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Preventive Detention of Dangerous Inmates

A Dialogue between Human Rights and Penal Regimes

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1 Introduction

1.1 Research motivation, background, and questions

1.1.1 Preventive detention as a more "liberal" alternative after the abolishment of the death penalty?

The motivation of this thesis results from a deep concern of the preventive detention of dangerous inmates becoming a practical alternative for the death penalty. In Taiwan, the death penalty is still applied to several criminal laws.[1] Moreover, after a four-year suspension, the government routinely executed four to six death row inmates annually from 2010 to 2015.[2] Although the International Covenant on Civil and Political Rights ("ICCPR") was ratified right after the Legislative Yuan passed an act to implement the two human rights covenants in 2009,[3] its ultimate stance of "the abolition of capital punishment"[4] seems to have no influence on the decisions of the government. On the other hand, greater tensions between human rights NGOs and the general population have arisen. Since then, the debate between the "abolition camp" and the "anti-abolition camp" has been rampantly re-initiated not only in academia but also in the media. Politicians were forced by journalists to disclose their positions before elections, but facing public opinion of 84% against the abolishment,[5] even those belonging to "liberal" parties had little choice but to give awkward answers.

Within the debated issues, it is taken for granted that the abolition camp bears the burden to propose feasible alternatives before the death penalty can be truly ended. Among all potential options, the life sentence without the possibility of parole ("LWOP") is presumed as the most appealing to reach maximum consensus of both camps. This is probably due to its power to permanently incapacitate "extremely" dangerous inmates without depriving them of their lives, while also maintaining a sufficient level of deterrence against those who would consider committing similar crimes. However, recently it has been solemnly determined that the LWOP

[1] Although there is no "mandatory" death penalty, fifty different crimes can still receive a sentence of death as maximum punishment.

[2] It is noteworthy that since the new President, Tsai Ing-Wen, assumed office on 20 May 2016, no death penalty has been executed so far. Ten days before her inauguration, however, the former government executed the only death penalty in 2016. The execution was against a 23-year-old who randomly killed four people and wounded 24 others on a metro in 2014.

[3] The Secretary-General of the United Nations rejected the deposit of ratification though, by indicating that the People's Republic of China (PRC) was recognized as "the only legitimate representative of China to the United Nations" according to the General Assembly Resolution no. 2758.

[4] Article 6.6.

[5] Liberty Times Net, "Latest polls! More than 80 percent of people oppose to the abolishment of the death penalty," http://news.ltn.com.tw/news/society/breakingnews/1651956, 2016 [in Chinese, last accessed 1 December 2017].

is directly against any notions of "human dignity," and would thus constitute an inhuman punishment.[6] Therefore, the abolition camp — comprising mostly liberalists — now has to formulate new, more liberal proposals for the sentencing of the most serious criminals who originally "deserved" to be killed.[7] Inasmuch as the existing punishment of a life sentence (with parole) is often criticized for its "inflexibility" in granting release, in a social context focusing on the recidivisms of dangerous inmates, people could easily turn their attention to a preventive detention regime, which aims at managing such risk.

As a researcher for the rights of criminals, prisoners, and inmates, the author of this thesis has a specific interest in the potential conflicts between the expansion of traditional criminal laws and the normative constraints imposed by international human rights law. On the other hand, the author also acknowledges, as Andrew Ashworth does, that while international human rights law is "significant in relation to criminal procedure," it is "slightly less significant in matters of sentencing and not extensive at all in the criminal law itself," and thus has "nothing to say on major issues."[8] Thus, by researching both the legitimacy of and justifications for preventive detention, the overarching goal of this thesis is to initiate a dialogue between human rights and penal regimes. This can be demonstrated in the following research question for this thesis:

- Is it possible to delimitate preventive detention within a *liberal* criminal law in order to be compatible with *current* international human rights jurisprudence?

However, before this thesis analyzes this question in more detail, the aforementioned social context should be explained for the research background of this thesis.

1.1.2 The social context of managing the risk of dangerous offenders

> *The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even those of convicted criminals against the State, a constant heart searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart*

[6] First in *Vinter and Others v. the U.K.* [2013], para. 113.

[7] See also Roger Hood and Carolyn Hoyle, "The Challenge of a Suitable Replacement," in *The Death Penalty: A Worldwide Perspective* (Oxford: Oxford University Press, 2015).

[8] "Criminal Law, Human Rights and Preventative Justice," in *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, ed. Bernadette McSherry, Alan Norrie, and Simon Bronitt (Oxford: Hart, 2009), 93.

> *of every man — these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation and are the sign and proof of the living virtue in it.*[9]

The words of Winston Churchill are full of benevolence and wisdom, but they are not a magic formula. In reality, tackling the populist emotion against serious criminals and the eagerness to curb their risks of recidivism has always been a challenging task for the governments of democratic and Rule-of-Law countries. In Taiwan, the crime rates for serious violence — including murder, robbery, seizure, aggravated assault, kidnapping for ransom, and intimidation for money — have steadily declined in the last ten years,[10] yet the public demand for risk-prevention is hardly satisfied as sporadic but appalling crimes occasionally appear on the news. The empirical phenomena of how the pursuit of provocation by bloodthirsty media can inspire the mass feeling of insecurity can also be found in Western countries, such as Australia[11] and the United Kingdom (U.K.).[12] However, such a feeling can be based on stereotypical misunderstandings of the general situation of crimes. For example, the process of "demonizing" sex offenders as "typical" men with limited social skills and bizarre behavior has in turn covered the truths that most sex offenders are acquaintances of their victims, most do not have any psychiatric illness, and most have never been convicted for their crimes.[13]

Unfortunately, the concept of "dangerousness," which is lavished by the media, has inevitably penetrated public policy and the criminal justice system as well. According to legal and social practitioners in Australia, tabloid journalism played a significant role in the development of "effective" policies against post-release sex offenders by exaggerating their image as recidivists.[14] Those policies concluded as the legislations of preventive detention against "dangerous" or "serious" sex offenders in several states of Australia from 2003 to 2009.[15]

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[9] Winston Churchill, Home Secretary, House of Commons, London, 20 July 1910 [emphases added].

[10] Criminal Investigation Bureau, "2015 Taiwan Criminal Statistics," (Taipei: Criminal Investigation Bureau, 2016), 30-31. Apart from these, the crime rate of offenses against sexual self-determination has been stably waving around 11/100,000 in the last ten years.

[11] See, e.g. Patrick Keyzer and Bernadette McSherry, "The Prevention of 'Dangerous' Sex Offenders in Australia: Perspectives at the Coalface," *International Journal of Criminology and Sociology* 2 (2013).

[12] See, e.g. Karen Harrison, "Dangerous Offenders, Indeterminate Sentencing, and the Rehabilitation Revolution," *Journal of Social Welfare and Family Law* 32, no. 4 (2010).

[13] Karen Gelb, *Recidivism of Sex Offenders: Research Paper* (Melbourne: Sentencing Advisory Council, 2007). Sex offenders also have a very low reoffending rate in Scotland, see Lindsay Thomson, "The Role of Forensic Mental Health Services in Managing High-Risk Offenders," in *Dangerous People: Policy, Prediction, and Practice*, ed. Bernadette McSherry and Patrick Keyzer, International Perspectives on Forensic Mental Health (New York: Routledge, 2011), 169.

[14] Keyzer and McSherry, "The Prevention of 'Dangerous' Sex Offenders in Australia," 302-04.

[15] In chronological order, they are: Dangerous Prisoners (Sexual Offenders) Act 2003 of Queensland, Crime (Serious Sex Offenders) Act 2006 of New South Wales, Dangerous Sexual Offenders Act 2006 of Western Australia, and Serious Sex Offenders (Detention and Supervision) Act 2009 of Victoria.

Theoretically, legislators, who should follow the principle of legality, may convert the subjective opinion of "dangerousness" into objective fact of "risk" in laws. In practice, however, the legislative or judicial decisions of whether the risk of a person is unacceptable (i.e. whether or not he/she is "too risky"), are still subject to the social context, wherein the public at large is already fascinated by all kinds of horrible plots.[16] In other words, in order to respond to the fears, interests, needs, and prejudices against former offenders of a society, the legal definition of "an unacceptable risk" has to be so elastic that it risks erosion of its Rule-of-Law foundation. Also of significance, is the low accuracy of risk assessments in relation to future offending, which, as this thesis shows in Section 3.4, can actually lead to serious injustice.

However, facing a new modernity of "risk society,"[17] some claim that measures to manage the "uncertainty" should be taken, because it is better to be too early than too late. Yet the stronger demand of security, public safety, or public protection, in a world without "Precogs," implies greater social control by the government. From a republican perspective, the ultimate goal of the government is to ensure the citizen has "the power of enjoying freely his possessions without any anxiety, of feeling no fear for the honor of his women and his children, [and] of not being afraid for himself."[18] Inasmuch as the "dangerous offenders" — being excluded from the category of "fellow citizen" — are the alienated "Other,"[19] citizens nowadays are more comfortable with the notion of a "Preventive State," which is, of course, too far away from the Orwellian "Police State."[20] It is rather a State, where punishment is certainly "not the only, the most common, or the most effective means of crime-prevention."[21] However, in the scenario of using the same "hard treatment" or "burden" (i.e. the deprivation of liberty), the transition of proportionality from the "wrong" of an offender to the necessity of prevention from his/her "dangerousness" or "risk" certainly deserves a more comprehensive investigation.

1.1.3 Different perspectives from human rights and penal regimes as well as a bridge to cross through the gap

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[16] Harrison, "Dangerous Offenders, Indeterminate Sentencing, and the Rehabilitation Revolution," 425.

[17] Ulrich Beck, *Risk Society: Towards a New Modernity* [Risikogesellschaft], trans. Mark Ritter (London Sage 1992).

[18] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford Clarendon Press 1997), 28.

[19] Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* [Folie et Déraison: Histoire de la folie à l'âge classique], trans. Richard Howard (New York: Pantheon Books, 1965).

[20] The Senior Officials to the Committee of Ministers nevertheless referred to it in the preparatory work of Article 5 ECHR as a warning. Namely, "where authorised arrest or detention is [affected] on reasonable suspicion of preventing the commission of a crime, it should not lead to the introduction of a régime of a *Police State*," see Council of Europe, doc. DH (56) 10, 19.

[21] Carol S. Steiker, "The Limits of the Preventive State," *Journal of Criminal Law and Criminology* 88, no. 3 (1998): 774.

Both human rights and penal regimes are "public law" in the sense that they both deal with the direct relationships between the State and its people. Defined simply, people claim their human "rights" against the State in order to fulfill themselves as integral human beings under the former regime, while penal theorists try to justify a State using legal punishment against people who have committed "wrongs" under the latter regime. Within their intersection, the justice in searching for truth in an impartial way and then giving the detected "act"[22] an appropriate appraisement serves towards the human rights of both the offender and his/her (potential) victims. Yet each of the regimes has its own contours, where the core value and the perspective of how the value is reached can be very different from another. On the one hand, the "rationality" of a right mostly arises from a "micro-level" perspective, because the core value of a human rights regime is to display the "moral agency" of each and every human being. Alternatively, the "reasonableness" of a penalty is primarily based on a "macro-level" perspective, as long as the core value of a penal regime is to protect the "important living interests" of individuals, society, or State through the legal means of punishing vandalisms.

As a result, when discussing the legitimacy of a punishment or treatment by the State, human rights lawyers will usually focus on the rights emanated from specific claimants. In the case of detention or imprisonment, those rights are primarily related to the deprivation of liberty. Moreover, at a certain level of severity or disproportionality, the detention or imprisonment can be considered a violation of the right against inhuman treatment or punishment.[23] In addition, if the deprivation of liberty is confirmed as a punishment or penalty, the procedural rights should provide extra safeguards as due process of law. As for the discussion of preventive detention by penal theorists, since it is still the punitive essence of State or *Leviathan* under scrutiny, they aim their attentions mostly at the justifications for the detention as punishment, regardless of a retributivist or a consequentialist point of view. This could be done by either forming a theory of criminalization that is engaged to capture the "characteristics" of those detainees,[24] or proposing complete usage of risk-based "indeterminate sentencing" in a criminal

[22] It could also be an "omission" in exceptional circumstances, e.g. when a parent, as the only caretaker, neglects his/her baby by failing to feed it, thus causing its death. The culpable requirement is that the person has "control" over any state of affairs for which he/she is punished, see Douglas N. Husak, "Preventive Detention as Punishment? Some Possible Obstacles," in *Prevention and the Limits of the Criminal Law*, ed. Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (Oxford Scholarship Online, 2013), 189-90.

[23] See, e.g. *Ireland v. the U.K.* [1977], para. 162.

[24] See, e.g. Douglas N. Husak, "Lifting the Cloak: Preventive Detention as Punishment," *San Diego Law Review* 48, no. 4 (2011).

justice system.[25] Once out of the scope of punishment, apart from criticizing its purely utilitarian justifications,[26] penal theorists would have to resort to broader theories of politics.[27]

Inasmuch as it is still debatable whether the "preventive" purposes of preventive detention outplay its "punitive" character, or *vice versa*, it provides a great opportunity for both regimes to re-examine the plausibility of their delineations of punishment. Accordingly, to further develop creative inputs to current literature on preventive detention, which often belongs to either a discourse of human rights or one of penal theory, this thesis as an independent craft obliges itself to investigate the current research gap between the two regimes and strives to bridge it in a methodical way. That is to say, within an interdisciplinary framework, by reconciling the discussions of preventive detention under both human rights and penal regimes, this thesis struggles to yield a proposal of a legitimate *as well as* a justifiable framework to not only support but also limit the "Preventive State" in implementing preventive detention.

The reason to expect that micro-level rights and macro-level theories can fulfill each other stems from the argument by Jürgen Habermas that the relationship between human rights and popular sovereignty is based on their reciprocal recognitions.[28] Following this rationale, the strength to advocate the "bottom-up" rights of criminals, prisoners, or inmates would be generated faithfully from a sound discourse recognizing the "top-down" penal authority of State and its liberal limitations. Therefore, in order to reach the goal, the following research sub-questions will be consecutively answered by this thesis:

- To what extent, if any, would preventive detention violate international human rights law?
- In what circumstances could preventive detention be morally justified, either as a punishment or as a non-punitive confinement?
- How to morally justify preventive detention in accordance with current international human rights jurisprudence?

With these sub-questions in mind, this thesis now comes to its method and structure that should be supportive and correspondent.

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[25] See, e.g. Christopher Slobogin, "Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases," *ibid.*

[26] See, e.g. Jan de Keijser, "Never Mind the Pain, It's a Measure! Justifying Measures as Part of the Dutch Bifurcated System of Sanctions," in *Retributivism Has a Past: Has It a Future?*, ed. Michael H. Tonry, Studies in Penal Theory and Philosophy (New York: Oxford University Press, 2011).

[27] See, e.g. Peter Ramsay, "A Political Theory of Imprisonment for Public Protection," *ibid.*, ed. Michael H. Tonry.

[28] "Human Rights and Popular Sovereignty: The Liberal and Republican Versions," *Ratio Juris* 7, no. 1 (1994).

1.2 Methodology and framework

1.2.1 A focus on convicted inmates

Described broadly, "preventive detention" can be referred to as the arrest or detention of an accused pending trial or conviction to prevent his/her escape or to protect the evidence, the other person, or the community at large. As with traditional criminal offences, prevention also forms at least part of the rationale for most sentences.[29] However, for the *terrain* of this thesis, the term specifically refers to the **indefinite** detention of serious criminal offenders for **explicitly** expressed preventive purposes **after** the expiration of a definite sentence. This includes an *initial* sentence that an indeterminate period should be served, usually after a minimum punitive "tariff," due to the dangerousness of the offender. Yet in many legislations, such preventive detention could even be subjected to serious criminal offenders by *reserved* or *subsequent* judicial orders after they were originally sentenced. Therefore, if a distinction were required, this thesis would respectively invoke "indefinite sentence" and "post-sentence preventive detention" to refer to the two different legal contexts of preventive detention.

The reason for this thesis to focus on "convicted" inmates is not only due to the motivation of seeking a more liberal alternative for those serious criminal offenders, but also due to an observation that the characteristic of preventive detention in the above social context is so obscure that it needs to be critically theorized like our formal punitive institutions and practices.[30] As mentioned in the last section, regardless of a "punitive" ground or for "preventive" purposes, the deprivation of liberty as "hard treatment" or "burden" remains the same.[31] However, as an extreme mode of State coercion, under the name of "prevention," the scheme could easily escape the constraints of parsimony, proportionality, and culpability to which "punishment" is always subject. Not to mention that, while the scheme aims at the prevention of "future" crimes, the reasonable grounds for it to target serious criminal offenders are still based on their "past" criminal records.

Because the goal of this thesis is to examine preventive detention as a general concept, the *approach* to investigating its "legitimacy" is grounded in the international human rights (hard and soft) law that is universally applicable. However, inasmuch as the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") has been the most

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[29] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014), 4.

[30] R. Antony Duff and Zachary Hoskins, "Legal Punishment," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Metaphysics Research Lab, Stanford University, 2017), s. 8.

[31] As this thesis indicates in Section 2.3, to some penal theorists, the "indefinite character" of preventive detention could make it harsher than a life sentence, see, e.g. Richard L. Lippke, "No Easy Way Out: Dangerous Offenders and Preventive Detention," *Law and Philosophy* 27, no. 4 (2008): 410.

advanced and integrated human rights treaty, both in form and substance, the jurisprudence from the European Court of Human Rights ("ECtHR") will be frequently invoked for strong guidance. In addition, as the common-law experience of crime-control has always been the spotlight of penal theorists worldwide, and preventive detention has already been a crucial part of criminal policies in many common-law countries, this thesis chiefly uses the United States of America (U.S.), the U.K., and Australian literature for its *approach* to explore and analyze its "justifications." Yet, the existing schemes of preventive detention in Taiwan and other countries, such as Germany, the Netherlands, Norway, and Scotland are also worthy of attention. In order to expand the vision of this thesis, articles introducing the schemes in those countries are also included.

In order to organize an interdisciplinary framework, the *method* used for this thesis was to conduct a preliminary literature review through thorough desk research. This was done in order to establish and confirm the particular international human rights "laws" that will be focused on as the basis for legal positivism. Following the review, an analysis of relevant cases determined by the United Nations Human Rights Committee ("CCPR") and the ECtHR is undertaken. As a legal theoretical contention of the defined preventive detention, this thesis primarily bases its arguments on the (critical) review of secondary data, which includes academic monographs and articles extracted from physical or online libraries. Meanwhile, in order to confirm and support its own theory with concrete evidence, domestic case law and practices based on factual data is frequently used. Therefore, the collection of online data was necessary, because many governmental authorities employ public websites to present their judicial decisions, decrees, statistics, and practical information. In this way, the relevant jurisprudence and experiences could be followed up quickly and effectively.

1.2.2 Main themes and structure

The overall methodology of this thesis can be more concretely displayed in its general framework that is divided into five chapters:

- Chapter 1: Introduction;
- Chapter 2: Possible Violations of International Human Rights Law;
- Chapter 3: Justifications from Penal Theories;
- Chapter 4: Filling the Gap between Human Rights and Penal Regimes;
- Chapter 5: Conclusion.

The next chapter is concerned with the human rights implications of preventive detention by exploring the international and regional human rights jurisprudence of relevant schemes. Treaties and decisions are considered in relation to how preventive detention may breach the

inmates' procedural rights, right to liberty, and right against inhuman treatment or punishment. In addition, whether other individuals' or the community's interests under the right to life or the prohibition of torture could be served as a counterbalance is also questioned and answered. The purpose of this chapter is to prove that, notwithstanding the existence of a legitimate aim (i.e. to prevent serious harm from dangerous inmates), preventive detention also raises other legitimate concerns from many rights-perspectives, and thus it might be worth rethinking the limit of a "Preventive State."

Chapter 3 provides an overview of the justifications for preventive detention in penal theories. Putting aside the question of whether preventive detention is a punishment or not, it first delves into the ancient debate between retributivists and consequentialists on how legal punishment by State can be justified. This is not only crucial when justifying preventive detention as a punishment but is also helpful to discuss the four legitimate penological grounds for detention in the next chapter. It later highlights some of the justifications that have been made concerning the use of preventive detention, either as a punishment or as a non-punitive confinement. At the end of this chapter, it is highlighted that the vulnerability of risk assessment has become the weakness of every justification for preventive detention — in both theory and practice.

Chapter 4 then turns to the interaction between human rights law and penal theories. The definitions of punishment proposed by penal theorists and the jurisprudence from the CCPR and the ECtHR that breaks through the "definitional stop" are examined first. Further, this chapter provides an overview of the penological grounds for detention conforming to international human rights law. Finally, the "Kantian means principle" is employed, in order to discuss the "inherent" relationships between the grounds and the inmates' right to liberty. Without standing on an all-or-nothing position, this thesis intends to reveal and recognize the multiple facets and characteristics of preventive detention. The expectation is that the interpretation of international human rights jurisprudence, in accordance with the "moral agency" as its normative basis, could guide us to propose a "liberal" framework of preventive detention for the "Preventive State."

The themes explored above allow this thesis to reach a conclusion in Chapter 5 that both dangerous inmates and persons with mental disabilities have been singled out for "indefinite" social control. This is likely because of the way in which intense emotion underscores the targeting of such individuals as being "different" from the social norm.[32] However, in order to extract some democratic values from the populist demand of controlling insecurity, this thesis responsibly proposes two plausible and feasible recommendations for a "Liberal State" which

[32] Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment*, International Perspectives on Forensic Mental Health (New York: Routledge, 2014), 4-5.

decides to totally abolish preventive detention. The recommendations are the alternative of community-based supervision and the establishment of a risk management authority. However, these mechanisms of implementing the "positive obligation" of States may be quite contrary to the "Third Way Theory" emphasized by many Western countries.[33]

[33] Ramsay, "A Political Theory of Imprisonment for Public Protection," 135-37.

2 Possible Violations of International Human Rights Law

This chapter aims to verify whether preventive detention is legitimate under international human rights law. By exploring the general comments and communications of the CCPR and the judgments of the ECtHR, this thesis focuses on the human rights that may be violated by preventive detention regimes. Such rights include the principle of legality, the prohibition of double jeopardy, the right to a fair trial, the prohibition of arbitrary detention, and the right against inhuman treatment or punishment. In order to detect possible violations of these rights, most of them are first identified through a textual approach and then discussed through the authoritative interpretations. This is followed by an analysis of how preventive detention might violate these rights of the inmates. Because governments often defend their preventive detention schemes on the basis that the protection of the community must be balanced against the rights of the inmates, especially their right to liberty, the last section of this chapter then analyzes how a balance should be struck between competing rights or interests.

2.1 Procedural rights

2.1.1 Principle of legality

The principle of legality can be traced back to the basic concept of the Rule of Law, which is one of the ideal values that dominate liberal political morality.[34] It was also referred to in the preambles for both the Universal Declaration of Human Rights ("UDHR") and the ECHR. While the Rule of Law calls for the availability of statute law, secondary legislation, authorized rule, or other legal mechanisms to implement them as State governance, the principle of legality requires them to be clear, non-retrospective, and ascertainable. In criminal law, the principle of legality assures the primacy of law in all criminal proceedings and can be expressed in the Latin phrase as "*nullum crimen, nulla poena sine praevia lege poenali*" (no crime can be committed, nor punishment imposed without a pre-existing penal law) or, in short, "*nulla poena sine lege*" (no crime without law). It is in this aspect that the principle of legality becomes a general principle of public international law and elements of international legal instruments, such as the UDHR,[35] the ICCPR,[36] the Rome Statute of the International Criminal Court,[37] the Convention

[34] Others are, e.g. democracy, human rights, social justice, and economic freedom, see Jeremy J. Waldron, "The Rule of Law," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Metaphysics Research Lab, Stanford University, 2016).

[35] See, e.g. Article 11.2.

[36] See, e.g. Article 15.1.

