reforms towards an adversarial system put in place new prosecuting organizations and increased the number of courts and prosecutors.⁴⁵ In the process, the idea – held at the beginning of these developments – of enhancing the efficiency of courts by reducing the time taken to make a judgment, and reducing high levels of pre-trial detentions through the introduction of oral procedures, was turned on its head and contributed to the increase of the region’s prison population.⁴⁶

In fact, most of these reforms aimed at reducing police powers and pre-trial detention rates in post-authoritarian settings have been systematically reversed by granting more powers to police and prosecutors to order and decide over custodial detentions, while leaving in place the increased adjudicatory capacities. One outcome of these developments is that human rights institutions and policies have been subordinated to the demands of political actors who call for harsher crime policies, increased penal supervision and control over the criminalized segments of those at society’s margins.⁴⁷ This trend is most visible in the fact that those penal institutions more closely involved in repression – the police and prosecutors – have received more political backing and resources than those institutions in charge of their oversight, such as control judges, public defence services and prison oversight judges.⁴⁸

The progressive subordination of police and justice reforms to the political needs of law and order campaigns and “tough on crime” policies also meant the subordination of activists and experts committed to advancing human rights standards for criminal justice procedures and prison realities. Powerful human rights movements who played an important role during the initial moments of the democratic transitions were actually sidelined by the criminal justice reform policies, mostly due to a refocusing of these reforms on enhanced efficiency and efficacy standards.⁴⁹ In turn, this has relegated concerns over human rights and

44 P. Hathazy and M.-M. Müller, above note 7; John Bailey and Lucia Dammert, *Public Security and Police Reform in the Americas*, University of Pittsburgh Press, Pittsburgh, PA, 2006; Hugo Frühling, “Police Reform and the Process of Democratization”, in Hugo Frühling, Joseph S. Tulchin and Heather A. Golding (eds), *Crime and Violence in Latin America: Citizen Security, Democracy, and the State*, Woodrow Wilson Center Press, Washington, DC, 2003.

45 Julio Maier, Kai Ambos and Jan Woischnik (eds), *Las reformas procesales penales en América Latina*, Ad-Hoc, Konrad Adenauer Foundation and Max Planck Institut, Buenos Aires, 2001; Cesar Rodriguez, “Globalization, Judicial Reform and the Rule of Law in Latin America: The Return of Law and Development”, *Beyond Law*, Vol. 7, No. 23, 2001; P. Hathazy, “Democratizing Leviathan”, above note 43, pp. 264–268.

46 See, for example, Sebastián Salinero Echeverría, “¿Porqué aumenta la población penal en Chile? Un estudio criminológica longitudinal”, *Revista Ius et Praxis*, Vol. 18, No. 1, 2012, pp. 113–115; M. L. Grajales and M. L. Hernandez, above note 38; Luis Pasara et al., *Independencia judicial insuficiente, prisión preventiva deformada: Los casos de Argentina, Colombia, Ecuador y Peru*, Due Process of Law Foundation, Washington, DC, 2013.

47 P. Hathazy and M.-M. Müller, above note 7; J. Bailey and L. Dammert, above note 44; H. Frühling, above note 44.

48 For Argentina and Chile, see P. Hathazy, “Democratizing Leviathan”, above note 43, pp. 220–246.

49 On criminal procedure, see *ibid.*, p. 146; Christian Riego, “The Chilean Criminal Procedure Reform”, *International Journal of the Sociology of Law*, Vol. 26, No. 4, 1998, p. 449 for the Chilean case. For a regional trend, see P. Hathazy, “Punitivism with a Human Face”, above note 43, p. 314. Grajales and Hernandez, above note 38, and Paladines, above note 38, observe analogous subordination of human rights standards to security concerns in Venezuela and Ecuador.

legal accountability to a secondary issue, thereby contributing to the “dark side” of what has been called the “post-human rights era” in contemporary Latin America.⁵⁰ This can also be seen in the subordination of rehabilitation ideals and programmes to more general concerns about security and order by prison administrations and penal bureaucrats more broadly.⁵¹ The expansion and new power of the latter, it should be recalled, also provided new employment options for some former human rights activists who got incorporated into the new police and penal bureaucracies. These former activists, while still officially committed to improving human rights, in practice tend to deny the ongoing human rights violations inside prisons, a process to which we will return to below.

To these factors and processes that fuelled the crisis of detention in contemporary Latin America, we must add the region’s geopolitical placement within the global “war on drugs”. As one leading expert summed it up:

The so-called “War on Drugs” waged over the last four decades has had a tremendous impact on security operations and judicial and prison systems in Latin America – to the point where nearly one-third of all detainees are incarcerated for non-violent drug-related crimes.⁵²

In fact, mostly in response to US pressure, including the US certification process that links the granting of development aid to a country’s active cooperation and performance in the war on drugs, new mandatory minimum sentences for drug-related crimes as well as new, and usually harsher, drug laws have been enacted and implemented in many Latin American countries.⁵³ As the following quote, from a report on related developments in Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru, and Uruguay – the region’s main “battlegrounds” in the “war on drugs” – illustrates, this has contributed substantially to the crisis of detention in the region:

In all these countries, the emphasis placed by drug control efforts on criminal sanctions has given rise to a significant increase in the number of persons incarcerated for drug offenses. The enforcement of severe laws for drug offenses has not only been ineffective in curbing the production, trafficking, and consumption of illicit substances, but has generated enormous negative consequences, including overwhelming caseloads in the courts, overcrowding in the prisons, and the suffering of tens of thousands of persons behind bars for small-scale drug offenses or simple possession. The weight of the drug

50 See, for instance, Edward L. Cleary, *Mobilizing for Human Rights in Latin America*, Kumarian Press, Bloomfield, CT, 2007.

51 See Special Issue on “Rebirth of the Prison”, *Crime, Law and Social Change*, Vol. 65, No. 3, 2016, edited by Paul Hathazy and Markus-Michael Müller.

52 Luciana Pol, “Failed Drug Policies in Latin America: The Impact on Prisons and Human Rights”, *Penal Reform International*, 24 April 2015, available at: www.penalreform.org/blog/failed-drug-policies-in-latin-america-impact-on/.

53 M.-M. Müller, above note 7, p. 62.

laws has been felt with greater force among the most disadvantaged and vulnerable sectors of society.⁵⁴

Contrary to the recent talk about the “failures” of the “war on drugs” and the emergence of seemingly more “progressive” Latin American drug policies (including legalization initiatives), this trend continues,⁵⁵ mostly because “legalization” initiatives are often at odds with prevailing drug market practices – for instance, decriminalizing the possession of amounts of drugs that are at odds with the amounts usually sold to end-users.⁵⁶ And it also continues to be convenient to incarcerate small-scale drug users for the production of statistics that demonstrate governments’ commitment to, and “success” in, fighting “organized crime”.⁵⁷

The processes described in this section are all directly implicated in the making of the crisis of detention in the region by contributing to prison overpopulation, violence, informality and the deterioration of prison conditions. Surprisingly enough, however, and despite recurrent episodes of prison massacres, they are also at the bases not only of the normalization of everyday violations of administrative, legal and humanitarian standards, but also of the denial of the critical situation in the region’s prison regimes. It is the analysis of this denial to which we now turn.

The political, judicial and expert denial of prison violence and human rights violations

Denial, defined by Milburn and Conrad as a “psychological defense mechanism” that “cancels out or obscures painful reality”,⁵⁸ is a common social and political phenomenon. In fact, “our official life as nation is built on a shared denial of painful realities and the suffering they engender”.⁵⁹ Taking this observation seriously by considering that the denial of collective suffering in democratic regimes tends to be more “subtle, putting veils over truth, establishing the public agenda, adjusting reality to interests, spin-doctoring, and showing a selective concern over policies”,⁶⁰ allows for a better and more comprehensive understanding of the current crisis of detention in Latin America. In fact, this crisis, we argue, is the direct result of a *politics of denial*.⁶¹ This politically

54 Pien Metaal and Coletta Youngers, *Systems Overload: Drug Laws and Prisons in Latin America*, Transnational Institute and Washington Office on Latin America, Washington, DC, 2011, p. 5, available at: www.tni.org/files/tni-systems_overload-def.pdf.

55 Alejandra Corda, *Drug Policy Reform in Latin America: Discourse and Reality*, Colectivo de Estudios Drogas y Derecho, 2015.

56 See, for instance, Julieta Lemaitre and Mauricio Albarracín “Patrullando la dosis personal: La represión cotidiana y los debates de las políticas públicas sobre el consumo de drogas ilícitas en Colombia”, in Alejandro Gaviria Uribe and Daniel Mejía Londoño (eds), *Políticas antidroga en Colombia: Éxitos, fracasos, extravíos*, Bogotá, Universidad de los Andes, 2011.

57 M.-M. Müller, above note 30, p. 232.

58 Michael A. Milburn and Sheree D. Conrad, *The Politics of Denial*, MIT Press, Boston, MA, 1996, p. 2.

59 *Ibid.*, p. 4.

60 S. Cohen, above note 28, p. 30.

61 *Ibid.*

produced denial is rooted in (a) the new political terrain and interests built around prison expansion, (b) internal changes in the relationship between institutions and bureaucracies operating in the carceral field of the region's penal States, and (c) the emergence and rise to power of new experts and expertise in the fields of prison policy.

Regarding agents primarily involved in *the political arena*, the politicization of crime control in Latin America, the widespread consensus regarding the so-called "benefits" of "tough on crime" policies, and the related centrality of punitive stances for promoting political careers in the region's "violent democracies"⁶² have pushed political actors to show a very selective concern, to use Cohen's words, with the outrageous prison conditions in their countries, as evinced in the cases discussed below. This is mostly because the recognition of the grim underside of the very punitive measures being promoted and implemented by these political actors would devalue the political capital they have accumulated by being "tough on crime".⁶³ In other words, such recognition would undermine the efforts of politicians, presidents, governors, mayors and/or high-profile legislators to "make crime pay"⁶⁴ by implementing punitive policies and/or institutional reforms that ultimately fuel the rise of the region's prison (over)population. At the discursive level, any call for the implementation of policies that would improve prison conditions or prisoners' rights contradicts the highly emotional and exclusionary punitive discourse that essentializes criminals as the dangerous "other", often derived from and fuelled by simplifying stereotypical tropes circulated by the press and politicians. Thus, there is a tendency to deny prison problems by systematically investing – in material, symbolic and discursive terms – in the punitive measures discussed above; measures that ultimately worsen prison conditions. In a context in which the political agenda of Latin America's "securitized democracies" is dominated by an over-concern with (in)security issues, it is not a big surprise that for political actors and the media, inmates only deserve mentioning and attention when spectacular riots – accompanied by escapes and/or massacres – happen. Such "spectacular" instances then create opportunities for blaming political opponents and increasing daily newspaper sales.⁶⁵ It is during such episodes that the routine denial of prison conditions is temporarily replaced by what Cohen refers to as an "implicatory denial" –

62 E. D. Arias and D. M. Goldstein, above note 39.

63 P. Chevigny, above note 32; Máximo Sozzo, "Populismo punitivo, proyecto normalizador y 'prisión-depósito' en Argentina", *Sistema Penal y Violencia*, Vol. 1, No. 1, 2010; Lucía Nuñovero Cisneros, "Las razones y los sentimientos del encierro: consideraciones político económicas del aumento de las poblaciones penitenciarias en el Perú", in Chloe Constant (ed.), *Pensar las cárceles de América Latina*, Instituto de Estudios Andinos, Lima, 2016.

64 Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics*, Oxford University Press, Oxford, 1997.

65 German Rey (ed.), *Los relatos periodísticos del crimen: Como se cuenta el delito en la prensa escrita latinoamericana*, Fundación Friedrich Ebert, Bogotá, 2007. See also Jenny Pontón Cevallos, "The Crime Section in Ecuadorian Media: A Problem of Citizen Security?", *Revista Urvio*, No. 5, September 2008; Jenny Pontón Cevallos, "Prensa y situación carcelaria en el país", *Boletín Ciudad Segura: FLACSO sede Ecuador*, No. 1, January 2006, p. 12, available at: <http://repositorio.flacsoandes.edu.ec/bitstream/10469/2355/1/BFLACSO-CS1.pdf>.

denying the “moral, political or psychological implications” of certain facts,⁶⁶ either by stressing the “necessity” of avoiding escapes or liberating hostages, by dehumanizing inmates (“What can you expect from prisoners?”), or, in very few cases, by recognizing the lack of political and administrative control in and over prisons. In many cases, routine atrocities are followed by State atrocities during the “recovery” of the prison from the rioting gangs.⁶⁷

Changes inside *the penal State*⁶⁸ – that is, the elite positions of the penal bureaucracies involved in the creation and execution of policies related to detention, sanctioning and punishment – have also contributed to the denial of prison violence and human rights violations. A study of judicial responses to prison problems in Latin America⁶⁹ distinguished three types of bureaucratic reactions in this regard: (a) a dominant tendency to “not intervene”; (b) interventions meant to highlight structural prison deficiencies that seemingly aim at improving prison conditions within a certain timeframe but ultimately assume that the main problem is a matter of overcrowding, thereby calling “for the building of more and better prisons”, often under the banner of “modernization” and “humanitarian” prison-building; and (c) the rather uncommon option of reducing the use of custodial sanctions. In a typical case of “interpretive denial” through “legalism”, most cases of non-intervention by the judiciary point to the lack of authority over the executive branch or prison authorities’ jurisdiction. It is also a common practice by the judiciaries to deny their responsibility for seemingly “structural agentless outcomes”, for instance by pointing to the fact that the prison crisis “is endemic” and its solution, therefore, will have to be postponed to an undefined future: “From the judicial point of view, overcrowding dominates the imagination of courts. From the judicial point of view it is believed that its disappearance will imply the perfect functioning of the penitentiary apparatus.”⁷⁰

This trend of legalist and normalizing responses has continued, and has even been reinforced by structural changes in the position of courts within the region’s carceral fields.⁷¹ Even if the relative power of Latin American judiciaries has increased vis-à-vis prison administrations, when considering the consequences of recent criminal procedure reforms, the new role of judiciaries as wardens of prisoners’ rights has substantially been curtailed by counter-developments. In inquisitorial criminal justice systems, the judiciary continued to impose highly

66 S. Cohen, above note 28, p. 27.

67 These dynamics were already observed by Teresa Caldeira in the late 1990s in her study of the Carandirú prison massacre in Sao Paulo, Brazil, where all these implicatory denials of prison violence and of the atrocities committed in the recovery of the prisons were present. See Teresa P. R. Caldeira, “The Massacre at the Casa de Detencao”, in *City of Walls: Crime, Segregation and Citizenship in Sao Paulo*, University of California Press, Berkeley, CA 2000, pp. 175–182.

68 David Garland, “Penalty and the Penal State”, *Criminology*, Vol. 51, No. 3, 2013.

69 Manuel Iturrealde Sanchez and Libardo Ariza, “Reformando el infierno: Los tribunales y la transformación del campo penitenciario en América Latina”, in Libardo José Ariza and Manuel Iturrealde (eds), *Los muros de la infamia: Prisiones en Colombia y en América Latina*, CIJUS, Universidad de los Andes, Bogotá, 2011.

70 *Ibid.*, p. 21.

71 P. Hathazy, “Democratizing Leviathan”, above note 43, pp. 244–245, 258–259; P. Hathazy, above note 17.

punitive measures⁷² as mandated by increasingly “toughened” penal law, and in line with a growing politicization of judicial positions.⁷³ In the adversarial criminal justice systems (i.e., those of Chile, Brazil, Mexico, Venezuela, Colombia and Argentina), the judges themselves lost power vis-à-vis prosecutors⁷⁴ and oversight special courts that received only very limited resources, thereby relegating these institutions to a predominantly symbolic invention.⁷⁵

Finally, changes in *the academic and expert sectors* during the last two decades have led to the proliferation of euphemistic discourses that justify prison expansion while leaving aside issues of prison violence and prisoners’ (human) rights. Although during the first phases of the transitions to democracy or regime transitions, such as in Mexico or Venezuela, local human rights activists paid close attention to prison problems,⁷⁶ over time their focus shifted towards – or, more accurately, followed – those problems privileged by politicians: questions of (in)security and police reform. As we will show below, in the case studies we analyze, for many activists, their prior investments in judicial and police reform projects reduced incentives to recognize the deterioration of prison conditions, as the latter were partly the unintended outcomes of their own work on police and judicial reform that contributed to an expansion in the size and powers of these institution⁷⁷ – a development that also fuelled their growing punitiveness. The main exception to this trend is a minority of “displaced” human rights activists who initially worked on police and criminal-court reforms but later started to pay attention to worsening prison conditions, as we will discuss below. Unfortunately, those interested in prison matters face severe problems and political obstacles in the politicized climate outlined above, and it is therefore no surprise that the most common avenue for presenting their claims has been the deployment of “internationalization strategies” (see below) – for instance, by presenting cases to the Inter-American Commission on Human Rights (IACHR) – producing the most surprising cases of government and bureaucratic denial, as we will analyze below.

To these factors we must add *the contribution of prison informality* discussed above. The informality that exists inside Latin American prisons often

72 For the Argentine cases, see P. Hathazy, “Democratizing Leviathan”, above note 43, pp. 272–273.

73 On the politicization of judicial positions and punitive stances, see Luis Pasara, “Prisión preventiva e independencia judicial en Colombia, Ecuador y Perú”, in *La justicia en la región andina*, Fondo Editorial, PUC-Peru, Lima, 2015, pp. 443–467.

74 Luis Pásara, “El ministerio público en la reforma procesal penal de Chile” and “Acercar de la reforma procesal penal en Chile, Ecuador y Perú”, in *La justicia en la región andina*, Fondo Editorial, PUC-Peru, Lima, 2015, pp. 115–152; Julita Lemgruber *et al.*, *Ministerio Público: Guardián da democracia brasileira?*, Centro de Estudos de Segurança e Cidadania, Rio de Janeiro, 2016.

75 P. Hathazy, “Democratizing Leviathan”, above note 43, p. 200; Jörg Alfred Stippel, “Acceso a la justicia en materia penitenciaria: ‘Una deuda pendiente y un desafío para el futuro’”, available at: www.oas.org/dsp/documentos/ministerial/pres%20Stippel%20esp-CE00379S04.pdf; Cesar Barros Leal, *La ejecución penal en América Latina a la luz de los derechos humanos*, Porrúa, ILANUD and UNAM, 2009.

76 Andres Dominguez Vial (ed.), *El sol en la ciudad: Estudios de prevención del delito y modernización penitenciaria*, Editora Nacional de Derechos Humanos, Santiago de Chile, 1993.

77 For the Argentine and Chilean cases, see P. Hathazy, “Democratizing Leviathan”, above note 43, pp. 275–276, 258–260; P. Hathazy “Punitivism with a Human Face”, above note 43.

leads prison authorities to deny and maintain secret everyday prison realities from which they benefit in political and often economic terms, including their complicity in facilitating riots or leaking information in order to produce public scandals that will limit the attempts of well-intentioned up-and-coming politicians to change prison regimes.⁷⁸ For high-ranking political agents, ministries or secretaries of justice, strategies of “not wanting to know” and delegating responsibilities to the “corrupt” low-ranking bureaucrats and prison staff become more and more common. The latter thereby serve as convenient scapegoats for prison problems while allowing for the preservation of political careers.⁷⁹ On the other hand, politicians are increasingly interested in reducing political scandals by informally granting prison officials more power in exchange for guarantees of peace and tranquillity inside their institutions, by whatever means necessary – including the delegation of power to prison gangs.⁸⁰ This further increases the denial of violence, corruption and informal self-government.

Finally, a *geographic dimension* contributing to the denial of the crisis of detention in Latin America must also be mentioned here. The massive prison construction boom, mostly following US prison complex architectures – including maximum-security units – coincides with the relocation of prison facilities away from urban areas.⁸¹ Prisons, and prison conditions, are literally disappearing from the sight of most (politically sensitive) citizens. Rising urban land and real-estate prices – a favourite investment site for the profits of the re-primarized export economies – contribute to the spatial peripherization of prisons and prisoners, as political and economic elites prefer to reserve precious urban lands for economic development projects and not the construction of desperately needed new prisons. In many cases, this has also led to the closing and selling of older prisons located in downtown areas, which had to make space for new urban development projects such as shopping malls, becoming monuments of consumption.⁸² Old prison farms located in the countryside and used as semi-open prisons housing soon-to-be-released prisoners then provide for the needed spaces on which to construct the new prison complexes, to which the

78 On the informality of prisons in Latin America, see Christopher Birkbeck, “Imprisonment and Internment: Comparing Penal Institutions North and South”, *Punishment and Society*, Vol. 13, No. 3, 2011. On the everyday markets of goods and information in prisons, see, for example, Francesca Cerbini, “El espacio carcelario y la organización interna de los reclusos de San Pedro (La Paz, Bolivia): Repensando el concepto de vigilar y castigar”, and Andres Antillano, “La prisión en dos tiempos: La cárcel venezolana entre el neoliberalismo y la revolución bolivariana”, in C. Constant (ed.), above note 63.

79 On the professionalizing tendencies of political agents in the new Latin American democracies, see M. Cavarozzi, above note 34, p. 56.

80 For Brazil, see Fernando Salla, “As rebeliões nas prisões: Novos significados a partir da experiência Brasileira”, *Sociologias*, Vol. 8, No. 16, 2006. For Chile and Argentina, see P. Hathazy, “Democratizing Leviathan”, above note 43, p. 225. For Venezuela, see A. Antillano, above note 78.

81 A prime example is the process of relocation observed in the Brazilian state of São Paulo, the biggest prison system in Latin America, as documented in Giane Silvestre, “O processo de interiorização penitenciária em São Paulo”, in *Dias de visita: Uma sociologia da punição e das prisões*, Alameda, São Paulo, 2012, pp. 121–130.

82 See Susana Draper, *Afterlives of Confinement: Spatial Transitions in Postdictatorship Latin America*, Pittsburgh University Press, Pittsburgh, PA, 2012.

criminalized dwellers of the urban periphery are now sent – further increasing invisibilization of the prison crisis through the spatial displacement of its victims.

In a regional and national context defined by politically induced denial and invisibility, the institutional weakening of protective organs, empowered prison bureaucrats, and new generations of criminal justice reformers interested in perfecting the “toughened” policing and judicial branches, human rights activists have invested in new avenues to advance prison change and prisoners’ protection. The most common strategy, not surprisingly, has been the internationalization of their fight, resorting to international organs, and introducing the language of humanitarian law into prison policy vocabularies, as a site of last resort. We now turn to the analysis of two cases where these structurally based politics of denial and human rights international strategies have clashed in the attempt to put a limit on the carceral social genocide taking place in Latin America.

National politics and international strategy convergence as (possible) sources of change

In this last section we briefly analyze the growing centrality of “international strategies” – considered to be “the ways that national actors seek to use foreign capital, such as resources, degrees, contacts, legitimacy and expertises[,] ... to build their power at home”⁸³ – by human rights activists and how they interact with tensions inscribed in the system of agents involved in punitive prison policy-making and the implementation of penal laws at the national level. We draw insights from two national cases, Chile and Mexico, that present similar mechanisms of denial but differ in the way in which international human rights activism has been able to alter the accepted political and expert thinking. The analysis shows that international human rights strategies are effective when they converge with the dynamics of and changes in the distributions of power in the national carceral arenas. Such dynamics of and changes in the distribution of power, while being beyond the control of activists, nonetheless must be mapped and taken into account for any successful attempt at change.

In Chile, the politicization of prison policies – that is, the displacement of human rights experts by reform technocrats interested in efficiency, security and penal State expansion⁸⁴ – led to the current prison crisis and its denial in the face of internal and external demands. However, breaking the logic of denial and the incipient introduction of alternative policies was possible, as human rights activists’ strategies, with their different temporalities (from press releases responding to scandals, to periodic report-making, to extraordinary long-term

83 Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States*, University of Chicago Press, Chicago, IL, 2002, p. 7. See also Markus-Michael Müller, “De-Monopolizing the Bureaucratic Field: Internationalization Strategies and the Transnationalization of Security Governance in Mexico City”, *Alternatives: Global, Local, Political*, Vol. 39, No. 1, 2014.

84 P. Hathazy, “Democratizing Leviathan”, above note 43, p. 224.

interventions via institution-building and resort to international bodies), converged with the actions of other experts and received the backing of temporarily marginalized political elites within the highly consensual party system and its technocratic style of policy-making.

Chilean prisons have been at the centre of the international human rights movement's attention in the 1970s and 1980s as part of the fight against authoritarian regimes and political imprisonment.⁸⁵ During the 1990s, authorities and experts expected that criminal procedure reforms would solve the overpopulation problem through faster trials and fewer pre-trial detainees,⁸⁶ with human rights expertise marginalized from prison policy-making circles. As the prison population grew by 50% between 1994 and 2000, from 20,954 to 33,051, and criminal accusations before courts ballooned from 21,966 in 1997 to 31,573 in 2000 after the new criminal procedure was passed,⁸⁷ the promised solutions soon proved to be false. A "prison crisis" exploded in December 2000 when 11,000 inmates out of the total prison population of 31,000 staged a nationwide protest after the death of seven inmates in a prison fire. Authorities responded with a programme of prison-building and privatization.⁸⁸ The crisis and the demands of the "grand reform" of the criminal justice system allowed private businesses to acquire a share in the business of punishment and high officers and State managers to replace correctionalist expertise with managerial skills.⁸⁹ The crisis also turned the Chilean prisons into a human rights battleground again.

In the late 1990s, human rights scholars once again aimed their human rights guns at the prisons. The strategies were threefold: informational, judicial and institutional. In 2000, professors at Diego Portales Law School began producing annual reports on human rights abuses under democracy, targeting prisons.⁹⁰ The Human Rights Center at Portales agglutinated other human rights groups: the older Corporation for the Defence of People's Rights (Corporación para la Defensa de los Derechos del Pueblo, CODEPU), created in 1980 and

85 The human rights reports of the 1970s gave renown to human rights organizations documenting the aberrant human rights violations during dictatorship. See Yves Dezalay and Bryant G. Garth, "From the Cold War to Kosovo: The Rise and Renewal of the Field of International Human Rights", *Annual Review of Law and Social Science*, Vol. 2, No. 1, 2006.

86 Cristian Riego, "La prisión durante el proceso penal en Chile", *Cuadernos de Análisis Jurídico*, No. 16, 1990; P. Hathazy, "Democratizing Leviathan", above note 43, p. 223.

87 See Jörg Alfred Stippel, *Las cárceles y la búsqueda de una política criminal para Chile*, LOM, Santiago de Chile, 2006, p. 34; S. Salinero Echeverría, above note 46, p. 115.

88 Three weeks after the first massive protest in prisons in Chile, the justice and public works ministers announced a programme to build prisons for 16,000 inmates, putting them in the hands of private companies: *El Mercurio*, 14 January 2001.

89 The government privatized prisons "the French way", retaining security and supervision of prisons and contracting out building and operations, as well as provision of food, laundry, medical and rehabilitation "services": *El Mercurio*, 14 January 2001. For an analysis of the privatization process, see P. Hathazy, "Democratizing Leviathan", above note 43, pp. 226–229.

90 Their 2002 report showed overcrowding, lack of hygiene, insufficient food, prisons controlled by inmates with high levels of violence, deaths, and a highly tense order produced by the collaboration between abusive and exploitative gangs and despotic guards. The report also denounced systematic torture and physical abuses. See Alvaro Castro and Martín Besio Hernández, "Chile: Las cárceles de la miseria", *Pena y Estado: Revista Latinoamericana de Política Criminal*, Vol. 6, No. 6, 2005.

tasked with the defence of prisoners,⁹¹ and the new Confraternity of Common Prisoners (Confraternidad de Familiares y Amigos de Presos Comunes, CONFRAPECO), an organization of ex-convicts mobilizing under the banner of human rights.⁹² For five years, between 2002 and 2007, the Chilean Ministry of Justice systematically denied the validity of the reports describing the terrible prison conditions.⁹³ Following a managerial approach, top-down prison bureaucracies tried to symbolically solve the problems of violence, killings and overcrowding, treating them as issues of public relations and public image. At the same time, they hired teams of local and foreign legal experts to show they were working on the problem. The Ministry of Justice hired its own human rights specialists and socio-legal scholars from Germany with the assistance of the (now-defunct) German Development Agency (Deutsche Gesellschaft für Technische Zusammenarbeit)⁹⁴ – with the explicit aim of assisting the Ministry in regulating judicial oversight of prisons.⁹⁵ After two years of work, and after receiving the collaboration of legal scholars from the Universidad Diego Portales and Universidad de Chile, the minister of justice decided to abandon the project in 2007 and replace it with a smaller plan to create supervising judge positions that have so far not been created.

Finding no response in the national arenas, in the mid-2000s human right activists at Diego Portales Law School deployed internationalization strategies similar to those used during dictatorship⁹⁶ and turned to the IACHR. They prompted a visit to Chile that reported on the overcrowding, State violence, officer abuses, inadequate facilities and lack of rehabilitation services found in the country's prisons.⁹⁷ The IACHR has been progressively interested in common prison conditions in the region since 1993.⁹⁸ The 2008 visit, along with internal political pressure, forced the Prison Service Directorate to recognize that prison conditions were substandard and that they violated human rights.

In the face of these negative reports and scandals, the central government finally decided in 2009 to call a special commission to study problems and propose solutions. Named the Council for a New Penitentiary Policy, it was a place where

91 CODEPU, “¿Quiénes somos?”, available at: www.codepu.cl/pagina-ejemplo/.

92 CONFRAPECO, “Confraternidad de Familiares y Amigos de Presos Comunes – CONFAPRECO”, *Idealist.org*, available at: www.idealist.org/es/ong/5f3558ab54bd4125b4ddd95146bfdb6a-confraternidad-de-familiares-y-amigos-de-presos-comunes-confapreco-santiago-de-chile.

93 Centro de Derechos Humanos, *Informe anual sobre derechos humanos en Chile 2009*, Universidad Diego Portales, Santiago de Chile, 2010, p. 96.

94 This was a private institution owned by the Federal Republic of Germany that under the banner of technical assistance (*technische Zusammenarbeit*) provided development aid to countries in the global South between 1975 and 2011.

95 See, for instance, Johannes Feest, “Hacia un sistema de control de la ejecución de penas no privativas de libertad”, *Boletín Jurídico del Ministerio de Justicia*, Vol. 4, No. 2, 2003.

96 See above note 80.

97 Rapporteur on the Rights of Persons Deprived of Liberty “Rapporteurship on the Rights of Persons Deprived of Liberty Concludes Visit to Chile”, Press Release No. 39/08, 2008, available at: www.cidh.oas.org/Comunicados/English/2008/39.08eng.htm.

98 In 1994 the IACHR declared that steps must be made “to remedy inhuman conditions in prisons”, and it began dealing with them in its annual report of 1995. It issued a recommendation in 1998, has produced country studies since 1998, and created a special rapporteurship on the rights of persons deprived of liberty in its 119th session, in March 2004. See: www.oas.org/en/iachr/pdl/default.asp.

many police and justice reformers who were displaced from centre stage when reforms were put in place could make a comeback.⁹⁹ In early 2010, the Council delivered a report which focused on overcrowding, security and custody, insufficient infrastructure, lack of “adequate offer of rehabilitation”, lack of integration between the closed and open system, and lack of judicial control.¹⁰⁰ Elected right-wing president Sebastián Piñera initially ignored the report, as the “managers” in the prison administration worked hard to deny, cover and minimize the brutal conditions of Chile’s prisons.¹⁰¹ On 8 December 2010, a riot exploded in the San Miguel Penitentiary Complex, a complex designed to house 1,100 that was housing 1,964 at the time, controlled by only thirty guards. Eighty-one inmates died in a fire ignited amidst the fighting.¹⁰² Only after the greatest prison catastrophe in Chilean history had put the prison system crisis in the world tabloids, and Concertación parties, now in opposition, had voiced the criticisms of the displaced experts and human rights activists, did the government begin to implement some of the IACHR and Council recommendations.¹⁰³ Since 2011, the government has backed reforms to reduce the prison population through alternative sanctions for small crimes and fines (excluding drug offences nonetheless), introduced a pardons policy for non-violent offences (Law 20.588 of General Pardon)¹⁰⁴ and put conditional release decisions in the hands of a special commission headed by judicial authorities instead of political delegates (Law 20.587).¹⁰⁵ Prison authorities have also created a Human Rights Unit in charge of monitoring human rights standards. These measures have served to stop the growth in imprisonment rates but high levels of overpopulation remain, as well as serious deficiencies regarding facilities, training and the physical security of inmates.¹⁰⁶

The Chilean case is quite unusual in that the human rights activists contributed to new policies and some changes regarding the quantity and quality of imprisonment. This depended on a very specific social configuration that weakened the logic of denial and permitted alternative policies to be advanced.

99 The Council was formed entirely of “specialists” from think-tanks and NGOs: the Fundación Paz Ciudadana, Center for the Study of Security, led by Hugo Frühling; the FLACSO Security and Citizenship Program, directed by Lucía Dammert; and Cristian Riego from the Justice Studies Center of the Americas. The think-tanks and university expert were joined by the Supreme Court prosecutor, and representatives of the Ministries of Justice and the Interior. The minister of justice asked them to work on rehabilitation. See Consejo para la Reforma Penitenciaria, *Recomendaciones para una nueva política penitenciaria*, Ministerio de Justicia de Chile, Santiago de Chile, 2010.

100 *Ibid.*

101 Centro de Derechos Humanos, “Sistema penitenciario y derechos humanos”, in *Informe anual sobre derechos humanos en Chile 2009*, Universidad Diego Portales, Santiago de Chile, 2010, p. 109.

102 Centro de Derechos Humanos, “Sistema penitenciario y derechos humanos”, in *Informe anual sobre derechos humanos en Chile 2011*, Universidad Diego Portales, Santiago de Chile, 2011, pp. 111–113, section “Incendio de la Carcel San Miguel”.

103 *Ibid.*, pp. 113–118, section “Reformas y avances desde 2010 a la fecha”.

104 Law 20.588, “Indulto general”, 22 May 2012, available at: www.leychile.cl/Navegar?idNorma=1040511.

105 Law 20.587, “Modifica el régimen de libertad condicional y establece en caso de multa la pena alternativa de trabajos comunitarios”, 8 July 2012, available at: www.leychile.cl/Navegar?idNorma=1040829.

106 Centro de Derechos Humanos, *Informe anual sobre derechos humanos en Chile 2014*, Universidad Diego Portales, Santiago de Chile, 2014, p. 286.

This was possible (a) because agents in the periphery of the carceral policy arena could launch effective strategies (i.e., human rights activists engaging supranational organs in convergence with marginalized experts trying to make a comeback); (b) when the responsible incumbent political authorities and allied experts saw their positions jeopardized because of international scrutiny (as in the visits and report of 2008 and 2010); and (c) when experts lost power and direct access to the government, as in 2010, when the left-centre Concertación alliance of parties lost the presidency to the right-wing opposition.

That these conditions are important when considering the feasibility of internationalization strategies for confronting the political denial of the domestic crisis of detention becomes apparent when contrasting the Chilean case with related developments in Mexico. Mexico, as shown elsewhere in greater detail, clearly joined the punitive turn in contemporary Latin America, including the related “crisis of detention”.¹⁰⁷ When comparing the Mexican developments with the Chilean case, however, three structural aspects that contributed to the lack of success in addressing this crisis by activists “going international” need to be taken into account: (a) the relative weakness of Mexican civil society organizations, including human rights groups; (b) the particularity of the Mexican security situation, in particular regarding the severity of the “war on drugs” that, since 2006, has consumed the lives of more than 100,000 people;¹⁰⁸ and (c) the inherited informal institutional legacy of the authoritarian one-party regime of the Institutional Revolutionary Party (Partido Revolucionario Institucional, PRI) that ruled Mexico from 1929 to 2000 and, after a short interlude, again since 2012.¹⁰⁹

The year 2000 signalled the breakthrough of the subnational democratization process that had been on the way since the mid-1990s at the national level. However, when looking at prison statistics, full-fledged regime transition also coincided with a hitherto unparalleled increase in Mexico’s inmate population, rising from 154,765 prisoners in 2000 to 247,888 in 2015.¹¹⁰ This contributed to serious overcrowding problems in the country, leading to a worsening of the already highly problematic prison conditions in authoritarian Mexico,¹¹¹ as evidenced by a comprehensive assessment of the Mexican prison system by the National Human Rights Commission (Comisión Nacional de Derechos Humanos, CNDH) in a 2014 report.¹¹²

When considering that such reports clearly evidencing serious deficiencies inside the country’s prisons are regularly issued by public institutions, it seems at

107 M.-M. Müller, above notes 30 and 36; Markus-Michael Müller, “Penal Statecraft in the Latin American City: Assessing Mexico City’s Punitive Urban Democracy”, *Social and Legal Studies*, Vol. 22, No. 4, 2013.

108 Kimberly Heinle, Octavio Rodríguez Ferreira and David A. Shirk, *Drug Violence in Mexico: Data and Analysis through 2015*, Justice in Mexico Project, University of San Diego, San Diego, CA, 2016, available at: <https://justiceinmexico.org/wp-content/uploads/2016/04/DrugViolenceinMexico-Final-2015.pdf>.

109 See Jay Longston, *Democratization and Authoritarian Party Survival: Mexico’s PRI*, Oxford University Press, Oxford, 2017.

110 Presidencia de la República, 4to. *Informe de Gobierno: 2015–2016. Anexo estadístico*, Gobierno de los Estados Unidos Mexicanos, Mexico City, 2016, p. 53.

111 On the latter, see Americas Watch, *Prison Conditions in Mexico*, Human Rights Watch, New York, 1991.

112 CNDH, *Diagnóstico nacional de supervisión penitenciaria 2014*, CNDH, Mexico City, 2014.

first sight that the Mexican authorities are trying to confront the crisis of detention. On closer inspection, however, this is not the case. To understand this outcome, it is important to place Mexico's crisis of detention within the context of the country's escalating drug war and a general, real as well as perceived deterioration of its security situation that coincided with the last phase of the democratization process and Mexico's embrace of neoliberalism since the mid-1990s. In turn, this, as elsewhere in Latin America, politicized the issues of crime and insecurity. This led Mexican politicians and bureaucrats to call for more, better and tougher law enforcement and harsher punishment for criminals.¹¹³ And it translated into efforts by politicians and law enforcement agencies to demonstrate their success in crime fighting by engaging in "statistical politics" that show that the government is winning its war against crime by arresting more and more "criminals". The latter, as elsewhere in the region, usually come from the most marginalized segments of the population and are hardly the worst or most dangerous criminals.¹¹⁴

Human rights activists interested in changing this situation are confronted by two main obstacles. First of all, as security is a main priority for Mexican citizens and politicians, and as the proliferation of "citizen security" discourses has divided up the Mexican political space into rights-deserving citizens and criminal "non-citizens", the latter have almost no lobby as it has become increasingly difficult to openly call for the protection and improvement of the rights of criminal and criminalized "non-citizens". As one interview partner working for an NGO that seeks to address these problems put it, "[f]or many Mexicans, perpetrators deserve no human rights" – a fact which translates into serious funding problems for civil society actors interested in improving Mexican prison conditions.¹¹⁵

Here it should be mentioned that Mexican civil society is rather weak when compared to other Latin American countries. This weakness stems from the often successful co-optation efforts of dissident groups by the PRI and the ways in which these have translated into a form of "State-financed" semi-official civic activism. This has had negative consequences for the credibility of many civic organizations in the country, preventing them from becoming deeply embedded in Mexican society.¹¹⁶ As one NGO member summed it up:

NGOs have historically served to enrich those people who direct them and they aren't accountable [*han servido para enriquecer a las personas, que las dirigen y no rinden cuenta*]. Therefore people don't give [them] money, which substantially limits the amount of money you, as an organization, can expect [to receive] from the people.¹¹⁷

This general problem is more severe for those groups struggling for prisoners' rights, and their struggle is made even more complicated and difficult by the

113 Arturo Alvarado Mendoza, "La criminalidad y las políticas de seguridad en México", *Cuestiones de Sociología*, No. 10, 2014.

114 M.-M. Müller, above note 30, p. 233.

115 Personal interview with NGO member, Mexico City, April 2008.

116 M.-M. Müller, above note 36, pp. 101–102.

117 Personal interview with NGO member, Mexico City, June 2006.

lasting legacy of those informal and co-optation-centred practices, including clientelism, in Mexico's contemporary political system.¹¹⁸ In fact, the prevailing informality inside the Mexican political system extends into the penal field and undermines the success of internationalization strategies, just as we have observed in the case of Chile. Indeed, Mexican activists, largely due to their domestic "weakness", have tried to go international, but due to high levels of domestic informality, these efforts have run dry. In the words of another NGO member:

What is true is that the state listens to you, but it does not comply. In Mexico there is no legal system which would apply international [human rights] recommendations or decisions to the national level. This means that it [the international human rights system] only serves as a medium for political pressure. Unfortunately in our legal environment, there exists no possibility of applying international criteria to concrete legal cases. Despite the fact that our constitution gives international treaties the status of supreme laws, there are no institutional juridical mechanisms which permit the direct application of a decision [of an international human rights body]. There is no respective legal system or the judge is not obliged to apply these recommendations. And on the other hand, although international human right treaties have the character of supreme laws, it is certain that the judges, that all the jurisdictional personnel neither has the capacity to adopt them, nor knows something about these treaties. ... Because in order to punish a governor or a police chief of whom we know that he gave the orders, you need a political judgement [*juicio político*] from the legislative power of the respective state or from the federal level. But, for sure, this guy has his godfathers [*compadres*] among the deputies, and they won't prosecute him. So, there is no way, definitely no way to sanction neither high ranking police officers, nor the responsible politicians.¹¹⁹

This observation extends to the realm of penal improvements, implying that because of the prevailing informality that determines the workings of power in the Mexican penal field, international human rights institutions and mechanisms lose their power when they travel back to Mexico. The fact that dominant human rights experts and agenda setters in Mexico's penal field often don't come from an activist background but are rather technocratic academics whose work ethos is dominated by ideals of impartiality, efficiency and neutrality – and who often follow the dominant political agendas and/or priorities of external funding bodies which, in light of Mexico's security crisis, often tend to ignore the crisis of detention in the country¹²⁰ – represents another structural problem for anyone

118 On the difficulties of access to government by civil society actors, see Sharon F. Lean, "Enhancing Accountability in Mexico: Civil Society in a New Relationship with the State?", *LASA Forum*, Vol. 45, No. 1, 2014, available at: <https://lasa.international.pitt.edu/forum/files/vol45-issue1/Debates3.pdf>.

119 Personal interview, NGO member, Mexico City, July 2007, quoted in Markus-Michael Müller, "The Struggle over Human Rights in Mexico", in Klaus Hoffmann-Holland (ed.), *Ethics and Human Rights in a Globalized World*, Mohr Siebeck, Tübingen, 2009.

120 M.-M. Müller, above note 83.

interested in improving Mexican prison conditions. The apparent “neutrality” of many human rights experts, the prevailing informality of Mexican politics and the “opportunity structure” provided by Mexico’s “drug war” for the political denial of the country’s prison crisis are factors that have ultimately undermined the more positive outcomes of activists “going international”.

In that respect, just as some political, judicial, administrative or expert agents may resist, abort or ignore struggles for new policies, as in the case of Mexico, it is only through alliances and the backing of these different agents located in the national carceral fields that improvements in domestic prison conditions will happen. The human rights principles, actions and desires of activists have to be matched with acute sensitivity and precise knowledge of the structure of interests and strategies of agents involved in the domestic definition of prison policies and priorities. The work of social scientists working in and on the region’s prisons becomes not only important for documenting the power and symbolic structures leading to the current prison crisis and the underlying sources of its denial, but also decisive in identifying the multiple options available to overcome resistance and produce positive changes.

In 1999, Special UN Rapporteur Nigel Rodley saw in the “decision of the Inter-American Commission on Human Rights to study prisons” the “one bright spot” in the region.¹²¹ Since then the IACHR has produced numerous country, regional and special topics reports. In 2011 the IACHR concluded its special report on the human rights of persons deprived of liberty, recommending interventions in different sectors of the carceral field. In the properly political arena, it recommended “comprehensive prison policies geared to the personal rehabilitation and reintegration of convicts into society”. At the judicial level it suggested legislative and institutional measures “to guarantee effective judicial monitoring of the enforcement of sentences”, in particular judges, and “measures necessary for providing public legal aid”. At the administrative level it recommended “monitoring the activities and decisions of ... authorities” involved in assigning work, bestowing prison benefits and sentencing decisions, to prevent irregularities and corruption; “notification of release orders”; “[s]etting up databases ... on all persons subject to criminal proceedings”; and “implementing post-prison follow-up and support programs”. At the prison level, finally, it pointed to the need to establish “nimble, equitable and transparent mechanisms for the awarding of slots in educational, vocational training, and work programs”.¹²²

Each of these policies points to different sectors and dimensions of the processes that have led to the current prison crisis and its denial. Social-scientific studies are in the best position to disentangle the limits and possibilities that the immanent tensions of the carceral fields have in store for the advancement of progressive policies within prisons. The reconstruction of the system of power

121 Nigel Rodley, “Torture and Conditions of Detention in Latin America”, in J. E. Mendez, G. O’Donnell and P. S. Pinheiro, above note 24, pp. 39–40.

122 IACHR, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Washington, DC, 2011, pp. 219–220, available at: www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf.

struggles, involving political, judicial, administrative, bureaucratic, social and reformist dynamics, is essential to advance in such a direction.

Conclusion

This article has assessed the causes and consequences of what we refer to as the crisis of detention in contemporary Latin America. This crisis, we have demonstrated, is most visible in the overpopulation of the region's highly informal prison systems, leading to ongoing human rights abuses and prison violence. We have situated these developments in their political and penal bureaucratic context and highlighted the somewhat paradoxical role of democratization, political regime change and party politics, as well as neoliberalization and post-neoliberalization, in triggering a "punitive turn" in the region that led to the emergence of penal State reform projects, combined with the rise of penal populism that contributed to both an historically unparalleled upsurge in incarceration rates and to the political, judicial and expert denial of prison violence and human rights violations in Latin American institutions of confinement. This denial has produced a state of institutional abandonment that is preserved by the interests of politicians and the judiciary, who are engaged in denying prison violence and human rights abuses while promoting and producing more punishment.

By turning towards sites of contestation of the denial of human rights abuses inside Latin American prisons, we have demonstrated how under conditions of politically and judicially produced abandonment, human rights become the element of last resort for inmates and human rights activists, thereby transforming prisons into targets for humanitarian interventions through internationalization strategies. These interventions, however, ultimately operate according to the system of tensions of each national penal field, which in most cases leads to a denial of the structural violence of Latin American prison conditions, while still demonstrating a "will to improve". In some cases, however, international human rights strategies have contributed to policy changes, going beyond a predominantly symbolic concern.

One important analytical and practical implication of our findings is that international human rights norms, standards, discourses and institutions are not a panacea for overcoming the crisis of detention in Latin America. Latin America's penal fields are what Dezalay and Garth call "two-tiered systems". These systems are composed of a cosmopolitan elite propagating and importing "grand principles" at the top, and "ordinary" agents, actors and bureaucrats at the bottom, whose routine practices continue to be defined by "clientelism and patronage".¹²³ These two tiers are so socially and institutionally separated that the impact of those actors aiming at improving local practices by going international is structurally limited if the two tiers are not in sync:

123 Y. Dezalay and B. G. Garth, above note 83, p. 249.

The cosmopolitan importers work to construct a new, internationally acceptable and legitimate state, but they must confront deeply ingrained practices at all social levels and the people who sustain those practices in ways that ultimately benefit the cosmopolitan elite. ... The devalorization or disqualification of local justice and local states in Latin America (and elsewhere) because of their embeddedness in patronage and clientelism also provides legitimacy and prestige for those at the top of the two-tiered system. They gain recognition, in part, for their sophistication of their criticisms. Their distance and their cosmopolitan connections and credibility, in other words, allow them to appear as a nobility speaking on behalf of the new sophisticated remedies for the state and the economy.¹²⁴

In this regard, the way forward and a possible way out of the crisis of detention in contemporary Latin America depends on the crafting of domestic and international alliances that bring these two levels of the increasingly internationalized penal fields in sync with each other. It should be obvious that in the over-politicized context of Latin America's "violent" and "securitized" democracies, in which political careers are built on the (re)production and denial of this crisis, such efforts will be met with severe resistance, but this is, in our view, the only way forward that would be capable of achieving a structural change in the region's prison systems. This change would also need to imply a critical rethinking and greater self-reflexivity of involved activists, scholars and experts who, often unintentionally, have contributed to this crisis in and through their own, well-intentioned work. As long as seemingly progressive discourses, such as "citizen security", which implicitly frame criminals as non-citizens, continue to proliferate, and as long as technocratic, efficiency-oriented expertise dominates in the region's penal fields, improvements may not come, even in the long run. In this regard, a better understanding of the unintended consequences of prison reform efforts and of the multiple interests involved is indispensable for moving out of the crisis of detention in the region. It is our hope that by mapping the institutional, political and bureaucratic terrain in which these reforms unfold, this article will make practitioners aware of this situation and help them to better navigate the over-politicized terrain of prison reform in the region.

124 *Ibid.*

Ageing prisoners: An introduction to geriatric health-care challenges in correctional facilities

Rachael Bedard, Lia Metzger and Brie Williams

Dr Rachael Bedard, MD, is an Assistant Professor in the Department of Medical Education at the Icahn School of Medicine at Mount Sinai in New York City, and a Geriatrics and Palliative Care Specialist in the jails on Riker’s Island for the New York City Department of Correctional Health Services.

Lia Metzger, BA, is an Assistant Clinical Research Coordinator in the University of California, San Francisco (UCSF) Division of Geriatrics. Ms Metzger supports research projects focused on health care for older adults in the criminal justice system under Dr Brie Williams of the UCSF.

Dr Brie Williams, MD, MS, is a Professor of Medicine in the Division of Geriatrics, Founding Director of the Criminal Justice & Health Program at UCSF, and Director of the UCSF Criminal Justice Aging Project of Tideswell at UCSF. Dr Williams works with collaborators from the criminal justice, public safety and legal fields to apply academic medicine, geriatrics and palliative care to transform criminal justice health care through policy-driven research and education.

Abstract

The rise in the number of older prisoners in many nations has been described as a correctional “ageing crisis” which poses an urgent financial, medical and programmatic challenge for correctional health-care systems. In 2016, the

International Committee of the Red Cross hosted a conference entitled “Ageing and Imprisonment: Identifying the Needs of Older Prisoners” to discuss the institutional, legal and health-care needs of incarcerated older adults, and the approaches some correctional facilities have taken to meeting these needs. This article describes some of the challenges facing correctional systems tasked with providing health care to older adults, highlights some strategies to improve their medical care, and identifies areas in need of reform. It draws principally on research and examples from the United States to offer insights and recommendations that may be considered in other systems as well.

Keywords: ageing, incarceration, geriatrics, palliative care, hospice, compassionate release.

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The ageing prison population

The worldwide population is ageing dramatically.¹ This phenomenon is also reflected in correctional populations throughout the world. For example, in the United Kingdom the overall prison population grew by 51% between 2000 and 2009, while the population over the age of 60 grew by 216%.² In Japan, the number of prisoners over the age of 60 increased by 160% between 2000 and 2006.³ Such a rapid rise in the number of older prisoners has been described as a correctional “ageing crisis” which poses an urgent challenge for correctional health-care systems – especially those poorly equipped to meet the complex needs of older adults.⁴

While these ageing trends are seen in many criminal justice systems throughout the world, they are most profound in the United States. From 1990 to 2009, the total US prison population doubled while the number of incarcerated individuals aged 55 or older increased by 300%,⁵ and the median age of state prisoners increased from 30 to 36 years.⁶ This demographic shift has continued in the United States even as the growth of the general prison population has decreased; between 2009 and 2013, the population of US federal prisoners aged

1 Wan He, Daniel Goodkind and Paul Kowal, *An Aging World: 2015*, US Census Bureau, International Population Reports, P95/16-1, US Government Publishing Office, Washington, DC, 2016.

2 United Nations (UN) Office on Drugs and Crime, *Handbook on Prisoners with Special Needs*, New York, 2009, available at: www.unodc.org/pdf/criminal_justice/Handbook_on_Prisoners_with_Special_Needs.pdf (all internet references were accessed in May 2017).

3 *Ibid.*

4 Brie A. Williams, James S. Goodwin, Jacques Baillargeon, Cyrus Ahalt and Louise C. Walter, “Addressing the Aging Crisis in U.S. Criminal Justice Health Care”, *Journal of the American Geriatric Society*, Vol. 60, No. 6, 2012.

5 Bureau of Justice Statistics (BJS), *Prisoners Series: 1990–2010*, US Department of Justice (DoJ), Office of Justice Programs (OJP), Washington, DC, available at: <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=40>.

6 BJS, *Ageing of the State Prison Population, 1993–2013*, DoJ, OJP, Washington, DC, May 2016, available at: www.bjs.gov/content/pub/pdf/aspp9313_Sum.pdf.

49 or younger decreased by 1%, whereas the number of prisoners aged 50 or older increased by 25%.⁷ Older prisoners now represent approximately 10% of the US state prison population.⁸

This article describes some of the challenges facing correctional systems tasked with providing health care to older adults, highlights some innovative approaches being taken to optimize the care of incarcerated older adults, and draws attention to some areas in need of reform. Drawing on evidence developed primarily in the United States and to a lesser extent Europe, it draws conclusions and makes observations that are widely applicable to correctional facilities worldwide.

Geriatric health-care in the correctional setting

While health-care professionals outside of the criminal justice system typically use the age of 65 to define which individuals are “older adults” or “geriatric”, the demarcation between “young” and “old” in correctional settings is less well defined. This is because many criminal justice-involved individuals experience multiple chronic physical and/or mental health conditions and physical disabilities at relatively young ages.⁹ They are also more likely to have experienced profound stress and/or trauma over their lifetime, to have a history of substance use disorder and/or homelessness, and to have had limited access to quality health-care and education.¹⁰ The high degree of early-onset medical and social complexity found in this population is often referred to as “accelerated ageing”.¹¹ To account for accelerated ageing, many jurisdictions consider individuals in their 50s to be “older prisoners”.¹²

Most correctional facilities were designed to restrict the liberty of young people, not to provide optimal care for the aged. As a result, correctional facilities are often ill-equipped to meet the needs of older adults with complex medical conditions and physical disabilities. These facilities often require residents to contend with challenging environmental features such as poor lighting, steep staircases, dimly lit walkways, high bunk beds and low toilets. The rise in the number of incarcerated older adults has led some correctional facilities to introduce environmental modifications for residents with physical disabilities and

7 Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, DoJ, Washington, DC, February 2016, available at: <https://oig.justice.gov/reports/2015/e1505.pdf>.

8 BJS, above note 6; BJS, *Prisoners in 2015*, DoJ, OJP, Washington, DC, December 2016, available at: www.bjs.gov/content/pub/pdf/p15_sum.pdf.

9 B. A. Williams *et al.*, above note 4.

10 Ron H. Aday, *Aging Prisoners: Crisis in American Corrections*, Praeger, Westport, CT, 2003.

11 *Ibid.*

12 Brie A. Williams, Marc F. Stern, Jeff Mellow, Meredith Safer and Robert B. Greifinger, “Aging in Correctional Custody: Setting a Policy Agenda for Older Prisoner Health Care”, *American Journal of Public Health*, Vol. 102, No. 8, 2012.

system-wide enhancements to manage their complex health needs. Together these factors likely contribute to high correctional costs.¹³

Yet a precise accounting of the health-care costs generated by incarcerated older adults is frequently hampered by a lack of data transparency on the part of correctional systems, and by differences in how systems that do share their cost data define and report on expenses.^{14,15} Best-guess estimates suggest that the average incarceration-related costs for older adults in the United States are up to nine times higher than for younger adults.¹⁶ In 2013, the US Office of the Inspector General found that the Federal Bureau of Prisons spent \$881 million to incarcerate individuals aged 50 or older.¹⁷ Furthermore, state prisons that house the highest proportion of older adults generate medication costs that are fourteen times higher than the prisons with the lowest proportion of adults aged 50 and older.¹⁸

Incarcerated older adults also experience unique criminal justice outcomes. Compared to their younger counterparts, older adults tend to incur fewer disciplinary actions while incarcerated and have lower recidivism rates once released. For example, in the US Federal Bureau of Prisons statistics, individuals aged 50 or older account for 19% of the population but generate only 10% of misconduct incidents.¹⁹ Over the same period, the three-year recidivism rate for all individuals leaving US federal prisons was 41%, while it was 15% for persons aged 50 or older.²⁰

In many nations, incarcerated individuals are entitled by law to an equivalent standard of health care that is received by free individuals in their community. For example, the International Covenant on Economic, Social and Cultural Rights affirms “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.²¹ The United Nations Basic Principles for the Treatment of Prisoners establishes that “[p]risoners shall have access to the health services available in the country without discrimination on

13 Tina Maschi, Deborah Viola and Fei Sun, “The High Cost of the International Aging Prisoner Crisis: Well-Being as the Common Denominator for Action”, *The Gerontologist*, Vol. 53, No. 4, 2013; Cyrus Ahalt, Robert L. Trestmann, Josiah D. Rich, Robert B. Greifinger and Brie A. Williams, “Paying the Price: The Pressing Need for Quality, Cost and Outcomes Data to Improve Correctional Healthcare for Older Prisoners”, *Journal of the American Geriatrics Society*, Vol. 61, No. 11, 2013.

14 *Ibid.*

15 Cyrus Ahalt, Ingrid A. Binswanger, Michael Steinman, Jacqueline Tulskey and Brie A. Williams, “Confined to Ignorance: The Absence of Prisoner Information from Nationally Representative Health Data Sets”, *Journal of General Internal Medicine*, Vol. 27, No. 2, 2012.

16 *Ibid.*

17 Office of the Inspector General, above note 7.

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 Andrew Coyle, “Standards in Prison Health: The Prisoner as a Patient”, *Prisons and Health*, WHO, 2014, available at: www.euro.who.int/__data/assets/pdf_file/0008/249191/Prisons-and-Health,-2-Standards-in-prison-health-the-prisoner-as-a-patient.pdf?ua=1; citing, e.g., European Court of Human Rights (ECtHR), *Mouisel v. France*, Application No. 67263/01, 14 November 2002; ECtHR, *Hénaf v. France*, Application No. 65436/01, 27 November 2003; ECtHR, *McGlinchey and Others v. United Kingdom*, Judgment, Application No. 50390/99, 29 April 2003.

the grounds of their legal situation”. The European Court of Human Rights has affirmed the right to standard of care for prisoners through case law.²² This is also the case in the United States, where in 1976, the Supreme Court guaranteed prisoners’ rights to “community-standard” health care.²³ This concept, commonly referred to in European nations as “equivalence of care”, is often used to define the minimal health-care standards required of correctional facilities.

While ethicists suggest that equivalence of care is difficult (and sometimes impossible) to achieve in a setting where patients have compromised autonomy, competing priorities (for example, legal concerns or safety issues) and considerable social and health-care needs that strain the resources available to treat them,²⁴ it is a useful concept for developing a basic expected standard of care. When the equivalence of care test is applied to the care of older adults in the correctional setting, it is important to use the field of geriatrics as the community benchmark for care. Geriatrics is the field of medicine that aims to optimize the health, function, independence and quality of life of older patients through the lens of bio-psycho-social assessment and treatment.²⁵ The field of geriatrics takes a patient-centred approach to prioritizing and assessing the risks and benefits of different (and at times competing) interventions offered to patients with multiple medical conditions and disability through a comprehensive assessment of their personal goals of care. To incorporate a geriatric health-care model in correctional settings requires an understanding of the clinical conditions prioritized in geriatric care.

Medical conditions prioritized in geriatric care

Functional ability

In geriatrics, “functional ability” refers to an individual’s capacity to attend to their own “activities of daily living” (ADLs), such as dressing, toileting and feeding oneself, and to common daily tasks called “instrumental activities of daily living” (IADLs), such as shopping and managing one’s finances and medications.²⁶ A person’s functional ability is a result of the interaction between their cognitive and physical abilities and the environment in which they live.

Assessing and optimizing functional ability in older adults is critical to maximizing their health, safety and well-being. In the community, research has consistently shown that a decline in an older adult’s ability to independently perform their ADLs and IADLs is a harbinger of worsening health, rising health-

22 A. Coyle, above note 21.

23 US Supreme Court, *Estelle v. Gamble*, Case No. 75-929, Judgment, 30 November 1976.

24 *Ibid.*

25 Brie A. Williams, Anna Chang, Cyrus Ahalt, Helen Chen, Rebecca Conant, C. Seth Landefeld, Christine Ritchie and Michi Yukawa, *Current Diagnosis and Treatment: Geriatrics*, 2nd ed., McGraw-Hill Professional, New York, 2014.

