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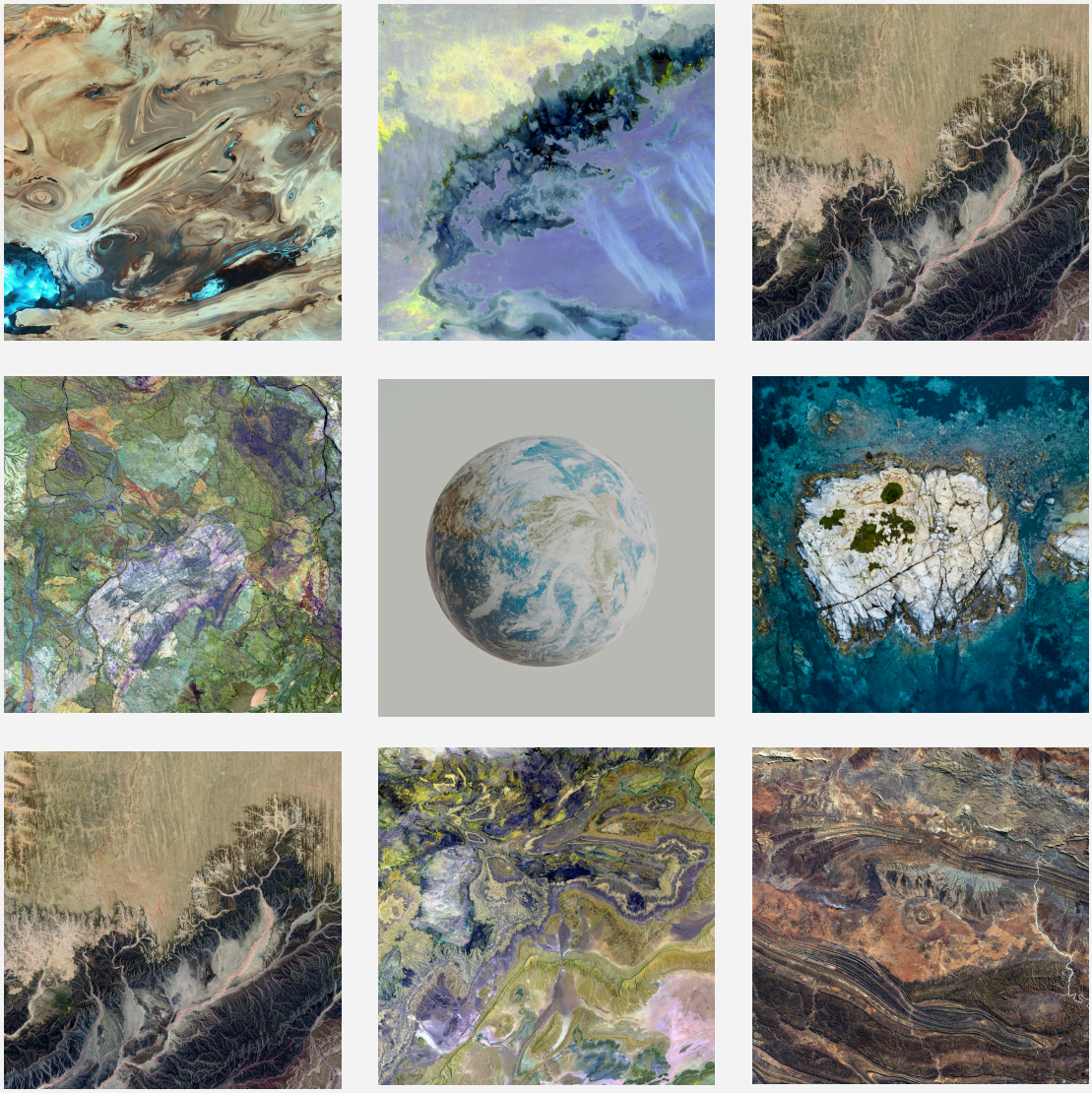

CONTEMPORARY CHALLENGES

THE GLOBAL CRIME, JUSTICE AND SECURITY JOURNAL

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Foreword from Academic Sponsor

It is a somewhat sad destiny of disciplines that study social problems that their success and development are to some extent related to the breadth and seriousness of social issues that exist in the society. ‘Contemporary Challenges’ is a good example of this: every new volume offers a glimpse into how much worse the world has become in just one year. Had a reader of the last year’s volume went to a year-long sleep and woken up just in time to read this year’s volume, they would probably stand in awe and horror of the challenges that we face today, many of which are discussed in this eloquent, imaginative and carefully curated issue.

And although the current times are often filled with hopelessness and desperation – because we, the citizens of the world, feel that we can and should do more, but we do not know how – the academic contributions to this volume are replete with ideas, suggestions and directions that may guide us (or at least guide our thinking) in the right direction. In each of the articles, the authors examine either a new phenomenon or an old event that was never properly recognized for what it was: the similarity between (most) articles is that they all indicate the increasing oppression, exclusion, control and rejection in the world. The topics include: the legitimacy of the new forms of killing (through the use of drones), the ability of zemiology to address the denial of harm, the need to acknowledge unrecognized forms of genocide, ways of tackling cyberwarfare, understanding how trust is established in the working of illicit markets, using a phycological lens to understand the success of surveillance, proposing the infusion of ‘Southern’ into ‘Northern’ criminology, examining proposed changes to the asylum system through a Foucauldian lens, arming robots to defend wounded persons, reducing the distance between ‘Northern’ and ‘Southern’ criminology, and – finally – examining judicial responses to crimes perpetrated by persons affiliated with the Islamic State.

This is an impressive, wide and multidisciplinary volume from which a reader can learn a great deal. It presents a successful culmination of the impressive work that journal editors, Ayma, Angel and Miles have done during the last academic year in compiling the issue, and the careful and engaged reviews provided by the article editors. Their joint commitment to this issue is an example of professionalism, collaboration and imagination.

Milena Tripkovic

Academic Sponsor
Senior Lecturer, Edinburgh Law School

Acknowledgement from Editor-in-Chief and Deputy-Editors-in-Chief

We are honoured to introduce Volume 5 of *Contemporary Challenges Journal.* The collective contributions in this issue explore diverse legal and criminological topics, with a common theme of examining how global and local contexts influence legal frameworks and practices.

Two articles focus on the limitations of dominant theories and systems, emphasizing the need for more inclusive approaches. They critique the dominance of Northern criminological theories and argue for the importance of Southern criminology, which brings local contexts into global discourse. Other articles address the intersection of law, technology, and warfare. One explores the use of social capital and reputation in illicit online markets, while another examines U.S. drone policy, questioning its adherence to international humanitarian law. The effectiveness of surveillance technology in crime prevention is also analyzed through psychological theories. Additionally, an analysis of the 2023 Common European Asylum System reform employs a Foucauldian lens, critiquing the securitization of migration. Lastly, discussions of prosecutorial strategies, cyber warfare, and the use of armed robots in conflict zones demonstrate how legal systems are adapting to modern challenges, from terrorism to technological advancements.

Many thanks are owed. The contributors to Volume 5 reflect a diverse and global cohort, with expertise spanning various areas of law, criminology, and social justice. As is tradition, many authors are University of Edinburgh students, but we are grateful for the participation of academics from around the world. Each article is penned by an author(s) deeply engaged with the subject matter they explore, and we are especially grateful for their enthusiasm and dedication, as most readily agreed to contribute despite the tight

deadlines. Their willingness to engage with the editorial process, including multiple rounds of revisions to ensure clarity and coherence, demonstrates their commitment to fostering thoughtful discourse. We hope their thoughtful contributions will leave readers with much to ponder and look forward to your future participation as an author, reviewer, or commentator.

We sincerely appreciate our article editors, all of whom are master's students at the University of Edinburgh Law School, for their close attention and valuable suggestions for revisions. Despite the demands of pursuing their degrees, they expertly balanced their academic commitments with the responsibility of peer-reviewing articles and ensuring objectivity throughout the process. As you move through these pages, please know that this volume is a product of their teamwork, attentiveness, and intellect.

CCJ's vision, to allow postgraduate students at Edinburgh Law School to publish legal research, would be unattainable were it not for the generosity of our sponsors. We would like to acknowledge the enthusiastic mentorship of Dr Milena Tripkovic and Dr Andy Aydin-Aitchison throughout this journey. Whenever we needed advice or direction on editorial decisions, their insight was always there to guide us. Warm thanks are due to Rebecca Wojturska as well, for her tireless efforts in maintaining the CCJ website and workflow which made the editorial process much smoother. We are also grateful to the Edinburgh Law School Postgraduate Office team for their assistance in allowing us to book teaching rooms and accommodate our large team for our meetings.

Ayma Naseem
Editor-in-Chief
LLM, International Law

Miles Ratcliffe and **Angel Shan**
Deputy Editors-in-Chief
LLM, Criminal Law and Criminal Justice / MSc Criminology and Criminal Justice

About the Journal

Contemporary Challenges was established with the aspiration to advance a multi-disciplinary approach to issues of global crime, justice and security that have traditionally been dealt with in compartmentalised academic fields. We believe that this has contributed to the formation of functional academic silos that are counterproductive when discerning responses to contemporary challenges. Our vision is for CCJ to serve as a platform for interdisciplinary debate that is of relevance to academics, policy makers and law enforcement officials alike. We hope that the journal will be a starting point for further discussion, research and collaboration across disciplines and professions.

Disclaimer:

The Editorial Board is responsible for the overall direction and editorial content of the journal. The publications featured in Volume 5 have been rigorously peer-reviewed, carefully quality-improved, and professionally selected by the editorial staff.

Whilst every effort has been made to ensure that the information contained in this journal is correct, the author(s) of each article appearing in this Journal is/are solely responsible for the content thereof. The views expressed in the Journal are those of the authors and do not necessarily reflect the views of the Editorial Board or Edinburgh Law School

Research Article

Analysing the U.S. Drone Program's Deployment of Armed Unmanned Aerial Vehicles (UAVs) for Targeted Killings Outside of National Boundaries

Amit Anand[1*] and Preethi Lolaksha Nagaveni[2*]

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Abstract

Following the 9/11 attacks, U.S. counterterrorism efforts have gradually shifted focus from Afghanistan to regions like Pakistan, Yemen, and Somalia. The deployment of armed drones in these areas to target al-Qaeda members and their affiliates has sparked a contentious international law debate. While the U.S. drone policy claims adherence to international targeting rules, the reality of operations in remote locations has led to numerous civilian casualties. With a rising toll of civilian deaths, challenges in distinguishing between combatants and non-combatants, and concerns about accountability in drone operations, the approach taken by U.S. policymakers may have misconstrued existing laws governing hostilities. The policy lacks clarity on the applicable legal framework and necessary constraints to prevent potential misuse of drone technology, fostering a perception that the U.S. administration consistently employs armed drones without transparency or accountability. Despite extensive literature on the 9/11 attacks and scholarly discussions on U.S. drone use, the

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alignment between rules governing targeting under international humanitarian law and the practical implementation of drone operations by the U.S. remains an area with limited examination in international law. Consequently, given issues related to civilian casualties, collateral damage, and potential violations of humanitarian law principles, it becomes crucial to evaluate whether U.S. targeting practices violate the law of armed conflict.

Keywords drones • distinction • targeting • proportionality • United States

Introduction

It is no secret that the 9/11 attacks[3] have profoundly affected the laws and policies concerning counterterrorism measures in the United States (the U.S.).[4] In the aftermath of the attack, the U.S. administration implemented a set of new measures and reforms to act against an enemy (al-Qaeda), which was responsible for the single largest attack on American soil.[5] The use of unmanned aerial vehicles (UAVs) or drones to win the war against al-Qaeda and its associated forces was one such measure adopted by the U.S. administration.[6] It is noteworthy that, following the events of 9/11, the Bush administration turned to the use of armed drones in order to target and kill members of al-Qaeda with successive American Presidents (President Obama being the first to institutionalise and normalise drones as weapons) having embraced the same policy

[3] "The 9/11 Terrorist Attacks," *Naval History and Heritage Command*, September 07, 2023, https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/sept-11-attack.html (accessed May 1, 2024) - On the morning of 11 September 2001, 19 terrorists from the Islamist extreme group al-Qaeda hijacked four commercial aircraft and crashed two of them into the North and South Towers of the World Trade Center complex in New York City. A third plane crashed into the Pentagon in Arlington, Virginia. After learning about the other attacks, passengers on the fourth hijacked plane, Flight 93, fought back, and the plane crashed into an empty field in western Pennsylvania about 20 minutes by air from Washington, D.C. The Twin Towers ultimately collapsed, due to the damage from the impacts and subsequent fires. Nearly 3,000 people were killed from 93 different countries. Most of the fatalities were from the attacks on the World Trade Center. The Pentagon lost 184 civilians and servicemembers and 40 people were killed on Flight 93. It was the worst attack on American soil since the Japanese attacked Pearl Harbor in 1941.

[4] Victor V. Ramraj, Michael Hor and Kent Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), 1.

[5] Ibid.

[6] Peter L. Bergen and Daniel Rothenberg, eds., *Drone Wars: Transforming Conflict, Law, and Policy* (Cambridge: Cambridge University Press, 2015), 254.

even more aggressively.[7]

While the Bush administration, in its attempt to battle terrorism, emphasised heavily on an international military campaign against al-Qaeda (Global War on Terror), the Obama administration particularly began by fighting a 'secretive war', relying on the use of armed drones to dismantle terrorist networks across the globe that pose a threat to American security.[8] Consequently, the increased use of drones, initiated by the Obama administration to target and destroy al-Qaeda and its associated forces, has been continued by subsequent administrations in response to global terrorism threats. This approach remains central to U.S. counterterrorism policy, despite recurrent criticism from various quarters regarding imprecise targeting and resulting civilian casualties.[9] As per a report published in the New York Times, it is alleged that there is a wider institutional acceptance of an inevitable collateral damage during drone strikes.[10] The available data is reflective of the acceptance of civilian casualties resulting from U.S. drone strikes on foreign soil. For instance, U.S. strikes in Afghanistan, Pakistan, Somalia, and Yemen from 2002 to 2020 killed between 10,000 and 17,000 people. Of these, between 800 and 1,750 are believed to have been civilians.[11]

The August 29, 2021, drone strike conducted by the Biden administration resulted in the death of 10 innocent people, including 7 children, in Kabul, Afghanistan. This incident has once again renewed the debate on drone warfare, underscoring the failure on the part of the U.S. to minimise the unintended consequences of its counterterrorism

[7] Alberto R. Gonzales, "Drones: The Power to Kill," *George Washington Law Review* 82, no. 1 (2013): 2.
[8] Michael J. Boyle, "The Costs and Consequences of Drone Warfare," *International Affairs* 89, no. 1 (2013): 2.

[9] Morris Davis, "The United States and International Humanitarian Law: Building it up, then tearing it down," *North Carolina Journal of International Law and Commercial Regulation* 39, no. 4 (2014): 17.

[10] Azmat Khan, "Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes," *New York Times*, December 18, 2021, https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html (accessed May 1, 2024).
[11] Sarah Kreps, Paul Lushenko and Shyam Raman, "Biden can reduce civilian casualties during US drone strikes. Here's how," *Brookings*, January 19, 2022, https://www.brookings.edu/articles/biden-can-reduce-civilian-casualties-during-us-drone-strikes-heres-how/ (accessed May 1, 2024).

policies, namely civilian casualties resulting from drone strikes.[12] Irrespective of the question on how many strikes have been made and where, drones remain the preferred choice when it comes to counterterrorism measures as they have been found to be very effective in lethally targeting enemies and hence have been used extensively over the years by the U.S.[13] Moreover, Obama's initial approach of supporting covert drone operations and use of drones for surveillance to destroy terrorist networks has been considered not only by members of his administration but also by his successors to be in compliance with both domestic and international laws.[14] The reliance on drones to lethally target and kill terrorists and terrorist suspects is often considered to be morally justified, on the grounds of cost effectiveness and safety of American troops.[15] As noted above, the U.S. administration has been deploying drones in Afghanistan, Pakistan, Yemen, and Somalia to kill terrorist suspects, although similar strikes have also been reported in other parts of the world.[16]

These drone operations are mostly run under the direct command of the Central Intelligence Agency (CIA) with little-to-no supervision by the U.S. Congress.[17] As a consequence, the secrecy surrounding the use of drones in warfare is one of many reasons which has given rise to a debate under both international human rights law and international humanitarian law.[18] Questions regarding the lawfulness of drone usage in combat situations, disputes over whether or not drone strikes are indiscriminate in

[12] Charlie Savage et al., "Newly declassified video shows US killing of 10 civilians in drone strike," *The Indian Express*, January 20, 2022, https://indianexpress.com/article/world/us-drone-strike-kabul-declassified-video-7732820/ (accessed May 1, 2024).
[13] Barack Obama, "Remarks by the President at the National Defense University," *National Defense University*, May 23, 2013, https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (accessed May 1, 2024).
[14] Harold Hongju Koh, "The Obama Administration and International Law," *Annual Meeting of the American Society of International Law*, March 25, 2010, https://2009-2017.state.gov/s/l/releases/remarks/139119.htm (accessed May 1, 2024).
[15] Boyle, "The Costs and Consequences of Drone Warfare," 2.
[16] Ibid.
[17] Boyle, "The Costs and Consequences of Drone Warfare," 2.

[18] Michael W. Lewis and Emily Crawford, "Drones and Distinction: How IHL encouraged the rise of drones," *Georgetown Journal of International Law* 44, no. 3 (2013): 1129.

nature (because of the number of collateral civilian casualties being reported by the media, non-governmental organisations etc.), transparency, and accountability pertaining to the decision-making process involved in carrying out strikes and issues relating to *jus ad bellum* are a number of grounds on which the drone program has often been challenged by its critics.[19]

Today, the U.S. has crossed geographical boundaries and travelled to remote territories of the world with the help of drones, to seek and destroy terrorists that threaten its security and other national interests. However, the move to incorporate drones as a tool in its counterterrorism operations has only brought criticism to the U.S. administration and its policies over the years.[20] The use/misuse of drone technology by the U.S. in its campaign against terrorism has raised profound questions related to international law, especially in the area of rules on targeting.[21] Nonetheless, as per the views of Former U.S. State Department Legal Adviser, Harold Koh, drone targeting practices are in full compliance with all applicable laws (principle of distinction, proportionality, etc.) and lethal operations conducted through the use of drones in remote locations has helped the U.S. in disrupting terrorist plots and dismantling core al-Qaeda networks.[22]

Despite the vast literature on the 9/11 attacks and the discussion amongst scholars on the use of drones by the U.S., the compatibility between the rules on targeting under international humanitarian law and the drone operations conducted by the U.S. remains an area which is less examined under international law.[23] Therefore, in light of issues such as civilian casualties, collateral damage, violation of international humanitarian law principles, etc., that pose a challenge to the legality of drone operations, it is necessary to examine whether or not the U.S. targeting practices are in violation of the law of armed conflict. This paper, therefore, presents an overview of the development of the U.S. drone program in the aftermath of the 9/11 attacks in the backdrop of the

[19] Ibid.
[20] Ryan J. Vogel, "Drone Warfare and Law of Armed Conflict," *Denver Journal of International Law and Policy* 39, no. 1 (2010): 102.
[21] Ibid.
[22] Koh, "The Obama Administration and International Law".
[23] Allen Buchanan & Robert O. Keohane, "Toward a Drone Accountability Regime," *Ethics & International Affairs* 29, no. 1 (2015): 19.

controversies resulting from the application and interpretation of the legal principles of *jus in bello* regarding the use of drones by the Bush and Obama administrations.

I. U.S. Drone Wars

A. Emergence of the Drone Warfare: Looking at the History of the Drone Program

The real transformation in the U.S. counterterrorism policy came immediately after 9/11, when the Bush administration authorised the CIA to use armed 'Predator' drones to target terrorists.[24] The Predator drone operates like an aeroplane which has the capability of flying in one place for hours offering surveillance and can be used to launch precision missiles to hit targets.[25] It is important to understand that the U.S. war against terrorism is mostly based upon the use of intelligence to target individuals who are scattered across many countries and in such a situation, the capabilities of the Predator drone have proven immensely useful to search and kill these individuals in remote corners of the world wherein deployment of troops has been either not possible or highly questionable.[26] Although the credit for developing the drone program as it exists today goes to the CIA, the origin of the program can be traced back to the Reagan administration.[27] As understood by Fuller, the current approach of the CIA towards counterterrorism measures only marks a return to a structure initially proposed by members like George W. Schultz (Secretary of State) and William J. Casey (Director of Central Intelligence) during the Reagan administration.[28] Both Schultz and Casey believed that terrorism could not be fought through debates and consultations. Instead, a move towards using force as a deterrent must be adopted. Schultz and Casey were of the view that the administration should consider going for pre-emptive or preventative

[24] Gregory S. McNeal, "Targeted Killing and Accountability," *Georgetown Law Journal* 102, no. 3 (2014): 693.
[25] Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 254.
[26] Ibid.
[27] Christopher J. Fuller, "The Eagle Comes Home to Roost: The Historical Origins of the CIA's Lethal Drone Program," *Intelligence and Security Law* 30, no. 6 (2014): 5.
[28] Ibid.

armed strikes against terrorists to prevent future terrorist acts.[29] However, it was only after the establishment of the CIA's Counter Terrorism Center (CTC) that the use of pre-emptive force and technology became a driving force in dealing with terrorist threats.[30]

It was only after 1986 that the idea proposed by Schultz and Casey started gathering attention when Duane Clarridge became the CTC's first director, who took it upon himself to bring a revolution within the CIA by pushing for offensive measures such as attacking terrorist safe havens preemptively.[31] However, Clarridge's attempt of developing a pilotless drone program that could allow drones to be loaded with rockets to strike on predetermined targets never became operational.[32] Notably, drones were only put to use for the purpose of battlefield surveillance during the late 80s and 90s. The idea to use armed drones to support intelligence operations was only put forward in late 2000 by Cofer Black (Head of the CIA's Counter Terrorism Center) and Richard Clarke (Chief Counter Terrorism Advisor for the National Security Council), after the Predator drone proved its effectiveness by providing conclusive evidence regarding the location of Osama bin Laden in Afghanistan.[33] After the Predator's successful mission in Afghanistan, the Air Force further modified the drone in early 2001 by adding laser guided missiles for improved targeting.[34] Regardless of the impact an advanced version of the Predator would have in locating and killing Osama bin Laden and other members of al-Qaeda, there was disbelief within the CIA itself vis-à-vis using armed drones in Afghanistan.[35] George Tenet (Head of CIA) questioned the use of drone technology for terminating terrorists by highlighting issues such as the CIA's right to use armed drones outside the control of the military, as well as authorisation and operation of the strikes.[36]

[29] Fuller, "The Eagle Comes Home to Roost," 8.
[30] Ibid.
[31] Fuller, "The Eagle Comes Home to Roost," 12.
[32] Ibid., 15.

