

**Punishment in Times of Conflict:
Justifications, Rationales and Effects**

DPhil Thesis

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Abstract

Throughout the history of conflict, states have used various mechanisms to confine enemy fighters, including detention as Prisoners-of-War, administrative detention, and imprisonment as convicted offenders. This thesis studies incarceration in times of conflict as a form of punishment. It explores various forms of detention during hostilities and identifies common themes of unwarranted severity, deviation from basic criminal law principles and the targeting of minorities. The thesis proposes the term *conflict penalty* to capture the special characteristics of how states punish perceived enemies. It develops the conceptual framework of conflict penalty by examining the case study of Israel's penal policies against Palestinian insurgents. It does so by discussing separately the approaches of the prisons, the political administration, and the Supreme Court of Israel. Exploring how different state actors engage with and justify special penal policies, the thesis provides a close analysis of how the Israeli-Palestinian conflict shaped Israel's punishment of Palestinians, and vice versa, how state authorities use their penal power to better manage Israel's interests in the ongoing conflict, in ways that exacerbate the political divide. The thesis develops several insights into how conflict reveals the politicisation of punishment, and how the framework of conflict penalty can improve our understanding of general criminal justice practices that operate in societies stratified by class and race tensions.

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Key Events in the Israeli-Palestinian Conflict Since 1947

The following list aims to assist the reader by pointing to important dates and events of the Israeli-Palestinian conflict. The list is by no means exhaustive, and it is included as a basic guide.

29 November 1947	The UN General Assembly adopted the partition plan of Mandate Palestine between the Jewish population and Palestinian Arabs.
14 May 1948	Zionist leaders declared the foundation of Israel and the 1948 War erupted, between Egypt, Jordan and Syria and Israel. The war ended with Israel expanding its borders beyond the partition plan. Egypt gained control over the Gaza Strip and Jordan over East Jerusalem and the West Bank of the Jordan River.
1959	The Palestinian Fatah is founded in Kuwait.
1965	The Arab League established the Palestinian Liberation Organisation, a coalition of Palestinian organisations. Fatah soon after became its leading member.
June 1967	War erupted between Israel and Egypt, Syria and Jordan. After six days, Israel occupied the Gaza Strip, the Sinai Peninsula, East Jerusalem, the West Bank and the Syrian highlands. It annexed East Jerusalem and established a military regime to rule the other territories.
December 1967	The Popular Front for the Liberation of Palestine, a socialist Palestinian national organisation, is established in Jordan. In 1968, a group of insurgents split from the organisation and founded the Democratic Front for the Liberation of Palestine, which focused on spreading Marxist ideology, rather than military action.
1982	Following a peace agreement with Egypt, Israel withdrew from Sinai.
1987	Islamic Palestinian organisations, Hamas and Islamic Jihad, were founded. The First Intifada erupted with mass protests against Israel's military regime across the West Bank and the Gaza Strip.
1993 - 1995	Israel and the Palestinian Liberation Organisation signed the interim Oslo Accords, which established the Palestinian Authority and acknowledged Palestinian governance in defined areas of the West Bank. The Accords included the release of 5,000 Palestinians and instated that a permanent agreement was to be signed by 2000.
2000	Failed negotiations towards a permanent agreement led to the Second Intifada, which included mass demonstrations and suicide bombers attacks. Israel retaliated through the extensive 'Defensive Shield' military operation.
2005	Israel withdrew settlers and military forces from the Gaza Strip yet maintains control over Gaza's coastal waters, air space and joint land borders.
2006	Hamas won the Palestinian parliamentary elections. Internal Palestinian clashes erupted. Hamas took over Gaza, while the Fatah-led Palestinian Authority retained the West Bank. In response, Israel imposed a blockade on the Gaza Strip.
2007- Today	Ongoing armed confrontations between Israel and Hamas and Islamic Jihad around and within the Gaza Strip.

List of Abbreviations

Israel Prison Service	IPS
Member of the Knesset (the Israeli legislative authority)	MK
Prisoner of War	POW

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Introduction

On September 6th, 2021, at 1:49 am, a taxi driver reported to the Israel Police that he had spotted six suspect figures crossing the road next to Gilboa prison in northern Israel.¹ In the following two weeks, Israel's security forces, Prison Service and Police conducted an extensive search for six Palestinian 'security prisoners' who had managed to escape the maximum-security facility.² As 'security prisoners', the classification of those incarcerated for terror-related offences, these men were considered highly dangerous.³ Israeli and international media followed the manhunt closely until all had been captured by September 13th 2021.⁴ The escape was considered a colossal failure of the Israeli Prison Service (IPS),⁵ and it reinvigorated politicians' critique of the supposedly lenient punishments and relaxed conditions Palestinians 'enjoy' in Israeli prisons.⁶

In practice, Palestinians face longer sentences for what Israeli law defines as 'security offences' against its authorities and civilians.⁷ As security prisoners, they also face harsh restrictions as the IPS prohibits their access to phones, limits family visits, and bars access to rehabilitation services.⁸ At the same time, for nearly forty years, the IPS has recognised the leadership of Palestinian organisations behind bars, allowing them to self-govern wings and allocating prisoners according to their organisational affiliation.⁹ This peculiar combination - of

¹ Peter Beaumont, 'Six Palestinian Militants Escape from High-Security Israeli Prison' *The Guardian* (6 September 2021).

² 'Palestinian prisoners' or 'incarcerated Palestinians' in this thesis include any suspect, detainee or prisoner of Palestinian descent, including citizens of Israel, whom Israel classifies as a 'security prisoner'. The term does not include Palestinians who were incarcerated for acts that do not amount to 'security offences', according to Israel, such as illegal stay or property offences. It also does not include Palestinians who are held in custody by Palestinian authorities in the Occupied Territories.

³ Prison Service Commission Ordinance 04.05.00 'Procedure for Classifying a Security Prisoner' (updated on 28 February 2018).

⁴ Josh Breiner, 'Six Palestinian Prisoners Escape Israeli Prison, Manhunt Underway' *Haaretz* (6 September 2021); Daniel Seriority and Idan Avni, 'After Five Days of Manhunt: Two of the Escaped Terrorists From Gilboa Prison were Caught' *Israel Hayom* (10 September 2021); The Associated Press, 'Six Palestinian Prisoners on the Run After Breaking Out of High-Security Israeli Jail' *NBC News* <<https://www.nbcnews.com/news/world/six-palestinian-prisoners-run-after-breaking-out-high-security-israeli-n1278558>> accessed 30 October 2022; Al Jazeera News, 'Six Palestinians Escape from High-Security Prison in Israel' *Al Jazeera* (6 September 2021) <<https://www.aljazeera.com/news/2021/9/6/six-palestinians-escape-from-high-security-prison-in-israel>> accessed 30 October 2022.

⁵ Moshe Nusbaum, 'The Calls Block System was Deactivated, Intelligence was Missing and Terrorists Managed to Escape' *N12* (6 September 2021) <https://www.mako.co.il/news-military/2021_q3/Article-4dfd81fc5e9bb71027.htm> accessed 19 October 2022.

⁶ Josh Breiner, 'Palestinian Prisoners Run 'A State Within a State' in Israel's Jails, Officials Say' *Haaretz* (14 September 2021).

⁷ See the discussion in Chapters Three and Five below.

⁸ Prison Service Commission Ordinance 03.02.00 'Rules Regarding Security Prisoners' (updated on 15 November 2020); Hedi Viterbo, 'Security Prisoners' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 392.

⁹ Maya Rosenfeld, 'The Centrality of the Prisoners' Movement to the Palestinian Struggle Against the Israeli Occupation: A Historical Perspective' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners*

long sentences, strict conditions, and political recognition- reveals how the Israeli-Palestinian conflict shapes Israel's penal policies against insurgency. It shows both the special gravity the state attributes to security offences and its willingness to compromise penal rationales of retribution and prevention for the sake of smooth prison management and broader security interests.

Throughout the history of conflict, states have used various mechanisms to confine their opponents' fighters, including detention as prisoners of war, administrative detention, and imprisonment as convicted offenders.¹⁰ A sizeable body of literature in history, sociology, and law examines states' carceral practices against perceived enemies from within or without. Scholars debate the legal status of detainees,¹¹ the use of indeterminate detention and quasi-judicial tribunals,¹² and the relationship between the state and people it identifies as imminent threats.¹³ Yet, academics have not yet examined the incarceration of enemies as a form of state punishment, which requires penal authority, and which might have broader political effects.

In times of conflict, the state acts against people who are considered to pose a risk to national security, and who question its authorities' power to govern. These pre-conditions raise a series of questions: What are the normative grounds for punishment against individuals who deny the state's authority? How does the conflict affect penal rationales and how do these materialise in prison conditions? How do the circumstances of conflict shape punishment as a political practice that carries broad social implications?

in Israel (Pluto Press 2011) 10-11; Abeer Baker, 'Palestinian Prisoners between the Community and the Individual – An Inside Look' (2016) 8 *Maasei Mishpat* 95, 99 [Hebrew].

¹⁰ Sibylle Scheipers, *Unlawful Combatants* (Oxford University Press 2015).

¹¹ Stephanie Carvin, *Prisoners of America's Wars: From the Early Republic to Guantanamo* (Columbia University Press 2010); Jordan Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War' (2003) 28 *Yale J Int'l L* 325; 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 2006).

¹² A.W.B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford University Press 1992); Fionnuala Ní Aoláin and Oren Gross (eds), *Guantanamo and Beyond* (Cambridge University Press 2013); John D Jackson and Sean Doran, 'Conventional Trials in Unconventional Times: The Diplock Court Experience' (1993) 4 *Crim L Forum* 503.

¹³ Fran Lisa Buntman, *Robben Island and Prisoner Resistance to Apartheid* (Cambridge University Press 2003); Andrew Silke, 'Terrorists, Extremists and Prison: An Introduction to the Critical Issues' in Andrew Silke (ed), *Prisons, Terrorism and Extremism* (Routledge 2014); Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland* (Oxford University Press 2001).

Drawing on these questions, the thesis explores how the extreme political climate of conflict shapes penal practices. It examines practices of incarceration in times of conflict as a form of sanction that delegitimises certain ideologies, provides the state with a position of moral superiority, and grants it a clear strategic advantage against its opponents. The discussion below identifies five common themes in states' penal practices: deviation from criminal law principles and the protection of basic rights; the importance of detainees' and prisoners' status; the use of punishment to delegitimise adversary political agendas and assert a normative superiority; the targeting of minorities as enemies; and the strategic use of punishment to manage conflicts, often by compromising penal rationales. The thesis proposes the term *conflict penalty*, to encapsulate the special, often distinct, ways in which the state sanctions ideologically motivated offences against its institutions and civilians. I refer to the Foucauldian concept of penality which scholars developed into a subject of inquiry that studies the relationship between the state, society, and punishment in a wider social and cultural context.¹⁴ The discussion here uses the term conflict penalty to build a conceptual framework for considering the normative and sociological aspects of how states punish in times of conflict and the reciprocal relationship between conflict and penal policies. Conducting a focused analysis of conflict penalty, the thesis aims to advance the academic debate on how ongoing hostilities affect punishment, and vice versa, how the state often draws on its penal power to promote security interests, rather than penal ideals.

The thesis then turns to focus on Israel's conflict penalty against Palestinian insurgency. Since 1967, following the occupation of the West Bank and the Gaza Strip (hereinafter 'the Occupied Territories'), Israel has developed an expensive special penal system, in which military and civilian courts impose longer sentences, and prison authorities enforce stricter restrictions. Israel provides a vivid example of how elaborate conflict penalty practices can be, and how they correspond with the greater historical and political circumstances of the ongoing conflict. The thesis analyses Israel's penal policies against Palestinians and examines how

¹⁴ Michel Foucault, *Discipline and Punish* (Penguin 1977) 16; David Garland and Peter Young, 'Towards a Social Analysis of Penality' in David Garland and Peter Young (eds), *The Power to Punish* (Heinemann 1983) 21; Michael Cavadino and others, *The Penal System: An Introduction* (5th edn, Sage 2013) 8, 78; See also Adrian Howe, *Punish and Critique* (Routledge 1996) 82.

different state actors responded to the changing conditions of the conflict through the states' penal mechanisms.

This thesis contributes to the study of incarceration in the context of conflict by adopting the normative and sociological perspective of punishment studies and discussing the authority, reasoning, and effects of penal power against perceived enemies. In doing so, it addresses the gap in the literature on confinement during conflict, which has yet to extensively examine the imprisonment of enemies as a form of state punishment. As this thesis shows, the perspective of punishment is important given that first, state practices against enemies often amount to punishment, and second, since legal and sociological punishment studies provide tools for deconstructing the state's justifications and reasoning for imposing penal power and discussing the effects of its punitive measures.

The thesis also promotes the expansion of punishment studies, beyond the traditional focus on criminal justice practices in domestic legal systems in times of peace. The thesis thus joins other scholarly endeavours to broaden the study of state power beyond the criminal justice system, across state borders and against noncitizens.¹⁵ Studying the case of Israel-Palestine, this research project also contributes to the expansion of the geographical, historical, and political boundaries of punishment literature, and exposes the tendency in criminological and legal scholarship to focus on punishment in Anglo-American and European states.¹⁶

Drawing on a general analysis of conflict penalty and the case of Israel and Palestinian prisoners, the thesis offers several insights into the importance of punishment as a state measure. First, it exposes how governments capitalise on penal power to reinforce the national narrative of strength, resilience, and justice, even though often the measures states take fundamentally

¹⁵ Arjen Leerkes and Dennis Broeders, 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention' (2010) 50 *British J Criminology* 830; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014); Vanessa Barker, 'Penal Power at the Border: Realigning State and Nation' (2017) 21 *Theoretical Criminology* 441; César Hernández, 'Immigration Detention as Punishment' (2014) 61 *UCLA L Rev* 1346; Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (2019) 28 *Soc & Legal Stud* 81.

¹⁶ Jonathan Simon and Richard Sparks, 'Punishment and Society: The Emergence of an Academic Field' in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage 2012) 4; Malcolm Thorburn, 'Criminal Law as Public Law' in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 40; Kerry Carrington, Russell Hogg and Máximo Sozzo, 'Southern Criminology' (2016) 56 *Brit J Criminology* 1, 2.

violate human rights. The use of authoritarian measures against conceived enemies, including the removal of procedural protections in the criminal process, the use of detention without trial, and the imposition of disproportionate sentences, all rather undermine the state's moral position to punish since they compromise the protections of those who challenge the government's authority. Furthermore, the state's common use of prisoners for national security ends, for instance, through imposing tougher conditions and exchange deals, further reveals its position as a party to the conflict, which is a very different status to that of a neutral arbitrator, merely enforcing its criminal law.

The following examination of Israel's policies reflects these aspects and demonstrates how different state actors consider the conflict's developments when determining penal policies, in the criminal process and inside prison. It highlights how state actors argue for greater penal severity, at times by using populist rhetoric, while trying to protect the state's democratic image. The thesis also reveals how penal policies identify Palestinian identity as a risk factor that justifies certain restrictions. The targeting of Palestinians implicates Israel's exclusionary idea of security, which sacrifices minority rights for the presumed benefit of the Jewish majority's security. Furthermore, Israel's categorically strict methods indicate an underlying punitive logic that uses restrictions to make punishment harsher, rather than solely to prevent future crimes.

Ultimately, the thesis proposes conflict as an important paradigm through which to analyse penal practices, by understanding the historical and ideological tensions it entails. The conflict paradigm highlights the direct political use of punishment when it targets individuals who are labelled as 'terrorists' and 'security risks'. This paradigm might also be relevant for examining the alienating effects of punishment against other populations who are often targeted by harsh penal policies, like noncitizens and ethnic minorities.¹⁷ It thus joins other critical perspectives which study how the conditions of ongoing racial and economic inequality impact

¹⁷ E.g. Loïc Wacquant, *Punishing the Poor* (Duke University Press 2009); Correta Phillips and Ben Bowling, 'Ethnicities, Racism, Crime and Criminal Justice' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (6 edn, OUP 2017) 190; Hindpal Singh Bhui, *Race and Criminal Justice* (Sage 2009); Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 Am U L Rev 367; Emma Kaufman, *Punish and Expel* (Oxford University Press 2015).

punishment, and how penal severity policies preserve social stratification.¹⁸ The thesis proposes that identifying the politicised elements of penal practice is key to understanding the importance of a political solution, that entails compromise, state accountability, and recognition instead of harsher punishments.

Defining ‘Conflict’ and ‘Punishment’

Conflict and punishment are two central terms this thesis builds on. Different academic disciplines use these terms in varying contexts. The discussion below draws heavily on legal and criminological literature, and therefore it builds on how the two disciplines engage with the terms conflict and punishment, as explained below.

By conflict, I refer to the legal definition of international and non-international armed conflicts between states and other states or non-state actors.¹⁹ As explored further below, the distinction between international and non-international conflict has bearing on the bodies of law that apply to the conflict in question, between international humanitarian law, international human rights law, and domestic law.²⁰ I use a broad definition here to include the past decades’ military operations in which state armies fought non-state actors.²¹ My use of ‘conflict’ is akin to what Gross and Ní Aoláin term ‘violent crisis’, which they define as ‘wars and international armed conflicts, rebellions, and terrorist attacks’.²² Accordingly, the thesis occasionally uses the term ‘violent crisis’ as well. Relying on this definition of conflict, I am setting aside other perspectives of sociological conflict theories which identify class and racial power dynamics, for instance, as forms of conflict.²³ Nevertheless, I address the historical dynamics of race and

¹⁸ Michelle Alexander, *The New Jim Crow* (The New Press 2010); Mary Bosworth, ‘Theorizing Race and Imprisonment: Towards a New Penalty’ (2004) 12 *Critical Criminology* 221; Joshua Kleinfeld, ‘Two Cultures of Punishment’ (2016) 68 *Stanford L Rev* 933; Sharon Dolovich, ‘Exclusion and Control in the Carceral State’ (2011) 16 *Berkeley J Crim L* 259, 261.

¹⁹ Elizabeth Wilmshurst, ‘Introduction’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 2.

²⁰ Marco Sassoli and Laura M Olson, ‘The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) 90 *Int’l Rev Red Cross* 599.

²¹ See Ingrid Detter, *The Law of War* (2nd edn, Cambridge University Press 2000) 20.

²² Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 4.

²³ It is common to see Marxism as the bedrock of the sociology of conflict, which influenced the further works of scholars such as Max Weber, Georg Simmel and Antonio Gramsci who addressed state action, social interactions and culture as sites of dominance and conflict; See Jonathan H Turner, ‘Marx and Simmel Revisited: Reassessing the Foundations of Conflict Theory’ (1975) 53 *Soc Forces* 618; Michael J Thompson, ‘Introduction: What is Critical Theory?’ in Michael J. Thompson (ed), *The Palgrave Handbook of Critical Theory* (Palgrave 2017) 3; Richard

colonialism when discussing penal practices against non-state actors, particularly through counterterrorism measures.

Punishment is also defined broadly in this thesis to capture the many forms penal practices take on during times of conflict. The definition of punishment is a contested topic in jurisprudence studies,²⁴ and scholars differ on whether it is possible to conceive a neutral definition that is independent of the moral justifications of the punitive act.²⁵ Scholars also argue about the essential components of punishment, and whether they must include pain or condemnation.²⁶ The definition I adopt here first draws on the widely-used definition Flew, Benn and Hart proposed,²⁷ which includes five elements of punishment:

- i. It must involve pain or other consequences normally considered unpleasant.
- ii. It must be for an offence against legal rules.
- iii. It must be of an actual or supposed offender for his offence.
- iv. It must be intentionally administered by human beings other than the offender.
- v. It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.²⁸

Building on these elements, I use a broad definition of punishment which includes preventive practices that are not formally recognised as punishment, such as administrative detention, in which people are detained for suspicion of illegal conduct or even preparatory acts, even though they are not sentenced for it. Acknowledging the scholarly debate about whether we should draw a clear line between preventive and punitive practices,²⁹ I choose to include certain preventive

Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (3rd edn, New York University Press 2017); Bart Moore-Gilbert, *Postcolonial Theory* (Verso 1997); Vivek Chibber, *Postcolonial Theory and the Specter of Capital* (Verso 2013).

²⁴ R.A. Duff, *Trials and Punishments* (Cambridge University Press 1986) 151; Nicola Lacey, *State Punishment* (Routledge 1988) 4-12; Jacob Adler, *The Urgings of Conscience* (Temple University Press 1992) Ch 4; Ted Honderich, *Punishment: The Supposed Justifications* (4th edn, Pluto 2006) 8; Michael Zimmerman, *The Immorality of Punishment* (Broadview 2011) Ch 1; Don E. Scheid, 'Note on Defining 'Punishment'' (1980) 10 Canadian J Phil 453.

²⁵ A.M. Quinton, 'On Punishment' (1954) 14 Analysis 133, 141; R.A. Duff, *Punishment, Communication and Community* (Oxford University Press 2001) xiv; David Boonin, *The Problem of Punishment* (Cambridge University Press 2008) 4; Zimmerman (n 24) Ch 1.

²⁶ Adler (n 24) 91; Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 The Monist 397, 400; Igor Primoratz, 'Punishment as Language' (1989) 64 Philosophy 187.

²⁷ Antony Flew, 'The Justification of Punishment' (1954) 29 *ibid* 291, 293; S.I. Benn, 'An Approach to the Problems of Punishment' (1958) 33 *ibid* 325, 326; H.L.A. Hart, *Punishment and Responsibility* (2nd edn, Oxford University Press 2008) 4-5.

²⁸ *Ibid*.

²⁹ Some, for instance, Robinson and Slobogin, conceive punishment as a response to past wrongdoing established by a court of law. Husak, on the other hand, points to the diffusion between prevention and punishment in criminal justice practices; Paul H. Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114 Harvard L Rev 1429, 1432; Christopher Slobogin, 'A Jurisprudence of Dangerousness' (2003) 98 Northwestern U L Rev 1, 12; Douglas Husak, 'Lifting the Cloak: Preventive Detention as Punishment' (2011) 48 San Diego Law Review 1173, 1178; Douglas Husak, 'Preventive Detention as Punishment? Some Possible Obstacles' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford

measures as punishment, given their extensive punitive effects, which cannot be ignored simply because the state classifies the practice as ‘preventive’.³⁰ The inclusive definition I adopt draws on the European Court of Human Rights case law, which similarly gave greater consideration to the characteristics and effects of detention practices, than to the state’s classification of the measure in question.³¹ As the Strasbourg Court ruled in several cases, when the state enforces detention measures that follow a suspicion of criminal conduct, including preparatory acts, in conditions that are akin to those of sentenced prisoners, while denying the detainees the means to reduce the risk they pose, it imposes detention that is ‘punitive by nature’, even if it is not officially classified as punishment.³² To clarify, I do not necessarily suggest classifying different forms of detention as punishment and equating them with post-conviction sanctions. However, I argue that an informed discussion of how states punish in times of conflict must account for practices that are punitive by nature, especially given the proliferation of detention measures during hostilities.

Methodology

The thesis begins with a broad examination of incarceration in times of conflict, to establish what is meant by punishment of state enemies and discuss normative and sociological aspects regarding conflict penalty. It then explores Israel’s penal policies against Palestinian insurgency as a case study of conflict penalty. It examines Israel’s treatment of Palestinian insurgents through a critical exploration of regulations, practices, and court rulings. Acknowledging that the state is a construct made of different agencies, with separate practices and potentially distinct motivations, the thesis addresses the operation of the prisons, the political administration, and

University Press 2013) 186; Also see Alec Walen, ‘A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists’ (2011) 70 Maryland Law Review 871.

³⁰ Hernández (n 15) 1380; Bosworth, ‘Immigration Detention, Punishment and the Transformation of Justice’ (n 15) 83; Sarah Turnbull and Ines Hasselberg, ‘From Prison to Detention: The Carceral Trajectories of Foreign-national Prisoners in the United Kingdom’ (2017) 19 Punishment & Society 135, 136; See Zedner for a critical response that warns of defining punishment based on the procedural safeguards that should apply for certain practices: Lucia Zedner, ‘Penal Subversions: When is a Punishment not Punishment, Who Decides, and On What Grounds?’ (2016) 20 Theoretical Criminology 3, 15.

³¹ *M v Germany* (2010) 51 EHRR 976, par 128, 130; *Welch v United Kingdom* (1995) 20 EHRR 247, par 27; Also see *Jamil v France* (1995) 17 EHRR 15917/89, par 30; Ashworth and Zedner (n 15) 16-20, 166-167; The High court of Australia and the US supreme court ruled differently on this matter, finding that post-sentence detention for public protection ends was not punitive, and may be considered as a civil mechanism; *Kansas v Hendricks* (1997) 117 S. Ct. 2072, 361-2, 369; *Fardon v Attorney-General (Qld)* (2004) 210 ALR 50, par 216-217.

³² *M v Germany* (n 31) par 130.

the courts with regard to Palestinian insurgency. By closely analysing the case of Israel, the thesis aims to deepen the discussion on how conflict penalty practices develop over time, and how the circumstances of the conflict, and the state's changing interests, shape the punishment of enemies. Furthermore, by separately discussing the approaches of the prison authorities, the political administration and the courts, the thesis broadens our understanding of how different state bodies practise, explain and review penal practices against Palestinians. After more than 55 years of incarceration of Palestinians through military and civilian justice systems, Israel's policies provide an elaborate example of conflict penalty. As the conclusions chapter elaborates, studying Israel's policies raises several important insights on how hostilities shape punishment which can advance further research and discussion on state power in times of violent crises, on its moral grounds, limitations, and consequences. Nevertheless, as with any case study, Israel's conflict penalty is very much related to the historical, geographical, and political context of the Israeli-Palestinian conflict, and any future studies of conflict penalty must likewise consider the local circumstances of the hostilities and the parties of the conflict in question.

In examining the case of Israel's penal policies, the thesis explores legislation, parliament records, official correspondence, court rulings, and media coverage. It studies texts produced by state actors to analyse how they define and justify penal practices, in a method that resonates with the work of postcolonial scholars who examine colonial practices of governance based on archival research.³³ Similarly, the thesis examines the rhetoric of legal advisors, politicians, and prison personnel to understand how Israeli authorities conceive of and justify the state's penal power and the use of specialised, and often severe, methods for Palestinians involved in security offending. To note, the thesis focuses on Israel's policies regarding Palestinian men, given the special conditions and characteristics of incarcerated women and children, which call for a separate and focused discussion.³⁴

³³ Ann Laura Stoler, 'Colonial Archives and the Arts of Governance' (2002) 2 *Archival Science* 87; Also see Nasser Hussain, 'Hyperlegality' (2007) 10 *New Crim L Rev* 514; Smadar Ben-Natan, 'Citizen-Enemies: Military Courts in Israel and the Occupied Territories 1967-2000' (DPhil thesis, Tel Aviv University 2020).

³⁴ See Nahla Abdo, *Captive Revolution: Palestinian Women's Anti-Colonial Struggle within the Israeli Prison System* (Pluto Press 2014); Hedi Viterbo, *Problematizing Law, Rights, and Childhood in Israel/Palestine* (Cambridge University Press 2021).

While this thesis does not conduct empirical research in the form of interviews and ethnography, it does conduct an empirical examination of legislative materials. It thus contributes to the area of legal-realistic research which studies the gap between the ‘law on the books’ and the ‘law in action’.³⁵ This thesis does so by proposing a critical analysis of legal texts, including primary and secondary legislation, parliament records and case law, that considers the writers’ intentions and the legal texts’ effects.

The thesis mainly engages with Israel’s policies against Palestinians since 1990 and until 2021, for several reasons. First and foremost, given the important changes that followed the Oslo Accords, the series of interim agreements signed between Israel and the Palestinian Liberation Organisation³⁶ between 1993 and 1995. As I elaborate below, the Oslo Accords led to the establishment of the Palestinian Authority which governs certain territories in the West Bank, the release of thousands of Palestinian security prisoners, and the shutdown of Israel’s detention facilities across the Occupied Territories.³⁷ The Accords, and the subsequent developments of the past 30 years, deeply shaped Israel’s penal policies. Moreover, during the 1990s, Israeli courts enshrined the constitutional status of basic rights,³⁸ and this affected the treatment of prisoners’ rights in subsequent regulations and case law, impacting incarcerated Palestinians as well.³⁹ Also since the 1990s, Israeli prison regulation has become partly accessible to the public, providing important further avenues for examining Israel’s penal practices.⁴⁰

This thesis focuses on how the state justifies its penal power. It examines the state’s perspective and thus does not fully explore the experience of those punished as a main object of

³⁵ Peter Cane and Herbert M Kritzer, ‘Introduction’ in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 5; For another example of such research in the Israeli context, see Sigal Shahav, *Anti-Terrorism Criminal Law* (Nevo 2019).

³⁶ A coalition of Palestinian organisations led by the Fatah, established in 1959 in Kuwait; The word Fatah is a palindromic acronym for the Palestinian Liberation Movement in Arabic (‘Harakat al-Tahrir al-Filastinyya’), see Helena Cobban, *The Palestinian Liberation Organisation* (Cambridge University Press 1984) 6, 23.

³⁷ Rosenfeld (n 9) 19-20.

³⁸ Most notably in the landmark case of LCA 1908/94 *United Mizrahi Bank Ltd v Migdal Cooperative Village* (9 November 1995).

³⁹ Aharon Barak, ‘Human Rights in Israel’ (2006) 39 *Israel Law Review* 12, 16; Gideon Sapir, *The Israeli Constitution: From Evolution to Revolution* (Oxford University Press 2018) 32; For a critical outlook see Lesli Saba, ‘Human Rights and the Penal System: Did the Nineties Produce Two Constitutional Revolutions?’ (1996) 1 *Bar-Ilan Law Studies* 183 [Hebrew].

⁴⁰ The IPS began setting its regulations in publicly available ordinances, e.g. Commission Ordinance - Classifying a Security Prisoner (n 3) and Prison Service Commission Ordinance 04.40.00 ‘Prisoners Furloughs’ (Updated on 29 March 2015).

inquiry. As prison studies illustrate very well, the experience of punishment, and incarceration specifically, is intricate, diverse, and is an important subject of research.⁴¹ This is without even accounting for the various issues that conflict brings to the fore regarding prisoners' backgrounds, their relationships with the prison authorities, and the ways they conceive their punishment in the context of their ideological motives. The perspective of those punished is undoubtedly of high importance for understanding the full effects of the penal action on those who face it. This thesis is, however, occupied with a different, earlier, stage of understanding the penal act, which studies how the state grounds its penal authority and its limits. In order to accomplish an in-depth examination of the state, the thesis does not attempt to articulate the experience of Palestinian prisoners as well and it does not conduct qualitative research to that end.⁴² It does, however, address and considers the experience of punishment drawing on secondary literature which includes first-hand accounts by Palestinian prisoners.⁴³

Importantly, a word should be said about my background as a Jewish Israeli legal scholar, who has spent most of her life in Israel and who has represented Palestinians before Israeli courts in the past. Arguably, my background raises questions about the impartiality of my observations, as I may 'favour' the Israeli or the Palestinian outlook. At the same time, my experience as an Israeli lawyer has undoubtedly served me well in locating sources and identifying nuance in legislation, case law, and parliament records that shed light on the state's approach to Palestinians.

The longstanding post-structuralist critique of supposedly objective observations⁴⁴ is that any background influences a researcher's position towards her object of study. Ethnographers, including prison scholars, have responded to such concerns over impartiality by

⁴¹ E.g. Gresham Sykes, *The Society of Captives* (Princeton University Press 1958); Jim Jacobs, *Stateville: The Penitentiary in Mass Society* (University of Chicago Press 1977); Alison Liebling, *Prisons and their Moral Performance* (Oxford University Press 2004); Mary Bosworth, *Engendering Resistance* (Ashgate 1999); Ben Crewe, *The Prisoner Society* (Oxford University Press 2009).

⁴² For studies that performed qualitative research, see Esmail Nashif, *Palestinian Political Prisoners: Identity and Community* (Routledge 2008); Alyssa G Bernstein, 'The Palestinian Prisoners' Movement, 1994 - 2016' (DPhil, The Queen's University of Belfast 2017); Julie M Norman, *The Palestinian Prisoners Movement* (Routledge, 2021).

⁴³ E.g. Nashif (n 42); Bernstein (n 42); Walid Daka, 'Consciousness Molded or the Re-identification of Torture' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto 2011); 'Interview with Ahmad Saadat: Leading from Prison, Ending Negotiations, and Rebuilding the Resistance' (2014) 43 J Palestine Stud 49; 'Interview with Marwan Barghout: Life and Politics in Prison, National Unity, and the Resistance' (2014) 43 J Palestine Stud 57; Ramzy Baroud (ed) *These Chains will be Broken* (Clarity Press 2020).

⁴⁴ Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Routledge 2002 (1970)) xxiv.

proposing to reflect on the formative role subjectivity plays in shaping how researchers observe and interpret their fields, referring specifically to the researcher's positioning on race, gender, and class.⁴⁵ I adopted this proposed method of reflexivity, and carefully considered how my identity might influence the process of critically assessing Israel's penal practices.

Background: The Israeli-Palestinian Conflict and the Incarceration of Palestinian Insurgents

The Israeli-Palestinian conflict is one of the most charged conflicts in today's world politics. Since the mid-20th century, the UN, countries of the EU and the US have tried to advance negotiations between the parties to achieve a peaceful resolution. All have been unsuccessful, and the conflict is at an unprecedented point of three decades of political stagnation, resulting in one-sided moves that are unlikely to promote an ending to the mutual hostilities.

This thesis includes a list of key milestones⁴⁶ that notes some of the central events of the conflict. The list is by no means exhaustive however, it can guide readers regarding the important turning points of the conflict. Considering the focus of this thesis, the following pages survey trends and events regarding Israel's imprisonment of Palestinians since its establishment in 1948.

The incarceration of Palestinians in Israeli prisons is a central issue for both parties of the conflict. Since its foundation, the State of Israel has perceived Palestinian insurrection as a threat, and accordingly persecuted Palestinian insurgents through criminal indictments and prison terms.⁴⁷ However, the incarceration of Palestinians became a much more important tool to cope with insurgency after 1967. As noted in the list of key events,⁴⁸ following the 1967 War Israel had control over the Gaza Strip, the Sinai Peninsula, East Jerusalem, the West Bank, and the Syrian highlands.⁴⁹ As Chapter Three elaborates, Israel established a system of military

⁴⁵ Pierre Bourdieu and others, *The Weight of the World: Social Suffering in Contemporary Society* (Polity 1999) 621; Howard Becker, 'Whose Side Are We On?' (1967) 14 *Social Problems* 239, 240; Coretta Phillips and Rod Earle, 'Reading Difference Differently? Identity, Epistemology and Prison Ethnography' (2010) 50 *British J Criminology* 360, 375; Kaufman (n 17) 61; Jeff Ferrel and Mark S. Hamm, 'True Confessions: Crime, Deviance, and Field Research' in Jeff Ferrel and Mark S. Hamm (eds), *Ethnography at the Edge* (Northeastern University Press 1998) 8; Alpa Parmar, 'Race at the Border' in Andriani Fili, Synnøve Jahnsen and Rebecca Powell (eds), *Criminal Justice Research in an Era of Mass Mobility* (Routledge 2018) 189.

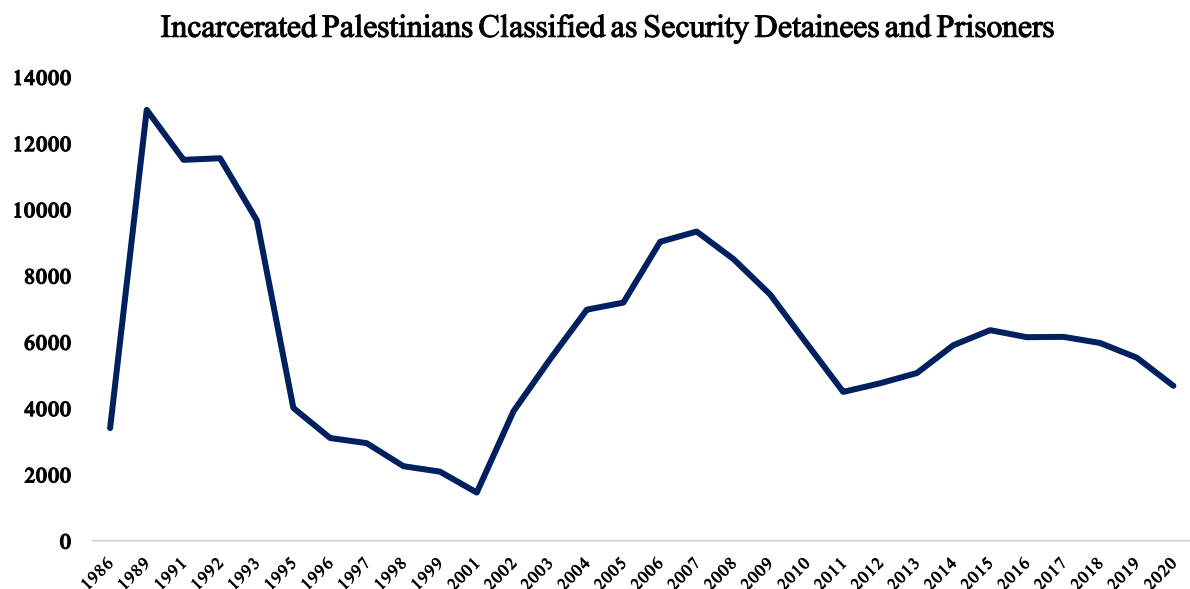
⁴⁶ Page 6 of this thesis.

⁴⁷ Shira Robinson, *Citizen Strangers* (Stanford University Press 2013) 128.

⁴⁸ Page 6 of this thesis.

⁴⁹ Israel annexed East Jerusalem and the Syrian Highlands, known in Israel as the Golan Heights; It withdrew from the Sinai Peninsula in 1982, as part of the peace accord with Egypt, and in 2005, unilaterally withdrew its settlers and military forces from the Gaza Strip as well, noted in the list of key events, page 6 of the thesis.

justice to contain and restrain insurgency in the newly Occupied Territories, which immediately caused a sharp rise in the number of incarcerated Palestinians.⁵⁰ There are no formal records of how many Palestinians Israel have held in custody since 1967. Scholars, NGOs, and UN organisations provide considerably different estimations, that range between 600,000 and 800,000 detainees and prisoners until the late 2010s.⁵¹ Notwithstanding this range, the formal data published by Israel indicate that it incarcerates thousands of Palestinians each year for security-related conduct. The graph below draws on various sources, and it provides the number of Palestinians classified as security detainees and prisoners, from the mid-1980s, just before the First Intifada, to 2020.⁵² The data refers to administrative detainees, pre-trial detainees, defendants awaiting trials and sentenced prisoners, and includes men and women of all ages.



⁵⁰ Rashid Khalidi, *The Hundred Years' War on Palestine* (Profile Books 2020) 123; Christopher C Burris, 'Re-examining the Prisoner of War Status of PLO Fedayeen' (1997) 3 North Carolina J Int'l L and Com Reg 944, 958.

⁵¹ Shai Gortler, 'Carceral Subjectivity and the Exercise of Freedom in Israel-Palestine' (PhD Thesis, University of Minnesota 2020) 9; United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, *Human Rights Situation in Palestine and Other Occupied Arab Territories* (A/HRC/7/17, 2008) 19; Addameer, *Palestinian Political Prisoners in Israeli Prisons* (2016) 4; Also see Bernstein's comment: Bernstein (n 42) 93.

⁵² Information for some of the years is missing. Moreover, accurate numbers from earlier years are difficult to obtain since the IPS annual reports did not consistently note the numbers of security prisoners; Israel Prison Service, *Annual Report 1985-1986* (1987) 66 (for 1986); Na'ama Carmi, *Oslo: Before and After* (B'Tselem, 1999) 12 (1989 and 1991); Tami Bash, *Human Rights Violations in the Occupied Territories 1992/1993* (1994) 110 (for the years 1992-1993); Shai Gortler, 'Israeli Prison Policy and the Production of Palestinian Subjects' (Master of Arts Thesis, The Hebrew University of Jerusalem 2013) 10 (for 1994-2001); B'Tselem, 'Statistics on Palestinians in the custody of the Israeli security forces' <https://www.btselem.org/statistics/detainees_and_prisoners> accessed 20 January 2021 (for 2001 to 2010, and 2018); Israel Prison Service, *Annual Report 2019* (2020) 13 (for 2010-2017, and 2019); Israel Prison Service, *Annual Report 2020* (2021) 12 (for 2020).

As the graph illustrates, the number of incarcerated Palestinians has changed dramatically throughout the turmoil of the ongoing conflict, rising to 13,000 in 1989, during the 1987 First Intifada, and then falling below 1,500 in 2001, after the Oslo Accords releases.⁵³ Yet, the numbers rose quickly again in 2002-2003, following the 2000 Second Intifada and Israel's military operation 'Defensive Shield'. During the past decades, Israel has also released prisoners as part of its negotiations with the Palestinian Authority, or as part of exchange deals to repatriate Israeli captives. For instance, in 2008, it released 250 Palestinian security prisoners as a gesture of goodwill to the Palestinian Authority.⁵⁴ In 2011, it released 1,027 Palestinian security prisoners in exchange for the return of kidnapped soldier, Gilad Shalit.⁵⁵ These releases however are not very much apparent in the graph above, which implicates a rise in the number of detainees during the early 2010s. In the past decade, the number of incarcerated Palestinians has been 5,500 on average.⁵⁶ Palestinians form a significant portion of Israel's incarcerated population and have on average comprised a third of the entire prison population between 2010 to 2020.⁵⁷ Adult men make up the majority of incarcerated Palestinians. Children and young people under the age of 18 comprised between 3 to 8 percent of inmates between 2010-2019, while women made up less than 0.5 percent between 2011-2015.⁵⁸

Israel's imprisonment of Palestinians is often referred to as mass incarceration, due to its extent and impact on the Palestinian population.⁵⁹ In 1993, a survey conducted in the Dheisheh refugee camp in the West Bank found that among 539 men aged between 25-40, 48 percent had been held in Israeli custody at least once. The same study found that 85 percent of participating households had one member who was incarcerated by Israel in the past or at the time of the survey, and 58 percent of households had two members or more.⁶⁰ As these numbers show, since

⁵³ The Accords included the release of 5,000 Palestinians between 1993 to 1999; Lior Lehrs, 'Prisoners Release, Justice and Reconciliation: Between Northern Ireland and Israel/Palestine' (2015) 25 *Politika: The Israeli Journal of Political Science and International Relations* 10, 12 [Hebrew].

⁵⁴ Government Decision 4285, 'Releasing Palestinian Prisoners as Goodwill Gesture for Muslim Holiday Eid al-Adha' (30 November 2008).

⁵⁵ BBC News, 'Gilad Shalit: Israel and Palestinians Welcome Deal' *BBC* (12 October 2011) <<https://www.bbc.com/news/world-middle-east-15273206>> accessed 30 October 2022.

⁵⁶ Israel Prison Service, *Annual Report 2020* (n 52) 10.

⁵⁷ *Ibid*, 10.

⁵⁸ Israel Prison Service, *Annual Report 2019* (n 52) 16; Addameer (n 51); Addameer, 'Imprisonment of Women and Girls' (2018) <https://www.addameer.org/the_prisoners/women> accessed 22 January 2021.

⁵⁹ Rosenfeld (n 9) 4-5; Viterbo (n 8) 383; Lisa Hajjar, *Courting Conflict* (University of California Press 2005) 186.

⁶⁰ Maya Rosenfeld, *Confronting the Occupation* (Stanford University Press 2004) 232.

1967 incarceration has become a prominent feature of Palestinian life, affecting nearly all Palestinian families and communities.⁶¹ Yet, while the Palestinian mainstream narrative considers Palestinians detained for security offences to be ‘political captives’ (*assra syasiwuna*) who sacrificed their liberty to free Palestine, Israelis commonly refer to them as ‘terrorists’ (*mehablim*). As I elaborate further below, the Palestinian Authority and various organisations accordingly support incarcerated Palestinians and their families.⁶² Meanwhile, Israeli authorities continue to see these prisoners as threats to national security, even from within its highly securitised prisons and accordingly condemn those who support them.⁶³

Immediately after the 1967 War, Israel held prisoners in facilities inside its borders and in the Occupied Territories, which were controlled by the IPS and the military.⁶⁴ IPS reports from these early years proudly depict extensive renovations of the facilities it took over, yet these mostly focused on increasing security arrangements amidst the ‘surrounding hostile population’.⁶⁵ As Chapter Three elaborates, the improvements were partial at best, as living standards in facilities across the Occupied Territories remained low, given overpopulation, lack of beds, and poor hygienic conditions.⁶⁶ Following the Oslo Accords, Israel closed down all its detention facilities in the Territories by October 1995.⁶⁷ The remaining incarcerated Palestinians were then transferred to prison sites inside Israel. Nevertheless, seven years later, Israel reopened Ofer camp, located in the Territories, to cope with the surging numbers of detainees noted earlier.⁶⁸ The map below indicates the location of prisons, detention centres, interrogation centres used by the Israel Security Agency to interrogate Palestinians, and military courts.⁶⁹

⁶¹ Rosenfeld, ‘The Prisoners’ Movement’ (n 9) 4-5.

⁶² Bernstein (n 42); Yossi Kuperwasser, *Incentivizing Terrorism: Palestinian Authority Allocations to Terrorists and Their Families* (Jerusalem Centre for Public Affairs, 2016) 21; Rita Giacaman and Penny Johnson, “‘Our Life is Prison’: The Triple Captivity of Wives and Mothers of Palestinian Political Prisoners’ (2013) 9 J Middle East Women’s Stud 54, 68.

⁶³ Commission Ordinance - Classifying a Security Prisoner (n 3).

⁶⁴ Uri Timor, ‘The Evolution of Prisons in Israel’ (2009) 12 Tzohar 7, 16; In the OPT, Israel took over prisons in Jenin, Nablus, Tul-Karem, Hebron, Ramallah, Gaza, and Kuneitra. In 1984, Israel opened the Central Prison of Judea and Samaria; Israel Prison Service, *Annual Report 1967* (1968) 151; Shimon Malka, ‘Security Prisoners in Israel - A Historical Overview’ (2005) 9 Tzohar 7.

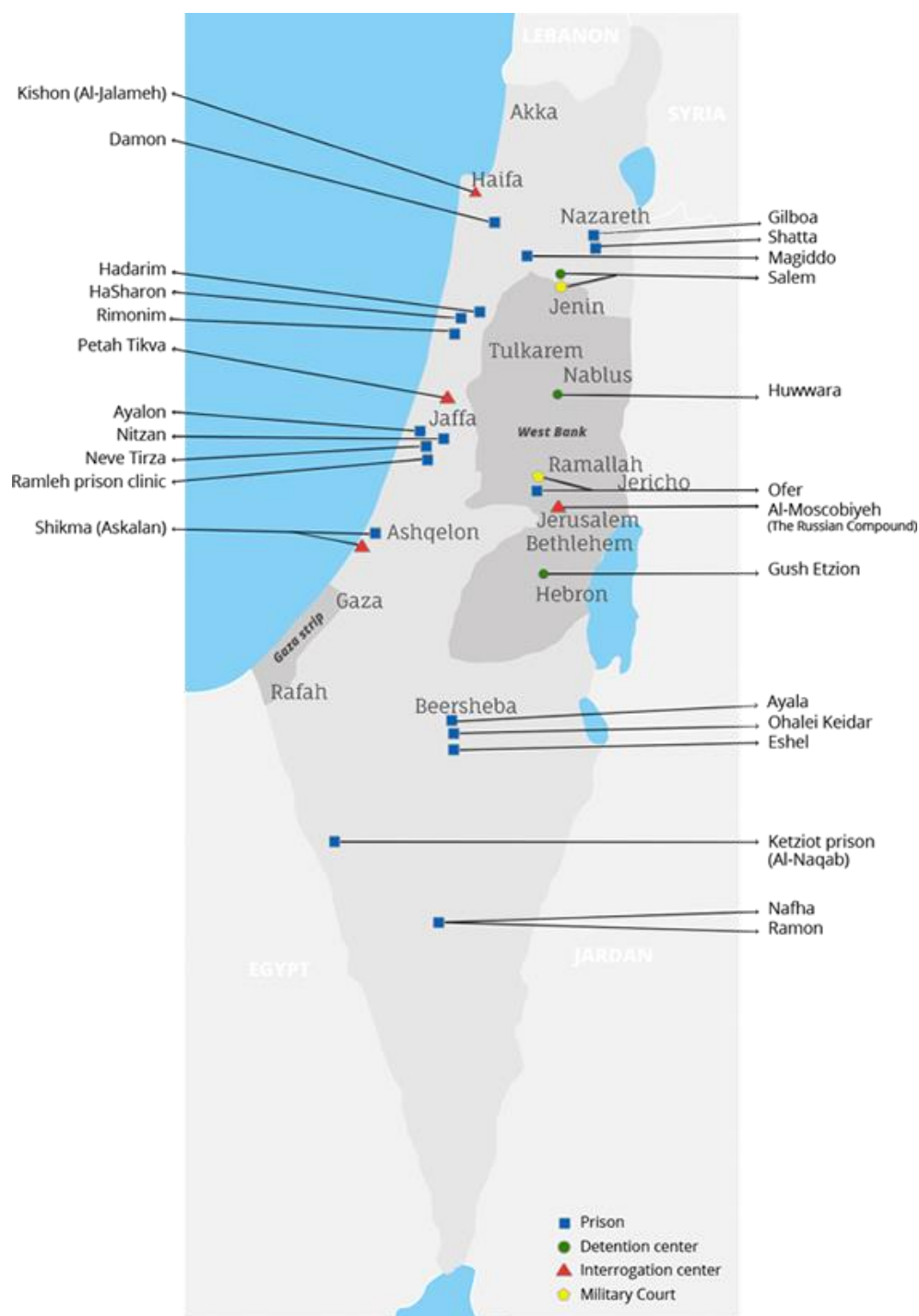
⁶⁵ Israel Prison Service, *Annual Report 1967* (n 64) 151.

⁶⁶ Baker (n 9) 99; Nashif (n 42) 48.

⁶⁷ Protocol no 10 of the State Control Committee Meeting, 14th Knesset (12 August 1996) 8.

⁶⁸ Ministry of Public Security, *Security Detainees - Presentation to the Ministries of Treasury and Public Security* (State Archive (GL-49170/11)).

⁶⁹ Addameer, ‘Prisons and Detention Centers’ (2022) <<https://addameer.org/prisons-and-detention-centers>> accessed 5 January 2023.



Addameer, 'Prisons and Detention Centers' (2022)

In 2023, the Israeli-Palestinian conflict is as far from resolution as it has ever been, while the human cost of the ongoing violence continues to grow, particularly on the Palestinian side.⁷⁰ For most of the past two decades, Israeli Right-wing parties, that strongly oppose the idea of an independent Palestinian state, controlled the Government. On the Palestinian side, the ongoing division between Hamas, which controls Gaza, and the Fatah-led Palestinian Authority, which controls the West Bank, also obstructed the path to general resolution.⁷¹ Prisoners' release did not take place since 2011, and it is hard to imagine when Israeli politicians will agree to pardon Palestinian insurgents again as part of a peace accord. As I note below, during this period of stagnation, Israel has moved to devise better ways of using incarceration to contain the threat of insurgency, to weaken the Prisoners' Movement, and build its penal power to better manage its conflict with Palestinian organisations. In this thesis, I hope to propose a conceptual framework that clarifies the function of penal power in these contexts of hostilities, deep political division, and ongoing bloodshed.

Structure

The structure of the thesis is as follows. The first chapter explores the sizeable literature on incarceration during conflict, dividing the discussion into three different types of settings: conflicts beyond state borders; state practices against enemies from within, mainly through counterterrorism measures; and internal conflicts, drawing on the cases of Northern Ireland and South Africa. The chapter identifies five themes that resonate across the different cases, and thus characterise conflict penalty. Chapter Two draws on legal and criminological studies to discuss conflict penalty. It asks how states justify using penal power against those who defy their authority, discusses the way penal rationales play out during conflict, and examines the impact

⁷⁰ According to the UN Office for the Coordination of Humanitarian Affairs, between 2008 and 2022, 6,179 Palestinians have been killed and 143,774 injured 'in the context of the occupation and conflict', compared to 284 killed on the Israeli side and 6,100 injured; UN Office for the Coordination of Humanitarian Affairs, 'Data on Casualties' <<https://www.ochaopt.org/data/casualties>> accessed 5 January 2023.

⁷¹ Fatah is a secular Palestinian national movement established in 1959. Since 1965, it has been the leading member of the Palestinian Liberation Organisation, which is a coalition of organisations that lead the campaign for Palestinian independence. In 1987, the Hamas and the Islamic Jihad were founded. Both are Islamic organisations which strongly opposed the Fatah-led negotiations with Israel in the early 1990s, which led to the Oslo Accords; Bernstein (n 42) 281; Jonathan Schanzer, *Hamas vs. Fatah* (Palgrave Macmillan 2008) 101-2.

of conflict penalty as a means to reinforce an exclusionary national narrative and serve the state's strategy in the ongoing conflict.

The following chapters explore the case of Israel and Palestinian insurgency drawing on the normative and sociological questions raised regarding conflict penalty. Chapter Three presents the procedures and institutions that enforce punishment in Israel, including the military and civilian justice systems and the prisons. It further examines the creation of the Palestinian Prisoners' Movement and the special regime the IPS has developed. The chapter considers how Israel's policy corresponds with the idea of conflict penalty as security stands as the organising principle of punishment and Palestinians are identified as threats based on their identity.

Chapter Four studies the practice of punishment inside Israeli prisons, examining the IPS policies since the Oslo Accords. The chapter explores how the weakening of the Palestinian Prisoners' Movement, the transfer of prisoners inside Israel, and the civilianisation of incarceration provided Israel with the opportunity to develop a sustainable, ultra-securitised, form of incarceration for Palestinians. The chapter also examines the Palestinian response to these developments, discussing how individual prisoners challenge the perception of Palestinians as threats through hunger strikes and seeking access to rehabilitation.

Chapter Five studies the political administration's legislation and policies that advanced broader criminalisation of any conduct related to Palestinian organisations and imposed greater penal severity for security offences. It further explores the use of prison restrictions to make conditions harsher and to restrain the Prisoners' Movement. The chapter lastly explores the Government's attempts to morally censure the Palestinian national narrative by sanctioning the financial support of prisoners, and the further strategic use of incarceration conditions to gain leverage against Palestinian organisations.

Chapter Six analyses the Supreme Court of Israel's approach to Israel's conflict penalty. It explores the Court's rulings on penal severity in security offences, the centralisation of deterrence as a main penal rationale, and the justifications for the special limitations that apply to Palestinian security prisoners. The chapter further examines how the Court reasoned the lack

of access to rehabilitation and reintegration, and the use of individual conditions as a means to further ends, notably, state security.

Lastly, the conclusions chapter ties together insights regarding the case of Israel and punishment in times of conflict more generally. It explores the emotive aspects of conflict penalty, expressed in penal severity and populist discourse, and how it undermines the state's moral position to punish. It further considers how penal practices perpetuate hostilities by exacerbating the political divide, which is particularly notable in the Israeli-Palestinian conflict. The chapter then examines the potential contribution of the conflict penalty lens to understanding punishment in other societies divided by socioeconomic, class, religious, and racial tensions. It concludes with several proposals on how to advance the study of penal practices in times of violent crisis.

Chapter 1: Understanding Punishment in Times of Conflict

The confinement of enemy fighters¹ is as old as conflict itself. Parties to conflicts use various titles for captured fighters, including prisoners of war (POWs), administrative detainees, and the self-proclaimed title of ‘political prisoners’.² This chapter surveys cases in which states detained or imprisoned enemy fighters. It explores the central elements of state practices and identifies commonalities between them. It then builds on common themes in state practices to gain a better understanding of how states punish perceived enemies. The chapter proposes the term *conflict penalty* to capture the special characteristics of punishment in times of internal and external hostilities. By drawing on various cases and practices, conflict penalty describes a different form of punishment, which is distinguished from state practice in the criminal justice system by its form, legal foundations, and goals.

The history of confinement in times of conflict is extensive, and it includes countless wars and inter-state conflicts throughout time and space. The academic literature is accordingly sizeable and multifaceted. This chapter focuses mainly on events of the 20th century onwards, and mostly, on penal practices by states that define themselves as democracies, and that are committed, at least officially, to international humanitarian law and the protection of human rights. These common grounds provide the basis for a comparison between modern penal practices, which often undermine the constitutional standards of liberal democracies, as well as their international legal obligations. Studying similar practices by non-democratic states might raise different questions about the state’s relationship with those punished, given the different point of departure regarding the state’s commitment to criminal law principles and human rights protections.³

¹ This thesis uses ‘fighter’ as an inclusive term for describing a person who participates in the hostilities, either as a soldier serving in a state’s armed forces or as an irregular fighter, for example, under a guerrilla group.

² Will Smiley, *From Slaves to Prisoners of War* (Oxford University Press 2018) 3; Sibylle Scheipers, ‘Introduction: Prisoners in War’ in Sibylle Scheipers (ed), *Prisoners in War* (2010) 1; Iris Rachamimov, ‘Military Captivity in the Two World Wars: Legal Frameworks and Camp Regimes’ in Roger Chickering, Dennis Showalter and Hans van de Ven (eds), *The Cambridge History of War*, vol 4 (Cambridge University Press 2012) 215; Aryeh Neier, ‘Confining Dissent: The Political Prison’ in Norval Morris and David Rothman (eds), *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press 1995) 358.

³ Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 3.

Admittedly, the cases I survey involve mainly Anglo-European countries whose experience has been widely reviewed in the western-oriented legal and criminological literature.⁴ Without dismissing the risk of drawing on the limited experience of Anglo-European countries, it is precisely the tension between conflict, the rule of law, and punishment, that draws my attention to seemingly stable democratic regimes during conflict.⁵ Clearly, there is still much more to learn about the punishment of enemies in democracies across Asia, Africa and Latin America.

This chapter explores actions motivated by various religious, national, and secular political ideologies. The discussion does not aim to justify or delegitimise these actions or the agendas they represent. Rather, it focuses on the state's response to those who challenge its powers, considering the normative standards of domestic and international legal obligations.

The chapter divides into three sections that cover different contexts of state action. The first section focuses on practices that mostly take place across the border. It surveys the emergence of POW status and the recent application of extra-legal categories for detainees, such as the infamous 'enemy combatant' status.⁶ The next section studies domestic measures, drawing mostly on counterterrorism policies in liberal democracies after 9/11. The third section discusses state measures in 'internal' or 'anti-colonial' conflicts, focusing on the cases of South Africa and Northern Ireland, which present certain similarities, as well as important differences, to the case study of the Israeli-Palestinian conflict. Building on these various cases, the chapter formulates a general concept of what is punishment in times of conflict, how it operates, and what it seeks to achieve.

⁴ Jonathan Simon and Richard Sparks, 'Punishment and Society: The Emergence of an Academic Field' in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage 2012) 4; Malcolm Thorburn, 'Criminal Law as Public Law' in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 40; Kerry Carrington, Russell Hogg and Máximo Sozzo, 'Southern Criminology' (2016) 56 *Brit J Criminology* 1 2; Emma Kaufman, *Punish and Expel* (Oxford University Press 2015) 49-50.

⁵ Gross and Ní Aoláin (n 3) 9.

⁶ Peter Jan Honigsberg, 'Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse' (2007) 12 *UCLA J Int'l L & For Aff* 1, 4.

A. Incarceration Beyond State Borders: From Prisoners of War to ‘Enemy Combatants’

Prisoners of War: The ‘Gold Standard’

Throughout the greater part of human history, parties to conflicts have killed, enslaved, and tortured enemy fighters.⁷ For the past two centuries certain advances have been made in the treatment of captives,⁸ yet the birth of international humanitarian law, as part of the law of war in the 19th century, marked the shift towards recognising a special protected status for fighters.⁹ The 1899 Hague Convention¹⁰ enshrined the international status of the POW in order to protect the ‘legitimate combatant’,¹¹ who should not be punished for fulfilling their duty as members of a state’s armed forces.¹² POW status has shown states’ recognition that confinement of enemy fighters is a common measure in conflict, which must not entail harsh conditions or torture.¹³ Mutual respect for combatants, and above all concerns over retaliation against captives, justified an agreed-upon protected status.¹⁴ As Mackenzie noted, the ‘mutual hostage factor’ motivated states to protect captured combatants and expect their opponents to do the same.¹⁵ However, while mutuality generated relatively fair treatment of captives in World War I, it fuelled a dynamic of retaliation and abuse in World War II.¹⁶ The mistreatment of POWs then resulted in the death of 5 million captives, mainly on the Eastern Front.¹⁷ The devastating outcome drove

⁷ Holger Afflerbach and Hew Strachan, ‘A “True Chameleon”? Some Concluding Remarks on the History of Surrender’ in Holger Afflerbach and Hew Strachan (eds), *How Fighting Ends: A History of Surrender* (Oxford University Press 2012) 441; Scheipers (n 2) 3.

⁸ Some protections were granted during the French Revolution and the conflicts between the Russian and Ottoman Empires; Afflerbach and Strachan (n 7) 442; Smiley (n 2) 2.

⁹ International humanitarian law governs the conduct of war (*jus in bello*), compared to *jus ad bellum*, which regulates the conditions for states’ use of force. International humanitarian law’s main objective is to reduce the suffering caused by warfare through moderating the hostilities and protecting human rights; Jean Pictet, ‘The Formation of International Humanitarian Law’ (1985) 25 Int’l Rev Red Cross 3; Hilaire McCoubrey, *International Humanitarian Law* (2nd edn, Routledge 2019) 1, 145; Geoffrey Best, *War and Law since 1945* (Oxford University Press 1997) 135.

¹⁰ Hague Convention II Respecting the Laws and Customs of War on Land, 29 July 1899, 32 Stat. 1803, T.S. 403.

¹¹ The term ‘combatant’ is typically used to describe a member of an armed force serving a party to a conflict, who is entitled to POW status. As I discuss below, Additional Protocol I to the 1949 Geneva Conventions broadened the criteria of those who may be considered ‘combatants’; Marco Sassòli, ‘The Status of Persons Held in Guantánamo under International Humanitarian Law’ (2004) 2 JICJ 96, 103; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 1(4), 43.

¹² Derek Jinks, ‘The Declining Significance of POW Status’ (2004) 45 Harv Int’l L J 367 422; Rachamimov (n 2) 217.

¹³ Nathaniel Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’ (2004) 43 Colum J Transnat’l L 1, 9-10; Sassòli, (n 11) 103.

¹⁴ Yasmin Naqvi, ‘Doubtful Prisoner-of-War Status’ (2002) 84 Int’l J Red Cross 571, 572-3.

¹⁵ S.P. MacKenzie, ‘The Treatment of Prisoners of War in World War II’ (1994) 66 J Modern History 487, 497.

¹⁶ Rachamimov (n 2) 231.

¹⁷ POWs were held in dire conditions, and some faced torture, starvation and marches during extreme weather, in violation of their rights according to the Convention Relative to the Treatment of Prisoners of War, 27 July 1929, 47 Stat. 2021, T.S. 846; MacKenzie (n 15) 487.

the further expansion of the protections accorded to POWs, under the 1949 Third Geneva Convention Relating to the Treatment of Prisoners of War.¹⁸

The Third Geneva Convention establishes detailed standards for the confinement of POWs, including physical conditions, such as food supply and medical care, contact with relatives and religious services.¹⁹ The Convention also orders the confinement of POWs according to their nationality, language, and customs, and allows them to elect representatives to communicate on their behalf with the Detaining Power.²⁰

Collective or corporal punishment, and any form of torture or cruelty towards POWs are prohibited.²¹ A Detaining Power may only punish POWs for offences that are punishable if committed by its armed forces, such as war crimes.²² It may do so only by adjudicating and sentencing POWs under the same courts that try members of its armed forces²³ and it may only impose the same degree of punishments that might apply to its soldiers.²⁴ Moreover, the courts of the Detaining Power must recognise, ‘to the wider extent possible’, that the accused POW is of foreign nationality, has no allegiance to the Detaining Power, and was detained as a result of ‘circumstances independent of his own will’.²⁵ Courts are accordingly provided with the liberty to reduce the sentence of POWs and to impose punishments that are lower than the prescribed minimum penalties.²⁶ At the same time, even after conviction and sentencing, POWs retain their status.²⁷ Lastly, the Convention orders that when active hostilities end, POWs are to be released

¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (hereinafter the Third Geneva Convention); Rachamimov (n 2) 230.

¹⁹ The Third Geneva Convention (n 18) section II, chapters II-II, V.

²⁰ Ibid, art 22, 79.

²¹ Ibid, art 13, 87; Civilians are also entitled to this protection; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (hereinafter the Fourth Geneva Convention), art 27, 31-33.

²² Generally considered as violations of the law of war, e.g. the targeting of civilians, genocide and other crimes against humanity; Jordan Paust, ‘War and Enemy Status after 9/11: Attacks on the Laws of War’ (2003) 28 Yale J Int’l L 325, 330.

²³ The Third Geneva Convention (n 18) art 85, 102; Jinks (n 12) 439; Neil McDonald and Scott Sullivan, ‘Rational Interpretation in Irrational Times: The Third Geneva Convention and the War on Terror’ (2003) 44 Harv Int’l LJ 301, 314.

²⁴ The Third Geneva Convention (n 18) art 88, 102.

²⁵ Ibid, art 87.

²⁶ Ibid, art 87-88.

²⁷ Ibid; The US and the UK insisted on including this article to guarantee the protection of convicted POWs, considering the varying prison regimes in different countries; Best (n 9) 137-9.

and repatriated without delay.²⁸ However, the repatriation of POWs who are undergoing prosecution or still serving their sentence depends on the Detaining Power's consent.²⁹

Best argues that the protections accorded to POWs make them 'the most favoured category of war victim',³⁰ holding far greater rights and guarantees than the wounded or the relatives of the dead. He explains that the vulnerability of soldiers held in the enemy's hands turns their captivity into 'an extension of the national conflict'.³¹ The World War II experience exemplifies this argument, as captivity then became an additional front to the conflict between states.³² This chapter similarly argues that states' penal practices indicate the symbolic and strategic importance of captured fighters.

While POW protections aim to limit the mistreatment of combatants, they simultaneously determine which captives are excluded from such protections. Critical international law scholars have long identified the exclusionary Euro-centric nature of the POW status.³³ Historically, European states created international humanitarian law to regulate their conflicts with one another.³⁴ They defined international conflict as hostilities between contracting parties, excluding non-European belligerency which they often faced during imperial conquests.³⁵ Such belligerency was perceived as non-sovereign and uncivilised.³⁶ POW criteria were custom-made for the soldier serving a state's armed forces³⁷ and turned members of anti-colonial groups into 'non-legitimate' combatants liable to prosecution. Under the Third Geneva Convention, 'irregular fighters', who belong to a militia volunteer corps or resistance movements, can only be granted POW status if they serve a party to a conflict, and form part of

²⁸ The Third Geneva Convention (n 18) art 115, 118.

²⁹ Ibid, art 115.

³⁰ Best (n 9) 135.

³¹ Ibid.

³² Rachamimov (n 2) 231.

³³ Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27 Third World Q 739, 742; Berman (n 13) 20; Helen M Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press 2011) Ch 3; 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 2006) 270.

³⁴ Ibid; Sassòli (n 11) 99; The Geneva Conventions include a more limited set of humanitarian protections for non-international conflicts, as enshrined in Common Article 3; Elizabeth Wilmshurst, 'Introduction' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 2; The Third Geneva Convention (n 18) art 3.

³⁵ Kinsella (n 33) Ch 3.

³⁶ Anghie (n 33) 742; Berman (n 13) 20.

³⁷ Rachamimov (n 2) 220; Mégret (n 33) 278.

that party's armed forces.³⁸ Alternatively, irregular fighters must fulfil four conditions: they are commanded by a person responsible for their subordinates; wear a distinctive and recognisable sign; carry arms openly and follow the laws and customs of war.³⁹ Hence, irregular fighters are called to higher standards than those which apply to 'ordinary' soldiers, who are free to violate the law of war and still retain their status. Meanwhile, the rejection of POW status has a normative effect, delegitimising fighters, their objectives, and methods. And even though international humanitarian law offers basic protection to irregular fighters as well,⁴⁰ the rejection of POW status has opened the door in the recent past to violations of detainees' rights, as discussed below. The refusal to grant the protected status seems to entail a punitive effect, that combines the moral censure of delegitimization with harsh treatment.

The criteria for POW status have changed since the 1949 Geneva Conventions. During the 1970s, new states founded in former colonies successfully pursued the expansion of the status, to include members of national liberation movements.⁴¹ The 1977 Protocol Additional I to the Geneva Conventions applied the Conventions to conflicts in which peoples are fighting against 'colonial domination', 'alien occupation' and 'racist regimes', and determined that members of irregular groups may be granted POW status.⁴² The Protocol enshrined inclusive POW criteria which, as scholars note, aimed to legitimise the late-1970s armed struggles for self-determination, particularly in South Africa and Israel.⁴³ To date, 174 states ratified the Protocol, however, several important actors like the US and Israel, have not ratified it.⁴⁴ As I show below,

³⁸ Including governments that are not recognised by the Detaining Power; The Third Geneva Convention (n 18) art 4A(3).

³⁹ Ibid, art 4A(1)-(6); In case of doubt regarding a captive's entitlement to POW status, article 5 orders that the captive shall enjoy the protection of the Third Geneva Convention until their status has been determined by a competent tribunal.

⁴⁰ According to Common Article 3 of the Geneva Convention, see footnote 34.

⁴¹ UN General Assembly, Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes, 12 December 1973, A/RES/3103; Mégret (n 33) 295.

⁴² Additional Protocol I (n 80) art 1(4), 43(1)-(2), 44(1)-(3); Additional Protocol I defined the conflict against racist and alien occupation as an international armed conflict, so that the forces fighting such regimes can be considered a party to the conflict. Articles 43-44 ruled that members of forces serving a party to a conflict, under a commander responsible for their conduct, are 'combatants', who are entitled to POW status. Additional Protocol I further determined that fighters are not required to distinguish themselves from civilians, as long as they carry their arms openly before and during military engagement; see; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I - Rules (Cambridge University Press 2005) 385.

⁴³ George H Aldrich, 'The Laws of War on Land' (2000) 94 Am J Int'l L 42, 45.

⁴⁴ International Committee of the Red Cross, 'Treaties, State Parties and Commentaries - Protocol Additional to the Geneva Conventions' (2021) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470#panelRatification> accessed 31 October 2022.

the US and Israel still follow the exclusionary POW definition set in the Third Geneva Convention, which allows them greater leeway in determining the classification, prosecution and punishment of captives.

Enemy Combatants of the 21st Century

The attack at the World Trade Centre and the subsequent US-led military campaigns in Iraq and Afghanistan reinvigorated the discussion about the POW criteria. US officials categorised the early 21st-century so-called ‘war on terror’⁴⁵ as a novel type of conflict between states and non-state actors who operate across the globe.⁴⁶ As then-US Attorney General John Ashcroft argued, the new threat of international terrorism justified a ‘paradigm of prevention’,⁴⁷ that seeks to stop terror attacks before they occur by all means necessary, including extra-legal measures like detention without trial, extraordinary rendition, and targeted killing.⁴⁸ The US then detained hundreds of suspects in off-shore facilities and CIA ‘black sites’.⁴⁹ These practices generated extensive academic debate over suspects’ status and access to basic human rights.⁵⁰

⁴⁵ President Bush declared war on 12 September 2001, and later that month addressed it as a ‘war on terror’; President George W Bush, ‘Remarks by the President In Photo Opportunity with the National Security Team’ (12 September 2001); President George W Bush, ‘Address to the Joint Session of the 107th Congress’ (20 September 2001).

⁴⁶ President George W Bush, *Guard and Reserves ‘Define Spirit of America’: Remarks by the President to Employees at the Pentagon*, quoted in Stephanie Carvin, *Prisoners of America’s Wars: From the Early Republic to Guantanamo* (Columbia University Press 2010) 151; Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford University Press 2016) 2; Strachan and Scheipers argue that the division between ‘old’ and ‘new’ wars has no empirical grounds given the history of conflicts between states and insurgent organisations; Hew Strachan and Sibylle Scheipers, ‘Introduction’ in Hew Strachan and Sibylle Scheipers (eds), *The Changing Character of War* (Oxford University Press 2011) 18-19.

⁴⁷ Attorney General John Ashcroft, ‘Prepared Remarks Before the Council on Foreign Relations’ <<https://www.justice.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm>> accessed 31 October 2022.

⁴⁸ David Cole, ‘Military Commissions and the Paradigm of Prevention’ in Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013) 97; David Cole, ‘Introductory Commentary: Torture Law’ in David Cole (ed), *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009); Jane Mayer, *The Dark Side* (Doubleday 2008) 102, 242; Leila Nadya Sadat, ‘Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror’ (2007) 75 Geo Wash L Rev 1200 1201; Jeremy Scahill, ‘The Assassination Complex’ *The Intercept* (15 October 2015); Jameel Jaffer, ‘Introduction’ in Jameel Jaffer (ed), *The Drone Memos* (The New Press 2016).

⁴⁹ Joseph Pugliese, *State Violence and the Execution of Law: Biopolitical Caesurae of Torture, Black Sites, Drones* (Routledge 2013) 165; Mayer (n 48) 102.

⁵⁰ David Cole, *Enemy Aliens* (The New Press 2003); Ronald Dworkin, ‘Terror and the Attack on Civil Liberties’ (2003) 50 The New York Review of Books; Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’ (2004) 53 Int’l & Comp L Q 1; Amy Kaplan, ‘Where is Guantánamo?’ (2005) 57 Am Q 831; Terry Gill and Elies van Sliedregt, ‘Guantanamo Bay: A Reflection on the Legal Status and Rights of Unlawful Enemy Combatants’ (2005) 1 Utrecht L Rev 28; Timothy Endicott, ‘Habeas Corpus and Guantanamo Bay: A View from Abroad’ (2009) 54 The American Journal of Jurisprudence 1; Kai Ambos and Annika Maleen Poschadel, ‘Terrorists and Fair Trial: The Right to a Fair Trial for Alleged Terrorist Detained in Guantanamo Bay’ (2013) 9 Utrecht Law Review 109.

As the White House General Counsel Alberto Gonzales observed, the US considered the 1949 Geneva Conventions to be irrelevant and ‘obsolete’ in the war between states and terror organisations.⁵¹ In line with this approach, the US transferred foreign nationals suspected of membership in al-Qaeda and Taliban from their home countries to the notorious Guantánamo Bay Camp Delta, in Cuba.⁵² As Steyn wrote, Guantánamo detainees were held in a ‘legal black hole’, situated ‘beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors’.⁵³ The US denied detainees of POW and civilian status, classifying them instead as ‘enemy combatants’,⁵⁴ a category with no basis in international law.⁵⁵ The US Government also deployed ‘enhanced interrogation techniques’ against detainees to extract intelligence, which could supposedly prevent future attacks.⁵⁶ Without international and domestic law protections, Guantánamo detainees faced torture, cruel treatment, and inhumane conditions, as reports later revealed.⁵⁷

The practice of detaining foreign nationals abroad was not only shaped by the preventive paradigm. The US administration also advanced the prosecution of Guantánamo detainees for ‘war crimes’ and established military commissions to that end.⁵⁸ Yet, the procedure before the commissions involved removing minimal due process safeguards, denying judicial review over

⁵¹ As noted in a memo to the president; Excerpts appear in Carvin (n 46) 153 and Stuart Taylor Jr., ‘We Don’t Need to Be Scofflaws to Attack Terror’ *The Atlantic* (February 2002).

⁵² E.g. Laurel E Fletcher and Eric Stover, *The Guantánamo Effect* (California University Press 2009); David Rose, *Guantánamo: America’s War on Human Rights* (Faber&Faber 2004); Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013); Jess Bravin, *The Terror Courts* (Yale University Press 2013); Andy Worthington, *The Guantánamo Files* (Pluto 2007).

⁵³ Steyn (n 50) 8.

⁵⁴ The status drew on the 1942 case of *Ex Parte Quirin*, which found that eight German saboteurs were liable to trial before military courts; In 2009, the Obama administration abandoned the use of the ‘enemy combatant’ category; *Ex Parte Quirin* 317 US 1 (1942); Honigsberg (n 6) 4; Gill and Sliedregt (n 50) 53; Department of Justice Department of Justice Withdraws ‘Enemy Combatant’ Definition for Guantanamo Detainees (13 March 2009) <<https://www.justice.gov/opa/pr/departement-justice-withdraws-enemy-combatant-definition-guantanamo-detainees>> accessed 30 January 2023.

⁵⁵ McDonald and Sullivan (n 23) 302; Sassòli (n 11) 102; Steyn (n 50) 9; Paust (n 22) 326; Also see *Hamdi v Rumsfeld* 542 US 507 (2004); *Boumediene v Bush* 553 US 723 (2008).

⁵⁶ Including solitary confinement, sensory, space, time and sleep deprivation, loud music, stress positions, beating and waterboarding; Ruth Blakeley, ‘Dirty Hands, Clean Conscience? The CIA Inspector General’s Investigation of “Enhanced Interrogation Techniques” in the War on Terror and the Torture Debate’ (2011) 10 J HR 544 547, 550; Also see Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers* (Cambridge University Press 2005).