26 *Ibid.*, p. 4.

care costs and mortality.²⁷ As a result, physicians and other health-care professionals who practice geriatric medicine focus primarily on assessing their patients' capacity to perform these tasks, an assessment which often results in recommendations for how to modify the living environment in order to maximize their independence. As an example, simple tools such as specialized button hooks and Velcro shoes can be used to overcome the difficulty experienced with severe arthritis.²⁸

Assessing functional ability in the correctional setting can be complicated. In the United States, for example, most – if not all – incarcerated individuals do not manage their own grocery shopping, cooking or finances. This makes it difficult to assess a patient's capacity to perform these daily activities. In contrast, other tasks may commonly be required of incarcerated individuals, such as standing for a long time for head count or climbing onto an assigned top bunk.²⁹ Unique daily activities such as these vary between facilities and even between housing units in the same facility. For this reason it is important to identify the physical tasks required to maintain independence ("activities of daily living for prison") in each housing unit and assign individuals according to their ability to perform these required tasks.³⁰

Multimorbidity and medical complexity

Incarcerated older adults shoulder a disproportionate burden of chronic medical conditions.³¹ One study that assessed the health of men aged 60 or older in prisons in England and Wales found that 85% reported at least one major chronic illness, a rate higher than that reported by their age-matched community counterparts and far higher than reported in younger prisoners.³² In Switzerland, incarcerated older adults have been found to seek medical attention more frequently – and for more complicated chronic conditions (such as diabetes and heart failure) – than younger prisoners.³³ In addition, common chronic illnesses, such as diabetes, advanced liver disease and coronary artery disease, can make the management of co-occurring conditions such as paraplegia more difficult.³⁴

27 Kenneth E. Covinsky, Amy C. Justice, Gary E. Rosenthal, Robert M. Palmer and C. Seth Landefeld, "Measuring Prognosis and Case Mix in Hospitalized Elders: The Importance of Functional Status", *Journal of General Internal Medicine*, Vol. 12, No. 4, 1997.

28 Brie A. Williams, Karla Lindquist, Rebecca L. Sudore, Heidi M. Strupp, Donna J. Willmott and Louise C. Walter, "Being Old and Doing Time: Functional Impairment and Adverse Experiences of Geriatric Female Prisoners", *Journal of the American Geriatric Society*, Vol. 54, No. 4, 2006.

29 *Ibid.*

30 *Ibid.*

31 Susan J. Loeb and Azza AbuDagga, "Health-Related Research on Older Inmates: An Integrative Review", *Research in Nursing and Health*, Vol. 29, No. 6, 2006; Jacques Baillargeon, Sandra A. Black, John Pulvino and Kim Dunn, "The Disease Profile of Texas Prison Inmates", *Annals of Epidemiology*, Vol. 10, No. 2, 2000.

32 Seena Fazel, Tony Hope, Ian O'Donnell, Mary Piper and Robin Jacoby, "Health of Elderly Male Prisoners: Worse than the General Population, Worse than Younger Prisoners", *Age and Ageing*, Vol. 30, No. 5, 2001.

33 Tenzin Wangmo, Sirin Hauri, Andrea H. Meyer and Bernice S. Elger, "Patterns of Older and Younger Prisoners' Primary Healthcare Utilization in Switzerland", *International Journal of Prisoner Health*, Vol. 12, No. 3, 2016.

34 Ingrid A. Binswanger, Patrick M. Krueger and John F. Steiner, "Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the USA Compared with the General Population", *Journal of Epidemiology and Community Health*, Vol. 63, No. 11, 2009.

Incarcerated older adults are also particularly vulnerable to infectious disease. One study in Texas found that rates of tuberculosis, hepatitis B and C, resistant staphylococcal infections (such as methicillin-resistant *Staphylococcus aureus*, or MRSA), syphilis and pneumonia were disproportionately high in incarcerated older populations compared to younger prisoners and to community-dwelling older adults.³⁵

Geriatric Syndromes in the Correctional Setting

In addition to chronic medical conditions, older adults frequently experience other “geriatric syndromes” that can have a negative impact on their physical function and quality of life. Examples include frequent falls, cognitive impairment and dementia, incontinence, sensory impairment and polypharmacy.³⁶ The presence of geriatric syndromes such as these contributes to an older adult’s overall frailty and poor health outcomes.³⁷ Older adults warrant a full geriatric evaluation upon intake at correctional facilities to identify whether any geriatric syndromes are present and, if so, to make recommendations for how to address these conditions. Persons ageing in prisons should receive periodic reassessment (i.e., annually) to identify and address new geriatric syndromes as they arise.

Falls

Falls are a leading cause of serious injury and death among older adults.³⁸ Loss of muscle mass, pain due to arthritis, impaired balance due to loss of nerve sensation, and hearing or visual impairment are examples of the many drivers of high fall risk among older adults.³⁹ In the correctional setting, many factors can heighten the risk of falls, such as dimly lit or crowded walkways. Furthermore, institutionalized older adults who spend the majority of their time indoors are at heightened risk for vitamin D deficiency due to insufficient sun exposure.⁴⁰ Vitamin D is critical for both muscle and bone health, and vitamin D deficiency puts older people at risk of falls.⁴¹ Any additional obstacles to normal ambulation – such as being required to walk with ankle or wrist restraints – are also likely to enhance the risk of falling. Moreover, those who have few

35 Jacques Baillargeon, Sandra A. Black, Charles T. Leach, Hal Jenson, John Pulvino, Patrick Bradshaw and Owen Murray, “The Infectious Disease Profile of Texas Prison Inmates”, *Preventive Medicine*, Vol. 38, No. 5, 2004.

36 C. Seth Landefeld, Robert M. Palmer, Mary Anne Johnson, C. Bree Johnston and William L. Lyons, *Current Geriatric Diagnosis and Treatment*, McGraw-Hill, New York, 2004.

37 Sharon K. Inouye, Stephanie Studenski, Mary Elizabeth Tinetti and George A. Kuchel, “Geriatric Syndromes: Clinical, Research and Policy Implications of a Core Geriatric Concept”, *Journal of the American Geriatrics Society*, Vol. 55, No. 5, 2007.

38 C. S. Landefeld *et al.*, above note 36.

39 Mary E. Tinetti and Chandrika Kumar, “The Patient Who Falls: ‘It’s Always a Trade-Off’”, *Journal of the American Medical Association*, Vol. 303, No. 3, 2010.

40 Peter D. Papapetrou, Maria Triantafyllopoulou and A. Korakovouni, “Severe Vitamin D Deficiency in the Institutionalized Elderly”, *Journal of Endocrinological Investigation*, Vol. 31, No. 9, 2008.

41 Michael F. Holick, “Vitamin D Deficiency”, *New England Journal of Medicine*, Vol. 357, No. 3, 2007.

opportunities to exercise may experience physical deconditioning, a strong risk factor for serious fall-related injury.⁴²

Cognitive Impairment

Normal age-related cognitive changes can include slower reaction times and slower performance on timed tasks.⁴³ In contrast, the diagnosis of *abnormal* cognitive changes (dementia) requires both memory impairment and impairment in at least one additional cognitive domain, such as judgement or executive function, plus some degree of new functional impairment (newly impaired ability to perform ADLs or IADLs).⁴⁴

The World Health Organization (WHO) estimates that there are 47.5 million people worldwide living with dementia, and that this number will increase to 75.6 million by the year 2030.⁴⁵ The incidence of dementia increases with advancing age; while the prevalence of dementia amongst people aged 70–79 is 5%, this number jumps to 37% for people over 90.⁴⁶ Many of the risk factors for dementia – such as poor educational attainment – are common in correctional populations.⁴⁷ Although there exists little research in this area,⁴⁸ it has been estimated that the prevalence of cognitive impairment in incarcerated older adults is high, reaching as high as 19% to 30% among incarcerated adults aged 55 or older.⁴⁹ One study found that dementia was listed as a diagnosis in 40% of older adults in one state prison system in the United States.⁵⁰

While the regimented daily schedule in correctional facilities may make it difficult to detect signs of cognitive impairment and dementia (such as getting lost, misplacing belongings and mismanaging money), early diagnosis is of critical importance in the correctional setting. Cognitive changes, personality changes that often accompany dementia, and “dementia-related behaviours” (such as wandering, fighting and poor impulse control) may put individuals at heightened risk for unwarranted disciplinary action, victimization or failure to comply with parole instructions following release. One important resource for detecting cognitive impairment in its early stages is to educate those who spend the most amount of time with individuals in prison – such as correctional officers – to recognize early warning signs. One study found that correctional officers with no

42 Tahir Masud and Robert O. Morris, “Epidemiology of Falls”, *Age and Ageing*, Vol. 30, 2001.

43 Caroline N. Harada, Marissa Natelson Love and Kristen Triebel, “Normal Cognitive Aging”, *Clinics in Geriatric Medicine*, Vol. 29, No. 4, 2013.

44 B. A. Williams *et al.*, above note 25, pp. 123–133.

45 WHO, *The Epidemiology and Impact of Dementia*, Geneva, 2015, available at: www.who.int/mental_health/neurology/dementia/dementia_thematicbrief_epidemiology.pdf.

46 B. Brent Simmons, Brett Hartmann and Daniel DeJoseph, “Evaluation of Suspected Dementia”, *American Family Physician*, Vol. 15, No. 84, 2011.

47 *Ibid.*

48 B. A. Williams *et al.*, above note 4.

49 R. H. Aday, above note 10.

50 Brie A. Williams, Jacques Baillargeon, Karla Lindquist, Louise C. Walter, Kenneth E. Covinsky, Heather E. Whitson and Michael A. Steinman, “Medication Prescribing Practices for Older Prisoners in the Texas Prison System”, *American Journal of Public Health*, Vol. 100, No. 4, 2010.

special training suspected the presence of cognitive impairment in five times as many individuals as clinical staff.⁵¹

Urinary incontinence

Although urinary incontinence is common among older adults, it is not a normal part of ageing and it always warrants a thorough medical evaluation.⁵² In the community, incontinence is often underreported and underdiagnosed.⁵³ Studies show that patients rarely bring it up to their health-care providers without prompting.⁵⁴ Indeed, in one survey of correctional health-care directors, respondents reported that they were 30% more likely to ask their patients about asthma than incontinence during a physical exam.⁵⁵ In the correctional setting, malodorous clothing due to incontinence could put older adults at heightened risk of victimization or intimidation. It is therefore critical for correctional health-care providers to ask all older adults about incontinence, and for prisons to stock appropriate incontinence hygiene supplies and allow older adults with incontinence to change clothes as often as needed.⁵⁶

Sensory impairment

At least one third of individuals aged 60 or older and more than 80% of individuals above age 85 have some degree of hearing impairment, while approximately one in three individuals over age 80 are visually impaired.⁵⁷ Hearing and vision impairment may present unique challenges for incarcerated individuals, such as interfering with the ability to respond to correctional officers' orders or to fully participate in a court hearing.⁵⁸ Sensory impairments also heighten the risk of injurious falls and can lead to distressing social isolation.⁵⁹ Incarcerated older adults should receive screening for hearing loss, as hearing aids can improve

51 Brie A. Williams, Karla Lindquist, Terry Hill, Jacques Baillargeon, Jeff Mellow, Robert Greifinger and Louise C. Walter, "Caregiving Behind Bars: Correctional Officer Reports of Disability in Geriatric Prisoners", *Journal of the American Geriatric Society*, Vol. 57, No. 7, 2009.

52 B. A. Williams *et al.*, above note 28.

53 Kathryn L. Burgio, Diane G. Ives, Julie L. Locher, Vincent C. Arena and Lewis H. Kuller, "Treatment Seeking for Urinary Incontinence in Adults", *Journal of the American Geriatrics Society*, Vol. 42, No. 2, 1994.

54 B. A. Williams *et al.*, above note 4.

55 Rebecca Reviere and Vernetta D. Young, "Aging Behind Bars: Health Care of Older Female Inmates", *Journal of Women & Aging*, Vol. 16, Nos 1–2, 2004.

56 B. A. Williams *et al.*, above note 28.

57 Anne D. Walling and Gretchen M. Dickson, "Hearing Loss in Older Adults", *American Family Physician*, Vol. 85, No. 12, 2012, available at: www.aafp.org/afp/2012/0615/p1150.html; Allen L. Pelletier, Ledy Rojas-Roldan and Janis Coffin, "Vision Loss in Older Adults", *American Family Physician*, Vol. 94, No. 3, 2016, available at: www.aafp.org/afp/2016/0801/p219.html.

58 Terry Hill, Brie A. Williams, Gail Cobe and Karla Lindquist, *Aging Inmates: Challenges for Healthcare and Custody*, Report, Lumetra, San Francisco, CA, 2006, available at: www.cphcs.ca.gov/docs/resources/AgingInmatesByLumetra0506.pdf.

59 *Ibid.*

social and emotional well-being.⁶⁰ Older adults should also receive annual vision testing and should be considered for hearing and vision testing after a fall, or if they become more withdrawn over time.⁶¹

Polypharmacy

“Polypharmacy” describes the simultaneous prescription of multiple medications, the use of any medication known to cause adverse events in older adults, and/or the use of a medication to treat the adverse effects of another medication.⁶² Older adults are particularly vulnerable to medication interactions and adverse medication side effects, both common in polypharmacy, due to age-related changes in drug metabolism that affect both the delivery and clearance of medications from the body.⁶³ Polypharmacy also can exacerbate the adverse effects of other geriatric syndromes (such as falls, incontinence or cognitive impairment) and is frequently an overlooked contributor to older patients’ physical complaints⁶⁴. For these reasons, geriatrics experts pay special attention to polypharmacy and frequently engage in “deprescribing”—reviewing and reconciling medication lists at every clinical visit to eliminate unnecessary and low-yield medications or those with a poor side-effect profile for older adults.⁶⁵ Polypharmacy is also common in the correctional setting—in a study focused on one state prison system, patients over 65 years of age were taking an average of nine different types of medication.⁶⁶ These patients were more likely to receive medications deemed inappropriate for older patients than those in comparable studies of community-dwelling elders.⁶⁷

Mental health disorders and isolation

Many incarcerated older adults face psychosocial challenges that can exacerbate physical disability. For example, approximately half of US prisoners have at least

60 Barbara E. Weinstein, Lynn W. Sirow and Sarah Moser, “Relating Hearing Aid Use to Social and Emotional Loneliness in Older Adults”, *American Journal of Audiology*, Vol. 25, No. 1, 2016; Raffaella Boi, Luca Racca, Antonio Cavallero, Veronica Carpaneto, Matteo Racca Francesca Dall’Acqua, Michele Ricchetti, Alida Santelli and Patrizio Odetti, “Hearing Loss and Depressive Symptoms in Elderly Patients”, *Geriatrics & Gerontology International*, Vol. 12, No. 3, 2012.

61 Brie A. Williams, Cyrus Ahalt and Louise Aronson, “Aging Correctional Populations”, in Gerben Bruinsma and David Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice*, Springer, New York, 2014.

62 Cynthia M. Williams, “Using Medications Appropriately in Older Adults”, *American Family Physician*, Vol. 66, No. 10, 2002.

63 *Ibid.*

64 S. K. Inouye *et al.*, above note 37.

65 Ian A. Scott, Sarah N. Hilmer, Emily Reeve, Kathleen Potter, David Le Couteur, Deborah Rigby, Danijela Gnjdjic, Christopher B. Del Mar, Elizabeth E. Roughead, Amy Page, Jesse Jansen and Jennifer H. Martin, “Reducing Inappropriate Polypharmacy: The Process of Deprescribing”, *JAMA Internal Medicine*, Vol. 175, No. 5, 2015; Michael A. Steinman, “Polypharmacy—Time to Get Beyond Numbers”, *JAMA Internal Medicine*, Vol. 176, No. 4, 2016.

66 B. A. Williams *et al.*, above note 50.

67 *Ibid.*

one mental health condition.⁶⁸ Estimates of the prevalence of serious mental illness in incarcerated older adults in the United States range from 10% to 40%.⁶⁹ Post-traumatic stress disorder is present in up to a third of incarcerated older individuals.⁷⁰ Older adults may also experience heightened anxiety related to their impending release to the community.⁷¹ Others may feel distress at the prospect of dying while incarcerated.⁷² For some, limitations in the ability to perform prison activities of daily living are associated with higher rates of depression and suicidal ideation.⁷³

Mental health can be further affected by feelings of isolation in the correctional setting. Compared to incarcerated younger adults, older adults generally have fewer regular visitors and fewer connections within the prison to social networks and self-help groups.⁷⁴ This relative social isolation can lead to diminished functional capacity or may be exacerbated by it, putting older adults at a heightened risk for subsequent worsening loneliness and physical disability.⁷⁵

The health of older women prisoners

Between 1980 and 2014, the number of incarcerated women in the United States increased by more than 700%.⁷⁶ In 2015, 7% of women prisoners in the state and federal prison systems were aged 55 or older.⁷⁷ In England and Wales, a growth in the population of women in correctional facilities is also outpacing the population of men: while the number of incarcerated men in these countries has been reduced by approximately 50% since 2004, the number of incarcerated women has doubled.⁷⁸ The number of incarcerated women is also growing at a faster rate than that of incarcerated men in Australia and New Zealand, and in

68 Doris J. James and Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Special Report, BJS, DoJ, Washington, DC, 2006.

69 B. A. Williams, C. Ahalt and L. Aronson, above note 71; Sabrina Haugebrook, Kristen M. Zgoba and Tina Maschi, "Trauma, Stress, Health, and Mental Health Issues among Ethnically Diverse Older Adult Prisoners", *Journal of Correctional Health Care*, Vol. 6, No. 3, 2010.

70 Jason D. Flatt, Brie A. Williams, Deborah Barnes, Joe Goldenson and Cyrus Ahalt, "Post-Traumatic Stress Disorder Symptoms and Associated Health and Social Vulnerabilities in Older Jail Inmates", *Ageing & Mental Health*, Vol. 21, No. 10, 2017.

71 Elaine Crawley and Richard Sparks, "Is There Life After Imprisonment? How Elderly Men Talk About Imprisonment and Release", *Criminology and Criminal Justice*, Vol. 6, No. 1, 2006.

72 Ronald H. Aday, "Aging Prisoners' Concerns toward Dying in Prison", *Journal of Death and Dying*, Vol. 52, No. 3, 2006.

73 Lisa C. Barry, Dorothy B. Wakefield, Robert L. Trestman and Yeates Conwell, "Disability in Prison Activities of Daily Living and Likelihood of Depression and Suicidal Ideation in Older Prisoners", *International Journal of Geriatric Psychiatry*, January 2016.

74 B. A. Williams *et al.*, above note 50.

75 Carla M. Perissinotto, Irena Stijacic Cenzer and Kenneth E. Covinsky, "Loneliness in Older Persons: A Predictor of Functional Decline and Death", *JAMA Internal Medicine*, Vol. 172, No. 14, 2012.

76 The Sentencing Project, "Incarcerated Women and Girls", Fact Sheet, Washington, DC, 2015, available at: www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf.

77 BJS, above note 8.

78 UN Office on Drugs and Crime, *Handbook on Women and Imprisonment*, 2nd ed., New York, 2014, available at: www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf.

many Latin American and European nations.⁷⁹ Yet the needs of older women risk being overlooked in many correctional systems that were originally designed to care for young, healthy men.

Few studies have considered the health-care needs of older women in correctional facilities. Much of what is known about women's health in correctional settings has been focused on the reproductive health of younger women.

Some inferences can be made about the health-related needs of incarcerated older women based on the few studies focused on this population, studies about incarcerated younger women, and what is known about the health-care needs of community-dwelling older women. For example, incarcerated women are more likely to have HIV/AIDS and other sexually transmitted diseases (STDs) than incarcerated men.⁸⁰ Studies from Texas have demonstrated that the prevalence of hepatitis B and C, HIV/AIDS, MRSA and syphilis are higher in incarcerated older women than in incarcerated older men.⁸¹ The high prevalence of sexually transmitted diseases is perhaps not surprising given the large number of incarcerated women who have experienced a history of physical or sexual abuse (57% in one study)⁸² or victimization (between 77% and 90%),⁸³ or who have engaged in commercial sex work. For example, 6.5% of women admitted to the New York City jail system in 2009 were sex workers, and these women were found to have a higher prevalence of STDs than non-sex workers.⁸⁴

Incarcerated women are also more likely to report drug or alcohol addiction and to be incarcerated for a drug-related crime compared to men (e.g., 59% of incarcerated women in the federal prison system in the United States compared to 40% of incarcerated men in the same corrections system in 2015).⁸⁵ The interconnected challenges of mental health and substance use disorders, histories of trauma, and sexually transmitted disease warrant special interventions in this population. As a result, many have advocated for the training of correctional clinicians to provide "trauma-informed care" to women in correctional settings.⁸⁶

In the community, geriatric syndromes including cognitive impairment and dementia, incontinence, falls and functional impairment are more common

79 *Ibid.*

80 Michele Staton, Carl Leukefeld and J. Matthew Webster, "Substance Use, Health, and Mental Health: Problems and Service Utilization among Incarcerated Women", *International Journal of Offender Therapy and Comparative Criminology*, Vol. 47, No. 2, 2003.

81 J. Baillargeon *et al.*, above note 35.

82 Natasha A. Frost, Judith Greene and Kevin Pranis, *Hard Hit: The Growth of Imprisonment of Women, 1977–2004*, Women's Prison Association, New York, 2006, available at: <http://csdp.org/research/HardHitReport4.pdf>.

83 Nena Messina and Christine Grella, "Childhood Trauma and Women's Health Outcomes in a California Prison Population", *American Journal of Public Health*, Vol. 96, No. 10, 2006.

84 Farah Parvez, Monica Katyal, Howard Alper, Ruth Leibowitz and Homer Venters, "Female Sex Workers Incarcerated in New York City Jails: Prevalence of Sexually Transmitted Infections and Associated Risk Behaviors", *Sexually Transmitted Infections*, Vol. 89, No. 4, 2013.

85 BJS, above note 8.

86 Stephanie S. Covington and Barbara E. Bloom, "Gendered Justice: Women in the Criminal Justice System", in Barbara E. Bloom (ed.), *Gendered Justice: Addressing Female Offenders*, Carolina Academic Press, Durham, NC, 2003.

in women than in men.⁸⁷ Osteoporosis, which increases the chance that a fall will lead to a fracture and to temporary or permanent disability, is four times as common in women over age 50 than men.⁸⁸ In a study of incarcerated women aged 55 or older in California, 16% reported needing help with at least one ADL and 55% reported a fall in the past year.⁸⁹ The disproportionate burden of medical illness and disability reported by incarcerated women may explain their high health-care utilization rates⁹⁰ and could suggest that incarcerated older women are significant contributors to increasing correctional health-care costs. In addition, the worse health profile of incarcerated women in the United States has resulted in a relative risk of mortality in the first two years following release from prison being 5.5 times greater than the community norm, while the relative risk for men is 3.3 times greater than the community norm.⁹¹

Conditions of Confinement

Environmental and systemic challenges for the geriatric prisoner population

Conditions of confinement in most correctional facilities present challenges to many older adults who are unable to adapt to the environment's unique physical demands. Sometimes the correctional facility's physical layout presents dangers to older adults.⁹² For example, uneven flooring, poor lighting and excess crowding can contribute to a risk of falls.⁹³ Correctional facilities that significantly restrict freedom of movement for much of the day may run the risk of contributing to physical deconditioning in older adults, an additional risk factor for falls, morbidity and mortality. Older individuals who require additional time to get places may require assistance with ambulation and travel to safely move between settings or to get places on time, such as for meals.⁹⁴ Additionally, older adults can experience impaired thirst and temperature regulation⁹⁵ which can pose a

87 C. S. Landefeld *et al.*, above note 36.

88 Anne C. Looker, Lori G. Borrud, Bess Dawson-Hughes, John A. Shepherd and Nicole C. Wright, "Osteoporosis or Low Bone Mass at the Femur Neck or Lumbar Spine in Older Adults: United States, 2005–2008", NCHS Data Brief, No. 93, National Center for Health Statistics, Hyattsville, MD, 2012.

89 B. A. Williams *et al.*, above note 28.

90 B. Jayne Anno, Camila Graham, James E. Lawrence and Ronald Shansky, "Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates", Criminal Justice Institute, Middletown, CT, 2004; Christine H. Lindquist and Charles A. Lindquist, "Health Behind Bars: Utilization and Evaluation of Medical Care among Jail Inmates", *Journal of Community Health*, Vol. 24, No. 4, 1999.

91 Ingrid A. Binswanger, Marc F. Stern, Richard A. Deyo, Patrick J. Heagerty, Allen Cheadle, Joann G. Elmore and Thomas D. Koepsell, "Release from Prison – a High Risk of Death for Former Inmates", *New England Journal of Medicine*, Vol. 356, No. 2, 2007.

92 B. A. Williams *et al.*, above note 28.

93 Cynthia Massie Mara, "Expansion of Long-Term Care in the Prison System: An Aging Inmate Population Poses Policy and Programmatic Questions", *Journal of Aging & Social Policy*, Vol. 14, No. 2, 2002.

94 UN Office on Drugs and Crime, above note 2.

95 B. A. Williams *et al.*, above note 4.

significant danger for those incarcerated in facilities with inadequate heating or cooling systems.⁹⁶ Moreover, some US correctional facilities have been found to fall short on universal accessibility requirements due to budgetary constraints.⁹⁷

A physical impairment need not lead to disability if the environment can be modified to meet the individual's needs; installation of grab bars and seats in the shower and the placement of special doorknobs to accommodate poor dexterity due to arthritis are examples of environmental modifications that can improve independent living.⁹⁸ A comprehensive inventory of the tasks required of an incarcerated individual to function in his or her housing unit and a systematic assessment of his or her capacity to meet those expectations are necessary to identify the environment most conducive to maintaining his or her independence. This is important because this so-called "environmental/functional mismatch" is often underappreciated, placing older adults at avoidable risk of injury or loss of independence.⁹⁹

Some environmental/functional mismatch may also be overcome with additional staffing to assist older adults with self-care. According to the US Bureau of Labor Statistics, nearly a million Americans are employed in the community as home health aides or personal care workers, an industry that is expected to grow significantly over the coming years.¹⁰⁰ Personal care workers are trained to assist with ADLs such as transferring, dressing and feeding for those patients in need. While most prisons do not allow personal care workers to provide physical assistance that could compromise the safety or dignity of patients (such as with toileting or bathing), personal care volunteers in correctional settings are sometimes used to provide companionship or to accompany older adults around the facility, such as to the dining hall for meals.

Sometimes, older adults face challenges accessing correctional health-care services and programming. For example, some correctional facilities require payment for health-care visits, written requests for medical appointments or standing in waiting areas for an appointment,¹⁰¹ all of which may pose barriers to care for some older adults. Additionally, individuals who experience prolonged incarcerations rely on institutional programming for stimulation, socialization and opportunities for personal development. But prison programming is rarely designed to meet the physical, developmental and social needs of older adults, who, for example, may already have a high-school degree and therefore not

96 Alan Blinder, "In U.S. Jails, a Constitutional Clash over Air-Conditioning", *New York Times*, 15 August 2016, available at: www.nytimes.com/2016/08/16/us/in-us-jails-a-constitutional-clash-over-air-conditioning.html?_r=0.

97 Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States*, 2012, available at: www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0_0.pdf.

98 Michael E. Rogers, Nicole L. Rogers, Nobuo Takeshima and Mohammad M. Islam, "Reducing the Risk for Falls in the Homes of Older Adults", *Journal of Housing for the Elderly*, Vol. 18, No. 2, 2004.

99 B. A. Williams *et al.*, above note 28.

100 Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016–17 Edition: *Home Health Aides*, US Department of Labor, Washington, DC, 2017, available at: www.bls.gov/ooh/healthcare/home-health-aides.htm.

101 T. Hill *et al.*, above note 58.

benefit from high-school education programming, may not be able to participate in employment training that is reliant upon physical labour, and may feel out of place when spending their days in the company of much younger adults.¹⁰²

Some facilities have developed age-segregated housing to overcome the common mismatch between correctional housing units and the needs of older adults. Such units can be constructed and staffed to mitigate environmental hazards and facilitate access to clinical health-care staff, and can sometimes minimize fear of elder abuse.¹⁰³ Yet many consider older adults to be a stabilizing force in prisons and to serve as a source of wisdom and support for younger adults.¹⁰⁴ In addition, many incarcerated older adults have developed rich relationships with incarcerated younger adults, some of whom act as informal caregivers.¹⁰⁵ Age-segregated units can fracture these relationships and lead to enhanced social isolation for older adults.¹⁰⁶

Sending older adults to specially constructed geriatric facilities may also result in moving them further away from their families and home communities, which can decrease their access to outside visitors.¹⁰⁷ Additionally, constructing and running special facilities that appropriately accommodate the highest level of need for older adults is expensive. At a New York State nursing home-style unit designed to house incarcerated older adults with dementia, an average individual's care costs more than twice what it would cost to live in a nursing home outside of the correctional setting.¹⁰⁸ Further research is needed to understand the impact of segregated housing units as a solution for some of the problems posed to incarcerated older adults.¹⁰⁹

The risk of administrative segregation for older adults

Administrative segregation – also called solitary confinement, special housing units, special needs units or supermax – is defined in the Mandela Rules as confinement for twenty-two hours or more per day without meaningful human contact.¹¹⁰ In the United States, solitary confinement often refers to the even more punitive correctional practice of housing prisoners in a small cell (roughly six by eight feet) for approximately twenty-three hours a day, with little to no human

102 Office of the Inspector General, above note 7.

103 UN Office on Drugs and Crime, above note 2; John K. Kerbs and Jennifer M. Jolley, “A Commentary on Age Segregation for Older Prisoners”, *Criminal Justice Review*, Vol. 34, No. 1, 2009.

104 Human Rights Watch, above note 97.

105 *Ibid.*

106 *Ibid.*

107 UN Office on Drugs and Crime, above note 2; Human Rights Watch, above note 97.

108 Michael Hill, “New York Prison Creates Dementia Unit”, *Washington Post*, 29 May 2007, available at: www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052900208.html; Maura Ewing, “When Prisons Need to Be More Like Prison Nursing Homes”, *Marshall Project*, 27 August 2015, available at: www.themarshallproject.org/2015/08/27/when-prisons-need-to-be-more-like-nursing-homes#.3EYvevSg9.

109 B. A. Williams *et al.*, above note 4.

110 UN General Assembly, *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, A/RES/70/175, 8 January 2016, available at: www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf.

interaction and only three to seven hours of exercise per week.¹¹¹ The use of solitary confinement is common in the United States with estimates that nearly one fifth of the country's incarcerated population – approximately 400,000 individuals – spend time in solitary confinement over the course of a year.¹¹² While in solitary confinement, prisoners often lack regular access to exercise and exposure to sunlight. These conditions pose a challenge for providing adequate health care and managing ageing-related health conditions.

Geriatric conditions like dementia, arthritis and osteoporosis can be exacerbated by the conditions found in solitary confinement such as profound lack of exercise, decreased exposure to sunlight leading to lower vitamin D levels, and minimal social interaction.¹¹³ Studies among community-dwelling older adults have found that spending too much time alone poses a risk for developing increased blood pressure, physical deconditioning and depression.¹¹⁴ Social isolation and loneliness alone have been associated with increased mortality.¹¹⁵ Based on what is known about the risk of worsening health in older adults, the health-related impact of isolation on incarcerated older adults is likely profound.

Serious, life-limiting illness, dying in prison and compassionate release

As the correctional population ages, an increasing number of incarcerated individuals are at risk of developing serious, life-limiting illnesses and dying while incarcerated. Serious, life-limiting illnesses are often debilitating for a long period of time before death and require enhanced medical attention, which can create challenges for correctional staff and strain health system resources. Clinicians with advanced training in the management of symptomatic distress in advanced

111 Hope Metcalf, Jamelia Morgan, Samuel Oliker-Friedland, Judith Resnik, Julia Spiegel, Haran Tae, Alyssa Roxanne Work and Brian Holbrook, *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies*, Yale Law School, Public Law Working Paper, 2013.

112 Allen J. Beck, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011–12*, BJS, DoJ, Washington, DC, 2015, available at: www.bjs.gov/content/pub/pdf/urhuspj1112.pdf.

113 M. F. Holick, above note 41; C. M. Perissinotto, I. Stijacic Cenzer and K. E. Covinsky, above note 75; L. D. Gillespie, M. Robertson, W. J. Gillespie, C. Sherrington, S. Gates, L. M. McCormick, Linda Teri, Paul Crane and “Interventions for Preventing Falls in Older People Living in the Community”, *Cochrane Database of Systematic Review*, Vol. 2, 2009.

114 Louise C. Hawkey, Ronald A. Thisted and John T. Cacioppo, “Loneliness Predicts Reduced Physical Activity: Cross-Sectional and Longitudinal Analyses”, *Health Psychology: Official Journal of the Division of Health Psychology, American Psychological Association*, Vol. 28, No. 3, 2009; John T. Cacioppo, Mary Elizabeth Huges, Linda J. Waite and Ronald Thisted, “Loneliness as a Specific Risk Factor for Depressive Symptoms: Cross-Sectional and Longitudinal Analyses”, *Psychology and Aging*, Vol. 21, No. 1, 2006; Eric B. Larson, Li Wang, James D. Bowen, Wayne C. McCormick, Linda Teri, Paul Crane and Walter Kukull, “Exercise Is Associated with Reduced Risk for Incident Dementia Among Persons 65 Years of Age and Older”, *Annals of Internal Medicine*, Vol. 144, No. 2, 2006.

115 C. M. Perissinotto, I. Stijacic Cenzer and K. E. Covinsky, above note 75; M. Tabue Teguo, N. Simo-Tabue, R. Stoykova, C. Meillon, M. Cogne, H. Amiéva and J. F. Dartiques, “Feelings of Loneliness and Living Alone as Predictors of Mortality in the Elderly: The PAQUID Study”, *Psychosomatic Medicine*, Vol. 78, No. 8, 2016.

illness are needed so that incarcerated patients do not experience severe pain or distressing symptoms that unnecessarily cause a loss of their functional capacity. Older adults in correctional settings have reported a particularly high symptom burden compared to their younger counterparts.¹¹⁶

Moreover, a rising death rate in US correctional facilities has created an urgent need for correctional staff training in the management of the seriously ill, and a need for improved housing options for those with serious illness or who are dying.¹¹⁷ As a result, many correctional facilities are exploring options for improving the care of dying patients while simultaneously considering the expansion of opportunities for early medical release for the seriously ill.¹¹⁸

Palliative care and hospice care in correctional facilities

One out of every eleven US prisoners is serving a life sentence; of these, a third have no possibility of obtaining parole.¹¹⁹ In 2013 there were over 3,800 deaths in US prisons. Over 80% of individuals who died in state prisons were over 45 years old, and 85% of those deaths were attributed to chronic illness.¹²⁰

Correctional facilities may face challenges when providing care to terminally ill and actively dying patients. The community standard of care for persons with a life-limiting or serious illness is palliative care.¹²¹ Palliative care is specialized medical care for people with serious illness; its goal is to improve quality of life for the patient and their loved ones.¹²² Palliative care-trained clinicians have advanced training in symptom management and in the science of prognosis.¹²³ Without training in prognosis, correctional clinicians may fail to identify potential candidates for early medical release programmes before it is too late for them to live through a prolonged assessment process.¹²⁴

116 Marielle Bolano, Cyrus Ahalt, Christine Ritchie, Irena Stijacic Cenzler and Brie A. Williams, "Detained and Distressed: Persistent Distressing Symptoms in a Population of Older Jail Inmates", *Journal of the American Geriatrics Society*, Vol. 64, No. 11, 2016; Brie A. Williams, Cyrus Ahalt, Irena Stijacic Cenzler, Alexander K. Smith, Joe Goldenson and Christine S. Ritchie, "Pain Behind Bars: the Epidemiology of Pain in Older Jail Inmates in a County Jail", *Journal of Palliative Medicine*, Vol. 17, No. 12, 2014.

117 B. A. Williams *et al.*, above note 4.

118 Human Rights Watch, *The Answer Is No: Too Little Compassion Release in US Federal Prisons*, 30 November 2012, available at: www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons; Office of the Inspector General, above note 7.

119 Ashley Nellis and Ryan S. King, *No Exit: The Expanding Use of Life Sentences in America*, Report, The Sentencing Project, Washington, DC, 2009, available at: www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf.

120 Brie A. Williams, "Testimony of Brie Williams, MD, MS", *United States Sentencing Commission: Public Hearing on Compassionate Release and Conditions of Supervision*, 17 February 2016, available at: www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/williams.pdf.

121 Amy S. Kelley and R. Sean Morrison, "Palliative Care for the Seriously Ill", *New England Journal of Medicine*, Vol. 373, No. 8, 2015.

122 Nathan E. Goldstein and R. Sean Morrison, *Evidence Based Practice of Palliative Medicine*, 1st ed., Elsevier, Amsterdam, 2013.

123 Timothy E. Quill and Amy P. Abernethy, "Generalist Plus Specialist Palliative Care – Creating a More Sustainable Model", *New England Journal of Medicine*, Vol. 368, No. 13, 2013.

124 B. A. Williams, above note 120.

Correctional settings present unique ethical and policy challenges in the provision of community-standard palliative care. For instance, there exists a great potential for patient–clinician mistrust due to the power imbalance inherent in the correctional setting.¹²⁵ The clinician–patient relationship may be strained further when patients fear that their treatment wishes will not be kept confidential or that their wishes for care at the very end of their life could affect their immediate needs for medical treatment.¹²⁶ An essential component of high-quality palliative care is patient-centred “advance care planning”, a process by which a patient appoints a health-care proxy and documents his or her goals and wishes for treatment at the end of life. Research in US correctional facilities has suggested that several barriers exist to conducting effective advance care planning for incarcerated patients, including lack of staff support for the practice, patient–provider mistrust, and difficulty transferring and communicating advance care plans between correctional and non-correctional settings.¹²⁷ More research is needed to understand how to improve and optimize the delivery of advance care planning in correctional facilities.

In contrast to palliative care, which is appropriate at any time throughout the course of serious illness, hospice care is focused on providing pain and symptom management – including managing existential and psychological distress – to patients in their last months of life. Quality hospice care provides comprehensive support that is focused on comfort and ensuring dignity in the dying process.¹²⁸

Many correctional facilities have developed hospice programmes or dedicated hospice facilities for dying patients.¹²⁹ Yet hospice eligibility restrictions in correctional facilities sometimes pose a challenge for optimal care of patients with serious illnesses. Most prison hospice units require that a patient has a prognosis of less than six months and has agreed to a “do not resuscitate” (DNR) order.¹³⁰ This second criteria, a DNR order, is not usually shared by community hospice organizations and can introduce an obstacle for individuals who do not wish to acquiesce to the order. It is important for correctional hospice programmes to follow national guidelines for best practices so that the level of care and services provided does not vary significantly by institution.¹³¹

125 Meredith Stensland and Sara Sanders, “Detained and Dying: Ethical Issues Surrounding End-of-Life Care in Prison”, *Journal of Social Work in End-of-Life and Palliative Care*, Vol. 12, No. 3, 2016.

126 S. J. Loeb et al., “End-of-Life Care and Barriers for Female Inmates”, *Journal of Obstetric, Gynecologic, and Neonatal Nursing*, Vol. 40, No. 4, 2011; M. Stensland and S. Sanders, above note 125.

127 Sara Sanders, Meredith Stensland, Jane Dohrmann, Erin Robinson and Kim Juraco, “Barriers Associated with the Implementation of an Advance Care Planning Program in a Prison Setting”, *Journal of Social Work in End-of-Life and Palliative Care*, Vol. 10, No. 4, 2014.

128 N. E. Goldstein and R. S. Morrison, above note 122.

129 Human Rights Watch, above note 97; Heath C. Hoffman and George E. Dickinson, “Characteristics of Prison Hospice Programs in the United States”, *American Journal of Hospice and Palliative Care*, Vol. 28, No. 4, 2011.

130 Rachel K. Wion and Susan J. Loeb, “CE: Original Research: End-of-Life Care Behind Bars: A Systematic Review”, *American Journal of Nursing*, Vol. 116, No. 3, 2016.

131 National Hospice and Palliative Care Organization, *Quality Guidelines for Hospice and End-of-Life Care in Correctional Settings*, 2009, available at: www.nhpco.org/sites/default/files/public/Access/Corrections/CorrectionsQualityGuidelines.pdf; National Prison Hospice Association, *Prison Hospice Operational Guidelines*, 1998, available at: <http://prisonhospice.files.wordpress.com/2011/11/prison-hospice-guidelines-revised3.doc>.

Successful prison hospices are often staffed in part by prisoner-volunteers. These volunteers may derive great benefit themselves from the experience of caring for a dying patient.¹³² They often receive extensive training and mentored experience in hospice practices.¹³³ However, volunteers require support from health-care staff, since it is common to feel overburdened when taking on critical caretaking roles, especially in the absence of adequate training.¹³⁴ As is standard of care in the community, an experienced and trained interdisciplinary care team that includes social workers, volunteers and chaplains should staff prison hospices.¹³⁵ Correctional facilities that fail to meet this interdisciplinary approach fall well below community care standards. Finally, symptom management for both seriously ill and dying patients is sometimes compromised by institutional limits on the use of evidence-based opioid analgesics, or other controlled substances, for seriously ill patients.¹³⁶ This presents obvious challenges for achieving adequate symptom control in patients who are in pain or who have other distressing symptoms that can best be treated with opioids, such as shortness of breath.

Early medical release

Early medical release (also called compassionate release or medical parole) is a policy that allows incarcerated patients with serious illness to die outside of a correctional setting before sentence completion.¹³⁷ These policies are grounded in the theory that a change in health status may affect the four principles justifying incarceration: retribution, rehabilitation, deterrence and incapacitation.¹³⁸ Early medical release policies generally consist of two components: (1) medical eligibility, based on physical health evidence; and (2) administrative approval (outside of the health-care system) for release based on legal and correctional evidence. Initiatives to expand early release policies in the United States in recent years have been prompted by the increasing number of incarcerated older adults and their high associated costs.¹³⁹ It is imperative that correctional health-care professionals understand the eligibility requirements for early release so that they know when it is appropriate to proceed with a petition.

For seriously ill patients who are difficult to care for in the correctional environment, early release policies should be pursued when a safe release plan

132 Kevin N. Writing and Laura Bronstein, "Creating Decent Prisons: A Serendipitous Finding about Prison Hospice", *Journal of Offender Rehabilitation*, Vol. 44, No. 4, 2008.

133 H. C. Hoffman and G. E. Dickinson, above note 129.

134 Kristin G. Cloyes, Susan J. Rosenkranz, Patricia H. Berry, Katherine P. Supiano, Meghan Routt, Kathleen Shannon-Dorcy and Sarah M. Llanque, "Essential Elements of an Effective and Sustainable Prison Hospice Program", *American Journal of Hospice and Palliative Care*, Vol. 33, No. 4, 2016; M. Stensland and S. Sanders, above note 125.

135 *Ibid.*

136 Violet Handtke, Hans Wolff and Brie A. Williams, "The Pains of Imprisonment: Challenging Aspects of Pain Management in Correctional Settings", *Pain Management*, Vol. 6, No. 2, 2016.

137 Brie A. Williams, Rebecca L. Sudore, Robert Greifinger and R. Sean Morrison, "Balancing Punishment and Compassion for Seriously Ill Prisoners", *Annals of Internal Medicine*, Vol. 155, No. 2, 2011.

138 *Ibid.*

139 *Ibid.*

has been identified. Unfortunately, the early release process in many US jurisdictions is rife with obstacles that prevent potentially eligible candidates from even being evaluated for their medical eligibility and, once approved, from being released in a timely fashion. Between August 2013 and September 2014, only 320 federal prisoners in the United States submitted requests for compassionate release, and only 111 were released.¹⁴⁰ This is surprising given that the system has over 4,000 prisoners over the age of 65, and many have serious or debilitating illnesses.¹⁴¹

One important barrier to accessing early release is that applications are often submitted too late in a person's disease trajectory, when they are likely to die or become incapacitated prior to having their request approved.¹⁴² Furthermore, it is common for physicians to be required to attest that the applicant has a fixed, short-term prognosis.¹⁴³ This can put excessive burden on the clinician since many common terminal illnesses, such as Alzheimer's disease, end-stage liver disease and congestive heart failure, have an unpredictable trajectory but are profoundly incapacitating for many years prior to death.

To increase their effectiveness, early medical release policies should reflect the different ways in which people experience serious illness. Patients should be able to apply for release at a stage in their illness when they are profoundly functionally or cognitively impaired, even when they have several months or years to live, so they can benefit from release.¹⁴⁴ In the United States, the Federal Bureau of Prisons and several states have expanded their early medical release programmes. Some have introduced a mechanism for early release for older adults based on age alone, after a specified portion of their sentence has been completed.¹⁴⁵

Returning to the community: Addressing the needs of older adults released from prison

The period following release from prison is a challenging and often dangerous time for many individuals, and older people are especially vulnerable to adverse outcomes. One study identified a dramatic increase in mortality compared to age-matched controls for people recently released from prison.¹⁴⁶ Some of this excess mortality risk was due to chronic disease (coronary artery disease, cancer), suggesting that the cause is sometimes attributable to interruptions in care, resources and/or social support.¹⁴⁷

140 Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, US Department of Justice, Washington, DC, 2013, available at: <https://oig.justice.gov/reports/2013/e1306.pdf>.

141 Office of the Inspector General, above note 7.

142 Office of the Inspector General, above note 140.

143 B. A. Williams *et al.*, above note 137.

144 B. A. Williams, above note 120.

145 *Ibid.*

146 I. A. Binswanger *et al.*, above note 91.

147 *Ibid.*

Moreover, without skilled support, older adults may have particular difficulty navigating the processes required to obtain social benefits, finding employment and suitable housing, and getting connected to health care following release.¹⁴⁸ As a result, they may risk running out of medication, requiring visits to the emergency department and/or hospitalization for decompensation of chronic medical conditions that could have been managed in an outpatient clinic.¹⁴⁹

To help individuals who are transitioning back to the community achieve success, the same geriatric transitional care models that are effective for hospital discharge should be adapted for older prisoners.¹⁵⁰ Such models include assigning case managers prior to discharge who assess needs and anticipate issues that might arise, and who follow their client post-discharge to help troubleshoot concerns.¹⁵¹ Exemplary models of transitional care that incorporate elements of hospital discharge programmes have been designed to meet the needs of individuals re-entering the community after a period of incarceration. One such programme, Project START, provides sequential risk assessment and personalized counselling sessions to young men with HIV and hepatitis C both before and after they are released from prison.¹⁵² Similarly, the Transitions Clinic programme in San Francisco pairs recently released individuals with community health workers who have a personal history of incarceration, and has been shown to decrease emergency room visits in the period following release from prison.¹⁵³ Similar strategies should be adapted to the specific needs of geriatric patients with complex medical needs who are returning to the community.

Discharges of older adults can be particularly difficult to plan when the individual requires a nursing-home level of care.¹⁵⁴ In the United States, it can be difficult to find nursing homes willing to accept individuals being released from prison, especially those with a history of sex offences or violence. In response to this challenge, the state of Connecticut now manages its own community-based skilled nursing facility where older adults in need of skilled care can be released on parole.¹⁵⁵

148 Human Rights Watch, above note 97.

149 Joseph W. Frank, Jeffrey A. Linder, William C. Becker, David A. Fiellin and Emily A. Wang, "Increased Hospital and Emergency Department Utilization by Individuals with Recent Criminal Justice Involvement: Results of a National Survey", *Journal of General Internal Medicine*, Vol. 29, No. 9, 2014.

150 Eric A. Coleman and Chad Boulton, "Improving the Quality of Transitional Care for Persons with Complex Care Needs", *Journal of the American Geriatrics Society*, Vol. 51, No. 4, 2003.

151 *Ibid.*

152 Centers for Disease Control and Prevention, *Project START, Best Evidence—Risk Reduction*, Atlanta, Georgia, September 2015, available at: www.cdc.gov/hiv/pdf/research/interventionresearch/compendium/cdc-hiv-project_start_best_rr.pdf; Richard J. Wolitski and Project START Writing Group, "Relative Efficacy of a Multisession Sexual Risk-Reduction Intervention for Young Men Released From Prisons in 4 States", *American Journal of Public Health*, Vol. 96, No. 10, 2006.

153 Emily A. Wang, Clemens S. Hong, Shira Shavit, Ronald Sanders, Eric Kessel and Margot B. Kushel, "Engaging Individuals Recently Released from Prison into Primary Care: A Randomized Trial", *American Journal of Public Health*, Vol. 102, No. 9, 2012.

154 Christine Vestal, "For Aging Inmates, Care Outside Prison Walls", Pew Charitable Trusts, 12 August 2014, available at: www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/08/12/for-aging-inmates-care-outside-prison-walls.

155 M. Ewing, above note 108.

Where do we go from here?

The challenge of providing community-standard health-care to an ageing prison population has been the subject of multiple recent convenings to establish a research and policy agenda and to share best practices.¹⁵⁶ Improving care for this population depends on interprofessional partnerships including correctional leadership and front-line staff, public health researchers, community agencies, neighbourhood associations, formerly incarcerated individuals and their families, law enforcement, and community and correctional clinicians. In addition, research money must be allocated by national grant-making agencies to build the evidence base needed for effective models of care for this population.¹⁵⁷

As health-care providers, researchers and corrections officials continue to build a fund of knowledge about the impact of incarceration on older adults and the impact of an ageing prisoner population on correctional facilities, leaders in the field of corrections should simultaneously adapt effective community-based geriatric care programmes to the correctional setting. One place to start would be to better align the approach to geriatric health in correctional settings with the standard of care that older adults are offered in the community. This would require training clinical staff to recognize and manage geriatric conditions, along with evidence-based prognostication and symptom management. Models exist for training of community clinicians in the practice of palliative care and geriatrics by primary care doctors who have not undergone speciality training in these areas.¹⁵⁸ These models have been adapted successfully for use in some correctional systems to train both clinicians and corrections staff,¹⁵⁹ and should be expanded and made part of universal training protocols in all correctional settings.

Furthermore, hospitals and community clinics have increasingly recognized the need to “geriatricize” their clinical spaces and to provide dedicated programming for geriatric patients, a practice which should be adopted for correctional facilities as well.¹⁶⁰ Some correctional medical units have begun this process. For example, HPM Whatton, a correctional facility in England with a large number of older patients, offers elderly inmates the opportunity to live in cohorted spaces that are accessible to individuals with mobility issues.¹⁶¹ This

156 B. A. Williams *et al.*, above note 4; House of Commons Justice Committee, *Older Prisoners: Fifth Report of Session 2013–14*, House of Commons, London, 2013, available at: www.parliament.uk/documents/commons-committees/justice/older-prisoners.pdf.

157 Cyrus Ahalt, Ingrid A. Binswanger, Michael Steinman, Jacqueline Tulskey and Brie A. Williams, “Confined to Ignorance: The Absence of Prisoner Information from Nationally Representative Health Data Sets”, *Journal of General Internal Medicine*, Vol. 27, No. 2, 2012.

158 T. E. Quill and A. P. Abernethy, above note 123.

159 Meera Sheffrin, Cyrus Ahalt, Irena Stijacic Cenzer and Brie A. Williams, “Geriatrics in Jail: Educating Professionals to Improve the Care of Older Inmates”, presented at the American Geriatrics Society Annual Conference, Long Beach, CA, 2016.

160 Audrey Ed Chun, *Geriatric Care by Design: A Clinician’s Handbook to Meet the Needs of Older Adults Through Environmental and Practice Redesign*, 1st ed., American Medical Association, 2011.

161 Lynn Saunders, “Older Offenders: The Challenge of Providing Services to Those Aging in Prison”, *Prison Services Journal*, No. 208, 2013.

prison trains staff in geriatric care, provides targeted activities for older adults and has developed a paid peer support programme.¹⁶²

To meet the community standard of care, all prisoners of advanced age, or who are seriously ill, should have access to palliative care and hospice services. Concurrent expansion of compassionate release policies would also limit the need for these resources and decrease the burden on prisons to accommodate the elderly or seriously ill who may be better served in the community. For this reason, compassionate release policies should be designed to incentivize saying “yes” to an applicant’s release rather than “no” and should be designed with input from medical specialists in prognostication, geriatrics and end-of-life care.

Another important avenue of inquiry is in the evaluation and optimization of effective alternatives to incarceration for older adults, especially those with cognitive impairment or dementia. Such alternatives might include house arrest, the use of electronic tracking devices, or diversion to nursing homes or hospices rather than prisons.¹⁶³ To avoid incarcerating those in the early stages of dementia, all older arrestees should be screened for cognitive impairment and assessed for their appropriateness for living in a correctional facility.

Finally, as we consider the impact that incarcerating older adults has on the individual, we cannot lose sight of the profound adverse impact that incarcerating older citizens can have on our communities. The psychologist Erik Erickson famously described the life stages of middle and old age as opportunities for “generativity”, or caring for the next generation and offering guidance, and “ego integration”, a chance to reflect and take stock.¹⁶⁴ When older adults do not have the chance to interact meaningfully with younger generations and offer their reflections and advice, they are deprived of an important social role and their family and community fails to gain their accumulated experience, perspective and wisdom.

Overall, at a most basic level, providing appropriate care for older or seriously ill prisoners is complex and, oftentimes, daunting. This complexity, in combination with the exorbitant costs generated by older prisoners, provokes important social questions that we will have to answer as our world population continues to grow older. Are there some people for whom incarceration is not appropriate? How do we determine when that moment has arisen? And what alternative mechanisms exist to restrict a person’s liberty? It is time to start asking these questions now.

162 *Ibid.*

163 Office of National Drug Control Policy, “Alternatives to Incarceration”, The White House, Washington, DC, available at: <https://obamawhitehouse.archives.gov/ondcp/alternatives-to-incarceration>.

164 Erik H. Erikson, *Identity and the Life Cycle*, reissue ed., Norton, New York, 1994.

NOTE

Strengthening IHL protecting persons deprived of their liberty: Main aspects of the consultations and discussions since 2011

Tilman Rodenhäuser

Tilman Rodenhäuser is Legal Adviser in the Legal Division of the International Committee of the Red Cross, based in Geneva. He took over the lead on this project from Ramin Mahnad, who led the project between 2012 and 2015 and is the author of most of the ICRC reports cited below.

Abstract

One key area in which international humanitarian law (IHL) needs strengthening is the protection of persons deprived of their liberty in relation to non-international armed conflicts (NIACs). While the Geneva Conventions contain more than 175 rules regulating deprivation of liberty in relation to international armed conflicts in virtually all its aspects, no comparable legal regime applies in NIAC. Since 2011, States and the International Committee of the Red Cross (ICRC) have worked jointly on ways to strengthen IHL protecting persons deprived of their liberty. Between 2011 and 2015, the ICRC facilitated consultations to identify options and recommendations to strengthen detainee protection in times of armed conflict; since 2015, the objective of the process has shifted towards work on one or more concrete and implementable outcomes. The present note recalls the legal need to strengthen detainee protection in times of NIAC and the main steps that have been taken over the past years to strengthen IHL.

Keywords: detention, strengthening IHL protecting persons deprived of their liberty, Resolution 1, International Conference, internment, detainee transfers, non-international armed conflict, ICRC.

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Introduction

Since 2011, States and the International Committee of the Red Cross (ICRC) have worked jointly on ways to strengthen international humanitarian law (IHL) protecting persons deprived of their liberty. Between 2011 and 2015, the ICRC facilitated consultations to identify options and recommendations to strengthen detainee protection in times of armed conflict; since 2015, the objective of the process has shifted towards work on one or more concrete and implementable outcomes.

This effort to strengthen IHL protecting detainees who are held, in particular, in relation to non-international armed conflicts (NIACs) addresses an important humanitarian challenge. In armed conflicts, deprivation of liberty is a reality. Detention makes individuals vulnerable because they depend on the detaining forces or authorities for their basic needs. From a legal perspective, the protection of persons deprived of their liberty is of particular concern when it occurs in NIAC because the IHL protection framework for detainees in such conflicts needs clarification and strengthening.

Between 2011 and 2016, the number of detainees visited by the ICRC rose from 540,000 to almost 1 million.¹ The ICRC visits detainees in various contexts, and the majority of persons visited are not detained in relation to armed conflicts. Still, detention visits provide the ICRC with unique insights into the often severe humanitarian consequences of deprivation of liberty, while presenting the organization with various protection-related as well as legal challenges. While detainee protection poses a variety of issues depending on each context, armed conflicts often aggravate the humanitarian needs and challenges. Regardless of which actor is depriving persons of their liberty or where those persons are held, all too often, detainees are subject to extra-judicial killing, enforced disappearance, or torture and other forms of ill-treatment. Likewise, the ICRC frequently observes that detainees are held in inadequate conditions of detention, lacking adequate food, water, clothes, accommodation, hygienic installations or health care. They are not properly registered or are deprived of meaningful contact with the outside world. Likewise, the specific needs of certain groups of detainees, such as children, women or the elderly, are not always adequately provided for.² Among persons deprived of their liberty, as well as

1 The steady increase in the number of persons that the ICRC visits in detention can be seen in the ICRC's annual reports for 2011–2016, available at: www.icrc.org/en/annual-report (all internet references were accessed in October 2017).

2 For a comprehensive analysis of the humanitarian concerns regarding conditions of detention and persons with specific needs, see ICRC, “Strengthening Legal Protection for Persons Deprived of their Liberty in relation to Non-International Armed Conflict: Regional Consultations 2012”, Background Paper, 2013,

their families, uncertainty regarding why and for how long they are being detained can cause deep anguish, as does uncertainty about the applicable legal process.³ In addition, in recent conflicts transfers of detainees from one authority to another have placed some transferees at great risk of fundamental rights violations, ranging from persecution on various grounds to torture and arbitrary deprivation of life.⁴

In many cases, ignorance of or failure to implement existing law leads to inhumane treatment of detainees. In other cases, lack of infrastructure and resources constitutes an impediment to the establishment of an adequate detention regime. In addition, in a 2011 study on strengthening legal protection for victims of armed conflicts, the ICRC emphasized that “the dearth of [relevant] legal norms – especially in non-international armed conflicts – also constitutes an important obstacle to safeguarding the life, health and dignity of those who have been detained”.⁵ Indeed, while the Geneva Conventions contain more than 175 rules regulating deprivation of liberty in relation to international armed conflicts (IACs) in virtually all its aspects, no comparable legal regime applies in NIACs.⁶ Against this background and based on Resolution 1 adopted at the 31st International Conference of the Red Cross and Red Crescent (International Conference), between 2012 and 2015 the ICRC conducted a major research and consultation process on how to strengthen IHL protecting persons deprived of their liberty. At the 32nd International Conference, members recommended further work on the subject

with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC.⁷

The consensus of States at the 32nd International Conference to pursue further in-depth work on strengthening IHL protecting persons deprived of their liberty was timely and important for at least three reasons.

First, as set out above, the severe humanitarian consequences of deprivation of liberty necessitate action on this issue. In order to better protect members of State armed forces, armed groups or civilians deprived of their liberty, additional legal, political and operational steps are needed. Working towards concrete and implementable outcomes that effectively strengthen IHL protecting persons

pp. 6–7, available at: www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf.

3 See *ibid.*, pp. 10–11.

4 See *ibid.*, p. 15.

5 ICRC, *Strengthening Legal Protection for Victims of Armed Conflicts*, Geneva, 2011, p. 7, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-5-1-1-report-strength-ihl-en.pdf.

6 For a more detailed analysis, see below.

7 32nd International Conference, Resolution 1, 32IC/15/R1, 2015 (Resolution 1), para. 8, available at: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf.

deprived of their liberty brings the humanitarian and legal challenges surrounding detention in relation to armed conflict back onto the agendas of States.

Second, as will be seen below, IHL applicable in NIAC is not sufficiently elaborate and clear with regard to the protection of persons deprived of their liberty. It can be argued that this lack of elaboration of applicable IHL could be fully compensated for by relying on protections found in international human rights law (IHRL).⁸ While IHRL provides important safeguards for persons deprived of their liberty, the extent to which IHRL norms can effectively regulate or strengthen the protection of persons deprived of liberty in all scenarios of NIAC – including different operational contexts such as detention close to the battlefield or during extraterritorial armed conflicts – remains subject to debate. As a result, commanders and legal advisers have the difficult task of providing concrete operational instructions without always having sufficiently clear guidance as to the applicable international law.⁹ Thus, concrete and implementable outcomes could provide additional clarity on the humane treatment of detainees, which is not only essential to protect human life and dignity but also crucial for operational success. It could help all parties to armed conflicts to implement their existing obligations and thereby prevent possible violations.

Third, this legal uncertainty is particularly important with regard to detention in the context of multinational operations. For example, if States conduct joint operations, they need to find agreement on common standards governing deprivation of liberty. In practice, this has raised significant difficulties because in coalitions the legal obligations of member States often stem from different IHL treaties¹⁰ as well as from international and regional human rights law.¹¹ As a former legal adviser from the US Department of State has emphasized, “a common set of baseline rules might facilitate multinational detention operations by ensuring that allies start from the same procedural propositions”.¹² In times of increasing numbers of multinational operations and collaboration between States with different legal obligations, concrete and implementable outcomes may provide essential guidance on detainee protection to which all members of a coalition agree to adhere.

8 In addition, especially in traditional NIACs taking place solely on the territory of the detaining State, national constitutions or national law often provide essential safeguards for persons deprived of their liberty.

9 Indeed, States have faced legal challenges to their detention practices before domestic or regional courts. A well-known case is UK Supreme Court, *Serdar Mohammed v. Ministry of Defence and Others*, [2017] UKSC 2, 17 January 2017. For additional references to national case law, see Thomas Winkler, “The Copenhagen Process and the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations”, *Journal of International Humanitarian Legal Studies*, Vol. 5, No. 1–2, 2014.

10 While all States are bound by Article 3 common to the four Geneva Conventions and customary IHL, Additional Protocol II (AP II), for example, is not universally ratified.