[33] Brian Glyn Williams, "The CIA's Covert Predator Drone War in Pakistan, 2004-2010: The History of an Assassination Campaign," *Studies in Conflict and Terrorism* 33, no. 10 (2010): 872.

[34] Ibid., 873.
[35] Williams, "The CIA's Covert Predator Drone War in Pakistan, 2004-2010," 872.
[36] Ibid.

He ultimately argued that the CIA had no authority to undertake covert operations involving the use of lethal force.[37]

Following the events of 9/11, the armed version of the Predator was quickly put to use. Tenet himself proposed a response plan in which the Predator had a role of locating and killing Osama bin Laden and others. In only a week's time, there was a complete turnaround in Tenet's views over the militarised use of drones.[38] Tenet explained his position by stating that, 'now that we had been thrown onto a war footing, issues that had seemed intractable just days earlier suddenly seemed far less set in concrete.'[39] When President Bush supported the CIA drone strikes against members of al-Qaeda as part of the global war against terrorism with little or no debate on the merits of the program, the question of drone-associated risks hardly remained a concern among the people in his administration.[40] Moreover, the Authorisation for the Use of Military Force (AUMF), passed by the U.S. Congress, which authorised the President to use 'all necessary and appropriate force' against those whom he deemed responsible for the 9/11 attacks, further empowered the CIA to carry out lethal strikes against al-Qaeda.[41]

Taking into consideration the evolution of the drone program, the subsequent sections will now go on to discuss a major concern in relation to the use of drones, namely the issue pertaining to the decision-making process involved in selection of targets by focusing especially on personality strikes as well as signature strikes.

B. The Predator Effect: Making of Kill-List and the Issue of Accountability

Over the years, the Predator drone, in the hands of the CIA, has proved to be an indispensable tool for the U.S. administration in the fight against al-Qaeda, especially in responding to threats from terrorists who have established safe havens in remote

[37] Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 259.
[38] Ibid.
[39] Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 259.
[40] Ibid.
[41] The Authorization for Use of Military Force 2001, sec. 2.

territories of the world.[42] The unrestricted use of the drone technology by the CIA has provided the U.S. with a strategic advantage of greatly minimising the time-frame between identifying a potential threat which is located miles away and using deadly force against that particular threat.[43] However, the unrestrained manner in which drones have been used poses a serious challenge to international security and more importantly, presents a threat to the lives of people around the globe.[44]

It is alleged by sectors of the media and several NGOs that drone strikes conducted by the CIA in Pakistan and elsewhere have killed individuals who are neither part of al-Qaeda nor any militant group associated with al-Qaeda and its ideology.[45] Attacks on innocent civilians have thus raised several questions over the manner in which the U.S. determines which individuals are to be targeted; therefore, critics of the drone program continue to question the process involved in identifying members of non-state armed groups from innocent civilians.[46] The Human Rights Committee has raised concerns about the U.S.'s extraterritorial use of unmanned drones for counterterrorism due to a lack of transparency and accountability, particularly regarding the legal justification and civilian casualties.[47]

It should be noted that the Bush administration, within a year of the U.S. invasion of Afghanistan, realised that the war against al-Qaeda would require different tactics as

[42] Kenneth Anderson, "Targeted Killing in U.S. Counterterrorism Strategy and Law," *Counterterrorism and American Statutory Law, a Joint Project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution*, 2009, https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/AndersonCounterterrorismStrategy.pdf (accessed May 1, 2024).
[43] Ibid.
[44] United Nations General Assembly, "Extrajudicial, summary or arbitrary executions: note / by the Secretary-General, A/68/382," *United Nations*, September 13, 2013, https://www.refworld.org/docid/5280b2914.html (accessed May 1, 2024).

[45] Noam Lubell and Nathan Derejko, "A Global Battlefield? Drones and the Geographical Scope of Armed Conflict," *Journal of International Criminal Justice* 11, no. 1 (2013): 83.

[46] Ibid.
[47] United Nations Human Rights Committee, "Concluding observations on the fourth periodic report of the United States of America," *United Nations*, April 23, 2014, http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf (accessed May 1, 2024).

many of the top al-Qaeda leaders had fled the battleground in Afghanistan.[48] With no major military targets left in Afghanistan, the war on terror soon became an intelligence operation, wherein the CIA took upon itself the task of identifying and tracking down al-Qaeda leaders and their associate forces with the Predator drone (the CTC maintained a 'kill-list' for the purposes of tracking down and killing al-Qaeda's top officials).[49] The 2002 Yemen attack on Al-Harethi consequently became the first drone strike against al-Qaeda outside the zone of active fighting in Afghanistan.[50] However, the decision of the U.S. administration to target terrorists through drones subsequently raised a number of questions regarding the nation's counterterrorism policy, such as who can be targeted, who approves adding names to the 'kill-list,' and who is responsible for carrying out the strikes.[51]

It is argued that when the CIA authorises a strike, it does so by maintaining a 'kill-list' which contains the names of high value targets.[52] The names are added to the list through a bureaucratic process. Usually, high level intelligence information on an individual is required prior to adding a name to the list.[53] Once intelligence is gathered by various officials on a particular individual to add his name to the kill list, the collected data is updated and examined against the most current intelligence available. This is done to confirm whether or not the particular individual is still a part of an organised armed group.[54] After further validation takes place on the recommended names through a bureaucratic process, a team of senior officials, including top lawyers, deliberate upon the legal issues involved in going ahead with the strike.[55] If there are no objections to continuing with the strike, the decision to further recommend the names and seek approval from the President is made by the President's counterterrorism advisor. At this stage, targets are again evaluated to make sure that the information gathered is

[48] Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 262.
[49] Ibid.
[50] Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 262.
[51] McNeal, "Targeted Killing and Accountability," 702.
[52] Ibid.
[53] McNeal, "Targeted Killing and Accountability," 728.
[54] Ibid.
[55] McNeal, "Targeted Killing and Accountability," 729.

accurate, the selection procedure has been followed, and all relevant concerns have been brought forth for consideration.[56]

The U.S. administration has time and again argued that lethal drone strikes targeting al-Qaeda members are well within the framework of international law.[57] According to former CIA Director, John Brennan, the process of targeting is committed to 'ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to U.S. interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that innocent civilians will not be harmed; and, of course, engaging in additional review if the al-Qaeda terrorist is a U.S. citizen.'[58] On the issue of accountability and transparency, Brennan further commented that the U.S. administration is continuously working towards setting up high standards and institutionalising its approach in a more formal manner.[59]

However, to date, the U.S. administration has not made available to the public a set of formal guidelines which dictates its targeting policy in relation to drone strikes. Hence, in the absence of such a critical piece of information, it becomes difficult to analyse whether the U.S. drone strikes are compatible with international legal norms.[60] Even the document on 'written policy standards and procedures for the use of force in counterterrorism operations outside the United States and areas of active hostilities' fails to either provide a layout of the current targeting practices of the administration or justify them.[61] As a result, a substantial number of questions about accountability remain

[56] Ibid.
[57] Richard Jackson and Samuel Justin Sinclair, eds., *Contemporary Debates On Terrorism* (Routledge, 2012).
[58] John O. Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy," *International Security Studies*, April 30, 2012, http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy (accessed May 1, 2024).
[59] Ibid.
[60] McNeal, "Targeted Killing and Accountability," 703.
[61] The White House-Office of the Press Secretary, "Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities," *The White House*, May 23, 2013,

unanswered, such as the extent of bureaucratic accountability, who approves names on the kill-list, whether the President or officials authorise and oversee attacks, and the President's responsibility for civilian casualties.[62]

C. Moving from Personality Strikes to Signature Strikes

Following the success of personality strikes (kill-list strikes), the CIA persuaded President Bush during his second term to further expand the drone program and allow the CIA to target individuals (suspected terrorists) without knowing their identity.[63] These signature strikes 'target individuals on the basis of their observed pattern of behaviour, or signature, such as possession of explosives, travel to al-Qaeda compounds, or association with known militants.'[64] The U.S. has consistently justified conducting signature strikes in the Federally Administered Tribal Areas (FATA) of Pakistan, Yemen, and Afghanistan by arguing that such strikes are carried out on the basis of accurate intelligence, which indicates that the targeted persons' actions over a period of time had made it clear they were a threat.[65]

However, the difficulty in assessing the legality of the U.S. claim with reference to signature strikes still exists since the government has classified all information on specific signature strikes.[66] In addition, the U.S. position on categorisation of the conflict with al-Qaeda (non-international armed conflict) along with issues of abiding by the principles of distinction and proportionality further complicate the matter.[67] According to Heller, the U.S. considers at least 14 distinct signatures to be sufficient, in order to establish that a drone attack is lawful under international humanitarian law.[68] The 14 signatures are: (1) Planning attacks- The U.S. administration targets individuals (without

https://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism (accessed May 1, 2024).
[62] McNeal, "Targeted Killing and Accountability," 729.
[63] Kristina Benson, "Kill'em and Sort it Out Later: Signature Drone Strikes and International Humanitarian Law," *Pacific McGeorge Global Business & Development Law Journal* 27, no. 1 (2014): 18.
[64] Bergen and Rothenberg, eds. *Drone Wars: Transforming Conflict, Law, and Policy*, 267.
[65] Benson, "Kill'em and Sort it Out Later," 18.
[66] Ibid.
[67] Benson, "Kill'em and Sort it Out Later," 24.
[68] Kevin Jon Heller, "One Hell of a Killing Machine: Signature Strikes and International Law," *Journal of International Criminal Justice* 11, no. 1 (2013): 94.

knowing their identities) who plan an attack against the U.S.; (2) Transporting weapons- The U.S. administration also uses drones to target individuals transporting weapons; (3) Handling explosives- Signature strikes are carried out on individuals involved in handling of explosives; (4) Al-Qaeda compound- The U.S. attacks buildings that are owned or controlled for the purposes of military advantage by al-Qaeda; (5) Al-Qaeda training camp- Training camps are also the subject matter of drone strikes for the reason that they contribute towards military action, for example, providing recruits with skills that are useful during combat; (6) Military-age male in area of known terrorist activity- U.S. drone strikes have targeted individuals who are of military age and are present in an area where terrorists operate; (7) Consorting with known militants- The U.S. targets individuals who consort with known militants; (8) Armed men travelling in trucks in Al-Qaeda in the Arabian Peninsula controlled area- The U.S. targets armed men travelling in trucks in areas controlled by al-Qaeda; (9) 'Suspicious' camp in al-Qaeda controlled area- the U.S. with the help of drones has been targeting 'suspicious' camps/compounds in areas controlled by al-Qaeda; (10) Groups of armed men travelling towards conflict; (11) Operating an al-Qaeda training camp; (12) Training to join al-Qaeda; (13) Facilitators; and (14) Rest areas- The U.S. also considers rest areas (place where fighters rest) to be targetable.

It should be noted that the legality of a signature strike depends not only on the validity of the signature but also on the evidence which is capable of establishing that the targeted individual is exhibiting the particular signature behaviour.[69] In the absence of such evidence, the attacking State is required to presume that the person is a civilian.[70] As noted earlier, despite the information made available by the U.S. administration on drone usage and policy, the issue on targeting of individuals remains highly debatable. Because the information provided is incomplete and insufficient, it becomes difficult to reach a decision regarding the applicability of law to facts or intelligence claims.[71]

[69] Ibid.
[70] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 50 (1).
[71] Monika Hlavkova, "Reconstructing the Civilian/Combatant Divide: A Fresh Look at Targeting in Non-International Armed Conflict," *Journal of Conflict and Security Law* 19, no. 2 (2014): 265.

In light of the discussion above, it would not be incorrect to state that, over the last two decades, there has been an explosive growth in the use of drones by the U.S., and the same is likely to continue in the coming years.[72] Drones certainly have changed the character of modern warfare but at the same time have presented new challenges in terms of their use and regulation vis-à-vis rules and principles of international law to the international community.[73] The main issue here is that drone warfare still thrives in the abstract with attacks taking place thousands of miles away in remote territories on 'faceless' targets based on often questionable surveillance with most of the process being hidden away from public scrutiny in the name of national security. This also highlights several ethical issues affecting the current form of the drone program.[74]

In contemporary warfare, targeting non-state actors like insurgents and terrorists presents complex moral challenges. Unlike traditional warfare where combatants wear distinctive uniforms, many of these individuals blend into civilian populations, engaging in both combat and peaceful activities interchangeably.[75] Moreover, these groups often lack clear hierarchical structures, blurring the lines between political and military leadership. Adding to the complexity is the dual-use nature of many facilities and vehicles employed by these actors. These assets serve civilian purposes at one moment and are utilised for military activities the next, making it challenging to differentiate between legitimate targets and civilian infrastructure.[76] Unlike guerrilla fighters of the past, modern insurgents are deeply intertwined with civilian communities, making it extremely difficult, if not impossible, to separate combatants from non-combatants in certain contexts.[77] Governments grappling with insurgent warfare in the twenty-first century face a crucial ethical dilemma: how to effectively combat

[72] Stuart Casey-Maslen, "Pandora's box? Drone strikes under jus ad bellum, jus in bello and international human rights law," *International Review of the Red Cross* 94, no. 886 (2012): 598.
[73] Hlavkova, "Reconstructing the Civilian/Combatant Divide," 251.
[74] Nils Melzer, "Human Rights Implications of The Usage of Drones and Unmanned Robots in Warfare," *European Parliament's Subcommittee on Human Rights,* May, 2013, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET(2013)410220_EN.pdf (accessed May 1, 2024).
[75] Matthew Crosston, "Pandora's Presumption: Drones and the Problematic Ethics of Techno-War," *Journal of Strategic Security* 7, no. 4 (2014): 6.
[76] Ibid.
[77] Michael J. Boyle, "The legal and ethical implications of drone warfare," *The International Journal of Human Rights* 19, no. 2 (2015): 121.

non-state actors while upholding the principle of distinction between combatants and civilians.[78]

The Obama administration has acknowledged the above-mentioned challenges of identifying combatants in today's complex intra-state conflicts but has maintained that these difficulties should not hinder the use of drones for targeted killings.[79] They argued that drone technology enables operators to adhere to the principle of distinction by accurately distinguishing between combatants and civilians.[80] The administration claimed to prioritise distinction and proportionality, emphasising efforts to minimise civilian casualties and maintain proportionate responses in drone strikes compared to other military options. Ethically, the Obama administration argued that the drone program is humane, as it results in relatively few civilian deaths, which are considered under the principle of double effect due to the military necessity of the strikes.[81]

Having looked at some of the key features regarding the development of the U.S. policy on use of drones, Part II will address some of the core issues concerning the legal principles under international humanitarian law and their application and interpretation regarding the drone warfare which will also present a strong challenge to the ethical arguments in support of the usage of drone program.

II. Legality of Drone Warfare

A. Examining Drone Attacks, Casualties, and Policy under International Humanitarian Law

One of the major criticisms against the U.S. drone policy over the last two decades is related to the policy being violative of the principles of international humanitarian law.[82] However, successive U.S. administrations have continued not only to justify their

[78] Ibid.
[79] Koh, "The Obama Administration and International Law".
[80] Ibid.
[81] Boyle, "The legal and ethical implications of drone warfare," 122.
[82] Martin S Flaherty, "The Constitution Follows The Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards," *Harvard Journal of Law & Public Policy* 38, no. 1 (2015): 26.

counterterrorism policy but have also claimed that the use of lethal force and drone strikes are well within the ambit of principles of international humanitarian law.[83] In view of the discussion in Part I of this paper (including recent U.S. drone strikes), it is important to examine the legality of drone strikes within the framework of international humanitarian law, particularly the law on targeting (indiscriminate attacks, proportionality, precaution, and distinction) to ascertain the lawfulness of the strikes keeping in mind the protection of civilians.[84]

1. Indiscriminate Attacks

Although Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts 1977 (hereinafter, 'Additional Protocol II') does not define 'indiscriminate attacks', it is argued that the definition of this term under Article 51(4)(a) of Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts 1977 (hereinafter, 'Additional Protocol II') forms part of Additional Protocol II's Article 13(2).[85] Since the rule on indiscriminate attacks is applicable to both international and non-international armed conflicts, it is crucial that the State conducting an attack clearly distinguishes military objectives from civilians and civilian objects.[86] This rule is crucial because it is highly likely (as is evident from recent U.S. drone strikes reported by the media) that while attacking members of an armed group in a given area, if the rule is not followed there is a possibility of death of innocent civilians including the destruction of that entire area.[87]

[83] Koh, "The Obama Administration and International Law". See also, "US Democrats urge Biden to overhaul drone strike and lethal force policies," *Middle East Eye*, January 21, 2022, https://www.middleeasteye.net/news/us-democrats-urge-biden-overhaul-drone-strike-lethal-force-policy (accessed May 1, 2024).
[84] Shakeel Ahmad, "A Legal Assessment of the US Drone Strikes in Pakistan," *International Criminal Law Review* 13, no. 4 (2013): 925.
[85] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (4) (a).
[86] International Humanitarian Law Databases, "Customary IHL Database," *International Committee of the Red Cross*, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter3_rule12 (accessed May 1, 2024).
[87] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2014).

In relation to drone strikes conducted extraterritorially by the U.S., the criticism levelled is that such strikes have resulted in large numbers of civilian casualties, raising questions over the intelligence gathered for conducting such strikes particularly and questioning whether the possibility of conducting such strikes away from populated areas was even considered by the administration.[88] Successive U.S. administrations have nevertheless argued that drone operations are lawful under international humanitarian law because not only are drones a safer alternative to traditional warfare but their use extraterritorially has always adhered to 'procedure' which is extremely rigorous, claiming that the advancement in technology has helped in making targeting operations more precise.[89]

However, contrary to the above claim it is still not known publicly whether the U.S. requires 'evidence of targetability sufficient to rebut the presumption of civilian status that attaches under international humanitarian law to individuals and many kinds of objects.'[90] Further, as previously highlighted, the U.S. has been conducting drone strikes based on a number of signatures that are inconsistent with the rules on laws of war.[91] Furthermore, it is still unclear what safety protocols the administration has in place to minimise loss of civilian lives while conducting drone strikes on members of an armed group who often tend to use civilian population as a shield to carry out their operations.[92]

2. Proportionality

Like indiscriminate attacks, the principle of proportionality which is codified under Article 51(5)(b) of Additional Protocol I is also said to be part of Additional Protocol II and is applicable to all conflicts.[93] The drone program has been continuously referred to as a

[88] Buchanan & O. Keohane, "Toward a Drone Accountability Regime," 22.
[89] P.W. Singer, *Wired for War: The Robotics Revolution and Conflict in the Twenty-first Century* (Penguin Press, 2009).
[90] Ibid., 119.
[91] Heller, "One Hell of a Killing Machine," 97-103.
[92] Amos N. Guiora, "Determining a Legitimate Target: The Dilemma of the Decision-Maker," *Texas International Law Journal* 47, no. 2-3 (2012): 327.
[93] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (4) (a).

great asset to the U.S. counterterrorism policy since 9/11. Recently, President Biden has referred to the drone program as a vital part of his 'over the horizon' strategy to respond to terrorist threats. His strategy can be understood by his remarks made to mark the end of war in Afghanistan wherein he stated that: 'I firmly believe the best path to guard our safety and our security lies in a tough, unforgiving, targeted, precise strategy that goes after terror where it is today, not where it was two decades ago. That's what's in our national interest.'[94] Regardless of this claim that the current drone program is not only rigorous but is part of a precise strategy that also abides by the principles of proportionality in both the planning and execution of the strikes, the increased number of civilian casualties has raised considerable doubts over the overall success of the drone program.[95]

It must be taken into consideration that the determination of whether a particular drone strike has met the requirements of the principle of proportionality remains highly subjective in nature.[96] Factors such as genuine military advantage, loss of future opportunity to target a high-profile terrorist, and termination of hostilities not only influence the decision-making process but also play a significant role in deciding the legality of strikes that result either in heavy losses to the civilian population or major damage to civilian objects. Therefore, it is important that both aspects (for example proportionality and ensuing military advantage) are weighed in together to assess each drone strike.[97]

3. Precaution in planning and carrying out attacks

According to the International Committee of the Red Cross (ICRC), State practice establishes the precautionary principle as a customary international law norm applicable

[94] Joe Biden, "Remarks by President Biden on the End of the War in Afghanistan," *The White House*, August 31, 2021, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/ (accessed May 1, 2024).
[95] W.J. Hennigan, "A Tragic Mistake. Botched Drone Strike in Afghanistan Raises Concerns Over Biden's Counterterrorism Strategy," *Time*, September 17, 2021, https://time.com/6099377/afghanistan-drone-strike-counterterrorism/ (accessed May 1, 2024).
[96] J. Vogel, "Drone Warfare and Law of Armed Conflict," 127.
[97] Ibid.

in both international and non-international armed conflicts.[98] Reducing collateral damage is central to the rule of precaution; for example, the attacking State is required to only target legitimate objectives and not civilians.[99] Whether drone strikes strictly abide by the rule of precaution remains difficult to ascertain largely due to unavailability of information in the public domain on the process involved in making a 'kill-list'. Nevertheless, the U.S. administration has always claimed that great care is taken in selecting targets and most importantly in ensuring accuracy of the strikes to limit civilian casualties (this is made possible through monitoring the target via video feed from the drone right before the strike).[100] Further, due to advancement in technology the missiles launched from armed drones have a smaller blast radius thereby reducing the likelihood of harm to innocent civilians.[101]

Despite the accuracy of the missiles, considerable failings have undeniably occurred by the U.S. in the conducting of drone strikes.[102] Therefore, the question which drone technology presents before us is what constitutes 'all feasible precautions' and how this phrase is interpreted by the attacking State.[103] More importantly, can the surveillance and intelligence gathered be trusted when it comes to satisfying the principle of precaution given that no technology can be a reliable substitute for trained eyes on the ground.[104]

[98] Jean-Marie Henckaerts and Louise Doswald-Beck, "Customary International Humanitarian Law Volume I: Rules," *International Committee of the Red Cross*, 2005, https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf (accessed May 1, 2024). See also, Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 57 (1). – 'In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.'

[99] International Humanitarian Law Databases, "Customary IHL Database," *International Committee of the Red Cross*, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5_rule15 (accessed May 1, 2024).

[100] McNeal, "Targeted Killing and Accountability," 728-729.

[101] Casey-Maslen, "Pandora's box?," 607.

[102] Ibid., 533.

[103] Frederik Rose´n, "Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility," *Journal of Conflict and Security Law* 19, no. 1 (2014): 128.

[104] Ibid.