[37] See, e.g. Articles 22-23.

on the Rights of the Child ("CRC"),[38] and the ECHR.[39] Deriving from this principle, specific protections are required at the international level, i.e. the legal certainty, the prohibition of retroactivity, and the prohibition of analogy.[40] [41]

2.1.1.1 Legal certainty

From the prohibition of retrospective punishment prescribed by Article 7.1 ECHR, the ECtHR interpreted the principle of legality more generally. It is required that "an offence must be clearly defined in law," so that "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court's interpretation of it, what acts and omissions will make him [or her] liable."[42] Yet, in order to reconcile the law-making power of common-law judges as "a well-entrenched and necessary part of legal tradition," the ECtHR loosened the principle of legality to some extent. Namely, the principle also allows courts to gradually clarify "the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development *is consistent with the essence of the offence and could reasonably be foreseen.*"[43] Moreover, even if the detention is not considered as a "punishment," from its "lawfulness" under Article 5.1 ECHR, the ECtHR has also called for such legal certainty to be satisfied. To the ECtHR, it is "a standard which requires that all law be sufficiently precise to allow the person — if need be, with appropriate advice — to *foresee*, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[44]

That is to say, the need for the legal certainty not only prohibits the uncertain "application" of any measure that deprives one's liberty, but it also provides an obstacle for the "lawmaking" *per se* — either a legislative or a judicial one[45]— lacking the qualitative requirement of

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[38] See, e.g. Article 40.2(a).

[39] See, e.g. Article 7.1.

[40] *Kokkinakis v. Greece* [1993], para. 52. In line with the context of preventive detention, this thesis does not discuss the prohibition of analogy specifically.

[41] As for the prohibition of custom, though provided in many civil-law criminal systems, it is nevertheless not a part of the international concept of the principle of legality. Notably and with respect to common-law States and international criminal law, none of the international conventions prohibit the application of customary criminal law as determined by judges, see Claus Kreß, "Nulla Poena Nullum Crimen Sine Lege," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Heidelberg Max Planck Institute for Comparative Public Law and International Law, 2010), 6.

[42] *Kokkinakis*, para. 52.

[43] *Khodorkovskiy and Lebedev v. Russia* [2013], para. 780 [emphasis added].

[44] *Korchuganova v. Russia* [2006], para. 47 [emphasis added]. See also *Sunday Times v. the U.K. (No. 1)* [1979], para. 49; *Silver and Others v. the U.K.* [1983], para. 88; and *Steel and Others v. the U.K.* [1998], para. 54.

[45] James R. Maxeiner, "Some Realism About Legal Certainty in the Globalization of the Rule of Law," *Houston Journal of International Law* 31, no. 1 (2008): 38-44.

foreseeability.[46] Inasmuch as inmates subject to preventive detention cannot "foresee" when and how their freedoms could be "certainly" gained, the demand for the legal certainty is not met, especially in the case of "post-sentence preventive detention."[47] Some may argue that if such a scheme were to become a stable element of a criminal system, then one could reasonably foresee this consequence *before* he/she decides to commit a serious crime. However, since the criteria that determine his/her continuous detention (e.g. his/her dangerousness or risk) are nearly impossible to be clearly defined in a statutory form, the legal certainty would still be jeopardized. Apart from the vague designation of being "a serious danger to the community"[48] or "a sexually dangerous person," [49] even a formal "risk assessment" requires many characteristics that the offender does not have "control" over. Such characteristics include race, gender, age, childhood history, psychopathy, ideology, "moral" emotion, etc.[50] Regardless, "[a] norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to *enable the citizen to regulate his conduct*."[51]

2.1.1.2 Prohibition of retrospective punishment

Article 15.1 ICCPR explicitly states that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

This prohibition is also set out in Article 7.1 ECHR, and becomes one of the few rights from which no derogation is possible in both treaties.[52] Yet, unlike the ICCPR, the ECHR did not "explicitly" set forth the right to retrospective application of the more lenient criminal law. Nevertheless, recently in *Scoppola v. Italy (No. 2)*, the Grand Chamber of the ECtHR finally held that Article 7.1 "implicitly" guarantees "the principle of retrospectiveness of the more

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[46] *C.R. v. the U.K.* [1995], para. 33; and *S.W. v. the U.K.* [1995], para. 35.

[47] *Haidn v. Germany* [2011], para. 96.

[48] Dangerous Prisoners (Sexual Offenders) Act 2003 of Queensland, s. 13; and Dangerous Sexual Offenders Act 2006 of Western Australia, ss. 7 and 17.

[49] Adam Walsh Child Protection and Safety Act 2006 of the U.S., ss. 4247-48.

[50] See, e.g. Husak, "Preventive Detention as Punishment?," 189-90; and Slobogin, "Prevention as the Primary Goal of Sentencing," 1159.

[51] *Hashman and Harrup v. the U.K.* [1999], para. 31[emphasis added]. The relationships between responsibility, control, and prediction are further examined in Section 4.3.

[52] Article 4.2 ICCPR and Article 15 ECHR.

lenient criminal law," by noticing an emerging consensus in Europe in favor of giving a defendant such benefit.[53]

From a perspective against potentially capricious State action, the right not to be subject to retrospective (stricter) criminal laws protects not only a particular accused, but also a public interest by assuring every individual that no future retribution by the society can occur without rules presently known. As a result, the fulfillment of such right would encourage "a just climate of security and humanity."[54] However, inasmuch as a preventive detention scheme is claimed by the State that its purpose is "community protection," rather than setting up "new criminal offences" or imposing "additional punishment" against individuals, it is questionable whether the right against retrospective *punishment* applies in such a scheme. This was similar to the position of Germany until a few years ago. However, the ECtHR has reached the opposite conclusions, first in *M. v. Germany* and then in a series of decisions concerning the retrospectiveness of the German legislation on preventive detention. In those cases, the notions of "punishment" and "penalty" became crucial.

Originally, under the German Criminal Code before 1998, there was a 10-year limit on preventive detention following a served prison term, which was later lifted.[55] In 2001, an individual referred to as "M." brought the first case before Germany's Federal Constitutional Court, the Bundesverfassungsgericht ("BVG"), challenging his preventive detention order made on the basis of the 1998 legislative amendments that abolished the "cap."[56] With respect to the prohibition of retrospective punishment, the BVG, in its first judgment in 2004, held that this prohibition did not extend to "measures" of correction and prevention, such as preventive detention, because they belong to another "track" that is different from "punishments" on conviction of offences in the German criminal justice system.[57] However, in *M*, the ECtHR stated, "the concept of 'penalty' in Article 7 is autonomous in scope," so it was not "bound by the qualification of the measure under domestic law."[58] Inasmuch as the ECtHR confirmed that the nature of preventive detention in Germany was still "punitive,"[59] it was concluded that Article 7.1 ECHR was thus violated.[60]

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[53] *Scoppola v. Italy (No. 2)* [2009], paras. 104-09.

[54] McSherry, *Managing Fear*, 200.

[55] Christopher Michaelsen, "'From Strasbourg, with Love' — Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights," *Human Rights Law Review* 12, no. 1 (2012): 151.

[56] *Ibid.*, 152-53.

[57] BVG [2004] Appl. no. 2 BvR 2029/01, para. 129. The twin-track criminal system of punishments and measures in most civil-law countries is further discussed in Section 3.3.

[58] *M. v. Germany* [2009], para. 126.

[59] *Ibid.*, para. 130.

[60] *Ibid.*, para. 137. The rationale of the ECtHR to recognize a "punishment" or "penalty" is investigated in Section 4.1.

2.1.2 Prohibition of double jeopardy

In order to prevent an offender from being punished twice, Article 14.7 ICCPR states that:

> No one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 4.1 Protocol No. 7 to the ECHR ("Protocol 7") also provides protection against double jeopardy (in common law) or *ne bis in idem* (in civil law) as a non-derogable right,[61] but more explicitly in "criminal proceedings under the jurisdiction of the same State." Due to this limitation, the protection does not extend to convictions (or equivalent) of foreign courts.[62] However, the Member States of Protocol 7[63] may implement legislations that allow for the reopening of a case in the event that new evidence is found or if there was a fundamental defect in the previous proceedings.[64] By interpretation of the word "finally" in both treaties, it is not a double jeopardy when the prosecution appeals an acquittal to a higher court but a continuation of the same trial.

From the point of view that preventive detention is executed following a normal prison term, it raises questions on the prohibition of double jeopardy when it is recognized as a "punishment" or "penalty." Although it is quite common in penal systems that one criminal act or omission might entail different types of penalties at the same time, (e.g. "imprisonment" can be coupled with a "fine" or "forfeiture") these additional sanctions shall be distinguished from those incidents when preventive detention is imposed. The reason for the distinction is, that in the first case the legal basis for all of the sanctions is the very same act or omission that happened in the past, while under a preventive detention regime, the same criminal act or omission is evaluated twice. The double evaluation refers once to the past (crime) and once to the future (risk), wherein each evaluation entails a separate but still homogeneous sanction, namely

[61] Article 4.3. It is nevertheless derogable under the ICCPR.

[62] The same limitation applies to the ICCPR "implicitly," see, e.g. *A.P. v. Italy* [1987], para. 7.3; and *A.R.J. v. Australia* [1997], para. 6.14.

[63] It has been ratified by all Member States of the Council of Europe except Germany, the Netherlands, and the U.K. as of 1 December 2017.

[64] Article 4.2. As for the ICCPR, the treaty body also expressed its view that the "resumption" of criminal proceedings "justified by exceptional circumstances" did not infringe the prohibition of double jeopardy, see General Comment no. 13, para. 19.

"imprisonment" and "detention" to be executed separately one after another.[65] This is specifically obvious in the case of "post-sentence preventive detention."

In two consecutive communications to the CCPR in 2006 and 2007, two Australian citizens, Fardon and Tillman, contended the unlawfulness of their preventive detentions in Queensland and New South Wales, respectively.[66] In both cases, the judicial orders for their preventive detentions were made a few days before the due dates of their sentenced terms of imprisonment in light of the "fresh-baked" legislations against sex offenders. Both Fardon and Tillman argued that such "post-sentence preventive detention," dependent on a finding of guilt that involves imprisonment, must be seen as a form of punishment beyond that of the sentence already served. In its final decisions, the CCPR "[did] not consider it necessary to examine the matter separately under article 14, paragraph 7."[67] Nevertheless, in its approaches to the right to liberty, it found that their "continued incarceration[s] under the same prison regime[s] as [preventive] detention … amounted, in substance, to a fresh term of imprisonment which … is not permissible in the absence of a conviction."[68] Accordingly, in the CCPR's view, the continued detention of such a scheme consists of double punishment, which was one of the factors involved in finding that the right to liberty had been violated.

2.1.3 Right to a fair trial

The right to a fair trial guaranteed by Article 14 ICCPR represents the core of procedural justice within international human rights law. It is also introduced in Article 6 ECHR, as a right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in "the determination of his [or her] civil rights and obligations or of any criminal charge against him [or her]," i.e. in both civil and criminal proceedings. However, both treaties allow for the exclusion of the public and the press from all or part of a trial in the following circumstances: (1) for reasons of morals, public order, or national security in a democratic society, (2) when the interests of juveniles or the protection of the private lives of the parties so require, *or* (3) to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[69] As for the meaning of "criminal charge," it "may also extend to acts [and omissions] that are criminal in nature with

[65] Marianna Klaudia Lévai, "Indefinite Sentencing in Criminal Law: A Human Rights Perspective" (Long Thesis, Central European University, 2013), 16.

[66] *Fardon v. Australia* [2010] and *Tillman v. Australia* [2010].

[67] *Ibid.*, para. 7.5.

[68] *Ibid.*, para. 7.4(1).

[69] Article 14.1 ICCPR and Article 6.1 ECHR.

sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their *purpose, character or severity*."[70]

Under the right to a fair trial, defendants in "criminal trials" have additional rights that are intended to provide fundamental guarantees against arbitrary State conduct and potential misuses of its authority.[71] With respect to preventive detention schemes, inasmuch as their "penal" characters can be confirmed, this principle of procedural fairness also requires safeguards to ensure that hearings carried out under the schemes would be operated in a way that is fair to the person facing potential "preventive" detention. Such safeguards include the burden and standard of proof, the equality of arms, and the right of appeal.[72] In *Fardon* and *Tillman*, the CCPR decided that the schemes in Queensland and New South Wales, being civil in their form, did not meet the due process guarantees under Article 14 ICCPR "for a fair trial in which a penal sentence is imposed."[73] This was, again, dependent on the notion that their continuous detentions in prison would amount to "punishment," a notion that was not accepted by Australia even after the CCPR's decisions.[74]

2.1.3.1 Burden and standard of proof

Although specific procedural requirements, such as jury trials (in criminal trials), are not mandated by the provision of Article 14 ICCPR, the right to a fair trial encapsulates the presumption of innocence in criminal trials and the obligation of the prosecution to establish its case beyond reasonable doubt in order to secure a conviction.[75] In Article 6 ECHR, the specific right to be presumed innocent until proven guilty was "explicitly" established by Article 6.2, while the requirement of proof beyond reasonable doubt only appeared "implicitly" in the reasoning of the ECtHR, which emphasized that "any doubt should benefit the accused."[76] Accordingly, in "normal" criminal trials, it obligates that the burden of proof must lie with the prosecution, while the standard of proof must go beyond reasonable doubt. As expressed by

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[70] General Comment no. 32, para. 15 [emphasis added]. See also *Gradinger v. Austria* [1995], para. 35.

[71] Article 14.2-14.6 ICCPR and Article 6.2-6.3 ECHR. See also Andrew Ashworth and Lucia Zedner, "Just Prevention: Preventive Rationales and the Limits of the Criminal Law," in *Philosophical Foundations of Criminal Law*, ed. R. Antony Duff and Stuart Green, Philosophical Foundations of Law (Oxford University Press, 2011), 293-94.

[72] Since all the preventive detention schemes that are analyzed by this thesis are based on sentencing or judicial orders made by the domestic "courts" (in either civil or criminal proceeding), it is the right of appeal rather than the right to an effective remedy being examined in this thesis.

[73] *Fardon* and *Tillman*, para. 7.4(3).

[74] McSherry, *Managing Fear*, 181.

[75] General Comment no. 13, para. 7. See also Javaid Rehman, *International Human Rights Law*, 2nd ed. (Harlow: Pearson/Longman, 2010), 104.

[76] *Barberà, Messegué and Jabardo v. Spain* [1988], para. 77.

Ashworth and Lucia Zedner, the "nub" of the presumption of innocence is that "each time one appears in the dock, and no matter how many previous convictions, one has the right to be presumed innocent of the present charges until [strictly] proven otherwise."[77]

Thus, when targeting specific offenders or prisoners to be subjected to "risk assessment," the State already deprives them of their right to be presumed "harmless." Such forfeiture, even based on their conviction, can be problematic.[78] Certainly, inasmuch as the presumption of innocence relates to crimes committed in the "past," in the case of preventive detention where the extra "penalty" is not, at least directly, connected to the past crime, this principle and its deriving requirements are vacated. In other words, one may argue that the presumption of innocence is "conceptually" connected to punishments and "normal" criminal trials of offences, so it does not apply in this context to the extent that preventive detention is not a "real" punishment.[79] Nevertheless, since the "detention," if not considered as a "penalty," is still based on the assessment of risk to "future" crimes, the predictive claim about the probability of future wrongful conduct still does damage to the values underpinning the presumption of innocence.[80] Predetermining someone as a risk definitely undermines his/her "right to be presumed innocent of future crimes."[81] Not to mention that such assessment even dictates an "indefinite" detention that extends well beyond proportionate punishment.

Similarly, due to "the uncertainties of psychiatric diagnosis,"[82] it is often rejected that the criminal standard of beyond reasonable doubt should apply to the decision of preventive detention, regardless of whether the detention is to be served as a "penalty" or not. However, even if a "normal" criminal trial is not considered a correct place to make the decision of preventive detention, when a person's liberty is at stake, at least a "high" standard of proof should be required. As argued by Denise Meyerson, "[t]he lower we require the likelihood of harm to be and the lower we require our degree of confidence in the predictions [of risk] to be, the higher the risk of the erroneous deprivation of liberty."[83] Yet this has not necessarily been the case when "community protection" has become a priority to some governments. In light of

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[77] *Preventive Justice*, 131.

[78] *Ibid.*

[79] This is another version of the "definitional stop" in discussions of punishment, see H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 5. This thesis goes through this problem with more details in Section 4.1.

[80] Ashworth and Zedner, *Preventive Justice*, 132.

[81] *Ibid.*

[82] McSherry, *Managing Fear*, 156.

[83] "Risks, Rights, Statistics and Compulsory Measures," *Sydney Law Review* 31, no. 4 (2009): 533. The comparison between the false positive of a risk assessment and the wrongful conviction of an innocent is investigated in Section 3.4.

the observation of Terry Carney *et al.*, the decisions made by mental health tribunals in Australia "were frequently based on the tribunal members' acceptance of the limited information available to the tribunal, dominated by the clinical perspective in the file, and that conflicting views … were downplayed."[84]

2.1.3.2 Equality of arms and right of appeal

The principle of equality of arms and the right of appeal are also parts of the right to a fair trial, as well as jurisprudential requirements issued by the ECtHR. In line with Article 6.3(b), (c), and (d) ECHR, the principle of equality of arms provides further guarantees of rights in criminal cases. These include the right to have adequate time and facilities to prepare his/her defence, the right to free legal assistance "when the interests of justice so require," and the right to examine and to obtain the attendance of witnesses.[85] Broadly defined by the ECtHR, the term "adequate facilities" means that "[t]he accused must have the opportunity to organise his [or her] defence in an appropriate way and without restriction as to the opportunity to put all relevant defence arguments before the trial court, and thus to influence the outcome of the proceedings."[86] As for a right of appeal against conviction and sentence, it is provided by Article 2.1 Protocol 7,[87] and the term "criminal offence" in this article has the same extended definition as the term "criminal charge" in Article 6 ECHR.[88]

Because the deprivation of liberty is one of the most serious consequences in any rights-respecting country, and because deprivation for a long or indefinite period is even more serious, there is a strong case for the equality of arms and the right of appeal to be provided in cases of preventive detention (if it is to be legitimate at all) on the same basis as other criminal cases.[89] Therefore, to obtain "adequate facilities," the convicted inmate who is subjected to risk assessment should have the right of access to evidence held by the State for or against them that is sufficient to mount a proper defence.[90] This includes the equal access to all forensic documents concerning the prediction of their risk. In addition, not only should (free) legal assistance be granted, but also the opportunity to summon expert witnesses on their own behalf

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[84] *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection & Treatment?* (Annandale, NSW: Federation Press, 2011), 196.

[85] See also Article 14.3(b), (d), and (e) ICCPR.

[86] *Mayzit v. Russia* [2005], para. 78.

[87] See also Article 14.5 ICCPR.

[88] *Gradinger*, para. 35. It follows that the right of appeal in Article 2.1 Protocol 7 may also apply to proceedings that are not currently defined as "criminal" in domestic law, see Ben Emmerson, Andrew Ashworth, and Alison Macdonald, *Human Rights and Criminal Justice*, 3rd ed. (London: Sweet & Maxwell, 2012), 887.

[89] Ashworth and Zedner, *Preventive Justice*, 261.

[90] *Ibid.*, 262.

should be provided. Moreover, to prevent arbitrariness, the inmates concerned should be given the right to appeal decisions of preventive detention. The appeal proceedings should also be based on the principle of equality of arms and other procedural requirements prescribed by the right to a fair trial as described above.[91] Nevertheless, these additional protections in a "normal" criminal trial are scarcely provided in the existing proceedings of preventive detention.

2.2 Right to liberty

2.2.1 Prohibition of arbitrary detention

The right to liberty is a core human right set out in Article 9 UDHR, Article 9 ICCPR, Article 37 CRC, Article 14 of the Convention on the Rights of Persons with Disabilities ("CRPD"), and Article 5 ECHR. Article 9 UDHR states that "[n]o one shall be subjected to arbitrary arrest, detention or exile." This is expanded upon by Article 9.1 ICCPR, which provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Regarding the general application of Article 9, the CCPR made the following interpretation that "paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases, such as mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc."[92] Since the "principle of legality" in this provision is already discussed in the last section, this section focuses on the prohibition of arbitrary detention, which is confirmed by the United Nations Working Group on Arbitrary Detention as both customary international law and a *jus cogens* norm.[93]

As Claire Macken argues, "arbitrary" detention means more than "unlawful" detention and imposes an additional higher requirement above unlawfulness.[94] By exploring the *travaux préparatoires* of the ICCPR, it was revealed that the drafters gave a distinct meaning to the word itself. In the Report of the Third Committee, the majority in the committee stated that an "arbitrary" act was one "which violated justice, reason *or* legislation, or was done according to someone's will or discretion or which was capricious, despotic, imperious, tyrannical or

[91] *Ekbatani v. Sweden* [1988], para. 26.

[92] General Comment no. 8, para. 1.

[93] Report of the Working Group on Arbitrary Detention, paras. 42-51.

[94] "Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966," *Adelaide Law Review* 26, no. 1 (2005).

uncontrolled."[95] The CCPR later also confirmed that according to "[t]he drafting history of article 9, paragraph 1 … 'arbitrariness' must be interpreted broadly to proscribe detention that is inappropriate, unjust and *unpredictable*."[96] As a body monitoring the implementation of the ICCPR by States Parties, the CCPR has further indicated in multiple decisions that, to avoid being characterized as arbitrary, detention must be (1) reasonable, (2) necessary in all the circumstances of the case, and (3) proportionate to achieving the legitimate ends of the State Party.[97] Accordingly, if a State could achieve its legitimate ends by less invasive means than detention, the detention would be considered arbitrary.[98]

In both *Fardon* and *Tillman*, the CCPR pointed out that due to the problematic nature of the concept of feared or predicted dangerousness, "the [Australian] Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise."[99] In order to avoid "arbitrariness," the onus was on the State to demonstrate that "rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, *particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation*."[100] Therefore, along with the procedural factors as double jeopardy,[101] retrospective punishment,[102] and undue process,[103] eleven of the thirteen members of the CCPR who participated in the examination of the communications agreed both schemes in Queensland and New South Wales were in violation of Article 9.1 ICCPR.[104] It is noteworthy that to the majority of the CCPR, the "less invasive means" principle, in the case of "post-sentence preventive detention," were referred to for the legitimate penological ground of "rehabilitation" instead of "incapacitation."[105] This could be a reference to a "treatment-oriented" measure or civil commitment as part of a State's positive obligations.

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[95] Draft International Covenants on Human Rights, para. 49 [emphasis added].

[96] *van Alphen v. the Netherlands* [1990], para. 5.8 [emphasis added].

[97] *A. v. Australia* [1997], para. 9.2; *de Morais v. Angola* [2005], para. 6.1; *Shafiq v. Australia* [2006], para. 7.2; and *Tarighat et al. v. Algeria* [2008], para. 8.3.

[98] *C. v. Australia* [2006], para. 8.2. See also Patrick Keyzer, "The 'Preventive Detention' of Serious Sex Offenders: Further Consideration of the International Human Rights Dimensions," *Psychiatry, Psychology and Law* 16, no. 2 (2009): 265.

[99] *Fardon* and *Tillman*, para. 7.4(4).

[100] *Ibid.* [emphasis added].

[101] *Ibid.*, para. 7.4(1).

[102] *Ibid.*, para. 7.4(2).

[103] *Ibid.*, para. 7.4(3).

[104] *Ibid.*, para. 8.

[105] See also General Comment no. 8, para. 4. The legitimate penological grounds for detention under the human rights regime are investigated in Section 4.2.

However, the CCPR justified cases of "indefinite sentence" when the judicial decision of preventive detention was ordered at the time of sentencing, if certain requirements are satisfied. In *Rameka et al. v. New Zealand*, a case in which the authors' indefinite sentences were challenged, the majority of the CCPR indicated that its jurisprudence against arbitrary detention does not prohibit States Parties to the ICCPR from authorizing their courts to order indefinite sentences that contain a preventive component.[106] Yet, it must be justified by compelling reasons and periodically reviewed by an independent body whose decisions are subject to judicial review.[107] In the same communication, four members of the CCPR, as a minority opinion, nevertheless observed a violation of Article 9.1 ICCPR by resorting to the procedural rights like *Fardon* and *Tillman*. Their view deserves a full quotation here:

> [T]he *arbitrariness* of such detention, even if the detention is lawful, lies in the assessment made of the possibility of the commission of a repeat offence … it is the very principle of detention based *solely* on potential dangerousness that [we] challenge, especially as detention of this kind often carries on from, and becomes a mere and … an "easy" extension of a penalty of imprisonment. While often presented as precautionary, measures of this kind in question are in reality penalties, and this change of their original nature constitutes a means of circumventing the provisions of articles 14 and 15 of the Covenant. For the defendant, there is no *predictability* about preventive detention ordered in such circumstances: the detention may be indefinite. To rely on a prediction of dangerousness is tantamount to replacing *presumption of innocence* by presumption of guilt. Paradoxically, a person thought to be dangerous who has not yet committed the offence of which he/she is considered capable is less well protected by the law than an actual offender is. Such a situation is a source of *legal uncertainty* and a great temptation to judges who may wish to evade the constraints of articles 14 and 15 of the Covenant [emphases added].