⁵⁷ Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba* (2006); Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo* (2008); UN Committee Against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America* (2014); Human Rights Watch, *Getting Away with Torture: The Bush Administration and the Mistreatment of Detainees* (2011); Rose (n 52) 97, 103-4.

⁵⁸ The military commissions use a wide definition of ‘war crimes’, that includes ‘material’ support to terror, like driving and cooking. Such expansive definition has no basis in the law of war; Cole, ‘Military Commissions’ (n 48) 112; Gary D Solis, ‘Contemporary Law of War and Military Commissions’ in Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013) 75.

detention, holding hearings in absentia, and accepting evidence obtained through torture.⁵⁹ The commissions' procedures have been repeatedly found unconstitutional by the US Supreme Court.⁶⁰ Despite the administrative endeavours to operate the commissions in the remote detention camp, they convicted only five men to date, with three convictions overturned on appeal.⁶¹ Given their problematic procedures, the commissions seems to be less a tribunal of justice, and more like an attempt to legitimise the enduring detention of certain suspects by creating the appearance of trial and conviction. Cole sees the commissions as 'an ill-advised effort to avoid paying the price for the 'paradigm of prevention', which has only damaged the US democracy by weakening its constitutional principles.⁶²

It is contested whether confinement in Guantánamo amounts to punishment, as most men were released with no charges pressed against them. However, all were detained on suspicion of being involved in terrorist conduct. All were held in conditions that were arguably much worse than those imposed on sentenced prisoners. All were also denied structured social or psychological support, which might have decreased the risk attributed to them. As noted earlier, according to the European Court of Human Rights, these conditions are sufficient to determine that detention in Guantánamo is punitive by nature, even though it is not formally recognised as punishment.⁶³ Those who support a narrow definition of punishment, who see it as a response to previous wrongdoings established by a court of law, might disagree.⁶⁴ Yet in the context of Guantánamo, the narrow definition seems lacking. It seems to serve the state by allowing it to

⁵⁹ Ibid, 86; Cole, 'Military Commissions' (n 48) 98.

⁶⁰ Despite the Supreme Court ruling, finding the commissions' procedures unconstitutional, the most recent 2009 Military Commissions Act is still not on par with civilian and military court-martial procedures, especially regarding the admissibility of evidence; See *Hamdi v Rumsfeld* (n 55) and *Rasul v Bush* 542 US 466 (2004) (determining that foreign national detainees maintain habeas corpus rights); *Hamdan v Rumsfeld* 548 US 557 (2006) (holding the military commissions as a violation of international and domestic law and determining that Common Article 3 applies for 'enemy combatants'); *Boumediene v Bush* (reaffirming habeas corpus rights and determining the Military Commissions Act of 2006 as unconstitutional); Cole, 'Military Commissions' (n 48) 98; Also see Joan Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism' (2002) 96 Am J Int'l L 345, 353.

⁶¹ See Recent Cases, 'Hamdan v United States' (2013) 126 Harvard L Rev 1683; The New York Times, 'The Guantánamo Docket' <<https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#convicted>> accessed 9 October 2022.

⁶² Cole, 'Military Commissions' (n 48) 97.

⁶³ *M v Germany* (2010) 51 EHRR 976, par 128, 130; *Welch v United Kingdom* (1995) 20 EHRR 247, par 27; Also see *Jamil v France* (1995) 17 EHRR 159/17/89, par 30; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) 16-20, 167.

⁶⁴ Christopher Slobogin, 'A Jurisprudence of Dangerousness' (2003) 98 Northwestern U L Rev 1, 12; Paul H. Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114 Harvard L Rev 1429, 1432; Note the similar approach taken by the High Court of Australia and the Supreme Court of the US, mentioned in the introduction (footnote 31) and discussed by Ashworth and Zedner (n 63) 163.

avoid criminal law standards by denying trial or referring detainees to problematic quasi-judicial procedures. It seems to disregard the greater political and social circumstances of 9/11, and the ‘punitive intention’ the US administration may have had against perceived ‘mega terrorists’.⁶⁵ At the same time, taking the narrow approach to defining punishment similarly ignores the position of those confined, for whom the question of conviction might be immaterial to their experience of detention as punishment.⁶⁶

Rather than determining whether the US is punishing detainees in Guantánamo, this section highlights how detention measures that presumably reinforce a ‘preventive paradigm’ include formal forms of punishment, via military commissions, and informal practices that are punitive by nature, drawing on the European Court of Human Rights’ terminology.⁶⁷ As Husak notes, punishment and prevention are two objectives that are embedded in criminal justice procedures, evident for instance in possession or driving under the influence offences.⁶⁸ I show below that prevention and punishment interplay closely in conflict as well, yet through practices that deviate significantly from criminal law principles and due process standards. Often, preventive rhetoric obscures the punitive character of detention measures, that respond to suspected politically motivated violence. In Guantánamo, prevention has led to the confinement of men for over two decades, with no charges filed against them.

Another important question is why the US insisted on offshore confinement, given the alternative international humanitarian law pathways for detention, through POW confinement or security internment under the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁶⁹ POW status would have allowed to detain, prosecute and imprison individuals just the same, even after the cessation of hostilities.⁷⁰ Again, if prevention was the main objective, the US might have found it easier to follow international humanitarian

⁶⁵ Douglas Husak, ‘Lifting the Cloak: Preventive Detention as Punishment’ (2011) 48 San Diego Law Review 1173, 1190.

⁶⁶ Mary Bosworth, ‘Immigration Detention, Punishment and the Transformation of Justice’ (2019) 28 Soc & Legal Stud 81, 83.

⁶⁷ Ashworth and Zedner (n 63) 165.

⁶⁸ Husak (n 65) 1176, 1203; Sarah Turnbull and Ines Hasselberg, ‘From Prison to Detention: The Carceral Trajectories of Foreign-national Prisoners in the United Kingdom’ (2017) 19 Punishment & Society 135, 139.

⁶⁹ The Third Geneva Convention (n 18) art 21; The Fourth Geneva Convention (n 21) art 7.

⁷⁰ The Third Geneva Convention (n 18) art 115; Jinks (n 12) 437; Manoocher Mofidi and Amy Eckert, ‘Unlawful Combatants or Prisoners of War: The Law and Politics of Labels’ (2003) 36 Cornell Int’l LJ 59, 89.

law, rather than deny its application, and pursue a complicated legal path of legitimising prolonged detention and compromised legal procedures. The US refusal to apply international humanitarian law attests to the normative importance of detainees' status. By refusing to grant any protective status, the administration signalled the delegitimization of individuals' conduct and political agenda. It used the construct 'enemy combatants' as a form of moral censure that effectively exposes those captured to prosecution for various types of involvement in hostilities, including membership and material support of organisations, for instance as drivers.⁷¹ The exceptional status of enemy combatants resulted in the state deeming those confined to be nonpersons, undeserving of basic human rights protections. Overall, the 'enemy combatant' classification entailed both stigma and harsh treatment, which imply the use of status as a form of punishment. The US used the classification to respond to conduct and enforce harsher treatment that deviates from criminal law principles of legality and proportionality.

The rejection of basic international humanitarian law protections also preserves the traditional exclusion of non-western individuals from international law. Mégret draws a direct line between 'enemy combatants' and the colonial notion of the 'savage', who was external to the traditional Eurocentric framework of the law of war.⁷² US officials' rhetoric indeed implies a colonial continuity in the approach to non-western fighters, considering President Bush's reference to al-Qaeda as 'barbaric people',⁷³ and Assistant Attorney General Bybee's description of the Taliban as a 'tribal militia' serving a 'failed state'.⁷⁴ Later in this chapter, I discuss how the prejudiced perception of anti-colonial warfare as disorganized and unlawful served to justify the common imperial practice of punishing resistance.⁷⁵

⁷¹ Cole, 'Military Commissions' (n 48) 112.

⁷² Mégret (n 33) 298-9.

⁷³ President Bush, *Guard and Reserves 'Define Spirit of America': Remarks by the President to Employees at the Pentagon* (n 46).

⁷⁴ Jay S. Bybee, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (22 January 2002) (2002) printed in Karen J Greenberg and Joshua L Dratel (eds) *The Torture Papers* (CUP 2005) 96-7.

⁷⁵ Florence Bernault, 'The Politics of Enclosure in Colonial and Post-Colonial Africa' in Florence Bernault (ed), *A History of Prison and Confinement in Africa* (Heinemann 2003) 3; Mary Bosworth and Jeanne Flavin, 'Race, Control, and Punishment: From Colonialism to the Global War on Crime' in Mary Bosworth and Jeanne Flavin (eds), *Race, Gender, and Punishment* (Rutgers University Press 2007) 3.

The Guantánamo detention camp and the use of military commissions have been often described as a ‘stain’ on the US democracy,⁷⁶ which continues to weaken the country’s constitutional principles and delegitimize its antiterrorism campaign.⁷⁷ The camp and commissions have been noted as a negative example of state practice that will potentially discourage states from following international law, and damage the US long-term interests.⁷⁸ Furthermore, the US policy risks exposing captured American soldiers to the rejection of their own POW status, especially upon suspected war crimes.⁷⁹ Guantánamo has arguably become a burden.⁸⁰ Yet, some US politicians, including former President Trump, still consider the off-shore site as a security necessity.⁸¹ Democratic presidential plans to close it have yet to materialise, and the facility holds to date thirty-six men, twenty-four of whom have not been charged.⁸² Without disregarding the advances in releasing detainees, the domestic political obstacles to closing Guantánamo and the ongoing operation of the military commissions, indicate their importance as a powerful, supposedly uncompromising, response against terror.⁸³ Punishment in Guantánamo, either by the military commissions or by detention of a punitive nature, has become a part of the US security apparatus against terror.

The 2003 War in Iraq: Mass Detention and Rehabilitation as Strategy

The US-led coalition forces adopted a formally different policy regarding captured fighters in the 2003 war in Iraq. Importantly, in Iraq, no party of the conflict doubted that the attack against

⁷⁶ Hina Shamsi, ‘20 Years Later, Guantánamo Remains a Disgraceful Stain on Our Nation. It Needs to End.’ (2022) <<https://www.aclu.org/news/human-rights/20-years-later-guantanamo-remains-a-disgraceful-stain-on-our-nation-it-needs-to-end>> accessed 11 October 2022; The New York Times Editorial, ‘The Guantánamo Stain’ *The New York Times* (25 April 2013); Elisa Epstein, ‘Guantanamo’s Ugly Taint on U.S. Diplomacy’ (2020) <<https://www.justsecurity.org/68642/guantanamos-ugly-taint-on-u-s-diplomacy/>> accessed 11 October 2022.

⁷⁷ Mofidi and Eckert (n 70) 91; Fletcher and Stover (n 52) 118; Cole, *Enemy Aliens* (n 50) 189; Rose (n 52) 137, 158; Fionnuala Ní Aoláin and Oren Gross, ‘Introduction: Guantánamo and Beyond’ in Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013) 30.

⁷⁸ Steyn (n 50) 14; Mofidi and Eckert (n 70) 91; David Cole, ‘Enemy Aliens’ (2002) 54 *Stanford L Rev* 953, 958; Also see David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2009) 205; Susan N Herman, ‘Ab(jud)ication: How Procedure Defeats Civil Liberties in the “War on Terror”’ (2017) 79 *Suffolk U L Rev* 79, 81.

⁷⁹ For instance, soldiers of regular armies may also ‘blend in’ civilian population at times, in contradiction to article 44 of Additional Protocol I and article 4 of the Third Geneva Convention; Paust (n 22) 332; Mofidi and Eckert (n 70) 90.

⁸⁰ Lee Wolosky, ‘What I Learned When I Tried to Close Guantanamo’ (2022) <<https://www.politico.com/news/magazine/2022/01/11/close-guantanamo-prison-wolosky-526829>> accessed 11 October 2022.

⁸¹ Ryan Browne, Elise Labott and Barbara Starr, ‘Trump Signs Order to Keep Guantanamo Open’ *CNN* (31 January 2018).

⁸² The New York Times, *The Guantánamo Docket* (n 61); Ní Aoláin and Gross, *Guantánamo and Beyond* (n 78) 23.

⁸³ See the account of President Obama’s Special Envoy for Guantanamo Closure: Wolosky (n 80).

Saddam Hussein's regime started an international conflict between states. And so, the Geneva Conventions applied and protected any person deprived of their liberty, including irregular fighters.⁸⁴ The coalition powers held Iraqis suspected of membership in armed groups as 'security internees', according to the Fourth Geneva Convention, which granted a right of appeal and a review of the internment order every six months.⁸⁵

Approximately 100,000 suspects were interned throughout the war.⁸⁶ Most were held by US forces.⁸⁷ Many had loose connections to insurgent groups, as they were arrested in the coalition forces' 'broad sweeps'⁸⁸ or were near 'the target of interest'.⁸⁹ Despite the application of the Geneva Conventions, and the explicit limitation of 'security internment' to cases of 'imperative reasons of security', masses of suspects were detained without substantial grounds.⁹⁰ International Humanitarian law protections also did not prevent the use of coercive interrogation techniques, which the US Government approved for obtaining 'critical intelligence'.⁹¹ The mistreatment of captured Iraqis caught international attention in 2004, following the publication of graphic images showing US soldiers abusing detainees in Abu Ghraib prison with atrocious cruelty.⁹² The formal application of the Geneva Conventions did not protect Iraqis from mass detention in overcrowded camps and inhumane treatment, at least in the first years of the war. Mainly, international humanitarian law seemed to provide a normative framework for detention,

⁸⁴ Sibylle Scheipers, *Unlawful Combatants* (Oxford University Press 2015) 198.

⁸⁵ The Fourth Geneva Convention (n 21) art 78; Amnesty International, *Beyond Abu Ghraib: Detention and Torture in Iraq* (2006) 16.

⁸⁶ Scheipers, *Unlawful Combatants* (n 84) 200.

⁸⁷ Silvia Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"' (2005) 87 Int'l Rev Red Cross 39, 43.

⁸⁸ Scheipers, *Unlawful Combatants* (n 84) 200.

⁸⁹ Cheryl Benard and others, *The Battle Behind the Wire* (RAND 2011) 80.

⁹⁰ The Fourth Geneva Convention (n 21) art 42.

⁹¹ Lt Gen Ricardo S Sanchez, 'Memorandum for Commander US Central Command: CJTF-7 Interrogation and Counter-Resistance Policy' (14 September 2003), which approved the use of the interrogation techniques adopted in Guantánamo Bay in a context in which the Geneva Conventions apply, hence, in Iraq; Scheipers, *Unlawful Combatants* (n 84) 199.

⁹² The horrendous images raised global attention and interdisciplinary academic engagement, e.g.: Shadi Mokhtari, *After Abu Ghraib: Exploring Human Rights in America and the Middle East* (Cambridge University Press 2009); Michelle Brown, "'Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad' (2005) 57 Am Q 973; Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (Granta Books 2005); Avery F Gordon, 'Abu Ghraib: Imprisonment and the War on Terror' (2006) 48 Race & Class 42; Lene Hansen, 'How Images Make World Politics: International Icons and the Case of Abu Ghraib' (2015) 41 Rev Int'l Stud 263; Torture and abuse were also reported in other occasions against Iraqi detainees, see Amnesty International (n 86) 28.

that is once more punitive by nature.⁹³ I discuss further below how states selectively use international law to justify practices which violate human rights and amount to punishment.

In the years following the Abu Ghraib scandal, US forces changed their policy regarding detainees. Concerns over the radicalization of ‘moderate’ individuals in the overcrowded facilities drove the military to release detainees and introduce deradicalization programmes for those who remained interned.⁹⁴ These programmes included literacy classes, professional training, and religious education.⁹⁵ In 2011, RAND, a think tank established originally to conduct research for the US military, published a report on US detention operations in armed conflicts throughout the 20th century.⁹⁶ Drawing on the Iraq experience, the report recommended the development of a unified doctrine for detention during armed conflicts. Such doctrine, the report argued, must consider the gains of offering rehabilitation and tracking recidivism as strategic tools to influence local populations and decrease the risk of insurgency.⁹⁷ Programmes that aim to de-radicalize and demobilize suspected counterinsurgents are not a new phenomenon. Yet, unlike the cases of South Africa and Northern Ireland I discuss below, rehabilitation in Iraq was offered to detainees who were never convicted of an offence and who were residents of a country invaded by the US coalition forces. Rehabilitation and measuring reoffending are preventive tools, akin to internment, however, they also serve the communitarian concept of punishment.⁹⁸ Rehabilitation advances the state’s obligation to protect the public, but also to allow those convicted the opportunity to reintegrate, since, despite their wrongdoings, they are still members of the state’s ‘political community’.⁹⁹ But the Iraq experience, and the following RAND report, conceive rehabilitation as a key measure for promoting military operational strategies. Education and training programmes, which in the usual criminal justice context are based on individual needs, are harnessed for managing security risks and better-controlling masses of

⁹³ *M v Germany* (n 63) par. 128 ; Ashworth and Zedner (n 63) 16-20, 167.

⁹⁴ All detainees were eventually handed to Iraqi authorities upon the US’ forces withdrawal in 2011; Scheipers, *Unlawful Combatants* (n 84) 200; Benard and others (n 89) 63.

⁹⁵ *Ibid.*, 71.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, 89.

⁹⁸ This rationale can apply in both retributivist and consequentialist models of punishment: Nicola Lacey, *State Punishment* (Routledge 1988) 189, 200; John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) 80; R.A. Duff, *Punishment, Communication and Community* (Oxford University Press 2001) 75;

⁹⁹ *Ibid.*, 46; Also see John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 1992) 65, 75; Igor Primoratz, ‘Punishment as Language’ (1989) 64 *Philosophy* 187, 188.

detainees and the occupied populations from which they originate. RAND recommends borrowing measures which build on a state-to-citizen relationship and reshaping them to serve the state's national security interests only.¹⁰⁰

Outsourcing Detention: Lessons from Guantánamo and Iraq

The extensive critique of the US practices in Guantánamo and Iraq has led the US to take a different approach in its conflict with the Islamic State (ISIS) organisation and hand most detainees to Iraqi and Kurdish forces.¹⁰¹ However, the US did not determine a detention policy, nor was it given any guarantees for the humane treatment of those arrested. The legal responsibility of the US-led forces for the fate of detainees remains unclear.¹⁰² NGO reports reveal abuse and executions of ISIS prisoners by Iraqi soldiers, the confinement of women and children in dire conditions, and the continuing detention of people by Kurdish forces, without charge.¹⁰³ Meanwhile, the UN is leading an ongoing campaign for the repatriation of foreign citizens, including women and children, and is simultaneously cooperating with Member States towards the prosecution of suspected ISIS members.¹⁰⁴

Handing over suspects to local authorities is not a new policy and was done by the coalition forces in Afghanistan and Iraq.¹⁰⁵ However, the extent of this policy in the fight against ISIS seems to constitute punishment-by-proxy, in which the US-led forces withdraw from the role of the confining authority. This approach contrasts the US practices of the early 21st century and raises important questions about the circumstances in which states will choose to detain, and at times, prosecute and punish, their enemies. In Guantánamo and Iraq, it was the immediate shock of 9/11 that drove the 'new type of war', justifying exceptional and illegal tactics. As

¹⁰⁰ Benard and others (n 89) 89.

¹⁰¹ In several cases, US forces interrogated detainees before their transfer to Iraqi or Kurdish forces; Elizabeth Grimm Arsenault, 'US Detention Policy Towards ISIS: Between a Rock and a Hard Place' (2017) *Survival: Global Politics & Strategy*, 109-110.

¹⁰² Ibid, 121; Ernesto Hernandez-Lopez, 'Detaining ISIS: Habeas and the Phantom Menace' (2019) 71 *Okla L Rev* 1109-1122; Human Rights Watch, *US: Detainees Transferred from Syria to Iraq* (2018).

¹⁰³ Arsenault (n 101) 111; Human Rights Watch, *Syria: Dire Conditions for ISIS Suspects' Families* (2019).

¹⁰⁴ However, states have been reluctant to cooperate with the UN towards the repatriation of their citizens; UNSC, *Repatriating Detained Foreign Fighters, Their Families Key to Combating Threat Posed by Islamic State, Counter-Terrorism Officials Warn Security Council* (24 August 2020) <<https://press.un.org/en/2020/sc14282.doc.htm>> accessed 30 October 2022; UN Secretary-General, *The Threat Posed by ISIL (Da'esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat* 10 (26 July 2022, S/2022/576).

¹⁰⁵ Scheipers, *Unlawful Combatants* (n 84) 198, 200.

Carvin remarks, the threat of non-state actors was viewed an imminent danger to ‘the West’, and al Qaeda was presented as an enemy that could not be negotiated with.¹⁰⁶ US officials have described the ISIS threat in similar lines, with President Obama referring to the organisation as ‘cancer’.¹⁰⁷ However, ISIS attacks took place mostly outside the US and Europe, in Asia, the Middle East and Africa.¹⁰⁸ The fact ISIS did not wreak havoc on US soil, as al-Qaeda did, and the experience of Guantánamo, might explain the US decision to outsource punishment. In the Israeli context, as I discuss below, Israel’s perception of the Palestinian threat as imminent still drives the operation of direct penal power.

To conclude so far, this section surveyed penal practices states operate beyond their borders. During conflicts, governments draw on what they define as security needs to shape and inform the penal approach to captured fighters. To that end, they draw on normative frameworks like international law, and reshape penal rationales, like rehabilitation, to advance national security interests and use punishment to manage the conflict.

B. The Enemy in Our Midst: Internal Counterterrorism of the 21st Century

Counterterrorism via the Criminal Justice System and Immigration Control

Penal practices that target conceived ‘enemies’ also often operate within state borders, importing the conflict into the domestic criminal justice system. This section focuses on the recent case of internal counterterrorism practices in several liberal democracies since the early 2000s. In the aftermath of 9/11, the perception of terrorism as an immediate threat to public security prompted a process of ongoing securitisation. Achieving security against the threat of terror has become the fundamental role of the state, surpassing constitutional commitments to the rule of law and

¹⁰⁶ Carvin (n 46) 164.

¹⁰⁷ Spencer Ackerman and Nicholas Watt, ‘Obama Urges Action to Halt Isis ‘Cancer’ as UK Steps Up Fight Against Jihadists’ *The Guardian* (21 August 2014); AlJazeera News, ‘Pentagon: IS ‘Beyond Anything We’ve Seen’’ *AlJazeera* (22 August 2014) <<https://www.aljazeera.com/news/2014/8/22/pentagon-is-beyond-anything-weve-seen>> accessed 13 October 2022.

¹⁰⁸ Christina Capatides, ‘ISIS Attacks: A Timeline of Terror’ *CBS News* (8 January 2016) <<https://www.cbsnews.com/pictures/isis-attacks-a-timeline-of-terror/>> accessed 13 October 2022; Tim Lister and others, ‘ISIS Goes Global: 143 Attacks in 29 Countries Have Killed 2,043’ *CNN World* (12 February 2018) <<https://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/index.html>> accessed 13 October 2022.

the protection of human rights.¹⁰⁹ The same ‘preventive paradigm’ that guided the US practice in Guantánamo, led Anglo-European democracies to introduce emergency legislation and enhanced executive powers to tackle the threat of terrorism at any cost.¹¹⁰ In the following paragraphs, I focus on how these powers resulted in detention, criminalisation and sentencing policies, and how they mostly targeted minority groups,¹¹¹ despite the rising threat of extreme right-wing violence coming from members of the majority white population.¹¹² I specifically draw on the examples of the US and the UK domestic systems.

In the US, the Bush administration led a series of measures as part of the domestic front of the ‘war on terror’. As several scholars commented, the term ‘war’ was rhetorical then more than accurate, since the US Government had no single definitive enemy, no geographical limits, and no set duration for its actions against terrorism.¹¹³ Like the ‘war on drugs’ or the ‘war on crime’, describing the Government plans as ‘war’ aimed to justify extensive new powers, which in the context of counterterrorism, were applied with little transparency.¹¹⁴ An important example is the extra-legal use of material witness detention, designed to guarantee witnesses’ testimony in court, for detaining suspects of terror-related offences.¹¹⁵ The US has detained individuals as material witnesses for months, often in solitary confinement, and often based on

¹⁰⁹ Lucia Zedner, *Security* (Routledge 2009) 50, 143; Liora Lazarus, ‘The Right to Security’ in Rowan Cruft, Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015) 438; Cole, ‘Enemy Aliens’ (n 78) 955; Ian Loader and Neil Walker, *Civilizing Security* (Cambridge University Press 2007) 9.

¹¹⁰ Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 20; Liora Lazarus and Benjamin J Goold, ‘Security and Human Rights: Finding a Language of Resilience and Inclusion’ in Liora Lazarus and Benjamin J Goold (eds), *Security and Human Rights* (Hart 2019) 1.

¹¹¹ Ibid, 9; Cole, *Enemy Aliens* (n 50) 47; Alpa Parmar, ‘Stop and Search in London: Counter-terrorist or Counter-productive?’ (2011) 21 *Policing & Society* 369, 371.

¹¹² Michael German and Sara Robinson, *Wrong Priorities on Fighting Terrorism* (2018) 3-4, 15.

¹¹³ President Bush, ‘Address to the Joint Session of the 107th Congress’ (n 45); Fitzpatrick (n 60) 346; Herman (n 78) 100-101.

¹¹⁴ Cole, ‘Enemy Aliens’ (n 78) 960; Scheipers, *Unlawful Combatants* (n 84) 208; Also see Heinz Steinert, ‘The Indispensable Metaphor of War: On Populist Politics and the Contradictions of the State’s Monopoly of Force’ (2003) 7 *Theoretical Criminology* 265.

¹¹⁵ The US Government refrained from revealing information about its use of material witness law in the counterterrorism context; A Human Rights Watch report indicates at least 70 cases between 2001 and 2005: Human Rights Watch, *Witness to Abuse* (2005) 2.

false information that was below the standard of evidence for a criminal arrest.¹¹⁶ The overwhelming majority of these detainees were Muslim.¹¹⁷

The US Government introduced further detention powers as part of the USA PATRIOT Act 2001, specifically in the field of immigration control.¹¹⁸ For example, the mandatory detention of noncitizens who are members and supporters of ‘terrorist organisations’,¹¹⁹ regardless of whether they are to be deported. The use of such elaborate detention powers, in harsh conditions and with no means to decrease the risk attributed to detainees, is punitive by nature, like the broad detention operations in Iraq and Guantánamo. The PATRIOT Act also introduced the deportation of noncitizens allegedly associated with terrorist organisations, irrespective of the nature of this association.¹²⁰ The use of immigration control measures as counterterrorism marked noncitizens as a threat, vilifying mostly Arab and Muslim communities.¹²¹ President’s Trump 2017 ban on travellers from countries with a Muslim majority population confirms that decades after 9/11, counterterrorism policies still cite ethnicity and religion as grounds for prejudiced practices.¹²²

Federal prosecution of terror-related offences has also expanded in the past decades, peaking between 2002 to 2005.¹²³ Research by the New York University Centre on Law and Security evaluated that between 2001 and 2011, sentences for various terror-related offences, ranging from passport fraud to attempts to use weapons of mass destruction, were on average 8.5 times longer than those imposed in non-terror-related cases.¹²⁴ In the US, counterterrorism

¹¹⁶ The Supreme Court upheld the use of witness detention against suspects; See *Ashcroft v al-Kidd* 563 US 731 (2011); Human Rights Watch, *Witness to Abuse* (n 116) 4, 26; Ricardo J Bascuas, ‘The Unconstitutionality of “Hold Until Cleared”: Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet’ (2005) 58 Vanderbilt L Rev 678.

¹¹⁷ 69 out of the 70 men detained between 2001 and 2005 were Muslim; Human Rights Watch, *Witness to Abuse* (n 116) 37.

¹¹⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001; Juliet P Stumpf, ‘The Justice of Crimmigration Law and the Security of Home’ in Barbara Hudson and Synnøve Ugelvik (eds), *Justice and Security in the 21st Century* (Routledge 2012) 49.

¹¹⁹ Immigration and Nationality Act of 1990, s 1189.

¹²⁰ USA PATRIOT Act, s 411, 412; Cole, ‘Enemy Aliens’ (n 78) 972.

¹²¹ Lazarus and Goold (n 110) 8; Cole, *Enemy Aliens* (n 50) 47; Parmar (n 111) 371; Lucia Zedner, ‘Security, the State and the Citizen: the Changing Architecture of Crime Control’ (2010) 13 New Crim L Rev 379, 381.

¹²² Mary Bosworth, Katja Franko and Sharon Pickering, ‘Punishment, Globalization and Migration Control: “Get them the hell out of here”’ (2018) 20 Punishment & Society 34, 45.

¹²³ 1,046 ‘terrorism and anti-terrorism’ cases were filed in 2002, whereas between 2006 to 2019 the annual average was 225 cases; US Department of Justice, *United States Attorneys’ Annual Statistical Report* (2002) 84; US Department of Justice, *United States Attorneys’ Annual Statistical Report* (2019) 12.

¹²⁴ NYU Center on Law and Security, *Terrorist Trial Report Card: September 11, 2001 – September 11, 2011* (2011) 9.

enforcement developed rapidly since 2001, creating a civilian securitised response that challenges basic legal principles of administrative and criminal law, most notably, equality, fair procedure and proportionality.

In the UK, the country's long history of colonial rule provided rich experience in enforcing special security measures.¹²⁵ Following 9/11 and the 2005 London attacks, the Labour Government acted against terror on several fronts. It used indeterminate, punitive-by-nature, detention of noncitizens suspected of terrorist conduct for several years, until the House of Lords and the European Court of Human Rights ruled the practice unlawful, in 2004 and 2009, respectively.¹²⁶ Noncitizens were further targeted by counterterrorism immigration control regulation, allowing the rejection of refugee status and the deportation of asylum seekers based on 'interests of national security'.¹²⁷ Since 2011, the Government has centralised its counterterrorism enforcement under the Counter-Terrorism Strategy (CONTEST), which focused on policing and intelligence gathering in minority communities and imposing administrative restrictions on terror suspects and former prisoners.¹²⁸ Concerns over the recruitment of British citizens to international terrorist organisations, such as ISIS, later brought about further measures like the limitation of international movement, temporary exclusion of citizens and citizenship deprivation, where 'reasonable grounds' indicate that the citizen can gain citizenship in another country.¹²⁹ Hence, citizenship deprivation directly targets people who

¹²⁵ Kent Roach, *The 9/11 Effect* (Cambridge University Press 2011) 244-262; Ashworth and Zedner (n 63) 182; During the 1990s the UK Government enacted the Terrorism Act 2000, which codified various emergency powers that were previously used in Northern Ireland.

¹²⁶ *A and others v Secretary of State for the Home Department* (2004) UKHL 56; *A v UK* (2009) 49 EHRR 29.

¹²⁷ Immigration, Asylum and Nationality Act 2006, s 97A, 54; Lucia Zedner, 'Curtailling Citizenship Rights as Counterterrorism' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights 2nd edition* (Hart Publishing 2019) 104.

¹²⁸ Terrorism Prevention and Investigation Measures Act 2011; Martin Innes and Michael Lavi, 'Making and Managing Terrorism and Counter-terrorism: The View from Criminology' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017) 465; Ashworth and Zedner (n 63) 184; House of Lords, House of Commons and Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2014) 10, 20.

¹²⁹ Counter-Terrorism and Security Act 2015, Ch 1-2; Immigration Act 2014, s 66; Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18 *European Journal of Migration and Law* 222.

are of non-British origins¹³⁰ and effectively allows the UK to render them stateless, against its international commitments to reduce cases of statelessness.¹³¹

Like the US, the UK has also pursued counterterrorism through its criminal justice system, by criminalising preparatory and associative conduct and introducing severe maximum punishments that are arguably disproportionate to the harm preparatory conduct inflicts.¹³² In 2019, two high-profile stabbing attacks by men formerly incarcerated for terror-related offences sparked a renewed trend of extending punishments and tightening the supervision of terrorist offenders.¹³³ The Government passed emergency legislation that prolonged prison time for terror offences by ending automatic early release for terror convicts and allowing them to access release only at the two-thirds point of their sentence, based on the parole board's decision.¹³⁴ The Conservative Government is also promoting a Counter-Terrorism and Sentencing Bill, which introduces a new 'Serious Terrorism Sentence' of a minimum of 14 years of imprisonment and 25 years on license, for certain offences, as well as increased maximum sentences for a range of terror-related offences.¹³⁵ The bill marks a serious push for longer sentences which will set new standards for punishment in the case of terror. As the thesis discusses further below, the gravity of terror might justify the growing gap between sentences for terrorist acts, and other kinds of offences. Yet, harsher punishments for terror also show how penal trends drive severity upwards in ways that might undermine the principle of proportionate sentencing and exemplify the use of punishment to reaffirm state power, rather than fulfil penal rationales.

¹³⁰ Zedner, 'Curtailling citizenship rights as counterterrorism' (n 128) 116; Also see Juliet Stumpf, 'Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen' (2004) 38 UC Davis L Rev 79.

¹³¹ David Anderson - Former Independent Reviewer of Terrorism Legislation, *Citizenship Removal Resulting in Statelessness* (2016); Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p 175.

¹³² Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8 Criminal Law and Philosophy 99, 117.

¹³³ Vikram Dodd, Kevin Rawlinson and Esther Addley, 'London Bridge: Attacker had Been Jailed for Al-Qaida Inspired Bomb Plot' *The Guardian* (29 November 2019); Ivana Kottasová, Emma Reynolds and Claire Colbert, 'London Stabbing Attacker Recently Released from Prison over Extremist Material' *CNN World* (3 February 2020) <<https://edition.cnn.com/2020/02/02/uk/london-police-shot-man-terror-intl-gbr/index.html>> accessed 31 October 2022.

¹³⁴ Terrorist Offenders (Restriction of Early Release) Act 2020; Ministry of Justice, 'Automatic Early Release of Terrorists Ends' (26 February 2020).

¹³⁵ Counter-Terrorism and Sentencing HC Bill (2020-07) 129.

Fighting Terror Inside Prisons and After Release

Counterterrorism endeavours have also shaped how states practise punishment in prisons and how they address those convicted of terror-related conduct after their release. Concerns over reoffending and the radicalisation of prisoners have led some Anglo-European governments to develop preventive measures inside prison and post-release.¹³⁶ For instance, Belgium, France, Spain, the Netherlands, and the UK, operate separate dedicated units for ‘extremists’ who might incite other prisoners.¹³⁷ These separated individuals face different conditions than the general prison population, which in the UK, for instance, entail an ‘individually tailored regime’ that includes enhanced control and monitoring of each person.¹³⁸ Following the terrorist attacks by former prisoners in 2019-2020, the UK Government announced expanding the use of separation centres,¹³⁹ after only a handful of individuals were regularly held in each of the three separation centres established.¹⁴⁰ However, according to the Prisons Inspector, the centres do not provide sufficient pathways for progression, in terms of reducing their inhabitants’ attributed risk. The centres also do not allow prisoners who made progress to prove their reduced dangerousness through gradual integration with the general prison population.¹⁴¹ Moreover, the fact that only Muslim men were referred to separation centres as of April 2022,¹⁴² indicates which ideologies are perceived as more dangerous by prison authorities, and who might be the target population of the new policy to expand the separation of ‘radical’ prisoners.¹⁴³ This is not only true for the UK, as a survey that included 9 other European countries found that 82% of the prisoners classified as ‘extremists’ were of Jihadist ideology.¹⁴⁴

¹³⁶ Andrew Silke, ‘Terrorists, Extremists and Prison: An Introduction to the Critical Issues’ in Andrew Silke (ed), *Prisons, Terrorism and Extremism* (Routledge 2014) 7; Lorenzo Vidino and Bennet Clifford, *A Review of Transatlantic Best Practices for Countering Radicalisation in Prisons and Terrorist Recidivism* (2019) 4; Innes and Lavi (n 128) 471; RAND, *Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners* (2008) 2.

¹³⁷ The US has yet to develop a comprehensive policy against prison radicalisation, on federal or state level; Rajan Basra and Peter R Neumann, *Prisons and Terrorism: Extremist Offender Management in 10 European Countries* (2020) 13; Jessica Stern and Paige Pascarelli, ‘Prison-Based Deradicalization: What Do We Need to Determine What Works’ in Stian Lid and Stig Jarle Hansen (eds), *Routledge Handbook of Deradicalisation and Disengagement* (Taylor & Francis 2020) 116.

¹³⁸ HM Chief Inspector of Prisons Charlie Taylor, *Report on an Inspection of Separation Centres* (2022) 3.

¹³⁹ Ministry of Justice, ‘New Drive to Tackle Terrorism in Prisons’ (27 April 2022) <<https://www.gov.uk/government/news/new-drive-to-tackle-terrorism-in-prisons>> accessed 22 October 2022.

¹⁴⁰ Q.C. Jonathan Hall, Independent Reviewer of Terrorism Legislation *Terrorism in Prisons* (2022) 75.

¹⁴¹ Charlie Taylor, HM Chief Inspector of Prisons, *Report* (n 139) 9.

¹⁴² *Ibid.*, 3.

¹⁴³ Ministry of Justice, ‘New Drive to Tackle Terrorism in Prisons’ (n 140).

¹⁴⁴ Basra and Neumann (n 138) 17.

Scholars and policymakers disagree on whether prison programmes should pursue the deradicalisation of prisoners' viewpoints, or rather, focus on disengagement from violent conduct.¹⁴⁵ Programmes may pursue both ends, however, the two goals represent different approaches regarding the purpose of punishing terrorists. Disengagement focuses on behaviour, while deradicalisation pursues the ideological transformation of individuals, and it is accordingly harder to measure and confirm.¹⁴⁶ Silke points to how disengagement pursues a much more realistic end, given the empirical evidence on how prisoners abandon violence, yet may remain sympathetic to the moral cause which guided their offending.¹⁴⁷ On the face of it, crime prevention per se is not sufficient to achieve deradicalisation, which seemingly demands a moral, social and perhaps even cultural shift. When the state requires deradicalisation in order to release a person or remove supervision measures, it expresses its lack of tolerance for certain ideologies and defines the abandonment of such views as the symbolic 'way back' to society. The requirement of deradicalisation represents a higher bar for reintegration, which prioritises a retributivist aim of condemning certain ideologies rather than focusing on prevention.

Governments have also been occupied with post-release monitoring, despite the existing findings on low recidivism rates amongst those imprisoned for terror offences, as found in studies from the US, Netherlands, Belgium and the UK.¹⁴⁸ These preventive post-release tools drew heavily on the already developed mechanisms of surveillance and risk assessment western democracies adopted since the early 1990s.¹⁴⁹ In some countries, for instance, Canada, France and the UK, post-release measures concerning terror offenders combine tight supervision with psychological support and educational programmes.¹⁵⁰ Nonetheless, such programmes have been criticised for impeding reintegration. In the UK, for instance, the Multi-Agency Public Protection Arrangements include a series of severe restrictions on released terror-related

¹⁴⁵ Vidino and Clifford (n 137) 8.

¹⁴⁶ Andrew Silke, 'Disengagement or Deradicalization: A Look at Prison Programs for Jailed Terrorists' (2011) 4 CTC Sentencing 18.

¹⁴⁷ Ibid; Jesse Morton and Mitchell D Silber, *When Terrorists Come Home* (2019) 35; Neil Ferguson, 'Disengaging from Terrorism' in Andrew Silke (ed), *The Psychology of Counter-Terrorism* (Routledge 2010) 113.

¹⁴⁸ Andrew Silke and John Morrison, *Re-Offending by Released Terrorist Prisoners: Separating Hype from Reality* (International Centre for Counter-Terrorism - The Hague, 2020); RAND (n 137) 2.

¹⁴⁹ Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford University Press 2017) 1; Ashworth and Zedner (n 63) 48; Also see the early work of Malcolm Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 Criminology 449, 456.

¹⁵⁰ Morton and Silber (n 148) 38.

offenders, limiting their freedom of movement, occupation, association and access to computers and phones, which all burden the process of rehabilitation for the sake of tighter supervision.¹⁵¹

Managing Suspect Minorities via Domestic Counterterrorism

The use of internal counterterrorism measures in the 21st century spawned an academic debate on the relationship between security, the rule of law, and human rights.¹⁵² Scholars have particularly observed how domestic counterterrorism preserves racial and ethnic inequality, by targeting minority groups.¹⁵³

The sacrifice of minority rights, ostensibly for the protection of the majority's security,¹⁵⁴ is not a new phenomenon. An early well-known example is the internment of 'enemy aliens' during the two world wars, who were suspected of association with enemy states based on their ancestry and foreign nationality.¹⁵⁵ The use of specialised measures against certain minority groups indicates their exclusion from human rights protections, and their identification as 'suspect communities', as Hillyard coined it.¹⁵⁶ As I elaborate in the next chapter, scholars like Hussain and Ben-Natan discuss the targeting of minorities through security enforcement as a form of colonial continuity, as states continue to use emergency regulation to manage occupied and disadvantaged populations.¹⁵⁷

¹⁵¹ Benedict Wilkinson, 'Do Leopards Change Their Spots? Probation, Risk Assessment and Management of Terrorism-Related Offenders on Licence in the UK' in Andrew Silke (ed), *Prisons, Terrorism and Extremism* (Routledge 2014) 268.

¹⁵² E.g. Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2nd edn, Hart 2019); Roach (n 125); Craig Raine, Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press 2007); Cian C Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Hart 2012); Fergal F Davis and Fiona de Londras (eds), *Critical Debates on Counter-Terrorism Judicial Review* (Cambridge University Press 2014); Genevieve Lennon, Colin King and Carole McCartney (eds), *Counter-terrorism, Constitutionalism and Miscarriages of Justice* (Hart 2018); Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 J L & Soc'y 507.

¹⁵³ Cole, *Enemy Aliens* (n 50) 47; Lazarus and Goold (n 110) 9; Parmar (n 111) 370; Innes and Lavi (n 128) 466.

¹⁵⁴ Waldron (n 110) 161; Cole, 'Enemy Aliens' (n 78) 955.

¹⁵⁵ A.W.B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford University Press 1992); Eric Lohr, *Nationalizing the Russian Empire: The Campaign Against Enemy Aliens during World War I* (Harvard University Press 2003); Martin F Auger, *Prisoners of the Home Front: German POWs and "Enemy Aliens" in Southern Quebec, 1940-1946* (UBC Press 2005); Richard Dove, '“A matter which touches the good name of this country”' in Richard Dove (ed), *"Totally Un-English"? Britain's Internment of "Enemy Aliens" in Two World Wars* (Rodopi 2005) 11; Stefan Manz and Panikos Panayi, *Enemies in the Empire* (Oxford University Press 2020) 9; Bernice Archer, *The Internment of Western Civilians Under the Japanese 1941-1945* (RoutledgeCurzon 2004) 5.

¹⁵⁶ Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press 1993).

¹⁵⁷ Nasser Hussain, 'Hyperlegality' (2007) 10 New Crim L Rev 514, 515; Smadar Ben-Natan, 'Citizen-Enemies: Military Courts in Israel and the Occupied Territories 1967-2000' (DPhil thesis, Tel Aviv University 2020) 27-8.

Yet, in the past decade enforcement endeavours against the rising threat of right-wing extremism have focused on populations who were not targeted by counterterrorism in the past. The UK and Canada, for instance, classify right-wing extremism as terror and target political groups whose members typically do not belong to ethnic and religious minorities.¹⁵⁸ US authorities, however, have yet to prioritise right-wing extremism, despite the increasing numbers of hate crimes, attacks and large-scale riots by white supremacy groups, including the January 2021 Capitol Hill riots.¹⁵⁹ Israel's policies also show that even though the state is beginning to address acts by members of the majority group as 'terror', it still applies relatively moderate enforcement practices against them, compared to the exceptional measures that regularly apply to Palestinians.¹⁶⁰

The events unfolding since 2001 indicate that 9/11 was an exceptional event. Since then, terror attacks take far more casualties in Africa, South Asia and the Middle East than in North America and Europe.¹⁶¹ Yet, the fear of terror still drives liberal democracies to expand counterterror enforcement through populist intrusive policies, in a seemingly endless pursuit of security that entails excessive formal and informal punishment.¹⁶² The next chapters further discuss the performative role of punishment against security threats, and how it contributes to 'penal nationalism' that reaffirms the state's authority and set the borders of belonging.¹⁶³

¹⁵⁸ United Nations Counter-Terrorism Committee Executive United Nations Counter-Terrorism Committee Executive Directorate, *Trend Alert: Member States Concerned by the Growing and Increasingly Transnational Threat of Extreme Right-wing Terrorism* (United Nations Security Council, 2020); UK Home Office, 'Proscribed Terrorist Organisations' (2021) <<https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version>> accessed 16 June 2021; which includes groups like National Action and Sonnenkrieg Division, a neo-Nazi group, as proscribed terrorist organisations; Regulations Amending the Regulations Establishing a List of Entities, SOR/2019-231 (CAN); which ordered the inclusion of Blood and Honour in its terrorist entities list.

¹⁵⁹ German and Robinson (n 112) 3-4, 15; Sebastian Rotella, 'Global Right-Wing Extremism Networks Are Growing. The U.S. Is Just Now Catching Up,' *ProPublica* (22 January 2021).

¹⁶⁰ E.g. The Association for Civil Rights in Israel, *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (2014).

¹⁶¹ Hannah Ritchie and others, 'Terrorism' (*Our World in Data*, 2019) <<https://ourworldindata.org/terrorism#which-regions-experience-the-most-terrorism>> accessed 11 October 2020.

¹⁶² Lazarus and Goold (n 110) 1; Zedner, *Security* (n 109) 20.

¹⁶³ Vanessa Barker, *Nordic Nationalism and Penal Order* (Routledge 2018) 7; Lynne Haney, 'Prisons of the Past: Penal Nationalism and the Politics of Punishment in Central Europe' (2016) 18 *Punishment & Society* 346; Kaufman (n 4) 45; Also see Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press 2012) 218-219; Parmar (n 111) 371.

C. State Punishment During Anti-Colonial and National Liberation Struggles

The punishment of insurgents is entrenched in the history of colonial rule.¹⁶⁴ Detention and criminalisation have been key in how European empires in Africa, Asia and the Pacific regions delegitimised resistance. Imprisonment, exile and, at times, executions did not only aim to disable local opposition but were also central in defining the ‘enemy’ who is threatening security and public peace.¹⁶⁵ To recall, international humanitarian law excluded anti-colonial struggles until the introduction of the 1977 Additional Protocols to the Geneva Conventions. The western ideal of the legitimate combatant was juxtaposed with how insurgent groups operated, and so, ‘savage’ members of such groups were denied POW protections.¹⁶⁶ Colonial regimes perceived non-European resistance as ‘barbaric’ and illegitimate and used repressive measures in combat, and its aftermath, including mass internment, air raids and in several cases, genocide.¹⁶⁷

As noted earlier, postcolonial scholarship argues that the 21st century’s counterterrorism operations revive the imperial rhetoric towards organisations which are established mostly in the Global South. Western condemnation of terror organisations, such as those that operated in Afghanistan and Iraq, serves powerful states while disguising these states violent conduct against civilians.¹⁶⁸ Despite international endeavours to de-westernise the idea of the legitimate combatant, states continue to apply exclusionary criteria for POWs and create ‘vanishing points’ of extra-legal measures, like Guantánamo.¹⁶⁹

Drawing from the colonial history of punishment, this section examines the function of punishment in the context of ongoing occupation and imperialism, focusing on the two cases of

¹⁶⁴ Bernault (n 75) 3; David Killingray, ‘Punishment to Fit the Crime? Penal Policy and Practice in British Colonial Africa’ in *ibid*, 97; Graeme Harper, ‘Criminal Minds and Felonious Nations: Colonial and Postcolonial Incarceration’ in Graeme Harper (ed), *Colonial and Postcolonial Incarceration* (Continuum 2001) 9; Bosworth and Flavin (n 75) 3; Also see Mark Brown, *Penal Power and Colonial Rule* (Routledge 2014).

¹⁶⁵ Philip J Havik and others, ‘Empires and Colonial Incarceration in the Twentieth Century’ (2019) 47 *J Imperial & Commonwealth Hist* 201, 202; Sibylle Scheipers, ‘The Use of Camps in Colonial Warfare’ (2015) 43 *ibid* 678.

¹⁶⁶ Mégret (n 33) 278.

¹⁶⁷ David Killingray, ‘“A Swift Agent of Government”: Air Power in British Colonial Africa, 1916-1939’ (1984) 25 *J African Hist* 429; A Dirk Moses, ‘Empire, Colony, Genocide: Keywords and the Philosophy of History’ in A Dirk Moses (ed), *Empire, Colony, Genocide: Conquest, Occupation and Subaltern Resistance* (Berghahn 2008) 8; Sven Lindqvist, *A History of Bombing* (Linda Haverty Rugg tr, Granta 2002).

¹⁶⁸ Elleke Boehmer and Stephen Morton, ‘Introduction: Terror and the Postcolonial’ in Elleke Boehmer and Stephen Morton (eds), *Terror and the Postcolonial* (Wiley-Blackwell 2010) 10.

¹⁶⁹ Derek Gregory, ‘Vanishing Points: Law, Violence and Exception in the Global War Prison’ in *ibid* 58.

Northern Ireland and South Africa.¹⁷⁰ In both instances, governments used informal and formal forms of punishment, which drove forward the creation of powerful prisoners' movements that eventually shaped how penal practices operated behind bars.

Northern Ireland: From Criminalisation to Pragmatism

It is common to view the 1969 Derry riots, between Irish nationalists and the Royal Ulster Constabulary,¹⁷¹ as the point in which the conflict between the Irish Republican resistance and British rule in Northern Ireland erupted. In the years that followed, the British Government introduced security measures it had previously used in its colonies. Emergency legislation permitted detention without trial of suspects of paramilitary conduct in a swift process that was not bound by criminal law standards of evidence.¹⁷² Mainland Britain mostly detained Republican suspects, who comprised 95% of all detainees between 1971 and 1975.¹⁷³ This occurred even though Loyalists,¹⁷⁴ who made up the remaining 5%, had a considerable share in attacks against Catholic communities, and caused comparable harm, in terms of casualties, to that caused by Republican paramilitaries.¹⁷⁵ Formally, detention was a preventive administrative measure to disable active paramilitaries, however, the biased enforcement attested to which kind of conduct was considered more dangerous, illegitimate, and unlawful. The targeting of Republicans indicated a symbolic reaction against those who opposed British rule, which was punitive rather than merely preventive.¹⁷⁶

In 1972, following a hunger strike by Republican prisoners, the Government granted incarcerated paramilitaries 'Special Category Status'. Paramilitaries were separated from other

¹⁷⁰ See Taylor C Sherman, 'Tensions of Colonial Punishment: Perspectives on Recent Developments in the Study of Coercive Networks in Asia, Africa and the Caribbean' (2009) 7 *History Compass* 659; David Arnold, 'The Colonial Prison: Power, Knowledge and Penology in Nineteenth-Century India' in David Arnold and David Hardiman (eds), *Subaltern Studies VIII: Essays in Honour of Ranajit Guha* (Oxford University Press 1994) 150; Frank Dikötter, 'A Paradise for Rascals': Colonialism, Punishment and the Prison in Hong Kong (1841-1898)' (2004) *Crime, History & Societies*.

¹⁷¹ The British police force deployed in Northern Ireland.

¹⁷² Hew Bennet, 'Detention and Interrogation in Northern Ireland, 1969-75' in Sibylle Scheipers (ed), *Prisoners in War* (Oxford University Press 2010) 187; Roach (n 125) 238, 245.

¹⁷³ In total, 2,060 suspected Republicans were detained, compared to 109 Loyalists; Laura K Donohue, *The Cost of Counterterrorism* (Cambridge University Press 2009) 36-7; Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland* (Oxford University Press 2001) 212-213.

¹⁷⁴ Loyalists support keeping British rule over Northern Ireland.

¹⁷⁵ McEvoy (n 173) 212-213.

¹⁷⁶ *Ibid*, 215.

prison populations and permitted to maintain their structure of command, wear civilian clothes, conduct lectures, and have their imprisoned commanders communicate with the authorities on their behalf.¹⁷⁷ Formally, the Government delegitimised paramilitaries and their campaign by denying them POW status, yet in effect, it provided them with many of the conditions guaranteed to legitimate combatants.¹⁷⁸ This approach, of normative denouncement alongside preferential conditions, allowed the Government to maintain its moral position while curbing in-prison resistance.

In the mid-1970s, Britain increasingly criminalized paramilitary conduct to further delegitimize and depoliticize the Republican campaign.¹⁷⁹ The Government sought to replace the use of internment with prosecution.¹⁸⁰ Based on the Diplock Commission recommendations, the Government built the specialised Diplock Courts to try offences related to paramilitary conduct.¹⁸¹ Unlike the British Common Law system, the Diplock Courts operated with a single judge, rather than with a jury, and followed relaxed standards on the admissibility of confessions.¹⁸² The Diplock Courts operated as an effective forum to convict paramilitary conduct and seemingly achieve justice, yet in a procedure divorced from ordinary standards of criminal procedure and fair trial.¹⁸³ Britain's use of quasi-judicial criminal procedure inspired similar strategies in the decades to follow, such as the US military commissions.¹⁸⁴ As part of the criminalisation policy, the Government withdrew paramilitaries' special category status in 1976. Republican prisoners fiercely resisted, in what became known as the blankets and dirty protests.¹⁸⁵ Despite prison authorities' attempts to aggressively suppress the protests, the struggle

¹⁷⁷ Thomas Hennessey, *Hunger Strike: Margret Thatcher's Battle with the IRA* (Irish Academic Press 2014) 11; Chris Ryder, *Inside the Maze: The Untold Story of the Northern Ireland Prison Service* (Methuen 2000) 105.

¹⁷⁸ See footnotes 19-20 of this chapter; Also see CP Walker, 'Irish Republican Prisoners - Political Detainees, Prisoners of War or Common Criminals?' (1984) 19 *Irish Jurist* 189, 208-212.

¹⁷⁹ McEvoy (n 173) 227.

¹⁸⁰ John D Jackson and Sean Doran, 'Conventional Trials in Unconventional Times: The Diplock Court Experience' (1993) 4 *Crim L Forum* 503, 504.

¹⁸¹ *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (1972, Cmnd, 5185, 1972); Jackson and Doran (n 180) 505.

¹⁸² For concerns over bias and intimidation of jurors; Ibid, 507.

¹⁸³ In 2007 the Diplock Courts were abolished, under the Justice and Security (Northern Ireland) Act 2007. The Criminal Justice Act 2003 currently permits jury-less trials based on the risk of jury tampering; Criminal Justice Act 2003 s 44.

¹⁸⁴ Fionnuala Ní Aoláin and Colm Campbell, 'Managing Terrorism' (2018) 9 *J Nat'l Security L* 367, 371.

¹⁸⁵ Paramilitaries refused to wear prison uniforms and wore blankets only for weeks. They escalated the protests by refusing to shower and applying excrement on the walls of their cells; McEvoy (n 173) Ch 4.

lasted five years, peaking at the lethal hunger strike of 1981. Prime Minister Thatcher famously explained the Government's uncompromising position then:

We are not prepared to consider special category status for certain groups of people serving sentences for crime. Crime is crime is crime. It is not political, it is crime. There can be no question of granting political status.¹⁸⁶

Ten prisoners lost their lives during the hunger strike, which ended with no immediate improvements to prisoners' conditions. Nevertheless, the strike attracted global attention, and provoked criticism of the UK Government's inflexibility.¹⁸⁷

Gradually, the Government moderated its approach, allowing paramilitaries to wear civilian clothes and to conduct limited associations.¹⁸⁸ Meanwhile, it developed a unique scheme for reviewing life sentences of Northern Irish prisoners, which included regular home leave, work outside prison, and at the final stage, release on life license.¹⁸⁹ Republican organisations opposed the scheme, as it meant prisoners conceded to being labelled as criminals, yet individuals participated nonetheless.¹⁹⁰

McEvoy describes the moderate conditions and release scheme as a managerial approach, which the British authorities adopted as a pragmatic solution to contain the paramilitary population.¹⁹¹ Administrators saw the daily dialogue and negotiations with paramilitaries as part of the technocracy of running the prison, disregarding the wider context of the ongoing conflict.¹⁹² Prisons scholars point to a similar depoliticization of imprisonment embedded in the managerial logic that aims to improve prisons while ignoring the social backdrop of incarceration and the inherent power dynamics between staff and prisoners.¹⁹³

Nevertheless, the daily communication between prison guards and prisoners showed some degree of political normalisation, as British authorities simultaneously worked with and

¹⁸⁶ Margaret Thatcher Foundation, 'Press Conference Ending Visit to Saudi Arabia (IRA hunger strikes)' (21 April 1981) <<https://www.margarethatcher.org/document/104501>> accessed 31 October 2022.

¹⁸⁷ Hennessey (n 178) 458.

¹⁸⁸ F. Stuart Ross, *Smashing H-Block: The Popular Campaign Against Criminalization and the Irish Hunger Strikes 1976-1982* (Liverpool University Press 2011) 158.

¹⁸⁹ McEvoy (n 173) 294.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, 288.

¹⁹² *Ibid.*

¹⁹³ Mary Bosworth, *Engendering Resistance* (Ashgate 1999) 32; Eamonn Carrabin, *Power, Discourse and Resistance* (Ashgate 2004) 179; Also see David Garland, *Punishment and Modern Society* (Oxford University Press 1990) 5.

against paramilitary organisations. Simultaneously, the Government's release scheme not only indicated the moderation of punishment but also advanced the isolation of those who participated, creating cracks in the paramilitary organisations.¹⁹⁴ Prisoners' struggles pushed the Government to compromise its penal power, creating a dialectical process in which prisoners have an impact on punishment, while the Government seeks alternatives by which to weaken paramilitary opposition, like rehabilitation.

South Africa: Torture and Securitisation alongside Negotiation

The South African experience was in many respects similar to that of Northern Ireland, as the Nationalist Government used penal policies that both compromised severity for pragmatism and used punishment as a strategic measure. Since the early 1960s, the Government assumed security measures against the anti-apartheid campaign, including mass detention without trial, at times under inhumane conditions.¹⁹⁵ Detainees were often held in solitary confinement, and some were tortured during interrogations.¹⁹⁶ As in the cases discussed earlier, detention was a preventive measure, but its conditions were punitive. The Government imposed other restrictions as well, including limitations on individuals' movement, withdrawal of citizenship, and deportation.¹⁹⁷ Foster studied the psychological impacts of detention and torture in South Africa, and described the Government's security policy as 'a form of political and psychological violence'.¹⁹⁸

The South African Government also prosecuted anti-apartheid activity through security legislation that criminalised violent and non-violent political involvement, such as boycotting and campaigning.¹⁹⁹ Here as well, the Government perceived criminal law as an appropriate framework for coping with insurgency, yet it did so by compromising the basic principles of criminal law. For instance, by prolonging the criminal process as a means to extend the

¹⁹⁴ McEvoy (n 173) 310.

¹⁹⁵ It is estimated that between 1960 to 1990 over 75,000 persons were detained without trial; see Max Coleman, *A Crime Against Humanity: Analysing the Repression of the Apartheid State* (Human Rights Committee of South Africa 1998) 14; Christopher Merret, 'Detention without Trial in South Africa: The Abuse of Human Rights as State Strategy in the Late 1980s' (1990) 37 *Africa Today*, 57.

¹⁹⁶ Reports indicate practices such as beatings, electric shocks, suffocation and holding in abnormal body positions; Don Foster, *Detention and Torture in South Africa* (James Currey 1987) 127; Amnesty International, *Political Imprisonment in South Africa* (1978) 57.

¹⁹⁷ Coleman (n 195) 18.

¹⁹⁸ Foster (n 196) 5.

¹⁹⁹ Coleman (n 195) 14.

confinement of detained defendants,²⁰⁰ and detaining state witnesses in order to obtain incriminating statements.²⁰¹ These violations of the right to liberty and fair procedure were inflicted so that the state could use criminal law to manage resistance effectively. Sentences for offences relating to political activity were often lengthy prison terms, and the Government also imposed capital punishment as a sentence for offences like treason and taking part in ‘terroristic activities’.²⁰² Based on the common law doctrine of ‘common purpose’, South African courts convicted dozens of people of colour for their involvement in unrest-related murders, which contributed to the extreme number of 1335 people executed between 1978 and 1988.²⁰³

Detainees and sentenced prisoners were denied POW status or any other form of political recognition.²⁰⁴ They were, nevertheless, mostly separated from those involved in criminal offences which were not related to the conflict.²⁰⁵ The majority of individuals detained for involvement in anti-apartheid conduct were held in Robben Island, under harsh conditions, including hard labour and abuse by staff and imprisoned criminal gangs.²⁰⁶ One ex-prisoner described these conditions as ‘a deliberate act of retribution by the vengeful and racist state’.²⁰⁷

Anti-apartheid prisoners’ key strategy for improving their circumstances was negotiation, in which they urged the prison authorities to act ‘in the name of the smooth running of the prison’.²⁰⁸ Domestic and international pressure on the South African Government provided the prisoners with leverage and induced the authorities to improve conditions, professionalise staff, reduce hard labour and allow prisoners-led education programmes.²⁰⁹ In turn, the Government capitalised on these advances to improve its international reputation.²¹⁰

²⁰⁰ Ibid, 93.

²⁰¹ Amnesty International, *Political Imprisonment in South Africa* (n 196) 33.

²⁰² Coleman (n 195) 96.

²⁰³ Ibid; A successful abolitionist campaign achieved a dramatic decrease in executions after 1988. The Constitutional Court abolished capital punishments in 1995; Michelle M Sharoni, ‘A Journey of Two Countries: A Comparative Study of the Death Penalty in Israel and South Africa’ (2001) 24 Hastings Int’l & Comp L Rev 257, 275.

²⁰⁴ South Africa was not a signatory to Additional Protocol I at the time; Coleman (n 195) 83.

²⁰⁵ Amnesty International, *Political Imprisonment in South Africa* (n 196) 79.

²⁰⁶ Fran Lisa Buntman, *Robben Island and Prisoner Resistance to Apartheid* (Cambridge University Press 2003) 75; Amnesty International, *Political Imprisonment in South Africa* (n 197) 77.

²⁰⁷ Buntman (n 206) 215, 57.

²⁰⁸ Ibid, 170.

²⁰⁹ Andrew Thompson, “‘Restoring hope where all hope was lost’: Nelson Mandela, the ICRC and the protection of political detainees in apartheid South Africa” (2016) 98 Int’l Rev Red Cross 799, 823; Amnesty International, *Political Imprisonment in South Africa* 77, 83; Crain Soudien, ‘Robben Island University Revisited’ in Anrianna Lissoni and others (eds), *One Hundred Years of the ANC* (Wits University Press 2009).

²¹⁰ Buntman (n 206) 203.

Prisoners described that following these changes, Robben Island has turned from ‘a brutal “hell-hole” to a “university” for activists and political leaders’, offering the ‘best’ conditions for incarcerated African people in South Africa.²¹¹ As in Northern Ireland, the Government also tried to weaken anti-apartheid organisations by granting remissions to individuals who renounced their support of violence.²¹² Throughout the anti-apartheid campaign, the South African Government as well shaped punishment according to strategic interests that are external to classic penal objectives.

The Impact of Prisoners’ Movements During Conflict and Peace Negotiation

The policies of detention and imprisonment in South Africa and Northern Ireland gave rise to prisoners’ organisations which garnered power. These movements influenced how punishment operated inside prison, built fierce opposition to the delegitimization of irregular fighters, and subsequently played a central role in the peace process.²¹³ The two cases exemplify how incarceration policies can become counterproductive as they promote the building of prisoners’ resistance.

The rise of influential movements among politically-motivated prisoners did not only occur in South Africa and Northern Ireland. Alexander’s research on anti-colonial fighters in Rhodesia similarly shows how confinement generated an opportunity for political development through education and self-government.²¹⁴ The Palestinian Prisoners’ Movement is another important example, which I discuss later in the thesis. In these cases, the power that politically-motivated prisoners gained attested to their importance as political actors and reinforced the centrality of the prison as a key arena of the conflict. Just as with POWs, individuals incarcerated for their ideological conduct were vulnerable at the hands of the state, and they managed to draw international attention by pointing to how the state uses especially harsh measures against them.

²¹¹ Ibid, 25.

²¹² Gail Super, “‘Like Some Rough Beast Slouching Towards Bethlehem to be Born’: A Historical Perspective on the Institution of the Prison in South Africa, 1976-2004’ (2011) 51 Brit J Criminology 201, 205.

²¹³ McEvoy (n 173) 335; Buntman (n 206) 216.

²¹⁴ Jocelyn Alexander, ‘The Productivity of Political Imprisonment: Stories from Rhodesia’ (2019) 47 J Imperial & Commonwealth Hist 317.

Ultimately, in both South Africa and Northern Ireland, the peace process entailed the extensive release of prisoners who were, up to that point, considered to be serious security threats.²¹⁵ The concessions made by the state in these cases required not only state renunciation of punishment but also, as McEvoy notes:

[...] an acceptance of the political motivation of paramilitaries, an implicit acknowledgement of the state as a protagonist in the conflict and a preference for politics over security.²¹⁶

The weight given to prisoners' release during negotiation further shows the leverage states earned by incarcerating insurgents and holding them as bargaining chips. Nevertheless, as prisoners gained more recognition, the governments' ability to enforce harsher conditions, and refuse release, became more limited.

The experience of South Africa and Northern Ireland shows how governments use policies of criminalisation, punishment, and even rehabilitation to advance their strategic goals of delegitimising and weakening insurgency. The developing circumstances of the conflict, notably the impact of prisoners' movement, drove governments to adopt various practices that sacrificed penal rationales, like retribution and prevention, to respond to international pressure and better contain imprisoned insurgents.

Conclusions: Themes Arising from States' Punishment of Enemies

This chapter has examined state penal practices in three different settings: beyond state borders, inside the state and through its enforcement authorities, and against internal insurgencies. The discussion of these practices raised five dominant themes that characterise state punishment of conceived enemies.

First, the creation of distinct legal tracks of judicial and executive powers that deviate from the criminal and constitutional standards of criminal justice. The British Diplock Courts

²¹⁵ 447 prisoners were released in Northern Ireland and approximately 1,000 in South Africa; Kieran McEvoy, Peter Shirlow and Karen McElrath, 'Resistance, Transition and Exclusion: Politically Motivated Ex-Prisoners and Conflict Transformation in Northern Ireland' (2004) 16 *Terrorism & Political Violence* 646; Kate Savage, *Negotiating the Release of Political Prisoners in South Africa* (2000).

²¹⁶ McEvoy (n 173) 350.

and the American military commissions exemplify the building of specialised tribunals which conduct quasi-judicial procedures that claim to advance justice, but in effect, accept evidence obtained through torture and compromise fundamental procedural safeguards. State criminalisation of preparatory conduct and the imposition of harsh punishments undermine the principles of legality and proportionality.²¹⁷ These are central values of criminal law that are often compromised in counterterrorism enforcement. The common use of detention without trial provides another important example. Detention has been used in varying contexts, outside the state, such as the extra-legal confinement of suspects in Guantánamo, and inside state borders, through the US misuse of the material witness detention measure.²¹⁸ Both the US and the UK have used detention as a counterterrorism measure applied through immigration control. Northern Ireland and South Africa have detained paramilitaries and anti-apartheid activists extensively. The conditions of detention were not identical in all these cases, and yet, they commonly reflect a punitive measure formally described as a preventive tool, drawing on the European Court of Human Rights' criteria.²¹⁹ States arguably used their preventive goals to disguise measures that responded to insurgency in a punitive manner yet denied those punished their basic criminal procedure guarantees. The extensive use of detention attests not only to governments' willingness to deprive their enemies of liberty without due process but also to the diffusion of prevention and punishment through administrative proceedings that are, in effect, forms of punishment.

The second theme is the importance states and detainees attribute to the question of status. Status matters because it reflects the state's normative perception of suspects' conduct and has implications for their conditions of confinement. Since the 1949 Geneva Conventions, POW status provides elaborate protections that signify the moral position of legitimate combatants in wartime.²²⁰ This does not mean that POWs might not face retaliation by their capturers, who may violate the Geneva Conventions. Reports on abuse of Ukrainian and Russian

²¹⁷ For an early discussion on legality in modern penal systems, see Jerome Hall, 'Nulla Poena Sine Lege' (1937) 47 Yale L J 165; Also see Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crim & Just 55.

²¹⁸ Human Rights Watch, *Witness to Abuse* (n 116) 2.

²¹⁹ See footnote 63 of this chapter.

²²⁰ Mofidi and Eckert (n 70) 89.

POWs by both parties provide a current example of how states neglect their obligations to comply with, and enforce penalties against violations of, international humanitarian law.²²¹ Despite these infringements, POW status still represents the legitimisation of certain fighters by decriminalising their actions. In the cases discussed above, governments refused to grant POW status, and in some cases refused to grant any protective status. Rather than pursuing the seemingly easy legal path of indeterminate detention of combatants, states created alternative routes that allowed them to define the normative status of detainees as terrorist suspects and convicted criminals. Without POW protections, states had greater leeway to expose detainees to ‘enhanced interrogation techniques’ and harsh and inhumane conditions. The rejection of protective status had both normative implications for how detainees were defined, and practical implications for how they were handled. As the case of Guantánamo exemplifies, using the extra-legal ‘enemy combatants’ label was a form of further sanction against suspects, which allowed their delegitimization and further dehumanisation.

The third theme is the use of criminalisation and punishment as a means to delegitimise resistance. This is especially apparent in the conflicts discussed in this chapter, given their asymmetric nature. In most of the examples discussed here, one party, most often the state, builds on its criminal and security apparatus to impose a moral censure against state opponents. As I discuss in the next chapter, Anglo-European government representatives often refer to insurgents as ‘terrorists’, which is a particularly effective term, since it reduces individuals to the wrongfulness of their conduct, disregarding the historical and political background of their actions. The criminalisation of ‘terrorists’ was particularly prevalent in Northern Ireland and South Africa as a government policy that aimed to depoliticise the armed struggle against the state and portray paramilitaries and anti-apartheid activists as criminals, while obscuring the wider political context of their conduct.²²²

Theme number four arises from how penal measures, especially those used within state borders, target minority groups. From the early example of ‘enemy aliens’ detained in the two

²²¹ Alexander Smith, ‘UN Urges Investigation into Videos of Alleged POW Abuse by Russia and Ukraine’ *NBC News* (29 March 2022) <<https://www.nbcnews.com/news/world/un-urges-investigation-alleged-prisoner-war-abuse-videos-russia-ukrain-rcna21947>> accessed 31 October 2022.

²²² McEvoy (n 173) 350; Coleman (n 195) 14.

world wars to the use of witness material detention, and the targeting of noncitizens through immigration detention of terror suspects states traditionally conceive foreign nationals of particular ethnic and religious backgrounds as suspects of insurgent conduct. The targeting of minority groups indicates, and reinforces, the racist and xenophobic perception of who is ‘the enemy’, and the underlying power dynamics between the often-white majority and excluded minority communities. I discuss further below the use of punishment to portray how the enemy looks, and thus to determine the boundaries of belonging to the nation-state and the political community it protects.

The fifth and last theme is the strategic use of punishment to manage the enemy, in ways that reset the interpretation of penal rationales as retribution and prevention according to the developing circumstances of the conflict. The analysis of penal practices in Northern Ireland and South Africa exemplified how prisoners’ movements, and international pressure, drove governments towards a pragmatic approach that mitigated unwarranted severity and the delegitimization of confined insurgents. Pragmatism eventually permitted the operation of prison organisations and turned the prison into a ‘university’ where insurgent ideology was taught and developed by prisoners.²²³ At the same time though, pragmatism permitted better control over the prisoners, while governments used rehabilitation to weaken their political organisations. These cases exemplify how the ongoing conflict, and changing national security needs, dictate the use of penal power, and might even lead to its full withdrawal, through the release of insurgents as part of a peace accord. Governments’ penal policies were thus closely tied to their general approach regarding ongoing conflicts. Often, national security interests took precedence over penal ideals, like retribution, as states used punishment as another instrument against their enemies, rather than a measure that demands moral standing and justifications.

The five themes together represent a commonality that characterises state practices of confinement against perceived enemies. This is not to say that these themes are unique to conflict. States also target minorities through criminal justice practices, regardless of ongoing

²²³ Thompson (n 210) 823.

conflict.²²⁴ However, considering these themes together, and how states repeatedly mimicked previous practices when dealing with insurgents, underlines the need for a separate study of punishment during times of conflict. This thesis employs the term *conflict penalty* to describe the commonality between states' practices, consider the different relationship that exists between states and punished enemies, and account for the political use of penal power during conflict. In the next chapter, I turn to discuss the normative and sociological questions conflict penalty raises, drawing on legal and criminological punishment literature. I focus on the state's moral standing to punish enemies, on how states reinterpret penal rationales, and how conflict penalty redefines the state's relationship with the recipient of punishment and plays a performative role in writing the state's national narrative.

²²⁴ E.g. Correta Phillips and Ben Bowling, 'Ethnicities, Racism, Crime and Criminal Justice' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (6 edn, OUP 2017) 190; Hindpal Singh Bhui, *Race and Criminal Justice* (Sage 2009).

Chapter 2: Legal and Criminological Perspectives on Conflict Penalty

He asked a very simple question: “Why, and by what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those they torment, flog, and kill?”

Tolstoy, *Resurrection*¹

The problem of punishment has occupied scholars for millennia.² Studies of the power to punish, the rationales of penal action and its effects on individuals and society have developed into a wide-ranging academic field.³ This chapter draws on legal and criminological studies of punishment to analyse normative and sociological questions that arise from the practices of conflict penalty. It asks: What grounds the state’s power to punish during conflict? How do disproportionate measures impact the state’s moral standing? What rationales guide the state’s penal practices during conflict? How does conflict penalty shape the power dynamics between the state and the punished ‘enemy’?

In discussing these questions, I build on penal theory and the sociology of punishment to understand the justifications, reasons for, and effects of conflict penalty. Traditionally, Anglo-European literature on punishment focused on legal sanctions prescribed within domestic criminal justice systems.⁴ However, the past three decades have seen an expansion of the field, as scholars began studying the increasing use of intrusive administrative powers in the context of crime prevention, counterterrorism, and, importantly, immigration control.⁵ As mentioned

¹ Leo Tolstoy, *Resurrection* (Oxford University Press 1999 (1899)) 340; Quoted in R.A. Duff, *Trials and Punishments* (Cambridge University Press 1986) 187.

² Mary McKenzie, *Plato on Punishment* (University of California Press 1981); Richard Bauman, *Crime and Punishment in Ancient Rome* (Routledge 1996); Matthew Walker, ‘Punishment and Ethical Self-cultivation in Confucius and Aristotle’ (2019) 31 *Law & Literature* 259.

³ Michael Tonry, ‘Introduction: Thinking About Punishment’ in Michael Tonry (ed), *Why Punish? How Much? A Reader on Punishment* (Oxford University Press 2011); Jonathan Simon and Richard Sparks, ‘Punishment and Society: The Emergence of an Academic Field’ in Jonathan Simon and Richard Sparks (eds), *The Sage Handbook of Punishment and Society* (Sage 2012); R.A. Duff and David Garland, ‘Introduction: Thinking About Punishment’ in R.A. Duff and David Garland (eds), *A Reader on Punishment* (Oxford University Press 1994); Didier Fassin, *The Will to Punish* (Oxford University Press 2018); Farah Focquaert, Elizabeth Shaw and Bruce N Waller (eds), *The Routledge Handbook of the Philosophy and Science of Punishment* (Routledge 2020).

⁴ Simon and Sparks (n 3) 4; Malcolm Thorburn, ‘Criminal Law as Public Law’ in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 40; Kerry Carrington, Russell Hogg and Máximo Sozzo, ‘Southern Criminology’ (2016) 56 *Brit J Criminology* 1, 2; Emma Kaufman, *Punish and Expel* (Oxford University Press 2015) 49-50.

⁵ Arjen Leerkes and Dennis Broeders, ‘A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention’ (2010) 50 *British J Criminology* 830; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014).

earlier, this thesis contributes to these endeavours and it draws on previous scholarship on the punitive aspects of administrative practices, particularly against noncitizens.⁶

The chapter develops several arguments regarding legal and criminological aspects of conflict penalty. It contends that conflict penalty challenges the classic normative grounds of punishment and requires us to turn to alternative theories that revolve around the state's prerogative to protect its security interests. The chapter further discusses the use of punishment as a means to delegitimise certain ideologies, most specifically through the 'terrorism' label, which decontextualises the circumstances in which the offender acted and their political motivation. It also examines states' tendency to adopt extreme preventive measures during conflict and use incapacitation and rehabilitation for strategic ends. It goes on to explore the alienating effect of penal practices during conflict, given how states prioritise surveillance over reintegration, and target minorities and noncitizens. Lastly, the chapter discusses the performative role of conflict penalty practices, in building a national narrative around the state's unlimited power and ability to avenge crimes against its population.

This chapter does not purport to offer a normative solution to the difficulties conflict penalty poses regarding state power and the authority to punish. Rather, I highlight these issues to create a general set of concepts for examining conflict penalty more closely. In subsequent chapters, I use the issues raised here to analyse Israel's punishment against Palestinians.

A. The Power to Punish in Times of Conflict

Conflict penalty poses several challenges to the normative grounds of state punishment. First, it often includes practices that take place beyond the border and against noncitizens, which raises questions regarding the boundaries of state power. Secondly, conflict penalty tends to undermine criminal law principles, violates human rights, and serves the state's strategic goals in the ongoing conflict in ways that erode the legitimacy of penal power. The following discussion draws on classic debates about the power to punish and contemplates possible

⁶ César Hernández, 'Immigration Detention as Punishment' (2014) 61 UCLA L Rev 1346; Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' (2019) 28 Soc & Legal Stud 81.

alternatives to justify state power during conflict. I start by examining the problem of punishment that is imposed despite the fact there is no state-citizen relationship and move on to discuss security as the basis for penal power.