11 See T. Winkler, above note 9, p. 260.

12 Ashley S. Deeks, “Administrative Detention in Armed Conflict”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 434.

Before delving into an analysis of the need to strengthen IHL protecting persons deprived of their liberty, brief mention is needed of other international processes that have addressed various aspects of detention in recent years. These include in particular the Copenhagen Process and the revision of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners. Due to a different scope of application as well as the different actors involved, the process based on Resolution 1 aims to complement the other two processes and to address important questions that did not form part of those processes.

First, the Copenhagen Process – which took place from 2007 to 2012 and was facilitated by the government of Denmark – addressed questions relating to “detention in international military operations”.¹³ In that process, a group of States defined a number of principles and guidelines applicable to international – meaning extraterritorial – military operations in the context of NIACs as well as law enforcement operations.¹⁴ Unlike the Copenhagen Process, the process based on Resolution 1 of the 32nd International Conference is different in scope and broader in participation. In terms of scope of the process, it focuses on deprivation of liberty “in relation to armed conflict, in particular in relation to NIAC”.¹⁵ This includes all types of NIACs, meaning purely internal as well as extraterritorial ones.¹⁶ However, it does not include situations other than armed conflicts, such as law enforcement operations. Moreover, discussions in the framework of the process based on Resolution 1 of the 31st International Conference are universal, meaning they are open to all States.

Second, between 2011 and 2015, an expert committee revised the UN Standard Minimum Rules for the Treatment of Prisoners.¹⁷ The revised Standard Minimum Rules are called the Mandela Rules, and they provide detailed guidance on conditions of detention in penitentiary facilities, mainly related to the criminal justice system. They may nonetheless be considered to contain key provisions related to the treatment of detainees and their conditions of detention, which are relevant in all situations. Complementing the Mandela Rules, the process based on Resolution 1 of the 32nd International Conference focuses explicitly on detention in relation to armed conflict, aiming to address legal and operational challenges that are especially relevant in these types of situations. These include detention in complex operational environments, such as extraterritorial detention or internment in military facilities, sometimes of a temporary nature, or detention located in operational bases close to the battlefield.

13 For the principles, their commentary, and a summary of the process, see Bruce Oswald, “The Copenhagen Principles, International Military Operations and Detentions”, *Journal of International Peacekeeping*, Vol. 13, 2013.

14 Paragraph IX of the Copenhagen Principles and Guidelines’ preamble clarifies: “*The Copenhagen Process Principles and Guidelines* are intended to apply to international military operations in the context of non-international armed conflicts and peace operations; they are not intended to address international armed conflicts.”

15 Resolution 1, above note 7, para. 8.

16 It does not consider law enforcement operations below the armed conflict threshold.

17 United Nations Standard Minimum Rules for the Treatment of Prisoners, E/CN.15/2015/L.6/Rev.1, 21 May 2015 (Mandela Rules).

This note first reiterates the *legal* reasons why the strengthening of IHL protecting persons deprived of their liberty is needed. It shows that whereas IHL applicable in IAC contains sufficient rules on deprivation of liberty, no similarly detailed legal protection framework applies in times of NIAC. Second, the note summarizes the main steps of the consultation process between 2012 and 2015, and presents key points raised by States with regard to deprivation of liberty in relation to NIAC. Finally, it presents the main aspects of further work since the adoption of Resolution 1 of the 32nd International Conference.

The legal need to strengthen IHL protecting persons deprived of their liberty

Two branches of international law are relevant to regulate deprivation of liberty in relation to armed conflict: IHL and IHRL.¹⁸ Whereas these branches are complementary and share some of the same aims, such as the protection of life and dignity of persons deprived of their liberty, their scope of application and rationales differ. Moreover, the interplay between the two continues to be debated, and is necessarily context-dependent.¹⁹ This section first summarizes IHL protections for persons deprived of their liberty in relation to IAC. Second, it shows that IHL of NIAC provides insufficient protections in the context of detention. Third, it examines the extent to which IHRL can complement IHL and address some of the identified protection needs.

Protection of persons deprived of their liberty in relation to international armed conflicts

The four Geneva Conventions, Additional Protocol I to the Geneva Conventions (AP I), and customary IHL provide a comprehensive legal regime applicable to deprivation of liberty in relation to IAC. Geneva Convention III relative to the Treatment of Prisoners of War (GC III) regulates the internment of prisoners of war (PoWs),²⁰ and Geneva Convention IV relative to the Protection of Civilian

18 It is generally accepted that IHRL continues to apply in times of armed conflict. See, for instance, International Court of Justice (ICJ), *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005, para. 116. This view has also been taken by the UN Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, pp. 13–22, available at: www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm.

19 For example, during the ICRC-facilitated consultation process in 2012–15, States expressed differing views on the conceptual question of whether and to what extent human rights law applies in various types of NIACs. ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Liberty: Concluding Report*, Geneva, 2015 (ICRC Concluding Report), p. 19, available at: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.

20 Prisoners of war are defined under Article 4 of GC III as well as Article 44 of AP I.

Persons in Time of War (GC IV) that of civilians falling under the scope of persons protected under the Convention.²¹ AP I supplements this regime, including with regard to persons not falling into the categories defined in GC III and GC IV.²²

IHL of IAC regulates deprivation of liberty in virtually all its facets. GC III and GC IV provide grounds on which PoWs or civilians may be interned,²³ including the applicable procedure,²⁴ and define at what point deprivation of liberty must end.²⁵ In all cases of internment, the Geneva Conventions and AP I prohibit any form of ill-treatment,²⁶ and they provide detailed rules on conditions of detention, ranging from rules on adequate places of internment to the provision of adequate food and access to the outdoors, as well as registration and family contact.²⁷ They also include specific protections for women and children in situations of internment.²⁸ Moreover, IHL regulates the transfer of PoWs and civilian internees. It prescribes in which circumstances it would be permissible to transfer such persons, and stipulates a transferee's return if the receiving power fails, in any important way, to grant protections as set down in the Conventions.²⁹ GC IV emphasizes the prohibition of transfer in cases in which the transferee "may have reason to fear persecution for his or her political opinions or religious beliefs".³⁰ As a result, in light of the comprehensive regulation of deprivation of liberty in the universally ratified Geneva Conventions, as well as the additional rules found in AP I (if applicable) and

21 Protected persons are defined under Article 4 of GC IV. See also Article 73 AP I.

22 See AP I, Arts 72–79.

23 See GC III, Art. 21(1); GC IV, Arts 42(1), 78(1).

24 Article 5(2) of GC III only provides that in case of doubt as to whether a person qualifies as a PoW, that person shall enjoy the protection of GC III until such time as his or her status "has been determined by a competent tribunal". In contrast, GC IV requires that interned persons shall be entitled to have the initial decision to intern reviewed as soon as possible, followed by biannual periodic reviews. See GC IV, Arts 43(1), 78(2).

25 PoWs "shall be released and repatriated without delay after the cessation of active hostilities": GC III, Art. 118(1). Civilian internees "shall be released ... as soon as the reasons which necessitated [their] internment no longer exist", or "as soon as possible after the close of hostilities". See GC IV, Arts 46(1), 132(1), 133(1); AP I, Art. 75(3). For more substantive discussion on internment in IAC, see ICRC, "Internment in Armed Conflict: Basic Rules and Challenges", Opinion Paper, Geneva, November 2014, pp. 3–6, available at: www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges; and the presentation of existing IHL protections contained in a background document prepared for government expert consultations in 2014: ICRC, *Thematic Consultation of Government Experts on Grounds and Procedures for Internment and Detainee Transfers*, Working Document, Geneva, 2014, available at: www.icrc.org/eng/assets/files/2015/consultation-internment-detainee-transfers-apr-2015.pdf.

26 See, in particular, GC III, Arts 13–14; GC IV, Arts 27–28, 31–34; AP I, Art. 75(2).

27 For a comprehensive presentation of protections contained in the IHL of IAC, see ICRC, *Thematic Consultation of Government Experts on Conditions of Detention and Particularly Vulnerable Detainees*, Working Document, Geneva, 2014, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4230.pdf.

28 Regarding women, see GC IV, Arts 89(5), 97(4), 132(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 119, 134. Regarding children, see GC IV, Arts 81(3), 82(2), 89(5), 94(2), 94(3); ICRC Customary Law Study, Rules 120, 135. See also see ICRC, above note 27.

29 GC III, Art. 12(2)–(3); GC IV, Art. 45(2).

30 GC IV, Art. 45(4).

customary IHL, it appears that for the time being IHL applicable in IAC provides a robust protection framework for persons deprived of their liberty.³¹

Protection of persons deprived of their liberty in relation to non-international armed conflicts

Unlike the comprehensive and robust detention regime defined with regard to IAC, IHL of NIAC contains significantly fewer rules protecting persons deprived of their liberty. Article 3 common to the four Geneva Conventions – which applies in all NIACs – provides essential safeguards against all forms of ill-treatment, requires fair-trial guarantees in cases of penal prosecutions, and requires minimum guarantees on conditions of detention as part of the requirement of humane treatment.³² Yet, common Article 3 does not provide explicit rules regarding the specific protection needs of certain groups of detainees, or grounds and procedures for internment. Moreover, while common Article 3 has to be interpreted as prohibiting transfers of detainees “to another authority when those persons would be in danger of suffering a violation of those fundamental rights [protected under common Article 3] upon transfer”,³³ it does not provide explicitly for any procedural aspects of the prohibition, such as pre- or post-transfer measures.

Additional Protocol II to the Geneva Conventions (AP II) develops and supplements common Article 3, especially with regard to fundamental guarantees of humane treatment, conditions of detention, the treatment of certain groups of detainees, and penal prosecutions.³⁴ In particular, with regard to “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”, AP II defines general rules regarding medical care and examinations, the provision of “food and drinking water”, “safeguards as regards health and hygiene”, protection against the “rigors of the climate and the dangers of the armed conflict”, the receiving of “individual or collective relief”, the practise of religion and spiritual assistance, working conditions, separate quarters for men and women, communication with the outside world, the possible evacuation of detainees, and education of children.³⁵ It does not define grounds or procedures for internment, and does not contain specific rules on detainee transfers.

31 See ICRC Concluding Report, above note 19, p. 10. Indeed, as stated in the report, “States participating in the Resolution 1 consultation process did not point to any specific areas of IHL applicable to IAC-related detention that were in need of strengthening”. Nonetheless, some States voiced an interest in also strengthening IHL protecting detainees in IAC.

32 For a comprehensive analysis of fundamental obligations under common Article 3, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (Commentary on GC I), paras 581–716. See also Jelena Pejic, “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011.

33 Commentary on GC I, above note 32, para. 708.

34 AP II, Arts 4, 5, 6.

35 AP II, Arts 5, 4(3)(a).

While AP II provides important additions to the fundamental guarantees defined in common Article 3, it is not yet universally ratified and applies only to NIACs meeting the threshold defined in the Protocol.³⁶ Moreover, even with regard to conditions of detention, “one must ask whether its provisions really are sufficient to address the humanitarian concerns related to conditions of detention”.³⁷ AP II’s rules are nowhere near as detailed as those found in the Geneva Conventions.

In addition to IHL treaty rules, customary IHL provides a number of important protections for persons deprived of their liberty in relation to NIAC. These include, in particular, fundamental guarantees regarding the treatment of detainees,³⁸ rules on judicial process,³⁹ and some rules regarding conditions of detention and the treatment of specific groups of detainees.⁴⁰ Customary IHL does not define grounds and procedures for internment or rules and procedures on detainee transfer. Moreover, as customary law is often formulated in rather more general terms, it sets out broad regulations that often fail to “provide sufficient guidance to detaining authorities on how an adequate detention regime may be created and operated”.⁴¹

As a result, it appears that IHL applicable in NIAC provides strong rules prohibiting all forms of violence and inhumane treatment and guaranteeing a fair judicial process. Moreover, AP II and customary IHL include a number of essential yet basic guarantees regarding conditions of detention and the protection of vulnerable groups. In stark contrast to IHL of IAC, however, IHL of NIAC may not provide sufficient regulations regarding conditions of detention (especially if AP II does not apply and if rules of customary IHL are questioned), and it contains no explicit rules on grounds and procedures of internment or procedural rules on the transfer of detainees.

To what extent can international human rights law strengthen the protection of persons deprived of their liberty in relation to armed conflict?

In IACs, IHL norms take precedence over IHRL norms concerning deprivation of liberty for the simple reason that States have agreed on the relevant provisions of IHL specifically for their application in IAC.⁴² In NIAC, however, the situation is

36 As defined in Article 1 of AP II, the Protocol shall apply only to NIACs “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Thus, AP II would not apply to NIACs fought only between non-State armed groups, or to conflicts in which the non-State party does not control any territory.

37 ICRC Concluding Report, above note 19, p. 13.

38 See ICRC Customary Law Study, above note 28, Rules 87–99.

39 See *ibid.*, Rules 100–103.

40 See *ibid.*, Rules 118–128.

41 ICRC, above note 5, p. 7.

42 ICRC, above note 18, p. 17. For its part, the ECtHR interpreted the European Convention on Human Rights (ECHR) “in a manner which takes into account the context of the applicable rules of

not clear-cut: IHL of NIAC provides limited rules on some issues, and no rules on others. In contrast, human rights treaties contain important provisions regarding, for example, grounds and procedures for deprivation of liberty or the prohibition of *non-refoulement*,⁴³ detailed jurisprudence exists on a number of these points, and human rights standards contain detailed rules on conditions of detention or the protection of women or children deprived of their liberty.⁴⁴ This note is not the place to examine in great detail important legal questions such as how exactly human rights norms and standards apply during armed conflicts, or how possible conflicts with contradicting IHL norms can be resolved. Instead, it is argued that despite the continuous applicability of human rights law during armed conflict, a reiteration and clarification of essential protections applicable in armed conflict would be of great practical value because it could reinforce and complement existing rules and standards in situations where their application is questioned or restricted, or when they do not provide sufficient guidance. At the same time, it is clear that any legally non-binding outcome to strengthen IHL protecting persons deprived of their liberty can only supplement existing law and standards and is without prejudice to any legal obligations that parties to armed conflicts might have under IHL or IHRL.

There are three main reasons for a strengthening of IHL applicable in NIAC despite existing human rights law and standards. First, the extent to which human rights law and standards apply to different conflict situations remains subject to some debate; second, IHRL instruments were primarily developed to apply outside armed conflict and do not always provide sufficient guidance for conflict-specific challenges; and third, debate continues on whether and to what extent non-State parties to armed conflicts have IHRL obligations.

With regard to the first point, the International Court of Justice, regional human rights courts and IHRL treaty bodies have found in unambiguous terms that relevant IHRL treaties continue to apply during armed conflict, both internally and extraterritorially.⁴⁵ Yet discussions among States continue, especially on the question of to what extent IHRL treaties apply extraterritorially or in times of armed conflict, and how they relate to applicable IHL.⁴⁶ This is particularly relevant with regard to grounds and procedures for internment and

international humanitarian law". ECtHR, *Case of Hassan v. The United Kingdom*, Application No. 29750/09, Judgment, 16 September 2014, paras 101–106. This does not mean, however, that IHRL cannot complement IHL.

43 See, for instance, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the ECHR, Article 7 of the American Convention on Human Rights, and Article 14 of the Arab Charter on Human Rights.

44 See, for example, Mandela Rules, above note 17; United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, UN Doc. E/RES/2010/16, 22 July 2010 (known as the Bangkok Rules); United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Res. 40/33, UN Doc. A/40/53, 1985 (known as the Beijing Rules).

45 See, for example, ECtHR, *Hassan*, above note 42, paras 74–80; ICJ, *Wall*, above note 18, paras 107–113.

46 See, for instance, HRC, *Fourth Periodic Report: United States of America*, CCPR/C/USA/4, 22 May 2012, paras 505–509; Working Group on Arbitrary Detention, *The Draft Basic Principles: Comments by the Government of Canada*, 28 April 2015, paras 4–8; Working Group on Arbitrary Detention, *The Draft Basic Principles: Comments by the Government of Australia*, 17 March 2015, paras 2–6.

questions of *non-refoulement*, which are not explicitly regulated under IHL but are defined under some IHRL treaties or in relevant jurisprudence. A particular issue with regard to IHRL are derogations in times of emergency or of armed conflict, including during extraterritorial NIACs. Indeed, the question of to what extent States are permitted to derogate from substantive and procedural rights regarding deprivation of liberty is one that comes up increasingly in practice – yet jurisprudence seems unsettled. In 2015 and 2016, for example, three European States derogated from some of their human rights obligations under regional and universal human rights law treaties.⁴⁷ In each case, the right to liberty was among the provisions from which States derogated. It is clear that derogations are only permitted within strict limitations;⁴⁸ moreover, relevant courts or treaty bodies oversee these derogations and will opine on their lawfulness. However, such scrutiny will only take place well after the derogation and related measures have been implemented by States in accordance with their own assessment of the situation.

Moreover, relevant IHRL treaties do not contain detailed provisions on conditions of detention. Instead, conditions of detention have been addressed in universally recognized standards such as the Mandela Rules, the Bangkok Rules and the Beijing Rules.⁴⁹ Such instruments set out minimum standards of humane treatment for prisoners and constitute an important and widely used reference framework in practice, but they focus on how States operate their regular penitentiary institutions and might not specifically take into account the particular circumstances of deprivation of liberty in armed conflicts.⁵⁰ Against this background, some States have openly questioned the applicability of these standards to persons deprived of their liberty in relation to armed conflicts.⁵¹

47 See derogations by Ukraine, France, and Turkey from the ECHR and the ICCPR. In addition, the UK announced in 2016 that it would introduce “a presumption to derogate from the European Convention on Human Rights ... in future conflicts”. See: www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations.

48 See, for example, Article 4 of the ICCPR and Article 15 of the ECHR. See also HRC, “CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency”, UN Doc. CCPR/C/21/Rev.1/Add.11, 2001.

49 See note 44 above. Such standards are frequently invoked to interpret more general provisions on humane treatment of detainees in human rights treaties. See, for instance, HRC, “CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)”, UN Doc. HRI/GEN/1/Rev.9, 1992.

50 The Mandela Rules, above note 17, are silent on whether or not they apply in times of armed conflict. Traditionally, the Standard Minimum Rules have been understood as applying to criminal-law prisoners held in regular penitentiary institutions, but they were amended to apply to “persons arrested or imprisoned without charge” (see amendment approved in ECOSOC Res. 2076 (LXI), 13 May 1977). For its part, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment only applies to “all persons within the territory of any given State”, which excludes extraterritorial detention or detention by non-State forces.

51 It is reported that during the recent revision process, the question of whether the Mandela Rules’ scope of application should be extended was set aside because issues such as “the interaction of international humanitarian and human rights law in the context of dealing with persons deprived of their liberty ... could have also led to an impasse, possibly even endangering the completion of the revision process”. Katrin Tiroch, “Modernizing the Standard Minimum Rules for the Treatment of Prisoners – A Human Rights Perspective”, *Max Planck Yearbook of United Nations Law*, Vol. 19, No. 1, 2016, p. 299.

Moreover, the Mandela Rules, for example, explicitly recognize that “it is evident that not all the rules are capable of application in all places and at all times”.⁵²

This leads to a second key challenge for the applicability of international human rights law and standards to all NIAC situations. Human rights law and jurisprudence regarding grounds and procedures of internment, and to some extent also regarding the principle of *non-refoulement*, are based on the assumption of a functioning State administration, including a judicial system able to provide all required due process guarantees.⁵³ Thus, in purely internal NIACs between government forces and one or more non-State armed groups, “domestic law, informed by the State’s human rights obligations and IHL, constitutes the legal framework governing the procedural safeguards that must be provided by the State to detained members of such groups”.⁵⁴ Given that the State’s armed forces operate “at home” and can rely on the State’s judicial infrastructure, in such situations it should be expected that the State continues applying human rights guarantees to all conflict-related detainees. Yet NIACs can also lead to situations in which State institutions or judicial systems disintegrate, or where already dysfunctional judicial systems face the extra burden of persons deprived of their liberty in relation to the armed conflict. Such challenges also emerge if States operate outside their territory without having their regular legal system readily available. In such contexts, States often face severe challenges to providing similar procedural guarantees to every detainee as they would in times of peace. For example, it might be very difficult to provide all internees with the possibility of having their deprivation of liberty reviewed by a court or to provide a court with the requisite level of evidence to obtain a confirmation of internment. As one commentator emphasizes:

At least for captures made during active hostilities, it is unrealistic to expect soldiers who must accept the surrender of enemies, to constitute a file which can be used in court, to leave the battlefield to testify in court and to collect other evidence necessary for the State to oppose the argument of the detainee that he or she did not directly participate in hostilities and was not a member of an armed group, all while the fighting goes on. The crux of the matter is that if a successful *habeas corpus* procedure for the State is not realistic, the obligation to conduct it could lead to the result that most fighters arrested by armed forces on the battlefield will be released by an independent and impartial court, which in turn, could lead to less compliance with the rules in

52 Mandela Rules, above note 17, Preliminary Observation 2(1).

53 However, it is also true that in a number of contexts, including States not involved in armed conflict, State administrations, including their judicial systems, are not well-functioning and are often unable to provide all necessary protections in practice.

54 ICRC, above note 18, p. 17. For examples of how Colombia has applied a criminal-law/IHRL approach to detention in the context of a NIAC, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, pp. 165–166.

the long-term, i.e. summary executions disguised as battlefield killings and secret detention.⁵⁵

To be clear, practical challenges in applying legal rules or standards do not lead to their inapplicability. However, they certainly pose the question of which humanitarian minimum guarantees need to be ensured in all circumstances.

Third, human rights law has traditionally been understood as only binding States and not non-State actors, meaning that it would only bind one side of the conflict. There is a growing practice by the UN Security Council, the UN Human Rights Council and UN special procedures of demanding different kinds of armed groups to respect fundamental human rights and humanitarian norms, such as the prohibition of torture.⁵⁶ Most armed groups would not, however, have the capacity to comply with the full range of human rights law obligations, unless they perform government-like functions on which the implementation of many human rights norms is premised.⁵⁷ Many groups lack an adequate apparatus for ensuring the fulfilment of the broad scope of standards on conditions of detention, or the capacity to deprive persons of liberty in compliance with IHRL requirements on grounds and procedures for detention.⁵⁸ Thus, even if international law further develops in a direction of requiring respect for certain human rights norms by non-State armed groups, only the most sophisticated groups would be able to perform deprivation of liberty in compliance with all relevant IHRL rules and standards.

As a result, an IHL document providing minimum guarantees and concrete implementation guidance on conditions of detention and the treatment of specific groups of detainees, grounds and procedures of internment, and rules on detainee transfer could provide an operationally relevant bottom line on the protection of persons deprived of their liberty in relation to NIACs, and strengthen their protection. Being specifically envisaged and accepted for armed conflict situations, it would need to carefully calibrate military and humanitarian considerations, and be designed to apply to all parties. Any such outcome would need to find ways to provide – at once – relevant guidance to parties to armed conflicts with very different capacities. The primary purpose and benefit of such an instrument would be to provide all parties to a NIAC with clear guidance on the treatment required in any conflict situation, regardless of where the conflict

55 Marco Sassòli, “Legal Framework for Detention by States in Non-International Armed Conflict”, *Proceedings of the Bruges Colloquium*, 16–17 October 2014, p. 65, available at: <https://archive-ouverte.unige.ch/unige:77195>.

56 For discussion of recent practice, see, for example, Jean-Marie Henckaerts and Cornelius Wiesener, “Human Rights Obligations of Non-state Armed Groups: A Possible Contribution from Customary International Law?”, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Elgar, Cheltenham, 2013, pp. 146–169; Tilman Rodenhäuser, “International Legal Obligations of Armed Opposition Groups in Syria”, *International Review of Law*, No. 2, 2015.

57 In the ICRC’s view, however, in “cases in which a group, usually by virtue of stable control of territory, has the ability to act like a state authority ..., its human rights responsibilities may ... be recognized *de facto*”. See ICRC, above note 18, pp. 14–15.

58 For some discussion on armed groups’ capacity to provide judicial process, see Commentary on GC I, above note 32, paras 689–695.

takes place. It could thereby complement applicable human rights protections without compromising or questioning their applicability.⁵⁹

The 2012–15 research and consultation process

The ICRC's 2012–15 research and consultation process is grounded in Resolution 1 adopted at the 31st International Conference in 2011. The resolution invited

the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict.⁶⁰

Accordingly, between 2012 and 2015, the ICRC conducted a broad consultation process with States, National Red Cross and Red Crescent Societies, and other relevant actors. In line with Resolution 1, these consultations were of an exploratory nature to enable the ICRC to propose options and make recommendations on strengthening IHL protecting persons deprived of their liberty in relation to armed conflict.⁶¹ The following section first briefly summarizes the main points that the ICRC drew from the three stages of the consultation process: regional consultations in 2012–13, thematic consultation in 2014, and an all-States meeting in 2015. Second, it flags a number of key points that States considered important to bear in mind with regard to deprivation of liberty in relation to NIAC.

The consultation process

Regional consultations (2012–13)

In order to launch consultations regarding the strengthening of IHL protecting persons deprived of their liberty, the ICRC conducted four regional consultations with States, which were held in Pretoria, South Africa (November 2012); San Jose, Costa Rica (November 2012); Montreux, Switzerland (December 2012); and Kuala Lumpur, Malaysia (April 2013).⁶² Based on extensive research on whether and in which areas IHL protecting persons deprived of their liberty needs strengthening, the ICRC suggested a focus on deprivation of liberty in relation to

59 Given that any outcome of this process will be of a legally non-binding nature, it cannot alter States' IHRL obligations.

60 31st International Conference, Resolution 1, 31IC/11/R1, 2011, para. 6.

61 The identified options and the ICRC's recommendations were submitted to the International Conference in the ICRC Concluding Report, above note 19, in June 2015.

62 Reports on all four meetings are available at: www.icrc.org/en/document/detention-non-international-armed-conflict-consultations-government-experts.

NIAC, particularly in four broad areas: conditions of detention, the protection of vulnerable persons, grounds and procedures for internment, and transfers of persons deprived of their liberty.⁶³

During the regional consultations, participants largely agreed that the suggested areas of protection would be the right ones to focus on. As seen above, they are sufficiently regulated in IHL applicable in IAC but not in IHL applicable in NIAC. When considering which standards could be drawn on to fill this gap, participants generally identified IHL of IAC to be the first point of reference. In addition, without prejudice to the question of their legal applicability, most participants also considered human rights norms and standards as valuable sources of guidance and inspiration, as well as State practice. Participants also discussed operational challenges to the implementation of different standards. In addition, participants exchanged preliminary views on the question of what might be the outcomes of the process. While some participants supported the development of a new IHL treaty, the general tendency was towards a legally non-binding outcome.⁶⁴

Thematic consultations (2014)

Building on the suggestions voiced during the regional consultations, in 2014 the ICRC held two thematic consultations with government experts, one focusing on issues related to conditions of detention and vulnerable detainee groups in NIAC, and one on issues relating to grounds and procedures for internment and detainee transfers in NIAC.⁶⁵ Participating experts were asked to consider substantive protections drawn from IHL of IAC and human rights law and standards, and to assess – without prejudice to the question of whether these rules and standards formally apply – which practical challenges parties to armed conflicts face in implementing such protections in NIAC. Moreover, they were asked to opine on specific elements of protection, meaning more detailed elements on which future discussion could focus.⁶⁶ As explained in the ICRC's Concluding Report:

The elements of protection approach taken by the ICRC operates on the assumption that human needs remain largely the same in both armed conflict and peacetime detention, while the normative content of IHL

63 See ICRC, above note 2.

64 See ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Synthesis Report from Regional Consultations of Government Experts*, Geneva, 2013, pp. 30–31.

65 Documentation on the first meeting is available at: www.icrc.org/en/document/detention-non-international-armed-conflict-first-thematic-consultation-government-experts. Documentation regarding the second meeting is available at: www.icrc.org/en/document/detention-non-international-armed-conflict-second-thematic-consultation-government-experts.

66 For example, regarding food and water, elements of protection on which discussions should focus include the quantity of food, quality of food, customary diet of the detainee, timing of meals, and sufficiency of and access to drinking water. See ICRC Concluding Report, above note 19, pp. 35–36.

protections designed to address those needs might need adaptation to the realities of armed conflict.⁶⁷

It is not possible or necessary to reproduce the wealth of the discussions here; however, a number of general considerations are summarized below.⁶⁸

All-States meeting (2015)

The third stage of the process consisted of a number of bilateral and multilateral consultations, as well as an all-States meeting in Geneva in 2015. The objective of this meeting was to provide all States, including those that had not participated in previous consultations, with an opportunity to discuss and refine the main points extracted from previous discussions, including the suggested elements of protection. Moreover, States were asked to engage in a more detailed exchange of views on potential outcomes of the process, which could inform the ICRC's Concluding Report and recommendations to be submitted to the 32nd International Conference of December 2015.⁶⁹

General considerations raised by States regarding deprivation of liberty in relation to NIAC

The following paragraphs present, in a fairly synthesized manner, a non-exhaustive list of general issues raised during the consultation process. They cannot, however, go into the details of the discussions among States on specific elements of protection.⁷⁰

Generally, States consider it important that their forces provide NIAC-related detainees with adequate conditions of detention, including specific protections for certain groups of detainees. Yet the degree of protection that States feel able to provide depends on the circumstances: while detainees held in ordinary detention facilities away from the battlefield could, in principle, be provided with protections similar to those applicable outside armed conflicts, this might not be the case in situations of "field detention", meaning persons deprived of their liberty in the context of hostilities and subsequently held in temporary or transitional places of detention at operational bases. In such circumstances, which are normally of limited duration, available infrastructure or food might not allow for the implementation of similar standards as in stable penitentiary facilities. Likewise, States considered that not all protections which are important during long-term detention, such as providing a variety of food or

⁶⁷ *Ibid.*, pp. 22–23.

⁶⁸ Detailed reports of the discussions have been published in the ICRC Thematic Consultation reports cited in above notes 25 and 27.

⁶⁹ The chair's conclusions are available at: www.icrc.org/en/document/strengthening-compliance-ihl-meeting-all-states-geneva-switzerland-27-29-april-2015.

⁷⁰ The ICRC has published detailed reports on all State consultations, available at: www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0. The following summary is mainly based on the ICRC Concluding Report, above note 19, pp. 25–31.

access to education, will be needed during short-term detention. In order to enable detaining forces to provide at least essential protections, participants emphasized the need for advance planning. This would include material aspects, such as the development of detention infrastructure, as well as non-material preparations, such as considering the composition of ground forces in order to ensure, for example, that female staff are available to search or guard female detainees.

Consultations also confirmed that grounds and procedures for internment are necessary to protect individuals from arbitrary detention. It was re-emphasized that internment needs to be distinguished from criminal detention because it does not constitute detention as punishment for past criminal conduct but rather is preventive deprivation of liberty imposed for security reasons in relation to armed conflict. Accordingly, one main point the ICRC drew from the consultations was that States “generally view the underlying justification for internment in all cases to be the existence of a threat posed by the individual being detained”.⁷¹ Yet States voiced different opinions regarding a definition of possible grounds for internment. While some held the view that an adequate standard would be “imperative reasons for security” as found with regard to the detention of civilians in GC IV, others disagreed with applying this standard outside the GC IV context, and still others argued that formal membership in an armed group could constitute a sufficient ground for internment.⁷²

Without prejudice to the applicable legal obligations, States held that key procedural safeguards need to be in force at the time of capture,⁷³ including initial and periodic review of the decision to intern, and some form of representation or assistance to the internee in relation to the process. While consultations confirmed that a review body would need to constitute a real check on the decision-making power of the detaining authority, different attributes of such a body were discussed, including whether it needs to be “independent and impartial” or “objective and impartial”, the latter placing emphasis on the view that no judicial review would be required. Likewise, the composition of the review body was discussed, with some States stressing that a degree of flexibility is required on this issue in order to address the particular circumstances of, for example, extraterritorial NIACs in which States may not have their full judiciary available. There was, however, convergence on the view that every internee needs to be informed of the reasons for their internment, and that the process needs to be fair and to consider all relevant information.

Regarding the transfer of detainees, States emphasized the difference between operations on the State’s own territory and detention abroad. While States generally considered the principle of *non-refoulement* under human rights or refugee law applicable regarding persons detained on their own territory, the

71 *Ibid.*, p. 28.

72 Regarding these standards, different views were expressed on what constitutes “imperative reasons of security” with regard to which criteria should be applied to determine membership in an armed group.

73 In this respect, different sources of grounds and procedures were discussed. While in purely internal NIACs domestic law is likely to be of vital importance, different sources might be needed with regard to detention in extraterritorial NIACs.

issue appeared to be more complex if States operate extraterritorially and consider transferring a detainee either to host-State authorities or other States. In such situations, the types of risks that would preclude transfer in addition to arbitrary deprivation of life, torture and cruel, inhuman or degrading treatment, or acts prohibited under common Article 3, would depend on a particular State's international obligations.⁷⁴ States also discussed advantages and challenges with regard to practical steps to avoid these risks, such as pre-transfer assessments of the receiving authority's detention policies and practices as well as the transferee's individual condition and fears, and post-transfer monitoring.

As a matter of fact, in the course of NIACs, not only State authorities but also non-State armed groups may detain individuals, and persons deprived of their liberty by armed groups have similar protection needs as those detained by States. Since in a number of cases armed groups do not have at their disposal detention infrastructure or judicial institutions comparable to those of States, their detention practices are likely to pose particular humanitarian challenges. In the course of State consultations, different States expressed the concern that regulating detention by armed groups risks granting these groups legitimacy under international law. Moreover, States cautioned that the great diversity among armed groups, in particular with regard to their level of internal organization and capacity, would make it difficult to identify a common set of expectations applicable to all groups. A third identified challenge was how to strengthen IHL and simultaneously incentivize respect for these norms.

These concerns show that the issue of detention by non-State armed groups is of particular sensitivity.⁷⁵ However, it needs to be recalled that in IHL instruments, States have always found adequate clauses and careful formulations clarifying that being regulated by IHL norms does not affect the legal status of parties to a NIAC.⁷⁶ While IHL imposes essential humanitarian obligations on armed groups, States remain free to criminalize the activity of non-State parties to a NIAC under national law. Moreover, potential outcomes of the process should ideally set out clear minimum protections with which all parties to armed conflicts can comply, while at the same time providing guidance on how essential protections should be implemented in circumstances in which parties have greater capacities.

Outlook

The 2012–15 research and consultation process enabled a very rich and unprecedented exchange among States on their detention practices in relation to armed conflict. The ICRC documented all research and consultations in four

⁷⁴ As a matter of practice, States discussed a number of grounds precluding transfer. See *ibid.*, pp. 31–32.

⁷⁵ Concrete suggestions of how to overcome these challenges are discussed in *ibid.*, pp. 33–35.

⁷⁶ See, for example, common Article 3, and Article 22(6) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999.

detailed background documents presenting its reading of the law, eight meeting reports providing summaries of different discussions in the consultation process, and one Concluding Report presenting the organization's recommendations on how to strengthen IHL protecting persons deprived of their liberty in relation to NIAC. These reports provide a solid basis for further work.

That consultation process led to the adoption, by consensus, of Resolution 1 at the 32nd International Conference. This resolution “*acknowledges* that strengthening the IHL protection for persons deprived of their liberty by any party to an armed conflict is a priority”.⁷⁷ Thus, it

recommends the pursuit of further in-depth work, in accordance with this Resolution, with the *goal of producing one or more concrete and implementable outcomes* in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC.⁷⁸

The Resolution enjoined States and the ICRC to determine, with the consensus of the participating States, the modalities of further work in order to ensure the State-led, collaborative and non-politicized nature of that work.⁷⁹ At a formal meeting of States in April 2017, however, it was not possible to agree on modalities of further work. In light of widely diverging views amongst States, which remained apparent also in a subsequent written consultation, on whether and how work on the implementation of Resolution 1 should be continued, the ICRC will not, at present, convene further meetings to discuss “modalities” of work. Instead, the ICRC will convene expert-level meetings in order to continue the conversation on current challenges regarding deprivation of liberty. This platform for engagement will provide a space to exchange views and practices aimed at addressing common humanitarian concerns and to examine issues identified earlier in the process that could be further explored. These expert discussions will not take place under Resolution 1, and they will not aim to produce concrete and implementable outcomes as envisaged in the Resolution. Their purpose will be to enable substantive expert discussions that may inform the legal and policy positions of all stakeholders, that should strengthen collaboration and exchange among States, and that could prepare the ground for further work within the framework of Resolution 1 at a later stage, if States so desire and if avenues emerge to find agreement on modalities.

⁷⁷ Resolution 1, above note 7, para. 5.

⁷⁸ *Ibid.*, para. 8 (emphasis added).

⁷⁹ *Ibid.*, para. 9.

National security and the right to liberty in armed conflict: The legality and limits of security detention in international humanitarian law

Zelalem Mogessie Teferra*

Zelalem Mogessie Teferra is a Senior Legal Officer at the African Court on Human and Peoples' Rights. He holds a PhD in international law from the Graduate Institute of International and Development Studies in Geneva.

Abstract

This paper examines the legality and limits of security detention in armed conflict situations. It particularly investigates the issues of whether the protection of national security is a legitimate ground to restrict the right to liberty of persons in situations of international or non-international armed conflict, and if so, what are the limits to a State's prerogative to restrict the right to liberty of individuals suspected of threatening its national security. On the basis of a thorough analysis of the relevant extant rules of international law regulating warfare, the paper concludes that security detention is permissible in armed conflict situations regardless of whether the nature of the conflict is international or non-international. However, the prerogative of a State to impose security detention is circumscribed by a plethora of fundamental substantive and procedural safeguards against arbitrariness that are provided in the different rules of international humanitarian law and international

* The views expressed in this paper are the author's own and do not necessarily reflect the position of the African Court on Human and Peoples' Rights or any other institution with which the author is affiliated.

human rights law. These safeguards affirm that the search for absolute security is neither desirable nor attainable and that the mere invocation of security concerns does not grant an absolute power to restrict or suspend the liberty of individuals in armed conflict situations. Whenever it is imposed, security detention should be preventive in nature, and must aim at safeguarding the basic national security interests of a State from serious, future, direct and imminent threats related to the armed conflict situation. Detainees should also be able to challenge its legality before a competent organ at the initial or later stage of the detention through a system of periodic review.

Keywords: detention, security, armed conflict, Geneva Conventions, international humanitarian law, international human rights law.

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Introduction

Whether it is international or non-international, armed conflict exemplifies the most traditional national security threat.¹ Irrespective of its nature or legitimacy, armed conflict often challenges and threatens a State's basic and common national security interests: the survival of its government, territorial integrity, political sovereignty or the well-being of its population. Accordingly, any measure that a State takes to deal with an armed conflict could in principle be assumed to have been dictated by the need to preserve its national security.²

In international law, a State whose national security is under threat is entitled to resort to all legitimate options, including the right to wage war in self-defence.³ It may also adopt measures that have the effect of restricting the rights and freedoms of individuals.⁴ Security detention is one of such measures that a State in a war may take to protect its overall security and continued survival. However, the legality of such measures in international humanitarian law (IHL), particularly in a situation where a State is involved in a non-international armed conflict (NIAC), is far from precise and has been a point of great controversy in both judicial and non-judicial fora. In contexts of international armed conflict (IAC), too, a close review of the rules of IHL on areas of security detention reveals a considerable number of gaps or lack of clarity.

This article builds upon existing literature on issues of detention and attempts to flesh out the legal limits of security detention if and when it is

1 Marco Sassòli, "The Concept of Security in International Law Relating to Armed Conflicts", in Cecilia M. Bailliet (ed.), *Security: A Multidisciplinary Normative Approach*, Martinus Nijhoff, Leiden, 2009, p. 7.

2 *Ibid.*

3 See Article 51 of the Charter of the United Nations (signed on 26 June 1945). See also International Court of Justice (ICJ), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *ICJ Reports* 1986, paras 134–139.

4 See, for example, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 43, 78.

imposed on individuals in armed conflict situations. To this end, it is comprised of two main parts. The first part deals with the legality of security detention in both IACs and NIACs and addresses the perennial question of whether IHL provides a legal basis for (security) detention in armed conflict situations, more specifically in NIACs. Predicated upon an affirmative finding that security detention is indeed permissible in both IACs and NIACs, the second part identifies some substantive and procedural limits to security detention. In IACs, however, the rules of IHL governing security detention vary depending on whether the detention happens in a State's own or occupied territory. The nature of the protected security interest that triggers the measure and the procedural and substantive safeguards against arbitrary detention are also different.⁵ For this reason, in the second part of the article, an effort is made to highlight the strictures of the law when security detention occurs in both "own" and "occupied" territories, and the extent to which some limits, in the form of substantive and procedural safeguards, may be invoked or applied in the contexts of NIACs. These limits are derived from the practice of domestic and international judicial institutions, other relevant rules of international law including international human rights law (IHRL) and legal doctrine, and International Committee of the Red Cross (ICRC) legal and policy documents. The article concludes with some remarks that the author considers relevant to assist the development of the law regulating detention, more specifically security detention during armed conflict situations.

At the outset, it should be pointed out that in this paper, the term "detention" is used to refer to all measures depriving individuals of their liberty, irrespective of the reasons for the detention. The terms "internment", "security detention" and "preventive or administrative detention" are also used interchangeably to refer to the detention of individuals that is prompted by security reasons. This excludes other forms of deprivation of liberty, including but not limited to detention for purposes of instituting a criminal charge against a person. The expression "arbitrary detention" generally describes a situation

5 In occupied territories, preventive detention is mainly aimed at safeguarding the safety and security of the military and its administration, while in a State's own territories, the protection of other broader national security interests, which may or may not have a direct link with military operations, may be a legitimate reason to subject individuals to security detention. As the Israeli Supreme Court has affirmed on various occasions, national security is broader than military security and in occupied territories, the occupying power may not invoke its own broad national security interests to take measures restricting the rights of individuals residing in the occupied territory. This same view had also been advanced during the draft discussion of Article 59 of GC IV, where the British delegate mentioned that acts endangering the security of the occupying power include "sabotage, unlawful hostilities by civilians and marauding". He also added that the term "military security" is a much more restrained criterion than national security. See *Jam'iyat Ascan*, cited in Supreme Court of Israel, *Beit Sourik Village Council v. The Government of Israel*, Case No. HCJ 2056/04, 2004, para. 27; Supreme Court of Israel, *Kipah Mahmud Ahmed Ajuri et al. v. The Commander of IDF Forces in the West Bank et al.*, Case No. HCJ 7015/02, 2002; Supreme Court of Israel, *Amattar Muhammad Ahmed Ajuri et al. v. The Commander of IDF Forces in Judeaea and Samaria et al.*, Case No. HCJ 7019/02, 2002, para. 28; Statement of Mr. Sinclair (United Kingdom), *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2(A), 1949, pp. 767, 797.

where detention or deprivation of liberty is not in accordance with grounds and procedures or conditions specified in domestic and international laws.⁶

Prohibition of arbitrary detention in international law

The right to liberty is one of the most sacrosanct and highly safeguarded rights in international law. IHRL strictly prohibits the arbitrary arrest and detention of individuals.⁷ Despite the absence of an explicit treaty provision to that effect, there is also a growing consensus that customary rules of IHL similarly forbid the arbitrary and capricious detention of individuals in armed conflict situations.⁸ Furthermore, arbitrary detention is usually viewed as something incompatible with the requirement of humane treatment – a norm that has a solid foundation in the various rules applicable in international and non-international armed conflicts alike.⁹ Given that IHRL continues to apply during armed conflict,¹⁰ the relevant rules of human rights law may be considered to give this prohibition an alternative legal basis in treaty law.

In IHRL, whether or not a particular detention is arbitrary depends on the permissibility of its grounds, whether it has a legal basis, and the observance of the available procedures for detention.¹¹ Although most human rights treaties, with the

6 According to the UN Human Rights Committee (HRC), “the concept of arbitrariness is not to be confined to procedural arbitrariness but extends to the reasonableness of the interference with the person’s rights and its compatibility with the purposes, aims and objectives of the [international human rights instruments]”. HRC, *Jama Warsame v. Canada*, Communication No. 1959/2010, 2011, para. 8.8. See also Yoram Dinstein, “The Israeli Supreme Court and the Law of Belligerent Occupation: Deportation”, *Israel Yearbook on Human Rights*, Vol. 23, 1993, p. 7.

7 The Universal Declaration on Human Rights (UDHR) of 1948 proclaims that “[e]veryone has the right to life, liberty and security of person”, and that “[n]o one shall be subjected to arbitrary arrest, detention or exile” (see UDHR, Arts 3, 9). Under Article 9, the International Covenant on Civil and Political Rights (ICCPR) gives effect to this provision, declaring that “[e]veryone has the right to liberty and security of person” and that “[n]o one shall be subjected to arbitrary arrest or detention”. Similar provisions also exist in regional and other universal human rights conventions. The right to liberty signifies the prohibition of the arbitrary deprivation of liberty, and it applies for all cases of restrictions to liberty, including all sorts of arrest or detention. See HRC, General Comment 8, 1982, para. 1; HRC, *Antti Vuolanne v. Finland*, Communication No. 265/1987, UN Doc. Supp. No. 40 (A/44/40), 1989, para. 9.4 (restriction of liberty in the context of military discipline), European Court of Human Rights (ECtHR), *Guzzardi v. Italy*, Application No. 7367/76, Judgment, 6 November 1980, paras 92–95 (in the context of compulsory residence in a particular area).

8 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 99.

9 See common Art. 3; Geneva Convention III (GC III), Art. 13; Geneva Convention IV (GC IV), Art. 27; Additional Protocol I (AP I), Art. 75(1); Additional Protocol II (AP II), Art. 4(1). Also see ICRC Customary Law Study, above note 8, Rule 87 (civilians and persons *hors de combat* must be treated humanely).

10 See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, paras 24–25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, para. 106; HRC, General Comment 31, 2004, para. 11; HRC, Concluding Observations on Israel, UN Doc. CCPR/CO/78/ISR, 5 August 2003, para. 11; Inter-American Commission on Human Rights (IACHR), *Coard et al. v. United States*, Case No. 10,951, Report No. 109/99, 29 September 1999, para. 42; ECtHR, *Hassan v. The United Kingdom*, App. No. 29750/09, Judgment, 16 September 2014, para. 77 (all acknowledge the applicability of IHRL during armed conflict situations).

11 See Els Debuf, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, Chatham House and ICRC, London, 22–23 September 2008, pp. 2–3.

notable exception of the European Convention on Human Rights (ECHR),¹² do not provide a list of possible grounds of detention, different human rights treaty bodies have identified national security as one of the non-arbitrary, legitimate grounds of detention.¹³ It is now well established that in peacetime, IHRL gives States the authority to impose security detention on individuals threatening their security. Nevertheless, the permissibility of security detention is not that straightforward in armed conflict, particularly in the context of NIACs.

Permissibility of security detention in IACs

The extant rules of IHL envision various forms of restriction to the liberty of persons existing in armed conflict situations, including security detention. The Third Geneva Convention (GC III) allows the detention of combatants as prisoners of war (PoWs) until the end of active hostilities to prevent them from rejoining the military of the State on which they depend or returning to the battlefield.¹⁴ This measure may itself be considered as a national security measure in its wider sense. As rightly pointed out by the ICRC, PoWs

may use force, i.e. target and kill or injure other persons taking a direct part in hostilities and attack military objectives. Because such activity is obviously *prejudicial to the security of the adverse party*, the Third Geneva Convention provides that a detaining State “may subject prisoners of war to internment”.¹⁵

12 Article 5 of the 1950 European Convention on Human Rights (ECHR) contains an exhaustive list of grounds of permissible detention. See ECHR, Art. 5(1)(a–f).

13 See HRC, *David Alberto Cámpora Schweizer v. Uruguay*, Communication No. 66/1980, UN Doc. CCPR/C/OP/2, 1990, para. 18.1; HRC, *Mansour Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, 2004, para. 10.2 (explicitly stating that “detention on the basis of a security certification on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1”). See also HRC, General Comment 35, 2014, para. 18; African Charter on Human and Peoples’ Rights, Art. 27. Other human rights bodies have also recognized the legitimacy of security detention in several occasions: see UN Office of the High Commissioner for Human Rights (OHCHR), *Report of the Working Group on Arbitrary Detention*, A/HRC/30/36, 2015; OHCHR, *Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings before Court*, June 2015, para. 9. However, the HRC has repeatedly emphasized that security detention presents a severe risk of arbitrariness. See HRC, Concluding Observations on Jordan, UN Doc. CCPR/C/JOR/CO/4, 2010, para. 11; HRC, Concluding Observations on Colombia, UN Doc. CCPR/C/COL/CO/6, 2010, para. 20; HRC, General Comment 35, 2014, para. 15. The ECtHR has also held that detention for security reasons may be permissible during public emergency and derogation made in accordance with Article 15 of the ECHR to deport someone, pending deportation proceedings. See ECtHR, *Chahal v. United Kingdom*, 23 EHRR 413, 1996, para. 112; ECtHR, *A and others v. United Kingdom*, Judgment (Grand Chamber), 2009 (C.7), para. 169; ECtHR, *Hassan*, above note 10, para. 104.

14 See GC III, Arts 21, 118; Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 1907, Art. 11. See also Alec D. Walen, “Crossing a Moral Line: Long-Term Preventive Detention in the War on Terror”, *Philosophy and Public Policy Quarterly*, Vol. 28, No. 3–4; Ashley S. Deeks, “Administrative Detention in Armed Conflict”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 404.

15 See ICRC, “Internment in Armed Conflict: Basic Rules and Challenges”, Opinion Paper, November 2014, p. 4 (emphasis added).

Unlike in the case of civilian internees, the State is not required to show necessity to detain PoWs. Necessity is presumed, and no judicial review is required.¹⁶ A PoW is normally not closely confined but rather held in a camp under IHL, but if charged with a crime may also be confined while awaiting trial “if it is essential to do so in the interests of national security”.¹⁷ Similarly, the Fourth Geneva Convention (GC IV) permits the internment and placing in assigned residence of protected persons and other civilians both in the territory of a belligerent State and in an occupied territory when doing so is necessitated by security considerations.¹⁸ It is thus evident from both conventions that the law of IAC duly acknowledges the traditional power of States to detain persons endangering their national security.

Is there a legal basis for security detention in NIACs?

In contrast to the rules governing IAC, the part of IHL regulating NIACs does not explicitly specify national security as a lawful ground for detention. For that matter, there is no explicit legal basis of detention in this law even for other grounds such as criminal charge. This lack of explicit authorization or proscription of detention in the rules governing NIACs has been a source of continuous debate among scholars and practitioners.¹⁹

Some contend that Article 3 common to the four Geneva Conventions and Articles 5 and 6 of Additional Protocol II (AP II) implicitly recognize the possibility

16 See Marko Milanović, “Norm Conflicts, International Humanitarian Law, and Human Rights Law”, in Orna Ben-Naftali (ed.), *Human Rights and International Humanitarian Law*, Collected Courses of the Academy of European Law, Vol. 19/1, Oxford University Press, Oxford, 2011, p. 27. Note, however, that PoWs may also be detained if they are lawfully prosecuted or have been lawfully convicted of crimes. See GC III, Arts 85, 99, 119, 129.

17 *Ibid.*, Art. 103. Note that Art. 21 of GC III makes it clear that “prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary”.

18 See GC IV, Arts 42, 78. See also Supreme Court of Israel, *Iad Ashak Mahmud Marab et al. v. IDF Commander*, 2002, paras 19–24. Note that GC IV uses the term “military security” instead of “national security” when it comes to occupied territories: see GV IV, Art. 5(2). This choice of terminology is important because occupied territories are governed by a military administration.

19 See UK High Court of Justice, *Serdar Mohammed v. Ministry of Defence and Others*, EWHC 1369 (QB), 2 May 2014; Kubo Mačák, “No Legal Basis under IHL for Detention in Non-International Armed Conflicts? A Comment on *Serdar Mohammed v. Ministry of Defence*”, *EJIL: Talk!*, 5 May 2014, available at: www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/ (all internet references were accessed in November 2017); Lawrence Hill-Cawthorne and Dapo Akande, “Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?”, *EJIL: Talk!*, 7 May 2014, available at: www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/; Peter Rowe, “Is There a Right to Detain Civilians by Foreign Armed Forces during a Non-International Armed Conflict?”, *International and Comparative Law Quarterly*, Vol. 61, No. 3, 2012; Ramin Mahnad, “Beyond Process: The Material Framework for Detention and the Particularities of Non-International Armed Conflict”, *Yearbook of International Humanitarian Law*, Vol. 16, 2013; Daragh Murray, “Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward”, *Leiden Journal of International Law*, Vol. 30, No. 2, 2017.

of security detention during situations of armed conflict.²⁰ These provisions talk about persons deprived of “liberty for reasons related to the armed conflict, whether they are *interned* or *detained*”, and this specific mentioning of detained or interned persons is deemed to have tacitly envisaged the possibility of detention including for security reasons.²¹ However, this line of argument is inherently flawed. The regulation of a particular measure by the law does not certainly imply that the law *authorizes* the recourse to such a measure.²² Indeed, “it is routine for areas of law to regulate a practice without providing a source of authority for that practice”.²³ For instance, IHL mentions and regulates warfare, but this does not mean that IHL authorizes the conduct of war – the regulation of war lies in a different branch of international law, namely the *jus ad bellum*.²⁴ Likewise, in NIACs, detention occurs as a fact and is a common practice, and the regulation of the treatment of detainees by IHL does not lead to the conclusion that a belligerent State or a non-State armed group is authorized by the same to take such a measure.²⁵ If this was the case, the relevant rules would explicitly do

20 Jelena Pejic argues that “[i]nternment is ... clearly a measure that can be taken in non-international armed conflict, as evidenced by the language of [AP II], which mentions internment in Articles 5 and 6 respectively”. Jelena Pejic, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 377, available at: www.icrc.org/en/document/security-detention. See also Jann K. Kleff, “Operational Detention and the Treatment of Detainees”, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2010, p. 471; John Bellinger III and Vijay Padmanabhan, “Detention Operations in Contemporary Conflicts”, *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 214; Knut Dörmann, “Detention in Non-International Armed Conflicts”, in Kenneth Watkin and Andrew J. Norris, *Non-International Armed Conflict in the Twenty-First Century*, International Law Studies Series, Vol. 88, US Naval War College, Newport, RI, 2012, p. 348. The Obama Administration has also invoked common Article 3, AP II and, strangely, the right of self-defence under Article 51 of the UN Charter as a legal basis to intern the Guantanamo detainees. See “Legal Adviser Koh’s Speech on the Obama Administration and International Law,” March 2010, available at: www.state.gov/documents/organization/179305.pdf.

21 AP II, Art. 5(1) (emphasis added); Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs), para. 3063. During the draft discussion for GC IV, in the ninth meeting at the conference of plenipotentiaries, Mr Day (United Kingdom) observed that “[i]f a person had committed an offence, he should be punished. Internment was not a punishment; it was a precautionary measure to safeguard the security of the State.” *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2, 1949, p. 674.

22 L. Hill-Cawthorne and D. Akande, above note 19; Ryan Goodman, “Authorization versus Regulation of Detention in Non-International Armed Conflicts”, *International Law Studies*, Vol. 91, 2015, p. 159. Aurel Sari also shares the general view that regulation cannot be equated with authorization, but he disagrees with the conclusion that “IHL does not authorize *any* of the activities it regulates”. See Aurel Sari, “Sorry Sir, We’re All Non-State Actors Now: A Reply to Hill-Cawthorne and Akande on the Authority to Kill and Detain in NIAC”, *EJIL: Talk!*, 9 May 2014.

23 *Ibid.*

24 See L. Hill-Cawthorne and D. Akande, above note 19. Marco Sassòli also argues that “in non-international conflicts, IHL cannot possibly be seen as a sufficient legal basis for detaining anyone. It simply provides for guarantees of humane treatment and, in case of prosecution for criminal offences, for judicial guarantees.” Marco Sassòli, “Terrorism and War”, *Journal of International Criminal Justice*, Vol. 4, No. 5, 2006, pp. 971–972. Similarly, Gabor Rona highlights the existence of a gap in the law of NIAC and suggests a gap-filling normative development. Gabor Rona, “Is There a Way Out of the Non-International Armed Conflict Detention Dilemma?”, *International Law Studies*, Vol. 91, 2015.

25 L. Hill-Cawthorne and D. Akande, above note 19. See also UK High Court of Justice, *Mohammed*, above note 19, para. 243.

so, but neither common Article 3 nor AP II clearly provides “who may be detained, on what grounds, in accordance with what procedures, or for how long”.²⁶

A seemingly more persuasive assertion can be found in the seminal work of Professor Ryan Goodman, who argued that

States have accepted more exacting obligations under IHL in international than in non-international armed conflicts. ... [I]f States have authority to engage in particular practices in an international armed conflict [e.g. detention], they *a fortiori* possess the authority to undertake those practices in non-international conflict.²⁷

Hence, if IHL permits States to detain civilians on security grounds in IACs, it surely allows them to pursue the same in NIACs.²⁸ In the same sense, it is also contended that the power to detain may be considered to flow from, and is consistent with, “the practice of armed conflict and the logic of IHL that parties to a conflict may capture persons deemed to pose a serious security threat and that such persons may be interned as long as they continue to pose a threat”.²⁹ Relatedly, some specifically argue that the authority to detain, including for security reasons, is an implicit and intrinsic aspect of the power to target individuals in armed conflict.³⁰

These arguments appear to be convincing but are also not entirely accurate. To begin with the argument that the power to detain is implicit in the power to target, it is true that detention represents a less severe measure compared to targeting, a measure which the rules of both NIACs and IACs permit, when it comes to combatants and civilians directly participating in hostilities (DPH).³¹ While it may

26 *Ibid.* See also Peter Rowe, “Is There a Right to Detain Civilians by Foreign Armed Forces during a Non-International Armed Conflict?”, *International and Comparative Law Quarterly*, Vol. 61, No. 3, 2012, pp. 701–706.

27 Ryan Goodman, “The Detention of Civilians in Armed Conflict”, *American Journal of International Law*, Vol. 103, No. 1, 2009, p. 50.

28 Hill-Cawthorne and Akande also convincingly state: “Since IACs concern two or more states, one state or the other is going to be acting on the territory of a foreign state and acting with respect to individuals who are foreign nationals. In these circumstances, only an explicit norm of international law can provide the legal authority for targeting, detention, etc. Without such a rule of international law, these actions would be unlawful as a matter of international law since states do not have authority to take such action on the territory of another state and have obligations to other states with respect to how they treat nationals of those other states.” L. Hill-Cawthorne and D. Akande, above note 19.

29 E. Debuf, above note 11, p. 4. Otherwise, the alternatives would be to either release or kill captured persons.

30 See, for example, Claus Krefß, “Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts”, *Journal of Conflict and Security Law*, Vol. 15, No. 2, 2010, p. 263, arguing that “an ‘armed conflict model’ for preventive detention in non-international armed conflicts is likely to emerge through ‘translation’ or analogizing principles from the laws of war governing traditional international armed conflicts”. Such a model could include an inherent power to detain as a corollary of the power to target.” See also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 301–302.

31 On the notion of DPH, see Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009. See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 152; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, ICRC, Geneva, 2001, p. 99; IACHR, *Ellacuria et al. v. Salvador*, 22 December 1990; Supreme Court of Israel, *Public Committee against Torture in Israel v. The State of Israel et al.*, 2005, paras 33–40.

be important to have the ability to target civilians who are DPH during NIACs, DPH itself is not a requirement to detain individuals on security grounds. In other words, to be a security threat is not synonymous with and, in fact, is broader than DPH. A person may be a security threat, and hence be subjected to detention, without directly or even *indirectly* participating in hostilities or engaging in activities that cause material and direct, *actual or potential harm* to a State and without violating the rules of IHL.³² Precisely put, the two regimes of detention and targeting and the subjects they regulate are distinct and should not be conflated. The contention that the prerogative of States to target some specific individuals also gives them the authority to detain those individuals who may be considered to have threatened State security but have not directly participated in hostilities is thus not watertight. The related argument that, in the absence of a legal basis for detention, States may be encouraged to kill rather than detain individuals is also not that evident. The act of killing individuals in armed conflict does not much depend on a State's ability to detain them.

It is also difficult to agree with the assertion that States have a power to detain individuals in NIACs since they have the same power in IACs, where they assume more exacting obligations. The nature of the conflict and the parties involved in IACs and NIACs is completely different. The *raison d'être* behind the rules regulating NIAC and IAC, including those concerning detention, is also not the same. IACs usually occur between two or more States, and recognizing the authority of a belligerent State to detain individuals threatening its security is a natural consequence of the inherent sovereign right of that State to protect its territorial integrity, its political independence and the well-being of its population.