2.2.2 An exhaustive list of Article 5.1 ECHR

The ECtHR has also held that "post-sentence preventive detention" breaches the right to liberty under Article 5.1 ECHR.[108] Much of its jurisprudence in this area concerns the preventive detention regime in Germany as mentioned in Section 2.1. Before 2011, there were three legal forms of preventive detention in Germany. In the 1998 amendment, the legislation not only lifted the 10-year limit on preventive detention but also lowered the requirements for its

[106] *Rameka et al. v. New Zealand* [2003], para. 7.2.

[107] *Ibid.*, para. 7.3.

[108] As for "indefinite sentence," it would not be deemed "arbitrary and therefore unlawful within the meaning of Article 5 § 1" by the ECtHR, *unless* it lacks the resources for rehabilitative programs by which detainees might tackle the causes of their dangerousness, see *James, Wells and Lee v. the U.K.* [2012], paras. 220-21.

imposition on physically aggressive and sexual offenders. From then, it had been possible for German courts to effectively order preventive detention at the time of sentencing (so-called "*Sicherungsverwahrung*").[109] In 2002, the German Criminal Code was further amended to allow the trial judge to delay an eventual order of preventive detention until the completion of two-thirds of the prison term (so-called "*vorbehaltene Sicherungsverwahrung*").[110] In 2004, an even broader legislation established the option for courts to subject prisoners to preventive detention retrospectively without prior notification at the time of sentencing (so-called "*nachträgliche Sicherungsverwahrung*").[111] In the latter two forms, preventive detention is warranted in the case where "new evidence" about the offender's future dangerousness that was not cognizable at trial became available during the prison term.[112]

In *M.*, the ECtHR did not consider that his preventive detention, which had been ordered at the time of sentencing (*Sicherungsverwahrung*), was, in principle, a breach of the right to liberty. Like those "indefinite sentences," it was covered by Article 5.1(a) ECHR as being detention "after conviction" by the sentencing court.[113] Therefore, in order to find a breach of this sub-paragraph, the ECtHR held that it is necessary to consider issues in relation to the causal connection between the respective offenders' convictions and the concerned deprivation of liberty, as well as the relevant law that applied at the time they were sentenced. In the present case, it was found that without the amendment of the German Criminal Code in 1998, the courts responsible for the execution of sentences would not have had jurisdiction to extend M.'s detention. Therefore, the causal link between his original imprisonment and his preventive detention was broken.[114] In this view, the continued detention of M. beyond the 10-year limit could not be justified under Articles 5.1(a).

Considering Articles 5.1(b), (d), and (f) ECHR "are clearly not relevant" to the present case,[115] the ECtHR later examined the alternative justifications for detention set out in sub-paragraphs (c) and (e). On the one hand, the ECtHR held that M.'s continued detention had not been justified by Article 5.1(c), as long as his risk to commit further serious offences, if released,

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[109] Michaelsen, "'From Strasbourg, with Love'," 151.

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*, 152. See also Grischa Merkel, "Incompatible Contrasts? — Preventive Detention in Germany and the European Convention on Human Rights," *German Law Journal* 11, no. 9 (2010): 1062.

[113] *M.*, para. 93. See also *Eriksen v. Norway* [1997], para. 85; and *Grosskopf v. Germany* [2010], para. 47. It is noteworthy that, in contrast to M., Grosskopf was not preventively detained for a period beyond the original statutory 10-year maximum.

[114] *M.*, paras. 97-100.

[115] *Ibid.*, para. 102.

were not "sufficiently concrete and specific" to trigger that provision.[116] Moreover, in line with Article 5.3 ECHR, everyone detained pursuant to Article 5.1(c) must be promptly brought before a judge and tried within a reasonable time or be released pending trial. Yet this is definitely not the *purpose* of M.'s preventive detention.[117] On the other hand, the ECtHR further ruled that his continued detention could not be justified under Article 5.1(e). According to the decision of the Frankfurt am Main Court of Appeal, M. no longer suffered from a serious mental disorder. In addition, the domestic courts that ordered his preventive detention did not base their decisions on the ground that he was of "unsound mind."[118]

Later, in *Haidn v. Germany*, it was the retrospective preventive detention order (*nachträgliche Sicherungsverwahrung*) that was under the ECtHR's discretion. As mentioned in Section 2.1, this kind of "post-sentence preventive detention" is in itself "unlawful" due to its retrospectiveness and thus lacking the qualitative requirement of "foreseeability."[119] Moreover, since only the judgment of the Passau Regional Court convicting Haidn of two counts of rape could be characterized as a "conviction" under Article 5.1(a), there was no sufficient causal connection between his conviction and his preventive detention. After all, in that judgment, no order had been made for his preventive detention in addition to his prison sentence.[120] Furthermore, Article 5.1(c) could not justify Haidn's detention either, because "a narrow interpretation" (as in *M.*) is required in order to be "consistent with the aim of Article 5.1."[121] As for Article 5.1(e), the ECtHR was not convinced that a "true mental disorder" had been established for Haidn. This was in consideration that the medical experts in his case were called upon to establish whether he posed a serious risk for the sexual self-determination of others, irrespective of his mental condition.[122] In addition, there was no sufficient relationship between the alleged detention of Haidn as a mental health patient and his placement and conditions of detention in prison.[123]

Because the BVG, by interpreting the Basic Law in accordance with the above jurisprudence of the ECtHR,[124] later ruled in 2011 that the German Criminal Code was in breach of the German constitution, a new amendment that limits the power of German courts to impose

[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*, para. 103.
[119] *Haidn*, para. 96.
[120] *Ibid.*, para. 86.
[121] *Ibid.*, para. 90.
[122] *Ibid.*, para. 93.
[123] *Ibid.*, para. 94.
[124] BVG [2011] Appl. nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, and 2 BvR 571/10, para. 68.

preventive detention became in force in 2013. Under this amendment, preventive detention could be prolonged (as in *M.*) or ordered retrospectively (as in *Haidn*), but *only if* the individual suffered a mental disorder and thus fell within the categories of "unsound mind" set out in Article 5.1(e) ECHR. The rationale of this amendment, at least in regards to prolongation, was tested in *Bergmann v. Germany*, the latest judgment of the ECtHR in relation to the German preventive detention. Bergmann was sentenced to 15 years in prison in 1986 and was ordered preventive detention at the same time (Sicherungsverwahrung). However, he was still confined until the ECtHR's decision in 2016.[125] Having regard to its findings in *M.*, the ECtHR also considered that his preventive detention beyond the ten-year "cap" was no longer a detention "after conviction" under Article 5.1(a).[126] Nevertheless, since Bergmann had been diagnosed as a sexual deviant[127] and was being provided a therapeutic environment,[128] his continued detention was justified under Article 5.1(e).[129] Namely, with its latest rationale being "partly" accepted by the ECtHR,[130] Germany finally won a significant victory for its preventive detention regime in Strasbourg.

To conclude, as a function of the ECtHR to determine whether Article 5 ECHR has been violated — even though it is "in the first place for the national authorities, notably the courts, to interpret and apply domestic law"[131] — the ECtHR remains the ultimate power to interpret and apply national law in line with the ECHR.[132] From the above jurisprudence of the ECtHR, it is reaffirmed that the list of exceptions set out in Article 5.1 provides an "exhaustive" definition of the circumstances in which a person may be "lawfully" deprived of his/her liberty[133] and is to be given a narrow construction.[134] However, as pointed out by Professor Kjetil Larsen, the initial proposals for Article 5 ECHR, like Article 9 ICCPR, were formulated as a more general prohibition against "arbitrary" detention.[135] The exhaustive list of non-arbitrary detention was eventually adopted instead, due to the U.K. Government's objection

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[125] *Bergmann v. Germany* [2016], paras. 7-13.

[126] *Ibid.*, para. 104.

[127] *Ibid.*, para. 114.

[128] *Ibid.*, para. 128.

[129] *Ibid.*, para. 133.

[130] As this thesis shows in Section 4.1, preventive detention under this new legislative framework, *as a rule*, still constituted a "penalty" for the purposes of Article 7.1 ECHR, *ibid.*, para. 181.

[131] *Winterwerp v. the Netherlands* [1979], para. 46.

[132] *Bozano v. France* [1986], para. 58; *Benham v. the U.K.* [1996], para. 41; and *Gusinskiy v. Russia* [2004], para. 66.

[133] See also *Engel and Others v. the Netherlands* [1976], para. 58; and *Ireland*, para. 194.

[134] See also *Winterwerp*, para. 37; *Guzzardi v. Italy* [1980], paras. 98 and 100; and *Quinn v. France* [1995], para. 42.

[135] "Detention for Protection: Searching for a 'Fair Balance' between the Restrictions on Preventive Detention and the Obligation to Protect Individuals," *Oslo Law Review* 2, no. 1 (2015): 15.

that "[t]he word 'arbitrary' is vague and its force undefined."[136] With this context in mind, it is necessary to discuss whether it is appropriate for the ECtHR to go even further by interpreting the list narrowly in the case of "post-sentence preventive detention." It is especially prominent when the State's positive obligations under the right to life and the prohibition of torture are included within the parameters of "proportionality."

2.3 Prohibition of inhuman treatment or punishment

2.3.1 Severity of length

Before this thesis discusses the right to liberty for preventive detainees *vis-à-vis* the interests of other individuals or the community under the right to life or the prohibition of torture, it is necessary to examine whether preventive detention *per se* could also raise an issue of inhuman treatment or punishment against the detainees as rights-holders. On the global scale, the right against inhuman treatment or punishment is prescribed in Article 7 ICCPR as a non-derogable right.[137] Yet, inasmuch as the fundamental objective of Article 7 is to protect the dignity as well as the physical and mental integrity of an individual,[138] the CCPR has tended to rely generally on the broad prohibitions contained within the whole article. Namely, it has preferred not to distinguish between the various facets Article 7, i.e. "torture," "cruel," "inhuman," "degrading," "punishment," and "treatment."[139] Furthermore, in order to take measures to implement Article 7, States Parties have been asked to ensure compliance with international standards provided by the United Nations, such as the Minimum Standard Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, the Standard Minimum Rules for the Administration of Juvenile Justice, etc.[140]

On the regional scale, the rights contained in Article 3 ECHR are also of a non-derogable nature, even in times of war and public emergencies.[141] To uphold this position, the ECtHR stressed that "the national interests of the State could not be invoked to override the interests of the individual where substantial grounds had been shown for believing that he [or she] would be subjected to ill-treatment … [since] Article 3 enshrines one of the most fundamental values of democratic society."[142] Different from the CCPR, the ECtHR took a view that the critical factor

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[136] Preparatory Work on Article 5 ECHR, 10.

[137] Article 4 ICCPR.

[138] Rehman, *International Human Rights Law*, 96.

[139] General Comment no. 20, para. 4.

[140] Rehman, *International Human Rights Law*, 98.

[141] Article 15 ECHR.

[142] *Chahal v. the U.K.* [1996], paras. 78-79. See also *Saadi v. Italy* [2008], paras. 137-38.

that distinguishes "inhuman or degrading treatment or punishment" from "torture" is the absence of a "deliberate intent" to cause suffering.[143] To constitute "degrading" treatment or punishment, the "humiliation and debasement" involved must attain a particular level, depending on, *inter alia*, the circumstances of the case, such as the nature and context of the punishment itself and the manner and methods of its execution.[144] Regardless, in order to constitute a violation of Article 3, it "must attain a minimum level of severity,"[145] and the assessment of which needs to consider various subjective factors including the applicant's physical and mental suffering, sex, age, health, and sensibilities, etc.[146]

It is also noteworthy that the ECtHR has indicated on occasions that the overall length of a custodial sentence could, in principle and in appropriate circumstances, amount to inhuman punishment contrary to Article 3 ECHR.[147] As mentioned, the deprivation of liberty for a long period is already the most severe punishment in any rights-respecting country, and the deprivation for a period even longer than a determinate sentence, or for an indefinite period, is definitely more stringent. In *Weeks v. the U.K.*, the ECtHR plenarily held that if a term of life imprisonment had been imposed on an offender (then aged 17) of armed robbery on purely punitive grounds, "one could have serious doubts as to its compatibility with Article 3 of the Convention, which prohibits, inter alia, inhuman punishment."[148] Yet the ECtHR finally accepted that subject to appropriate safeguards, in particular the periodic review under Article 5.4 ECHR, an "indeterminate sentence" could be justified by the need to protect society.[149] However, at least to those who have already served in prison for a very long time, it is still an open question what the ECtHR's position would be. Such a position would be based on an individualized assessment of each prisoner's situation without doubt.

2.3.2 Right to hope?

In fact, within the context of life imprisonment, the prohibition of inhuman punishment has been presented to the ECtHR several times, but the issues of sentencing fall within the scope of Article 3 ECHR in only very limited circumstances. Inasmuch as relevant tests require life sentences to be "grossly disproportionate," the article can only be met in "rare and unique

[143] *Ireland*, para. 167.

[144] *Tyrer v. the U.K.* [1978], para. 30; and *Campbell and Cosans v. the U.K.* [1982], para. 28.

[145] *Ireland*, para. 162; *Campbell and Cosans*, *ibid.*; and *A. v. the U.K.* [1998], para. 20.

[146] *Ireland* and *A.*, both *ibid.* See also *V. v. the U.K.* [1999], para. 99.

[147] Emmerson, Ashworth, and Macdonald, *Human Rights and Criminal Justice*, 836.

[148] *Weeks v. the U.K.* [1987], para. 47.

[149] *Ibid.*, paras. 58-59. See also *Hussain v. the U.K.* [1996], para. 53.

occasions."[150] Nevertheless, the ECtHR has finally made it clear that the LWOP is in violation of Article 3 — owing to its lack of hope for a future release — since its Grand Chamber judgment of *Vinter and Others v the U.K.*[151] Furthermore, when a legal system fails to provide for the possibility for review of a life sentence, it fails to provide for such prospect for release. This is due to the requirement "to consider whether any changes in the life prisoner are so significant, and such progress towards *rehabilitation* has been made in the course of the sentence, as to mean that continued detention can no longer be justified on *legitimate penological grounds*."[152]

Rather than assessing the concrete circumstances that existed when it became time to examine the case, in *Vinter and Others*, the ECtHR took the position that the sentences' compatibility with Article 3 ECHR could also be analyzed *ab initio*,[153] i.e. from the perspective of the moment when a prisoner begins serving that sentence. This is due to implicit reasoning that "the right to hope," as described by Judge Power-Forde in his Concurring Opinion to this landmark judgment, is encompassed by Article 3 and recognized as an important and constitutive aspect of a human person. As a result, an *ex-ante* analysis was initiated instead of an *ex-post* assessment for this judgment, in an effort to safeguard this prospective right. Yet, even with this advanced view in mind, preventive detention seems to still satisfy the threshold of Article 3, as long as an ongoing *post-tariff review* is provided, and thus a "faint hope" of release is nevertheless sustained.[154] In *Haidn*, for example, although the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") had expressed concern about the practice of "*Sicherungsverwahrung*" in Germany,[155] the ECtHR concluded that there had been no violation of Article 3 since Haidn "did have a possibility of being released."[156]

However, if the view of Richard Lippke is considered, the ECtHR seemed to underestimate the "indefinite" character of preventive detention, which can alter its symbolic qualities in ways that would make the experience endured by the detainees even harsher than that by the prisoners of life imprisonment.[157] Inasmuch as those subject to "definite" life sentences at least know

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[150] *Vinter and Others*, para. 83.

[151] *Ibid.*, para. 116.

[152] *Ibid.*, para. 119 [emphases added]. See also *László Magyar v. Hungary* [2014], para. 50.

[153] *Vinter and Others*, para. 98 and the partly dissenting opinion of Judge Villiger.

[154] *Ibid.*, the concurring opinion of Judge Mahoney, paras. 17 and 20,

[155] *Germany: Visit 2005*, para. 100.

[156] *Haidn*, para. 111. However, if it lacks "any kind of treatment or even of any assessment of treatment needs and possibilities" and thus is not "*de facto* reducible," it could still trigger the prohibition of inhuman treatment or punishment under Article 3, see *Murray v. the Netherlands* [2016], para. 125.

[157] "No Easy Way Out," 410.

from the beginning that they will never get out, they could try to fashion somewhat meaningful lives for themselves in light of that knowledge. By comparison, those in preventive detention are kept in a kind of "legal limbo,"[158] wherein their "faint hopes" of release are constantly extinguished. Even though their detention may be periodically reviewed and subject to appeal, the difficulty of escaping the original judicial designation as "dangerous offenders" dooms to fail the subsequent process of convincing parole boards or courts that they are safe enough to be released into the community. As Pat Carlen observes, there is a populist demand that policy realization should be conflated with "risk-induced" policy *per se*, and thus less and less discretion and fault tolerance has been granted to the professionals.[159] In this social context, few of them would want to lose their credibility for those who have already been given up by a "civilized" society.

2.4 Right to life and prohibition of torture as a counterbalance

2.4.1 Positive obligations of States

The right to life, contained in Article 3 UDHR, Article 6 ICCPR, and Article 2 ECHR, represents the most fundamental basis of all human rights. The term "inherent" as used in Article 6.1 ICCPR already connotes a positive and broad obligation of States to not only "respect" but also "protect" and "fulfill" the rights of people subject to their jurisdictions.[160] It is also "implicit" in Article 7 ICCPR that States Parties "have to take *positive measures* to ensure that *private persons or entities* do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power."[161] In Europe, according to constant case law of the ECtHR, Article 2 ECHR "enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction."[162] The same applies to Article 3, as it also "requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by *private individuals*."[163]

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[158] *Ibid.*

[159] *A Criminological Imagination: Essays on Justice, Punishment, Discourse*, Pioneers in Contemporary Criminology Series (Farnham: Ashgate, 2010), 121. See also Nicola Padfield and Shadd Maruna, "The Revolving Door at the Prison Gate: Exploring the Dramatic Increase in Recalls to Prison," *Criminology and Criminal Justice* 6, no. 3 (2006): 339.

[160] Rehman, *International Human Rights Law*, 93.

[161] General Comment no. 31, para. 8 [emphases added].

[162] First in *L.C.B. v. the U.K.* [1998], para. 36.

[163] *A.*, para. 22 [emphasis added].

In the context of crime-control and -prevention, the Grand Chamber of the ECtHR, in *Osman v. the U.K.*, further developed a wide-ranging general obligation that "extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person." That is, "to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual."[164] However, this obligation is not absolute, as it only exists in "certain well defined circumstances" [165] due to "the difficulties involved in policing modern societies, *the unpredictability of human conduct* and the operational choices … made in terms of priorities and resources."[166] Therefore, this general obligation only arises where "the authorities knew or ought to have known of the existence of *a real and immediate risk to the life of an identified individual*, and that they failed to take measures within their powers which, judged reasonably, might have been expected to avoid that risk [emphasis added]."[167] This delimitation of States' positive obligations is also confirmed in the case of preventing the risk of "ill-treatment" under Article 3.[168]

Although the scope of the general obligation set out by the ECtHR is potentially wide, its jurisprudence established by *Osman* sought to ensure that positive duties to protect are clearly identified and narrowly delimited.[169] As argued in Section 1.1, because the "rationality" of human rights arises from a "micro-level" perspective, the rights-claimants have to be "specific individuals" in order to make a claim. This is also the inherent reason, according to this thesis, why the ECtHR had insisted that the risk of life or ill-treatment be concrete and specific enough to trigger the "requirement to take operational measures to prevent that risk from materialising."[170] However, this position could change in the wake of a "communal" demand to deploy justifications for an increasing range of preventive penal measures based on a State's positive obligations.[171] In *Maiorano and Others v. Italy*, a violation of the positive obligations under Article 2 was found in the case where the "general protection to society against the

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[164] *Osman v. the U.K.* [1998], para. 115.

[165] *Ibid.* The term has later been amended to read "appropriate circumstances," see *Kontrová v. Slovakia* [2007], para. 50; and *Opuz v. Turkey* [2009], para. 129.

[166] *Osman*, para. 116 [emphasis added]. In the same paragraph it was again exhorted by the ECtHR that the "powers to control and prevent crime" under such obligation should "fully respect[s] *the due process and other guarantees* which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including *the guarantees contained in Articles 5* [emphases added]."

[167] See also *van Colle v. the U.K.* [2012], para. 88; and *Amadayev v. Russia* [2014], para. 71.

[168] *Milanović v. Serbia* [2010], para. 84.

[169] Liora Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect or Coerce?," in *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*, ed. Lucia Zedner and Julian V. Roberts (Oxford: Oxford University Press, 2012), 139.

[170] *Osman*, para.116.

[171] Lazarus, "Positive Obligations and Criminal Justice," 141.

potential acts of one or of several persons serving a prison sentence for a violent crime" was not afforded.[172] It is within the scope of this "general protection" that this thesis comes to discuss the balance between the rights of the person "at risk of harm" and the "potential" perpetrator of the harm.

2.4.2 Striking a "fair" balance?

In *Jendrowiak v. Germany*, another case against the measure of preventive detention in Germany, the ECtHR further discussed the relationship between the State's negative obligations under Article 5 and positive obligations under Article 3. On the one hand, the ECHR "does not permit a State to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1."[173] On the other hand, the provision, as exhaustively listed in Article 5.1, already contains "all grounds on which a person may be deprived of his liberty in the public interest, including the interest in protecting the public from crime."[174] Furthermore, it was reaffirmed by the Grand Chamber of the ECtHR in *A. and Others v. the U.K.*, another high-profile case, that "[i]f detention does not fit within the confines of the paragraphs *as interpreted by the Court*, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee."[175]

As mentioned in Section 2.2, it can nevertheless be argued that the ECtHR's "interpretation" of Article 5.1, including sub-paragraph (c), is too strict and rigid in the case of "post-sentence preventive detention."[176] Especially when the purpose of such detention is to implement the positive obligation to afford "general protection to society" against threats to their lives or personal integrities as obliged by Article 2 and 3, the interpretation should consider those interests at stake.[177] On the one hand, this thesis supports this argument to the extent that a "fair" balance should be called for by the ECtHR when forming a case law that totally denies the possibility of justifying "post-sentence preventive detention" under Article 5.1(c). Inasmuch as the principle of "proportionality" under the prohibition of arbitrary detention should be considered, it is necessary to strike a "fair" balance between conflicting rights or interests. On the other hand, in the aspect of its legal substance, this thesis fully supports the position of the

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[172] *Maiorano and Others v. Italy* [2009, in French only], para. 107. The English translation in the quotation is in reference of *Mastromatteo v. Italy* [2002], para. 69.

[173] *Jendrowiak v. Germany* [2011], para. 37.

[174] *Ibid.*, para. 38.

[175] *A. and Others v. the U.K.* [2009], para. 171 [emphasis added].

[176] Larsen, "Detention for Protection," 16.

[177] *Ibid.*

ECtHR, so long as its "inherent reason" of why the inmates' right to liberty would prevail over the positive obligation of States can be demonstrated.

Before such demonstration, there are several points that must be recalled. First, in both *Fardon* and *Tillman*, without resorting to an exhaustive list of non-arbitrary detentions, the CCPR also found "post-sentence preventive detention" arbitrary under Article 9.1 ICCPR.[178] Second, a *prima facie* violation of the right to liberty was established in the communications, at least implicitly, as the CCPR required the Australian government to demonstrate that "the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention" in order to avoid arbitrariness.[179] One could certainly argue that this statement is a *presumption of violation* before a State could counter-prove that the imprisonment or detention is not arbitrary. Finally, even the unprecedentedly broad "general protection" provided by *Maiorano and Others* cannot be extended to include "post-sentence preventive detention" directly, as long as the targets of such protection are explicitly limited to "persons *serving* a prison sentence for a violent crime."[180] On the contrary, the targets of "post-sentence preventive detention" are persons who have already *served* their sentences.