4. Distinction

Distinction is accepted as one of the fundamental principles of the law of armed conflict.[105] As per Article 48 Additional Protocol I, 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives.'[106] With respect to the law on targeting, it is vital that the principle of distinction is factored in for the lawful determination of the drone strike.[107] In other words, an individual may be lawfully targeted and killed based on their status category rather than an immediate perceived threat posed at that moment.[108] Under international armed conflict, the principle of distinction is therefore based upon the premise that an individual either falls into the category of a civilian or a combatant.[109] The term *combatant* is defined under Article 43 Additional Protocol I as an individual who is not allowed to take part in hostilities.[110] The term 'combatant', however, is not referred to in the rules concerning non-international armed conflict, and as a result, combatant privilege is not accorded to those who take up arms against the State.[111] *Civilian,* on the other hand, is defined negatively as all non-combatants.[112] However, in the context of non-international armed conflict, there is uncertainty regarding the classification of individuals as combatants or civilians. This uncertainty primarily stems from differing interpretations of the clause "unless and for such time as they take a direct part in hostilities" found in Article 51(3) of Additional Protocol I.[113] With regard to the rules on targeting, once a civilian takes active part in hostilities he/she can be

[105] International Humanitarian Law Databases, "Customary IHL Database," *International Committee of the Red Cross*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (accessed May 1, 2024).
[106] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 48.
[107] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford: Oxford University Press, 2011).
[108] Ibid.
[109] Michael N. Schmitt, "Deconstructing Direct Participation in Hostilities: The Constitutive Elements," *New York University Journal of International Law and Politics* 42, no. 3 (2010): 700.
[110] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 43 (2).
[111] Lubell, *Extraterritorial Use of Force Against Non-State Actors*, 136.
[112] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 50 (1).
[113] W. Lewis and Crawford, "Drones and Distinction," 1146.

lawfully targeted.[114] Nevertheless, States are mandated to comply with the principle of distinction when using force under international humanitarian law. For example, an attacking State can only target combatants or military objectives and not civilians or civilian objects, unless a civilian gives up the protected status by taking part in hostilities.[115] Referring back to the drone program, the main criticism against the U.S. has been its failure to prove that the strikes meet the requirement of distinction. For example, the drone program adequately distinguishes between civilian and military targets by also taking into consideration the loss of civilian protected status by direct participation.[116]

5. Use of Artificial Intelligence (A.I.) in the Drone Program and the Evolving Battlefield

In September 2023, the U.S. Deputy Defense Secretary Kathleen Hicks gave strong indications regarding the need to modernise the U.S. drone program particularly through the use of A.I.[117] This would be achieved by developing a number of lethal autonomous weapons systems relying on A.I. that could identify, track, and attack targets without any human intervention.[118] As noted in the above sections, even with human oversight, the use of drones has raised significant humanitarian and human rights concerns such as respect for national sovereignty and the respect for territorial integrity under international law, compliance with the principle of distinction under international humanitarian law, and the unintended collateral damage to non-combatants.[119] These concerns, though often raised by critics of the drone program, remain to be thoroughly addressed considering there is still no consensus on laying down clear procedures for

[114] Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), art. 51 (3).
[115] Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014).
[116] J. Vogel, "Drone Warfare and Law of Armed Conflict," 118.
[117] Sue Halpern, "A.I. and The Next Generation of Drone Warfare," *The New Yorker*, September 15, 2023, https://www.newyorker.com/news/news-desk/ai-and-the-next-generation-of-drone-warfare (accessed May 1, 2024).
[118] Brianna Rosen, "AI and the Future of Drone Warfare: Risks and Recommendations," *Just Security*, October 3, 2023, https://www.justsecurity.org/89033/ai-and-the-future-of-drone-warfare-risks-and-recommendations/ (accessed May 1, 2024).
[119] Rose´n, "Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility," 128.

authorising strikes. The use of A.I. within the drone program as an innovative step is said to bring a 'game-changing shift' in the way the U.S. fights wars. However, this new technological approach poses greater, if not similar, risks to non-combatants than the conventional drones of the past, especially due to complete automation.[120] Under conventional drone warfare, it is believed that the human-machine interaction at nearly every stage of targeting ensures that only properly vetted combatants are legitimate targets. The ethical and legal concern persists regarding how artificially intelligent drones will analyse intelligence data and generate a list of targets while minimising the potential for human operators to intervene.[121]

Considering these concerns, during the inaugural United Nations Security Council meeting on AI in July 2023, UN Secretary-General António Guterres suggested that states should implement a 'legally binding instrument within three years to ban autonomous weapons systems that operate without human control or oversight and cannot be used in accordance with international humanitarian law.'[122] Despite this initiative, several critical issues remain unresolved. These include determining the legal restrictions necessary to ensure autonomous weapons systems adhere to international humanitarian law. Additionally, ensuring consistent and reliable human oversight in future drone operations heavily reliant on A.I. for strike capabilities poses a significant challenge.

Conclusion

The primary issue highlighted in this paper is whether the U.S. counterterrorism policy allowing State authorities to target and kill suspected terrorists through the help of armed drones is justifiable considering the legal rules and principles applicable to conduct of armed operations. Today's global fight against terrorism heavily relies on

[120] Noah Robertson, "Replicator: An inside look at the Pentagon's ambitious drone program," *Defense News*, December 19, 2023, https://www.defensenews.com/pentagon/2023/12/19/replicator-an-inside-look-at-the-pentagons-ambitious-drone-program/ (accessed May 1, 2024).
[121] Ibid.
[122] David Adam, "Lethal AI weapons are here: how can we control them?," *Nature*, April 23, 2024, https://www.nature.com/articles/d41586-024-01029-0 (accessed May 1, 2024).

data analysis, where the distinction between combatants and civilians is determined by intelligence analysts operating remotely from the conflict zones. However, since data can be imperfect, errors may occur, potentially endangering the lives of innocent civilians. Moreover, issues like lack of adequate information about the target and the strike location raise fundamental questions on the legality and accountability of the drone operation. Yet, drone proponents have argued that because drones have greater surveillance ability and can also afford greater accuracy in operations than any other weapon, they can better prevent civilian casualties and injuries. This argument may be true to an extent, but it does not negate the fact that the accuracy factor in drone strikes still depends on human intelligence which can make mistakes. A greater concern highlighted in this paper is regarding the unregulated use of drones; for example, drones make it easier to kill without risking the lives of troops, therefore, policy makers and State authorities are more tempted to interpret the legal restrictions on who can be killed, and under what circumstances, too broadly. As detailed in this paper, the broad application of the law of armed conflict by the U.S. administration to justify covert drone operations is not only unjustified but also represents a misinterpretation of the relevant legal norms and principles.

Given that international humanitarian law imposes minimal procedural requirements beyond the obligation to take feasible precautions during military operations, the data-driven approach to combating global terrorism and concerns about accountability and misuse of drone technology underscore the need for the law to evolve to address the specifics of the U.S. drone program. In the absence of clarity on U.S. drone policy, it is required that the rules on targeting and identification of parties to the conflict are interpreted more comprehensively. To encourage this development, it is essential that the U.S. administration provides essential details about their targeting practices to the public. Furthermore, if upon scrutiny any of the standards and practices are found to be incompatible with existing laws, the U.S. should not include them as part of their counterterrorism policy. Finally, with the imminent deployment of A.I.-enabled drones on the battlefield, current regulations will likely prove inadequate unless existing laws and

standards evolve to accommodate the evolving practices of states engaged in extraterritorial drone warfare.

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Research Article

The Ciudad Juárez Fire: Zemiology's Expansion of a Criminological Analysis

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Abstract

The migrant detention centre fire in Ciudad Juárez, Mexico, on March 27, 2023, led to 40 deaths and 27 injuries. All those affected were migrants. Analysing this tragedy from a zemiological perspective demonstrates its usefulness in deepening and expanding our understanding of its implications. This is illustrated via three points of analysis. First, zemiology explores several important harms not captured from a criminological standpoint. A key harm in this case is cultural harm. Second, zemiology holds those not scrutinised by criminology's state-centred investigation responsible. This shines a light on the United States and Mexican governments' culpability for the fire. Finally, zemiology expands the definition of the victim. Survivors of the fire, as well as the broader migrant community, receive acknowledgement for their suffering. Finally, the implications for immigration policy are touched upon.

Keywords Ciudad Juárez fire • zemiology • cultural harm • government culpability • immigration policy

Introduction

In an overcrowded cell with little food or water, tension built as migrants detained in one of Mexico's Instituto Nacional de Migración's (INM) detention centres were desperate to know more about their deportation from the border town of Ciudad Juárez. It is alleged

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that two of these migrants, in an act of protest, set fire to their mattresses.[124] This quickly turned into a horror scene, as the highly flammable mattresses lit the centre ablaze, producing dangerous smoke. At the onset of the fire, it was reported that a top official of the INM ordered guards not to release the migrants.[125] Then, as the fire spread, guards fled the building as the migrants remained locked inside their cells, unable to escape.[126] The fire on March 27, 2023, resulted in the deaths of 40 migrants, with 27 more injured.[127] Almost all these men had come from Central America and Venezuela.[128] Most were fleeing violence and instability in their home countries, looking to the United States for greater economic and educational opportunities.[129]

In the wake of the fire, the Mexican Attorney General proceeded with criminal charges against ten individuals: the two migrants accused of starting the fire, six guards and lower-level officials from the INM, the INM's representative for the state of Chihuahua, and eventually, the head of the INM, Francisco Garduño. The Mexican government was to compensate the deceased's families an average of $70,000. Those who survived the fire were not recognised as victims under Mexican law.[130]

An analysis of the Ciudad Juárez fire from a zemiological perspective would demonstrate the discipline's ability to enhance and expand a traditional criminological examination. Zemiology, or the study of social harms, allows one to consider what some

[124] James Fredrick, "A Survivor Recalls Horrors of Mexico's Migrant Center Fire That Almost Killed Him," NPR, October 14, 2023, https://www.npr.org/2023/10/14/1203246684/mexico-migration-detention-fire-survivor.
[125] The Associated Press, "Arrest Orders Are Issued for 6 People in the Deadly Mexican Immigration Center Fire," NPR, March 31, 2023, https://www.npr.org/2023/03/31/1167393055/mexico-migrant-center-fire-arrests.
[126] Jose Luis Gonzalez, "At Least 39 Dead in Fire at Mexico Migrant Center near U.S. Border," *Reuters*, March 28, 2023, sec. Americas, https://www.reuters.com/world/americas/least-ten-dead-after-fire-migrant-facility-mexicos-ciudad-juarez-sources-2023-03-28/.
[127] Josiah Heyman and Jeremy Slack, "The Causes behind the Ciudad Juárez Migrant Detention Center Fire," NACLA, April 20, 2023, https://nacla.org/ciudad-juarez-migrant-shelter-fire.
[128] Maria Verza and Morgan Lee, "Migrants Start Fire at Mexico Detention Center, Killing 40," AP NEWS, March 28, 2023, https://apnews.com/article/mexico-fire-migrant-facility-dead-eea0b6efafd77f9868ef27ed1cf572b3.
[129] Gonzalez, "Mexico Border Fire."
[130] Frederick, "Survivor Recalls Horrors."

may regard as unconventional areas of destruction.[131] The field emerged as a response to traditional criminology's reliance on state-centred definitions of harm. Zemiologists critique the restricting and biased nature of criminology, opting for a broader consideration of harm.[132] However, zemiology should not only be understood as a critique of criminology. Rather, it has a greater impact when employed to enhance and expand the bounds of traditional criminology. A zemiological analysis identifies many different types of social harms beyond traditional considerations. While there is no exact definition, social harms can be thought of as denying individuals the conditions necessary for self-realisation.[133] They include physical, financial, psychological, and cultural/environmental harms.[134] This has implications for how we think of crimes – the injuries they cause, who the perpetrators are, and who we should look to support in the wake of such instances.

In relation to the Ciudad Juárez fire, zemiology's utility is demonstrated via three points of analysis. First, zemiology explores several important harms not captured from a criminological standpoint. A key harm in this case is cultural harm, which will be expanded on later.[135] Second, zemiology holds those not scrutinised by criminology's state-centred investigation 13 responsible. This shines a light on the United States and Mexican governments' culpability for the fire. Finally, zemiology expands the definition of the victim. Survivors of the fire, as well as the broader migrant community, receive acknowledgement for their suffering.

[131] Paddy Hillyard and Steve Tombs, "Social Harm and Zemiology," in The Oxford Handbook of Criminology, ed. Alison Liebling, Shadd Maruna, and Lesley McAra (Oxford, UK: Oxford University Press, 2017), 285, https://discovered.ed.ac.uk/permalink/44UOE_INST/110jsec/alma9924016739102466.
[132] Francesca Soliman, "States of Exception, Human Rights, and Social Harm: Towards a Border Zemiology," Theoretical Criminology 25, no. 2 (2021): 228-244, https://doi.org/10.1177/1362480619890069.
[133] Soliman, "States of Exception," 237-239.
[134] Hillyard and Tombs, "Social Harm and Zemiology," 289.
[135] Hillyard and Tombs, "Social Harm and Zemiology," 289.

Expanding Harm

While a criminological analysis uncovers violations of the law, zemiology illuminates many social harms resulting from the fire.[136] Of special importance would be the cultural harm associated with the fire. Cultural harms are those that harm a culture rather than solely an individual. They must be considered with reference to global North/South relations and the legacy of colonialism.[137] The conditions that the migrants in the Ciudad Juárez centre were held in and the actions during the fire send a clear message to migrants and their families. They are *disposable*.[138] Their lives were not worth protecting. The centres were already known to be dangerous to the livelihoods of the migrants within them. Leading up to the incident, concerns had been raised about the unsafe conditions and overcrowding of INM's detention centres.[139] The highly flammable mattresses that exacerbated the fire were known to be a danger. A similar fire involving the same mattresses killed 41 girls in a state-run youth home in Guatemala in 2017.[140] Just three years prior, migrants at another INM detention centre in Tenosique lit their sleeping pads on fire, killing one and injuring 14 others.[141] The Ciudad Juárez fire was, therefore, not an inconceivable phenomenon and could have been mitigated if the INM had acted with concern for the safety of its detainees. In failing to spend the time or money to address issues as simple as the sleeping arrangement of the migrants, the INM conveys the sentiment that these minor adjustments are worth more than the lives of the migrants.

The response during the fire is an even clearer manifestation of this attitude. When the fire first broke out, the guards were told to keep the migrants locked up inside. As the fire intensified, the guards in charge of the migrants fled, leaving the men trapped in the flames with no way of getting out. The men inside the centre were stripped of their

[136] Hillyard and Tombs, "Social Harm and Zemiology," 289.
[137] Edward J. Wright, "Decolonizing Zemiology: Outlining and Remedying the Blindness to (Post)Colonialism within the Study of Social Harm," *Critical Criminology* 31 (March 20, 2023): 134, https://doi.org/10.1007/s10612-022-09682-5.
[138] Gabriella Sanchez, "After the Fire | Oxford Law Blogs," blogs.law.ox.ac.uk, May 5, 2023, https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/05/after-fire.
[139] Gonzalez, "Mexico Border Fire."
[140] The Associated Press, "Arrest Orders."
[141] Frederick, "Survivor Recalls Horrors."

autonomy and the ability to preserve their lives. This restriction of basic human rights sends the message that they are less than human. They were treated as if their lives were worth less than the guards meant to watch over them. In addition to the physical and financial harms, the Ciudad Juárez fire leaves a lasting scar on the psyche of the communities of these migrants. The communities are not only damaged by the loss of their loved ones but also by a sentiment of carelessness towards their wellbeing. A combined criminological and zemiological analysis underscores the true gravity of March 27 and the different harms it has caused.

Expanding Responsibility

A criminological analysis is limited to the immediate and individual perpetrators of the fire. A zemiological analysis expands responsibility for the fire.[142] It recognises the United States government's immigration policy and the Mexican government's attitude towards migrants as key actors. Why were these men detained in Mexico in the first place? What fostered such desperation from these migrants and apathy from the guards in charge? The fire occurred during a period of migrant build-up and frustration along the border. This is partly attributed to the United States' Title 42 policy.[143] Title 42, which has since been repealed, expelled migrants quickly from the US into border towns and then made them wait there as people struggled to get asylum appointments from a flawed new application meant to process these appointments.[144] This created a fraught environment filled with uncertainty and frustration. Mexican towns were overcrowded as migrants were transported across the border.[145] This put pressure on Mexico's immigration system to keep these 'returned' migrants from crossing the border again.

As to be expected, this influenced Mexican immigration policy. Mexico's harsh immigration tactics were also to blame for the Ciudad Juárez fire. In response to

[142] Hillyard and Tombs, "Social Harm and Zemiology," 289.
[143] Gonzalez, "Mexico Border Fire."
[144] Washington Office on Latin America, "Ciudad Juárez Fire: What Happened and What Does It Tell Us about Immigration Policy?," WOLA, 2023, https://www.wola.org/events/ciudad-juarez-fire-immigration-policy/.
[145] Heyman and Slack, "Causes Behind Ciudad Juárez Fire."

American pressure, Mexico's handling of migrants became increasingly militarised, and migrants were 'dealt with' through mass detentions.[146] The U.S. policy of immediate expulsion combined with Mexico's mass detention system created unrest along the border. Mexican senator Emilio Álvarez Icaza put it well: "This didn't happen just because a guard didn't open the gate; this happened because [President] López Obrador decided to accept the pressure from the Trump and now Biden administrations to contain migrants, and in turn, the government systematically abuses them."[147] A zemiological analysis of the Ciudad Juárez fire cannot ignore the U.S. and Mexican governments' responsibility for creating a situation ripe for disaster. While they did not light the match, they created an environment ready to spark at any moment. Using both a criminological and a zemiological analysis identifies all those responsible for the Ciudad Juárez fire. Criminology targets the individual and the immediate perpetrators, whereas zemiology can capture the remote and powerful institutions responsible.

Expanding The Victim

Zemiology expands on who is considered a victim of the Ciudad Juárez fire. Criminology limits victims to legal definitions. In this regard, victims are individuals directly impacted by breaking criminal laws. A zemiological perspective allows us to consider those outside of the legal interpretation and indirectly subjected to harm.[148] In the fire, a zemiological analysis includes survivors of the fire and the greater migrant community. While it seems evident that survivors of the fire have suffered from the event, the Mexican government has yet to officially recognise any of the survivors as victims under the law.[149] This leaves many without the government support they need. According to the legal definition, only the families of those who have perished have received monetary compensation. Zemiology, in breaking free from legal barriers, is not limited by Mexico's laws. It can identify survivors of the fire as victims who suffer from many consequences of the tragedy.

[146] Washington Office on Latin America, "Ciudad Juárez Fire."
[147] Frederick, "Survivor Recalls Horrors."
[148] Hillyard and Tombs, "Social Harm and Zemiology," 289.
[149] Frederick, "Survivor Recalls Horrors."

In recognising cultural harms, we can also identify the broader migrant community as victims of the Ciudad Juárez fire. As discussed above, cultural harms were created as the fire sent the message to migrants that they were disposable to the U.S. and Mexican governments. This sentiment not only affected those directly involved but also left a scar across the entire migrant community. The Ciudad Juárez fire and similar tragedies serve to isolate migrant communities from their northern counterparts. It places them lower down in the global hierarchy and ensures they feel the pain of their position. In this sense, victims of the Ciudad Juárez fire can be found globally. Migrants across the Americas feel the effects of this message. Zemiology adds to a criminological understanding of the victim, breaking free of legal boundaries and globalising the audience of the tragedy.

Conclusion

Zemiology provides an excellent framework for contextualising and understanding the Ciudad Juárez detention centre fire. Criminology grounds this analysis in the immediacy of the situation and provides a good starting point for explanation. A combined approach to understanding the Ciudad Juárez migrant detention centre fire allows us to identify more harm, perpetrators, and victims. We are left with a more complete understanding of the tragedy, which could contribute to better immigration policies moving forward. This is especially relevant given the fickle nature of U.S. immigration policy. While Title 42 has been revoked, this does not mean that American immigration policy has shifted towards a more humane approach.

With immigration policy tied to increasingly divisive political polarities, the lives of millions of migrants are ever uncertain and caught in the whirlpool that is American politics. The influence of U.S. pressure on the Mexican government, as elucidated above, magnifies these effects. By incorporating a zemiological understanding of disasters such as the Ciudad Juárez fire and the effects of immigration policy more generally, emphasis is put on the personal harms that are caused. Issues of immigration have become more people-focused, as they very well should be, but most often, they

are not. In effect, zemiology could contribute to a more humane approach to immigration policy. However, what exactly these policies would look like is a topic for another essay.

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Research Article

The Making of a Monster: The Perpetrators of the 1984 Sikh Riots

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Abstract

Our in-depth understanding of atrocities and their perpetrators stems from extensive research on the Holocaust. Since then, we have been able to ascertain the roles of authority figures, society, and environmental factors in determining the behaviour of atrocity perpetrators. It is found that violators of human rights are more often than not ordinary people. Thus, it becomes important to study this perceived ordinary nature of perpetrators because it might help us prevent genocides in the future. In 1984, the Sikh community of India found themselves on the receiving end of a genocidal war. Even after years, they have been unable to cope with the trauma and suffering. This paper aims to understand the psyche and attitudes of the ordinary individuals who decided to murder the people they had grown up with. The paper will provide an overview of the Sikh genocide, the events that led up to it, the tumultuous environment in which it was set up, the role of superior figures, and how it affected the perpetrators.

Keywords Sikh riots • genocide • Indira Gandhi • atrocity perpetrators • mass murder

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On 31 October 1984, the then Prime Minister of the Republic of India was shot and assassinated by her two bodyguards, Beant Singh and Satwant Singh[151], who belonged to the Sikh religion.[152] The act of vengeance that followed was grim and horrifying. A state-sponsored brutal attack was launched towards the Sikh community in different parts of India, especially in the capital, Delhi. The genocide was extremely violent and swift and was carried out by the civilian population. The first three days of the violence were some of the worst mass murders India had witnessed in the post-partition era. Afterward, the violence slowed down and ceased.

According to the Nanavati Commission Inquiry, 2146 Sikhs were brutally murdered in Delhi, and 586 of them were killed in other parts of the country. A specific peace-loving ethno-religious group, the Sikhs, were systematically targeted and burnt, maimed, or tortured to death. The then-ruling party, Congress, to which Indira Gandhi belonged, had a strong influence in fanning the genocidal fire. It has been suggested by many sources that the Congress party and the police were complicit in these acts of violence.[153]

This paper provides an in-depth overview of the Sikh genocide that occurred in 1984 in India. The impact of this incident was felt even by the Sikh diaspora living abroad. It will briefly examine how these riots were organised and orchestrated by the state with the help of ordinary people living ordinary lives. Most of our research on ordinary people as atrocity perpetrators comes from studies based on the Holocaust. Through studies based on the Holocaust, this paper will examine how these riots were organised and orchestrated by the state with the help of ordinary people. The studies indicate that to understand extraordinary violence perpetrated by ordinary people, we must dissect the social influences and psychological processes that play a key role in the actions of an

[151] Crossette, Barbara. 1989. “India Hangs Two Sikhs Convicted in Assassination of Indira Gandhi.” The New York Times, January 6, 1989, sec. World.
[152] Nanavati, Girish Thakurlal. 2005. “Justice Nanavati Commission of Inquiry.” MHA. Ministry of Home Affairs.
[153] Chakravarti, Uma. 1994. “Victims, ‘Neighbours’, and ‘Watan’: Survivors of Anti-Sikh Carnage of 1984.” Economic and Political Weekly 29 (42): 2722–26.

individual.[154] This paper will also attempt to identify the effect of authority on motives, belief systems, and the psyche of the individuals who were complicit in this act of violence.