The recognition of the detention power of a State during IACs also has the element of reciprocal benefits for States: it guarantees to warring States that their citizens who might be detained by other belligerent States are treated humanely. In IACs, the basic assumption is that the belligerent States have the capacity and institutional ability to keep individuals in detention humanely and with dignity and have judicial or quasi-judicial mechanisms to redress possible arbitrary incarcerations. In contrast, such assumptions either do not exist or are qualified when it comes to NIACs. NIACs involve conflicts between States and non-State actors or between non-State actors, and the lack of an express authorization of detention is evidently a reflection of States' aversion to any rules that may bestow a degree of recognition on the non-State actors. Of course, this does not necessarily suggest that States had the intention to restrict their own capacity to detain in NIACs.³³ Instead, they are well aware that they have other legal avenues

32 The Geneva Conventions and their Additional Protocols do not require a material harm to transpire from the activities of a protected person. GC IV Article 42 allows the internment of or imposition of assigned residence on an alien "if the security of the Detaining Power makes it absolutely necessary". This provision does not require that a hostile act is actually committed by the alien; the potential to commit such acts suffices. See Robert W. Ghering, "Loss of Civilian Protections", *Military Law Review*, Vol. 90, Autumn 1980, pp. 51–52, 84–85, arguing that "[a] civilian who has committed no hostile acts nor engaged in any prejudicial activity may still be denied a right whose exercise would be prejudicial to the national interests or security of his enemy". See also R. Goodman, above note 27.

33 K. Maćák, above note 19.

that they may use, besides the rules of IHL, to detain individuals threatening their security, including domestic law. Therefore, the assertion that IHL offers the legal basis for detention in the contexts of NIACs needs to rest on an alternative reasoning with some legal scaffolding in treaty or customary law.

One alternative would be to draw a parallel rule from IACs where both treaty and customary IHL contain an inherent power to intern, and then to extrapolate this to NIACs and consider this “inherent power to intern” as a legal basis of internment in NIACs.³⁴ One can indeed find strong normative foundations for this view in customary international law. States have always engaged in detaining individuals threatening their security, whether in peacetime or in NIACs, and this has generally been accepted as lawful.³⁵ It may consequently be argued that the necessary elements of customary law – practice and *opinio juris* – exist, and hence there is a customary rule permitting detention in NIACs.

An additional legal source, which is often overlooked in the literature, can be found in Article 3 of AP II, which declares:

Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, *by all legitimate means*, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State [emphasis added].

In this provision, the formulation “all legitimate means” is couched in broad terms and encompasses a wide range of measures that States may adopt to protect their security. Although the provision does not mention examples of such measures, undoubtedly one can envisage security detention as forming part of “all legitimate means” necessary to maintain law and order and to safeguard national unity and territorial integrity, which are the traditional national security interests of States.³⁶

On these two grounds – namely, customary law and Article 3 of AP II – it may thus be concluded that IHL authorizes detention in NIACs and that, accordingly, States have the authority to detain individuals posing a threat to their security. It should nevertheless be noted that the formation of a rule of customary law is essentially State-centric, and Article 3 of AP II itself makes reference to States as the only entity permitted to use “all legitimate means” to

34 See Jelena Pejic, “The Protective scope of Common Article 3”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 208–209: “It is believed that the ‘imperative reasons of security’ standard strikes a workable balance between the need to protect personal liberty and the detaining authority’s need to protect against activity seriously prejudicial to its security.” See also ICRC, “Strengthening Legal Protection for Persons Deprived of Their Liberty in Relation to Non-International Armed Conflict: Regional Consultations”, Background Paper, 2012, p. 13.

35 See Major Robert E. Barnsby, “Yes We Can: The Authority to Detain as Customary International Law”, *Military Law Review*, Vol. 202, 2009, pp. 73–81. See also Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, p. 70; Kubo Mačák, “A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 45, 2015, available at: <https://ssrn.com/abstract=2559220>.

36 The historical genesis of this provision indicates that the rule was included to allay the concern of States with regard to possible interventions from outside forces including humanitarian organizations under the pretext of humanitarian operations. See ICRC Commentary on APs, above note 21, pp. 1361–1363.

maintain national security and public order. The same argument cannot therefore be advanced for the detention power of non-State actors. Indeed, the unwillingness of States to risk giving legitimacy to armed groups has often made States hesitant to acknowledge the detention power of non-State actors.³⁷ In NIACs, States rarely agree or even acquiesce to the *de facto* power of their adversaries to target or detain individuals. Given this, the validity of the argument that there is a customary rule of IHL granting detention power in NIACs is valid only with regard to States, and not to non-State armed groups. Some authors have attempted to develop a corresponding authority to detain for non-State armed groups on the basis of “equality of arms”, arguing that this would promote the coherent application of IHL for all parties to an armed conflict.³⁸ However, this lacks a strong normative foundation, at least as far as detention is concerned – in other words, there is a clear normative gap in the law.

Moving away from the debate on authorization versus regulation

The foregoing analysis and a large part of the scholarly works written on the subject³⁹ clearly suggest that for the most part the debate on detention revolves around the issue of whether IHL *authorizes* or *regulates* detention in NIACs. As concluded in the preceding section, a close examination of the different arguments reveals that, as far as detention is carried out by *States*, the contention that IHL provides a legal basis for detention in NIACs has a firm ground in customary law and Article 3 of AP II; however, no similar normative rules authorize non-State armed groups to exercise the same power under either treaty or customary rules of international law. Notwithstanding this conclusion, one may still step back and raise two fundamental questions: first, is it even necessary for the protection of individuals in armed conflict situations that IHL provide rules which *explicitly* permit or proscribe detention; and second, if not, what alternative legal avenues are available for parties to NIACs to resort to measures of detention?

It is intuitively true that a clear and explicit rule permitting/proscribing detention in NIACs creates legal certainty. However, the enduring debate on whether IHL does or should expressly offer a legal basis for detention in NIACs is of little practical importance and may even be undesirable in light of the existence of other alternative legal avenues available for States to resort to measures of detention. What is more important for detainees is to focus on the conditions rather than the permissibility of detention.⁴⁰ The issue of

37 As Justice Leggatt rightly pointed out in the *Mohammed* case, above note 19, States would not have agreed to establish by treaty a power to detain in a NIAC as it would be “anathema” to accept that a potential rebel group would have the right to exercise a function which is a core aspect of State sovereignty.

38 D. Murray, above note 19.

39 See, for example, K. Mačák, above note 19; L. Hill-Cawthorne and D. Akande, above note 19; R. Goodman, above note 22; A. Sari, above note 22.

40 The only practical relevance of arguing for or against IHL providing specific grounds for detention in NIACs is to determine whether a European country involved in a NIAC could impose security detention without violating Article 5 of the ECHR. This was indeed what happened in the *Mohammed* case, above note 19. See L. Hill-Cawthorne and D. Akande, above note 19.

permissibility of detention should be left to other rules such as the domestic law of States, UN Security Council resolutions, if any, and IHRL.⁴¹ Of course, considering that these rules, particularly domestic laws and IHRL, are traditionally applied only by States and not by non-State actors, it may be apposite to clearly specify in the rules of IHL the basis under which detention may be conducted by non-State armed groups during NIACs. Nevertheless, as stated above, States are often unwilling to accept any rule suggesting that non-State armed groups have equal power to detain individuals. States may view acceptance of the authority to detain for non-State armed groups as sharing sovereign power with these armed groups and limiting their own ability to contain insurrection.⁴² States are aware of the possibility of detention by non-State armed groups, but they do not want to give it any legal clout, as this may imply recognition of the legitimacy of those groups. The resistance of States to expressly acknowledging the detention power of non-State armed groups in the law is thus essentially a “framing” issue and not a denial of the occurrence of detention by non-State armed groups. As can clearly be inferred from the limited provisions that common Article 3 and AP II (Articles 4 and 5 in particular) provide, States prefer to bind themselves to rules that enhance respect for humane treatment of detainees, without giving the impression that non-State actors have equal power to detain.

To move in a direction that is palatable to States, the general debate on the issue should thus focus on the extent of material legal protection that IHL should provide for persons detained in NIACs, particularly concerning the procedural and substantive conditions of their detention, treatment during detention, and their transfer and release. The development of the law regulating NIACs should similarly aim at guaranteeing more humane treatment of detainees rather than focusing on *authorizing* or *forbidding* detention. The normative gap-filling effort should move towards developing rules governing NIACs that guarantee, at least, the same procedural and substantive humanitarian standards of treatment available in IHL for those detained in IACs, or in IHRL standards available for those individuals detained in the context of derogation from human rights norms.⁴³ The legal regime applicable in times of derogation from IHRL obligations is generally meant to regulate situations such as war, and the substantive and procedural guarantees available during derogations are minimum

41 Gabor Rona has stated: “It is logical that ... since there is no conflict between two or more sovereigns [in a NIAC], the IHL of non-international armed conflict should be silent, in deference to national law, on questions of detention.” Gabor Rona, “An Appraisal of US Practice Relating to ‘Enemy Combatants’”, *Yearbook of International Humanitarian Law*, Vol. 10, 2007, pp. 232, 241. This is true for most cases of NIAC, but NIACs may also occur across international borders outside the jurisdiction of a particular State, and there is a possibility that the domestic law of one State may not necessarily be adequate. See C. Krefß, above note 30. See also E. Debuf, above note 11, pp. 3–9; Monica Hakimi, “International Standards for Detaining Terrorist Suspects: Moving Beyond the Armed Conflict–Criminal Divide”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, pp. 607–609; M. Sassòli, above note 24, p. 972; Andrea Bianchi and Yasmin Naqvi, *International Humanitarian Law and Terrorism*, Hart, Oxford and Portland, OR, 2011, p. 329.

42 See D. Murray, above note 19, p. 451.

43 In this regard, attempts to highlight these procedural and substantive safeguards have already been made by a few scholars. See, for example, K. Dörmann, above note 20, pp. 349–365.

standards that are applicable in all contexts irrespective of the level or nature of crisis, including where a State is involved in a NIAC or IAC. Historically, the main reason why States have incorporated the various derogation provisions in regional and international human rights treaties is to overcome threats of armed conflict.⁴⁴

As far as security detention is concerned, it should be noted that the existing forms of security detention that are contemplated by the pertinent provisions in the various IHL treaties – namely pre-trial confinement, internment and assigned residence – are generally considered to be very serious measures with grave repercussions on the rights of individuals.⁴⁵ Hence, no other, more restrictive forms of security detention are allowed, regardless of the nature or degree of the security threat posed by such individuals.⁴⁶

Given its severe implications on the rights of individuals, security detention may be selectively imposed only when it is warranted by the circumstances. This is evidenced by the language of Article 42 of GC IV: “if the security of the Detaining Power makes it *absolutely necessary*”; and, in occupied territory, Article 78: “for *imperative reasons of security*”. These formulations indicate that security detention without trial is an exceptional measure, the imposition of which is acceptable only when circumstances are compelling.⁴⁷ The provisions are underpinned by the basic precept that the individual rights and freedoms of individuals should remain unimpaired unless a real threat to security demands restriction.⁴⁸

44 See Giorgio Agamben, “The State of Exception as a Paradigm of Government”, in Giorgio Agamben, *State of Exception*, trans. Kevin Attel, Chicago University Press, Chicago, IL, 2005, pp. 1–31.

45 Jean Pictet states that “internment and the placing of a person in assigned residence are the severest measures of control that a belligerent may apply to protected persons”. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (ICRC Commentary on GC IV), p. 258. Also see Supreme Court of Israel, *Marab*, above note 18, para. 20. In terms of degree of severity, internment is more severe than assigned residence “as it generally implies an obligation to live in a camp with other internees”. See ICRC Commentary on GC IV, above, p. 256. See also Supreme Court of Israel, *Ajuri*, above note 5, para. 26.

46 Article 41 of GC IV ordains that “[s]hould the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43” (emphasis added). Article 78 similarly declares that the occupying power “may, at the most, subject them [protected persons] to assigned residence or to internment” (emphasis added).

47 See ICRC Commentary on GC IV, above note 45, p. 258; Supreme Court of Israel, *Ajuri*, above note 5, para. 24 (“these measures may be adopted only in extreme and exceptional cases”). In *Al-Jedda v. The United Kingdom*, the ECtHR noted that internment is “a measure of last resort”: ECtHR, *Al-Jedda v. The United Kingdom*, 2011, para. 107. Also see Hans-Peter Gasser, “Protection of the Civilian Population”, in Dieter Fleck and Michael Bothe (eds), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 288.

48 Supreme Court of Israel, *Marab*, above note 18. The Court stated that “it must always be kept in mind that detention without the establishment of criminal responsibility should only occur in unique and exceptional cases. The general rule is one of liberty. Detention is the exception. The general rule is one of freedom. Confinement is an exception.” Pejic also argues that “internment is an exceptional measure ... based on the general principle that personal liberty is the rule, and on the assumption that the criminal justice system is able to deal with persons suspected of representing a danger to State security”. J. Pejic, above note 20, p. 380. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Zejnil Delalić et al.*, 1998, para. 565.

For the purposes of this article, the author will treat the rules of IHL applicable in IAC as customary rules applying also in NIAC unless otherwise stated. Furthermore, as there is no combatant status in IAC, the author will consider detainees in NIAC to be akin to “civilian internees” rather than PoWs. In the following section, an attempt is made to highlight some minimum conditions for security detention in IACs. In NIAC, similar rules are derived from treaty and customary rules of IHL, IHRL and the practice of domestic courts and international judicial institutions. It is significant to note that any future proposal to develop the law of NIACs governing security detention should be mindful of the “framing effect” of the rules and its possible impact on the response of States.

Conditions and limits of lawful security detention

While recognizing the power of a State in armed conflict to impose security detention on persons posing a threat to security, the law of war does not allow the general suspension of the right to liberty of victims of armed conflict for any alleged security threat. It only allows the restriction of liberty in very narrowly defined circumstances, and upon the fulfilment of certain conditions. These conditions place effective limits on the power of States to have recourse to security detention in times of war and could, as States deem fit, be applied to security detention occurring in both IACs and NIACs.

Nexus with the armed conflict

The first important condition for security detention in IHL is the requirement of nexus with the armed conflict. A State can impose security detention in accordance with IHL only when the security threat dictating such a measure is related to an armed conflict. A State cannot rely on IHL to subject individuals to security detention in order to deal with a threat that is not linked with the armed conflict, regardless of the impact of the threat on its security. This is simply because the material domain of application of IHL is restricted to armed conflict situations. Accordingly, someone may be interned only if his present or projected activities can be considered as part of or related to the war. This is the case if a civilian shoots a passing enemy soldier, plants a bomb in an enemy encampment, destroys communication facilities, attempts to liberate PoWs, intentionally misleads troops or performs other intelligence functions on behalf of the enemy. Generally, all “[s]ubversive activit[ies] carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power ... threaten the security of a country”.⁴⁹

49 ICRC Commentary on GC IV, above note 45, p. 258.

The seriousness of the threat and the existence of a reasonable suspicion

The seriousness of the threat is generally an important prerequisite to invoking the national security exceptions recognized by the IHL treaties. A security threat that serves as a basis for the detention of individuals in the context of armed conflict has to satisfy some minimum threshold of gravity; it should be of serious nature and the invocation of its existence should be adequately substantiated.⁵⁰ The detaining power should always demonstrate that there are “serious and legitimate reasons” to consider that the detainees may prejudice its security.⁵¹ This was well articulated by Justice Barak, former president of the Israeli Supreme Court, in *Ajuri v. IDF Commander*. While examining the legality of assigned residence that the Israeli military commander imposed on some Palestinians in the occupied Palestinian territories for security reasons, Justice Barak stated:

What is the level of danger that justifies assigning a person’s place of residence, and what is the likelihood thereof? The answer is that any degree of danger is insufficient. In view of the special nature of this measure, it may usually only be exercised if there exists administrative evidence that – even if inadmissible in a court of law – shows *clearly and convincingly* that if the measure of assigned residence is not adopted, there is reasonable possibility that he will present *a real danger* of harm to the security of the territory.⁵²

Security detention based on a mere suspicion or a non-existent threat, or even an insignificant contribution made to a credible threat, cannot therefore be justified.⁵³ Furthermore, in order to subject someone to preventive detention, it is, for instance, insufficient to show the existence of a tenuous connection of a detainee with a “terrorist” organization. Rather, a specific and individualized determination of the threat should be made on the basis of an individual’s “connection and contribution to the organization ... expressed in other ways that

50 See ICRC Commentary on GC IV, above note 45, p. 258 (where Pictet mentions serious threats to security such as espionage and sabotage). Article 75 of GC IV, albeit in relation to suspension of execution of death penalty in occupied territories, talks about “grave emergency involving an organized threat to the security of the Occupying Power or its forces”. In the *Schweizer* case, the HRC also emphasized that “[a]lthough administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasizes that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances” (emphasis added). HRC, *Schweizer*, above note 13, para. 18.1.

51 See S. Sivakumaran, above note 30, p. 303: “Preventive detention without evidence and on a mere suspicion is prohibited even if its stated purpose is to ensure the security of the State.” In its 1999 report on Colombia, the IACHR also observed that “preventive detention is a special measure which should only be applied in cases where *reasonable suspicion*, and not mere presumption, exists that the defendant may flee from justice or destroy evidence”. IACHR, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, Doc. 9 Rev. 1, 26 February 1999, para. 21; see also IACHR, *Report on Terrorism and Human Rights*, 2002 (IACHR Terrorism Report), para. 123.

52 Supreme Court of Israel, *Ajuri*, above note 5, para. 25 (emphasis added). See also Supreme Court of Israel, *A v. State of Israel*, CrimA 6659/06, 5 March 2007, para. 23, available at: http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf (“clear and convincing evidence”). A similar standard of proof, “highly likely” or “certain”, is also suggested by some experts. See E. Debuf, above note 11, p. 5.

53 Supreme Court of Israel, *Ajuri*, above note 5, para. 39.

suffice to include him in the cycle of hostilities in its broad sense, such that his detention will be justified under the law”.⁵⁴ This requires that the threat which is the basis of his detention should be posed by the detainee himself.⁵⁵ As such, a security detention cannot be ordered, for instance, to deter others, for purposes of convenience to the detaining power, or to use an individual as a “bargaining chip” with the enemy, even if it might be thought that this would enhance national security.⁵⁶ Similarly, the internment of individuals cannot be carried out for the sole purpose of gathering intelligence information in a circumstance where a detainee himself poses no security threat.⁵⁷

The preventive nature of the measure

Security detention is inherently preventive in nature. The main purpose of security detention is only to address a present or prospective danger rather than to punish a previous unlawful act.⁵⁸ Security detention cannot be ordered to penalize a person for his/her past criminal deeds.⁵⁹ This clearly implies that even if an individual did

54 Supreme Court of Israel, *A v. State of Israel*, above note 5, para. 21. According to the Israeli Supreme Court, “in order to intern a person it is not sufficient that he made a remote, negligible or marginal contribution to the hostilities against the State of Israel. ... [T]he State must prove that he contributed to the perpetration of hostile acts against the State, either directly or indirectly, in a manner that is likely to indicate his personal dangerousness.” *Ibid.* See also R. Goodman, above note 27, p. 55.

55 See ICRC Commentary on GC IV, above note 45, p. 258

56 “An essential condition for being able to assign the place of residence of a person under art. 78 of the Fourth Geneva Convention is that the person himself constitutes a danger, and that assigning his place of residence will aid in averting that danger. It follows that the basis for exercising the discretion for assigning residence is the consideration of preventing a danger presented by a person whose place of residence is being assigned. The place of residence of an innocent person who does not himself present a danger may not be assigned, merely because assigning his place of residence will deter others.” Supreme Court of Israel, *Ajuri*, above note 5, paras 24, 27. See also Supreme Court of Israel, *John Does (A) v. Ministry of Defense*, HCJ 1 CrimFH 7048/97, 12 April 2000, paras 15–19, available at: www.hamoked.org/files/2012/230_eng.pdf. The Court again confirmed this position in *Batya Arad v. The Knesset*, Case No. HCJ 2967/00, PD 54 (2) 188, 2000, and in *A. and B. v. State of Israel*, CrimA 6659/06, CrimA 1757/07, CrimA 8228/07, CrimA 3261/08, 11 June 2008, paras 18–19. See also E. Debuf, above note 11, p. 5; HRC, Concluding Observations on Azerbaijan, UN Doc. CCPR/C/79/Add.38, 1994, para. 8.

57 See R. Goodman, above note 27, p. 55 (citing US Supreme Court, *Hamdi v. Rumsfeld*, 542 US 507, 2004); J. Pejic, above note 34, p. 21; M. Hakimi, above note 41, p. 644. See also ICRC Commentary on GC IV, above note 45, p. 343.

58 ICTY, *Delalić*, above note 48, para. 577; Supreme Court of Israel, *A v. State of Israel*, above note 52, para. 22.

59 *Ibid.*, para. 22. Dinstein has also written that “administrative detention must have a preventive nature, that is, must be resorted to not as a penalty for an offence committed in the past but as a measure denying the suspect the possibility of committing an offence in the future. When a person is suspected of having already committed an offence, he should be prosecuted by a competent court. True, it happens that administrative detentions are inflicted on persons who are suspected of having committed offences in the past, when there is not sufficient evidence to bring about their conviction by a court of law, or where proof of their guilt beyond reasonable doubt requires the disclosure of intelligence sources (especially the exposure of secret agents whom the occupant does not wish to endanger or whose clandestine operation he is unwilling to discontinue). Yet, even in such instances, the reason for the internment (at least in theory) is not punishment (without due process of law) for the offence committed in the past, but apprehension lest similar acts be committed in the future.” Yoram Dinstein, “The International Law of Belligerent Occupation and Human Rights”, *Israel Yearbook on Human Rights*, Vol. 8, 1978, pp. 125–126.

in fact carry out acts which harmed the security of a State, he cannot be subjected to assigned residence or internment unless there is a real possibility that he will repeat such or similar acts.⁶⁰ It is plausibly argued that this is essentially because the need for security detention “stems, *inter alia*, from the difficulty in finding a response within criminal law to certain threats to national security”.⁶¹ If the danger is a past event, the criminal justice system, rather than preventive detention, becomes the most apt means to deal with it.⁶² For preventive detention to be sustained, there must therefore be a continuing threat.⁶³ Also, if a person has already been preventively detained, interned or subjected to assigned residence without a criminal charge, he should be released “as soon as the reasons which necessitated his internment no longer exist”⁶⁴ and in any case “as soon as possible after the close of hostilities”.⁶⁵ The only exception is if the detainee is accused or convicted of crimes or has violated disciplinary rules.⁶⁶

The requirements of absolute necessity and imperativeness

The standards of *absolute necessity* and *imperativeness* in Articles 42 and 78 of GC IV also constitute important safeguards.⁶⁷ In order to legitimately impose security detention, States should demonstrate that there is a material and temporal

60 *Ibid.* However, as Dinstein has indicated (*ibid.*), this does not mean that the individual cannot be subjected to other measures. Indeed, if he is a civilian, he may be subjected to criminal proceedings and punishment upon conviction for participating in hostilities. See, for example, GC IV, Art. 68.

61 Supreme Court of Israel, *John Does*, above note 56, para. 16.

62 See M. Hakimi, above note 41, pp. 610–614.

63 *Ibid.* See also Supreme Court of Israel, *Ajuri*, above note 5, para. 24.

64 GC IV, Art. 132.

65 *Ibid.*, Art. 133. This is a long-standing position of the ICRC. According to Jelena Pejic, “[o]ne of the most important principles governing internment/administrative detention is that this form of deprivation of liberty must cease as soon as the individual ceases to pose a real threat to State security, meaning that deprivation of liberty on such grounds cannot be indefinite. In view of the rapid progression of events in armed conflict, a person considered to be a threat today might not pose the same threat after a change of circumstances on the ground. In other words, the longer internment lasts, the greater the onus on a detaining authority to prove that the reasons for it remain valid. The rationale of the principle is, thus, to facilitate the release of a person as soon as the reasons justifying the curtailment of liberty no longer exist.” J. Pejic, above note 20, p. 382. See also AP I, Art. 75(3). This is considered to be a rule of customary international law applicable for both IAC and NIAC. See ICRC Customary Law Study, above note 8, Rule 128(c); M. Hakimi, above note 41, p. 607; K. Dörmann, above note 20, pp. 352–353. See also A. Bianchi and Y. Naqvi, above note 41, p. 370; H.-P. Gasser, above note 47, pp. 322–323.

66 GC IV, Art. 133(2). See Y. Dinstein, above note 59, p. 126.

67 Pictet has written that GC IV “stresses the exceptional character of internment and assigned residence by making their application subject to strict conditions; its object in doing this is to put an end to an abuse which occurred during the Second World War. All too often the mere fact of being an enemy subject was regarded as justifying internment. Henceforward only absolute necessity, based upon the requirements of State security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means. All considerations not on this basis are strictly excluded.” ICRC Commentary on GC IV, above note 45, p. 258; ICTY, *Delalić*, above note 48, para. 581 (“The judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security. Thus, if these measures were inspired by other considerations, the reviewing body would be bound to vacate them”). See also H.-P. Gasser, above note 47, p. 320.

necessity that demands the detention of individuals without trial. It also has to be shown that there is a rational connection (“rational means test”) between the security detention and the danger which is sought to be averted; that security detention is the least restrictive means available to deal with such danger (“least injurious means test”); and that the protection of the national security interest at stake is worthy of its cost – i.e., the deprivation of liberty resulting from the security detention (“proportionality in the narrower sense”).⁶⁸ In this vein, it is rightly contended that the institution of security detention is only

designed to prevent and frustrate a security danger that arises from the acts that [a detainee] may perpetrate and which may not reasonably be prevented by adopting regular legal measures (a criminal proceeding) or by an administrative measure that is less severe from the viewpoint of its consequences (for the purpose of reaching conclusions from past acts with regard to future danger).⁶⁹

It should further be mentioned that the mere fact that armed hostilities exist for a prolonged period of time “cannot justify the extended detention or internment of civilians; their detention is only justified as long as security concerns strictly require it”.⁷⁰

A higher threshold of necessity and a stricter standard of proportionality for internment and assigned residence in human rights law

As implied in the terms “absolute” and “imperative” under Articles 42 and 78 of GC IV, the serious nature of internment and assigned residence requires a higher degree of necessity and proportionality than ordinary cases of necessity recognized in IHRL or the *essentiality* standard under Article 103 of GC III for pretrial confinement of PoWs.⁷¹ Although a precise threshold of necessity is difficult to draw, and is likely to depend on the circumstances, security detention in armed conflict presupposes the existence of a more exacting standard of necessity than in peacetime.

68 A good illustration of these tests can be found in the decision of the Israeli Supreme Court in the *Beit Sourik* case, above note 5, para. 41. See also R. Goodman, above note 27, p. 55. Gasser has further observed that “[i]nternment should be ordered only if other control measures are not sufficient”: H.-P. Gasser, above note 47, p. 288. See also IACHR, *Coard et al. v. United States*, 1999, para. 52; IACHR Terrorism Report, above note 51, para. 143.

69 Supreme Court of Israel, *Sejadia v. Minister of Defence*, Case No. HCJ 253/88, IsrSC 43(3) 801, 1988, cited in Supreme Court of Israel, *Ajuri*, above note 5, para. 25.

70 IACHR Terrorism Report, above note 51, para. 143.

71 In IHRL, the term “necessary” is considered to be not synonymous with “indispensable”, nor has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”. See the decisions of the ECtHR in *Handyside v. United Kingdom*, 1976, para. 48. see also ECtHR, *The Observer and the Guardian v. The United Kingdom*, Judgment, 26 November 1991, para. 59; ECtHR, *Gillow v. United Kingdom*, Judgment, 24 November 1986, para. 55. The ICJ in the *Nicaragua* case also held that those measures designed to protect national security interests must be “not merely useful but ‘necessary’”: ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 117, para. 224.

Given that armed conflict is the gravest security threat that might require States to adopt more exceptional and severe measures in contrast to any other security threat in peacetime, this interpretation may appear illogical, the reason being that the State should have more flexibility during war than in peacetime. Yet there is also a greater potential for abuse in armed conflict than in a peacetime situation. It is thus plausible and desirable to place a stricter standard of necessity in contexts of armed conflict.

Note, however, that even if there is no such explicit requirement under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee (HRC) has adopted the same standard of “absolute necessity” for security detention in a peacetime context.⁷² If this is taken as the prevailing norm, there is therefore no difference in the required threshold of necessity between armed conflict situations and peacetime, and security detention shall be imposed only to the extent that it remains absolutely necessary.

Occupied territories: A particularly compelling standard of necessity

It is argued that the standard of necessity which is required to subject individuals to measures of assigned residence or internment becomes even more strict in occupied territories. According to Pictet:

In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately. ... [The] exceptional character [of internment and assigned residence] must be preserved.⁷³

This more restrictive approach towards the authority of the occupying power to detain in occupied territories for security reasons is warranted by the nature of occupation itself. Military occupation is presumed to be a temporary phenomenon, and military administration is normally thought to be an unavoidable outcome of military necessity rather than a system designed to fulfil a zeal for annexation of the territory of the enemy, or to have full political control over persons found therein.⁷⁴ Because of this lack of sovereign power over both the territory and the people, the military must demonstrate a truly compelling necessity to intern

⁷² HRC, General Comment 35, 2014, para. 15.

⁷³ ICRC Commentary on GC IV, above note 45, pp. 367–368.

⁷⁴ Supreme Court of Israel, *Beit Sourik*, above note 5, paras 27–28 (asserting that the security barrier wall was meant to address security concerns emanating from terrorists and not as a political measure to define a boundary). See also Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, p. 21; Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, p. 247; Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 673; Y. Dinstein, above note 59, pp. 109–110.

civilians in an occupied territory, more than would be required of a detaining power in its own territory. As will be illustrated below, the occupying power is also required to institute a regular procedure to determine whether someone should be interned or assigned to a particular area of residence.

Prohibition of security detention as a collective measure

IHRL does not allow the imposition of security detention in the absence of an individual evaluation of a person's particular level of security threat.⁷⁵ The same rule applies to security detainees during an armed conflict. This is a direct and logical consequence of the rule that was stated earlier – i.e., that individuals shall be the subject of security detention only when they *personally* pose a security threat. A belligerent State cannot lawfully intern or place in assigned residence protected persons *en masse*, without thoroughly examining the case of each and every internee. Preventive detention, whether in occupied or a State's own territory, shall not be used as a collective punishment applicable indiscriminately to all individuals without consideration of the nature or level of threat that each detainee has posed.⁷⁶ Obviously, in order to conduct such an evaluation, detainees need to have the rights and procedural guarantees that enable them to contest the legality of their detention. This directly leads us to the next section, which discusses the procedural guarantees that international law provides for persons subjected to security detention.

Procedural safeguards against arbitrary detention

The relevant rules of IHRL provide various procedural and substantive guarantees against arbitrary detention, including the right of *habeas corpus*, the right to be promptly informed of the reasons of detention, access to a lawyer, and the right to periodic review of the necessity for continued detention, in cases of security detention.⁷⁷ As IHRL continues to apply during armed conflict situations, these guarantees should in principle apply as well. However, because IHRL allows derogation from, or at least the modification of, some of these guarantees during

75 See HRC, Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93, 1998, para. 21. See also HRC, Concluding Observations on India, UN Doc. CCPR/C/79/Add.81, 4 August 1997, para. 24.

76 “This does not mean that a detaining authority cannot intern a large number of persons, but that both the initial decision on internment and any subsequent decision to maintain it, including the reasons for internment, must be taken with respect to each individual involved.” J. Pejic, above note 20, pp. 381–382.

77 See ICCPR, Art. 9(4); ECHR, Art. 5(4); Inter-American Convention on Human Rights, Art. 7(6). See also Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearance; Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 14 of the Convention on the Rights of Persons with Disabilities; and Principle 4 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UNGA Res. 43/173, 9 December 1988 (UN Body of Principles). See also HRC, General Comment 35, 2014, paras 15, 40, 46; HRC, *Schweizer*, above note 13, para. 18.1; IACHR Terrorism Report, above note 51, paras 128, 139; OHCHR, General Comment 8, UN Doc. HRI/GEN/1/Rev.1, 1994, para. 4.

emergency situations (the most typical example of which being armed conflict), States have been invoking this derogation regime in order to deprive detainees of the necessary procedural guarantees.⁷⁸ There is therefore a need to determine whether these safeguards are derogable in armed conflict situations or continue to apply despite the fact that derogations may have been made in accordance with the applicable rules of IHRL.

The relevant rules of IHL expressly ordain that detainees who are subjected to internment or assigned residence shall be accorded some of the most important procedural safeguards against arbitrary detention.⁷⁹ What makes this prescription, as opposed to the same rule in IHRL, different is that States cannot derogate from it.⁸⁰ IHL provides minimum humanitarian guarantees already taking into consideration both military necessity and the associated emergency that States normally face during armed conflicts.⁸¹ Therefore, no reason of national security or emergency justifies the suspension of these safeguards except in the manner provided by the same law itself.⁸² Below are some other procedural safeguards against arbitrary detentions applicable in situations of armed conflict which security detainees may also benefit from.

The requirement of a “regular procedure”

In occupied territories, Article 78 of GC IV provides that the decision to intern or assign residence “shall be made according to a regular procedure to be prescribed by the Occupying Power”. This refers to the *initial* decision to detain and is distinct from the examination of the legality of the detention at a later stage. There is no explanation in the Convention as to what the requirement of “regular procedure”

78 For example, the US Constitution even allows the suspension of the right of *habeas corpus* “in Cases of Rebellion or Invasion [as] the public Safety may require it.” Constitution of the United States, Art. 1, Sec. 9, para. 2. In the first couple of years following the 9/11 terrorist attacks, for instance, the government of the United States consistently claimed that those detainees held in Guantanamo should not benefit from the right of *habeas corpus*. See Jonathan Hafetz, “A Different View of the Law: *Habeas Corpus* during the Lincoln and Bush Presidencies”, *Chapman Law Review*, Vol. 12, 2009, p. 441.

79 GC IV, Arts 5(3), 71–78, 123(2), 126.

80 Dinstein has noted that the rules of IHL “are in force, in their full vigor, in wartime (as well as in hostilities short of war), in as much as they are directly engendered and shaped by the special demands of the armed conflict. Derogation from [these rights] is possible in extreme instances, but limited to specific persons or situations and no others. In this crucial respect, [the rights in IHL] are utterly different from ordinary (peacetime) human rights. Ordinary (peacetime) human rights are frequently subject to restrictions, which can be placed on their exercise ‘in the interests of national security or public safety’. Even more significantly, the application of ordinary (peacetime) human rights – whether or not restricted – can usually be derogated from in time of an international armed conflict.” Y. Dinstein, above note 31, p. 22. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Rosslyn Higgins, Advisory Opinion, 2004, para. 14; Louise Doswald-Beck and Sylvain Vite, “International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, Vol. 33, No. 293, 1993, p. 98; IACHR Terrorism Report, above note 51, para. 78; ICRC Commentary on APs, above note 21, p. 303; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2003, p. 250.

81 ICTY, *Delalić*, above note 48, para. 581. See also ICRC Commentary on GC IV, above note 45, p. 261 (stating that “the procedures established in Geneva Convention IV itself are a minimum”).

82 For example, see GC IV, Art. 5.

signifies. It has been asserted that this requirement suggests that the internee should have a chance to be heard and that, for this purpose, the State is also obliged “to establish procedures permitting the examination of the internment measures”.⁸³

There is no corresponding requirement in a State’s own territory,⁸⁴ or in common Article 3 or the provisions of AP II applicable to situations of NIAC. Thus, the nature and manner of the decision to detain in a State’s own territory during IACs and NIACs likely depends on domestic legislation and the circumstances of the capture. The commonly accepted principle existing in the domestic laws of many countries is that detention (particularly where it extends more than forty-eight hours) should be authorized by a judge, unless this is not possible due to the circumstances prevailing at the time the decision is made.⁸⁵ In times of war, whether IAC or NIAC, it may not be possible to secure an arrest warrant using the usual judicial procedure. Nevertheless, the power which issues the preventive detention order, whether judicial or administrative, should have procedures to verify the existence of a good cause – notably, the existence of a direct, imperative and imminent security threat – that necessitates immediate arrest and detention.⁸⁶

The right of *habeas corpus*

In addition to the requirement of “regular procedure” for the initial detention order, Article 78 of GC IV further demands that there shall be an appellate procedure to which detainees may have recourse to challenge the validity of the decision to detain them. This reflects the right of *habeas corpus*, which is also recognized under Article 43 of GC IV, applied in a State’s own territory. The provision proclaims that “[a]ny protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose”. In the recent War on Terror, although it has been consistently contested that such a right is not applicable for so-called “unlawful combatants”, it seems now beyond contention that the right of *habeas*

83 See H.-P. Gasser, above note 47, p. 289. Similarly, the IACHR stated that the requirement of a “regular procedure” includes “the right of the detainee to be heard and to appeal the decision, and any continuation of the detention must be subject to regular review”: IACHR Terrorism Report, above note 51, para. 143.

84 The relevant GC IV provision in a State’s own territory, Article 43, only talks about the requirement of administrative or judicial *review* of the decision to intern. However, Pictet asserts that the nature of the *regular procedure* under Article 78 to make the *original* decision to detain should mirror the stipulations in Article 43. ICRC Commentary on GC IV, above note 45, p. 368. The explicit stipulation of a regular procedural requirement only in relation to occupied territories may be viewed as a reinforcement of the exceptional nature of security detention in occupied territory, as opposed to a State’s own territory.

85 See Supreme Court of Israel, *Marab*, above note 18, para. 32. The procedures specified under Article 78 are also available in the military manuals of many countries, and the practice of many countries reveals the applicability of the principle of judicial detention. See ICRC Customary Law Study, above note 8, p. 345 and Vol. 2: *Practice*, pp. 2240–2250.

86 See HRC, General Comment 35, 2014, para. 15.

corpus applies to all civilian internees, whether they are designated as unlawful or enemy combatants or whether they find themselves in their own or occupied territories.⁸⁷ In view of this, persons detained in armed conflicts on security grounds, like all persons detained for any reason, enjoy the right to have their detention considered as soon as possible by a judicial or quasi-judicial organ.⁸⁸ This organ shall employ a due process that properly balances the right to liberty of the detainee and the security interests of the detaining power, taking into account the possibility of erroneous assessments of the detainee's level of risk in the uncertain and challenging moments of armed conflict.⁸⁹

It should be noted that the right of *habeas corpus* is not expressly provided in the rules of IHL regulating NIACs. However, the rule is found in the domestic law of most States in the world,⁹⁰ and except the African Charter, all other regional human rights treaties and numerous conventions have given it explicit recognition.⁹¹ Even in the African system, the African Commission on Human and Peoples' Rights (ACHPR) has found such a right to exist through a combined reading of Articles 6 and 7 of its Charter.⁹² On various occasions, the ACHPR has noted that "judicial bodies shall *at all times* hear and act upon petitions for *habeas corpus* ... or similar procedures. *No circumstances whatever* must be invoked as a justification for denying the right to *habeas corpus*."⁹³ The ACHPR does not as such accept any reasons, including security justifications or invocation of armed conflict, to deny or unreasonably delay a detainee from exercising his right to *habeas corpus*.⁹⁴ Similarly, its American counterpart, the

87 See US Supreme Court, *Zadvydas v. Davis*, [2001] 533 US 678, 2001; US Supreme Court, *Hamdi v. Rumsfeld*, 542 US 507, 2004; US Supreme Court, *Rasul v. Bush*, 542 US 466, 2004; US Supreme Court, *Boumediene v. Bush*, 553 US 723, 2008. See also Jennifer K. Elsea and Michael John Garcia, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, CRS Report for Congress, 3 February 2010; Supreme Court of Israel, *Marab*, above note 18, para. 26. See also *A v. State of Israel*, 6659/06 HCJ, 5 March 2007, para. 41.

88 Article 43, article 78 GC IV ("with the least possible delay"). Unlike IHRL, there is not a specific time provided for judicial intervention in IHL. So it depends on the circumstances and the test of proportionality shall come into play when intervention is delayed for some time. The Israeli Supreme Court in *Marab* case has found that 18 days' time to be brought before a judicial authority in occupied territories is unacceptable while in *A v. State of Israel*, it found 14 days delay not disproportionate. Supreme Court of Israel, *Marab*, above note 18, para. 32; Supreme Court of Israel, *A v. State of Israel*, above note 52."

89 See US Supreme Court, *Hamdi*, above note 87, p. 532.

90 ICRC Customary Law Study, above note 8, p. 351.

91 ICCPR, Art. 9(4); ECHR, Art. 5(4); Inter-American Convention on Human Rights, Art. 7(6). See also Article 17(2)(f) of the International Convention for the Protection of all Persons from Enforced Disappearance, Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 14 of the Convention on the Rights of Persons with Disabilities; and Principle 4 of the UN Body of Principles, above note 77.

92 ACHPR, *Achuthan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, Comm. Nos 64/92, 68/92, 78/92, 1995, paras 8–9; ACHPR, *Abdel Hadi, Ali Radi and Others v. Republic of Sudan*, Communication No. 368/09, 4 June 2014, para. 87; ACHPR, *Purohit and Moore v. The Gambia*, Communication No. 241/01, 2003, para. 70.

93 Emphasis added. ACHPR, *Hadi*, above note 92, para. 87. See also, e.g., ACHPR, *Purohit*, above note 92, para. 72; ACHPR, *Good v. Botswana*, 2011; ACHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle 5(e).

94 See ACHPR, *Hadi*, above note 92, para. 88; ACHPR, *Good*, above note 93, para. 175.

Inter-American Commission on Human Rights (IACHR), has repeatedly affirmed that the writ of *habeas corpus* is a *non-derogable* norm and that even a state of emergency or the severest form of national security threat, including armed conflict, cannot justify its suspension or render it ineffective.⁹⁵ The European Court of Human Rights, on the other hand, has consistently stressed that the existence of national security threats such as terrorism does not provide States with *carte blanche* “to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions”.⁹⁶ Correspondingly, the UN HRC has observed that the fact that an individual is detained as part of a security measure does not deprive him of his right to challenge the lawfulness of his detention, and that any law which denies the right to *habeas corpus* for security detainees violates Article 9(4) of the ICCPR.⁹⁷ It can therefore be concluded that, as a non-derogable norm, the right of *habeas corpus* applies not only in IACs but also to those persons detained for security reasons in situations of NIAC.

Initial review

In contrast to the rule of *habeas corpus* in IHRL that requires detention to be examined by an appropriate judicial body,⁹⁸ Article 43 of GC IV allows review by not only a court but also an administrative board. In occupied territories, Article 78 of GC IV contemplates that the review could be made by “a competent body set up by the [Occupying] Power”. Given that occupation is enforced by military administration, it is understandable that the occupying power is given the chance to set up a competent body rather than a formal court. It is argued that the purpose of providing two alternatives under IHL is to allow warring States to have some flexibility.⁹⁹

95 IACHR Terrorism Report, above note 51, paras 126–127. See also Inter-American Court of Human Rights (IACtHR), *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, Ser. A, No. 8, 30 January 1987. The Arab Charter also takes the same position on the non-derogability of the right of *habeas corpus*. Although Article 4 of the ICCPR does not explicitly list it among the catalogue of non-derogable rights, the HRC has observed that “[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant”: HRC, General Comment 29, 2001, para. 16. See also the HRC’s Concluding Observations on Israel, UN Doc. CCPR/C/79/Add.93, 1998, para. 21 (in the context of preventive detention, the HRC observed that despite Israel’s derogation from Article 9, Israel “may not depart from the requirement of effective judicial review of detention”). The statements of the Committee clearly imply that the right of *habeas corpus* is of peremptory nature, at least when it is invoked in relation to non-derogable rights. See A. Bianchi and Y. Naqvi, above note 41, p. 304.

96 See ECtHR, *Sakik and Others v. Turkey*, Judgment, 26 November 1997, para. 44.

97 HRC, *Luis Tournon v. Uruguay*, Communication No. R.7/32, UN Doc. Supp. No. 40 (A/36/40), 1981, paras 2.1, 2.3, 12.

98 Article 9(4) of the ICCPR specifies that the body must be a court, while Article 5(3) of ECHR, Article 14(5) of ACHPR and Article 7(5) of the IACHR require the body to be a “judge or other officer authorized by law to exercise judicial power”.

99 Article 43 is modelled on the provision in Article 35(2) of GC IV. See ICRC Commentary on GC IV, above note 45, p. 261.

Accordingly, IHL clearly but partially departs from IHRL as regards the nature of the review body. This difference highlights that “the two bodies of law have distinct presumptions about the context of detention”; one assumes peacetime, wherein the ordinary judiciary is presumably well-functioning, and the other is concerned with an armed conflict context in which an administrative board may be better suited to cope with the emergency pressure engendered by the conflict or to substitute for a deficient or non-functioning judiciary.¹⁰⁰ Yet, it is convincingly asserted that the review board in a State’s own territory or the “competent body” in an occupied territory should ensure at least the appropriate guarantees that a formal court would offer, including the necessary safeguards of independence and impartiality.¹⁰¹ Such a body must also have the power to order the release of detainees whose detention is found to be “inspired by other considerations than those of security”.¹⁰² The fact that Article 43 of GC IV uses the disjunctive term “or” to place an administrative board as an alternative option and on an equal footing with a court strengthens the construction that the board or the competent authority should exhibit some basic attributes of a formal court.

Articles 43 and 78 of GC IV apply only to situations of IACs, and the question as to the nature of the review body in NIACs inevitably arises. One alternative would be to adopt the standard from IHRL that the review body should be judicial. In NIACs, however, availing a judicial body for all security detainees may not be possible in some situations – for example, if because of a protracted conflict, the ordinary courts of a country are dysfunctional in some or all parts of the country, or if the conflict takes place overseas with a non-State armed group and establishing a judicial body is not practically feasible. The same flexibility that States require to be able to decide on the nature of the review body in IACs is also needed during NIACs, and therefore, the same possibility of instituting an “appropriate court or administrative board” should be available in the context of NIACs to allow security detainees to challenge the legality of their detention.

Periodic review

Both Article 43 and Article 78 of GC IV require that the decision on internment or assigned residence shall, in addition to the initial review made by a court, administrative board or competent authority, be controlled by a periodic review. The same safeguard is also recognized in IHRL, and the regular review helps to monitor that the continued detention is not arbitrary and remains necessary

100 J. Bellinger III and V. Padmanabhan, above note 20, p. 210.

101 In the case of *Hassen v. UK*, the ECtHR noted that “Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent ‘court’ in the sense generally required by Article 5 § 4 ..., nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the ‘competent body’ should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness”: ECtHR, *Hassan*, above note 10, para. 106. See also ICRC Commentary on GC IV, above note 45, p. 260.

102 *Ibid.*, p. 261.

under the changing circumstances.¹⁰³ Periodic review obliges and enables “the responsible authorities ... to take into account the progress of events ... and changes as a result of which it may be found that the continuing internment or assigned residence of the person concerned are no longer justified”.¹⁰⁴ This helps to ensure compliance with “the fundamental consideration that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands”.¹⁰⁵

However, distinct from IHRL, which simply requires “sufficiently frequent and reasonable” review,¹⁰⁶ Article 43 of GC IV specifies a clear time for the frequency of the review. The court or administrative board should examine the validity of the internment or the assigned residence *at least twice a year*. In occupied territory, by contrast, the occupying power is only required to provide a periodic review “*if possible every six months*”. The six-month limit is aspirational and, thus, review may be carried out within a reasonable interval even longer than six months depending on the circumstances.

It shall further be emphasized that “unlike the procedure for the initial appeal” described above, “which only takes place at the request of the person concerned, the periodical reconsiderations [under Articles 43 and 78 of GC IV] will be automatic once a protected person has made his first application to the responsible authority”.¹⁰⁷ In the opinion of the Israeli Supreme Court:

Judicial review is not “external” to the detention. It is an inseparable part of the development of the detention itself. At the basis of this approach lies a constitutional perspective which considers judicial review of detention proceedings essential for the protection of individual liberty. Thus, the detainee need not “appeal” his detention before a judge. Appearing before a judge is an “internal” part of the detention process. The judge does not ask himself whether a reasonable police officer would have been permitted to carry out the detention. The judge asks himself whether, in his opinion, there are sufficient investigative materials to support the continuation of the detention.¹⁰⁸

103 HRC, General Comment 35, 2014, paras 15, 18. In *A v. Australia*, the Committee observed that “every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification.” HRC, *A v. Australia*, 1997, para. 9.4.

104 ICRC Commentary on GC IV, above note 45, p. 261.

105 *Ibid.*; ICTY, *Delalić*, above note 48, para. 58. Similarly, the Israeli Supreme Court held that “[t]he extreme means of detention ... places a special duty both on the competent authority and on the court in making the judicial review to carefully examine, from time to time, the extent of justification for the continuation of detention, while exercising restraint in use of the detention means and limiting it to situations in which real security needs require it.” See also *Khaled Ali Salem Said v. State of Israel*, CrimA 7446/08, Judgment, 7 November 2008, para. 43.

106 See, for example, ECtHR, *Lebedev v. Russia*, Judgment, 25 October 2007, paras 78–79. The HRC also did not specify the length of time between each review; it simply stated that there shall be “sufficiently frequent review”.

107 ICRC Commentary on GC IV, above note 45, p. 261.

108 Supreme Court of Israel, *Marab*, above note 18, para. 32.

As such, the detaining or occupying power is, *ex proprio motu*, bound to automatically review the decision to detain after the first petition for reconsideration is made by the detainee.¹⁰⁹

Intervention by the protecting power

Article 43 of GC IV also provides an additional safeguard against arbitrary security detention. Save in cases where the detainees object, the detaining power is obliged to communicate to the protecting power, *as rapidly as possible*, the names of all detainees who are subjected to internment or assigned residence, including those who are released. In addition, the outcome of the initial or subsequent review of the detention by the courts or boards should be relayed to the same as rapidly as possible.¹¹⁰ This enables the home authorities on whom the detainees depend “to form an exact picture of the position of the majority of their nationals who have remained in the territory of the adverse Party and to inform their families”.¹¹¹ It is, thus, a mechanism to ensure that detainees have contact with the outside world.¹¹²

It should further be appreciated that Article 143 of GC IV also establishes for protecting powers a right to visit places of detention and internment. The provision requires that protecting powers, as well as the delegates of the ICRC, shall be given “access to all premises occupied by protected persons and shall be able to interview the latter without witnesses, personally or through an interpreter”. This access may only be exceptionally and temporarily restricted (postponed, but never entirely denied) for imperative military necessity.¹¹³ Once access is permitted, the duration or frequency of the visit should not be subject to any hindrance.¹¹⁴ This should be considered as another safeguard against arbitrary detention.

Additional safeguards

In addition to the aforementioned procedural guarantees, IHL provides for other safeguards against arbitrary security detention during armed conflict. These include the right of internees to be promptly informed of the reasons of their detention,¹¹⁵ the right of access to a lawyer (subject to security arrangements)

109 H.-P. Gasser, above note 47, p. 322.

110 There is no similar requirement in occupied territory under Article 78 of GC IV.

111 ICRC Commentary on GC IV, above note 45, p. 262.

112 Note that Article 43 of GC IV (unlike Article 35) does not specify that there should be a request from the protecting power. So, the detaining power should act on its own motion. *Ibid.*

113 *Ibid.*, pp. 574, 577.

114 *Ibid.*

115 Article 75 of AP I, for example, states that “any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken”.

and the right to be visited by international supervisory institutions, particularly the ICRC.¹¹⁶ Further, security detainees must always be humanely treated and may in no circumstances be subject to inhuman and degrading treatment, torture or violence to their life, health, or physical or mental well-being, or be taken as hostages or subjected to public curiosity.¹¹⁷ Detention conditions must not compromise the dignity and health of detainees. The detaining or occupying power is obliged to fulfil the “minimum needs of the ordinary individual”¹¹⁸ such as food and clothing,¹¹⁹ hygiene and medical care,¹²⁰ and an opportunity to perform religious and physical activities.¹²¹ As was elaborated by the Israeli Supreme Court in *HaMoked et al. v. Commander of the Israel Defence Force*, where the applicants (security detainees) alleged that they were deprived of food and beds for security reasons:

while certain fundamental rights are balanced by conflicting interests, there is a bottom line that cannot be crossed, at which the rights become absolute, or almost absolute. This is the line that we reach regarding minimum detention conditions, in which the detainee is denied his humanity if they are not met. But not only the humanity of the detainee is denied; the keeper also loses it. ... Therefore, the detaining authority is not allowed – under any conditions – to infringe these rights, and they are given to the detainee absolutely.

... [I]t is inconceivable that reasons depending on security considerations ... will justify, for example, provision of food that is extremely poor in quantity and quality, or the failure to supply a bed ... to sleep on at night; or justify use of physical violence and humiliation against the detainees, and so forth. Security-based grounds have their place, but, in all due respect, they cannot justify such grave infringement of such fundamental and elementary rights belonging to detainees and prisoners.¹²²

116 This right is not explicitly mentioned in IHL treaties for security detainees, but the Israeli Supreme Court derived this right from Articles 27 and 113 of GC IV and observed that the right to access a lawyer “stems from every person’s right to personal liberty”. All the same, the Court noted that the right, depending on the circumstances, may be qualified for reasons of security provided that any prevention of access to a lawyer is reasonable and proportional. The detainee cannot use this right “as a pretext for the giving of information for subversive purposes”. Supreme Court of Israel, *Marab*, above note 18, paras 42–45. See also *HaMoked et al. v. Commander of the Israel Defense Force in the West Bank*, Case No. HCJ 3278/02, 2002, paras 54–57 available at: www.hamoked.org/items/1030_eng.pdf (unofficial translation).

117 GC IV, Arts 27, 37; AP I, Art. 75; common Article 3; AP II, Arts 4, 5. See also ICRC Commentary on GC IV, above note 45, p. 39 (on taking of hostages).

118 Supreme Court of Israel, *HaMoked*, above note 116, para. 29.

119 GC IV, Arts 89, 90.

120 *Ibid.*, Arts 90, 91.

121 *Ibid.*, Arts 93, 94.

122 Supreme Court of Israel, *HaMoked*, above note 116, paras 33–39.

Although IHL does not explicitly proscribe indefinite, *incommunicado* or secret detentions (so long as the protecting power is informed), both IHRL and the judgments of some domestic courts clearly suggest that no exceptional circumstances whatsoever justify an indefinite, secret or prolonged detention of individuals, including in the context of armed conflict.¹²³ These forms of detention are also likely to contravene the foregoing guarantees, particularly the prohibition against inhuman and degrading treatment or torture.¹²⁴

Prohibition of *refoulement*, mass expulsion and transfer

Article 45 of GC IV encapsulates the principle of *non-refoulement* by proclaiming, “*In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs*” (emphasis added). This applies for all protected persons whether they are in detention or not.¹²⁵ In comparison to the same rule in IHRL,¹²⁶ the prohibition against removal is absolute under Article 45 of GC IV.¹²⁷ The prohibition applies

123 See HRC, CCPR General Comment No. 29, “Article 4: Derogations during a State of Emergency”, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para.13(b); HRC, General Comment 20, 1992, para. 11. See also UN Body of Principles, above note 77, Principle 12; HRC, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, UN Doc. A/HRC/13/42, 19 February 2010, pp. 1–5; US Supreme Court, *Hamdi*, above note 87.

124 Indeed, in several cases that involved the detention of individuals for security reasons, the different human rights treaty bodies uniformly noted that prolonged incommunicado detention/solitary confinement may be contrary to the prohibition against torture and inhuman or degrading treatment. HRC, *Medjnoune v. Algeria*, Communication No. 1297/2004, UN Doc. CCPR/C/87/D/1297/2004, 2006, para. 8.4; IACtHR, *Case of Castillo Petruzzi et al. v. Peru*, Judgment, 30 May 1999, paras 195, 198; IACtHR, *Velasquez Rodriguez v. Honduras*, Judgment, Ser. C, No. 4, 29 July 1988, para. 156; ACHPR, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, Communication No. 250/02, 20 November 2003, para. 55, ECtHR, *Ramirez Sanchez v. France*, Judgment, 4 July 2006.

125 See Vincent Chetail, “The Transfer and Deportation of Civilians”, in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 1201.

126 See Article 3 of the UN Convention against Torture; Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture; Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 19(2) of the 2000 Charter of Fundamental Human Rights of the European Union; and Article 22(8) of the Inter-American Convention on Human Rights. See also HRC, *Chitat Ng v. Canada*, UN Doc. CCPR/C/49/D/469/1991, 7 January 1994; HRC, *A. J. R. v. Australia*, UN Doc. CCPR/C/60/D/692/1996, 11 August 1997. See also HRC, General Comment 20, 1992, para. 9.

127 Unfortunately, unlike Article 49, Article 45 does not mention the term “deportation”, and this gave rise to misinterpretation of the provision that it allows expulsion of individuals for national security reasons. For example, the ICRC Commentary states that “[i]n the absence of any clause stating that deportation is to be regarded as a form of transfer, this Article would not appear to raise any obstacle to the right of Parties to the conflict to deport aliens in individual cases when State security demands such action”: ICRC Commentary on GC IV, above note 45, p. 266. This is an incorrect interpretation, and it is “even dangerous and counterproductive”, for it allows a State to shirk its obligation by expelling protected persons to States where transfer is prohibited under Article 45. V. Chetail, above note 125, pp. 1197.

to any form of removal of detainees to all places, whether or not they risk being subjected to torture and ill-treatment.¹²⁸

Note also that IHL further prohibits “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not ..., regardless of their motive”.¹²⁹ This provision is an additional safeguard for security detainees in occupied territories. The fact that individuals are detained for national security reasons is irrelevant and thus, forcible transfers remain illegal even when an occupying power may invoke reasons of security.¹³⁰ This is accentuated by the terms of Article 78 of GC IV itself, which categorically states that assigned residence and internment are measures that an occupying power may “at most” take for imperative reasons of security.

Even though Article 49 of GC IV recognizes a narrow exception when “the security of the population or imperative military reasons so demand”, this exception refers only to emergency evacuations¹³¹ and as such should not be more broadly applied to include a wider national security exception.¹³² In this sense, the ACHPR, in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions*

128 The only exception under Article 45 is extradition “in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law”. The inevitable question is, which law shall prevail, say, for a refugee in an armed conflict who is detained or interned for security reasons? One possible solution is to apply the most favourable rule to the detainee. For example, as far as the *non-refoulement* of a refugee to places of persecution on “political opinions or religious” is concerned, IHL shall prevail over both international refugee law and IHRL. As has been indicated, the absolute proscription of Article 45 protects the refugee detainee not only from being sent back to a country where he or she fears persecution for reasons of national security (under Article 33 of the 1951 Refugee Convention), but also from being sent to other places whether there is a risk of torture or ill-treatment, as is required by IHRL. If, however, the risk of persecution is based on other grounds such as race, nationality, membership of a particular social group or colour, either international refugee law or IHRL shall apply, whichever is found to be more favourable on the basis of a context-specific analysis. For a general overview of the “most favourable rule”, see Vincent Chetail, “Armed Conflict and Forced Migration”, in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 701–703; Björn Arp (ed.), *International Norms and Standards for the Protection of National Minorities: Bilateral and Multilateral Treaties with Commentary*, Martinus Nijhoff, Leiden, 2008, p. 67. Also see, e.g., IACtHR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, 1985, para. 4; IACtHR, *In the Matter of Viviana Gallardo et al.*, Advisory Opinion G 101/81, 13 November 1981, para. 16.

129 GC IV, Art. 49 (emphasis added). See also AP II, Art. 17; Y. Dinsteine, above note 59, p. 123.

130 Both individual and collective transfers are prohibited. It has been further argued that the prohibition applies to both within or outside the occupied territories. See V. Chetail, above note 125, pp. 1187–1188. See also Y. Dinsteine, above note 6, pp. 14–15, 19; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden and Boston, MA, 2009, pp. 330–331. See, however, the much criticized decision of the Israeli Supreme Court in which the Court held that individual deportations are outside the purview of Article 49: Supreme Court of Israel, *Association of Civil Rights in Israel et al. v. The Minister of Defence et al.*, HC 5973192 etc., 47(1) Piskei Din 267, *Israel Yearbook on Human Rights*, Vol. 23, 1993, p. 356.

131 The Trial Chamber of the ICTY confirmed that “[e]vacuation is by definition a temporary and provisional measure”: ICTY, *The Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgment (Trial Chamber), 17 October 2003, para. 597. See also V. Chetail, above note 125, p. 1192.

132 The phrase “security of the population” refers to the safety of the population of the occupied territory, not the safety or national security of the occupying power. See H.-P. Gasser, above note 47, p. 253.

(COHRE) *v. Sudan*, observed that the evictions of the population from Darfur villages during the Darfur war could not be justified by “collective security”, a term used in Article 27(2) of the African Charter on Human and Peoples’ Rights and interpreted to encompass the notion of national security.¹³³ According to the ACHPR, “[f]or such reasons to be justifiable, the Darfurian population should have benefited from the collective security envisage[d] under Article 27.2” of the African Charter.¹³⁴ Although the ACHPR did not make reference to Article 49 of GC IV, it clearly – and rightly – suggested that the collective security justification cannot be invoked to license forced evictions. The “security of the population” exception under Article 49 of GC IV should accordingly be interpreted to allow temporary evacuation from the occupied territory if and only if this is important to the safety of the population, including security detainees.¹³⁵ In any event, individuals who are considered to have threatened security in the occupied territory should not be interned or assigned residence outside the occupied territory.¹³⁶

Conclusions

Armed conflict symbolizes one of the most traditional threats to national security. During armed conflict, international law allows States to take a plethora of measures, ranging from the right to wage war in self-defence to restrictions on the rights and freedoms of individuals. Security or preventive detention of individuals is among such lawful measures that States may use during armed conflicts to protect themselves from activities prejudicial to their security. While the legality of such measures remains uncontested during IACs, the absence of an explicit rule permitting or authorizing (security) detention in NIACs has been a source of continuous debate among practitioners and scholars. In this paper, on the basis of customary international law and Article 3 of AP II, it is argued that IHL in fact offers a legal basis for security detention in NIACs, when it is carried out by States. However, nowhere in the rules of IHL can be found a similar legal support for the detention power of non-State armed groups, and to this extent there is still a clear normative gap in the law.