The Absence of the State-Citizen Relationship

The relationship between the state and the citizen has been the focus of various accounts of punishment.⁷ Yet, in conflict, this relationship is either absent, since the state punishes noncitizens, or compromised since the citizen arguably challenges their civil status as a member of the polity through their conduct. This section explores the normative challenge to state punishment in these conditions, when the offender is not a citizen, or rather, when she or he renounces their loyalty to the state. Specifically, I engage with Chehtman's interest-based theory of extraterritorial punishment, which aims to justify punishment, regardless of a state-citizen relationship.

Scholars who theorise the justification of punishment often draw on political theories of the role of the state.⁸ We can roughly divide these theories into two traditions of thought: liberalism and communitarianism.⁹ The liberal tradition generally perceives the state and the individual as two parties to a contract that establishes mutual obligations. Citizens consent to the state's authority and in return, the state promises them security and order.¹⁰ Communitarianism, on the other hand, focuses on how the bonds between citizens raise mutual obligations towards

⁷ R.A. Duff, *Punishment, Communication and Community* (Oxford University Press 2001); Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017); Matt Matravers, *Justice and Punishment* (Oxford University Press 2000); Markus D Dubber, 'Citizenship and Penal Law' (2010) 13 New Crim L Rev 190; Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010) 3, 128; Sigal Shahav, *Anti-Terrorism Criminal Law* (Nevo 2019); Alessandro De Giorgi, *Re-thinking the Political Economy of Punishment* (Ashgate 2006); Also see Amy Lerman and Vesla Weaver, *Arresting Citizenship* (University of Chicago Press 2014).

⁸ Thomas Hobbes, *Leviathan* (Oxford University Press 2008), Ch 28; John Locke, *Two Treatises of Government* (Yale University Press 2003 (1690)), book II, Ch I, VII; John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press 1992) (n 3); Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy' (2004) 7 Buffalo Crim L Rev 307; Also see Lucia Zedner, 'Is the Criminal Law only for Citizens? A Problem at the Borders of Punishment' in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment* (Oxford University Press 2013).

⁹ Michael Sandel, *Liberalism and the Limits of Justice* (2nd edn, Cambridge University Press 1998); Stephen Mulhall and Adam Swift, *Liberals and Communitarians* (Blackwell 1996) xiii; Nancy Rosenblum (ed) *Liberalism and the Moral Life* (Harvard University Press 1989); Some stressed that this divide is problematic as it neglects the multiple meanings liberalism and communitarianism might have in different contexts, and further disregards accounts that claim to represent both traditions; Duff (n 7) 35.

¹⁰ Matt Matravers, 'Political Theory and the Criminal Law' in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 68.

each other and the community.¹¹ Duff famously argued that a ‘political community’, in which individuals live under a legal framework that represents their shared values, can function as the source of legitimacy for the state and its criminal law.¹² In such a community, members participate in designing norms by electing representatives who then legislate on criminal law matters.¹³

On the face of it, liberalism and communitarianism do not justify state power that operates beyond its recognised geographic borders and against noncitizens. When the US punishes a citizen of Afghanistan detained in Guantánamo for aiding al Qaeda, for example, it acts beyond its borders, outside its jurisdiction, deliberately in this case, and against a person who is not a member of the American community. A similar problem may rise when the state asks to punish a foreign national who committed ordinary crimes, like theft, within its borders. Duff proposed that penal power exists in the latter case since noncitizens should be seen as guests, who are temporary members of the state’s political community.¹⁴ However, in conflict, the normative challenge is greater since the noncitizens act against the political community directly, targeting its institutions and attacking its citizens indiscriminately. Performing such crimes signals that the offender might not seek temporary membership, but rather to undermine the state’s authority and stability. This does not necessarily mean that the obligations to obey the law do not apply to such individuals, but that state power cannot build on the state’s ‘temporary’ relationship with them, as they do not seem to accept the state’s authority, to begin with.

Citizens’ actions may also challenge the liberal and communitarian justifications for punishment, by similarly committing large-scale attacks against government authorities and other citizens. Such acts might be considered a gross violation of a citizen’s contractual or communitarian duties. The crime is so serious that it can be understood as a rejection of the state-citizen relationship, and of the state’s authority to try and punish the offender.¹⁵ Again, this is not

¹¹ R.A. Duff, ‘I Might Be Guilty, but You Can’t Try Me: Estoppel and Other Bars to Trial’ (2003) 1 *Ohio J Crim L* 245, 246; Thorburn (n 4) 40; Zedner (n 8) 43-44.

¹² Duff (n 7) 46, 75; R.A. Duff, *Answering for Crime* (Hart 2007) 49-50.

¹³ R.A. Duff, ‘Responsibility, Citizenship, and Criminal Law’ in R.A. Duff and Stuart Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press 2011) 141.

¹⁴ Anthony Duff, ‘Citizens, Enemies, Outlaws: The Criminal Law and Its Addressees’ (presented at the Hebrew University, May 2008).

¹⁵ RA Duff, ‘Penance, Punishment, and the Limits of the Community’ in Michael Tonry (ed), *Why Punish? How Much? A Reader on Punishment* (Oxford University Press 2012) 187; Also see Scolnicov’s discussion about how the

to say that the state does not hold the power to punish outside its borders and against noncitizens.¹⁶ But rather, that liberal and communitarian explanations do not seem to fully justify penal power in such situations, given their limited application to a reciprocal state-citizen relationship.¹⁷

In *The Philosophical Foundation for Extraterritorial Punishment*, Chehtman proposes a normative framework for state punishment that does not depend on a state-citizen relationship, and yet is still committed to liberal values of individual rights. For Chehtman, the power to impose punishment relies on an interest-based justification, driven by the individual and collective interest in the existence of a criminal law system that enforces the prohibition of murder, rape, theft and other offences.¹⁸ A system of criminal law, he argues, protects individuals as right-holders and thus contributes to their dignity and well-being.¹⁹ Punishment is an essential component of such a system since it indicates that the system takes people's rights seriously.²⁰ Chehtman argues that such a system can impose extraterritorial punishment against noncitizens on the grounds of universality.²¹ This is because the moral prohibition on certain offences, like rape and murder, does not depend on a person's civil status. Quite persuasively, Chehtman argues that individuals worldwide benefit from having a system of criminal law that enforces against the prohibitions set above, and protects them as rights-holders.²² Therefore, a state's power to punish should not be contingent upon a state-citizen relationship.²³ He also contends that extraterritorial penal power builds on 'the protective principle', recognised in customary international law as grounds for states' jurisdiction to punish noncitizens for acts that threaten

offence of treason challenges liberalism and individual freedom, by demanding citizens a duty of loyalty; Anat Scolnicov, 'Against the State' in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart 2017) 141, 153.

¹⁶ Many countries maintain extra-jurisdictional liability on citizens' and noncitizens' actions outside state borders. For instance, for acts that affected protected interests within the state, like money laundering and counterfeiting of state currency; Chehtman (n 7) 84; Duff, *Answering for Crime* (n 12) 54.

¹⁷ Chehtman (n 7) 3, 128.

¹⁸ Ibid, 40.

¹⁹ Ibid.

²⁰ Ibid, 41.

²¹ Ibid, 136-7.

²² Ibid, 137.

²³ As noted, Duff justifies the state's power to punish tourists as well, yet Chehtman argues that his explanation fails to establish convincing grounds for power, beyond the territorial conception of criminal liability; Ibid, 83.

their vital interests.²⁴ Chehtman's account builds on his claim that there is a collective interest in a system that will protect security and government functions.²⁵

Chehtman further explains that power is not enough. He differentiates between power and the authority to punish. Drawing on the 'integrity principle', developed in the works of legal theorists,²⁶ Chehtman argues that the state's authority to punish noncitizens depends on its ability to provide accuracy and fairness in the criminal process.²⁷ Duff suggests a different take on integrity. He argues that integrity is a fundamental component in the communicative criminal process since by providing fair trial, the state treats the defendant as a citizen and therefore earns the moral standing to punish. In short, Duff sees 'integrity as integration'.²⁸ Chehtman, on the other hand, distances himself from the state-citizen relationship. He argues that integrity is important for establishing the state's capability to provide justice and thus achieve the goals of an operating criminal justice system better than nonstate actors.²⁹ Only when the state both protects collective interests and satisfies the standards of fair and accurate process, does it hold both the power and authority to punish. Only then, can the state's judgment be considered morally just and binding.³⁰

There are several limitations to Chehtman's account, which derive from the normative gap created in the absence of a state-citizen relationship. To begin, Chehtman's reference to fair and accurate process as a prerequisite to penal authority is divorced from how states punish in times of conflict. As the previous chapter showed, states repeatedly fail to provide fair and accurate procedures to those conceived as 'enemies'. Rather, they commonly deviate from criminal law principles, deny procedural safeguards, and routinely violate human rights.

²⁴ Espionage is a notable example: Matthew Garrod, 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality' (2012) 12 Int'l Crim L Rev 763, 824; Kenneth S Gallant, *International Criminal Jurisdiction: Whose Law Must We Obey?* (Oxford University Press 2022) 410.

²⁵ Chehtman (n 7) 74.

²⁶ Anthony Duff and others, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart 2007) 226; Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (5th edn, Oxford University Press 2019) 448; Also see Lucia Zedner, 'Security Against Arbitrary Government in Criminal Justice' in Antje du Bois-Pedain, Magnus Ulväng and Petter Asp (eds), *Criminal Law and the Authority of the State* (Hart Publishing 2017) 91.

²⁷ Chehtman (n 7) 142, 147.

²⁸ Duff and others (n 26) 235; Later in this chapter, I discuss how Duff remodels this principle in the case of no state-citizen relationship.

²⁹ Chehtman builds on Joseph Raz's service conception of authority, which grounds authority in the 'epistemic advantage' the state holds to adjudicate crimes accurately and fairly; Chehtman (n 7) 147.

³⁰ Ibid, 152.

Chehtman's account is too detached from the reality of punishment.³¹ The fact that deviations from fairness and accuracy are emblematic of conflict penalty, indicates that many states deprioritise these standards regarding conceived enemies, and thus do not see them as necessary for establishing their authority to punish. Conflict penalty rather supports the Duffian understanding of the integrity principle, which ties fair trial with the state-citizen relationship.³² Nevertheless, states also violate due process protections within their criminal justice systems, and against citizens, which likewise might chip away at penal authority.³³

Moreover, Chehtman's idea of a universal set of interests as the basis for the power to punish is likewise problematic. People might generally agree that murder is wrong, but they can take very different opinions on whether a particular act of killing was wrong and should be considered murder. Conflict situations provide numerous examples of how local communities support the violent struggle, whether against British rule in Malaya³⁴ and Northern Ireland³⁵ or the Nationalist Government in South Africa.³⁶ Chehtman disregards the potential for contrasting opinions regarding acts of violence, and thus the problem of justifying punishment of ideological offending that challenges the state. As Martin observes, he places too much weight on 'a speculative point about the beliefs of participants'.³⁷ The case of Israel and the Palestinian insurgency similarly shows fundamentally opposite standpoints that make finding a common view of wrongdoing very difficult.

While arguing for a universal interest-based justification, Chehtman also pushes back against the common objections of 'victors' justice' and lack of 'clean hands', that regard the indictment of opponents' combatants as a hypocritical use of the criminal process. Chehtman responds that a state's participation in a conflict, as well as the possible wrongdoings of its soldiers, have no implications for its power and authority to punish. The state can still provide a

³¹ Margaret Martin, 'Reflections on Punishment from a Global Perspective: An Exploration of Chehtman's *The Philosophical Foundations of Extraterritorial Punishment*' (2014) 8 Crim L & Phil 693, 709.

³² Duff and others (n 26) 235.

³³ Also see Zedner, 'Security Against Arbitrary Government in Criminal Justice' (n 26) 92, 98, 100.

³⁴ Sibylle Scheipers, *Unlawful Combatants* (Oxford University Press 2015) 167.

³⁵ Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland* (Oxford University Press 2001) 54.

³⁶ Fran Lisa Buntman, *Robben Island and Prisoner Resistance to Apartheid* (Cambridge University Press 2003) 192.

³⁷ Martin (n 31) 706.

system that is accurate and fair while protecting people as rightsholders.³⁸ At this point, Chehtman acknowledges that the lack of ‘clean hands’ be problematic, since ‘the relevant stakeholders’³⁹ might disagree that the state is ‘enforcing the relevant legal rule’⁴⁰ regarding the crime in question. Chehtman does not define what turns a group of people into stakeholders in relation to the crime committed. He also does not propose a solution to the challenge stakeholders might raise against the state’s power and authority to punish. A lack of ‘clean hands’ and selective prosecution can erode the standing of the punishing authority and portray its system of justice as a discriminatory mechanism that prosecutes only certain wrongdoers, without condemning the wrongs committed by others.⁴¹

Cehtman’s focus on universal principles, identified as interests or human rights standards, provides only a partial solution to the problematic relationship between the state and the ‘enemy’ punished. Chehtman conceives the state as the body deciding the protected interests. The experience of conflict penalty shows that the state will often protect the interests of the majority group whilst compromising those of minorities, including citizens.⁴² Chehtman does not explain how the supposedly collective benefit of punishment serves the people punished and the ethnic or national group to which they belong. In other words, the lack of a state-citizen relationship creates a gap that Chehtman does not quite address. This gap is a central feature in conflict penalty, which disregards the punished individual’s position regarding the moral standing of the state.

In a similar vein as Chehtman’s notion of universal interests, some scholars see international law as the possible source of penal authority when the relationship gap exists. Duff, for instance, proposes that international conventions represent a ‘normative community of

³⁸ Chehtman (n 7) 162.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Dannenbaum wrote this in the context of international criminal tribunals; Tom Dannenbaum, ‘Legitimacy in War and Punishment: The Security Council and the ICC’ in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020) 136.

⁴² Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010) 20; Liora Lazarus and Benjamin J Goold, ‘Security and Human Rights: Finding a Language of Resilience and Inclusion’ in Liora Lazarus and Benjamin J Goold (eds), *Security and Human Rights* (Hart 2019) 1; David Cole, *Enemy Aliens* (The New Press 2003) 47.

humanity’,⁴³ which includes all states and persons, and does not depend on a prior relationship between the state and the punished individual. So, terror suspects and defendants are still ‘responsible members’ of humanity, entitled to human rights. In this way, the principle of integrity is protected in these cases too, based on international law obligations.⁴⁴

There are two notable difficulties with drawing on international law as a normative source for penal authority. First, as Chapter One discussed, important international law frameworks still perpetuate Anglo-European hegemony by excluding certain types of belligerency as non-sovereign, and thus, illegitimate.⁴⁵ Advances like the 1977 Additional Protocols to the Geneva Conventions marked an important expansion of some westernised legal definitions, like prisoners of war.⁴⁶ Yet, the fact that countries like the US and Israel refrained from ratifying the protocols indicates how global power dynamics dictate the content and binding power of international law. Secondly, the history of conflict penalty reveals that even when states rely on international law, they do so selectively to legitimise incarceration practices that violate human rights protections.⁴⁷ For instance, the UK’s indeterminate detention of foreign nationals suspected of terrorist conduct⁴⁸ relied on exercising the right of a state to derogate under Article 15 of the European Convention on Human Rights from the Convention, in times of emergency.⁴⁹ As Chapter One noted, despite the appearance of legality, both the House of Lords and the European Court of Human Rights found the practice unlawful, as it violated the UK’s other commitments to protect the human rights of all persons within its jurisdiction, conduct a lawful detention procedure and guarantee equality before the law.⁵⁰ In Iraq as well, the US-led coalition drew on the limited power to detain ‘security internees’, set out in the Fourth Geneva

⁴³ R.A. Duff, ‘Authority and Responsibility in International Criminal Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 600-603.

⁴⁴ Ibid, 603.

⁴⁵ Helen M Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press 2011) Ch 3; Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27 Third World Q 739, 742; Nathaniel Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’ (2004) 43 Colum J Transnat’l L 1, 20; Makau Mutua, ‘What is TWAIL?’ (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 13, 33.

⁴⁶ See Chapter One on page 44 of this thesis.

⁴⁷ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005) 13.

⁴⁸ Part 4 of the Anti-Terrorism Crime and Security Act 2001.

⁴⁹ The Human Rights Act 1998 (Designated Derogation) Order 2001.

⁵⁰ The House of Lords accordingly quashed the derogation order; *A and others v Secretary of State for the Home Department* (2004) UKHL 56, par 68, 73, 78; *A v UK* (2009) 49 EHRR 29; Nevertheless, the released 11 foreign nationals were immediately subject to Control Orders, which included limitations equivalent to house arrest; Ashworth and Zedner (n 5) 184.

Convention,⁵¹ to perform sweeping arrests of Iraqi citizens, many of whom had no proven connections with insurgent groups.⁵² As the thesis will demonstrate, the case of Israel also reveals a selective use of international law.⁵³ International law has undoubtedly made valuable contributions to the protection of human rights.⁵⁴ And yet, states have also used it to legitimise practices that compromise basic protections, rather than to establish a penal authority that guarantees procedural rights.

To clarify, the thesis does not argue that states do not have the power and authority to punish in times of conflict, nor does it suggest alternatives to state punishment, such as international tribunals. It also does not rule out the possibility that states could establish normative grounds for criminalisation outside the state-citizen relationship. Rather, it highlights a central problem with the normative grounds for conflict penalty, regarding the legal standing of the state to punish those it sees as ‘enemies’. In practice, states operate punishment without a state-citizen relationship, without a substantiated collective interest, and while deviating from fundamental procedural protections. Conflict penalty, alongside other forms of punishment against noncitizens,⁵⁵ seems to build on other grounds of state authority which require us to think beyond the traditional political theory of the state-citizen relationship.

⁵¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 78.

⁵² Cheryl Benard and others, *The Battle Behind the Wire* (RAND 2011) 80; Scheipers (n 34) 200.

⁵³ Orna Ben-Naftali, ‘Geneva Law’ in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of OPT* (Cambridge University Press 2018) 147.

⁵⁴ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) Ch 2; Antonio Cassese, ‘Current Challenges to International Humanitarian Law’ in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Humanitarian Law* (Oxford University Press 2014) 6.

⁵⁵ Hernández (n 6); Bosworth (n 6); Matthew J Gibney, ‘Deportation, Crime, and the Changing Character of Membership in the United Kingdom’ in Katja Franko Aas and Mary Bosworth (eds), *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford University Press 2013) 219; Also see Juliet Stumpf, ‘The Process is the Punishment in Crimmigration Law’, *ibid*, 73.

The greater tragedy of terrorism, however, is that it leads to counterterrorism.

Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture, 1988⁵⁶

The aftermath of 9/11 generated elaborate academic debates on the limits of state power on security matters, including the power to punish.⁵⁷ A main point of contention was around whether the state should, in some circumstances, perceive terror as an act of war, rather than another form of crime.⁵⁸ Should the state respond to major terror attacks by mobilising its military and security forces or should it take action against terrorism through its domestic criminal justice system?⁵⁹ In practice, Anglo-European governments have used both paths for the past two decades by introducing securitised preventive measures and disproportionate punishment within their criminal justice systems, while using their security services for internal enforcement, and establishing special tribunals that imitate the criminal process, yet deny procedural protections.⁶⁰ As noted earlier, the normative challenge to penal power exists in both paths and is exacerbated by the fact that states commonly violate domestic and international legal principles when enforcing counter-terrorist measures, and thus compromise their normative standing to indict and punish under either framework.

Acknowledging the normative limitations on penal power, some scholars propose that the state can take exceptional measures against those who oppose its authority and jeopardise

⁵⁶ Pnina Lahav, 'A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture' (1988) 10 Cardozo L Rev 529.

⁵⁷ E.g. Ronald Dworkin, 'Terror and the Attack on Civil Liberties' (2003) 50 The New York Review of Books; Cole (n 42); David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2009); Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); Lucia Zedner, 'Terrorizing Criminal Law' (2014) 8 Criminal Law and Philosophy 99; Lazarus and Goold (n 42).

⁵⁸ Noah Feldman, 'Choices of Law, Choices of War' (2002) 25 Harvard Journal of Law and Public Policy 457, 485; Laura K Donohue, *The Cost of Counterterrorism* (Cambridge University Press 2009) 6; Lucia Zedner, *Security* (Routledge 2009) 121; Vaughan Lowe, "'Clear and Present Danger': Responses to Terrorism' (2008) 54 Int & Comp L Q 185, 189.

⁵⁹ Ashworth and Zedner (n 5) 174.

⁶⁰ Donohue (n 58) 7; Gross and Ní Aoláin (n 57) Ch 1; David Cole, 'Military Commissions and the Paradigm of Prevention' in Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013) 97; Zedner, 'Terrorizing Criminal Law' (n 57) 118; Also, on the diversification and pluralisation of security governance, see Trevor Jones, 'Governing Security: Pluralization, Privatization, and Polarization in Crime Control and Policing' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, Oxford University Press 2012) 745, 747.

national interests, based on its duty to guarantee security.⁶¹ These scholars refer to the danger that conflict, in the form of large-scale acts of aggression, poses to the state's most fundamental institutions. Such acts create a threat, imagined or substantiated, to the life of the nation. The threat invokes the state's obligation to provide its citizens with security and to maintain the stability of its institutional framework,⁶² in a similar manner to the protective principle mentioned earlier. The obligation of the state to provide security justifies a degree and form of punishment that, at times, might deviate from the fundamental principles and protections of criminal law.⁶³

In the following section, I focus on two sets of justifications for state power that revolve around security: The need for exceptional powers in times of emergency and the justification of a separate penal law for state enemies, drawing on Jakobs' influential concept of enemy criminal law. I build on these different theories of state power to discuss alternative normative grounds for conflict penalty.

Emergency-based Justifications for the Power to Punish

The concept of emergency challenges the legal system, as it entails unexpected circumstances with which the law of regular times cannot arguably cope. How to define an emergency, and distinguish different kinds of crises, between economic, climate-related or violent crises, are contested questions given their direct impact on the state's response and its extent.⁶⁴ Since this thesis studies conflict, it focuses on states' responses to violent crises, such as wars, internal insurgencies and large-scale terror attacks.⁶⁵ Violent crises, particularly those that take place within state borders, call the state's powers of enforcement into question, including the power to incarcerate, indict and punish.

⁶¹ Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press 2006) 46; Bruce Ackerman, 'The Emergency Constitution' (2004) 113 Yale L J 1029, 1038; Alan M Dershowitz, *Preemption: A Knife That Cuts Both Ways* (W.W. Norton 2006) 40.

⁶² Ashworth and Zedner (n 5) 7; Also see Mark Neocleous, *Critique of Security* (Edinburgh University Press 2008) 42.

⁶³ Lazarus and Goold (n 42) 1; Donohue (n 58) 6; Waldron (n 42) 25.

⁶⁴ Gross and Ní Aoláin (n 57) 4-5.

⁶⁵ Ibid.

As Chapter One observed, for the past twenty years states' responses to violent emergencies entailed violations of their constitutional values and international law commitments, which in many cases, targeted noncitizens and ethnic minorities. Often, the argument supporting such measures drew on the perception that in times of violent crises: 'legal niceties may be cast aside as luxuries to be enjoyed only in times of peace and tranquillity'.⁶⁶ Hence, the pressing need to guarantee the survival of the state justifies deviating from fundamental principles and adopting exceptional powers to impose harsh punishment, with minimal or no procedural safeguards.

For the past two decades, scholars have debated extensively on how to delineate emergency powers during violent crises.⁶⁷ In the *Law in Times of Crisis*, Gross and Ní Aoláin provide a useful typology of different approaches to the question of if and how the law should limit state power during emergencies. First, they note the 'Business as Usual' approach, which rejects the argument that emergencies may justify states' compromise of constitutional duties.⁶⁸ When a state violates basic principles and values it jeopardises 'the basic justification for the preservation of the constitutional order'.⁶⁹ This is because a government draws its powers from the constitution, and it has no mandate to operate beyond constitutional limitations.⁷⁰ Some see this approach as naïve. They argue that such resistance to emergency powers creates unrealistic legal systems which will end up facing radical changes by politicians, instead of measured and limited violations.⁷¹ A second approach to emergency powers is the extra-legal position, which recognises that under certain circumstances, a government may introduce extra-legal measures if these are seen as necessary for protecting the nation in the face of calamity. Supporters of this approach argue that as crises cannot be anticipated, the law should not limit the state's powers to respond to emergencies, which can appear in various forms and scales.⁷² Gross and Ní Aoláin

⁶⁶ Ibid, 7.

⁶⁷ Spencer Ackerman and Nicholas Watt, 'Obama Urges Action to Halt Isis 'Cancer' as UK Steps Up Fight Against Jihadists' *The Guardian* (21 August 2014); Dyzenhaus (n 57) Ch 1; Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 Yale L J 1011; Philip A Thomas, '9/11: USA and UK' (2002) 26 Fordham Int'l L J 1193; Ackerman (n 61); Gross and Ní Aoláin (n 57).

⁶⁸ Among the scholars who support this approach are Dyzenhaus (n 57) 62; Dworkin (n 57); David Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (2004) 113 Yale Law Journal 1753, 1798.

⁶⁹ Gross and Ní Aoláin (n 57) 93.

⁷⁰ Ibid, 93; Also see Cole, 'The Priority of Morality: The Emergency Constitution's Blind Spot' (n 68) 1799.

⁷¹ Ackerman (n 61) 1030; Gross and Ní Aoláin (n 57) 94, 112.

⁷² Ibid, 6; Also see Giorgio Agamben, *The State of Exception* (University of Chicago Press 2004) 10.

note several distinctions within this approach, however, for our discussion here it is sufficient to say that the extra-legal position allows the suspension of fundamental values in certain situations.⁷³ The US response to terror in the early 2000s exemplifies this model, through the use of extraordinary rendition, indeterminate offshore incarceration and material witness detention.⁷⁴

A third, intermediate, approach proposes that the law should accommodate and regulate emergencies.⁷⁵ Supporters of this approach highlight the importance of democratic deliberation for monitoring the hard choices governments must make when fighting terrorism. In his book, *The Lesser Evil: Political Ethics in an Age of Terror*, Ignatieff argues that democracies cannot afford to ignore the threat of terrorism and must act by the ‘lesser evil’ principle, which orders to prioritise certain morally problematic practices if these can potentially prevent greater harm.⁷⁶ Ignatieff suggests that governments should draw on this principle, and that democratic accountability will limit the violation of constitutional obligations.⁷⁷ Ackerman’s article, *The Emergency Constitution*, also lays out a detailed accommodation model which offers to restrict emergency powers through close parliamentary review.⁷⁸ The following paragraphs focus on Ackerman’s model, and specifically, on the rationales he proposes to regulate emergency powers. To note, Ackerman sought to limit his model to ‘episodic terrorism’,⁷⁹ however, I find his rationales relevant for the discussion of long-term conflicts as well, as I detail below.

Ackerman highlights an existential function for emergency powers, to argue that a government must be able ‘to counter the threat to its survival’.⁸⁰ He contends that limiting emergency powers through constitutional restrictions distances the idea of emergency ‘from fascist thinkers like Carl Schmitt, who used it as a battering ram against liberal democracy’.⁸¹

⁷³ Posner (n 61) 40,46.

⁷⁴ Kent Roach, *The 9/11 Effect* (Cambridge University Press 2011) 162.

⁷⁵ Gross and Ní Aoláin (n 57) 112.

⁷⁶ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh University Press 2004) 8.

⁷⁷ Ibid, 155.

⁷⁸ Ackerman (n 61) 1047; The paper was much debated by legal scholars: Cole, ‘The Priority of Morality: The Emergency Constitution’s Blind Spot’ (n 68); Gross and Ní Aoláin (n 57) 112; Laurence H Tribe and Patrick O Gudridge, ‘The Anti-Emergency Constitution’ (2004) 113 Yale L J 1801, 1802.

⁷⁹ Ackerman (n 61) 1045.

⁸⁰ Ibid, 1038.

⁸¹ Ibid, 1044; Schmitt, a leading political theorist for the Nazi regime, wrote extensively against the limitations liberalism imposes on sovereign rule, particularly in times of imminent and abnormal threats to the state; The proliferation of emergency counterterrorism measures at the beginning of the 21st century led to a renewed, and

Yet like Schmitt, Ackerman also proposes that states suspend liberal values to respond to emergencies. He further highlights a ‘reassurance function’, which justifies allowing the government time-limited emergency powers to show the public that ‘it is taking aggressive action to contain the crisis and to deal with the prospect of its recurrence’.⁸² He specifically offers that governments should be allowed the power to detain without reasonable suspicion, and notes several ways to later compensate those who were unjustly detained.⁸³ Ackerman holds that such emergency powers can be necessary and justified to prevent ‘cycles of public anxiety that will trigger recurring waves of repressive legislation’.⁸⁴

Ackerman’s functions correspond with how political leaders present exceptional measures. For instance, as Carvin notes, international terrorism post 9/11 has been viewed as a ‘nihilist peril that seeks to destroy the liberties and freedoms of the West’, and al Qaeda specifically was described as ‘an enemy of all humanity and civilization, an enemy that cannot be negotiated with, only exterminated because of the nature of the threat it poses’.⁸⁵ The rhetoric of imminent threat was adopted to try to justify an assertive state response, which materialised in extended executive powers.⁸⁶ Ultimately, the existential and the reassurance functions neglect the state’s obligations towards those it incarcerates and allow the use of individual incarceration as means to reassure the public.⁸⁷

The emergency-based justifications accept penal power that enforces exceptional proceedings, imposes punitive by nature detention and tends to target minorities. Eventually, the extra-legal and accommodation approaches both seek to justify state power that is not based on the normative grounds of the state-citizen relationship, the integrity principle or international law commitments. Both approaches support a form of penal power that derives from the

controversial, academic engagement with his work, see Tracy B Strong, ‘Foreword: Dimensions of the New Debate about Carl Schmitt’ in Carl Schmitt and others (eds), *The Concept of the Political* (Extended edn, The University of Chicago Press 2007); Oren Gross, ‘The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy’ (2000) 21 Cardozo L Rev 1825 and Smadar Ben-Natan, ‘Citizen-Enemies: Military Courts in Israel and the Occupied Territories 1967-2000’ (PhD thesis, Tel Aviv University 2020).

⁸² Ackerman (n 61) 1037.

⁸³ Ibid, 1037, 1070.

⁸⁴ Ibid, 1077.

⁸⁵ Stephanie Carvin, *Prisoners of America’s Wars: From the Early Republic to Guantanamo* (Columbia University Press 2010) 164.

⁸⁶ Roach (n 74) Ch 4.

⁸⁷ Cole, ‘The Priority of Morality: The Emergency Constitution’s Blind Spot’ (n 68) 1797.

government's prerogative, as sovereign, to respond to crises, and as Ackerman adds, to guarantee the population that 'the situation is under control'.⁸⁸ Both approaches accept that in conflict, the government's aim to provide assurance can generate an us-or-them perception that, in effect, exacerbates the alienation of certain groups, as I detail further in this chapter.

Accommodation models attempt to limit emergency powers through parliamentary deliberation,⁸⁹ yet seem to disregard the fact that many states, including the UK,⁹⁰ Australia⁹¹ and Israel,⁹² have legislated such powers. Overall, parliamentary and judicial review did not prevent governments from expanding and prolonging security powers, decades after 9/11, and the events that instigated the rise of counterterrorism in western democracies.⁹³ Scholars also report how such powers contaminate the regular justice systems, for instance in the UK, through the securitisation of interrogation procedures and policing practices.⁹⁴ At the same time, the Bush administration's experience of responding to 9/11 demonstrates a restraint of democratic oversight through the broad use of presidential executive powers.⁹⁵ The practice of emergency powers seems to counter the argument that democratic oversight will limit state power and guarantee that governments subject their authority to a 'lesser evil' approach.⁹⁶ As I show with regards to Israel, it is more likely that governments use the 'lesser evil' rhetoric to underline the necessity of emergency powers given the degree of the terrorist threat.

Emergency-based justifications accept the risk of prolonged intrusive executive measures in the name of survival and reassurance. In practice, how states use emergency powers fits less with Ackerman's proposal, and more with Agamben's depiction of the state of exception as a paradigmatic feature of political rule.⁹⁷ As Agamben notes:

⁸⁸ Ackerman (n 61) 1031.

⁸⁹ Ibid, 1048.

⁹⁰ David Cole, 'English Lessons: A Comparative Analysis of UK and US Responses to Terrorism' (2009) 62 Current Legal Problems 136, 139-140; Roach (n 74) Ch 7.

⁹¹ Ibid, Ch 6.

⁹² Orna Ben-Naftali, Michael Sfard and Hedi Viterbo, 'Introduction' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 1.

⁹³ Gross and Ní Aoláin (n 57) Ch 4; Lazarus and Goold (n 42) 1.

⁹⁴ Manuel Cancio Meliá, 'Terrorism and Criminal Law: The Dream of Prevention, the Nightmare of the Rule of Law' (2011) 14 New Crim L Rev 108, 120; Fionnuala Ní Aoláin and Colm Campbell, 'Managing Terrorism' (2018) 9 J Nat'l Security L 367, 408.

⁹⁵ Carvin (n 85) 168-172.

⁹⁶ Ignatieff (n 76) 14-15.

⁹⁷ Agamben (n 72) 2, 6-7.

[...] in the field of tension of our culture, two opposite forces act, one that institutes and makes, and one that deactivates and deposes. The state of exception is the point of their maximum tension – as it coincides with the rule – that which threatens today to render them indiscernible.⁹⁸

Agamben further argues that it is when the legal norm contains a state of emergency that it reveals the close relationship between law and violence.⁹⁹ In the context of conflict penalty, emergency-based justifications allow penal power that incorporates authoritarian features into democracies. These chip away at the state's commitment to individual liberty, equality and the rule of law. Justifying these measures means accepting that not only terror, but the fight against it, may also lead to lasting repercussions for democratic regimes.¹⁰⁰

A Criminal Law for Enemies: Jakobs' Idea of *Feindstrafrecht*

Günther Jakobs' idea of *Feindstrafrecht*, often translated as 'enemy criminal law'¹⁰¹ or 'enemy penology',¹⁰² provides an alternative theory of a separate form of criminal law justified by the conduct of those punished, and not necessarily by the greater context of emergency. Enemy criminal law is not bound by the fundamental principles of citizens' criminal law (*Bürgerstrafrecht*) and, according to Jakobs, should apply to individuals who extensively violate legal norms and show no prospect of reintegration into society. Jakobs argues that such individuals should be addressed as non-persons, or 'enemies', since their conduct undermines the foundations of legal norms.¹⁰³ He argues that they are no longer entitled to the protection of the citizens' criminal law and may face the removal of procedural safeguards, criminalisation of preparatory conduct, severe, and at times disproportionate sentences for the aim of deterrence,

⁹⁸ Ibid, 87.

⁹⁹ Ibid; Also see Susanne Krasmann, 'The Enemy on the Border: Critique of a Programme in Favour of a Preventive State' (2007) 9 *Punishment & Society* 301, 309.

¹⁰⁰ Ignatieff (n 76) 59-61; Dworkin (n 57); Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *J L & Soc'y* 507, 532; Also see Phil Edwards, 'Counter-terrorism and Counter-law: An Archetypal Critique' (2018) 38 *Legal Studies* 279, 296.

¹⁰¹ Daniel Ohana, 'Günther Jakobs's *Feindstrafrecht*: A Dispassionate Account' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) 356; Carlos Gomez-Jara Diez, 'Enemy Combatants Versus Enemy Criminal Law' (2008) 11 *New Crim L Rev* 529.

¹⁰² Krasmann (n 99) 302.

¹⁰³ Günther Jakobs, 'Appendix D: On the Theory of Enemy Criminal Law' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) 415; Daniel Ohana, 'Trust, Distrust and Reassurance: Diversion and Preventive Orders Through the Prism of *Feindstrafrecht*' (2010) 73 *Modern L Rev* 721.

and detention beyond their prescribed sentence.¹⁰⁴ These practices feature in conflict penalty measures, which indicate how depersonalisation can materialise by denying individual protections in the criminal process, and by detaining and imprisoning people for further, conflict-related, goals.

Importantly, Jakobs does not see the ‘enemy’ label as permanent, and he does not see the diversion from citizens’ criminal law as the end of the state-citizen relationship. An individual could regain their personhood if they change their conduct and show renewed commitment to legal norms.¹⁰⁵ Furthermore, Jakobs contends that the state should make minimal use of enemy-criminal-law-type measures required for security, thus, he acknowledges the extreme nature of his proposed legal framework.¹⁰⁶

Like other scholars, I find Jakobs’ work helpful for understanding the drivers and effects of specialised measures that operate alongside liberal traditional criminal law.¹⁰⁷ The normative case Jakobs’ presents for enemy criminal law rests on the state’s obligation to provide security, while maintaining the integrity of citizens’ criminal law.¹⁰⁸ His proposal builds on retributivist grounds, since it is when an individual repeatedly violates their contractual agreement to obey the law, that they forfeit their personhood. The state can then respond with a sanction that is beyond the agreed-upon rules of the contractual or communitarian bargain of punishment.¹⁰⁹ Jakobs ultimately ties individual conduct to a person’s relationship with the state, in ways that subordinate a citizen’s protected status to their loyalty to the state.¹¹⁰

Both retributivist and consequentialist accounts might oppose enemy criminal law. Retributivists insist on individual accountability¹¹¹ and would resist the abuse of a person’s

¹⁰⁴ Ohana, ‘Günther Jakobs’s Feindstrafrecht’ (n 101) 356.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Liz Fekete and Frances Webber, ‘Foreign Nationals, Enemy Penology and the Criminal Justice System’ (2009) 51 *Race & Class* 1, 7; Stuart Macdonald, ‘Cyberterrorism and Enemy Criminal Law’ in Jens David Ohlin, Kevin Govern and Claire Finkelstein (eds), *Cyber War: Law and Ethics for Virtual Conflicts* (Oxford University Press 2015) 75; Diez (n 101) 552.

¹⁰⁸ Ohana, ‘Günther Jakobs’s Feindstrafrecht’ (n 101) 356.

¹⁰⁹ Jakobs (n 103) 423.

¹¹⁰ Zedner, ‘Is the Criminal Law only for Citizens?’ (n 8) 49-50.

¹¹¹ This is part of the classic Kantian objection to consequentialist penal rationales; Immanuel Kant, *The Metaphysical Elements of Justice* (John Ladd tr, Bobbs-Merrill 1965 (1798)) 138; Also see: Duff, *Trials and Punishments* (n 1) 178; The Committee for Examining Ways to Structure Judicial Discretion in Sentencing, *Report* (1997) 12.

liberty for further ends, through procedural compromises and disproportionate punishments. Consequentialists might similarly object, first since there is insufficient evidence that detention without trial and longer imprisonment prevent crime.¹¹² Secondly, given that exceptional practices might weaken the justice system,¹¹³ even though Jakobs' proposal seeks the exact opposite, to protect the integrity of citizens' criminal law. Yet, Jakobs draws on a mixture of consequentialist and retributivist rationales, including security, the integrity of the justice system, and individual conduct, to justify the diversion of certain people to a separate harsher form of punishment. He conceptualises the withdrawal of entitlement to citizens' criminal law as part of the state's response to serious reoffending and seeks to justify forms of punishment that deviate from classic retributivist and consequentialist thought.

One of the prominent themes of conflict penalty is that it targets people not necessarily for their conduct, but for their racial and ethnic identity.¹¹⁴ Indeed, Jakobs' account focuses on legitimising a differential regime for those who do not respect the law.¹¹⁵ Yet, critics point to the reality in which differential regimes, for instance in the areas of counterterrorism and immigration control, apply to certain populations rather than to certain offenders.¹¹⁶ As Fekete and Webber note, German far-right parties misuse Jakobs' theory to call for differential treatment of foreign offenders since their assumed 'lack of affiliation to the nation' threatens Germany.¹¹⁷ Theories like enemy criminal law provide a legal framework that accords legal protections selectively, drawing on the reasoning of security and suspected serious conduct. They jeopardize the function of law as a source of legitimacy, by allowing the state to establish a separate legal framework, which has thus far been mostly discriminatory towards ethnic, racial, and national minorities. Jakobs' may very well resist such application of enemy criminal law,

¹¹² Cheryl Marie Webster and Anthony N Doob, 'Searching for Sasquatch: Deterrence of Crime Through Sentence Severity' in Joan Petersilia and Kevin R Reitz (eds), *The Oxford Handbook of Sentencing and Corrections* (Oxford University Press 2012) 190; Meliá (n 94) 114, and the sources detailed there in footnote 15; Ashworth and Zedner (n 5) 179; Fletcher and Stover note, for instance, the reporting that a third of Guantánamo detainees in the summer of 2002 had no proven connection to terrorist conduct; Laurel E Fletcher and Eric Stover, *The Guantánamo Effect* (California University Press 2009) 118.

¹¹³ Cole, *Enemy Aliens* (n 42) 189; David Rose, *Guantánamo: America's War on Human Rights* (Faber & Faber 2004) 137, 158; Fionnuala Ní Aoláin and Oren Gross, 'Introduction: Guantánamo and Beyond' in Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013) 30.

¹¹⁴ Macdonald (n 107) 74; Cole, *Enemy Aliens* (n 42) 48; See page 73 in Chapter One of this thesis.

¹¹⁵ Jakobs (n 103) 423.

¹¹⁶ Fekete and Webber (n 107) 7; Krasmann (n 99) 306; Also see Juliet Stumpf, 'Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen' (2004) 38 UC Davis L Rev 79, 136.

¹¹⁷ Fekete and Webber (n 107) 7-8.

but the experience of exceptional measures indicates that his theory does not provide sufficient protection against the state misusing its power to build a separate penal regime. Nor does he properly address how a separate regime might delegitimise the state's penal power, and thus harm rather than protect the integrity of citizens' criminal law.¹¹⁸

As noted, some penal practices during conflict feature in Jakobs' enemy criminal law, however, conflict penalty as a term covers a much broader set of measures. Unlike Jakobs' idea, conflict penalty discusses practices that target both citizens and noncitizens, take place inside and outside state borders, and are imposed in the context of hostilities. Conflict penalty also considers how practices link to the state's interests in the ongoing conflict. Enemy criminal law offers a useful framework for discussing potential justifications for some conflict penalty practices, however, it does not consider the entire range of measures that are common in conflict.

Justifications for conflict penalty measures that are based on security propose a different prioritisation of values. Some, notably the extra-legal approach for emergency powers, readily accept security practices that are beyond the law. Others, such as Ackerman's model and Jakobs' theory legitimise exceptional powers but demand limitations which are divorced from how states practise security enforcement. Conflict penalty practices incorporate the justifications that both Ackerman and Jakobs provide, referring to the state's prerogative to protect itself and to the justified differential treatment of those who oppose state authority. Under such practices: 'the law is extended to enemies, without extending full legal protections.'¹¹⁹ The reasoning of survival, reassurance, and integrity of the legal system, end up revealing pre-existing flaws in liberal democratic states, as certain populations find themselves outside the law's protection. As I show in greater detail with regard to Israel, politicians and jurists willingly accept, and proudly state, the legalised deviation from core values. In conflict, and against enemies, the state garners extended penal power that lacks normative grounds and seems to mainly draw on how the government defines security goals and prioritises them.

¹¹⁸ Krasmann (n 99) 309; Diez (n 101) 562.

¹¹⁹ Smadar Ben-Natan, 'Citizen-Enemies: Palestinian Citizens and the Military Courts in Israel and the Occupied Territories, 1967-2000' in Amal Jamal (ed), *The Politics of Inclusion and Exclusion in Israeli-Palestinian Relation* (The Walter Lebach Institute, Tel Aviv University 2020) [Hebrew] 30.

B. Why Punish in Times of Conflict: The Reformulation of Penal Rationales

Penal theories commonly divide the rationales for punishment between the retributivist and consequentialist camps.¹²⁰ In this section, I consider how the conditions of conflict influence the interpretation of backward-looking retributivist and forward-looking consequentialist positions. During conflict, the absence of a state-citizen relationship might implicate how criminal justice actors, prosecutors and judges, approach the accused. They might not recognise the individual before them as a full member of society, given the gravity of suspicions or charges laid, for instance, if terror-related. They might not see the individual as someone who will reintegrate in the future, even if that person is released and not deported or denied their citizenship. The individual might also deny the wrongfulness of their action and reject the state's power to punish them. These conditions impede the expressive role of punishment, which seeks to fulfil the function of condemnation.¹²¹ It also hampers the use of punishment as a communicative censure and as a tool for achieving 'secular penance', as Duff argues.¹²² In this setting, the state often designs penal practices that seek to secure external effects, which go beyond the individual facing punishment and target their community, wider society, and in some cases, the global political sphere.

The section first focuses on the use of censure to express moral condemnation of opposing ideologies and to establish the superiority of the punishing state, particularly by using the 'terrorism' label. I then consider how forward-looking penal rationales evolve during conflicts in ways that serve the state's greater strategic objectives. I conclude by examining how these different interpretations of penal rationales correspond with the justifications of punishment discussed earlier, as in the collective interest approach, and the security-minded emergency powers and enemy criminal law models.

¹²⁰ Tonry (n 3) 3.

¹²¹ Joel Feinberg, 'The Expressive Function of Punishment' (1965) 49 *The Monist* 397, 408; Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press 1993) 9, 73; Igor Primoratz, 'Punishment as Language' (1989) 64 *Philosophy* 187, 188.

¹²² Duff, 'Penance, Punishment, and the Limits of the Community' (n 15) 187.

Censure and Penal Severity in Conflict

Retributivists perceive punishment as a moral act. As classic theories define, punishment is the state's duty to respond to wrongdoings by imposing a sanction proportionate to the severity of the crime.¹²³ During conflict, this duty often means punishing acts against the public and government functions. At times, such acts result in serious harm that cost numerous civilian lives and create havoc and disturbance to the peace. In the past two decades, attacks of such scope have attracted wide-ranging condemnation. Alongside the promise to fight security threats, politicians have stressed the importance of holding perpetrators accountable and imposing severe punishments.¹²⁴

As in other instances of criminal enforcement, the state depends on its capability to apprehend individuals who have offended against its institutions and population, and to perform its duty to punish. When it comes to ideological offending, the state's ability to punish also places it in the moral position of a neutral adjudicator. Unlike the offender, the state merely enforces the law, as if it is not a party to the conflict who has an interest in shutting down certain types of political activities. The 'terrorists' label is a particularly effective tool to condemn specific groups and actions. Often, the legal definition of 'terrorism' requires that the offender had a political or religious motivation for their actions, yet concurrently, the terrorist label narrows down the offender to the act they committed.¹²⁵ The label acknowledges that the offender had a political orientation yet portrays their ideology as making their criminal action even more severe

¹²³ Kant (n 111) 138; Cesare Beccaria, *An Essay on Crimes and Punishments* (W.C. Little and Co. 1872) Ch VI.

¹²⁴ President George W Bush, 'Address to the Joint Session of the 107th Congress' (20 September 2001); Prime Minister Tony Blair, 'London Attacks: Speech Before the House of Commons' (2005) <<https://publications.parliament.uk/pa/cm200506/cmhansrd/v0050711/debtext/50711-06.htm>> accessed 31 October 2022; Also see 'Counter-Terrorism and Sentencing Bill Explanatory Notes' <<https://publications.parliament.uk/pa/bills/lbill/58-01/129/5801129en.pdf>> accessed 30 October 2022.

¹²⁵ Terrorism Act 2000, s 1 [UK]; Counterterrorism Act 5776–2016, SH 2566 s 2 [Israel]; Some definitions do not directly use the term 'political', but require that the act intends to influence the conduct of governments, which is another way to describe political ends without explicitly using the term; E.g. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 s 802 [US]; European Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA) art 1; Alex P Schmid's 1984 study of 109 legal definitions of terrorism indicated that political motivation was a repeated component in most definitions; Alex P Schmid and AJ Jongman, *Political Terrorism: A New Research Guide to Actors, Concepts, Data Bases, Theories and Literature* (2 edn, Center for International Affairs, Harvard University 2005) 5.

and dangerous and denies that it explains or justifies the offender's choices.¹²⁶ As Krasmann further explains:

The political criminal however can be perceived both as part of society and as a figure that is threatening the constitution and transgresses the border. The fight against terrorism thus witnesses a long history of arbitrary shifts between both categories. The terrorist at one time crystallizes as a political threat, justifying exceptional measures, at the same time he crystallizes as a criminal being negated precisely that political significance, so that the usual catalogue of criminal law can be imposed.¹²⁷

Criminalisation and punishment decontextualise the backdrop of ideological offences by focusing on the criminal act. The National Government in South Africa and the British Government attempted to do just that when they pursued criminal enforcement to portray anti-apartheid and paramilitary insurgents as criminals.¹²⁸ Punishment, as Martin observes, is 'a particularly powerful tool through which to tell one's story and solidify one's standing on the global stage (and in the history books)'.¹²⁹

As Chapter One showed, counterterrorism regulation often covers many types of conduct, including non-violent acts, like providing financial support to an organisation or distributing 'terrorist' content.¹³⁰ While these prohibitions seek to prevent the funding and spreading of what the state defines as a 'terrorist' agenda, they ultimately expand the criminal prohibition. The law not only condemns the violent act, but the entire enterprise that allegedly propels the violent conduct, and the ideology it advances. The 'terrorist' label and its broad enforcement against non-violent acts mark the organisation in question, and its objectives, as criminal wrongs.

Furthermore, the selective use of the 'terrorism' label in the past three decades, particularly implicit in counterterrorism measures that target Islamist organisations whilst

¹²⁶ Bruce Hoffman, *Inside Terrorism* (Columbia University Press 2006) 41; Paul Wilkinson, 'Ethical Defences of Terrorism – Defending the indefensible' (1989) 1 *Terrorism and Political Violence* 7, 10; Buntman (n 36) 27; McEvoy (n 35) 5.

¹²⁷ Krasmann (n 99) 304.

¹²⁸ McEvoy (n 35) 227; Max Coleman, *A Crime Against Humanity: Analysing the Repression of the Apartheid State* (Human Rights Committee of South Africa 1998) 18.

¹²⁹ Martin (n 31) 706.

¹³⁰ Terrorism Act 2000 s 11-18; USA PATRIOT Act, Title III and Title VIII; European Council Framework Decision on Combating Terrorism (n 125) art 2(b).

traditionally neglecting right-wing extremism, attests to a problematic bias.¹³¹ This is despite the fact that in the US, for instance, between 2001 and 2018, nearly half of the casualties from terror were killed in what the authorities define as ‘domestic terrorism’ attacks, instigated by racism and xenophobia.¹³² As noted earlier, the UK and Canada have recently begun using counterterrorism measures against right-wing extremism,¹³³ however, US law enforcement has arguably yet to prioritise this threat properly.¹³⁴ It seems then, that the condemnation of some acts as terror not only depends on the gravity of the harm but on the agenda and the racial and ethnic identities of the would-be ‘terrorists’. In the US, even though both White supremacy and Islamist organisations may challenge democratic values, the Government has been more willing to contain the former’s subversive ideology. Punishment, and particularly the ‘terrorist’ label, is an important indication of which agendas a government chooses to delegitimise.

The condemnation of ‘terrorism’ offences is also expressed in the severity of the state’s response to suspected and convicted offenders, discussed in Chapter One. As Waldron comments, ‘Many people have a sense that a special sort of moral outrage should be reserved for terrorist crimes, as distinguished from other homicides or acts of destruction.’¹³⁵ Indeed, the ongoing inflation in counterterrorism legislation continues to make punishments harsher for ‘terrorist’ offences.¹³⁶ But the ‘moral impulses’,¹³⁷ to use Waldron’s words again, that drive forward the penal severity for terror offences arguably compromises the principle of proportionality.¹³⁸ Retributivists have generally condemned punitive trends which, in the age of mass incarceration, undermine the ideal of proportionate punishment.¹³⁹ Some retributivists,

¹³¹ Lazarus and Goold (n 42) 7; Michael German and Sara Robinson, *Wrong Priorities on Fighting Terrorism* (2018) 2.

¹³² Victims from domestic terrorism, described as ‘racist, Islamophobic, anti-Semitic, homophobic, and anti-immigrant violence’ were on average 46% out of the casualties of both domestic and ‘jihadist’ or ‘Islamist’-driven acts of ‘terrorism’; Ibid, 16; Michael C McGarrity, ‘Statement Before the House Homeland Security Committee - Confronting the Rise of Domestic Terrorism in the Homeland’ (2019) <<https://www.fbi.gov/news/testimony/confronting-the-rise-of-domestic-terrorism-in-the-homeland>> accessed 31 October 2022.

¹³³ See footnote 158 of Chapter One of this thesis.

¹³⁴ Sebastian Rotella, ‘Global Right-Wing Extremism Networks Are Growing. The U.S. Is Just Now Catching Up.’ *ProPublica* (22 January 2021).

¹³⁵ Waldron (n 42) 49.

¹³⁶ E.g. Counter-Terrorism and Sentencing HC Bill (2020-07) 129.

¹³⁷ Waldron (n 42) 49.

¹³⁸ See in Chapter One on page 58-59 and 72 of this thesis.

¹³⁹ Richard Lippke, ‘Retributive Parsimony’ (2009) 15 *Res Publica* 377; Michael Cahill, ‘Retributive Justice in the Real World’ (2007) 85 *Washington U L Rev* 815; Richard Frase, ‘Limiting Excessive Prison Sentences Under Federal and State Constitutions’ (2009) 11 *U Pa J Const L* 39, 43-45; Also see Ian Loader, ‘For Penal Moderation: Notes Towards a Public Philosophy of Punishment’ (2010) 14 *Theoretical Criminology* 349, 354.

notably von Hirsch and Ashworth, acknowledge the role social and political factors play in shaping penal severity.¹⁴⁰ However, they seem to disregard how the lack of a uniform scale of proportionate punishment weakens the potential contribution of proportionality to limiting severity.¹⁴¹ Legislators, at the same time, keep updating the interpretation of what proportionality means, usually introducing longer sentences.¹⁴²

During conflict, states also seem to draw on international humanitarian law as an instrument for imposing censure. By rejecting POW status for certain groups, states deem them illegitimate fighters, whose participation in the hostilities can be considered a crime and is not protected by the Third Geneva Convention. As noted earlier, the US refused to provide Taliban and al Qaeda fighters with the protected status, which entailed a censuring effect, while making it easier for the Government to disregard basic obligations under international law and to expose detainees to cruel and inhumane conditions.¹⁴³ In doing so, the US also maintained the traditional exclusion of non-state actors from the protections of international humanitarian law.¹⁴⁴ However, US soldiers, who fall under the westernised definition of ‘combatants’, according to the Third Geneva Convention, are entitled to POW status regardless of their conduct during armed conflict.¹⁴⁵ Just as there is no symmetry in penal power, there is no symmetry in the standards required of those taking part in the hostilities. States use the rejection of POW status for censuring certain actors, and certain types of conduct. As noted, critical international law scholars point to how relying on the Third Geneva Convention, despite the inclusive definitions set in Additional Protocol I, propels the use of international humanitarian law to maintain imperial power dynamics that are driven by racist sentiments against non-European opponents.¹⁴⁶

¹⁴⁰ Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (Oxford University Press 2005) 141.

¹⁴¹ Nicola Lacey and Hanna Pickard, ‘Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems’ (2015) 78 *Modern L Rev* 216.

¹⁴² See how Israel’s penal policies exemplify this point in Chapter Five below.

¹⁴³ Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman, and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba* (2006); Jane Mayer, *The Dark Side* (Doubleday 2008) 165; Rose (n 113) 103.

¹⁴⁴ Marco Sassòli, ‘The Status of Persons Held in Guantánamo under International Humanitarian Law’ (2004) 2 *JICJ* 96.

¹⁴⁵ Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 article 4; Manooher Mofidi and Amy Eckert, ‘Unlawful Combatants or Prisoners of War: The Law and Politics of Labels’ (2003) 36 *Cornell Int’l LJ* 59, 90.

¹⁴⁶ Kinsella (n 45) Ch 3; Anghie (n 45) 742; Berman (n 45) 20.

To conclude, when states punish during conflict, they draw on their ability to exercise penal power to gain moral superiority over those who challenge their authority. By imposing hard treatment, whether through detention or a prison sentence, states aim to delegitimise certain acts and agendas. The power to censure enables states to define their enemies as criminals and assert a supposedly higher normative position as their adjudicators. Punishment thus provides important moral capital for states against their enemies.

Uncompromising Prevention and the Strategic Use of Forward-looking Penal Rationales

The backdrop of conflict deeply influences how penal rationales are interpreted and pursued. In the discussion below, I focus on two ways in which conflict impacts forward-looking penal rationales. First, the special severity attributed to ‘terrorist’ crimes, for instance, licences extensive preventive measures that seek to eliminate risks of future offending, under the ‘paradigm of prevention’.¹⁴⁷ These measures may, however, hamper the reintegration of offenders. Second, the conditions of conflict often bring policymakers to conflate crime prevention and national security goals, for example, by aiming to weaken and decentralise terror organisations. In such cases, the state uses criminal enforcement for broader strategic ends and proposes instrumental interpretations of penal rationales that align more with its national security interests than with the normative notions of retributivist or utilitarian punishment.

Penal severity in the context of conflict is also, arguably, preventive. It seeks to deter and incapacitate active threats. Yet, as with the general doubts about whether punishment deters crime,¹⁴⁸ it is also unclear whether harsher punishments will deter ‘terrorist’ offenders motivated by a coherent ideology.¹⁴⁹ Suicide bombers, for instance, are unlikely to be deterred by punishment.¹⁵⁰ At the same time, imposing longer sentences might not be justified as a means of prevention, given the relatively low recidivism rates among those convicted of terror offences, as found in an international survey that included England and Wales, the US, Belgium and the

¹⁴⁷ Attorney General John Ashcroft, ‘Prepared Remarks Before the Council on Foreign Relations’ <<https://www.justice.gov/archive/ag/speeches/2003/021003agcouncilonforeignrelation.htm>> accessed 31 October 2022; Cole, ‘Military Commissions’ (n 60) 97.

¹⁴⁸ See footnote 112.

¹⁴⁹ Meliá (n 94) 114.

¹⁵⁰ Ashworth and Zedner (n 5) 179.

Netherlands.¹⁵¹ Moreover, the rising concerns over prison radicalisation, and the existing knowledge of the harmful effects of incarceration, indicate that prolonged incapacitation may hamper rather than promote prevention.¹⁵² Nevertheless, the fact that prolonged punishments apply to various types of alleged terrorist acts, including non-violent and preparatory conduct, indicates a penal response that hides categorical severity behind a cloak of preventive rhetoric.

States' approach to rehabilitation and reintegration also provides important insights about the preventive rationale and how it constructs the risk posed by security threats. As noted earlier, prison and post-release programmes that focus on de-radicalization, compared to disengagement, demand individuals to undergo an ideological transformation. Such programmes continue the line of using criminal enforcement to delegitimise certain political and religious motivations. While some might see both de-radicalization and disengagement programmes as attempts to reintegrate those convicted of terror-related conduct, post-release measures may lead to different results. Post-release supervision measures join the set of administrative powers that impose draconian restrictions on suspected individuals and preserve their labelling as terrorist suspects rather than equal members of society.¹⁵³ Like penal severity, the fear of terrorism drives forward extreme forms of the 'New Penology', as Feeley and Simon famously suggested,¹⁵⁴ that prioritises tight supervision even if it obstructs the reintegration of former prisoners.¹⁵⁵

Conflict penalty also demonstrates that practices that seem to serve classic penal rationales may instead promote national security ends. For instance, incapacitation, either through detention or a prison sentence, prevents future harm, but it also helps the state weaken

¹⁵¹ Andrew Silke and John Morrison, *Re-Offending by Released Terrorist Prisoners: Separating Hype from Reality* (International Centre for Counter-Terrorism - The Hague, 2020) 5.

¹⁵² Lorenzo Vidino and Bennet Clifford, *A Review of Transatlantic Best Practices for Countering Radicalisation in Prisons and Terrorist Recidivism* (2019) 4; Martin Innes and Michael Lavi, 'Making and Managing Terrorism and Counter-terrorism: The View from Criminology' in Alison Liebling, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (6th edn, Oxford University Press 2017) 471; RAND, *Radicalization or Rehabilitation: Understanding the Challenge of Extremist and Radicalized Prisoners* (2008) 2.

¹⁵³ Benedict Wilkinson, 'Do Leopards Change Their Spots? Probation, Risk Assessment and Management of Terrorism-Related Offenders on Licence in the UK' in Andrew Silke (ed), *Prisons, Terrorism and Extremism* (Routledge 2014) 268.

¹⁵⁴ Malcolm Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30 *Criminology* 449.

¹⁵⁵ House of Lords, House of Commons and Joint Committee on Human Rights, *Post-Legislative Scrutiny: Terrorism Prevention and Investigation Measures Act 2011* (2014) 10, 20-21.

organisations that pose security risks by disabling active members. Incarcerating active members also provides the state with strategic leverage in negotiations with their organisations since it can degrade conditions or release prisoners. Incarceration further allows the state the opportunity to influence those incarcerated, through rehabilitation programmes and early release schemes that aim to distance individuals from certain ideologies. Chapter One discussed how American detention camps in Iraq used rehabilitative programmes teaching literacy, professional training, and religious education to reduce the chance of detainees joining Islamist organisations.¹⁵⁶ In South Africa and Northern Ireland, rehabilitation aimed to weaken prisoners' movements. Individual programmes were used to destabilise the opponents' ranks.¹⁵⁷ At the same time, the release of prisoners as part of peace accords in both countries indicated the erosion of the retributivist and the preventive rationales in the face of certain political circumstances. Hence, during conflicts, the power to punish the opponent's combatants is an important tool in the state's arsenal, and it is often used in conjunction with the state's general strategy and security interests. As I will discuss below, when the state prioritises the strategic use of punishment, it risks losing its moral standing to punish as it unveils itself as a party to the conflict, willing to use incarcerated individuals as pawns.

The US policy of outsourcing the power to punish ISIS suspects raises different insights regarding the advantages, and shortcomings, of using direct penal power during conflict. There could be various strategic, and security-related, reasons for the Government's decision to transfer suspects to Iraqi and Kurdish hands.¹⁵⁸ As noted, these might relate to the lessons learned from detention operations in Iraq and Guantánamo, which damaged the US democratic image and delegitimised its global anti-terror campaign.¹⁵⁹ Regardless of why the US outsources punishment, the decision to do so marks the Government's choice to wave its power to take legal action against its opponents and capitalise on the moral gains of 'victors' justice'. Rather, it

¹⁵⁶ Benard and others (n 52) 71.

¹⁵⁷ McEvoy (n 35) 294; Buntman (n 36) 25.

¹⁵⁸ In several cases, US forces interrogated detainees before their transfer to Iraqi or Kurdish forces; Elizabeth Grimm Arsenault, 'US Detention Policy Towards ISIS: Between a Rock and a Hard Place' (2017) *Survival: Global Politics & Strategy* 109-110.

¹⁵⁹ Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (2004) 53 *Int'l & Comp L Q* 1, 14; Cole, 'Military Commissions' (n 60) 97; Mofidi and Eckert (n 145) 91; Fletcher and Stover (n 112) 118; Rose (n 113) 137, 158; Ní Aoláin and Gross (n 113) 30.

chose to restrain the state's penal power, which shows a lack of interest by the US in forming any kind of relationship with ISIS suspects that will entail obligations to protect their human rights. The outsourcing of penal power can also be seen as an evasion of the arguably burdensome obligations imposed under international humanitarian law.

Penal rationales have tended to shift towards severity and uncompromising prevention in the age of mass incarceration and new penology.¹⁶⁰ When conflict enters the frame, however, we see even more extreme practices of exclusionary prolonged prison terms and enhanced administrative measures. At the same time, states use punishment for goals that are strategic and go beyond penal rationales. How does the state justify power that puts forward subvert interpretations of penal rationales, yet meanwhile compromises the same rationales based on political circumstances? Chehtman's interest-based justification seems lacking in this regard. Disproportionate sentences, detention without trial and surveillance measures infringe on basic rights in ways that undermine Chehtman's thesis about how justice systems can contribute to a universal sense of well-being and dignity. Rather, flexible frameworks that harness incapacitation and rehabilitation to national security ends indicate an underlying security-related justification, that in practice permits the violation of due process and human rights. How states apply penal rationales against enemies reflects a power to punish that builds on sovereign power, and the government's arguably fundamental obligation to protect national security and does not necessarily advance a collective agreed-upon interest. Post-release supervision mechanisms similarly attest to the ongoing exclusion of terrorist offenders, who, as a consequence of their offences, can no longer be considered full members of society. Such treatment fits Jakobs' enemy criminal law model, which justifies differential treatment to certain offenders. Since both emergency-based justifications and enemy criminal law call for the prioritisation of security over constitutional obligations. Both kinds of justifications permit penal power that first, introduces severe interpretations of penal rationales, and second, might compromise these same rationales for external strategic goals.

¹⁶⁰ Michael Cavadino and others, *The Penal System: An Introduction* (5th edn, Sage 2013) 13-14; Tonry (n 3) 24; Ashworth and Zedner (n 5) 10; von Hirsch and Ashworth (n 140) 78-85.

C. The Effects of Penal Power during Conflict

Conflict penalty often operates in extreme political climates. Security threats, emergency regimes, occupation and ongoing violence by both state and non-state actors are common features in the setting of conflict. This section explores the impact of penal power in such circumstances. It draws on critical literature that sees punishment as an instrument that not only aims to respond to crime but has greater social and cultural meanings.¹⁶¹ The discussion builds on punishment and society scholarship and critical security studies to analyse punishment as a construct that generates and responds to power dynamics,¹⁶² and examine its effects in the conditions of ongoing conflict. I build on these critical perspectives of incarceration and punishment to examine how conflict penalty affects the state, the individual punished and the community to which they belong, as well as the general society.

The section is structured along the lines of the different relationships punishment creates and shapes. I start by discussing the impact of conflict penalty on minority groups and noncitizens and move on to understand its influence as a performative state action, that targets the general population.

The State and the Recipient of Punishment

Conflict penalty affects the state's relationship with the individual punished. The categorisation of someone as a threat to national security, as a risk to an entire society, places that person in opposition to the state and its population. A common result of this categorisation is special procedures that remove legal protections and enforce much harsher sanctions against those detained and punished. I argue that the impact of such treatment is not only exclusion, but also alienation by depicting the individual as an enemy. I use the term alienation not in its Marxist

¹⁶¹ Michel Foucault, *Discipline and Punish* (Penguin 1977) 22-23; David Garland, *Punishment and Modern Society* (Oxford University Press 1990) 10; Jonathan Simon, *Governing Through Crime* (Oxford University Press 2006) 18-20; Nicola Lacey, *The Prisoners' Dilemma* (Cambridge University Press 2008) 48-9; See the presentation of this field in Simon and Sparks (n 3) 6.

¹⁶² E.g. Loïc Wacquant, *Punishing the Poor* (Duke University Press 2009) 296; de Giorgi (n 7) 77; Michelle Alexander, *The New Jim Crow* (The New Press 2010) 185; Adrian Howe, *Punish and Critique* (Routledge 1996) 67-8; Kelly Hannah-Moffat, *Punishment in Disguise* (University of Toronto Press 2001) 190.

sense,¹⁶³ but rather to signify an effect that goes beyond exclusion, and which leaves no way for the individual to gain, or regain, the status of an equal member of society.

Exclusion has been widely discussed as an effect of punishment. Scholars in the US particularly debate the combination of prolonged incarceration, disenfranchisement, and denial of access to social benefits as a form of ‘civil death’ imposed on imprisoned US citizens.¹⁶⁴ Similarly, Lerman and Weaver’s idea of ‘custodial citizenship’ captures the ostracization of individuals whose relationship with the state is confined to their entanglement with law enforcement.¹⁶⁵ Conflict penalty, with its intrusive and often disproportionate measures, adds to these forms of penal exclusion an emotive and nationalist sentiment that has symbolic and practical implications. It is symbolic in that the person punished is identified with a subversive ideology that threatens state stability and the well-being of its population. It is practical in that even if the individual punished retains their civil status and regains their liberty, they may still face restrictions and surveillance for years to come.

The ways in which conflict penalty targets minorities further indicate how the categorisation of the enemy, and its alienating effect, work along the lines of race and ethnicity.¹⁶⁶ Counterterrorism immigration control measures specifically reinforce the perception of noncitizens, and even citizens of foreign ancestry, as potential security threats.¹⁶⁷ Similarly, scholars note the rise of nationalist political discourse in Anglo-European countries, which sees unregulated immigration and its presumed connection with terrorism as an impending danger for the nation-state.¹⁶⁸ As Haney proposes, practices of criminalisation, detention, and deportation can be seen as a form of ‘penal nationalism’ that reaffirms the nation-state’s power

¹⁶³ Karl Marx, *Economic and Philosophic Manuscripts of 1844* (Progress Publishers 1977) 68.

¹⁶⁴ Alec Ewald, ‘“Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States’ (2002) 5 Wisconsin L Rev 1049; Joshua Kleinfeld, ‘Two Cultures of Punishment’ (2016) 68 Stanford L Rev 933; Sharon Dolovich, ‘Exclusion and Control in the Carceral State’ (2011) 16 Berkeley J Crim L 259, 261.

¹⁶⁵ Lerman and Weaver (n 7) 32.

¹⁶⁶ David Cole, ‘Enemy Aliens’ (2002) 54 Stanford L Rev 953, 976; Alpa Parmar, ‘Stop and Search in London: Counter-terrorist or Counter-productive?’ (2011) 21 Policing & Society 369, 371; Also see: Matthew Gibney, *Who Should be Included? Non-citizens, Conflict and the Constitution of the Citizenry CRISE Working Paper No.17* (CRISE, Queen Elizabeth House 2006).

¹⁶⁷ Lucia Zedner, ‘Security, the State and the Citizen: the Changing Architecture of Crime Control’ (2010) 13 New Crim L Rev 379, 381.

¹⁶⁸ Alberto Martinelli, ‘Introduction’ in Alberto Martinelli (ed), *When Populism Meets Nationalism* (ISPI 2018) 8; Jon Fox and Peter Vermeersch, ‘Backdoor Nationalism’ (2010) 2 Archives Euro Sociology 325; Also see Stephen Tierney, ‘Nationalism and Globalisation: New Settings, New Challenges’ in Stephen Tierney (ed), *Nationalism and Globalisation* (Hart 2015).

by enforcing stricter rules of membership.¹⁶⁹ Security concerns provide the ultimate justification for harsh policies that, while supposedly preventing greater harm, target certain groups as threats. ‘Penal nationalism’ is a useful concept for examining how counterterrorism and immigration control redefine the boundaries of belonging by distinguishing between those who attract suspicion and those who require protection. These measures classify who belongs to ‘us’, the public represented by the nation-state, and who belongs to ‘them’, the suspect groups that pose a threat to the public and state institution, and should not be trusted.

The history of alienating security threats is also closely tied to the history of anti-colonial struggles. As Hussain argues, the elaborate emergency regimes states have developed since the early 2000s echo the security measures empires operated in their colonies to suppress the local insurgency.¹⁷⁰ Hussain contends that emergency regimes are characterised by *Hyperlegality*, an inflation of rules and regulations that expand executive powers.¹⁷¹ He argues that such regimes not only respond to an emergency, but generate a colonial form of governance that aims to better control certain suspected populations.¹⁷²

Arguably, executive power targets various types of groups that pose a risk to society, including those convicted of sex offences and repeat offenders.¹⁷³ Yet, conflict penalty practices seem to especially demonstrate how draconian measures sustain the alienation of certain racial and ethnic minorities as suspected enemies, again, based on identity rather than conduct. As I discuss below, Israel also enforces a security regime that perceives Palestinian identity as a risk factor, as evident in the jurisdiction rules of military courts, procedural compromises in the criminal justice system, and severe punishment. The identification of certain racial, ethnic, and national characteristics as risk factors redefines the state’s relationship not only with the person punished, but also with the community to which she or he belongs.

¹⁶⁹ Lynne Haney, ‘Prisons of the Past: Penal Nationalism and the Politics of Punishment in Central Europe’ (2016) 18 *Punishment & Society* 346; Kaufman (n 4) 45; Vanessa Barker, *Nordic Nationalism and Penal Order* (Routledge 2018) 7.

¹⁷⁰ Nasser Hussain, ‘Hyperlegality’ (2007) 10 *New Crim L Rev* 514, 523.

¹⁷¹ *Ibid*, 515

¹⁷² Nasser Hussain, *The Jurisprudence of Emergency* (University of Michigan Press 2019) 39-41; Hussain heavily draws on Foucault’s idea of governmentality; Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-78* (Palgrave Macmillan 1978) 108.

¹⁷³ Ashworth and Zedner (n 5) Ch 4 and 6.

Yet, conflict penalty does not always benefit state control over suspected groups. As previously noted, punishment is often dysfunctional,¹⁷⁴ and emergency measures can likewise fail to achieve prevention and effective population management. As Chapter One discussed, in South Africa and Northern Ireland, mass detention and prolonged punishment of members of anti-apartheid and paramilitary organisations led to the creation of impactful prisoners' movements. In both cases, prison authorities eventually negotiated closely with incarcerated insurgents and effectively recognised the special status of these prisoners. Daily communications between the authorities and the prisoners resulted in better conditions and more orderly prisons. These, in turn, lifted international pressure on the British and South African Nationalist Governments.¹⁷⁵ Thus, both governments benefited from prisoners' political affiliation, and yet formally rejected their demand for special political status. Both states appear to have compromised their penal rationales by cooperating with prisoners, but their flexibility provided them with greater gains. Gortler draws on the Foucauldian term of 'subjectification'¹⁷⁶ to describe this process, in which the state harnesses ideological affiliation to increase its control over politically-motivated prisoners.¹⁷⁷ Unlike 'subjection', 'subjectification' is not coercive, but rather depends on the agent's choices 'as means of transformation'.¹⁷⁸ The experience of Northern Ireland and South Africa exemplifies how the state can use prisoners' movements to improve the management of detention facilities and advance national security goals. I show below how Israel as well perfected its use of Palestinian political affiliation to weaken the general prisoners' movement and advance tighter control over incarcerated Palestinians.

¹⁷⁴ David Garland, 'Frameworks of Inquiry in the Sociology of Punishment' (1990) 41 *British J Sociology* 1, 4.

¹⁷⁵ See Chapter one, in pages 67 and 69 of this thesis.

¹⁷⁶ Todd May, 'Subjectification' in Leonard Lawlor and John Nale (eds), *The Cambridge Foucault Lexicon* (Cambridge University Press 2015) 496.

¹⁷⁷ Gortler discusses subjectification in the Israeli prison as I elaborate further on; Shai Gortler, 'Carceral Subjectivity and the Exercise of Freedom in Israel-Palestine' (PhD Thesis, University of Minnesota 2020) 154.

¹⁷⁸ *Ibid*; May (n 176) 498.

Conflict Penalty as Performance of a National Narrative

Earlier in this chapter, I noted how the circumstances of ideological offending, in which people often take pride in their criminalised conduct, might hamper the expressive goal of punishment, which aims to condemn those punished.¹⁷⁹ Considering this limited normative impact on the individual punished, I now wish to discuss how conflict penalty policies aim to influence the general population of the punishing state. With reference to Ackerman's reassurance rationale, conflict penalty policies demonstrate the state's response to violent crisis. The rhetoric around the penal policies discussed so far indicates the importance of their presentation to the public as an assertive response by the state. Special penal severity serves governments by showing how the state uses penal power to protect the nation. Violations of procedural guarantees similarly indicate the government's willingness to take every step necessary, or perceived as necessary, to protect security. Overall, conflict penalty serves the government to reinforce a national narrative of strength and resilience in the face of a violent crisis.

To inquire more into the performative role of conflict penalty, I draw on Mathiesen's concept of the Synopticon.¹⁸⁰ Mathiesen proposes this term as complementary to Foucault's use of Bentham's Panopticon to describe the disciplinary effect of the many being watched by the few. The Synopticon, Mathiesen argues, is the condition in which the many are disciplined through the act of watching the few.¹⁸¹ For instance, the coverage of crime and punishment in news outlets operates as a modern spectacle that is highly effective in displaying state power and propagating the narrative of fear and prejudice towards what is criminal.¹⁸² Through mass media, state bodies and powerful corporations stage certain versions of real events and nurture a 'viewer society'.¹⁸³ The Synopticon 'directs and controls or disciplines our *consciousness*'.¹⁸⁴

While Mathiesen focuses on media as the main arena of the Synopticon, I build on his concepts to examine how the introduction of conflict penalty measures in politicians' speeches,

¹⁷⁹ Feinberg (n 121) 408; von Hirsch (n 121) 9, 73; Primoratz (n 121) 188.

¹⁸⁰ Thomas Mathiesen, 'The Viewer Society: Michel Foucault "Panopticon" Revisited' (1997) 1 *Theoretical Criminology* 215.

¹⁸¹ *Ibid*, 219.

¹⁸² *Ibid*, 231.

¹⁸³ *Ibid*, 223.