The Etymology of Genocide

The term ‘genocide' can be traced to Raphael Lemkin, a Polish lawyer who combined the Greek prefix *genos*, meaning tribe or race, and the Latin suffix *-cide*, meaning killing, in 1944.[155] Lemkin was able to highlight the importance of differentiating between mass killings and individual killings and why the former needed to be researched exhaustively. He persuaded the world to view the Holocaust as an extreme form of mass murder or, as he called it, a genocide. Lemkin argued that it is imperative to prohibit individuals from carrying out the complete and total destruction of an ethnic group or a way of life thereby causing immense suffering.[156]

Frank Chalk summarised Lemkin's definition of genocide as ‘the coordinated and planned annihilation of a national, religious, or racial group by a variety of actions aimed at undermining the foundations essential for the survival of the group as a group’.[157] The destruction of this nature is a crime under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[158] It is important to establish wrongful intent for a criminal conviction in the case of a mass murder.[159] Intent here refers to the wilful act of damage towards another person or community. The word ‘intent’ is relatively tied to criminal culpability.[160] It is, therefore, necessary to understand the term ‘genocide’ and ‘intent’ to navigate this paper.

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[154] Cohen, Stanley. 2001. States of Denial: Knowing about Atrocities and Suffering. Cambridge, UK: Polity.
[155] United Nations. 2024. “United Nations Office on Genocide Prevention and the Responsibility to Protect.” United Nations. United Nations. 2024.
[156] Irvin-Erickson, Douglas. 2017. Raphael Lemkin and the Concept of Genocide. JSTOR. University of Pennsylvania Press.
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[158] United Nations. 2024. “United Nations Office on Genocide Prevention and the Responsibility to Protect.” United Nations. United Nations. 2024.
[159] Sayre, Francis Bowes. 1932. “Mens Rea.” Harvard Law Review 45 (6): 974.
[160] Greenawalt, Alexander K. A. 1999. “Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation.” Columbia Law Review 99 (8): 2259.

Operation Blue Star and the Sikh Riots

To answer the questions of what led to the mass killings of the Sikhs, whether there were any provocations, and what the perpetrators' motives were, there is a vital need to explore the events that culminated in the assassination of Gandhi. Born to the first prime minister of independent India, Indira Gandhi became the prime minister herself in 1966.[161] She was widely celebrated and viewed as a tough leader by the Indian masses. She is credited for leading India to victory in the 1971 war against Pakistan and turning India into an emerging nuclear power.[162] As a leading Indian journalist puts it, 'Indira Gandhi was a formidable, complicated woman, an ambitious alpha-female, steely, tender, cripplingly insecure led India to victory against a war'.[163] Lovingly referred to as Mother India, she was viewed as a strong maternal figure.[164]

However, she was in constant tussle with the democratic ideals of the nation. In 1984, she became increasingly frustrated with the agitation in the northern state of Punjab. Punjab is a prosperous farmland state with the highest concentration of Sikhs. Sikhism is a relatively new religion founded by Guru Nanak Dev in the late 15th century.[165] There are 30 million Sikhs in the whole world, of which 24 million live in India.[166] Members of the Sikh community visit the gurudwara to pray where people of all religions are welcome. Sikhs have a very unique and distinct racial identity. The men adorn a beard, moustache, and unshorn hair, a colourful pagdi, or a turban.[167] The men use Singh as their last name or middle name, and the women use Kaur.[168] This makes them easily identifiable.

[161] MANAS. n.d. "Indira Gandhi." MANAS. Accessed February 2, 2024.
[162] ibid.
[163] Ghose, Sagarika. 2017. "19th November 2017: 100 Years of Indira Gandhi. She Was the Mother of Every Indian Supremo." The Times of India, 2017.
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[166] S. Jutla, Rajinder. 2016. "The Evolution of the Golden Temple of Amritsar into a Major Sikh Pilgrimage Center." AIMS Geosciences 2 (3): 259–72.
[167] Chilana, Rajwant Singh. 2005. "Sikhism: Building a Basic Collection on Sikh Religion and Culture." 45 (2): 108–16.
[168] ibid.

Jarnail Singh Bhindranwale was at the heart of the crisis in Punjab in 1984. Bhindranwale was a charismatic and popular leader of the Sikh separatist movement. He was a controversial figure hailed as a saviour by the extremist Sikh groups of Punjab and a troublemaker by the government of India. He was an orthodox Sikh who demanded a homeland called Khalistan for the Sikh population separate from India.[169] He urged the people to return to the ideals and teachings of Sikhi (Sikh religion) and promised the masses that he would bring back the glory days that existed in Punjab during the reign of King Ranjit Singh.[170] His popularity was rising steadily and hence, Indira Gandhi viewed him as a threat that needed to be eliminated. Amid rising tensions, Bhindranwale moved to the Golden Temple with his armed troops after fruitless negotiations with the government of India.[171]

The Golden Temple of Amritsar, India, is a major pilgrimage centre for the followers of Sikhism.[172] Every year, millions of Sikhs travel to the city of Amritsar to pray and worship at the Harmandir Sahib Gurudwara (Golden Temple). Jarnail Singh fortified the gurudwara with his supporters. In response, Indira Gandhi swiftly launched an army attack code-named Operation Blue Star that lasted from June 1st to June 8th, 1984, to evict Bhindranwale from Harmandir Sahib.[173] Unfortunately, the operation coincided with the remembrance day of the martyrdom of Guru Arjan Singh, the fifth guru of Sikhs, which meant that many pilgrims had congregated at the gurudwara.[174] Consequently, 700-800 Indian army men, 500 militants including Bhindranwale, and 5000 civilians were killed.[175] Official Indian government figures reported 575 civilian deaths, but independent reports believe the estimate is much higher, up to 3000.[176] The United Kingdom is considered to be complicit in the operation too, but they have since

[169] Hundal, Sunny. 2009. “Operation Blue Star: 25 Years On.” The Guardian, June 3, 2009, sec. Opinion.
[170] ibid.
[171] ibid.
[172] Jutla, S. Rajinder. 2016. “The Evolution of the Golden Temple of Amritsar into a Major Sikh Pilgrimage Center.” AIMS Geosciences 2 (3): 259–72.
[173] Das, Deb Zyoti, and Bhanu Singh Rohilla. 2020. “Operation Blue Star & the Course of India: Through the Legal Filter.” SSRN Electronic Journal.
[174] Taneja, Poonam. 2013. “Why 1984 Golden Temple Raid Still Rankles for Sikhs.” BBC News, August 1, 2013, sec. Asia.
[175] Das, Deb Zyoti, and Bhanu Singh Rohilla. 2020. “Operation Blue Star & the Course of India: Through the Legal Filter.” SSRN Electronic Journal.
[176] GOV.UK. 2014. “Statement on the Indian Operation at Sri Harmandir Sahib in 1984.” GOV.UK. February 4, 2014.

maintained a stance that their role was merely advisory in the entire operation.[177] Their actual role, however, remains unclear.

Operation Blue Star is remembered as 'teeja ghallughara' (the third holocaust) by the Sikh community.[178] A macabre scene had unfolded at the threshold of Harmandir Sahib, the holiest shrine. The attack led to the damage of certain parts of the holy gurudwara, which hurt the sentiments of the Sikhs.[179] This shook the faith of millions of Sikhs worldwide. The attack was perceived as an insult and threat to their religion. They were brimming with anger and fraught with sadness. The Sikhs were enraged by the deaths of innocent Sikh pilgrims, the damage to the holy Sikh manuscripts, and the desecration of the sacred Akal Takht (the throne of the timeless God).[180] Many innocent pilgrims were caught in the crossfire. Most people believe that a tragedy of this magnitude could have been avoided if Indira Gandhi had negotiated with Bhindranwale efficiently and reached a settlement, but she acted with haste.[181] As a result, the Sikh community developed a deep-seated hatred and anger towards Indira Gandhi who was viewed as the mastermind behind this operation. The wounds that the survivors of Operation Blue Star experienced were not even healed when another tragedy came knocking at their door. In the early morning of 31 October 1984, Indira Gandhi was assassinated by her two Sikh bodyguards as revenge for the desecration of the Golden Temple in Amritsar.[182] This was the catalyst.

Genocide Perpetrators: The Making of a Monster

The evening of 31 October, 1984 was marked by bloodshed, brutality, and severe violence. More than several Sikhs became the target of fury and hatred. Sikhs are a racially visible minority in the country because of their turbans. As a result, many Sikh

[177] ibid.
[178] Singh, Pritam. 2021. "Wounds That Never Heal: Remembering Operation Bluestar." The Wire. 2021.
[179] Balbir K. Singh. 2016. "Unjust Attachments: Mourning as Antagonism in Gauri Gill's '1984.'" Critical Ethnic Studies 2 (2): 104.
[180] Jutla, S. Rajinder. 2016. "The Evolution of the Golden Temple of Amritsar into a Major Sikh Pilgrimage Center." AIMS Geosciences 2 (3): 259–72; Das, Deb Zyoti, and Bhanu Singh Rohilla. 2020. "Operation Blue Star & the Course of India: Through the Legal Filter." SSRN Electronic Journal.
[181] Singh, Pritam. 2021. "Wounds That Never Heal: Remembering Operation Bluestar." The Wire. 2021.
[182] Bryjak, George J. 1985. "The Economics of Assassination: The Punjab Crisis and the Death of Indira Gandhi." Asian Affairs 12 (1): 25–39. https://www.jstor.org/stable/30171983?seq=8.

men were identified at one glance and subsequently beaten to death in public places such as bus stands and railway stations. Delhi became the centre of this genocidal conflict. According to Singh, hundreds of Sikhs were attacked and burnt alive, and their houses were ransacked and destroyed.[183] The Sikh women were also sexually assaulted by these atrocity perpetrators.[184] This mass murder was well-orchestrated and organised. The attack was so swift and deadly that many did not even get a chance to flee the state for their safety. A mob of perpetrators made their way to Sikh dwellings. Instead of killing Sikhs on the streets, they were now being hunted in their own homes. In a gut-wrenching scene, 95 Sikhs were trapped in a housing complex and burnt alive.[185] The women of the household experienced profound grief and trauma as they lost their fathers, husbands, brothers, and sons in front of their own eyes. The necklacing method, an inhumane torture method, was widely used where burning tires were thrown around the neck of the victims by the murderers to make the death slow and painful.[186] Many expressed grief over neighbours turning against each other.

Most of the atrocity perpetrators were ordinary Hindus from the lower economic class who widely looted the affluent Sikh homes and their businesses.[187] The Hindus are a majority group in India. They were enraged by the death of their Hindu Prime Minister who was viewed as a motherly figure. Hindus and Sikhs had resided together peacefully for centuries. Most of the attackers knew the victims personally. According to Chakravarti, the killers belonged to the same neighbourhood and localities, and many of them refused to help the ailing families.[188] As Tirell has put it, genocidaires are ordinary and very much like us.[189] The attackers knew the victims well and vice versa. This is

[183] Balbir K. Singh. 2016. “Unjust Attachments: Mourning as Antagonism in Gauri Gill’s ‘1984.’” Critical Ethnic Studies 2 (2): 104. https://doi.org/10.5749/jcritethnstud.2.2.0104.
[184] ibid.
[185] Bryjak, George J. 1985. “The Economics of Assassination: The Punjab Crisis and the Death of Indira Gandhi.” Asian Affairs 12 (1): 25–39. https://www.jstor.org/stable/30171983?seq=8.
[186] Baweja, Harinder. 2018. “The Decision to Re-Investigate the 1984 Anti-Sikh Riots Gives so Many Victims Hope.” Hindustan Times. January 11, 2018.
[187] Bryjak, George J. 1985. “The Economics of Assassination: The Punjab Crisis and the Death of Indira Gandhi.” Asian Affairs 12 (1): 25–39. https://www.jstor.org/stable/30171983?seq=8.
[188] Chakravarti, Uma. 1994. “Victims, ‘Neighbours’, and ‘Watan’: Survivors of Anti-Sikh Carnage of 1984.” Economic and Political Weekly 29 (42): 2722–26. https://www.jstor.org/stable/4401905?seq=1.
[189] Tirrell, Lynne. 2016. “Perpetrators and Social Death: A Cautionary Tale.” Metaphilosophy 47 (4/5): 585–606. https://www.jstor.org/stable/26602384?seq=3.

exhibited in Chakravarti's paper in which a victim exclaims, 'No one was from outside; they were all from here'.[190]

The just-world hypothesis poses that people often assume that victims deserve their suffering because they have earned it.[191] In the case of the riots, the ordinary perpetrators believed that all Sikhs deserved a fate like death. Many attackers allegedly felt that the Sikhs might come for them after they had already killed the leader.[192] Often such rationalisations are employed to justify the killings of many. The assassination of the Prime Minister who belonged to the Hindu community by two Sikh men served as a catalyst for rampant violence and destruction.

The local leaders of the Congress party were complicit in the attack as they instigated the mob to avenge the death of their Prime Minister and supplied weapons and inflammable material.[193] In *Eichmann in Jerusalem*, Hannah Arendt refers to the term 'banality of evil' to describe ordinary people, without an individual agenda, who commit atrocities only to satisfy authority.[194] The authority in this case was represented by a handful of Congress supporters who wanted to avenge Indira Gandhi's death. The police were not swift in taking action.[195] According to the Nanavati Commission, the police did not record First Information Reports (FIRs) and witness statements.[196] The Sikh families residing in Delhi were located through electoral polls that were distributed amongst the mob.[197] This was a huge lapse in the security and safety of the citizens as

[190] ibid.
[191] Staub, Ervin. 2003. "Steps along a Continuum of Destruction: Perpetrators and Bystanders." Edited by Ervin Staub. Cambridge University Press. Cambridge: Cambridge University Press. 2003.
[192] Chakravarti, Uma. 1994. "Victims, 'Neighbours', and 'Watan': Survivors of Anti-Sikh Carnage of 1984." Economic and Political Weekly 29 (42): 2722–26. https://www.jstor.org/stable/4401905?seq=1.
[193] ibid; Nanavati, Girish Thakurlal. 2005. 'Justice Nanavati Commission of Inquiry.' MHA. Ministry of Home Affairs.
[194] Reicher, Stephen D., S. Alexander Haslam, and Arthur G. Miller. 2014. "What Makes a Person a Perpetrator? The Intellectual, Moral, and Methodological Arguments for Revisiting Milgram's Research on the Influence of Authority." Journal of Social Issues 70 (3): 393–408. https://doi.org/10.1111/josi.12067.
[195] Singh, Balbir. 2016. "Unjust Attachments: Mourning as Antagonism in Gauri Gill's '1984.'" Critical Ethnic Studies 2 (2): 104. https://doi.org/10.5749/jcritethnstud.2.2.0104.
[196] Nanavati, Girish Thakurlal. 2005. "Justice Nanavati Commission of Inquiry." MHA. Ministry of Home Affairs.
[197] Singh, Balbir. 2016. "Unjust Attachments: Mourning as Antagonism in Gauri Gill's '1984.'" Critical Ethnic Studies 2 (2): 104. https://doi.org/10.5749/jcritethnstud.2.2.0104.

these voter polls often mentioned the religion of the individual. Many families were shattered, wives widowed, and children orphaned.

Why Do Ordinary People Commit Atrocities?

'A very small minority of the perpetrators are indeed sadists and psychopaths, but most perpetrators are ordinary and law-abiding citizens who commit their crimes on orders of the state'.[198] It is important to understand the various factors that motivate individuals to commit crimes, including the state's role and other external influences. External environments and social forces have a very strong role in influencing and determining an ordinary perpetrator's behaviour. The identity processes as described by Moshman are critical in understanding the nature of group violence that unfolded on the fateful night of 31 October 1984.[199]

- Dichotomisation - The 'us' vs. 'them' feeling strengthened through religious groupings of Hindus vs. Sikhs. Indira Gandhi was a Hindu and the assassins were Sikh.
- Dehumanisation - The Sikhs were viewed as immoral traitors who were responsible for the death of the beloved, mother-like figure.[200] Chirot and McCauley talk about the perception of moral inferiority of the victims of atrocity perpetrators which helps them rationalise their actions.
- Denial - This was explained by Bandura's moral disengagement theory in which harmful behaviours were justified as morally correct behaviours that served a worthy cause.[201] The mass murder of Sikhs was viewed as revenge against the assassination and a way of protecting the community.

[198] Smeulers, Alette. n.d. "Perpetrators of International Crimes – Alette Smeulers."
[199] Moshman, David. 2011. "'Ordinary Men,' Ordinary Children, and Extraordinary Violence: Commentary on Wainryb." Human Development 54 (5): 301–6. https://www.jstor.org/stable/26765015.
[200] Chakravarti, Uma. 1994. "Victims, 'Neighbours', and 'Watan': Survivors of Anti-Sikh Carnage of 1984." Economic and Political Weekly 29 (42): 2722–26. https://www.jstor.org/stable/4401905?seq=1.
[201] Bandura, Albert. 2016. "Moral Disengagement: How People Do Harm and Live with Themselves." Psycnet.apa.org. Worth Publishers. 2016. https://psycnet.apa.org/record/2015-43532-000.

It has become quite apparent that authority plays an important role in genocide. In this case, Congress played a huge role in instigating the mob and giving orders for the complete annihilation of the Sikh population. Milgram's obedience experiment and the Stanford prison experiment attempt to explain the influence of authority on an individual. In Milgram's experiment, the subjects administered electric shocks at the behest of perceived authority.[202] Milgram was able to establish that people can be influenced to commit atrocities under the guise of obeying orders from their superiors.[203] The Stanford prison experiment conducted by Zimbardo revealed a grim reality of the immoral impulses that every individual possesses, which only come out under extraordinary circumstances.[204] Thus, it can be argued that every person has the potential to commit crimes under the right conditions. Gandhi's assassination brought about a surge of emotions, and this precise emotional outburst provided a conducive environment for the tragedy to unfold.

Staub talks about a continuum of destructiveness in which it becomes increasingly difficult to return to perceived normalcy after committing a destructive act by the perpetrator.[205] For example, hurling abuse is a small act that has the potential of snowballing into causing physical harm to the other person. However, it is unclear if the attackers in this case were able to employ their moral compass while making these atrocious decisions. There was an erosion of personal agency even if it was unintentional.[206] This is where the role of a group as a whole comes into focus. The killings were not committed by one person alone but rather by a group as a whole. The group was functioning as a murderous unit together. Groupthink behaviour is typically employed where authority is not questioned and irrational decisions are made.[207] Such

[202] Reicher, Stephen D., S. Alexander Haslam, and Arthur G. Miller. 2014. "What Makes a Person a Perpetrator? The Intellectual, Moral, and Methodological Arguments for Revisiting Milgram's Research on the Influence of Authority." Journal of Social Issues 70 (3): 393–408. https://doi.org/10.1111/josi.12067.
[203] ibid.
[204] Konnikova, Maria. 2015. "The Real Lesson of the Stanford Prison Experiment." The New Yorker. The New Yorker. June 12, 2015. https://www.newyorker.com/science/maria-konnikova/the-real-lesson-of-the-stanford-prison-experiment.
[205] Staub, Ervin. 2003. "Steps along a Continuum of Destruction: Perpetrators and Bystanders." Edited by Ervin Staub. Cambridge University Press. Cambridge: Cambridge University Press. 2003.
[206] Dudai, Ron. 2006. "Understanding Perpetrators in Genocides and Mass Atrocities." The British Journal of Sociology 57 (4): 699–707. https://doi.org/10.1111/j.1468-4446.2006.00132.x.
[207] Lee, YiLin. 2015. "Groupthink as a System of the Decision Making Process." Nyu.edu. 2015. https://wp.nyu.edu/steinhardt-appsych_opus/groupthink.

groups hardly take into account the personal opinions of group members but rather adopt a herd-like mentality. Groupthink can be extremely dangerous and toxic in certain situations. Such crowds are pathological and abnormal.[208] An individual completely loses a sense of themselves but gains power and invincibility.[209] This leads to the diffusion of responsibility that is directly correlated with highly risk-taking behaviours that increase the aggressive tendencies of a group.[210] The violators feel no direct responsibility for the gruesome act they have committed. Thus, we can hereby prove that atrocity perpetrators are indeed ordinary people who have the potential to commit heinous crimes against individuals in specific circumstances. Their motives, behaviours, and attitudes are an amalgamation of social and environmental influences.

Conclusion

The victims of the Sikh genocide are still waiting for justice. The government of India has, to date, refused to acknowledge the Sikh riots as a genocide. Even after years since the massacre, only thirty people have been convicted despite the widespread participation of ordinary civilians.[211] Such attitudes led to a rise in discriminatory practices towards the Sikh community. Many women were widowed, and kids orphaned. This created a vacuum in a patriarchal society where men were the sole breadwinners of the family. The women had to find work outside their home, and children were left unsupervised. This led to drug use by Sikh teenagers due to the absence of supervision and to cope with their trauma.[212] Such aftereffects of genocide are extremely discerning and difficult to comprehend. The generational trauma permeates through the victims to their kids who were not even born at that time.The Sikh genocide serves as a warning

[208] Behtaji Siahkal Mahalleh, Vahid, Hazlina Selamat, and Fargham Sandhu. 2017. “Review on Psychological Crowd Model Based on LeBon’s Theory.” TELKOMNIKA (Telecommunication Computing Electronics and Control) 15 (2): 763. https://doi.org/10.12928/telkomnika.v15i1.6114.
[209] ibid.
[210] Beyer, Frederike, Nura Sidarus, Sofia Bonicalzi, and Patrick Haggard. 2016. “Beyond Self-Serving Bias: Diffusion of Responsibility Reduces Sense of Agency and Outcome Monitoring.” Social Cognitive and Affective Neuroscience 12 (1): 138–45. https://doi.org/10.1093/scan/nsw160.
[211] Human Rights Watch. 2014. “India: No Justice for 1984 Anti-Sikh Bloodshed | Human Rights Watch.” Human Rights Watch. October 29, 2014. https://www.hrw.org/news/2014/10/29/india-no-justice-1984-anti-sikh-bloodshed..
[212] The Quint. 2022. “Riot Ep 2: How Widows’ Colony in Delhi Never Recovered from the Trauma of the 1984 Anti-Sikh Riots.” Www.youtube.com. 2022. https://youtu.be/-ysMODI6WGk?si=TLsAA9pOV11EFcuA.

to the masses that the ones in the majority will always have more power and control in society. We are ordinary people. We are not killers but under the right circumstances, even ordinary people can become one. Under the right circumstances, we can display our darkest sides unintentionally.