Besides, it has also been observed that the rules of IHL regulating detention during NIACs and, even partly, during IACs are not robust in the sense that the safeguards against arbitrariness are either incomplete or not detailed. In order to fill this normative gap, it is suggested that specifically for NIACs, efforts aimed at the development of the law should move away from the mere issue of *authorization* versus *prohibition* of detention. Rather, the focus should be on promoting and expanding the substantive legal protection of detainees. This resolves the “framing

133 ACHPR, *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communication No. 279/03-296/05, 27 May 2009, para. 165.

134 *Ibid.*

135 ICRC Commentary on GC IV, above note 45, p. 280. See also V. Chetail, above note 125, p. 1191.

136 See Supreme Court of Israel, *Ajuri*, above note 5, paras 20–22. See also ICRC Commentary on GC IV, above note 45, p. 368.

problem” impeding States, and allows them to avoid accepting rules that clearly acknowledge the detention power of non-State armed groups, which they may perceive as a compromise to their sovereignty.

In this paper, it is further noted that the prerogative of States in armed conflicts to subject individuals to security detention is circumscribed both by substantive and procedural safeguards against arbitrariness. These safeguards are derived from both the customary and treaty rules of IHL, IHRL, the practice of international and domestic courts and the legal positions of the ICRC. Accordingly, appropriate considerations should be paid to these safeguards in developing the law of NIACs and expanding the existing rules regulating detention in IACs. Among those substantive and procedural limitations identified in this paper are the standards of necessity and proportionality, which require that security detention be warranted by the circumstances throughout its duration and be proportional to the security interest sought to be achieved. The requirement of temporality also demands that security detention cannot be enforced indefinitely.

Security detention is inherently preventive and, accordingly, cannot be imposed to punish past criminal activities; it may only be imposed to deal with present or future imminent and serious threats jeopardizing the critical interests of a State or one of its components (its territory, sovereignty, government and democratic institutions, or population as a whole).

Furthermore, individuals can be a subject of preventive detention only on the basis of the level of the security threat that they personally pose to the critical interests of the State. In armed conflict situations, security detention should not be ordered on, e.g., *all* enemy aliens or simply to deter other persons regardless of the security threat caused by the detainees individually. It should always be established that security detainees have personally engendered the security threat by their conduct, such as spying, sabotage or any other act that diminishes the fighting capacity of the detaining State in the war.

IHL also strictly prohibits the *refoulement* of protected persons to places where they may risk persecution on the basis of their political opinions or religious beliefs. Further, mass transfer of protected persons is proscribed in times of occupation. These prohibitive norms are absolute and cannot be derogated in the name of protecting national security. Consequently, security detainees should not be *refouled* to areas where they face persecution, and may only be transferred *en masse* from occupied territories to another territory if this is to protect their personal safety or security and the transfer is made temporarily.

Both IHL and IHRL also forbid torture and inhuman or degrading treatment. The preservation of national security may not be used to justify torture of detainees or subjecting them to treatment that may be inhuman or degrading, irrespective of the seriousness of the danger they pose. In order for security detention to remain lawful, detainees should further be able to enjoy procedural rights, such as the right of *habeas corpus*. Their detention must be reviewed periodically, and protecting powers, as well as the ICRC, should have access to places of internment.

The principles of good faith and strict interpretation put additional constraints on the prerogative of States to invoke or enforce national security

exceptions in order to engage in security detention. In this regard, during the draft discussions of the 1949 Geneva Conventions, various delegates noted that the effectiveness of the rules of IHL will depend on the will of the contracting parties and, as such, the security exceptions shall be interpreted and applied in good faith.¹³⁷ It is also a general rule of interpretation that exceptions shall be construed and enforced narrowly.¹³⁸ The exception must be interpreted and applied restrictively.¹³⁹ The principle of restrictive interpretation is very important, not only because national security exceptions are amenable for expansive interpretation, but also because these exceptions are not intended to guarantee complete security in its abstract sense. Security is not an absolute, but a relative degree of safety.¹⁴⁰ In the context of armed conflicts, it is inconceivable to ensure absolute security.¹⁴¹ There is always some insecurity that States assume during war – for that matter, even in time of peace, States cannot guarantee absolute security. Emerson has eloquently stated that true national security

cannot be a search for total security. That is only achievable in a police State, and then only temporarily. National security in a democratic society involves taking some risks and allowing some flexibility. It entails faith that an open community is better prepared to adjust to changing conditions than a closed one. It is based upon the proposition that the creation of economic, political, and social institutions that respond to the needs of the people is a better protection than implacable enforcement of sedition laws, loyalty programs, and regulations classifying information as secret.¹⁴²

Indeed, it is also the unattainability of absolute security that prevents security from being the usual “prime value”, and this is why it ought not *always* and “necessarily trump other values such as [individual] liberty”.¹⁴³ Accordingly, security detention is not and should not be meant to allay all concerns of insecurity, but only those grave ones threatening the critical existential elements of a State. The exceptions permitting security detention should, thus, be applied to address only those serious threats mounted against the most important national interests of a State.

137 *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 2(A), p. 796, and Vol. 2(B), p. 526. See also Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960 (ICRC Commentary on GC III), p. 596.

138 Chris Ingelse, *United Nations Committee Against Torture: An Assessment*, Kluwer Law International, Boston, MA, 2001, p. 216.

139 They should be applied exceptionally. M. Sassòli, above note 1, p. 17. Also see ICRC Commentary on GC III, above note 137, p. 492; ICRC Commentary on GC IV, above note 45, p. 218, 367.

140 “Security is a relative rather than an absolute term. National and international security need to be viewed as matters of degree.” UNGA Res. 38/188, 20 December 1983, submitted by the UN Secretary-General as *Study on Concepts of Security*, Report A/40/553, 26 August 1985, p. 45, para. 206.

141 See M. Sassòli, above note 1, p. 19.

142 Thomas I. Emerson, “National Security and Civil Liberties”, *Yale Journal of International Law*, Vol. 9, No. 1, 1982, p. 82.

143 Jennifer A. Chandler, “Personal Privacy versus National Security: Clarifying and Reframing the Trade-Off”, in Ian Kerr, Carole Lucock and Valerie Steeves (eds), *On the Identity Trail: Anonymity, Privacy and Identity in a Networked Society*, Oxford University Press, Oxford, 2009, p. 126.

International humanitarian law's old questions and new perspectives: On what law has got to do with armed conflict

Thomas Forster*

Thomas Forster holds a PhD in law from the University of Bern. He has worked as a Delegate for the International Committee of the Red Cross and is currently employed by the United Nations Office of the High Commissioner for Human Rights.

Abstract

The question of whether international humanitarian law (IHL) has an impact on how armed conflicts are conducted is a controversial one. Sceptics claim that the law is virtually irrelevant in determining State behaviour in armed conflict. Proponents point to its importance in mitigating the suffering caused by war. This paper looks at recent scholarship from historians, political scientists, economists and lawyers that challenges traditional narratives held dear by the law's sceptics and proponents alike. It then discusses implications of these approaches for a current understanding of the role of IHL in today's armed conflicts. The new perspectives allow for a broader understanding of IHL's central issues and permit us to ask more pertinent questions when looking at the law with the aim of putting it to use for the protection of civilians.

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Keywords: international humanitarian law, armed conflict, compliance, empirical studies, game theory, critical approaches.

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Introduction

Tina Turner's "What's Love Got to Do with It?" is playing. You turn up the volume and listen to the chorus. In your mind, Tina sings "law" instead of "love" and "heart".

What's law got to do, got to do with it? What's law but a sweet old-fashioned notion? ... Who needs a law when a law can be broken?

The questions that have been asked time and time again about international humanitarian law (IHL) never sounded so good.¹ Hence, you decide to look at the issue from another angle. The International Committee of the Red Cross (ICRC), as "Guardian of International Humanitarian Law",² should have something to say about it. Its YouTube channel has a lot to choose from. For instance, a video entitled "Rules of War (in a Nutshell)" seems like a good starting point. Here is what "Wes the Hunter" had to say about it in the comments section: "There is f***ing rules of war.... Stupidest s**t I have heard ever."³

Even when shown in touching animated film, the basic ideas of IHL are met with a certain scepticism by the broader public (granted, outside the anonymity of online comment sections, that scepticism will usually be expressed in more measured terms). This is nothing new.⁴ War inevitably conjures up images of chaos and destruction, and the thought of those who wage war coming up with rules and then actually sticking to them goes against intuition. Doubts about the impact of IHL run deep and have been present since it was conceived in its modern form. To this day, the anxiety over essential issues is constitutive of the way people think about it.⁵ There is a tendency for clearly demarcated positions

- 1 If you tend to look dazed, you've read it someplace, you've got cause to be: given the number of articles in legal journals that have featured the "What's law got to do with it?" pun in one form or another, there is a strong chance for déjà vu. A book-length example can be found in Charles Gardner Geyh (ed.), *What's Law Got to Do with It? What Judges Do, Why They Do It, and What's at Stake*, Stanford University Press, Stanford, CA, 2011.
- 2 See Yves Sandoz, "The International Committee of the Red Cross as a Guardian of International Humanitarian Law", December 1998, available at: www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm (all internet references were accessed in October 2017).
- 3 ICRC, "Rules of War (in a Nutshell)", August 2014, available at: www.youtube.com/watch?v=HwpzzAefx9M. Comment posted in January 2016.
- 4 See, for example, the references given in Benjamin Valentino, Paul Huth and Sarah Croco, "Covenants without the Sword: International Law and the Protection of Civilians in Times of War", *World Politics*, Vol. 58, No. 3, 2006, p. 342.
- 5 Helen Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian*, Cornell University Press, Ithaca, NY, 2011, p. 198.

that either completely share the scepticism or fully reject it on moral grounds. For every new armed conflict that engages public opinion, the basic questions are asked and answered again in a blanket way.

However, continued doubts have also lead to a critical review of long-held positions. Recent scholarship from historians, political scientists, economists and lawyers promises a more nuanced look at the role and effectiveness of IHL. It challenges well-established narratives held dear by sceptics and proponents alike.

This article aims to make accessible these points of view that have yet to become part of wider discussions in the legal field. It will first describe the perspectives that have traditionally shaped our understanding of the effects of legal norms applying to armed conflict. It will then give a cursory overview of new approaches to these issues. On the one hand, this includes efforts to empirically analyse the effect of IHL on States' behaviour. On the other, it involves scholarship that tries to make explicit the power relationships which shape IHL. Finally, the potential implications that these new approaches can have for current understandings of the role of IHL in today's armed conflicts will be discussed.

Realism versus idealism

The stated goal of IHL is to regulate the behaviour of armed forces and limit the effects of armed conflict.⁶ Why would States which see themselves as potential actors in armed conflict come up with rules that limit their strategic options? Why would they choose to restrict themselves in their choice of weapons and in the decision of who to target with them? The usual answers to these questions can be placed on a spectrum between pragmatism and ethical necessity.⁷

On the pragmatist side, it is argued that States commit to these rules because they have a solid interest in doing so. When States face each other in armed conflict, the threat of reciprocal retaliation is the force that can limit certain excesses. The classic example concerns the treatment of prisoners of war, where the threat of retaliation is particularly tangible and can lead to mutual respect of prisoners' lives.⁸ This can then translate into codified rules that States view as valuable on utilitarian grounds. From this perspective, though, compliance with the rules can be sustained only if each State credibly threatens to retaliate in response to violations.⁹

6 See in this regard the fundamental points made by Hans-Peter Gasser, former Senior Legal Adviser at the International Committee of the Red Cross, in "International Humanitarian Law and the Protection of War Victims", November 1998, available at: www.icrc.org/eng/resources/documents/misc/57jm93.htm.

7 This paragraph to a large extent paraphrases Benvenisti and Cohen's introduction in Eyal Benvenisti and Amichai Cohen, "War is Governance: Explaining the Logic of the Laws of War from a Principal-Agent Perspective", *Michigan Law Review*, Vol. 112, No. 8, 2014, p. 1365.

8 *Ibid.*, p. 1366.

9 Eric Posner, "Human Rights, the Laws of War, and Reciprocity", *The Law & Ethics of Human Rights*, Vol. 6, No. 2, 2013, p. 152.

This view mirrors how one strand of political science has looked at international law in general and how it sees legal norms playing a role in influencing how States act. In this so-called realist view, law is virtually irrelevant in determining State behaviour. States are seen to act on a basis of rationally assessed and pursued self-interest. Since international law usually lacks strict enforcement, it is without independent pull towards compliance.¹⁰ High rates of compliance with international law commitments are seen as no more than selection effects, meaning that States only sign treaties that codify norms by which they would abide even in the absence of treaties.¹¹ One hundred and fifty years ago, humanitarian icon Florence Nightingale already voiced what political scientists have put in more technical terms in recent days when describing international law as epiphenomenal, claiming that it solely follows the consequences of power and interests.¹² Considering the early efforts to codify IHL in 1864, Nightingale stated: “But it’s like vows. People who keep a vow would do the thing without the vow. And if people will not do without the vow, they will not do with it.”¹³

On the other side of the spectrum, the focus is put on ethical reasons behind the existence and normative force of IHL. Its rules are seen as a product of ethical necessity.¹⁴ This is what the instruments of IHL sometimes explicitly state themselves. In the preamble of the Hague Convention of 1907, for example, it is claimed that the Convention is “animated by the desire to serve ... the interests of humanity and the ever progressive needs of civilization”.¹⁵ This insistence on the moral grounding of the norms is part of how many humanitarian lawyers conceive the foundations of the field. After the atrocities of World War II, disillusionment with IHL was at its height.¹⁶ Nevertheless, the eminent international lawyer Hersch Lauterpacht retained his conviction about the law’s importance and what lies at its base:

We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose.¹⁷

10 Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press, Cambridge, 2010, p. 11; James Morrow, *Order within Anarchy: The Laws of War as an International Institution*, Cambridge University Press, Cambridge, 2014, p. 10.

11 Adam Chilton, *The Laws of War and Public Opinion: An Experimental Study*, Coase-Sandor Institute for Law & Economics Working Papers, 2014, p. 3, available at: chicagounbound.uchicago.edu/law_and_economics/684/.

12 J. Morrow, above note 10, p. 14.

13 As cited in Caroline Moorehead, *Dunant’s Dream: War, Switzerland, and the History of the Red Cross*, Carroll & Graf, New York, 1999, p. 47.

14 E. Benvenisti and A. Cohen, above note 7, p. 1365.

15 Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (entered into force 26 January 1910).

16 H. Kinsella, above note 5, p. 112.

17 Hersch Lauterpacht, “The Problem of the Revision of the Law of War”, *British Yearbook of International Law*, Vol. 29, 1952, pp. 363–364.

Idealist versus realist: those are the stereotypical points of reference when framing the debate about the role of IHL from the point of view of international lawyers and political scientists. Clearly there is a lot of potential for controversy between these positions, yet they are seldom brought into direct opposition. The critical views of political scientists and lawyers who analyze international law from an economic perspective rarely find their way into the discourse of IHL. Within this field, the main image drawn is that of a struggle between principled humanitarian lawyers pushing for maximum protection of the innocent and pragmatic military lawyers who argue for rules that take into account the tough choices faced by soldiers in armed conflict. Usually, neither of these sides enters into the debate about if and how IHL works.

New approaches to assess the purpose and effect of IHL

The questions surrounding the purpose and effect of IHL have existed since its inception. However, in their current form they are also part of a bigger trend of critical approaches to international law in general. Whether and why States comply with their international legal commitments has been an important topic of inquiry for scholars of international relations and international law over the last decade.¹⁸ Some lawyers tend to think of international law as a separate entity, as something that resists outside perspective and is best understood from within. In the words of David Kennedy, “we lack the conceptual and social scientific tools to assess ‘what happened’ in a way which could disentangle the legal from everything else”.¹⁹ That has not stopped economists, political scientists, historians and legal scholars from applying different methods and drawing their conclusions. A selection of these efforts will be discussed in what follows. First, empirical analyses of the impact of IHL on States’ behaviour will be looked at. The focus then turns to economic, game theoretical and constructivist perspectives on the same issue that provide a more nuanced picture of how IHL can influence decisions in armed conflict. Finally, recent scholarship that actively questions some of the most basic assumptions about IHL will be reviewed, turning the attention to the power relations that underlie the law and to the question of the purpose of IHL beyond its stated goals.

Empirical studies

Despite long-standing and intense debates over the effects of IHL, quantitative empirical analysis of States’ compliance with its rules has long been absent. The first observational studies trying to examine the influence of IHL were those by

18 A. Chilton, above note 11, p. 3.

19 David Kennedy, “Lawfare and Warfare”, in James Crawford, Martti Koskeniemi and Surabhi Ranganathan (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge, 2012, p. 173. At the same time, Kennedy notes: “To understand what law does in war we will not want to limit ourselves to what professionals in the discipline say that it does.” *Ibid.*, p. 174.

Valentino, Huth and Croco in 2006²⁰ and by Morrow in 2007.²¹ Both studies examined compliance with international norms in international armed conflicts from the start of the twentieth century.

Valentino, Huth and Croco reached a harsh verdict. The study found “no evidence that signatories of international treaties on the laws of war are significantly less likely to kill civilians in war than are non-signatories”.²² The results of their empirical analyses “indicate that the laws of war do not provide strong protection for civilians in times of war. None of the variables representing international treaty commitments produced significant results in our equations.”²³

Morrow, on the other hand, found that States’ compliance with IHL is influenced by the ratification of the relevant agreements, at least for democracies. According to his analysis, States at war have been more likely to comply when both sides have ratified the treaties in question. Moreover, he found that reciprocal enforcement has played an important role in ensuring compliance and that legal obligations favour but do not substitute such responses in kind.²⁴

Apart from their conflicting results, these early efforts put a focus on the dynamic nature of States’ compliance with IHL. Whether or not States abide by their legal commitments varies depending on the nature, duration and intensity of the armed conflicts they are involved in and is influenced by the nature of the States themselves.²⁵ Compliance equally varies across particular issues such as the use of chemical weapons, aerial bombardment or the treatment of civilians.²⁶ When the question was traditionally asked, it was simply “Does it work or not?” Now, however, the questions looked at are “What parts of it work and why?”, or “Under which circumstances and in what way does IHL influence the behaviour of actors in armed conflict?”²⁷

With the lessons these early studies provided, they acted as a stepping stone for more refined approaches. Morrow greatly enhanced his work on the topic and published a book-length study in 2014 that presents the most comprehensive empirical analysis of IHL so far.²⁸ In the study, he points out that IHL has an effect on States’ behaviour by clarifying what acts are violations, thereby inducing restraint in actors that would otherwise engage in such behaviour.²⁹ Further,

20 B. Valentino, P. Huth and S. Croco, above note 4.

21 James Morrow, “When Do States Follow the Laws of War?”, *American Political Science Review*, Vol. 101, No. 3, 2007.

22 B. Valentino, P. Huth and S. Croco, above note 4, p. 340.

23 *Ibid.*, p. 368.

24 J. Morrow, above note 21, p. 570.

25 In this regard, empirical studies on armed conflict have paved the way. See, for example, Alexander Downes, *Targeting Civilians in War*, Cornell University Press, Ithaca, NY, 2008.

26 J. Morrow, above note 10, pp. 144–145.

27 The research undertaken for the updated ICRC study on “The Roots of Behaviour in War” gives a good example of such efforts; Francesco Gutierrez Sanin speaks of a “topology and typology” of compliance. See: www.icrc.org/en/event/roots-behaviour-war-revisited. For a broader view of empirical approaches to international law in general and IHL in particular, see Gregory Shaffer and Tom Ginsburg, “The Empirical Turn in International Legal Scholarship”, *American Journal of International Law*, Vol. 106, No. 1, 2012.

28 J. Morrow, above note 10.

29 *Ibid.*, pp. 144–145.

Prorok and Appel recently published a paper that empirically examines compliance with IHL, specifically focusing on the role of third-party States in enforcement.³⁰ Using the same data set as Valentino, Huth and Croco, they come to the conclusion that, with regard to the targeting of civilians, ratification of the relevant treaties does matter under particular circumstances.³¹

Recent observational studies have brought to light the methodological problems and limitations of analyzing the impact of IHL empirically.³² So far, studies have focused on compliance with IHL in international armed conflict.³³ A main limitation in this respect is the small sample size of conflicts to study since the specific rules of IHL were developed.³⁴ Another shortcoming is that there is no longer meaningful variation in the applicability – through treaty or customary law – of the central rules that govern international armed conflict.³⁵ Further, the data sets analyzed are not beyond dispute.³⁶ Crucially, Chilton points out that “even using sophisticated statistical techniques, it is extremely hard to tell whether States change their behaviour as a result of ratifying IHL treaties, or whether States ratify IHL treaties because they are likely to already comply with the norms the treaties codify”.³⁷

These problems have prompted different approaches. On the one hand, there has been a turn to more qualitative empirical analyses.³⁸ On the other, experimental methods have been chosen. Chilton has conducted a survey experiment that tested whether changes in public opinion create pressure on States to comply with IHL. His results suggest that democracies are likelier to comply with the laws of war when there is an expectation of reciprocity.³⁹ The idea behind this experimental approach is to look at mechanisms hypothesized to drive compliance with international law – changes in public opinion, in Chilton’s

30 Alyssa Prorok and Benjamin Appel, “Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War”, *Journal of Conflict Resolution*, Vol. 58, No. 4, 2014.

31 *Ibid.*, p. 715.

32 See A. Chilton, above note 11, pp. 4–5; J. Morrow, above note 10, p. 272.

33 An exception in this regard is the work of Hyeran Jo and Catarina Thompson, “Legitimacy and Compliance with International Law: Access to Detainees in Civil Conflicts, 1991–2006”, *British Journal of Political Science*, Vol. 44, No. 2, 2013.

34 See A. Chilton, above note 11, p. 5; J. Morrow, above note 10, pp. 248, 251. Efforts to increase the precision of IHL and achieve a more specific prohibition against civilian targeting only took off in the second half of the twentieth century. Regarding the absence of specific rules in respect to the targeting of civilians, see, for example, Anthony Grayling, *Among the Dead Cities: Was the Allied Bombing of Civilians in WWII a Necessity or a Crime?*, Bloomsbury, London, 2006, pp. 221 ff.

35 A. Chilton, above note 11, p. 4.

36 The study by Valentino, Huth and Croco, above note 4, operates under the assumption that the rules of IHL regarding the targeting of civilians have been clearly set out and straightforward to apply since 1907. How to unambiguously identify to a legal standard applicable at the time of the events the exact number of civilians intentionally targeted seems more difficult than the authors suggest, to say the very least.

37 A. Chilton, above note 11, p. 5.

38 See, in this regard, Laura Dickinson, “Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance”, *American Journal of International Law*, Vol. 104, No. 1, 2010, with further references on p. 2.

39 *Ibid.*, p. 1. In this regard, see also Downes’ results, suggesting that democracies are not likelier to comply with regard to targeting civilians: A. Downes, above note 25, pp. 246, 257.

example – using methods developed in behavioural studies. This approach comes with its own limitations and is in its infancy in this field,⁴⁰ but the hope is that it could help to explore the question of why States are more or less likely to comply with their international obligations, adding another facet to the broader discussion of the role and impact of IHL.⁴¹

Moving beyond a rational choice approach to IHL: Questioning rationality assumptions and examining interests

The discussions regarding the role of law in armed conflict from the political science perspective have been triggered largely by the apparent divide between the extensive IHL normative framework and the perceived lack of compliance with it in actual armed conflict. Consequently, IHL first became an easy target for voices critical of international law's effects in general. The issue was looked at mainly using the tools of economic analysis, relying on standard assumptions of perfect rationality of States and decision-makers.⁴² This rational choice approach to international law has found wide acceptance in legal scholarship and international relations theory of international law.⁴³ It strongly supported the traditional doubts about the effects of international law in general and those about IHL in particular.

While the rational choice paradigm as used in economics has been thoroughly challenged in its own field and in international relations since the 1970s, it has taken longer for the economic analysis of the law to react to the impulses described by behavioural economics.⁴⁴ Rational choice approaches to international law usually assume that the State is a unitary actor and that it acts rationally.⁴⁵ Drawing on the findings of cognitive psychology, behavioural economics complements and corrects these views. It points out that human rationality is bounded, characterized by systematic failures, shortcuts, and susceptibility to seemingly irrational traits such as fairness.⁴⁶ Recent efforts to operationalize these insights for the analysis of international law in general have come from van Aaken and Broude.⁴⁷ As van Aaken puts it: “Law, including

40 A. Chilton, above note 11, p. 19. See also Andrew Bell, “Leashing the ‘Dogs of War’: Examining the Effects of LOAC Training at the U.S. Military Academy and in Army ROTC”, *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 108, 2014.

41 A. Chilton, above note 11, p. 19. See also the specific experiment described in Tomer Broude, “Behavioral International Law”, *University of Pennsylvania Law Review*, Vol. 163, 2015, p. 1153.

42 See A. van Aaken, “Behavioral International Law and Economics”, *Harvard International Law Journal*, Vol. 55, No. 2, 2014, p. 422; T. Broude, above note 41, p. 1153.

43 See Anne van Aaken, above note 42, p. 424, for an account of the influence of rational choice approaches to international law.

44 *Ibid.*, p. 423.

45 *Ibid.*, p. 441.

46 T. Broude, above note 41, p. 1103. The work of Daniel Kahneman has been fundamental in this respect: see Daniel Kahneman, *Thinking, Fast and Slow*, Farrar, Straus & Giroux, New York, 2011.

47 See A. van Aaken, above note 42; T. Broude, above note 41. Broude and van Aaken are currently working jointly on a book project on behavioural economics and international law, to be published at the end of 2017. An early call for the analysis of violations of IHL from the angle of law and economics came from Jeffrey Dunoff and Joel Trachtman, “The Law and Economics of Humanitarian Law Violations in Internal Conflict”, *American Journal of International Law*, Vol. 93, No. 2, 1999.

international law, is never neutral: it sets reference points, produces endowments ... and sets points for perceived fairness. How, exactly, the law achieves those ends is a promising research field.”⁴⁸ IHL, with its rules regarding decisions on matters of life and death, seems particularly ripe for research into collective decision-making, the cognitive psychology of individuals and the influence of legal standards.⁴⁹

In the political science debate on the effects of international law on the behaviour of States in general, the so-called constructivists have also tried to expand on the rigid rational choice argument. They acknowledge that international law lacks enforcement by a higher authority. The constructivists then take a closer look at how the interests that are said to dominate States’ calculations in such an environment are formed. Brunnée and Toope note:

The key claim is that interests are not simply given and then rationally pursued, but that social construction of actors’ identities is a major factor in interest formation. ... Constructivists show how, through interaction and communication, actors generate shared knowledge and shared understandings that become the background for subsequent interactions. In the process, social norms may emerge that help shape how actors see themselves, their world and, most importantly for us, their interests.⁵⁰

Constructivist views have played an important role in the discussion of international law in general from a political science point of view all along. The application of constructivist concepts to IHL in particular is more recent. International relations scholar Janina Dill has provided a comprehensive effort in her study on the legitimacy of targeting under IHL.⁵¹ She argues that there is no contradiction between tangible interests and normative beliefs that are usually brought in opposition when analyzing the law’s effects.⁵² Taking the constructivist perspective, Dill sees interests as being constructed in the same way as normative beliefs – i.e., subject to perceptions.⁵³ The factors that influence the behaviour of actors are located on a continuum between immediate interests and more abstract normative considerations. Actors tend to be motivated by multiple considerations along that continuum at the same time, taking into account both immediate utility and normative appropriateness.⁵⁴

Dill then argues that IHL can be behaviourally relevant by mediating between actors’ immediate interests and more general normative beliefs. The law provides a “ready compromise between instrumental and principled courses of action”,⁵⁵ and in doing so, it has an influence in two main ways. First, it provides

48 A. van Aaken, above note 42, p. 441.

49 T. Broude, above note 41, p. 1150.

50 J. Brunnée and S. Toope, above note 10, p. 12.

51 Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing*, Cambridge University Press, Cambridge, 2015, pp. 44–63.

52 *Ibid.*, p. 47.

53 *Ibid.*, p. 47.

54 *Ibid.*, p. 48.

55 *Ibid.*, p. 52.

action guidance by prescribing behaviour that already encompasses a compromise solution.⁵⁶ Second, it provides a tool that enables assessment of behaviour, be it by self-assessment, public scrutiny or institutionalized review. In this way it can change an actor's perception of potential courses of action and therefore their evaluation of strategic options.⁵⁷

Traditionally, it has been argued that IHL does not provide a separate cause for compliance beyond prior interests or normative beliefs.⁵⁸ Dill moves beyond this position based on the way she sees IHL influencing behaviour as described above. She acknowledges that enforcement and sanctions, which are usually seen as law's independent pull towards compliance, are mostly lacking.⁵⁹ However, in her view IHL has an effect that is not reducible to calculations of interest and normative compliance that would take place in absence of legal guidelines. She describes this effect as being distinguishable from pure considerations of utility or appropriateness without being independent of them or possible on its own.⁶⁰

Game theoretical approaches

Armed conflict is one of the main issues to which game theory has traditionally been applied.⁶¹ It is not surprising, then, that the role of IHL in armed conflict has also been looked at from this point of view. This has usually happened in connection with rational choice approaches to support the conclusion that compliance with the law is solely based on calculations of interest.⁶² The general argument is that States are best understood as mere participants in "prisoner's dilemma" settings, seeking to achieve self-interested outcomes. Compliance with international law can then be explained neatly within that framework. Most prominently, this view has been forwarded by Posner:

States create international law for the sake of reciprocal gains, and they comply with international law so that those gains are not lost. The logic of reciprocity can be understood using simple game theory models, which show that it is the key to self-enforcement in the repeated bilateral prisoner's dilemma.⁶³

While alluring in its simplicity, this view seems to put aside some of game theory's finer points. As Ohlin observes critically, "Recent accounts have harnessed game theory's alleged lessons in service of a new brand of 'realism' about international law. ... Such claims are not just vastly exaggerated; they represent a profound

⁵⁶ *Ibid.*, p. 53.

⁵⁷ *Ibid.*, p. 54.

⁵⁸ *Ibid.*, p. 28.

⁵⁹ *Ibid.*, p. 55.

⁶⁰ *Ibid.*, p. 53.

⁶¹ See, for example, the work of Thomas Shelling, one of game theory's most famous exponents: Thomas Shelling, *The Strategy of Conflict*, Harvard University Press, Cambridge, MA, 1960; and *Arms and Influence*, Yale University Press, New Haven, CT, 1966.

⁶² A. van Aaken, above note 42, p. 438.

⁶³ E. Posner, above note 9, p. 170.

misunderstanding about the significance of game theory.”⁶⁴ In his empirical study regarding States’ compliance with IHL, Morrow develops a more differentiated game theoretical framework for analyzing IHL as an international institution. He goes further in analyzing reciprocity⁶⁵ and additionally focuses on the importance of shared understandings, echoing constructivist views.⁶⁶ “What the actors think one another will do is as central to their own calculations as their preferences over outcomes.”⁶⁷ In games representing social settings, multiple equilibria exist – i.e., multiple sets of strategies can be stable. Which set of strategies is chosen depends on shared understandings of the situation.⁶⁸

International law helps to create such shared understandings. Shared understandings alone, however, are insufficient to ensure that parties will comply.⁶⁹ Morrow uses game theory to expand on the traditional opposition between realist and idealist views:

States have created international law to help them realize benefits from cooperation, but law helps to address some of the issues that make that cooperation difficult. ... The realists correctly see that states select into legal agreements because they believe they will benefit from them, but fail to see that the resulting cooperation may require the mechanisms induced by those agreements. The idealists see that legal agreements structure international relations, but they fail to see the myriad problems that can impede cooperation ...⁷⁰

This game theoretical perspective highlights how IHL can help to restrain violence by fostering expectations that influence behaviour, but does not guarantee that everyone will follow its rules.⁷¹ The effect that IHL can have cannot be separated from the strategic incentives that States face.⁷² In Morrow’s words: “The laws of war shape but do not determine how States fight.”⁷³

Thinking within and against the traditional narrative on IHL

Recent legal and historical scholarship has tried to actively question some of the basic assumptions about IHL and the manner in which it has commonly been

64 Jens Ohlin, “Nash Equilibrium and International Law”, *Cornell Law Review*, Vol. 96, No. 4, 2010, p. 869. See also the comments made by Scott Gates in a discussion at the Peace Research Institute Oslo, 2012, available at: www.youtube.com/watch?v=BMC-FxqPDWU (starting at 54:00). Gates makes the point that armed conflict presents a game so loosely defined that you might not even know what game you are playing, let alone what the possible outcomes might be.

65 In this regard, see also the work by René Provost, “Asymmetrical Reciprocity and Compliance with the Laws of War”, in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, University of British Columbia Press, Vancouver, 2012.

66 J. Morrow, above note 10, p. 23.

67 *Ibid.*, p. 20.

68 *Ibid.*, p. 23. See also A. van Aaken, above note 42, pp. 434–435, with references to behavioural game theory.

69 J. Morrow, above note 10, p. 7.

70 *Ibid.*, p. 15.

71 *Ibid.*, p. 5.

72 *Ibid.*, p. 299.

73 *Ibid.*, p. 299.

analyzed. One of the assumptions questioned is the focus on States as the unique protagonists of IHL. The role and importance of non-State actors in armed conflict has become an important focus of recent legal and political science scholarship.⁷⁴ At the same time, the State as a homogenous unit of analysis has been put into question. Traditionally, States are seen as actors having interests and taking decisions according to these interests much in the way individual persons would decide and act. The metaphorical quality of personal characteristics attributed to States is easily put aside. This manner of looking at States and political and social outcomes has come under intense scrutiny in political science and history over the last half-century.⁷⁵ Discussions about IHL in legal circles, however, have rarely dealt with this issue explicitly.

The current interest of legal scholars in “prying open the black box of the state”⁷⁶ has drawn on methods of institutional analysis developed in political science and behavioural economics-based approaches.⁷⁷ As Benvenisti and Cohen put it, the basic observation is “that states engaged in armed conflict are not unitary actors but rather complex institutions that include internal chains of command within the echelons of power, accountable to a civilian government and ultimately to the public”.⁷⁸ Recent game theoretical approaches draw attention to the same issue when they point out different levels of interrelated strategic problems within States and their armed forces.⁷⁹ Kennedy equally questions the concept of the State as a homogenous unit, both internally and in comparison to other States:

States ... differ dramatically in powers, resources, and independence. There is something audacious – and terribly misleading – about calling them all states Even in the most powerful and well-integrated states, moreover, power today lies in the capillaries of social and economic life.⁸⁰

Looking closer at States’ internal dynamics does not seem radical in light of the ideas that have been advanced in political science for some time. However, it breaks with a nation-State-based narrative that lies at the heart of the classic conception of IHL and still dominates a large part of discussions in this field today.⁸¹ This shift in perspective permits a more nuanced look at the purposes and effects of IHL.

When the effectiveness of IHL is discussed, what is usually referred to is the impact the law can have in preventing violence against persons who do not participate in hostilities. IHL is measured against the goals that have been explicitly set by the States drawing up its main body of law: serving the interests

74 In this regard, see the section on “Disaggregation” below.

75 For a review of the literature, see, for example, Robert Oprisko and Kristopher Kaliher, “The State as a Person? Anthropomorphic Personification vs. Concrete Durational Being”, *Journal of International and Global Studies*, Vol. 6, No. 1, 2014, pp. 31 ff.

76 E. Benvenisti and A. Cohen, above note 7, p. 1368.

77 A. van Aaken, above note 42, p. 441.

78 E. Benvenisti and A. Cohen, above note 7, p. 1368.

79 J. Morrow, above note 10, pp. 70–71.

80 David Kennedy, *Of War and Law*, Princeton University Press, Oxford, 2006, p. 14.

81 See D. Kennedy, above note 19, p. 170, who talks about the “remnants of discarded sensibilities that remain”.

of humanity and protecting the victims of armed conflict.⁸² As discussed, the traditional counter-position has been to point out the raw State interests that lie below the thin veneer of humanitarian terminology. In this view, the soberer question to ask with regard to the impact of the law is if and how it affects inter-State relations. Looking closer at the dynamics within States, however, opens a different range of questions. What function and effect does IHL have within States? Beyond its stated goals and the interests of States taken as a whole, are there other purposes the law serves?

It has proven fruitful to look at the historical development of IHL and to take into account the different actors with competing interests that constitute the State. Recent work highlights functions of the law that are not made explicit by the law itself or by those who apply and shape it.⁸³ Benvenisti and Cohen argue that a main function and driver of IHL development is the control function it serves within State structures:

[C]ontrolling the armed forces, especially during war, is one of the most acute challenges for any government. In democracies, one of the “most basic of political questions” is how “to ... reconcile a military strong enough to do anything the civilians ask, with a military subordinate enough to do only what civilians authorize.” ... There is conflict not only between the high command of the armed forces and the civilian government that seeks to control it. Resorting to force creates conflicts between civil society and elected officials, between elected officials and military commanders, and between those commanders and combat soldiers. IHL is an external tool designed to address many of these internal conflicts.⁸⁴

They conclude that IHL often reflects governments' or commanders' attempts to create an effective means of monitoring their troops rather than an international effort to regulate conduct between States.⁸⁵

Kennedy makes a similar point when describing international law as an instrument through which force is disciplined and rendered effective.⁸⁶ He goes further, however, in describing law also “as a tactical ally, ... a strategic asset, an instrument of war” that legitimizes and therefore enables military campaigns.⁸⁷ In a narrower sense, a legitimizing role of the law can be seen in the relationship between governments and their soldiers. It has been argued that Augustine's efforts in the fifth century to theorize the just war were made to absolve Christians from murder and allow them to participate in war.⁸⁸ IHL can be seen

82 See note 15 above. The first Additional Protocol to the Geneva Conventions of 1977 makes this explicit in its title: “relating to the Protection of Victims of International Armed Conflicts”.

83 Whether or not certain aims are pursued consciously is a separate question. See E. Benvenisti and A. Cohen, above note 7, p. 1385, fn. 83.

84 *Ibid.*, pp. 1368–1369.

85 *Ibid.*, pp. 1367, 1371.

86 D. Kennedy, above note 19, p. 160.

87 *Ibid.*, p. 160.

88 H. Kinsella, above note 5, p. 193.

to play a similar role today in absolving soldiers from moral responsibility for their participation in armed violence.⁸⁹

Gaining awareness of the forces that shape IHL

Gender perspectives, third-world approaches, postcolonial looks: these are the headings for a range of recent scholarship that tries to make explicit the other power relationships that have shaped and continue to shape IHL.⁹⁰ They offer different lenses through which to analyze the law's content and the way it is thought and talked about. Looking at IHL in this way comes as part of a bigger trend of current critical approaches to international law⁹¹ which have their roots in schools of thought such as critical legal studies and feminist legal theory that started in the 1970s. In this tradition, international law is taken not as a neutral body of law but rather as an institution inseparable from politics and power structures.

Early on, feminist critique pointed to the fact that IHL is based on a view of armed conflict which envisages men and women playing particular roles: men as fighters and women as victims of war.⁹² Gender-conscious perspectives aimed at further unmasking such assumptions and exposing their inherently discriminatory dimension,⁹³ and have worked towards a better understanding of the different experiences of gendered actors in armed conflict.⁹⁴ A large part of these early efforts became focused on the pressing issue of sexual violence in armed conflict. In the emerging field of international criminal law, there was a concerted and successful push for the criminalization and punishment of sexual violence against women.⁹⁵ Broader debates about IHL's gendered assumptions, however, were somewhat sidelined by this focus on sexual violence.⁹⁶ Recent efforts in a range of fields give a more nuanced picture of women's experiences

89 J. Morrow, above note 10, p. 307. Kennedy goes further in arguing that IHL can work as a mechanism of absolution for soldiers and humanitarian actors alike: "In the face of the irrationality of war, modern law has built an elaborate discourse of evasion, offering at once the experience of safe ethical distance and careful pragmatic assessment. ... The legal language has become capacious enough to give the impression that by using it, one will have 'taken everything into account' or 'balanced' all the relevant competing considerations." D. Kennedy, above note 80, pp. 143, 169.

90 See, for example, the work of H. Kinsella, above note 5; Frédéric Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'", in Anne Orford (ed.), *International Law and Its Others*, Cambridge University Press, Cambridge, 2006; Orly Stern, "The Principle of Distinction and Women in African Conflict", doctoral thesis, London School of Economics and Political Science, 2015, available at <http://etheses.lse.ac.uk/3291>.

91 As represented by the work of Anne Orford, Marti Koskeniemi and Anthony Angie, for example.

92 O. Stern, above note 90, pp. 110 ff, provides an account of early feminist critiques in this regard. See also Judith Gardam, "A New Frontline for Feminism and International Humanitarian Law", in Margaret Davies and Vanessa E. Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory*, Routledge, London, 2013, p. 222, with further references.

93 Helen Durham and Katie O'Byrne, "The Dialogue of Difference: Gender Perspectives on International Humanitarian Law", *International Review of the Red Cross*, Vol. 92, No. 877, 2010, pp. 34, 45.

94 *Ibid.*, p. 42.

95 J. Gardam, above note 92, p. 217.

96 H. Durham and K. O'Byrne, above note 93, p. 51, observe the development of the discourse in this way. See also J. Gardam, above note 92, p. 218: "IHL as a whole has not been subjected to a broader scrutiny by feminists."

in armed conflict and the question of how IHL in many ways fails to respond to this reality.⁹⁷ Beyond the attention to the role of women, a more comprehensive gender-conscious approach is in the making.⁹⁸

Legal scholarship identifying as third-world and postcolonial approaches to international law is re-examining the historical foundations of international law.⁹⁹ These efforts place emphasis on legal history particularly in terms of imperial power dynamics, recognizing the colonial legacy as in some ways constitutive for international law.¹⁰⁰ In this way, they try to provide under-represented and alternative knowledge about the subject.¹⁰¹ With regard to IHL in particular, important areas of re-evaluation are the dominance of European or Western points of view and the ensuing exclusions from the realm of IHL based on race, religion and purported levels of civilization.¹⁰² These exclusions have taken the shape of a restrictive application of IHL to conflicts involving non-European people, namely the non-application of the norms to colonial wars.¹⁰³ But they have also manifested as practices of exclusion of alternative points of view from past and current debates. Further points of discussion in the postcolonial perspective on IHL concern the unacknowledged contributions to the law from non-Western backgrounds¹⁰⁴ and the effects of the structure of the law on postcolonial States today.¹⁰⁵ Additionally, recent scholarship has challenged the overwhelmingly progressist narrative of IHL, the complacency of the international law discourse in treating the colonial legacy as a dead letter that has been overcome by the process of decolonization.¹⁰⁶

One subject that has received renewed scrutiny from legal scholars and political scientists alike is the principle of distinction between civilians and combatants, a concept central to IHL. These analyses provide an example of recent efforts that explicitly take into account power structures in terms of gender and the colonial and postcolonial background, as well as non-Western experiences.¹⁰⁷ How the Geneva Conventions and their Additional Protocols were elaborated with regard to the principle of distinction gives a good idea of why

97 *Ibid.*, p. 229. See, for example, the work of O. Stern, above note 90; Irène Herrmann and Daniel Palmieri, "Between Amazons and Sabines: A Historical Approach to Women and War", *International Review of the Red Cross*, Vol. 92, No. 877, 2010.

98 A development outlined in H. Durham and K. O'Byrne, above note 93, pp. 39, 51.

99 James Thuo Gathii, "TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography", *Trade, Law and Development*, Vol. 3, No. 1, 2011, p. 30. In this regard, see also the seminal work of Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge, 2007.

100 J. T. Gathii, above note 99, p. 40; F. Mégret, above note 90, p. 2.

101 J. T. Gathii, above note 99, p. 38.

102 H. Kinsella, above note 5, pp. 107 ff.; F. Mégret, above note 90, pp. 11, 17.

103 F. Mégret, above note 90, p. 15; H. Kinsella, above note 5, p. 11.

104 Corri Zoli, "Islamic Contributions to International Humanitarian Law: Recalibrating TWAIL Approaches for Existing Contributions and Legacies", *AJIL Unbound*, No. 109, 2016.

105 F. Mégret, above note 90, p. 34.

106 J. T. Gathii, above note 99, p. 30; H. Kinsella, above note 5, pp. 112, 152 ff.; F. Mégret, above note 90, pp. 4, 21 ff.

107 See the work of H. Kinsella, above note 5; O. Stern, above note 90; and F. Mégret, above note 90; see also Hugo Slim, *Killing Civilians: Method, Madness and Morality in War*, Hurst & Co, London, 2007, pp. 11 ff.

IHL is also referred to as a “strategic expression of morals”.¹⁰⁸ A closer look at the principle of distinction shows a blind spot, because the principle

presumes that we know what a combatant is. Of course, combatants do not exist in nature, any more than war exists as a natural condition waiting to be “regulated” by the laws of war. What is and what is not a combatant is an elaborate normative and social construct.¹⁰⁹

Kinsella shows from a historical perspective just how the terms “civilian” and “combatant” are neither neutral nor inevitable identities but have rather been defined and redefined, and continue to be adapted, with clear strategic goals in mind.¹¹⁰

The range of efforts discussed feeds into a growing awareness of the implicit and explicit biases of IHL. They provide a further dimension to the basic questions about IHL: in addition to asking where the law fails or succeeds, they put in question what it has excluded and obscured.¹¹¹ They lead to an increased consciousness of how the discourse on IHL is shaped by power relations and how that needs to be taken into account when envisaging future developments of the law and applying it for the benefit of those affected by armed conflict.

Discursive threads resulting from the new perspectives on IHL

The new perspectives on IHL look at the issues raised from different angles, making observations based on premises that vary greatly. In this way, they do not form a unified picture but in combination allow for more depth in our perception of certain questions. There are common discursive threads that emerge, some of which will be discussed below.

Disaggregation

Invariably, looking at the impact of IHL from a range of perspectives not only provides answers but also leads to new and more specific questions. In this respect, the analysis of the law follows in the footsteps of conflict research that has been going through a similar process. For this field, Kalyvas notes:

Empirical and theoretical disaggregation has led us to a point where we are able to ask more clearly defined questions about the dynamics of conflict and to use more appropriate techniques to address them. For example, we have moved away from largely sterile debates about the primordial versus constructed

108 H. Kinsella, above note 5, p. 188.

109 F. Mégret, above note 90, p. 28.

110 H. Kinsella, above note 5, p. 196. Benvenisti and Cohen also analyze the concept of distinction, noting that while it is seen today as providing the framework for the protection of civilians, it was initially designed to prevent the participation of irregular fighters. See E. Benvenisti and A. Cohen, above note 7, pp. 1398–1399.

111 F. Mégret, above note 90, p. 34.

nature of ethnic identities, or the greedy versus aggrieved motivations of rebel actors. Instead, we are moving toward formulating research questions that investigate the precise ways in which ethnicity is configured as political action and explore how exactly motivations interact with context.¹¹²

Ways of further investigating the extremely complex phenomenon that is armed conflict are seen in disaggregating it with regards to space, sequencing, and actors involved in the process, and in questioning the dichotomy between violence and non-violence.¹¹³ In looking closer at IHL and its effects, all of these forms of refined analysis equally promise to expand on our current understanding.¹¹⁴

As discussed, examining the actors of armed conflict is part of several current approaches. The game theoretical and institutional analysis of IHL point to the importance of different levels of strategic competition and differing strategic interests within States.¹¹⁵ Recent discussions of the law also highlight the importance of actors other than States. Engaging non-State actors has been called “the new frontier for international humanitarian law”.¹¹⁶ There is a tendency to “conceptualize non-state political factions involved in armed conflict as monolithic actors akin to States writ small”.¹¹⁷ However, adopting a less State-centred view has made discussions more likely to take into account issues regarding the particular structure and dynamics of non-State groups, as pointed out by recent conflict research in this area.

Another important area of disaggregation lies in the dynamics of behaviour in armed conflict over time. Kalyvas calls war a transformative phenomenon and points out that “[c]ollective and individual preferences, strategies, values, and identities are continuously shaped and reshaped in the course of a war”.¹¹⁸ Recent empirical work confirms this with regard to the killing of civilians in international armed conflict.¹¹⁹ Compliance with the law is not a static phenomenon. This insight is not new, but it is surprising how little it has informed discussions about the impact of IHL so far.

These considerations tie in with practical approaches to IHL. The ICRC is currently updating its study on “The Roots of Behaviour in War”, which looks at what leads combatants to comply or not to comply with legal norms.¹²⁰ The study and its update highlight the importance of taking a differentiated look at

112 Stathis Kalyvas, “Internal Conflict and Political Violence: New Developments in Research”, in Erica Chenoweth and Adria Lawrence (eds.), *Rethinking Violence: States and Non-State Actors in Conflict*, MIT Press, Cambridge, MA, 2010, p. xiii.

113 *Ibid.*, p. xii.

114 See also A. Bell, above note 40, pp. 371, 373.

115 See in this respect the remarks by Benvenisti and Cohen referred to in note 83 and Morrow's remarks referred to in note 79, above.

116 Marco Sassòli, “Engaging Non-State Actors: The New Frontier for International Humanitarian Law”, in Geneva Call (ed.), *Exploring Criteria and Conditions for Engaging Armed Non-State Actors*, Conference Report, Geneva, 2007.

117 S. Kalyvas, above note 112, p. xii.

118 Stathis Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, Cambridge, 2006, p. 389.

119 A. Downes, above note 25, p. 8.

120 See: www.icrc.org/en/event/roots-behaviour-war-revisited.

the issue if the aim is to draw lessons for putting the norms of IHL to use. The wealth of experience that the ICRC has gathered in interacting with armed actors during conflict makes it hard to uphold blanket assumptions about their behaviour.¹²¹ Instead, the current efforts towards more effective work with regard to compliance with IHL seem to focus on the law's impact on a local level, within different organizational structures and taking into account the transformative nature of armed conflict.¹²²

Great expectations

What questions are asked about IHL, and the way in which they are asked, is influenced by what the law is expected to do. Given IHL's stated aim to "prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle",¹²³ these expectations tend to be considerable. Also, they tend to neglect the specific nature of international law and IHL in particular. In the middle of the last century, Hersch Lauterpacht famously described international law as being at the vanishing point of the law, and the law of war as being at the vanishing point of international law.¹²⁴ Notwithstanding the development of international law and its institutions since, this description is still relevant today.

There is still a general tendency "to look at international society through the prism of domestic legal systems and to find international law underdeveloped or wanting".¹²⁵ With specific regard to IHL, Kennedy notes:

Discussions about international law and war usually unfold as if the participants were imagining an international law which would be able to substitute itself for sovereign power in a top-down fashion, first to distinguish legal from illegal violence and then, perhaps not today but eventually, or perhaps not directly but indirectly, to bring that distinction to bear in the life of sovereigns, extinguishing sovereign authority for war at the point it crosses a legal limit.¹²⁶

The automatic association of national law enforcement mechanisms with the terms "law" and "crimes" can be problematic at the international level. While individuals can be prosecuted for violations of IHL domestically and in some cases internationally, the same does not go for States. To put it simply, one cannot call

121 Notwithstanding the tendencies towards cynical simplification sometimes displayed by humanitarian workers. With regard to this phenomenon, see, for example, Fiona Terry, *Condemned to Repeat? The Paradox of Humanitarian Action*, Cornell University Press, Ithaca, NY, 2002, pp. 224 ff.

122 See www.icrc.org/en/event/roots-behaviour-war-revisited, including a recording of the panel discussion held on 28 April 2016; compare the comments by Francesco Gutierrez Sanin regarding a "typology and topology" of compliance.

123 H. Lauterpacht, above note 17, pp. 363–364.

124 *Ibid.*, p. 382.

125 J. Brunnée and S. Toope, above note 10, p. 6.

126 D. Kennedy, above note 19, p. 158.

the police on States that violate IHL rules. The expectation that this should be possible inevitably leads to frustration in the current environment.¹²⁷

The hollowness of imagining a monopoly of force to create and enforce rules in relation to armed conflict has been widely discussed.¹²⁸ In theory, the differences from domestic law are well understood and acknowledged.¹²⁹ Practically, though, the thinking in domestic legal concepts and the expectations that go with it are commonplace.

On 3 October 2015, a US aircraft opened fire on the Médecins Sans Frontières (MSF) trauma hospital in Kunduz, Afghanistan. According to the US Department of Defense, the airplane mistook the hospital for the intended target and fired its heavy guns on the medical facility, despite frantic calls from MSF to military commanders.¹³⁰ The attack killed forty-two people, including patients and medical personnel, and wounded dozens more.¹³¹ In the aftermath of the events, the United States launched an internal investigation that resulted in administrative sanctions for sixteen military personnel. MSF, understandably dissatisfied with this outcome, demanded a separate investigation by the International Humanitarian Fact Finding Commission. Given the Commission's jurisdiction, this demand will most likely remain unanswered.¹³² However, it illustrates the yearning for an independent body that distinguishes legal from illegal behaviour and metes out justice accordingly.¹³³ It shows how much the expectations towards IHL and its effects are modelled on what is expected from a functioning domestic legal order.

Moving images

In the opening scene of *American Sniper*, a film directed by Clint Eastwood and based on a soldier's account of his experience in Iraq until 2009, a US

127 It is often assumed that international law can only be effective if it creates absolute obligations, the equivalent to State-backed sanctions in a domestic system. This puts aside the effect that IHL has in States through implementation and enforcement within their armed forces, and it neglects a whole range of mechanisms in which norms can be enforced in a decentralized system and which play an important role in the enforcement of international law. See, in this respect, A. van Aaken, above note 42, pp. 471 ff.

128 See, for example, R. Provost, above note 65, p. 37.

129 J. Morrow, above note 10, p. 317.

130 See Matthew Rosenberg, "Pentagon Details Chain of Errors in Strike on Afghan Hospital", *New York Times*, 29 April 2016, available at: www.nytimes.com/2016/04/30/world/asia/afghanistan-doctors-without-borders-hospital-strike.html?_r=0.

131 See MSF, "Kunduz: Initial Reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital", 29 April 2016, available at: www.msf.org/en/article/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma.

132 See, in this regard, the article by Catherine Harwood on the potential role of the International Humanitarian Fact-Finding Commission in the investigation of the attack. Catherine Harwood, "Will the 'Sleeping Beauty' Awaken? The Kunduz Hospital Attack and the International Humanitarian Fact-Finding Commission", *EJIL: Talk!*, 15 October 2015, available at: www.ejiltalk.org/will-the-sleeping-beauty-awaken-the-kunduz-hospital-attack-and-the-international-humanitarian-fact-finding-commission/.

133 The International Criminal Court – with all its imperfections – embodies the same impulse. The frustration about the lack of traction for the International Humanitarian Fact-Finding Commission is common among international lawyers; see, for example, Marco Sassòli's comments made at a panel discussion organized by the ICRC on 21 April 2016, available at: www.icrc.org/en/event/law-armed-conflict-crisis-and-how-recommit-its-respect.

sharpshooter is faced with a difficult decision. Through the gunsight of his rifle he sees a woman and a child carrying explosives, approaching a US patrol. While he is considering firing at the woman and child, another soldier present at the scene bluntly tells him, “They’ll fry you if you are wrong”, referring to the US military prosecutors. Without mistaking the movie for the reality on the ground, it is telling that the potential for criminal prosecution for breaches of IHL¹³⁴ is portrayed in a Hollywood film as part of the heavy burden the hero has to bear.

For one, it points to the impact of the law through implementation in procedures and training. In a number of armed forces, “IHL has been transformed from an ‘external’ constraint on military action to an intrinsic facet of the military’s own operational code”.¹³⁵ Practitioners themselves have noted the substantial recent increase in the role of IHL in US target decision-making processes.¹³⁶ Legal advisers embedded in front-line units and who are involved in operational decisions are now common in the US, British, other NATO and Israeli armed forces.¹³⁷ More generally speaking, for armed forces of this type the “institutional pathways by which war is made have been carved in law”.¹³⁸ Given the current technological possibilities, soldiers and commanders must reckon with the knowledge that their battlefield decisions are subject to painstaking re-evaluation by their chain of command, by their opponents, by their families and also by themselves.¹³⁹

The *American Sniper* example also shows the enormous development IHL has gone through and the impact it has on how armed conflict is thought and talked about. “War is cruelty and you cannot refine it”, wrote William T. Sherman, general for the Union Army during the American Civil War. With this statement he was justifying his decision to adopt scorched-earth tactics, to evict the inhabitants of Atlanta and burn a large part of the city after it was captured.¹⁴⁰ Imagine how Sherman would have to frame such a justification in today’s context. Compare it to the language used by US generals after the recent incident in Kunduz.¹⁴¹

IHL not only stipulates a set of norms but also provides terminology with which to discuss armed conflict. The use of the concept of distinction between combatants and civilians by both the United States and the Taliban in recent years offers an example of how actors on opposite ends of the spectrum disagree in a shared jargon.¹⁴² Kennedy notes that “even enemies who stigmatize one

134 This happens through the intermediary of US legislation in this case.

135 Amichai Cohen, “Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law”, *Connecticut Journal of International Law*, Volume 26, 2011, p. 389.

136 See, for example, Geoffrey Corn, “Legitimate Questions about Legitimate Targets”, *EJIL: Talk!*, 23 September 2015, available at: www.ejiltalk.org/13613-2/.

137 E. Benvenisti and A. Cohen, above note 7, p. 1410.

138 D. Kennedy, above note 80, p. 33.

139 *Ibid.*, pp. 133–134.

140 A. Downes, above note 25, p. 1.

141 See Barbara Starr and Ryan Browne, “Pentagon: U.S. Bombing of Afghanistan Hospital not a ‘War Crime’”, *CNN*, 29 April 2016, at: <http://edition.cnn.com/2016/04/29/politics/u-s-airstrike-hospital-afghanistan-investigation/>.

142 See the revealing account by H. Kinsella, above note 5, pp. 1–3.

another as not sharing in civilization nevertheless find themselves using a common vocabulary to dispute the appropriateness of military ends and means".¹⁴³ In this sense, IHL plays a role as a communication tool.¹⁴⁴ Kennedy goes on to argue: "We should come to see law ... not as the articulation of rights or restraints, but as a more subtle and dispersed practice through which people struggle with one another through articulation and action."¹⁴⁵

More often than not, the law is referred to in quests for legitimacy rather than for legal measures.¹⁴⁶ This is not a new phenomenon. The tactic of complying with IHL and communicating this strategically to gain legitimacy was used by postcolonial movements, for example.¹⁴⁷ As early as 1914, the British military manual observed that "it is in the interest of a belligerent to prevent his opponent having any justifiable occasion for complaint, because no Power, and especially no Power engaged in a national war, can afford to be wholly regardless of the public opinion of the world".¹⁴⁸ The importance of IHL as a tool of strategic communication has become crucial, however, with the advent of today's communication technologies. They provide the stakeholders of armed conflict with the dramatic ability to reach global audiences in near real time and with minimal effort.¹⁴⁹

Blind spots

The different perspectives on IHL allow for an awareness of blind spots, of biases in the way it is usually perceived. One of these blind spots concerns the selective public perception of violations of the law versus its preventive impact. As Helen Durham of the ICRC notes:

The media and humanitarian agencies often only publicise breaches of the law, not the many instances in which it is respected and applied: every time a child is vaccinated in a conflict area, an army stops an attack because of the potential for civilian casualties, or a detainee is protected from torture.¹⁵⁰

143 D. Kennedy, above note 80, p. 24. It can take on this role internationally but also among actors within States: see E. Benvenisti and A. Cohen, above note 7, p. 1371.

144 D. Kennedy, above note 19, p. 166.

145 *Ibid.*, p. 182.

146 Even though the format of legal measures and judicial review continues to be a means to gain or question legitimacy, of course. Kennedy speaks of a shift from validity to persuasiveness: see D. Kennedy, above note 80, p. 96. Dill makes a similar point when distinguishing behaviour in war permitted by law from behaviour that is perceived as legitimate: see J. Dill, above note 51. Going against this tendency, international criminal law lets people imagine a return to pure validity arguments and the clarity and sovereign-backed enforcement of national legal orders.

147 See H. Kinsella, above note 5, pp. 130–131, regarding the strategies adopted by the FLN during the French–Algerian War.

148 UK War Office, *Manual of Military Law*, 1914, p. 301, as quoted in E. Benvenisti and A. Cohen, above note 7, p. 1391.

149 D. Kennedy, above note 80, p. 25.

150 Helen Durham, "Atrocities in Conflict Mean We Need the Geneva Conventions More than Ever", *The Guardian*, 5 April 2016.

Similarly, weapons treaties such as the Chemical Weapons Convention¹⁵¹ and the Ottawa Treaty banning landmines¹⁵² have had a significant impact on the use of these weapons. What draws attention, however, are instances in which these treaties are not respected. What drives this selective perception? As a start, the preventive impact of IHL is difficult to ascertain.¹⁵³ How do you go about determining what violations would have taken place in the absence of the law?¹⁵⁴ More importantly, compliance with the law lacks the shock value of videos showing wounded children after an indiscriminate attack. Someone stuck to the rules? That is not exactly front page material. Publicizing alleged violations is a powerful tool as part of political campaigns that serve strategic interests; again, communicating the absence of violations will be more difficult and likely less effective in achieving such goals. Additionally, even humanitarian actors will often have an interest in painting a sombre picture to attract attention and funding to their cause. The sheer flood of imagery of blood and gore with which we are confronted on all channels makes it tempting to dismiss the impact of IHL from the outset.