2.4.3 A rights talk on security

The balancing test nevertheless lies on the preliminary inquiries of "who" are the holders of relevant rights or interests and "how" are their rights or interests being interfered with. On the one hand, the negative obligation in this test is to protect the right to liberty of the prisoners or inmates who are subject to preventive "detention," which explicitly expresses that their "physical liberty" would be deprived to an absolute extent.[181] On the other hand, inasmuch as the positive obligation in this test is to protect "unidentified" individuals or the "community" in general, it is the "freedom from fear of crime,"[182] as an "interest" under the right to life and the prohibition of torture, that is being protected. After all, if a risk to life or of ill-treatment is "sufficiently concrete and specific," it could well be averted by those "preventive offences" in criminal law, such as the preparatory or inchoate offences, the crimes of concrete or abstract endangerment, etc.[183] The deprivation of liberty is thus covered by Article 5.1(c) ECHR with

[178] *Fardon* and *Tillman*, para. 7.4.

[179] *Ibid.*

[180] *Maiorano*, para. 107.

[181] *Engel and Others*, para. 58.

[182] Ramsay, "A Political Theory of Imprisonment for Public Protection," 135.

[183] Whether "post-sentence preventive detention" could be designed as another "punishment" or "offence" is discussed in Section 3.2, but the scopes of and justifications for "preventive offences" are not without criticisms, see, e.g. Ashworth and Zedner, *Preventive Justice*, 95-116.

its strict interpretation and then sub-paragraph (a) without question. There is no need to resort to "post-sentence preventive detention," except when the risk or fear of harm is completely based on the "dangerousness" of the prisoners or inmates, which, as described by Anthony Giddens, could cause a threat to the "ontological security" of citizenship.[184]

In this context, a short and intermediate conclusion of this thesis is that the State's negative obligation to respect the "rights of individual" under Article 5, as a trump card, should be more imperative than its positive obligation to protect or fulfill the "interests of community" under Article 2 and 3. This conclusion is not directly based on a theoretical hierarchy in which "negative obligations" or "individuals" are always superior to "positive obligations" or the "community," respectively, under the human rights regime. Rather, this thesis is more concerned with the restriction on rights and liberties to an extent farther than the normal limitations that citizens as a whole might experience by living in a fair, socially democratic, and redistributive society.[185] As argued in Section 2.1, "post-sentence preventive detention" is, in and of itself, procedurally unjust in various aspects. This is why, in order to circumspectly confirm a violation of the prohibition of arbitrary detention, the CCPR had to consider the loss of procedural guarantees caused by the Australian schemes.[186] After all, it is impossible to neglect the surrounding procedural issues when determining whether a deprivation of liberty is substantially proportionate or not.

Moreover, extra caution should be exercised, especially when the language of "the right to security" has gained an increasing currency in political debate around the world since the 9/11 terrorist attacks. In fact, this term is now becoming ubiquitous for any "war on terror."[187] As Jeremy Waldron argues, even the *communal* aspects of security should be considered, the distribution of security by a State should be egalitarian.[188] This means an equal distribution to all *individuals* rather than sacrificing part of the population in order to pursue its overall maximum. The measure is illegitimate if the State disregards or (in)directly compromises the security of minorities in its efforts to maximize the security of the majority.[189] Furthermore, if preventive detention is fully justified by prevention of future crimes, logically all members of society would be legitimate subjects of such detention if it could be proven that they posed a sufficient risk.[190] However, at least in practice, risk assessment with a view to preventive detention is not generally available but restricted to certain offenders or inmates. As argued in

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[184] *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991), 40.

[185] Lazarus, "Positive Obligations and Criminal Justice," 146.

[186] *Fardon* and *Tillman*, para. 7.4. See also *Osman*, para. 116.

[187] Lazarus, "Positive Obligations and Criminal Justice," 150.

[188] "Safety and Security," *Nebraska Law Review* 85, no. 2 (2006): 479.

[189] *Ibid.*, 493.

[190] Ashworth and Zedner, *Preventive Justice*, 147.

Section 2.1, such discrimination not only deprives them of their right to be presumed "harmless," but it is also problematic to the presumption of innocence *per se*. To initiate a "rights talk on security" beyond these limitations as a positive obligation of the State not only undermines the Rule of Law, but it also risks a backfire of democracy.

2.5 Conclusion

The preamble to the UDHR makes it clear in its "recognition of the inherent dignity and of the equal and inalienable rights *of all members of the human family* [emphasis added]" that offenders do not forfeit their human rights even after they are convicted of serious crimes.[191] At the international level, "post-sentence preventive detention" has been held by both the CCPR and the ECtHR as a violation of the inmates' right to liberty. This is mainly because it is difficult to avoid the violations of their rights not to be subject to retrospective law and double punishment as well as their right to a fair trial, which make the detention potentially arbitrary. However, if such detention is limited to those of "unsound mind," it has been held by the ECtHR that a violation of the right to liberty has not been made providing that certain minimum conditions be satisfied. As for the human rights status regarding "indefinite sentence," it is viewed lawful as long as the offender knows *at the time of sentencing* that he/she is being imprisoned indefinitely and a nominal term is set that triggers a system of periodic review. However, the human rights authorities often neglect its intrinsic problem of *legal uncertainty*. Substantially, this international human rights jurisprudence still provides a framework for preventive detention schemes that helps ensure a balance between individual rights and community interests.

[191] McSherry, *Managing Fear*, 203.

3 Justifications from Penal Theories

In order to examine the arguments of how preventive detention could be justified, either as a punishment or as a non-punitive confinement, this chapter needs to start by delineating the ancient debate between retributivists and consequentialists. Afterwards, Douglas Husak's depiction of preventive detention as "crimes of possession" of "the characteristics that predict future harm" enable us to address deeper retributive concerns about the punitive form of preventive detention. Another punitive argument made by Christopher Slobogin holds that risk-based "indeterminate sentencing" should substitute the traditional determinate regime, as long as the primary goal of punishment is to prevent former offenders from committing future crimes. As for the notion of non-punitive confinement, it has been adopted by both civil-law and common-law countries either as a "measure" or as a "civil commitment" to preventively detain dangerous inmates. However, this thesis contends that neither of these approaches entirely succeeds in showing that preventive detention is justified and, most importantly, none of them can evade the problem of accurately identifying candidates for preventive detention.

3.1 The ancient debate between retributivists and consequentialists

3.1.1 Meaning of desert

The language of "desert" in penal theories conveys that those who commit criminal offences "deserve" to be punished. In other words, it is from a *backward-looking* viewpoint that the penal system should punish the guilty to the extent they deserve. The punishment is thus positively justified by its intrinsic character as a deserved response to past crime.[192] Nevertheless, why do the guilty "deserve to suffer"? Why should it be for the State to inflict that suffering on them through a system of criminal punishment? One prominent retributivist answer to these questions is, that since the offender takes the benefit of the self-restraint of others but refuses to restrain him/herself under criminal law, he/she has gained an unfair advantage that should be removed by a punishment imposing an additional burden on him/her. It is the State's job to inflict this suffering or burden upon him/her as the author or guarantor of criminal law.[193] However, an objection to this theory is that it misrepresents the essence of crime that makes it deserving of punishment. Rather than the supposed "unfair advantage" that the criminal takes over *all those who obey the law*, it is the "wrongful harm" he/she does to *the individual victim* that makes his/her offence deserving of punishment.[194]

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[192] Duff and Hoskins, "Legal Punishment," s. 4.

[193] *Ibid.*

[194] *Ibid.*

A different retributivist account appeals to the emotional responses to crime (e.g. the resentment or "retributive hatred") involving a desire to make the wrongdoer suffer, which crime may arouse,[195] or the guilt involving a judgment that I ought to be punished, which my own wrongdoing would arouse in me.[196] Therefore, crime deserves punishment in the sense that it makes certain emotions, such as resentment or guilt, satisfied by or expressed in punishment. However, these theories have yet to show why it should be the State's task to satisfy or provide formal expression for such emotions rather than private persons or entities. Furthermore, even if guilt, resentment, or indignation are appropriate responses to our own or others' wrongdoing, one could still argue that the State should resist meeting the desire for suffering that they so often involve.[197] Another empirical concern worth pondering are the imitative effects on human behavior caused by State punishment, especially those from a "war on terror." When the frequency of "retribution," by resorting to the emotional responses against "terrorists," becomes more intensive, does everyone still have the same opportunity to rely on it instead of suffering from it?[198]

3.1.2 Pure consequentialism

From a utilitarian perspective, "all punishment in itself is evil," and thus it must be justified as a cost-effective means to attaining certain independently identifiable goods that promise "to exclude some greater evil."[199] Accordingly, the prevention of crime becomes the most plausible and immediate good that a system of punishment can bring.[200] It is with this basic rationale that a consequentialist theory could justify punishment as a measure to "passively" *deter* crime offenders (special deterrence) and other potential offenders (general deterrence), or to "actively" *reform* the former and *educate* the latter, or to simply *incapacitate* the criminals from reoffending. If one holds that "only" one or several of these *forward-looking* consequences are relevant to the question of justification, then he/she is presumed as a "pure" consequentialist.[201] Nevertheless, there is always a contingent question whether punishment can be an efficient method of preventing crime in any of these ways. Thus, many objections to the consequentialist

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[195] Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge Univiversity Press, 1988), 1-13.

[196] Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press, 2010), 153-88.

[197] Duff and Hoskins, "Legal Punishment," s. 4.

[198] Jung-Chien Huang, *The Basis of Criminal Law* [基礎刑法學], 3rd ed., 2 vols., vol. I (Taipei: Angle, 2006), 18.

[199] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, vol. 6, The Hafner Library of Classics (New York: Hafner Publishing Company, 1948), 170.

[200] Duff and Hoskins, "Legal Punishment," s. 3.

[201] As for the consequentialists who presuppose that punishment should only be inflicted upon those who have committed crimes in the *past*, they are characterized as "limited" consequentialists as below.

justifications rest on the *empirical* claim that punishment cannot be the most efficient method for crime-prevention.[202]

The *moral* objections to consequentialist accounts of punishment, on the other hand, argue that crime-preventive efficiency (if it is to be reached at all) does not suffice to justify a system of punishment. For example, punishments for those known to be innocent or excessively harsh punishments for the guilty are, in principle, justified by purely consequentialist theories if they efficiently serve the aim of crime-prevention.[203] Yet their retributivist opponents contend that such punishments would be normatively "wrong" simply because they are unjust.[204] Even though such "unjust" punishments would really produce the best consequences, the punishment system should not put aside the moral significance of injustice. In other words, the wrongness of punishing a known innocent is not contingent on its instrumental contribution to the system's aims but is rather intrinsic to the punishment itself. From a deontological point of view, in order to generate suitable protection against unjust punishments, even resorting to a richer or subtler account of the "ends" that the criminal law should serve cannot solve the consequentialist problem of contingency.[205]

3.1.3 Limited consequentialism

The most familiar response to such objection is to replace pure consequentialism with "limited" or "qualified" consequentialism. That is to say, although insisting that the *positive* "general justifying aim" of a system of punishment must lie in its beneficial effects,[206] some consequentialists consent that the pursuit of that aim by a system of punishment must be constrained by non-consequentialist principles. In that case, the kind of injustices alleged to flow from a purely consequentialist account can be fully precluded.[207] However, it is not clear whether such "side-constraints" (i.e. the constraints that forbid the deliberate punishment of the innocent or the excessively harsh punishment of the guilty) can be justified without appealing to a *negative* retributivism, which insists that punishment is justified only if it is a deserved retribution. Furthermore, inasmuch as punishment is used to serve consequentialist ends, including but not limited to the end of crime-prevention, the use of punishment is to use the

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[202] Duff and Hoskins, "Legal Punishment," s. 3. See, e.g. David Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), 53 and 264-67.

[203] As presented in Section 4.1, for a defence that it is conceptually incoherent to punish the innocent under the definition of punishment, it is exactly what Hart referred as a "definitional stop," see *Punishment and Responsibility*, 5.

[204] Duff and Hoskins, "Legal Punishment," s. 3.

[205] *Ibid.*

[206] Hart, *Punishment and Responsibility*, 8-11.

[207] Duff and Hoskins, "Legal Punishment," s. 6.

punished "merely as a means" to further those ends. This is to deny them the respect and moral standing that is their due as rational and responsible agents.[208]

To respond to such objection, some argue that those who voluntarily commit an offence thereby forfeit such respect and moral standing and thus at least some of the rights that other reasonable citizens can claim. Moreover, some portray punishment as a species of "societal self-defence" that does not treat the attacker "merely as a means." In both scenarios, the wrongdoing of offenders "legitimizes" the consequentialist punishments that would normally be wrong as violating citizens' rights.[209] Still, others offer "contractarian" justifications for punishment that are grounded in the consideration that the punishment of those who commit crimes is rendered permissible by the fact that the offender, as a rational agent or reasonable citizen, would have consented to a system of law that provided for such punishment.[210] Furthermore, some focus on the "active" perspective of consequentialist punishment. For example, rather than treating people like "dogs" who must be cowed into obedience by waving a big stick,[211] deterrent punishment is argued to offer people prudential reasons to refrain from crime. These reasons are of a kind that can be expected to appeal to self-interested agents and are intended to dissuade those who are not sufficiently moved by the law's moral appeal from crime.[212]

All these consequentialist arguments could be referred to as "mixed" theories of retributivism and consequentialism, so long as they ground an essential part of their justifications for punishment on the claim that it is a permissible response to the commission of crime. To those penal theorists, the justifications for punishment must look not only to the future (to the consequential benefits that it is intended to bring) but also to the past (to the justificatory relationship between crime and punishment that renders the offender liable to be punished).[213] However, their thought of retributivism is often used as a "negative" constraint rather than a notion that could "positively" justify the aim of punishment. The consideration of the commission of crime in those theories is more for the removal of obstacles to consequentialist

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[208] Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy and Public Affairs* 2, no. 3 (1973): 218-19. This Kantian means principle is further illustrated in Section 4.3.

[209] Duff and Hoskins, "Legal Punishment," s. 6. Such responses nevertheless have to face the doubts whether it is too fast and loose to exclude fellow citizens from the rights and status of citizenship if there is justified account of punishment on which punishment can still be claimed to treat those punished as full citizens, rather than "them" against "we." See also Duff, R. Antony Duff, *Punishment, Communication, and Community*, Studies in Crime and Public Policy (Oxford: Oxford University Press, 2001), 17-18.

[210] Duff and Hoskins, "Legal Punishment," s. 6.

[211] G.W.F. Hegel, *Philosophy of Right* [Grundlinien der Philosophie des Rechts], trans. T.M. Knox (Oxford: Clarendon Press, 1942), 246.

[212] R. Antony Duff, "Legal Punishment," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Metaphysics Research Lab, Stanford University, 2016), s. 4.

[213] *Ibid.*

reasoning that provides punishment's positive justifications.[214] Of course, one should note that in order to answer the question of how "punishment" can be justified, the debate between retributivists and consequentialists should be established on an agreement that the conception of punishment does not favor a particular position of its justifiability. However, when a punishment is already "defined" with a historical sense of retributivism, the ability of a consequentialist theory should not be limited to justifying such punishment without doubt.[215]

3.2 Justifications for preventive detention as punishment

3.2.1 A punishment of retributivism

Unlike many penal theorists who go to great lengths to differentiate preventive detention from punishment, Husak alleges that transforming preventive detention into punishment is not only among the most promising strategies for justifying it but would also make it far more humane and acceptable.[216] For this purpose, a defence of some sort of preventive detention can be developed squarely within a retributive justification of criminal law and punishment surrounding desert.[217] Even if preventive detention is not currently legalized as a punishment, Husak argues that the State could resolve whatever problems associated with the principle of legality and other procedures by creating new statutes that would be violated by the persons it proposes to detain preventively as part of its criminal law system.[218] However, inasmuch as many other penal theorists insist that such statutes cannot be a part of the State's criminal law since persons can only be punished for their "past" behaviors, a theory purporting to resolve the ancient debate between retributivists and consequentialists is required to overcome this conceptual obstacle.[219]

Certainly, Husak does not want to conceptualize preventive detention as a "pre-punishment," which is controversial as long as it can only be satisfied with an epistemic condition close to omniscience.[220] Rather, to provide a practical as well as substantive theory, Husak separates the general question of "What is punishment imposed for?" into two different sub-questions. (1) *In virtue of* what is punishment inflicted, and (2) what is the purpose *for* which punishment is

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[214] *Ibid.*

[215] Or more bluntly, "no account of what punishment allegedly is can refute consequentialist rationales," see Husak, "Preventive Detention as Punishment?," 184. The conceptual and normative definitions of punishment are further investigated in Section 4.1.

[216] "Lifting the Cloak," 1174.

[217] *Ibid.*, 1180.

[218] *Ibid.*, 1183-84.

[219] *Ibid.*, 1185-86.

[220] Lippke, "No Easy Way Out," 388.

inflicted?[221] Within a retributive framework, a punishment for preventive detention should be imposed "in virtue of" the possession of characteristics that are designed as elements of an offense due to their predictability of future harm. While the purpose "for" imposing such punishment is, of course, to avert subsequent harm. Recognizing the bulk of preventive (consequentialist) rationales in current criminal justice systems, such as those in the anticipatory or inchoate crimes, as a retributivist, even though the answer to his first question necessarily looks backward, it does not follow that the answer to his second question must also look backward.[222] In other words, the possession of the characteristics that predict future harm is morally "wrong" and thus "deserves" to be punished under a preventive detention regime.

However, another question in relation to desert may come up so long as it requires persons to perform a bad "action" as wrongdoing.[223] To solve this question, Husak contends that what penal theorists typically regard as the "act requirement" in criminal law is better construed as a distinct but related set of normative principles designed to ensure that persons have control over any state of affairs for which they are punished.[224] Therefore, a "control requirement" is more appropriate to meet those principles. Take the crime of possession, for example. If criminal liability is ever imposed "in virtue of" the state of possession, as is apparent in many penal codes, it follows that criminal liability is not always based on a requirement of act.[225] Another controversy that needs to be tackled is the demand of "proportionality," which is typically construed to require the severity of punishment to be a function for the seriousness of the past crime in a retributive framework. Yet Husak refutes this objection by claiming that "the newly enacted crimes these defendants would commit would tend to be incredibly serious, making perpetrators eligible for lengthy periods of confinement."[226] Moreover, since these crimes are "continuous" in the sense that they are committed repeatedly as long as persons remain in possession of the characteristics proscribed, the ongoing nature of these offenses may suffice the extension of their punishments.[227]

One can certainly discern Husak from "pure" retributivists, so long as he believes that "consequentialist considerations must be included in a justification for punishment."[228] This thesis also agrees that, *in a real world* where many drawbacks from the institution of criminal

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[221] Husak, "Lifting the Cloak," 1186.

[222] *Ibid.*, 1187-88.

[223] *Ibid.*, 1194.

[224] *Ibid.*, 1195.

[225] *Ibid.*, 1196.

[226] *Ibid.*, 1198. This claim nevertheless presupposes a "risk-proportionality" based on future prediction, which is empiri*cally*, *intrinsically*, and *ethically* problematic as this thesis shows in Section 3.4.

[227] *Ibid.*

[228] *Ibid.*, 1200.

justice exist, the value of realizing a principle of retributive justice, by itself, is insufficient to offset those drawbacks.[229] However, by creating offenses that authorize preventive detention as "preventive offences," his efforts already stand upon a rationale that seems unsecure, according to this thesis.[230] After all, the rationale of those crimes in practice implies earlier criminalization, earlier interventions by law enforcers, and earlier and more intrusive policing, which are much closer to our everyday behaviour.[231] Even worse, what triggers those practices no longer has to be expressed externally but something that is scooped out from our internal minds, since the preventive detention regime proposed by Husak requires detection of human "characteristics." To this extent, the Model Penal Code of American Law Institute is commendable, so long as it insists that the offender of a possession crime had to have "*knowingly* procured or received the thing possessed or was *aware* of his control thereof for a sufficient period to have been *able to terminate* his possession." [232] This is usually not the case when one possesses certain "characteristics" that predict future harm.[233]

With these new penal statutes, it seems like all members of a society can be punished if proven to possess the characteristics, otherwise Husak fails to propose any justification of why such offences are restricted to specific groups of people. If so, then "Thought Police" should be recruited and grand surveillance technologies, such as the ubiquitous "telescreen," should be installed for the State to prosecute the "crimes" effectively. Maybe these suspicions in relation to the Orwellian "Thoughtcrime" are simply fictional or even a landslide fallacy, as Husak believes that the application of his standards would make political officials far less likely to resort to preventive detention in the real world.[234] Yet such offences themselves can hardly meet the "control requirement" he proposed and thus could not satisfy the principle of legality as this thesis argues in Section 2.1. If some elements were to be ruled out to meet the requirement, whether the rest of them are sufficient to sustain a certain level of predictability is seriously doubted. Furthermore, if a punishment is deserved "in virtue of" the possession of the characteristics that predict future harm, the principle of proportionality should be based on this "possession" rather than the "harm" that does not actually happen in the real world. For this thesis, the possession itself should not cause "lengthy periods of confinement."

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[229] *Ibid.*, 1201.

[230] *Supra* note 183.

[231] Ashworth and Zedner, *Preventive Justice*, 118.

[232] Article 2.01(4) [emphases added].

[233] As this thesis indicates in Section 4.3, most of the offenders who are considered "dangerous" may have *neither* primary *nor* secondary moral controls.

[234] "Preventive Detention as Punishment?," 193. However, as this thesis shows in Section 3.3, Nazi Germany was the first country to enthusiastically endorse the idea of "habitual offender law," which later became the current preventive detention scheme in Germany.

3.2.2 A punishment of consequentialism

Another argument for preventive detention depends on the notion of "indeterminate sentencing," which bases the offenders' dispositions explicitly on risk assessments — with release or conditional release dependent on periodic review of the degree of risk posed.[235] Slobogin's version of this argument requires that candidates for punitive confinement be convicted of offenses, while the duration and nature of their sentences should be based on back-end decisions made by experts in recidivism reduction — within broad ranges set by the legislature. Inasmuch as indeterminate sentencing is explicitly designed to limit both false negatives and false positives, it is claimed that the sentencing regime becomes the most cost-effective means of protecting the public from recidivism.[236] Nevertheless, seven principles that govern the State's operation of preventive intervention authority should be satisfied whenever it is exercised:

> (1) the principle of legality, which requires commission of a crime or imminently risky conduct before preventive detention takes place; (2) the risk-proportionality principle, which requires that government prove a probability and magnitude of risk proportionate to the duration and nature of the contemplated intervention; (3) the related least drastic means principle, which requires the government to adopt the least invasive means of accomplishing its preventive goals and thus may well preclude confinement as well as require treatment in many cases; (4) the principle of criminal justice primacy, which requires that systems of preventive detention separate from criminal justice be limited to detention of those whose subsequent behavior is unlikely to be affected even by a significant prospect of serious criminal punishment; (5) the evidentiary rule that, when government seeks preventive confinement, it may only prove its case using actuarial-based probability estimates or, in their absence, previous antisocial conduct; (6) the evidentiary rule that the subject of preventive detention may rebut the government's case concerning risk with clinical risk assessments, even if they are not as provably reliable as actuarial prediction; (7) the procedural principle that a subject's risk and risk management plans must periodically be reviewed using procedures that ensure voice for the subject and avoid executive branch domination of the decision-making process.[237]

Apart from the doubt of whether "clear lines between the dangerous and non-dangerous" can be drawn by risk assessments,[238] the problem of "unjust" detention persists. This is because such assessments are more likely to be based on, at least in part, static factors that an individual

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[235] Slobogin, "Prevention as the Primary Goal of Sentencing," 1129. With an explicit aim on crime-prevention, it could be a form of "indefinite sentence" as defined by this thesis.

[236] *Ibid.*, 1130.

[237] *Ibid.*, 1131.