¹⁸⁴ *Ibid*, 230.

legislation and case law, similarly produces an impactful discourse that identifies the enemy and uses their punishment to reaffirm state power.¹⁸⁵ Images of barbed-wired fortress-like facilities, such as Robben Island in South Africa, or off-shore sites like Guantánamo Bay, are visual evidence of the state's capacity to capture and punish those who challenge it. Governments draw on punishment to establish physical and moral superiority over 'monstrous others', who are allegedly 'immune to normal human emotions'.¹⁸⁶ Through such images and rhetoric, punishment not only responds to conflict but also perpetuates it by narrowing those punished to security threats, in ways that rule out direct dialogue. As Lyon commented, in the Synopticon:

The larger-than-life criminal (or terrorist) is repackaged for consumption as a spectacle within a panic regime, a stereotype cut off from antecedent events, social ties or political motivation.¹⁸⁷

The often-draconian measures governments impose on perceived enemies exemplify punishment that functions as a performative response to sentiments of fear and resentment against those who seek to harm the nation-state and its population. Driven by nationalist sentiment, harsher penal practices represent the state's acts of vengeance against enemies, presented to the public.

This is not to say that any display of fierce state response against security threats is necessarily conducive to state power. Moreover, people differ significantly in their responses to policies of penal severity. There are clear examples of when instances of punishment undermine the state's moral superiority, be it the exposure of the abuse of detainees in Abu Ghraib,¹⁸⁸ the use of quasi-judicial tribunals, like the military commissions and the Diplock Courts,¹⁸⁹ the 'Torture Memos' which permitted 'enhanced interrogation techniques' against al Qaeda suspects,¹⁹⁰ and the ongoing struggle of incarcerated insurgents in South Africa and Northern

¹⁸⁵ Fassin (n 3) 26.

¹⁸⁶ Barbara Hudson, *Justice in the Risk Society* (Sage 2003) 204; Also see Barbara Hudson, 'Punishing Monsters, Judging Aliens: Justice at the Borders of Community' (2006) 39 *Austl & NZ J Criminology* 232, 238.

¹⁸⁷ David Lyon, '9/11, Synopticon, and Scopophilia; Watching and Being Watched' in Kevin D Haggerty and Richard V Ericson (eds), *The New Politics of Surveillance and Visibility* (Toronto University Press, 2006) 44.

¹⁸⁸ Connal Parsley, 'The Exceptional Image: Torture Photographs from Guantánamo Bay and Abu Ghraib as Foucault's Spectacle of Punishment' in *Law and the Visual: Representations, Technologies, Critique* (University of Toronto Press 2018) 241.

¹⁸⁹ Cole, 'Military Commissions' (n 60) 3; John D Jackson and Sean Doran, 'Conventional Trials in Unconventional Times: The Diplock Court Experience' (1993) 4 *Crim L Forum* 503, 504.

¹⁹⁰ Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers* (Cambridge University Press 2005).

Ireland who, at times, uncovered the political position of the state as their political enemy.¹⁹¹ Harsh penal measures can reaffirm sovereignty and generate a victorious national narrative, while destabilising the state's commitment to constitutional and international law obligations and jeopardising its self-proclaimed standing to punish those who defy its power.

Conclusions

Discussing the normative and sociological aspects of conflict penalty reveals the opportunity that violent crisis presents to those seeking to expand the state's penal power. The conditions of emergency provide the reasons for building special powers that legal frameworks often fail to restrain. Conflict supports the rise of penal power that is driven by narrow interpretations of what security means and is not committed to protecting the rights of those punished. It is the passage of time, and the complicated developments of ongoing conflicts, which often uncover the faults of conflict penalty. Yet, the exposure of human rights violations does not necessarily lead to an immediate limitation of state power, as evident in the ongoing operation of Guantánamo, or the continued expansion of counterterrorism immigration control in the UK, such as citizenship curtailment. In these cases, state power feeds off the violent crisis, as a justification for the exercise of penal power that is far from the criminal law ideals of proportionality, equality, and individual responsibility.

These same circumstances of conflict, however, reveal the state's normative faults. They show the government's willingness to use criminal justice for strategic political ends and expose the use of punishment as a form of state violence against objectors, unlimited by constitutional standards. Moreover, the fact that in several cases, conflict penalty powers have not proven beneficial to state security challenges the existential rationale, as Ackerman defined it, of emergency powers. Rather, the counter-productiveness of draconian penal measures provides evidence that they primarily serve a reassurance function, towards the general population.

¹⁹¹ Buntman (n 36) 216; McEvoy (n 35) 350.

Scholars have long discussed the function of criminal punishment as a political construct.¹⁹² Yet, conflict penalty, with its common violations of legal standards and strategic use of punishment for national security, represents an even clearer type of politicised punishment. Analysing conflict penalty reveals, first, a deep moral deficit of the state's penal power in the circumstances of violent crisis, and second, that special penal measures might jeopardise the state's legal structure and relationship with its citizens, as it weakens constitutional standards and human rights protections.

In the following chapters, I build on the notion of conflict penalty, and the normative and sociological issues it raises, to closely analyse Israel's penal practices against Palestinians. I compare Israel's policies with the common features of conflict penalty identified earlier, and examine how the Prison Service, the legislator and the courts address the moral deficit of Israel's actions against Palestinians, and likewise advance the strategic benefits of punishment.

¹⁹² See footnotes 161-162 of this chapter.

Chapter 3: Introducing Israel's Penal Practices against Palestinians

Punishment has been woven into the history of Israel/Palestine since the early 20th century. Incarceration, deportation and capital punishment were central to the British Mandate's efforts to counter Jewish and Palestinian insurgencies.¹ The new state of Israel has also used detention and prison sentences to prevent Palestinians from returning to the homes and villages from which they fled during the 1948 war.² Yet, it was after 1967, when Israel established its security apparatus in the Occupied Territories, that punishment became a prominent feature in Palestinian society and the Israeli administration. Following the 1967 War, Palestinian resistance to Israeli rule expanded through protests and attacks on soldiers and civilians.³ Israel's new military regime responded with extensive arrests, criminal charges and prison terms.⁴ Inside Israel, a specialised track for prosecuting security offences was also designed and implemented.⁵ For the past five decades, the systematic incarceration of thousands of Palestinians each year has turned punishment into a focal point of the conflict for Israeli authorities and Palestinian organisations alike.

This chapter explores the development of punishment in the Israeli-Palestinian context as a case study of *conflict penalty*. In order to provide a comprehensive presentation of Israel's penal policies, I discuss the various mechanisms that produce and exercise punishment, including the military and civilian justice systems and prisons. The chapter identifies security as the organising principle of these different mechanisms, and as the main aim that shapes Israel's punishment of Palestinians. Yet, drawing on British colonial regulation, Israel maintains an exclusionary perception of security that defines threats along the lines of ethnic identity. As the chapter shows, Israel's penal practices provide a manifestation of conflict penalty: its criminal procedures and prison regime deviate from basic principles of criminal and administrative law;

¹ David A Charters, *The British Army and Jewish Insurgency in Palestine, 1945-47* (Palgrave Macmillan 1989) 49; Zeina B Ghandour, *A Discourse on Domination in Mandate Palestine* (Routledge 2009) 166; Shai J Lavi, 'Imagining the Death Penalty in Israel: Punishment, Violence, Vengeance and Revenge' in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment: Comparative Perspectives* (Stanford University Press 2005).

² Shira Robinson, *Citizen Strangers* (Stanford University Press 2013) 128.

³ Rashid Khalidi, *The Hundred Years' War on Palestine* (Profile Books 2020) 123; Christopher C Burris, 'Re-examining the Prisoner of War Status of PLO Fedayeen' (1997) 3 North Carolina J Int'l L and Com Reg 944, 958.

⁴ Lisa Hajjar, *Courting Conflict* (University of California Press 2005) 52.

⁵ Sigal Shahav, *Anti-Terrorism Criminal Law* (Nevo 2019)[Hebrew].

it enforces a security categorisation whilst denying POW status to Palestinians; Israel also capitalises on criminalisation to delegitimise Palestinian resistance and assert moral superiority; its penal measures target Palestinians directly; and lastly, Israel uses penal power for strategic ends. Analysing how Israel's conflict penalty came about helps to explain the dynamic between the external events of the conflict and state punishment.

The longevity of the Israeli-Palestinian conflict introduces several further issues around conflict penalty. First, the importance of normalising exceptional procedures and regimes of punishment for sustaining them. Secondly, the varying approaches to security taken by different government bodies, which is evident in the different attitudes of Israeli courts and prisons to Palestinian organisations. This chapter provides a detailed examination of Israel's punishment of Palestinians as the basis for the next three chapters, which analyse more closely the policies led by the Israel Prison Service (IPS), the Israeli political administration, and the Supreme Court.

The first section of this chapter examines the securitised procedures of Israel's military and civilian systems of punishment, which target Palestinians and incorporate authoritarian measures. The second section explores the treatment of incarcerated Palestinians, from denying them POW status to creating a special prison regime for the emerging Palestinian Prisoners' Movement.

A. Military and Civilian Justice and Punishment

Foundations of Emergency and Exclusion

Since its foundation, Israel has relied on emergency security powers to govern the Palestinian population.⁶ Most notably, Israel drew heavily on the British Mandate's 1945 Defence (Emergency) Regulations (hereinafter 'Defence Regulations'), which establish military courts and provide the military with extensive powers, like censorship, curfew, administrative detention and the demolition of property.⁷ Even though Zionist leaders criticised these powers

⁶ Israeli governments maintained the declaration of a state of emergency since the state's establishment in 1948. During the state of emergency, the state may operate the 1945 Defence (Emergency) Regulations, and instate further regulations for responding to the said emergency; Governance and Justice Procedures Ordinance, 1948-5708 s 9; Basic Law: The Government s 38-39.

⁷ The Defence (Emergency) Regulations, 1945, Palestine Gazette 1442, Supplement 2, 1058.

when used against Jewish insurgency, the Defence Regulations remain key to Israel's approach towards the Palestinian population.⁸

Between 1948 and 1966, the Defence Regulations were the basis for Israel's military regime within its borders, in areas highly populated by Palestinians.⁹ During this period, security measures focused on controlling the population and preventing Palestinians from returning to the homes and villages from which they fled in 1948.¹⁰ Accordingly, military courts mostly dealt with violations of movement permits.¹¹ Israel granted citizenship to Palestinians who remained within its borders.¹² And yet, it used military justice to distinguish Palestinians as a population to be restrained through colonial regulation. As Robinson proposes, Israel conceived Palestinians as 'citizens strangers'¹³ because of their alienation from the Jewish state.¹⁴ Sentiments of cultural superiority among the Jewish population and administration also fuelled the exclusion of Palestinians, who as Arabs were perceived to be 'backward, parasitic and responsive only to the language of force'.¹⁵ The internal military regime ended in 1966 as it was no longer perceived as a security necessity.¹⁶ However, military justice and punishment returned one year later, as Israel entered a new era of securitised military regime.

⁸ Yael Barda, 'Managing "Dangerous Populations": From Colonial Emergency Practice to Counter-Terror Laws in India and Israel' (2015) 44 *Theory and Criticism* [Hebrew] 97, 113-114.

⁹ These were the Negev, the Galilee and the Triangle, in central Israel; *Ibid*, 114.

¹⁰ Robinson (n 2) 10; Arnon Yehuda Degani, 'The Decline and Fall of the Israeli Military Government, 1948-1966: A Case of Settler-Colonial Consolidation?' (2018) 5 *Settler Colonial Studies* 84, 87.

¹¹ Smadar Ben-Natan, 'Citizen-Enemies: Military Courts in Israel and the Occupied Territories 1967-2000' (PhD thesis, Tel Aviv University 2020) 101.

¹² David Kretzmer, *The Legal Status of the Arabs in Israel* (Routledge 1990) 4.

¹³ Robinson (n 2) 69.

¹⁴ *Ibid*, 152; Sharri Plonski, *Palestinian Citizens of Israel: Power, Resistance and the Struggle for Space* (IB Tauris 2018) 26-7.

¹⁵ Robinson (n 2) 156.

¹⁶ Degani (n 10) 91; Smadar Ben-Natan, 'Citizen-Enemies: Palestinian Citizens and the Military Courts in Israel and the Occupied Territories, 1967-2000' in Amal Jamal (ed), *The Politics of Inclusion and Exclusion in Israeli-Palestinian Relation* (The Walter Lebach Institute, Tel Aviv University 2020) [Hebrew] 52-3.

Immediately after the 1967 War, Israel declared military rule over the newly held territories.¹⁷ It issued a series of ready-made proclamations, which granted the military legislative, executive and judicial powers.¹⁸ On the face of it, Israel's military governance over the Occupied Territories was in line with the international law of occupation,¹⁹ which permits the Occupying Power to enforce penal provisions 'to maintain the orderly government of the territory, and to ensure the security of the Occupying Power'.²⁰ But Israel also heavily drew on the Defence Regulations and applied measures like deportations and house demolitions, which violate basic protections enshrined in the Fourth Geneva Convention.²¹ For the military regime, preserving Israel's control over the Occupied Territories was the number one priority, and it was advanced by the military, working alongside the Israeli Security Agency. To that end, the military issued the Order on Security Provisions, an expansive penal code that lists 'security offences', like prohibited military training and harming a soldier.²² The Order also specifies the powers of the military, the police, and the Israeli Security Agency, and sets out the procedures that apply in military courts.²³

The military justice system operates in the Occupied Territories to this day, and its main objective is to prosecute offences against military rule, including against Jewish settlers.²⁴ However, Jewish settlers are not under military law jurisdiction, and they are tried before civilian

¹⁷ Let alone East Jerusalem, which was annexed to Israel; See the list of key events, page 6 of this thesis.

¹⁸ Meir Shamgar, 'Legal Concepts and Problems of the Israeli Military Government - The Initial Stage' in Meir Shamgar (ed), *Military Government in the Territories Administered by Israel 1967-1980: The Legal Aspects* (Hebrew University of Jerusalem 1982) 14-15.

¹⁹ The main legal sources of the international law of occupation are: Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, T.S. 539, art 43; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (The Fourth Geneva Convention), art 47-78.

²⁰ Ibid, art 64.

²¹ David Kretzmer, *The Occupation of Justice* (State University of New York Press 2002) 121-5; Ben-Natan, 'Citizen-Enemies: Palestinian Citizens and the Military Courts' (n 16) 53.

²² Order Regarding Security Provisions (Consolidated Version)(Judea and Samaria) (No. 1651) 5770-2009, s 215, 238.

²³ The order was first enacted in 1967; *ibid*; Sharon Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2007) 89 Int'l Rev Red Cross 395, 401.

²⁴ Military courts also enforce traffic violations. Civil and criminal matters between Palestinians are usually dealt by the Palestinian Authority's justice system; Hedi Viterbo, 'Military Courts' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 266; The Association for Civil Rights in Israel, *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (2014) 49-50.

courts inside Israel.²⁵ As Israeli law confirms, ethnicity dictates the jurisdiction rules for security offences.²⁶ This is not entirely surprising, since it is the military occupation that created the military justice system. Israel's military rule over the Occupied Territories does not represent Palestinians, but rather its objective is to keep the Palestinian population under control. To that end, the military justice system plays an important role in delegitimising Palestinian resistance through prosecution and punishment.²⁷

Military justice is also harsher than its civilian counterpart, compromising basic principles of criminal law and procedural rights.²⁸ Security offences use vague terminology, and criminalise acts like harming 'the security of the region'²⁹ or influencing 'public opinion' in ways that could harm 'public peace and order'.³⁰ There is no military evidence law, and judges may draw on Israeli civilian evidence law, as applied in criminal procedures in Israel.³¹ Detention powers are expansive, permitting the arrest of suspects for 8 days before judicial review and up to 6 months before indictment.³² The court may also order the detention of a suspect in absentia for up to 8 days.³³ Access to legal counsel can be denied for up to 60 days, once more for vague, broad reasons, like 'grounds of security' or if the interrogation requires so.³⁴ Maximum penalties are also more severe than inside Israel, and at times are seriously disproportionate. This gap is especially apparent provided the numerous offences in military law which permit the court to impose life imprisonment, including weapon possession, sabotaging a military facility and the general offence of harming the security of the region.³⁵ The presumption of innocence is also compromised as most defendants are placed on remand. Often, the long periods of remand,

²⁵ The Israeli law applies to citizens and persons of Jewish origins who reside in the Occupied Territories; Emergency Regulations (Offences in the Administered Territories – Adjudication and Legal Assistance) 5727-1967, 2069 KT 2741.

²⁶ Ben-Natan, 'Citizen-Enemies: Palestinian Citizens and the Military Courts' (n 16) 62.

²⁷ Hajjar (n 4) 3.

²⁸ Smadar Ben-Natan, 'The Application of Israeli Law in the Military Courts of the Occupied Palestinian Territories' (2014) 43 Theory & Criticism [Hebrew] 45, 50.

²⁹ The Occupied Territories are termed 'the region' in military regulation; Proclamation Regarding Regulation of Administration of Law (no 2), 1967, 1 Collection of Proclamations, Orders and Appointments of the Military Commander of the West Bank Region, Israeli Defence Forces, 3.

³⁰ Order Regarding Security Provisions (n 22) s 222, 251(b)(1).

³¹ Ibid, s 86.

³² Civilian detention powers last 24-48 hours before judicial review and 30 days before indictment; *ibid*, s 33(b); Criminal Procedure Act (Powers of Enforcement - Arrest), 5756-1996, s 29-30, 60.

³³ Order Regarding Security Provisions (n 22) s 52(b).

³⁴ Civilian law permits a maximum of 21 days without access to counsel: *ibid*, s 58, 59; Criminal Procedure Act - Arrest (n 32) s 35.

³⁵ Civilian criminal law prescribes life imprisonment only for murder, espionage and treason; Penal Act, 5737-1977, parts 7, 10; Order Regarding Security Provisions (n 22) s 222, 230(b).

coupled with detainees' mistrust in the military justice system, increase the pressure on those detained to plea bargain to achieve a shorter sentence, that will take into account their time in detention.³⁶ Military court personnel and scholars estimate that 95% of cases are resolved by plea deals.³⁷ A 2015 study found that this estimation was quite conservative, as among 642 cases, only 5 (0.8%) went to trial.³⁸ Hence, trials, and the scrutiny of evidence, are a rarity in military courts. Lastly, proceedings are held in Hebrew, which further reinforces the disadvantaged position of Palestinian litigants and lawyers as most do not speak Hebrew fluently.³⁹ The courts provide translation services, yet these are reportedly of poor quality, whilst written protocols and decisions are not translated.⁴⁰

Military justice provides prosecutors and judges with wide discretion to interpret ambiguous terms and enforce extensive powers against detainees and defendants. Like the special tribunals in Northern Ireland and Guantánamo, Israel's military courts compromise criminal law principles of legality and proportionality, while impinging on litigants' rights to liberty, due process, and fair trial. Israel's military courts however differ from the two latter examples given their longstanding operation, for over half a century, and large-scale workload. 12,138 proceedings begun in 2016 alone, and an average of 4,230 indictments were served each year between 2011 and 2019.⁴¹ Just under a third of Israel's prison population were sentenced in military courts.⁴² Military justice is an integral part of Israel's law enforcement apparatus.⁴³

Military law has long deviated from the normative framework of the Fourth Geneva Convention and international human rights law, as enshrined in conventions Israel signed and ratified.⁴⁴ Israeli governments' persistent, and controversial, position has been that these

³⁶ Lior Yavne, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Yesh Din, 2007) 53.

³⁷ There is no formal data on the conclusion of military proceedings; Ibid, 104-5; Hajjar (n 4) 219; Ben-Natan, 'Citizen-Enemies' (n 11) 193; Naama Baumgarten-Sharon and Yael Stein, *Presumed Guilty: Remand in Custody by Military Courts in the West Bank* (B'Tselem, 2015) 18-19.

³⁸ Ibid, 17, 59.

³⁹ Hajjar (n 4) 225-6.

⁴⁰ Ben-Natan, 'The Application of Israeli Law in the Military Courts' (n 28) 49-50.

⁴¹ The State Comptroller, *The Operation of Military Courts in Judea and Samaria* (Annual Report 69B, 2019), 2344; The Military Prosecution, *Annual Report 2016* (2017) 42; The Military Prosecution, *Annual Report 2019* (2020) 55.

⁴² Military courts tried the majority of security prisoners, and these comprised on average a third of Israel's prison population between 2010 to 2020; Israel Prison Service, *Annual Report 2020* (2021) 12; see the Introduction of this thesis.

⁴³ Ben-Natan, 'Citizen-Enemies' (n 11) 9.

⁴⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

international law sources do not apply in the Occupied Territories.⁴⁵ Israeli jurists argued that the Occupied Territories had no lawful sovereign before 1967, and so, Israel's seizure of the territories does not fall under Common Article 2 of the Geneva Conventions and the Government is not obligated to comply with them.⁴⁶ Israeli governments have committed to abide by the 'humanitarian provisions' of the Fourth Geneva Convention,⁴⁷ yet this promise remained vague as officials never clarified to which provisions they referred.⁴⁸ Israeli governments have also argued that international human rights law does not apply since it should be limited to the sovereign territories of state parties, and that applying the law of belligerent occupation in the Occupied Territories, notably the 1907 Hague Regulations, excludes the application of international human rights law.⁴⁹ As I discuss in Chapter Six, while the Supreme Court of Israel took a more nuanced approach to the question of applying international human rights law,⁵⁰ it accepted the state's position regarding the Fourth Geneva Convention. The Supreme Court tended to uphold practices that violate the Fourth Geneva Convention in the Occupied Territories, particularly in matters that concern security, like house demolitions and preventing defendants' access to counsel.⁵¹ Based on Israel's approach, its governments and Supreme Court could choose when to deviate from international law and when to refer to it as a normative authority, for instance when its policies supposedly benefitted Palestinians.⁵²

As Supreme Court judges found, military law occasionally deviates from criminal law principles as it has 'to deal with the circumstances of the region'.⁵³ The circumstances of having to govern the Palestinian population justified establishing the military justice system in 1967 and

Punishment (adopted 10 December 1984, entered into force 26 June 1987); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990).

⁴⁵ Kretzmer, *The Occupation of Justice* (n 21) 34; Orna Ben-Naftali, 'Geneva Law' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of OPT* (Cambridge University Press 2018) 147.

⁴⁶ Yehuda Z Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 Isr L Rev 279; Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 Isr YB Hum Rts 262.

⁴⁷ Shamgar, 'Legal Concepts' (n 18) 42-3.

⁴⁸ Ben-Naftali (n 45) 147.

⁴⁹ Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 Isr L Rev 17, 26.

⁵⁰ *Ibid.*, 24.

⁵¹ Kretzmer, *The Occupation of Justice* (n 21) 119; Ben-Naftali (n 45) 147; Yavne (n 36) 84.

⁵² Ben-Naftali (n 45) 161.

⁵³ This was ruled with regards to the differences in penal severity between military and civilian courts: HCJ 1073/06 *Massalha v The Military Court of Appeal* (26 March 2006) par c; Also see HCJ 7932/08 *Alharov v The Regional Military Commander - Judea and Samaria* (29 December 2009).

allowing it to deviate from the normative principles of criminal law and international law. Based on these circumstances, Israel prioritises averting potential threats over procedural safeguards that seek to guarantee fair trial, like judicial review during the detention process, access to counsel, and the protection of the presumption of innocence. Through these compromises, military law represents a system that is focused on control rather than justice.

Based on colonial legislation,⁵⁴ Israel built an elaborate military justice system that constructs its litigants as a hostile population who possess fewer rights compared to Israeli citizens. Accordingly, punishment is not justified on wider normative grounds, substantiated in a contractual relationship between the state and those punished or in a communitarian relationship between the citizens themselves. Punishment is imposed by an external occupying power, as former Military Judge Yonatan Livni summarised well:

As a Military Judge, you represent the authorities of the occupation, vis-à-vis a population that sees you as the enemy. You are conducting a trial against your enemy.⁵⁵

The normative grounds for punishment are thus embedded in the power of Israel as the occupying entity. Israel uses military courts and punishment as essential tools for protecting and reproducing its power over the population. To that end, military justice may deviate from standards and principles, that aim to guarantee legal protections and carefully measured sanctions, as endorsed by penal theorists.⁵⁶

Securitised Civilian Criminal Justice

Military rule ended inside Israel in 1966, supposedly marking the de-securitisation of justice for Palestinian citizens. Yet, in 1967, Israel built a new military court in Lod, a city within its borders, to prosecute security offences attributed to residents of annexed East Jerusalem and Palestinian citizens of Israel.⁵⁷ From 1967, Israel operated three judicial systems, one civilian and two

⁵⁴ The Defence Regulations (n 7).

⁵⁵ *The Law in These Parts*, directed by Ra'anan Alexandrowicz (2012); Quoted in Viterbo (n 24) 267.

⁵⁶ E.g. Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing* (Oxford University Press 2005); Norval Morris, *The Future of Imprisonment* (University of Chicago Press 1974); John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989).

⁵⁷ Jewish and foreign citizens, including Palestinians from the Occupied Territories, were not tried in Lod; Ben-Natan, 'Citizen-Enemies' (n 11) 185-6, 213.

military systems, which all followed identity-based rules of jurisdiction.⁵⁸ Palestinians inside Israel and in the Occupied Territories were labelled as potential ‘enemies’, even if they were Israeli citizens. In 2000, the Lod Court was shut down, following the endeavours of military prosecutors and judges who argued that military courts should not try citizens.⁵⁹ By that time, however, the Israeli justice system has already developed special procedures for security prosecution in civilian courts.

Criminal procedure within Israel permits several deviations for suspects and defendants whose actions have been classified as ‘security offences’.⁶⁰ Security suspects may be denied access to counsel for up to 21 days.⁶¹ Unlike with other crimes, the police are not obligated to record the interrogations of security suspects by audio and visual means, which significantly narrows the level of scrutiny of these interrogations.⁶² Civilian courts may also order detention in absentia for up to 4 days, and 6 days if the suspect has been present in a previous hearing.⁶³ Beyond these special procedural deviations, Israeli courts also impose stricter punishments for security offences. Criminal statistics between 2000 and 2009 show that a custodial sentence was most commonly given to those convicted of security offences, compared to other offences.⁶⁴

Defence lawyers working in Israel report that security classification often applies to Palestinian defendants, even if there is no indication of an ideological motive or a connection with a ‘terrorist organisation’.⁶⁵ Palestinians comprise the vast majority of security suspects and defendants and are consequently the population most affected by procedural compromises and harsh punishments for security offences.⁶⁶ As Chapter Five elaborates, the Israeli Government made further significant changes to its civilian security laws in 2016, as it introduced more

⁵⁸ Ben-Natan, ‘Citizen-Enemies: Palestinian Citizens and the Military Courts’ (n 16) 67.

⁵⁹ Ben-Natan, ‘Citizen-Enemies’ (n 11) 213.

⁶⁰ Civilian legislation includes different definitions, as further detailed in Chapter Five. Detention regulation includes, among others, weapon possession, and membership and leadership of a ‘terror organisation’; The 2016 Counterterrorism Act sets the term ‘serious security offence’ which includes aggravated assault, murder and also infiltration to Israel; Counterterrorism Act 5776–2016, SH 2566, s 2. Criminal Procedure Act - Arrest (n 32) s 35(b).

⁶¹ Ibid, s 35(a).

⁶² Criminal Procedure Act (Interrogation of Suspects) 5762-2002, 1855 SH 468, s. 7, 17.

⁶³ Counterterrorism Act (n 61) s 45-6.

⁶⁴ Let alone 2000-2001 and 2004, when security offences were slightly behind sex offences. Israel’s Central Bureau of Statistics has not published data on punishments since 2009; Central Bureau of Statistics, *Percentage of Convictions in which Penalties were Imposed, by Type of Penalty and Characteristics of the Convicted - Table 11.4* (2002-2011).

⁶⁵ Shahav (n 5) 159.

⁶⁶ Israel Prison Service, *Annual Report 2020* (n 42) 12; B’Tselem, ‘Statistics on Palestinians in the custody of the Israeli security forces’ <https://www.btselem.org/statistics/detainees_and_prisoners> accessed 31 October 2022.

offences that use the ‘terrorist’ label with regard to security offending and prescribe even tougher punishments.⁶⁷ I discuss in the following chapters how the terrorist terminology was particularly useful for Israel after 9/11 since it related the conflict with Palestinian organisations to the global ‘war on terror’.⁶⁸

Shahav sees the procedural deviations of Israel’s civilian criminal law as a form of ‘Anti-Terrorism Criminal Law’ which Israel has been developing since the early 1980s.⁶⁹ Shahav argues that, unlike the standard criminal process, anti-terrorism law does not necessarily seek the goal of prosecution. Rather, its central objective is to support the prevention of future crimes through interrogation and intelligence collection which violate suspects’ rights.⁷⁰ Shahav’s analysis aligns with the critique against the preventive paradigm that liberal democracies like the US and the UK developed after 9/11.⁷¹ Anti-terrorism law and the preventive paradigm both permit the violation of basic rights for preventive ends. In practice, both allow security measures that sacrifice certain minorities’ rights and reveal existing hierarchies based on ethnic and racial identity.⁷²

An additional important feature of Israel’s security apparatus is administrative detention. Civilian and military regulations permit detention without trial for renewable periods of six months in which detainees are held in similar conditions to those of sentenced prisoners.⁷³ Since 1967, Israel has administratively detained thousands of Palestinians and has held an average of

⁶⁷ Counterterrorism Act (n 60) s 2, 20-36.

⁶⁸ Kent Roach, *The 9/11 Effect* (Cambridge University Press 2011) 102; Khalidi (n 3) 232-233.

⁶⁹ Shahav (n 5) 221.

⁷⁰ Ibid, 15.

⁷¹ David Cole, ‘Military Commissions and the Paradigm of Prevention’ in Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013); Jeremy Waldron, *Torture, Terror and Trade-Offs* (Oxford University Press 2010).

⁷² Liora Lazarus and Benjamin J Goold, ‘Security and Human Rights: Finding a Language of Resilience and Inclusion’ in Liora Lazarus and Benjamin J Goold (eds), *Security and Human Rights* (Hart 2019); Also see Alpa Parmar, ‘Stop and Search in London: Counter-terrorist or Counter-productive?’ (2011) 21 *Policing & Society* 369.

⁷³ The Emergency Powers Act (Detentions) 5739-1979, 33 LSI 89, s 2(a); Order Regarding Administrative Detention (Temporary Order)[Consolidated Version](Judea and Samaria)(No. 1591) 5767-2007; Administrative detainees are held separately, yet their physical conditions are identical to those of sentenced prisoners. At the same time, they are entitled to a longer daily walk of two hours, instead of one, and to family visits every two weeks, instead of every two months. Like sentenced security prisoners, they cannot access phone calls; Prison Service Commission Ordinance 04.02.00 ‘Incarceration Conditions in Administrative Detention’ (entered into force on 11 February 2003) s 9, 13; Prison Service Commission Ordinance 03.02.00 ‘Rules Regarding Security Prisoners’ (updated on 15 November 2020) s 17(c)(3), 19.

500 administrative detainees at any given time for the past twenty years.⁷⁴ For Israeli authorities, this administrative procedure has been a particularly useful tool to impose long-term incarceration through a fast-track classified procedure that does not require the publication of substantial evidence and is detached from criminal law standards.⁷⁵

In the early 1990s, Israel administratively detained 10 Lebanese citizens who completed their prescribed sentences in Israeli prisons for the outspoken purpose of hastening the release of Israeli captives.⁷⁶ In the landmark decision of *John Does v The Ministry of Defence* (2000), the Supreme Court of Israel found the detention unlawful, as it violated the detainees' rights to liberty and dignity.⁷⁷ To keep the said detainees in detention, Israel legislated the 2002 Incarceration of Unlawful Combatants Act,⁷⁸ which permits the detention of people who participated in hostilities against Israel, and who are not entitled to POW status, for renewable periods of six months.⁷⁹ The Act aims to target foreign nationals involved in attacks against Israel,⁸⁰ and includes a problematically categorical presumption of dangerousness of 'unlawful combatants', for as long as the hostilities between their forces and Israel continue.⁸¹ Nevertheless, the Supreme Court found the Act constitutional as it builds on individual risk.⁸² The Court avoided a discussion on whether Israel adopted a third category of 'unlawful combatants', which is unrecognised in international law,⁸³ by finding that the Act merely regulates detention powers, rather than creates a new category of detainees.⁸⁴ I do not elaborate on this Act further since, despite its great powers, Israel has barely used it compared to its routine

⁷⁴ The number of detainees peaked at 1,794 in November 1989, during the first Intifada; Ofir Feuerstein, *Without Trial* (B'Tselem and Hamoked, 2009) 11; B'Tselem, 'Statistics on Administrative Detention' <https://www.btselem.org/administrative_detention/statistics> accessed 31 October 2022.

⁷⁵ Hedi Viterbo, 'Future-Oriented Measures' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 133.

⁷⁶ CrimFH 7048/97 *John Does v Ministry of Defence* (12 April 2000) par 2, President Barak's judgment.

⁷⁷ Ibid, par 18-20, President Barak's judgment.

⁷⁸ The Incarceration of Unlawful Combatants Act, 2002-5762.

⁷⁹ Ibid, s 1, 5(c).

⁸⁰ CrimApp 6659/06 *John Does v The State of Israel* (11 June 2008) par 35, President Beinisch's judgment.

⁸¹ The Incarceration of Unlawful Combatants Act (n 78) s 7.

⁸² CrimApp 6659/06 *John Does v The State of Israel* (n 80) par 21 and 49, President Beinisch's judgment.

⁸³ Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) 2 JICJ 96, 101-102; Jordan Paust, 'War and Enemy Status after 9/11: Attacks on the Laws of War' (2003) 28 Yale J Int'l L 325, 327.

⁸⁴ CrimApp 6659/06 *John Does v The State of Israel* (n 80) par 13-14, President Beinisch's judgment.

use of administrative detention. Since 2002, only 18 ‘unlawful combatants’ were detained, all of whom were Gazan residents, and since 2017 the Act has not been in use.⁸⁵

Despite its declared preventive goal, Israel’s administrative detention falls under the European Court of Human Rights criteria for a measure that is punitive by nature,⁸⁶ since it imposes prison conditions and does not provide detainees with means to reduce the risk they supposedly pose. Furthermore, the Kafkaesque position of detainees who are given no basic details of the grounds for their detention and how long it will last exacerbates the pains they experience in detention.⁸⁷ Considering its effects then, detention is an executive power that pursues a preventive end through a punitive measure of prolonged confinement. While this discussion focuses on incarceration, it is important to note that detention is only one of Israel’s executive mechanisms against Palestinian insurgency, which has been debated as a punitive response cloaked as a preventive measure.⁸⁸ Notable examples are deportations, house demolitions and the extreme measure of targeted killing.⁸⁹

Israel’s civilian and military criminal justice systems reflect the continuum of security enforcement across military and civilian systems in Israel and the Occupied Territories. The continuum identifies Palestinians as potential enemies for their ethnic identity, which costs them basic procedural rights and the threat of stricter punishments. For Palestinians, their status as right-bearers is contingent upon their loyalty to Israel. As in the early days of military rule within

⁸⁵ According to information provided to B’Tselem, the Israeli Information Center for Human Rights in the Occupied Territories, by the Israel Prison Service and the Israeli military; B’Tselem, ‘Statistics on Palestinians in the custody of the Israeli security forces’ (n 266) ; Human Rights Watch, ‘Gaza: Unlawful Combatants Law Violates Rights’ (2017) <<https://www.hrw.org/news/2017/03/01/gaza-unlawful-combatants-law-violates-rights>> accessed 30 October 2022.

⁸⁶ *M v Germany* (2010) 51 EHRR 976, par 128, 130; *Welch v United Kingdom* (1995) 20 EHRR 247, par 27; Also see *Jamil v France* (1995) 17 EHRR 15917/89 par 30; Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press 2014) 16-20, 167.

⁸⁷ Tamar Pelleg-Sryck, ‘The Mysteries of Administrative Detention’ in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011) 125.

⁸⁸ Didier Fassin, *The Will to Punish* (Oxford University Press 2018) 42; Viterbo, ‘Future-Oriented Measures’ (n 75) 129.

⁸⁹ Amichai Cohen and Tal Mimran, *Cost without Benefit: A Reexamination of Israel’s Demolition Policy* (Policy Paper 12, The Israel Democracy Institute, 2015); Michael Sfard, ‘House Demolitions’ in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 162; Tami Bash, Yuval Ginbar and Eitan Felner, *Deportation of Palestinians from the Occupied Territories and the Mass Deportation of December 1992* (B’Tselem, 1993) 22-26; Orna Ben-Naftali and Karen R. Michaeli, ‘We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings’ (2003) 36 Cornell Int’l L J 233.

Israel, security enforcement uses criminal procedure and punishment which position Palestinians outside of the Israeli political community.

Normalising Exclusion

Since 1967, a system of counterinsurgency has developed inside Israel and the Occupied Territories. By compromising procedural rights, imposing disproportionate punishments, and enforcing preventive-punitive measures, the Israeli legal system embodies many of the characteristics Jakobs attributes to enemy criminal law.⁹⁰ Colonial regulation provided Israel with the basis for penal practices that conceive recipients as suspected subjects whose rights may be compromised. Israel's version of enemy criminal law has sustained and developed through decades of control over the Occupied Territories, and it has become normalised as part of Israel's general system of law enforcement.

During the past twenty years, the proliferation of security measures in countries that identify as liberal democracies contributed to the legitimisation of Israel's methods which target suspects based on their ethnicity.⁹¹ Israeli politicians took pride in the state's experiences in fighting 'terror' and its adherence to legality, given that security measures are set in regulation and are subject to judicial review.⁹² In line with Ackerman's model of accommodation, Israeli governments also prioritise legalising exceptional measures over suspending the law under conditions of emergency.⁹³ As a result, Israel has a vast system of military and civilian regulation that enshrine authoritarian powers which violate basic rights.⁹⁴

For Israeli governments, enacting security measures in law legitimises them, and supports the country's image as a law-abiding democracy in the eyes of its citizens and the

⁹⁰ Daniel Ohana, 'Günther Jakobs's Feindstrafrecht: A Dispassionate Account' in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) 356; Günther Jakobs, 'Appendix D: On the Theory of Enemy Criminal Law' in *ibid*, 415.

⁹¹ David Cole, 'Enemy Aliens' (2002) 54 *Stanford L Rev* 953, 955; Waldron (n 71) 161.

⁹² Roach (n 68) 101.

⁹³ Uri Shoham, 'The Principle of Legality and the Israeli Military Government in the Territories' (1996) 153 *Military L Rev* 245, 273; Regarding the legal accommodation of emergency measures for protecting the rule of law, see Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 17; Bruce Ackerman, 'The Emergency Constitution' (2004) 113 *Yale L J* 1029.

⁹⁴ Orna Ben-Naftali, Michael Sfard and Hedi Viterbo, 'Introduction' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 4.

international community.⁹⁵ Palestinians mostly do not share this view, as a disenfranchised population who has no impact on the legislative process and finds itself targeted by legal security measures. At most, it seems that the law could potentially provide Palestinians with a clearer understanding of the standards that apply in Israeli procedures and measures.⁹⁶ Likewise, judicial review could have provided a legal avenue for challenging security powers, yet so far Israeli courts have had limited impact on restraining security measures, as Chapter Six further elaborates.⁹⁷ The regulation of security measures may protect Israel's democratic image, but it also solidifies the exclusion of Palestinians as outsiders to Israeli democracy. Legalisation results in the formal compromise of Palestinians' rights, by creating 'grey holes'⁹⁸ of wide executive discretion and limited judicial review.⁹⁹ Drawing on Hussain's term of *Hyperlegality*,¹⁰⁰ Israel's ongoing use of administrative powers is not necessarily a carefully calculated response to a particular emergency, but rather it resonates with colonial governance that aims to control suspect populations.

The leading normative principle in Israel's enemy criminal law is protecting security, albeit, in ways that safeguard the Jewish majority and exclude the security of Palestinians. As Kretzmer eloquently observed, in Israel: 'Security of the state is synonymous with the security of the Jewish collective.'¹⁰¹ This understanding of security dictates the rules of jurisdiction in military law, the security classification of Palestinians under civilian justice, and the use of administrative detention. Israel shapes its securitised penal practices according to the desired boundaries of its political community. Yet, as this thesis discusses below, security is pursued differently at the various stages of the penal practice and Israel's fight against Palestinian insurgency takes a surprising turn inside the prison.

⁹⁵ Concerns over legitimacy motivated military personal to close down the Lod Court; Ben-Natan, 'Citizen-Enemies' (n 11) 207; Hajjar (n 4) 189.

⁹⁶ Emanuel Gross, 'Trying Terrorists' in Fionnuala Ní Aoláin and Oren Gross (eds), *Guantánamo and Beyond* (Cambridge University Press 2013) 282.

⁹⁷ Kretzmer, *The Occupation of Justice* (n 21) 187; Ben-Naftali (n 45) 152.

⁹⁸ David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2009) 42.

⁹⁹ Roach (n 68) 127.

¹⁰⁰ Nasser Hussain, 'Hyperlegality' (2007) 10 New Crim L Rev 514, 515.

¹⁰¹ Kretzmer, *The Legal Status of the Arabs in Israel* (n 12) 136.

B. The Practice of Punishment: Palestinians Inside Israeli Prisons

‘Security Prisoners’, not POWs

Since its foundation, Israel has not granted POW status to Palestinian insurgents.¹⁰² In its first decade, the Israeli administration referred to incarcerated Palestinians, who were involved in cross-border raids from the West Bank and Gaza, as ‘Fedayeen’.¹⁰³ Palestinians who were charged with simply crossing the border were called ‘infiltrators’.¹⁰⁴ Both ‘Fedayeen’ and ‘infiltrators’ were held with foreign nationals from surrounding states, and the three groups together rarely exceeded 200 prisoners.¹⁰⁵ In these years, Palestinians and foreign nationals were incarcerated alongside Jewish Israeli citizens, yet this policy gradually changed, beginning from the important events of 1958.¹⁰⁶

On 31 July 1958, Palestinians and foreign nationals held in Shata prison led the most extensive prison revolt in Israel’s history. Eleven incarcerated men and two guards were killed and no less than sixty-six prisoners managed to escape to Jordan.¹⁰⁷ The serious security failure had long-term effects on the IPS. The Prisons Commissioner resigned, and the IPS changed its guiding principle from rehabilitation to security.¹⁰⁸ While the investigative report into the revolt found a series of security faults according to existing standards, it recommended introducing new increased conditions of security for ‘prisoners who pose a specific security threat’, such as Shata’s Palestinian prisoners.¹⁰⁹ The IPS then began to devise a distinctive approach towards ‘security prisoners’, as they were soon to be titled, which included incarceration in separate and highly securitised facilities.¹¹⁰

¹⁰² Israel signed the Third Geneva Convention in 1951: International Committee of the Red Cross, ‘Treaties, State Parties and Commentaries - Israel’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=IL&nv=4> accessed 31 October 2022.

¹⁰³ Describes those who sacrifice themselves for a greater cause; William O’Brien, *Law and Morality in Israel’s War with the PLO* (Routledge 1991).

¹⁰⁴ Burris (n 3) 952; Shai Gortler, ‘Carceral Subjectivity and the Exercise of Freedom in Israel-Palestine’ (PhD Thesis, University of Minnesota 2020) 10.

¹⁰⁵ *Ibid.*, 11.

¹⁰⁶ Roni Shaked, ‘Security Prisoners in Israeli Prisons’ (2008) 23 *Seeing Shabas - Journal of the Israeli Prison Service* [Hebrew] 26, 27.

¹⁰⁷ *Report of the Committee for Investigating the Shata Prison Incident* (1958) 11.

¹⁰⁸ Uri Timor, ‘The Evolution of Prisons in Israel’ (2009) 12 *Tzohar* [Hebrew] 7, 15.

¹⁰⁹ *Report of the Committee for Investigating the Shata Prison Incident* (n 107) 21.

¹¹⁰ *Ibid.*, 21; Shaked (n 106) 27.

The debate about providing POW status to Palestinians developed further when Palestinian political organisations emerged in the late 1960s. In 1969, the Israeli Military Court denied a POW status application by members of the Popular Front for the Liberation of Palestine. The Military Court held that the applicants did not represent a ‘Party to a Conflict’ and did not fulfil the criteria of article 4 of the Third Geneva Convention, because they targeted civilians and therefore violated the law of war.¹¹¹ As noted, the 1977 Additional Protocol I to the Geneva Conventions weakened the former argument, as it recognised liberation movements as parties to conflicts,¹¹² and it particularly aimed to apply the Geneva Conventions to the Israeli-Palestinian conflict.¹¹³ Even though Israel remains a strong objector to Additional Protocol I, its reasoning for denying POW status has shifted since the early 1990s from the formalist claim against the status of Palestinian organisations to the moral argument regarding the targeting of civilians.¹¹⁴ Ben-Natan explains that focusing on Palestinians’ conduct allows the Israeli authorities to avoid a legal debate about whether the organisations are liberation movements, a question which has become particularly contentious after Israel recognised the Palestinian Liberation Organisation¹¹⁵ as the representative of the Palestinian people in the Oslo Accords.¹¹⁶

Nevertheless, there is still a problem of consistency with the moral argument, since Israel also denies POW status to Palestinians who targeted soldiers and arguably followed the laws of war. The Supreme Court similarly found in the past that an appellant’s targeting of a ‘Jewish soldier’ was equal, or even slightly worse, than the targeting of a civilian.¹¹⁷ Moreover, Israel’s generalised approach refers to the conduct of organisations to draw conclusions on individuals, which also violates its obligation to conduct a personal assessment of the POW status of each person before a competent tribunal.¹¹⁸

¹¹¹ *Military Prosecutor v Kassem* 42 ILR (13 April 1969).

¹¹² Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 1(4).

¹¹³ George H Aldrich, ‘The Laws of War on Land’ (2000) 94 Am J Int’l L 42, 45.

¹¹⁴ Smadar Ben-Natan, ‘Are There Prisoners in This War?’ in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto 2011) 158.

¹¹⁵ The Fatah-led coalition of Palestinian organisations, see footnote 35 of the Introduction to this thesis.

¹¹⁶ Ben-Natan, ‘Are There Prisoners in This War?’ (n 114) 153, 159.

¹¹⁷ CrimApp 10111/16 *Al Fath Yichya v The State of Israel* (15 February 2018) par 3, Judge Hendel’s judgment.

¹¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (The Third Geneva Convention) art 5.

At the same time, it is uncertain whether incarcerated Palestinians would benefit from POW status in practice. For instance, POW status would permit Israel to detain Palestinians without trial for long periods, given that the hostilities are ongoing.¹¹⁹ POW status would also not prevent Israel from prosecuting Palestinians for war crimes.¹²⁰ As I discuss below, since the late 1980s, the conditions of Palestinians have come close to those accorded to POWs, particularly around the right to representation, and to conduct religious and educational activities.¹²¹ Status is nevertheless important for its normative implications for Palestinian insurgency. Israel's refusal to provide POW status denies the legitimacy of Palestinian organisations and their cause. By disregarding Additional Protocol I, Israel draws on the exclusionary definition of the POW to identify Palestinian insurgency as non-sovereign armed resistance that is liable to punishment.¹²² Israel also relies on the original POW criteria to impose high standards of warfare on Palestinian organisations, while the conduct of Israeli soldiers and whether they violate the laws of war have no implications for their status as legitimate combatants.¹²³

Unlike the POW status, which recognises the legitimate participation of fighters in hostilities, the 'security prisoner' label depicts Palestinian insurgents as criminals who pose a threat to the security of the state and the Israeli public.¹²⁴ Moreover, by applying the security classification to all Palestinians involved in security offences, the IPS disregards basic distinctions between prisoners' backgrounds, and the severity of the offences committed. As I elaborate below, this approach not only violates fundamental liberal principles of individual treatment and equality,¹²⁵ but it also reveals how the IPS relates the perception of threat with ethnic identity rather than conduct.¹²⁶ To be clear, security classification also applies to a few

¹¹⁹ Ibid, art 118.

¹²⁰ Ibid, art 82; Derek Jinks, 'The Declining Significance of POW Status' (2004) 45 Harv Int'l L J 367, 439.

¹²¹ The Third Geneva Convention (n 118) art 79 and chapter V.

¹²² 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 2006) 298-9.

¹²³ The Third Geneva Convention (n 118) art 85.

¹²⁴ Gortler (n 104) 239.

¹²⁵ Alon Harel, 'Who Is a Security Prisoner and Why? An Examination of the Legality of Prison Regulations Governing Security Prisoners' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto 2011) 38.

¹²⁶ Abeer Baker and Anat Matar, 'The Palestinian Prisoners: Politicization and Depoliticization' in *ibid* (Pluto Press) viii.

Jewish prisoners, whose number did not exceed 25 between 2014 and 2020.¹²⁷ For Jewish prisoners, however, the security classification has different implications for the type of prison regime they face, as I discuss further in this chapter.

Despite its frequent use by the Israeli administration, the ‘security prisoner’ label is no more than an administrative classification set out in a Prison Service Commission Ordinance.¹²⁸ According to the Commission Ordinance ‘Classifying a Security Prisoner’, a security prisoner is an inmate who is suspected, charged or convicted of an offence that is either by ‘its nature and circumstances a security offence’¹²⁹ or is included in the lists of offences that are annexed to the ordinance. A security prisoner can also be a person who has been charged or convicted for actions that aided, or were likely to aid, a terror organisation or a person who seeks to threaten national security, or an inmate who has been indicated by the Israel Security Agency as a person who poses a threat to national security.¹³⁰ The law does not use the term ‘Palestinians’ directly in relation to security prisoners, most likely to avoid a blatant violation of Israel’s constitutional obligation to fair and equal treatment. Instead, the legislators use different legal solutions for policies that target Palestinians directly, like the exclusion of security prisoners from early release programmes as elaborated below.¹³¹ At the same time, the policy of classification and separation created a power dynamic within prisons that the IPS did not foresee, and yet, was able to harness to perfect its control over prisoners.

The Rise of the Palestinian Prisoners’ Movement

To recall, Israel initially held Palestinians in facilities inside the country and in the Occupied Territories. Despite the IPS publications on renovations of facilities, living conditions remained at a relatively low standard. Prisoners were housed in overcrowded cells, slept on the floor, and

¹²⁷ Israel Prison Service, Data Provided following a Freedom of Information Request (2021).

¹²⁸ Prison Service Commission Ordinance 04.05.00 ‘Procedure for Classifying a Security Prisoner’ (updated on 28 February 2018).

¹²⁹ Ibid, s 3b.

¹³⁰ Ibid.

¹³¹ Counterterrorism Act (n 60) s 40A.

were provided with poor-quality food. They were also denied books and stationery, and often suffered degrading and violent treatment by prison staff.¹³²

To manage the growing number of prisoners more ‘efficiently’,¹³³ the IPS and the military began appointing a ‘Shawish’,¹³⁴ as in a representative from each wing, to manage meal distribution and keep the wing tidy and clean.¹³⁵ With time, the Shawish role expanded, and the appointed prisoners decided on work allocations, in the kitchen or warehouse for instance, and they also led wing meetings. The Shawishs gradually became the prisoners’ representatives who communicated their needs to the prison authorities.¹³⁶ Former IPS officials see the Shawish scheme as a strategic turning point because it arguably played a significant role in nurturing internal Palestinian leadership.¹³⁷

Other accounts of the Prisoners’ Movement place greater emphasis on the separation of Palestinians and the extremely harsh conditions they faced as important catalysts for their initial organisation.¹³⁸ Since 1968, prisoners began to protest their conditions through hunger strikes across different IPS facilities.¹³⁹ The IPS retaliated with solitary confinement and by dispersing strike leaders, a strategy that proved counter-effective since it helped Palestinians to expand their network of protests.¹⁴⁰ Early strikes made important and symbolic gains as Palestinians were allowed to hold stationery, converse freely in the yard, and receive books from the International Committee of the Red Cross.¹⁴¹ These initial protests built the foundations of the emerging Prisoners’ Movement.

In the early 1970s, the rise of Palestinian organisations drove changes to the prison population. Incarcerated members of Fatah, the Palestinian Front for the Liberation of Palestine

¹³² Abeer Baker, ‘Palestinian Prisoners between the Community and the Individual – An Inside Look’ (2016) 8 *Maasei Mishpat* [Hebrew] 95; Esmail Nashif, *Palestinian Political Prisoners: Identity and Community* (Routledge 2008) 48.

¹³³ Illy Goldberg, ‘Security Prisoners: The Dynamic between the Prisoners and the Palestinian Society and its Relationship to National Security in Israel (2000-2007)’ (National Defence College 2008) [Hebrew] 36.

¹³⁴ Translates as ‘sergeant’, though prisoners clearly had no official role under the IPS.

¹³⁵ Protocol no 200 of the Internal Affairs and Environment Committee Meeting, 12th Knesset (9 July 1991) 24.

¹³⁶ Shimon Malka, ‘Security Prisoners in Israel - A Historical Overview’ (2005) 9 *Tzohar* 7 [Hebrew].

¹³⁷ *Ibid*; Goldberg (n 133) 36.

¹³⁸ Maya Rosenfeld, *Confronting the Occupation* (Stanford University Press 2004) (n 127) 244; Alyssa G Bernstein, ‘The Palestinian Prisoners’ Movement, 1994 - 2016’ (DPhil, The Queen’s University of Belfast 2017) (n 6) 127; Baker (n 131) 96; Nashif (n 132) 48.

¹³⁹ Shaked (n 106) 28.

¹⁴⁰ Gortler (n 104) 165.

¹⁴¹ *Ibid*, 167; Julie M Norman, *The Palestinian Prisoners Movement* (Routledge 2021) 52-53.

and the Democratic Front for the Liberation of Palestine¹⁴² gained popularity in prison wings and began building internal organisational frameworks of self-governance.¹⁴³ Palestinians elected representatives to leadership roles and governing bodies that managed matters of education, security, discipline and dialogue with the IPS.¹⁴⁴ Self-governance aimed to challenge the IPS strict prison regime by building a ‘counter-order’ and an alternative framework to manage prisoners’ lives inside.¹⁴⁵ In 1980, the Prisoners’ Movement gained traction outside the prison, as the death of two hunger strikers who were force-fed drew domestic and international attention to the prisoners’ plight and protests.¹⁴⁶

The collective was a central value for the Prisoners’ Movement, and it encouraged Palestinians to consider themselves as part of a group and to prioritise joint interests before their own.¹⁴⁷ Different Palestinian organisations, including the religious Hamas and the Islamic Jihad, established later in 1987, led separate schedules and monitored their members closely.¹⁴⁸ Members enforced compliance with the organisations’ rules and values. Misconduct was handled through internal disciplinary proceedings, followed by sanctions, including corporal punishments.¹⁴⁹ The organisations’ elected representatives also handled all communications with prison authorities, to counter any disruption or potential recruitment of informants by the IPS.¹⁵⁰ At times, those accused of collaborating with Israel were assassinated in prison, although this practice reportedly ceased in 1997.¹⁵¹ Despite their ideological differences, Palestinian organisations worked closely in the early days of the Prisoners’ Movement and operated joint ‘dialogue committees’ to present a unified front against the IPS.¹⁵² As detailed below, cross-

¹⁴² See the list of key events for details on the foundation of these organisations on page 6 of this thesis.

¹⁴³ Nashif (n 132) 13; Baker (n 132) 97.

¹⁴⁴ Gortler (n 104) 128; Malka (n 136) 8.

¹⁴⁵ Rosenfeld, *Confronting the Occupation* (n 138) 244.

¹⁴⁶ Rasem Halaweh and Ali elJa’afari died following force-feeding; Ishaq elMaragha also suffered injuries following force-feeding which reportedly led to his death in prison in 1983; Palestinian Human Rights Organisations Council, *Factsheet: Force-feeding under International Law and Medical Standards* (2015) 3; Baker (n 132) 97.

¹⁴⁷ Gortler (n 104) 198.

¹⁴⁸ Israel Prison Service, *Security Prisoners in the Custody of the Prison Service* (2007) 10; See the list of key events, page 6 of this thesis.

¹⁴⁹ Gortler (n 104) 128, 145; Shaked (n 106) 28; Baker (n 132) 98.

¹⁵⁰ *Ibid*, 105.

¹⁵¹ Bernstein (n 138) 140, 220.

¹⁵² *Ibid*, 139; Gortler (n 104) 173.

organisational ties took a serious blow after the Oslo Accords, which changed the power dynamics between the IPS and incarcerated Palestinians as well.

An important element of collective life in prison was the organisations' mandatory education programmes, which included the histories of the Palestinian liberation movement and Zionism, philosophy, political theory and Arabic literacy, English, and Hebrew.¹⁵³ For Palestinians from underprivileged backgrounds, the education programmes were an opportunity to acquire knowledge and skills that were inaccessible outside prison.¹⁵⁴

In contrast to the IPS security prisoners classification, incarcerated Palestinians re-identified themselves as political subjects, rather than offenders.¹⁵⁵ Like imprisoned members of the African National Congress in South Africa, and the Irish Republican Army in Northern Ireland, Palestinians built 'universities' inside prisons¹⁵⁶ and turned imprisonment into a formative experience that informed prisoners' understanding of the conflict and shaped their political identities.¹⁵⁷ As one of Rosenfeld's interviewees describes very well:

Before being in prison, I was connected emotionally to the national struggle, but in jail, I became connected to it intellectually and ideologically. It was in prison that I read the theory. Love of the homeland became more rooted, for two reasons: my discussions with other people and my reading of pamphlets and books.¹⁵⁸

Since imprisonment touched on almost every Palestinian family, the Prisoners' Movement took on a central role in Palestinian national politics. Its struggles against the IPS became a symbol of Palestinian resistance. Inside prisons, the self-governing institutions nurtured leaders who then led national protests beyond prison walls, particularly during the 1987 First Intifada.¹⁵⁹ Outside

¹⁵³ Nashif (n 132) 72; Hedi Viterbo, 'Security Prisoners' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 392.

¹⁵⁴ Maya Rosenfeld, 'The Centrality of the Prisoners' Movement to the Palestinian Struggle Against the Israeli Occupation: A Historical Perspective' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011) 10-11; Gortler (n 104) 177.

¹⁵⁵ Nashif (n 132) 4; Lisa Taraki, 'The Development of Political Consciousness Among Palestinians in the Occupied Territories, 1967-1987' in Jamal R Nassar and Roger Heacock (eds), *Intifada: Palestine at the Crossroads* (Praeger 1990) 68.

¹⁵⁶ Bernstein (n 138) 135; Crain Soudien, 'Robben Island University Revisited' in Anrianna Lissoni and others (eds), *One Hundred Years of the ANC* (Wits University Press 2009); Kieran McEvoy, *Paramilitary Imprisonment in Northern Ireland* (Oxford University Press 2001) 217.

¹⁵⁷ Rosenfeld, *Confronting the Occupation* (n 138) 252.

¹⁵⁸ Ibid.

¹⁵⁹ Gortler (n 104) 174; Bernstein (n 138) 150.

prisons, the Palestinian public protested for prisoners' rights and provided financial support to those incarcerated and their families.¹⁶⁰

By the early 1990s, the Prisoners' Movement was so well-organised that it achieved the dismissal of two Prisons Commissioners who adopted tougher policies against Palestinians. In 1987, the successful escape of six prisoners from Gaza prison led to the resignation of Commissioner David Maimon, who until then had refused to acknowledge the prisoners' elected leaders.¹⁶¹ Five years later, Commissioner Gabi Amir similarly refused to negotiate with Palestinians. A mass hunger strike that threatened the success of the Oslo negotiations, led to his dismissal.¹⁶² The 1992 strike is often depicted as the most successful hunger strike led by Palestinians, as after 15 days they achieved the closure of a designated solitary wing for Palestinians, secured longer family visits with permission for physical contact between prisoners and their children, gained access to hot plates that allowed in-cell cooking, and achieved access to remote academic studies.¹⁶³

The development of the Prisoners' Movement and its centrality in Palestinian politics symbolises the contrasting narratives in Israel/Palestine regarding Palestinian insurgency. Yet, the prisoners' pursuit of special status did not always play against Israeli interests, inside and outside of prison. As the next section discusses, the prisoners' struggle generated a prison regime that reinforces the control of Palestinian organisations, but at the same time provides Israel with a flexible form of governance that treats Palestinians as a unified group and uses punishment to advance security interests, given the prisoners' political identification. Clearly, the special regime is important to the Prisoners' Movement, but I argue that it is no less important for Israel's managerial and national security concerns.

¹⁶⁰ Rosenfeld, 'The Prisoners' Movement' (n 154) 14.

¹⁶¹ Goldberg (n 133) 92.

¹⁶² Reports on how many participated vary. Gortler reports that around 8,000 took part while Bernstein mentions 12,000; Gortler (n 104) 181; Bernstein (n 138) 146.

¹⁶³ Baker (n 132) 98; Goldberg (n 133) 93.

A Special Prison Regime

Even though Israel did not grant Palestinians POW status, it treated them as a special group to begin with, through separation, classification and the Shawish scheme. Yet, when prisoners attempted to organise their leadership, the IPS resisted, and its hostile response escalated when organisations entered the wings. Tear gas and force were routinely used against prisoners who committed public acts of affiliation, like marking the anniversary of their organisation.¹⁶⁴ A gradual change of approach developed during the late 1980s. Prisons administrations began to recognise the dialogue committee as the representative body of prisoners. However, this recognition was informal, and it was not entirely consistent across the IPS' different facilities.¹⁶⁵ Standardisation of this approach only came after 2000, as I discuss in the next chapter.

Nevertheless, even informal recognition marked an important turning point for Palestinians, since it acknowledged their right to representation, similar to that provided to POWs.¹⁶⁶ Palestinians earned special status as a group, which stood in contrast to how Israel addressed its general prison population as individuals. The IPS surrendered the control of prisoners' schedules to the organisations, and in return, demanded compliance with prison regulations.¹⁶⁷

As the Prisoners' Movement was developing, the IPS began to allocate prisoners according to their affiliation with organisations, and so different organisations ruled over different cells and wings.¹⁶⁸ However, this policy, which continues to operate today, does not only apply to existing members of organisations. Rather, the IPS sets an affiliation with an organisation for every Palestinian 'security prisoner' and allocates them accordingly.¹⁶⁹ Palestinians who do not state their membership in any organisation are affiliated by the IPS based on intelligence or their background. For instance, if they are religious Muslims, they might find themselves in Hamas or Islamic Jihad wings.¹⁷⁰ Through this policy the IPS effectively

¹⁶⁴ Baker (n 132) 97, n 22.

¹⁶⁵ Internal Affairs Committee Meeting (9 July 1991) (n 135) 9-10.

¹⁶⁶ The Third Geneva Convention (n 118) art 79; Also see The Fourth Geneva Convention (n 19) art 102.

¹⁶⁷ Baker (n 132) 98.

¹⁶⁸ Internal Affairs Committee Meeting (9 July 1991) (n 135) 10.

¹⁶⁹ AppR 5754/15 *Hatib et al v The Prison Service* (2 July 2017) par 5-6.

¹⁷⁰ Baker (n 132) 99.

reinforces the organisations' control over wings, and, moreover, provides them with new recruits, even though membership and recruitment to the Palestinian organisations are criminal offences in Israel.¹⁷¹

While the allocation policy helps the organisations, it is also a central justification for the IPS' harsh restrictions on prisoners' contact with the outside world.¹⁷² Visits are allowed for close family relatives only, for example, a mother or sister, visitors are separated by security partitions, and are allowed to visit at most once every two months.¹⁷³ Conjugal visits and furloughs are also prohibited.¹⁷⁴ Phones were prohibited for decades, until, following a hunger strike in 2019, the IPS conceded to installing public phones in Palestinian wings.¹⁷⁵ However, Palestinians still face serious limitations and monitoring on their use of public phones, as Chapter Four discusses.¹⁷⁶ The IPS has also yet to update its regulation on this matter, which still strictly prohibits Palestinians' access to phones.¹⁷⁷ Furthermore, prison education or rehabilitation programmes do not run in Palestinian wings, despite the IPS' legal obligation to provide these services to all citizens and residents of Israel.¹⁷⁸

None of the limitations above applies to the general prison population whose access to phones, furloughs, visits and rehabilitation is limited on an individual basis.¹⁷⁹ As for Jewish security prisoners, even though prison regulation does not distinguish them from Palestinian prisoners, court rulings and media coverage indicate that they may find it easier to remove security limitations and access rehabilitation programmes.¹⁸⁰ Regardless of their special limitations, Palestinian prisoners also still face harsh physical conditions as they are held in the

¹⁷¹ Counterterrorism Act (n 60) s 22-23.

¹⁷² Commission Ordinance - Rules Regarding Security Prisoners (n 73) s 1b.

¹⁷³ *Ibid*, s 17.

¹⁷⁴ *Ibid*, s 18-19; Prison Service Commission Ordinance 04.40.00 'Prisoners Furloughs' (Updated on 29 March 2015). s f.

¹⁷⁵ Avi Ashkenazi, 'Israel Stepped Down: The Prisoners Demands were Answered – The Hunger Strike Ended' *Walla* (15 April 2019) <<https://news.walla.co.il/item/3230791>> accessed 31 October 2022.

¹⁷⁶ Jacky Khoury and Josh Breiner, 'Palestinian Prisoners' Hunger Strike End After Reaching Deal with Israel' *Haaretz* (15 April 2019).

¹⁷⁷ Commission Ordinance - Rules Regarding Security Prisoners (n 73) s 19.

¹⁷⁸ Palestinian residents of the Occupied Territories are not included in this category, other than residents of East Jerusalem; The Prisons Ordinance [New Version], 5732-1971, s 11d; Viterbo, 'Security Prisoners' (n 153) 395.

¹⁷⁹ Prison Service Commission Ordinance 04.17.00 'Providing and Withdrawing Privileges' (updated on 6 November 2016).

¹⁸⁰ AppR 8571/07 *The State of Israel v Ofer Gamliel* (4 February 2008); HCJ 1920/00 *Galon v Maasiyahu Parole Committee* (11 May 2000); Eli Ashkenazi, 'Israel Prison Service Begins Rehabilitating Security Prisoners – but Only Jews' *Haaretz* (11 February 2013).

most overpopulated prisons in Israel. In 2014, living space in security prisoners' facilities ranged between 2.2 and 2.8 sqm per person, below Israel's standard of 4.5 sqm and much below the European standard of 8.8 sqm per person.¹⁸¹ These conditions have reportedly improved since the Supreme Court ordered the state in 2017 to provide the statutory standard of living space to all detainees and prisoners.¹⁸² Yet, Palestinians are still the only incarcerated population held in tents rather than built barracks.¹⁸³

Despite the current focus on affiliation with 'terror organisations', the IPS' strict approach against Palestinian security prisoners was born before organisations came to the fore. The Palestinian organisations merely added another factor that justifies the IPS categorical approach and obscures how it relates security classification with ethnicity. Palestinians' membership in organisations is what makes them even more dangerous. But, the IPS creates the conditions for this perception of dangerousness.¹⁸⁴ First, by defining all of those convicted of security offences as security prisoners, and second, by affiliating them with organisations. Through a double-step classification system, the IPS solidifies the connection between Palestinian identity and dangerousness. And so, all Palestinians are presumed to belong to unlawful associations and to be equally dangerous. As advocate Abeer Baker writes:

A fourteen-year-old boy suspected of throwing a Molotov cocktail that did not explode is regarded as equally dangerous as a forty-year-old man who commanded an armed cell that carried out attacks.¹⁸⁵

The IPS policy regarding Palestinians is mostly set out in its commission ordinances. According to the 1971 Prisons Ordinance, commission ordinances are secondary legislation that is independently regulated by the Prisons Commissioner.¹⁸⁶ For Prisons Commissioners, the ordinances are a useful tool that provides broad discretion on penal regulation. The ordinances are updated frequently, with no transparency as to the reasons for the various updates.¹⁸⁷ Since

¹⁸¹ Petition in HCJ 1892/14 *The Association for Civil Rights in Israel v Minister of Public Security* (11 March 2014).

¹⁸² HCJ 1892/14 *The Association for Civil Rights in Israel v Minister of Public Security* (13 June 2017); See note 53 of Chapter Five of this thesis regarding the state's compliance with the judgement.

¹⁸³ Israel Prison Service, *Annual Report 2019* (2020) 99.

¹⁸⁴ Abeer Baker, 'The Definition of Palestinian Prisoners in Israeli Prisons as "Security Prisoners" – Security Semantics for Camouflaging Political Practice' (2009) 5 *Adalah Review* 65.

¹⁸⁵ *Ibid*, 67.

¹⁸⁶ The Prisons Ordinance (n 178) s 80a.

¹⁸⁷ Commission Ordinance – Rules Regarding Security Prisoners (n 73), for instance, has been updated 21 times since first instated in 2002.

2000, the IPS has used commission ordinances to standardise its treatment of Palestinians across its different facilities.¹⁸⁸

Two commission ordinances regulate much of the penal regime against security prisoners. The first, noted earlier, sets out the procedure for classifying a security prisoner.¹⁸⁹ The second, titled ‘Rules Regarding Security Prisoners’, defines some of the restrictions that apply to security prisoners, and includes special provisions that acknowledge elected speakers, allow education programmes as well as the joint purchase of fresh groceries by Palestinians.¹⁹⁰ Importantly, the Ordinance also permits the Prisons Commissioner to provide or withdraw certain ‘privileges’, such as additional family visits and TV channels, to specific ‘groups’ in prison.¹⁹¹ Such provisions are key to the IPS approach which governs Palestinians as groups rather than individuals.

The commission ordinances omit, however, the important allocation by affiliation policy. Moreover, according to a Supreme Court ruling from 2017, the IPS has also failed to show any other internal order that regulates the allocation procedure.¹⁹² This is an exception to Israel’s tradition of legality, yet it is not surprising since that the allocation policy raises serious legal difficulties, given that the IPS arguably unlawfully supports and endorses illegal associations.¹⁹³

The IPS Commission Ordinance on conditions also prescribes a procedure through which security prisoners can apply to remove the restrictions that apply to them. The procedure requires applicants to fulfil two conditions:

1. They have no connection with a ‘hostile organisation’,¹⁹⁴ and if such a connection existed in the past, an Israel Security Agency opinion confirms that the prisoner underwent a ‘substantial change’ and cut his ties with the said organisation.
2. An Israel Security Agency opinion indicates that the removal of the restriction in question will not endanger national security.¹⁹⁵

¹⁸⁸ Alina Korn, ‘Prison Policy and Political Imprisonment in Northern Ireland and Israel’ in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011) 75.

¹⁸⁹ Commission Ordinance - Classifying a Security Prisoner (n 128).

¹⁹⁰ Commission Ordinance - Rules Regarding Security Prisoners (n 73) s 6, 20-21.

¹⁹¹ *Ibid*, s 34.

¹⁹² *Hatib v The Prison Service* (n 169) par 48.

¹⁹³ The Counterterrorism Act (n 60) s 22(c) and 23.

¹⁹⁴ As in a ‘terror organisations’ or an ‘unlawful association’ as defined in the Counterterrorism Act (n 60) s 2, 101.

¹⁹⁵ *ibid*, s 4b.

Often this procedure also entails a process titled ‘disaffiliation’, in which the prisoner asks to have their affiliation removed so that they will not be associated with any Palestinian organisation.¹⁹⁶ In practice, disaffiliation has become the preliminary stage for satisfying the conditions set out in the Commission Ordinance.¹⁹⁷

The overall process of removing security restrictions poses an almost impossible bar for Palestinian prisoners. First, it requires individuals to turn against the collective to which they were allocated and denounce the organisations that control nearly every aspect of their lives in prison. Second, it requires a ‘substantial change’, as in an ideological transformation, yet prisoners trying to prove this rely on the security-minded opinion of the Israel Security Agency.

The procedure for removing security restrictions essentially places a serious barrier before those asking to exit the Palestinian wings, for instance, if they were affiliated against their will or if they wish to access rehabilitation.¹⁹⁸ For Jewish security prisoners, however, the procedure is significantly less difficult since they are not affiliated with any organisation, even if some of them are members of right-wing organisations, like the nationalist Kach Movement.¹⁹⁹ As Baker notes, it may very well be that the procedure was tailored to fit the circumstances of Jewish security prisoners.²⁰⁰

An alternative path for removing restrictions is the procedure of changing one’s security classification. Until recently, this procedure, set out in the Commission Ordinance ‘Classifying a Security Prisoner’, focused on factors relating to the offence and the applicant’s motivation.²⁰¹ As Chapter Six discusses, the IPS broadened the considerations for classification change in 2018 following the Supreme Court’s comments.²⁰² The current procedure examines developments following an applicant’s conviction as well, for instance, if they disconnected their ties with a terror organisation or if there is no longer a risk in removing their security classification. Hence, the procedure is somewhat akin to the limitations removal process, however, it imposes a higher

¹⁹⁶ Commission Ordinance - Classifying a Security Prisoner (n 128) s 9.

¹⁹⁷ See the discussion in Chapter Six about the Supreme of Israel’s approach to petitions concerning disaffiliation.

¹⁹⁸ Baker (n 132) 101.

¹⁹⁹ Baker, ‘Palestinian Prisoners as Security Prisoners’ (n 184) 67.

²⁰⁰ Ibid.

²⁰¹ Commission Ordinance - Classifying a Security Prisoner (n 128) s 3.

²⁰² AppR 4779/17 *Mansour v The Prison Service* (22 March 2020) par 14, Judge Meltzer’s judgment.

bar given its extensive implications on the applicant's entire prison regime.²⁰³ In the cases examined later, I will show that even those who managed to disaffiliate struggled and failed to change their security classification.

These overtly burdensome procedures discourage individuals from disengaging with the organisations and seeking rehabilitation. Unlike prison authorities in Northern Ireland and South Africa, the IPS does not harness rehabilitation to weaken the organisations in prisons.²⁰⁴ The IPS, state counsels, and the Israeli Supreme Court have often explained this policy of not providing rehabilitation services by referring to the ideological motivation of Palestinians.²⁰⁵ As Supreme Court Judge Solberg held:

Naturally, the IPS does not hold treatment groups for security prisoners. The ideological background that is at the basis of security offending - which is usually political, national or religious - inhibits group therapy programmes like those which treat criminal tendencies or behavioural deviance, that characterise other prison populations [...] Rehabilitation programmes that aim to change religious, national or political ideology might be seen as 're-education' on behalf of the state against those who oppose and fight its government from ideological motives.²⁰⁶

There are two ways to understand this reasoning. First, as a seemingly benevolent recognition of the Palestinian political disposition, that does not categorise it as 'treatable' criminal deviance. The second, which I find more convincing, is the identification of the 'security prisoner' as an indoctrinated dangerous person who is inherently violent. According to this view, there is no point in holding rehabilitation programmes in security prisoners' wings, and the authorities should focus on incapacitation and supervision for preventing future offending. But in practice, this approach applies only to Palestinian security prisoners, who must undergo a series of obstacles just to access rehabilitation. As the next chapters show, despite a rising number of individual Palestinians who seek rehabilitation, Israel maintains the position that sees dangerousness as embedded in Palestinian identity.

²⁰³ Commission Ordinance - Classifying a Security Prisoner (n 128) s 6.

²⁰⁴ McEvoy (n 156) 310; Fran Lisa Buntman, *Robben Island and Prisoner Resistance to Apartheid* (Cambridge University Press 2003) 25.

²⁰⁵ Viterbo, 'Security Prisoners' (n 153) 395; State Response in AppR 1981/14 *Jabarin v Israel Police* (2 February 2015) par 45; CrimApp 1456/07 *John Doe v the State of Israel* (10 July 2007).

²⁰⁶ AppR 3786/13 *John Doe v the Attorney General* (18 August 2013) par 7.

Accordingly, parole is rarely granted to Palestinians. Recidivism rates for Palestinian security prisoners are low, given an average of 18% reincarceration between 2011 to 2013, five years after release, compared to 40% among ‘criminal prisoners’ during the same years.²⁰⁷ And yet, case law imposes a greater burden on security prisoners who seek parole. As the Israeli Supreme Court ruled in *Galon v Maasiyahu Parole Committee* (2000), ideological offending may attest to determined views which could drive security prisoners to re-offend upon their release.²⁰⁸ Based on *Galon*, prosecutors and Parole Committees regularly apply a ‘presumption of dangerousness’ for security prisoners, which requires them to prove they deserted the ideological mindset that led to their offending to become eligible for parole.²⁰⁹ This is extremely difficult for Palestinians, given the IPS allocation policy to organisations’ wings and the lack of access to rehabilitation. The said requirement adds to the general criteria for conditional release, which concern the risk posed by the prisoner and the prospect of their rehabilitation.²¹⁰

The rates of security prisoners who are released on parole are very low, ranging between 3% to 5% of all security prisoners released between 2017 and 2019.²¹¹ Among ‘criminal prisoners’, 14% of all those released were granted parole.²¹² As Chapter Five shows, recent legislation has even abolished the path to parole for Palestinians convicted of murder and attempted murder that amounted to a ‘terrorist act’.²¹³ For Palestinians, especially residents of the Occupied Territories who are legally not entitled to rehabilitation services in Israel, release through exchange deals between Israel and Palestinian organisations seems more likely than parole. These prisoners, therefore, have an increased incentive to remain active within the organisations.

Israel’s penal regime seems to address several managerial and security concerns. First, self-governance allows the IPS to rely on the organisations’ strict internal discipline to achieve

²⁰⁷ It could be argued that since Palestinian security prisoners are convicted of serious offences their potential reoffending can cause serious harm; Unfortunately, no formal data present the rate of recidivism divided by type of offence, which could have supported or refuted this argument; Yohanan Vaknin and Katrin Ben Zvi, *Recidivism of Israeli Prisoners 2013-2018* (Israel Prison Service - Research Branch, 2019)[Hebrew] 18-19.