A blind spot of a different nature concerns those who deal with the law from an institutional point of view. The discourse on IHL is dominated by people who have the privilege of sophisticated university education and of living in contexts of relative peace and security. For the most part, those who publish texts like the present one live in societies in which armed violence is a rare exception. In this environment, a functioning monopoly of force provides levels of security that make people perceive armed violence as an anomaly. Baberowski argues that this “belief that violence is deviant behaviour helps people in peaceful societies to imagine their reality as a space in which the argument triumphs over the fist”.¹⁵⁵ This is a comforting idea, especially for lawyers, but it makes it hard to imagine violence as the powerful resource, the viable option for pursuing one’s goals, that it becomes under different circumstances.¹⁵⁶ It makes it hard to imagine situations in which armed violence is the dominating factor in people’s lives – a force that affects everyone and that fundamentally alters all social relations.¹⁵⁷

This divide affects how IHL is approached. Kennedy notes that it is easy to mistake our ability to articulate the law for an actual capability to restrain the power and violence of war.¹⁵⁸ To roughly paraphrase Saul Bellow’s “Herzog”: people who

151 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 UNTS 45, 13 January 1993 (entered into force 29 April 1997).

152 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1999).

153 Kaul makes the same observation for international criminal law. See Hans-Peter Kaul, “Abstrafung der Täter – ein Instrument zur Prävention”, in Hans-Joachim Heintze and Knut Ipsen (eds), *Heutige bewaffnete Konflikte als Herausforderungen an das humanitäre Völkerrecht*, Springer, Berlin, 2011, p. 158.

154 See in this regard the comments made regarding the update of the ICRC’s “Roots of Behaviour in War” study, which aims to examine compliance with IHL’s norms, available at: www.icrc.org/en/event/roots-behaviour-war-revisited.

155 Jörg Baberowski, *Räume der Gewalt*, S. Fischer, Frankfurt am Main, 2015, p. 20 (author’s translation).

156 *Ibid.*, p. 27.

157 *Ibid.*, p. 11. See also Kalyvas’ remarks referred to in note 112 above.

158 D. Kennedy, above note 19, p. 172.

spend their lives in humane studies imagine that once cruelty is described in books, it is ended.¹⁵⁹ This is a caricature, of course, but it points towards the tendency to confound formal representation of law with successful law-making and effective engagement.¹⁶⁰

Conclusion

In the end, what *has* law got to do with it? Given the complexity of the subject, it comes as no surprise that blanket answers do not satisfy those looking for more than simply to confirm their initial ideological leanings. The new approaches described in this article allow us to ask more pertinent questions that might allow for a wider and more detailed understanding of IHL's central issues. These questions are far from answered and will remain so along with the changing nature of armed conflict. Questions regarding the purpose, effects and limits of IHL need to be asked continuously, especially if we are looking at the law with the aim of putting it to use for the protection of civilians. Any answers that come in the form of simple declarations should be met with the suspicion they deserve.

Tina Turner's "What's Love Got to Do with It?" betrays the anger of someone whose heart has been broken, and likewise, some who ask the tough questions about IHL might be those who are in it with their heart. They might be the ones who feel strongly about the suffering of people affected by armed conflict and are frustrated by how little is achieved in trying to stop it. In this sense, dropping the rose-tinted glasses and acknowledging that IHL might at the same time be more and less than we want it to be is an important first step. Taking a good hard look at one's own imperfections would not hurt, either. Then the pain needs to be turned into forward movement instead of bitterness. That is the Tina Turner thing to do.

159 Saul Bellow, *Herzog*, Viking Press, New York, 1964, p. 238.

160 J. Brunnée and S. Toope, above note 10, p. 47. Kennedy goes further and speaks about an "elaborate discourse of evasion": D. Kennedy, above note 19, p. 169.

When is a conflict international? Time for new control tests in IHL

Djemila Carron*

Djemila Carron is the Co-Founder and a Lecturer at the Law Clinic on the rights of vulnerable people at the Law Faculty of the University of Geneva. She is also a Senior Lecturer in the InZone Center at the Global Studies Institute of the University of Geneva. In 2016 she published her PhD thesis on the triggering act of an international armed conflict.

Abstract

This article clarifies the control a State should have over an armed group for the triggering act of an international armed conflict and for the internationalization of non-international armed conflicts in international humanitarian law. It explains the reasons for the distinction between these two types of attribution and details the specificities of each test, with an innovative approach. The author proposes new control tests for both triggering and internationalization, rejecting the effective and overall control tests regarding internationalization proposed by the International Court of Justice and the International Criminal Tribunal for the former Yugoslavia. For instance, regarding the internationalization of a non-international armed conflict, a general and strict control test is proposed. Finally, this article addresses specific issues like the difficult question of the control required for an occupation through an armed group.

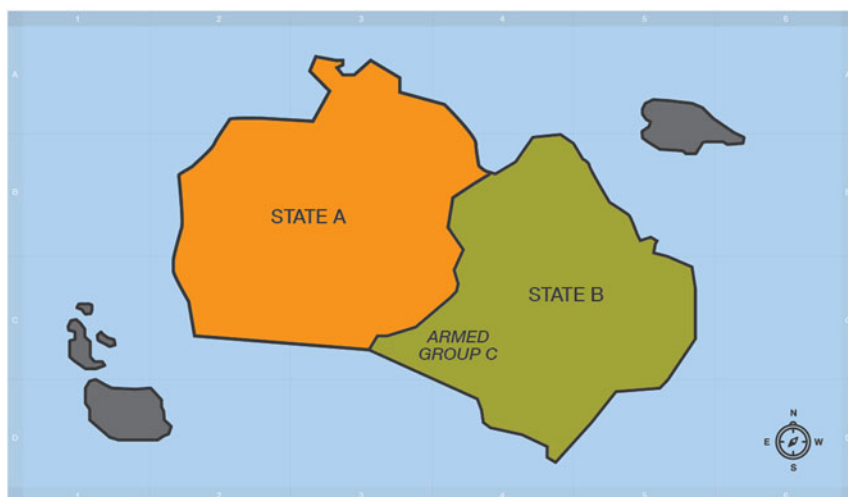
Keywords: internationalization, control tests, classification, effective control, overall control, responsibility, indirect occupation, direct intervention.

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* The author wishes to thank Professor Marco Sassòli and Chloé F. Smith for their thoughtful comments and suggestions. This article is an adaptation of a section of the author's doctoral thesis on the triggering act of an international armed conflict. See Djemila Carron, *L'acte déclencheur d'un conflit armé international*, Schulthess, Geneva, 2016.

Introduction

Imagine an armed group C engaged in massive hostilities against State B within the territory of this State B. Now, imagine a State A endorsing the actions of armed group C with arms supplies, finances and military advisers. Does this support transform the pre-existent non-international armed conflict (NIAC) between armed group C and State B into an international armed conflict (IAC) between States A and B? What is the control State A should have over armed group C for an IAC between States A and B to occur? Should such a control be the same if armed group C *starts* its hostilities against State B with the support of State A (i.e., without the pre-existence of a NIAC between armed group C and State B)? This theoretical case will be used throughout this article to determine what type of control a State should have over an armed group for an IAC to exist. This case resembles real conflict situations such as the support provided by the United States to the Contras in Nicaragua in the 1980s,¹ the endorsement of the Bosnian Serb armed forces (Vojska Republike Srpske, VRS) by the Federal Republic of Yugoslavia (FRY) in the 1990s,² or more recently, the backing of separatists in Ukraine by Russia.³ In all these concrete examples, there is a crucial need to determine the point at which the support of a State for an armed group that is engaged in hostilities against another State makes the endorsing State a party to an IAC.



- 1 This relationship between the Contras and the United States is analyzed in depth in International Court of Justice (ICJ), *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986.
- 2 The link between VRS and the FRY is scrutinized in International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-I, Judgment (Appeals Chamber), 15 July 1999.
- 3 For a text on the classification of the situation between Russia and Ukraine, see Laura R. Blank, "Ukraine's Crisis Part 2: LOAC's Threshold for International Armed Conflict", *Harvard National Security Journal* (Online), 25 May 2014, available at: <http://harvardnsj.org/2014/05/ukraines-crisis-part-2-loacs-threshold-for-international-armed-conflict/> (all internet references were accessed in November 2016).

These challenging questions are not new – for instance, many authors and judicial instances have already dealt with the tricky issue of internationalization of NIACs.⁴ Throughout this contribution, the above interrogations will be addressed with an innovative approach, focusing on the concrete consequences of the emergence of an IAC – principally the application of the law of IACs.⁵ It is nevertheless accepted for this article that international humanitarian law (IHL) recognizes only two types of armed conflicts, IACs and NIACs,⁶ and that these two categories of armed conflicts lead to the application of specific sets of norms – the law of IACs and the law of NIACs – with few, but crucial, differences.⁷ A widely shared definition of NIACs will also be endorsed, requiring an organized armed group and hostilities of a certain level.⁸

The broad issue addressed in this article will be divided into two sub-questions: (1) What is the control a State should have over an armed group engaged in a NIAC to internationalize this NIAC into an IAC (control for internationalization)? (2) What is the control a State should have over an armed group for the creation of an IAC without the pre-existence of a NIAC (control for triggering)? These two control tests are slightly different one from another, and should be separated from a third – the control leading to State responsibility in international law and IHL – despite the fact that all revolve around the issue of attribution. Indeed, the three control tests aim to determine what the State's

4 For references on internationalization, see the section on “Control for Internationalization”, below.

5 See, among others, Article 2 common to the four Geneva Conventions of 1949, which states that each of the Geneva Conventions “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”.

6 See common Articles 2 and 3; Article 1, paragraph 3 of Additional Protocol I (AP I); and Article 1 of Additional Protocol II (AP II). Customary IHL also recognizes this IAC-NIAC dichotomy. Indeed, for each rule of the International Committee of the Red Cross (ICRC) Customary Law Study, it is mentioned whether the rule is customary in IACs and/or in NIACs; see the ICRC Customary IHL database, available at: www.icrc.org/customary-ihl/eng/docs/home. For scholars who emphasize this dichotomy, see, among many others, Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 37–39; Marko Milanovic and Vidan Hadzi-Vidanovic, “A Taxonomy of Armed Conflict”, in Nigel D. White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bellum*, Edward Elgar, Cheltenham, 2013, pp. 272–273; Dino Kritsiotis, “The Tremors of Tadić”, *Israel Law Review*, Vol. 43, No. 2, 2010, pp. 264–266.

7 For instance, in the law of NIACs, there is no recognition of the statuses of combatant and prisoner of war equivalent to those existing in the law of IACs. Consequently, in NIACs, members of an organized armed group could, for example, be arrested and prosecuted for their military actions. See, for instance, Robert Kolb, *Jus in bello: Le droit international des conflits armés: Précis*, Helbing Lichtenhahn, Basel, 2009, pp. 448–450; Jean d’Aspremont and Jérôme de Hemptinne, *Droit international humanitaire: Thèmes choisis*, Pedone, Paris, 2012, p. 46.

8 For more details on these two criteria, see ICTY, *The Prosecutor v. Limaj, Bala and Musliu*, Case No. IT-03-66, Judgement (Trial Chamber II), 30 November 2005, para. 84; ICTY, *The Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Judgment (Trial Chamber II), 10 July 2008, paras 175–206; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report to the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, pp. 8–11; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 164–180 (and attached references); Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 122–133.

control should be over an entity to attribute to this State the actions and omissions of this entity. As we will see in depth, the author of this article proposes new control tests for both triggering an IAC and internationalization of a NIAC into an IAC, rejecting for instance the overall and effective control tests regarding internationalization, and arguing instead that a State A should have a general and strict control over an armed group C already engaged in hostilities against a State B for those hostilities to be internationalized. Pointedly, this means that according to the author, the degree of control required for internationalization should be higher than that of overall control supported by the majority opinion. State A's training, equipping, financing and help in the general planning of armed group C's military operations against State B would therefore not suffice to internationalize the conflict. As a result, fewer situations would be covered by the law of IACs, but this set of norms would apply to violence on the ground *de facto* taking place between two States.

The first section of this article will explain the control necessary for State responsibility and the reasons for which this test must be differentiated with the control tests for triggering and internationalization. Then the details of the control tests for triggering and internationalization will be highlighted. Finally, some remarks on this topic will be addressed, such as the impact of occupation over a pre-existent NIAC.

Control leading to State responsibility

What is the control a State should have over an armed group to make that State responsible for the armed group's actions and omissions? This question addresses one of the crucial issues of international law of the past decades. In order to clarify the author's reflections on why the controls for triggering and internationalization do not need to be in conformity with the control test for State responsibility, a brief summary of the different positions on the latter will be explained in this section.

Description of the control leading to responsibility

In international law, it is principally the rules on responsibility of States for internationally wrongful acts that have raised the question of attribution of actions and omissions to a State.⁹ Indeed, one of the conditions for this responsibility is the attribution of conduct to a State.¹⁰ Adopted by the

9 See United Nations (UN), Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by UNGA Res. 56/83, 12 December 2001 (Draft Articles), available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

10 Article 2 of the Draft Articles states that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State". For a detailed analysis of attribution for responsibility of States in international law, see Jérôme Reymond, *L'attribution de comportements d'organes "de facto" et d'agents de l'état en droit international: Etude sur la responsabilité internationale des états*, Schulthess, Geneva, 2013.

International Law Commission in 2001, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles)¹¹ essentially clarify the law on attribution for responsibility by, in sum,¹² making a distinction between the attribution of actions and omissions by *de jure* (Article 4) and *de facto* (Article 8) organs of a State.¹³

According to Article 4, paragraph 2 of the Draft Articles, *de jure* organs of a State are mainly defined by domestic law, with some limitations posed in international law.¹⁴ It is a broad category, encompassing all of a State's organs, regardless of their function and hierarchical position.¹⁵ For instance, armed forces and police forces are *de jure* organs of a State. In the *Nicaragua* judgment of 1986 and the *Genocide* judgment of 2007, Article 4 of the Draft Articles was also interpreted by the International Court of Justice (ICJ) to encompass a person or a group of persons under "complete dependence" of a State.¹⁶ This complete dependence control requires very close scrutiny over a person or group of persons, given that all their actions and omissions are attributable to the State in question.¹⁷ Such a person or group can be described as a "*de jure de facto*" organ.

According to Article 8 of the Draft Articles, a *de facto* organ of a State is a "person or group of persons ... acting on the instructions of, or under the direction or control of, that State in carrying out the conduct". The Commentaries to Article 8 of the Draft Articles explain that the decisive element is the existence of "a real link between the person or group performing the act and the State machinery".¹⁸ There are few difficulties with the attribution of persons or groups acting on *instructions*; the delicate point arises when faced with persons and groups under the *direction* or *control* of a State. According to the same Commentaries, a

conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only

11 The Draft Articles of the International Law Commission have not yet been adopted by the General Assembly but were annexed to three UN resolutions in 2001, 2004 and 2007. See UN, Meetings Coverage, 6th Committee, GA/L/3395, 19 October 2010.

12 The Draft Articles distinguish between *de jure* and *de facto* organs of a State but also between persons or entities exercising elements of governmental authority (Article 5), organs placed at the disposal of a State by another State (Article 6), persons or groups of persons exercising elements of governmental authority in the absence or default of the official authorities (Article 9), and insurrectional or other movements which become the new government of a State (Article 10). These articles are left out of this contribution as they are not fundamental to the issues discussed herein.

13 Note that terminology varies from one author to another and from one instance to another. For example, the ICJ does not consistently use references to *de jure* or *de facto* organs.

14 Draft Articles, above note 9, p. 42.

15 *Ibid.*, p. 41.

16 ICJ, *Nicaragua*, above note 1, para. 109; ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paras 391–395.

17 According to the ICJ, "to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them". *Ibid.*, para. 393.

18 Draft Articles, above note 9, p. 42.

incidentally or peripherally associated with an operation and which escaped from the State's direction or control.¹⁹

The particular extent of the control that a State must have over a person or group to be responsible for their actions and omissions under Article 8 of the Draft Articles is at the heart of a major controversy in international law between the ICJ and the International Criminal Tribunal for the former Yugoslavia (ICTY).²⁰ In broad terms, the ICJ holds that if a person or group does not fulfil the test to become a *de jure de facto* organ of a State (complete dependence), it could only fall into the responsibility of a State if that person or organ were to be under the *effective control* of the State – an effective control that has to be fulfilled for each of the operations concerned.²¹ If an organized military group were to be concerned, the ICTY considers that an *overall control* would be sufficient for such an attribution.²² Indeed, in the famous *Tadić* judgment of 1999, the ICTY had to decide on the existence of an IAC between the FRY and Bosnia and Herzegovina. To address this issue, the Tribunal had to determine what the control should be of the FRY over the VRS forces in order to attribute actions of the VRS to the FRY, and thus transform the NIAC between Bosnia and Herzegovina and the VRS into an IAC between Bosnia and Herzegovina and the FRY. The ultimate goal of the exercise was to decide on the responsibility of Duško Tadić, leader of the Serb Democratic Party, on the basis of Article 2 of the ICTY Statute; this Article only applies in IAC situations.²³

When assessing the question of control for internationalization of the armed conflict, the ICTY based its argumentation on Article 8 of the Draft Articles.²⁴ In other words, according to the ICTY, attributions for responsibility and for internationalization must obey the same criteria and be based on the Draft Articles.²⁵ Yet the ICTY rejected the interpretation made by the ICJ on the control test under Article 8 and opted for an overall control, broader than the effective control defined by the ICJ. The ICTY believed that the effective control

¹⁹ *Ibid.*, p. 47.

²⁰ See, for instance, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, para. 4-32; ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997, Dissenting Opinion of Judge McDonald, paras 16–34; Marko Milanovic, “State Responsibility for Genocide”, *European Journal of International Law*, Vol. 17, No. 3, 2006, pp. 575–604; Antonio Cassese, “The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia”, *European Journal of International Law*, Vol. 18, No. 4, 2007; Leo Van den Hole, “Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadić”, *Syracuse Journal of International Law and Commerce*, Vol. 32, No. 2, 2005; Theodor Meron, “Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout”, *American Journal of International Law*, Vol. 92, No. 2, 1998; Christine Byron, “Armed Conflicts: International or Non-International?”, *Journal of Conflict and Security Law*, Vol. 6, No. 1, 2001, pp. 66–90.

²¹ ICJ, *Nicaragua*, above note 1, paras 109–117; ICJ, *Genocide*, above note 16, paras 398–415.

²² ICTY, *Tadić*, above note 2, paras 88–145; ICTY, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-4/I, Judgment, 24 March 2000, paras 130–134.

²³ ICTY, *Tadić*, above note 2, paras 80–87.

²⁴ *Ibid.*, paras 98, 103–104, 117.

²⁵ In the same sense, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (Commentary on GC I), Art. 2, paras 267–268.

test was not convincing due to “the very logic of the entire system of international law on State responsibility”²⁶ and “international judicial and State practice”.²⁷ The ICTY explained its test further:

Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.²⁸

In other words, the ICTY holds that it is important to distinguish between the control for individual persons (effective control) and the control for militarily organized groups (overall control).

From a general perspective, it is interesting to note that the main difference between the effective control of the ICJ and the overall control of the ICTY is one of nature, and not one of intensity of the relationship between the armed group and the controlling State.²⁹ It is true that the effective control of the ICJ requires a closer scrutiny by a State over an armed group than the overall control, but above all, this effective control necessitates an influence over a specific action, which is not the case for the overall control.³⁰

Concerning the test for responsibility, the author supports the effective control adopted by the ICJ for three main reasons. Firstly, the ICJ test corresponds to the logic of the Draft Articles, which reflects the customary law on this topic. The Commentaries to Article 8 of the Draft Articles underline the necessity for a State to have a control over a group for a specific action in order to be held responsible for the behaviour of this group.³¹ Therefore, unlike the overall control test, the Commentaries coincide with the effective control test.³² Secondly, the ICTY control was conceptualized to address an issue of conflict classification and criminal responsibility of individuals, not a State responsibility issue, and this had an influence on the wording of the test. For instance, the overall control differentiates an attribution for persons from an attribution for military organized groups. The organization of an armed group is a key concept in IHL.³³ It seems that the ICTY used this concept because, in reality, its aim was

26 ICTY, *Tadić*, above note 2, para. 116.

27 *Ibid.*, para. 124.

28 *Ibid.*, para. 137.

29 M. Milanovic, above note 20, p. 581. See also L. Van den Hole, above note 20, pp. 280–286, who argues that overall and effective controls do not substantially differ.

30 ICJ, *Genocide*, above note 16, para. 400.

31 Draft Articles, above note 9, p. 48. See also M. Milanovic, above note 20, pp. 582–583.

32 Draft Articles, above note 9, p. 47.

33 See above note 8.

to classify a conflict for criminal purposes, not to address State responsibility issues. Thirdly, in the author's view, the logic of the ICTY's test is flawed. It questions the ICJ effective control with an inaccurate reading of it,³⁴ and has an interpretation of Article 8 of the Draft Articles that does not correspond to their Commentaries.³⁵ In reference to the illustrative case, the author therefore endorses the view that State A is responsible for actions of armed group C only if it has an effective control over this armed group for the actions concerned. This reasoning does not preclude the possibility, supported by many authors and instances,³⁶ that the control necessary for internationalization could be the one identified by the ICTY even though the reference to rules on responsibility was not necessary.

Is it necessary to adopt this control test for responsibility in establishing the existence of an IAC?

As explained above, for a State to be held responsible for the actions and omissions of an armed group, it must have effective control over members of the armed group. For the control tests for triggering and internationalization, there would be some advantages to using the test for responsibility. For instance, with one single attribution test, the security of law would, most likely, be better conserved.³⁷ That being said, there are three main reasons why the controls necessary for triggering and internationalization do not need to follow the control leading to responsibility.

Firstly, the rules on responsibility are secondary rules of international law, whereas IHL rules are primary rules of international law. As explained by Marko Milanovic and Vidan Hadzi-Vidanovic, it seems "conceptually inappropriate for secondary rules of attribution to determine the scope of application of the primary rules of IHL".³⁸ Indeed, secondary rules have the specific goal of sanctioning violations of primary rules and could not, at the same time, define the material scope of application of those primary rules – it would be a circular argumentation. As mentioned by Katherine Del Mar,

it would ... be worrying if, in order to apply the rules of IHL of international armed conflict to a particular individual, it was first necessary to establish that the actions of this individual could be attributed to a state which consequently incurred responsibility for his or her actions.³⁹

34 In the same sense, see M. Milanovic, above note 20, pp. 583–588.

35 See the section "Description of the Control Leading to Responsibility", above.

36 See, among others, ICJ, *Genocide*, above note 16, para. 404; Marko Milanovic, "What Exactly Internationalizes an Internal Armed Conflict?", *EJIL: Talk!*, 7 May 2010, available at: www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/; Marco Roscini, *Cyber Operations and the Use of Force in International Law*, Oxford University Press, New York, 2014, pp. 138–139.

37 ICTY, *Tadić*, above note 2, paras 103–105.

38 M. Milanovic and V. Hadzi-Vidanovic, above note 6, p. 294.

39 Katherine Del Mar, "The Requirement of 'Belonging' under International Humanitarian Law", *European Journal of International Law*, Vol. 21, No. 1, 2010, pp. 108–109. See also M. Milanovic, above note 20, pp. 583–585.

Secondly, there is no structural reason to adopt the control test leading to State responsibility when assessing what control a State should have over an armed group for an IAC to exist, since these are completely different questions.⁴⁰ On the one hand, with the control leading to responsibility, the goal is to establish what the control of a State should be over an armed group to make this State responsible for actions and omissions of the armed group – i.e., the link is sufficient to make a State responsible for those actions and omissions. For instance, in the theoretical case described at the beginning of this article, if massive killings by armed group C are attributed to State A because of its control over armed group C, State A is considered as the author of these killings and has obligations to repair towards the victims or their families.⁴¹ On the other hand, for the controls for triggering and internationalization, the aim is to define the type of control of a State over an armed group necessary to make the State a party to an IAC because of the actions of the armed group – i.e., the link is sufficient to engage a State in an IAC. Since States have many obligations when partaking in an IAC, the consequences of this attribution are extensive. For instance, States Parties have the duty to protect cultural objects and the natural environment, to take precautions in the conduct of military operations, to ensure that legal advisers are available to instruct military commanders, to repress breaches of the Geneva Conventions and their Additional Protocols, etc.⁴² Also, the existence of an IAC could have effects outside of the battleground. For example, if State A is engaged in an IAC with State B because of its control over armed group C, State A is authorized to arrest and detain citizens of State B on its territory under certain conditions even though State A is not directly engaged in hostilities with State B on the ground, and *vice versa*.⁴³

Thirdly, and more substantially, the rules of attribution for responsibility do not take into account the peculiarities of attribution for triggering and internationalization. This is completely understandable, because this is not their object. According to the author, the control tests for triggering and internationalization should have, at their core, their consequences – i.e., the existence of an IAC and the application of the law of IACs. In other words, the central point is to ensure the relevancy of applying the law of IACs to hostilities that concretely, on the ground, take place between an armed group and a State. More precisely, it is important to keep in mind that in the absence of strong control by a State, an

40 Many authors and instances have underlined the differences between the controls for responsibility and internationalization. See, among many others, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, paras 17–19; ICTY, *Tadić* (Trial Chamber), above note 20, Dissenting Opinion of Judge McDonald, para. 27; ICJ, *Genocide*, above note 16, paras 402–406; ICTY, *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, paras 230–231; Andrew Yuile, “At the Fault-Lines of Armed Conflict: The 2006 Israel-Hezbollah Conflict and the Framework of International Humanitarian Law”, *Australian International Law Journal*, Vol. 16, No. 1, 2009, pp. 197–199; T. Meron, above note 20, pp. 237–242; C. Byron, above note 20, pp. 83–84.

41 See Articles 28 *et seq.* of the Draft Articles, above note 9.

42 See, for instance, Articles 53, 57, 82 and 85 of AP I, among other provisions of the Geneva Conventions, Additional Protocols, IHL treaties and customary IHL.

43 See GC IV, Art. 42.

armed group does not have the capacities and the attributes to respect the law of IACs. For instance, many articles of the law of IACs refer to a State's territory, legislation, government, etc.⁴⁴ In the same sense, a State would need strict control over an armed group to ensure that it respects the extensive rules of IACs mentioned above, like the detailed obligations regarding the conduct of military operations.⁴⁵ Finally, the State attacked by the armed group would accept the application of the law of IACs against its adversary only if the armed group was tightly controlled by another State.⁴⁶ States have indeed agreed to apply the law of IACs only to hostilities between sovereign entities.⁴⁷

In sum, the control tests for triggering and internationalization may substantially – if accidentally – correspond to the effective control of the ICJ, although there is absolutely no obligation to do so. The tests for triggering an IAC and for internationalization, and their specific content, will be addressed in the next section.

Control for triggering

What is the control that a State should have over an armed group for an IAC to be created without the pre-existence of a NIAC between this armed group and another State? This is a seriously neglected question in doctrine and jurisprudence. There have been a large number of articles and judgments on control tests for responsibility and internationalization of a NIAC, but very few on control for triggering an IAC – most authors and instances simply transpose their reasoning with the other types of existing control tests.⁴⁸

As previously addressed, the control necessary for State responsibility should be distinguished from the control tests for triggering and internationalization. In the author's view, the test for triggering is also slightly

44 See Alan Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts*, Institute for Human Rights, Åbo Akademi, Turku, 2005, p. 247; Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 15–20; S. Sivakumaran, above note 8, pp. 72–77.

45 As explained above, States have many obligations when they are parties to an IAC. To ensure the respect of those obligations by an armed group, the State must have close control over the armed group.

46 See, for instance, M. Milanovic and V. Hadzi-Vidanovic, above note 6, pp. 272–273; Katie A. Johnston, "Transformations of Conflict Status in Libya", *Journal of Conflict and Security Law*, Vol. 17, No. 1, 2012, p. 85; Jed Odermatt, "'New Wars' and the International/Non-international Armed Conflict Dichotomy", International Institute of Higher Studies in Criminal Sciences, 2009, pp. 14–17; Marco Sassòli, "The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?", in Sienho Yee and Wang Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London and New York, 2001, p. 311.

47 Note that the State's control over an armed group does not necessarily mean that the armed group's members would acquire the status of prisoners of war if caught by another State.

48 See, for instance, Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *Collected Courses of The Hague Academy of International Law*, Vol. 163, Sijthoff and Noordhoff, Alphen aan den Rijn, 1979, p. 131.

different from the one for internationalization, and this is with regard to two main elements. Firstly, when analyzing the case of internationalization, the focus is on the power that a State acquires over an armed group which is *already engaged in a NIAC*. This means there are ongoing hostilities of a certain level, an organized armed group and the application of the law of NIACs – a set of rules that matches with the identity of the parties fighting on the ground.⁴⁹ In this situation and in reference to our theoretical case, the central question is, thus, on the level of control that State A must gain over armed group C in order to consider that State A is fighting through armed group C against State B, and consequently to determine if an IAC exists between States A and B. With the control for triggering, there is no previous NIAC between armed group C and State B. Therefore, the focus is on the control of State A over armed group C when hostilities start between C and State B. Secondly, for the control for triggering, it is important to ensure that a State is behind the armed group for the particular use of force that will lead to the emergence of an IAC. This is different for the control test for internationalization, which requires a general relationship between the armed group and the supporting State⁵⁰ and therefore does not require the control of a State over an armed group for a specific act.

In order to analyze the specificities of the control test for the triggering act of an IAC, a short explanation of some of the author's positions is needed. The triggering act of an IAC must be a use of force that can be defined as a physical act leading directly to deaths, injuries, damage or destruction to people or objects.⁵¹ The majority view, supported by the author,⁵² also holds that IACs do not require any threshold of violence to be triggered.⁵³ This is contrary to NIACs,

49 The IAC-NIAC dichotomy is mainly based on the identity of the parties to the hostilities. The law of IACs applies to "armed conflict which may arise between two or more of the High Contracting Parties", i.e. States (common Article 2), whereas the law of NIACs applies to "armed conflict not of an international character", i.e. between a State and an armed group or between armed groups (common Article 3). See Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the War on Terror", *Fletcher Forum of World Affairs*, Vol. 27, No. 2, 2003, pp. 58–59; Marco Sassòli, "Transnational Armed Groups and International Humanitarian Law", Program on Humanitarian Policy and Conflict Research, Harvard University, Cambridge, MA, 2006, p. 4.

50 M. Milanovic, above note 20, p. 581.

51 This is thoroughly explained in the author's PhD thesis. Many authors and instances support partly or totally the different elements of this definition. See the references provided in Djemila Carron, *L'acte déclencheur d'un conflit armé international*, Schulthess, Geneva, 2016, pp. 139–200.

52 See, among many others, ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70; ICTY, *Delalić*, above note 40, paras 184, 208; International Criminal Court (ICC), *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, paras 207–209; ICRC, "How Is the Term 'Armed Conflict' Defined in International Humanitarian Law?", Opinion Paper, Geneva, March 2008, pp. 1–3, 5; UN Human Rights Council, Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, A/HRC/3/2, 23 November 2006, para. 51; D. Akande, above note 6, pp. 40–42; Masahiko Asada, "The Concept of 'Armed Conflict' in International Armed Conflict", in Mary Ellen O'Connell (ed.), *What Is War? An Investigation in the Wake of 9/11*, Martinus Nijhoff, Leiden and Boston, MA, 2012, pp. 55–67; Jann K. Kleffner, "Scope of Application of International Humanitarian Law", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2013, pp. 44–45; M. Roscini, above note 36, pp. 132–136.

53 D. Carron, above note 51, pp. 201–254.

which only exist if a certain level of hostilities occurs.⁵⁴ In other words, when defining what the control should be of State A over armed group C for the creation of an IAC between States A and B without the pre-existence of a NIAC between armed group C and State B, the control of State A over armed group C must be determined in order for the first use of force by C to create an IAC between States A and B. For example, the first gunshot by a fighter of armed group C against a soldier of State B triggers an IAC between A and B, with the application of the law of IACs in its entirety.⁵⁵ Yet, as explained previously, the law of IACs confers obligations to a State Party that could only be ensured if State A is closely linked to armed group C. In addition, an armed group will only be able to respect the law of IACs if it is tightly connected to a State, and States will accept the application of the law of IACs only when they consider that the conflict is between States.⁵⁶ Therefore, it is solely when an armed group is very well connected to a State that the law of IACs is the appropriate set of norms to govern hostilities between this controlled armed group and another State.

Such specificities and consequences must be at the heart of attribution of the triggering act. The author proposes a new test of control for the purpose of triggering an IAC between States A and B. In the test suggested, control necessary for triggering an IAC must be firstly specific regarding its *scope*. In other words, the focus should be on the control over an armed group for a specific act, like for attribution for responsibility. Indeed, as it is solely a use of force that can trigger an IAC, this specific act must be controlled by the State. Secondly, concerning the *intensity* of the control, the author is in favour of a strict relationship between the States – i.e., for an IAC to exist between States A and B, State A must closely control armed group C that is using force against State B. For instance, when armed group C uses force for the first time against State B, State A should have a crucial and leading role in organizing, coordinating and planning this specific military action. It must finance, train, equip, counsel and provide operational support to armed group C. State A may also provide to armed group C part of its infrastructure if necessary, like its detention facilities, justice mechanisms or part of its territory. This attribution test ensures a strong presence of a State beyond the triggering act of an IAC, which also corresponds to an interpretation of Article 2 common to the four Geneva Conventions.⁵⁷ In the authors' view, the test which suggests control to be specific regarding its scope and strict regarding

⁵⁴ See above note 8.

⁵⁵ This “first shot theory” was developed by Jean Pictet in the ICRC Commentaries to common Article 2 in 1952. It is still the view of the ICRC, as confirmed in its Commentary on GC I, above note 25, Art. 2, paras 236–244.

⁵⁶ See the section “Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?”, above.

⁵⁷ D. Carron, above note 51, pp. 280–301. For example, when interpreting common Article 2 according to the interpretative method of the Vienna Convention on the Law of Treaties, the context must be taken into account (Article 31, paragraph 2 of the Vienna Convention) – notably common Article 3, which establishes the existence of NIACs and of the law of NIACs. The author is of the opinion that the definition of IACs should permit NIACs to exist, as the law of NIACs is the appropriate set of rules to govern hostilities between a State and an armed group. Consequently, it is necessary to have a strong presence of a State behind a potential triggering act of an IAC.

its intensity, as proposed in this article, could be, in substance, comparable to the effective control test developed by the ICJ regarding Article 8 of the Draft Articles.⁵⁸ This would also have the advantage of avoiding a State being engaged in an IAC by actions for which it would not be responsible under international law.

This control test may appear restrictive in comparison with the overall control test developed by the ICTY regarding internationalization. As explained above, the control tests for triggering and internationalization of armed conflict should be distinguished, and the next section will address the reasons why the author does not endorse the overall control even for internationalization. Moreover, only a restrictive control test is adapted to the impact of triggering – i.e., the creation of an IAC with the first use of force between an armed group controlled by a State and another State. For the author, if the result of the overall control test would permit a conflict to be classified as an IAC more rapidly and thus the more generous law of IACs would be applied, it would nevertheless be incompatible with the capacities of States and armed groups, and the willingness of States to accept that the law of IACs applies.⁵⁹

Control for internationalization

Preliminary remarks

What is the control that a State should have over an armed group engaged in a NIAC to internationalize this NIAC? The answer to this central question of IHL will have an important place in this article. As demonstrated above, control for internationalization must be distinguished from the control tests for State responsibility and triggering an armed conflict. Therefore, to address the present interrogation, the consequences of internationalization – i.e., the shift from a NIAC to an IAC, and the application of the law of IACs to the hostilities – will be at the centre of this analysis.

Prior to any further investigation, a more precise definition of internationalization is needed. Even if internationalization can encompass many situations, this article focuses on the specific case where State A controls armed group C located in State B and where there is an ongoing NIAC between C and State B. Internationalization is thus restrained to the transformation of a NIAC into an IAC because of the control a State obtained over a non-State party to a NIAC.⁶⁰ Internationalization by the direct intervention of a State will not be the main focus of this article.⁶¹ As a reminder, however, a direct intervention is

58 ICJ, *Nicaragua*, above note 1, paras 109–117; ICJ, *Genocide*, above note 16, paras 398–415. See also the section “Description of the Control Leading to Responsibility”, above.

59 See the section “Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?”, above.

60 There are other situations of internationalization like the recognition of belligerency or the acquisition of statehood by the non-State party to a NIAC.

61 See, nevertheless, the section on “Direct Interventions”, below.

when a State enters a NIAC by directly targeting, with its *de jure* organs, the State party to the conflict, or by occupying part of the territory of this State. For instance, when Russian armed forces bombed Georgian military infrastructure, this was considered a direct intervention.⁶² Indirect intervention is when a State enters a NIAC by controlling the non-State party to that NIAC – for example, when the FRY supported Bosnian Serb armed forces engaged in hostilities with Bosnia and Herzegovina.⁶³

Contrary to the opinion of many authors, internationalization is also defined here as the shift from a NIAC to a single IAC.⁶⁴ According to the author, when an IAC is simply added to a NIAC because of the direct involvement of a second State, there is no internationalization but a mere complication of the original armed conflict.⁶⁵ Thus, for an internationalization of the NIAC between State B and armed group C to occur, State A must not only act against State B but must also constitute a single State party to an IAC with C. In other words, it is insufficient for internationalization for State A to act *against* State B or *with* armed group C. To obtain internationalization, State A must act *through* armed group C or armed group C *on behalf of* State A *against* State B.⁶⁶ The question of internationalization is therefore restricted to the transformation of the non-State party to a NIAC into a State party to an IAC, even though, concretely on the ground, the operations are led by an armed group.

Doctrine and jurisprudence

When subject to internationalization, doctrine and jurisprudence tend to focus on four main issues: (1) determining the situations leading to internationalization, (2) deciding on the necessary control that a State must have over an armed group in an indirect involvement, (3) fixing the level of direct intervention for internationalization, and (4) deciding on the level of internationalization when confronted with direct interventions. Despite some controversies on each of these issues, the majority opinion believes that (1) direct and indirect interventions of a second State into a NIAC on the side of the non-State party are the two main

62 See, for instance, CNN, “Russian Warplanes Target Georgia”, 9 August 2008, available at: <http://edition.cnn.com/2008/WORLD/europe/08/09/georgia.ossetia/>.

63 “Direct” and “indirect” interventions are generally the terms used in the doctrine and jurisprudence. See, among others, ICTY, *Tadić*, above note 2, para. 84; ICC, *Lubanga*, above note 52, para. 209; J. d’Aspremont and J. de Hemptinne, above note 7, pp. 53–57; R. Kolb, above note 7, pp. 183–186.

64 Many authors analyzed the various situations leading to internationalization (mainly direct and indirect interventions) first, and then scrutinized the level of internationalization in a second phase of analysis. In this second phase, some writings opt for the “theory of pairings”, which classifies hostilities between the two States involved as an IAC and violence between the non-State party and the attacked State as a NIAC. See, for instance, J. d’Aspremont and J. de Hemptinne, above note 7, p. 53. In the author’s opinion, it would be better to begin by defining the cases of internationalization (shift from a NIAC to a single IAC) and then to continue by analyzing the criteria for such an internationalization. Therefore, in the case of the “theory of pairings”, in the author’s view, there is no transformation of a NIAC into an IAC (no internationalization) but rather the addition of an IAC to a previously existing NIAC.

65 K. Johnston, above note 46, pp. 99–100.

66 See for instance, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, paras 4–32.

situations leading to internationalization,⁶⁷ (2) an overall control is necessary for internationalization through indirect intervention,⁶⁸ (3) a certain level of direct intervention is necessary for internationalization,⁶⁹ and (4) a direct intervention of a State in a pre-existent NIAC does not necessarily internationalize the whole NIAC.⁷⁰ The goal of the author's contribution is to answer the second of these four issues. The other elements will also be raised when necessary.

Much has been written on the issue of the necessity of overall control for internationalization through indirect intervention, and it was at the centre of one of the biggest tensions between the ICJ and the ICTY.⁷¹ In the author's view, the debate between these two courts was not on control for internationalization but rather on control for responsibility, as the two jurisdictions pretended to base their argumentation on the Draft Articles. Nevertheless, since the ICTY considered that these two control tests must be the same, the controversy contaminated the issue of internationalization.⁷² There are three main positions on the issue of attribution for internationalization. The first one considers that overall control of a State over an armed group is necessary for internationalization.⁷³ This is the majority view, and the one proposed by the ICTY.⁷⁴ Some authors follow this overall control test but maintain that the passage through control for responsibility is unnecessary.⁷⁵ The second position

67 See above note 63.

68 See, among others, ICC, *Lubanga*, above note 52, paras 210–211; Commentary on GC I, above note 25, Art. 2, paras 265–273; Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013, pp. 79–82; Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 71.

69 This question was largely ignored by doctrine and jurisprudence. For a direct intervention to transform a NIAC into a single IAC, some writings require “significant and continuous military action” by the intervening State (ICTY, *The Prosecutor v. Ivica Rajić*, Case No. IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber), 13 September 1996, para. 13) while others are in favour of a less stringent test (ICTY, *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2, Judgment (Trial Chamber), 26 February 2001, para. 108; K. Johnston, above note 46, pp. 96–97; S. Sivakumaran, above note 8, p. 225).

70 As explained in above note 64, the majority view is in favour of the “theory of pairings”. See ICJ, *Nicaragua*, above note 1, para. 219; Tristan Ferraro, “The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict”, *International Review of the Red Cross*, Vol. 97, No. 900, 2016, pp. 1240–1251; D. Akande, above note 6, p. 57; Tamás Hoffmann, “Can Foreign Military Intervention Internationalize a Non-International Armed Conflict? A Critical Appraisal”, in ISISC, Ninth Specialization Course in International Criminal Law, 2009; M. Milanovic and V. Hadzi-Vidanovic, above note 6, pp. 302–303; Jelena Pejic, “Status of Armed Conflicts”, in Elizabeth Wilmshurst and Susan Carolyn Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge and New York, 2007, pp. 90–91; D. Schindler, above note 48, pp. 150–151.

71 See section “Description of the Control Leading to Responsibility”, above.

72 See above note 24.

73 See above note 68.

74 See, for instance, ICTY, *Tadić*, above note 2, paras 88–145. See also ICTY, *Aleksovski*, above note 22, paras 130–134.

75 M. Milanovic and V. Hadzi-Vidanovic, above note 6, pp. 293–295 (without stating a clear position on the issue); M. Milanovic, above note 36; Djamchid Momtaz, “Le droit international humanitaire applicable aux conflits armés non internationaux”, *Collected Courses of the Hague Academy of International Law*, Vol. 292, Martinus Nijhoff, The Hague, 2001, pp. 65–66.

should logically be that of the effective control developed by the ICJ for responsibility. In reality, there are very few texts arguing for an effective control for internationalization.⁷⁶ Finally, a minority view is in favour of an alternative position detached from effective and overall controls.⁷⁷ According to this latter opinion, neither the effective nor the overall controls are adapted to internationalization, and the focus should rather be on determining the relevant criteria for internationalization.⁷⁸

As demonstrated above, the majority view remains in favour of the overall control test. This is also the position of the International Committee of the Red Cross, recently reaffirmed in its new Commentaries on the Geneva Conventions.⁷⁹

The test adopted

Like for the test for triggering, the scope and intensity of the link between State A and armed group C engaged in hostilities against State B must be closely examined in order to determine the point at which the NIAC between C and State B becomes a single IAC between States A and B. The author rejects the overall and effective controls, and opts for a test that is general (in its scope) and strict (in terms of intensity). This test focuses on the consequences of internationalization – i.e., the application of the law of IACs.

Firstly, the control for internationalization should be general in its scope. In other words, like the overall control developed by the ICTY for internationalization or the complete dependence control articulated by the ICJ for State responsibility, and in opposition to the effective control of the ICJ for responsibility, the endorsing State A does not need to exercise its control over armed group C for a specific action.⁸⁰ Indeed, for internationalization to occur, the focus must be on the overall relationship between State A and armed group C and not on the control for specific activities of armed group C, since internationalization must determine the moment when a State is globally acting through an armed group against another State. Consequently, if the specific control seems pertinent for responsibility and for triggering since the cursor is on a particular act, it is not appropriate for internationalization.⁸¹ This general control also has the advantage of avoiding changes of classification according to the control of State A over specific acts of armed group C. Actually, with an effective control test, some actions of armed group C under the control of State A would be governed by

⁷⁶ See, nevertheless, ICTY, *Tadić*, above note 2, Separate Opinion of Judge Shahabuddeen, para. 19.

⁷⁷ This position is well summed up in S. Sivakumaran, above note 8, p. 227.

⁷⁸ D. Akande, above note 6, pp. 61–62; R. Kolb, above note 7, pp. 185–186; James G. Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 323–328.

⁷⁹ Commentary on GC I, above note 25, Art. 2, paras 265–273. See also T. Ferraro, above note 70, pp. 1234–1240.

⁸⁰ M. Milanovic, above note 20, p. 581.

⁸¹ This is one of the reasons why the ICTY opted for a general control for internationalization. See ICTY, *Tadić*, above note 2, para. 131.

IHL of IACs between States A and B, while others would not. The conflict would thus vary from NIAC to IAC, and *vice versa*, along all the hostilities. This would not permit a stable application of the law of armed conflict.⁸² As a result, for hostilities between State B and armed group C to become an IAC between States A and B because of the support provided to C by A, State A does not have to issue instructions to C regarding a particular attack that would mark the entry of State A into the conflict and its internationalization. In the same vein, State A does not need to be behind all the actions of armed group C against State B. It must nevertheless ensure a global presence that should additionally respect the criteria analyzed in the next paragraph.

Secondly, and contrary to the overall control supported by the majority opinion, the level of control for internationalization should be strict in terms of intensity. This criteria requires from endorsing State A a strong presence behind armed group C. The arguments are mainly the same as those developed for attribution for triggering.⁸³ They refer to the consequences of internationalization: the existence of an IAC and the application of the law of IACs to violence which concretely, on the ground, occurs between an armed group and a State. As has already been stated, a State needs a strict control over an armed group to ensure that the rules of IACs are respected. In the same sense, an armed group would only be able to apply the law of IACs if it was under the close scrutiny of a State. Finally, the State attacked by the armed group would accept applying the law of IACs against its adversary only if the armed group was tightly controlled by another State. For all these reasons, it is essential to establish rigorous scrutiny by a State over an armed group party to a NIAC to conclude that this NIAC has become an IAC. This test also has the advantage of being close to the one for triggering, which is logical since both have impacts on classification.⁸⁴ This general and strict control test would, therefore, be reached if State A had a crucial and leading role in organizing, coordinating and planning military actions of armed group C. It is not sufficient for State A to loosely accommodate the activities of armed group C, nor to merely help in the general planning of its military operations, as required by the overall control test. The room for manoeuvre of C should not be too large, and it must be possible to establish a chain of command between the armed group and the controlling State. Additionally, as for the test for triggering, State A must finance, train, equip, council and provide operational support to armed group C, even though this control does not have to be fulfilled for a specific act. State A may also put its infrastructure (such as detention facilities), its justice mechanisms or part of its territory at the disposal of armed group C if necessary.

In addition to the arguments exposed above, the author rejects the overall control for internationalization promoted by the ICTY for several reasons. First, the

82 Commentary on GC I, above note 25, Art. 2, para. 271. For the rest, the Commentary on GC I is in favour of an overall control test for internationalization.

83 See the section "Control for Triggering", above.

84 Both tests require a strict control for intensity. They differ on the scope of the control: specific for triggering, general for internationalization.

ICTY based its control on the Draft Articles; in other words, the ICTY assembled the tests for responsibility and internationalization. The author believes that the secondary rules for responsibility are not adapted to attribution for internationalization in their structures and content.⁸⁵ Second, the effective control of the ICTY was developed to address a question of criminal law. The ultimate goal of the ICTY was to decide on the guiltiness of a person, not on the classification of conflict.⁸⁶ The focus was therefore on international criminal law and not on the law of armed conflict. According to the author, this focus is an explanation as to why the overall control does not take into consideration the concrete consequences of internationalization in IHL, mainly the application of the law of IACs and the extensive obligations it entails for States on and off the battlefield.⁸⁷ The test for internationalization should be focused on the law of armed conflict. Even if there is a clear interdependence between this *corpus* and international criminal law, international criminal law is one of the enforcing instruments of IHL.⁸⁸ IHL and international criminal law do not have the same objective or the same scope of application. The application of IHL must rely on the concrete existence of hostilities and on the identity of the parties to the violence.⁸⁹ It is an operational set of norms that must be applicable at the moment of the hostilities. International criminal law is applied out of the battleground, after hostilities occur, and aims at deciding on the guiltiness of participants to armed conflicts. In the author's view, though the overall control could appear logical in criminal law, it does not coincide with the issue of internationalization of a NIAC. It would indeed lead to a rapid application of the law of armed conflict without taking into account the reality of the battlefield.

With the application of the proposed general and strict test, there would be fewer situations of hostilities covered by internationalization, and thus fewer situations of hostilities dealt with by the application of the law of IACs. It is nevertheless important to underline that when the threshold for internationalization is not met, there is no legal vacuum. Indeed, if the control of State A over armed group C is not sufficient to transform the NIAC between C and State B into an IAC between A and B, the hostilities between C and B remain covered by the law of NIACs,

85 See the section "Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?", above.

86 Article 1 of the ICTY Statute states that the Tribunal has the power "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute".

87 See at the section "Is it Necessary to Adopt this Control Test for Responsibility in Establishing the Existence of an IAC?", above.

88 For a critical approach to international criminal law as an IHL means to enforcement, see Rogier Bartels, "Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials", in Mariëlle Matthee, Brigit Toebes and Marcel Brus (eds), *Armed Conflict and International Law: In Search of the Human Face: Liber Amicorum in Memory of Avril McDonald*, TMC Asser Press, The Hague, 2013; Marco Sassòli and Julia Grignon, 'Les limites du droit international pénal et de la justice pénale internationale dans la mise en oeuvre du droit international humanitaire', in Abdelwahab Biad and Paul Tavernier (eds), *Le droit international humanitaire face aux défis du XXI^e siècle*, Bruylant, Brussels, 2012.

89 See, for instance, common Articles 2 and 3.

completed by rules of international human rights law and domestic law. Also, the support provided by State B is a violation of the principle of non-intervention of the UN Charter,⁹⁰ and B is thus responsible for those actions under international law.⁹¹ Moreover, if State A intervenes directly in the conflict by bombing State B or occupying it, an IAC would emerge between States A and B in addition to the NIAC between State B and armed group C.⁹² To conclude, the goal here is not to restrain the application of the law of IACs with a narrow internationalization test but to apply the law of IACs when it makes the most sense. The author is of the opinion that if the State's control over the armed group is not general and strict, the law of IACs is not the appropriate set of norms to regulate violence which concretely, on the ground, occurs between a State and an armed group. For instance, in the absence of such general and strict control, it would be difficult, if not impossible, for armed group C on the ground and endorsing State A to ensure that prisoner-of-war camps are managed according to the elaborate standards of the Third Geneva Convention regarding quarters, food, clothing, canteens, hygiene, medical attention, and activities.⁹³ In the same vein, armed group C and State A would have to guarantee that prisoners of war – detained by armed group C – were judged for offences through State's A military tribunals.⁹⁴ These are only a few examples of the extensive obligations that a State would have to endorse when party to an IAC through its control over an armed group. In contrast, the law of NIACs seems much more appropriate for regulating hostilities when the armed group involved is under the mere overall control of a State. Indeed, the law of NIACs has been drafted for hostilities involving armed groups. For all those reasons, the test of general and strict control should be endorsed for the internationalization of NIACs.

Specific issues

Direct interventions

The test presented above addresses indirect intervention of a State into a NIAC. What happens in cases of direct intervention, for instance when State A bombs positions of State B in State B during the NIAC between B and armed group C? First, it is important to recall that given that force has been used by one State against another, there is clearly a situation of IAC between A and B⁹⁵ – an IAC that completes the NIAC between B and C. Second, it is interesting to question the point at which the IAC-NIAC classification evolves into a single IAC. As posited by Sandesh Sivakumaran, “[t]he crucial question is whether a single

90 See Article 2, paragraph 7 of the UN Charter.

91 See Articles 28 *et seq.* of the Draft Articles, above note 9.

92 See common Article 2. See also the section “Control for Triggering”, above.

93 GC III, Arts 25–38.

94 *Ibid.*, Art. 84.

95 See the section “Control for Triggering”, above.

armed conflict is being fought, albeit with multiple actors participating in it, or whether parallel armed conflicts are taking place, albeit with some associations within them”.⁹⁶ This is of course an issue of internationalization, and once again, internationalization requires that a State is fighting *against* another one *through* an armed group engaged in a pre-existing NIAC.⁹⁷

There is very little doctrine and jurisprudence on this issue. Despite the minority view of automatic internationalization in cases of direct intervention,⁹⁸ most authors defend the “theory of pairings”.⁹⁹ According to this latter position, an IAC exists alongside a NIAC in cases of direct intervention. Authors nevertheless have a divided opinion on cases where this direct intervention transforms the IAC-NIAC classification into a single IAC. It is interesting to underline that most texts assert a relationship between internationalization and the level of the direct intervention, rather than looking at the closeness of the relationship between the armed group and the intervening State.¹⁰⁰ The author believes that the situation should be decided by the criteria developed for indirect intervention.¹⁰¹ If State A intervenes against State B where there is an ongoing NIAC between B and armed group C, this is an IAC-NIAC situation. The law of IACs governs the hostilities between the two States, and the law of NIACs governs the violence between the State and the armed group. The classification evolves to a single IAC only in a specific situation: when State A generally and strictly controls armed group C, and the violence is in fact between States A and B through armed group C. The reasons for such a conclusion are the same as those for internationalization in the case of indirect intervention.¹⁰²

When there is no NIAC

Where there is a very low level of violence between State B and armed group C, and State A is also providing support to armed group C, the question arises of how to regulate this situation. As the criteria for NIACs are not fulfilled, the situation seems to be governed by international human rights law and all the pertinent domestic law.¹⁰³ For an IAC to emerge in this particular situation, there should be a triggering act – i.e. a use of force by State A against State B, the occupation of State B by State A, or a specific and strict control by State A over armed group C, which

96 S. Sivakumaran, above note 8, p. 224.

97 See the section “Preliminary Remarks”, above.

98 Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, 2012, pp. 171–178; K. Johnston, above note 46, pp. 97–102.

99 See above note 64.

100 See, nevertheless, D. Akande, above note 6, p. 57; Christopher Greenwood, “The Applicability of International Humanitarian Law and the Law of Neutrality to the Kosovo Campaign”, in Andru E. Wall (ed.), *Legal and Ethical Lessons of Nato’s Kosovo Campaign*, International Law Studies, Vol. 78, Naval War College Press, Newport, RI, 2002, pp. 45–46.

101 See the section “The Test Adopted”, above.

102 See the section “The Test Adopted”, above.

103 As a reminder, for a NIAC to exist, even if the author is in favour of a very low threshold of violence, the degree of hostilities is still one of the two criteria recognized for the emergence of a NIAC. See above note 8.

is the test suggested by the author for triggering an IAC.¹⁰⁴ In the author's view, this control test is appropriate in the given situation, since there is no pre-existent NIAC. Thus, as soon as State A specifically and strictly controls armed group C, and this armed group uses force against State B, an IAC exists between States A and B and no threshold of violence is required precisely because the situation is an IAC.¹⁰⁵

The influence of the level of violence

What should the test for internationalization be when, in addition to a NIAC between armed group C and State B, State A massively attacks State B without having a general and strict control over C? In other words, does the intensity of violence between A and B transform the IAC-NIAC situation into a single IAC even though the threshold control for internationalization is not fulfilled?¹⁰⁶ The author believes that the level of violence between A and B has no influence on the classification of hostilities between C and B. Under IHL, internationalization depends on the identity of the parties to the conflict, not on the level of violence.¹⁰⁷ Thus, by applying the general and strict control test for internationalization of a NIAC, it is only if State A generally and strictly controls armed group C that the IAC-NIAC becomes a single IAC. Without this control, State A would not be acting through armed group C and there would be no reason to apply the law of IACs to violence that concretely occurred between a State and an armed group. The violence between A and B is thus governed by the law of IACs, and that between B and C by the law of NIACs.

Occupation

What is the influence on classification of an occupation of State B by State A during a NIAC between armed group C and State B? Does this occupation internationalize the NIAC? In terms of occupation, the law of IACs applies between A and B whether or not there are uses of force between these two States.¹⁰⁸ Also, according to the author, a NIAC can exist during an occupation.¹⁰⁹ In other words, an occupation does not preclude the existence of a NIAC between the occupied State and an

104 See the sections "Control for Triggering", above, and "Occupation", below.

105 See the section "Control for Triggering", above.

106 Some authors suggest that a NIAC could become an IAC because of the intensity of a second State's direct interventions. See, for instance, Emily Crawford, "Unequal Before the Law: The Case for the Elimination of the Distinction between International and Non International Armed Conflicts", *Leiden Journal of International Law*, Vol. 20, No. 2, 2007, p. 449; J. d'Aspremont and J. de Hemptinne, above note 7, p. 58.

107 See above note 49.

108 See common Article 2, paragraphs 1 and 2.

109 For the author's arguments on this point, see D. Carron, above note 51, pp. 372–374, 431–432. For authors following this position, see, among others, ICRC, *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, ed. Tristan Ferraro, Geneva, 2012, pp. 124–128; Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Martinus Nijhoff, Boston, MA, 2009, pp. 301–304; Marko Milanovic, "Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli Targeted Killings Case", *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 384–386.

armed group. This was precisely the situation in Afghanistan after 2001, with an occupation of Afghanistan by the United States and its allies alongside a NIAC between the Taliban (the *de facto* government of Afghanistan) and Afghan rebels. Finally, the author does not think that occupation is sufficient, in itself, to internationalize a NIAC, as occupation does not modify the identity of the parties to the NIAC. For this situation to become a single IAC, a general and strict control by State A over armed group C is required, since it is only in this case that A is fighting against B through C.

There is also the different situation in which State A does not occupy State B but controls armed group C, which itself controls part of the territory of B. Such cases of indirect intervention are not the topic of this article,¹¹⁰ but in the author's view the general and strict control developed above could be the necessary link between State A and armed group C to recognize this indirect occupation.¹¹¹

Conclusion

This article clarifies the control tests for responsibility, triggering and internationalization of conflict in international law and IHL. It explains the reasons for the distinction between these three types of attribution and details the specificities of each test. Regarding the control leading to State responsibility, the author endorses the effective control developed by the ICJ in its *Nicaragua* (1984) and *Genocide* (2007) judgments. If an armed group C is not under the complete dependence of a State A, this State must control armed group C effectively and for the specific act concerned to be responsible for an act by C. This interpretation corresponds to the Commentaries to Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001. Concerning the control for triggering an IAC, a specific and strict control test is preferred. In other words, for State A to be engaged in an IAC against State B through a first use of force by armed group C against State B, A must strictly control C for the specific military act concerned. Finally, the control necessary for internationalization is closely linked to the control for triggering, since they are both tests for classification of armed conflicts. In the author's view, for a pre-existent NIAC between armed group C

110 The level of sufficient control for indirect occupation is controversial among authors. Interestingly, some writers who are in favour of the overall control for internationalization support a more stringent test for indirect occupation. For further details on indirect occupation, see Commentary on GC I, above note 25, Art. 2, paras 330–332; Tristan Ferraro, “Determining the Beginning and End of an Occupation under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012, pp. 158–160, available at: www.icrc.org/en/international-review/article/determining-beginning-and-end-occupation-under-international; J. d’Aspremont and J. de Hemptinne, above note 7, pp. 128–129 (notably note 50); Vaios Koutroulis, *Le début et la fin de l’application du droit de l’occupation*, Pedone, Paris, 2010, pp. 31–34; Marco Sassòli, “The Concept and the Beginning of Occupation”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, 1399–1400. See also ICTY, *The Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Judgment (Appeals Chamber), 29 November 2017, para. 334.

111 See the section “The Test Adopted”, above.

and State B to become an IAC between States A and B due to the relationship between C and A, this control should be strict, like for the test for triggering, but general in the sense that A does not need to control C for specific actions. Indeed, for internationalization, there is no obligation to focus on a particular action as the central question is on the global relationship between the controlling State and the armed group.

This article also addresses specific issues such as direct intervention. In cases of direct interventions by State A in a NIAC between armed group C and State B, there is a NIAC parallel to an IAC, except if State A generally and strictly controls armed group C. In this situation, the NIAC becomes a single IAC. Also, the level of direct interventions by State A has no influence on the classification of the conflict.