[238] P.D. Scott, "Assessing Dangerousness in Criminals," *The British Journal of Psychiatry: The Journal of Mental Science* 131 (1977): 140.

has little to no control over.[239] However, other than the unconstitutionality of reliance on race in making a risk assessment, Slobogin refutes this objection because he believes the word "justice" does not have to be hijacked by retributivists.[240] In his mind, determinate sentencing based solely on blameworthiness and gravity of the offense could be unjust, for example, if an offender is ready to be law-abiding but must serve out the sentence he/she "deserves."[241] When an offender has been released prematurely, it is also unjust to his/her new victim and him/herself who must now suffer avoidable punishment for a crime he/she would not have committed had detention and treatment continued. In addition, Slobogin believes that the concern that an indeterminate sentence denigrates the dignity of the offender is dissolved. This is because his Principles (1) and (3) require that the sentence must be preceded by a conviction that announces the offender's moral culpability and must include treatment designed to reduce his/her risk.[242] Moreover, he summons "restorative justice" as a risk-based program that further acknowledges the victims' concerns by incorporating them into the dispositional process.[243]

Another expected objection to indeterminate sentencing is closely related to concerns that, because of its focus on the risk of specific offenders, it undermines the preventive purpose of general deterrence, the moral structure of society, or the authorities of law and government.[244] However, Slobogin argues that these concerns are empirically unfounded, as indeterminate sentencing has existed well throughout the first three quarters of the twentieth century. What is more, he proposed additional requirements of his indeterminate regime in the following two situations.[245] First, if indeterminate sentencing in its pure form is so poor at capturing the urge to condemn noncompliance, legislatures could authorize and courts could impose high sentencing maxima that is graded among crimes according to desert, but allow earlier release if a risk assessment so dictates. Second, although research only supports that punishment has little impact on decisions to commit crime,[246] theoretically, in case some potential offenders who believe they possess few risk factors would like to "roll the antisocial dice" and commit crimes as a result, some prison time might be necessary even in the absence of significant risk.

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[239] Slobogin, "Prevention as the Primary Goal of Sentencing," 1158.

[240] *Ibid.*, 1160.

[241] It seems like Slobogin considers that the "moral regret" of offenders after their offences could negate the justice of punishment.

[242] Slobogin, "Prevention as the Primary Goal of Sentencing," 1161.

[243] *Ibid.*, 1162.

[244] *Ibid.*, 1163-64.

[245] *Ibid.*, 1165.

[246] Paul H. Robinson and John M. Darley, "The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best," *Georgetown Law Journal* 91, no. 5 (2003): 976-89.

Slobogin further emphasizes that indeterminate sentencing would be focused on reducing risk through rehabilitative efforts. Although comprehensive correctional programs cost more than a prison system that merely aims at exacting punishment, rehabilitation blocks the cycle of crime for offenders and thus their time spent incarcerated and under State supervision. This makes the programs more cost-effective.[247] He also criticizes that, under a determinate regime, success at treatment has no effect on release. This feature presumably diminishes the inmates' incentive to participate in rehabilitative programs.[248] As for the concern of "unequal treatment" due to those "uncontrollable" static factors, it can be addressed partly by ensuring that trained professionals conduct periodic reviews based on structured professional judgments that take into account clinical and management risk factors as well as historical ones.[249] Inasmuch as indeterminate sentencing follows immediately upon conviction and its implementation is part of the criminal process, he argues that it is different from the "post-sentence commitment" without proof of serious mental illness or serious impulsivity. The latter type of disposition is unjust and unconstitutional, in his opinion, because it treats an autonomous individual as a non-autonomous "predator" or an autonomous actor only willing to choose antisocial behavior.[250]

Under Slobogin's indeterminate regime, sentencing as disposition of convicted inmates should be proportionate to risk rather than desert (culpability). Relying on this risk-proportionality reasoning, he proposed that initial incarceration for preventive purposes should require proof at the 50 per cent level.[251] Yet even without such a risk, a minimum prison sentence is necessary to dissuade people with few risk factors from doing the calculations to get "one free bite at the apple."[252] This simple paradox, as an example, highlights the position of Slobogin as a limited consequentialist who reluctantly resorts to desert-based conviction and other side-constraints as prerequisites to his indeterminate regime that aims at special preventions. However, after proposing solutions to overcome the entire possible (retributive and general preventive) objections, his indeterminate regime, when put into practice, is not so different from a determinate regime with restorative and rehabilitative programs as well as discretionary probation and parole release. Its "indefinite" nature is also eliminated as long as a retributive "cap" on sentencing should be granted. The only difference might be a rather wide authority given to the parole board or "experts in recidivism reduction" in deciding the duration and nature of sentencing.

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[247] Slobogin, "Prevention as the Primary Goal of Sentencing," 1166.

[248] *Ibid.*, 1167.

[249] *Ibid.*

[250] *Ibid.*, 1169.

[251] Slobogin, "Legal Limitations on the Scope of Preventive Detention," in *Dangerous People: Policy, Prediction, and Practice*, ed. Bernadette McSherry and Patrick Keyzer, International Perspectives on Forensic Mental Health (New York: Routledge, 2011), 40.

[252] Slobogin, "Prevention as the Primary Goal of Sentencing," 1165.

Of course, his principles are comprehensively designed and fully aware of the danger that the authority might abuse its discretionary power. However, to effectively implement them in reality, without eroding the theory itself, it would require an inestimable amount of resources. Therefore, one could hardly expect such a regime to replace desert-based punishment entirely but instead only to a certain extent. If this were the case, Slobogin did not address the arduous task of categorizing offenders into those who should be subjected to his indeterminate regime and those who should not. Furthermore, if risk is already included in the discretions of parole release, this thesis does not find Slobogin's reasons plausible when answering why a treatment orientation cannot sit well in a retributive framework. The "right to rehabilitation" of convicted inmates can be justified — independent of utilitarian considerations — as a positive right to counteract the deteriorating effects of imprisonment that is excessive to the lawful punishment they "deserve."[253] Their "moral rehabilitation" can be even furthered through the expression and persuasion of retributive punishment.[254] Not to mention that their rehabilitative progress can absolutely influence the back-end decisions of their parole release and thus become a positive incentive.

An intrinsic problem of Slobogin's indeterminate regime is that he interprets the principle of legality, especially the legal certainty in criminal justice, too narrowly.[255] By limiting the principle *at the stage of trial*, the principle only protects individuals from vague or broad offences provided by law, while ignoring their interests to foresee their sentences and release afterwards. As John Monahan argues, the criminal justice system is based on the premise of *whether* as well as *how much* punishment is deserved in response to choices offenders have made.[256] Yet according to Slobogin, "if the relevant law permits sentences to be based on dangerousness, it does not undermine the criminal justice system's 'premise of self-determination' (a premise that has already been honored at trial)."[257] Thus to him, risk assessment can be, with the exclusion of race, based on "immutable or quasi-immutable traits," in order to provide the fact finder with "the best means of making the prediction."[258] However,

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[253] Edgardo Rotman, "Do Criminal Offenders Have a Constitutional Right to Rehabilitation?," *The Journal of Criminal Law and Criminology* 77, no. 4 (1986): 1067-68. This argument is further explored in Section 4.2.

[254] R. Antony Duff, "Guidance and Guidelines (Sentencing: What's at Stake for the States?)," *Columbia Law Review* 105, no. 4 (2005): 1183-84.

[255] However, this problem is no longer acute when legislatures *do* authorize and courts *do* impose high sentencing maxima.

[256] "A Jurisprudence of Risk Assessment: Forecasting Harm among Prisoners, Predators, and Patients," *Virginia Law Review* 92, no. 3 (2006): 427-28.

[257] *Proving the Unprovable: The Role of Law, Science, and Speculation in Adjudicating Culpability and Dangerousness*, American Psychology-Law Society (Oxford: Oxford University Press, 2007), 114.

[258] *Ibid.*

unless the conviction itself would make the offender no longer (be treated as) a rational and responsible agent,[259] a justification to stop applying the legal certainty *at the stage of sentencing and its implementation* is missing.

3.3 Justifications for preventive detention as non-punitive confinement

3.3.1 Another track within criminal law

Different from the common-law system, most civil-law countries, including Germany, the Netherlands, Norway, and Taiwan, have a twin-track system of *punishments* and *measures* in their penal codes. In the track of punishments, the penalty for a wrongfully committed offence is fixed according to the culpability of the offender and the seriousness of the offense. Measures, on the other hand, can be ordered against offenders solely for special preventions of future harm, and thus are not concerned with retribution for past offences. In Germany, as mentioned in Section 2.1, preventive detention is considered as a "correction and prevention" measure, which is separate from the track of punishments. Thus, the requirement of culpability and other general sentencing principles, such as the prohibitions of retrospective punishment and double jeopardy, do not apply.[260] However, preventive detention did not exist in the traditional German criminal justice until 1933. The measure was first introduced by the Nazis to detain "habitual offenders" and was retained in West Germany as part of the Criminal Code.[261]

Slightly earlier, in 1928, the Netherlands introduced — also as a means to protect society beyond the limitations of desert — the entrustment order (TBS). It was introduced as a "new" measure for those with mental illness or psychiatric defect after they are considered (partially) responsible for their criminal acts by the courts.[262] Inasmuch as the order is statutorily limited to relatively serious crimes, it may be extended indefinitely in two-year increments that are each decided upon by a court that reviews the case.[263] In the next year, an indefinite "preventive supervision" for diagnosed mentally deviant offenders thought to be at risk for recidivism was also implemented in Norway,[264] where for a long time the largest group subjected to this

[259] Such forfeiture is further criticized by this thesis in Section 4.3.

[260] Michaelsen, "'From Strasbourg, with Love'," 150.

[261] *Ibid.* Notably in response to criticisms, a maximum of 10 years following a served prison term was introduced by the German parliament in 1975.

[262] de Keijser, "Never Mind the Pain, It's a Measure!," 191.

[263] *Ibid.*, 194. A four-year upper limit was added to the provision as late as 1988, but this limitation does not apply to violent offenders.

[264] Jane Dullum, "The Fall and Rise of Preventive Detention in Norway," in *The Politics of Abolition Revisited*, ed. Thomas Mathiesen (London: Routledge, 2015), 297.

measure was those relapsing into property crimes.[265] These special "measures" in the criminal laws of these countries could be resulted from rather deterministic views of offending. These views directly challenge the classic desert-based and indeterministic nature of criminal justice granted in the 18th century. Strongly advocated by influential jurists and academics since late 19th century,[266] these "Modern-School" ideas consider punishment primarily as an instrument for protecting society against future offending. The emphasis of penal codes should thus be on the offender as a deviant person and his/her deficiencies rather than his/her offense and guilt.[267]

The subsequent expansion of this "new direction" is to respond to the outcry of protecting society against dangerous and habitual (addicted) offenders through risk management and actuarial justice in this "era of insecurity."[268] As mentioned in the last chapter, in order to fight sex offences and other severe forms of criminality, the conservative government of Germany lifted the 10-year limit on preventive detention in 1998. Almost in the same period, although the Dutch courts were already using TBS extensively, another separate measure called ISD was introduced in the Netherlands. It was first introduced in 2001 as a measure to "treat" or "incapacitate" male addicted habitual offenders and was then extended to the entire group of persistent offenders three years later.[269] Since the types of crimes that are involved with the ISD are only those offenses that are not so serious, it is imposed for the default duration of two years and cannot be extended.[270] In the next year later, the Norwegian preventive supervision was replaced with "preventive detention" for criminally responsible offenders, "compulsory mental health care" for psychotic defendants, and "compulsory care" for the mentally retarded to a high degree.[271] In the first situation, although the condition is limited to specific violent and sexual crimes, the contribution of forensic psychiatrists is no longer required.[272]

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[265] *Ibid.*, 299.

[266] Its roots may go back to Franz von Liszt, the great German criminal lawyer, who famously dismissed his neo-Kantian opponents for being too preoccupied by the nature of the sentence of a court in 1893, see Kirstin Drenkhahn, Christine Morgenstern, and Dirk van Zyl Smit, "What Is in a Name? Preventive Detention in Germany in the Shadow of European Human Rights Law," *Criminal Law Review*, no. 3 (2012): 185.

[267] de Keijser, "Never Mind the Pain, It's a Measure!," 191.

[268] Ybo Buruma, "Risk Assessment and Criminal Law: Closing the Gap between Criminal Law and Criminology," in *Punishment, Places and Perpetrators: Developments in Criminology and Criminal Justice Research*, ed. Gerben Bruinsma, Henk Elffers, and Jan de Keijser (Cullompton: Willan, 2004), 44.

[269] de Keijser, "Never Mind the Pain, It's a Measure!," 191. Within this measure, offenders who are considered motivated and eligible for behavioral treatment are included in "treatment and resocialization programs," while those who are unmotivated and not open to treatment are placed under a "sober incarceration regime."

[270] *Ibid.*, 197.

[271] Dullum, "The Fall and Rise of Preventive Detention in Norway," 299.

[272] *Ibid.*, 300. However, instead of "social inquiry," the court may decide that the person charged shall be subjected to "forensic psychiatric inquiry," which is nearly all cases in practice.

In Taiwan, the so-called "post-sentence compulsory treatment" targeting sex offenders was also introduced into the "measure" tract of its criminal code in 2005. According to the law, specified sex offenders may be ordered to a suitable institution for compulsory treatment if they are "found through appraisal and evaluation during the period of receiving counseling or treatment as having the danger of recidivism before the expiration of the sentence."[273] The period of such measure lasts until "the danger of recidivism is remarkably reduced," while "appraisal and evaluation shall be performed annually" to check whether it is necessary to stop the treatment. Professor Jung-Chien Huang commented at that time that it was "a progressive move for the criminal law from the traditional punishment to the counseling and assessing work of sex offenders through perspectives of psychology and personality."[274] However, he also warned, "[r]elevant resources should be provided to make such *treatment* truly effective [emphasis added]." In the present practice, because general medical institutions do not want to take over these hot potatoes and the proposals to establish specialized hospitals are constantly protested by local residents, the compulsory treatment of sex offenders is nevertheless still provided within prison premises.[275]

One could perceive that criminal offenses are merely events triggering these measures. Namely, the gravity of the offense and the moral culpability of the offender are, strictly speaking, irrelevant in the track of measures.[276] But unlike the indeterminate regime that applies to all offenders proposed by Slobogin, measures within the criminal codes of civil-law countries are usually limited to certain types of offenders who, because of their psychiatric illness or frequency of offending, pose an unacceptable risk to society that cannot be addressed by desert-based punishments. In order to avoid their risks from materialising, the measure can either be an extension of the punishment or, in a case when no punishment is deserved, a substitution.[277] As mentioned, this separation but co-existence of punishments and measures in a twin-track criminal system can be historically understood as a "compromise" between the classic notions underlying traditional penal codes and the ideas of the Modern School with its further developments since the 1980s. Without the ground of retribution, it is claimed that a measure

[273] Article 91-1.

[274] *The Basis of Criminal Law*, I, 118.

[275] Ching-Chin Wu, "The Difficulty of the Establishment of Premises for Post-Sentence Compulsory Treatment," Apple Daily, http://www.appledaily.com.tw/appledaily/article/headline/20120616/34303960, 2012 [in Chinese, last accessed 1 December 2017].

[276] de Keijser, "Never Mind the Pain, It's a Measure!," 193.

[277] The latter situation is out of the scope of "preventive detention," as the focus of this thesis is on "convicted" inmates. Thus, a certain degree of "culpability" should be detected.

does not inflict suffering "deliberately" or "intentionally," so any pain that is felt as a result is unintentional, subjective, and subordinate to the goal of promoting public safety.[278]

3.3.2 Civil commitment of mental disorders

As some common-law countries do, another alternative is resorting to the "civil" commitment of individuals with or without mental disorders. Prominent examples of the latter are the legislations of preventive detention against "dangerous" or "serious" sex offenders in the four states of Australia, which this thesis mentions in Section 1.1.[279] As for the former type of confinement, it can be found in sexual violent predator ("SVP") laws in at least twenty states in the U.S. that allow for indefinite civil commitment of sexually violent offenders after they have served their desert-based sentences.[280] Apart from the Australian schemes, a limitation that might prohibit such intervention even when the government can demonstrate the requisite risk of the offenders has been established by the U.S. Supreme Court since its holding of *Kansas v. Hendricks*. In order to sustain the constitutionality of the SVP statute in Kansas, the Supreme Court interpreted the law restrictively by stating that it requires the government to show the person is "dangerous beyond [his/her] control."[281]

Strictly speaking, such interpretation still expanded the traditional role of civil detention that had been reserved for people with psychosis and similar mental problems. Nevertheless, the expansion was more implicitly than the Australian schemes, so long as it still required people with less severe "mental abnormalities" or even "personality disorders."[282] Later, in *Kansas v. Crane*, although the Supreme Court reconfirmed this paradoxical limitation for expansion,[283] it remains unclear whether a formal psychiatric diagnosis and follow-up treatment program are necessary. It is nevertheless based on these decisions that Slobogin makes a distinction between criminal and non-criminal prevention under his indeterminate regime. As Justice Scalia stated in his dissenting opinion in *Crane*, if SVP laws make sense, it is because "[o]rdinary recidivists choose to reoffend and are therefore amenable to deterrence through the criminal law," while "those subject to civil commitment under [SVP laws] are unlikely to be deterred."[284] Borrowing the concepts in Scalia's statement, Slobogin concludes his Principle (4) with the idea that a

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[278] de Keijser, "Never Mind the Pain, It's a Measure!," 193. Again, this could lead to the so-called "definitional stop" on justifications for "punishments," as criticized by Hart and other penal theorists.

[279] *Supra* note 15.

[280] de Keijser, "Never Mind the Pain, It's a Measure!," 201.

[281] *Kansas v. Hendricks* [1997], paras. 357-58.

[282] *Ibid.*

[283] *Kansas v. Crane* [2002], para. 413.

[284] *Ibid.*, para. 420.

significant degree of "undeterrability" is required for a preventive detention regime that is apart from criminal justice.[285] Therefore, the scope of a "civil" commitment is limited to people who have great difficulties in controlling their behaviors.

However, it is debatable whether the limitation set up by the U.S. Supreme Court works in practice, as both the terms "mental abnormality" and "personality disorder" are quite broad and have been criticized as going beyond recognized diagnostic categories of mental disorder.[286] It is even more questionable whether Slobogin's proposal of "a significant degree of undeterrability" draws a better line. More importantly, if the "civil" commitment is merely a different mode for imposing interventions that are as or more repressive than criminal sanctions and are subjectively experienced as punitive, than the suffering beyond desert remains unjustified, and worse, even better hidden than "criminal" punishments or measures.[287] This is largely the case now with the commitment of SVP laws, which is criticized by Andrew Harris as a form of criminal sanction under the *fig leaf* of treatment and nominal civil intervention.[288]

3.3.3 Unintended suffering beyond desert

Some penal theorists argue that, in order to positively deal with the moral problem of the "contingent" suffering in non-punitive confinements, conditions in preventive detention, either as a "non-punitive" measure or as a "civil" commitment, should be deliberately different from conditions in prison. In this way, the suffering of detention at least can be alleviated.[289] As David Wood claims, "there is no reason in principle why … they cannot be made pleasant and agreeable places, so that inmates suffer little or no material harm or loss beyond the denial of liberty."[290] Therefore, preventive detainees should not only be subjected to as little official interference as possible, but also be granted better food, clothing, accommodations, more association with others, and remuneration. This will lead them to be seen as "the aristocracy of the penal community" in order to compensate or counterbalance their material loss or harm.[291] Ideally, such preventive detention "will have none of the individual and selective quality of a

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[285] "Prevention as the Primary Goal of Sentencing," 1142.

[286] See, e.g. Bruce J. Winick and John Q. La Fond, *Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy* (American Psychological Association, 2003).

[287] de Keijser, "Never Mind the Pain, It's a Measure!," 201.

[288] "The Civil Commitment of Sexual Predators: A Policy Review," in *Sex Offender Laws: Failed Policies, New Directions*, ed. Richard G. Wright (New York: Springer, 2015).

[289] "Never Mind the Pain, It's a Measure!," 202.

[290] "Reductivism, Retributivism, and the Civil Detention of Dangerous Offenders," *Utilitas* 9, no. 1 (1997): 137.

[291] Norval Morris, *The Habitual Criminal*, Publications of the London School of Economics (Cambridge: Harvard University Press, 1951), 70-77. See also Stephen J. Morse, "Blame and Danger: An Essay on Preventive Detention," *Boston University Law Review* 76, no. 1-2 (1996): 150.

'poena', but will express only the collective quality of an act of humane social defence,"[292] as long as it does not convey public rebuke for past crimes.[293]

However, as Lippke argues, such symbolic assertions seem dubious, especially when preventive detention is consecutive and limited to those convicted of serious offenses.[294] It is hardly apparent that the public, or even the offenders themselves, will regard continued preventive detention as saying something different about the individuals deemed too dangerous to release from prison due to their "notorious" histories. To use his own words, "the lingering suspicion that it is simply extended imprisonment seems [more] likely to prevail."[295] Furthermore, since preventive detainees are supposed to be so dangerous that they cannot possibly be allowed back into civil society, hopefully they would be kept under tight control and relatively isolated from their fellow detainees and keepers.[296] The ways in which they may use their remuneration will also be quite limited due to security concerns and the nefarious projects some of them might have undertaken in the past.[297] If these were the cases, the constant surveillance and restrictions of such confinement would still overwhelm the improved amenities claimed to reduce or compensate the suffering to a substantive degree.

Of course, as a committed consequentialist, one could still justify the suffering exacted by measure or civil commitment by claiming that the common good to protect the society outweighs the amount of suffering.[298] However, for such a utilitarian justification to hold its ground, it has to, at least, be shown that these non-punitive confinements do promote the common good to a degree that is sufficient to prevail individual suffering.[299] Yet their effective evaluations are often unavailable in the empirical world. Though both measures and civil commitments boast treatment, evidence suggests that the most serious and intractable criminal offenders, especially those with psychopathic personality disorder, are nearly insusceptible to character change.[300] Then, for a detainee that is currently "untreatable," the justification for his/her preventive detention must be based solely on the special prevention of deterrence or incapacitation that treats him/her either as a Hegelian "dog" or as a Foucauldian "Other." To make the consequentialists even more ill at ease, their "common good" is actually promoted by

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[292] Morris, *The Habitual Criminal*, 243.

[293] Wood, "Reductivism, Retributivism, and the Civil Detention of Dangerous Offenders," 137.

[294] "No Easy Way Out," 410.

[295] *Ibid.*

[296] *Ibid.*, 411.

[297] *Ibid.*, 413.

[298] de Keijser, "Never Mind the Pain, It's a Measure!," 203.

[299] *Ibid.*

[300] Lippke, "No Easy Way Out," 396. However, more and more research supports the view that clients with personality disorder can change in response to a variety of coordinated and psychologically informed intervention, see, e.g. W. John Livesley, *Practical Management of Personality Disorder* (New York: The Guilford Press, 2003).

sacrificing the "wrong" persons. This is so as long as individual predictions of future offenses are based on risk assessment tools that are still far from perfect. In the next section, this thesis will dig into this problem.

3.4 Risk assessment as a vulnerable prerequisite

3.4.1 The certainty and uncertainty of actuarial tools

Malcolm Feely and Jonathan Simon first introduced the term "actuarial justice" when they used it to provide a new framework as an alternative to the "hyper-moralistic, retributive discourse about penal policy."[301] As mentioned in the last section, it has become increasingly popular in governmental practices. The basic idea behind it is taken from the insurance business, where the individual's premiums are estimated based on experiences with certain groups or situations.[302] In line with this logic, some penal theorists and forensic scientists believe that, in order to predict crime and to use the outcome for assessing the individual's "cost," what happened in the past in groups that the individual belongs to would give an indication for his/her future behaviour. Therefore, more and more actuarial instruments that allow evaluators to place an individual within a numerical risk category have been devised under preventive detention regimes, so that the confinements can be *justified* under a "risk-proportionality." Slobogin is among those who promote the use of actuarial evidence as a substitute for traditional clinical evidence when the governments need to prove a high degree of risk. In his Principle (5), he argues that even with effective cross-examination and opposing witnesses, the latter type of testimony is too vague to rebut,[303] and is thus unreliable and prejudicial.[304]

It is true that, in general, actuarial prediction is superior to clinical prediction.[305] However, "because Mr. X belongs to a group, then his level of reoffending is most likely to be the average for the group," such theory "is technically correct but fundamentally misleading," as criticized by David Cooke and Christine Michie.[306] Certainly, this "scientific" prediction intends to

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[301] "Actuarial Justice: The Emerging New Criminal Law," in *The Futures of Criminology*, ed. David Nelken (London: Sage, 1994), 173.

[302] Buruma, "Risk Assessment and Criminal Law," 47.

[303] See, e.g. Shari Seidman Diamond *et al.*, "Juror Reactions to Attorneys at Trial," *The Journal of Criminal Law and Criminology* 87, no. 1 (1996): 40-41.

[304] Slobogin, "Prevention as the Primary Goal of Sentencing," 1146.

[305] Robyn M. Dawes, David Faust, and Paul E. Meehl, "Clinical Versus Actuarial Judgement," *Science* 243, no. 4899 (1989).