It is important to consider the role of religion here. Religion has become an integral part of every society. It is responsible for the demarcation of communities into ‘us vs. them’. Understanding the role of religion in turning ordinary people into atrocity perpetrators is crucial. The role of groups as a whole must be exhaustively researched. It will help us eliminate herd mentality and groupthink behaviour. It is important to hold the perpetrators accountable. We should view them as criminals who have committed a crime instead of monsters that only exist in movies and books. The state also has an important responsibility to uphold. They must protect their citizens no matter what group they belong to and collaborate with the police to ensure peace. International authorities must keep the states in check to prevent any violation of human rights. In the end, atrocity perpetrators must be punished for their role, no matter how small. Atrocity perpetrators might be ordinary people, but that does not mean they can get away with murder.

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Research Article

Cyberwarfare and the Challenges it Poses to the International Governance of Armed Conflict

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Abstract

Cyberwarfare is an emerging form of conflict in the 21st Century. Whether it is considered a domain, a field of weaponry, or capable of being a completely new and separate type of conflict, the international governing community must find a way to protect citizens from its potential damage. International law may be able to do so. Still, there are plot holes in existing international law governing armed conflicts involving cyber-attacks, particularly regarding attributability, distinction, and self-defence. This paper uses two case studies, the 2008 Russo-Georgian War and the ongoing Russia-Ukraine War, to discuss the practical application of international law to cyber warfare.

Keywords cyber warfare • International law • armed conflicts • attributability • cyber-attacks

INTRODUCTION

Cyberwarfare is arguably a 'fifth domain' of warfare following land, sea, air, and space.[214] Given this and its relative novelty in the legal areas of armed conflict, it is important to understand the challenges it presents to its governance by international

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[214] Mohan B. Gazula, 'Cyberwarfare Conflict Analysis and Case Studies'. *Cybersecurity Interdisciplinary Systems Laboratory (CISL), Sloan School of Management,* MIT (2017).

law. Several key concepts of international law are directly relevant to the emergence of cyberwarfare. These roles of non-state actors and the ethics of war have been translated into law – specifically, the principles of *distinction* and *attributability*. Once we understand these concepts about cyberwarfare, we can look at two notable case studies of cyberwarfare: the 2008 Russo-Georgian War and the 2022 cyber attacks in the Russia-Ukraine War. These can help us analyse how international law functions, or does not function, in governing cyberwarfare in relation to the above key concepts. I conclude that the position of cyberwarfare in today's international law system needs reanalysis to ensure that attacks do not go ungoverned. This is particularly noted in recognising the role of non-state actors, ensuring the principle of distinction is abided by, and addressing the future possibility of instances where cyber warfare may occur without kinetic warfare.

THE 'NON-STATE ACTOR' CONCEPT

A non-state actor in international law is an actor who 'without representing states, can operate at the international level and be relevant to international law and relations'.[215] Non-state actors in contemporary conflicts are often terrorist organisations or resistance groups who are not officially acting on behalf of the state itself, or might even be embroiled in conflict with state authorities. Essentially, this means that the field of international law and rules governing state relations do not inherently apply to them. This has produced an era of warfare that is more complex and ungoverned than the 'traditional' warfare that has come before.

This is directly applicable to the challenges of cyberwarfare because cyber attacks are often carried out by non-state actors like private expert cyber companies, terrorist organisations, or civilian hackers. This creates similar challenges for the governance of cyberwarfare as those faced in armed conflicts which involve insurgent groups or 'private' aggressors. It is also relevant to classifying whether something is an 'act of

[215] Said Mahmoudi, Non-State Actors and the Development of International Environmental Law: A Note on the Role of the CEDE, *Yearbook of International Environmental Law*, Volume 30, Issue 1, 2019, Page 68, https://doi.org/10.1093/yiel/yvaa073.

force' warranting a self-defence response to a cyber attack.[216] An 'act of force' is the threshold an attack must meet for the target state to engage in legal acts of self-defence, and it involves the 'act of force' being conducted by a state actor.

This brings into the discussion Articles 2(4) and 51 of the UN Charter and customary international law, which the Tallinn Manual aimed to address in relation to cyber.[217] Article 2(4) outlines the prohibition of threat or use of force in international relations. In contrast, Article 51 refers to the ability of a state to engage in self-defence if such instances occur.[218] As this paper moves through the case studies, it will become apparent that, in general, international law often needs to be developed more and must pay attention to the presence of non-state actors,[219] and that this shortcoming is especially apparent in the emerging cases of cyber warfare.

ETHICS OF WAR IN INTERNATIONAL LAW

Attribution

The *principle of attributability* is linked to the challenges of governing cyberwarfare, particularly regarding the aforementioned non-state actors. Attributing attacks to certain actors in cyberspace is difficult as other actors are often present in the virtual battlefield, and third-party servers are used.[220] The Tallinn Manual states that for a cyberattack to be considered a use of force, a non-state actor's actions must be *attributable* to a state.[221] Furthermore, there is ongoing discussion about a modernised version of the Caroline Test as to whether anticipatory or pre-emptive self-defence can be permissible

[216] Michael Schmitt, 'Cybersecurity and International Law', in Nils Melzer and Robin Geiss (eds.) *The Oxford Handbook of the International Law of Global Security,* Oxford University Press, 2021. p 674.
[217] United Nations, *Charter of the United Nations*, 1945, Articles 2(4) & 51.; Michael Schmitt, 'Cybersecurity and International Law', in Nils Melzer and Robin Geiss (eds.) *The Oxford Handbook of the International Law of Global Security,* Oxford University Press, 2021: pp 673-675.
[218] United Nations, *Charter of the United Nations*, 1945, Articles 2(4) & 51.
[219] Nicholas Tsagourias and Russell Buchan, 'Cyber-Threats and International Law' in Mary Footer et al. (eds.), *Security and International Law*, Hart Publishing, 2016. p388.
[220] Giesen, K-G. "Towards a Theory of Just Cyberwar." *Journal of Information Warfare* 12, no. 1 (2013): 25. https://www.jstor.org/stable/26486996.
[221] Michael Schmitt, 'Cybersecurity and International Law', in Nils Melzer and Robin Geiss (eds.) *The Oxford Handbook of the International Law of Global Security,* Oxford University Press, (2021): 674-675.

in the case of cyberattacks.[222] The Caroline Test refers to the criteria a state must meet if it wishes to employ anticipatory self-defence against a supposed upcoming threat: “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”[223] Such acts of self-defence are inextricably linked to the ability to determine attributability. Attribution is important not only for the law of self-defence but also for holding actors accountable in systems like the International Criminal Court (ICC) or International Court of Justice (ICJ) if the time comes. Giesen argues that because of the complexity of attribution in cyberspace, a ‘probabilistic approach’ should prevail, where whilst there may not be absolute certainty, we can require a 99% probability.[224]

Distinction

Distinction, a principle in the ethics of war and International Humanitarian Law, is also important in discussions of cyberwarfare. It lays out who and what can be targeted in warfare and designates that civilians and combatants must be distinguished.[225] Cyber attacks target public services or websites affecting civilians’ daily lives. They can also aim to spread disinformation and perpetrate psychological warfare, which fails to distinguish between civilian and combatant targets clearly. Eitan points out that many cyber targets have dual civilian and military usage, making this principle even more complex in its applicability to cyber warfare and attacks.[226] However, this dual usage places them in the legal category of a military target.[227] This means the extent to which

[222] John Dever, and James Dever. “Cyberwarfare: Attribution, Preemption, and National Self Defense.” *Journal of Law & Cyber Warfare* 2, no. 1 (2013): 25–63. http://www.jstor.org/stable/26441240. p37.
[223] Daniel Webster, Case of the Caroline, *Niles’ National Register*, (September 1842): 57. Quoted in John Dever, and James Dever. “Cyberwarfare: Attribution, Preemption, and National Self Defense.” *Journal of Law & Cyber Warfare* 2, no. 1 (2013): 25–63. http://www.jstor.org/stable/26441240. p37.
[224] K-G Giesen, “Towards a Theory of Just Cyberwar.” *Journal of Information Warfare* 12, no. 1 (2013):25. https://www.jstor.org/stable/26486996.
[225] International Committee of the Red Cross, ‘Principle of Distinction. How Does Law Protect in War?’ Accessed: https://casebook.icrc.org/law/principle-distinction
[226] Eitan Diamond. “Applying International Humanitarian Law to Cyber Warfare.” Edited by Pnina Sharvit Baruch and Anat Kurz. *Law and National Security: Selected Issues*. Institute for National Security Studies, 2014. P77. http://www.jstor.org/stable/resrep08957.8.
[227] ibid.

cyberinfrastructure is considered a legitimate military target is significant, making the discussion of distinction crucial in the international governance of cyber warfare.

CASE STUDY 1: 2008 RUSSO-GEORGIAN WAR

The 2008 Russo-Georgian War set the first precedent for using cyber warfare alongside boots-on-the-ground military operations.[228] It engaged questions of the role of non-state actors' attributability in cyber attacks and other rules of war. In August 2008, cyber attacks from Russia targeted the Georgian '.ge' internet domain by flooding the servers with large amounts of web traffic.[229] This caused the national phone network to go offline, disrupted other public services like banking, and hindered the Georgian government's communication ability.[230] In total, 54 websites, including those hosting the news, government sites, and financial services, were targeted, defaced and/or experienced denial of service disruptions.[231]

Regarding attributability, whilst Russia benefited greatly from the cyber attacks and the organisers of the attacks appeared to have strong knowledge of the ground war and assistance in such organising, they denied state responsibility for the cyber attacks.[232] These cyber attacks have linked questions of attributability and the role of non-state actors. These attacks were attributed to pro-Russia volunteers and hackers, who are essentially skilled individuals likely located in the Russian state.[233] These are sometimes referred to as 'hacktivists'.[234] Many of the attacks can also be traced back to a Russian cybercriminal group called RBN.[235] Thus, in this example, we face non-state actors as individual hackers and a more organised cybercriminal group.

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[228]Andria Gotsiridze, The Cyber Dimension of the 2008 Russia-Georgia War. Rondeli Foundation. 2019.
[229] Geoff Van Epps, "Common Ground: U.S. and NATO Engagement with Russia in the Cyber Domain." *Connections* 12, no. 4 (2013): 30. http://www.jstor.org/stable/26326340
[230]ibid.
[231] Sarah P White. 'Understanding Cyber Warfare: Lessons from the Russia-Georgia War', *Modern War Institute.* (March 2018): 1.
[232] Geoff Van Epps. "Common Ground: U.S. and NATO Engagement with Russia in the Cyber Domain." *Connections* 12, no. 4 (2013): 30. http://www.jstor.org/stable/26326340
[233] Andria Gotsiridze, The Cyber Dimension of the 2008 Russia-Georgia War. Rondeli Foundation. (2019).
[234] Paulo Shakarin. 'The 2008 Russian Cyber-Campaign Against Georgia'. *Military review*. (2011): 64.
[235]Andria Gotsiridze, 'The Cyber Dimension of the 2008 Russia-Georgia War.' *Rondeli Foundation*. (2019)

The Russo-Georgian war provides empirical evidence of how cyber warfare allows the 'empowerment of third-party non-state actors in modern conflict'.[236] One report stated, 'there is no need for the state machine in modern cyber warfare'.[237] If we consider this true, the future of international law in governing warfare, particularly concerning attributability and, therefore, protection of civilians, is one concern. The argument for legal self-defence following a cyber-attack is also made complex, as the Tallinn Manual lays out, for an action to be counted as a 'use of force', it must be attributable to the state (so the victim state can therefore engage in self-defence against that perpetrating state).[238] In this case, Georgia was already engaged in self-defence as there was kinetic warfare alongside the cyber attacks. However, the issues of attributability of cyberattacks raise concerns about future claims of self-defence when only facing cyberwarfare.

As previously mentioned, the principle of distinction designates what constitutes a legal target in wartime and what does not. In this context, it can be applied to the fact that the attacks had informational and psychological effects on the state of Georgia, as they worked to establish a lone Russian narrative of the war, isolating Georgia from the outside world.[239] The principle of distinction is part of International Humanitarian Law and states that military operations must target objects of military value, sparing citizens as much as possible.[240] In this case, the attacks engaged in psychological warfare, targeting populations rather than military forces.[241] Cyber attacks of this nature purposely targeted civilian infrastructure, meaning that the Russian use of cyber warfare potentially violated International Humanitarian Law, at least about distinction. The link

[236] Sarah P White. 'Understanding Cyber Warfare: Lessons from the Russia-Georgia War', *Modern War Institute.* (March 2018): 5.
[237] Sarah P White. 'Understanding Cyber Warfare: Lessons from the Russia-Georgia War', *Modern War Institute.* (March 2018): 8
[238] Michael Schmitt, 'Cybersecurity and International Law', in Nils Melzer and Robin Geiss (eds.) *The Oxford Handbook of the International Law of Global Security,* Oxford University Press, (2021): 674-675.
[239] Paulo Shakarin. 'The 2008 Russian Cyber-Campaign Against Georgia'. *Military review.* (2011): 63.
[240] International Committee of the Red Cross, 'Principle of Distinction. How Does Law Protect in War?'. Accessed: https://casebook.icrc.org/law/principle-distinction
[241] Sarah P White. 'Understanding Cyber Warfare: Lessons from the Russia-Georgia War', *Modern War Institute.* (March 2018): 1-5.

between the infrastructure and military use would have to be analysed, as well as hackers' intent to disrupt military operations or civilian capabilities. This could, therefore, encourage a review of the principle of distinction and where the line blurs between civilian and combatant, as cyberwarfare is inherently likely to target infrastructure with dual military and civilian purposes.

In the case of the Russo-Georgian war and the argument for pre-emptive self-defence, the first cyberattack took place before the kinetic warfare began.[242] This means that if Georgia had sought to undertake a pre-emptive act of self-defence in response to the cyber attack, they would have needed prior knowledge of it, arguably more challenging in the cyber domain. However, this did not take place, and in this case, Georgia did not take pre-emptive action but instead engaged in self-defence in the kinetic warfare sense, allowing it to fit under existing international law of armed conflict.

A brief discussion of the Caroline Test, a debated rule in international law allowing for pre-emptive self-defence, may be useful. White argues that, in learning from the Russo-Georgian war, there is an 'erroneous notion' that cyberspace is too technically complex for the traditional war community to understand.[243] She writes that whilst cyberattacks can unfold more quickly, they are based on long processes of identifying vulnerabilities and maintaining access - a cyberattack requires months if not years of planning.[244] Therefore, if methods of cyber warfare are to be used more commonly, there is arguably a possibility that pre-emptive self-defence could be legitimate even when operating only in cyberspace, as knowledge of an imminent attack could be uncovered before it happens. This would then engage the principles of necessity and proportionality, legal principles referring to the unavailability of other response options and using only force proportional to the threat faced and the objective pursued.[245] These

[242] Andria Gotsiridze, 'The Cyber Dimension of the 2008 Russia-Georgia War.' *Rondeli Foundation.* (2019). Accessed: https://gfsis.org.ge/blog/view/970
[243] Sarah P White. 'Understanding Cyber Warfare: Lessons from the Russia-Georgia War', *Modern War Institute.* (March 2018): 11.
[244] Sarah P White. 'Understanding Cyber Warfare: Lessons from the Russia-Georgia War', *Modern War Institute.* (March 2018): 13
[245] Dapo Akande, and Thomas Liefländer. "Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense." *The American Journal of International Law* 107, no. 3 (2013): 563–70. https://doi.org/10.5305/amerjintelaw.107.3.0563.

are inherently more difficult to prove when the act of self-defence is pre-emptive, and should Georgia have wanted to act in self-defence purely regarding the cyber attacks, they would have had to employ these principles. However, the broader scope of the war meant that this question did not need to be deeply engaged.

CASE STUDY 2: RUSSIA-UKRAINE 2022

A more recent example of the use of cyber warfare in armed conflict is the case of the Russia-Ukraine war. This case provides further evidence and supports the points raised by the Russo-Georgian War, leading to similar conclusions about international governance challenges. Throughout the conflict, Russian cybercriminals and government groups have targeted civilian services such as government agencies, television stations, and energy substations.[246] This continued until more recently when, in February 2023, the attack ATK256 (UAC-0056) targeted several Ukrainian public bodies.[247]

Similar questions around attributability and non-state actors are raised here, as in the discussion of the Russo-Georgian war. For example, since the start of the conflict, 61% of all cyberattacks occurring worldwide have been perpetrated by pro-Russian hacktivist groups.[248] Once again, we see the Russian state engaging through non-state actors, complicating attributability to the state. The same waterfall effect occurs where it becomes difficult to consider cyberattacks as an act of force attributable to a state, making self-defence difficult to claim under international law.

Furthermore, the principle of distinction in relation to Russia-Ukraine is important to consider. A focus should be placed on ensuring that only military targets are targeted,

[246] John Sakellariadis and Maggie Miller. 'Ukraine Gears up for a New Phase of Cyberwar with Russia'. *Politico.* (February 2023). Accessed: https://www.politico.com/news/2023/02/25/ukraine-russian-cyberattacks-00084429
[247] From Ukraine to the Whole of Europe: Cyber Conflict Reaches a Turning Point'. Summary of Extensive Analysis from the Thales Cyber Threat Intelligence Team. *Thales.* (March 2023). Accessed: https://www.thalesgroup.com/en/worldwide/security/press_release/ukraine-whole-europecyber-conflict-reaches-turning-point
[248] ibid.

while civilian services like television stations should arguably be non-legal targets. In the third quarter of 2022, we observed cyber attacks spread beyond Ukraine and engag other European states in hybrid cyber warfare.[249] This also poses questions about distinction as not only 'at-war' states' military properties and services are being targeted, but third-party states are becoming involved in cyber attacks, which may not be able to be classified within the laws of war.

In general, the use of cyber warfare in the Russia-Ukraine war is similar to that of the Russo-Georgian war and raises similar questions. Its repeated use shows the changing nature of modern armed conflict in general. In this war, the scale of military operations has appeared inversely correlated with the strategic importance of cyber operations.[250] The author argues that, if this is the case, perhaps cyberwarfare should not be considered a 'fifth domain of war'.[251] This is interesting to note as cyberwarfare becomes more common in war and should be observed closely. Perhaps cyberwarfare may take a route apart from kinetic warfare, and international law will need to develop laws specific to cyberwarfare. Alternatively, it will largely remain correlated to traditional warfare, and the international community needs to amend certain laws or build upon the existing rules for armed conflict, including cyber.

CONCLUDING DISCUSSION

To discern the effectiveness of international law in dealing with the emergence of cyberwarfare's increasing prevalence, I have looked at questions of attributability, non-state actors, distinction, and the classification of use of force/legality of self-defence and pre-emptive self-defence.

Overall, the strength of international law as applied to cyberwarfare is lacking. The two cases where we observe the parallel activity of traditional kinetic warfare and cyber

[249] ibid.
[250] Jon Bateman, Nick Beecroft, Gavin Wilde. 'What the Russian Invasion Reveals About the Future of Cyber Warfare'. *Carnegie Endowment for International Peace*. (December 2022).
[251] ibid.

attacks, therefore theoretically making it easier to apply the law of armed conflict, have not seen extensive legal constraints regarding the cyber attacks. We also have not seen the Russian government held accountable by the ICC or ICJ. The major 'plot holes' in the international governance of armed conflict are due to the role of non-state actors, the linked principle of attributability, and the principle of distinction. For cyberwarfare to be legal under the law of armed conflict, it must be able to be termed a use of force or as part of a use of force and, ideally, be attributable to a state actor. In regard to distinction, cyber warfare is symbolic of the general changing nature of war. It engages in more psychological warfare as it targets civilian infrastructure and information services, which points towards the need to review the rules of distinction in relation to cyber.

Recommendations

In the case of the Russo-Georgian 2008 war and the ongoing Russia-Ukraine war, cyber attacks have been difficult to directly and definitively attribute to the state. In future questions of the international governance of cyberwarfare, we need to engage the law of state responsibility and determine the extent to which a state is responsible for individual or group actors operating on their territory or on behalf of their military objectives. Thus, we *could* look at laws regarding state-harboured terrorism. However, the role of non-state cyber actors is quite different as they tend to operate on behalf of state military objectives in regard to armed conflict. Rule 15 of Tallinn Manual 2.0 lays out State Responsibility yet struggles to define individual hacktivists as they are not 'state organs', nor does domestic law empower them.[252] Therefore, the purposeful engagement of civilian hackers and private hacking groups should be reviewed to be included in state responsibility for acts of war, potentially dependent on their damage outcomes. Buchan and Tsagourias argue that, in the case of cyber warfare, 'If a state is unwilling to curb the activities of non-state actors amounting to involvement in the attack, it should become the target of the self-defence action, whereas if the state is

[252] Michael Schmitt. 'Law of international responsibility.' In *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (2017): 79-167. Cambridge: Cambridge University Press. doi:10.1017/9781316822524.010

unable, then self-defence action should target the non-state actor directly.'[253] This would seem an engaged and informed argument to be made on behalf of the role of non-state actors, attributability, and the laws of self-defence, which is the key area to which these two concepts apply in international law.

Further research

Cyberwarfare presents other problems for international law in that cyberattacks alone may not be able to be classified as armed conflict under international law and, therefore, would not face the same legal restrictions. This should be further considered; however, to investigate the constraints that international law of armed conflict places on cyber warfare, we have examined cases in which it has been used definitively in armed conflict. Further discussion and analysis can also be conducted on the ethics of war and international law principles of proportionality and necessity in regard to self-defence. However, as these case studies took place in a broader context of kinetic armed conflict and less literature on direct cyberattack self-defence, proportionality and necessity have been omitted here to keep this discussion within its limits.

In conclusion, cyberwarfare poses significant challenges to the international governance of armed conflict. Current international law concepts of non-state actors, attributability and distinction must be reviewed to apply them to cyber attacks, or new guidelines for cyberwarfare need to be discussed.

[253] Nicholas Tsagourias and Russell Buchan, 'Cyber-Threats and International Law' in Mary Footer et al. (eds.), *Security and International Law*, Hart Publishing, (2016): 386.