This contribution places the different attribution tests and additional issues at the heart of their impact in international law and IHL. According to the author, controls for triggering and internationalization must focus on the consequences they create – i.e., the emergence of an IAC and the application of the law of IACs even though concretely, on the ground, the hostilities are between a State and an armed group. Indeed, these three elements should always be kept in mind when deciding on the control tests: (1) a State needs a strict control over an armed group to ensure that the rules of IACs are respected by the armed group acting on its behalf; (2) an armed group is generally only able to apply the law of IACs if it is under the close scrutiny of a State; (3) a State attacked by an armed group accepts applying the law of IACs against its adversary only if this armed group is tightly controlled by another State. The tests proposed by the doctrine and jurisprudence, notably the overall control of the ICTY, do not reflect these crucial elements of IHL and suggest a reasoning which is more adapted to international criminal law. The risk of this approach is in applying a set of norms that is not adapted to the situation, though is admittedly more generous, to the capacities of the entities engaged in hostilities and to the willingness of States.

In sum, the central issue was to determine the controls for triggering and internationalization without challenging IHL provisions. With such a starting point, the strict control tests were endorsed because the current law of IACs would only be adapted to hostilities concretely taking place between a State and an armed group if the non-State party to the violence was under the close scrutiny of another State. Consequently, control tests have been developed taking for granted the definitions of IACs and NIACs that are largely supported by doctrine and jurisprudence and the existing laws of IACs and NIACs. An alternative position would have been to support less stringent attribution tests, like the overall control test of the ICTY, but to adapt IHL norms for the specific situation where an armed group acts against a State and under the control of another State. This is certainly an area that would require further research and reflection.

REPORTS AND DOCUMENTS

Protecting people deprived of their liberty

Why should the ICRC care about detainees?

Whatever the reason for their detention, people deprived of their liberty are, by definition, vulnerable. They have been taken out of their normal environment and are no longer allowed to manage their own lives.

How vulnerable they are depends on a number of factors, including their individual characteristics (sex, age, etc.), the general situation in which they are detained, the reason for their detention, the stage they are at in any judicial or administrative process, and by whom they are being held.

In addition, systemic shortcomings in facilities, procedures and processes often affect all detainees to some degree, regardless of other factors. For example, in the chaos of armed conflict, detention systems may be badly disrupted or may have to be improvised. And for people detained under criminal law (which accounts for the vast majority of detainees worldwide), the judicial and prison systems are often unable to cope with the numbers, and alternatives to detention barely exist.

The humane treatment of detainees is made even more challenging in prisons that are neglected, overcrowded or in the grip of prison gangs.

In addition, many authorities impose severe restrictions on detainees, and are increasingly resorting to segregation and isolation.

Our long-standing experience

Guided by the Fundamental Principles of the International Red Cross and Red Crescent Movement (the Movement), in particular humanity, impartiality,

neutrality and independence, the International Committee of the Red Cross (ICRC) has acted to improve the conditions of detention and treatment of people deprived of their liberty since 1870.

Prompted by deep concern about their situation, we started visiting prisoners of war in the First World War. We did so on our own initiative, but with the consent of the warring parties. The ICRC's objective was to encourage the warring parties to improve the prisoners' living conditions and to enable the prisoners to tell their families how they were. The processes for visiting prisoners and sending personal information were later developed and codified in international humanitarian law in the 1929 and 1949 Geneva Conventions and the latter's 1977 Additional Protocols.

The ICRC's detention-related activities have progressively evolved from a monitoring role during armed conflicts to a broader range of activities that seek to help individuals deprived of their liberty in a variety of situations and places of detention.

Our goals

International law stipulates that detaining authorities must ensure that any detainees under their jurisdiction are treated humanely – i.e., with the respect due to their inherent dignity and value as human beings. This obligation could be seen simply to entail the preservation of life and health, but in fact humane treatment requires much more than that.

The ICRC's role is to ensure that detainees' dignity and physical integrity are respected, that they are treated in accordance with international humanitarian law and other applicable laws and standards, and, whenever necessary, to help detaining authorities fulfil their obligations.

We work to prevent and put an end to violations of humanitarian law and other applicable laws, and seek to resolve other detention issues of humanitarian concern. We do so from the time of arrest or capture until release, and in certain cases until the consequences of imprisonment have significantly diminished after release. We focus on:

- ending and preventing summary executions and forced disappearances;
- ending and preventing torture and other forms of ill-treatment;
- ensuring that living conditions in detention are decent and ensuring the physical and psychological integrity of detainees, in particular by guaranteeing access to food, drinking water, space, shelter and adequate health care and hygiene in a safe environment;
- restoring and maintaining links between detainees and their relatives and promoting the maximum possible contact between them throughout the period of detention;
- ensuring that detainees may exercise their rights and enjoy due process of law, including the judicial guarantees and procedural safeguards designed to prevent arbitrary detention; and

- contributing to the rehabilitation of released detainees (this most frequently involves addressing medical or psychological issues arising from ill-treatment and overcoming practical challenges faced in reintegrating fully into their communities).

Detainees of particular concern

All detainees are potentially of concern to the ICRC, but we will get involved primarily where people are arrested in connection with armed conflict or other situations of violence. Such detainees, given their real or supposed allegiance to the opponents of the detaining authority, are often at greater risk of ill-treatment. In addition, the circumstances of detention may be more chaotic and involve many different types of authority that lack the will or the resources to fully meet their responsibilities.

The detainees concerned are:

- prisoners of war and civilian internees held by a party to an international armed conflict, as well as civilians held by the occupying power in occupied territories, who are specifically protected by the Third and Fourth Geneva Conventions of 1949 and their first Additional Protocol of 1977;
- individuals held in relation to a non-international armed conflict by the government or a non-State armed group party to this conflict; and
- individuals held in connection with other situations of violence, such as political or social unrest.

Individuals held in relation to a non-international armed conflict or another situation of violence are often mixed with detainees held for other reasons. The latter group of detainees may be adversely affected by this, or all detainees may face the same problems because it is the system itself that is dysfunctional. As a result, the ICRC looks at the living conditions of all detainees held together. We target first and foremost problems of serious humanitarian concern, even if they affect detainees other than those who initially prompted our involvement. This is because it would be contrary to our Fundamental Principles of humanity and impartiality to address the needs of one group of people when another might have identical, or even greater, need of help.

Regardless of the reason for their detention, vulnerable groups such as children, women, foreigners, and wounded, sick and disabled detainees are given special attention, including when they are detained in relation to their immigration status.

Based on specific agreements, the ICRC also monitors the situation of detainees held by the United Nations (UN) or regional peacekeeping forces and those held under the authority of or sentenced by international courts (International Tribunal for the former Yugoslavia, International Tribunal for Rwanda, Special Court for Sierra Leone, International Criminal Court).

Our approach

The welfare of individuals deprived of their liberty is the starting point for the ICRC's activities. We seek to ensure that these individuals live in decent conditions and receive humane and fair treatment in accordance with applicable laws and standards.

This is done through interdependent and complementary activities, namely:

- assessing what detainees need and the problems affecting them, essentially through direct, first-hand experience acquired during visits to places of detention;
- analyzing the causes of these problems in relation to detention systems;
- taking into consideration the views of the people in charge and having confidential discussions on possible solutions at all levels of the hierarchy; and
- deciding on our strategy and carrying out our humanitarian activities within a constructive working relationship with the authorities.

The ICRC's approach to detention issues is founded on having direct access to people in the place where they are being held and fostering a constructive and well-informed dialogue with those in charge.

Assessing detainees' needs

The ICRC works hard to assess and understand what detainees need and what problems are affecting them.

We develop this understanding through visits and by looking at how the detention system works overall to find out what might be causing problems and what sustainable solutions could be put in place.

We look at the country's legal, political, cultural and social background; the roles, organization, policies and resources of those who hold detainees; the security apparatus and chains of command; the criminal justice system and public services such as health, water and energy; and how all the different authorities interact.

The ICRC tries to understand the authorities' situation and point of view, and their willingness and/or ability to address the problems at hand. When considering how we should respond to what we find out, we distinguish between, on the one hand, incapacity, negligence and omission and, on the other, behaviour that intentionally affects the physical and psychological integrity and dignity of detainees.

The information we gather comes from various sources, and we take into account its varying quality and reliability. Key to gathering information are visits to places of detention and direct contacts with detainees, management and staff. We complete our assessments by talking to members of the authorities in the police, military, judiciary, prison authority and health authority, as well as, where

appropriate, lawyers, families of detainees, armed groups, civil society groups and other relevant individuals and organizations.

Developing this broad and holistic understanding of the issues is essential for us to build an effective, practical and sustainable humanitarian response. The assessment also makes it possible to identify the degree of overlap between the ICRC's humanitarian concerns and the authorities' main areas of interest and opportunity, providing an entry point for constructive dialogue. The assessment is regularly reviewed and updated to take into account any changes in conditions that could require a revision of the ICRC's strategy.

Visits to places of detention

Regular visits to detention facilities are a key component of the ICRC approach. They are essential to understanding how detention facilities function and to identifying possible deficiencies.

We make sure we are able to have private conversations with detainees during these visits. For many detainees, these visits and private conversations are a recognition of their existence and dignity as human beings. Talking one-on-one is also the only way to find out how they see their situation and problems, what is important to them and what they think about possible solutions. It enables us to monitor how our work affects them, including possible harmful or perverse effects and how to prevent them. Visits also enable the ICRC, where necessary, to provide direct services to detainees, such as re-establishing contact with their families.

"I wish I could offer you more as a guest in my cell, but I have nothing. But having company here, in this dark and cold place, warms me inside. You are my first visitor since my arrest and I will never forget it."

– *Detainee in interrogation centre, to ICRC delegate*

"You are the only ones I could possibly trust to enter my detention centre. It is not only the detainees who appreciate your visits, but my staff too; we can all trust you. You help me find solutions to the problems I face and you keep me and my staff in check; this is positive teamwork for the good of all."

– *Director of a national-security detention facility*

Direct contact with the authorities in charge and their staff helps us to understand their situation, their motivation and their constraints and challenges – a prerequisite for building a relationship of trust and cooperation and for facilitating a constructive dialogue between them and the ICRC.

Terms and conditions for ICRC visits to detainees

The ICRC has a set of terms and conditions that are based on our long-standing experience of monitoring detainees' living conditions and treatment. Before we can carry out visits, we need to know that the detaining authorities understand and accept our terms. In particular, we insist on the following:

- The right to access all detainees at all stages of their detention, whatever status has been conferred on them by the authorities and wherever they are held.
- The right to have access to all premises used by and for the detainees.
- The right to speak freely and in private (i.e., without witnesses) with individual detainees of the ICRC's choice.
- The right to register detainees of the ICRC's choice. The registration of detainees allows the ICRC to follow up on the specific needs of selected individuals. For example, this might concern minors detained among adults, sick detainees, security detainees or individuals who fear or report abuses.
- The right to repeat our visits. The repetition of visits enables the ICRC to monitor the results of its action, to follow up the individual cases and ensure that its visits do not have undesirable consequences for detainees. The frequency of ICRC visits to a given place of detention depends on the needs identified by the ICRC.

These terms and conditions are enshrined in the Geneva Conventions of 1949 (Article 126 of the Third Geneva Convention and Article 143 of the Fourth Geneva Convention) and are the basis for all agreements worldwide. It is worth noting that a number of national, regional and international monitoring mechanisms have taken their inspiration from them, as have the UN's revised Standard Minimum Rules for the Treatment of Prisoners.

How does the ICRC carry out visits?

We do not make an exhaustive assessment of a place of detention each time we visit. Rather, we establish a set of objectives, then adapt the length of the visit and the composition of the visiting team accordingly. ICRC delegates follow a procedure proven to provide optimal conditions for collecting and analyzing the required information in an objective, holistic and independent manner.

Initial meeting with the detaining authorities

This is an opportunity for us to introduce ourselves and explain our objectives and visiting procedures. For the authorities, it is an opportunity to explain their main concerns, how the detention facility functions, what support they may need and any changes made since the ICRC's last visit. The authorities also answer our

questions about the legal status of detainees, transfers in and out, and any releases, amnesties, deaths or escapes that may have occurred. ICRC delegates should be authorized to consult the facility's registers. Members of the visiting team who specialize in areas such as health, maintenance or technical issues meet with their counterparts in those fields.

Tour of areas used by and for detainees

Together with staff from the detention facility, delegates conduct a tour of all areas used by and for detainees: sleeping quarters, kitchens, sanitary facilities, exercise yards, disciplinary cells, workshops, infirmaries, etc.

Private interviews with detainees and individual registration

ICRC delegates talk privately with groups of detainees or with selected individuals. They hold private interviews (i.e., without witnesses) with detainees that they themselves have selected, for as long as necessary, in a location of the delegates' choice. At this stage, delegates may record the names and personal details of detainees who they feel are in need of individual follow-up.

Final meeting with the authorities

During this stage of the visit, delegates submit their observations and preliminary conclusions to the detaining authorities. They give recommendations and take note of the authorities' responses. They also tell them how the ICRC intends to follow up on the visit.

Who is part of a visiting team?

The number of ICRC representatives making up a visiting team depends on a range of factors, including the number of detainees and the nature and size of the detention facility. Usually, the team is made up of one or more delegates who specialize in detainee visits. Our delegates may be accompanied by ICRC health professionals, water and sanitation engineers, nutritionists and/or interpreters. The local situation – including issues of language, nationality, culture or gender – is taken into account when forming the team.

ICRC doctors or other health professionals play an important role, particularly in the following crucial areas:

- They assess the entire health-care system for detainees. This means assessing the performance of the detaining authority's medical personnel, and their resources, independence and compliance with medical ethics and professional standards. ICRC doctors also look at whether the same standard of care is provided by the health-care systems inside and outside the facility and how the two are connected.

- They assess how living conditions in the place of detention affect detainees' health.
- They are the only members of the ICRC team with the right to access detainees' medical files.
- They may examine detainees who are ill or may have been tortured or subjected to other forms of ill-treatment.
- They can make recommendations for medical treatment.
- They determine, implement and monitor the ICRC's strategy in relation to health-care issues affecting detainees identified during visits.

Detaining authorities' agreement to ICRC involvement

The ICRC systematically reminds the parties to an international armed conflict of its right to access detainees in accordance with Article 126 of the Third Geneva Convention and Article 143 of the Fourth Geneva Convention. Only the practical arrangements of visits to detainees need to be agreed upon with the authorities.

If the conflict in question is not an international armed conflict, the ICRC must obtain authorization to carry out visits. Such authorizations can differ in scope and form. They can be given orally or in writing (e.g., a formal agreement signed by the authorities and the ICRC, an exchange of letters, or official orders issued to detaining facilities). The form of authorization chosen depends on the country's legal system, institutions and usual practice. The ICRC often signs formal

visiting agreements which, depending on the type of constitutional system, may be deemed to be international agreements and published in official national gazettes.

In all circumstances, we make it clear to the authorities what accepting the ICRC's visits means. Meetings are held to explain our working procedures, including with those directly in charge of detention. We also make clear what we will primarily be looking at: the treatment of detainees at all stages of their detention, their living conditions, their contact with relatives, and issues related to the due process of law.

It is important to note that accepting the ICRC's services does not amount to a situation being recognized as a non-international armed conflict and does not affect the legal status of the parties to a conflict. Nor do ICRC visits to detainees confer any particular legal status on those visited.

"We were finding it extremely difficult to manage the bloated prison population, so we opened our doors to anyone who wanted to help. After working with them for around ten years, the ICRC has been our greatest ally. In the beginning it was not easy: we had reservations about working with them, and were even a little suspicious. But time and experience have proven the value of our relationship. The ICRC's staff have been trustworthy partners in making a difference in the lives of detainees."

— *Prison commissioner*

Whatever the format, visiting agreements must always grant the ICRC direct access to detainees in their place of detention, in accordance with the terms and conditions described above.

By accepting our visits, the authorities are expressing their desire that detainees should receive decent, humane treatment. It also shows that the authorities trust our experience, professionalism and competence and realize that, beyond our monitoring role, we can be a part of the solution to the problems affecting detainees, bringing valuable experience, insight and support.

Working with others

The ICRC is not alone in this field: a number of NGOs, human rights organizations, professional associations, private contractors, governments and intergovernmental bodies are also involved in detention-related programmes and activities. This requires coordination and offers opportunities for stronger, combined efforts towards humanitarian problems. We therefore take an active part in meetings with others to ensure our work is useful and complementary and has the maximum impact, and to avoid wastage and overlap.

We also work with other service providers, either combining our efforts with theirs as partners or making use of their expertise for a particular programme. This is always done with full transparency and the agreement of the authorities concerned. Technical subcontractors, for example, often carry out infrastructure projects, while local humanitarian or charitable organizations may be encouraged to work on a particular problem facing detainees. Mobilization of other national or international organizations, with the agreement of the authorities, can also be useful when additional resources or expertise are needed.

For reasons of acceptance, perception, neutrality and independence, National Red Cross and Red Crescent Societies are not usually active within places of detention during armed conflicts and other major violence. In other situations, however, they may help detainees, such as detained migrants, released detainees or their families. In such cases, the ICRC may provide technical support, in line with the Fundamental Principles of the Movement.

What is the legal basis for our visits?

The legal basis for our visits depends on the particular situation at hand.

International armed conflicts

The four Geneva Conventions and Additional Protocol I explicitly give the ICRC the right to act in the event of international armed conflict, as well as a broad right of

initiative. Our mandate to work on behalf of detainees in wartime is very clear: the Geneva Conventions give the ICRC the right to have access to prisoners of war, civilian internees and detainees, including in occupied territories, and to receive all relevant information pertaining to them.

Non-international armed conflicts

The ICRC has a broad right to offer its services to the parties to non-international armed conflicts under Article 3 common to the four Geneva Conventions. Such offers of services include visiting detainees held in relation to the conflict. The detaining authorities are under no legal obligation to accept the ICRC's visits and help for detainees. Nonetheless, the ICRC has continued to offer and carry out these visits for decades, which has led to them being internationally recognized and widely accepted.

Other situations

In other situations warranting humanitarian action, the ICRC has a right of initiative as set out in the Statutes of the International Red Cross and Red Crescent Movement. We offer our services when we believe our involvement will make a positive difference for people deprived of their liberty. We decide to get involved after a preliminary analysis of the situation to see whether our involvement would be necessary. The detaining authorities are under no legal obligation to accept our offer of services and to grant us access to detainees. However, as above, over the decades these visits have come to be a recognized part of our work and accepted by numerous countries.

Our commitment to confidentiality

Detention visits and related activities are subject to the ICRC's long-standing policy and practice of confidentiality. Confidentiality is crucial to ensuring access to places of detention and detainees. Years of experience have shown that confidentiality facilitates candid talks with the authorities in an atmosphere of trust that is geared to finding solutions and avoids the risk of politicization that comes with public exposure.

We respect the confidential nature of our findings, including detention reports and discussions of detention issues. The detaining authorities, for their part, also undertake to respect the confidentiality of our reports, letters and all other forms of confidential communication with our representatives. They commit to maintaining dialogue with the ICRC on detention matters and take steps to address the issues that we raise.

However, our commitment to confidentiality is not unconditional. The purpose and justification for this commitment derive from the quality of the dialogue that we maintain with the authorities and on the humanitarian impact

achievable through bilateral, confidential communication. In exceptional and serious circumstances, if we have exhausted all other options and have not got anywhere, we may decide to make our concerns public. We do this if we are convinced that it is the only way to improve the humanitarian situation.¹

We also follow a strict policy regarding the collection and management of personal data, including the protection of sensitive information pertaining to individual detainees.

Humanitarian action

The ICRC endeavours to take effective action in response to both the causes and consequences of humanitarian problems affecting detainees. We put forward realistic and achievable solutions that are in line with local traditions and culture and are suited to the authorities' willingness and ability to make changes. As much as possible, we try to attain sustainable results by suggesting how to fix systematic weaknesses. We set priorities according to the severity of each problem and the authorities' level of interest and openness, with particular attention paid to any intentional harm caused to detainees.

We look for sustainable solutions that help detainees cope better with their situation, and actively engage the authorities in resolving problems, seeking to address both causes and consequences.

A multi-pronged approach

The ICRC works to address humanitarian problems in detention through a variety of activities, ranging from encouraging the authorities to assume their responsibilities to providing services directly to detainees.

Dialogue

Persuading the authorities responsible for the conditions and treatment of detainees to make changes through dialogue is an essential part of the ICRC's approach. Bilateral and confidential dialogue aims at ensuring that the authorities are aware of the problems affecting detainees individually or collectively, persuading them to take action to address these problems and giving practical recommendations. The ICRC's goal is not to judge, but rather to improve the treatment and living conditions of detainees through constructive dialogue.

1 See ICRC, "Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, 2005, available at: www.icrc.org/eng/resources/documents/publication/p0893.htm (accessed in October 2017).

At the end of each visit, for example, our delegates meet with the authorities in charge of the facility. We may also hold meetings with higher-level government officials or send written reports of our findings and recommendations. These reports may highlight urgent issues to be addressed or the progress achieved. In our discussions, the ICRC may also propose direct assistance or offer support.

Direct assistance

Especially in life-threatening or emergency situations, the ICRC may act directly – with the consent of the authorities and provided it has the capacity to do so – to improve the conditions of detention.

This may mean helping individuals or groups of detainees by providing medical or material aid (such as clothes, blankets, food, eating utensils, spectacles, books or orthoses) or by giving detainees the means to re-establish and maintain contact with their families. We may also design and implement improvements to infrastructure, such as water supply, storage and distribution systems, waste management, energy sources, sanitary facilities, kitchens and clinics.

Support

The ICRC may support the detaining authorities in providing improved services to detainees by a variety of means, such as joint pilots and projects, training and on-the-spot capacity-building, making contact easier between different administrations, and sharing best practice from other countries. We also offer expert advice on addressing shortcomings in the system, and provide support to the authorities in areas such as:

- defining budget needs;
- managing infrastructure and equipment;
- managing detention registers and detainee files;
- improving the food-supply chain, from budgeting to procurement, storage, preparation and distribution;
- organizing effective access to health care, including referrals when necessary;
- treating people with respect for their dignity and integrity;
- identifying and managing vulnerable detainees such as pregnant women, juveniles and the elderly;
- developing management procedures and external relationships (e.g., with the courts) to ensure the application of judicial and procedural safeguards;
- contributing to the adequate recruitment and training of security or prison staff;
- advising on prison planning and design in countries that need to increase their detention capacity; and
- providing input when legislation or operating procedures are being drafted, to ensure their compliance with international standards.

Structural or systemic changes can only be undertaken when the authorities recognize that they are necessary. It is the authorities who must take the lead in

what are often complex, multidisciplinary programmes. The ICRC can support and facilitate such changes. Support from the ICRC includes a training component to ensure the transfer of knowledge and skills to the authorities; this enables them to reach solutions autonomously in the long term.

Striking a balance

Most often, our work is a combination of persuasive dialogue, direct services and support, with each aspect reinforcing the others. For example, providing support may be a catalyst for change, build good will and nurture a more constructive dialogue, therefore reinforcing our efforts to persuade. Providing emergency assistance may help the detaining authorities to bridge a gap and, by alleviating a dire humanitarian situation, give them the time they need for things to be fixed or return to normal.

We review our goals and plans of action regularly and make any necessary adjustments to ensure our activities are in line with the intended results.

When does the ICRC get involved?

If a detaining authority is to treat its detainees humanely, ensure their safety and preserve their dignity, it must meet their physical, mental, social and legal needs. The ICRC gets involved to check that these needs are being met.

For example, we seek to prevent summary execution, forced disappearance and all forms of ill-treatment; make sure that detainees' living conditions are adequate in terms of space, light, hygiene, water, food and health care; ensure that they can have meaningful contact with each other, staff, family and the outside world; and make sure that they have access to legal representation. We also encourage the authorities to identify detainees who are particularly vulnerable and take into account their needs.

Torture and other forms of ill-treatment

Although strictly prohibited in all circumstances, the use of torture and other forms of ill-treatment remains sadly frequent and widespread.

Ill-treatment includes any assault on the physical and psychological integrity and dignity of an individual. When assessing how a detainee is treated, it is important to take into account all the factors that have a direct impact on detainees. The ICRC considers

“If the ICRC had not helped me, my life would have been completely different. Being able to stand and walk again means more than I can say.”

– *Detainee who suffered severe ill-treatment during detention and needed surgical reconstruction*

the cumulative effect of the detainees' experience, including how they are being and have been treated and for how long, what their living conditions are like, their access to information about what will happen to them, and how personally vulnerable they are to ill-treatment.

Ill-treatment may occur at different phases of detention, from the moment of arrest to release, for a variety of reasons. The ICRC is committed to ending torture and cruel, inhuman and degrading treatment. We also seek to analyze why people commit torture and to develop and maintain a dialogue with the authorities on the absolute prohibition of torture and other forms of ill-treatment. This dialogue includes supportive discussions with the authorities to improve how their staff treat detainees. The ICRC also reminds authorities about the principle of *non-refoulement*, which prohibits the transfer of a detainee to any country where he or she has serious fears of being ill-treated.

The victims of torture are the focus of the ICRC's concern; our goal is to ensure that they recover a sense of their inherent dignity and humanity. Private interviews with detainees, in particular with victims or potential victims of torture or ill-treatment, are essential – actively listening and empathizing with them helps them to recover their sense of personal dignity, and can provide comfort. The ICRC also engages in the rehabilitation of victims of torture and other forms of ill-treatment in certain situations.

The ICRC's definitions of torture and other forms of ill-treatment

- **Torture** consists of severe pain or suffering, whether physical or mental, inflicted for such purposes as obtaining information or a confession, exerting pressure, intimidation or humiliation.
- **Cruel or inhuman treatment** consists of acts which cause serious pain or suffering, whether physical or mental, or which constitute a serious outrage upon individual dignity. Unlike torture, these acts do not need to be committed for a specific purpose.
- **Humiliating or degrading treatment** consists of acts which involve real and serious humiliation or a serious outrage upon human dignity, and whose intensity is such that any reasonable person would feel outraged.

The expression “ill-treatment”, though not strictly a legal term, covers all the above-mentioned acts.

The ICRC endeavours to contribute to the creation or strengthening of a legal, institutional and ethical environment conducive to preventing ill-treatment. We strive to reinforce the absolute prohibition on torture by drawing attention to the grave consequences of such practices for both the individuals concerned and society as a whole. We also work at the local, national and international levels to ensure that the legislative, regulatory and disciplinary safeguards in place provide for the absolute prohibition of torture and cruel, inhuman or degrading treatment.

Sexual violence in detention

Sexual violence in detention exists in most countries, and is a very complex issue both to analyze and to address. In detention, sexual violence can span a wide range of acts by different types of perpetrators (e.g., detaining authorities and detainees, of the same sex or not) and can vary widely in severity. Societal and cultural norms and sexual taboos may make it particularly difficult for detainees to disclose that they have been victims of sexual violence. This may also make them reluctant to seek medical treatment for physical and psychological injuries, exacerbating the harm suffered, and may also make it difficult for the authorities to discuss and address the problem.

Measures can be taken by the authorities to prevent sexual violence, but only if they are prepared to acknowledge that the problem exists. Possible measures are: separating men from women and adults from minors (if not from the same family); careful recruitment and training of male and female detention staff; ensuring that detainees have equal access to basic goods and services, and that no one extorts favours from detainees for such things; laying down detailed protocols for interrogation, searches and transfers; making available medical, psychological and social staff who are trained to detect sexual violence in a place of detention and identify victims in need of help; giving detainees and staff safe ways to make complaints and reports to the detaining authorities and independent bodies; and prohibiting and punishing sexual relations between staff and detainees.

ICRC delegates pay particular attention to the way they collect information in this delicate area, particularly in private interviews with detainees who may have been victims of sexual abuse or who wish to report it, applying carefully the idea of “do no harm”. When sexual violence is suspected, as for other forms of ill-treatment, the ICRC takes action both on individual cases and on the general issue as part of our confidential dialogue with the detaining authorities and our direct and systemic support to improve conditions and treatment for detainees. The ICRC pays particular attention to the risk of reprisals against the individuals concerned and to those likely to be the most vulnerable, such as minors, women, poor, sick and disabled detainees, migrants, detainees under interrogation and people of various gender identities.

Disappearance

Forced disappearance may mean a person is held incommunicado or in a secret place of detention for some time, but can end in death in the case of extrajudicial execution. This is, of course, a very serious issue and particularly affects people arrested in relation to armed conflict or other situations of violence. The ICRC does its utmost to address this problem as a matter of absolute priority. Information about arrest, access to places of detention, registration and

individual follow-up are key elements of its strategy, as is the timely notification to the family of a detainee's detention and whereabouts.

Administrative disappearance is often the result of disorganization. It can be caused by a lack of registers, up-to-date individual files or effective filing system, or the absence of a system for notifying families and the judicial authorities. Administrative disappearances are common in many countries and affect all detainees without distinction. This has serious consequences for detainees and their families, preventing access to basic services, courts and family visits, and leads to detention that is illegally prolonged. Where this is the case, the ICRC will help the authorities to make changes to their system in order to remedy the situation.

Living conditions

The material conditions of detention are among the most important things shaping detainees' lives. To preserve their health and human dignity, detainees must have decent living conditions in terms of space and accommodation, hygiene, food, water, sufficient access to the open air and physical exercise, and being able to spend their time meaningfully (education, vocational training, work, etc.).

Most aspects of life in detention have an impact on the physical and mental health of detainees, as well as staff. In all situations, including deprivation of liberty, a person's health is the sum of the three elements that make up the "health pyramid". The base of the pyramid consists of adequate food, water, hygiene and habitat, which contribute to a healthy environment. Preventive care builds on the base, while curative care sits at the top of the pyramid, as it is effective only when the foundations are in place.

The place used for detention may be unsuitable. This may be because of its location in a remote or unsanitary area far from sufficient energy and water sources, use of poor-quality materials in its construction, a design unsuited to the purpose and climate, a lack of maintenance, makeshift repairs or alterations, and/or overcrowding. Lack of knowledge and expertise, lack of interest or budget, absence of national standards, or simply inadequate procedures for keeping basic services running are only a few of the causes of such problems.

"We were even scratching in our dreams. Now we sleep well."

– *Detainee after a scabies eradication campaign conducted jointly by the ICRC and prison authorities*

"We really needed new equipment. It used to take three to four hours to cook and serve food. Now with this system, we can provide three meals a day instead of two."

– *Staff member of a prison kitchen where the ICRC installed solar water heaters to reduce energy consumption and the time needed to prepare food*

Prevention is better than cure. The ICRC works at all levels of the detention system to address problems arising because of shortcomings in the detention environment. For instance, we seek to prevent outbreaks of disease caused by poor sanitation. This generally has a positive impact on the staff working in the place of detention too, as well as the neighbouring community.

The ICRC looks at a broad range of issues to ensure that facilities provide:

- suitable and safe accommodation, such as adequate space, ventilation, light, heating, bedding and access to the open air;
- enough clean water to drink;
- adequate sanitary facilities and supplies to ensure personal hygiene;
- appropriate waste management and pest control (rodents, insects and other vectors of disease);
- equipment for storing and preparing food and eating;
- exercise yards, classrooms or workshops; and
- protection from the risk of fire, etc.

ICRC engineers sometimes improve infrastructure directly – for instance, by renovating accommodation blocks and sanitary facilities, improving water storage and distribution, and refurbishing kitchens and living areas used by the detainees. We may also help the authorities to reduce their energy consumption by installing low-energy ovens, solar panels or biogas plants.

ICRC engineers also work with the authorities and their technical staff to build up their capacity sustainably. This includes organizing national or regional training to promote best practice and experience-sharing, and advising on establishing national technical standards.

“I learnt about project management during my studies years ago. But it was really useful to go over those ideas again so that the new prisons would be built sustainably and match the country’s and the detainees’ needs.”

– *Prison administration architect at a training course on project management*

The ICRC increasingly advises governments on how to plan and design new prisons. This involves ensuring that the size of the facility, its location and its design are in line with local requirements, resources and culture; that it matches its environment; that the planning stage properly takes into account how the place is to operate and how detainees move within and between different areas; and that the design will enable the detaining authorities not only to ensure security but also to accommodate detainees safely and humanely.

Food and nutrition

The presence of detainees suffering from moderate or severe acute malnutrition in a detention facility usually reveals gaps in the entire food-supply chain – from budget,

procurement and storage to preparation and distribution of food – and/or a high prevalence of diseases related to an unhealthy environment.

Treatment of malnutrition offers short-term (and lifesaving) gains but does not address the risk of detainees again becoming malnourished if the food-supply chain and living environment remain inadequate. General hygiene must be improved and all parts of the food-supply chain must function properly.

The ICRC's approach in the field of nutrition is typically a mixture of direct assistance, support and dialogue. Direct assistance often comprises malnutrition treatment programmes, providing certain foods or micro-nutrients and improving the infrastructure for food storage and preparation. Support typically comprises technical assistance in optimizing the way the food-supply chain is managed and how detainees are diagnosed and treated for malnutrition.

Dialogue aims at persuading the staff of places of detention, health-care workers and other authorities concerned to work towards making the food-supply chain work properly. The ICRC aims also to prevent malnutrition by ensuring that food is distributed fairly within places of detention.

Health care

Health care in places of detention should be at least equivalent in quality to what is available in the community outside and/or to what the national health authorities recommend for public health facilities, in line with international standards. Providing preventive and curative health care to detainees requires infrastructure, equipment and

resources; well-trained staff and organization; and appropriate mechanisms to ensure that all detainees have access to health-care services when they need it.

To achieve this, ICRC doctors and nurses provide expert advice to the detaining authorities, while also advocating for the increased involvement of national health ministries in places of detention. In addition, they work to support health-care workers in places of detention, including by raising awareness of and compliance with medical ethics, such as medical confidentiality, needs-based and patient-oriented care, and access to health-care services without barriers or discrimination.

Furthermore, as millions of people enter and leave detention systems worldwide every year, ensuring adequate health care in places of detention has a positive impact on the health of the outside community too.

“With time we have learnt something from each other. With the help of the ICRC detention doctor I have been able to uphold medical ethics. She supported me in a crucial case, and we got the informed consent of the patient.”

– *Doctor working in a prison health facility, speaking about an ICRC detention doctor*

Controlling tuberculosis in prison

Tuberculosis (TB), in particular multi-drug-resistant TB, is a contagious and potentially fatal disease. It is spreading at alarming rates in some parts of the world and is particularly virulent in places of detention. It can be more than 100 times more prevalent inside prison walls than out. It is often caused by overcrowding, insufficient ventilation, ignorance of prevention measures, poor health-care services and failure to supervise and ensure adequate adherence to treatment.

For many years, the ICRC has been working with governments in an effort to fight the disease. This work has involved contacts with different ministries (health, interior, justice) and national and international organizations involved in TB treatment in particular. In detention facilities, our work has been in a broad spectrum of activities such as screening, treating (takes up to two years) and managing TB patients in a specialist facility; training specialists; providing and installing equipment, organizing laboratories and dedicated wards; and advising on public health policy. For our involvement to be successful, obviously we need a strong commitment on the part of national authorities to fulfilling their roles.

Cooperation and partnerships with the World Health Organization on TB in prison also ensure that learning is shared, notably through worldwide dissemination of fact sheets, policy papers and recommendations.

Contact with family and the outside world

All human beings have emotional ties with their families and communities that strengthen their psychological well-being. But deprivation of liberty abruptly redefines and limits people's interaction with the outside world. Non-existent or poorly organized contact between detainees and their families causes intense stress and suffering to both.

“My mother’s crying was like a bullet to my heart. I cannot describe my feelings during the visit. It’s like I was dead but came back to life again. I feel like I’ve been reborn. Her visit eased my suffering.”

– *Detainee who, after two years in detention, saw his mother again thanks to an ICRC family visit programme*

Even though detention facilities are closed institutions, detainees remain members of society with a number of rights regarding contact with the outside world. They need, and should have, the right to maintain contact with relatives, as well as with legal counsel, inspection agencies, religious leaders and diplomatic representatives. Keeping in contact is equally important for detainees' spouses, children and parents. Often, family members support their detained relatives by giving them clothes, food, money, etc. They may also help establish and

coordinate contact with a lawyer, as well as follow up on the progress of their loved one's case before the judicial authorities if needed.

Detainees may lose contact with their families for a variety of reasons: poor organization on the part of the detention authorities, dysfunctional communication systems (postal service or telephone), long distances and/or unsafe travel conditions, or the family's lack of resources. Depriving them of contact with their families may also be a deliberate punishment or a way of putting pressure on detainees.

"I still carry around the first Red Cross message I received from my family through the ICRC... It's been ten years. I had thought I would never see my wife and children again, but after the ICRC's visit and the messages, they came to visit me. My life changed that day, knowing they were OK."

– Detainee sentenced to life imprisonment

Helping restore and maintain family links is a fundamental part of the ICRC's detention-related activities. Having identified why contact was lost, we help detainees to let their families know where they are. This alleviates a great deal of anxiety and stress, and is also a protective measure against being held incommunicado and the risk of disappearance. In the longer run, if we have the agreement of the detaining authority, we may provide various means of maintaining contact: Red Cross messages, phone calls, video conferences and arrangements for family visits, etc.

The ICRC may also offer the authorities recommendations and support to establish or improve ways of notifying family, lawyers or diplomatic representatives of detainees' whereabouts, as well as ensuring that the facility's infrastructure and working procedures are sufficiently geared towards frequent positive contact with the outside world.

Access to justice

All people deprived of their liberty have the right to judicial and procedural safeguards. This ensures the legality of the judicial or administrative proceedings that they are going through, and protects them from being detained arbitrarily.

International law has defined judicial safeguards that should be incorporated into domestic law. These safeguards can have a vast influence on the lives of detainees throughout their time in detention. Why have they been detained? What is happening now? How, when and by whom will their case be decided, and how can they defend themselves? These questions are all essential to the mental and psychological well-being of detainees and their families, and are often among the first concerns raised by the detainees with whom ICRC delegates meet.

Judicial and procedural safeguards are also instrumental in helping the ICRC to address other problems, such as forced disappearance, ill-treatment (e.g.,

in working to end forced confessions) and overcrowding (e.g., in reducing automatic recourse to pre-trial detention and promoting compliance with time limits).

Whenever possible and advisable, the ICRC's work in this area combines action at the level of individual detainees (pointing out that proper procedure has not been observed in specific cases) with higher-level efforts (raising issues of systemic shortcomings we have encountered with the military, police and judicial and/or prison authorities).

Overcrowding

The ICRC has witnessed first-hand – in a wide variety of detention facilities over many years – the serious and growing impact of overcrowding on detainees and detaining authorities alike. Overcrowding causes substandard and inhumane conditions of detention. It seriously compromises the authorities' ability to fulfil detainees' basic needs in terms of living conditions, medical care, family visits and access to justice. In overcrowded facilities, detainees are squeezed into cramped living quarters, often with appalling sanitation and no privacy; this makes the experience of being deprived of liberty – already stressful in normal circumstances – far worse. It erodes human dignity and undermines detainees' physical and mental health along with their prospects for reintegration into society. In addition to putting excessive strain on infrastructure, overcrowding heightens the potential for conflict with staff and among detainees. It quickly leads to difficulties in maintaining order within the facility, sometimes resulting in severe consequences in terms of detainees' safety and supervision, as well as overall security.

Reforms, such as reviewing criminal policies, improving how statistics are gathered, embarking on legislative or procedural changes and altering long-standing judicial practices, are anything but straightforward. Considerable sensitivity is required when confronting commonly held perceptions or investing in alternatives to detention while still reassuring the public that measures are being taken to fight crime. But all these actions need to be considered to reduce overcrowding. After analyzing the main causes of overcrowding and the priority issues for the ICRC, we can work in different ways and at different levels to tackle the problem, so long as the authorities are willing to address it.

We work to bring together the government and others whose action is required in finding a solution. This can help achieve legislative or procedural changes – in sentencing policies and pre-trial case management, for example. Such collaboration can lead to improvements in the efficiency of the criminal justice system, including access to legal aid, reductions in the length of pre-trial detention and improved alternatives to detention. The ICRC can also push for more social reintegration programmes – such as education and vocational training – and stronger family links in order to reduce recidivism. Finally, we can work with the authorities to find ways to manage prison capacities better, and plan improvements in existing and future detention facilities.

Reducing overcrowding requires short-, medium- and long-term action by the ICRC, particularly persuasive dialogue, but also multidisciplinary technical support and coordination and mobilization of other organizations. In our experience, small but coordinated steps by a range of people can make a real difference in resolving this complex problem, alleviating the negative impact of overcrowding on both detainees and detention authorities.

Reintegrating into society

The struggles of living through a period of detention can leave scars that take a long time to fade. Many detainees suffer the long-lasting effects of poor nutrition or medical care, loss of contact with family and community, ill-treatment, stigmatization, etc. Former detainees may face rejection and harassment by the authorities or their own communities.

“I had never had the opportunity to be trained for a job – the only thing I knew was how to fire a gun. Thanks to the ICRC and the prison staff, I received training in carpentry. Now I can make anything you need for your house out of wood. These skills have changed my entire life. I am full of energy. When I get out, I plan to work in a carpentry shop. With a bit of investment I can start my own business and be independent.”

– *Detainee who received ICRC-funded vocational training in detention*

Rehabilitating people who have been deprived of their liberty requires actions and services that restore the physical, psychological and social integrity that was eroded by detention. Reintegration is a long and complex process which in many cases can do no more than mitigate certain consequences of detention. It encompasses physical and mental health, social reintegration, economic security and physical security.

In countries where disappearances happen, the ICRC may need to check that certain individuals have really been released. The ICRC also seeks to alleviate the problems faced by former detainees, especially by victims of ill-treatment. But such a process is too complex for the ICRC to deal with alone. Our role consists mainly of developing targeted post-detention programmes that offer initial aid to people who have recently been released. Depending on the circumstances, the ICRC may also support local services that help former detainees over a longer period.

Lastly, it is important to note that a detainee's rehabilitation should start during detention. In our dialogue with the authorities, we urge them to prepare for detainees' release and implement measures that reduce the negative impact of detention as soon as possible.

Women and detention

Women represent roughly 6% of detainees worldwide. Because of the role they usually play in family life, the detention of women has a specific impact on their dependants, young and old, as well as on their own experience of detention. The designers and managers of detention facilities tend to be men; health care in detention is thus often designed primarily with men's bodies and needs in mind, with women's specific needs largely overlooked. Women and girls also face higher risks of ill-treatment, including sexual abuse by male detention staff and co-detainees. This is especially the case when families are not kept together as a unit, men and women not separated, and female staff are not part of the management. Finally, society often has a different perception of male and female detainees: for women, this can mean rejection by their families and communities upon release.

For all of the above reasons, the ICRC pays particular attention to the situation of women and girls in detention. Priority concerns include safe living conditions, in particular the separation of male and female accommodation or facilities (unless family members are held as a unit); sufficient levels of hygiene and availability of hygienic supplies; safe and equitable access to food, sanitary facilities, health services, work opportunities, education, recreational spaces and other services; ability to maintain contact with family, including visits from children and other family members; sufficient attention to the specific needs of pregnant women and girls, and of mothers held with their babies or small children; and effective female supervision of women's accommodation, particularly in order to prevent sexual abuse.

Children and detention

Children – all individuals under 18 years old – may be detained for various reasons. They may be born to detained women or girls, or held with a detained parent; held, as is increasingly the case, in immigration-detention centres; held under criminal law, often as first-time offenders charged with minor offences; detained for association with armed groups; or taken into administrative or “preventive” detention, ostensibly to protect them from living on the streets or because they are seen as antisocial or as posing a security threat.

Children who grow up in detention face daunting challenges to becoming well-adjusted adults. They are at increased risk of violence, neglect or exploitation, which for many is a continuation of pre-existing hardship.

During detention visits, the ICRC pays particular attention to the treatment and living conditions of children. We strive to ensure that detaining authorities protect children with measures that take their specific needs into account. Such measures include properly assessing their age; protecting children from all forms of ill-treatment, including sexual violence; providing legal advice and practical

support to children and ensuring that criminal laws, procedures and institutions are adapted to reflect their specific needs and best interests; ensuring that children are detained only as a last resort and for the shortest possible time; separating children from adult detainees (except when the child is detained with a family member); moving children to appropriate, non-custodial accommodation; maintaining direct, regular and frequent contact between children and their families; providing children with adequate food, sanitary facilities and access to health care; making sure children can take outdoor exercise every day for as long as possible; and enabling children to take part in education, sport and other recreational activities.

Such action often requires long-term, multidisciplinary involvement by the ICRC at various levels of the hierarchy and using a variety of methods, such as persuasive dialogue and cooperation with, and support for, agencies specializing in child protection.

Migrants and detention

The ICRC visits detained migrants in both criminal facilities and dedicated immigration detention centres.

An increasing number of migrants – regardless of their personal circumstances – end up in detention because they entered or remained in a country illegally. Detention can be particularly harmful for migrants' mental health because it may compound the trauma they have already suffered in their home country or along the migration route. Uncertainty surrounding the administrative process and fears for the future are also extremely stressful. We therefore remind authorities that all detention of migrants must be necessary, reasonable and proportionate to a legitimate aim. We encourage them to make such detention a last resort and to consider the possible alternatives, especially for vulnerable groups such as asylum-seekers, children, victims of human trafficking and traumatized individuals.

As with all detainees, the ICRC focuses on migrants' conditions of detention and treatment and works to ensure they receive due process of law and have contact with the outside world. Such contact is especially important in places where migrants might not otherwise be able to reach their families or a consulate. We also raise issues related to the transfer of migrants to ensure that the authorities know their obligations under international law and respect the principle of *non-refoulement*.

The ICRC also provides support and expertise to National Red Cross and Red Crescent Societies that work with detained migrants.

REPORTS AND DOCUMENTS

ICRC report on the visit to “Robbeneiland” (Robben Island) Prison on the 1st May, 1964, by Mr G. Hoffmann, Delegate General of the International Committee of the Red Cross in Africa

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On 1 May 1964, Georg Hoffmann, the International Committee of the Red Cross (ICRC) Delegate General in Africa, inspected Robben Island Prison, where some twenty days earlier Nelson Mandela was visited for the first time. Having access to political prisoners in apartheid South Africa, the ICRC sought to ensure that detainees lived in decent conditions and were treated humanely. The following is the report of the detention visit conducted by Georg Hoffmann. The document provides a detailed overview of the living conditions, work and medical treatment of detainees, as well as recommendations given to prison authorities after the visit. The report was confidential at the time of writing. It was made public in 2004 and is reproduced for the first time here in the *Review*.

The ICRC is well known for its work on behalf of people deprived of liberty in connection with armed conflicts and other situations of violence. Also in other circumstances, the ICRC takes action wherever it can, with the aim of securing humane treatment and conditions of detention for all detainees, preventing torture and other forms of ill-treatment, preventing and addressing disappearances, improving detention conditions, restoring and maintaining family contacts, and ensuring respect for legal safeguards. To that end, the ICRC bases its work upon a comprehensive assessment of the situation both inside and outside places of detention, facilitated by constructive, confidential dialogue with the authorities and visits places of detention.¹

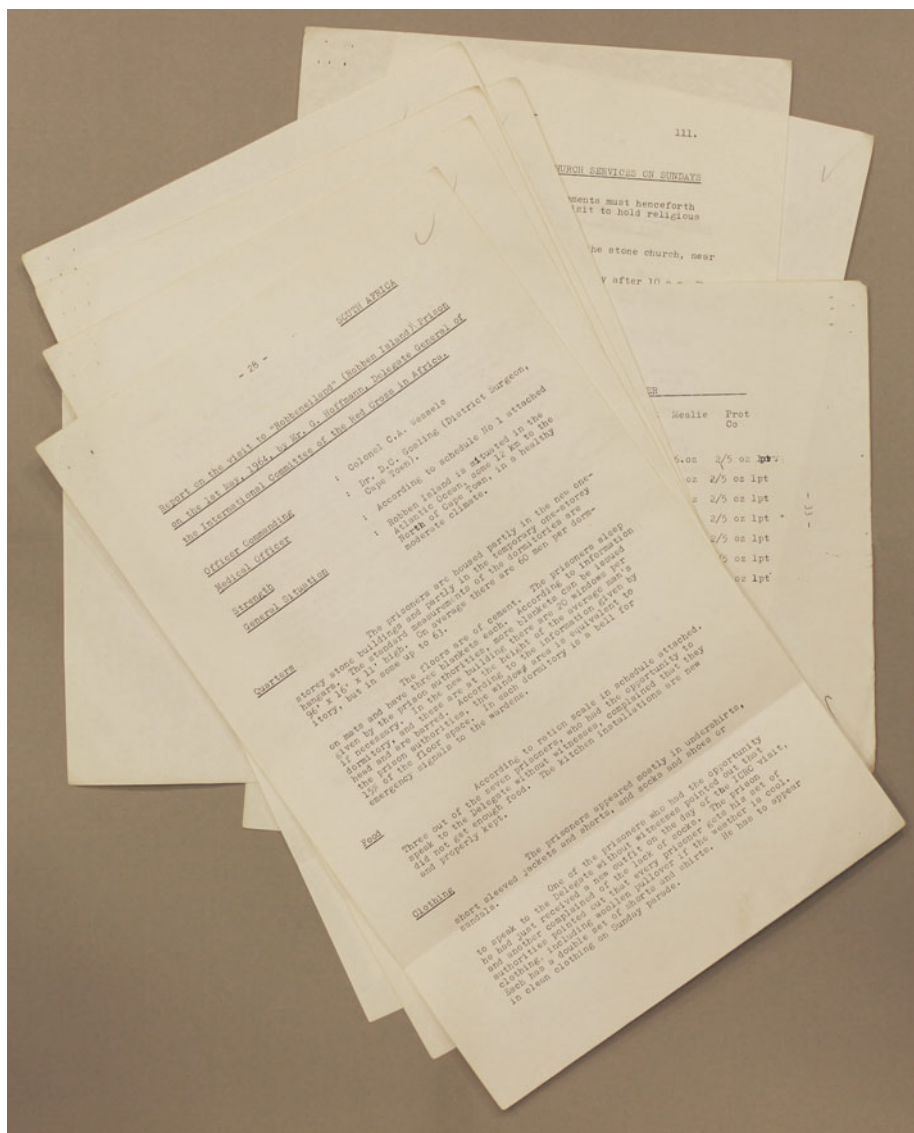
ICRC Historical Archives

The following document comes from the ICRC Archives. The ICRC historical archives collect and preserve ICRC documents dating from the organization's inception to the present day, and make them available for research. The ICRC's historical archives, run by professional archivists and historians, comprise 6,700 linear metres of textual records and a collection of photographs, films and other audio archives.

The ICRC's public archives represent an essential historical source for surveying, studying and debating contemporary and diplomatic history, more particularly in the field of humanitarian operations and their impact on States, societies, cultures and armed conflicts or other situations of violence.

The public archives cover the history of the ICRC since its foundation in 1863 to 1975, and are available for consultation, by appointment. If you wish to consult the ICRC Historical Archives in Geneva, you may schedule an appointment via email at publicarchives@icrc.org.

¹ For more information on the ICRC's approach and action when carrying out prison visits, see ICRC, "What We Do for Detainees", available at: www.icrc.org/en/document/what-we-do-detainees.



Archival source: ICRC Archives, B AG 225.005-007. Photos © Sarah Roxas/ICRC.

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SOUTH AFRICA

Report on the visit to "Robbeneiland" (Robben Island) Prison
on the 1st May, 1964, by Mr. G. Hoffmann, Delegate General of
the International Committee of the Red Cross in Africa.

Officer Commanding : Colonel C.A. Wessels
Medical Officer : Dr. D.C. Gosling (District Surgeon,
Cape Town).
Strength : According to schedule No 1 attached
General Situation : Robben Island is situated in the
Atlantic Ocean, some 12 km to the
North of Cape Town, in a healthy
moderate climate.

Quarters

The prisoners are housed partly in the new one-storey stone buildings and partly in the temporary one-storey hangars. The standard measurements of the dormitories are 96' x 16' x 11' high. On average there are 60 men per dormitory, but in some up to 63.

The floors are of cement. The prisoners sleep on mats and have three blankets each. According to information given by the prison authorities, more blankets can be issued if necessary. In the new building there are 20 windows per dormitory, and these are at the height of the average man's head and are barred. According to the information given by the prison authorities, the window area is equivalent to 15% of the floor space. In each dormitory is a bell for emergency signals to the wardens.

Food

According to ration scale in schedule attached. Three out of the seven prisoners, who had the opportunity to speak to the Delegate without witnesses, complained that they did not get enough food. The kitchen installations are new and properly kept.

Clothing

The prisoners appeared mostly in undershirts, short sleeved jackets and shorts, and socks and shoes or sandals.

One of the prisoners who had the opportunity to speak to the Delegate without witnesses pointed out that he had just received a new outfit on the day of the ICRC visit, and another complained of the lack of socks. The prison authorities pointed out that every prisoner gets his set of clothing, including woollen pullover if the weather is cool. Each has a double set of shorts and shirts. He has to appear in clean clothing on Sunday parade.

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Hygiene

Adjacent to the dormitories and included within the area in which the prisoners are locked in in the evening, are cold shower facilities, other washing facilities and W.C. installations.

Medical Attention

A district medical officer visits the prison daily. There is an infirmary in the temporary prison buildings. On the day of the visit there were 12 patients confined to bed, most of them down with "Flu". All wore brown pyjamas and had sheets and blankets on their beds.

According to the doctor there are no epidemics or serious diseases on the island. Serious cases are evacuated to the non-European Somerset Hospital in Cape Town. The doctor stated that the whole population of the prison is X-rayed at least once a year to prevent T.B. spreading, and all are vaccinated against smallpox and typhoid. The doctor is assisted by three orderlies and one male nurse (all Europeans).

One of the prisoners interviewed by the Delegate without witnesses, Nathaniel Ciliwe, aged 32, who is having treatment in the camp infirmary because of a swollen calf (veins) wanted to see a specialist. This request was conveyed to the Prison Commander, Col. Wessels, by the Delegate. Colonel Wessels answered that Dr. Gosling is trying another treatment and that if this is not successful he will consult a specialist.

Deaths

According to prison authorities there have been three deaths since the 1st January, 1963, only one of whom was a "political prisoner", who died of heart disease. One prisoner drowned while endeavouring to escape, and one was shot whilst attacking another prisoner.

Religious Service

There is a special church available to all prisoners. A Chaplain from one of the protestant churches visits once a month except in December when he makes three visits. (See appendices 3 and 4).

Recreation and Study

No facilities are provided.

Work

The prisoners work from 0800 hrs to 1300 hrs and from 1400 hrs to 1700 hrs, (including the walk to and from the place of work).

The following types of work are undertaken:- Quarry, masonry, carpentry, painting, workshop, cooking, waiting in the Officers Mess, excavating, husbandry (pigs, cows).

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Skilled workers are generally employed in their trades; unskilled labourers are given the opportunity to learn a trade, subject to good behaviour. On release from prison they are given a diploma which does not show their prison background.

The hardest labour is in the quarry. Prisoners are issued with protective glasses.

Financial Resources

Only prisoners who have advanced to the grade of Monitor can earn some money - up to R1 per month.

Correspondence

The permission to correspond differs according to the group to which the prisoner belongs. There are four groups:-

A is the lightest security degree
B is medium security
C and D are maximum security

Group A can write and receive three letters per month
Group B can write and receive one letter per month
Group C can write and receive one letter every three months
Group D can write and receive one letter every six months

Not included in these restrictions are letters to legal advisers and letters on compassionate grounds (family emergencies).

Visits

Group A prisoners are allowed to receive visits from two persons twice a month, (contact visits).

Group B prisoners are allowed to receive a visit from two persons once a month (non-contact visits).

Group C prisoners are allowed to receive a visit from one person once in three months (non-contact visits).

Group D prisoners are allowed to receive a visit from one person in six months (non-contact visits).

The visits by lawyers are not included in the above.

The visits are limited to half an hour's duration.

Prisoners are graded according to behaviour in prison. Once a year every prisoner has to appear before a Prison Board. Political prisoners on Robben Island are still not graded higher than categories C and D.

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Treatment

At various working places the Delegate picked out a total of seven political prisoners, at random, for a personal interview without witnesses. Three of them complained that they are beaten by some warders.

The Delegate pointed out these complaints to the Commanding Officer, and the latter declared that he does not tolerate beating of prisoners, and that in fact beating of prisoners is prohibited. He had already reprimanded two warders who had been named by the prisoners concerned.

General Remarks

Robben Island can, as a whole, be considered a hard labour prison, as the island situation provides the necessary security background for open air labour for prisoners who otherwise would be behind bars most of the time.

As to the morale of the prisoners, the outward expression appears to be rather grim; no one seems to smile.

The political category is not separated from the ordinary criminals. The prison authorities informed the Delegate that there are four gangs amongst the hard bitten prisoners, which tend to terrorise their fellow prisoners, and might even go so far as to "sentence" fellow prisoners to death.

The Delegate mentioned the problems of the gangs to the Chief Commissioner of the Prison Department, General Steyn, who is an international penalist, and General Steyn told the Delegate that he was studying the problem of gangs and the possibility of eliminating this danger.

There has been one case where a young prisoner was homosexually assaulted by an older criminal. This case was discussed in Parliament in Cape Town. The young prisoner concerned was picked out by the Delegate for interview. He had been transferred to another compound.

Three out of the seven prisoners complained to the Delegate that they had no opportunity to continue their studies.

Considering the above described situation, the Delegate recommended to the Commanding Officer and to the Chief Commissioner of the Prison Department, General Steyn, that at least the less dangerous political prisoners be separated from the ordinary criminals, and that the younger ones particularly be given the opportunity to study. General Steyn informed the Delegate that screening in this respect was already on the way in Robben Island and such prisoners were being transferred to an Agricultural Prison in the Western Cape Province (See report concerning the Prison Victor Verster near Paarl).

It appears that a rather high percentage of young men are among the political detainees.

N.B. The Delegate was accompanied on this visit by Lt. Col. Schutte from the Prison Department.

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1.

L/Robbery

Murder	57
Culpable Homicide	27
Robbery	64
Rape	9
Assault with intent to do grievous bodily harm	33
Fraud	2
Housebreaking and theft	186
Stock-theft	5
Motorcar theft	13
Theft	74
In possession of dagger	2
Conspiracy to murder	11
Sabotage	284
Offences in terms of the Suppression of Communism Act, 1950, the Public Safety Act, 1953, the Criminal Law Amendment Act, 1953, the Riotous Assemblies Act, 1956 and the Unlawful Org- anizations Act, 1960	628
	1,395

RATION SCALE: BANTU PRISONERS: CONTINUED BY THEDEPARTMENT OF NUTRITION

BREAKFAST				LUNCH				DINNER			
Mealie Meal	Proteine sauce	Sugar	Coffee Tea	Samp.	Puze mashila	Meat	Beans	Veg.	Mealie	Prot Co	
Sunday 6.oz.	2/5 oz	1 1/2 oz	1 pt.	8.oz.	1.7/9 oz	5.oz.	-	8.oz	6.oz	2/5 oz 1pt	
Monday 6.oz.	2/5 oz	1 1/2 oz	1 pt.	8.oz.	1.7/9 oz	-	4 oz	8.oz	6.oz	2/5 oz 1pt	
Tuesday 6.oz.	2/5 oz	1 1/2 oz	1 pt.	8.oz	1.7/9 oz	5.oz	-	8.oz	6.oz	2/5 oz 1pt	
Wednesday 6.oz.	2/5 oz	1 1/2 oz	1 pt.	8.oz.	1.7/9 oz	-	4 oz	8.oz	6.oz	2/5 oz 1pt	
Thursday 6.oz.	2/5 oz	1 1/2 oz	1 pt.	8.oz.	1.7/9 oz	5.oz	-	8.oz	6.oz	2/5 oz 1pt	
Friday 6.oz.	2/5 oz	1 1/2 oz	1 pt.	8.oz.	1.7/9 oz	-	4 oz	8.oz	6.oz	2/5 oz 1pt	
Saturday 6.oz.	2/5 oz	1 1/2 oz	1 pt.	8.oz.	1.7/9 oz	5.oz	-	8.oz	6.oz	2/5 oz 1pt	

SPIRITUAL NEEDS OF PRISONERS: CHURCH SERVICES ON SUNDAYS

The following arrangements must henceforth be made on Sundays when chaplains visit to hold religious services.

- (1) Church services will be held in the stone church, near the new prison.
- (2) The first service will start shortly after 10 a.m. The prisoners must be in the church in order for the chaplain to go there directly to hold the service after the landing of the boat.
- (3) The second service will start approximately 2.15 p.m. that is, as soon as possible after members are back from their meals.
- (4) Priority must be given to members of the denomination of the chaplain. The church can accommodate about 160 persons at a time.
 - (a) If there are too many members for the first service, some must attend the second service.
 - (b) If there are not enough members, even for the first service, the number must be augmented by other prisoners anxious to attend the service. The church must in any event be filled to capacity as far as possible.
- (5) After the first service, which will last until approximately 11 a.m. the chaplain can hold further services at the hospital, the isolation and segregation sections. The chaplain will stand between the rows of dormitories at the isolation and segregation sections to deliver his sermon. He will be allowed to walk up and down the corridor, but will confine himself solely to the service and will not do individual work at the penal sections.
- (6) Should the chaplain be desirous to see some of the prisoners individually who were in the church service, he will be allowed to see them at the institution. Make the necessary arrangements for a venue at the institution. Where the chaplain wants to talk to prisoners, it must be members of his own church only.
- (7) Attached is a preliminary of visits by the various chaplains. Other names of chaplains may, however, be added.
- (8) This notice must be brought to the attention of all members who are in command during weekends.

C.A. Wessels
OFFICER COMMANDING.

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IV.