[306] "Violence Risk Assessment: Challenging the Illusion of Certainty," in *Dangerous People: Policy, Prediction, and Practice*, ed. Bernadette McSherry and Patrick Keyzer, International Perspectives on Forensic Mental Health (New York: Routledge, 2011), 150.

"reasonably" satisfy the public thirst for "certainty" as a basic human desire, but it often fails to inform the decision-makers about the rather large degree of "uncertainty" associated with it. While the "confidence interval" — or the breadth of uncertainty — for a specific group could be narrowed down with an increasing sample size, the "prediction interval" for a specific individual, as a meta-analysis of several groups, is generally much wider.[307] Not to mention that the latter interval will only "narrow to a finite range and no further because there is an inherent patient-to-patient variability."[308] Even in relation to medical risks, "the ability to estimate the average risk of a group, which may be good, is not matched by any corresponding ability to predict which individuals are going to fall ill soon."[309] When further considering the complexity of assessing the psychological characteristics of an individual, any pursuit of his/her behavioral certainty, as revealed by Cooke and Michie, is simply an illusion.

3.4.2 False positive vs. wrongful conviction

In order to limit the alarm experienced by those misidentified, a false positive rate of five per cent is a convention in medicine.[310] Within criminal justice settings, however, considerations of policy relating to the protection of the public could justify higher false-positive rates, according to some consequentialists. Slobogin, for example, defends the actuarial risk assessment by comparing it with the inaccuracy associated with the culpability assessment mandated by sentencing.[311] Due to the difficulty to obtain a reliable determination of the offender's blameworthiness, which, at a minimum, requires discerning the offender's mental state at the time of committing the offense, he criticizes the latter assessment as merely "guesswork," or worse, a "gesture of enormous chutzpah."[312] Therefore, "if we are willing to countenance these harsh penalty differentials based on such a high degree of uncertainty, we may be hard pressed to criticize a preventive detention regime on unreliability grounds."[313] Under his indeterminate regime where sentencing issues are still subject to a conviction of crime, Slobogin seems to restrict his comparison only to the wrongful determination of a "sentence."

However, if the justification to "initiate" the deprivation of his/her liberty is based solely on special preventions, the false positive of risk assessment as a necessary evil should rather be

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[307] *Ibid.*, 151.

[308] Jonathan Roth, "Prediction Interval Analysis Is Underutilized and Can Be More Helpful Than Just Confidence Interval Analysis," *Journal of Clinical Monitoring and Computing* 23, no. 3 (2009): 182.

[309] Geoffrey Rose, *The Strategy of Preventive Medicine*, Paperback ed., Oxford Medical Publications (Oxford: Oxford University Press, 1993), 48.

[310] Cooke and Michie, "Violence Risk Assessment," 155.

[311] "Prevention as the Primary Goal of Sentencing," 1154.

[312] *Ibid.*, 1155-56.

[313] Christopher Slobogin, *Minding Justice: Laws That Deprive People of Mental Disability of Life and Liberty* (Harvard University Press, 2006), 110.

compared with the wrongful "conviction" itself as the "trigger" of a determinate regime based on retribution. In other words, the standard of proof in a traditional criminal case is a burden to prove "beyond reasonable doubt" that the crime was committed by the defendant, rather than a burden to prove "beyond reasonable doubt" that his/her sentence is correct, which is ridiculed by Slobogin. As a result, if a conviction should be based on, for example, a 95 per cent certainty that the defendant *did* commit the *past* crime, then under the same standard, the preventive detention order should also be based on a 95 per cent certainty that the offender *will* commit a *future* crime. However, in regards to their calculated risk, this is not the case when research compares those who actually recidivated within the observation period to those who did not recidivate.[314] According to the research and its follow-up, 29 per cent of those who did not recidivate received a high-risk score using the HCR-20.[315] This percentage of false positive is hard to be overlooked.

Apart from this "intolerably inefficient inaccuracy,"[316] under the "obligation of society to do *individual* justice,"[317] even a one per cent false positive rate would become the "Achilles' heel" of a criminal policy.[318] Certainly, this principled rejection also applies to the intolerable situations of wrongful conviction. However, the individual injustice would become even more serious when the *prediction* of his/her risk is based on "external evidence" that is generated from studies of other individuals and transformed into risk factors, such as criminal history, diagnosis, gender of the victim, etc.[319] Strictly speaking, these risk factors are "data about classes of people which are insensitive to relevant but unknown differences among the individuals in that class"[320] due to the complexity of each and every individual. In order to alleviate the injustice of using the level of the group to dictate the level of the individual, this complexity needs to be addressed psychologically rather than statistically.[321] Therefore, a structured process — scenario planning — should be individually tailored. This will help the assessor move from an assessment of risk factors to a formulation of the nature of risk posed

[314] de Keijser, "Never Mind the Pain, It's a Measure!," 204.

[315] Historical, Clinical, Risk Management-20 is an internationally popular assessment tool that helps mental health professionals estimate a person's probability of violence.

[316] R. Antony Duff, "Dangerousness and Citizenship," in *Fundamentals of Sentencing Theory: Essays in Honour of Andrew Von Hirsch*, ed. Andrew Ashworth and Martin Wasik (Oxford: Clarendon Press, 1998), 143. In the next sentence he also implies this problem "might (at present, or for the foreseeable future) be insoluble."

[317] Andrew von Hirsch, "Prediction and False Positives," in *Principled Sentencing*, ed. Andrew von Hirsch and Andrew Ashworth (Boston: Northeastern University Press, 1992), 122.

[318] de Keijser, "Never Mind the Pain, It's a Measure!," 205.

[319] Meyerson, "Risks, Rights, Statistics and Compulsory Measures," 518.

[320] *Ibid.*, 522.

[321] Cooke and Michie, "Violence Risk Assessment," 158.

by that individual.[322] But this way of *treating* or *managing* individual risks is currently in a state of creative flux and awaits development.

3.4.3 The ethical dilemma of forensic mental health professionals

To use the words of Andrew Carroll *et al*. as a short and intermediate conclusion, "[n]o method, clinical, actuarial or combined, achieves anywhere near 100% predictive power, whether short or long term risk is considered."[323] However, in a legal system that appears increasingly intent on incarcerating or otherwise incapacitating those at risk of harming others, regardless of the consequences for them, mental health practitioners may face ethical issues when dealing with the relationship between society and the individual. Inasmuch as courts rely on their reports to inform decision-making about risk-based sentencing or order in practice, their professional judgment is no longer aimed at treating the offenders but segregating them for community protection.[324] A worse consequence is that such decisions risk further identifying, isolating, and shaming former offenders by limiting their access to the types of support and contact with others that might serve to limit their risks.[325] Therefore, even without those false positives, their assessments "inadvertently contribute to the generalization of stigma from the targeted (negative) behavior to the characteristics of the groups designated as high risk, thereby placing a scientific stamp on the public's prejudice and fear."[326]

In medical ethics, the principles of "beneficence" and "nonmaleficence" require that no harm be caused to the patient or client and can thus be viewed as requiring mental health practitioners to eliminate or minimize any potential for damage.[327] But some also argue that, as long as the limits are acknowledged and relevant professional guidelines followed, risk assessment techniques have developed to a standard that enable mental health professionals to serve "justice."[328] That is, considering the *justice ethics* based on "truth" rather than beneficence or nonmaleficence, mental health practitioners are acting as "an advocate of justice, not as a source

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[322] *Ibid*., 159-60.

[323] "Clinical Hopes and Public Fears in Forensic Mental Health," *Journal of Forensic Psychiatry and Psychology* 15, no. 3 (2004): 413.

[324] Gwen Adshead, "Duties of Psychiatrists: Treat the Patient or Protect the Public?," *Advances in Psychiatric Treatment* 5, no. 5 (1999): 326.

[325] Mark Farmer and Ruth Mann, "High-Risk Sex Offenders: Issues of Policy," in *Managing High-Risk Sex Offenders in the Community: Risk Management, Treatment and Social Responsibility*, ed. Karen Harrison (Uffculme: Willan, 2010).

[326] Eric Silver and Lisa L. Miller, "A Cautionary Note on the Use of Actuarial Risk Assessment Tools for Social Control," *Crime and Delinquency* 48, no. 1 (2002): 155.

[327] Gerald P. Koocher and Patricia Keith-Spiegel, *Ethics in Psychology and the Mental Health Professions: Standards and Cases*, 3rd ed. (Oxford: Oxford University Press, 2008), 551.

[328] McSherry, *Managing Fear*, 222.

of punishment."[329] The ensuing harm and its justification are thus viewed as questions to other professionals and irrelevant to the assessment itself. However, one can hardly forget the involvement of mental health practitioners in the "euthanasia programs" of Nazi Germany, which "possessed one of the most advanced and sophisticated codes of medical ethics in the world in existence from 1931."[330] Without "an understanding of the sociopolitical context in which care takes place and of the potential for their work to be subverted for political ends,"[331] they became agents or mere instruments of State power and for the politics of social control.

Within this shadow, practices of mental health professionals in current preventive detention regimes, especially those that violate international human rights law, are not far from their predecessors' assistance to the crimes of Nazi Germany. However, Paul Appelbaum makes a practical point that, where liberty or rights are at stake, it may be preferable to "have a decision-maker whose judgment [i]s informed by the testimony of experts in the field rather than one who [i]s forced to rely on his or her haphazard knowledge and entrenched prejudices."[332] Therefore, an ideal approach for them to find the middle ground is probably to practice risk assessments only for *treatment* or *management* purposes. Even when it is known that adequate treatment is not available, the use of risk assessments can only lead to management "that [does] not violate respect for dignity, responsible caring or integrity" of the person, who "should not be sacrificed to a vision of the greater good of society."[333] In accordance with such a primary duty, this thesis shares the same view of the Royal College of Psychiatrists for the U.K. and the Republic of Ireland. Namely, "it is not ethically part of medicine to assist the courts in *increasing punishment* and *public protection* by applying medical skills to such a purpose."[334]

3.5 Conclusion

If the arguments in this chapter are sound, then they should have clearly shown that preventive detention of dangerous inmates is difficult to justify. Putting aside our inability to confidently predict that they will commit further violent offenses, the retributivists may have a hard time to

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[329] *Ibid.*, 220.

[330] Rael D. Strous, "Psychiatry During the Nazi Era: Ethical Lessons for the Modern Professional," *Annals of General Psychiatry* 6 (2007): 5.

[331] Robin M. Ion and M. Dominic Beer, "Valuing the Past: The Importance of an Understanding of the History of Psychiatry for Healthcare Professionals," *International Journal of Mental Health Nursing* 12, no. 4 (2003): 250.

[332] "Ethics and Forensic Psychiatry: Translating Principles into Practice," *The journal of the American Academy of Psychiatry and the Law* 36, no. 2 (2008): 198.

[333] Canadian Psychological Association, "Canadian Code of Ethics for Psychologists," (Ontario: Canadian Psychological Association, 2017), 4.

[334] "The Psychiatrist, Courts and Sentencing: The Impact of Extended Sentencing on the Ethical Framework of Forensic Psychiatry: Council Report Cr129," *Psychiatric Bulletin* 29, no. 2 (2005): 75 [emphases added].

come up with crimes that would make the inmates "deserve" punitive preventive detention after they are proportionally punished. The consequentialists who eschew a retributive component in a comprehensive theory of legal punishment may be able to evade this paradox, but the costs of doing so without desert constraints in a theory of legal punishment are even harder to neglect.[335] A "reasonably humane" and thus non-punitive confinement that makes preventive detention much different from defensible imprisonment is also impractical. This would make its supporters who claim that dangerous inmates do not deserve to be further punished seem hypocritical. Finally, all these justifications are to a certain degree dependent on risk assessment, which has advanced over the past decades due to the development of actuarial instruments but is still far from ideal or sophisticated. Caution and restraint in its usage in the legal system is demanded for considerations of the prospect of unnecessary deprivation of liberty due to "false positives," unknown differences in particular groups, and the ethics of its practice to avoid the potential for abuses in the past to recur.

[335] Lippke, "No Easy Way Out," 414.

4 Filling the Gap between Human Rights and Penal Regimes

In this chapter, this thesis engages the proposal of a "liberal" framework for the "Preventive States" to structure their own preventive detention schemes that are compatible with current international human rights jurisprudence. First, by exploring the definitions of legal punishment in penal theories and decisions from the CCPR and the ECtHR, this thesis identifies the "definitional stop" that is susceptible to political abuse due to the very different requirements in punitive and non-punitive proceedings. Second, in order to construct the bridge between human rights and penal regimes, the case law regarding the legitimate penological grounds (i.e. retribution, deterrence, incapacitation, and rehabilitation) is also recognized and interpreted in a liberal sense. Finally, this thesis intends to use the Kantian "moral agency" as the foundation for both penal and human rights philosophy in order to cross through the research gap within current literature on preventive detention. It is expected that the commitment of this thesis would speak for international human rights law in matters of sentencing and in the criminal law itself when the dangerous inmates are in the hands of popular sovereignty.

4.1 Definitions of legal punishment

4.1.1 In penal theories

Although there are many definitions of "legal punishment," there is no agreement on a precise definition by penal theorists. For instance, H.L.A. Hart, drawing on Anthony Flew and Stanley Benn, defines "the standard or central case of 'punishment'" in terms of five elements,[336] which can be summarized as a "*hard treatment* intentionally inflicted on a person who has offended against a legal rule, by an authority constituted by the relevant legal system."[337] However, Igor Primoratz criticizes this definition for missing the "symbolic significance" of punishment as distinguished from mere penalties, such as a parking ticket. As a result, a more restrictive definition, as provided by Ashworth and Zedner, is that in addition to "the intentional imposition of hard treatment on the offender for the offence," a punitive measure must also involve "the *censure* of an offender for an offence."[338] Namely, this reprobate or condemnatory

[336] "(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," see *Punishment and Responsibility*, 4-5.

[337] Igor Primoratz, "Punishment as Language," *Philosophy* 64, no. 248 (1989): 187 [emphasis added].

[338] *Preventive Justice*, 14 [emphasis added].

character of punishment, by expressing the censure for the offender's crime through its imposition, distinguishes it from taxes or mere penalties.[339]

Furthermore, some penal theorists stress that what distinguishes punishment from other kinds of coercive imposition is that it is precisely *intended* to be burdensome.[340] In other words, the "aim" or "intention" of the authorities to burden the offender is also an indispensable element of punishment. According to the observation of Jan de Keijser, all authoritative definitions of punishment include this intended infliction of "hard treatment" for an offense.[341] However, whether the intention should also cover the element of "censure" is not so clear. Husak, who uses the terms "deprivation" and "stigma" to describe the two elements of "burden" and "reprobation," is among those who require both to be brought about intentionally.[342] According to him, the situations that State sanctions *happen to* impose deprivations and stigmatize their recipients are out of the scope of punishments. Therefore, although some State practices, such as involuntary confinement of the dangerous mentally ill, *knowingly* cause a stigmatizing deprivation, these sanctions differ from punishments because they lack a punitive *intention*.[343] If this even more restrictive requirement is considered, a conclusive definition of punishment could be made as "the imposition of something that is intended to be *both* burdensome *and* reprobative, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so."[344]

4.1.2 The "definitional stops"

With these dazzling definitions in mind, what Hart terms as the "definitional stop" may remind some penal theorists to ponder if there is an abuse of the definition of punishment in discussions of preventive detention. According to Hart:

> it would prevent us from investigating the very thing which modern scepticism most calls into question: namely *the rational and moral status* of our preference for a system

[339] Duff and Hoskins, "Legal Punishment," s. 1.

[340] *Ibid.* One can notice that "burden" is used as a more neutral term instead of "hard treatment" as pain or suffering, in case some penal theorists argue that punishment does not need to be "intrinsically bad."

[341] "Never Mind the Pain, It's a Measure!," 200. See, e.g. Hart as well as Ashworth and Zedner above; Ted Honderich, *Punishment: The Supposed Justifications* (Cambridge: Polity Press, 1989); and Nigel Walker, *Why Punish?*, An Opus Book (Oxford: Oxford University Press, 1991).

[342] "Lifting the Cloak," 1189.

[343] *Ibid.*

[344] Duff and Hoskins, "Legal Punishment," s. 1 [emphases added].

> of punishment under which measures painful to individuals are to be taken against them only when they have committed an offense.[345]

At that time, Hart was arguing against the "definitional stop" being used to prevent utilitarian rationales from giving an answer to the question of why the innocent should not be punished if it is justified by beneficial consequences. In other words, the consequentialists were blamed for stopping at the "conceptual" reply, according to which punishing the innocent is not an issue simply because punishment "is" only for an offense. According to Hart, such an argument is not persuasive at all, so long as it is based on a fallacy of defining punishment that excludes "[p]unishment of persons … who neither are in fact nor supposed to be offenders," which is one of his four "secondary cases" of punishment.[346]

If penal theorists cannot make the imprisonment of the innocent acceptable just by calling it "regulation" instead of "punishment,"[347] neither can they make the imprisonment of inmates who have already served their deserts acceptable just by calling it "preventive detention" instead of "punishment." Nevertheless, de Keijser notices that in discussions on the latter, there is another version of the "definitional stop." That is, due to the definitional division based on the *intentionality* of punishment, penal theorists are reluctant to examine "the rational and moral status" of preventive detention. Inasmuch as the preventive detention being discussed does not *intentionally* inflict burden and reprobation above commonly accepted notions of desert, and thus does not constitute a punishment, its deeper issues in relation to punishment are sidestepped.[348] Such a conceptual defence dispenses preventive detention too easily, not only with the deficiencies of its consequentialist justifications on normative grounds[349] but also with the procedural safeguards for punishment, such as the principle of legality, the prohibition of double jeopardy, and the presumption of innocence, as discussed in Section 2.1.

Furthermore, even if such a conceptual defence could be accepted, it is notoriously difficult to identify the content of intentions, especially when a collective entity like the State is involved.[350] For example, de Keijser argues that the hard treatment of preventive detention — at least to the level of suffering associated with ordinary imprisonment — is not at all accidental

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[345] *Punishment and Responsibility*, 5-6 [emphasis added].

[346] *Ibid.*

[347] Michael Corrado, "Punishment and the Wild Beast of Prey: The Problem of Preventive Detention," *Journal of Criminal Law and Criminology* 86, no. 3 (1996): 781.

[348] de Keijser, "Never Mind the Pain, It's a Measure!," 200.

[349] Husak, "Lifting the Cloak," 1186.

[350] *Ibid.*, 1189-90. Whether a State or a collective entity could have "mental states" such as intention is another philosophical question that should be dealt with by those who insist punishment must be intended.

or unforeseen, so long as it is the exact result of a deliberate decision by the court.[351] Moreover, if punishment is defined neutrally as a "deprivation," it is even harder to argue that preventive "detention" is not an intentional deprivation of physical liberty. In other words, though preventive detention may have a *purpose* other than burden or deprivation, the infliction of burden or deprivation must be *intentional* to reach that purpose.[352] Not to mention that the mental suffering of its detainees could be more serious than that of the prisoners because of its "indefinite" character and the difficulties associated with offering material alleviation or compensation due to the practical reasons mentioned in Section 3.3.

Then, the only way to hide behind the "definitional stop" is probably to insist that preventive detention has no intention of "reprobation" or "censure." Nevertheless, this element is a dubious legacy of the penal debate between retribution and deterrence, so long as it excludes the possibility of a purely "incapacitative" punishment or a purely "reformative" punishment. Moreover, even with the strictest definition in mind, this thesis already demonstrates in Section 3.2 that preventive detention can still be conceptualized as a punishment of such under retributivism or consequentialism. Therefore, punishment and preventive detention are not as conceptually distinguishable as some penal theorists believe. Briefly speaking, inasmuch as preventive detention is a mode of *State coercion* aimed exactly at the *prevention of future crimes*, the philosophical controversies over the definition of punishment should not exclude it from the same normative field as punishment.[353]

4.1.3 Decisions from the CCPR and the ECtHR

Under the human rights regime, the "legal" definition of punishment is not only "conceptual" but also "normative." This is because relevant issues often happen in cases where applications of procedural safeguards for criminal proceedings were seriously debated. As mentioned in Section 2.1, the principle of legality, the prohibition of double jeopardy, and the right to a fair trial require either that Sate coercions be *penal* in their characters or that more protections be provided in *criminal* trials. Therefore, whether and how a case could resort to these procedural rights is dependent on the interpretations of the statutory terms, such as "punishment," "penalty," "criminal," etc. Of course, when answering the question of whether preventive detention *is* a punishment or not, different schemes of preventive detention may have very different conditions and thus no single answer can suffice for all cases. Still, the jurisprudence for human rights can provide us with some useful guidance to discern between in which circumstances preventive detention would fall into the category of punishment and in which it would not.

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[351] "Never Mind the Pain, It's a Measure!," 200.

[352] *Ibid.*

[353] Duff and Hoskins, "Legal Punishment," s. 8.

Instead of being preoccupied with the ambiguous intentions of States, human rights authorities have comprehensively evaluated the qualification of preventive detention schemes according to multiple factors, such as purpose, character, nature, procedure, severity, etc.

At the universal level, questions of whether a preventive detention scheme amounts to a "punitive" sanction exist mostly in cases concerning "post-sentence preventive detention." For example, in *Fardon* and *Tillman,* the Australian government argued that "the *purpose* of these schemes is not to indefinitely detain serious sex offenders, but rather to ensure as far as possible that their release into the community occurs in a way that is safe and respectful of the needs of both the community, and the offenders themselves."[354] Nevertheless, the CCPR still found both Fardon's and Tillman's "continued incarceration[s] under the same prison regime[s] as [preventive] detention … amounted, in substance, to a fresh term of imprisonment,"[355] which "is penal in *character*," and "can only be imposed on conviction for an offence in the same proceedings in which the offence is tried."[356] In other words, based on the mere fact that the preventive detentions at issue took place consecutively in the same prison premises, the CCPR confirmed that the "character" of those schemes was still "penal imprisonment," which already overwhelmed their preventive "purpose."

In terms of the ECHR, although preventive detention was not considered a "punishment" but rather a "measure" under Germany's twin-track system of criminal law,[357] the ECtHR still concluded in *M.* that it was to be qualified as a "penalty" for the purposes of Article 7.1. Like the views of the CCPR in *Fardon* and *Tillman*, the ECtHR also noted that persons subjected to preventive detention were held in prison, albeit in separate wings.[358] In addition, the ECtHR observed that the measure against M. appeared to "be among the most *severe* — if not the most severe — which may be imposed under the German Criminal Code," as a court had to find that there was no danger that a preventive detainee would commit further offences before he/she could be released.[359] This is virtually a difficult condition to fulfill. As in the case of M., his continued preventive detention had been more than three times the length of his original prison

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[354] McSherry, *Managing Fear*, 182 [emphasis added].

[355] *Fardon* and *Tillman,* para. 7.4(1).

[356] *Ibid.*, para. 7.4(2) [emphasis added].

[357] Such characterization under domestic law was a factor to be weighed, but the ECtHR had to look "behind appearances," see *M.*, para. 133. The ECtHR has insisted that legislative labels alone are not determinative of whether a "measure" is in substance criminal or not since its plenary judgment of *Engel and Others*, para. 58.

[358] *M.*, para. 127. In the same paragraph, the ECtHR sternly added that "[m]inor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order."

[359] *Ibid.*, para. 132 [emphasis added].

sentence. Even though the "severity" of preventive detention "is not … in itself decisive,"[360] its importance in relation to Article 7.1 ECHR has been reaffirmed in *Glien v. Germany*.[361]

As mentioned, the rationale of preventive detention in Germany was changed after the BVG's decision in 2011. Only if the inmates were "persons of unsound mind," as set out in Article 5.1(e) ECHR, can preventive detention, if provided in a therapeutic environment,[362] be retrospectively prolonged or ordered. However, in *Bergmann*, the ECtHR found that preventive detention under this new legislative framework, *as a rule*, still constituted a "penalty."[363] This was because "[w]hen a trial court orders preventive detention together with punishment for an offence, the person concerned may well understand it as an additional punishment."[364] Furthermore, since this measure "can be imposed only if the person concerned was found guilty of several intentional criminal offences of certain gravity … [i]t clearly entails also a deterrent element, which is not eclipsed by the additional treatment measures in better material conditions of detention."[365] In addition, preventive detention "still remains among the most *severe* measures which may be imposed under the Criminal Code."[366] As a result, the ECtHR reached the conclusion that:

> the more preventive *nature* and *purpose* of the revised form of preventive detention [does] not suffice to eclipse the fact that the measure, which entails a deprivation of liberty without a maximum duration, was imposed following conviction for a criminal offence and it is still determined by courts belonging to the criminal justice system.[367]

However, the ECtHR's final application of Article 7.1 ECHR to Bergmann was such that "both the nature and the purpose of his preventive detention substantially changed and that the punitive element, and its connection with his criminal conviction, is eclipsed to such an extent that the measure is no longer to be classified as a penalty."[368] Such a diversion in "the present case" from its judgment of "the rule itself" is briefly explained by stating that Bergmann's preventive detention was "*extended* because of, and with a view to the need to treat his mental disorder."[369] Considering that the new criminal law of preventive detention as "the rule itself" also requires medical treatment, this reasoning by the ECtHR is not so clear. Nevertheless, it

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[360] *Ibid.*

[361] *Glien v. Germany* [2013], para. 129.