²⁰⁸ *Galon v Maasiyahu Parole Committee* (n 180) par 11, Judge Or’s judgment.

²⁰⁹ AppR 3103/15 *Nadal v The Attorney General* (8 June 2015); AppR 4878/06 *The State of Israel v Ode* (13 September 2006); AppR 6914/16 *Savir v The State of Israel* (25 October 2016).

²¹⁰ Release on Parole Act, 5761-2001, SH 1795, s 3, 9.

²¹¹ Nurit Yechimovitz-Cohen, *Issues in Incarceration in Israel* (2020) 74.

²¹² *Ibid.*

²¹³ Counterterrorism Act (n 60) s 40a.

prison order.²¹⁴ Like in Northern Ireland and South Africa, recognising the prisoners' leadership was identified as a pragmatic solution for coping with organised internal resistance.²¹⁵ Separating Palestinians according to their organisations also provides an opportunity to monitor cross-organisational communication as well as to collect intelligence on the organisations' external activities.²¹⁶ Moreover, the separation allows the IPS to maintain a distinct flexible regime through which it can deny 'privileges' to specific groups in prison. The regime makes it easier for the IPS to create further divisions between groups, and to use prison conditions as bargaining chips in negotiations with the external organisations, as I discuss in Chapter Five.²¹⁷

Israel's prison regime for Palestinians is unusual, to say the least, and it has been formed following years of protests and hunger strikes. To some degree, the regime legitimises prisoners' political identities, particularly by recognising their elected representatives. However, it also entails the treatment of prisoners as a collective, while disregarding individual circumstances. The regime undermines the fundamental liberal principle of individual treatment and accountability.²¹⁸ It indicates that for the IPS, Palestinians lack personalised traits and needs. Unlike Jewish security prisoners, they are excluded from the IPS' supposedly liberal prison regime, which accords rights in prison on an individual basis and encourages rehabilitation. The IPS regime continues the exclusionary approach of Israel's military and civilian justice systems, as a form of enemy criminal law inside prison. That is, a type of incarceration in which the state denies its obligation to provide the prisoner with fair procedures and equal treatment.²¹⁹

The regime also promotes different interpretations and prioritisation of penal rationales. The IPS' support of organisations and recruitment of new members goes against the rationale of incapacitation, as imprisonment only seems to increase the security risk Israel attributes to prisoners. Restrictions on contact with the outside world are arguably preventive, but they are

²¹⁴ Gortler (n 104) 142-6.

²¹⁵ McEvoy (n 156) 288; Buntman (n 204) 170; Andrew Thompson, "'Restoring hope where all hope was lost': Nelson Mandela, the ICRC and the protection of political detainees in apartheid South Africa" (2016) 98 Int'l Rev Red Cross 799, 823.

²¹⁶ Israel Prison Service, *Security Prisoners in the Custody of the Prison Service* (n 148) 12-3.

²¹⁷ Alon Margalit, 'Accounting for Those in the Hands of the Belligerent: Security Detainees, the Missing and the Dead in the Israeli-Hamas Conflict' (2020) 25 J Conflict & Security L 565.

²¹⁸ Harel (n 125) 38; Shahav (n 5) 234.

²¹⁹ On how enemy criminal law manifests in Israel's parole procedures for security prisoners, see Netanel Dagan, 'Enemy Parole' (2022) (first online) Punishment & Society 1, which is further discussed in Chapter Six.

excessive considering the risk incarcerated men pose and the alternative means of monitoring their contact with the outside world. Likewise, the limitations on parole options supposedly build on the risk posed by Palestinian prisoners, but they disregard the low recidivism rates among Palestinians as a relevant factor. The generalised application of these limitations generates disproportionately severe punishments that indicate an underlying punitive reasoning, rather than a preventive approach.²²⁰ The result is a harsher form of punishment that seems to be motivated by prisoners' identities, rather than the threat they pose.²²¹ Lastly, prison exchange deals compromise both prevention and retribution as individuals who are referred to as 'security threats' are, nonetheless, released mid-sentence. Penal rationales are thus far from ideal-type values in Israel's penal regime, and they are compromised when managerial and national security interests require so.

Conclusions

This chapter introduced the mechanisms of detention, prosecution, and incarceration of Palestinians by Israeli authorities as a continuum of security enforcement. Nevertheless, conducting a comprehensive survey of different stages of Israel's penal practices reveals varying perceptions on how to pursue security. Most notably, the persecution of Palestinian organisations by military and civilian courts does not coincide with the IPS endorsement of these organisations in prison. While the Israeli justice system seeks to delegitimise Palestinian resistance, the IPS uses the organisational structures to control the prison population better and to pursue greater national security concerns by collecting intelligence and using prison conditions as bargaining chips. At the same time, policies in the courts and prisons are consistent in how they perpetuate the perception of Palestinians as a hostile population. In prison as in the justice system, Jewish prisoners are treated differently, and they are not exposed to the strict conditions Palestinians face. Throughout the criminal process and punishment, security considerations repeatedly outweigh criminal and constitutional law principles and specifically target Palestinians.

²²⁰ Harel (n 125) 38.

²²¹ Baker, 'Palestinian Prisoners as Security Prisoners' (n 184) 67.

The history of Israel's conflict penalty mirrors the experience of other countries that have used punishment to exclude suspect populations and created separate tracks of justice that prioritise security above fundamental legal principles. First, it builds on colonial legislation to establish securitised justice that delegitimises Palestinian resistance by prosecuting violent and non-violent offences. Israel also relies on traditional International Humanitarian Law definitions that delegitimise non-state actors, like Palestinian organisations. Securitised justice and punishment target the Palestinian population by pursuing an exclusionary interpretation of security that identifies Palestinians as potential enemies of the Jewish state. The longevity of the conflict has produced a specialised penal framework that, for the most part, is enshrined in law and regulation, and that has been upheld by the Israeli courts.²²² While international organisations, NGOs and scholars highlight the problematic nature of Israel's penal practices against Palestinians,²²³ Israel's own justice system and Government have long normalised its practices of conflict penalty.

Having provided a detailed picture of how Israel punishes Palestinians, I now move to explore how Israel's penal policies shifted over time and have been constantly affected by the turmoil of the conflict. The following chapters examine the versatility of Israel's conflict penalty since the post-Oslo era, beginning in 1990.

²²² As discussed in Chapter Six.

²²³ Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel* (CCPR/C/ISR/CO/4, 2014); Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Israel* (CAT/C/ISR/CO/5, 2016); Amnesty International, *Israel's Apartheid against Palestinians* (2022); Ben-Natan, 'Citizen-Enemies' (n 11); David Kretzmer and Yaël Ronen, *The Occupation of Justice* (2nd edn, Oxford University Press 2021).

Chapter 4: Post-Oslo in Israeli Prisons: Civilianisation, Ultra-Securitisation and Division

The population here is the worst. These are child murderers. So, my guards must act as professionally as possible. Just like we fight terror in the Territories – we fight terror inside the prison. From here we protect state security.

Amal Tafesh, Security Officer, Gilboa Prison, Israeli Prison Service¹

In October 2006, the IPS took over the last military detention camp for Palestinians.² Since then, almost all Palestinians have been held in the custody of Israel's civilian prisons authority.³ They are no longer subject to military orders inside prison but are governed by civilian laws and ordinances. The civilianisation of incarceration, as this chapter discusses, is one of several fundamental changes that took place following the Oslo Accords, signed between 1993 to 1995, between Israel and the Fatah-led Palestinian Liberation Organisation. Most notably, the Accords included the mass release of incarcerated Palestinians and led to Israel shutting down its Occupied Territories facilities, in favour of prisons inside its borders. This chapter studies the post-Oslo changes, and examines how they influenced the IPS' approach towards incarcerated Palestinians and shaped Israel's conflict penalty inside prison.

The Oslo negotiations took place during the heyday of the Prisoners' Movement.⁴ Palestinian organisations established democratic institutions in prisons which maintained daily schedules and mandatory education programmes. They operated an internal security apparatus that went so far as to assassinate suspected informants.⁵ Different organisations built a unified movement against the IPS, which culminated in the 1992 mass cross-organisation hunger strike.⁶

¹ in Orit Shteltzer, 'Terror Within Prison Walls' (2004) 13 Seeing Shabas - Journal of the Israeli Prison Service 14, 18 [Hebrew].

² This was Ofer Camp, the last Israeli detention facility in the Occupied Territories; Naama Telem, 'Eyes Wide Open in Ofer' (2012) 32 *ibid* 12-13.

³ Some are held for short periods by military authorities or the Israel Security Agency until they are brought to the IPS facilities.

⁴ Abeer Baker, 'Palestinian Prisoners between the Community and the Individual – An Inside Look' (2016) 8 *Maasei Mishpat* 95 [Hebrew]; Maya Rosenfeld, 'The Centrality of the Prisoners' Movement to the Palestinian Struggle Against the Israeli Occupation: A Historical Perspective' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011); Shai Gortler, 'Carceral Subjectivity and the Exercise of Freedom in Israel-Palestine' (PhD Thesis, University of Minnesota 2020) 22; Alyssa G Bernstein, 'The Palestinian Prisoners' Movement, 1994 - 2016' (DPhil, The Queen's University of Belfast 2017) 143.

⁵ *Ibid*, 139.

⁶ Walid Daka, 'Consciousness Molded or the Re-identification of Torture' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto 2011) 245-6.

For all involved, the Israeli Government, the IPS and the external headquarters of Palestinian organisations, the Prisoners' Movement was a force to be reckoned with.

The Oslo Accords transformed the Prisoners' Movement, as it led to the release of more than 5,000 incarcerated Palestinians between 1993 to 1999,⁷ leaving fewer than 1,500 people behind bars, the lowest since the early years of the occupation.⁸ The bulk of those who were released were Fatah members who, subsequently, took up positions at the Palestinian Authority's Security Services and the Ministry of Prisoners.⁹ Members of other organisations felt that the Fatah leadership had left them behind.¹⁰ The disillusionment from the Accords grew as years went by and the prospect of a permanent agreement, which would include the release of all incarcerated Palestinians, failed to materialise.¹¹ Internal divisions increased as the Palestinian Security Services persecuted members of the Islamic opposition, most notably those belonging to Hamas and the Islamic Jihad organisations.¹² The prisoners, and the greater Palestinian public, began seeing the Palestinian Authority as a corrupt collaborator of Israel, that is more concerned with benefiting its senior staff than promoting the release of all prisoners.¹³

By the early 2000s, the number of prisoners had risen again, following the Second Intifada and operation 'Defensive Shield'.¹⁴ However, the Prisoners' Movement had changed.¹⁵ The majority of new detainees had little experience in activism outside prison and lacked the intellectual background and skills required to revitalise the prisoners' self-governing bodies.

⁷ Following the signing of the 1994 interim Agreement on the Gaza Strip and Jericho Area (the Cairo Agreement), Israel gradually released 5,000 Palestinians. In 1998, it released 100 more 'security' prisoners, as part of the Wye River Memorandum, alongside 150 Palestinian 'criminal' prisoners; Lior Lehrs, 'Prisoners Release, Justice and Reconciliation: Between Northern Ireland and Israel/Palestine' (2015) 25 *Politika: The Israeli Journal of Political Science and International Relations* [Hebrew] 10, 12; Alina Korn, 'Prison Policy and Political Imprisonment in Northern Ireland and Israel' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011).

⁸ By January 2001, the military held 719 Palestinians while the IPS confined 737; B'Tselem, 'Statistics on Palestinians in the custody of the Israeli security forces' <https://www.btselem.org/statistics/detainees_and_prisoners> accessed 31 October 2022.

⁹ Bernstein (n 4) 170-171.

¹⁰ Gortler (n 4) 152.

¹¹ The Agreements noted that a permanent agreement was to be signed within 5 years from Oslo II, in the year 2000; Declaration of Principles on Interim Self-Government Arrangements, A/48/486 (Signed 13 September 1993) ('Oslo I') art 1; Rashid Khalidi, *The Hundred Years' War on Palestine* (Profile Books 2020) 210.

¹² Lisa Hajjar, *Courting Conflict* (University of California Press 2005) 14-15; Also see Julie M Norman, *The Palestinian Prisoners Movement* (Routledge 2021) 67.

¹³ Khalidi (n 11) 214; Bernstein (n 4) 208; For a recent survey of Palestinians' opinions about corruption in the Palestinian Authority, see Transparency International, *Citizens' Views and Experiences of Corruption* (2019).

¹⁴ See the list of key events on page 6 of this thesis, and also the description of the uprising in Khalidi (n 11) 213.

¹⁵ Korn (n 7) 72.

Meanwhile, those affiliated with the Islamic opposition organisations did not seek to reunite the Prisoners' Movement and focused on their internal activities.¹⁶ Overall, while some internal structures remained, the strict regimes and inter-organisational cohesion which had characterised the early 1990s Movement, gradually faded.¹⁷

This chapter analyses how these post-Oslo developments - the weakening of the Prisoners' Movement, the relocation of prisoners inside Israel and civilianisation - allowed Israel to redefine its penal practices against Palestinians. I argue that the IPS capitalised on the post-Oslo conditions to further fracture the Prisoners' Movement and tighten its control over prisoners. Thirty years after Oslo, the IPS developed a form of punishment that is much more unified, coordinated, and conducive to Israel's management of the conflict.¹⁸

The chapter's structure builds around three thematic discussions about the operation of prisons since 1990. In order to stick to the topical examination of the IPS policies, the chapter deviates at times from chronology. A timeline is followed, however, within the separate sections.

The chapter's first section discusses the transfer of prisoners and the take-over of the IPS as two major changes that shaped the punishment of Palestinians in Israel from 1990 to the early 2000s. The second section delves deeper into the IPS policies since 1990. It shows how, from the early 2000s, the IPS has standardised its approach and developed a model of ultra-securitised incarceration, in which militarised special units take over wings and intelligence officers recruit collaborators in prison. The section discusses how the IPS maintained the mechanism of self-governance and built on internal Palestinian divisions to create a more sustainable, securitised, form of incarceration. The third section examines the new challenges Palestinian prisoners pose to the IPS, by using smartphones and individual action. These include administrative detainees' hunger strikes, which undermine Israel's power to imprison without trial, and petitions for rehabilitation, which contest the universal policy against all incarcerated Palestinians.

¹⁶ Rosenfeld (n 4) 18-19.

¹⁷ Bernstein (n 4) Ch 6-8.

¹⁸ Yaacov Bar-Siman-Tov, 'Dialectic between Conflict Management and Conflict Resolution' in Yaacov Bar-Siman-Tov (ed), *The Israeli-Palestinian Conflict: From Conflict Resolution to Conflict Management* (Palgrave Macmillan 2007); For another analysis on civilianisation, which focuses on the creation of a single 'carceral state' that operates beyond Israel's formal sovereign boundaries, see Smadar Ben-Natan, 'The Boundaries of the Carceral State: Accounting for the Role of Military Incarceration' (forthcoming, 2023) *Theoretical Criminology*.

A. Post-Oslo Reality: Relocation and Civilianisation

The Transfer of Incarcerated Palestinians into Israel

In the early 1990s, Israel held incarcerated Palestinians in facilities inside its borders and in the Occupied Territories. The IPS oversaw the built facilities, while the military-operated detention camps combined tents with built barracks. The military and the IPS both recognised the internally elected leadership and allowed Palestinians to maintain self-governing bodies.¹⁹

In October 1995, following the signing of the Oslo II Accord, Israel officially closed all its detention facilities in the Occupied Territories.²⁰ The remaining prisoners were transferred into facilities within Israel, in an act that violated the Fourth Geneva Convention, which prohibits the forced relocation and incarceration of Protected Persons outside the occupied territory.²¹ The Supreme Court of Israel had already upheld Israel's policy of incarcerating Palestinians within its borders in 1988,²² and it reiterated this position in *Yesh Din v The IDF Commander* (2010).²³ In both cases, the Court ruled that emergency regulation overcomes international humanitarian law provisions and that interpretations of the Fourth Geneva Convention must consider the local circumstances of the Israeli-Palestinian conflict.²⁴

The transfer of prisoners meant that the IPS was no longer incarcerating Palestinians amid a 'hostile population',²⁵ but rather in remote areas within Israel. The move increased the IPS' control over its facilities and their inhabitants. It enabled to prevent protests at prison gates and to limit visits from the Occupied Territories, due to the securitised process of obtaining entry permits and the rules prohibiting Palestinians to travel to prisons independently.²⁶ Post-Oslo

¹⁹ Uri Timor, 'The Evolution of Prisons in Israel' (2009) 12 Tzohar 7, 16 [Hebrew]; Anat Ziso, Inspection Visit in Incarceration Facility 384, Addressed to the Military Attorney General, 26 December 1993 (Israel Defense Forces & Defense Establishment Archives); Gortler (n 4) 173.

²⁰ Protocol no 10 of the State Control Committee Meeting, 14th Knesset (12 August 1996) 8; Ofer Camp was reopened in 2002.

²¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 49, 76 (The Fourth Geneva Convention).

²² HCJ 253/88 *Sajdiya v Ministry of Defence* (8 November 1988).

²³ HCJ 2690/09 *Yesh Din v The IDF Commander in the West Bank* (28 March 2010).

²⁴ Ibid, par 6-7 of President Beinisch's judgment; *ibid*; *Sajdiya v Ministry of Defence* (n 22) par 6 of President Shamgar's judgment.

²⁵ Israel Prison Service, *Annual Report 1967* (1968) 151.

²⁶ The International Committee of the Red Cross assists families by applying for permits and providing shuttles to prisons; Michael Sfard, 'Devil's Island: The Transfer of Palestinian Detainees into Prisons within Israel' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011); International Committee of the Red Cross, *Annual Report 2019* (2020) 455.

prisoners found themselves even more isolated from their families and communities, especially given the lack of access to phones. Since Oslo, Israel has also prohibited family visits for long periods, in further violation of international humanitarian law and human rights law.²⁷ The isolation of Palestinian prisoners rendered the remote Israeli prison a penal colony, a ‘devil’s island’ as Sfard commented, which is cut off from the Occupied Territories by ‘an ocean of walls, checkpoints and a bureaucracy of segregation’.²⁸

The relocation of prisoners raised serious difficulties. As the Prisons Deputy Commissioner explained to the Knesset²⁹ State Control Committee, the IPS was particularly concerned that prisoners would attempt to resist through hunger strikes that could potentially escalate to protests outside prisons. To avoid this scenario, the IPS moved incarcerated Palestinians between facilities in the West Bank for two weeks, in a deliberate bid to disorient them. Eventually, they were relocated to Israel with no prior notification. The transfer operation was considered a success as it occurred without escapes or protests.³⁰ It seems unlikely that prisoners were entirely unaware of the IPS plans as they were moved between facilities. Nevertheless, back then, many still expected to be released following the Oslo Accords, and so it is probable that at least some avoided protests and attempted escapes, which might have earned them a new conviction.

Regardless of prisoners’ reactions, the transfer operation violated customary international humanitarian law and human rights law, by intentionally denying incarcerated people information regarding their place of detention.³¹ While the operation had a declared preventive end of avoiding disturbances, it indiscriminately imposed a particularly harsh

²⁷ Sigi Ben-Ari and Anat Barsella, ‘Family Visits to Palestinian Prisoners Held Inside Israel’ in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press 2011) 203; Oriana Almasi, *Prison Conditions of Security Prisoners in Israel Prison Service Facilities* (Knesset Research and Information Center, 2015) 16; Alon Margalit, ‘Accounting for Those in the Hands of the Belligerent: Security Detainees, the Missing and the Dead in the Israeli–Hammas Conflict’ (2020) 25 J Conflict & Security L 565; The Fourth Geneva Convention (n 21) art 116; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I: Rules (International Committee of the Red Cross 2005) rule 126; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Doc A/RES/43/173, 9 December 1988) principle 19; Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (UN Doc A/RES/70/175 17 December 2015) rule 58(b).

²⁸ Sfard (n 26) 188.

²⁹ Israel’s legislative authority.

³⁰ State Control Committee Meeting (12 August 1996) (n 20) 9.

³¹ The Fourth Geneva Convention (n 21) art 128; Henckaerts and Doswald-Beck (n 27) rule 105, which requires the Detaining Power to provide information on internees’ whereabouts to family members; UN Body of Principles (n 27) principle 12; Mandela Rules (n 27) 7(c), 9, 68.

transfer process on all Palestinians. In line with the IPS' categorical approach, the operation imposed tougher conditions based on Palestinian identity rather than individual risk. At the very least, such generalised practice indicates an indifference to the suffering of incarcerated Palestinians. Moreover, the transfer operation did not aim to prevent future offences but hamper Palestinian protest. The operation aligned the IPS' tactic with Israel's general strategic use of penal power to repress violent and nonviolent Palestinian resistance.

As Prisons Commissioner Aryeh Bibi explained, the IPS worked hard to be 'Zionist', in the sense of fully compliant with the Government's plan to evacuate prisons in the West Bank. Eventually, 1,357 incarcerated Palestinians were moved into Israel in October 1995. The military took in 766 'light' prisoners, serving sentences of up to five years, to its facilities, and the remaining 591 'heavy' prisoners were moved into IPS prisons.³² The rushed transfer of prisoners into Israel also meant that the IPS had to make several security compromises, as it struggled to provide prison space that met the high standards required for holding security prisoners. It eventually resorted to renovating prison cells in which Palestinians were already housed, which was far from ideal.³³ Perhaps inevitably, in August 1996, two prisoners managed to escape Ashmoret prison, in central Israel, which 'did not earn us any respect', as the Minister of Public Security, Avigdor Kahalni, exclaimed.³⁴ The IPS' commitment to 'Zionism' garnered fierce criticism for its failure to prevent escapes. This was another blow to the organisation's reputation and its guards' 'morale'.³⁵ As the next section discusses, concerns over potential escapes, dictated much of the IPS' policy towards Palestinians in subsequent years.

Numbers Increase Prompts the Civilianisation of Incarceration

Until the early 2000s, the number of incarcerated Palestinians remained relatively low, rarely exceeding 2,500 in both military and IPS facilities.³⁶ In March 2002, Israel launched operation 'Defensive Shield', reoccupying Palestinian cities in the West Bank and reinstating mass arrests,

³² State Control Committee Meeting (12 August 1996) (n 20) 9.

³³ Ibid, 11.

³⁴ Ibid, 4.

³⁵ Idan Grinbaum, "'Give a Prisoner Education and Rehab, but first, Guard Him'" (2006) 17 Seeing Shabas - J Israeli Prison Service 30, 31 [Hebrew]

³⁶ B'Tselem, 'Statistics on Palestinians in the custody of the Israeli security forces' (n 8).

in an effort to eradicate the operation of Palestinian organisations.³⁷ By October 2002, incarceration rates increased up to 4,600 prisoners.³⁸ The military reopened two tents detention camps - Ofer, inside the West Bank, and Ktziot, in South-West Israel, near the Egyptian border. But this was insufficient.³⁹ For Government ministers and representatives of the Israel Security Agency, prison space was a burning issue since Israel's ability to thwart Palestinian attacks depended on its capacity to arrest and interrogate suspects.⁴⁰ Prison space was in short, cast as a matter of national security, required for pursuing the Government's strategic plans against Palestinian organisations.

Notwithstanding the discourse around security needs, the increase in detainees prompted military officials to demand the end of military detention. Senior commanders reasoned that the military lacked the professional knowledge to run prisons and that the increase in detainees diverted too many soldiers away from the military's main combat role.⁴¹ The IPS fiercely objected, arguing that there was already a serious shortage in prison space and that incarcerating Palestinians was preventing the IPS from fulfilling its primary role of imprisoning and rehabilitating 'criminal prisoners'.⁴² Even Israel's prison authority saw the incarceration of Palestinians as a special, separate, task. No state agency was willing to assume full responsibility for holding Palestinian security prisoners.

Subsequently, Israel's Prime Minister Ariel Sharon determined that from January 2003, the IPS would gradually take over the task of incarcerating Palestinians in Israel.⁴³ As former Prisons Commissioner Yaacov Ganot noted, the IPS was to become the central incarceration authority in Israel,⁴⁴ building on the professional experience it holds in running prisons.⁴⁵ Formally, the Prime Minister's decision meant the civilianisation of incarceration. However, as this chapter argues, the IPS did not draw back from high standards of security or equate the

³⁷ Prime Minister Ariel Sharon, *Speech at the 296 Meeting of the 15th Knesset* (8 April 2002).

³⁸ Ministry of Public Security, *Security Detainees - Presentation to the Ministries of Treasury and Public Security* (State Archive (GL-49170/11)).

³⁹ Ibid.

⁴⁰ Ibid; Tali Bashan, 'Saluting the IPS' (2004) 12 *Seeing Shabas - J Israeli Prison Service* 7 [Hebrew].

⁴¹ Ministry of Public Security (n 38).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The Police and the Israeli Security Agency still detain suspects during their interrogation.

⁴⁵ Tali Bashan, 'The Officer Leaves, the Gentleman Stays' (2007) 20 *Seeing Shabas - J Israeli Prison Service* 4, 6 [Hebrew].

treatment of Palestinian security prisoners with their ‘criminal’ counterparts. Rather, it developed its distinct securitised approach to Palestinians even further.

Like the military, the IPS was not prepared to staff all the new facilities. The solution was that the military would continue to provide soldiers on mandatory service,⁴⁶ who would work alongside the IPS personnel.⁴⁷ Eighteen-year-old soldier guards were given IPS uniforms, and while their presence officially ‘militarised’ the facilities, they were not necessarily the cause of the militarisation of prisoners’ treatment. For the IPS, the presence of young guards, was a mixed blessing, as they often created disciplinary issues, for instance around absenteeism, while generating further security concerns due to staff shortage.⁴⁸

At the same time, military facilities had a slightly different management culture than IPS prisons. As a former soldier guard notes, commanders of facilities sought to achieve ‘quiet’, which in Hebrew refers to a smooth, disruption-free operation, at all costs. Soldiers were instructed not to interrupt the organisations’ daily routines and to avoid any confrontations with Palestinians.⁴⁹ As the chapter further shows, even though ‘quiet’ was a guiding principle in IPS facilities as well, civilianisation led to a gradual change in the prisons management methods.

Benevolence, Securitisation, or Legitimisation?

The IPS’ takeover of the incarceration of Palestinians introduced several seemingly benevolent changes to prisoners’ conditions. First, the IPS transferred some of those imprisoned from tents to barracks, which was a significant improvement in their material conditions.⁵⁰ These efforts mirrored the IPS’ renovations of the old prisons in the Occupied Territories after the 1967 war.⁵¹ The improvement of conditions in Israeli facilities was also mentioned by the Supreme Court when it explained its decision to uphold the transfer of Palestinians outside the Occupied Territories.⁵² While better conditions should not be discounted, they also contributed to

⁴⁶ All 18-year-old Israeli citizens must perform mandatory military service, however, Palestinian citizens are exempt; Defence Service Law (Consolidated Version), 5746-1986, s 13.

⁴⁷ Timor (n 19) 21.

⁴⁸ Aviv Mesika, ‘Ofar’s Ofarim’ (2008) 24 Seeing Shabas - J Israeli Prison Service 3 [Hebrew].

⁴⁹ Grinbaum (n 35) 31.

⁵⁰ Orit Scheltzer, ‘Ktziot is Ours’ (2006) 16 Seeing Shabas 3 [Hebrew]; Mesika (n 47) 3.

⁵¹ Israel Prison Service, *Annual Report 1967* (n 25) 151; Israel Prison Service, *Annual Report 1969* (1970) 131.

⁵² *Yesh Din v The IDF Commander in the West Bank* (n 23) par 13.

legitimising Israel's penal practices against Palestinians, who faced more reasonable terms of imprisonment. Moreover, the move from tents to barracks also had a security rationale. IPS personnel report that prisoners from different tents could communicate by shouting at one another, and could spread information, coordinate attacks, or initiate protests more easily.⁵³ The built barracks allowed guards to control the prisoners better and closely monitor cross-cell and wing communication. Yet, the 2017 Supreme Court's decision on prison overpopulation led the IPS to open new tent wings to abide by Israel's statutory living standard of 4.5 sqm per person.⁵⁴ Constitutional obligations and financial restraints forced the IPS to compromise its security standards once more and hold its arguably most dangerous population in makeshift detention facilities.⁵⁵

In addition to improving material conditions, the IPS takeover also led to a separation between Palestinian minors and adults, who until then were housed together in military facilities.⁵⁶ The separation was in line with Israeli law,⁵⁷ and international human rights law, which require the separation and rehabilitation of incarcerated children and youth.⁵⁸ Once again, however, this change had a mixed effect. On the one hand, the separation has benefited some young prisoners since they are now no longer affiliated with organisations and they are not subjected to the strict hierarchies of the organisations' wings.⁵⁹ On the other hand, incarcerated adult Palestinians had previously provided children around them with emotional and material support, while shielding them from guards and helping them to communicate with prison authorities.⁶⁰ When the IPS separated minors, it replaced that system of support by allocating

⁵³ Mesika (n 48) 4-5.

⁵⁴ HCJ 1892/14 *The Association for Civil Rights in Israel v Minister of Public Security* (13 June 2017).

⁵⁵ Israel Prison Service, *Annual Report 2019* (2020) 99.

⁵⁶ Hedi Viterbo, 'Security Prisoners' in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds), *The ABC of the OPT* (Cambridge University Press 2018) 393.

⁵⁷ The Prisons Ordinance [New Version], 5732-1971, s 10a(1); The Youth Act (Adjudication, Punishment and Methods of Treatment), 5731 – 1973, s 34b(a).

⁵⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1755 UNTS 3, art 37(c); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 10.2(b) and 10.3; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (UN Doc A/RES/40/33, 29 November 1985), art 13.4; United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules) (UN Doc A/RES/45/113, 14 December 1990), art 29; Mandela Rules (n 27) art 11(d).

⁵⁹ Abeer Baker (Discussant), Hedi Viterbo, *Problematising Law, Rights and Childhood in Israel/Palestine Book Launch* (2021).

⁶⁰ Naama Baumgarten-Sharon, *No Minor Matter* (B'Tselem, 2011) 60; Philip Veerman and Adir Waldman, 'When can Children and Adolescents be Detained Separately from Adults? The Case of Palestinian Children Deprived of Their Liberty in Israeli Military Jails and Prisons' (1996) 4 Int'l J Child Rights 147, 154.

several adult prisoners to each youth wing.⁶¹ The IPS did not, and still does not, offer young Palestinians any of the rehabilitation and support services it offers to ‘criminal’ youth.⁶² So, the IPS separation represented a model of ‘thin’ compliance with international humanitarian law, by merely separating young people while failing to provide them with the substantial protections and services they need. Furthermore, the separation also took apart a system of intergenerational connections that existed for decades, which nurtured young Palestinians through support and political education. Separating minors could be seen as another part of the IPS divide-and-rule strategy, which uses divisions to weaken the general Prisoners’ Movement and make the control of incarcerated Palestinians easier.⁶³

Studying the process of civilianisation reveals important differences between how the IPS and the military treat incarcerated Palestinians. When the IPS took over, it encountered various challenges in running the military’s facilities. The military’s tent barracks, 18-year-old guards, and nonconfrontational approach did not meet the IPS security standards.⁶⁴ Such practices seem to imply that for the military, incarcerating Palestinians was a transient mission, even though it has been imprisoning this population for decades. Incarcerating Palestinians was part of the military’s response to escalations, following popular uprisings or large-scale operations. The military’s focus was immediate incapacitation, rather than broader penal rationales, like retribution and the prevention of future crimes, which might have entailed harsher conditions and closer monitoring of prisoners. Having the military incarcerate Palestinians also draw a direct line between the hostilities and the imprisonment of Palestinians, which symbolically portrayed them as war captives, rather than administrative detainees, defendants, or sentenced prisoners.

Following the developments of the early 2000s, the failure of the Camp David Summit, the Second Intifada, and Operation ‘Defensive Shield’, the Israeli Government acknowledged

⁶¹ Itzik Lerner, *Megiddo* (The New Fund for Cinema and Television 2017) episode 3.

⁶² CrimApp 8639/13 *Eldabas v The State of Israel* (17 March 2014) par 16; Public Defence Office, *Conditions of Detention and Imprisonment in the Prison Service Facilities 2019-2020* (Ministry of Justice, 2021) 59; Defence for Children International - Palestine, *Bound, Blindfolded and Convicted: Children Held in Military Detention* (2012) 48.

⁶³ Hedi Viterbo, ‘Rights as a Divide-and-Rule Mechanism: Lessons from the Case of Palestinians in Israeli Custody’ (2018) 43 *Law & Soc Inquiry* 746, 771.

⁶⁴ Grinbaum (n 35) 31; Mesika (n 48) 3.

that mass incarceration was no longer a temporary measure and that the number of captured Palestinians was likely to increase in the coming years.⁶⁵ The Government's realisation drove forward the shift from temporary incarceration in military facilities to permanent and professional IPS facilities. This shift did not only aim to improve Israel's capacity to imprison Palestinians but also to normalise its extensive security enforcement, as part of a general move towards conflict management, rather than resolution.⁶⁶ During the same years of the early 2000s, the proliferation of security measures in liberal democracies like the US, the UK and members of the European Union also contributed to the normalisation of Israel's longstanding security apparatus.⁶⁷

Through relocation and civilianisation Israel created a more sustainable, controlled, and permanent form of incarceration, that was also conducive to legitimising its practices. The next section analyses the IPS policies, going back to the early 1990s to examine how it gradually developed its ultra-securitised approach to Palestinians.

B. The Post-Oslo IPS: Ultra-Securitisation and Division

The IPS' policy towards Palestinians since the Oslo Accords has varied considerably. Often, it appears that Israeli governments have lacked a plan, leaving its Prisons Commissioners to dictate much of the penal regime. Occasionally, external factors, like ongoing negotiations or escalations have led the Government to impose instructions that contradict the incumbent Commissioner's approach or to force extensive changes on the IPS.⁶⁸ Nevertheless, over the past thirty years, the IPS has created a standardised and ultra-securitised incarceration model for Palestinians. To discuss how this model came about, I wish to go back to the year 1990, just before the signing of the Oslo Accords.

⁶⁵ Ministry of Public Security (n 38).

⁶⁶ Bar-Siman-Tov (n 18) 9.

⁶⁷ Kent Roach, *The 9/11 Effect* (Cambridge University Press 2011) 102.

⁶⁸ Illy Goldberg, 'Security Prisoners: The Dynamic between the Prisoners and the Palestinian Society and its Relationship to National Security in Israel (2000-2007)' (National Defence College 2008) 45.

Recognising the Incarcerated Palestinian Leadership

By 1990, the IPS *de facto* allowed Palestinians to self-govern in their wings. In 1987, new Prisons Commissioner Shaul Levi assumed a different approach than its predecessor. Levi spoke Arabic, and reportedly ‘got along great with the prisoners’⁶⁹ while regularly negotiating with their leaders.⁷⁰ As in the military facilities, Levi seemed to prioritise ‘quietly’ operating prisons, with few protests and escapes as possible.⁷¹ However, he did not build an overarching policy that will guide wardens on how to engage with Palestinian self-government and whether to limit the prisoners’ internal activities, and these matters were determined on a local basis in the different prisons.⁷²

In 1991, a report by the Internal Comptroller for the Office of Public Security criticised Levi’s approach.⁷³ The report highlighted the lack of consistency across different facilities and found that the elected leadership pulled too many strings in prison, deciding on prisoners’ allocation, work and whether they could visit the clinic or speak to the warden.⁷⁴ The Comptroller argued that prison authorities became weak, as:

[...] The [prisons’ – RNH] management and the prisoners realised that the IPS senior management values quiet so much that in the power struggle inside the prison, the balance is in favour of the prisoners.⁷⁵

Ministers for Public Security and Prisons Commissioners often responded to such criticism by explaining that any special conditions aimed to provide for humanitarian needs, without compromising security standards.⁷⁶ So, for instance, while the IPS allowed joint activities like Friday prayer summons, guards would inspect the summon beforehand and would listen in, to make sure it did not include ‘inciting’ content.⁷⁷ At the same time, material benefits, like TV sets

⁶⁹ Protocol no 162 of the Internal Affairs and Environment Committee Meeting, 15th Knesset (24 September 2000) 16.

⁷⁰ Ibid, 16.

⁷¹ Ibid, 14; Protocol no 7 of the Internal Affairs and Environment Committee Meeting, 13th Knesset (16 November 1992) 9.

⁷² Protocol no 200 of the Internal Affairs and Environment Committee Meeting, 12th Knesset (9 July 1991) 23; Internal Affairs Committee Meeting (24 September 2000) (n 69) 16.

⁷³ The report was not published but was paraphrased in the Internal Affairs Committee Meeting (9 July 1991) (n 72) 9–10.

⁷⁴ Internal Affairs Committee Meeting (24 September 2000) (n 69) 16.

⁷⁵ Internal Affairs Committee Meeting (9 July 1991) (n 72) 10.

⁷⁶ Protocol no 277 of the Internal Affairs and Environment Committee Meeting, 11th Knesset (5 October 1987) 7; Internal Affairs Committee Meeting (24 September 2000) (n 69) 8, 14; Protocol no 102 of the Internal Affairs and Environment Committee Meeting, 14th Knesset (25 June 1997) 22.

⁷⁷ Internal Affairs Committee Meeting (9 July 1991) (n 72) 24.

within cells, kept prisoners occupied, and contributed to prison order.⁷⁸ The comptroller was not convinced and argued that Palestinians were taking advantage of ‘humanitarian needs’ to organise ‘nationalist’ activities inside prison.⁷⁹ He concluded that elected leaders did not mediate between the prison and the prisoners, as the IPS claimed, but sought to gain full control within their wings.⁸⁰

In taking this view, the Comptroller disregarded just how powerful the Prisoners’ Movement was in the early 1990s. The Movement’s capability to organise mass protests that traversed prison walls placed a lot of pressure on the IPS to cooperate with elected leaders.⁸¹ As the last chapter discussed, Prisons Commissioners who thought otherwise, like Maimon in 1987, and Amir in 1992, lost their positions.⁸² The external impact of the Prisoners’ Movement forced the IPS to learn how to delicately balance recognising the elected leadership while acting to limit their impact in and outside prison. The mass prisoners’ release during the Oslo Accords gave the IPS the break it needed to reset its relationship with incarcerated Palestinians.

An Odd ‘Win-win’: Making Incarceration More Tolerable with Palestinian Funding

The rise of the Prisoners’ Movement was closely connected with the financial and moral support it received from the Palestinian public.⁸³ After the 1987 First Intifada, new NGOs began institutionalising the support of incarcerated Palestinians by monitoring and promoting their rights in Israeli prisons.⁸⁴ After the Oslo Accords, the Palestinian Authority’s newly established Ministry of Prisoners Affairs assumed responsibility for improving prison conditions and negotiating prisoners’ rights with the IPS.⁸⁵ The Ministry further introduced an expansive system of regular financial support to prisoners and their families, which operates to this day. Through

⁷⁸ Internal Affairs Committee Meeting (16 November 1992) (n 71) 8.

⁷⁹ Internal Affairs Committee Meeting (9 July 1991) (n 72) 29.

⁸⁰ Internal Affairs Committee Meeting (24 September 2000) (n 69) 16.

⁸¹ Gortler (n 4) 131.

⁸² Goldberg (n 68) 50.

⁸³ Rosenfeld (n 4) 15.

⁸⁴ Notable organisations are the Prisoners’ Club (Nadi el’Assir) and Addameer Prisoner Support and Human Rights Organisation; Ibid, 16; Bernstein (n 4) 176; On October 2021, the Israeli government declared Addameer as a terrorist organisation, based on alleged connections with the Popular Front for the Liberation of Palestine; Ranu Ayyub, ‘Israel Designates Palestinian Civil Society Groups as Terrorists, U.N. ‘Alarmed’ *Reuters* (22 October 2021) <<https://www.reuters.com/business/aerospace-defense/israel-designates-six-palestinian-civil-society-groups-terrorists-2021-10-22/>> accessed 31 October 2022.

⁸⁵ Bernstein (n 4) 179.

this system, Palestinians receive monthly allowances, to purchase goods from the prison store,⁸⁶ alongside salaries that are calculated according to the length of their sentence and are paid to prisoners' families.⁸⁷ In 2010, salaries ranged between 2,000 NIS (£332) per month for those serving a term of 3-5 years and up to 12,000 NIS (£1,990) for those serving sentences longer than 30 years.⁸⁸ Released prisoners receive grants which are also determined by how many years they spent behind bars.⁸⁹ In the impoverished Occupied Territories, where, in 2017, 29% of the population lived in poverty and 4,300 NIS was the average monthly household expenditure, the salaries and grants provide crucial financial support.⁹⁰ But the funds are not distributed equally. Released prisoners have indicated that salaries and grants depended on their loyalty to the Palestinian Authority.⁹¹ A report by the Israeli Jerusalem Centre for Public Affairs similarly argued that the Palestinian Authority reduced the grants for released members of opposition groups, like Hamas and Islamic Jihad, in 2015.⁹²

The Palestinian Authority's involvement changed the dynamics inside Israeli prisons. Its financial support system improved incarcerated Palestinians' quality of life, as they could afford the high-priced products of the IPS canteen, which were double the price of items in the Occupied Territories.⁹³ Families accordingly reported how considerable parts of the salaries funded life inside.⁹⁴ Some prisoners and their families saw the financial support as 'hush-money', which aimed to silence the critique of post-Oslo prisoners against the Palestinian Authority.⁹⁵ The Palestinian Authority's involvement in promoting better prison conditions also

⁸⁶ The allowance ranges between 350-450 NIS each month; Ibid, 181; Elisha Ben Kimon, 'With the State's Approval: Security Prisoners Receive Funding from the Palestinian Authority' *YNET* (9 August 2021) <<https://www.ynet.co.il/news/article/bku45ht1f>> accessed 31 October 2022.

⁸⁷ Yossi Kuperwasser, *Incentivizing Terrorism: Palestinian Authority Allocations to Terrorists and Their Families* (Jerusalem Centre for Public Affairs, 2016) 21; Rita Giacaman and Penny Johnson, "'Our Life is Prison': The Triple Captivity of Wives and Mothers of Palestinian Political Prisoners' (2013) 9 *J Middle East Women's Stud* 54, 68.

⁸⁸ According to the Israeli Jerusalem Centre for Public Affairs, reportedly based on a Palestinian Authority Government decision from 2010. GBP rates are calculated according to the 6.03 conversion rate of 2010. I have not found a more recent trustworthy source regarding the Palestinian Authority's funding schemes; Kuperwasser (n 86) 11 and appendix 1.

⁸⁹ The sums are recorded in USD, and range between \$1500 to those who served between 1 to 3 years in prison and USD 25,000 to those who served 30 years behind bars; *ibid*, appendix 2.

⁹⁰ The statistics for the Gaza Strip are significantly worse than those for the West Bank. 53% of the Gaza Strip population lives in poverty, compared to 13.9% of the West Bank population. Poverty rates are calculated using the standard of monetary poverty, as noted in the Palestinian Central Bureau of Statistics report; Palestinian Central Bureau of Statistics, *Palestine in Figures 2020* (Ramallah - Palestine, 2021) 26.

⁹¹ Bernstein (n 4) 183.

⁹² Kuperwasser (n 87) 12.

⁹³ Giacaman and Johnson (n 87) 68; This is often explained by Israel's high living costs and its added 17% VAT.

⁹⁴ *Ibid*.

⁹⁵ Gortler (n 4) 181; Bernstein (n 4) 182.

moved those incarcerated to the backseat in their own struggle.⁹⁶ Moreover, by advocating prisoners' rights, the Palestinian Authority effectively accepted the reality in which Israel continued to imprison Palestinians, and neglected the goal of releasing all captives.⁹⁷

Subsequently, the Palestinian Authority's support created a peculiar win-win situation for all, but the people incarcerated. The Authority earned political credit from the Palestinian public for taking care of those held in Israeli prisons and used its resources to silence potential opposition. Meanwhile, the IPS enjoyed external funding that granted prisoners a better standard of living, despite the harsh conditions of its overpopulated facilities.⁹⁸ For prisoners, the regular support improved conditions, and yet it concurrently had a legitimising effect on their captivity by making their life in Israeli prisons only slightly more tolerable.

As Chapter Five details, Israeli politicians also capitalised on the funding schemes for delegitimising the Palestinian Authority as it rewards 'terrorists'. In 2014, criticism by foreign donor governments over the funding schemes, led the Authority to turn its Ministry of Prisoners Affairs to an external Commission. Nevertheless, the Authority continues to fund the financial support mechanisms, which all remained in place.⁹⁹

The Standardisation of the IPS Regime

Despite the Comptroller's critique of inconsistent policies in 1991, it took the IPS several more years to begin standardising its treatment of Palestinians. In 2000, following a cross-organisation hunger strike, an internal IPS Committee recommended improving conditions and unifying the policy towards Palestinians.¹⁰⁰ Based on the Committee's recommendations, newly appointed Commissioner Orit Adato, the first woman Prisons Commissioner, led the inscription of the special regime in commission ordinances. The two main commission ordinances that currently regulate Palestinians' classification and conditions were instated then.¹⁰¹ Following the 2000

⁹⁶ Ibid, 179.

⁹⁷ Giacaman and Johnson (n 87) 70.

⁹⁸ Daka (n 6) 240.

⁹⁹ Kuperwasser (n 86) 14; Bernstein (n 4) 178.

¹⁰⁰ Korn (n 7) 75.

¹⁰¹ Prison Service Commission Ordinance 04.05.00 'Procedure for Classifying a Security Prisoner' (updated on 28 February 2018); Prison Service Commission Ordinance 03.02.00 'Rules Regarding Security Prisoners' (updated on 15 November 2020).

strike, the first versions of the commission ordinances prescribed visits with no security partitions, allowed prisoners to move between wings and even permitted furloughs.¹⁰² But the Ordinance on prison conditions also included provisions that weakened cross-organisational ties. Namely, it did not recognise the joint dialogue committees which included members of different organisations. Instead, it formalised the role of a single elected wing speaker, who had to be confirmed by the warden, and was to communicate on matters of their own wing.¹⁰³ The Ordinance also ruled that education activities will be held within the cell only, and will be subject to inspections by guards who may cease classes that serve ‘negative needs’.¹⁰⁴ As discussed in Chapter Three, the Ordinance also allows to remove or provide ‘privileges’ to certain groups,¹⁰⁵ which could create different circumstances for different wings and inhibit joint resistance for improving conditions.

The commission ordinances standardised the IPS methods of containing, whilst controlling, Palestinian self-governance. Through these methods, the IPS could endorse ‘positive’ cooperative leaders, rather than ‘negative’ ones who incite protest and organise collective resistance.¹⁰⁶ To this day, the IPS imposes prolonged solitary confinement on prominent Palestinians in a unit specially built to house prisoners who may mobilise others.¹⁰⁷ By working with separate wing speakers and using ‘privileges’ to nurture ‘positive’ leaders, the IPS began capitalising on the decline of the Prisoners’ Movement, to deepen the internal divide and harness Palestinian leadership for its own needs. This approach aligns with Israel’s use of its collaboration with the Palestinian Authority for advancing its national security interests.¹⁰⁸ It is one of the many ways in which the IPS strategy coincides with Israel’s policy outside prison.

In the years after Oslo, the IPS moved from settling for ‘quiet’ to monitoring the internal organisations more closely and using their leadership to benefit prison management. Standardisation was key to this change, as it provided the Prisons Commissioner with greater

¹⁰² Shimon Malka, ‘Security Prisoners in Israel - A Historical Overview’ (2005) 9 Tzohar 7, 11 [Hebrew].

¹⁰³ Daka (n 6) 245; Baker (n 4) 99.

¹⁰⁴ Commission Ordinance – Rules Regarding Security Prisoners (n 101) s 21(a).

¹⁰⁵ Ibid, s 34.

¹⁰⁶ Gortler (n 4) 152.

¹⁰⁷ Bernstein (n 4) 256; Also see Netanel Dagan and Sharon Shalev, ‘The Role of Israeli Judges in Authorising Solitary Confinement Placements: Balancing Human Rights and Risk, or Neutralising Responsibility?’ (forthcoming) *Punishment & Society*.

¹⁰⁸ Hajjar (n 12) 15; Giacaman and Johnson (n 87) 69.

control over the relationships between personnel and Palestinians in different facilities. Accordingly, during these years the IPS also began to explicitly distinguish the operation of ‘security’ versus ‘criminal’ prisons in its annual reports. As the table below shows, the IPS conceived the incarceration of security prisoners quite differently:

The Role of Prisons - Israel Prison Service 1999 Annual Report¹⁰⁹

Prisons for ‘criminal prisoners’	Prisons for security prisoners
Holding prisoners in custody whilst guaranteeing the rareness of escapes.	Holding prisoners in custody whilst absolutely preventing escapes.
Managing prisoners for safeguarding their personal safety.	Managing prisoners for safeguarding their personal safety.
Fighting drugs within prisons.	Taking measures to prevent associations and negative leadership in prison.
Encouraging prisoners to participate in correctional activities	Preparing for emergencies with the help of the security forces.
Providing basic services ¹¹⁰ to all prisoners and an enhanced set of services to those found eligible.	Guaranteeing guards’ physical safety and pursuing their welfare and personal growth.
Guaranteeing guards’ physical safety and pursuing their welfare and personal growth.	Performing maintenance works to improve prisoners’ living conditions.
Maintenance of facilities.	

As this table indicates, the IPS special approach to security imprisonment included the strategy of oppressing ‘negative’ leadership and omitted any reference to rehabilitation, which is listed as one of the goals of ‘criminal’ incarceration. Two further important differences capture the securitised approach to Palestinians: the focus on completely preventing security prisoners’ escapes and the ongoing collaboration with external security agencies, like the military and the Israeli Security Agency. This table appeared in the IPS’ reports only between 1999 and 2002, and yet it reveals underlying the essentially different goals and priorities regarding security prisoners.

Since 2000, the IPS has developed a formal separate approach to Palestinians that recognised self-governance yet incorporated various tools to weaken the Prisoners’ Movement.

¹⁰⁹ Israel Prison Service, *Annual Report 1999* (2000) 6-7.

¹¹⁰ The report here most likely refers to educational, vocational and rehabilitation services.

Prisons Commissioner at the time, Adato, sees this approach as pragmatism that did not only benefit prison order but contributed to Israel's general interests as well.¹¹¹ Like other IPS personnel and security researchers, Adato argues that Palestinians become more 'moderate' in Israeli prisons.¹¹² She describes that the price of prolonged imprisonment and the daily encounter with Israeli guards, drive Palestinians to prioritise diplomatic solutions over armed struggle. Better conditions and acknowledging 'moderate' leaders, support this 'moderation' process.¹¹³ Members of Islamic organisations, however, are excluded from this proposition, given their supposedly strict political orientation.¹¹⁴ Adat argues that fostering moderation advances security by encouraging Palestinians to disengage from terrorist organisations. Former Warden Illy Goldberg takes this approach even further and argues that the IPS should propose rehabilitation to 'moderate' prisoners and help them become Palestinian 'change agents'.¹¹⁵ Adato and Goldberg propose to use imprisonment for greater preventive ends that benefit Israel's interests. Their approach seems to undermine the IPS' categorical perception which sees all Palestinians as equally dangerous, yet not by recognising Palestinians' individual rights, but by using the moderation of some to benefit Israel's national security. Nevertheless, as I discuss below, this approach did not prevail as Adato's successor turned to intense securitisation rather than moderation and rehabilitation.

Ultra-Securitisation

The daring escapes of the 1980s and 1990s deeply influenced the IPS' approach to security in Palestinian wings. Two important steps were taken as a result. First, the IPS expanded its intelligence apparatus by creating the role of the intelligence officer, to be stationed in every prison. Intelligence officers were to interview every new prisoner, monitor the cells and wings closely, recruit informants and collect information on organisational activities inside and outside

¹¹¹ Gortler (n 4) 144.

¹¹² Ibid; Goldberg (n 68) 42; Lt Col Res Yochanan Tzoreff, 'The Palestinian Security Prisoners' (The Van Leer Jerusalem Institute, 29 March 2005).

¹¹³ Gortler (n 4) 144.

¹¹⁴ Ibid; Goldberg (n 68) 42; Tzoreff however argues that Hamas prisoners are going through moderation as well; Tzoreff (n 111).

¹¹⁵ Goldberg (n 68) 78.

the prison.¹¹⁶ These staff members also worked closely with external bodies and regularly forwarded information collected in prison to the Israeli Security Agency.¹¹⁷ Secondly, following the 1996 escapes, the schedule for night-time counts was varied so that prisoners would not know when to expect the guards.¹¹⁸ Like standardisation, these steps reflect the IPS' attempt to try to regain control over Palestinian prisoners.

When Yaacov Ganot replaced Adato as Prisons Commissioner in 2003, securitisation received a significant boost. To recall, these were the years when the number of incarcerated Palestinians was rising rapidly, following the Second Intifada and Operation 'Defensive Shield'. Some of the new detainees were involved in large-scale attacks against the Israeli civilian population and were seen as a 'new generation' of security prisoners who were 'daring, extreme, enraged with hate and rule out any dialogue with the IPS', as a former IPS officer described.¹¹⁹ Backed by the right-wing Minister of Public Security, Tzahi Hanegbi, Commissioner Ganot introduced tougher securitised policies against the so-called 'new generation'.¹²⁰ During these years, mobile phones were also first found in Palestinian wings, and they marked a serious security concern since they allowed prisoners to coordinate attacks in and out of prison.¹²¹ To counter the threat, Ganot enforced frequent cell searches in which guards would empty cells almost entirely by tossing prisoners' belongings onto the wing corridors.¹²² Strip searches were also regularly imposed on those returning from the visiting compound and court hearings.¹²³ Ganot further reinstalled glass security partitions in the visiting compound, against previous agreements with the Prisoners' Movement.¹²⁴ According to Nassar Ortani, who was incarcerated in Megiddo, an all-security-prisoners facility, Ganot's securitised routine was exhausting:

¹¹⁶ State Control Committee Meeting (12 August 1996) (n 20) 6; Naama Telem, 'Ahead of the Action' (2013) 35 Seeing Shabas - J Israeli Prison Service 10 [Hebrew].

¹¹⁷ Ibid.

¹¹⁸ State Control Committee Meeting (12 August 1996) (n 20) 11.

¹¹⁹ Malka (n 102) 9; Goldberg (n 68) 36.

¹²⁰ Bashan (n 40) 7.

¹²¹ Ibid.

¹²² For a depiction of several scenes of cell searches, see Lerner (n 61); Malka (n 102) 11; Israel Prison Service, *Security Prisoners in the Custody of the Prison Service* (2007).

¹²³ Daka (n 6) 240.

¹²⁴ Bashan (n 40) 7.

Think about it. You are asleep, early in the morning, and suddenly there is count. After the count, a search. After the search, there is a bars inspection.¹²⁵ You must go outside the cell. Then there is count again at noon and in the evening as well.¹²⁶

Ganot's securitised measures were imposed indiscriminately, making the conditions of all Palestinian security prisoners disproportionately worse, which once more implied the IPS' punitive rather than preventive motivation.¹²⁷

Ganot also established new units that specialised in responding to large-scale protests, riots and hostage-taking of guards. The first unit, carrying the supposedly fitting name Masada,¹²⁸ was built to become the IPS' elite SWAT team.¹²⁹ Masada's combatants, as they are called, are armed, masked and wear full combat gear during deployment. They specialise in seizing occupied prison cells and wings and are equipped with an array of so-called nonlethal weapons.¹³⁰ Ganot also established special district units that serve as on-call unarmed forces for 'lighter' events, such as medium-size protests and extensive cell searches.¹³¹ As explained below, Masada and the district unit mark Ganot's push towards ultra-securitisation which effectively imports military practices to better control Palestinians in civilian prisons.

A documentary series about Megiddo prison portrays the deployment of Ganot's special units.¹³² Made in 2015, the series shows how guards seized a concealed paper in a Hamas wing, which contained a caricature depicting the kidnapping of a soldier. For the warden, the note was an audacious breach that could not go unpunished. Those in the cell where the note was found were punished by lockdown. Other residents of the wing protested this response and refused to leave their cells in solidarity. The Prison Warden then deployed both Masada and the district unit. He explained to the Masada combatants that the goal of their deployment was pre-emptive:

¹²⁵ During which guards closely inspect that the bars at the cell's window are intact.

¹²⁶ Lerner (n 61) episode 3.

¹²⁷ Alon Harel, 'Who Is a Security Prisoner and Why? An Examination of the Legality of Prison Regulations Governing Security Prisoners' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto 2011) 42-43.

¹²⁸ After the ancient fortress in the Judean Desert, where in 74 CE, 960 Sicarii rebels committed mass suicide to avoid being caught by the Romans.

¹²⁹ Orit Scheltzer, 'The Warrior Behind the Mask' (2004) 12 See'ing Shabas - J Israeli Prison Service 10 [Hebrew].

¹³⁰ Naama Telem, 'The Strongest Brick in the Wall' (2013) 34 *ibid* 6, 8 [Hebrew].

¹³¹ Naama Telem, 'The Unit' (2012) 32 See'ing Shabas - J Israeli Prison Service 16 [Hebrew].

¹³² Lerner (n 61) episode 1.

We are not at war with anyone. The matter is professional, and the goal is to create deterrence. For this reason, we brought our elite forces here, to make it surgical and decisive.¹³³

The series documents Masada's method, of entering cells in the middle of the night, handcuffing, and lining up the prisoners. The district unit then took over and ordered prisoners to kneel while facing the guards, until the entire wing was under control.¹³⁴

Prison raids by special IPS units have become increasingly frequent since the early 2000s. In 2011, a prisoner in Gilboa reported that raids occurred twice a month.¹³⁵ The aftermath of these raids includes disciplinary punishments, commonly for disturbance of prison order. Punishments range from solitary confinement to collective fines, as well as temporary denial of family visits.¹³⁶ While often the declared goal of the raids is to perform a search of prison wings, they mainly seem to function as a form of collective punishment, to repress and deter future 'negative' behaviour, such as expressing solidarity with wing mates as exemplified in the Megiddo example. These late-night searches of cells resemble Israel's common military practice of 'mapping' in the Occupied Territories, in which soldiers conduct late-night raids on Palestinian homes for collecting information on the building inhabitants and structure. NGOs refer to this practice as 'an effective tool for oppressing the Palestinian population and preserving control over it for so many years.'¹³⁷ As late-night raids on homes signal the military's control over public and private spaces, so does the deployment of specialised units reinforce the IPS control over Palestinian cells and wings. By introducing late-night raids and searches behind bars, Ganot imported military methods to 'reoccupy' Palestinian spaces in prison.

¹³³ Ibid, episode 1.

¹³⁴ Ibid, episode 1.

¹³⁵ Addameer, *Aggressions by Special Units of the Israeli Prison Service against Prisoners and Detainees during Transfers and Raids* (2014) 85.

¹³⁶ Ibid, 104.

¹³⁷ Miryam Wijler and Ziv Stahl, *A Life Exposed: Military Invasions of Palestinian Homes in the West Bank* (Yesh Din, Physicians for Human Rights and Breaking the Silence, 2020) 102; In June 2021, the Israeli military notified NGOs that it will halt the practice of 'mapping' except in 'exceptional circumstances; Ilan Ben Zion, 'Israel to Halt Nighttime 'Mapping' of Palestinian Homes' *AP News* (16 June 2021) <<https://apnews.com/article/israel-middle-east-bbcd7e2345ff7b0ea9db294111e20a29>> accessed 31 October 2022.

Masada's activity also affects guards' sense of confidence, as the Unit's commander himself indicated:

Our operations definitely raise the self-image of the guard, who knows he is not the last one standing before the prisoner [...] The prisoner also now knows that guards have Masada and that he does not want to mess with us.¹³⁸

On at least one occasion, it was revealed that Masada was deployed to boost staff morale. On 22 October 2007, Masada was ordered to perform a late-night surprise search operation in a tent wing in Ktizot prison. As a Court proceeding later revealed, the operation's command paper included the declared goal of 'raising staff's morale and motivation' alongside other aims like 'detering prisoners', 'improving guards' professional skills while working with Masada' and 'seizing dangerous contraband'.¹³⁹ After the search started, prisoners in multiple tent wings responded by setting fire and throwing objects at guards. Masada then broke into all prison wings to subdue the prisoners and indiscriminately shot a supposedly nonlethal weapon into dark tents.¹⁴⁰ Fifteen prisoners were injured and one, Muhammad Ashkar, who was shot in his forehead, later died of his wounds.¹⁴¹ While the Israeli prosecution closed the criminal case against the guards involved, Ashkar's family filed a civil lawsuit and received 1.2 Million NIS from the IPS in a settlement.¹⁴² When asked whether raising morale justified the operation, and its tragic consequences, Deputy Commissioner Dov Lutzki replied affirmatively:

A guard must believe in his abilities. He must understand that his role is important. That he is protecting the homeland in how he chooses to perform his job. Any sign of weakness is immediately translated by the other side as an opportunity to achieve more gains.¹⁴³

Lutzki portrays morale as a matter that relates to security and to the reinforcement of guards' authority before the prisoners. Guards who will devalue their work or lack confidence might create 'security gaps' by showing vulnerability. So, if the guards' superiority is challenged, or if

¹³⁸ Telem, 'The Strongest Brick in the Wall' (n 130) 6.

¹³⁹ Tomer Zarchin, 'Among the Goals of the Operation which led to a Prisoner's Death - Boosting Guards' Morale' *Haaretz* (10 March 2009).

¹⁴⁰ Omri Asenheim, 'The Tape the State Tried to Hide' *Uvda* (14 April 2011) <https://www.mako.co.il/tv-ilana_dayan/2011-17/Article-d5ceda4d0bf4f21006.htm> accessed 27 October 2021; According to media reports, the IPS refused to reveal the type of nonlethal weapon which was used during the operation.

¹⁴¹ Zarchin, 'Boosting Guards' Morale' (n 139).

¹⁴² £ 196,000 according to the May 2012 rates, when the settlement agreement was signed; Tomer Zarchin, 'Israel to Pay 1.2 Million NIS to Palestinian Convict Killed in Prison Riot' *Haaretz* (3 May 2012) <<https://www.haaretz.com/1.5218967?lts=1635407827678>> accessed 31 October 2022.

¹⁴³ Asenheim, 'Uvda' (n 140).

their morale is down, Masada should be put into action. Accordingly, the internal investigative report that followed the 2007 incident noted Masada's Operation Officer's proposal to have another operation in Ktziot soon after, 'to make sure that prisoners understand the IPS' policy'.¹⁴⁴

Despite the supposed 'doomsday device' of Masada, guards' regular conduct still attests to some degree of fear of incarcerated Palestinians, as evident for instance, in the practice of preforming count in full protective gear.¹⁴⁵ Violent attacks against prison staff do occur, including stabbing and spilling boiling oil on guards.¹⁴⁶ Guards believe that they must always be prepared that prisoners may 'flip' and matters will escalate to a mass protest in minutes.¹⁴⁷ To these concerns joins the perennial fear of escapes, since, as the Commander of the IPS Security Prisoners Transfers Unit describes:

They have nothing to lose. When I hold the man behind the Park hotel terror attack,¹⁴⁸ who was sentenced to 20 life sentences, I know that he regularly collects intelligence in an attempt to plan an escape.¹⁴⁹

While the IPS personnel see Palestinians as exceptionally dangerous and unpredictable, they also pride themselves on providing professional and humane treatment. Some argue that they do so despite external political developments and despite how they are personally affected by the ongoing conflict.¹⁵⁰ As the Warden of Megiddo prison explains:

Our reality here is that while my son was fighting in Gaza during operation Tzuk Eitan [the 2014 Gaza War- RNH], I was forced, after sleepless nights, to take care of Hamas prisoners and provide for their needs.¹⁵¹

By taking this stance, of supposedly providing humane conditions regardless of the ongoing conflict, the IPS personnel positions itself as morally superior to the Palestinians it incarcerated. As the Gilboa prison Warden emphasises:

¹⁴⁴ Zarchin, 'Boosting Guards' Morale' (n 139).

¹⁴⁵ As displayed in Megiddo; Lerner (n 61) episode 1; State Control Committee Meeting (12 August 1996) (n 20) 11.

¹⁴⁶ Scheltzer, 'Terror Between the Walls' (n 1); Maya Lev, 'Staying Alive' (2007) 22 Seeing Shabas - J Israeli Prison Service 11 [Hebrew]; Naama Telem, 'Gilboa's Aspirations' (2009) 26 *ibid* 12 [Hebrew].

¹⁴⁷ Dana Bahar, 'The "Safe"' (2010) 27 *ibid* 3 [Hebrew].

¹⁴⁸ The Park Hotel bombing was the deadliest terror attack of the Second Intifada. Thirty people lost their lives after a suicide bomber activated a bomb in the Hotel's dining room on the eve of Passover, 2002.

¹⁴⁹ Eli Kolodner, 'Nahshon is Ready for Battle' (2003) 11 Seeing Shabas - J Israeli Prison Service 9, 12 [Hebrew].

¹⁵⁰ Bahar (n 147) 4; Telem, 'Gilboa's Aspirations' (n 146) 13.

¹⁵¹ Lerner (n 61) episode 3.

When I hear an officer explaining to a guard why we protect the rights of security prisoners, despite the kidnapping of Gilad Shalit, and the officer says: “our state is ruled by law, we are not terrorists and we are not Hamas”, I am filled with pride. This is not just a job. It is a mission with values.¹⁵²

Yet, when IPS personnel try and explain how external events do not penetrate the prison, they uncover the underlying national tensions for which Israeli guards treat Palestinians differently. Such expressions reveal how the internal relationships are fed by Israelis’ conception of Palestinians. For guards, incarcerated Palestinians are first and foremost part of the greater Palestinian enemy, and they are all related to the external organisations’ activities.

The various incidents of disproportionate application of power against Palestinians also undermine the IPS’ self-declared commitment to ‘law’ and ‘values’. Reports indicate assault and abuse during prisoners’ transfer, by guards of the Nachshon unit, which is responsible for the mobilization of incarcerated persons.¹⁵³ Prison raids have also reportedly entailed direct violence against prisoners.¹⁵⁴ A notable recent incident of this kind happened in June 2019, after a Palestinian prisoner stabbed two guards, again, in Ktziot prison. Fellow prison guards responded by gathering 55 Palestinian prisoners, handcuffing them, and beating them continuously whilst they were sitting on the grounds, showing no resistance. The prisoners were then left handcuffed on the ground for 12 hours.¹⁵⁵ Palestinians reported that Masada was deployed in the incident, however, it was the local prison guards who did the beating, despite their daily communication with the prisoners.¹⁵⁶ The Israeli prosecution closed the case for insufficient evidence, yet reopened it in July 2021, after CCTV footage of the events leaked to Israeli media.¹⁵⁷ Troubling incidents of guard violence attest to the volatile relationship between guards and prisoners and indicate how ‘surgical’ tasks of deterrence may very well be acts of

¹⁵² Telem, ‘Gilboa’s Aspirations’ (n 146) 13.

¹⁵³ Hamoked - Centre for the Defence of the Individual, ‘Violence by Nachshon Unit Prison Guards Against Palestinian Minors in Custody – Complaints to the National Prison Wardens Investigation Unit’ (25 March 2019) <<http://www.hamoked.org/Document.aspx?dID=Updates2067>> accessed 31 October 2022; Addameer (n 135) 46.

¹⁵⁴ According to Addameer, Palestinians reported beating, severe injuries as well as strip searches, and holding prisoners naked in cold weather; Addameer, (n 135) 103; Addameer, *Violent Raids against Palestinian Prisoners in Israeli Occupation Prisons* (2021).

¹⁵⁵ Josh Breiner, ‘Israeli Officers Were Filmed Beating Palestinian Inmates. No One Arrested, Case Closed’ *Haaretz* (12 June 2021).

¹⁵⁶ *Ibid.*

¹⁵⁷ Josh Breiner, ‘Israel Prosecutor Reopens Case Against Officers Beating Palestinian Inmates After Haaretz Investigation’ *Haaretz* (16 August 2021).

retaliation against Palestinians as a group. In other words, ultra-securitised measures like Masada have not only provided the IPS with better control over Palestinians but have also been used as a punitive collective tool. In some cases, they have allowed guards a way to ‘avenge’ prisoners for attacks against their colleagues.

The move towards ultra-securitisation marked an important turning point. The ties with security agencies alongside the deployment of special units raised the status of the IPS. Its personnel were no longer demoralised civilian officers and guards. Ultra-securitisation brought them closer to Israel’s general security apparatus, working hand in hand with other agencies against terror and standing as the last link in the chain of counterterrorism.¹⁵⁸ So, ultra-securitisation did not only provide the IPS with better tools for controlling Palestinians, but it also tied civilian incarceration to Israel’s general securitised policies against Palestinians outside of prison. As the next section discusses, creating further divisions among the prisoners complemented securitisation and improved the IPS regime further.

Capitalising on Division

In the summer of 2004, a group of incarcerated Palestinians were determined to respond to Commissioner Ganot’s harsh measures. A carefully planned cross-organisational hunger strike was announced, demanding the withdrawal of Ganot’s security measures, like strip searches and security partitions in family visits, alongside other demands around prison conditions.¹⁵⁹ The IPS refused to negotiate, and Minister Hanegbi declared that as far as he was concerned, prisoners can ‘starve to death’.¹⁶⁰ When the strike commenced, the IPS responded with what personnel referred to as ‘psychological warfare’.¹⁶¹ It isolated the leaders, conducted daily raids on wings and confiscated prisoners’ belonging, including the salt they were consuming to sustain the strike.¹⁶² The IPS also spread false news about how incarcerated leaders broke the strike, and brought ‘criminal’ prisoners to barbeque inside the Palestinian security wings.¹⁶³ After 18 days,

¹⁵⁸ Bahar (n 147); Scheltzer, ‘Terror Between the Walls’ (n 1).

¹⁵⁹ Goldberg (n 68) 56-7.

¹⁶⁰ Haaretz Services and Agencies, ‘Hanegbi: Prisoners on Hunger Strike “Can Starve to Death”’ *Haaretz* (13 August 2004); Ofer Lepler, ‘The Great Hunger Strike’ (2004) 13 *Seeing Shabas - J Israeli Prison Service* 3 [Hebrew].

¹⁶¹ *Ibid.*

¹⁶² Daka (n 6) 241.

¹⁶³ *Ibid.*; Goldberg (n 68) 56-7.

the strike was abandoned following disagreement and miscommunication among its participants.¹⁶⁴ It was the first general strike in which Palestinians made no gains and it landed a hard blow on the prisoners' already-deteriorating morale.

Following the strike, the IPS began allocating prisoners not only by organisational affiliation but also by their geographical origin.¹⁶⁵ As a result, members of the same organisation were now separated according to the village or town they came from. The IPS presented this shift as a response to prisoner demands to be closer to their families and certainly, in some cases, prisoners were moved to facilities closer to their hometowns.¹⁶⁶ Yet, this supposed benevolent reason does not explain why people from the northern areas of the West Bank were divided within Northern facilities according to their villages and why the geographic separation was also imposed in remote facilities in southern Israel.¹⁶⁷ Instead, as scholars and prisoners have argued, the geographic allocation aimed to divide the Prisoners' Movement further and to chip away at the organisations' unity.¹⁶⁸ Once more, such strategy mimicked Israel's wider policy of dividing the Occupied Territories and preventing inter-geographical and national resistance.¹⁶⁹

The growing rift between Palestinian organisations, namely between Fatah and the religious Hamas and Islamic Jihad, fuelled the internal divide even more.¹⁷⁰ In January 2006, Hamas' victory in the second Palestinian Parliamentary Elections caused political upheaval. The Fatah-led Palestinian Authority and Hamas disagreed over the division of power within the Palestinian administration, while Israel's transfer of tax revenue and US funding to the Palestinian government were cut off due to Hamas' designation as a terror organisation.¹⁷¹ In May of that year, six incarcerated Palestinian leaders attempted to encourage Palestinian unity by publishing the 'prisoners' letter'. The letter, later known as the 'national reconciliation letter',

¹⁶⁴ Ibid, 58; Bernstein (n 4) 272.

¹⁶⁵ Bahar (n 147) 3-4.

¹⁶⁶ Korn (n 7) 76.

¹⁶⁷ Bahar (n 147) 4; Daka (n 6) 239.

¹⁶⁸ Ibid; Gortler (n 4) 243.

¹⁶⁹ Sari Bashi and Eitan Diamond, *Separating Land, Separating People: Legal Analysis of Access Restrictions between Gaza and the West Bank* (Gisha, 2015).

¹⁷⁰ Jonathan Schanzer, *Hamas vs. Fatah* (Palgrave Macmillan 2008).

¹⁷¹ Bernstein (n 4) 277; Khalidi (n 11) 220.

presented a joint vision for the future of the Palestinian struggle.¹⁷² Yet the letter included several points of controversy, as it recognised the Palestinian Authority's administration and the need to negotiate with Israel. These views were unacceptable for Hamas. Its incarcerated representatives, together with Islamic Jihad leaders, ended up withdrawing their signatures, indicating the lack of unity between Palestinians inside prisons as well.¹⁷³ The internal conflict peaked in 2007 when violent clashes erupted between Hamas and Fatah in Gaza. Subsequently, Hamas took over the governing of Gaza, while Fatah maintained control over the Palestinian Authority Presidency and the West Bank.¹⁷⁴ As far as the IPS was concerned, the Palestinian divide accommodated an easier-to-govern Prisoners' Movement. Indeed, since 2004, the Prisoners' Movement has not held an extensive, cross-organisational, strike.¹⁷⁵ With important leaders in solitary confinement and other members closely monitored by intelligence officers and through frequent searches, the IPS has arguably gained the upper hand over the Prisoners' Movement.

Importantly though, the IPS never attempted to abolish prisoners' self-governing bodies. Despite ultra-securitisation, the IPS continues to recognise elected speakers, and seemingly compromise security to maintain the existing systems of compliance and order in Palestinian wings. Wardens and wing commanders show respect to speakers and converse with them daily. Yet, this approach turns around if prisoners retaliate against a specific issue since the prison seeks to deter them from organising protests. At the same time, wing speakers seek to preserve some degree of self-governance and to accomplish improvement in conditions, to gain further support from their 'constituents'. Lastly, prisoners negotiate their individual positions within the wing and the collective they belong to. Unlike in the early 1990s, Palestinians are now more engaged in a local dialogue with their wardens and wing commanders than in a cross-organisational and national dialogue with the IPS management.

¹⁷² Jerusalem Media & Communication Centre, 'The National Conciliation Document of the Prisoners' (11 May 2006) <<https://web.archive.org/web/20060615183553/http://www.jmcc.org/documents/prisoners.htm>> accessed 30 October 2022.

¹⁷³ Bernstein (n 4) 281.

¹⁷⁴ Schanzer (n 170) 101-2.

¹⁷⁵ Bernstein (n 4) 322.

For Palestinians, post-Oslo prison conditions were better than ever. Meanwhile, prisoners' participation in political education has declined. Daka argues that Palestinians have become more occupied with material concerns, like food and television, than with political education.¹⁷⁶ Their internal security apparatus has loosened as well, making their activities more susceptible to the IPS intelligence endeavours.¹⁷⁷ Prisoners' interest in remote academic studies, through the Open University of Israel, and since 2011 in Palestinian universities,¹⁷⁸ has also marked a shift from collective political education to academic degrees that mainly provide individual benefits.¹⁷⁹ This individualisation of interests increased despite the fact that, for the IPS, prisoners were still considered part of a collective. Since the Second Intifada, Islamic religious organisations, notably Hamas, were the ones able to maintain strict schedules and activities for prisoners. Fatah wings, on the other hand, have turned into general units where prisoners without previous ties to organisations were allocated.¹⁸⁰ These changes made Hamas the leading Palestinian faction in prison in terms of organised resistance.

Group hunger strikes still take place and, at times, include several organisations.¹⁸¹ Yet, Fatah officially refuses to cooperate in Hamas-led protests, and members who did so in the past were reportedly punished and moved out of the Fatah's wings.¹⁸² Protests also seem to raise less support among the Palestinian public, compared to the early 1990s mass demonstrations.¹⁸³ And still, Israel remains concerned about the prisoners' impact on the greater public. In 2012, for instance, Hamas led an extensive hunger strike and Israel agreed to reduce its use of administrative detention and reinstate visits from Gaza, to end the strike before Nakba Day,¹⁸⁴

¹⁷⁶ Daka (n 6) 250.

¹⁷⁷ Bernstein (n 4) 228.

¹⁷⁸ Since 2011 Israel prohibits security prisoners to enrol on remote academic courses, and yet Palestinians have reportedly studied remotely in Palestinian academic institutions; Nurit Yochanan, 'Despite the Prohibition: 93 Security Prisoners Completed Degrees' *KAN* (5 August 2019) <<https://www.kan.org.il/item/?itemid=56613>> accessed 30 October 2022; Amr El-Tohamy, 'Palestinian Universities Are Urged to Help Prisoners to Complete Higher Education' *Al-Fanar Media* (29 September 2022) <<https://www.al-fanarmedia.org/2021/09/palestinian-universities-are-urged-to-help-prisoners-to-complete-higher-education/>> accessed 30 October 2022.

¹⁷⁹ Daka (n 6) 250; Gortler (n 4) 203.

¹⁸⁰ Bernstein (n 4) 256.