CHAPLAINS' PROPOSED VISITS TO ROBBERN
ISLAND DURING 1964

19th January, 1964	-	A. Hughes (Church of England).
16th February, 1964	-	C. de Wet (Presbyterian Church)
15th March, 1964	-	P. Storey (Methodist Church)
19th April, 1964	-	C. de Wet
3rd May, 1964	-	A. Hughes
21st June, 1964	-	P. Storey
19th July, 1964	-	A. Hughes
2nd August, 1964	-	C. de Wet
20th September, 1964	-	P. Storey
18th October, 1964	-	C. de Wet
15th November, 1964	-	A. Hughes
6th December, 1964	-	P. Storey
13th December, 1964	-	C. de Wet
27th December, 1964	-	A. Hughes

Kleurling Eerwaarde September - Morawiese Sending.

REPORTS AND DOCUMENTS

What's new in law and case law around the world?

Biannual update on national implementation of international humanitarian law* January–June 2016

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The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL).

In addition to a compilation of domestic laws and case law, the biannual update includes other relevant information related to accession and ratification of IHL and other related instruments, and to developments regarding national committees and similar bodies on IHL. It also provides information on efforts by the ICRC Advisory Service during the period covered to promote universalization of IHL and other related instruments, and their national implementation.

ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, to supplement and support governments' own resources, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with specialized legal advice and the technical expertise required to incorporate IHL into their domestic legal frameworks;¹ (iii) to collect and facilitate the exchange of information on national implementation measures and case law;² and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

* This selection of national legislation and case law has been prepared by Estefania Polit, Legal Attaché in the ICRC Advisory Service on International Humanitarian Law, with the collaboration of regional legal advisers.

Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL and other related treaties is a first vital step toward respect for life and human dignity in situations of armed conflict. In the period under review, twelve IHL and other related international conventions and protocols were ratified or acceded to by fifteen States.³ In particular, there has been notable ratification/accession to the Arms Trade Treaty (ATT). Indeed, seven States ratified the ATT in the first half of 2016, bringing the number of States Parties as of 30 June 2016 to eighty-six. In addition, four States have acceded to the Protocol on Explosive Remnants of War (Protocol V) to the Convention on Certain Conventional Weapons during the period in question.

Other international treaties are also of relevance for the protection of persons during armed conflicts, such as the Optional Protocol to the Convention on the Rights of the Child and the International Convention for the Protection of all Persons from Enforced Disappearance (CPPED).

The following table outlines the total number of ratifications of and accessions to IHL treaties and other relevant related international instruments, as of the end of June 2016.

Ratifications and accessions, January–June 2016

Conventions	States	Ratification/ accession date	Number of parties
1971 Convention on the Prohibition of Biological Weapons	Côte d'Ivoire	23 March 2016	174
1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Bahrain	11 March 2016	123
	Côte d'Ivoire	25 May 2016	

- 1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits, model laws and checklists, as well as reports from expert meetings, all available at: www.icrc.org/en/war-and-law/ihl-domestic-law (all internet references were accessed in December 2016).
- 2 For information on national implementation measures and case law, please visit the ICRC National Implementation of IHL Database, available at: www.icrc.org/ihl-nat.
- 3 To view the full list of IHL-related treaties, please visit the ICRC Treaties, States Parties and Commentaries Database, available at: www.icrc.org/ihl.

1980 Protocol II to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on Mines, Booby-Traps and Other Devices	Côte d'Ivoire	25 May 2016	95
1980 Protocol III to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Incendiary Weapons	Bahrain	11 March 2016	113
1995 Protocol IV to the Convention on Certain Conventional Weapons on Blinding Laser Weapons	Bahrain	11 March 2016	107
	Lesotho	25 April 2016	
1998 Rome Statute of the International Criminal Court	El Salvador	3 March 2016	124
2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	Guinea	8 April 2016	165
	Brunei	17 May 2016	
	Samoa	17 May 2016	
2001 Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Lesotho	25 April 2016	83
2003 Protocol V to the Convention on Certain Conventional Weapons on Explosive Remnants of War	Bahrain	11 March 2016	91
	Lesotho	25 April 2016	
	Montenegro	20 May 2016	
	Côte d'Ivoire	25 May 2016	
2006 International Convention for the Protection of All Persons from Enforced Disappearance	Sri Lanka	25 May 2016	52

Continued

Continued			
Conventions	States	Ratification/ accession date	Number of parties
2008 Convention on Cluster Munitions	Cuba	6 April 2016	100
	Palau	19 April 2016	
2013 Arms Trade Treaty	Lesotho	25 January 2016	86
	Peru	16 February 2016	
	Greece	29 February 2016	
	Cyprus	10 May 2016	
	Zambia	20 May 2016	
	Georgia	23 May 2016	
	Monaco	30 June 2016	

National implementation of international humanitarian law

The laws and case law presented below were either adopted by States or delivered by domestic courts in the first half of 2016. They cover a variety of topics linked to IHL, such as weapons, terrorism, missing persons, criminal repression, enforced disappearances, victims' rights and establishment of national committees or similar bodies on IHL.

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation and related issues based on information collected by the ICRC. The full texts of these laws and case law can be found in the ICRC's National Implementation of IHL Database.⁴

A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (January–June 2016). Countries covered are Liberia, Mauritius, Peru, Sri Lanka and Togo.

⁴ See the ICRC National Implementation of IHL Database, available at: www.icrc.org/ihl-nat.

Liberia

*Firearms and Ammunition Control Act*⁵

On 12 May 2016, the House of Representatives of Liberia passed the Liberia Firearms and Ammunition Control Act of 2015, which regulates the possession and use of small arms and light weapons in the country.

The domestic gun control law was established with the purpose of preventing and reducing violence caused by small arms as well as their proliferation. Part II of the Act establishes a national small arms registry as well as the requirements to acquire licenses to possess, use, repair, manufacture, deal, broker, import, export, transit or transship small arms.

Part V of the Act provides for the conditions for brokering, export, import and transit of small arms, ammunition and other related materials. In every section, the law prohibits licensing for these activities when it is known, at the time of considering the application, that this material would be used in the commission of genocide, crimes against humanity or war crimes. The Act further prohibits the brokering, importation, exportation, transit or transshipment of small arms that could be used to commit or facilitate violations of IHL.

The Act prohibits the brokering, import, export, transit and transshipment of such material when it contravenes Liberia's international obligations, including the ECOWAS Small Arms and Light Weapons Convention, and includes an explicit ban on these activities where there is a risk of them resulting in "serious acts of gender-based violence or serious acts of violence against women and children under Liberian Laws".

Finally, the Act establishes the penalties for violations of its provisions, which can range from administrative sanctions to criminal penalties under the Penal Law of Liberia.

Mauritius

*Anti-Personnel Mines and Cluster Munitions (Prohibition) Act 2016*⁶

On 24 June 2016, the Parliament of Mauritius promulgated the Anti-Personnel Mines and Cluster Munitions (Prohibition) Act 2016, repealing the Anti-Personnel Mines (Prohibition) Act of 2015.

According to Section 2, the Act gives effect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction and the Convention on Cluster Munitions, domesticating both international instruments through one piece of legislation.

5 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=7268B7747562B4E8C12581BE004BECA8&action=openDocument&xp_countrySelected=LR&xp_topicSelected=GVAL-992BUP&from=state.

6 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=644E983208B74E93C1258099003A5B43&action=openDocument&xp_countrySelected=MU&xp_topicSelected=GVAL-992BUK&from=state.

Section 4 establishes a number of offences related to both anti-personnel mines and cluster munitions, and establishes the corresponding penalties. The offences include the development, production, acquisition, stockpiling, retention, use or transferring to anyone, directly or indirectly, of any anti-personnel mine, cluster munition or explosive bomblet specifically designed to be dispersed or released from a dispenser affixed to an aircraft. Any person who in any manner assists, encourages or induces any other person to engage in any of the prohibited acts mentioned above is also held criminally responsible. The Act establishes that if these and other activities are performed for the purpose of detection and destruction of anti-personnel mines and cluster munitions, they will not constitute an offence.

The Act gives jurisdiction to a court in Mauritius in respect of offences committed outside the territory with regards to citizens of or ordinary residents in Mauritius, as well as in cases in which the following conditions are fulfilled: if the act affects or is intended to affect a public institution, a business or any other person in Mauritius; if the person is found to be in Mauritius; and if the person is, for any reason, not extradited by Mauritius, or there is no request to extradite that person.

Peru

*Legislative Resolution No. 30434 Recognizing the Competence of the Committee against Enforced Disappearances of the UN*⁷

On 14 May 2016, the Peruvian Congress passed a legislative resolution in which it approved the Declaration Recognizing the Competence of the United Nations Committee against Enforced Disappearances, after having ratified the CPPED on 26 September 2012.

The Declaration enables the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation of the provisions of the CPPED by the Republic of Peru, in accordance with Article 31 of the said convention.

*Law No. 30470 on the Search for Missing Persons during the 1980–2000 Period of Violence*⁸

On 22 June 2016, the president of Peru promulgated Law No. 30470 on the search for those who went missing during the 1980–2000 period of violence.

Article 2 provides for a humanitarian approach in the search process in order to relieve the suffering of the families, without excluding the determination of individual criminal responsibility. It prescribes the search process as encompassing forensic investigation, psychosocial support, identification of dead

7 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=C132B826D364E912C12581800046C02D&action=openDocument&xp_countrySelected=PE&xp_topicSelected=GVAL-992BUF&from=state.

8 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=23C5E44C4007B58FC1258009002E5B08&action=openDocument&xp_countrySelected=PE&xp_topicSelected=GVAL-992BUF&from=state.

bodies or human remains, and material and logistic support to the families of missing persons.

Article 3 recognizes the right of families of missing persons to know the fate of their missing relatives, including their whereabouts, or, if deceased, the circumstances and cause of their death, as well as the place of burial.

Article 6 further creates the National Register for Missing Persons and Burial Sites, with a view to individualizing information on missing persons and the circumstances behind their disappearance, as well as to supporting the search process.

Finally, the Second and Third Supplementary Provisions require the Ministry of Justice to create the National Plan for the Search for Missing Persons and to draft a law on the establishment of a genetic data bank of the disappeared.

Sri Lanka

*Prescription (Special Provisions) Act No. 5, regulating the right to pursue the recovery of immovable property due to the activities of any militant terrorist group*⁹

On 26 April 2016, the Parliament of the Democratic Socialist Republic of Sri Lanka passed this Act aimed at protecting the rights of rightful owners to reclaim their immovable property who were not able to do so as a consequence of the activities of militant terrorist groups between 1 May 1983 and 18 May 2009. It allows the said persons to institute such action before the courts within two years after the coming into operation of the Act.

Article 6 further interprets the notion of “activities of any militant terrorist group” as any act which is defined as a “terrorist act” in the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005, as amended by Act No. 3 of 2013.¹⁰ It further regulates the right of the disadvantaged person, defined in Article 6 as a “person who was unable to pursue his rights in a court in which he was by law enabled to pursue such rights as a result of the circumstances during the period commencing on May 1st, 1983 and ending on May 18th, 2009”, to claim his/her property, and the running of the statute of prescription or limitations.

9 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=74E6A6C69664EBE0C12581800049D7CF&action=openDocument&xp_countrySelected=LK&xp_topicSelected=GVAL-992BUB&from=state.

10 Article 5(2) of the Convention on the Suppression of Terrorist Financing (Amendment) Act, No. 3 of 2013:

(a) an act which constitutes an offence within the scope of or within the definition of any one of the Treaties specified in Schedule I to this Act;

(b) any other act intended to cause death or serious bodily injury, to civilians or to any other person not taking an active part in the hostilities, in a situation of armed conflict or otherwise and the purpose of such act, by its nature or context is to intimidate a population or to compel a government or an international organization, to do or to abstain from doing any act.

Togo

*Law No. 2016-008 on the Code of Military Justice*¹¹

On 21 April 2016, the president of Togo promulgated the Law on the Code of Military Justice, repealing Law No. 81-5 of 30 March 1981 on the same subject. The Code addresses various issues related to the organization and jurisdiction of courts, military criminal proceedings, military offences and corresponding penalties.

Article 2 establishes that the Code applies mainly to soldiers of the Togolese armed forces, members of military corps under the Ministry of Security, members of the operational reserve force, prisoners of war, civilians charged with military offences and civilians employed in military services and establishments.

Article 52 gives military jurisdiction the competence to prosecute violations of IHL committed by persons who are part of the military service/corps and also police and members of the military judicial police when they commit offences in their judicial police capacity. However, it subjects military justice to the control of the Supreme Court, in accordance with the provisions of the present Code, the Law on Judicial Organization, the Criminal Code and the Procedural Criminal Code.

The Code, in Title II, criminalizes a number of conducts by military members including insubordination, desertion, surrender, treason, pillaging, looting and destruction. Article 171 further punishes the misuse and abuse of distinctive emblems and signs in violation of the laws and customs of war, carried out by both civilians and members of armed forces.

Certain offences prescribed in the Code of Military Justice, such as the misuse of emblems and pillaging, are also criminalized by the Togolese Criminal Code, adopted on 24 November 2015, and could therefore be prosecuted as war crimes under the Criminal Code.

B. National committees or similar bodies on IHL

National authorities face a formidable task when it comes to implementing IHL within the domestic legal order. This situation has prompted an increasing number of States to recognize the usefulness of creating a group of experts or similar body – often called a national IHL committee or a national commission for IHL – to coordinate activities in the area of IHL. Such committees, *inter alia*, promote ratification of or accession to IHL treaties, make proposals for the harmonization of domestic legislation with the provisions of these treaties, promote dissemination of IHL knowledge, and participate in the formulation of the State's position regarding matters related to IHL. In January 2016, the Palestinian National Commission for the Implementation of IHL was established.

11 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=011C1CE311E3BE4CC1258180003FD4C5&action=openDocument&xsp_countrySelected=TG&xsp_topicSelected=GVAL-992BU6&from=state.

In addition, Kenya's National Committee was reconstituted on 10 June 2016, bringing the total number of national IHL committees across the world to 109 by June 2016.¹²

Kenya

*National Committee for the Implementation of IHL*¹³

On 10 June 2016, Kenya's National Committee for the Implementation of International Humanitarian Law, created in 2001, was reconstituted as prescribed in Gazette Notice No. 4135.

The main function of the National Committee is to coordinate and monitor the implementation of IHL in Kenya. One of its mandates is to advise the government on the ratification of IHL instruments and the corresponding reporting obligations. It also provides recommendations on existing and new legislation and is responsible for the coordination of IHL dissemination.

The National Committee is chaired by the solicitor-general from the State Law Office and Department of Justice, and is composed of representatives of the Ministries of Foreign Affairs, Defence, Home Affairs, and Sports, Culture and the Arts, the National Police Service, the commissioner-general of prisons, the Regional Delegation of the ICRC, and the Kenyan Red Cross Society.

Palestine

*Palestinian National Commission for the Implementation of IHL*¹⁴

On 13 January 2016, the Palestinian National Commission for the Implementation of IHL was established by Decree No. 2/2016.

The main function of the National Commission is to act as an advisory reference for the State of Palestine with regards to the implementation of IHL. Among its mandates are to coordinate the activities of the entities involved in the dissemination and implementation of IHL and to monitor and document violations of IHL provisions. It is responsible for reviewing laws and preparing draft laws to harmonize the State's actions with the principles and norms of IHL. The National Commission also contributes to improving the level of national expertise and capacity to apply IHL, and strengthening awareness of IHL

12 To view the full list of national committees and other national bodies on IHL, please visit the ICRC's related webpage, available at: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>.

13 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=7E3FDA204088F5B5C12581BE00500634&action=openDocument&xp_countrySelected=KE&xp_topicSelected=JPAA-9DWC8W&from=topic.

14 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=BC98C369DF153E87C125817F005325EE&action=openDocument&xp_countrySelected=PS&xp_topicSelected=JPAA-9DWC8W&from=topic.

principles among different circles. To attain these objectives, the National Commission cooperates with the ICRC, as established in Article 4.

The National Commission is chaired by the Ministry of Foreign Affairs and includes representatives from the General Secretariat of the Palestinian Liberation Organization, the Palestinian Red Crescent, the Supreme Judicial Council, the Ministries of Justice, the Interior, Education and Higher Education, and Health, the Commission of Detainees and Ex-Detainees Affairs, the Political and National Guidance Organization, the Legal Commissions of the National Assembly and Legislative Assembly, the General Directorate for Civil Defence, the Military Judiciary Authority, the Independent Commission for Human Rights, and civil society organizations concerned with IHL.

C. Case law

The following section lists, in alphabetical order by country, relevant domestic case law related to IHL and released during the period under review (January–June 2016). Countries covered are Colombia, Guatemala, Senegal and South Africa.

Colombia

*Decision No. C-084/16 (2016) on IHL and IHRL application to military prosecutions, Constitutional Court*¹⁵

Keywords: IHL application, military prosecution, human rights.

On 24 February 2016, the Colombian Constitutional Court decided that Legislative Act No. 1 of 2015 was constitutional. The Act amends Article 221 of the Constitution by including two subparagraphs that prescribe the applicability of IHL to the investigation and prosecution of violations perpetrated by members of the armed forces in the context of armed conflict.

A claim of unconstitutionality against the Act was filed by a number of petitioners who argued that the exclusive application of IHL in the investigation and prosecution of violations committed by members of the armed forces in armed conflict violates a fundamental pillar of the Constitution: the obligation of the State to investigate and prosecute serious violations of human rights, as provided under international human rights law (IHRL), as well as serious violations of IHL.

The Court established that the amendment of the Constitution as envisaged in the Act does not exclude the applicability of IHRL in the prosecution of members of the armed forces for violations committed during armed conflict. The Court emphasized that the universal and permanent obligation of the State to respect,

15 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=46229086E0DAE4EC12580D50054C9C0&action=openDocument&xp_countrySelected=CO&xp_topicSelected=GVAL-992BU6&from=state.

protect and fulfil human rights under IHRL forms part of the body of constitutional rules applicable in armed conflict, and further asserted the complementary character of these two legal frameworks.

The Colombian Constitutional Court therefore dismissed the claim, as the Act does not exclude the applicability of human rights, and thus confirmed its enforceability.

Guatemala

*Republic of Guatemala v. Esteelmer Francisco Reyes Girón and Heriberto Valdez Asig, High Risk “A” Tribunal, C-01076-2012-00021*¹⁶

Keywords: sexual violence, IHL application, war crimes.

On 26 February 2016, the Tribunal de Mayor Riesgo A. charged two former military officers with sexual violence and domestic and sexual slavery offences as well as several counts of homicide and enforced disappearances against indigenous women, when stationed at the Sepur Zarco military base in Alta Verapaz.

The Tribunal classified as a non-international armed conflict the situation at the time when the atrocities occurred and then analyzed the conducts of the military forces carried out against the Mayan population and in particular against Mayan Q’eqchi’ women.

Article 378 of the Criminal Code punishes “Crimes against duties of humanity”, which includes both war crimes and crimes against humanity, as it refers to “acts against prisoners of war or wounded persons as a result of the hostilities [...]”, or “any other inhumane act against the civilian population”. The Tribunal held that the accused were responsible for crimes against the duties of humanity in the form of sexual violence, humiliating and degrading treatment and domestic slavery.

Further, the prohibition of “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment” of civilians and persons *hors de combat*, as established under common Article 3 of the Geneva Conventions of 1949, was invoked by the Tribunal.

Finally, the Tribunal ordered a combination of individual and collective redress measures on behalf of the victims, including the incorporation of women’s rights and prevention of violence against women into military education and training curricula.

16 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=1C57325B4F89A421C12581B00043C3DF&action=openDocument&xp_countrySelected=GT&xp_topicSelected=GVAL-992BU6&from=state.

Senegal

*Ministère Public c. Hissain Habré, Judgment of 30 May 2016, Extraordinary African Chambers*¹⁷

Keywords: Extraordinary African Chambers, Hissain Habré, universal jurisdiction.

On 30 May 2016, the Extraordinary African Chambers (EAC) of the Senegalese court system delivered the verdict in the case of *Ministère Public c. Hissain Habré*, former head of State of Chad. The EAC sentenced Habré to life imprisonment for having perpetrated crimes against humanity, war crimes and torture against the Hadjerai and Zaghawa ethnic groups, the people of southern Chad and political opponents, in the period between 7 June 1982 and 1 December 1990.

On 4 July 2000, five months after the Senegalese Regional Tribunal of Dakar had indicted Habré on torture charges, the Court of Appeal of Dakar reverted the decision by declaring that tribunals were not competent to judge acts of torture committed by a foreigner outside Senegal. On 20 March 2001, a ruling from the Court of Cassation confirmed the judgment of the Court of Appeal.

As Senegalese courts had declared a lack of jurisdiction to prosecute the former head of State of Chad, the situation was referred to the African Union, which in 2006 mandated Senegal to try Habré in its territory “on behalf of Africa”.¹⁸ To this end, Senegal underwent a revision of its Constitution and criminal laws to enable the prosecution of Habré.

On 18 November 2010, as a response to the petition filed by Habré claiming his right not to be prosecuted based on the principle of non-retroactivity of the law, the Court of Justice of the Economic Community of West African States (ECOWAS) ruled that Senegal must try Habré through a “special or ad hoc procedure of an international character”.

Following the ECOWAS Court’s judgment, Senegal and the African Union signed an agreement on 22 August 2012 establishing the EAC – embedded in the Senegalese justice system – to prosecute the “person or persons” most responsible for international crimes committed in Chad between 1982 and 1990.

The trial began on 20 July 2015, and approximately one year later the EAC found Habré guilty of torture, of the crimes against humanity of rape, forced slavery, murder, massive and systematic practice of summary executions, kidnapping of persons followed by their enforced disappearance, torture and inhumane treatment, and of the war crimes of murder, torture, inhumane treatment and unlawful confinement.

The conviction represents not only the first time a former head of State has been tried and convicted in another State, but also the first universal jurisdiction case in Africa, as the crimes prosecuted were committed abroad and by a

17 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=A59DAF636BE1C348C12581BE003F356A&action=openDocument&xpp_countrySelected=SN&xpp_topicSelected=GVAL-992BU6&from=state.

18 See Decision on the Hissain Habré Case and African Union Doc. Assembly/Au/3 (Vii), available at: www.hrw.org/news/2006/08/02/decision-hissene-habre-case-and-african-union-doc-assembly/au/3-vii.

foreigner, regardless of the nationalities of the victims. An appeal was filed against this judgment on 10 June 2016.

South Africa

*Decision No. 867/15, Minister of Justice and Constitutional Development v. Southern African Litigation Centre, Supreme Court of Appeal*¹⁹

Keywords: arrest warrant, immunities, ICC, Al Bashir.

On 15 March 2016, the Supreme Court of Appeal issued its decision in the case of *Minister of Justice and Constitutional Development v. Southern African Litigation Centre*. The decision follows the appeal filed by the minister against the order of arrest in the case of *Southern African Litigation Centre v. Minister of Justice and Constitutional Development and Others*.

On 23 June 2015, the Gauteng High Court declared unlawful the conduct of the South African government when it failed to take steps to arrest and detain the president of Sudan, Omar Al Bashir.²⁰ Although the government argued that the basis for the immunity given to President Al Bashir was found in the provisions of the host agreement with the African Union, in terms of the South African Diplomatic Immunities and Privileges Act, No. 37 of 2001 (DIPA), the Court ordered his arrest by virtue of South Africa's domestic and international obligations.

In order to successfully convince the Court to grant the leave to appeal, the government additionally contended that the general immunity which a head of State enjoys stems from the provisions of customary international law and the provisions of Article 4(1)(a) of DIPA, which reads: "A head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as ... heads of state enjoy in accordance with the rules of customary international law."

The Supreme Court of Appeal agreed that head of State immunity exists under both customary international law and domestic law, but noted that the Implementation Act, which domesticates the provisions of the Rome Statute, excluded this immunity in relation to international crimes and South Africa's obligations to the International Criminal Court. Therefore, the Supreme Court dismissed the appeal.

19 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=06B21F9772B4B800C1257FB1002E7060&action=openDocument&xp_countrySelected=ZA&xp_topicSelected=GVAL-992BU6&from=state.

20 See Supreme Court of Appeal, *Southern African Litigation Centre v. Minister of Justice and Constitutional Development and Others*, 2015 (5) SA 1 (GP), 2015, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=481F300878BA3075C1257F1E00386F19&action=openDocument&xp_countrySelected=ZA&xp_topicSelected=GVAL-992BU6&from=state.

Other efforts to strengthen national implementation of IHL

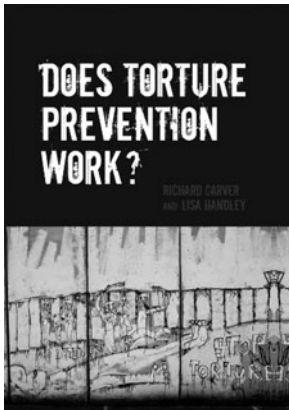
To further its work on implementation of IHL, the ICRC Advisory Service organized, in cooperation with respective host States, regional or sub-regional organizations, a number of national workshops and several regional conferences directed at engaging national authorities in the period under review.

Of particular interest was the Roundtable Meeting on the Progress towards Legally Binding Measures to Prohibit and Eliminate Nuclear Weapons, co-organized by the ICRC, the Institute for Security Studies and the International Law and Policy Institute, which took place on 17–18 February 2016 in Pretoria, South Africa. The event brought together government representatives from Austria, Botswana, Egypt, Ghana, Kenya, Malawi, Mauritius, Nigeria, Norway, South Africa, Switzerland and Zambia. The main topic on the agenda was nuclear non-proliferation and disarmament.

Another event of interest was the Fourth Regional Seminar on IHL National Implementation, jointly organized by the ICRC and the Office of the Attorney General and Department of Justice of the government of Kenya, from 7 to 9 June 2016 in Naivasha, Kenya. The seminar gathered civil servants from various ministries and departments of governments associated with the promotion and national implementation of IHL, including members of national IHL committees from Djibouti, Ethiopia, Kenya, Somalia and Tanzania. Among the topics reviewed during the seminar, particular attention was given to issues related to weapons treaty implementation, the obligation to respect and ensure respect for IHL, country reports, the ICRC 2015 Challenges Report, national IHL committees and the protection of cultural property.

A similar event was held in Abuja, Nigeria, from 28 June to 1 July 2016. The 13th ICRC-ECOWAS Annual Review Meeting on the implementation of IHL brought together governmental officials and national IHL committees from Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal and Togo. The conference dealt mainly with IHL and national implementation and other IHL-related issues, such as internally displaced persons, the protection of cultural property in armed conflict, and the ATT.

BOOK REVIEW



Does Torture Prevention Work?

Richard Carver and Lisa Handley*

Book review by Olivier Chow, Protection Coordinator for the ICRC Pretoria Regional Delegation for Southern Africa.

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Does Torture Prevention Work?, by Dr Richard Carver from Oxford Brookes University and Dr Lisa Handley, an independent scholar from the United States, is the first independent and global study of the impact of torture prevention measures. The research provides important new insights into the most effective ways to reduce incidences of torture. Carver and Handley led a team of researchers in fourteen countries, and asked them to look at torture and prevention mechanisms over a thirty-year period. Their research demonstrates that torture can be prevented.

This book is important not only because of its key messages and findings but also because it fills a significant gap in the research on torture, a practice that sadly remains a prevalent concern worldwide. There is indeed little extant scholarly analysis of the impact of preventive measures on torture. The legal literature tends to be normative and usually limits itself to what States are required to do, rather than what actually works in practice. Most of what is written about torture is found in country-specific studies, drafted by non-governmental organizations, with alerts that torture is endemic, but not generally explaining why preventive measures succeed or fail.

The book is divided into eighteen chapters, with two discernable sections. The first section is composed of the first three chapters, which introduce and explain the methodology set up for the research as well as the key findings. The second section includes chapters that look at the fourteen country-specific studies:

* Published by Liverpool University Press, Liverpool, 2016.

the United Kingdom, Chile, Hungary, Indonesia, Israel, Peru, South Africa, Georgia, Tunisia, Turkey, Ethiopia, India, Kyrgyzstan and the Philippines. The case studies are grouped into four main categories: countries that have seen consistent and sustained improvement (UK, Chile), countries where positive developments have stalled after initial success (Hungary, Indonesia, Israel, Peru, South Africa), countries that have made recent dramatic improvements which may or may not be sustained (Georgia, Tunisia, Turkey), and finally, countries where there has been no discernable sustained improvement over the years (Ethiopia, India, Kyrgyzstan and the Philippines). In the final chapter, the authors provide their conclusions.

This review will focus on the first section of the book, due to the importance and transversal nature of the research methodology and key findings presented therein. The methodology of the research combines quantitative and qualitative analysis to examine which torture prevention methods were the most effective during the period under review (1984–2014). The researchers identified sixty independent variables, which they divided into four main categories: detention, prosecution, monitoring and complaints mechanisms. These correspond to the main legal obligations contained in the main relevant international and regional treaties, as well as the key recommendations from human rights mechanisms.¹ In addition, the researchers added a variable about training in each of the categories, training being recognized as an important feature of torture prevention.

The authors came up with an index to measure the incidence of torture: the Carver-Handley Torture Score (CHATS), focusing on the frequency, geographical spread and severity of torture.² They used the torture definition contained in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³ – thus excluding ill-treatment and cruel, inhuman and degrading treatment (for example, poor material conditions of detention or the use of force during demonstrations). The authors point out the “human rights information paradox”: the significant rise in incidences of torture, which could index a rise in the phenomenon, is often connected to a better documentation and reporting of those incidences, and therefore to a shift by the government towards eliminating torture.

The key finding from the research is that torture prevention works. Detention safeguards have the highest torture prevention impact, followed by prosecution and monitoring mechanisms. The interesting finding is that complaints mechanisms had no measurable impact on torture prevention.⁴ The study found a significant gap between law and practice – particularly with respect to detention safeguards and investigation and prosecution of torturers, often determined by the political environment. The third main finding is that training has a positive impact in all areas: one of the chief recommendations is that

1 *Does Torture Prevention Work?*, pp. 34–35.

2 *Ibid.*, pp. 36–42.

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987).

4 *Does Torture Prevention Work?*, p. 3.

training should be targeted at improving professional skills, particularly at institutions like police academies, and that it should not be limited to information and dissemination about human rights norms, which is often the case in practice today. Importantly, no single measure alone is sufficient to prevent torture: a holistic approach to torture prevention is therefore necessary in order to create a conducive environment where torture is less likely to occur.

When detention safeguards are applied in practice, this has the highest correlation in reducing incidences of torture. Amongst all of them, abstaining from unofficial detention and the implementation of safeguards in the first hours and days after arrest are the most important means for preventing torture. In particular, notification of relatives or friends and access to a lawyer have the greatest effect in reducing torture, closely followed by access to an independent medical examination. The study also highlights the positive impact of reducing reliance on confessions, which for obvious reasons often leads to coercion and torture. Audio and video recording during interrogation are important but are not much used in practice.

When perpetrators are consistently prosecuted, the risk of torture diminishes. However, there is a huge gap between law and practice: while most countries criminalize torture, prosecutions are rare. One of the factors that came out of the study was whether complaints were lodged with prosecuting authorities. Other important factors are disciplinary sanctions against perpetrators and the absence of amnesty laws for perpetrators.

Monitoring bodies – understood broadly to include National Preventive Mechanisms under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,⁵ but also civil society organizations and international bodies – have a direct effect in reducing torture. Additionally, the ability to carry out unannounced visits and to interview detainees in private are considered key elements. The impact of monitoring bodies in detention might, however, be less significant than expected, and the focus should be on police custody rather than on prisons, which are the focus of most monitoring bodies.

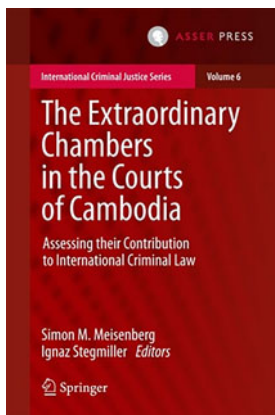
Complaints mechanisms do not have a measurable impact on the prevention of torture, unless there is a specific mandate to carry out investigations and refer cases to a prosecutorial authority.

In addition to the general conclusions mentioned above, there are some interesting yet – for some – unsurprising findings. These include poor quality of data concerning incidences of torture and related issues: poor data handling, shifting definitions of torture which make it difficult to compare data from one year to the next, and torture indicators that do not necessarily indicate much about the incidence of torture. The authors recommend that relevant treaty bodies be supplemented by a format for State recording of data on torture and ill-treatment. This would certainly be helpful.

5 Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, UN Doc. A/RES/57/199, 9 January 2003 (entered into force 22 June 2006).

This book is important because it is the first evidence-based feedback on the many efforts of national and international actors in the field of torture prevention. The findings of the research can provide concrete and actionable material for those who work in the field of torture prevention, enabling them to focus on and invest in what works rather than only going along with a formatted response – which sadly is often the norm. It paves the way to a hopefully more tailored and efficient response. Careful attention should nevertheless be paid to context and environment analysis – the case studies highlight the discrepancies between contexts and the need to keep away from a one-size-fits-all approach. The book's message of cautious optimism will most certainly appeal to and comfort those who are actively involved in this delicate and sometimes frustrating work, where low-hanging fruits are few and far between.

BOOK REVIEW



The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law

Simon Meisenberg and Ignaz Stegmiller (eds)*

Book review by Katie Shea, Federal Prosecutor, Illegal Imports and Exports, Human Exploitation and Border Protection, Commonwealth Director of Public Prosecutions. Former legal intern in the Office of the Co-Prosecutors, ECCC.

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The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established by a joint agreement between the United Nations and the Kingdom of Cambodia in 2006 to try senior leaders and those most responsible for crimes committed under international and domestic law during the era of Democratic Kampuchea from 1975 to 1979. Since its establishment, the ECCC has heard one case to completion and is currently deliberating in the second. The trial in Case 001, against Kaing Guek Eav (alias Duch), the former chairman of the S-21 security centre, closed in November 2009, and on 3 February 2012, following appeals by the accused and the co-prosecutors, the Supreme Court Chamber entered convictions against Duch for crimes against humanity and grave breaches of the Geneva Conventions of 1949,

* Published by T. M. C. Asser Press, The Hague, 2016.

sentencing him to life imprisonment.¹ Case 002, initially involving the four former Khmer Rouge leaders Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, was severed into a series of smaller trials.² Ieng Thirith was found unfit to stand trial, and Ieng Sary died on 14 March 2013.³ On 7 August 2014, in Case 002/01, Nuon Chea and Khieu Samphan were found guilty of crimes against humanity and sentenced to life imprisonment.⁴ Appeals are currently under way in the Supreme Court Chamber while the Trial Chamber deliberates on the evidence heard in Case 002/02.⁵ Cases 003 and 004, in which Meas Muth, Ao An and Yim Tith have been named as charged persons, remain in the investigation stage.

The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law, edited by Simon Meisenberg and Ignaz Stegmüller, draws together the contributions of academics and practitioners in international criminal law (ICL), many of whom have been directly involved with the ECCC at some point in the life of the Court. The book seeks to provide a positive, but appropriately critical, analysis of the often overlooked and undervalued contributions made by the ECCC to the development of ICL. In doing so, *The Extraordinary Chambers in the Courts of Cambodia* goes beyond the bare legal principles by also examining the Court's role and responsibility in Cambodian society and its broader implications for a country struggling to come to terms with its violent past and the daily realities of its challenging present.

Frequently, criticisms of the Court's composition, independence and unusual structure enable it to be dismissed from the ICL landscape. With mirrored national and international components (national and international co-investigating judges, national and international co-prosecutors) and a mixed composition of judicial officers in the three chambers,⁶ the Court has been troubled by allegations of interference and deadlocks in decision-making.⁷ Refreshingly, *The Extraordinary Chambers in the Courts of Cambodia* confronts these criticisms directly. Divided into three parts, the book first examines the history of the country, previous efforts at accountability for Khmer Rouge leaders and the challenges in establishing the Court. This introductory section is enriched by the contribution of Dr Helen Jarvis, who has long been embedded in the Cambodian landscape and witnessed first-hand the painful beginnings of the ECCC. Dr Jarvis' chapter introduces readers to the Cambodian reality and provides insight into the profound impact of the Khmer Rouge on national

1 ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007-ECCC/SC, Case 001 Appeal Judgment, 3 February 2012, pp. 320–321.

2 See ECCC, *Prosecutor v. Nuon Chea, Prosecutor v. Khieu Samphan*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013.

3 ECCC, "Case 002", available at: www.eccc.gov.kh/en/case/topic/2 (all internet references were accessed in July 2017).

4 ECCC, *Prosecutor v. Nuon Chea, Prosecutor v. Khieu Samphan*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgment, 7 August 2014, pp. 579–580, 595–596.

5 ECCC, "Closing Statements in Case 002/02 Conclude", 23 June 2017, available at: www.eccc.gov.kh/en/articles/closing-statements-case-00202-conclude.

6 *The Extraordinary Chambers in the Courts of Cambodia*, p. 22.

7 *Ibid.*, Ch. 3.

identity. This part goes on to provide a frank assessment of allegations of political interference, bias and corruption and the heavy weight of expectations on the Court. If occasionally repetitious, the historical background provided by the authors is effective in setting the scene for those unfamiliar with the Cambodian context. In his chapter, Jeudy Oeung does well also to highlight central issues for the Court: victim participation and legacy. Whilst acknowledging the imperfect and limited role of the civil parties in the trials to date,⁸ the authors place that participation in the context it deserves; in circumstances where there has been no truth and reconciliation commission and where former Khmer Rouge cadres still occupy places of responsibility in the country's leadership, holding the trials in the country where the atrocities took place has enabled 243,941 people to physically attend the trial in Case 001 and in the first part of Case 002.⁹ The impacts of this are recognized by the authors. In the context of legacy, this part of the book provides an intense criticism of the opportunities missed for a coherent approach by ECCC staff. It also delivers a frank assessment of capacity-building efforts to improve the Cambodian domestic legal system while recognizing the progress made and the central role of non-governmental organizations in spearheading initiatives for change.

The second part of the book considers the ECCC's substantive contributions to ICL. A thorough analysis of the trial judgments in Case 001, against Kaing Guek Eav,¹⁰ and Case 002, ultimately against Nuon Chea and Khieu Samphan,¹¹ elucidates the many legal questions ventilated, including issues of jurisdiction, the scope of joint criminal enterprise as at 1975–1979, and the legal characterization of acts as genocide. Nathan Quick's thoughtful review of the development of the law on forced transfer and deportation identifies the value of the Trial Chamber's judgment in Case 002/01 in confirming that any forced transfer is a criminal act in its own right.¹² Opportunities lost and taken to develop the law on sexual and gender-based violence at the international level are considered by Valerie Oosterveld and Patricia Viseur Sellers. Specifically, the authors examine the Court's approach to forced marriage and advances in the law, with both positive and negative elements. Recognition is given to the crucial role played by the lawyers for the civil parties in advocating for the investigation of forced marriage and forced sexual relations by the co-investigating judges. That advocacy led directly to the inclusion of the regulation of marriage as one of the five policies forming part of the common plan of a joint criminal enterprise

8 See Alain Werner and Daniella Rudy, "Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?", *Northwestern Journal of International Human Rights*, Vol. 8, No. 3, 2010; Marie Guiraud, *Victims' Rights before the Extraordinary Chambers in the Courts of Cambodia*, International Federation for Human Rights, Paris, November 2012.

9 ECCC, "ECCC at a Glance", April 2014, p. 3, available at www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf.

10 ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010.

11 ECCC, *Chea, Samphan*, above note 4.

12 *The Extraordinary Chambers in the Courts of Cambodia*, p. 319.

in the Closing Order (indictment) for Case 002.¹³ The controversial finding that rape was not a crime against humanity in 1975 is considered, along with how that decision sits with the findings of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.¹⁴ This part also provides some stern criticism of the Trial Chamber's application of the law concerning war crimes in the context of an international armed conflict.

In the third part, the authors examine how international criminal procedure has been developed as a result of the ECCC proceedings. Central to this is the recognition that the ECCC was essentially an experiment in mass-atrocity trials conducted according to the inquisitorial process. The natural corollary is that the Court was unable to draw upon the procedural decisions of the International Criminal Court or the *ad hoc* tribunals in resolving procedural struggles. The authors recognize the difficulties and the "pure mongrel"¹⁵ inquisitorial-adversarial hybrid that came about as being very particular to the Cambodian context. Rather than attempting to draw a definitive result from the inquisitorial experiment, the authors provide valuable analysis of the strengths and weaknesses of both procedural models, ultimately suggesting that any procedural model needs to be pragmatically tailored to the context and realities on the ground.¹⁶ Pragmatism and its limitations are considered later in the book in an examination of the severance decision in Case 002. Following the Trial Chamber's decision to sever the indictment in Case 002 into a series of "mini-trials" in an effort to expedite the proceedings and enable judgment to be rendered against the octogenarian accused, the authors examine the ramifications of that decision in terms of procedure and the fair trial rights of the accused.

An issue often central to international criminal trials, and discussed further in the book, is that of the fair trial rights of aged accused. In his chapter, Roger Phillips gives important consideration to the impact of advanced age and poor health upon the accused's ability to meaningfully participate in a trial. A key procedural point also developed in this part is the approach to torture statements and the use to be made of them under international law. The attention given to this issue is fitting in light of the central role that "confessions" played as a tool for Democratic Kampuchea's control of its citizens. Appropriately, the book closes with reviews of the role of victims in international criminal trials, the practicalities and limitations of the civil party approach adopted by the ECCC, and the mechanisms available to recognize and enforce victims' rights.

The limitations of the ECCC – and there are many – are readily acknowledged by the authors of *The Extraordinary Chambers in the Courts of Cambodia*. However, rather than allowing the imperfect nature of the proceedings to obscure their value, the authors seek, and find, the lessons to be learned from the controversial tribunal. *The Extraordinary Chambers in the Courts of*

¹³ *Ibid.*, p. 327.

¹⁴ *Ibid.*, pp. 334–347.

¹⁵ *Ibid.*, p. 430.

¹⁶ *Ibid.*, p. 432.

Cambodia is a thought-provoking work which will generate discussion among practitioners and contribute to the diverse, nuanced landscape for international law scholars, and its underlying theme of gradual, hard-won progress is one that is certainly familiar to students of ICL. The result is a generally optimistic volume that accords the ECCC its proper status in the fight against impunity and recognizes the potential role of hybrid courts in the future of criminal justice.

BOOK REVIEW



Compliant Rebels: Rebel Groups and International Law in World Politics

Hyeran Jo*

Book review by Ezequiel Heffes, Thematic Legal Adviser,
Geneva Call; LLM, Geneva Academy of International
Humanitarian Law and Human Rights; Lawyer, University of
Buenos Aires School of Law.

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In the last few years, the role and status of rebel groups¹ have become essential topics of analysis and discussion for a better understanding of current international dynamics. Although contemporary public international law still seems to be predominantly State-oriented, it is undeniable that over the last few decades the increasing participation of rebel groups in the international realm has led to many discussions and complex debates. One of the primary concerns has been how to increase respect for humanitarian rules by rebel groups. Generally, difficulties related to compliance can be linked to various circumstances, such as the unwillingness of the parties to acknowledge that a situation of violence amounts to an armed conflict, the absence of an incentive for the parties to abide by humanitarian rules,² or rebels' lack of an appropriate structure or resources.³ In *Compliant Rebels: Rebel Groups and International Law in World Politics*, Hyeran Jo meticulously addresses some of these issues, taking into consideration the role of rebel groups in the international realm and focusing on the reasons as to why they might choose to comply with international norms.⁴ This topic is not merely a matter of legal theory, and has an impact on the everyday reality of international humanitarian law (IHL). As inquired by the author at an early stage of the book,

* Published by Cambridge University Press, Cambridge, 2015.

“why do some rebel groups comply with international standards of conduct in warfare, while others do not? Are rebel groups aware of international standards? When and why do they make conscious efforts to abide by international rules?”⁵

Running in parallel with an exponential increase of academic literature on the subject,⁶ the author took upon herself the task of putting together a detailed analysis of some of the most transcendental difficulties that affect legal compliance by rebel groups. The book’s central thesis is that “legitimacy-seeking” rebels are more likely to comply with international law than those which are “legitimacy-indifferent”.⁷

At this stage, it shall be noted that the number of studies – books and articles – on this issue has been growing for some time, both in the international law and international relations literature.⁸ Although this is probably the first time

- 1 Although the international law literature normally refers to “non-State armed groups”, “armed opposition groups”, “armed groups” or “armed non-State actors” indistinctively, this book review will use the term “rebel groups”, as chosen by Jo. According to her, this term is used to highlight “the fact that these groups are fighting government forces inciting rebellion, and to remind us that they usually ‘rebel’ against a set of existing norms, potentially including international rules”. *Compliant Rebels*, p. 37.
- 2 Krieger, for instance, affirms that “[a]ctual decisions to obey a legal norm result from a complex mixture of diverse motivations. Power relations as well as historical, political, social and anthropological conditions determine these motivations so that compliance is context-dependent.” Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, Cambridge, 2015, pp. 4–5.
- 3 Olivier Bangerter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 357. See also International Committee of the Red Cross (ICRC), *Improving Compliance with International Humanitarian Law – ICRC Expert Seminars*, October 2003, pp. 20–21, available at: www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf (all internet references were accessed in August 2017); Ezequiel Heffes and Marcos Kotlik, “Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 1201.
- 4 Due to the potential vastness of the subject, Jo cleverly narrows her analysis to rebel groups active in civil conflicts between 1989 and 2009. This is deliberate, and reflects the increasing amount of conflicts in which rebel groups have played a role in the last few decades.
- 5 *Compliant Rebels*, pp. 4–5.
- 6 See, among others, H. Krieger, above note 2; Sophie Rondeau, “Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011; Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010; O. Bangerter, above note 3, p. 357; Olivier Bangerter, “Internal Control: Codes of Conduct within Insurgent Armed Groups”, *Small Arms Survey*, Occasional Paper No. 31, November 2012, pp. 4 ff., available at: www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP31-internal-control.pdf; Geneva Call, *In Their Words: Perceptions of Armed non-State Actors on Humanitarian Action*, 2016, available at: genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WH_S_Report_2016_web.pdf.
- 7 *Compliant Rebels*, p. 5.
- 8 See, for instance, the issue on “Generating Respect for the Law” of the *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014; Anna Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War*, Cambridge University Press, Cambridge, 2015; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017; Konstantinos Mastodorimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundations and Framework of Obligations, and Rules on Accountability*, Routledge, London, 2016. Also, in 2011 the *International Review of the Red Cross* published two standing issues on the role of armed groups in the international sphere: see *International Review of the Red Cross*, Vol. 93, Nos 882 and 883, 2011. For further literature, see Ezequiel Heffes, “Armed Opposition Groups”, in Anthony Carty (ed.), *Oxford Bibliographies in International Law*, Oxford University Press, New York, 2016.

an exhaustive project on compliance of humanitarian norms by rebel groups has been undertaken, Jo's book should be viewed as part of this trend of publications. Based on a thorough practical analysis and a novel combination between political science and international law, it fills an important gap in the literature – and this is probably its most distinguishing feature, setting it apart from other relevant books on armed groups and international law.⁹ Jo has done a commendable job that is certainly welcome.

The analysis of rebel groups' compliance is organized into nine chapters, all of which offer a good amount of academic literature and practice. As the book offers an extensive theoretical framework as well as empirical evidence, a detailed review of each chapter is indeed impossible given the inherent limitations of a book review. Therefore, the present reviewer has selectively engaged with specific theoretical topics identified in the first four chapters.

The main challenges are presented in the general introduction. According to Jo, the first of these lies in rebel groups' strategic and military considerations, since IHL and human rights rules "prohibit the sort of actions that often serve the strategic interests of rebel groups – the sort of actions that may, at times, give them a competitive advantage over government forces".¹⁰ The second difficulty is related to the lack of participation of rebels in international law-making processes:

Nor have they ever been signatories to international treaties and conventions, such as the Geneva Conventions. Why would rebel groups follow rules they neither created nor signed on to? Although rebel groups do have obligations under international law even without consent, it is intriguing to observe that some groups voluntarily submit themselves to those rules.¹¹

In order to resolve these issues, Jo refers to rebel groups' pursuit of legitimacy in the eyes of political audiences that care about values consistent with international law at the domestic and international levels.¹² As she interestingly suggests, if rebels seek legitimacy "in the eyes of key audiences with preferences for rules consistent with international standards, then we are likely to see rebel compliance".¹³ In this sense, rebel legitimacy is defined as "support and recognition that a rebel group is a viable political authority".¹⁴

9 Zakaria Daboné has also recently explored the role of rebel groups, but addresses this topic exclusively within the international law realm. See Zakaria Daboné, *Le droit international public relatif aux groupes armés non étatiques*, Schulthess, Geneva, 2012.

10 *Compliant Rebels*, p. 6

11 *Ibid.* Although the lack of participation in the creation of customary international law is not particularly explored in the book, Jo refers later to the benefits of including rebel groups in the drafting of rules and laws. According to her, "[f]rom the rebel perspective, an opportunity to participate in this drafting process may serve as a powerful incentive and rationale to change behavior. The basic idea is that rights and obligations under the law must be balanced: if armed groups are to be subjected to certain obligations and responsibilities under international humanitarian law, then they should have rights to participate in law-making too." *Ibid.*, p. 256.

12 *Ibid.*, p. 13.

13 *Ibid.*, p. 19.

14 *Ibid.*, p. 27.

The second chapter of the book addresses whether these non-State actors are aware of international law and asks whether they are actually bound by this legal regime, and if so, why.¹⁵ With respect to the former question (do rebels know about international law?), Jo takes as an indicator certain formal commitments made by rebels.¹⁶ According to her, these can materialize in three possible ways: (1) participation in international negotiations as observers; (2) public expressions of willingness to abide by international law; and (3) the conclusion of agreements with international organizations, such as with the United Nations bodies, or with non-governmental organizations, such as Geneva Call. Regarding the latter question (are rebel groups bound by international law, and if so, why?), Jo differentiates between those rebel groups that explicitly consent to international norms, which are “without a doubt bound by international law”, and those that even without consent still “carry obligations to abide by humanitarian law” due to the customary nature of certain rules.¹⁷ Although the possibility of having rebel groups directly consenting to their international obligations is an interesting proposal, it is not further addressed in the book, even when it could be used as a tool to enhance their respect for humanitarian rules.¹⁸ Two additional points shall also be noted in this regard. Firstly, the author deals indistinctively with IHL and international human rights obligations, but these legal regimes present different features when dealing with rebel groups,¹⁹ and a more extensive analysis could have been useful.²⁰ Secondly, despite Jo initially affirming that “rebel groups without consent are bound by international law in a customary sense”, she then states:

The prevention of genocide, now accepted as a global norm, for example, clearly applies to rebel groups. The nature of international law-making restricts the participatory rights of rebel groups. Rebel groups do not take part in negotiating international laws and do not have institutional means to ratify the laws. Their obligations derive from being under the authority of a state party or by issue of the laws being natural laws applicable to all subjects of international politics.²¹

In these lines, Jo makes a distinction in the application of *jus cogens* rules and the rest of international norms. It remains unclear, however, why one framework

15 *Ibid.*, p. 36.

16 *Ibid.*, p. 48.

17 *Ibid.*, p. 46.

18 For an analysis of the participation of non-State armed groups in the conclusion of special agreements, see E. Heffes and M. Kotlik, above note 3.

19 For instance, in an excellent contribution, before discussing whether non-State armed groups are subject to direct international obligations, Daragh Murray has thoroughly explored whether they can possess international legal personality to be bound by these rules. Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart Publishing, Oxford and Portland, OR, 2016, pp. 23–81.

20 *Compliant Rebels*, p. 39. There, Jo affirms that “[a] rebel group’s organizational structure will have implications for behavior regarding human rights in rebel groups. Depending on its level of authority, rebel leadership can order and incite rebel soldiers to commit violations of the laws of war.” For a similar approach, see *ibid.*, p. 45.

21 *Ibid.*, pp. 46–47.

would apply directly upon the non-State entity, while others would have to be accepted beforehand by the State fighting against the rebel group. Additionally, how these scenarios interplay with the abovementioned proposal on rebels directly consenting to their international obligations could have been further explored.

The third chapter is the most important theoretical part of the book. Here, Jo proposes her legitimacy-based theory of rebel compliance, according to which rebel groups with “legitimacy-seeking” features are more likely to comply with international norms than their “legitimacy-indifferent counterparts”. In the words of the author, for most rebels there is something to be gained by complying with international law: recognition, legitimacy and reputation. As she explains:

Recognition provides international credibility around the world, and thus a stronger strategic position for groups in their struggle against an opposing government at home. Legitimacy also gives rebel groups greater authority compared with their national government, especially in instances where the government itself lacks legitimacy to govern. Having a reputation as a complier with international law can earn rebel groups a medal of good citizenship in the long run.²²

In examining the constituencies of rebel groups, Jo interestingly suggests that both the government and international society play a role in making or breaking rebel compliance. This is the reason why a comprehensive analysis of rebel groups’ behaviour must take into account relevant interactions among rebels, governments and international actors.²³ The author affirms in this vein that these non-State actors do consider international law as legitimate when they have some expected political advantages to be gained by complying. Therefore, decisions to comply or not are mostly driven by the need to obtain legitimacy in order to ensure group survival.

The fourth chapter represents the bridge between this theoretical framework and empirical evidence. Since legitimacy-seeking motivations of rebel groups are, according to Jo, the most important determinants of their possible compliance, she underlines three possible indicators to understand their level of respect: (1) the existence of a political wing within a rebel organization; (2) a secessionist aim with clear governance objectives in an autonomous region; and (3) foreign support under the influence of human rights groups.²⁴ These elements serve to provide an indication that the group is “legitimacy-seeking”, and constitute a novel argument as to why rebels comply with international rules.

Although this proposal seems helpful towards having more respected legal regimes, the author also refers to the link between the non-State entity and the domestic law of the State against which it is fighting. In this sense, when dealing with the first indicator, Jo recognizes that if opposing governments allow rebel

²² *Ibid.*, pp. 64–65.

²³ *Ibid.*, p. 70.

²⁴ *Ibid.*, p. 93.

groups to enter the political sphere, “rebels will then have less incentive to resort to violence unnecessarily”.²⁵ The practical consequences of considering this, however, are not thoroughly envisaged. To that end, certain real-world scenarios are difficult to solve under this proposal. For instance, it is unclear how recognition by governmental authorities might operate in complex conflicts that take place in the territory of a given State between a rebel group and a third State. Which opposing government should recognize the rebel group as a political party to enhance its compliance? Moreover, even if this theory could apply to certain contexts, it is difficult to imagine that every State will recognize a rebel group as having some sort of legitimacy under its domestic legal system; and during an armed conflict, would a rebel group be allowed to present candidates for an election while hostilities are still active? Finally, would this political acceptance also recognize as lawful certain acts that naturally challenge the sovereignty of States, such as the establishment of courts by rebel groups or their provision of education in the territories under their control?²⁶

In any case, based on the abovementioned indicators, Jo presents three hypotheses that are worth noting. Firstly, that rebel groups with political wings are more likely to comply with international norms; according to Jo, this prospect would be stronger if these political wings had a firmer control over the groups’ military sections. Secondly, that rebel groups with secessionist aims are more likely to comply with international law. Since these non-State entities can establish social relations with civilians because of family or ethnic ties, the expectation is that groups with social relations are more likely to refrain from violence against civilians. Thirdly, Jo argues that rebels who rely on foreign sponsors with human rights organizations are more likely to comply with international norms. Those groups that open themselves to organizations such as the International Committee of the Red Cross (ICRC) or Geneva Call, according to Jo, are more likely to make commitments to international law, and therefore positively change their behaviours.²⁷

Since there is a vast number of humanitarian rules that could be studied in light of these hypotheses, Chapters 5, 6 and 7 narrow the empirical analysis of the book to three main humanitarian issues: the killing of civilians, the use of child soldiers, and rebel groups’ decisions with regard to granting the ICRC access to their detention facilities.²⁸ At the centre of Jo’s inquiry is the source from which the book draws its information: the Rebel Groups and International Law database, which was exclusively built for the book project and includes both qualitative and quantitative information about rebel groups’ institutional “and

²⁵ *Ibid.*

²⁶ Jan Willms, “Courts of Armed Groups – a Tool for Inducing Higher Compliance with International Humanitarian Law?”, in H. Krieger, above note 2, p. 150. For a practical approach to the provision of education by non-State armed groups, see PEIC/Geneva Call, *Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda*, 2015, available at: www.genevacall.org/wp-content/uploads/dlm_uploads/2015/12/Geneva_Call_Paper1.pdf.

²⁷ *Compliant Rebels*, pp. 110–111.

²⁸ *Ibid.*, p. 24.

organizational profiles, and their humanitarian and human rights behaviors”.²⁹ The study of these issues is well researched and structured, and every chapter thoroughly combines a general factual approach with a specific case study in which the author shows how the abovementioned indicators influenced the group’s respect for the law.³⁰ Chapter 8 compares and contrasts these three topics, highlighting as a common finding that achieving strategic legitimacy influences rebel groups’ decisions to comply with international norms in specific ways. The final chapter serves as a conclusion.

As can be seen from Jo’s research, some rebel groups actually care about international law, and compliant rebels should not be seen as a rare phenomenon. Groups complying with international law are indeed numerous, specifically among those legitimacy-seeking groups with articulated norms and ties to domestic populations. Contrary to the conventional thinking that rebel groups are violent and constantly breach humanitarian rules, the present book argues that some rebel groups are not only aware of international law but are also committed to adhering to its rules, and often try to “advance their rebellion by exploiting the normative structure of international law”.³¹ Although a more detailed analysis on the legal framework would have been useful (particularly on the reasons why rebels are bound by this legal regime), *Compliant Rebels* still represents an excellent addition to the literature dealing with generating respect for humanitarian rules, and one that is unique in its scope and fresh in its approach. For the purpose of better protecting victims in conflict situations, rebel groups should not be ignored, but should rather be further studied and engaged.

29 *Ibid.*, pp. 83 ff. When building her database, it shall be noted that Jo takes different sources into account. For instance, as explained by her, “Their Words”, the database of Geneva Call that compiles the commitments made by rebels, “was essential in the analysis of rebel commitment to international law”, see p. 279.

30 Jo also acknowledges the possible lack of information related to some specific issues, such as detention access. As she recognizes, “[s]everal difficulties complicate accurate observation and measurement of detainee treatment. Some rebel groups rarely detain, opting instead to kill or conduct hit-and-run operations; others detain, but do so in remote places.” *Ibid.*, p. 188.

31 *Ibid.*, p. 238.

BOOKS AND ARTICLES

New publications in humanitarian action and the law

This selection is based on the new acquisitions of the ICRC's Library Service

Air warfare

Articles

R. D. Hooker, “Airpower in American Wars”, *Survival*, Vol. 58, No. 6, 2016–2017, pp. 121–134.

Katharine Hall Kindervater, “The Emergence of Lethal Surveillance: Watching and Killing in the History of Drone Technology”, *Security Dialogue*, Vol. 47, No. 3, 2016, pp. 223–238.

Arms

Books

Nehal Bhuta and Robin Geiss (eds), *Autonomous Weapons Systems: Laws, Ethics, Policy*, Cambridge University Press, Cambridge, 2016, 410 pp.

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CORRIGENDUM

“Rahmatan lil-’alamin” (A mercy to all creation): Islamic voices in the debate on humanitarian principles – CORRIGENDUM

Abdulfatah Said Mohamed and Ronald Ofteringer

doi:10.1017/S1816383115000697. First published online
by Cambridge University Press, 2 December 2015.

The text of the above article by Abdulfatah Said Mohamed and Ronald Ofteringer originally stated on page 832 that the Code of Conducts for Muslim Humanitarian Relief Organizations elaborated by the Turkish Humanitarian Relief Foundation (İnsan Hak ve Hürriyetleri ve İnsani Yardım Vakfı, IHH) in 2009 was the first draft document for the dialogue between the Organization of Islamic Cooperation (OIC) and the Islamic NGOs from its member States and therefore disseminated more widely. It should instead have specified that the Islamic Charter of the Work of Goodness, a project of the Geneva-based Cordoba Foundation, was discussed with Islamic charities already in 2006 at a conference in Doha, and was equally presented in the OIC-Islamic NGO consultations. Both documents informed the subsequent discussions in The Humanitarian Forum, and the dialogue between OIC and NGOs.

In addition, please note that the following document name has changed: the Islamic Charter of the Work of Goodness changed its name in 2015 to the Charter of the Work of Goodness.

Reference

Abdulfatah Said Mohamed and Ronald Ofteringer, “Rahmatan lil-’alamin” (A mercy to all creation): Islamic voices in the debate on humanitarian principles’ in *International Review of the Red Cross*, 2015, doi: 10.1017/S1816383115000697.

CORRIGENDUM

War and security at sea: Warning shots – CORRIGENDUM

Vincent Bernard, Editor-in-Chief

doi:10.1017/S1816383117000443. First published online by Cambridge University Press, 2 October 2017.

The text of the above editorial by Vincent Bernard referred to “the Falklands War”. This should have instead read “Falklands/Malvinas war”, with the disclaimer that the designation as such does not imply official endorsement, nor the expression of any opinion whatsoever concerning the legal status of any territory, or concerning the delimitation of its frontiers or boundaries.”

Reference

Vincent Bernard, ‘War and security at sea: Warning shots’ in *International Review of the Red Cross*, 2017, doi: 10.1017/S1816383117000443.