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Research Article

Trusting the Untrustworthy: How Trust is Established and Maintained in Illicit Markets

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Abstract

Illicit markets are characterised by risk and uncertainty. Inherent information asymmetry and the ubiquitous threat of law enforcement and adversaries like scammers create an environment where cooperation and exchange would seem unlikely. To profit in illicit markets, however, cooperation is necessary. Given the potential high payoffs, illicit actors find means to overcome the barriers to collaboration. This article explores how criminal actors cooperate in what would be assumed to be an uncooperative environment. Without the usual legal mechanisms, they establish trust to mitigate such risks. This is done through leveraging social capital, emitting signals that are cheap to emit but costly to fake and using the threat of violent sanctions. In online markets, like Silk Road, where anonymity generates further problems for cooperation, actors also use built-in reputation systems and chat forums to mitigate risk.

Keywords illicit markets • cooperation • social capital • trust mechanisms • reputation systems

Introduction

Trust is a crucial component of social life and the basis of social cooperation.[255] Undoubtedly trust is important to all social groups and markets, but it is even more so in

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[255] Bakken, Silje A. "Drug Dealers Gone Digital: Using Signalling Theory to Analyze Criminal Online Personas and Trust." *Global Crime* 22, no. 1 (2021): 51-73.

illegal or non-normative groups.[256] Social cooperation requires actors to establish trust, but illicit markets are riddled with risks and uncertainty, which makes for a low-trust environment. The constant threat of law enforcement, the danger of scamming, and the absence of legal support, make risk omnipresent in illicit markets. This volatile backdrop, paired with suggestions that those engaged in criminal activities are less honest and dependable, would indicate that criminal collaboration would break down.[257] Co-offending and illicit markets are, however, prolific, showing that this does not happen. This is likely because the potential payoffs of collaboration are so profitable. How criminal actors establish and maintain trust is, therefore, an important matter to study to understand how such groups and markets function. This paper will first establish what is meant by trust and examine why it is particularly important in illicit markets. This is important to examine initially in order to explore why trust building is so important to criminal actors and how they do so. Then, it will consider some of the unique challenges to building and retaining trust in illicit markets, before exploring some of the solutions criminal actors find to this trust problem. These include the selective employment of violence, utilising social capital, and using trust signalling. Next, it will turn to online illicit marketplaces, which pose further challenges to the establishment of trust for criminals. It finds that platforms and users have overcome these issues by integrating trust-building into marketplace mechanisms. Overall, it becomes clear that trust is essential to operations in illicit markets.

Conceptualising Trust

Trust is an essential component of social life as it is a prerequisite to all social relations.[258] Social life comes with uncertainties about the intentions of others, which creates risk for individuals. Thus, social cooperation and relationship building inherently involve risk, and trust is how people manage the uncertainty that comes with incomplete

[256] Densley, James A. "Street Gang Recruitment: Signalling, Screening, and Selection." *Social Problems* 59, no. 3 (2012): 301-321.
[257] Von Lampe, Klaus, and Petter Ole Johansen. "Organized Crime and Trust: On the Conceptualization and Empirical Relevance of Trust in the Context of Criminal Networks." *Global Crime* 6, no. 2 (2004): 159-184.
[258] Bakken, "Drug Dealers Gone Digital"
Yip, Michael, Caroline Webber, and Nigel Shadbolt. "Trust Among Cybercriminals? Carding Forums, Uncertainty and Implications for Policing." *Policing and Society* 23, no. 4 (2013): 516-539.

knowledge.[259] Uncertainties can hinder collaboration, so in this sense, trust is the transactional cost of collaboration.[260] Trust presupposes a future outcome that results in harm, while it also indicates that avoiding such risk of harm would mean missing out on potential opportunities.[261] It is through trust that cooperation between actors may occur despite a lack of history of cooperation.

Trust is a “multifaceted phenomenon” that is difficult to define and highly context specific, whether in licit or illicit markets.[262] There are different types of trust and different factors influence those within the trust relationship, such as cultural influences, rationality, and emotions.[263] The dynamics of trust may differ between settings, for example, how trust is enacted in families may be different to in a business setting – the former is based on familiarity and obligation, while the latter relates more to reputation and shared norms (with the help of legal and normative frameworks).[264] Familial and kinship bonds reduce the uncertainty surrounding cooperation, encouraging trust, as individuals have accumulated track records and reputations that help facilitate this trust. Shared ethnicity or local community can also be a strong facilitator of trust, which is based on familiarity, conformity, and shared values.

Market Trust

In markets, uncertainty and asymmetric information can be a barrier to cooperation. Trust issues primarily arise from information asymmetry, where future actions or product quality are not easily observable.[265] When one party in a transaction possesses more transaction-related information than the other, this constitutes ‘information asymmetry/dissymmetry’.[266] Typically, this is the case when sellers are more informed about the quality of their product relative to buyers. It can, though, also occur with

[259] Von Lampe and Johansen, "Organized Crime and Trust"
[260] Yip at al., "Trust Among Cybercriminals?"
[261] Munksgaard, Rasmus. "Building a Case for Trust: Reputation, Institutional Regulation and Social Ties in Online Drug Markets." *Global Crime* (2022): 1-24.
[262] Von Lampe and Johansen, "Organized Crime and Trust"
[263] Bakken, "Drug Dealers Gone Digital”
[264] Von Lampe and Johansen, "Organized Crime and Trust"
[265] Munksgaard, "Building a Case for Trust"
[266]Akerlof, George A. "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism." *The Quarterly Journal of Economics* 84, no. 3 (1970): 488-500.

information imbalances between employers and new recruits, for example. Akerlof describes this risk derived from asymmetric information in his paper about the 'market for lemons'. He theorised that in a market with asymmetrically distributed information, this drives prices down so that high-quality sellers leave the market and only poor-quality goods are available. Trade, consequently, breaks down entirely. Similarly, when individuals cannot accurately judge the trustworthiness of potential collaborators, cooperation is not possible. To employ Akerlof's classic example, the market for used cars is one in which sellers have more information about the quality of the product or seller, which creates a situation where buyers risk overpaying for a poor-quality product. Trust is necessary to avoid this breakdown of trade and failure of cooperation.[267] Actors, thus, have an incentive to demonstrate that they can be trusted so that the transactions and relationships are possible. Such is the case for markets with asymmetric information, whether licit or illicit. Many such markets exist, including those for hiring labour and buying stocks, to the market for counterfeit medication.[268] Nonetheless, additional barriers to trade exist in illicit markets due to the absence of trade-supporting mechanisms such as regulation.

In licit markets, collaborations can be supported by legal and social apparatus. Legal structures can function as a protection against the potential harm that comes with social relations, by legally binding the actions of individuals in the arrangement.[269] Contracts and product standards ensure that quality and expectations must be met, or, otherwise, the individual will be legally sanctioned. Additionally, repeated interaction is commonplace in licit markets, alongside high levels of transparency, which facilitate informational symmetry and trust. Alongside this, shared norms, interpersonal relationships, and reputational considerations make the establishment and maintenance of trust possible and common in licit markets.[270]

[267] Munksgaard, "Building a Case for Trust"
[268] Beckert, Jens, and Frank Wehinger. "In the Shadow: Illegal Markets and Economic Sociology." *Socio-Economic Review*11, no. 1 (2013): 5-30.
[269] Von Lampe and Johansen, "Organized Crime and Trust"
[270] Von Lampe and Johansen, "Organized Crime and Trust"

Trust Problems in Illicit Markets

Illicit markets amplify the need for trust due to the clandestine nature of criminal activities, which are characterised by uncertainty, secrecy, and additional external threats. Numerous challenges to cooperative relationships exist in illicit markets that do not in licit markets.[271] For sellers, the omnipresent threat of law enforcement makes risk inherent to operations and, thus, establishes a "special need for trust".[272] With every transaction, criminals expose themselves to the risk of arrest. Consequently, it is significantly more difficult for them to find collaborators and customers, and successfully operate than for businesses in licit markets. Nonetheless, many bear this risk of arrest, largely because the potential payoffs are so high.[273]

Risk in illicit markets also arises from other criminal actors, due to the absence of the rule of law.[274] Unlike in licit markets, there is no third-party conflict resolution and there are no legal frameworks, such as contracts and product regulations, that are often used to bind people.[275] As a result, there is no institutional trust. Without regulatory standards, buyers in illicit markets must be cautious about the risk of low-quality or overpriced goods due to informational asymmetries.[276] In the case of illicit goods such as drugs, poor-quality products can also have major health consequences. Additionally, collaboration and recruitment in criminal spheres are difficult because there are incentives for collaborators to deviate in pursuit of individual profits.[277] With no legal mechanisms to prosecute individuals or protect rights, cooperative arrangements are unenforceable, which leaves criminal actors vulnerable to the possibility that these arrangements might be violated.[278] Actors participating in markets outside of the law consequently become easy targets for other criminals. Furthermore, criminals have an

[271] Tzanetakis, Meropi, Gunnar Kamphausen, Bernd Werse, and Richard von Laufenberg. "The Transparency Paradox: Building Trust, Resolving Disputes and Optimizing Logistics on Conventional and Online Drugs Markets." *International Journal of Drug Policy* 35 (2016): 58-68.
[272] Tzanetakis et al., "The Transparency Paradox", 67.
[273] Yip at al., "Trust Among Cybercriminals?"
[274] Tzanetakis et al., "The Transparency Paradox"
[275] Munksgaard, "Building a Case for Trust"
[276] Munksgaard, "Building a Case for Trust"
[277] Densley, "Street Gang Recruitment"
[278] Beckert and Wehinger, "In the Shadow"

incentive to scam others as they can increase their profits without fear of legal repercussions.

In the event of loss or mistreatment in illicit markets, actors have little opportunity for compensation or justice.[279] Without regulatory protections, actors in illicit settings must rely on different mechanisms to facilitate cooperation and sanction behaviour that violates it. Given actors in the illicit market are operating illegally, the crime reporting incidence is low as participants can simultaneously be victims and offenders.[280] Moreover, many in criminal spheres may reject formal mediation due to beliefs held about institutions like the police, or considerations that criminal disputes are not taken seriously. For some, eliciting police support is seen as reputationally damaging, as it signals weakness.[281] As a result, many victims avoid formal mediation in favour of enacting "street justice", by which victims avoid law enforcement and instead utilise alternative resolution approaches such as violence.[282] In drug markets, for example, Jacques and Wright determine that such street – or "popular" – justice is "conflict management absent the government", which is performed by the people, not the police.[283] Actors must choose to *tolerate* deviance, *avoid* it, *negotiate* with those involved, or to *retaliate* against it. Depending on the criminal setting, different methods are preferred. Violent retaliation in response to deviance is common in drug markets in poor, inner-city areas, while toleration or avoidance is more commonplace in suburban drug markets.[284]

Credit and debt can be important in many illicit markets. Holding large inventories of illicit goods heightens criminals' risk of arrest or theft. As a result, this tends to be undesirable. Consequently, many sellers aim to redistribute their goods quickly.[285]

[279] Holt, Thomas J., Olga Smirnova, and Alice Hutchings. "Examining Signals of Trust in Criminal Markets Online." *Journal of Cybersecurity* 2, no. 2 (2016): 137-145.
[280] Jacques, Scott, and Richard Wright. "How Victimised Drug Traders Mobilise Police." *Journal of Contemporary Ethnography* 42, no. 5 (2013): 545-575.
[281] Jacques and Wright, "How Victimised Drug Traders Mobilise Police."
[282] Jacques and Wright, "How Victimised Drug Traders Mobilise Police.", 547.
[283] Jacques, Scott, and Richard Wright. "Informal control and illicit drug trade." *Criminology* 49.3 (2011): 733.
[284] Jacques, Scott, and Richard Wright. "Informal control and illicit drug trade." *Criminology* 49.3 (2011): 729-765.
[285] Moeller, Kim, and Sveinung Sandberg. "Credit and Trust: Management of Network Ties in Illicit Drug Distribution." *Journal of Research in Crime and Delinquency* 52, no. 5 (2015): 691-716.

Offering credit schemes can improve their ability to rapidly redistribute goods, but without the legal apparatus of above-ground debt markets, credit makes sellers vulnerable to scams. Establishing trust is, therefore, beneficial to criminals as it enables them to enact credit relationships and, thus, increases their flexibility and profitability.

Resolving Trust Problems in Illicit Markets

Given the unique array of trust problems present in illicit markets, mechanisms to overcome these are essential if the market is to function effectively. Thus, to benefit from engaging in illicit markets, criminals employ tactics such as violence, utilising social capital and trust signalling. Violence – or the threat thereof – is often used to enforce market functions, while relationships prove important to engaging in market exchange at all. Meanwhile, signalling aids actors in determining with whom to work.

Violence

Despite a criminal's ability (and need) to build trust, “no basis of trust is strong enough to rule out the possibility of betrayal”.[286] To maintain the functionality of illicit activities, actors must impose sanctions on those that violate arrangements.[287] In such circumstances, criminals, such as organised crime groups, utilise mechanisms such as threats of violence, ostracisation, and violence.[288] Jacques et al. claim that it is the illegal nature of illicit markets that causes so much violence within them.[289] In the absence of legal conflict resolution mechanisms, criminal actors must turn to violence instead. To function as a deterrent, though, violent threats must also be seen as credible, so collaborators must trust the group’s willingness and capacity to exert violence.[290] Thus, actors must effectively signal their capacity for - and willingness to use violence.[291]

[286] Von Lampe and Johansen, "Organized Crime and Trust", 176.
[287] Densley, "Street Gang Recruitment”
[288] Beckert and Wehinger, "In the Shadow"
[289] Jacques, Scott, Andrea Allen, and Richard Wright. "Drug Dealers' Rational Choices on Which Customers to Rip-off." *International Journal of Drug Policy* 25, no. 2 (2014): 251-256.
[290] Von Lampe and Johansen, "Organized Crime and Trust"
[291] Densley, "Street Gang Recruitment”

Whilst violence is undoubtedly important to conflict resolution in the absence of law enforcement, its role must not be overestimated. Violent retributions come with too many drawbacks to be utilised in most instances.[292] Generally, successful criminals will avoid unnecessary use of violence.[293] Heightened violence is costly in terms of resources, and comes with unwanted consequences such as attracting attention, including from the police and the public.[294] Furthermore, many crime groups claim to protect their members (which can be a strong draw to the group for potential members) so in-group violence contradicts their claims and may damage the group's reputation, hinder recruitment, and diminish trust in the group.[295] Violence, or threats of violence, are arguably necessary in criminal markets, but, in the long run, it does not serve as an adequate mechanism to enforce cooperation, so trust-based solutions are the most feasible alternative.[296]

Social Capital

Collaboration comes with many risks in criminal settings. Nonetheless, actors still choose to collaborate. The primary reason behind this is the desire for social capital.[297] Authors like Granovetter[298] and Portes and Sensenbrenner[299] have shown that embeddedness in social networks can provide material benefits to individuals, and this holds for criminal actors. Yip et al. describe social capital as "the advantages that arise from the connections with others".[300] Such advantages may include access to resources and information, trust building, obligations, or social norms. Thus, collaboration is worthwhile to those in illicit markets because in many cases the associated rewards outweigh the risks, such as punishment by law enforcement.

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[292] Densley, "Street Gang Recruitment"
[293] Moeller, Kim, and Sveinung Sandberg. "Credit and Trust: Management of Network Ties in Illicit Drug Distribution." *Journal of Research in Crime and Delinquency* 52, no. 5 (2015): 691-716.
[294] Beckert and Wehinger, "In the Shadow"
[295] Densley, "Street Gang Recruitment"
[296] Beckert and Wehinger, "In the Shadow"
Densley, "Street Gang Recruitment"
[297] Yip at al., "Trust Among Cybercriminals?"
[298] Granovetter, Mark S. "The Strength of Weak Ties." *American Journal of Sociology* 78, no. 6 (1973): 1360-1380.
Granovetter, Mark. *Getting a Job: A Study of Contacts and Careers*. University of Chicago Press, 2018.
[299] Portes, Alejandro, and Julia Sensenbrenner. "Embeddedness and Immigration: Notes on the Social Determinants of Economic Action." In *The Sociology of Economic Life*. London: Routledge, 1993: 93-115.
[300] Yip at al., "Trust Among Cybercriminals?", 519.

Social networks provide criminals with an opportunity to build their reputations and establish long-term criminal collaborations.[301] Social connections are so important because they are a means to build trust in an otherwise low-trust setting. Actors foster this trust through repeat interactions and relationship building or taking advantage of existing connections[302]. It has been found, for example, that drug dealers are more likely to defraud strangers than long-term customers[303]. Existing friendships and familial relationships, or shared ethnicity or locality help build trust in illicit markets.[304] As trust is produced through experience, long-standing social connections reduce uncertainty.[305] Consequently, personal connections can make favourable co-offenders. In contrast to licit markets, actors in illicit markets rely heavily on "pre-modern trust devices", which means that illicit market activity depends upon personal relationships more than institutions.[306] Social capital is, therefore, hugely important to the establishment of trust in illegal markets. Moreover, networks can serve as a means of regulation. When criminal activities are embedded in social networks, actions that violate the group's code can be sanctioned with ostracization. If groups are based on long-running relationships, this functions as a much stronger threat. Overall, social capital serves as a means to establish and maintain trust in the setting of illicit markets.

Trust Signalling

Signalling theory, which has its roots in economics and biology, demonstrates how people, including criminal actors, communicate attributes in the presence of asymmetric information.[307] To reap the benefits of cooperation in illicit markets, actors must evaluate the trustworthiness of their potential co-offenders. Given the risks involved in co-offending, picking an appropriate collaborator is important. A good co-offender will possess sufficient trust-warranting properties – the presence of these properties

[301] Beckert and Wehinger, "In the Shadow"
[302] Munksgaard, "Building a Case for Trust"
[303] Jacques et al., "Drug Dealers' Rational Choices on Which Customers to Rip-off."
[304] Densley, "Street Gang Recruitment"
[305] Munksgaard, "Building a Case for Trust"
[306] Beckert and Wehinger, "In the Shadow"
[307] Gambetta, Diego. "Codes of the Underworld: How Criminals Communicate." Princeton: Princeton University Press, 2009.

determines whether an actor wishes to interact with them or not.[308] Organised crime groups, for example, highly value characteristics like loyalty, trustworthiness, and competence in potential recruits or collaborators due to the precarious market in which they operate. In addition, more specialised skills like toughness or a readiness to exert violence are essential to groups such as street gangs.[309] Since observing these properties directly is not possible, they must be inferred through the signs and signals that an individual exhibits.[310]

Signals are the features that an individual deliberately displays to manipulate perceptions about themselves.[311] These features are anything perceivable about an individual, whether that be their behaviour or their physical presentation. Signs, instead, are anything that can impact people's views about an individual. These may include how an individual dresses, tattoos, accents or mannerisms. Signs are not necessarily noticed, but they have the capacity to be and can, thus, be transformed into signals - signs are "dormant potential signals".[312] Even if signs may not have been purposely chosen to reflect certain characteristics, they can be utilised to do so at any point.

Together, signs and signals determine how people are viewed by others, and they are how an individual is judged as trustworthy.[313] With asymmetric information, signalling is a means for actors to indicate the presence of invisible characteristics, like trustworthiness, through visible signs and reduce the uncertainty related to social interaction.[314] A major problem arises from signalling; however, a signal that can be emitted to reflect an individual's characteristic can often also be mimicked by another trying to pose.[315] In this regard, signals lose their value if they can be easily faked. Given the lack of enforceability of trust agreements in illegal markets, this causes a big

[308] Densley, "Street Gang Recruitment"
Gambetta, Diego. "Signalling" In *The Oxford Handbook of Analytical Sociology*, edited by Peter Bearman and Peter Hedström. Oxford: Oxford University Press, 2011.
[309] Densley, "Street Gang Recruitment"
[310] Gambetta, "Signalling"
[311] Gambetta, "Codes of the Underworld"
[312] Gambetta, "Codes of the Underworld", xv.
[313] Gambetta, "Codes of the Underworld: How Criminals Communicate."
[314] Jann, Ben, and Wojtek Przepiorka, eds. *Social Dilemmas, Institutions, and the Evolution of Cooperation*. Berlin: De Gruyter Oldenbourg, 2017.
[315] Gambetta, "Signalling"

issue as individuals have a strong incentive to fake signals.[316] The extent to which fake signals occur depends on the cost of signals.

Emitting signals entails costs. Being part of the yakuza, for example, requires the cost of bearing their signature tattoos.[317] These elaborate tattoo designs signal both members' toughness, through enduring the painful process of acquisition, and their commitment to crime life, by foregoing the opportunity to re-enter refined society. Only those who are willing to commit to the yakuza would get such tattoos. Whilst such tattoos can theoretically be false signals, the resulting social exclusion and pain is a cost too high for most to fake.

High costs alone, however, might also put honest signallers off. Generally, though, there is a signalling cost differential based on the signaller: it tends to be costlier to emit a false signal than a genuine one.[318] Gangs in London, for example, recruit from specific localities and potential recruits can easily signal that they are from that area through not only mutual connections, but also hard-to-fake local knowledge and proximity.[319] It is, however, much harder to credibly mimic this. Signals that are cheap for the honest signaller to omit but costly for the false signaller are most effective, as they result in fewer mimickers. Thus, in equilibrium, only honest signallers could afford to signal. It is, therefore, in the interest of genuine sellers and buyers to produce signals that are relatively cheap to emit but costly to mimic, as it makes it possible for them to establish trust while still making it easy for honest signallers to take part[320]. Trust signalling is, thus, hugely important to criminal actors to establish trust and enable cooperation in what is otherwise a trust-deprived setting.

Trust Problems in Online Illicit Markets

Illicit markets have seen massive developments in recent decades with the emergence of cryptomarkets - online marketplaces where users are anonymised and

[316] Munksgaard, "Building a Case for Trust"
[317] Gambetta, "*Codes of the Underworld: How Criminals Communicate.*"
[318] Gambetta, "Signaling"
[319] Densley, "Street Gang Recruitment"
[320] Holt et al., "Examining signals of trust in criminal markets online."

communication is encrypted.[321] Undoubtedly, these markets have created new opportunities for criminals. The international scope of cryptomarkets has reshaped the process of buying and selling illegal goods by eliminating geographic limitations on trade.[322] Underground connections, in the traditional sense, are no longer necessary to purchase or distribute illicit goods. While offline illicit markets rely on secrecy and interpersonal relationships, paradoxically, online illicit markets list publicly (albeit under fake identities) but trade anonymously.[323] In contrast to traditional criminal markets, illegal activity is conducted openly, while criminals hide behind aliases. This shift has introduced new challenges to establishing and maintaining trust between criminal actors.