¹⁸¹ Baker (n 4) 104; For instance: Peter Beaumont, 'Mass Palestinian Hunger Strike in Israeli Jails Ends after Visitation Deal' *The Guardian* (27 May 2017) <<https://www.theguardian.com/world/2017/may/27/mass-palestinian-hunger-strike-israel-ends>> accessed 28 October 2022.

¹⁸² Bernstein (n 4) 305, 324.

¹⁸³ Giacaman and Johnson (n 87) 70; Goldberg (n 68) 73-4.

¹⁸⁴ 'Nakba', 'catastrophe' in Arabic, commemorates the displacement of most Palestinian residents of Mandatory Palestine following the establishment of Israel in 1948. The day is marked on 15 May, on which Israel declared independence in 1948.

and avoid potential escalations in the Occupied Territories.¹⁸⁵ Organisational and inter-organisational actions are still conceived as a potential threat by Israel, and as I discuss next, Palestinians continue to challenge the IPS in old and new ways.

C. Challenges of the 21st Century Prisoners' Movement

How Smartphones Contest the IPS Restrictions

As the IPS indicates in its Commission Ordinance, Palestinian prisoners' contact with the outside world remains a top security concern.¹⁸⁶ For Palestinians, the limitations on visits and phones prevent easy communication with families and any contact with the organisations' external headquarters. Under these circumstances, mobile phones provide crucial means of maintaining a connection with the outside world. Media reports also indicate that mobile phones are also a way for senior members of organisations to keep their members close and loyal.¹⁸⁷ For the IPS, the presence of contraband mobile phones renders the restrictions on public phones meaningless and creates a risk of unmonitored communication.¹⁸⁸ As the Supreme Court explained in a criminal case where the appellant was convicted of smuggling mobile phones into prison:

The use of mobile phones in prison allows security prisoners to maintain high operative capabilities, and as a result, execute terror attacks. Through these cellular devices, prisoners maintain contact with existing terrorist networks and build new ones, whilst imprisoned. In practice, cellular phones thwart the fortified prison walls [...]¹⁸⁹

Smartphones radically increased the threat as prisoners could now access the never-ending data trove of the internet whilst conducting video chats with their comrades and families. In 2013, a video of dozens of incarcerated Palestinians holding an engagement party for one of their wing mates in Eshel prison appeared on social media.¹⁹⁰ The video showed them enjoying music, soft drinks and snacks bought at the prison canteen. Israeli news outlets reported on 'terrorists

¹⁸⁵ Visits were prohibited then since 2007 when Hamas took over the Gaza Strip; Bernstein (n 4) 322; Giacaman and Johnson (n 87) 70.

¹⁸⁶ Baker (n 4); Commission Ordinance – Rules Regarding Security Prisoners (n 101).

¹⁸⁷ Josh Breiner, 'Gridlock in Talks Between Israel, Hamas Prisoners Over Using Phones in Jail' *Haaretz* (11 August 2019).

¹⁸⁸ Prisons Bill (Amendment no 46)(Smuggling a Forbidden Item in Aggravating Circumstances) 2013-5773.

¹⁸⁹ CrimApp 2891/12 *The State of Israel v Murad Rabaa* (15 July 2012) par 4 of Judge Barak-Erez's judgment.

¹⁹⁰ Stuart Winer, 'Palestinian Prisoners Party in their Cell Block' *The Times of Israel* (16 January 2013) <<https://www.timesofisrael.com/palestinian-prisoners-party-in-their-cell-block/>> accessed 30 October 2022.

celebrating in prison' which fed into the populist Israeli narrative that Palestinians are too comfortable in Israeli prisons.¹⁹¹ The IPS declared that all those involved were punished by solitary confinement.¹⁹² Such videos, like escapes, humiliate the IPS by revealing the prisoners' abilities to outwit its security apparatus.

The IPS fight against mobile phones has been long and hard. In 2014, the Knesset passed a bill that introduced the offence of smuggling or holding a communication device in prison.¹⁹³ The bill increased the maximum sentence which existed for smuggling a contraband item from 6 months to 3 years for a communication device and prescribed up to 10 years if the offence aimed to risk life, harm state security or aid a terror organisation.¹⁹⁴

Alongside criminal enforcement, the IPS began to install reception blocks in security wings. In April 2019, on the eve of Israel's general elections, Hamas prisoners started a hunger strike in response to the activation of cellular reception blocks in Palestinian wings.¹⁹⁵ With the backdrop of elections, the Government and the IPS quickly settled with the strikers, who ended their protest after eight days only.¹⁹⁶ The IPS committed to installing public phones for the first time in wings where reception blocks were placed. It agreed to allow each prisoner up to 3 calls a week, for 15 to 30 minutes long, to close family members only. The Israeli Security Agency was to preapprove prisoners' phone contacts and monitor the calls. Unsurprisingly, the Agency supported this compromise given the opportunity it stored to track prisoners' communications.¹⁹⁷

¹⁹¹ Elior Levi and Raanan Ben Tzur, 'Watch: A Palestinian Terrorist Celebrated his Engagement with Fellow Prisoners' *YNET* (15 January 2013) <<https://www.ynet.co.il/articles/0,7340,L-4332702,00.html>> accessed 30 October 2022.

¹⁹² Amihai Etali, 'Following the Party Video, the IPS Moved the Security Prisoners to Solitary Confinement' *NRG* (16 January 2013).

¹⁹³ Including any mobile communication device, or any part of such devices, such as a sim card, battery or charger; The Prisons Ordinance (Amendment no 47), 5774-2014, SH 2449, s 2(c); Protocol no 257 of the Internal Affairs and Environment Committee Meeting, 19th Knesset (18 March 2014) 8-9.

¹⁹⁴ The Prisons Ordinance (Amendment no 47) (n 191).

¹⁹⁵ Al Jazeera, 'Palestinian prisoners in Israel's Jail Launch Hunger Strike' *Al Jazeera* (7 April 2019) <<https://www.aljazeera.com/news/2019/04/palestinian-prisoners-israel-jails-launch-hunger-strike-190407082536790.html>> accessed 30 October 2022.

¹⁹⁶ Avi Ashkenazi, 'Israel Stepped Down: The Prisoners Demands were Answered – The Hunger Strike Ended' *Walla* (15 April 2019) <<https://news.walla.co.il/item/3230791>> accessed 30 October 2022.

¹⁹⁷ It is likely that Israel already had some capacity to monitor calls made through contraband mobile phones; Jacky Khoury and Josh Breiner, 'Palestinian Prisoners' Hunger Strike End After Reaching Deal with Israel' *Haaretz* (15 April 2019).

Individual access to phones could also potentially weaken the organisations' grip over prisoners, in providing alternative means for contacting families.¹⁹⁸

Despite initial disagreements, the IPS operates public phones in Palestinian wings, including those of Hamas prisoners.¹⁹⁹ Nevertheless, media reports reveal that the IPS deactivates its reception blocks in some wings, to resolve tensions with the Palestinian leadership.²⁰⁰ Media reports also indicate that despite activated reception blocks, some prisoners are still able to use mobile phones.²⁰¹

The Hamas-led struggle on the issue of phones attests that Palestinians can still resist and influence IPS policies. Yet, on Israel's end of things, it seems that security considerations of better-monitoring prisoners charted the path for the public phones alternative, rather than a compromise following prisoners' protest. Moreover, public phones also support Israel's divide-and-rule strategy once again, this time by individualising prisoners' contact with the outside world and removing their dependency on the organisations' leaders. Nevertheless, the inconsistent policy on activating cellular blocks indicates that for the IPS, at least in some cases, the battle against mobile phones is not worth the direct clash with the prisoners' leaders.

The Rise of Individual Action

The IPS' strategy of weakening the Prisoners' Movement did not always lead to greater control over incarcerated Palestinians. The decreasing power of the collective created an opening for individuals to take actions that personalised their fight for human rights and challenged the IPS' categorical approach.

Individual hunger strikes of administrative detainees provide an important example. Food refusal has increased since 2012, particularly after Khader Adnan's successful effort, which

¹⁹⁸ Breiner, 'Gridlock in Talks Between Israel, Hamas Prisoners Over Using Phones in Jail' (n 187).

¹⁹⁹ Ibid; Josh Breiner, 'Israel Prison Service: The Hunger Strike of Hamas and Islamic Jihad Prisoners has Ended' *Haaretz* (16 September 2021).

²⁰⁰ Moshe Nusbaum, 'The Calls Block System was Deactivated, Intelligence was Missing and Terrorists Managed to Escape' *N12* (6 September 2021) <https://www.mako.co.il/news-military/2021_q3/Article-4dfd81fc5e9bb71027.htm> accessed 19 October 2022.

²⁰¹ Breiner, 'Gridlock in Talks Between Israel, Hamas Prisoners Over Using Phones in Jail' (n 187).

lasted 66 days and led to his release after four months of detention.²⁰² The Palestinian and international campaign for Adnan's release was extensive.²⁰³ His image featured on posters and media reports in central news outlets, embarrassing Israel by highlighting its use of the authoritarian measure of detention without trial.²⁰⁴ Adnan's success inspired dozens of Palestinian detainees.²⁰⁵ But for the Palestinian Prisoners' Movement, individual strikes signalled that the collective framework was less effective and that some prisoners may benefit from fighting for their rights on their own.²⁰⁶ It also provided prisoners with individual achievements, rather than general improvements to the incarcerated Palestinian population.²⁰⁷ While some individuals have been released, their actions did not impact Israel's general use of administrative detention. In fact, since 2012, Israel almost tripled its use of administrative detention, from 178 detainees to an average of 476 between 2014 to 2020.²⁰⁸

For Israel, individual hunger strikes remain a security threat and a publicity disaster, particularly given the possible repercussions of someone starving to death. The frequent appearance of hunger strikers in international media,²⁰⁹ and their depiction as sole fighters

²⁰² Harriet Sherwood, 'Palestinian Prisoner Khader Adnan Ends 66-day Hunger Strike' *The Guardian* (21 February 2012).

²⁰³ Bernstein (n 4) 311.

²⁰⁴ Kevin Flower, 'Palestinian's Hunger Strike Puts Spotlight on Israeli Detentions' *CNN* (18 February 2012) <<https://edition.cnn.com/2012/02/18/world/meast/israel-palestinian-detainee/index.html>> accessed 28 October 2022; BBC News, 'Palestinians Rally in Support of Hunger Strike Prisoner' *BBC* (17 February 2012) <<https://www.bbc.co.uk/news/world-middle-east-17079461#TWEET80120>> accessed 28 October 2022; Harriet Sherwood, 'Palestinian Hunger Striker Khader Adnan "Near Death" in Israeli Detention' *The Guardian* (16 February 2012) <<https://www.theguardian.com/world/2012/feb/16/khader-adnan-palestinian-hunger-strike>> accessed 29 October 2022.

²⁰⁵ Known cases include journalist Muhammad al-Qiq, Muhammad Allan and Maher al-Akhras. In October 2021, Kayed Al-Fasous, Miqdad Al-Qawasameh, Alaa Al-Araj, Ismail Abu Hawash and Shai Abu Aka were hunger striking simultaneously in a fight for their release; BBC News, 'Mohammed Allan: Palestinian Hunger Striker May be Freed' *BBC* (19 August 2015) <<https://www.bbc.co.uk/news/world-middle-east-33988572>> accessed 29 October 2022; Maya Oppenheim, 'One of the Longest Hunger Strikes in History has Come to an End' *Independent* (26 Friday 2016) <<https://www.independent.co.uk/news/world/middle-east/palestinian-journalist-mohammed-alqiq-ends-one-of-the-longest-hunger-strikes-in-history-after-his-early-release-is-announced-a6898001.html>> accessed 28 October 2022; UN News, 'Fears Grow for the Lives of 5 Palestinians on Hunger Strike in Israeli Prisons' (2021) <<https://news.un.org/en/story/2021/10/1103762>> <<https://news.un.org/en/story/2021/10/1103762>> accessed 28 October 2022.

²⁰⁶ Baker (n 4) 105.

²⁰⁷ Bernstein (n 4) 313.

²⁰⁸ B'Tselem, 'Statistics on Administrative Detention' <https://www.btselem.org/administrative_detention/statistics> accessed 27 October 2022.

²⁰⁹ Reuters, 'Palestinian Detainee Mohammed Allan Loses Consciousness on Hunger Strike' *NBC News* (14 August 2015) <<https://www.nbcnews.com/news/world/palestinian-activist-mohammed-allan-loses-consciousness-hunger-strike-n409826>> accessed 29 October 2022; Isabel Kershner, 'Palestinian is Rearrested and Resumes Hunger Strike' *The New York Times* (16 September 2015) <<https://www.nytimes.com/2015/09/17/world/middleeast/israel-palestinian-hunger-strike.html>> accessed 29 October 2022; Oliver Holmes and Sufian Taha, 'Hunger-striking Palestinian Close to Death, Family Says' *The Guardian* (21 October 2020) <<https://www.theguardian.com/world/2020/oct/21/maher-al-akhras-hunger-striking-palestinian-israel-west-bank-close-to-death>> accessed 29 October 2022.

against a powerful oppressive state,²¹⁰ humanised incarcerated Palestinians. Against the IPS' universal perception of dangerous security prisoners, Palestinian hunger strikers became known, with a story and a legitimate cause they were fighting for through virtuous means. When people began using food supplements, they also lasted much longer in their food refusal, for example, up to 266 days, in the case of Samer Issawi.²¹¹ Such long hunger strikes created lasting international pressure on Israel to release detainees and generally decrease its use of administrative detention.²¹² The effects of individual action were substantial. As Bernstein found, most individual strikers between 2012 and 2016 were eventually released, even though some were later re-arrested by Israel.²¹³

In an attempt to curb the impact of individual and group hunger strikes, the Israeli Government passed an amendment to the Prison Ordinance in 2015 which legalises force-feeding of hunger strikers.²¹⁴ The amendment declaratively aims to protect the lives of hunger strikers, yet as the Minister for Public Security himself confirmed, the underlying goal is to hamper strikers' ability to pressure the Government, by removing the threat of death.²¹⁵ As Chapter Six discusses, this amendment is highly controversial,²¹⁶ and yet the Supreme Court upheld it.²¹⁷

²¹⁰ See Richard Falk, 'Saving Khader Adnan's Life and Legacy' *Aljazeera* (22 February 2012) <<https://www.aljazeera.com/opinions/2012/2/22/saving-khader-adnans-life-and-legacy>> accessed 28 October 2022; Amnesty International, 'Israel: Detention of Palestinian Journalist on Hunger Strike Without Charge "Unjust and Cruel"' (28 February 2017) <<https://www.amnesty.org/en/latest/press-release/2017/02/israel-detention-of-palestinian-journalist-on-hunger-strike-without-charge-unjust-and-cruel/>> accessed 29 October 2022; Omar Shakir, 'Hunger Strikes Highlight Isolation of Palestinian Prisoners' (*Human Rights Watch*, 2 May 2017) <<https://www.hrw.org/news/2017/05/02/hunger-strikes-highlight-isolation-palestinian-prisoners>> accessed 29 October 2022.

²¹¹ Kareem Khadder and Steve Almasy, 'Israelis Release Palestinian Prisoner who Protested with No Solid Food for 9 Months' *CNN* (23 December 2013) <<https://edition.cnn.com/2013/12/23/world/meast/palestinian-prisoner-released/index.html>> accessed 21 October 2022.

²¹² Reuters, 'UN Worried about Health of Hunger-striking Palestinian Detainees' *Reuters* (6 June 2014) <<https://www.reuters.com/article/us-israel-palestinian-un-idUSKBN0EH2EY20140606>> accessed 29 October 2022; UN News, 'UN Official "Deeply Concerned" about Health of Detained Palestinian Hunger Striker' (20 August 2016) <<https://news.un.org/en/story/2016/08/537062-un-official-deeply-concerned-about-health-detained-palestinian-hunger-striker>> accessed 29 October 2022.

²¹³ Bernstein (n 4) 313; E.g. Middle East Monitor, 'Palestinian Prisoner Launches Fifth Hunger Strike in Israel Detention' (2021) <<https://www.middleeastmonitor.com/20210602-palestinian-prisoner-launches-fifth-hunger-strike-in-israel-detention/>> accessed 29 October 2022.

²¹⁴ The Prisons Bill (Amendment no 48)(Preventing Hunger Strike Damages), 5774-2014.

²¹⁵ Protocol no 306 of the Internal Affairs and Environment Committee Meeting, 19th Knesset (16 June 2014) 6.

²¹⁶ UN High Commissioner for Human Rights, *UN Experts Urge Israel to Halt Legalization of Force-Feeding of Hunger-Strikers in Detention* (2015); Israel Medical Association, *The Position of Israel Medical Association on the Bill of Force-Feeding* (Presented to the Knesset Committee on Interior Affairs and Environment, 2014).

²¹⁷ H CJ 5304/15 *Israel Medical Association v The Knesset of Israel* (11 September 2016).

A second example also relates to prisoners' release, albeit, from a different direction. In the past decade, the stagnation in negotiations to resolve the conflict, and the unknown prospects for prisoners' exchange deals, have driven some Palestinians to pursue alternative paths for early release, like parole. Palestinian residents and citizens of Israel who sought to increase their chances for parole began demanding the IPS to fulfil its legal obligations and allocate them to rehabilitation programmes.²¹⁸ These applicants must satisfy the conditions of the procedure for removing restrictions, discussed in Chapter Three. To recall, they are required to 'disaffiliate', terminate their connections with any 'hostile organisation' and show that they have undergone an ideological transformation. The Israeli Security Agency must also confirm that applicants have 'substantially' changed and that their participation in rehabilitation does not endanger national security.²¹⁹

The procedure of removing limitations is difficult, as discussed earlier. Palestinians must condemn the organisation that manages life in prison and distance themselves from collective acts of resistance, small or large. As shown in the documentary series *Megiddo*, when Hamas prisoners sought to identify with their wing mates and refuse to leave their cells, the wing commander passed cell by cell, asking who will come out for their daily walk.²²⁰ To express an individual objection at that moment, for instance, meant to publicly disobey the collective code. Despite the general weakening of collective frameworks, life in Palestinian wings is still organised around group action. These conditions place a significant burden on those who wish to remove security limitations, i.e., access rehabilitation, but also unlimited phone calls and visits. Palestinians who took the path of disaffiliation reportedly paid a heavy price and faced social alienation and threats, which in some cases led to their solitary confinement, ostensibly for their own protection.²²¹ Subsequently, only a handful of Palestinians have pursued the track of rehabilitation, and not many have been successful.²²² As Chapter Six describes, the Supreme Court addressed the hardships of these prisoners yet refrained from overruling the IPS policy.

²¹⁸ The Prisons Ordinance (n 57) s 11d.

²¹⁹ Baker (n 4); Commission Ordinance – Rules Regarding Security Prisoners (n 101) s 4b.

²²⁰ Lerner (n 61) episode 2.

²²¹ AppR 5754/15 *Hatib et al v The Prison Service* (2 July 2017) par 44 of Judge Barak-Erez's judgment.

²²² Baker (n 4) 106.

For the Prisoners' Movement, the mere fact that some people are trying to revoke their affiliation indicates the cracks in the organisations' hold over wings.²²³ Such actions also challenge the Palestinian narrative of prisoners as freedom fighters, who have committed no crime. Unlike hunger strikers, individuals who seek rehabilitation acknowledge that they have committed a criminal wrong and recognise Israel's penal authority. This does not necessarily mean that they abandon their beliefs. Some, for instance, support the non-violent struggle for Palestinian independence.²²⁴ Such prisoners seem to be the 'moderate' individuals of whom former Commissioner Adato spoke, who gradually distanced themselves from violent resistance. Still, the entire Israeli penal system, the IPS, the prosecution, and the courts as well, remain sceptical of these prisoners' actions and force them to undergo years of social exclusion and solitary confinement, to prove their eligibility for rehabilitation, let alone parole. Their response indicates just how entrenched is the perception of Palestinians as inherently dangerous. As discussed in Chapter Three, this perception is what underlies Israel's policy of not offering Palestinians rehabilitation in the first place.

Yet, Israel's position does not only derive from a risk-averse rationale to prevent Palestinians from manipulating the system. As the Chairman of the Knesset's Interior Affairs and Environment committee declared:

It is not my goal to rehabilitate security prisoners and provide them with education. I do not think the State of Israel should invest in a person who hurt our families.²²⁵

Security offences justify harsher punishment, which includes a ban on rehabilitation, education, and occupational programmes. Such a punitive approach reflects a rather limited perception of rehabilitation as a privilege given to the prisoner, rather than a preventive tool that benefits the public interest. Again, this approach disregards the variety of offences and harms attributed to security prisoners as well as the serious wrongs some 'criminal' prisoners have committed, which did not take away their access to rehabilitation programmes.

²²³ Ibid, 105.

²²⁴ *Hatib v The Prison Service* (n 221) par 23 of Judge Barak-Erez's judgment; AppR 5555/14 *Salhab v The Parole Committee* (8 December 2014) par 8 to Judge Hayut's judgment.

²²⁵ Protocol no 537 of the Internal Affairs and Environment Committee Meeting, 18th Knesset (7 May 2012) 7.

Conclusions

Since the early 1990s, the IPS has gradually built a form of civilian incarceration which is, nonetheless, inextricably linked to the ongoing conflict. Inside prisons, the battle between staff and prisoners as the two parties of the conflict goes on. The prison population continues to be conceived as a suspected group, that must be managed in line with Israel's general policy towards Palestinian resistance outside prison.

The move into civilian prisons within Israel's border advanced the creation of a standardised system that professionalised security incarceration and effectively imposed harsher treatment than had previously been meted out in military facilities. Through ultra-securitisation, the IPS positioned itself alongside Israel's other security agencies, conceiving the incarceration of Palestinians as a separate task from its other function of holding 'criminal' prisoners. In that regard, the incarceration of Palestinians is considered unrelated to the penal rationales of 'criminal' incarceration. Securitisation focuses on containing 'active' threats inside prison, and on the immediate effects of incapacitation, rather than forward-looking aims like rehabilitation and prevention of future offences. In that regard, the 'moderation' of prisoners might be conducive to the management of prisons only and has a very limited effect on prisoners who wish to access rehabilitation and parole. While civilianisation generated a pseudo-legitimate model of incarceration during conflict in democratic Israel, securitisation imported militarised methods into prisons that imitated the military's model of control over the Occupied Territories through division, deterrence, and oppression of resistance.

At the same time, the gradual weakening of the Prisoners' Movement allowed the IPS to redefine security incarceration. In the early 2000s, the fast rise of prisoners' numbers posed a threat to prison order and security as it 'recruited' new members to the shrinking prisoners' collective at the time. The IPS countered this threat not by dissolving the Prisoners' Movement, but by maintaining organisational and geographical divisions to preserve the acting modes of management inside wings while thwarting cross-faction cooperation. It harnessed political affiliation to both govern prisoners and prevent large-scale resistance.²²⁶ Accordingly, the

²²⁶ Gortler (n 4) 159.

Prisoners' Movement's declining impact on the Palestinian public also affected power dynamics as prisoners did not hold the same political leverage of inciting mass protests. The material improvements, funded mainly by external Palestinian funding, have also normalised incarceration and contributed to the weakening of prisoners' commitment to political engagement in prison.²²⁷

Unlike South Africa, Northern Ireland, and current counter-terrorism prison practices, the IPS does not attempt to rehabilitate or 'de-radicalise' Palestinians. On the contrary, it acts as though ideological affiliation is inevitable and stems from Palestinian identity. The reason for this approach is not only the IPS' universal, discriminative, perception of Palestinians. The IPS is also concerned that offering rehabilitation will make it seem more lenient towards security prisoners, particularly considering the critique it faced for past escapes and protests. As the next chapter discusses, the IPS aligns itself with right-wing politicians in that regard, who call for harsher conditions for Palestinian prisoners.

In contrast to the IPS' categorical treatment of all Palestinian security prisoners, individuals have demonstrated their agency through individual hunger strikes and applications for rehabilitation. Administrative detainees' hunger strikes had challenged Israel publicly, undermining its supposed liberal image and generating pressure that echoes the Prisoners' Movement's impact on Israeli politics. Applications for rehabilitation, many of which have been processed through Israeli courts, have similarly challenged the IPS punitive categorical approach, though with limited success. By having to fight to participate in rehabilitation, Palestinians further uncover Israel's discriminatory prison regime which is detached from classic penal rationales and prioritises the unified securitised governance of all Palestinians.

The development of standardised ultra-securitised incarceration provided Israel with a sustainable solution for Palestinian insurgency. The IPS has built a system that can contain sudden rises in numbers and provide the backbone to Israel's operations against Palestinian organisations. So, with a weaker Prisoners' Movement, the IPS has managed to go through the

²²⁷ Daka (n 6) 250.

past two decades with minimal mass disturbances and far greater control over cross-factional communications.

As the next chapter discusses, Israeli politicians have been pushing for tougher punishments for Palestinians in Israeli prisons. As shown below, for Israeli politicians as well, Palestinian prisoners represent enemies held in the state's prison. Yet the rise of populist discourse around harsher conditions and the ending of prisoner self-governance mechanisms could destabilise order in prisons, hamper the IPS' long and hard efforts to regain control and encourage the reunification of the Prisoners' Movement.

Chapter 5: ‘Forget Right versus Left’¹ - Israel’s Penal Policy Against Palestinian Insurgency

Throughout the conflict, Israel has constantly updated its approach to Palestinian violent and nonviolent resistance. This chapter examines the state’s position towards Palestinians, as evident in its executive policies on criminal enforcement, sentencing and prison conditions. The discussion begins in the summer of 1995 when Israel released 4,832 Palestinians as part of the Oslo Accords.² Thousands of Fatah members were then pardoned and took on jobs in the Palestinian Authority’s administration, which closely cooperates with Israel to this day.³ Those left behind bars, and the tens of thousands of Palestinians who were incarcerated in later years, continued to be perceived and treated as terrorists, as if the Oslo Accords, and the sweeping amnesties they entailed, did not take place. How the State of Israel treats Palestinian security suspects, detainees and prisoners in the post-Oslo era is the core subject of this chapter.

This chapter makes several claims. First, for the past three decades, Israel has been developing a specialised policy that expands criminalisation, broadens executive powers, and entails harsher punishments. This policy not only contrasts with the Oslo Accords amnesties but is also distinct from Israel’s general criminal justice policy of the past decade. As the title of this chapter implies, Government ministers attempted to legitimise a stricter approach to the Palestinian insurgency by presenting it as a security need that rises above political differences, and which should be supported by parties of the Right and the Left. Often, ministers have also argued that the Israeli public demands tougher sentences, implying the underlying punitive sentiment which drove penal severity forward. In line with the IPS’ endeavours to build a sustainable ultra-securitised form of incarceration, the state has also developed elaborate counterterrorism enforcement as part of its strategy of managing the conflict, rather than working harder to resolve it. Initially, the specialised approach encountered the resistance of legal advisors, however, this has softened over time, as advisors gradually accepted penal and security reasoning for enforcing categorically stricter policies against Palestinians.

¹ Protocol of the 294th Meeting of the 20th Knesset, DK 11 (3 January 2018) Minister of Environmental Protection, MK Ze’ev Elkin, 179.

² Protocol of the Internal Affairs and Environment Committee Meeting, 13th Knesset (3 July 1995) 13.

³ Alyssa G Bernstein, ‘The Palestinian Prisoners’ Movement, 1994 - 2016’ (DPhil, The Queen’s University of Belfast 2017) 170-171; Jacky Khoury and others, ‘The Palestinian Authority Announced Renewing the Coordination with Israel’ *Haaretz* (17 November 2020).

As part of the specialised approach, Government ministers and Members of the Knesset (MKs)⁴ also promoted bills and policies regarding the conditions of Palestinian security defendants and prisoners. For instance, several bills aimed to weaken prisoners' protests, like the notorious 2015 force-feeding law.⁵ In a similar vein, the state has also used incarcerated Palestinians' rights for external national security ends, indicating Israel's strategic use of penal power as a party to the conflict. Through such policies, and others I discuss below, the Israeli administration showed its willingness to further divert from basic criminal law principles and human rights protections when it comes to incarcerated Palestinians.

The chapter analyses several legislation procedures and policies, including some which did not pass and were not executed. It draws on parliamentary records of the Knesset Plenum and the Knesset Committees, and media reports. I use these sources to examine Israel's approach, explore different actors' standpoints and critically examine the rationales guiding ministers and MKs. The bills and policies studied do not exhaust the Israeli legislative engagement with security enforcement and punishment, however, they represent important policies, and provide a broad understanding of Israel's conflict penalty since the Oslo Accords. This chapter delves into how the Israeli administration conceptualises the punishment of Palestinian insurgents through laws and policies.

Israel's legislative procedure features several important actors. First, the person who initiates the bill, who is a minister for a government bill and an MK for a 'private bill', which the Government does not necessarily support. Once bills are approved in their first reading before the Knesset Plenum, Knesset committees deliberate and prepare them for the second and third final readings. Private bills undergo an additional initial preliminary reading, after which a Knesset Committee prepares the proposed legislation for its first reading. In the committees, lawyers from the Attorney General's office and the committees' legal teams advise MKs on the legality and wording of proposed laws. Representatives of other government bodies, like the Ministry of Defence and the State Prosecution, also comment on bills based on their relevant experience and needs. Often, members of the Israel Police, the Israel Security Agency and the

⁴ These could be members of the coalition or opposition parties.

⁵ Prisons Bill (no 48)(Preventing Hunger Strike Harms) 2014-5774, 870 HH.

IPS also advise on matters concerning national security, criminal justice policies and incarceration. At times, the committees invite NGO representatives, academics, and other members of the public, like bereaved family members, to provide their perspectives on proposed laws that concern their areas of expertise and their experiences. This chapter also addresses the relationships between these actors, including that which is between the Government and the Knesset as the executive and legislative authorities.

I start by surveying several important laws that consolidate the specialised procedures and punishments for security offences. I describe the enactment of the 2016 Counterterrorism Act and further examine laws that advanced distinctive penal severity, including provisions in the Counterterrorism Act, the denial of administrative early release, and the Death Penalty Bill. The chapter then explores policies around prison conditions and studies the deterioration of incarceration terms in order to deter future insurgents and weaken the Prisoners' Movement. To follow, I discuss the symbolic and strategic use of penal power through Israel's campaign against the Palestinian Authority's funding scheme for prisoners, and the instrumental use of prison conditions in response to external threats.

A. Codifying Severity: The Law of Security Punishment Since Oslo

Another 'Independence Day for the State of Israel':⁶ The 2016 Counterterrorism Act

In 2016, Israel passed the Counterterrorism Act, its most elaborate civilian legislation on terrorism to date. The legislative process lasted for over a decade, with the ongoing involvement of various government bodies, most notably, the Israel Security Agency, whose representatives actively participated in numerous Knesset Committees meetings. The Act was originally prompted by the 2005 Disengagement,⁷ as Israel required new legal grounds for special powers, like detention in absentia, against Gazans.⁸ The Government sought to avoid reinstating military courts inside Israel, so it initiated a new counterterrorism civilian law, which consolidated and

⁶ Protocol of the 134th Meeting of the 20th Knesset, DK 29 (15 June 2016) 122.

⁷ Israel's withdrawal from the Gaza Strip, as noted in the list of key events on page 6 of this thesis.

⁸ Israel legislated a temporary order for regulating special detention powers against Gazans, that was later replaced by the Counterterrorism Act; Criminal Procedure Law (Detainee Suspected of a Security Offence) (Temporary Order) 5766-2006.

replaced old legislation, including many sections of the 1945 British Defence Regulations.⁹ The Counterterrorism Act's stated aim is to prevent terror while balancing Israel's commitment to protect human rights according to international law.¹⁰ Yet the Act introduced broad definitions, extensive powers, and longer sentences, which expanded Israel's civilian enemy criminal law, and entrenched its deviation from fundamental criminal law principles and due process standards, as first described in Chapter Three.¹¹ This section analyses several important changes included in the Counterterrorism Act, and what they reveal on Israel's attitude to insurgency. The next section elaborates further on the Act's penal severity provisions, as part of the general policy trend of increasing punishments for terror-related offences.

The Counterterrorism Act broadened the definition of a 'terrorist act' by including harm to sacred sites and artefacts, the state economy, and the environment. It also instated a presumption that acts committed by a terror organisation or its member are done with the motive and aim required to establish a 'terrorist act'.¹² The Act also expanded the definition of a 'terror organisation', to include bodies that support prescribed 'terror organisations', for instance through funding and political education.¹³ The Israel Security Agency strongly supported the latter expansion as a means to hinder terror from its early stages and thwart its civil society networks, including in schools and even nurseries.¹⁴ MKs promoted this broad definition and rejected counterarguments that like Palestinian organisations, Israeli Ultra-orthodox parties also operate politically-oriented schools.¹⁵ For MKs, unlike Israeli parties, Palestinian organisations advance 'terrorist' rather than 'political' objectives in their civil society networks.¹⁶ Hence, the

⁹ Protocol no 140 of the Constitution, Law and Justice Committee Meeting, 19th Knesset (17 February 2014), Deputy Attorney General Raz Nizri, 4; Protocol no 42 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (12 October 2015) Deputy Attorney General Raz Nizri, 3.

¹⁰ Counterterrorism Act 5776–2016, SH 2566 s 1; For instance, under the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

¹¹ Mordechai Kremnitzer and Amir Fuchs, *The Counterterrorism Act Bill, 2011-5771* (2014); Leila Margalit and Adam Shinar, *Position Paper Regarding the Counterterrorism Act Bill, 2011-5771* (The Association for Civil Rights in Israel).

¹² Counterterrorism Act (n 10) s 2; The full definition draws from section 1 of the Prohibition on Terrorist Financing Act 5765-2005, SH 1973, according to which a 'terrorist act' is done with a political, ideological, religious or nationalist motive, with the aim of spreading fear or compelling a government or an international organisation to take or avoid action, and by threatening or acting in a manner that poses a significant risk of serious harm to individuals, the public, sacred sites and artefacts, essential infrastructure, state economy and the environment.

¹³ Counterterrorism Act (n 10) s 2.

¹⁴ Constitution, Law and Justice Committee Meeting (17 February 2014) (n 9) 8; Protocol no 253 of the Constitution, Law and Justice Committee Meeting, 19th Knesset (10 November 2014) 44.

¹⁵ Protocol no 177 of the Constitution, Law and Justice Committee Meeting, 19th Knesset (13 May 2014) 26.

¹⁶ Ibid.

Act conceived civil organisations that are even loosely tied with declared ‘terror organisations’, as bodies affiliated with terror, rather than with Palestinian national ideology.

Similarly, the Act introduced a new broad definition for a ‘member of a terror organisation’, which includes individuals who might have identified as members but did not act on any organisation’s behalf.¹⁷ The Israel Security Agency’s representatives dismissed concerns raised by MKs and academics over situations of ‘forced’ membership, when people are pressured to declare their affiliation with a Palestinian organisation.¹⁸ In response, a representative of the Attorney General explained that the Act aimed: ‘to pass on a clear message [...] to the civil population, to stay away from terror, period. No excuses.’¹⁹

Furthermore, the Act updated old offences, prescribing longer sentences as detailed below, while adding new offences like preparation to commit a terrorist act and failing to prevent one.²⁰ It also introduced provisions that removed important procedural safeguards of criminal law. For several offences, for example, it enacted presumptions that pass the burden of proof to defendants, who must establish a reasonable doubt. For instance, a defendant’s presence at a site of unlawful training grounds the presumption that she or he participated in the training, and the defendant may refute this by raising a reasonable doubt.²¹ The Act also expanded the exception to the rule prohibiting the use of hearsay evidence, by allowing the court to accept written evidence for ‘terror offences’²² if established that the witness providing the evidence left Israel for a neighbouring Arab country or the Palestinian Authority’s territories.²³ Lastly, the Act broadened detention powers, allowing the incarceration of suspects of ‘aggravated security offences’²⁴ for up to 96 hours before a first hearing,²⁵ and permitting detention extension in

¹⁷ Counterterrorism Act (n 10) s 2.

¹⁸ Protocol no 262 of the Constitution, Law and Justice Committee Meeting, 19th Knesset (24 November 2014) 17.

¹⁹ Protocol no 67 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (23 November 2015) 9.

²⁰ Counterterrorism Act (n 10) s 2, 20-36; The Penal Act also includes an offence of failing to prevent a crime, which prescribed a maximum sentence of two years, compared to the three years set in the Counterterrorism Act.

²¹ *Ibid*, s 2, 29.

²² Offences that are included in the Counterterrorism Act or that are classified as an act of terror; *ibid*, s 2.

²³ Israeli evidence law permits the use of external written evidence under specific conditions, which require the court to establish that wrongful means dissuaded the witness from testifying; Evidence Ordinance [New Version], 1971-5731 s.10A; Kremnitzer and Fuchs (n 11) 26.

²⁴ A category which includes certain aggravated terror offences from the Counterterrorism Act, and other serious offences, like aggravated assault and murder; Counterterrorism Act (n 10) s 2.

²⁵ *Ibid*, s 46; Instead of 24 hours, and 48 hours in certain circumstances as set in the Criminal Procedure Act (Powers of Enforcement - Arrest), 5756-1996, s 29(a).

absentia,²⁶ all of which narrowed the gap between Israel's civilian and military detention powers that apply in the Occupied Territories.

Legal scholars have primarily criticised the Act for its broad definitions that disproportionately and unjustifiably expand the scope of special counterterrorism powers, so much that it 'challenges the clear legitimacy of the legal fight against real terror'.²⁷ Opposition MKs raised further concerns regarding the Act's disregard for whether a 'terrorist act' targeted civilians or soldiers.²⁸ The bill's explanatory notes specifically mentioned this distinction, stating that attacks against soldiers would be considered 'terror' as well, since 'terror is an illegitimate path for achieving political, ideological and religious goals, regardless of who is the victim'.²⁹ Yet, as critics argued, it is the targeting of innocent civilians which justifies tougher sanctions against terror.³⁰ Disregarding who 'terror' targets also contradicts the basic customary principle of distinction in the laws of war, which distinguishes the lawfulness of an action according to those targeted, and forbids the targeting of civilians.³¹ Failing to consider if organisations follow this principle of distinction further disincentivises them from complying with the laws of war, as their acts will be considered unlawful regardless.³² As previous chapters showed, Israel is already disregarding the principle of distinction as it criminalises all types of Palestinian insurgency. Opposition MKs also argued that the Act's focus on organisations fails to respond to the rising phenomenon of attacks by individuals with no prior ideological connections.³³ MKs and legal scholars argued together that the Act simply replicates the repealed

²⁶ Counterterrorism Act (n 10) s 48.

²⁷ Mordechai Kremnitzer and Amir Fuchs, *The Counterterrorism Act Bill, 2011-5771: Summary of the Israel Democracy Institute Position* (2014) 2.

²⁸ Protocol no 182 of the Constitution, Law and Justice Committee Meeting, 19th Knesset (20 May 2014), former Minister of Justice, Dan Meridor, 4.

²⁹ Counterterrorism Bill, 5775-2015, 949 HH 1066, 1071.

³⁰ The Constitution, Law and Justice Committee Meeting (20 May 2014) (n 28) former Minister of Justice, Dan Meridor, 4.

³¹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 48, 51, 52; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I: Rules (International Committee of the Red Cross 2005) rule 1.

³² Kremnitzer and Fuchs, *The Counterterrorism Act Bill, 2011-5771* (n 27) 10.

³³ The Constitution, Law and Justice Committee Meeting (12 October 2015) (n 9) 17; Protocol no 57 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (2 November 2015) 2; Knesset Meeting (15 June 2016) (n 6) 133.

colonial regulation while intentionally omitting Israel's most draconian measures, house demolitions and administrative detention, to avoid 'staining' the Israeli modern law book.³⁴

In contrast to these concerns, the Knesset's majority saw the Counterterrorism Act as a necessity,³⁵ and at the same time as a source of national pride.³⁶ Nissan Sluminsky, Chairman of the Constitution, Law and Justice Committee, described the replacement of British Mandate laws as no less than another 'Independence Day',³⁷ as Israel now relied on its own law to fight terror. MKs and legal advisors hailed the Act as a modern progressive response to terror that sets an example to other countries.³⁸

The Counterterrorism Act substantially expanded Israel's securitised civilian justice, indicating the Government's aim to improve the prevention and containment of insurgency. In line with the IPS policy, the Act provided another way to manage the conflict and cope with ongoing violence, rather than push towards negotiations and resolutions, which would have entailed acknowledgement and compromise. Thirty years after Israel pardoned members of terror organisations as part of the Oslo Accords, it expanded its enforcement powers by introducing wider definitions that target greater parts of the Palestinian population.

'Our Society Does Not Wish to Forgive Terrorists':³⁹ Formalising the Penal Severity Policy

Sentences for security offences have traditionally been severe, as Chapter Three elaborated, and yet, in the past decade, Israeli administrations have made these punishments even harsher. At the same time, Israel's penal policy underwent a shift towards structured sentencing, deprioritising deterrence, and reducing prison rates. As should by now be familiar, Israel's general move to moderation mostly excludes Palestinian security defendants and prisoners, which further

³⁴ Protocol no 191 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (30 May 2016) 21; Knesset Meeting (n 6) 131, 189; House demolitions are performed to this day based on section 119 of The Defence (Emergency) Regulations, 1945, Palestine Gazette 1442, Supplement 2, 1058; Administrative detentions are regulated in The Emergency Powers Act (Detentions) 5739-1979, 33 LSI 89; The Knesset aimed to update the regulation on administrative detention as part of an amendment to the Counterterrorism Act, however, deliberations on this matter did not continue since 2017.

³⁵ Knesset Meeting (15 June 2016) (n 6) 231.

³⁶ Ibid, 123.

³⁷ Ibid, 121.

³⁸ Protocol of the 270th Meeting of the 18th Knesset, DK 39 (3 August 2011), Minister of Justice, Yaakov Neeman, 323; Knesset Meeting (15 June 2016) (n 6) 123, 231, 238.

³⁹ Protocol no 4 of the Joint Knesset and Constitution, Law and Justice Committee Meeting, 20th Knesset (26 November 2018) 5.

illuminates the gaps between the general criminal justice system and the penal approach to Palestinians.

In 2012, the Knesset restructured how courts consider penal rationales when determining a sentence, for all types of offences.⁴⁰ Retribution was set as the core principle of sentencing, which dictates the appropriate range of punishment and the final sentence within the range.⁴¹ In setting the appropriate range, courts were guided to consider the existing penal policy, as ruled by other courts before them.⁴² Rehabilitation was of secondary importance, as it could justify deviating from the appropriate range.⁴³ Public protection could likewise lead to a sentence longer beyond the range, yet, only to a limited extent.⁴⁴ Deterrence, on the other hand, could only affect punishment within the range, and only if the court found a real probability that a certain sentence will contribute to individual or general deterrence.⁴⁵ The amendment reorganised penal rationales, giving deterrence a lower priority in the process of sentencing.⁴⁶

In 2015, a report by the Public Committee for Examining the Penal Policy and the Treatment of Offenders, headed by former Judge of the Supreme Court, Dalia Dorner (hereinafter ‘Dorner Report’), represented another step towards a shift in Israel’s general penal policy. Importantly, the report found that there are no grounds for the assumption that longer punishments contribute to deterrence.⁴⁷ Acknowledging the negative impacts of imprisonment, it found that incarceration’s main benefit is the incapacitation of dangerous offenders. Therefore, the report recommended the adoption of an ‘efficient penal policy’ to narrow the use of imprisonment when it is not a necessary means for incapacitating dangerous offenders.⁴⁸ The report listed various practical proposals, including setting principles for future criminal law legislation and building alternatives to incarceration.⁴⁹ The Government adopted the report and

⁴⁰ Penal Act (Amendment no 113), 2012-5772, 2330 SH.

⁴¹ Penal Act, 5737-1977, s 40B.

⁴² Ibid, s 40C(a).

⁴³ Ibid, s 40D; Hagit Lernau and Ishay Sharon, ‘Eight Moral Decisions in the Law for Structuring Judicial Discretion in Sentencing’ (2012) 183 HaSanegor 14, 17 [Hebrew].

⁴⁴ Penal Act (n 41) s 40E.

⁴⁵ Ibid, s 40F-40G.

⁴⁶ Lernau and Sharon (n 43) 19; Yaniv Vaki and Yoram Rabin, ‘Structuring Judicial Discretion in Sentencing: Snapshot and Reflections About the Future’ (2013) 52 The Prosecutor 413, 44 [Hebrew].

⁴⁷ The Public Committee for Examining the Penal Policy and Treatment of Offenders, *Report* (2015) 22 (Dorner Report).

⁴⁸ Ibid, 28.

⁴⁹ Ibid, 40.

advanced alternatives to imprisonment, by developing Israel's Problem-Solving Courts and expanding the use of the service labour sentence.⁵⁰

As noted earlier, two years after the Dorner Report, the Supreme Court handed down a landmark decision on Israel's prison overpopulation, ordering the state to comply with its statutory living standard of 4.5 sqm per prisoner.⁵¹ Israeli governments made various endeavours to comply with the judgment by expanding alternatives to incarceration and broadening the IPS' administrative automatic early release scheme.⁵² Notwithstanding this, in October 2022, the Government announced its plans to increase Israel's prison space by building new facilities in order to comply with the statutory living standard.⁵³

These developments do not signify an absolute and immediate change in Israel's policy, and the Government occasionally still increases sentences for some offences in the name of deterrence.⁵⁴ Likewise, building new prisons might also lead to a rise in prison rates.⁵⁵ Yet, overall, the Government, the IPS, the State Prosecution and the Attorney General's Office, have all been occupied in the past decade with generally reducing the country's prison rates, as evident in a series of Government decisions and official reports.⁵⁶ Meanwhile, the same actors pushed for a very different penal policy regarding security offences.

The Counterterrorism Act, for instance, includes penal severity as a central element in the state's response to terrorist conduct. The Act amends previous offences by more precisely specifying the criminalised conduct. While this creates clearer criminal provisions, it also entails longer maximum sentences for several offences. For instance, previously, all members of

⁵⁰ Government Decision 1840, 'Streamlining Israel's Penal Policy and Rehabilitation of Offenders' (11 August 2016).

⁵¹ H CJ 1892/14 *The Association for Civil Rights in Israel v Minister of Public Security* (13 June 2017).

⁵² Government Decision 3595, 'Upgrading the Incarceration System and Expanding the Living Space in Prisons' (25 February 2018); The Prisons Ordinance (Amendment no 54 and Temporary Order), 5778-2018, SH 2755.

⁵³ Government Decision 1903, 'National Plan to Streamline and Expand the Incarceration System and the Living Space in Prisons and Amending the Government Decision' (23 October 2022); The Court granted the state an extension of five more years to comply with its judgment, until 2027; H CJ 1892/14 *The Association for Civil Rights in Israel v Minister of Public Security* (29 December 2022).

⁵⁴ For instance the Penal Bill (no 135)(Weapon Theft), 2018-5778, 811 HH 16; Penal Bill (no 142 - Temporary Order)(Minimum Sentence for Unlicensed Weapon Possession), 2021-5781.

⁵⁵ The Public Defence, 'The National Public Defender's Letter to the Attorney General Concerning the Minimal Living Space and the Problems with Building New Prisons' (4 September 2022).

⁵⁶ Government Decision 1840 (n 50); Government Decision 3595, (n 52); The Interdepartmental Team for Examining Alternatives to Imprisonment, *Report* (2021); Prosecution Team for Examining the Implementation of Dorner Report, *Report* (2018).

organisations faced a maximum sentence of 5 years imprisonment.⁵⁷ The Counterterrorism Act prescribes the same maximum sentence for membership yet sets a new offence of active membership and recruitment, which bears the maximum sentence of 7 years.⁵⁸ Likewise, participants of unlawful training were previously subject to 7 years imprisonment, yet following the Counterterrorism Act, instructors may face 9 years.⁵⁹ For some offences, the Act reduced the maximum sentence prescribed in the Defence Regulations, for example, setting a 5 instead of 10 years of the maximum sentence for providing service or means to a terror organisation.⁶⁰

The Act also introduces a direct penal severity provision, that doubles the maximum sentence for offences classified as a ‘terrorist act’, up to a cap of 25 years.⁶¹ Similarly, it imposes tougher punishments on those who assist terrorist acts⁶² and doubles the punishment for conspiracy to commit a terrorist act.⁶³ It further adds a mandatory life sentence for the new offences of directing a terror organisation which has been involved in a murder.⁶⁴ Lastly, the Act sets longer life sentences for ‘terror offences’,⁶⁵ prescribing that 15 years must pass before the Special Parole Committee can recommend the determination of a final sentence to the President of Israel and that the minimal final sentence is 40 years.⁶⁶ This is instead of 7 years, before the Committee’s recommendation, and a minimum sentence of 30 years, that applies to those serving a life sentence for ‘regular offences’.⁶⁷

According to the explanatory notes of the Counterterrorism Act, terror is an ‘inherent aggravating factor’ which justifies penal severity.⁶⁸ When it comes to terror, the explanatory

⁵⁷ Prevention of Terrorism Ordinance 5708-1948 s 3 (repealed).

⁵⁸ Counterterrorism Act (n 10) s 22.

⁵⁹ Ibid, s 29.

⁶⁰ Ibid, s 23; Note, however, that the 1948 Prevention of Terrorism Ordinance prescribed a maximum sentence of 3 years for a similar offence; Prevention of Terrorism Ordinance (n 57) s 4 (repealed).

⁶¹ The provision excludes offences set in the Counterterrorism Act and offences that impose a mandatory life sentence; Counterterrorism Act (n 10) s 37.

⁶² A person aiding the commission of an offence is liable to half of the prescribed sentence. The Counterterrorism Act imposes half of the doubled sentence as the maximum sentence while setting a maximum sentence of 15 years for aiding an offence that prescribes a life sentence, compared to the cap of 10 years prescribed in the Penal Act; Penal Act (n 41) s 32.

⁶³ Imposing a 14 years maximum sentence for conspiring a crime and 4 years for conspiring a misdemeanour, or the doubled sentence set for either case, whichever is shorter; Counterterrorism Act (n 10) s 38.

⁶⁴ Ibid, s 20.

⁶⁵ See footnote 22.

⁶⁶ The President determines the final sentences length based on the Committee’s recommendation; Counterterrorism Act (n 10) s 40.

⁶⁷ Release on Parole Act, 5761-2001, SH 1795, s 29.

⁶⁸ Counterterrorism Bill, 2015 (n 29) p 1105.

notes contend, deterrence and retribution call for more severe sentences, given the ideological background of the offender's conduct, the support she or he enjoys from the greater civilian society, meaning the Palestinian public, and the harm caused by the offence.⁶⁹ During the deliberations regarding the Act, the Israel Security Agency representative similarly warned the MKs that a deterring effect on terrorist acts has been lacking for years.⁷⁰ The State Prosecution representative likewise noted the importance of sending a clear message to the courts to impose stricter penalties.⁷¹

As a result, six months after the Dorner Report came out, Israel passed an Act that explicitly contradicts its conclusions, by pursuing deterrence through longer sentences. Legal scholars argued that the Act's reliance on broad definitions and presumptions will lead to marginal actors in the terror network facing harsher punishments and that there were no justifications to deviate from the existing penal hierarchy between primary offenders, and their aides and conspirators, only in respect of terrorist conduct.⁷² Critics doubted that longer prison terms would deter ideological offenders, in line with empirical data and academic literature on this issue, as mentioned in previous chapters.⁷³ Overall, critics argued that Israel already imposes tougher sentences for terror-related crimes and that the Act will lead to disproportionate sentencing.⁷⁴ These critiques led to some moderation of the Act enacted,⁷⁵ yet, the Act still introduced a clear penal severity approach for terror-related offences, distinct from the general policy of deprioritising deterrence and decreasing incarceration.

Another example of a specialised approach to Palestinians is evident in the exclusion of security prisoners from the scheme of administrative release. As noted earlier, Israel expanded its administrative release scheme in 2018, to comply with the Supreme Court's ruling on prison

⁶⁹ Ibid, 1105; Constitution, Law and Justice Committee Meeting (17 February 2014) (n 9) Deputy Attorney General, Raz Nizri, 6; Protocol no 86 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (28 December 2015) the Attorney General Office representative, 69.

⁷⁰ Protocol no 107 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (1 February 2016) 15.

⁷¹ Ibid, 5, 22.

⁷² Kremnitzer and Fuchs, *The Counterterrorism Act Bill, 2011-5771* (n 27) 24; Margalit and Shinar (n 11) 24.

⁷³ The Constitution, Law and Justice Committee Meeting (28 December 2015) (n 69) MK Ze'ev Begin, 72; The Constitution, Law and Justice Committee Meeting (1 February 2016) (n 70) MK Ze'ev Begin, 11; See footnote 112 in Chapter Two of this thesis.

⁷⁴ Kremnitzer and Fuchs, *The Counterterrorism Act Bill, 2011-5771* (n 27) 24; The Constitution, Law and Justice Committee Meeting (1 February 2016) (n 70) the Constitution Committee's Legal Advisor, Sigal Kogot, 3.

⁷⁵ For instance, the cap in the penal severity provision was taken down from 30 years to 25.

overpopulation. Administrative early release has been used since 1990, and it allows the IPS to release prisoners a few weeks before the end of their prison term, to manage prison overpopulation.⁷⁶ In 2012, the Government sought to narrow the scheme, reportedly in response to the Israel Security Agency's demand to exclude security prisoners from it.⁷⁷ Legal advisors were then concerned that explicit exclusion would seem discriminatory. The scheme was therefore amended to bar those serving sentences of over four years, targeting supposedly dangerous offenders who were sentenced to longer prison terms, and not directly excluding all security prisoners.⁷⁸ Accordingly, MKs agreed in August 2018 to retain the same policy regarding the expanded administrative release scheme.⁷⁹

However, two months later, *Haaretz* reported that 300 security prisoners would be released earlier than scheduled thanks to the expanded release scheme.⁸⁰ Subsequent events provide a clear example of how media reporting can have an immediate impact on legislation. In response to the *Haaretz* article, Yoav Kisch, Chair of the Internal Affairs and Environment Committee, called an emergency meeting and demanded to exclude security prisoners from the release scheme.⁸¹ The Attorney General representatives finally conceded, rationalising that security offences reflect an 'enhanced anti-social behaviour',⁸² that justifies categorical distinction when it comes to administrative release, and that Israeli law already includes special policies regarding terror-related offences.⁸³ The enacted amendment therefore excluded people convicted by military courts for Defence Regulation offences and those convicted of offences according to the Counterterrorism Act, and the previous offences of the Defence Regulations and the 1948 Prevention of Terrorism Act.⁸⁴ In other words, what was still considered discriminatory in August 2018, became a legitimate retribution-based categorisation in October

⁷⁶ Initially, administrative release excluded offenders convicted of certain crimes, including security offences, drug crimes and sex offences. In 1993 the exclusion provision was removed, considering the short periods of release in question; Administrative Release Act (temporary order), 5750-1990; Protocol of the 79th Meeting of the 13th Knesset (22 March 1993) 151.

⁷⁷ Protocol no 707 of the Internal Affairs and Environment Committee Meeting, 20th Knesset (1 August 2018) 26.

⁷⁸ Protocol no 506 of the Internal Affairs and Environment Committee Meeting, 18th Knesset (20 February 2012) 27; Those sentenced for over four years could receive early administrative conditional release, before the two-thirds point of their sentence, if found eligible by the Parole Committee.

⁷⁹ Internal Affairs Committee Meeting (1 August 2018) (n 77) 26.

⁸⁰ Josh Breiner, 'Israel Expected to Free 300 Palestinian Prisoners Due to Overcrowding' *Haaretz* (6 October 2018).

⁸¹ Protocol no 716 of the Internal Affairs and Environment Committee Meeting, 20th Knesset (16 October 2018) 3.

⁸² *Ibid.*, 13.

⁸³ *Ibid.*

⁸⁴ The Prisons Ordinance (Amendment no 54 and Temporary Order) (n 52).

of that year. Even though security prisoners were held in the most overcrowded IPS facilities, with an average living space ranging between 2.2 and 2.8 sqm per person in 2014,⁸⁵ their offences justified prolonging their sentence compared to criminal prisoners.⁸⁶ Several MKs condemned the distinction as discriminatory and populist.⁸⁷ Yet, Kisch, and Gilad Ardan, then the Minister for Public Security, took pride in the exclusion of security prisoners and commanded the Attorney General who ‘realised the moral significance of this law’⁸⁸ and essentially approved further differential treatment of security prisoners.

The Israeli administration also advanced penal severity by abolishing the possibility of parole for some security prisoners in 2018. Until then, Israeli law permitted all prisoners to apply for parole after serving two-thirds of their sentence.⁸⁹ Since 2016, MKs began submitting bills seeking to deny security prisoners parole and guarantee longer punishments.⁹⁰ Supporters argued for a clear distinction between criminal and security offenders.⁹¹ MK Anat Berko contended that a security prisoner ‘disconnected his relationship with the society which he sought to harm’, and that as a result, ‘we do not owe anything to a terrorist’.⁹² Berko accordingly reasoned that rehabilitation is irrelevant for security prisoners and that the state should pursue deterrence and retribution.⁹³ These justifications resonate with Jakobs’ grounds for enemy criminal law.⁹⁴ Like Jakobs’, Berko argues that by their conduct, security prisoners disentitled themselves to

⁸⁵ Petition in H CJ 1892/14 *The Association for Civil Rights in Israel v Minister of Public Security* (11 March 2014).

⁸⁶ In 2021, the administrative scheme was further narrowed, excluding prisoners sentenced for over three years, and allowing prisoners convicted of aggravated assault, sex offences and hate crimes to access the extended administrative release only if found eligible for parole; The Prisons Ordinance (no 57 and Temporary Order), 2021-5781, 2941 SH.

⁸⁷ Protocol of the 371st Meeting of the 20th Knesset (5 November 2018) 34, 37, 45; The Supreme Court denied a petition against the exclusion of security prisoners, reasoning that the 2021 amendment changed the rule regarding the populations excluded from the scheme, even though security prisoners are still the only group categorically excluded from the extended-release scheme based on their type of offending; H CJ 1406/19 *John Does v The Knesset* (27 February 2022).

⁸⁸ Knesset Meeting (5 November 2018) (n 87) 69, 29.

⁸⁹ Release on Parole Act (n 67) s 3.

⁹⁰ Release on Parole Bill (Amendment - Release on Parole and Determining Terrorists’ Sentences) 2016-5776, P/20/2794 (21 March 2016); Release on Parole Bill (Amendment - Abolishing the Commutation of Sentence for Security Prisoners) 2018-5778, P/20/5740 (15 October 2018).

⁹¹ Protocol of the 370th Meeting of the 20th Knesset (31 October 2018) 23; Protocol no 1 of the Joint Knesset and Constitution, Law and Justice Committee Meeting, 20th Knesset (19 November 2018) 7.

⁹² Protocol of the 373rd Meeting of the 20th Knesset (7 November 2018) 31.

⁹³ *Ibid.*, 31.

⁹⁴ Daniel Ohana, ‘Günther Jakobs’s Feindstrafrecht: A Dispassionate Account’ in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) 356.

reintegration through parole. MK Miki Zohar went as far as to say that parole hampers deterrence, as security prisoners know they have a ‘good chance’ to be granted early release.⁹⁵

Supporting MKs reframed deterrence as a pseudo-securitised rationale, even though this claim lacked empirical grounds, and was of limited relevance because security prisoners already had very low chances of accessing parole, as noted in Chapter Three. As with the administrative release scheme, the Attorney General warned of discrimination.⁹⁶ The Ministers Committee on Legislation subsequently approved a much narrower bill, that denied access to parole only for those convicted of murder or attempted murder classified as a terrorist act,⁹⁷ and this was the final version of the amendment.⁹⁸ Denying parole significantly prolongs the fixed duration of life sentences. For prisoners serving a 40-year minimum sentence, the amendment moved their earliest point of release forward by 13 years. In line with the penal severity provisions of the Counterterrorism Act, this amendment further identifies terror-related murders as deserving of tougher life sentences, compared to other types of murders.

Alongside the extension of prison sentences, MKs also promoted bills that prescribed the death penalty as the maximum sentence for terror offences. Israeli civilian and military law include capital punishment for several offences,⁹⁹ yet it has been used only once in the country’s history, against the Nazi officer Adolf Eichmann, in 1962.¹⁰⁰ As a matter of policy, military prosecutors refrain from demanding the death penalty.¹⁰¹ Military judges are bound by several procedural hurdles for imposing capital punishment, including the requirement of a unanimous decision of the court.¹⁰² Nevertheless, calls for enforcing the death penalty against Palestinian

⁹⁵ Knesset Meeting (7 November 2018) (n 92) 3.

⁹⁶ Joint Knesset and Constitution, Law and Justice Committee Meeting (26 November 2018) (n 39) 20.

⁹⁷ Joint Knesset and Constitution, Law and Justice Committee Meeting (19 November 2018) (n 91) 26.

⁹⁸ The Counterterrorism Act (Amendment no.4), 5779-2019, SH 2769; In January 2023, the Supreme Court denied a Palestinian life prisoner’s petition against a Parole Committee’s decision, which also argued against the lawfulness of this amendment. The Court held that arguments against the amendment must be made in a direct petition regarding its lawfulness, and avoided examining whether the amendment was constitutional in relation to the applicant; AppR 6646/22 *Mahnia v The State of Israel* (1 January 2023).

⁹⁹ In civilian law, it is prescribed for offences of treason, offences by Nazis and their collaborators and several offences under the Defence Regulations; Military law also prescribes the death penalty for the offence of ‘deliberately causing death’; Order Regarding Security Provisions (Consolidated Version)(Judea and Samaria) (No. 1651) 5770-2009 s 209; Penal Act (n 41) s 97-99; Nazis and Nazi Collaborators Penal Act 5710-1950, 57 SH 281 s 1.

¹⁰⁰ Eichmann was captured by Israeli agents in Argentina and was brought to trial in Israel in 1960.

¹⁰¹ Ron Dudai, ‘Restraint, Reaction, and Penal Fantasies: Notes on the Death Penalty in Israel, 1967–2016’ (2018) 43 *Law & Soc Inq* 862, 867.

¹⁰² Order Regarding Security Provisions (n 99) s 156, 165.

security offenders led to numerous private bills and public campaigns.¹⁰³ In recent years, Israel Beitenu party advanced the issue in its 2015 election campaign ‘death sentence for terrorists’, and it even included the matter in its coalition agreement with the Likud party.¹⁰⁴ Accordingly, a death penalty bill passed a preliminary reading in late 2017.¹⁰⁵ The bill proposed prescribing capital punishment as a maximum sentence to a new offence of ‘murder in the circumstances of a terrorist act’ in civilian law, removing the unanimous decision requirement in military courts, and cancelling the military commander’s power to commute a death sentence laid by a military court.¹⁰⁶

Proponents of the death penalty typically raise the need to ‘restore deterrence’, claiming that Palestinians enjoy a high living standard in Israeli prisons only to be later released in exchange deals.¹⁰⁷ At times, such explanations include racist depictions of Palestinians as ‘animals’ who deserve the harshest measures.¹⁰⁸ Yet, traditionally, security authorities in Israel resist the death penalty for Palestinians. Israel Security Agency representatives argue that the death penalty will not deter ‘terrorists’, since they are willing to die in their attacks. Rather, it could encourage the kidnapping of Israelis to pressure the release of Palestinians on death row.¹⁰⁹ Capital punishment will also further glorify Palestinian insurgents as Shaheed heroes.¹¹⁰ Legal advisors also note that capital punishment might not deter ideological offending, in contrast to their position on the Counterterrorism Act, and warn of damage to Israel’s image abroad.¹¹¹

¹⁰³ See the partial list of bills in Dudai (n 101) 868, supra note 25.

¹⁰⁴ Coalition Agreement for Including a Faction to the 34th Government of the State of Israel (25 May 2016) s 34.

¹⁰⁵ Penal Bill (Amendment - Death Sentence to a Convict of Murder in the Circumstances of Terror), 5777-2017, P/20/4638 (30 October 2017); Protocol of the 294th Meeting of the 20th Knesset, DK 11 (3 January 2018) 190.

¹⁰⁶ Penal Bill (Amendment – Death Sentence to a Convict of Murder in the Circumstances of Terror) (n 104).

¹⁰⁷ Ibid; Protocol of the 294th Meeting of the 20th Knesset, DK 11 (3 January 2018) Avigdor Liberman, 155; Protocol no 708 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (14 November 2018) 20, 27, 32; Yossi Fuchs, ‘The Time has Come: Death Sentence for Terrorists’ (2014) <<http://www.haforum.org/he/%d7%94%d7%92%d7%99%d7%a2-%d7%94%d7%96%d7%9e%d7%9f-%d7%a2%d7%95%d7%a0%d7%a9-%d7%9e%d7%95%d7%95%d7%aa-%d7%9c%d7%9e%d7%97%d7%91%d7%9c%d7%99%d7%9d/>> accessed 30 October 2022.

¹⁰⁸ See examples in Dudai (n 101) 879; and more recently in the Knesset Meeting (3 January 2018) (n 105) MK Ze’ev Elkin, 179.

¹⁰⁹ The Constitution Committee Meeting (14 November 2018) (n 107) 71; Boaz Sangero, ‘On Capital Punishment in General and on the Death Penalty for Murder Committed During a Terrorist Act in Particular’ (2000) 2 Alei Mishpat 127 195, 199 [Hebrew].

¹¹⁰ Originally describing a witness or a martyr in the Quran, and commonly used today to describe a person who died for an ideological cause; Ibid, 201; Dudai (n 101) 872.

¹¹¹ Protocol no 720 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (28 November 2018) 11, 27.

Israel Beitenu's bill was eventually halted after the party left the coalition.¹¹² Yet MKs continue to submit similar bills.¹¹³ Dudai argues that Israel's death penalty discourse reflects a tension between restraining state power, which arguably legitimises Israel, and using capital punishment as a 'penal fantasy', which allows an outlet for national rage, even if its proponents know it will not materialise.¹¹⁴ Dudai highlights that all the while, Israel utilises de facto alternatives to capital punishment, like targeted killing. However, the ongoing debate highlights the significance of the death penalty as an expression of extreme state power.¹¹⁵ Given the trend of imposing harsher punishments for Palestinians, it is not unlikely that the Knesset might make the penal fantasy of executions come true.

The four areas discussed here, the Counterterrorism Act, the exclusion from extended administrative release, the denial of parole and the repeated legislative attempts around the death penalty, reflect the gradual development of a formally specialised, and distinctively severe, policy for security punishment. General deterrence arguments are central to this specialised policy. For MKs and legal advisors, deterrence is important since security prisoners were proud of their actions and were supported by the Palestinian society.¹¹⁶ But this reasoning just questions the relevance of deterrence, since its target audience supposedly conceives attacks against Israeli citizens and soldiers as normative, and even admirable, conduct. Often, MKs explained the importance of promoting penal rationales like retribution and deterrence, by referring to the general circumstances of the conflict rather than to the specific conduct of the offender in question. For instance, the need to deter the Palestinian public from involvement with terror organisations, considering the supposedly good prison conditions and the prospect of exchange deals. Ministers and MKs accordingly conceive their promotion of more severe penalties as a

¹¹² Oliver Holmes, 'Israeli Defence Chief Avigdor Lieberman Quits Over Gaza Truce' *The Guardian* (14 November 2018).

¹¹³ Penal Bill (Amendment - Death Sentence to a Convict of Murder in the Circumstances of Terror) 5780-2019, P/22/1403 (9 December 2019); Penal Bill (Amendment - Death Sentence to a Convict of Murder in the Circumstances of Terror) 5780-2020, P/23/122 (20 April 2020); Penal Bill (Amendment - Death Sentence to a Convict of Murder in the Circumstances of Terror) 5781-2021, P/24/28 (3 May 2021).

¹¹⁴ Dudai (n 101) 883.

¹¹⁵ *Ibid*, 872.

¹¹⁶ Joint Knesset and Constitution, Law and Justice Committee Meeting (26 November 2018) (n 39) 5.

security necessity, demanding the support of both coalition and opposition members,¹¹⁷ and seeking to turn any critics into Fifth Columnists who identify with ‘terrorists’.¹¹⁸

The focus on deterrence in Israel’s specialised policy contrasts the state’s sentencing law and the Dorner Report recommendations. Moreover, the empirical knowledge regarding the limited deterring effects of longer sentences indicates that Israel’s specialised policy also contravenes the Report’s main recommendation to develop an ‘efficient penal policy’, particularly given the perception of all security prisoners as equally dangerous.¹¹⁹ Long before the Dorner Report, a 1997 public committee’s report on structuring judicial discretion in sentencing similarly commented that general deterrence is constitutionally problematic as it instrumentalises individual liberty for other ends, in violation of Israel’s Basic Law: Human Dignity and Liberty.¹²⁰ As noted earlier, such instrumental use of liberty exemplifies the depersonalisation process entailed in enemy criminal law.¹²¹ Like Jakobs’ concept of a special law that depersonalises enemies,¹²² Israel’s specialised policy punishes security offending by withdrawing the offender’s entitlement to individual treatment. Almost always, those facing this specialised policy to security offending, are Palestinians. A Palestinian then maintains her or his personhood for as long as they avoid suspected conduct against Israel.

Israel’s specialised penal approach to security offences is in line with its general security apparatus that perceives Palestinians as a suspect population to be governed, rather than protected. At the same time, the move towards explicit targeting of Palestinians and potentially disproportionate punishments, confirmed by legal advisors, signifies the further departure of Israel’s legal system from equal treatment and basic criminal law standards. As I discuss further on, like the state legal advisors, judges of the Supreme Court of Israel have also upheld the differential treatment of security offenders, during the criminal process and inside prison.

¹¹⁷ Protocol of the 386th Meeting of the 20th Knesset (10 December 2018) 241; Knesset Meeting (31 October 2018) (n 91) 18; Knesset Meeting (3 January 2018) (n 105) 179.

¹¹⁸ Knesset Meeting (10 December 2018) (n 117) 220, 240.

¹¹⁹ Dorner Report (n 47) 28.

¹²⁰ The Committee for Examining Ways to Structure Judicial Discretion in Sentencing, *Report* (1997) 12.

¹²¹ Ohana (n 94) 356.

¹²² Günther Jakobs, ‘Appendix D: On the Theory of Enemy Criminal Law’ in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) 415.

B. The Prison Front: The Politicisation of Penal Power Behind Bars

By the mid-2000s, a permanent peace agreement was out of sight, as attacks took place inside Israel and large-scale military operations raged in the Occupied Territories. As described in Chapter Four, the Government conceived the detention of more Palestinians as a pressing security need and accordingly increased its capacity to accommodate thousands of new detainees. Likewise, the Government sought to gain better control over the incarcerated population and hinder the security risk prisoners posed. Like the IPS, Israeli legislators and policymakers saw the need to restrain the Prisoners' Movement but also identified the potential of capitalising on the Movement's contact with external organisations to advance Israel's security interests. This section analyses how Government ministers and MKs used Israel's control over prison conditions as an instrument in its larger fight against Palestinian organisations.

'The Party is Over':¹²³ Law and Policy for Restraining the Prisoners' Movement

In the 2000s, the Prisoners' Movement was a rather disoriented coalition of organisations, which saw its first failed general hunger strike in 2004.¹²⁴ Israel has since led various policies to weaken the Movement further and obstruct prisoners' endeavours to organise protests. Ministers and MKs often explained that stricter supervision of security prisoners was a security necessity, and yet, at times their rhetoric invoked the penal rationales of deterrence and retribution, which equally justified tougher prison conditions.

A first example can be seen in the regulation limiting lawyer visits. Lawyer visits are crucially important for Palestinian prisoners because they provide more frequent contact with the outside world, compared to the restricted family visits and limited access to phones. For Israel, however, these legal visits create confidential spaces, at least officially, which prisoners use for smuggling cell phones and for coordinating communications across different facilities. The visits also permit contact between people in prison and external organisations, including

¹²³ Josh Breiner, "'The Party Is Over': Israeli Minister Announces Harsher Conditions for Palestinian Security Prisoners' *Haaretz* (2 January 2019).

¹²⁴ See Chapter Four on page 169 of this thesis.

around protests and attacks.¹²⁵ In 2002, the Government expanded secondary legislation to include the IPS' powers to prevent certain legal visits.¹²⁶ Two years later, the Government had to enact these powers in primary law, following a 2004 Supreme Court decision.¹²⁷ The bill proposed to limit legal visits for security prisoners only,¹²⁸ by providing the IPS with the power to prevent a particular lawyer from visiting, based on a real suspicion that the visit would enable the commission of an offence or would cause severe harm to prison discipline, which would seriously disrupt prison order and management.¹²⁹ The Government conceived criminal offences, like phone smuggling, and prisoners' protests, as security issues which should be handled in similar ways. This time, Centre-Right Coalition MKs were concerned that direct targeting of security prisoners would seem discriminatory, and the law enacted subsequently applied to all prisoners.¹³⁰

Later, the Government broadened the power to limit lawyer visits. In 2011, it prolonged the period for preventing a visit by a specified lawyer,¹³¹ and expanded the grounds for such prevention, to include the need to thwart information transfer among prisoners, and between prisoners and external bodies, if the IPS suspected that the information related to a terror organisation's conduct, or was passed on based on the organisation's order.¹³² A 2012 amendment authorised the IPS to limit the number of lawyers who could visit specific prisoners, targeting the numerous lawyer visits with incarcerated leaders.¹³³ Deputy State Prosecutor, Shai Nitzan, argued that this power was needed since terror organisations moved their headquarters inside Israeli prisons, and accused lawyers of coordinating funds, strategy, and terror attacks.¹³⁴ Yet, when MKs protested that such matters should be dealt with by criminal investigation, instead of

¹²⁵ Protocol no 480 of the Constitution, Law and Justice Committee Meeting, 16th Knesset (19 May 2005) 17, 21.

¹²⁶ The Prisons Regulations, 1978-5733, 3882 KT 1958 s 29.

¹²⁷ HCJ 1437/02 *The Association for Civil Rights in Israel v Minister of Public Security* PD 58(2) 746 (2004).

¹²⁸ The bill included a definition for a 'security prisoner', based on the type of offence, since the category was until then defined in IPS commission ordinances only.

¹²⁹ Prisons Bill (no 30)(Prisoner's Lawyer Meeting), 2004-5765, 141 HH 314.

¹³⁰ Protocol no 493 of the Constitution, Law and Justice Committee Meeting, 16th Knesset (5 June 2005) 34; The Prisons Ordinance (Amendment no 30), 2005-5765, 2014 SH.

¹³¹ The period of administrative prevention was doubled from 5 to 10 days and the District Court judicial prevention was prolonged from 3 months, in 21 days intervals, for up to 6 months; The Prisons Ordinance (Amendment no 40) 2011-5771, 2311 SH 1034.

¹³² *Ibid*, s 45A(b).

¹³³ The Prisons Ordinance (Amendment no 43) 2011-5771, 2359 SH 410.

¹³⁴ Protocol no 426 of the Internal Affairs and Environment Committee Meeting, 18th Knesset (1 August 2011) 3.

expanding executive powers,¹³⁵ the Israel Security Agency responded that evidence for such conduct was confidential and that prosecutions of several lawyers had not stopped the phenomenon.¹³⁶ Another problem was that Israeli law does not criminalise prison protests, so criminal law powers were not suitable to eradicate communications around internal resistance. Preventing prisoners from communicating with lawyers broadened the IPS administrative arsenal against the organisations.¹³⁷

The Knesset also limited Palestinians' contact with MKs. For decades, Palestinian citizens of Israel who were elected MKs regularly visited incarcerated Palestinians and advanced issues concerning their rights, promoting better conditions, but also voicing complaints regarding guard violence and degrading treatment.¹³⁸ Palestinian MKs have also tried halting penal severity legislation and promoted negotiations around hunger strikes.¹³⁹ Jewish MKs have regularly condemned Palestinian MKs' contact with prisoners and their families, accusing them of representing 'terrorists' and of 'cynically taking advantage of the Israeli democracy',¹⁴⁰ instead of serving the 'Arab public, citizens of Israel'.¹⁴¹ This critique disregards the fact that other Jewish MKs, especially from Ultra-Orthodox parties, also visit members of their communities and promote their rights.¹⁴² Furthermore, occasionally, Israel's security bodies permit MKs to visit Palestinian leaders, like Marwan Barghouti,¹⁴³ most likely for conveying certain messages from the Israeli Government.

¹³⁵ Constitution, Law and Justice Committee Meeting (5 June 2005) 17; Protocol no 531 of the Internal Affairs and Environment Committee Meeting, 18th Knesset (1 May 2012) 20.

¹³⁶ Ibid.

¹³⁷ See Chapter Four on pages 141-142 of this thesis.

¹³⁸ Protocol of the 146th Meeting of the 14th Knesset (19 November 1997) 275; Protocol of the 82nd Meeting of the 18th Knesset, DK 29 (8 December 2009) 30; Protocol of the 148th Meeting of the 16th Knesset (29 June 2004) 8; Protocol of the 370th Meeting of the 18th Knesset (11 July 2012) 43; Protocol of the 112th Meeting of the 20th Knesset (25 February 2004) 181; Protocol of the 77th Meeting of the 18th Knesset (25 November 2009) 99.

¹³⁹ Knesset Meeting (10 May 2017) (n 138) 38; Protocol of the 356th Meeting of the 18th Knesset (6 June 2012) 210; The Constitution, Law and Justice Committee Meeting (12 October 2015) (n 9) 21; Knesset Meeting (15 June 2016) (n 6) 189.