[362] Criminal Code 1998 of Germany, s. 66c.

[363] *Bergmann*, para. 181.

[364] *Ibid.*, para. 175.

[365] *Ibid.*

[366] *Ibid.*, para. 180 [emphasis added].

[367] *Ibid.*, para. 181 [emphases added].

[368] *Ibid.*, para. 182.

[369] *Ibid.* [emphasis added].

seems plausible to presume that such rationale may be based on the relationship between the preventive detention *at stake* and the offence for which it was ordered. Because the causal link between Bergmann's initial imprisonment and his preventive detention was broken, his status as a "mentally ill" detainee was no longer a result of his conviction for a "criminal offence." This distinction, on the other hand, may also imply that "indefinite sentences," including those following extra orders made *at the stage of sentencing*, cannot easily shake off their nature as "punishment" by simply turning their focus to "treatment" *at the stage of its implementation* when their main justification is still under Article 5.1(a) ECHR.

4.2 The four legitimate penological grounds for detention under the human rights regime

As stated by the Grand Chamber of the ECtHR in *Vinter and Others*, "[i]t is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention."[370] Here, the intentional usage of "detention" instead of "imprisonment" may imply a broader application than that within the scope of (a strictly defined) "punishment." This implication is further supported by another statement in the same decision. Namely, "even if the requirements of *punishment* and *deterrence* were to be fulfilled, it would still be possible that [the prisoners] could continue to be detained on grounds of *dangerousness*."[371] In other words, the "legitimate penological grounds" can be invoked to serve towards the case of "indefinite sentence," even when the punitive "tariff" was over. Furthermore, inasmuch as this "judicial" decision reaffirms the ability of consequentialist rationales to justify not only punitive but also non-punitive detention in "theory," there is no reason why they cannot become grounds for "post-sentence preventive detention" as well. In the jurisprudence of the ECtHR, apart from retribution, the grounds have been recognized as: deterrence, incapacitation, and rehabilitation. Each allows for or even supports the full recognition of detainees' rights at the stages of sentencing and its implementation.[372]

4.2.1 Retribution and deterrence

As the first legitimate penological ground for detention, retribution refers to the punishment of a person who is guilty in accordance with his/her offense. This "desert-based" punishment, as mentioned in Section 3.1, must be proportionate to the seriousness of the offence and the

[370] *Vinter and Others*, para. 111.

[371] *Ibid.*, para. 131 [emphases added].

[372] Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: Oxford University Press, 2009), 80.

culpability of the offender assessed at the stage of sentencing.[373] While some serious offenses are under scrutiny, the only "proportionate" disposition for the offenders is to take away their "liberty" as a punishment instead of other relatively minor deprivations.[374] Thus, at the stage of implementation, retribution should be completely fulfilled by the deprivation of liberty *in and of itself*, so long as people "come to prison *as* a punishment, not *for* punishment."[375] In the salient words of Michel Foucault, the essence of the prison is primarily based on the simple form of "deprivation of liberty" in a society where "liberty is a good that belongs to all in the same way and to which each individual is attached by a 'universal and constant' feeling."[376] Apart from this, no additional pains may be imposed on the prisoner and only a minimal interference with the fundamental rights and freedoms of the prisoners is legitimate.[377]

As for the rationale of deterrence, it is rather from a consequentialist theory that the majority of people, as *homo economicus*, would "rationally" base their decisions on foreseeable consequences in their daily lives. In other words, they would be deterred from doing something simply because they have evaluated and foreseen that the adverse outcomes would be (much) greater than the beneficial ones. Following this logic, the best way to deter people from committing a crime is to make the punishment as "adverse" as necessary. In the context of detention, this conclusion presumes that a person who attempts to commit an offence should be able to foresee a future of imprisonment for a period of time that is long enough to deter him/her from committing that offence (again). As mentioned in Section 3.1, such a penological ground can be part of general or special preventive objectives. Nevertheless, empirical research has shown that deterrence is irrelevant to many "irrational" or "impulsive" offences.[378] As for other offences, it is more the reiteration of legal norms themselves, as well as the certainty and the speed of reactions, rather than the length or the condition of imprisonments that reduces offending rates.[379]

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[373] *Ibid.*, 81.

[374] Andrew Coyle, *Understanding Prisons: Key Issues in Policy and Practice*, ed. Mike Maguire, Crime and Justice (Maidenhead: Open University Press, 2005), 12.

[375] S.K. Ruck, ed. *Paterson on Prisons: The Collected Papers of Sir Alexander Paterson*, 1st ed. (London: Frederick Muller, 1951), 13 [emphases added].

[376] *Discipline and Punish: The Birth of the Prison* [Surveils a Punir: Naissance de la Prison], trans. Alan Sheridan, Social Theory (New York: Vintage Books, 1979), 232.

[377] van Zyl Smit and Snacken, *Principles of European Prison Law and Policy*, 81. See also *Dickson v. the U.K.* [2007], the separate concurring opinion of Judge Bratza.

[378] *Ibid.*, 82. See also Robinson and Darley, "The Role of Deterrence in the Formulation of Criminal Law Rules."

[379] See, e.g. Deryck Beyleveld, "Deterrence Research and Deterrence Policies," in *Principled Sentencing*, ed. Andrew von Hirsch and Andrew Ashworth (Boston: Northeastern University Press, 1992); and Andrew von Hirsch, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford: Hart, 1999).

Under the human rights regime, it is noticed that "deterrence," as a legitimate penological ground for "punitive detention," is often connected with the ground of "retribution." For example, in *V. v. the U.K.*, like *Vinter and Others*, the Grand Chamber of the ECtHR confirmed that "[a]ccording to English law and practice, juveniles sentenced to detention during Her Majesty's pleasure must initially serve a period of detention, 'the tariff,' to satisfy the requirements of retribution *and* deterrence."[380] Although in this case, the initial decision of a fifteen-year tariff had been quashed by the House of Lords and thus no new tariff had yet been set,[381] the ECtHR nevertheless assumed V.'s six-year detention after his conviction was served for both purposes. This is due to a judgment that V. had "not yet reached the stage in his sentence where he is able to have the continued lawfulness of his detention reviewed with regard to the question of dangerousness."[382] Yet the ECtHR did not convey its reason for such judgment and thus left "the length of punitive detention," justified by retribution and deterrence, to be determined by the domestic courts.

The attitude of the ECtHR towards the relationship between retribution and deterrence may indicate its position as a limited consequentialist who insists that punishment, as a cost-effective means, must be side-constrained by proportionate desert. To the ECtHR, *both* retribution and deterrence are legitimate penological grounds for the punitive "tariff" of "indefinite detention," even though it did not move forward to illustrate their meanings and functions. Regardless, at the stage of sentence *implementation*, by detaining the perpetrator as a *fait accompli* in order to deter him/her from committing another crime after release, the deterrence mentioned in *V.* is more significant to its special preventive objective. As for the objective of general deterrence, the ECtHR recognized it in other decisions, when the objective began to be effective as early as the stage of *sentencing* or *legislation*. Since *X and Y v. the Netherlands*,[383] "criminal-law provisions" have been constantly invoked by the ECtHR as a "positive obligation" of States to effectively deter threats against the right to life under Article 2,[384] or the right to respect for private life under Article 8.[385] Inasmuch as such deterrence aims to have an effect "before" any offences occur, it is instead targeting the "potential" offenders.

4.2.2 Incapacitation and rehabilitation

[380] *V.*, para. 96 [emphasis added].
[381] *Ibid.*, para. 93.
[382] *Ibid.*, para. 99 [emphasis added].
[383] *X and Y v. the Netherlands* [1985], para. 26.
[384] See, e.g. *Osman*, para. 115.
[385] See, e.g. *M.C. v. Bulgaria* [2003], para. 150.

How does detention achieve the purpose of "public protection"? The most straightforward and popular answer might be to send people who are considered "dangerous" to isolated places where they cannot harm anyone outside the walls.[386] In the concise words of Ruth Morris, "[m]any people go to sleep at night *imagining* that prisons are protecting them."[387] The fact that imprisonment can decrease the public fear of potential harm also reflects that incapacitation is not only a "ground" for detention but also a "practice" of detention. However, in an extreme rationale for incapacitation, there is an implication that the more dangerous people are imprisoned and the longer their terms of imprisonment are, the more protected the public feels.[388] This may result to overcrowding prisons and institutions for detention, especially when detention is dependent on the problematic delimitation of "dangerousness" or "risk," which, as reviewed in Section 3.4, at present or for the immediate future cannot be solved by any scientific measure. Not to mention that under such a regime, prolonged detention further enhances the "prisonization" or "institutionalization" of detainees, which makes their reintegration into society even more arduous.[389]

However, as mentioned in Chapter 2, the ECtHR accepted *incapacitation* of dangerous offenders as a legitimate penological ground for detention in the case of "indefinite sentence," as long as periodic access to a court to review the necessity of continued detention is provided.[390] Yet such detention for "social protection" could become illegitimate if release were made impossible because of the effects of the way in which it is implemented.[391] In other words, the ground of "incapacitation" should always be accompanied by the ground of "rehabilitation," which is seen as a reintegration process that must help prisoners reduce their dangerousness. This connection between the two grounds is confirmed by the ECtHR in *James, Wells and Lee v. the U.K.* — a prominent case concerning the Imprisonment for Public Protection ("IPP") in England and Wales. The IPP came into force in 2005 as a typical "indefinite sentence," where the potentially dangerous offenders were held until the Parole Board determined that their risks were sufficiently reduced and that their post-tariff detentions were "no longer necessary for the

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[386] Coyle, *Understanding Prisons*, 17.

[387] *Penal Abolition, the Practical Choice: A Practical Manual on Penal Abolition* (Canadian Scholars' Press, 1995), 27 [emphasis added].

[388] This is merely an issue of "feeling," so long as empirical evidence does not support that higher incarceration rates provide higher safety for or a lower crime rate against the public.

[389] Thomas Mathiesen, *Prison on Trial* (Waterside Press, 2008), 47-48. The term "prisonization" is coined by Donald Clemmer as "the taking on, in greater or lesser degree, of the folkways, mores, customs, and general culture of the penitentiary" by inmates, see *The Prison Community* (New York: Holt, Rinehart and Winston, 1958), 299.

[390] *Weeks*, paras. 47 and 58. Although the ECtHR did not use the term "incapacitation" directly, it cannot not disguise that the purpose of such detention is to segregate the dangerous offenders from the public, so that the former becomes harmless to the latter.

[391] van Zyl Smit and Snacken, *Principles of European Prison Law and Policy*, 83.

protection of the public." [392] In only seven years, the number of IPP prisoners had become more than 6,500, while less than 4 per cent of post-tariff detainees had been released.[393]

Apart from the controversies over its attachment to low-tariff sentences, its reliance on actuarial risk-assessment instruments, and its obscurity about the gravity of prospective harm required, the most serious failing of the IPP was its lack of resources for rehabilitative programs.[394] In *James, Wells and Lee*, the ECtHR concluded that "*rehabilitation* is a necessary element of any part of the detention which is to be justified solely by reference to *public protection*,"[395] because "any review of dangerousness which took place in the absence of the completion of relevant treatment courses was likely to be an empty exercise."[396] As a result, inasmuch as the applicants "had no realistic chance of making objective progress towards a real reduction or elimination of the risk they posed,"[397] the ECtHR found that the period of post-tariff detention served by the applicants was "arbitrary and therefore unlawful within the meaning of Article 5 § 1 ECHR."[398] This judgment pressed the U.K. government to totally abolish the IPP under the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in 2012.[399]

As a legitimate penological ground for detention, the meaning of "rehabilitation" does not include using disproportionate and invasive treatments to "reform" them or to "cure" their criminal propensities. Originally, according to its Latin and French roots, rehabilitation denoted "return to competence."[400] Here, it is preferably used as a concept of "social reintegration." This is best defined as "the opportunities to participate in all aspects of social life which are necessary to enable persons to lead a life in accordance with human dignity."[401] Edgardo Rotman goes even further to argue that, in its most advanced formulations, rehabilitation has attained the status of a "right" for the prisoners to have those opportunities.[402] In this regard, rehabilitation is clearly not an excuse for the extension of detention or for exceeding the limitations of the Rule of Law. Rather, it should be provided as an improved environment that

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[392] Crime (Sentences) Act 1997 of the U.K., s. 28(6).

[393] Ashworth and Zedner, *Preventive Justice*, 158-59.

[394] *Ibid.*

[395] *James, Wells and Lee*, para. 209 [emphases added].

[396] *Ibid.*, para. 212.

[397] *Ibid.*, para. 220.

[398] *Ibid.*, para. 221.

[399] Ashworth and Zedner, *Preventive Justice*, 160. They nevertheless criticize that the continuing plight of those already held was not addressed by the new act.

[400] Mathiesen, *Prison on Trial*, 27.

[401] van Zyl Smit and Snacken, *Principles of European Prison Law and Policy*, 83.

[402] "Beyond Punishment," in *A Reader on Punishment*, ed. R. Antony Duff and David Garland, Oxford Readings in Socio-Legal Studies (Oxford: Oxford University Press, 1994), 286.

is conducive to social reintegration, or even within a non-institutional background that allows these former offenders to be a part of the society. In fact, it is only *in* the society that their rehabilitation is most fully realized.[403] Such conception of rehabilitation is not only in line with Article 10.3 ICCPR, but it has also been referred to by European human rights authorities since the 1990s.

By considering the scope of Article 8 ECHR, the European Commission of Human Rights ("EComHR") first expressed that the right to respect for prisoners' private life "requires [States] to assist prisoners as far as possible to create and sustain ties with people outside prison in order to promote prisoners' social rehabilitation."[404] In several reports, the CPT further described the importance of having reasonably good contact with the outside world and, more specifically, of relationships with family and close friends, for the social rehabilitation of prisoners.[405] The Grand Chamber of the ECtHR, in *Dickson v. the U.K.*, also noticed such increasing emphasis on "rehabilitation" in European penal policy, which is positively based on "the idea of re-socialisation through the fostering of personal responsibility."[406] Moreover, even in "the early days of a sentence, when the emphasis may be on punishment and retribution," the "progression principle" should be followed. By following this principle, a prisoner can move progressively through the prison system "to the latter stages, when the emphasis should be on preparation for release."[407] This principle implies that "rehabilitation" should function throughout the course of serving a sentence, even though the need for it at a later stage will be even more imperative.[408]

4.3 Moral agency as an essential core of liberty

4.3.1 From the Kantian means principle

> *So act that you use humanity, whether in your person or in another, always at the same time as an end, never merely as a means.*[409]

As mentioned in Section 3.1, even the side-constrained consequentialism, which clearly protects the "innocent," has to answer the question of why the rights or moral standing of the

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[403] *Ibid.*

[404] *Wakefield v. the U.K.* [1990].

[405] See, e.g. *Armenia: Visit 2002*, para. 145; and *Czech Republic: Visit 2006*, para. 87.

[406] *Dickson*, para. 28.

[407] *Ibid.*

[408] See also *James, Wells and Lee*, para. 220.

[409] Immanuel Kant, *Groundwork of the Metaphysics of Morals* [Grundlegung zur Metaphysik der Sitten], trans. Mary J. Gregor, Cambridge Texts in the History of Philosophy (Cambridge: Cambridge University Press, 1998), 429.

"guilty," as "rational and responsible agents," are dismissed when they are punished "merely as a means" to further the ends, such as deterrence, incapacitation, or rehabilitation.[410] Even if the question could be plausibly answered, whether the answers can directly apply to preventive detention is still questionable, especially when it is constructed as an extra burden, if not a punishment, *beyond* desert. This orthodox doubt is based on the Kantian normative principle that treating another *merely* as a means (or *just* using another) is typically wrong.[411] Though this principle is admittedly unclear in its implications, Victor Tadros is among those who comprehensively formulate it as a negative rule of moral philosophy. He further explains that "whilst it may be permissible to pursue the good where this will have, as one of its side effects, some lesser harm to others, it is not permissible to pursue the good where others will be used as a means to achieve that good."[412] Based on this general idea, he illustrates two versions of the means principle — i.e. the Doctrine of Double Effect and the Doctrine of Productive Purity.

The difference between these two views is that the first doctrine claims the permissibility of an act depends on the "intention" with which it is done, while the second doctrine claims "causal relations," as mind-independent facts, are all that matter to permissibility.[413] To use the well-known Trolley Problem as an example, the Doctrine of Double Effect alleges that it is wrong to *intend* to kill one person to save five but it is not wrong to save five, *foreseeing* that the act of saving the five will result in the death of the one. Rather, the Doctrine of Productive Purity holds that we should focus on the causal relations between the death of the one person and the death of the five.[414] In other words, it is wrong to push a fat man onto the track, because "the causal path by which the saving of lives is brought about runs through the unconsented-to use of a person's body," [415] and thus the fat man's body is the means by which the five are saved. On the other hand, changing the direction of the trolley or lowering the drawbridge are not ways of "using" the one trapped or passing by, as long as the result of his/her death is irrelevant to the causal path of the saving of five.

In determining whether preventive detention uses convicted inmates as a *mere means* to pursue consequentialist *ends*, this thesis seconds the opinion of Larry Alexander that "[a]ctors' mental states can affect their culpability but not whether their acts are morally permissible."[416] This is

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[410] Murphy, "Marxism and Retribution," 219.

[411] Samuel J. Kerstein, *How to Treat Persons* (Oxford: Oxford University Press, 2013), 53.

[412] Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law*, Oxford Legal Philosophy (Oxford: Oxford University Press, 2011), 114.

[413] *Ibid.*, 116.

[414] *Ibid.*

[415] Larry Alexander, "The Means Principle," in *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore*, ed. Kimberly Kessler Ferzan and Stephen J. Morse (Oxford University Press, 2016), 253.

[416] *Ibid.*, 251.

not only due to that the identification of the "mental state" of States, as argued in Section 4.1, is problematic, but also because the true "intention," even of an individual actor, is nearly impossible to be discerned when he/she has "foreseen" the harmful result.[417] As Professor Huang states:

> In fact, many factors are taken into account when one does something. There may be some factors that will prompt him/her to do one thing (or choose to do something), and some other factors may cause him/her not to do one thing (or make other choices). Nonetheless, body language can help us understand the true intention of the agent, even his/her own intention that he/she did not realize. What an agent finally put into action is the choice he/she makes after his/her overall consideration. […] That is, the so-called "contrary to his/her intention" only refers to a single aspect of emotional contradiction to his/her intention, rather than the final contradiction to his/her intention.[418]

Therefore, an actor cannot give a defence that his/her pushing of the fat man was not intended to kill him, or that it was "contrary to his/her intention" to save five and thus does not violate the means principle. This defence, based on the intention-focused doctrine, is also intuitively implausible. Of course, one could plausibly conceptualize the Doctrine of Double Effect to include the Doctrine of Productive Purity, by claiming its expression to "intend to kill one person to save five" already presupposes that the killing of the fat man is a *causally necessary means* for saving the five. Then, an argument from a State that its intention is not to "indefinitely detain" the dangerous inmates but rather to "protect the society" is invalid under both doctrines, so long as its *usage of their humanity* must lie on the causal path to reach an end that is external to the humanity itself. Like the death of the fat man, it is hard to imagine that the detention authorized by "preventive detention" is only a side effect of its causal path to crime-prevention.

4.3.2 The relationships between responsibility, control, and prediction

Under such a formulation of the Kantian means principle, purely deterrent imprisonment and purely incapacitative detention of dangerous inmates beyond their deserts are both impermissible. The aims of these confinements, to *simply* cow them into obedience to authorities and to *simply* segregate them from the public in case they commit further crimes, are clearly not the ends of the inmates themselves. In order to reach these aims, the deprivation of their liberty is indispensable from the causal paths, therefore the inmates are treated as a *mere* means that are apathetic to their dignity or worth as a person.[419] On the contrary, if a State is

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[417] Huang, *The Basis of Criminal Law*, I, 477.

[418] *Ibid.*, 476.

[419] Murphy, "Marxism and Retribution," 218-19.

treating the inmates "as an end," with the respect due to them as rational and responsible agents, it must seek to modify their conduct by only offering them good and relevant reasons to modify their behavior for themselves.[420]

The response that a deterrent punishment is given to offer "prudential reasons" to refrain from crime is no longer valid in the context of preventive detention. This is because its "indefinite" character would pierce its rational veil and reveal its essence as a "brute language of self-interest."[421] If a State could indefinitely detain the inmates until they are reflectively deterred, it is not "offering" or "appealing" to them prudential reasons but is "threatening," or even "forcing," them to accept any reasons that it claims are prudential. It is also invalid to portray preventive detention as a species of "societal self-defence" that does not use the threats "merely as a means," as long as the element of "imminence" is not satisfied. As argued by Anthony Duff, although "[d]efensive force can be an appropriate response to another's attempted wrongdoing," it cannot "*incapacitate* her [or him] from *future* wrongdoing."[422] As a purely incapacitative detention, preventive detention "deprives her [or him] of the ability to determine her [or his] own conduct in the light of his [or her] grasp of reasons of action — an ability that is crucial to autonomous agency."[423]

Some consequentialists may then argue that because inmates who are dangerous enough to be preventively detained are not truly "rational and responsible agents," they have lost the status of "humanity," which guarantees that they will not be used as a mere means. In other words, their "autonomous agency" as normal human beings no longer exists once they are identified as dangerous "animals," or what Michael Corrado terms "wild beasts of prey."[424] However, apart from those who were not responsible for their actions because of a mental illness, the inmates subjected to preventive detention are "convicted" offenders who were considered by the court to be (partially) responsible. Inasmuch as the convictions entail that they can be justly held responsible for past criminal conduct, any denial of their moral standing as a "rational and responsible agent" is hardly compatible. As criticized by Stephen Morse:

> It is utterly paradoxical to claim that a sexually violent predator is sufficiently responsible to deserve the stigma and punishment of criminal incarceration, but that the predator is not sufficiently responsible to be permitted the usual freedom from involuntary civil commitment that even very predictably dangerous but responsible

[420] Duff and Hoskins, "Legal Punishment," s. 6.

[421] Duff, *Punishment, Communication, and Community*, 79.

[422] *Ibid.*, 78.

[423] *Ibid.*

[424] "Punishment and the Wild Beast of Prey," 778.

> agents retain because our society wishes to maximise the liberty and dignity of all citizens. Even if the standards for responsibility in the two systems need not be symmetrical, it is difficult to imagine what adequate conception of justice would justify blaming and punishing an agent too irresponsible to be left at large. Our society must decide whether sexually violent predators are mad or bad and respond accordingly.[425]

Despite this, the consequentialists can still argue that the "standards for responsibility" in criminal and civil systems are nevertheless asymmetrical. Though preventive detainees are legally competent people who were held responsible for their acts or omissions *at the time of commission*, they do not reach the moral standing as a "rational and responsible agent," so long as they are incapable of controlling their dangerous violent or sexual impulses *at the time of risk assessment*. Lippke further illustrates how the different "standards for responsibility" can be distinguished by resorting to two different "moral controls" of "rational and responsible agents."[426] On the one hand, the primary moral control requires agents to be able to discern and properly weigh moral considerations in the myriad-choice situations they confront and guide their conduct according to their judgments of what such considerations require of them. On the other hand, the secondary moral control requires agents to be capable of understanding the importance of primary moral control and taking the steps necessary to acquire or maintain that control over their actions. In line with this illustration, it is suggested that preventive detainees may have *only* secondary moral control over their conduct, which already makes them responsible offenders who are not eligible for involuntary civil commitment.[427]

However, Lippke also doubts whether many of those dangerous offenders (e.g. terrorists, psychopaths, sexual predators, or hardened criminals) even have secondary moral control at all. Unlike drunk drivers who can recognize themselves as dangerous and concede that their danger is indefensible when they are sober, these offenders are more likely to keep rationalizing their dangerousness, blaming others for it, or attempting to pass it off as not reprehensible at all.[428] Even worse, "it seems more plausible to believe that most dangerous offenders were never very accomplished moral beings to begin with."[429] If this were the case, then the State should deem them as "mad" rather than "bad" promptly at the trial, otherwise there is a violation of the principle of culpability. Preventive detention should *only* be reserved for those who, *at one point in their lives*, were robustly motivated by moral considerations but were not moved by them at the time of commission *as well as* assessment. Namely, they are only *presumed* to have

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[425] "Fear of Danger, Flight from Culpability," *Psychology, Public Policy, and Law* 4, no. 1-2 (1998): 258-59.