Whilst the same overarching threats of law enforcement and asymmetric information between actors remain in online settings, the anonymity inherent to cryptomarkets further hinders trust building and means of social control.[324] Moreover, in online markets, the omnipresent threat of law enforcement poses the risk of arrest and site shutdown, platforms are saturated with scammers (due to a strong incentive to scam), and it is often impossible for victims to seek retribution. One common example of this is the exit scam – when a vendor retires from the market and takes customers' money without fulfilling orders.[325] In the absence of impactful sanctions, actors have a financial incentive to conduct exit scams, especially if they would retire anyway. Naturally, this risky environment increases the need for strong trust between actors, however, anonymity (despite aiming to protect users from law enforcement) poses a problem for fostering such trust. To overcome the trust deficit that exists in online illegal settings, cryptomarkets have designed technological mechanisms to build trust amongst their users, while users themselves try to signal their trustworthiness to others.[326]

[321] Tzanetakis et al., "The Transparency Paradox"
[322] Tzanetakis et al., "The Transparency Paradox"
[323] Tzanetakis et al., "The Transparency Paradox"
[324] Dupont, Benoit, Antoine M. Côté, Jean-Ian Boutin, and Jean Fernandez. "Darkode: Recruitment Patterns and Transactional Features of 'the Most Dangerous Cybercrime Forum in the World'." *American Behavioral Scientist* 61, no. 11 (2017): 1219-1243.
[325] Tzanetakis et al., "The Transparency Paradox"
[326] Lusthaus, Jonathan. "Trust in the World of Cybercrime." *Global Crime* 13, no. 2 (2012): 71-94.

Resolving Trust Problems in Online Illicit Markets

Cryptomarkets are by design “signalling environments” that are devised by administrators, who determine which signalling opportunities are incorporated into the platform.[327] Consequently, the transactional relationship diverges from a dyadic relationship to a triangular relationship between the buyer, seller, and administrator.[328] Trust must be established within the mechanisms provided by the platform. Hence, market technology shapes trust relations and transactions. This exposes market participants to risk that stems from dependence on the market technology and administrators.[329] The systems are responsible for the distribution of risk, and as a result, administrators and vendors hold the power.[330]

Just as reputation is vital to criminals in offline settings, it also plays an important role in fostering trust in cryptomarkets, many of which have integrated reputation mechanisms.[331] As in licit online marketplaces, like Gumtree or Depop, tools are used in online illicit markets to facilitate transactions by enabling trust building. These reputation mechanisms, such as built-in review systems, are in place to encourage vendors to complete transactions to a high standard, thus establishing trust in vendors.[332] On one dark-web marketplace, Silk Road, such trust-building infrastructure was integral to transactions, as reviews systems helped users make trust judgements on other anonymous users.[333] Through positive reviews, vendors signal that they are reliable and trustworthy. Often positive reviews are a result of not only transaction completion but also high levels of customer service, including fast replies and discrete packaging.[334] Reputation scores play a “principle role in the gaining or loss of vendor trust” and are

[327] Maras, Marie-Helen, Jana Arsovska, Alex S. Wandt, and Karen Logie. "Keeping Pace with the Evolution of Illicit Darknet Fentanyl Markets: Using a Mixed Methods Approach to Identify Trust Signals and Develop a Vendor Trustworthiness Index." *Journal of Contemporary Criminal Justice* (2023): 10439862231159530: 4.
[328] Tzanetakis et al., "The Transparency Paradox"
[329] Bancroft, Angus, Tim Squirrell, Anne Zaunseder, and Irene Rafanell. "Producing Trust Among Illicit Actors: A Techno-Social Approach to an Online Illicit Market." *Sociological Research Online* 25, no. 3 (2020): 456-472.
[330] Tzanetakis et al., "The Transparency Paradox"
[331] Tzanetakis et al., "The Transparency Paradox"
[332] Maras at al., "Keeping Pace with the Evolution of Illicit Darknet Fentanyl Markets"
[333] Christin, Nicolas. "Traveling the Silk Road: A measurement analysis of a large anonymous online marketplace." *Proceedings of the 22nd international conference on World Wide Web*. 2013.
[334] Tzanetakis et al., "The Transparency Paradox"

more important than even the product range or prices on offer[335]. Thus, establishing trust is a method for improving both a vendor's reputation and their demand.

Together with positive reviews, vendors signal their trustworthiness in several ways. Prior to the transaction, strong customer service is a means to signal their reliability.[336] Providing additional support demonstrates sellers' commitment to the deal. Furthermore, users' profile pages are strong points of signalling.[337] They are an opportunity to signal trust through language and presentation, but normally also include vendors' ratings and number of transactions.[338] A high number of transactions functions in itself as a positive indicator of trustworthiness. Combined, these factors build sellers' reputations, which are hugely influential in vendor selection.[339] Furthermore, repeat interactions are common and reinforce the trust relationship between the buyer and seller.[340]

Discussion forums are another popular mechanism to establish and maintain trust among buyers and sellers in illicit markets. Forums allow for the dispersal of information, including evaluations of vendors.[341] Similar to review systems, this reduces the uncertainty and risk faced by buyers. Vendors can also signal their reliability through forum interactions.[342] Furthermore, the publicity of forums creates a means to punish scammers by publishing their scams, which can lead to ostracization or banning from the site.[343] Naturally, this acts as a deterrent to would-be-scammers. Although users could re-join the platform with a new account, they would be tasked with rebuilding their reputation and trust among buyers. Community is vital to many cryptomarkets, and some platforms rely heavily on this as a risk-management approach.[344] Moral sanctioning in many ways replaces traditional methods of retribution.

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[335] Maras at al., "Keeping Pace with the Evolution of Illicit Darknet Fentanyl Markets"
[336] Holt et al., "Examining signals of trust in criminal markets online."
[337] Tzanetakis et al., "The Transparency Paradox"
[338] Holt et al., "Examining signals of trust in criminal markets online."
[339] Maras at al., "Keeping Pace with the Evolution of Illicit Darknet Fentanyl Markets"
[340] Munksgaard, "Building a Case for Trust"
[341] Maras at al., "Keeping Pace with the Evolution of Illicit Darknet Fentanyl Markets"
[342] Tzanetakis et al., "The Transparency Paradox"
[343] Lusthaus, "Trust in the World of Cybercrime"
[344] Bancroft at al., "Producing Trust Among Illicit Actors"
Tzanetakis et al., "The Transparency Paradox"

Another trust-building system integrated into many online illicit marketplaces is an escrow service. Such systems aim to reduce the inherent risk to buyers on cryptomarkets by guaranteeing a successful transaction using an intermediary that holds the payment until the transaction is complete.[345] Escrow systems are designed to generate and signal trust amongst users as they reduce the risk to buyers.[346] Platforms tend to have a single escrow agent, who is responsible for holding escrow money, and is therefore in a position of great trust.[347] Although enabling trust between users, this system reallocates power to administrators.[348] Concentrating so much money in the hands of an escrow agent provides the opportunity for a large-scale exit scam that is more impactful than that of just one vendor. In such cases, victims are essentially helpless and have no chance of recovering their losses given the anonymity and illegality of where the crime took place. Whilst some defrauded victims have sought retribution through means such as doxing the perpetrators, this is rarely effective and does not serve as a credible incentive against committing the crime. Consequently, some platforms have opted to avoid escrow services due to this risk.[349]

Many of these systems in place reduce uncertainties between users yet cannot protect users against risks such as falling victim to an exit scam or other predatory behaviour. Moreover, while sites like Silk Road may have predominantly positive reviews, scams still occurred, just mostly “out of escrow”.[350] Thus, these measures cannot fully protect users. Dupont et al. argue that the most effective method to overcome these persistent issues and more effectively build trust in cryptomarkets is to restrict entry to platforms.[351] Restricting members serves to reduce the risk of law enforcement and scamming by building a closed community of skilled criminals that is based on trust. While the platform Dupont et al. claimed to be such an elite hacking forum with limited entry, the incentive to increase users’ profits by growing the marketplace resulted in a platform that was not very exclusive and faced the same issues as many other cryptomarkets.

[345] Holt et al., "Examining signals of trust in criminal markets online.”
[346] Lusthaus, "Trust in the World of Cybercrime."
[347] Holt et al., "Examining signals of trust in criminal markets online.”
[348] Tzanetakis et al., "The Transparency Paradox"
[349] Tzanetakis et al., "The Transparency Paradox"
[350] Christin, "Traveling the Silk Road"
[351] Dupont at al., "Darkode"

This shows that, although restricting users can be a means to foster trust, strong profit incentives exist to open platforms.

Ultimately, the fundamental processes of trust building in online illicit markets are similar to their offline counterparts despite the differences in trust-building mechanisms.[352] In both settings, informal social control is vital to relations, and building social connections, through repeated exchanges, fosters trust amongst actors. Different cryptomarkets have built platforms that function despite the additional challenges to trust building. In many ways, the success of these cryptomarkets has been due to how trust-establishing mechanisms have been built into the platforms. Even as criminal spheres develop technologically, it is likely they will continue to rely on social apparatus to facilitate collaboration and trade.

Conclusion

Illicit markets and most criminals would not be able to function successfully without trust. In the lawless illicit sphere, where risks are heightened from the threat of arrest and scamming, trust relations are necessary for co-offending and market relations. To acquire the social capital that makes criminal activities possible, actors draw on existing relationships and form new ones. Forming relationships in the illicit sphere requires vulnerability as it unavoidably entails risk. While risk is inevitable, actors try to minimise it through trust. Trust signalling is important in illicit markets as it allows actors to build trust by signalling their trustworthiness and other desirable qualities.

Different signals have differing success in different groups. While the yakuza want members to signal their commitment by branding themselves with elaborate tattoos, alternatively London street gangs seek recruits to signal their backgrounds and propensity for violence. The emergence of online illicit markets, however, challenged this use of signalling between criminals due to the anonymity inherent to cryptomarkets. Without the capacity to learn anything about an individual, it can be difficult to evaluate their trustworthiness. Platforms, however, have been designed as signalling

[352] Munksgaard, "Building a Case for Trust"

environments to overcome this problem; integrated features, including review mechanisms, chat forums, and escrow services, foster trust amongst users.

Building trust in a trust-poor setting is undoubtedly a challenge, but the cooperative relations of criminal actors show that it is both possible and common, especially when the reward for cooperation is high. Ultimately, while they use different means, the behaviour of online criminals is not very different from their offline counterparts: trust is established and maintained through signalling and interpersonal relationships. More generally, a criminal actor's trust-building behaviour is a reaction to the high-risk setting in which they operate, as without trust they could not function. Understanding how trust is built and maintained in criminal spheres can, thus, be crucial to law enforcement aiming to curtail illicit activity.

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Research Article

Psychological Explanations for Surveillance Technologies in Crime Prevention

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Abstract

The growth of surveillance technology in relation to crime prevention raises questions about the effectiveness of such tools in altering behaviour. The purpose of this essay is to examine surveillance technology through psychological theories such as social-identity theory and shame culture. The examples of Closed Circuit Television (CCTV), remote workplace monitoring, and police body-worn cameras will be analysed through the lens of psychology to explain where surveillance technology may succeed or fail to prevent crime and suggest that social psychology plays an important role in determining the success of surveillance technology.

Keywords crime prevention • psychology • shame culture • social identity theory • surveillance • surveillance technology

I. Introduction

Crime prevention is complicated. Surveillance technology serves several roles in relation to crime and response, specifically through observation, documentation, and prevention.[354] The prevention aspect is vital, with parties at multiple levels –

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[354] Rudschies, Catharina. "Power in the Modern 'Surveillance Society': From Theory to Methodology," 276.

government, law enforcement, corporate, etc – working to try to identify ways to limit criminal conduct. It is a modern panopticon, testing the idea that if we are being watched, we are more likely to abide by societal norms.[355] However, little is known about the extent to which such tools have an impact. This essay will focus on this idea, asking what the relationship is between psychology and surveillance technology in preventing criminal acts. It will use the concepts of social identity and shame culture to argue that surveillance technology serves to alter behaviour by forcing conformity to social norms. The first section will explain social identity theory and shame culture before discussing the growth in surveillance technology in the second section. The third and final section will look at how the two combine and consider three examples – closed circuit television (CCTV), remote workplace monitoring, and police body-worn cameras – that showcase how surveillance technology alters behaviour. The essay concludes with a summary of the evidence provided, addressing the central argument on the influence that surveillance has on social identity and behaviour.

II. Psychology and Social Behaviour

The first aspect of exploring the relationship between psychology and surveillance technology is understanding the theories behind behavioural decisions. This paper will approach the relationship by looking at social identity and shame culture. Social identity is part of the self-concept – one's image of oneself – 'that is derived from memberships in social groups or categories.'[356] A major aspect of any individual's identity is their relationship with groups – age, gender, job, favourite television show, etc. – they perceive themselves to be a part of. These groups are the 'in-group' and the groups that an individual does not recognise themselves as a part of or does not wish to identify

[355] See Rudchies 276-277 or Lyon, David. *Electronic Eye: The Rise of Surveillance Society,* 58.
[356] "APA Dictionary of Psychology," "APA Dictionary of Psychology," Social Identity (American Psychological Association, n.d.); "APA Dictionary of Psychology," Self-Concept.

with are the 'out-group.'[357] People are then influenced by these groups, emphasising the role of group membership and 'belonging' in shaping behaviour.[358]

Individuals will compare themselves with others, particularly with those in similar groups, and adjust their behaviour to follow the respective norms. Adherence is based on the level at which the group and their behaviour align with the individual's overall social identity.[359] When an individual can balance the norms successfully through adjusting actions and behaviours, they feel better about their self-concept. However, when they fail, they may experience negative emotions or become exiled into the out-group.[360] It is important to note that the group dynamics posed in social identity theory are not reflective of overarching uniformity but rather of a level of depersonalization, allowing individuals to meet standards of acceptable behaviour in their respective groups while also maintaining their own singular goals and desires.[361]

Social identity extends into cultural standards, including the idea of shame. 'Shame culture' refers to any society that maintains a 'strong desire to preserve honour and avoid shame.'[362] This idea presents an extension of social identity, in which the culture is the group, presenting a set of behavioural requirements for individuals to meet the 'honourable' standard and feel like true members of society. Authority – like in social identity – shapes behaviour and is one of the primary influences in developing a shame culture. The dominant authority – such as government or religious leaders – determines the expectations that need to be met, causing individuals to act in a way to avoid being

[357] Stets, Jan E., and Peter J. Burke. "Identity Theory and Social Identity Theory," 224, 225.
[358] "APA Dictionary of Psychology," Social Identity Theory; Mirbabaie, Milad, Stefan Stieglitz, Felix Brünker, Lennart Hofeditz, Björn Ross, and Nicholas R. J. Frick. "Understanding Collaboration with Virtual Assistants—The Role of Social Identity and the Extended Self," 22-24.
[359] See about Social Comparison Theory in Goldstein, Noah J., Robert B. Cialdini, and Vladas Griskevicius. "A Room with a Viewpoint: Using Social Norms to Motivate Environmental Conservation in Hotels," 475; Stets and Burke 225.
[360] Mirbabaie et al, 24.
[361] Stets and Burke 227-228, 233.
[362] See Gilligan, James. "Shame, Guilt, and Violence," 1151 and Flanagan, Owen. *How to Do Things with Emotions: The Morality of Anger and Shame Across Cultures, 2*09; "APA Dictionary of Psychology," Shame Culture.

met with negative responses – such as disappointment or anger – and remain in the in-group.[363]

Cultures that utilise shame tend to manipulate individual emotions and situational decisions into a tool that can 'teach and protect values,' particularly those related to the group as a whole.[364] The expectations provided lead to the development of an understanding of cues that trigger internalised feelings of shame and, likewise, diminish the probability of actions that are viewed as detrimental to the community.[365] If the connection between the culture and one's social identity is strong enough, the feelings of shame may become internalised and no longer require an audience. However, the impact on behaviour is still largely dependent on a person's feelings of being seen and judged by their group.[366]

III. Development of Surveillance Technology

While methods such as interpersonal relationships, laws, and other individuals were for a long time important in the development of cultural norms and social expectations, surveillance technology – and its use in 'dataveillance' – has since grown in prominence[367] Over the past few decades, technologies such as body-cameras, security cameras, and radio-frequency identification (RFID) chips have become ingrained into society.[368] The growth in individual surveillance tools has also coincided with the appearance of technologically-savvy 'smart cities' – the theory and practice of

[363] Benedict, Ruth. "Continuities and Discontinuities in Cultural Conditioning," 162-163; Flanagan, 141, 146-147; Milgram, Stanley. "Obedience to Authority: An Experimental View," 8, 11, 68.
[364] Cosmides, Leda, and John Tooby. "Evolutionary Psychology and the Emotions."; Flanagan, 194, 202, 210.
[365] Flanagan, 134-136; Cosmides and Tooby; See also Creighton, Millie R. "Revisiting Shame and Guilt Cultures: A Forty-Year Pilgrimage," 287.
[366] Flanagan, 199.
[367] Lyon, 41,47-48; Clarke, Roger. "Information Technology and Dataveillance," 499. See also Clarke's definition of 'dataveillance' as 'the systematic monitoring of people's actions or communication through the application of information technology,' 499.
[368] Sheldon, Barrie. "Camera Surveillance Within the UK: Enhancing Public Safety or a Social Threat?" 193; See Leman-Langlois, Stéphane. *Technocrime: Technology, Crime and Social Control,* 17.

optimising urban life and business efficiency through internet connectivity, dispersed sensors, and big data.'[369]

In its basic form, surveillance technology attempts to disrupt the basic elements of crime, providing a new 'guardian' to limit opportunities for crime and encourage individuals to meet new expectations to fulfil their social identity.[370] However, the question remains of how exactly this is done and whether it successfully alters behaviours on a social level. It is also important to note that surveillance technologies maintain questionable ethical standards, with protection laws not always matching the implementation of surveillance systems. There is a lack of data considering the impact of restrictions on the use of surveillance technology and its related efficacy, but the role that the law remains vital to consider in how such technologies are utilised in crime response and deterrence. For example, San Francisco implemented a facial recognition ban in 2019, meaning that law enforcement and governmental agencies – despite reportedly not actively using them at the time – will not be able to implement facial recognition technology in their operations going forward.[371]

IV. Connecting the Technological to the Psychological

It would not be fair to consider social identity and shame culture in relation to surveillance technology without first addressing how the concepts connect to general situational crime prevention (SCP). Emotional cues shape an individual's behavioural decisions in an almost algorithmic structure.[372] As the purpose of SCP is to prevent the occurrence of crime by removing situational opportunities, an individual's psychological processes may affect whether the preventative measures are successful. If the measure

[369] Pat O'Malley and Gavin JD Smith, "'Smart' Crime Prevention? Digitization and Racialized Crime Control in a Smart City," 40-41. See also, Bokhari, Syed Asad Abbas, and Myeong Seunghwan. 2024. "How Do Institutional and Technological Innovations Influence the Smart City Governance? Focused on Stakeholder Satisfaction and Crime Rate" 1-4.
[370] Felson, M., & Boba, R. "Chemistry for crime" 28; Doyle, Aaron., Randy K. Lippert, and David Lyon. Eyes Everywhere: The Global Growth of Camera Surveillance, 67.
[371] Barber, Gregory. "San Francisco bans agency use of Facial Recognition Tech."
[372] Recall Cosmides and Tooby.

is able to make it so that the cost of the act is less than the benefit, the person will be more likely to choose not to act.[373]

Likewise, if the individual is a member of a shame culture, they may view any risk of violating cultural norms through acts such as theft as unfavourable. An example of this is the usage of community watch programs. These programs use community members to surveil themselves, promoting a micro-culture of shame and removing opportunities for crime not only through decreasing the availability of vulnerable targets but also through forcing those who live in the community to limit their own acts in favour of the preferred behaviours.[374] Once extended to digital surveillance, the norm becomes a digital panopticon.

Jeremy Bentham's panopticon presents the idea that if a person is under the impression that they may be under surveillance at any given time, they are forced to alter their behaviour in a manner deemed positive by the surveilling group.[375] In its structure, the panopticon mirrors the expectations set in place through social identity, however, the question remains if such concepts effectively reinforce norms and alter behaviour. One way that surveillance may effectively influence behaviour is if it, as discussed in the previous section, takes the place of a 'guardian.' Rather than merely serve as a crime-tracking tool, surveillance technology may increase the risk and reduce the anonymity involved in an act.[376] When a person is aware of being watched they will, theoretically, alter their behaviour to avoid being identified as going against the norms established in their social identity. Actual observation, however, is not a requirement. As displayed with the theory around the panopticon, what matters is that the person *believes* they are being watched. Similarly, research has shown that behaviour disruption works best when the surveillance is known.[377] A person who does not know

[373] Heal, Kevin, and Gloria Laycock. *Situational Crime Prevention: from Theory into Practice,* 43-44, 47-48.
[374] Heal and Laycock, 105.
[375] Lyon, 58, 62-63.
[376] See Cornish, Derek B., and Ronald V. Clarke. *Opportunities, Precipitators and Criminal Decisions: A Reply to Wortley's Critique of Situational Crime Prevention,* 90; see also Heal and Laycock 44, 47-48.
[377] Shearing, Clifford D., and Philip C. Stenning. "From the Panopticon to Disney World: the development of discipline," 507; see also Rudschies 284.

whether their behaviours are being observed is less affected than someone who believes they are being watched. Someone who knows they are being watched will be the most affected

In addition to the panopticon and SCP, another model that influences our understanding of how surveillance may impact behaviour is the General Aggression Model (GAM). The GAM suggests that violent actions – and potentially any non-socially acceptable action – are influenced by a cycle involving three parts – '(1) person and situation inputs, (2) present internal states, and (3) outcomes of appraisal and decision-making processes.'[378] An additional implication is made that interventions should be made to address individual inappropriate processes.[379]

Applying this model, the conduct of a person may be shaped in the situational aspect by the technology watching them, impacting their cognitive processes and changing their decision-making processes away from impulsive actions to thoughtful actions. For example, if a person were to consider stealing from a grocery store. In that case, the presence of a security camera may cause them to feel shame for considering a violation of the anti-theft social norms and result in them making the thoughtful decision to not steal over the impulse action of stealing.

These models demonstrate that surveillance disrupts behaviour decisions and promotes conformity to social rules. These rules go on to impact an individual's social identity and create or strengthen a shame culture. In groups where shame and conformity are already present, the use of surveillance technology may work better, as those in the group already have a social identity that is reliant on the performance of acceptable actions. However, more individualist-based cultures and groups may not have a receptive response – recall that obedience is impacted by the level of authority the dominant figure is given.[380] An example of these may be viewed in the differences

[378] DeWall, C. Nathan, Craig A Anderson, and Brad J Bushman. "The General Aggression Model: Theoretical Extensions to Violence," 244-246.
[379] Dewall et al, 251.
[380] Milgram, 11, 68; also see Benedict, 163.

between American and Japanese cultures, where the individual and community have different levels of import.[381] The difference in action may also impact the response – for example, car theft versus violent assault.[382] For a deeper understanding, the next few paragraphs will discuss the 'surveillance capacity' of three different technologies and the impacts they may have on individual behaviour.[383]

IV.A. Closed-Circuit Television (CCTV)

Law enforcement, private companies, and individuals use CCTV systems to monitor and prevent crime or to provide evidence.[384] To understand how CCTV may impact individual behaviour, the SCP approach provides a helpful model.[385] The impact of surveillance in increasing risk and decreasing anonymity in the SCP model has also been connected to greater reporting of crimes by the public and record keeping by law enforcement.[386] violating a clearly established group norm.