¹⁴⁰ Protocol no 105 of the Knesset Committee Meeting, 20th Knesset (8 February 2016) 5; Protocol no 415 of the Internal Affairs and Environment Committee Meeting, 20th Knesset (29 May 2017) 20; Protocol of the 136th Meeting of the 18th Knesset (26 May 2010) 35.

¹⁴¹ Knesset Meeting (n 138) 39; Protocol no 194 of the Knesset Committee Meeting, 20th Knesset (20 December 2016) 3; Jewish MKs often accuse Palestinian MKs of refusing to condemn, and even supporting, violence against Israeli citizens. At times they also try to disqualify Palestinian MKs' candidacy for their alleged support of violence. See AB 852/20 *The Central Elections Committee for the 23rd Knesset v MK Hiba Yazbek* (19 February 2020).

¹⁴² Protocol no 162 of the Internal Affairs and Environment Committee Meeting, 15th Knesset (24 September 2000); Protocol of the 232nd Meeting of the 16th Knesset (9 March 2005) 35.

¹⁴³ Knesset Committee Meeting (20 December 2016) (n 141) 27.

In 2016, Palestinian MK Basel Ghattas was summoned for police investigation following suspicion that he smuggled mobile phones while visiting security prisoners.¹⁴⁴ For Jewish MKs from Left, Centre and Right, the singular incident of suspected phone smuggling provided grounds for action against MKs' regular contact with security prisoners.¹⁴⁵ On the day of Ghattas' investigation, even before he was indicted, the Knesset Committee confirmed the following decision:

The Knesset Committee opposes MKs visiting security prisoners, as defined by the IPS, and considers that these visits endorse and encourage such prisoners [...] the Knesset Committee [...] determines that visiting security prisoners is not within the rights and immunity of MKs, due to the potential harm to state security, according to the security services opinion.¹⁴⁶

The decision further confirmed that the Knesset¹⁴⁷ could appoint coalition and opposition MKs who would be permitted to visit security prisoners and monitor their conditions.¹⁴⁸ The IPS amended its Commission Ordinance, allowing only appointed MKs to visit, and adding that they must be accompanied by guards.¹⁴⁹ Thereafter, security prisoners could not converse with MKs in confidence. During a petition proceeding on the matter to Supreme Court, the IPS announced it would reform the regulation, to allow one MK from each party to visit certain prisoners in confidence, unless security considerations required otherwise, and to allow all MKs to visit while accompanied by guards.¹⁵⁰ The petition was dismissed based on this declared reform in July 2020,¹⁵¹ however, to date, the IPS has yet to update its Commission Ordinance. Capitalising on Ghattas' investigation, and subsequent conviction, the Knesset managed to cut incarcerated Palestinians off from a crucial channel of communication, and thus significantly hamper their ability to promote personal and collective issues.

¹⁴⁴ Eli Senyor, Hassan Shaalan and Moran Azulay, 'Joint List MK Suspected of Phone Smuggling to Palestinian Prisoners' *YNET* (18 December 2016) <<https://www.ynetnews.com/articles/0,7340,L-4894876,00.html>> accessed 30 October 2022.

¹⁴⁵ Protocol no 190 of the Knesset Committee Meeting, 20th Knesset (19 December 2016) 20.

¹⁴⁶ Knesset Committee Meeting (20 December 2016) (n 141) 9; An Israel Security Agency opinion was submitted to the Committee, detailing that MKs' visits pose a risk to state security.

¹⁴⁷ The Chair of the Knesset, the State Control Committee Chair and the Knesset Committee Chair would appoint the MKs; *ibid*, 9.

¹⁴⁸ *Ibid*, 9.

¹⁴⁹ Prison Service Commission Ordinance 03.13.00 'Knesset Member Meeting with Prisoners in Prison' (updated on 9 May 2017).

¹⁵⁰ H CJ 4252/17 *MK Dr Yousef Jabareen v The Knesset* (14 July 2020) par 11, Judge Solberg's judgment.

¹⁵¹ *Ibid*, par 20, Judge Solberg's judgment.

Perhaps the most extreme legislation the Knesset has passed to thwart prisoners' protests, is the 2015 law permitting force-feeding of hunger strikers.¹⁵² The 2012 hunger strike, and the individual protests that have proliferated since, moved the Government to search for ways to cope with lasting prisoners' struggles. For the Government, a major concern was that a striker's death might lead to a mass uprising, creating serious security repercussions.¹⁵³ The bill on force-feeding aimed to prevent the risk of death by permitting the Prisons Commissioner to request a District Court President or Deputy President to allow doctors to treat hunger strikers against their will, and thus save them from serious harm to their health. Importantly, the bill required the Court to consider state security, among other things, when determining the request.¹⁵⁴ The bill used a sanctity of life reasoning, elaborating the need for a special legal arrangement that would consider that hunger strikers do not wish to die and that their strike impacts large parts of society. According to the bill, the World Medical Organisation's prohibition on force-feeding¹⁵⁵ disregarded these considerations and further ignored the state's duty to protect the lives of those in custody.¹⁵⁶ During the Internal Affairs and Environment Committee debates, an Attorney General's representative even argued that Palestinians cannot make autonomous decisions given collective pressure, ignoring the IPS' part in preserving the organisations' control over prisoners and the possible solution of merely separating strikers.¹⁵⁷

As ministers and MKs repeatedly made clear, the law's chief goal was not to protect Palestinian prisoners, but rather to hamper their ability to pressure Israel into action by decreasing the chances of their death.¹⁵⁸ NGOs and legal scholars widely criticised the bill as a serious violation of human dignity.¹⁵⁹ The Israeli Medical Association responded that force-feeding amounts to torture and that it would guide its member to refuse to perform such

¹⁵² The Prisons Ordinance (Amendment no 48), 5775-2015 SH 2499.

¹⁵³ Protocol no 314 of the Internal Affairs and Environment Committee Meeting, 19th Knesset (23 June 2014) 47.

¹⁵⁴ Prisons Bill (no 48)(Preventing Hunger Strike Harms) 2014-5774, 870 HH, 770.

¹⁵⁵ World Medical Association Declaration of Malta on Hunger Strikers (Revised by the 68th WMA General Assembly, Chicago, US, October 2017) par 21; World Medical Association Declaration of Tokyo - Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (Revised by the 67th WMA General Assembly, Taipei, Taiwan, October 2016) par 8.

¹⁵⁶ Prisons Bill (Preventing Hunger Strike Harms) (n 154) 765.

¹⁵⁷ Internal Affairs and Environment Committee Meeting (23 June 2014) (n 153) 69.

¹⁵⁸ Protocol no 306 of the Internal Affairs and Environment Committee Meeting, 19th Knesset (16 June 2014) 7.

¹⁵⁹ Ibid, 29, 31; Mordechai Kremnitzer and Amir Fuchs, *The Prisons Ordinance Bill (Amendment no 48)(Preventing Hunger Strike Damages)*, 5774-2014 (Israel Democracy Institute, 2015); Revital Hovel, 'Physicians for Human Rights to Weinstein: Force Feeding is Against International Conventions' *Haaretz* (16 July 2013).

procedures, even if the law passed.¹⁶⁰ Israel's National Bioethics Council explained that Israeli doctors managed to save strikers' lives so far through dialogue by convincing them to take fluids.¹⁶¹ Force-feeding was said to ruin the trust doctors manage to build with protestors.¹⁶² MKs of the Centre and Left parties strongly opposed the law as well, arguing that the state should not erode strikers' dignity to prevent riots and that the law would damage Israel's international reputation.¹⁶³ It was also not at all certain that this law would achieve its declared goal of saving lives and limiting the impact of prisoners' protests. So far, all five incidents of hunger strikers' death in Israel were caused by force-feeding.¹⁶⁴ Moreover, the death of hunger strikers in 1980 is often mentioned as the catalyst leading to the rise of the Prisoners' Movement, hence, it only strengthened the Palestinian national campaign.¹⁶⁵

Nonetheless, the law was confirmed.¹⁶⁶ It was also later upheld by the Supreme Court, which found it to be constitutional since it protects the right to life and refers to security as a secondary consideration only.¹⁶⁷ However, the law has had no evident practical implications to date, as the Israeli Medical Association maintains its position on prohibiting doctors from force-feeding.¹⁶⁸ Meanwhile, the law indeed led to international concern over Israel's willingness to perform 'cruel, inhuman and degrading treatment' and violate basic human rights standards.¹⁶⁹

¹⁶⁰ Israel Medical Association, *The Position of Israel Medical Association on the Bill of Force-Feeding* (Presented to the Knesset Committee on Interior Affairs and Environment, 2014).

¹⁶¹ The National Bioethics Council, *Response to the Intention to Amend the Prisons Ordinance Regarding Force Feeding of Hunger Striking Prisoners* (2014); Protocol of the 42nd Meeting of the 20th Knesset (29 July 2015) 573, 599.

¹⁶² Israel Medical Association (n 160); The National Bioethics Council (n 161).

¹⁶³ Internal Affairs Committee Meeting (16 June 2014) (n 158) 33, 36; Internal Affairs and Environment Committee Meeting (23 June 2014) (n 153) 43.

¹⁶⁴ Reportedly, Abd el-Qaeder, Rasem Halaweh, Ali elJa'afari and Hussain Nimmer died following force-feeding while in IPS custody. Ishaq elMaragha also suffered injuries following force-feeding which reportedly led to his death in prison in 1983; Knesset Meeting (29 July 2015) (n 161) 565; Internal Affairs Committee Meeting (16 June 2014) (n 158) 6; Palestinian Human Rights Organisations Council, *Factsheet: Force-feeding under International Law and Medical Standards* (2015).

¹⁶⁵ Abeer Baker, 'Palestinian Prisoners between the Community and the Individual – An Inside Look' (2016) 8 *Maasei Mishpat* 95 [Hebrew].

¹⁶⁶ The law enacted requires the court to find a real possibility that within a short time, the lack of treatment will endanger the striker's life or cause him irreversible disability. When determining whether to permit force-feeding, the court may consider a possible risk to life or serious harm to state security, if evidence on the matter was brought before the court; The Prisons Ordinance (Amendment no 48) (n 152) s 19(14)(1)-(5).

¹⁶⁷ HCJ 5304/15 *Israel Medical Association v The Knesset of Israel* (11 September 2016).

¹⁶⁸ Jack Khoury, Sharon Fulbear and Ido Efrati, 'The HCJ Upheld Force Feeding of Hunger Striking Security Prisoners' *Haaretz* (11 September 2016); Betina Birmans, 'On Ground' Medical Staff Win Against the Force-Feeding Law' *Siha Mekomit* (28 December 2016)

<<https://mekomit.co.il/%D7%94%D7%94%D7%96%D7%A0%D7%94-%D7%91%D7%9B%D7%A4%D7%99%D7%99%D7%94/>> accessed 21 October 2021.

¹⁶⁹ UN High Commissioner for Human Rights, *UN Experts Urge Israel to Halt Legalization of Force-Feeding of Hunger-Strikers in Detention* (2015).

It seems that Israel made no clear gains from the force-feeding law. Merely legislating the legal path to force-feed underlined the imbalance between Israel, the powerful state, and the sole frail Palestinian hunger striker. While the law's contribution to security remains a puzzle, it did indicate Israel's readiness to undermine its democratic image and to take all means necessary to prevent Palestinians from dictating its policies. In that sense, highlighting Israel's power against sole strikers seems to have been a chief goal of this law, signifying once more that Israel is not only a state that incarcerates Palestinian offenders, but is in an ongoing conflict with the people it imprisons.

Lastly, in recent years the Ministry of Public Security began to promote a plan for dissolving Palestinian 'autonomy' in security wings. This decision followed decades of MKs criticising the IPS for yielding to terrorists and turning Israeli prisons into luxury 'summer camps'.¹⁷⁰ In 2018, the tension between the MKs' punitive approach and the IPS' traditional pragmatism¹⁷¹ culminated, when the Minister of Public Security, Ardan, announced his plan to degrade Palestinians' prison conditions to the minimum required by law.¹⁷² Ardan explained that he seeks to deter future terrorists:

A unique study we performed among security prisoners held in Israel showed that in many cases, Palestinians sought to die or get arrested in a terror attack, as a way out of family or financial hardships. It sounds bizarre, but it is true. Hence, we must reduce the incentives for potential terrorists. Anyone who plans to execute a terror attack out of religious or nationalist reasons must know – he will pay with his life, or he will languish in prison for many years.

Ardan's explanation is confusing. His findings on personal and financial hardships seem to call for broader strategies for disincentivising terror, like better welfare mechanisms and employment opportunities in the Occupied Territories. He seems to acknowledge that hardship feeds despair and frustration which might lead people to extreme actions. Adopting this

¹⁷⁰ Protocol no 200 of the Internal Affairs and Environment Committee Meeting, 12th Knesset (9 July 1991) 24, 34; Protocol of the 254th Meeting of the 18th Knesset (28 June 2011) 137; Protocol no 277 of the Internal Affairs and Environment Committee Meeting, 11th Knesset (5 October 1987) 14; The Internal Affairs and Environment Committee Meeting (24 September 2000) (n 142) 42; Protocol no 160 of the Internal Affairs and Environment Committee Meeting, 19th Knesset (23 December 2013) 15; Internal Affairs and Environment Committee Meeting (29 May 2017) (n 140) 60.

¹⁷¹ Protocol no 7 of the Internal Affairs and Environment Committee Meeting, 13th Knesset (16 November 1992) 8.

¹⁷² Ministry of Public Security, 'Minister Ardan Announced a Public Committee for Examining the Conditions of Security Prisoners' (13 June 2018) <https://www.gov.il/he/departments/news/security_prisoners_incarceration_130618> accessed 30 October 2022.

approach almost recognises that Palestinians are individuals, acting from personal motivations, rather than a universally dangerous population whose members seek to annihilate Israel. Yet, Ardan seems to ignore these findings, by calling for tougher punishments, based on preventive and retributivist reasoning regarding ideological offences. His policy contradicts his own words, on the revealed importance of personal and financial circumstances as drivers for security offending. Ardan sees conditions of imprisonment as another front for advancing penal severity against Palestinians. Furthermore, his proposal to deter future offenders by degrading prison conditions expands the use of Palestinians' rights for other ends, in ways that go beyond the loss of liberty and dictate life inside the prison as well. Chapter Six examines how this approach contradicts the Supreme Court's case law regarding prisoners' rights in Israel.

To promote his objectives, Ardan established a public committee, with members from the IPS, the Police and the Israel Security Agency, to propose ways to narrow security prisoners' conditions.¹⁷³ After touring prison wings and interviewing dozens of IPS, Israel Security Agency and government offices personnel, the Committee found that:

Security prisoners' self-management narrows state sovereignty [...] Terror organisations establish de facto control over prisoners' lives.¹⁷⁴

The Committee recommended a substantial shift in the IPS regime, which would include, among other things: abolishing the prison 'autonomy' by dispersing the organisational wings and treating prisoners as individuals; replacing the elected wing speaker function with a changing representative who would only communicate on general matters and would not have 'blood on his hands', as in, he was not convicted of an act leading to serious injury or death;¹⁷⁵ decreasing the funds deposited for prisoners by families; ceasing the Palestinian Authority's deposits and any external acquisition by prisoners; and prohibiting cooking within wings.¹⁷⁶ The Committee further criticised the IPS' allocation by geographic location policy, explaining that it helped

¹⁷³ Ibid.

¹⁷⁴ Josh Breiner, 'Palestinian Prisoners Run 'A State Within a State' in Israel's Jails, Officials Say' *Haaretz* (14 September 2021).

¹⁷⁵ Israeli politicians and jurists commonly use this title to signify Palestinians who deserve stricter punishments and who are considered especially dangerous; For a detailed definition with regards to exchange deals, see Protocol of the 52nd Meeting of the 16th Knesset (30 July 2003) Minister of Public Security Gideon Ezra, ¹⁷⁷

¹⁷⁶ Ministry of Public Security, 'Revoking Security Prisoners' Autonomy' (2019) <<https://www.gov.il/en/departments/news/security-prisoner-conditions-020119>> accessed 16 February 2021.

prisoners get organised and amplified the risk they pose,¹⁷⁷ rather than create divisions as discussed in Chapter Four. To recall, in September 2021, six Jenin residents held in a cell together substantiated this concern, as they managed to plan and execute an escape from Gilboa prison.¹⁷⁸ In conclusion, the Committee suggested rolling back the gains the Prisoners' Movement made.

In January 2019, Ardan declared that the prisoners' 'party is over',¹⁷⁹ and that he would bring the Committee's report before the Ministerial Committee on National Security Affairs.¹⁸⁰ But no substantial progress has been made since, possibly, due to the ongoing political crisis in Israel, which led to five elections between 2019 and 2022 and to three different ministers leading the Office of Public Security since 2019.¹⁸¹ Reportedly, security bodies oppose the recommendations, explaining that current prison conditions are sufficiently severe and that dispersing the organisations could incite mass protest and escalation.¹⁸² A dispersal of prisoners might also hamper the IPS' divide-and-rule strategy, and possibly encourage people to reorganise in order to recover their material benefits, by rebuilding the national Prisoners' Movement and regaining the Palestinian public's support. On the face of it, such development would be detrimental to the IPS, and Israel's security interests more broadly. So far, pragmatic security considerations halt the Committee's recommendations, but that might change. As with the death penalty, ministers and MKs' pressure to impose tougher, and supposedly more deterrent, punishment could prevail. This could happen sooner than later, since, following the 2021 escape noted in the introduction, an Official Government Inspection Committee has been founded to study the security failure which allowed the prison break.¹⁸³ The findings of the inspection, which have yet to be published, might potentially support the Ardan Committee's

¹⁷⁷ Breiner, 'A State Within a State' (n 174).

¹⁷⁸ Peter Beaumont, 'Six Palestinian Militants Escape from High-Security Israeli Prison' *The Guardian* (6 September 2021); Breiner, 'The Party Is Over' (n 123).

¹⁷⁹ *Ibid.*

¹⁸⁰ Ministry of Public Security, 'Revoking Security Prisoners' Autonomy' (n 176).

¹⁸¹ Bethan McKernan, 'Israel Braces for Fifth Election in Less than Four Years' *The Guardian* (29 June 2022).

¹⁸² Amos Harel and Josh Breiner, 'IDF, Shin Bet Oppose Plan to Crack Down on Security Prisoners Over Fear of Unrest' *Haaretz* (6 November 2018); Breiner, 'A State Within a State' (n 174).

¹⁸³ The Committee members include a former judge, a Professor for Criminology and a former senior director in the Israel Security Agency; Tova Tzimuki, Eli Senior and Moran Azulai, 'A Government Inspection Committee Will Investigate the Terrorists Escape' *YNET* (9 September 2021) <<https://www.ynet.co.il/news/article/hk15uidmf>> accessed 6 January 2023; Alon Hachmon, 'The Gilboa Prison Escape: The Government Inspection Committee Panel has been Published' *Maariv* (24 September 2021) <<https://www.maariv.co.il/news/israel/Article-866657>> accessed 6 January 2023.

recommendations. It is thus unclear whether the Government and security bodies would manage to curb the critique against the IPS special regime for much longer.

Incarcerated Palestinians as a Symbolic and a Strategic Tool

Israeli governments have also harnessed penal power to advance wider policy objectives that go beyond the criminal process, like dictating the Palestinian Authority's policy and pressuring Palestinian organisations in negotiations. This section examines two examples of such use of Israel's power, starting from the campaign against the Palestinian Authority's funding of prisoners, and continuing with the repeated legislative initiatives to equate the conditions of Palestinians with those of kidnapped Israelis.

'We Should Stop Paying Our Executioners':¹⁸⁴ Delegitimising the Palestinian Narrative by Defunding the Prisoners

As Chapter Four showed, the Palestinian Authority has institutionalised the financial support scheme of allowances and salaries for prisoners and families of those who died or were injured by Israeli forces. According to the Israeli Ministry of Defence, the Authority spends up to 1.2 billion NIS per year on the scheme,¹⁸⁵ which comprises approximately 7 percent of its annual budget.¹⁸⁶ Half of the scheme's funds go to allowances, salaries and grants for prisoners and ex-prisoners.¹⁸⁷ In recent years, Israel has been leading a successful campaign to cut foreign aid to the Palestinian Authority, since it funds 'terrorism'.¹⁸⁸ In 2018, the Trump administration passed the Taylor Force Act, which partly cut US economic aid, until the scheme of 'payments for acts of terrorism' was abolished.¹⁸⁹ That year, Australia and the Netherlands similarly

¹⁸⁴ Protocol of the 328th Meeting of the 20th Knesset (7 May 2018) MK Anat Berko, 40.

¹⁸⁵ Approximately £ 286 M.

¹⁸⁶ Protocol no 219 Foreign Affairs and Defense Committee Meeting, 20th Knesset (9 January 2018) 13; As noted in Chapter Four, the Palestinian Authority does not publish data on the total funds devoted to the scheme.

¹⁸⁷ Ibid, 13.

¹⁸⁸ Haaretz, 'Benjamin Netanyahu Addresses 2018 AIPAC Confab' (6 March 2018); Protocol of the 241st Meeting of the 20th Knesset (14 June 2017) 52.

¹⁸⁹ Taylor Force Act, H.R. 1164, s 4(B); which is named after an American citizen who was killed in an attack in Tel Aviv in 2016.

announced ending their direct aid after learning about the Palestinian Authority's funding of prisoners and their families.¹⁹⁰

Meanwhile, MKs demanded the Government to develop a direct response to the funding scheme, which will set an example for other countries supporting the Palestinian Authority. In March 2017, opposition and coalition members collaborated and submitted a private bill which orders the Government to deduct the funds paid to prisoners and families from the tax revenues Israel regularly transfers to the Palestinian Authority, in line with the Oslo Accords.¹⁹¹ MKs reasoned that the funding policy prevents 'achieving real peace', by providing a financial incentive for terror attacks and endorsing terrorists.¹⁹² Originally, MKs proposed to use the seized funds to compensate terror victims, but following concerns over international criticism, it was decided to merely retain the funds and avoid spending them.¹⁹³ Regardless, halting the funds also violates the Oslo Accords, yet legal advisors argued that endorsing terror likewise breaches the Accords and that Israel can lawfully prevent the transfer of funds that incite terror.¹⁹⁴

In the past, Israeli governments have occasionally halted Palestinian tax revenues in response to specific developments. This was done, for instance, in 2006, following Hamas' victory in the parliamentary elections,¹⁹⁵ and in 2015, after the Palestinian Authority joined the International Criminal Court in The Hague to pursue a case against Israel.¹⁹⁶ However, the bill aimed to limit the Government's discretion, forcing it to regularly deduct the support scheme from Palestinian tax revenues. The Government tried to moderate the bill so that the Committee of Ministers of National Security Affairs could decide not to deduct the funds, considering reasons of foreign affairs and national security, but MKs opposed this amendment and insisted

¹⁹⁰ Editorial, 'Australia Ends Direct Aid to Palestinian Authority' *ABC News* (2 July 2018); Ali Younes, 'Netherlands Halts Aid to Palestinians Over Family Payments' *Aljazeera* (21 November 2019).

¹⁹¹ Deduction of Funds from the Palestinian Authority for Supporting Terror Bill, 2017-5777, P/20/4079 (20 March 2017).

¹⁹² Ibid; Knesset Meeting (14 June 2017) (n 188) 52; Foreign Affairs and Defense Committee Meeting (9 January 2018) (n 186) 16.

¹⁹³ Protocol no 226 Foreign Affairs and Defense Committee Meeting, 20th Knesset (12 February 2018) 5; Protocol no 260 of the Foreign Affairs and Defense Committee Meeting, 20th Knesset (27 June 2018) 6.

¹⁹⁴ Protocol no 181 of the Foreign Affairs and Defense Committee Meeting, 20th Knesset (28 June 2017) 11.

¹⁹⁵ Aluf Ben, 'Israel Halted Transferring 200 Million Shekels to the Palestinian Authority' *Haaretz* (29 January 2006) 2.

¹⁹⁶ Associated Press in Jerusalem, 'Israel Freezes Palestinian Tax Funds over International Criminal Court Move' *The Guardian* (3 January 2015).

on an automatic deduction provision that narrows executive power.¹⁹⁷ The Act passed in 2018,¹⁹⁸ and the Government accordingly ordered to halt parts of the Palestinian tax revenues each year between 2019 and 2021.¹⁹⁹

Effectively, Israel has seized funds it does not own²⁰⁰ to condemn the funding of prisoners, which was facilitated by its own prison authorities. If the Government wished to stop the funding, it could have ordered the IPS to block prison allowance deposits from the Palestinian Authority and Palestinian families.²⁰¹ Such a move would likely have caused havoc in Palestinian wings. So, instead, the Government and the MKs chose to have it both ways: to criticise the financial support of ‘terror’, while continuing to facilitate ‘terror’ funds to maintain prisoners’ quality of life and keep the IPS’ facilities orderly. Israel itself preserved the system of rewards for prisoners and families. Essentially, the Government had no way to also shut down the Palestinian Authority’s support scheme for families, and it did not present any plan to do so. Meanwhile, as Israeli media also acknowledged, the Authority could not afford to end the funding scheme, as that might have destabilised its regime, given the political status of prisoners and those killed by Israeli forces in Palestinian society.²⁰² And indeed, the Authority responded to the Act by refusing to receive partial revenues, and by declaring it would continue to support prisoners and families.²⁰³ But its financial state deteriorated fast, raising concerns that Hamas might try to take over the West Bank by bribing unpaid security personnel, as it reportedly did

¹⁹⁷ Foreign Affairs and Defense Committee Meeting, 20th Knesset (12 February 2018) (n 193) 7; Protocol no 231 of the Foreign Affairs and Defense Committee Meeting, 20th Knesset (21 February 2018) 6; Protocol no 252 of the Foreign Affairs and Defense Committee Meeting, 20th Knesset (11 June 2018) 6.

¹⁹⁸ Act to Halt Funds Paid by the Palestinian Authority with Relation to Terror from the Funds Transferred by the Government of Israel, 2018-5778, 2730 SH 732.

¹⁹⁹ Noa Landau and Jack Khoury, ‘Israel Freezes Transfer of 500 Million Shekels of Palestinian Authority Taxes’ *Haaretz* (17 February 2019); Ministry of Defence, *The Minister of Defence Report to the Committee of Ministers for National Security Affairs According to the Act to Halt Funds Paid by the Palestinian Authority with Relation to Terror from the Funds Transferred by the Government of Israel, 2018-5778* (2021).

²⁰⁰ As representatives from the Ministry of Treasury and the Ministry of Foreign Affairs explained; Foreign Affairs and Defense Committee Meeting (28 June 2017) (n 194) 3; and Palestinian MKs argued in Protocol of the 320th Meeting of the 20th Knesset (5 March 2018) 150.

²⁰¹ As Palestinian MK Jamal Zahalka commented: *Ibid*, 169; Protocol of the 352nd Meeting of the 20th Knesset (2 July 2018) 118.

²⁰² Moran Azulai, Shahar Hai and Elinor Levi, ‘The Cabinet Confirmed Terrorist Salaries Deduction Law’ *YNET* (17 February 2019) <<https://www.ynet.co.il/articles/0,7340,L-5464875,00.html>> accessed 30 October 2022.

²⁰³ Herb Keinon, ‘PA Refuses to Accept Tax Fees from IL Following “Pay-for-Slay Deduction”’ *The Jerusalem Post* (21 February 2019); Jacky Khoury and Amira Hass, ‘The Palestinians: We Denied Hundreds Million Shekels from Israel Following the First Deduction from the Authority’s Funds’ *Haaretz* (27 February 2019).

in Gaza in 2006.²⁰⁴ In 2020, Israeli ministers were accordingly concerned that further deductions will continue to weaken the Authority, against the recommendations of the military and the Israel Security Agency, however, the Act left them no leeway on the matter.²⁰⁵

The Act of halting funds pursues the moral condemnation of the Palestinian narrative regarding national resistance. For the proposing MKs, this goal bypassed pragmatic considerations, which might justify supporting the cooperative Palestinian Authority. Through this Act, Israeli legislators aimed to dictate how the Palestinian leadership responds to insurgency and to penalise it for not turning against the admiration for prisoners and Shaheeds. While the Palestinian Authority remained immune to these pressures, despite the ongoing deductions and foreign aid cuts, it reportedly began to change the funding scheme rules. According to Israeli media, the Authority agreed in November 2020 to begin determining salaries based on financial need, rather than the severity of the offence, in exchange for receiving its deducted revenues.²⁰⁶ Such a change signifies a step towards de-politicisation of the scheme, by turning it to a system of welfare support rather than ‘gratitude’ funds for freedom fighters. Financial support of this kind is still far from Israel’s opposition to any type of funding, yet it also slightly departs from what is arguably a glorification of deadly attacks.

Equating Conditions: The Strategic Use of Prison Conditions for External Negotiations

Recent decades have also seen Israeli administrations degrade incarcerated Palestinians’ conditions in response to external events, drawing on prisoners’ political affiliations. As Chapter One showed, such direct use of prisoners is common in conflict penalty, and it uncovers the conflict that is behind the supposedly judicial process of punishment. It reveals the state’s interest as a party to the hostilities. In Israel, the Government has been increasingly, and more

²⁰⁴ Ohad Hemo, ‘Senior PA Man Warns: Hamas will Exploit the Financial Crisis - and After Gaza, Will Take Over the West Bank Too’ *N12* (16 April 2019) <https://www.mako.co.il/news-military/security-q2_2019/Article-1778b3ba0472a61004.htm> accessed 30 October 2022.

²⁰⁵ Barak Ravid, ‘Debate in the Cabinet: Gantz, Michaeli and Horowitz Disagreed the Timing for Halting Palestinian Tax Revenues’ *Walla* (13 July 2021) <<https://news.walla.co.il/item/3447967>> accessed 30 October 2022.

²⁰⁶ Before, salaries were determined by the length of the sentence, rewarding those who serve lengthier punishments, most likely for serious crimes; Khoury and others (n 3).

explicitly, using its power to dictate prison conditions for ends unrelated to individual criminal punishment.

In 2009, the Government commissioned a professional board of representatives from the IPS, the Israel Security Agency, the military and the Ministry of Justice, to consider Palestinians' conditions following the prolonged three years captivity of Israeli soldier Gilad Shalit.²⁰⁷ This board preceded the one initiated by Minister Ardan, and it similarly recommended the withdrawal of privileges for Palestinians, to pressure Hamas to repatriate Shalit.²⁰⁸ In 2011, the Government implemented the recommendation to cease all academic studies for Palestinians, who until then could access remote academic degrees through the Open University of Israel.²⁰⁹ As I show in the next chapter, even though Shalit was released later that year, the IPS has maintained the prohibition on academic studies, and the Supreme Court upheld this policy, as it found the funding of tuition fees by organisations to constitute a reward for terror.²¹⁰

The Government often prohibits family visits in response to external developments. Occasionally, limiting visits is an immediate reaction to escalations, for instance, the Hamas and Fatah clashes in 2007, or the 2014 Gaza War.²¹¹ In 2017, the Government authorised the Minister of Public Security to impose 'pressure measures' on Hamas prisoners, as part of the endeavours to advance the return of two kidnapped Israeli citizens, who suffer from mental conditions, and the remains of two soldiers. The Minister accordingly ceased family visits of Gazan Hamas members in July 2017, and this prohibition is still in place to this day.²¹²

Despite the Government's regular use of administrative power to withdraw rights, MKs repeatedly attempt to regulate and dictate the executive discretion of the IPS on withdrawing security prisoners' rights. Since 2007, five different private bills have been submitted to this end, some several times. Four bills made it past preliminary reading, however, none have continued

²⁰⁷ Protocol of the 39th Meeting of the 18th Knesset (23 June 2009) 72.

²⁰⁸ HCJFH 204/13 *Salah et al v The Prison Service et al* (4 April 2015) par 1-2, President Naor's judgment.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*, par 4, Judge Shoham's judgment and par 5, Judge Hendel's judgment.

²¹¹ Protocol of the Foreign Affairs and Defense Committee Meeting, 17th Knesset (2 April 2008) 11; Protocol of the 195th Meeting of the 19th Knesset (16 July 2014) 15.

²¹² HCJ 6314/17 *Namnam v The Government of Israel* (4 June 2019) par 1 and 11.

to further readings.²¹³ As MKs explained, the bills aimed to equate the conditions between kidnapped Israelis and incarcerated Palestinians, to deter the organisations, by showing that hijacking Israelis will only lead to harsher conditions rather than to prisoners' release.²¹⁴ MKs also argued that tougher conditions will pressure the organisations to release hostages in return for reinstating privileges, instead of releasing prisoners.²¹⁵ The underlying retributivist rationale was that incarcerated Palestinians should pay for their organisations' actions. As Minister Ardan commented, the Israeli public is furious over the conditions Palestinians enjoy, for instance by buying fresh groceries and cooking in their wings, while Hamas continues to hold Israeli captives.²¹⁶

Most bills proposed to prohibit family visits for members of an organisation that has kidnapped Israelis, to match Hamas' refusal to allow visits by third parties to kidnapped Israelis.²¹⁷ However, some bills suggested further measures, including solitary confinement, denial of parole, detention orders upon the end of prisoners' sentences,²¹⁸ and prohibiting contact with the outside world, including through lawyer visits.²¹⁹ Some of the bills ordered the automatic withdrawal of rights, leaving the Minister of Public Security no discretion,²²⁰ or some opening to allow visits in exceptional cases.²²¹

Legal advisors oppose these bills. The Deputy Attorney General explained that the proposed denial of visits amounts to forbidden collective punishment, which might also hamper

²¹³ Prisons Bill (Limiting Visits for Security Prisoners) 5767-2007, P/17/2904 (25 July 2007); Prisons Bill (Denying Visits of Security Prisoners Affiliated With a Terror Organisation Holding Israeli Captives) 5768-2008, P/17/3375 (11 February 2008); Prisons Bill (Preventing Visits) 5769-2009, P/18/735 (1 April 2009); Release of Captives and Kidnapped Persons Bill, 5769-2009, P/18/892 (4 May 2009); Prisons Bill (Denying Visits of Security Prisoners Affiliated With a Terror Organisation Holding Israeli Captives) 5778-2018, P/20/4964 (8 January 2018).

²¹⁴ Release of Captives and Kidnapped Persons Bill, 5769-2009; Foreign Affairs and Defense Committee Meeting (2 April 2008) (n 211) 11; Knesset Meeting (26 May 2010) (n 140); Protocol of the 368th Meeting of the 20th Knesset (24 October 2018) 75; Knesset Meeting (23 June 2009) (n 207) 72; Protocol of the 247th Meeting of the 20th Knesset (28 June 2017) 20.

²¹⁵ Release of Captives and Kidnapped Persons Bill, 5769-2009; Protocol no 456 of the Internal Affairs and Environment Committee Meeting, 18th Knesset (28 November 2011) 5.

²¹⁶ Knesset Meeting (24 October 2018) (n 214) 79.

²¹⁷ See e.g. Stephanie Nebehay, 'ICRC Demands Hamas Provide Proof Shalit Alive' *Reuters* (23 June 2011) <<https://www.reuters.com/article/uk-palestinians-israel-idUKTRE75M1V120110623>> accessed 25 May 2022; Prisons Bill (Preventing Visits), 5769-2009; Prisons Bill (Limiting Visits for Security Prisoners), 5770-2010, P/18/2396 (17 May 2010); Prisons Bill (Denying Visits of Security Prisoners Affiliated With a Terror Organisation Holding Israeli Captives), 5778-2018.

²¹⁸ Imprisonment of Wanted Prisoners Bill, 5769-2009, P/18/758 (1 April 2009).

²¹⁹ Release of Captives and Kidnapped Persons Bill, 5769-2009.

²²⁰ Prisons Bill (Preventing Visits), 5769-2009.

²²¹ Imprisonment of Wanted Prisoners Bill, 5769-2009; Prisons Bill (Denying Visits of Security Prisoners Affiliated With a Terror Organisation Holding Israeli Captives), 5768-2008.

Israel's ability to protect the policy of incarcerating Palestinians within its borders.²²² A Ministry of Justice representative added that prisoners serving a sentence for their membership of an organisation should not be punished for an action the organisation has taken, in which they had no direct part.²²³ Opposing MKs argued that Israel should not imitate Hamas' conduct²²⁴ and should not 'search for symmetry in cruelty' to captives.²²⁵ Ultimately, it may be that the Government avoided promoting these bills to retain broad discretion and avoid automatic limitations like those set out in the Act on halting tax revenues.

MKs' determination to achieve symmetry between Israeli captives and Palestinian prisoners attests to a comparison between the status of these two groups that obscures the criminal context of Israel's incarceration of Palestinians. MKs specifically used the word 'mutuality',²²⁶ which resonates with the grounds for protecting captured fighters as a way to guarantee fair treatment of captives by all parties.²²⁷ However, as the experience of World War II showed, mutuality can also fuel a dynamic of retaliation against captured fighters.²²⁸ Israeli governments adopted the same course of action, using penal power as a response to external events, imposing harsher treatment to condemn the organisations' conduct and create leverage in negotiations. In essence, Israel has used its ability to punish Palestinians further to reinforce its superior power whenever challenged by Palestinian organisations. As the next chapter discusses, in 2019, the Supreme Court upheld the prohibition on visits to Gazan Hamas members, finding that it is within the power of the Minister of Public Security.²²⁹ As elaborated below, in this decision, the Court effectively confirmed a practice that amounts to unlawful collective punishment.²³⁰

²²² Foreign Affairs and Defense Committee Meeting (2 April 2008) (n 211) 3.

²²³ Ibid, 7.

²²⁴ Knesset Meeting (26 May 2010) (n 140) 46.

²²⁵ Internal Affairs and Environment Committee Meeting (28 November 2011) (n 215) MK Israel Hasson, 15.

²²⁶ Knesset Meeting (28 June 2017) (n 214) 21; Release of Captives and Kidnapped Persons Bill, 5769-2009.

²²⁷ S.P. MacKenzie, 'The Treatment of Prisoners of War in World War II' (1994) 66 J Modern History 487, 497.

²²⁸ Iris Rachamimov, 'Military Captivity in the Two World Wars: Legal Frameworks and Camp Regimes' in Roger Chickering, Dennis Showalter and Hans van de Ven (eds), *The Cambridge History of War*, vol 4 (Cambridge University Press 2012) 231; MacKenzie (n 227) 497.

²²⁹ *Namnam v The Government of Israel* (n 212), par 12, Judge Hendel's judgment.

²³⁰ Alon Margalit, 'Accounting for Those in the Hands of the Belligerent: Security Detainees, the Missing and the Dead in the Israeli-Hamas Conflict' (2020) 25 J Conflict & Security L 565; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 116; Henckaerts and Doswald-Beck (n 31) rule 126; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Doc A/RES/43/173, 9 December 1988) principle 19; Standard

Conclusions

Since 1990, successive Israeli governments have expanded the criminalisation, enforcement, and use of punishment against Palestinian insurgency. Doing so, governments have also increased the gap between Israel's criminal justice policy, which deprioritised deterrence and pursued alternatives to incarceration, and the approach it has taken to Palestinian prisoners. Israel's practices of the past decades attest to a special policy for security offending, which targets any kind of support for bodies designated as 'terror organisations', expands administrative powers, prioritises deterrence and enforces more severe penalties against Palestinian resistance.

Israel's policies also show its willingness to adopt universal measures against Palestinian security prisoners. MKs often argued for a firm moral response to 'terror' that represents the Israeli public's position and de-legitimises the Palestinian narrative that supports insurgents. At times, the IPS and Israel Security Agency supported this approach, to gain better governance of incarcerated Palestinians and weaken their ability to organise protests and communicate their goals with the outside world. Yet, when legal advisors sought to moderate penal severity, or avoid the direct targeting of security prisoners, they faced MKs' critique for disregarding the people's will for tougher punishment. MKs similarly argued that ministers and executives were neglecting their moral duty to halt tax revenues as a response to the funding of prisoners. MKs criticism, and successful attempts to limit executive discretion, resonates with the populist penal discourse that proliferated in Anglo-European countries for the past four decades.²³¹ Like penal populists, MKs claimed to represent the will of the people when promoting longer sentences and stricter conditions, against the professional, supposedly disconnected, views of lawyers and security experts. Occasionally, MKs seem to have recognised the complexity of security offending and how it may be driven by personal and financial hardships,²³² rather than purely ideological motivation. However, the solutions they proposed focused on harsher punishments,

Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)(UN Doc A/RES/70/17517, December 2015) rule 58(b).

²³¹ John Pratt, *Penal Populism* (Routledge 2007) 12; Nicola Lacey, *The Prisoners' Dilemma* (Cambridge University Press 2008) 3.

²³² Ministry of Public Security, 'Minister Ardan Announced a Public Committee for Examining the Conditions of Security Prisoners'; Also see Minister of Education Naftali Bennet's comment in Knesset Meeting (7 November 2018) (n 92) 35.

rather than broader strategies that address the financial conditions in the Occupied Territories or consider possible resolutions to the conflict.

At times, MKs' moral position has been in tension with the views of legal advisors and the position taken by security organisations, who wished to consider the legal and strategic implications of certain practices, including on Israel's image. As this chapter has shown, legal advisors seem to have gradually come to terms with several problematic practices, by developing special retributivist and preventive rationales and citing security needs, to justify practices that deviate from criminal law principles and infringe on human rights. Perhaps the most extreme example in this context is the 2015 force-feeding law. As Chapter Six will demonstrate, the Supreme Court of Israel as well provided various justifications for imposing collective and separate penal policies for incarcerated Palestinians.

This chapter has also discussed several policies that have not (yet) been implemented, but which signify the future intentions of ministers and MKs to make punishment more severe. Pragmatic considerations have halted initiatives like abolishing the special regime or imposing the death penalty, but given the Knesset's pull towards greater penal severity on grounds of security, this might well change.

The development of a specialised penal approach to Palestinian security offenders aligns more closely with Israel's resort to using individual punishments, including prison conditions, in pursuit of national security goals. This approach recognises that Palestinians are external to Israel's criminal law and criminal justice policies, and so there is no contrast between the collective treatment of Palestinians and the country's constitutional and international law commitments. Israel's move towards a clearer specialised policy exemplifies penal power that responds to conflict. The ongoing hostilities, and lack of prospects for negotiations, led the state to develop a distinct system that follows a different prioritisation of penal rationales, than the one adopted in criminal law, and makes direct use of prisoners to advance security objectives. Three decades after the Oslo Accords, it is almost unimaginable that Israel might pardon Palestinian security prisoners again. Instead, it continues to develop the use of penal power to respond, thwart and delegitimise the Palestinian national agenda.

Chapter 6: Conflict Penalty as Reviewed by the Supreme Court of Israel

In November 1992, the Supreme Court of Israel (hereinafter in this chapter ‘the Supreme Court’ or ‘the Court’) moved from its old building in Jerusalem city centre to a new site, close to the Knesset and the Prime Minister’s Office. Built with Jerusalem stone, the new building draws on traditional and modern architecture, featuring wide windows and arches, to symbolise the Court’s relationship with society and its commitment to both traditional and modern values.¹ As its location and design underscore, the Supreme Court is Israel’s highest judicial forum. Serving as the Court of Appeal for civil, administrative, and criminal procedures, and as the Supreme Court in proceedings against Government policies, the Supreme Court’s decisions bind all lower courts and shape all areas of Israeli law.

In this chapter I analyse the Supreme Court’s rulings on Israel’s penal policies against Palestinians, drawing on cases that date from 1980, when the Court first reviewed the IPS’ restrictions on incarcerated Palestinians, to 2021, when petitioners continued to challenge the categorical limitations they face.² Studying these cases, the chapter examines the Court’s approach to Israel’s penal policy against Palestinian security detainees, defendants and prisoners. It considers the Court’s rulings on penal severity, the restriction of prisoners’ rights, the limitations on rehabilitation and parole, and the use of individual rights for other ends that serve the state’s security interests.

Discussing the Court’s approach to these issues is particularly pertinent for rulings that followed the 1990s, a decade in which Israel declared itself increasingly committed to human rights. In 1991, Israel ratified five important international human rights conventions, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the UN Convention on the Rights of the Child.³ A

¹ The Supreme Court, ‘The Construction of the New Supreme Court Building’ <<https://supreme.court.gov.il/sites/en/Pages/HistoricalBG.aspx>> accessed 30 October 2022.

² The earlier cases were included since they refer to longstanding practices of the IPS against security prisoners.

³ UN Office of the High Commissioner for Human Rights, ‘Status of Ratification Interactive Dashboard’ (2022) <<https://indicators.ohchr.org/>> accessed 30 October 2022.

year later, the Knesset enacted the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. In the 1995 landmark case of *United Mizrahi Bank Ltd v Migdal Cooperative Village*,⁴ the Supreme Court found that Basic Laws have constitutional status.⁵ Therefore, the Court could strike down laws that violate rights enshrined in basic laws and which fail to fulfil the conditions of the violation of rights paragraph.⁶ According to this paragraph, nonconforming legislation must align with the values of the State of Israel, serve a proper purpose, and violate rights only to the extent necessary.⁷ As noted in the Introduction, *United Mizrahi Bank Ltd v Migdal Cooperative Village* brought about a judicial constitutional revolution in Israel, and the Court has since protected human rights by striking down primary and secondary legislation and ruling against Government policies.⁸

Since 1967, the Supreme Court has heard cases by Palestinian residents of the Occupied Territories, including petitions against military actions, and appeals against Israeli and military courts' decisions. The Court's assertion of jurisdiction, as a domestic tribunal reviewing military actions in an occupied territory, was unprecedented.⁹ In several cases, the Court intervened in state policies and protected the rights of Palestinians.¹⁰ For Israeli jurists, the Supreme Court's judicial review of state actors in the Occupied Territories attested to Israel's commitment to the rule of law and the safeguarding of Palestinians' rights.¹¹ However, Israeli politicians, particularly from the Right, strongly oppose the Court's 'judicial activism' which, they argue,

⁴ LCA 1908/94 *United Mizrahi Bank Ltd v Migdal Cooperative Village* (9 November 1995).

⁵ Ibid, par 38 and 54, former President Shamgar's judgment.

⁶ Ibid, par 4, President Barak's judgment.

⁷ Basic Law: Human Dignity and Liberty s 8; Basic Law: Freedom of Occupation s 8.

⁸ Examples relating to incarceration include the striking down of prisons privatisation, of internment of asylum seekers, and of detention hearings for security suspects who are denied access to legal advice; HCJ 2605/05 *The Academic Center of Law and Business v The Minister of Finance* (19 Nov 2019); HCJ 7146/12 *Adam et al v The Knesset of Israel et al* (16 September 2013); CrimAppR 8823/07 *John Doe v The State of Israel* (11 February 2010).

⁹ Although Ben-Nathan argues that through a colonial lens, the Supreme Court is akin to the British Privy Council, which operated as a higher judicial authority reviewing cases from the colonies; Smadar Ben-Nathan, 'The Supreme Court and the Territories: The Last Diamond in the King's Throne' in Ishay Menuchin (ed), *50 Concepts, Testimonies and Representations of Occupation* (November Books 2017) [Hebrew].

¹⁰ E.g. HCJ 390/79 *Dweikat v Government of Israel*/PD 34(1) 1 (22 October 1979) (the Court found that a seizure order of lands for the building of a settlement did not serve military needs and was thus null and void); HCJ 5100/94 *Public Committee Against Torture v The State of Israel* (6 September 1999) (the Court ruled against any use of physical measures against security suspects, unless in exceptional cases upon immediate risk for a terror attack); HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* (30 June 2004) (in which the Court found that military land confiscation writs for building the barrier wall were unlawful as they disproportionately violated land owners rights).

¹¹ David Kretzmer and Yaël Ronen, *The Occupation of Justice* (2nd edn, Oxford University Press 2021) 2; Lisa Hajjar, *Courting Conflict* (University of California Press 2005) 119, in her interview with a military judge; Also see Meir Shamgar, *Over and Incomplete: Life Chapters* (Yediot Books 2015) [Hebrew].

destabilises the separation of powers.¹² This critique has increased in the past twenty years, as part of the general populist discourse against legal experts, as discussed in Chapter Five. Politicians target Supreme Court judges in particular as members of an elite that works against ‘the people’ and hampers the elected Knesset’s work.¹³ MKs and ministers promote ways to restrain the Court. First, by outspokenly trying to ‘re-balance’ it by appointing ‘conservative judges’,¹⁴ and by proposing different bills that increase the Government’s control over judges appointment process.¹⁵ Secondly, by promoting a bill that requires a unanimous Court decision in order to strike down legislation. The same bill also allows the Knesset to enact direct violations of basic laws, based on a Knesset majority, even if the Court already found these unconstitutional.¹⁶

As far as security practices are concerned, the politicians’ critique of the Court is far from accurate. In the vast majority of petitions by Palestinian litigants, the Court has ruled in favour of the state.¹⁷ It has tended to avoid intervention in cases concerning security policies, conceiving security as a matter determined by professionals, military and security bodies’ personnel, who should enjoy broad discretion to fulfil their duty.¹⁸ Scholars argue that the few cases in which the

¹² Kretzmer and Ronen (n 11) 3, citing Prime Minister Rabin’s famous saying that the Palestinian Liberation Organisation will better control the territories as it would fight Hamas ‘with no B’Tselem and no HCJ’; Also see Ayelet Shaked Minister of Justice, ‘Paths towards Governance’ (2016) 1 Hashiloach 37 [Hebrew]; Moran Azulai and Yael Friedson, ‘After the Historic Precedent: Right Wing Parties Promise to Deal with the HCJ’ *YNET* (18 March 2019) <<https://www.ynet.co.il/articles/0,7340,L-5480219,00.html>> accessed 30 October 2022.

¹³ As Chapter Five noted, the populist charge against legal experts is not unique to Israel, see footnote 231 there; Kipa News, ‘The Unified Right Parties Campaign Against the HCJ’ *Kipa* (19 March 2019) <<https://www.kipa.co.il/%D7%97%D7%93%D7%A9%D7%95%D7%AA/%D7%90%D7%99%D7%97%D7%95%D7%93-%D7%9E%D7%A4%D7%9C%D7%92%D7%95%D7%AA-%D7%94%D7%99%D7%9E%D7%99%D7%9F-%D7%91%D7%A7%D7%9E%D7%A4%D7%99%D7%99%D7%9F-%D7%A0%D7%92%D7%93-%D7%91%D7%92%D7%A6/>> accessed 30 October 2022; Yehuda Schlezinger, ‘Levin Attacks the HCJ: “The Disconnect from the Public Harms the State’s Jewish Character”’ *Israel Hayom* (2018); Also see Kelner A, ‘The Infiltrators HCJ: Can the Court Find its Way Out of the Hole it Dug?’ (2018) *Mida* <<https://mida.org.il/2018/03/18/%D7%91%D7%92%D7%A5-%D7%94%D7%9E%D7%A1%D7%AA%D7%A0%D7%A0%D7%99%D7%9D-%D7%94%D7%90%D7%9D-%D7%99%D7%95%D7%9B%D7%9C-%D7%91%D7%99%D7%AA-%D7%94%D7%9E%D7%A9%D7%A4%D7%98-%D7%9C%D7%A6%D7%90%D7%AA-%D7%9E/>> accessed 30 October 2022 [Hebrew].

¹⁴ Peter Beaumont, ‘Israel’s Rightwing Justice Minister Hails Supreme Court Appointments’ *The Guardian* (23 February 2017); The Minister of Justice chairs the Judges Appointment Committee, whose members include the President of the Supreme Court, two Supreme Court judges, a Government Minister, two MKs and two representatives of the Israel Bar Association; Basic Law: The Judiciary s 4(b).

¹⁵ The Courts Bill (Amendment - Hearing and Secret Ballot for Supreme Court Judges) 2020-5780, P/23/313 (26 April 2020); Proposed Draft by the Chair of the Constitution Committee, Basic Law: The Judiciary Bill (Amendment – Reinforcing the Separation of Powers, 2023-5783.

¹⁶ That is a majority of 61 out of a total 120 of MKs of the Israeli Knesset; Basic Law: Enhancement Bill (Law Amendments), 5780-2020, P/24/254 (3 May 2021).

¹⁷ Ronen Shamir, ‘“Landmark Cases” and the Reproduction of Legitimacy: The Case of Israel’s High Court of Justice’ (1990) 24 *Law & Soc Rev* 781-785; Orna Ben-Naftali, Michael Sfard and Hedi Viterbo, ‘Introduction’ in Orna Ben-Naftali, Michael Sfard and Hedi Viterbo (eds) *The ABC of the OPT* (Cambridge University Press 2018) 4.

¹⁸ Kretzmer and Ronen (n 11) 316; Shamir (n 17) 787.

Court ruled in favour of Palestinian plaintiffs did more to support its image as an impartial tribunal than provide essential protection to the rule of law and Palestinians' rights.¹⁹ Some noted that the Court often encourages the parties to compromise by pressuring the state's representatives to partially concede, thus resolving the case without having to review the Government's policy and determine its lawfulness.²⁰ The Court's tendency to conceive matters concerning Palestinians as 'security issues', allowed it to avoid adjudicating these cases, and to disregard Israel's accountability in creating the security risk through long-lasting years of occupation.²¹

As this chapter shows, the Court took a similar non-interventionist approach when ruling on Israel's penal policy. It rarely criticised the legislative and executive branches' discretion, and mostly upheld the practices reviewed, including the collective treatment of prisoners and the instrumentalization of prison conditions for political ends. It has done so by deploying several methods discussed below, by prioritising different penal rationales for security offences, distinguishing between prisoners' rights and privileges, and adopting a broad interpretation of 'state security', which allows the Court to avoid judicial review more easily on the matter in question.

The chapter begins by examining Supreme Court rulings on penal severity, and the rationales that guide sentencing for security offences. It then discusses the case law on prison conditions, first surveying the general case law regarding prisoners' rights, examining the doctrine of separating rights from privileges and discussing the Court's restrained judicial review of the IPS collective policy. Next, the chapter analyses the rulings on the reintegration of Palestinian security prisoners and, finally, examines judges' approach to the use of prison conditions for broader political ends.

¹⁹ Yoav Dotan, 'Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada' (1999) 33 *Law & Soc Rev* 319, 356; Ben-Nathan (n 9); Kretzmer and Ronen (n 11) 3; Shamir (n 17) 797; Leon Shelef, 'The Green Line is the Border of Judicial Activism: Queries about the Supreme Court Judgments in the Territories' (1993) 17 *Iyunei Mishpat* 757, 804 [Hebrew].

²⁰ This practice is not unique to cases concerning security matters; Kretzmer and Ronen (n 11) 3; Dotan (n 19) 354.

²¹ Kretzmer and Ronen (n 11) 313.

A. Penal Severity and Deterrence: The Court's Contribution to Counterterrorism

Deterrence-Based Sentencing and the Developing Circumstances of the Conflict

Traditionally, Israeli courts impose severe sentences for security offences. As Chapter Three set out, custodial sentences during the first decade of the 21st century were most common among security offenders, compared to other types of offending.²² Israeli governments have since pushed for harsher sentences, as described in Chapter Five. The Supreme Court did not halt this penal severity trend but rather confirmed it by denying appeals against the severity of punishments and accepting state appeals against supposedly lenient sentences. Often, the Court focused on deterrence as the chief rationale for stricter sentences:

When dealing with offences against state security, most consideration ought to be given to deterrence. Sentencing is still individual, but the balance between different penal rationales in such offences prioritises, or grants greater weight, to deterrence [...] such offences are usually committed based on ideological background, and thus there is importance in imposing a deterring sentence, that defendants will consider before they decide to engage in offences against state security.²³

The Court conceived the ideological component of the offence as the grounds for prioritising deterrence, tying it to other preventive considerations like public protection:

The Court [...] must convey a poignant message in the form of harsh and severe punishment, to promote the deterrence of these actions. As this Court ruled, when dealing with offences committed from an ideological background, other penal considerations, like the rehabilitation interest, make way for the public protection rationale and the deterrence of offenders from committing similar acts.²⁴

The penal severity rhetoric also often drew on the pressing circumstances of Israel's struggle against Palestinian insurgency:

The war raging between the State of Israel and Palestinian terror organisations and others who seek to destroy Israel is a daily, hard, struggle. Terror causes a heavy blood toll and indiscriminately hurts Israeli residents and citizens, Jews and Arabs.²⁵

²² Central Bureau of Statistics, *Percentage of Convictions in which Penalties were Imposed, by Type of Penalty and Characteristics of the Convicted - Table 11.4* (2002-2011).

²³ CrimApp 3417/10 *The State of Israel v John Doe* (1 November 2011) par 5, Judge Arbel's judgment.

²⁴ CrimApp 2826/15 *Abed v The State of Israel* (7 June 2016) par 14, Judge Shoham's judgment.

²⁵ CrimApp 3694/04 *Garbouny v The State of Israel* (12 July 2007) par 5, Judge Hayut's judgment; Also see CrimApp 1456/07 *John Doe v the State of Israel* (10 July 2007); CrimApp 10680/04 *The State of Israel v Kanaana* (10 November 2005) par 7, Judge Arbel's judgment.

The Court referred also to occasional escalations of violence to underline the need for stricter sentences, for instance, during the Second Intifada or the proliferation of knife attacks in 2014-2015.²⁶ As Judge Levi ruled:

The period in which we live is bloody, and all, especially those who owe allegiance to the State of Israel, must act with every means possible to narrow the scope of terror. To that end, the courts must make their contribution as well and deter [...].²⁷

For the past two decades, the Court's consistent position on penal severity provided grounds for Government policies on security sentencing. Explanatory notes to bills cited the Supreme Court and drew on its reasoning to justify longer maximum sentences, for instance, in the Counterterrorism Bill,²⁸ or the bill introducing longer sentences for smuggling communication devices into prisons.²⁹ And when the legislator enacted longer maximum penalties, the Court further insisted on its obligation to follow the 'legislator's command', and accordingly increased the length of sentences.³⁰ Since the early 2000s, the Court and the Government echoed each other positions on penal severity, generating a spiral of harsher maximum sentences and lengthier punishments for security offending.

To recall, Israeli sentencing law de-prioritised deterrence as a penal rationale in 2012 and permitted judges to consider it only within the appropriate range of punishment, and only if they found a real probability that a certain sentence would advance deterrence.³¹ Yet, when a court sets the appropriate range, it must also consider current sentencing practices. The Supreme Court's penal policy, coupled with the new penal severity laws, drove a change in sentencing practice, indicating a new, stricter, conception of the proportionate punishment for security offences. The point of departure for security punishment was longer sentences, which moved the boundaries of the appropriate punishment range upwards. Even though deterrence was no longer

²⁶ CrimApp 1299/17 *Dawiat v The State of Israel* (13 January 2019) par 10, Judge Vogelmann's judgment.

²⁷ CrimApp 2131/03 *Saadi v The State of Israel* (22 December 2003).

²⁸ Counterterrorism Bill, 5775-2015, 949 HH 1066.

²⁹ Prisons Bill (Amendment no 46) (Smuggling a Forbidden Item in Aggravating Circumstances) 2013-5773; CrimApp 5152/12 *Dessouki v The State of Israel* (22 April 2013) par 7, Judge Hendel's judgment; CrimApp 2891/12 *The State of Israel v Murad Rabaa* (15 July 2012).

³⁰ CrimApp 1466/20 *The State of Israel v John Doe* (22 July 2020); CrimApp 1465/20 *The State of Israel v John Doe* (19 March 2020); CrimApp 6533/18 *Hashim v The State of Israel* (24 October 2020).

³¹ Penal Act, 5737-1977 s 40(f)-(g).

a formal chief penal rationale, the Supreme Court's decisions and Government policies allowed it to effectively shape sentencing policies.

Like the Government, the Court used deterrence as a leading penal rationale, which was also against the recommendations of the 2015 Dorner Report.³² The Court held that security offending requires a different prioritisation of penal rationales. It perceived upholding longer sentences as the judicial contribution to Israel's battle against Palestinian insurgency. Since punishment is a tool against terror, the Court readily considered the developing circumstances of the conflict and imposed tougher sentences, particularly during times of heightened tensions.³³ Also, like the Government, it disregarded the fact that deterrence measures use individual liberty for other ends.³⁴ The Court similarly ignored the lack of empirical evidence for the claim that longer sentences advance deterrence, especially in respect of ideological offences.³⁵ It seems that for Supreme Court judges, the mere chance of deterring and possibly preventing terror superseded the principles of individual treatment and punishment. Judges took a similar approach when they found that even a slight chance of preventing terror also justifies broad restrictions on prisoners.

Limited Consideration of the Rehabilitation Rationale

Despite prioritising deterrence, the Court also considered the rehabilitation rationale at times, and criticised the IPS' policy of not providing rehabilitation services in the Palestinian security wings.³⁶ Judges were particularly concerned over the lack of programmes for juveniles and young adults, given their potential to rehabilitate, and compared to the IPS' elaborate services for juvenile 'criminal' offenders.³⁷ When examining the IPS' policy, Judge Rubinstein cited the Israeli Public Defence report, following a visit to Damon Prison:

³² E.g., *Dawiat v The State of Israel* (n 26); CrimApp 4966/13 *Abed v The State of Israel* (17 March 2014).

³³ For instance, see the Court's comments on its policy to impose tougher sentences for attempted murder by knife attacks; *Dawiat v The State of Israel* (n 26) par 10, Judge Vogelmann's judgment.

³⁴ Immanuel Kant, *The Metaphysical Elements of Justice* (John Ladd tr, Bobbs-Merrill 1965 (1798)) 138; R.A. Duff, *Trials and Punishments* (Cambridge University Press 1986) 178; The Committee for Examining Ways to Structure Judicial Discretion in Sentencing, *Report* (1997) 12.

³⁵ See Chapter Three on page 101 of this thesis.

³⁶ CrimApp 8639/13 *Eldabas v The State of Israel* (17 March 2014); CrimApp 4682/11 *John Doe v The State of Israel* (9 January 2012); CrimApp 4102/08 *Dirbas v The State of Israel* (1 December 2008); CrimApp 10118/06 *John Doe v The State of Israel* (30 April 2007); CrimApp 1456/07 *John Doe v the State of Israel* (n 25).

³⁷ In line with The Youth Act (Adjudication, Punishment and Methods of Treatment), 5731 – 1973.

The juveniles are held in crowded, unventilated, cells for 21 hours a day, with no way of stretching their legs, spending some energy, or accessing any mental stimulation – while they smoke themselves away and stare at the TV screens.³⁸

The IPS argued that security prisoners are not interested in any contact with Israeli social workers, as this might make them appear as collaborators with Israel. Yet, in this case, and in several decisions that followed, Judge Rubinstein rejected the IPS' approach:

It is no man's wish that these juveniles (or others who are very young), who enter the prison for terror offences, will enjoy an upgrade in offending, with the prison operating as a university for terror, given the terrorist company they will have, without any counter endeavours, even with vague success odds, around treatment, occupation, and education. This is not only in the interest of the juveniles or the young, and it does not turn the prison [...] into a sanatorium; **It is the public interest** to pursue the prospect – even if not brilliant in all cases – that the offences were juvenile slips, and that the individuals in question could get back on a normative track. [...] There should be programmes, considering the said law [the Youth Law – RNH], and there should be a reconsideration of family visits and communication arrangements, which have greater importance for juveniles.³⁹ [highlights included in the source – RNH]

The Court repeatedly forwarded these decisions to the Attorney General, the State Prosecutor, and the Prisons Commissioner, asking them to reconsider offering rehabilitation programmes for juveniles and young adult security prisoners.⁴⁰ Judges have raised this critique in cases concerning Palestinian citizens and residents,⁴¹ to whom the IPS must offer rehabilitation,⁴² and in cases of residents of the Occupied Territories.⁴³ The Court found that rehabilitation was relevant for both populations, building on the underlying assumption that it can prevent re-offending.⁴⁴ But the state did not change its policy. In response, judges continued to comment on the problematic lack of correctional services,⁴⁵ while Judge Rubinstein also decided on a

³⁸ CrimApp 1456/07 *John Doe v The State of Israel* (n 25) par B(3), Judge Rubinstein's judgment.

³⁹ CrimApp 10118/06 *John Doe v The State of Israel* (n 36) par H(2), Judge Rubinstein's judgment; CrimApp 1456/07 *John Doe v The State of Israel* (n 25) par B(5), Judge Rubinstein's judgment.

⁴⁰ Ibid, par H(3), Judge Rubinstein's judgment; *Dirbas v The State of Israel* (n 36); CrimApp 6257/10 *John Doe v The State of Israel* (29 May 2011); CrimApp 4682/11 *John Doe v The State of Israel* (n 36); CrimApp 3528/14 *Bakirat v the State of Israel* (22 September 2014); CrimApp 3702/14 *John Doe v The State of Israel* (28 September 2014); CrimApp 6908/16 *John Doe v The State of Israel* (4 May 2017).

⁴¹ CrimApp 4682/11 *John Doe v The State of Israel* (n 36) par 19, Judge Rubinstein's judgment; CrimApp 5873/09 *Bayoumi v The State of Israel* (28 October 2010) par 11; CrimApp 4966/13 *Abed v The State of Israel* (n 32).

⁴² The Prisons Ordinance [New Version], 5732-1971 s 11D; The Youth Act (n 37) s 34c.

⁴³ CrimApp 1456/07 *John Doe v The State of Israel* (n 25) par B(5), Judge Rubinstein's judgment.

⁴⁴ Ibid.

⁴⁵ CrimApp 3702/14 *John Doe v The State of Israel* (n 40); CrimApp 2337/13 *Quasme v The State of Israel* (16 September 2013).

symbolic sentence reduction of several months for juvenile and young security offenders who were denied access to rehabilitation.⁴⁶

The judicial critique of the lack of rehabilitation services offers a different standpoint on the individual needs and circumstances of Palestinian litigants and the arguably hazardous consequences of incarceration in the Palestinian organisations' wings. Nevertheless, as the quote above indicated, judges highlighted the benefit of rehabilitation for preventing reoffending. Hence, they advance rehabilitation as a preventive measure, rather than an essential service to which every offender should have access. Still, the Supreme Court's critical approach draws into question the categorical system that sees all Palestinians as dangerous offenders with no prospect of rehabilitation. However, when judges deliberated on pleas by Palestinian petitioners to access rehabilitation, they were far less critical of the IPS. Rather, they repeatedly upheld the IPS' scheme that places an extremely high bar for Palestinians asking for rehabilitation. This gap between the Court's approaches to rehabilitation in different proceedings is discussed below.

B. The Supreme Court and Incarcerated Palestinians' Rights

Background: The Legal Framework for Limiting Prisoners' Rights in Israel

The Supreme Court has long ruled that 'the prison walls do not separate the detainee from human dignity'.⁴⁷ The chief aim of any prison sentence is to limit the convicted offender's liberty,⁴⁸ and so, in principle, incarcerated persons retain their basic rights behind bars.⁴⁹ As legal scholars observed, different democratic regimes conceive the goal of incarceration differently, in ways that impact prison conditions and prisoners' rights. For instance, US courts see the terms of incarceration as part of the punitive continuum.⁵⁰ Prisons are not meant to be 'comfortable',⁵¹

⁴⁶ CrimApp 4682/11 *John Doe v The State of Israel* (n 36); *Eldabas v The State of Israel* (n 36) par 19, Judge Rubinstein's judgment.

⁴⁷ HCJ 355/79 *Katlan v The Prison Service* PD 34(3) 294 (10 April 1980) par 5, Judge Barak's judgment.

⁴⁸ HCJ 2245/06 *MK Neta Dovrin v The Prison Service* (13 June 2006) par 14, Judge Procaccia's judgment; APP 4463/94 *Golan v The Prison Service* PD 50(4) 136 (25 August 1996) par 12, Judge Matza's judgment.

⁴⁹ APP 4/82 *The State of Israel v Tamir* PD 37(3) 201 (29 May 1983) par 4, Judge Elon's judgment; HCJ 540/84 *Yousef v Warden of the Central Prison in Judea and Samaria* (27 February 1986) par 7, Judge Barak's judgment.

⁵⁰ Van Zyl Dirk van Zyl Smit, 'Prison Law' in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) 1005; Netanel Dagan, 'The Janus Face of Imprisonment: Contrasting Judicial Conceptions of Imprisonment Purposes in the European Court of Human Rights and the Supreme Court of the United States' (2020) 21 *Criminology & Crim Just* 633, 639.

⁵¹ *Rhodes et al v Chapman et al* 452 US 337 (1981) 349.

and stricter conditions serve the retributivist goal of imprisonment.⁵² On the other hand, the European Court of Human Rights holds a different ‘relative autonomy theory’ approach, which applies different penal rationales at the stage of imprisonment.⁵³ According to this approach, after the point of sentencing, the criminal justice system should focus on rehabilitation, rather than retribution. Hence, life in prison should resemble the outside world as much as possible in order to encourage prisoners’ ‘resocialisation’.⁵⁴ The Israeli Supreme Court’s position can be placed between these two approaches, because it does not officially conceive tough conditions as part of the retributivist goal of punishment, and yet, it also does not follow the standard of ‘resocialisation’ when reviewing prison conditions.

The Supreme Court has acknowledged that the deprivation of liberty can inherently limit further ‘residual’ rights⁵⁵ that depend on it, for instance, the right to privacy or freedom of occupation.⁵⁶ Furthermore, imprisonment may necessitate eroding rights to guarantee prison order and public protection, for example, by limiting prisoners’ contact with the outside world.⁵⁷ Such limitations might also concern state security, which, as Judge Procaccia noted, is ‘particularly relevant with regards to security prisoners’.⁵⁸

Yet, restriction of rights beyond the loss of liberty must follow the conditions of the violation of rights paragraph noted earlier. In particular, they must align with the values of the State of Israel, serve a proper purpose, and be limited to the extent required.⁵⁹ Furthermore, violation of basic rights must be fixed in primary legislation voted on by the Knesset, rather than secondary legislation or administrative decisions made by the Government and executive

⁵² Dagan (n 50) 640.

⁵³ Kristel Beyens, Sonja Snacken and Dirk van Zyl Smit, ‘Truth in (the implementation of) Sentencing: Belgium and Elsewhere’ in Tom Daems, Dirk van Zyl Smit and Sonja Snacken (eds), *European Penology?* (Hart 2013) 272-3; Liora Lazarus, ‘Conceptions of Liberty Deprivation’ (2006) 69 *Modern L Rev* 738, 742.

⁵⁴ Beyens, Snacken and Smit (n 53) 273.

⁵⁵ Lazarus (n 53) 742.

⁵⁶ *Dovrin v The Prison Service* (n 48) par 14, Judge Procaccia’s judgment.

⁵⁷ *The State of Israel v Tamir* (n 49); HCJ 337/84 *Houkama v The Minister of Interior* PD 38(2) 826 (6 July 1984) par 2, Judge Elon’s judgment.

⁵⁸ *Dovrin v The Prison Service* (n 48) par 14, Judge Procaccia’s judgment.

⁵⁹ Basic Law: Human Dignity and Liberty s 8; HCJ 4636/04 *Physicians for Human Rights v The Minister of Public Security* (12 February 2007) par 10, Judge Procaccia’s judgment; AppR 4644/15 *Ra’ai v The Prison Service* (15 June 2016) par 14 and 21, Judge Vogelmann’s judgment and par 8, Judge Jubran’s judgment; Before the judicial constitutional revolution, the Court similarly required that limitations of prisoners’ rights must be proportionate and serve a worthy purpose: *The State of Israel v Tamir* (n 49) par 4 and 8, Judge Elon’s judgment.

bodies.⁶⁰ As the Supreme Court clarified, these limitations on the impairment of rights apply to criminal and security prisoners alike, incarcerated in Israel and the Occupied Territories.⁶¹

Importantly, the state cannot restrict incarcerated persons' rights to pursue further penal goals, for example, for advancing deterrence or imposing a harsher punishment, even for the worst of crimes.⁶² As the Court ruled in a petition by Yigal Amir, who was convicted for assassinating Israeli Prime Minister Yitzhak Rabin:

[...] those limitations of human rights do not seek to add a punitive component to the punishment imposed. Their objective is not to create a tougher punishment [...] Their goal is not to retaliate against the prisoner for his crimes, for which he was sentenced [...] If this was the goal of such limitations, then they might not pass the constitutional test, for they would not serve a proper purpose. A limitation that does not directly result from the purpose of imprisonment, and does not serve another legitimate public interest, is in fact another form of punishment for the offence committed. Such limitation, which increases the degree of the sentence imposed, deviates from the IPS' powers to limit prisoners' rights. It deviates from the principles of criminal punishment, notably the principle of legality, enshrined in section 1 of the Penal Law, 5737-1977, according to which there can be no crime and no punishment without law. The punitive objective is fulfilled with the loss of liberty, ruled by the sentencing court; Hence, the IPS is not authorised to add punitive components on top of the sentence.⁶³

The loss of liberty in the period set by the sentencing court fulfils the goal of punishment and the penal rationales it serves.⁶⁴ In particular, using prison conditions to make punishment harsher undermines the principle of legality, since the IPS is not authorised to determine that certain offenders will experience tougher sentences.⁶⁵ Certain changes in prison conditions can also increase severity to a degree that may make punishment disproportionate, for instance, through long solitary confinement.

Israeli case law provides important protections for prisoners' basic rights. Yet, in practice, the Supreme Court rarely intervenes with the IPS' internal policies. In line with the

⁶⁰ H CJ 715/98 *Rubinstein v The Minister of Defence* PD 52(5) 481 (9 December 1998) par 19-25, President Barak's judgment; *Public Committee Against Torture v The State of Israel* (n 10) par 19, President Barak's judgment.

⁶¹ *Yousef v Warden of the Central Prison in Judea and Samaria* (n 49) par 8, President Barak's judgment.

⁶² *Dovrin v The Prison Service* (n 48) par 2-3, Judge Jubran's judgment; *Physicians for Human Rights v The Minister of Public Security* (n 59) par 11, Judge Procaccia's judgment.

⁶³ *Dovrin v The Prison Service* (n 48) par 14, Judge Procaccia's judgment.

⁶⁴ Penal Act (n 31) s 40A.

⁶⁵ APP 1076/95 *The State of Israel v Kountar* PD 50(4) 492 (13 November 1996) par 8, Judge Zamir's judgment.

administrative law principle of deference,⁶⁶ the Court does not replace the IPS' judgment with its own when deciding on petitions.⁶⁷ As recognised in past rulings, the IPS task of running incarceration sites is extremely difficult, and this justifies providing it with broad professional discretion in performing its duties.⁶⁸ Hence, judicial review of the IPS policies is performed with 'greater balance and sensitivity than in other cases'.⁶⁹

Another way in which the Court limits the review of IPS policies is the distinction between prisoners' rights and privileges. As noted, infringing on rights must abide by the violation of rights paragraph. Restricting privileges, however, is well within the IPS' discretion, and it is not monitored by constitutional law to the same degree.⁷⁰ Effectively, the distinction builds on the wording of the Prisons Ordinance,⁷¹ and the Prisons Regulations, the latter of which is secondary legislation.⁷² So, for instance, the Prisons Ordinance includes a right to send and receive letters.⁷³ The Regulations define visits, on the other hand, as a privilege.⁷⁴ Yet, both sources of law do not fully codify prisoners' rights.⁷⁵ Hence, the Court often drew on individuals' uncoded entitlement to basic human rights, like the right to bodily integrity,⁷⁶ including the right to choose one's medical practitioner,⁷⁷ the right to vote,⁷⁸ and the right to legal representation of a person's choice.⁷⁹ Commission ordinances, regulated by the Prisons Commissioner,⁸⁰ include further instructions on providing and denying privileges.⁸¹ Regarding

⁶⁶ Timothy Endicott, *Administrative Law* (5th edn, Oxford University Press 2021) Ch 7.

⁶⁷ AppR 2682/97 *The State of Israel v Cohen* (25 June 1997); CrimAppR 2410/93 *The State of Israel v Levi* (2 August 1993).

⁶⁸ APP 5537/02 *The State of Israel v Sarsawi* (10 November 2003); AppR 3097/08 *John Doe v The Prison Service* (8 December 2008); Also see Sharon Dolovich, 'Forms of Deference in Prison Law' (2012) 24 Fed Sent'g Rep 245.

⁶⁹ AppR 6956/09 *Yunes v The Prison Service* (7 October 2010) par 69, Judge Danziger's judgment; AppR 6561/97 *The State of Israel v Mendelsson* (22 December 1998) par 14, Judge Zamir's judgment; App 7440/97 *The State of Israel v Golan* PD 52(1) 1 (15 January 1998) par 7, Judge Zamir's judgment.

⁷⁰ The Prisons Regulations, 1978-5733, 3882 KT 1958 s 19; AppR 4779/17 *Mansour v The Prison Service* (22 March 2020) par 5, Judge Meltzer's judgment.

⁷¹ The Prisons Ordinance (n 42).

⁷² The Prisons Regulations (n 70).

⁷³ The Prisons Ordinance (n 42) s 36, 47A.

⁷⁴ The Prisons Regulations (n 70) s 19A.

⁷⁵ Only in 2012, the Prison Ordinance was amended to enshrine a general right to 'proper living conditions', including bedding, lighting, and a daily walk; The Prisons Ordinance s 11B.

⁷⁶ *Katlan v The Prison Service* (n 47) par 5, Judge Barak's judgment.

⁷⁷ *The State of Israel v Tamir* (n 49) par 3, Judge Elon's judgment.