[426] "No Easy Way Out," 395.

[427] *Ibid.*, 400.

[428] *Ibid.*, 401.

[429] *Ibid.*, 399.

secondary moral control when being convicted, but they do not *actually* regain control during the period of punishment, according to a strong prediction of them harming others.

If such a portrayal of preventive detainees is correct, the risk assessment should be positioned as an auxiliary tool for the State to detect whether they require *treatment* or *management* as a more suitable alternative to *imprisonment*. While the latter is a proven failure, the former is better designed to help them retrieve their moral standing as "rational and responsible agents." The assessment should never be constructed as a decisive machine that dictates their liberty in order to purely deter or incapacitate them from committing further crimes against others. As Morse argues, though perfect or almost perfect predictability is not necessarily inconsistent with responsibility, purely preventive detention threatens to dehumanize the detainees. This is because it treats them as if they were simply dangerous animals, rather than "autonomous moral agent[s]."[430] Such conflicts between the behavioral prediction and the moral standing of inmates can become more serious when the accuracy of the former is unavoidably pursued by considering many static factors that the inmates cannot control. Regardless, the "moral agency" should be recognized as an essential core of liberty and should be fully *respected*, or otherwise *cultivated* if it can no longer be found in a human being.

4.3.3 An individualized spectrum from retribution to rehabilitation

Morse later characterizes SVP provisions in the U.S. as being reliant upon "a strange hybrid of desert/disease jurisprudence."[431] Even though the offenders have a mental disorder that can cause them to be dangerous, they are responsible enough to be held liable for an offence because their capacity is not reduced to the extent of being held criminally insane. Inspired by such characterization of the deposition of those dangerous inmates, this thesis develops its own theory of their indefinite detention. Namely, in order to treat dangerous inmates as an *end* rather than a *mere means*, their detention can only be grounded on "an individualized spectrum from retribution to rehabilitation" throughout the implementation of their punishment *and* preventive detention. This is so even when the latter can no longer be considered punitive. Inasmuch as "desert" is reserved for "rational and responsible agents," criminal punishment is restricted to those who not only committed crimes but who were also *culpable* for their crimes. Nevertheless, the importance of rehabilitative programs will gradually increase during the implementation of a retributive sentence, because the existence of their secondary moral control is simply a presumption made at trial and such a presumption will be gradually diluted if they continue to be deemed dangerous.

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[430] Morse, "Blame and Danger," 151. See also Slobogin, "Prevention as the Primary Goal of Sentencing," 1169.

[431] "Protecting Liberty and Autonomy: Desert/Disease Jurisprudence," *ibid.*: 1096.

One might doubt that if rehabilitation is a consequentialist rationale, then in what way it can avoid violating the Kantian means principle. However, as defined in Section 4.2, rehabilitation does not include those purely "reformative" punishments that aim to modify offenders' dispositions so they willingly obey the law in the future, or treatments of them as objects to be re-formed by whatever efficient techniques a State can find.[432] Rather, as a "right" to social reintegration, rehabilitation is meant to treat dangerous inmates as either *presumed* or *potential* "rational and responsible agents" through punishment or treatment, respectively. In order to appeal to such agents, rehabilitation can offer not only prudential reasons but also *incentives* for them to *autonomously* refrain from crime when they are not sufficiently moved by the law's moral appeal. In other words, its aim is an internal end of the inmates' humanity or moral agency, even though the external public can share the end as a follow-up effect. As a result, their spectra, from retribution to rehabilitation, must be "individualized" or "tailored" according to their different mental situations and needs for psychiatric services.

What is more, inasmuch as their imprisonment or detention is considered punitive, the main ground to deprive the inmates' liberty is still retribution (and deterrence). After all, a rehabilitation-oriented punishment does not use or treat dangerous inmates *merely* as a means, as long as it is still *within* desert. Therefore, after a proportionate punishment is exhausted, a purely "rehabilitative" system can only support necessary "treatment" or "management" for the sake of the inmates' reintegration into society. In the point of view of this thesis, this is also the inherent reason why the ECtHR has been insisting that "post-sentence preventive detention" must be subject to those of "unsound mind" and carried out in a therapeutic environment. Putting aside the "inherent problem" of discrimination against persons with disabilities in Article 5.1(e) ECHR, such a system should nevertheless bear in mind that the longer "institutionalized" treatment or management strictly deprives the detainees' liberty, the more difficult it will be for them to truly fulfill the end of rehabilitation.

4.3.4 Prohibition of preventive detention based solely on deterrence or incapacitation as an absolute right

As James Griffin states, human rights should be understood as "resistant to trade-offs, but not too resistant."[433] Yet even though the right to liberty is not absolute, this thesis still argues that the (potential of) moral agency, as an essential core of liberty, is exactly what Kant referred to as "humanity" that cannot be traded off by any cost-effective means. This argument is also in accordance with the role of "human rights," which Griffin defines as — to protect people's

[432] Duff and Hoskins, "Legal Punishment," s. 6.

[433] *On Human Rights* (Oxford: Oxford University Press, 2010), 30.

ability to form, revise, and pursue conceptions of a worthwhile life — a capacity that he variously refers to as "autonomy," "normative agency," and "personhood."[434] Since human beings "are not only intentional animals [but] also reflective animals," it is their "whole activity, the unstopping succession of desire and fulfilment, to be itself sometimes leading to what is neither trivial nor a mere means" that characterizes their ends.[435] Such characterization of the Kantian "humanity" or "moral agency" is put forward, not so much as a description but as a *proposal*, as the best way of giving human rights unity, coherence, and even limits.[436]

To the extent that Griffin sees human rights as fundamentally moral rights, this thesis believes that preventive detention for the sole purposes of deterrence or incapacitation is a violation of the Kantian means principle, and thus an interference of the core of their right to liberty. Such an interference cannot be plausibly justified without resorting to *self-ends* desert or social-reintegration. When compared to the case law demonstrated in the last section, such theorization of their punitive and preventive detention based on an "individualized spectrum from retribution to rehabilitation" is, at least in Europe, in line with current human rights jurisprudence. Although deterrence and incapacitation are also recognized as legitimate penological grounds for detention by the ECtHR — presumably to offset the drawbacks from the institution of criminal justice in a real world[437] — they are approved with the condition of either retribution or rehabilitation. As a result, this thesis further argues that under the human rights regime, the prohibition of preventive detention based solely on deterrence or incapacitation has already been (implicitly) recognized as an absolute (legal) right. Thus, without the grounds of retribution or rehabilitation, preventive detention would become arbitrary.

4.3.4.1 Desert as a "justification" as well as a "limitation" of indefinite sentences

Based on this theory and the interpretation of relevant human rights jurisprudence, in the case of "indefinite sentence," including those following extra orders made *at the time of sentencing*, retribution (and deterrence) should be the main *justification(s)* for the imposition of a "punitive" tariff. However, since dangerous inmates who are subject to "indefinite" detention are only *presumed* to be "rational and responsible agents" at the time of sentencing, the rehabilitative efforts are indispensable during this period.[438] When the tariff is ending and the post-tariff

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[434] James W. Nickel, "Human Rights," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Metaphysics Research Lab, Stanford University, 2017), s. 2.2.

[435] Griffin, *On Human Rights*, 116-17.

[436] Nickel, "Human Rights," s. 2.2.

[437] Husak, "Lifting the Cloak," 1201. They are also what Griffin views as "practicalities" as "a second ground" of human rights, which give the rights safety margins and consulting facts about human nature and the nature of society, see *On Human Rights*, 37-39.

[438] See, e.g. *James, Wells and Lee*, paras. 220-21.

detention that is dependent on the risk assessment is about to be served, the requirement of rehabilitation becomes even more pressing. This is not only because the early presumption of the dangerous inmates as "rational and responsible agents" is becoming weaker, but is also to offer them a "realistic chance of making objective progress" towards parole or release.[439] Therefore, its original focus on retribution (and deterrence) should be gradually shifted to their reintegration into society, which will last for the whole imposition of "post-tariff detention."[440]

However, different from "post-sentence preventive detention," the period of "post-tariff detention," though no longer being "positively" justified by retribution, should be "negatively" limited to proportionate desert, so long as it is still considered as a punishment or penalty.[441] In other words, as a penal "sentence" or measure ordered "at the time of sentencing," the only appropriate condition to warrant making it "indefinite" is one that the offender *deserves* to be detained indefinitely as a proportionate response to his/her crime and guilt. This condition would require its attachment to the most serious offences, which preclude the legislation and imposition of "low-tariff indefinite sentences" that have less offense gravity and blameworthiness. In the latter situation, the period of their "post-tariff detention," even with a forward-looking aim of "incapacitation" or "social protection," should be determinate rather than indeterminate according to the "negative" constraint of backward-looking desert. It is definitely "arbitrary" to claim that a minor offender is just *as dangerous as* a major one and thus deserves the same indefinite disposition.[442]

4.3.4.2 A "treatment-oriented" post-sentence preventive detention

In cases of "post-sentence preventive detention," including those have been *retrospectively ordered or prolonged*, the only way to sustain their legitimacy is to transform their nature into non-punitive measure or civil commitment.[443] This could be done only when dangerous inmates are no longer presumed as "rational and responsible agents" to have secondary moral control. The "standard for responsibility" of such detention should have no difference with the imposition of those of "unsound mind,"[444] as both of them are *purely* justified by rehabilitation

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[439] *Ibid.*

[440] *Ibid.*, para. 209.

[441] See, e.g. *M.*, para. 130.

[442] Of course, if one only considers the risk of future harm, it is possible to find that, for example, a terrorist who bombed a car without harming anyone is as dangerous as a terrorist who blew up ten people. However, such consideration should be limited to their different deserts, otherwise it becomes arbitrary.

[443] See, e.g. *Bergmann*, para. 133.

[444] In its leading case of *Winterwerp*, the ECtHR held that "[t]he very nature of what has to be established before the competent national authority — that is, a true mental disorder — calls for objective medical expertise. Further,

as well as incapacitation. Therefore, a therapeutic environment should be provided first. This will help ensure that the "prolonged detention" will not diminish the inmates' human dignity.[445] In addition, along with such provision, a fair and constant review procedure should be granted. This will help ensure that any "compulsory treatment" is proportionate to the conditions and risks presented by the inmates. Moreover, as a "treatment-oriented" detention, it should be based on the consideration that the detainees are nevertheless *potential* "rational and responsible agents." As a result, disproportionate and invasive treatments that defy their autonomy or moral agency are strictly prohibited. Regardless, when there are conflicts between their social reintegration and the public protection, the former should always prevail over the latter.

4.4 Conclusion

In order to fill the gap between human rights law and penal theories, the scope of legal punishment or penalty should be emancipated from its conceptual definitions and moderately expanded in consideration of the liberty or rights at stake. It is also by taking such a step that the four legitimate penological grounds for detention could be incorporated in a sound discourse of human rights. Moreover, by using the Kantian "moral agency" as the normative basis of human rights, this chapter sets a limit for the "Preventive State" to inflict "indefinite sentences" and "post-sentence preventive detention" upon convicted inmates who are reasonably considered dangerous. This framework has demonstrated its potential for developing into practical preventive detention schemes because it can be morally justified in accordance with current international human rights jurisprudence. In other words, based on the "moral agency" derivative from the Kantian means principle, the interdisciplinary justification proposed by this chapter is comprehensive enough to bridge the research gap between legal and philosophical analyses of preventive detention. Nevertheless, although this proposal of a preventive detention regime is rather "liberal," it is still provided for a "Preventive State," where "practicalities" being compromised with "the nature of society" is still at large.[446]

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the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder," para. 39.

[445] *M.S. v. the U.K.* [2012], paras. 44-45.

[446] *Supra* note 437.

5 Conclusion

In this concluding chapter, this thesis draws together some of the most important themes explored in the previous chapters, while summarizing its own theory of limiting the usage of preventive detention. However, by comparing it with the most recent jurisprudence of the United Nations Committee on the Rights of Persons with Disabilities ("CmRPD"), this thesis further interrogates the intrinsic problem of preventive detention in specific relation to those of "unsound minds." In view of this, this thesis proposes that community-based supervision should substitute preventive detention and that a risk management authority should be established to serve as a main agent in the management and treatment of dangerous inmates, so that States could still fulfill their positive obligations to prevent harm without discrimination. At the end, this thesis is concluded with critical remarks against the populism and penal policies that hinder the reintegration of inmates into society in most countries.

5.1 Review and recommendations

5.1.1 Equal protection of dangerous inmates and persons with mental disabilities

As this thesis demonstrates in Chapter 2, (post-sentence) preventive detention has great legitimate concerns with procedural rights, the right to liberty, and the right against inhuman treatment or punishment under the human rights regime. This thesis also supports the jurisprudence of the ECtHR that confirms that other individuals' or community's "interests" under the right to life or the prohibition of torture cannot trump the "rights" of convicted inmates. Disregarding that a legal punishment by the State is to be justified by retributivist, consequentialist or mixed theories, there is no simple way to justify the use of preventive detention, either as a punishment or as a non-punitive confinement. Moreover, the empirical, intrinsic, and ethical problems of risk assessment directly make the consequential rationales of preventive detention untenable, or at least based on a shaky epistemic ground. Furthermore, inasmuch as "moral agency" is recognized as the essential core of liberty, preventive detention based solely on deterrence or incapacitation should be absolutely prohibited. As a result, it should be strictly limited either as an indefinite *punishment* that is the desert of the offender, or as a *treatment* or *management* if a mental illness is identified during the period of imprisonment.

However, even in this "liberal" proposal, one could still recognize discrimination against dangerous inmates and persons with mental disabilities from "normal" offenders and human beings. After all, within a "Preventive State," we have to admit that a real world composed of

"human nature" cannot assume a perfect practice of the Kantian means principle.[447] In an ideal world, or within a "Liberal State," on the other hand, there should be no gap between deserts as a "justification" and a "limitation" — once a retributive punishment is expired, then there should be no room for such *punishment* to serve any other external ends. There should be no room for the *detention* of persons with mental disabilities, either. In other words, to single out "presumed" and "potential" moral agents from others is an undeniable "trick" based on *proportional rights*.[448] Even only to a limited extent, the egalitarian dimensions of human rights, such as their universality and their character as equal rights to be enjoyed without discrimination, are traded off for the sake of the "ontological security" of citizenship.

Nevertheless, it should be noted that under the latest human rights development, especially at the universal level, the importance of these dimensions has gradually increased as new human rights conventions serve to provide *equal protection* for those "defective agents," such as the CRC and the CRPD. For example, regarding the right to liberty, Article 14.1(b) CRPD provides that: "States Parties shall ensure that persons with disabilities, on an equal basis with others … are not deprived of their liberty unlawfully or arbitrarily … and that *the existence of a disability shall in no case justify a deprivation of liberty* [emphasis added]." During its drafting, however, some States advocated for clarity in that any deprivation of liberty should not be "solely" based on disability,[449] yet the word was ultimately not included. As a result, the Office of the United Nations High Commissioner of Human Rights ("OHCHR") later confirmed that the legal grounds for detention "must be de-linked from the disability and neutrally defined so as to apply to *all persons* on an equal basis."[450] This point of view is reaffirmed in the Guidelines on Article 14 CRPD, which is adopted by the CmRPD in September 2015.

According to Paragraph 13 of the Guidelines, "[t]he involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty." This is exactly because:

> Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and others when they do not consent to and/or resist medical or therapeutic treatment. All persons, including those with disabilities, have a duty to

[447] Huang, *The Basis of Criminal Law*, I, 16.

[448] Nickel, "Human Rights," s. 2.2.

[449] Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.

[450] Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, para 49 [emphasis added].

> do no harm. Legal systems based on the rule of law have criminal and other laws in place to deal with the breach of this obligation. Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.[451]

Namely, neither incapacitation nor rehabilitation could positively justify the involuntary detention of persons with mental disabilities under the jurisprudence of the CmRPD. This is due to its "absolute prohibition of detention on the basis of impairment."[452] This is different from the approach of Article 5.1(e) ECHR, which allows for the detention of an "unsound mind" when other criteria such as "dangerousness" *or* "the need for treatment" coexist.[453]

5.1.2 From preventive detention to community-based supervision

If discrimination against dangerous inmates and persons with mental disabilities is to be recognized and eliminated, it could lead this thesis to conclude that the total abolishment of preventive detention is necessary. However, public fear of crimes as insecurity is not contemptible under the human rights regime. Rather, the connection between public security and protection provided for each and every individual from death or harm makes the former an important "interest" under this regime. This is because the latter specifically addresses the individualistic need for the "right to life" and the "prohibition of torture," which are both non-derogable rights.[454] In other words, when the interest is still in the whole individuals' safety in order to prevent being killed or tortured in a society (i.e. a "meta-accumulation" of millions of rights to life or rights against torture), the State does have a "positive obligation" to take measures that would possibly restrict some "freedoms" of those it reasonably considers as dangerous.[455] However, as argued in Section 2.4, inasmuch as this interest is simply a "political good," which does not reach the level to trump liberty as a "right," such restrictions can only be made to the extent that it would not amount to detention.[456]

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[451] Guidelines on Article 14 CRPD, para. 14.

[452] *Ibid.*, the heading of Section III.

[453] *Stanev v. Bulgaria* [2012], para. 146.

[454] Article 5 ICCPR and Article 15 ECHR.

[455] See, e.g. *Maiorano and Others*, para. 107.

[456] See, e.g. *Jendrowiak*, paras. 37-38.

Thus, to protect the public interest from being harmed by dangerous inmates who no longer deserve to be punished and by those with mental disabilities who no longer need or are suitable for compulsory treatments, the ultimate goal of a "Liberal State" is to substitute its current practice of "preventive detention" by "community-based supervision." This includes a comprehensive range of control techniques, such as license conditions, tagging, exclusions, registers, etc.[457] This alternative is not only in line with the "less invasive means" principle provided by the prohibition of arbitrary detention,[458] but is also compatible with the unfulfilled ground of "rehabilitation,"[459] which is better in non-institutional settings that allow the offender or patient to remain in society.[460] After all, the tensions between offenders and the community can only be reconciled in an accommodating environment through their "aftercare services." Nevertheless, in this scenario, the identity of individuals as former offenders or persons with mental disabilities is simply a *trigger*, instead of a justification, for the State to trade off their "freedom of movement" with the "ontological security" of citizenship. In other words, such a trade-off should be initiated *on an equal basis* with situations wherein a State can reasonably presume that other persons have the same level of risk.[461]

5.1.3 A risk management authority

Regardless of whether the proposal for the "Preventive State" or the "Liberal State" is to be adopted, the problem of the risk assessment should be dealt with, or at least relieved, for the best interest of those subjected to it. As mentioned in Section 3.4, instead of letting the court or the parole board rely on their "haphazard knowledge and entrenched prejudices" about dangerousness, it is more plausible to have decisions "informed by the testimony of experts" in the field of risk assessment.[462] Furthermore, this thesis proposes that a risk management authority should be established, so that the assessments and opinions provided to the decision-makers can be strictly focused on the *management* and *treatment* of dangerous inmates and persons with mental disabilities. As an independent public authority, it is composed of a group of forensic experts, including different types of expertise. In theory, this authority is more neutral than any expert the present court or parole board prefers and is more capable of creating

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[457] Carloine Logan, "Managing High-Risk Personality Disordered Offenders," in *Dangerous People: Policy, Prediction, and Practice*, ed. Bernadette McSherry and Patrick Keyzer (New York: Routledge, 2011), 238. Certainly, inasmuch as these techniques are still different modes of *State coercion*, they must be subject to the principle of legality, the principle of proportionality, and other procedural guarantees without doubt, see Article 12.3 ICCPR.

[458] See, e.g. *C.*, para. 8.2.

[459] See, e.g. *Fardon* and *Tillman* para. 7.4(4).

[460] Rotman, "Beyond Punishment," 286.

[461] See also General comment no. 27, para. 18.

[462] Appelbaum, "Ethics and Forensic Psychiatry," 198.

a statistical database that is appropriate to its own social context. In practice, since 2007 it has already been a crucial element in the Scottish approach to handling "high-risk offenders,"[463] which is divided into four stages:

- **risk assessment** utilizing structured professional judgment to identify risk and protective factors;
- **risk formulation** to analyze comprehensively violent behavior, and to identify predisposing, precipitating, and perpetuating factors;
- **scenario planning** to consider potential future events; and
- **risk management** to reduce the likelihood of an adverse event occurring and to minimize the severity of any such event.[464]

Since many high-risk offenders have a "personality disorder,"[465] it is by recognizing their needs for psychiatric services at an earlier stage and with proactive pre-release planning that the debate between punishment and treatment is no longer dichotomized. It is also noted that prisoners with mental disorders in Scotland are transferred to a psychiatric hospital much faster than those in England and Wales are.[466] These practices are also conforming to the theory of an "individualized" spectrum from retribution to rehabilitation that this thesis adopts. Of course, whether the Scottish approach has been "successful" still awaits to be examined, but it is observed by Lindsay Thomson that "the creation of the Risk Management Authority has led to greater clarity of thought and more consistent practice by mental health and criminal justice professionals on the assessment and management of risk."[467] That is to say, this authority, along with the Multi-Agency Public Protection Arrangements, has systematically engaged mental health professionals with their criminal justice colleagues in the assessment and management of high-risk offenders with complex needs, problem behaviors, and personality disorders.[468]

5.2 Concluding remarks: controlling insecurity as a populist demand after the abolishment of the death penalty

The public may easily agree with whatever harsh sanctions the State inflicts on offenders, as long as the offences they committed are considered "serious." However, such emotional judgment, even with bottom-up dynamism, does not make the State's reflective exercise of its

[463] Thomson, "The Role of Forensic Mental Health Services in Managing High-Risk Offenders," 169.

[464] *Ibid.*, 175 [emphases added]. The final stage of "risk management" involves "monitoring (surveillance techniques), supervision (direct control), treatment, and victim safety planning."

[465] *Ibid.*, 170.

[466] *Ibid.*, 177.

[467] *Ibid.*, 178.

[468] *Ibid.*, 181.

penal power morally or legally justifiable, as many have already demonstrated in the cases of the death penalty and the LWOP. Different from those who "deserve" to be executed (physically or socially), preventive detainees are indefinitely isolated from the society under the name of "security." Although their offences might have very different degrees of seriousness and blameworthiness, the same or even worse imposition applies to them in a social context where the fear of "good men" could trump whatever rights belong to a "bad guy." Namely, in an "era of insecurity," the source of the public desire to hang or socially exclude "the Other" is substituted by fear, which owns no more rationality than the original resentment against death row inmates. Moreover, the targeting of convicted inmates in a preventive detention regime is still implicitly accentuated by the intense emotion for what they have done in the past, even after they have already served what they deserve.

However, by claiming that preventive detention is not part of the defined punishment or penalty, relevant political agendas no longer need to be restricted by the penal principles, such as "culpability," "proportionality," and "parsimony," as well as the procedural guarantees provided for criminal offenders, or at least to the same level. Therefore, conspired by the media and popular culture, the politicians can easily use them as a powerful tool to gain political currency from the populist demand of controlling insecurity. Substantially, this is a win-win strategy for both the public and politicians to recover their loss from the abolishment of the death penalty and the LWOP. Furthermore, covered by a scientific cloak of "risk assessment," the implementation of such populism no longer appears "capricious, despotic, imperious, tyrannical or uncontrolled,"[469] while all the false positives who sacrifice their liberty and social lives for the sake of public security are necessary "evils." After all, forensic scientists are allowed to be optimistic to reach the behavioral certainty of dangerous inmates but not to treat their personality disorders. Inasmuch as such public "illusion" of security is sustained by using inmates merely as a means, any punitive or rehabilitative system is simply a disguise for social exclusion and thus doomed to failure.

[469] Draft International Covenants on Human Rights, para. 49.

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