⁷⁸ *Houkama v The Minister of Interior* (n 57) Judge Porat's judgment and par 2 of Judge Elon's judgment.

⁷⁹ HCJ 1437/02 *The Association for Civil Rights in Israel v Minister of Public Security* PD 58(2) 746 (2004) par 9, Judge Naor's judgment.

⁸⁰ See Chapter Three, on page 137 of this thesis.

⁸¹ The Prisons Ordinance (n 42) s 80A.

privileges, the IPS decision is generally bound by administrative law,⁸² which orders it to act within the remits of its powers and follow the principles of reasonableness and proportionality.⁸³

The Court has various sources to determine whether a prisoner's plea relates to a right or a privilege, and to decide therefore whether the case calls for constitutional or administrative judicial review. As discussed below, judges have tended to accept the 'privilege' classification, even in cases that concern rights, like the right to family visits according to international humanitarian law and international human rights law.⁸⁴ Doing so has allowed the Court greater leeway in examining the IPS' conduct, given that it is not assessed by a constitutional standard, but rather through administrative law.⁸⁵

Israeli courts draw on an array of interpretive tools to determine whether a violation of a basic right occurred and to refrain from intervening in the IPS' broad discretion. These tools have been proven useful for applying a narrower judicial review that is less critical of the IPS policies. Often, the Court used them to uphold restrictions on incarcerated Palestinians, accepting the state's preventive, rather than openly retributivist, logic against security offending. As the judgments below show, the Court rejected arguments on the disproportionate harm categorical restrictions cause, and the discrimination of Palestinian security prisoners compared to other prison populations, including Jewish security prisoners. By maintaining a broad interpretation of what constitutes reasonable and proportionate preventive measures, judges gave lesser weight to how the restrictions make the punishment of all incarcerated Palestinians

⁸² *Yunes v The Prison Service* (n 69) par 8, Judge Procaccia's judgment.

⁸³ HCJ 6314/17 *Namnam v The Government of Israel* (4 June 2019) par 6, Judge Hendel's judgment; Unreasonableness as a standard for judicial intervention in administrative decisions varies significantly between legal systems. The original interpretation set by English courts was narrow, demanding that no reasonable authority would accept the decision in question. Israeli case law expanded the standard in the past decades to include an 'internal imbalance' between the relevant considerations the authority must have accounted for in its decision, which thus justifies the Court's intervention; Daphne Barak-Erez, *Administrative Law*, vol B (The Israel Bar Publishing House 2010) 725 [Hebrew]; Jud Mathews, 'Reasonableness and Proportionality' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020); Endicott (n 66) Ch 2.

⁸⁴ *Namnam v The Government of Israel* (n 83); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (The Fourth Geneva Convention), art 116; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol I: Rules (International Committee of the Red Cross 2005) rule 126; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Doc A/RES/43/173, 9 December 1988) principle 19; Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (UN Doc A/RES/70/17517 December 2015) rule 58(b).

⁸⁵ *The State of Israel v Kountar* (n 65); *Yunes v The Prison Service* (n 69); AppR 4779/17 *Mansour v The Prison Service* (n 70).

significantly harsher.⁸⁶ As the discussion below shows, the Supreme Court's support of the all-encompassing preventive logic obfuscates the underlying rationales of retribution and general deterrence, which continue to shape Palestinians' punishment long after sentencing.

Reviewing Incarcerated Palestinians' Rights: Legitimising Collective Treatment

In 1980, the Supreme Court handed down a brief, yet influential decision, on security prisoners' conditions. The case of *Darwish v The Prison Service*⁸⁷ dealt with the plaintiffs' right to sleep on beds, like 'criminal' prisoners, instead of on mattresses on the floor. The IPS argued for a preventive reasoning, given the concern that security prisoners would disassemble the beds and use the parts as weapons. In a majority opinion, the Court accepted the IPS approach to providing differential treatment to security prisoners:

Security prisoners form a unified ideological body, based on the orders of an organisational mechanism the prisoners operate in every prison, which dictates their actions, enforces strict discipline, and uses punishments that amount to the physical elimination of those who are defiant. [...] The unique nature of the security prisoners' organisations, which expresses hostility to the government, justifies [...] enforcing harsher security measures than those taken against criminal prisoners. The discrimination, for which the petitioner complains, is thus not prohibited. It does not derive from invalid grounds, yet from appropriate considerations of protecting security in prison.⁸⁸

Judge Cohen in the minority opinion found that all incarcerated persons are entitled to a bed and that security concerns do not justify the distinction between criminal and security prisoners on this matter.⁸⁹ Yet, the majority opinion in *Darwish* has become the leading authority by which to justify the differential treatment of Palestinians held for security offences.⁹⁰ In *The State of Israel v Elrazak* (2003),⁹¹ the Court also confirmed the IPS' classification practices, even though it was based on Commissioner Ordinances, and essentially limited rights based on secondary

⁸⁶ Alon Harel, 'Who Is a Security Prisoner and Why? An Examination of the Legality of Prison Regulations Governing Security Prisoners' in Abeer Baker and Anat Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto 2011) 41.

⁸⁷ HCJ 221/80 *Darwish v The Prison Service* (25 November 1980).

⁸⁸ Ibid, par 5, Judge Y Cohen's judgment.

⁸⁹ Ibid, par 5, Judge H Cohen's judgment; In 2007, the Supreme Court ruled that the state must provide a bed to all prisoners, following the enactment of a similar obligation towards all detainees; *Physicians for Human Rights v The Minister of Public Security* (n 59).

⁹⁰ E.g. HCJFH 204/13 *Salah et al v The Prison Service et al* (4 April 2015); *Yunes v The Prison Service* (n 69); *The State of Israel v Kountar* (n 65).

⁹¹ AppR 6797/03 *The State of Israel v Elrazak* (2 November 2003).

legislation. Judge Grunis reasoned that the Prisons Ordinance permits the IPS to place measures to guarantee prison order and security, which include the classification of those incarcerated according to the risk they pose.⁹² The Court reaffirmed the IPS' generalised perception of Palestinians convicted of security offences as a unified group of highly dangerous offenders. With this, it also upheld the approach of military and civilian criminal courts, which delegitimise Palestinian resistance, violent and nonviolent, by conceiving it as a security concern, also after the stage of conviction and sentencing.

The security classification and the special characteristics of security prisoners provided the grounds for collective restrictions.⁹³ In later cases, the Court found restrictions like the prohibition on phone calls, extended family visits, and the possession of certain newspapers, lawful, as they protect prison order and public and state security.⁹⁴ Nevertheless, judges often found the restrictions proportionate thanks to mechanisms that allow Palestinians to change their conditions, like the removal of limitations process, set out in section 4b of Commission Ordinance 'Rules Regarding Security Prisoners',⁹⁵ and the option to change security classification.⁹⁶ As discussed earlier, both procedures place a heavy burden on applicants, usually requiring them to first disaffiliate from their organisations⁹⁷ and then receive the confirmation of the Israel Security Agency.⁹⁸ Between the two, classification change entails an even more difficult process, given its implications for the applicant's entire prison regime. As noted earlier, a significant hurdle for applicants is providing positive evidence of their departure from the prescribed organisations. Only a few Palestinians pursue these pathways. Between 2015 to 2016, for instance, only thirteen applied to disaffiliate with Palestinian organisations, and only two were successful.⁹⁹

⁹² Ibid, par 10, Judge Grounis' judgment.

⁹³ Prison Service Commission Ordinance 03.02.00 'Rules Regarding Security Prisoners' (updated on 15 November 2020) s 1b.

⁹⁴ HCJ 733/79 *Maalabi v The Prisons Commissioner* (16 April 1980); *The State of Israel v Kountar* (n 65); *Yunes v The Prison Service* (n 69).

⁹⁵ Commission Ordinance - Rules Regarding Security Prisoners (n 93) s 4b.

⁹⁶ Prison Service Commission Ordinance 04.05.00 'Procedure for Classifying a Security Prisoner' (updated on 28 February 2018) s 6.

⁹⁷ AppR 5754/15 *Hatib et al v The Prison Service* (2 July 2017) par 7, Judge Barak-Erez's judgment.

⁹⁸ Commission Ordinance - Rules Regarding Security Prisoners (n 93) s 4b; Commission Ordinance - Classifying a Security Prisoner (n 96) s 6(5).

⁹⁹ *Hatib v The Prison Service* (n 97) par 30, Judge Barak-Erez's judgment.

Analysing the Supreme Court's decisions on the IPS' restrictions raises two main approaches with which the judges aligned. The first views security prisoners as a separate group who pose an increased risk and have special characteristics, which make them incomparable to 'criminal' prisoners. This approach creates room for strict categorical limitations, which should only be removed in rare situations, to guarantee the full protection of state security. It ultimately prioritises state security over individual rights and 'privileges' and permits extensive restrictions that result in more severe punishment. The second also accepts that state security justifies limitations, however, it maintains that security prisoners still have the right to equal and individual treatment. Judges supporting this view see mechanisms like the removal of limitations, set out in section 4b of the Commission Ordinance noted earlier,¹⁰⁰ as important procedures for security prisoners to fulfil their right to personal examination. Since these kinds of procedures balance the state's categorical limitations, they should be made more accessible to applicants. The following paragraphs analyse several cases to examine how these approaches materialise. As shown below, the two approaches represent different standpoints on the state's obligations towards the individuals it punishes. However, in practice, this difference had a relatively minimal impact on IPS practices.

In *Yunes v The Prison Service* (2010),¹⁰¹ Judge Danziger found that the prohibition on extended family visits is lawful as security prisoners may still communicate with the outside world through letters and visits from close relatives. Danziger found the prohibition to be proportionate even if it only slightly benefits security, given the possible dangerous consequences if individuals misuse their visits.¹⁰² Yet, he also found that for sake of proportionality, the state must apply section 4b reasonably, and not merely build on an applicant's administrative allocation in an organisation's wing for denying their request. Danziger ruled that when there is no positive evidence of an applicant's affiliation, the IPS should move to examine section 4b's second condition, and assess the risk of removing the limitation in question.¹⁰³ Applying 4b this way might have helped many of those struggling to

¹⁰⁰ Commission Ordinance - Rules Regarding Security Prisoners (n 93) s 4b.

¹⁰¹ *Yunes v The Prison Service* (n 69).

¹⁰² *Ibid*, par 75, Judge Danziger's judgment.

¹⁰³ *Ibid*, par 79, Judge Danziger's judgment.

provide positive evidence of their departure from the organisations. For Danziger, the state must still provide individual treatment, even to people who pose a security risk. Doing otherwise might amount to a disproportionate restriction on incarcerated persons. Hence, the state's power to enforce categorical restrictions depends on whether it offered substantial protection for the individual rights of those incarcerated.

While the other judges of the panel agreed that the prohibition on extended family visits was proportionate, they dissented on the important point of how to apply section 4b. On this matter, the majority opinion held that prisoners' ongoing relationship with terror organisations is the point of departure, and so there are no grounds for removing the requirement for positive evidence.¹⁰⁴ Yet, the majority opinion failed to consider the IPS' automatic affiliation practice, nor the conditions in Palestinian wings which hamper a person's ability to establish their case under section 4b.

In *Salah et al v The Prison Service* (2015),¹⁰⁵ an extended panel of seven judges reconsidered the IPS prohibition of security prisoners' access to higher education.¹⁰⁶ This restriction originally aimed to advance the repatriation of kidnapped soldier Gilad Shalit. The IPS maintained the prohibition despite Shalit's release, on the basis that Palestinian organisations were rewarding terror by funding security offenders' tuition. Unlike other restrictions, this prohibition had no exceptions, since the state argued it could not effectively monitor how prisoners' families funded tuition.¹⁰⁷ The applicants argued that imposing this limitation, with no exceptions, was discriminatory and unlawful.¹⁰⁸ A group of Israeli academics supported the petition through an Amicus Curiae application, arguing that higher education increases prisoners' chances for rehabilitation, and contributes to prison order and discipline, based on empirical studies. They also argued that studies on past national struggles can moderate

¹⁰⁴ Ibid, par 12-14, Judge Procaccia's judgment.

¹⁰⁵ *Salah et al v The Prison Service et al* (n 90).

¹⁰⁶ The Court upheld the prohibition in its first decision, granted by a regular panel of three judges; AppR 2459/12 *Salah et al v The Prisons Service* (24 December 2012).

¹⁰⁷ *Salah et al v The Prison Service et al* (n 90) par 24, President Naor's judgment.

¹⁰⁸ Ibid, par 13, President Naor's judgment.

people's views, towards realising the benefits of compromise over the shortcomings of violent struggle.¹⁰⁹

The entire panel of judges upheld the prohibition on academic studies, yet judges present different reasoning for their positions. Former President Grunis, for example, found that the differences between security and 'criminal' prisoners are so substantial, 'on the circumstances of imprisonment, the risk they pose, their way of life in prison and the means required to guard them in custody',¹¹⁰ that security prisoners should be considered an entirely separate group. Hence, differential prohibitions are not discriminatory, for the IPS regime against security prisoners is incomparable to its treatment of other populations.¹¹¹ Moreover, Grunis saw no reason to impose the burden of individual assessment on the authorities, noting that an individual may also apply to change their security classification, yet disregarding how this procedure leaves an extremely narrow opening for applicants seeking higher education.¹¹²

President Naor led a different position, which was relatively more critical against the IPS' entirely different regime for security prisoners.¹¹³ She highlighted that the IPS must provide equal treatment, and deviate from this obligation only when differential treatment is justified.¹¹⁴ Since having terror organisations fund tuition might incentivise terror and endanger state security, Naor found the prohibition on higher education to be just.¹¹⁵ Yet, the prohibition might be disproportionate if it rules out individual examination, for instance, by applicants who can show that they self-funded their tuition. Such examination is potentially possible by drawing on section 4b.¹¹⁶ Yet, Naor, and those supporting her position, left the matter of individual assessment as a recommendation only,¹¹⁷ allowing the prohibition to continue without exceptions. Hence, while President Naor disagreed with Grunis' perception of security prisoners as a separate group, she permitted the IPS to impose discriminative treatment just the same. *Salah*

¹⁰⁹ Amicus Curiae Application in HCJFH 204/13 *Salah et al v The Prison Service* (19 February 2014).

¹¹⁰ *Salah et al v The Prison Service et al* (n 90) par 2, President Grunis' judgment.

¹¹¹ Ibid, par 8, President Grunis' judgment.

¹¹² Ibid, par 12, President Grunis' judgment.

¹¹³ Ibid, par 16-18, President Naor's judgment.

¹¹⁴ Ibid, par 20, President Naor's judgment.

¹¹⁵ Ibid, par 23, President Naor's judgment.

¹¹⁶ Ibid, par 1, Judge Hayut's judgment.

¹¹⁷ Ibid, par 28, President Naor's judgment.

is an important example of how the Court uses the rhetoric of individual analysis to legitimise differential treatment, without even demanding that incarcerated persons would be able to access individual assessment.

In *Salah*, Grunis also made an important comment, as he wondered regarding the effectiveness of stopping terror organisations from funding tuition, while Palestinians continue their relationship with the same organisations in prison, and while their families continue to receive salaries, and use them for other purposes.¹¹⁸ Grunis essentially highlighted the hypocrisy of the prohibition on academic studies, given that the IPS permits Palestinians to maintain organisational self-governance and use ‘terror funds’ to buy commissary goods, instead of bachelor degrees. Grunis’ comment revealed that the prohibition’s most direct effect is to worsen prison conditions, as a symbolic response to the benefits that proscribed organisations provide their members. It could also very well be that the Government refused to reinstate a ‘privilege’ that it has already taken away from Palestinians. Eventually, the general circumstances of the prisoners’ regime and the ongoing financial support of families indicated that the prohibition’s contribution to security was questionable, particularly given the submitted evidence that academic studies advance rehabilitation.¹¹⁹ By upholding this prohibition, the Court undermined its case law, allowing the IPS to use conditions to make punishment stricter to promote penal rationales, like deterrence of future offenders. Moreover, this prohibition might end up hampering prison and state security further, as Palestinians disobey it and study in Palestinian universities,¹²⁰ where the academic content is not under Israeli supervision.

In several cases dealing with disaffiliation, the Supreme Court seemed to have moved towards the second approach, as it considered Palestinians’ struggle to fulfil the conditions of section 4b. In *Zuabi v The Prison Service* (2015),¹²¹ Judge Rubinstein ordered the IPS to reconsider the allocation of a petitioner convicted of drug and weapons dealing offences to a ‘criminal prisoners’ wing.¹²² Rubinstein also expressed concerns that wing speakers examine

¹¹⁸ Ibid, par 11, President Grunis’ judgment.

¹¹⁹ Amicus Curiae Application in HCJFH 204/13 *Salah v The Prison Service* (n 109).

¹²⁰ Nurit Yochanan, ‘Despite the Prohibition: 93 Security Prisoners Completed Degrees’ *KAN* (5 August 2019) <<https://www.kan.org.il/item/?itemid=56613>> accessed 28 October 2022.

¹²¹ AppR 5278/14 *Zuabi v Israel Police* (28 April 2015).

¹²² Ibid, par C, Judge Rubinstein’s judgment.

prisoners' written applications to prison authorities.¹²³ The state denied this practice and notified the Court that it posted signs in all security wings, which inform of prisoners' option to approach staff directly and discreetly. Even though these signs did not necessarily affect the power dynamic that dissuaded Palestinians from speaking to staff, the Court found the state's action sufficient.¹²⁴

In *Hatib et al v The Prison Service* (2017),¹²⁵ two Palestinian citizens of Israel convicted of security offences argued that the IPS' disaffiliation process draws solely on the Israel Security Agency's opinion and prevents them from showing the change they underwent inside prison. For the first time, the Court recognised the hurdle embedded in section 4b. Judge Barak-Erez acknowledged the circumstances which make it difficult for applicants to actively resist organisational actions and found that the state should accordingly give little weight to attributed participation in collective resistance.¹²⁶ She found that the disaffiliation procedure is lacking since it does not allow applicants to provide relevant information on their changed views. Barak-Erez ordered the IPS to allow applicants an interview with a social worker who would assess their ideological change and produce a report that will inform the IPS decision-making process.¹²⁷ While a report to this end could potentially assist applications under section 4b, a later case showed otherwise. In *John Doe v the Parole Committee* (2019),¹²⁸ a Parole Committee found that a social worker's report was unhelpful, as it merely documented the prisoner's words and did not assess the honesty of his intentions.¹²⁹ Hence, judges provided procedural protections that could potentially expand the use of section 4b, however, their remedies seem to be cosmetic corrections which do not create an accessible pathway for proving ideological change.

In *Mansour v The Prison Service* (2020),¹³⁰ the majority decision ruled that security prisoners cannot access furloughs, even if they disaffiliate from proscribed organisations and

¹²³ Based on a letter by an IPS officer which confirmed that the wing speaker examines prisoners' applications before forwarding them to the authorities; *ibid*, par D, Judge Rubinstein's judgment.

¹²⁴ AppR 5278/14 *Zuabi v Israel Police* (4 January 2016).

¹²⁵ *Hatib v The Prison Service* (n 90).

¹²⁶ *Ibid*, par 44, Judge Barak-Erez's judgment.

¹²⁷ *Ibid*, par 45, Judge Barak-Erez's judgment.

¹²⁸ AppR 119/19 *John Doe v the Parole Committee* (14 April 2019).

¹²⁹ *Ibid*.

¹³⁰ AppR 4779/17 *Mansour v The Prison Service* (n 70).

access phone calls and rehabilitation. The Court accepted the IPS' interpretation of its Commission Ordinance, that only those who change their classification to 'criminal prisoners' may access regular furloughs.¹³¹ During the proceedings, and upon the judges' recommendations, the IPS expanded the considerations for changing security classification, to include developments since the applicant's conviction, including their departure from an organisation.¹³² Hence, while the Court rejected the option that security prisoners would access furloughs, it sought to maintain, and even expand, their ability to change their security classification.¹³³ In theory, this would seem like a better way to remove limitations. In practice, the state places an even higher burden on classification change. For instance, regarding the petitioner in *Mansour*, the IPS refused to change his security classification even after he ended his affiliation and was allocated to a 'criminal' wing.¹³⁴ Judge Mazuz's minority opinion supported a different interpretation that allows security prisoners to access furloughs through section 4b, which is slightly more attainable than classification change.¹³⁵ Once more, the Supreme Court accepted an extensive limitation on security prisoners only, justifying it by the ostensibly expanded procedure of classification change. Nevertheless, relying on classification, rather than organisational affiliation, might also hamper the applications of Jewish security prisoners, who usually access regular furloughs.¹³⁶ Here, the categorical approach could potentially narrow the gap between Palestinian and Jewish security prisoners.

As these cases show, both approaches, one which views security prisoners as a separate group, and the other which pursues a fairer application of 4b, uphold the IPS' restrictions. Distinguishing between the two is, however, useful to identify judges' perceptions of Israel's obligations towards incarcerated Palestinians. Judges who support completely differential treatment with minimal or no exceptions, see security prisoners as a distinct population. In line with Israel's specialised criminal process and punishment, these judges support a separate

¹³¹ Ibid, par 57, Judge Meltzer's judgment; Prison Service Commission Ordinance 04.40.00 'Prisoners Furloughs' (Updated on 29 March 2015).

¹³² Commission Ordinance - Classifying a Security Prisoner (n 96) s 6.

¹³³ AppR 4779/17 *Mansour v The Prison Service* (n 70) par 14 and 52, Judge Meltzer's judgment.

¹³⁴ AppR 263/19 *Mansour v The Prison Service* (22 January 2019); This was determined after the IPS expanded the considerations allowing the change of classification.

¹³⁵ AppR 4779/17 *Mansour v The Prison Service* (n 70) par 11, Judge Mazuz's judgment.

¹³⁶ E.g. AppR 6914/16 *Savir v The State of Israel* (25 October 2016); AppR 6566/13 *Dvir v The Attorney General* (11 February 2014); AppR 8571/07 *The State of Israel v Ofer Gamliel* (4 February 2008).

standard for Palestinians, who make up most of the security prisoner population. In so doing, they support the imposition of a form of an enemy prison regime, which targets Palestinians and deems them ineligible for individual treatment and accountability. Meanwhile, those rejecting the imposition of a different prison regime seemingly insist on individual assessment. Yet these judges' commitment to equality and prisoners' rights remains largely rhetorical, as they also maintain the enemy penal regime by upholding procedures that undermine the same core values and permit discrimination against Palestinians. It seems that supporters of this latter approach were more occupied with how to legitimise the restrictions, than with critically assessing how the IPS' categorical treatment infringes on rights and considering the lawfulness of its practices.

Both approaches support collective harsher punishment of Palestinians, based on the self-governing conditions endorsed by the IPS. Effectively, these IPS' restrictions undermine the case law against arbitrary and disproportionate restriction of rights and privileges. They also undermine the core principle of no punishment without law, as the state occasionally worsens conditions to advance penal rationales that are within the sentencing court's discretion.

C. Against Reintegration: On Rehabilitation and Parole

Rehabilitation as a Prison Restriction

One of the most important distinctions between the different regimes the IPS applies to security and 'criminal' prisoners is the access the latter have to correctional services. For those incarcerated, participation in rehabilitation directly impacts their prison conditions. Advancing on the correctional pathway allows access to further 'privileges', like furloughs and employment outside prison.¹³⁷ More importantly, evidence of rehabilitation directly affects a person's chances of being granted parole.¹³⁸ The lack of significant education and rehabilitation services for Palestinians, juveniles, and adults, is another element that impacts the severity of punishment. However, despite the importance of rehabilitation to the public interest, the Court has upheld this IPS policy.

¹³⁷ Commission Ordinance 'Prisoners Furloughs' (n 131); Prison Service Commission Ordinance 04.54.02 'Rehabilitation Centres and Allowing Prisoners to Work Outside Prison' (updated on 14 October 2021).

¹³⁸ AppR 4612/16 *John Doe v The Parole Committee* (25 July 2016).

In 2012, the Knesset enacted an important amendment to the Prisons Ordinance, which, other than establishing the right to proper living conditions, prescribed the right to access educational and recreational activities.¹³⁹ The amendment included a section ordering the Prisons Commissioner to guarantee the optimal allocation of Israeli citizens and residents in rehabilitation activities.¹⁴⁰ MKs saw this amendment as the enactment of prisoners' right to rehabilitation, since its wording sets a right to demand optimal allocation in rehabilitation, based on the IPS' duty to provide it.¹⁴¹ However, to recall, the former Minister for Public Security and several MKs opposed the rehabilitation of security prisoners, and this resistance has been one of the reasons for the exclusion of non-nationals from rehabilitation activities.¹⁴² Other states also exclude certain populations, particularly foreign nationals, from accessing correctional services in prison.¹⁴³ The common reasoning behind this approach is that the state has no duty to offer rehabilitation to those who are likely to be deported and will not reintegrate into society.¹⁴⁴ As with security prisoners, the perception of those punished as outsiders dictates the state's obligations towards them and accordingly shapes their conditions of punishment. Yet, to recall, Israeli judges also noted the importance of rehabilitating Palestinian noncitizens for the sake of Israel's security.¹⁴⁵ That is, they supported the rehabilitation of noncitizens for utilitarian goals, rather than for people's intrinsic right to access rehabilitation services.

Drawing on the 2012 amendment, Palestinian citizens and residents of Israel have begun demanding the IPS to allocate them to rehabilitation programmes. When dealing with such petitions, the Supreme Court has upheld the IPS' policy of examining rehabilitation requests

¹³⁹ The Prisons Ordinance (Amendment no 42), 5772-2012 SH 2355.

¹⁴⁰ The Prisons Ordinance (n 42) s 11c-d.

¹⁴¹ Protocol no 510 of the Internal Affairs and Environment Committee Meeting, 18th Knesset (21 February 2012) 4, 17; Protocol of the 342 Meeting of the 18th Knesset (7 May 2012) 267; The Supreme Court has not fully addressed the question of whether there is a basic right to rehabilitation, however, it has referred to rehabilitation as a 'right' in the past: AppR 3969/97 *The State of Israel v Abu Rabiaa* PD 51(5) 470 (11 December 1997) par 10, Judge Strasbour-Cohen's judgment.

¹⁴² Protocol no 537 of the Internal Affairs and Environment Committee Meeting, 18th Knesset (7 May 2012) 7; Protocol of the 373rd Meeting of the 20th Knesset (7 November 2018) 31; Ministry of Public Security, 'Revoking Security Prisoners' Autonomy' (2019) <<https://www.gov.il/en/departments/news/security-prisoner-conditions-020119>> accessed 30 October 2022.

¹⁴³ Regarding the UK, see Emma Kaufman, *Punish and Expel* (Oxford University Press 2015) 129-30; Jason Warr, 'The Deprivation of Certitude, Legitimacy and Hope: Foreign National Prisoners and the Pains of Imprisonment' (2016) 16 *Criminology & Crim Just* 301, 312; And in relation to the US: Emma Kaufman, 'Segregation by Citizenship' (2019) 132 *Harv L Rev* 1380, 1401.

¹⁴⁴ Thomas Ugelvik and Dorina Damsa, 'The Pains of Crimmigration Imprisonment: Perspectives from a Norwegian All-Foreign Prison' (2018) 58 *Brit J Criminology* 1025, 1037; Kaufman, 'Segregation by Citizenship' (n 143) 1394.

¹⁴⁵ CrimApp 1456/07 *John Doe v the State of Israel* (n 25) par B(5), Judge Rubinstein's judgment.

under section 4b and requiring disaffiliation as a first step.¹⁴⁶ Applicants were required to establish they had undergone an ideological transformation before the IPS would even consider their rehabilitation. This approach signalled to Palestinians that they must earn their access to rehabilitation through long and hard struggles.¹⁴⁷ In at least two cases, judges even rejected petitions by plaintiffs who managed to disaffiliate, based on the Israel Security Agency's position that they still did not establish that they had undergone a 'substantial change' as section 4b commands.¹⁴⁸ The Court's decisions to uphold such obstacles to prisoners' rehabilitation allow the IPS to violate its obligation according to the 2012 amendment. Furthermore, it contrasts the critique mentioned earlier, in which judges particularly emphasised the need to offer rehabilitation to all juvenile and young Palestinians.¹⁴⁹

The Supreme Court had several opportunities to continue its critique of the IPS' policy where it could have had practical implications. Yet it has refrained from doing so. Rather, it generally accepted the state's position on the difficulty of rehabilitating ideological offenders, given their political and at times religious motives¹⁵⁰ and considering that such programmes might be seen as 're-education'.¹⁵¹ This is even though Jewish security detainees and prisoners regularly access rehabilitation,¹⁵² and despite the potential chances of success, given the low recidivism rates among security offenders.¹⁵³ In *Hatib*, Judge Barak-Erez criticised the IPS policy for violating the 2012 amendment and neglecting the important interest of rehabilitating citizens. However, she did not deem the current arrangement unlawful.¹⁵⁴

¹⁴⁶ AppR 3786/13 *John Doe v the Attorney General* (18 August 2013); AppR 3770/14 *Harube v The Prison Service* (3 August 2014); AppR 5555/14 *Salhab v The Parole Committee* (8 December 2014).

¹⁴⁷ Parole Committees have taken a similar approach to citizens and residents' entitlement for parole: Maya Rosenfeld and Rachel Noah, '(No)-Parole Committees? An Empirical Study of Parole in Israel' (2021) 15 *Hukim: A Journal on Legislation* 79, 83 [Hebrew]; Also see Mona Lynch, 'Rehabilitation as Rhetoric: The Ideal of Reformation in Contemporary Parole Discourse and Practices' (2000) 2 *Punishment & Society* 40.

¹⁴⁸ AppR 6395/15 *Harube v The Prison Service* (10 February 2016); AppR 3359/17 *Kabhaa v The Prison Service* (24 July 2018).

¹⁴⁹ CrimApp 4682/11 *John Doe v The State of Israel* (n 36) par 19, Judge Rubinstein's judgment; *Bayoumi v The State of Israel* (n 41) par 11; CrimApp 4966/13 *Abed v The State of Israel* (n 32).

¹⁵⁰ *Salhab v The Parole Committee* (n 146) par 7, Judge Hayut's judgment; CrimApp 1456/07 *John Doe v the State of Israel* (n 25) par 6, Judge Arbel's judgment.

¹⁵¹ AppR 3786/13 *John Doe v the Attorney General* (n 146) par 7, Judge Solberg's judgment.

¹⁵² CrimApp 3793/18 *John Doe v State of Israel* (3 May 2020).

¹⁵³ See Chapter Three on page 141 of this thesis; Yohanan Vaknin and Katrin Ben Zvi, *Recidivism of Israeli Prisoners 2013-2018* (Israel Prison Service - Research Branch, 2019) 18-19.

¹⁵⁴ *Hatib v The Prison Service* (n 97) par 38 and 44, Judge Barak-Erez's judgment.

Thus far, judges have avoided a constitutional analysis of how the IPS' policy hampers the right to access rehabilitation, which Israel guaranteed to citizens and residents, and which should arguably exist for all those incarcerated.¹⁵⁵ The Court did not refer to rehabilitation as a privilege, but even if it had, it might have still struggled to justify the IPS' differential treatment of Palestinian prisoners since it does not appear to be justified on security grounds. As discussed in the previous chapters, the prohibition on rehabilitation seems to be grounded in the discriminatory perception of Palestinians as irredeemably dangerous and in the conception of rehabilitation as a benefit that Palestinian prisoners do not deserve. Both types of reasoning underline the conception of Palestinians, citizens or not, as outcasted 'enemies'.

Special, yet Unattainable, Standards for Parole

Israel's 2001 Release on Parole Act permits early release only if a Parole Committee found that an applicant is 'worth of release' and that his parole will 'not endanger the public'.¹⁵⁶ The Act includes a list of factors the Committee should consider, including the applicant's age and personal circumstances, the potential for rehabilitation, behaviour in prison, criminal record, and professional opinions by prison authorities, Israel police and security bodies, such as the Israel Security Agency.¹⁵⁷ As these factors indicate, parole is a forward-looking procedure that focuses on the individual's circumstances and generally pursues positive reintegration and the prevention of reoffending.¹⁵⁸ The Act only permits Parole Committees to consider other penal rationales like retribution and general deterrence in exceptionally severe cases.¹⁵⁹

Parole rates out of general prison releases in Israel are relatively low, particularly for security prisoners, as set out in Chapter Three.¹⁶⁰ In a recent study of Parole Committees' decisions regarding security prisoners, Dagan found that out of 207 decisions made between 2019

¹⁵⁵ See Edgardo Rotman, 'Do Criminal Offenders Have a Constitutional Right to Rehabilitation?' (1986) 77 J Crim L & Criminology 1023; Sonja Meijer, 'Rehabilitation as a Positive Obligation' (2017) 25 Eur J Crime, Crim L & Crim Just 162.

¹⁵⁶ Prisoners sentenced for less than 12 months apply to an internal IPS unit which does not conduct oral hearings, and aims to operate a streamlined speedy parole process; Release on Parole Act, 5761-2001, SH 1795 s 2-3.

¹⁵⁷ *Ibid*, s 9.

¹⁵⁸ Rosenfeld and Noah (n 147) 82.

¹⁵⁹ Release on Parole Act (n 156) s 10a.

¹⁶⁰ To recall, between 3% to 5% of all security prisoners were granted parole between 2017 and 2019, compared to an average of 14% 'criminal' parole decisions during the same years, out of all 'criminal' prisoners released; Nurit Yechimovitz-Cohen, *Issues in Incarceration in Israel* (2020) 74-75.

and 2020, 91.78% of applicants were rejected, with only 17 people released on parole.¹⁶¹ As noted earlier, following the Supreme Court ruling in *Galon v Maasiyahu Parole Committee* (2000),¹⁶² security prisoners applying for parole must refute a ‘presumption of dangerousness’, since their ideological background indicates a high likelihood of reoffending.¹⁶³ As clarified in *Galon*, there is no need for evidence showing the applicant might commit an offence upon release, nor for negative information on his behaviour in prison. Like section 4b and the classification change, if the applicant cannot provide positive evidence showing that she or he has abandoned the ideological mindset that led to their offending, they are still considered dangerous.¹⁶⁴ The Court reaffirmed that the presumption applies to juveniles as well, in contrast to its approach in criminal cases, which attributes reduced culpability to minors on grounds of their youth and ongoing mental development.¹⁶⁵ Applying the same presumption to adults and juveniles also contrasts with the Court’s case law which recognised that juveniles and young security offenders have a greater potential for rehabilitation.¹⁶⁶ Most importantly, the general presumption of dangerousness has no empirical grounds, given the low recidivism rates among security prisoners, which are less than half the rates found among their ‘criminal’ counterparts.¹⁶⁷

As with section 4b and the classification change, the Court gave little consideration to how the IPS regime impairs an individual’s means to refute the presumption of dangerousness. For instance, it ruled that expressions of remorse, apologies and declared change of ideology do not suffice,¹⁶⁸ despite the consequences an individual might face for expressing these from other inmates in the organisations’ wings. Judges also disregarded differences between Palestinian organisations, rejecting arguments by Fatah members regarding their moderate views and support of the Oslo Accords.¹⁶⁹ And while the Court considers rehabilitation as the main path to

¹⁶¹ Netanel Dagan, ‘Enemy Parole’ (2022) (first online) Punishment & Society 1, 8.

¹⁶² HCJ 1920/00 *Galon v Maasiyahu Parole Committee* (11 May 2000).

¹⁶³ *Ibid* (n 178) par 11, Judge Or’s judgment.

¹⁶⁴ *Ibid*, par 13, Judge Or’s judgment.

¹⁶⁵ AppR 4612/16 *John Doe v The Parole Committee* (n 138); CrimApp 10715/05 *John Doe v The State of Israel* (4 September 2007) par 12-13, Judge Procaccia’s judgment; and CrimApp 1176/06 *Cohen v The State of Israel* (15 May 2016), which concerned juveniles convicted of security offences.

¹⁶⁶ CrimApp 10118/06 *John Doe v The State of Israel* (n 36); CrimApp 1456/07 *John Doe v The State of Israel* (n 25); CrimApp 6257/10 *John Doe v The State of Israel* (n 40).

¹⁶⁷ Vaknin and Zvi (n 153) 18-19; 18% compared to 40% among ‘criminal’ released prisoners.

¹⁶⁸ HCJ 5749/99 *The Attorney General v The Parole Committee* (6 October 1999); *Galon v Maasiyahu Parole Committee* (n 162) par 13, Judge Or’s judgment.

¹⁶⁹ AppR 51/15 *John Doe v The Parole Committee* (28 April 2015); AppR 6083/07 *Jandiya v The Attorney General* (21 October 2007).

refute the presumption of dangerousness,¹⁷⁰ it has ignored security prisoners' lack of access to correctional services. It deemed this circumstance irrelevant since without rehabilitation, and in the absence of other indications, the applicant is still considered to be just as dangerous.¹⁷¹ Judges also commented that even disaffiliation merely indicates the potential to rehabilitate, and does not necessarily refute the presumption, which builds on the applicant's conviction of security offences, and past engagement in the security wings.¹⁷² In *Salhab v The Parole Committee* (2014), the Court further rejected an applicant who managed to disaffiliate and even access rehabilitation, ruling that he must continue his rehabilitation further to refute the presumption of dangerousness.¹⁷³

Parole Committees also consider the opinions of the Israel Security Agency. Unlike domestic violence and sexual violence offenders, the Act does not require the submission of professional opinions in security prisoners' parole procedures. Yet, the Agency regularly provides its opinions, and the Committees usually consider them. In nearly all cases, the Agency's opinion opposes release, as Dagan found in all 207 procedures he examined.¹⁷⁴ As the Supreme Court has also noted,¹⁷⁵ the opinions are often generalised and rarely address the applicant's attributed dangerousness. Often, they provide broad descriptions of the risk released security prisoners pose and their high likelihood of re-offending, despite the empirical evidence showing otherwise.¹⁷⁶ At times, the opinions also warn the Committee that early release might impair general deterrence against terror attacks,¹⁷⁷ even though the Committee is not permitted to consider deterrence.¹⁷⁸ Nevertheless, Parole Committees, and subsequently the District Courts and the Supreme Court reviewing their decisions, give considerable weight to the opinion of the

¹⁷⁰ Rosenfeld and Noah (n 147) 121.

¹⁷¹ AppR 4612/16 *John Doe v The Parole Committee* (n 138) par 13, Judge Solberg's judgment; AppR 9789/17 *Abu Iash v The District Court* (1 February 2018).

¹⁷² AppR 119/19 *John Doe v the Parole Committee* (n 128).

¹⁷³ *Salhab v The Parole Committee* (n 146) par 8, Judge Hayut's judgment.

¹⁷⁴ Dagan, 'Enemy Parole' (n 161) 9.

¹⁷⁵ *Salhab v The Parole Committee* (n 146) par 7, Judge Hayut's judgment; AppR 4612/16 *John Doe v The Parole Committee* (n 138) par 8, Judge Solberg's judgment.

¹⁷⁶ Dagan, 'Enemy Parole' (n 161) 9.

¹⁷⁷ E.g. AppR 51/15 *John Doe v The Parole Committee* (n 169).

¹⁷⁸ Release on Parole Act (n 156) s10a.

Israel Security Agency.¹⁷⁹ The Agency's opinions often provide the professional grounds for the rejection of Palestinian parole applicants.¹⁸⁰

The Supreme Court's case law on the 'presumption of dangerousness' established an informal special parole procedure reserved for Palestinian security prisoners. This is not to say that Jewish security prisoners easily access parole,¹⁸¹ and yet, their path to refuting the presumption is often easier given their ability to access rehabilitation.¹⁸² Palestinians on the other hand, and particularly those who are not entitled to rehabilitation at all, have extremely limited access to parole. Judges have rejected applicants' arguments that parole is unattainable, reasoning that even though the bar is higher for security prisoners, it is reachable.¹⁸³ Indeed, some, though few, Palestinian security prisoners manage to achieve parole. Nevertheless, the current procedure that the Court has created and upheld undermines the basic principles of parole. Instead of a forward-looking individual examination, the procedure focuses on the security classification of the offender to establish categorical dangerousness. As the case law shows, the Committees and the Supreme Court give little weight to post-sentencing developments,¹⁸⁴ even for applicants who apply for parole decades after committing their offence.¹⁸⁵ Dagan usefully terms this past-focused generalised procedure as 'enemy parole', which:

[...] suspends the internal components of citizen parole that are incompatible with the category of the 'enemy' and the 'other' while preserving the appearance of a liberal, equal and legitimate process.¹⁸⁶

Enemy parole prevents discretionary individual assessment of applicants. For Palestinians, the way out of the vicious cycle of dangerousness, affiliation and lack of rehabilitation, requires them to 're-individualise' by turning against the organisations, and, in this way, establishing

¹⁷⁹ In Dagan's research, 75% of the decisions referred directly to the Agency's opinion; Dagan, 'Enemy Parole' (n 161) 10.

¹⁸⁰ Ibid, 10.

¹⁸¹ E.g. *Savir v The State of Israel* (n 136).

¹⁸² *The State of Israel v Ofer Gamliel* (n 136); Eli Ashkenazi, 'Israel Prison Service Begins Rehabilitating Security Prisoners – but Only Jews' *Haaretz* (11 February 2013).

¹⁸³ AppR 119/19 *John Doe v the Parole Committee* (n 128) par 6, Judge Amit's judgment; *Abu Iash v The District Court* (n 171).

¹⁸⁴ Dagan, 'Enemy Parole' (n 161) 17.

¹⁸⁵ AppR 119/19 *John Doe v the Parole Committee* (n 128) (in which the applicant petitioned the Supreme Court 17 years after committing his offence); AppR 51/15 *John Doe v The Parole Committee* (n 169) (25 years passed from the offence, and the applicant's petition to the Supreme Court).

¹⁸⁶ Dagan, 'Enemy Parole' (n 161) 14.

entitlement to personal examination.¹⁸⁷ Such applicants are ultimately required to de-contextualise their incarceration, define themselves as criminals, and fully accept Israeli penal authority. They are required to align with Israel's delegitimization of Palestinian resistance, to secure the Committee's consideration of the personal risk they pose. As the case law shows, however, even those who go to great lengths to establish their ideological change may still be considered dangerous based on their past conduct.

The Supreme Court's approach to rehabilitation and parole suggests an underlying resistance to the reintegration of security prisoners, which constructs almost impassable barriers. The current settings inherently impede applicants' access to correctional services and implies that parole procedures advance other goals than reintegration and prevention with regard to Palestinians. Given the conception of rehabilitation and parole as a benefit, the wide-scale rejection of parole symbolises another penal retributivist tactic against Palestinians. The formal accessibility to parole and rehabilitation also operates, like section 4b and the classification change process, to legitimise Israel's pseudo-liberal procedures, and with them, its incarceration of Palestinians. Yet, while the Court builds on these procedures to uphold Israel's special approach to Palestinians, legislators have moved to deny parole to those convicted of murder and attempted murder classified as a 'terrorist act'.¹⁸⁸ The latter amendment reinforced the judicial position that rejects comparisons between security and 'criminal' prisoners and readily accepts no-exceptions policies. If the Supreme Court continues this approach, it will indicate it is willing to abandon the goal of creating a fair and equal system for Palestinians, and officially accept that differential punishment applies to them.

¹⁸⁷ Ibid, 16.

¹⁸⁸ As noted earlier, the Supreme Court denied a parole applicant's petition that argued against the lawfulness of the amendment, and held that any arguments against the amendment must be made through a direct constitutional petition to the Supreme Court; AppR 6646/22 *Mahnia v The State of Israel* (1 January 2023).

D. Punishment as a National Security Strategy: The Case of Gazan Family Visits

As noted in previous chapters, Israel uses security prisoners' conditions to pursue national security goals. From threatening tougher conditions to restricting internal protests, the Government harnesses penal power to advance Israel's interests in its conflict with Palestinian organisations. This section examines how the Supreme Court has rationalised the state's use of penal power for broader ends, drawing specifically on the 2019 decision in *Namnam v The Government of Israel*,¹⁸⁹ which dealt with family visits to Gazan Hamas members.

Before analysing *Namnam*, it is worth going back to the important case of *John Does v Ministry of Defence*,¹⁹⁰ decided in 2000 and mentioned earlier in Chapter Three. In this case, the Court limited the use of incarceration for security ends. It found that the detention of ten Lebanese detainees beyond their tariff sentences, in order to advance the release of captured soldiers, was unlawful.¹⁹¹ Originally, the Supreme Court upheld the detention, adopting a broad interpretation of 'state security', which encompassed the need to drive third parties into action, in this case, into providing information and releasing missing soldiers.¹⁹² Yet, in a later hearing, an extended panel of nine judges overturned the judgment. President Barak led the majority opinion, finding that Israeli constitutional law does not permit the detention of individuals as bargaining chips, as it deeply violates their rights to liberty and dignity. State security, he found, cannot justify the detention of persons who do not pose a risk themselves.¹⁹³ The Court preferred this interpretation of state security as it conforms with the International Convention Against the Taking of Hostages.¹⁹⁴ Barak ruled that the detention was further disproportionate given the lack of near certainty, nor reasonable possibility, that the prolonged detention would lead to the release of captured soldiers.¹⁹⁵ The three minority judges found otherwise, that state security justified the detention of security offenders.¹⁹⁶ Nearly twenty years later, the Supreme Court in

¹⁸⁹ *Namnam v The Government of Israel* (n 83).

¹⁹⁰ CrimFH 7048/97 *John Does v Ministry of Defence* (12 April 2000).

¹⁹¹ *Ibid*, par 20 to President Barak's judgment.

¹⁹² AppAD 10/94 *John Does v The Minister of Defence* PD 53(1) 97 (13 November 1997).

¹⁹³ CrimFH 7048/97 *John Does v Ministry of Defence* (n 190) par 18-20, President Barak's judgment.

¹⁹⁴ *Ibid*, par 20, President Barak's judgment; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) No. 21931.

¹⁹⁵ CrimFH 7048/97 *John Does v Ministry of Defence* (n 190) par 26, President Barak's judgment.

¹⁹⁶ *Ibid*, in Judges Heshin, Kedmi and Tirkel's judgments.

Namnam moved closer to the minority opinion in *John Does* by allowing broad security considerations to shape access to family visits.

In *Namnam*, the judges unanimously upheld the Government's policy to deny visits of Gazan families to Hamas members in order to pressure Hamas into releasing Israeli citizens and the remains of deceased Israeli soldiers. Judge Hendel's point of departure was that prohibiting family visits does not violate a constitutional right. As the Prisons Ordinance wording show, visits are a privilege rather than a right, despite the approach of international law as noted earlier.¹⁹⁷ Similarly, the Court found that the restriction does not violate the right to family life, since, as found in earlier cases, prisoners can still correspond with family members and can also receive visits from lawyers, clerics and imams, and representatives of the International Committee of the Red Cross. Hence, the policy merely limited prisoners' contact with the outside world, rather than completely abolishing it. Hendel found that since visits are a privilege, withdrawing them does not amount to punishment, nor collective punishment, since it is 'a legitimate refrainment of providing privileges for security considerations'.¹⁹⁸ Again, the rights versus privileges distinction is not convincing, since it results in tougher conditions which serve the punitive goal of responding to external events. In this context, prison restrictions do not aim to secure the prison, but to deter external organisations from future actions against Israel. From the international humanitarian law perspective, making family visits conditional on actions that are not within the responsibility or control of the incarcerated persons might amount to unlawful collective punishment.¹⁹⁹ Yet, unlike in *John Does*, the Court in *Namnam* did not mention any source of international law and referred only to Israeli domestic legislation.

Judge Hendel held that the case varied dramatically from *John Does*, given the difference between the right to liberty and the 'privilege' of family visits. Depriving a person's liberty is more serious than limiting their contact with their family, however, for Palestinians, visits are

¹⁹⁷ The obligation is not absolute, however, it should be provided to 'the degree practicable', as Henckaerts and Doswald-Beck mention; Note, Israel's reason for prohibiting the visits is not related to practical or direct security concerns; Henckaerts and Doswald-Beck (n 84) rule 126; Alon Margalit, 'Accounting for Those in the Hands of the Belligerent: Security Detainees, the Missing and the Dead in the Israeli-Hamas Conflict' (2020) 25 J Conflict & Security L 565, 587; The Fourth Geneva Convention (n 84) art 116; UN Body of Principles principle (n 84) 19; The Mandela Rules (n 84) rule 58(b).

¹⁹⁸ *Namnam v The Government of Israel* (n 83) par 15, Judge Hendel's judgment.

¹⁹⁹ Margalit (n 197) 22; Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277, T.S. 539, art 50; The Fourth Geneva Convention (n 84) art 33.

the only way to have direct contact with their relatives, other than through contraband mobile phones. The prohibition significantly hampered their contact with the outside world. Moreover, the Court's reasoning in *John Does* not only focus on the importance of the right violated, but also on how human dignity demands individual treatment that refrains from using people as means to other ends.²⁰⁰ The state argues that it provides individual treatment in the process of detention, indictment and sentencing, so, it is unclear what justifies applying a different approach for prisoners. Similarly, if the state cannot use liberty for security ends, as ruled in *John Does*, what justifies doing otherwise for the few 'residual rights' that prisoners still hold?

Given the importance of family visits, it seems likely that the Court might uphold other restrictions that serve different ends. In the minority opinion in *John Does*, Judge Heshin highlighted that the detainees brought the loss of liberty upon themselves, for their previous acts against the State of Israel.²⁰¹ Similarly, Judge Hendel in *Namnam* emphasised that the prisoners were not innocent victims, but members of 'murderous' organisations,²⁰² who were bound to face serious limitations.²⁰³ By their membership, Palestinians forfeited the right to individual treatment. Regardless of whether membership should cost a person their access to family visits, the Supreme Court's reasoning once more ignores the IPS' automatic allocation policy. Judges conveniently disregard how Palestinians lose their access to individual treatment for their ethnicity, rather than for their conduct.

Eventually, in *Namnam*, the Court justified the Government's policy by adopting a broad interpretation of state security considerations. Judge Hendel ruled that the Minister of Public Security can guide the Prisons Commissioners on matters relating to state security, and then agreed to the state's interpretation of 'state security', which includes the goal of returning kidnapped citizens and the remains of soldiers.²⁰⁴ Limiting incarcerated persons' contact with their families for pressuring Hamas was found to be well within the Minister of Public Security's

²⁰⁰ CrimFH 7048/97 *John Does v Ministry of Defence* (n 190) par 19, President Barak's judgment.

²⁰¹ Judge Heshin in fact called for symmetry and for holding the detainees as war captives until the release of Israeli soldiers. His decision disregards what providing this title to detainees might mean for their entitlement to further rights and protections as Prisoners of War; *ibid*, par 7, Judge Heshin's judgment.

²⁰² *Namnam v The Government of Israel* (n 83) par 14, Judge Hendel's judgment.

²⁰³ *Ibid*.

²⁰⁴ *Ibid*, par 12, Judge Hendel's judgment.

powers. Furthermore, since these restrictions targeted Hamas, Hendel accepted that there is no point in regulating exceptions which might limit the desired effect on the organisation's leadership.²⁰⁵ Unlike President Barak in *John Does*, Hendel was also less critical of the policy's effectiveness and found the policy proportionate, despite the lack of certainty that it will lead to the repatriation of captives.²⁰⁶

Until *Namnam*, the Supreme Court accepted that state security considerations might dictate Palestinians' conditions. Yet these considerations mainly revolved around the risk that prisoners themselves posed,²⁰⁷ and the need to deter future terrorist acts, for instance, by prohibiting academic studies funded by terror organisations.²⁰⁸ At most, judges permitted the state to consider security as a secondary factor when deciding on the force-feeding of a hunger striker while saving the striker's life was placed as the primary objective.²⁰⁹ The decision in *Namnam* significantly expanded how general security interests might inform punishment, by including the political aim of retrieving captives as the primary goal, and by enforcing a restriction unrelated to individual risk. Effectively, the Supreme Court confirmed the state's direct political use of incarcerated Palestinians and recognised their special status. *Namnam* fulfilled what Judge Meltzer already recognised in *Salah*, that limiting the state's power to use conditions:

[...] will narrow the executive branch's ability to fight terror by withdrawing privileges, and inter alia, operate necessary and legitimate leverage against the terror attacks the organisations execute for releasing their affiliated security prisoners.²¹⁰

In these decisions, the Court confirmed that penal power is a strategic tool. In doing so, it aligned the goals of punishment with the state's strategic aims in the ongoing conflict. Not only did the Court disregard how such use of individuals for instrumental ends might lead to disproportionate, collective, punishment, but it also ignored how upholding these practices

²⁰⁵ Even though the state promised to consider visits in humanitarian exceptional circumstances; Ibid, par 12, Judge Hendel's judgment.

²⁰⁶ Ibid, par 12 to Judge Hendel's judgment.

²⁰⁷ *Darwish v The Prison Service* (n 87); *Yunes v The Prison Service* (n 69); *The State of Israel v Kountar* (n 65).

²⁰⁸ *Salah et al v The Prison Service et al* (n 90).

²⁰⁹ HCJ 5304/15 *Israel Medical Association v The Knesset of Israel* (11 September 2016) Judge Rubinstein's judgment.

²¹⁰ *Salah et al v The Prison Service et al* (n 90) par 4 to Judge Meltzer's judgment.

might undermine the Court's standing as a neutral tribunal which monitors the state's compliance with domestic and international legal obligations.

Conclusions

The cases discussed here demonstrate that the Supreme Court has traditionally avoided criticising Israel's penal policies. Judges confirmed and encouraged longer punishments to deter security offenders, refrained from criticising the IPS affiliation practices, and upheld the general policy against the reintegration of Palestinians. Even judges who disagreed with a categorically different approach to security prisoners refrained from overturning the IPS' collective treatment. Rather, they relied on inaccessible mechanisms to balance the IPS approach and did not require the creation of tangible procedures for individuals who wished to access 'criminal' prisoners' conditions. In all these ways, the Supreme Court has contributed to legitimising Israel's harsh collective practices that target Palestinians in the criminal process and throughout punishment.

As implied earlier, the Court's approach is not entirely surprising, as it serves the State of Israel, whose citizens and institutions are the target of Palestinian insurgency. While the Court is committed to the general principles of justice, equality, and rights, its judges also belong to Israeli society, and their affiliation impacts their perspective. As Kretzmer and Ronen describe:

The judges' individual independence does not remove them from the political context in which they operate; they are not neutral.²¹¹

Beyond the judges' convictions, the Court is also dependent on the public trust of Israeli society, which can restrain it, particularly in matters concerning security. Israeli judges recognised this tension but have reaffirmed their prioritisation of the rule of law and constitutional rights, emphasising their role of reviewing and balancing the executive and legislative powers. As former President Barak wrote in his book *The Judge in a Democracy*:

²¹¹ Kretzmer and Ronen (n 11) 496.

The need to ensure public confidence does not mean the need to ensure popularity. [...] Public confidence does not mean pleasing the public [...] On the contrary, public confidence means ruling according to the law and according to the Judge's conscience, whatever the attitude of the public may be.²¹²

President Hayut similarly commented in Yigal Amir's petition on his right to parenthood that:

This case raises the understandable collective sentiment of vengeance the petitioners express for the national trauma Amir caused with the political murder he committed. But this sentiment cannot dictate an outcome that undermines the basic principles of our legal system.²¹³

In respect of punishment for security offences, the Court chose broad security considerations over the principles of criminal, constitutional, and administrative law. Its judges created various doctrines to justify prioritising security. By focusing on deterrence for security offences, distinguishing between rights and privileges based on the Prisons Ordinance rather than international law and substantial analysis of rights, and addressing incarcerated Palestinians as a separate population, the Court established a hierarchy between security needs and Palestinian individual rights. Often, judges explained this position by emphasising the severity of security offences to highlight the degree of the risk Palestinians posed. In doing so, they tapped into public concerns about terror. These same concerns restrained judges from critically examining security policies and taking the risk of curbing Israel's counterterror practices upon themselves.²¹⁴ Given the severity of the security risk, judges were willing to impose broad limitations with questionable efficacy, as they did with extended family visits,²¹⁵ academic studies²¹⁶ and visits to Gazan Hamas members.²¹⁷ The ongoing criticism of the Court's supposed 'judicial activism' might have similarly contributed to restraining judicial review, particularly on sensitive matters such as security. Nevertheless, judges' relatively conservative approach to

²¹² Aharon Barak, *A Judge in a Democracy* (Princeton University Press 2006) 83.

²¹³ *Dovrin v The Prisons Service* (n 48) par 3, Judge Hayut's judgment.

²¹⁴ Kretzmer and Ronen (n 11) 17 and 501.

²¹⁵ *Yunes v The Prison Service* (n 69).

²¹⁶ *Salah et al v The Prison Service et al* (n 90).

²¹⁷ *Namnam v The Government of Israel* (n 83).

security has failed thus far to resist Right-wing attempts to ‘balance’ the judges’ composition and restrain the Supreme Court’s powers.

Conflict penalty practices pose a challenge to domestic courts. By reviewing state measures and considering human rights violations, domestic courts seemingly position themselves across from the state’s national security interests, and outside society. Often, courts have been cautious of criticising state practices during times of conflict and emergency.²¹⁸ Yet, as Chapter One discussed, there were several important exceptions in the past decades, notably the Supreme Court of the United States’ rulings regarding foreign nationals held in Guantánamo Bay,²¹⁹ and the UK House of Lords decision that the indeterminate detention of noncitizens terror suspects was unlawful.²²⁰ The Israeli Supreme Court has also handed down several decisions that curbed Israel’s security measures.²²¹ Israeli courts’ willingness to criticise security practices reflects the legal system’s commitment to core democratic principles of human rights, equality, and due process. In respect of incarcerated Palestinians, the Supreme Court of Israel noted these values, however, it rarely acted to defend them. Instead, it has tended to align with the state’s exceptional policies and upheld the creation of a special penal track for Palestinians. A special track which enforces longer sentences in tougher conditions, uses human rights as bargaining chips, and allows no realistic prospect to those seeking reintegration.

²¹⁸ Kretzmer and Ronen (n 11) 315; Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’ (2004) 53 Int’l & Comp L Q 11.

²¹⁹ E.g. *Hamdi v Rumsfeld* 542 US 507 (2004); *Rasul v Bush* 542 US 466 (2004); *Hamdan v Rumsfeld* 548 US 557 (2006).

²²⁰ *A and others v Secretary of State for the Home Department* (2004) UKHL 56.

²²¹ See footnote 10 of this chapter.

Chapter 7: Conclusions

The difficult conditions of incarcerated Palestinians rarely attract the attention of Israeli mainstream media. Most often, Israeli media mentions Palestinian security prisoners around escapes and prison riots, citing politicians that argue against their lenient punishments and ‘comfortable’ terms of confinement.¹ Jewish ministers and MKs are likewise highly critical of Palestinian MKs who try to promote incarcerated Palestinians’ rights and blame them for supporting terrorists.² Given the backdrop of the conflict, criticising Israel’s policies against security offenders is often perceived as a challenge to the security bodies’ endeavours to eradicate terror and to Israel’s struggle against Palestinian insurgency. Even merely researching Israel’s practices, and analysing their problematic aspects, might be seen as siding with the Palestinian national agenda. The same cannot be said for studies which, for instance, criticise the state’s penal approach to organised crime or sex offences. Such studies would not be perceived as possibly supportive of criminal enterprise or sexual violence. This gap between how the state and the majority group understand conflict-related crimes, and how other types of offending are perceived, is evident in the distinct procedures and harsh punishments that characterise conflict penalty.

Conflict-related crimes generate an emotional charge that leads to a special penal response. Conflicts feed off historical, political, and cultural tensions, and further preserve and amplify them. Conflict-related crimes aim to change the political conditions, while punishment similarly maintains the parties’ disagreement and signals to each side their just struggle. The conflicts discussed here entailed large-scale wrongdoings that harmed millions. They have nurtured exclusionary national narratives that feature in governments’ policies to this day, particularly around immigration. Sentiments of fear, hate and vengeance featured in the penal policies states advanced during hostilities. The anxiety over conflict violence and its perception as a danger to the life of the nation promoted the preventive paradigm that prioritised security over human rights and criminal justice principles. Rage over the loss of innocent civilian lives generated exceptionally punitive detention and sentencing practices. Vengeance fuelled

¹ See Chapter Five on pages 195 and 206 of this thesis.

² Page 202 of this thesis.

dehumanising practices that stripped individuals of their rights and expelled them to ‘black holes’.³ These sentiments created extreme penal policies. Yet, at the same time, the especially harsh sentences that feature in conflict penalty reveal the inherent deficit of the state’s authority and legitimacy to punish perceived ‘enemies’.

Conflict penalty includes an expressive element that is not contingent upon the punitive experience of the person being punished. Unlike Feinberg’s understanding of punishment, which entails the experience of condemnation,⁴ Israel’s penal practice is often much more focused on Israeli public opinion than on whether Palestinians indeed experience harsh treatment. The Palestinian Authority’s ongoing financial support of prisoners, which Israel permits, indicates this very well. Instead of preventing the funds from reaching the prison, Israel took the declarative route of sanctioning the Palestinian Authority. This policy sends a moral message, yet one that will not necessarily impact the prisoners, but rather the Palestinian Authority’s revenues. The IPS prohibition on phone calls has a similar effect. Here, an alleged security limitation effectively imposes harsher punishment. However, the IPS avoids activating all its cellular reception blocks, and so in reality mobile phones are commonly used in Palestinian wings. This policy subsequently reinforces the hierarchy inside the wings, as prisoners depend on the organisations’ leaders, who often hold the contraband mobile phones, for regular contact with their families. Furthermore, while Israel’s approach ultimately makes punishment harsher, Palestinians might not necessarily experience it as a greater moral sanction, but rather as discrimination, given the differences between their penal regime and the rules that apply to other prison populations, including Jewish security prisoners, as Chapter Three discussed. The practical effects of Israel’s policies attest to an expressive punishment that disregards the views and experiences of those punished.

Similarly, the state conceives those convicted of conflict-related crimes as outsiders to the polity, which further allows the violation of individual rights as a form of depersonalisation, a fundamental element in Jakobs’ concept of enemy criminal law.⁵ The case of Israel highlights

³ Johan Steyn, ‘Guantanamo Bay: The Legal Black Hole’ (2004) 53 Int’l & Comp L Q 1, 14.

⁴ Joel Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 The Monist 397, 408.

⁵ Günther Jakobs, ‘Appendix D: On the Theory of Enemy Criminal Law’ in Markus D Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press 2014) 415.

the importance of depersonalisation for the state's use of punishment to other ends, notably through deterrence, but also, by using those incarcerated as bargaining chips. The central role afforded to deterrence in Israel's punishment of Palestinians not only dehumanises people who are punished but further infantilises the entire Palestinian public who are expected to 'learn a lesson' and respond in unison to Israel's policies of penal severity and strict prison conditions. This is while general Israeli sentencing law deprioritised deterrence as a penal rationale, and Government policies have pushed for decreasing the rates of imprisonment.

Emotive penal policies that depersonalise the punished are not unique to conflict. Conflict falls under a range of social and political conditions in which exceptionally harsh and exclusionary practices of punishment develop. Critical criminologists and punishment and society scholars have long analysed how penal trends reflect and preserve social stratification and the alienation of minorities.⁶ Conflict penalty offers yet another perspective through which to analyse penal practices while taking into account the competing ideologies behind conflict and the state's strategic use of its penal power. It is a perspective that similarly reflects underlying power imbalances between majority and minority groups, specifically when states use domestic measures. The conceptual framework of conflict penalty complements critical punishment studies by proposing to focus on state sanctions that respond to hostilities and occur in historical and ideological contexts of conflict.

Closely examining Israel's conflict penalty provided insights into how different Government branches seek to substantiate Israel's moral position to punish Palestinians. As Chapters Four to Six showed, Israeli authorities are preoccupied with how to justify their penal power and protect the country's democratic image, despite the exceptional measures they regularly use, deviating from due process standards and basic human rights protections. IPS personnel highlighted their mission to protect the Israeli public, while safeguarding prisoners' rights, despite ongoing military operations. At the same time, Prisons Commissioners imported

⁶ Stuart Hall and others, *Policing the Crisis* (MacMillan 1978); George Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Columbia University Press 1939); Bruce Western, *Punishment and Inequality in America* (Russell Sage 2006); Alessandro De Giorgi, *Re-thinking the Political Economy of Punishment* (Ashgate 2006); Michelle Alexander, *The New Jim Crow* (The New Press 2010); Mary Bosworth, 'Theorizing Race and Imprisonment: Towards a New Penalty' (2004) 12 *Critical Criminology* 221; Jonathan Simon, *Governing Through Crime* (Oxford University Press 2006).

militarised methods of control that aimed to deter prisoners' protests, and Palestinians reported on violence and frequent raids by guards. MKs highlighted the pressing security necessity which justifies compromising some human rights for saving the country.⁷ Gradually, MKs and legal advisors used the security justification to impose a direct punitive approach that targeted Palestinians and separated them from other recipients of the criminal justice system. MKs have often promoted this punitive approach through populist rhetoric around the need for tougher sentences and conditions, particularly by dissolving the special regime for incarcerated Palestinians. This was against the views of security authorities and entailed risking the pragmatic gains the IPS made as it managed to control the Prisoners' Movement better. Moreover, such a shift risked a revival of the Prisoners' Movement, by mixing members of different organisations and allowing them to cooperate against the IPS. In this regard, studying Israel's conflict penalty makes possible a better understanding of what penal populism trends look like during times of violent crisis and how they might impede democracy and the state's security interests simultaneously. Judges have been occupied with highlighting procedural protections that only seemingly allow individual treatment, given the IPS' inherently categorical approach to Palestinians. In a similar vein to the expressive effect of punishment, Israel does not seek to legitimise its practices in the eyes of Palestinians. Hence, its authorities find it sufficient to provide security justifications, and ineffective procedural protections, to maintain its moral authority to punish in the eyes of the Jewish majority and the international community.

While MKs and judges justify the existing penal policy by referring to the risk of terror attacks, I argue that Israel's conflict penalty also advances the strategic path of preserving the perception of the Palestinian agenda as terrorist and rejecting direct negotiations. Despite the unbalanced power dynamic between Israel and Palestinian organisations, Israeli Governments identify Palestinian insurgency as an imminent threat. The security discourse conceives Palestinian resistance as part of the 'map of threats' endangering Israel's stability and existence, just like the Iranian regime and Hezbollah, the Lebanese political party and militant

⁷ E.g. Protocol no 42 of the Constitution, Law and Justice Committee Meeting, 20th Knesset (12 October 2015) Tzipi Livni, 25; Protocol of the 134th Meeting of the 20th Knesset, DK 29 (15 June 2016) 231.

organisation.⁸ Focusing on and over-inflating the risk terror poses keeps the conflict going. Maintaining the image of prisoners as active threats to Israel and Israelis is useful to sustain fear, anxiety, and anger among the public. Punishment is not only an important tool for managing conflict. It is also a means by which to deepen the political divide and amplify the hostilities.

At this point, the reader might wonder again about the normative argument this thesis makes. Does it argue that conflict penalty is wrong? Does it suggest that an international, neutral, tribunal should try conflict-related crimes? Is there no prospect for a legitimate domestic criminal justice against perceived ‘enemies’?

My main objective has been to describe and explain the phenomena of conflict penalty. To identify its common features, the relationship, and hierarchies it embeds, and the distinct normative and sociological questions it raises about the justifications and effects of punishment. Critical works in the field of punishment and society have, in the past, faced criticism for failing to propose an alternative and for providing ‘grand narratives’⁹ that generalise penal policies and lack a normative proposition of better ways to respond to criminal conduct. Arguably, expansive critiques that do not include practical suggestions of normative alternatives merely expose the penal reality, in ways that do not necessarily advance change. It was not my intention to disregard this important critique against post-structural studies of criminal justice systems.

This thesis rather has examined an area which I argue has not been understood fully. Punishment in times of conflict has been debated through various disciplinary perspectives which did not closely examine the normative and sociological aspects it raises. This thesis has built a framework that will encourage further studies of the problematic relationship between the state and the ‘enemies’ it punishes. It provided the concepts for discussing punishment that is imposed without moral authority and with intentional exclusionary consequences. It studied cases in which the state used penal power to legitimise its agenda and delegitimise insurgent

⁸ Israel Defence Forces, ‘Security Threats’ (2023) <<https://www.idf.il/en/mini-sites/security-threats/>> accessed 6 January 2023; The Embassy of Israel to the United States, ‘Infographic: Map of Threats Facing Israel’ (2013) <<https://embassies.gov.il/washington/NewsAndEvents/Pages/Threats-Facing-Israel-Map.aspx>> accessed 6 January 2023.

⁹ Lucia Zedner, ‘Dangers of Dystopias in Penal Theory’ (2002) 22 *Oxford J Legal Stud* 341, 346; Also see a further critique regarding Garland’s work in John Braithwaite, ‘What’s Wrong with the Sociology of Punishment?’ (2003) 7 *Theoretical Criminology* 5, 8-9 and Pat O’Malley, ‘Volatile and Contradictory Punishment’ (1999) 3 *ibid* 175.

ideologies. As the discussion here showed, it is during conflict when punishment appears in an almost pure political form as it creates the clear boundaries of ‘us’ and ‘them’ and pursues strategic goals on the backs of the punished.

The thesis has not sought to idealise penal policies that states implement against their citizens, in peaceful times. I do not argue that contractual or communitarian relationships generate a moral authority to punish, particularly in the form of incarceration. As many others have observed, the use of punishment in several liberal democracies impacts minorities in disproportionate ways that challenge the contractual and communitarian relationship, and accordingly, the state’s authority to punish.¹⁰ Yet, in such contexts, the state can ‘earn’ the moral standing to punish more easily, given that those punished do not necessarily object to the state’s power altogether, unlike many recipients of punishment in times of conflict.

The state of conflict understandably poses a challenge to the state’s power to punish, yet, turning to extreme securitised justifications only exacerbates the state’s lack of legitimacy to incarcerate and sentence insurgents. Precisely because the state, in most cases, does not hold a state-citizen relationship with the ‘enemy’ punished, it must follow due process protections and protect human rights. Enhanced compliance with international human rights law would help the state reinforce its moral standing. Drawing on Beetham’s idea of legitimacy,¹¹ applied by prisons and criminal justice scholars,¹² Israel could consider trying to legitimise its penal power by providing fair procedures and protecting basic rights. It could try to end, or at the very least significantly narrow, the use of administrative detention, equate the procedures and detention powers of military courts to civilian courts and decrease the use of prolonged sentences. These steps might help Israel to try and establish its powers under a theory of ‘thin’ legitimacy,

¹⁰ R.A. Duff, ‘I Might Be Guilty, but You Can’t Try Me: Estoppel and Other Bars to Trial’ (2003) 1 Ohio J Crim L 245, 258; Richard Delgado, ‘Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation’ (1985) 3 Law & Ineq 9, 56, 70; Also see Michael Tonry, ‘Introduction: Thinking About Punishment’ in Michael Tonry (ed) *Why Punish? How Much? A Reader on Punishment* (Oxford University Press 2011) 24; Michael Tonry, ‘Proportionality, Parsimony, and Interchangeability of Punishment’ in ibid 230; Barbara Hudson, ‘Beyond Proportionate Punishment: Difficult Cases and the 1991 Criminal Justice Act’ (1995) 22 Crime, Law & Social Change 59, 70.

¹¹ David Beetham, *The Legitimation of Power* (Macmillan 1991) 11, 20; Also see Tom R Tyler, *Why People Obey the Law* (Yale University Press 1990) 84.

¹² Richard Sparks, Anthony Bottoms and Will Hay, *Prisons and the Problem of Order* (Oxford University Press 1996) 329; Anthony Bottoms and Justice Tankebe, ‘Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice’ (2012) 102 J Crim L & Criminology 119 132; Also see Justice Tankebe and Alison Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013).

according to which legitimate power is not contingent upon serving independent norms,¹³ but rather upon guaranteeing fair procedures and dialogue.¹⁴ Doing so might also help the Government to satisfy its critics, who point to its violations of international law.¹⁵ Yet, a shift towards compliance would not necessarily guarantee Israel a universal moral authority to punish, as Chehtman argues.¹⁶ Providing due process protections would not change the circumstances in which Israel maintains its authority over Palestinians by force, rather than by democratic means. It is uncertain that ‘thin’ legitimacy is attainable in conditions of ongoing conflict and occupation. Nonetheless, the potential gains of providing due process protections and just treatment to individual Palestinians facing the military and civilian courts are not to be ignored. Ultimately, Israel chose a different path, as it is drawing away from compliance with international law since the 2000s. For the past two decades, Israel has been perfecting its securitised form of justice and special punishment for Palestinians, making its policies harder to justify and harder to legitimise.

At the same time, the Israeli model of conflict penalty underlines the importance of incarcerated Palestinians in the context of the conflict. As in other conflicts, particularly those in South Africa and Northern Ireland, the symbolic importance of incarcerated insurgents ensured their central role in the peace process. In Israel, the Oslo Accords, and the centrality of released prisoners among the ranks of the Palestinian leadership, further exemplify the role of those imprisoned as political actors. But just as conflict penalty highlights the political position of incarcerated ‘enemies’, it also reinforces their delegitimization. While, historically, conflict penalty created a strong political group of prisoners who could advance possible resolutions, it

¹³ As the traditional conceptualisation of legitimacy requires, see the works of John Locke, *Two Treatises of Government* (Yale University Press 2003) 136-137; and John Rawls, *Political Liberalism* (Extended edn, Columbia University Press 2005) 446-447, 459.

¹⁴ Richard Sparks and Anthony E Bottoms, ‘Legitimacy and Order in Prisons’ (1995) 46 *Brit J Criminology* 45, 58-59.

¹⁵ Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel* (CCPR/C/ISR/CO/4, 2014); Committee Against Torture, *Concluding Observations on the Fifth Periodic Report of Israel* (CAT/C/ISR/CO/5, 2016); Amnesty International, *Israel’s Apartheid against Palestinians* (2022); Smadar Ben-Natan, ‘Citizen-Enemies: Military Courts in Israel and the Occupied Territories 1967-2000’ (PhD thesis, Tel Aviv University 2020); David Kretzmer and Yaël Ronen, *The Occupation of Justice* (2nd edn, Oxford University Press 2021).

¹⁶ Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010) 142, 147.

simultaneously underpinned the contrasting narratives on conflict-related violence, making it harder for the parties to bridge their normative gap.

Here is another point where conflict penalty may help us understand other conditions in which the state uses punishment that targets minorities. In these cases, the state also uses punishment to reinforce its moral superiority against those who are perceived as external threats. Penal policies as such do not encourage reintegration, but rather mark the boundaries of the political community. Conflict penalty clarifies the political aspect of such practices, evident in how the state marks those condemned and harnesses punishment for advancing an exclusionary national narrative. Just like with conflict, punishment is an essential component in the state's endeavours to identify the opposing parties and preserve its superiority. Turning to other forms of actions other than punishment, such as negotiations, inclusion, and moderation of measures, could decrease the vilification of minorities. By narrowing punitive immigration control practices or cutting down on the detention and imprisonment of ethnic minorities, the state can signal a turn to inclusion, instead of maintaining the political oppression of certain groups. When the state upholds the punitive exclusionary perspective, it blocks pathways for resolution and fuels the conflictual approach against minorities and noncitizens. In that regard, transitional justice scholars and practitioners have discussed alternatives to classic criminal justice for decades, and these solutions have been used in international and domestic contexts when societies coped with large-scale violence and historical wrongdoings.¹⁷

From a normative perspective, conflict penalty uncovers a politicised punishment, and as such, it implies the need for a political solution of direct recognition and negotiations. Negotiations that first and foremost acknowledge the political standing of the opponent, rather than criminalise their position. This is not to say that states should not criminalise violence against innocent people, or that they should necessarily negotiate with any paramilitary organisation that initiates an armed campaign. Yet, state violence, through indeterminate incarceration and violations of basic human rights, often goes unaccounted for, which likewise

¹⁷ E.g. Philip Clark, *The Gacaca Courts, Post-genocide Justice and Reconciliation in Rwanda* (Cambridge University Press 2010) 30; Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2011); Greensboro Truth and Reconciliation Commission, *Executive Summary* (2006).

questions the moral power to punish those who act against state institutions. Recognition and reconciliation entail acknowledgement of wrongdoings by both parties, which state punishment disregards. In conflict, as in other conditions of race and class inequality, harsh punishments often merely inflate the problem.

There is still much to learn about conflict penalty. My discussion here engaged mainly with establishing this theoretical paradigm and exploring it through critical reading of Israeli government records, laws, and court rulings. Qualitative studies through interviews and oral testimonies might offer an important closer examination of the actors involved in planning and implementing conflict penalty policies. Similarly, studying the experience of detainees and prisoners is likewise important in order to understand fully how politicised punishment impacts the recipients' perception of the state and its moral standing. Furthermore, conflict penalty might raise different questions and insights in different settings. The past twenty years have featured expansive military operations across the globe, from the war in Tigray, Ethiopia, through the coup in Myanmar, to the raging Russian campaign in Ukraine. Lasting conflicts entail lasting practices of detention, and at times adjudication and punishment. The different circumstances of each of the examples noted earlier raise different questions about the application of international humanitarian law and human rights law, and how these influence the state's legal practices against captured enemy fighters. Further studies of conflict penalty could pursue a closer comparative analysis, that evaluates the importance of international law commitments and the impact of historical power dynamics and geopolitical circumstances on penal policies. This thesis has sought to provide the grounds for a better understanding of punishment in times of large-scale hostilities, on the ways in which it sustains conflict and obstructs resolution.

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