When you consider this model, research into the impact of CCTV surveillance is easier to understand. CCTV systems work best in deterring crime in enclosed and well-lit areas and in cases of incidents where social pressure may appear – namely drug dealing and auto theft.[387] A study conducted by Brandon Welsh and David Farrington found that the presence of CCTV correlates with moderate decreases in crime rates.[388] Crimes where an individual may be less impacted by how others view them are less likely to have their relationship with their sense of social identity affected by the presence of CCTV.[389] Specifically, non-violent crimes are the most impacted, with Welsh

[381] Creighton, 296; Flanagan, 209.
[382] Sheldon, 199.
[383] 'The concept of 'surveillance capacity', first suggested by James Rule, is intended as a means of measuring the effectiveness of surveillance systems.' Lyon, 51.
[384] Sheldon, 193-194, 199, 201; See also O'Malley and Smith, 40-41; Leman-Langlois, 17.
[385] O'Malley & Smith, 41, 45; See also Welsh, Brandon C., and David P. Farrington. "Surveillance for Crime Prevention in Public Space: Results and Policy Choices in Britain and America," 500.
[386] Welsh, Brandon C., and David P. Farrington. "Effects of Closed-Circuit Television Surveillance on Crime," 4, 14.
[387] Leman-Langlois 27-28, 37-38; Sheldon, 199; Welsh and Farrington, "Surveillance for Crime Prevention in Public Space: Results and Policy Choices in Britain and America." 501, 514.
[388] Welsh and Farrington. "Effects of Closed-Circuit Television Surveillance on Crime," 4, 13.
[389] Rudschies, 280; Sheldon, 199.

and Farrington's study finding that the presence of CCTV only had an effect in three of the 23 evaluated locals while the example of non-violent vehicle theft saw an impact in nearly half of the cases.[390]

They may acknowledge, however, in situations of violent crime, the increased risk and decreased anonymity may do little to create a sense they are failing to meet the expectations set forth by their social identity. CCTV cameras are also useful in enforcing social notions that normalise certain behaviours while discouraging others.[391] In these cases, CCTV serves to reinforce existing notions of a shame culture yet does not create a shame culture itself.

IV.B. Remote Workplace Monitoring

Another prominent example of contemporary surveillance is that of remote workplace monitoring. Remote workplace monitoring itself, while not geared towards crime prevention, is designed to monitor and discourage certain behaviours and therefore its examination can be used in relation to crime prevention. While in use for many years, remote workplace monitoring systems gained popularity during the COVID-19 lockdown.[392] The primary element of this type of surveillance is that of the panopticon. As workers believe their performance is being consistently reviewed, it is believed that it will encourage them to work harder and prevent any sort of non-favourable actions, such as clocking out early, taking long lunch breaks, or 'slacking off.'[393] However, the central parts of the panopticon concept are those of self-regulation and authority.[394]

While an employee may self-regulate, they may not do so in a way that falls within the norms of their company – for example, by utilising a 'jiggle mouse.'[395] This is because

[390] Welsh and Farrington. "Effects of Closed-Circuit Television Surveillance on Crime." 17.
[391] Doyle et al., 249-250.
[392] Antonio Aloisi and Valerio De Stefano, "Essential Jobs, Remote Work and Digital Surveillance: Addressing the COVID-19 Pandemic Panopticon," 295-296.
[393] Aloisi and De Stefano, 298; Coldiron, Roxanna. "Employer Surveillance of Remote Workers and Impacts on Privacy and Cybersecurity in the Workplace," 1-3.
[394] Shearing and Stenning, 500, 504; Aloisi and De Stefano, 299.
[395] Aloisi and De Stefano, 299-300; Coldiron, 13.

employment – particularly remote employment – may not be part of a person's social identity. While an important aspect of day-to-day life, other relationships and groups prove more influential in social identity.[396] If an individual does not see their job as a vital part of their social identity or their place in the company as a major 'group,' meeting all the norms set forth does not provide any major benefit to the person's ego.[397] As a result, they do not feel the same level of pressure to maintain their status in the group. Likewise, if the boss or company setting the expectations does not garner enough dominance within the group, the employees involved will not be as inclined to perform to the set standard.[398] In short, the example of remote workplace monitoring shows that surveillance only works to the extent to which the individual values and views their relationship with the related in-group. This idea can be applied to crime prevention as while surveillance is applied to deter certain behaviours, if the behaviour and related situation does not meet the level required for one to view the action and groups involved as important, the technology may not have the intended effect.

IV.C. Police Body-Worn Cameras (BWC)

The third example of surveillance technology is that of BWCs utilised by law enforcement. Most cameras track an officer's body movements and record interactions they have with the public. BWCs additionally play a role in efforts to promote trust and transparency between law enforcement and communities. BWCs have additionally served as a tool for law enforcement agencies and local governments to attempt to rebuild the relationship between police officers and the community as well as promote police accountability, as is the case with the American states of Ohio and New Hampshire.[399] A report by the United States Bureau of Justice Statistics (BJS) stated that studies in cities such as Boston, Rialto, and Phoenix saw greater reductions in complaints and use-of-force reports against police officers who wore BWCs compared

[396] Mirbabaie et al, 21-24.
[397] Aloisi and De Stefano, 300.
[398] Milgram, 8; Coldiron, 13.
[399] Marlow, Chad, and Gary Daniels. "Ohio Bucks a Bad Trend with New Police Body Camera Law: ACLU."

to those who did not. It was also shared that BWCs show a promising correlation to decreases in civilian fatalities.[400]

The GAM is useful in looking at how BWCs impact behaviour. The use of BWCs falls under the GAM's environmental modifiers that impact the individual's processing of a situation. With the knowledge that their actions are being tracked, the police officer's internal state would be affected, altering the decision-making process and promoting a more thoughtful outcome in the encounter.[401] However, the actual impact is only based on the extent to which the police officer's social identity includes those they are interacting with. A police officer may view their social identity as including fellow officers but not members of the public – a view stemming from notions that police serve as dominant authorities in communities.[402] If they view themselves as superior to or outside of the group they are tasked with protecting, the officer may not experience any psychological pressure to alter their behaviour. Likewise, as communities grow increasingly mistrustful of the police, the impacts of a growing shame culture will only be seen if the officer holds enough of their social identity to include that community as to cause them to be capable of feeling ashamed and therefore conforming.

This idea has appeared in studies that have found that 'officer buy-in' is vital to the effectiveness of BWCs.[403] Likewise, studies that have found changes in civilian fatalities or use of force complaints report that the changes are additionally reliant on law enforcement's investment in BWCs and related technologies such as software and data storage.[404] In cases where law enforcement officers view themselves as a part of the communities they protect, BWCs have proven effective at decreasing cases of excessive force or injury.[405]

[400] National Institute of Justice, "Research on Body-Worn Cameras and Law Enforcement."
[401] DeWall et al., 245-246.
[402] Wood, Jennifer D., and Elizabeth R. Groff. "Reimagining Guardians and Guardianship with the Advent of Body Worn Cameras," 61, 70.
[403] Wood and Groff, 70-71.
[404] National Institute of Justice.
[405] Wood and Groff, 64-65, 70.

Surveillance technology only works when it effectively impacts social expectations. Since the outcome of successfully fulfilling the expectations established by the groups held as valuable in a person's social identity is positive, there needs to be a sense of expectation that the person will benefit. These benefits are largely connected to the individual's social identity and whether or not their actions will strengthen or simply maintain their identity and place in their 'in-groups.' If the action – such as theft – and being more likely to be recognised or perceived as committing the action is detrimental to this part of social identity, it becomes a less favourable choice. For this reason, surveillance technology does not effectively stop every type of unfavourable action. In situations like those described above, a person needs to identify themselves as part of the group and feel enough connection to the group to cause any shame or concern that would force them to alter their actions.

V. Conclusions

When considering the relationship that psychological theories such as social identity and shame culture have to surveillance technologies, it becomes clear that there is a strong correlation. As society attempts to alter behaviour and force conformity, such tools work alongside psychological processes to produce the desired outcomes. While some technologies may force an individual to feel embarrassment or shame, resulting in changed actions, the impact is only as strong as the technology's ability to tap into that person's sense of social identity, as seen with the changes in non-violent crime when CCTV is present compared to the lack thereof for violent crime.

To consider the behavioural impacts any surveillance technology may have on the deterrence of crime without addressing the relationship to social identity will result in the ineffectual disbursement of technology. Further research should be undertaken to consider specifically how different cultural approaches to social identity – i.e. individualism versus collectivism – correlate to the successes of these technologies. Psychology proves important in understanding surveillance technology, meaning that it is vital that concepts such as social identity theory and shame culture continue to be

discussed as they provide an explanation to when and how surveillance technologies will affect behaviour.

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Research Article

Displacing Northern Dominant Criminological Discourse: The Importation of Southern Criminology into Criminological Literature and Its Implications

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Abstract

Through a carefully selected set of criminological case studies from both the Global North and the Global South, this article takes on a critical approach on how hegemonic Northern criminological theories have fallen short in their attempts at formulating universally-applicable causative theses. It demonstrates how the field of criminology can be sharpened and brought to compelling new heights through the importation of the alternative Southern criminology, which reifies the need to consider individual, localised contexts on top of global influences in criminological inquiries. Vastly different historical contexts seen in the Global South mean that while the region may produce criminal justice outcomes similar to the Global North, how it derives at such outcomes may diverge greatly from the North. Likewise, countries appearing to share notable commonalities in the South may not produce similar criminological outcomes as one another, unlike what one would usually expect from the North. This cautions against undertaking comparative research based on resemblances and similarities across nations alone, and highlights the need to reconsider the starting points of comparative research and any attempted universalisation of theories. Lastly, criminological trends seen in the North are also responses to what is being brought in from the South in this age of advanced globalisation. Understanding criminological trends already extant in the South allows for a sharpened analysis of modern day Northern law enforcement and why Northern states have responded in certain manners. In its challenging of Northern

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hegemony and its providence of alternative de-colonial causal theses, as well as its refreshing coverage of what Northern criminology may have overlooked, Southern criminology should be enthusiastically welcomed and incorporated into the field as a means to further refine criminology as a discipline.

Keywords Global North • Global South • criminological theories • ethnocentrism • decolonisation

1. North-South Dynamics: A Background

The criminological theories of the Global North have long been the dominant discourse of the field. This presence of a dominant narrative alludes to an ongoing power imbalance within the field of criminology that should be deconstructed if the discipline is to be furthered. Such discourses are produced whenever a dominant power prescribes particular rules and categories that define the criteria for legitimating knowledge and truth. These rules are continuously reiterated within society, which solidifies these rules as ahistorical, universal, scientific facts that are stable and objective. In reality, however, they are anything but so.[407] The longstanding narrative that the Global North is the epicentre of modernity and development, while the Global South lies merely in the periphery given its 'developing", 'less developed', or 'underdeveloped' status is the heartbeat behind the reproduction and dominance of said Northern (also known as Euro-American) theories.[408]

The terms 'Global North" and 'Global South' are used to distinguish nations worldwide through the lens of political systems and socio-economic statuses. The North refers to the metropolitan states of Western Europe and North America, while the South is an umbrella term for the nations of Latin America, Africa, Asia, and Oceania.[409] The relationship between both regions has long been posited as one where the peripheral societies of the South, should they wish to successfully modernise, must learn from and

[407] Mark GE Kelly. "*Foucault's History of Sexuality Volume I, the Will to Knowledge: An Edinburgh Philosophical Guide*." Edinburgh University Press, 2013.
[408] Raewyn Connell. "*Southern theory: The global dynamics of knowledge in social science*." Routledge, 2020.
[409] Lara Braff and Katie Nelson. *"The global north: Introducing the region".* In *Gendered Lives*, 2022.

emulate the examples shown in the North because the North is the epitome of economic and modernisation successes.[410] This is seen in examples throughout history, such as when the World Bank and the International Monetary Fund offered Southern states monetary aid on the condition that they adopt Northern neoliberalist economic models because these models are keys to economic growth.[411]

Beyond the economic realm, such assumptions are reflected in the social sciences as well. They result in ethnocentrism, – where one sees their views and methods of doing things as universally right for everyone,[412] – on the part of the Global North. *If* criminological phenomena are investigated in the Global South, it is done through the lens of theories that have been formulated by the Global North. This assumed universality and imposition of Northern theories is myopic because like any other dominant discourse, it excludes, marginalises, and oppresses realities that make equally (if not more) valid claims to the question of how power can be exercised.[413] It perpetuates the false narrative that Northern theories are the only right explanations, and fails to account for the colonial legacies that so vibrantly colour criminological trends in the South. It also fails to recognise the widespread circulation of ideas brought about by globalisation. In truth, the North is influenced by the South as much as the South has been affected by the North.[414]

Against this backdrop, this article will discuss the contemporary relevance of Southern criminology. It will posit that looking beyond Northern perspectives to Southern ones can sharpen the discipline because it addresses both aforementioned failures. It will first spotlight the pitfalls of Northern ethnocentrism and highlight the importance of taking into account individual contexts when formulating causal theories. Afterward, it will delve

[410] Kerry Carrington, Russell Hogg, John Scott, Máximo Sozzo, and Reece Walters. "*Southern criminology*." Routledge, 2018.
[411] George Baylon Radics. *"(Cr) Immigration and Merit-Based Migration in Singapore: The Permanent "State of Exception".* In *Criminal Legalities and Minorities in the Global South: Rights and Resistance in a Decolonial World*, pp. 105-125. Cham: Springer International Publishing, 2023.
[412] Maureen Cain. *"Orientalism, occidentalism and the sociology of crime*." British Journal of Criminology 40, no. 2 (2000): 239-260.
[413] Ibid.., 1.
[414] David S. Fonseca. *"Reimagining the sociology of punishment through the global-south: Postcolonial social control and modernization discontents."* Punishment & Society 20, no. 1 (2018): 54-72.

into how Southern criminology decolonises the literature, and in so doing supports the aforementioned importance of considering individual contexts. It will also show how criminological phenomena observed in the North can and have been shaped by contexts in the South through the global movements of peoples, histories, and cultures. In this manner, the introduction of alternative Southern criminological studies to the literature brings to the table more than just a challenge to the claims of universality often made by the Global North. It also sharpens and complements extant works by introducing new perspectives that enhance the inclusiveness and comprehensiveness of the field.

2. The Pitfalls of Northern Ethnocentrism

2 (a). The Failure of Northern Theories in Niche Contexts

Extensive comparative studies in the North have brought forth elegant theories and theses of causation behind several phenomena in criminology (such as explanations for the rise of punitiveness, crime rates, the targeting of certain population demographics by the criminal justice system, etc.). At first glance, these theories often seem to apply seamlessly to all contexts. It would seem that countries in the North often share enough characteristics with each other that they also end up sharing independent variables behind various criminological trends. One such example is found in studies comparing the U.S. and the UK. Scholars have observed that both countries share similar criminal justice features, such as zero-tolerance policies (where low-level crimes are cracked down upon), curfew implementations, private prisons, and electronic monitoring systems.[415] Such shared characteristics are derived from their similar political ideologies. Both the U.S. and the UK leaned towards neoliberalism at the same time under the administrations of George Bush and Margaret Thatcher respectively. This gave them the same lens to define their problems and justify their solutions. Furthermore, both countries also have significant influence on each other. In the U.S.,

[415] Tim Newburn. *"Atlantic crossings: 'Policy transfer and crime control in the USA and Britain."* Punishment & Society 4, no. 2 (2002): 165-194.

Bill Clinton's campaign slogans featured promises that were tough on crime, such as 'zero-tolerance' and 'prison work'. This usage of war metaphors, in turn, brought him great electoral success. To appeal to the public, UK politicians followed in Clinton's footsteps and adopted similar strategic political manoeuvres and heightened punitive measures for crime.[416]

Such comparative analyses do lend credence to the position that Northern theories of causation can be universalised – other countries that politicise crime the same way as the U.S., for example, may see similar punitive trends. However, this narrative changes when we expand the scope of the countries studied, and rightfully so. Upon bringing in a more diverse range of countries, even within the Global North where countries are expected to be more or less equally modernised and developed and hence similar, we start to see that sweeping theories of causation do not apply universally after all. There often is a pressing need to look into localised contexts to adequately explain certain phenomena. Cavadino and Dignan, for example, came up with a cogent political system theory where they argued that a country's punitiveness is a result of its political economy.[417] They categorised Global North political systems into neoliberal, conservative, social democratic, and oriental corporatist political economies, and posited that these different typologies all produce their respective punitive trends. Neoliberal societies, for example, produce the highest prison rates as their socioeconomic policies reproduce exclusionary cultural attitudes towards the marginalised, who often end up imprisoned. Corporatist societies and social democratic societies, on the other hand, adopt more inclusive economic and social policies that protect their citizens economically and prioritise the re-socialisation of offenders. Hence, they produce the lowest incarceration rates.

Elegant theories like this are often taken to be universal ones as well. Many may think that such a theory of punitiveness does seamlessly apply to all contexts because every country has a political economy that falls within the aforementioned typologies.

[416] Ibid.., 9.
[417] Michael Cavadino and James Dignan. *"Penal policy and political economy."* Criminology & Criminal Justice 6, no. 4 (2006): 435-456.

However, this typing of political economies falls short as an independent variable and key defining causation of punitiveness when we zoom into specific countries within the Global North itself. This is saliently displayed in the comparison between Italy and the Netherlands. Focusing on political economies is not relevant at all in the case of Italy. Despite having the same punitive level as the Netherlands, Italy's low incarceration rates do not result from the regulatory role of the state and its resulting political economy like the Netherlands' does. Instead, we see a converse lack of respect for state legality in Italy. What actually brought the country's punitiveness down were the local cultures of forgiveness, solidarity, and fraternalism – all of them stemming from Catholic traditions and left-wing ideological influences that are both unique to Italy alone.[418]

The need to look at unique, specific, and localised contexts becomes even more prominent when we move out of relatively similar countries of the Global North with its limited variance. The idea that criminological procedures can actually be independent of one's political and socioeconomic contexts is reified when we bring in analyses of countries in the Global South. China, for example, had steered clear of neo-liberalist ideologies, and yet its incarceration rates remain infamously high. On the other hand, Russia has adopted neoliberalism but its incarceration rates have since dropped significantly.[419] These trends in the Global South are classic foils to the universality of Cavadino and Dignan's theory. They also highlight also the dangers of ethnocentrism and the assumed universality of Northern theories in general. While many of these theories do provide accurate explanations for certain criminological phenomena, they do not necessarily work in all contexts despite positing to do so.

2 (b). The Failure to Consider Southern Influences on the North

Furthermore, there is also a need to consider the phenomenon of globalisation and how porous the nation-states have become in this era of advanced capitalism. There are

[418] David Nelken. *"Comparative criminal justice: Beyond ethnocentrism and relativism."* European Journal of Criminology 6, no. 4 (2009): 291-311.
[419] Ibid.., 12.

constant movements of technology, resources, capital, information, and knowledge, as well as people and crime all over the world every second of every day.[420] Assuming that globalisation is simply the extension of Northern trends across the globe and believing that Northern theories can and should hence be applied all over the world is myopic – it dismisses the fact that the North is itself an entity that is immune to the influences of the South.[421] In truth, criminological happenings and trends in the South often get brought into the North. This means that before we can even begin to impose Northern theories on everyone else, these Northern theories can and should be formulated with the South in mind in the first place. There is a need to look at phenomena in the North and ask ourselves this: On top of Northern characteristics, what is going on and has been going on in the South that are often brought into the North and has contributed to the said phenomena of study?

3. The Functions of Southern Criminology

3 (a)(i). The Context of Decolonisation in the Global South

When we move away from critiquing Northern theories to looking at Southern studies alone, we see that the study of Southern criminology reifies the aforementioned need to pay attention to individual contexts. Its value lies in its ability to show how local cultures, on top of global influences, have contributed to a criminological end result that may be found elsewhere in the world. The Global South possesses historical trajectories that diverge completely from that of the Global North, and while they may produce the same kinds of criminal justice outcomes as the North, how and why they get there could be entirely different. In the very first place, the philosophies of modern Western thinkers like Thomas Hobbes, John Locke, Immanuel Kant, and Jean-Jacques Rousseau that characterise the Westphalian-type modern nation-state in the North are completely

[420] Zygmunt Bauman. *"Wasted Lives"* Cambridge. Polity 41 (2004); .
David S. Fonseca. *"Reimagining the sociology of punishment through the global-south: Postcolonial social control and modernization discontents."* Punishment & Society 20, no. 1 (2018): 54-72.
[421] Ibid.., 4.

irrelevant to the South.[422] While the North has naturally formed nation-states with sovereignty observed and upheld between one another, many nations in the South were simply given their independence and had their boundaries dictated by their former colonial masters. More often than not, these borders were drawn up without consideration by said colonial powers for local populations, dynamics, and tensions. Many diverse communities were also intentionally kept separate to prevent cohesion.[423] It was not surprising then that the periods following decolonisation for many of these countries were marked by utter chaos and violence. Regimes often adopted coercive measures to enforce unitary and homogenous visions of nationhood in nation-building, and such measures led to violence against minorities, secessionist movements, and even civil wars in the Global South.[424] Lasting colonial legacies in the region also consisted of nationalist ideals being influenced by what their previous colonial masters had thought about civilisation, modernity, and progress. In attempts to meet these misconstrued ideals, minority groups often end up becoming seen as shameful relics of the past and threats to the nation that must be eradicated.[425] All of these had spillover effects into law and enforcement as well. Unlike in the North, laws did not spring from mutual agreements, constitutional promises, legitimacies of authorities, and notions of inherent individual rights.[426] In the South, laws were sometimes inherited directly from their colonial masters, and other times they were enacted in ways that ended up causing chaos and disorder as groups in society saw their rights being robbed in favour of others.[427]

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[422] James Tully. "*Strange multiplicity: Constitutionalism in an age of diversity*." No. 1. Cambridge University Press, 1995; .
George B. Radics. *"(Cr) Immigration and Merit-Based Migration in Singapore: The Permanent "State of Exception"."* In *Criminal Legalities and Minorities in the Global South: Rights and Resistance in a Decolonial World*, pp. 105-125. Cham: Springer International Publishing, 2023.
[423] Ibid.., 5.
[424] Will Kymlicka, and He Baogang, eds. "*Multiculturalism in Asia*." OUP Oxford, 2005.
[425] Ibid.., 5.
[426] Ibid.., 5.
[427] Seymour Martin Lipset. *"Some social requisites of democracy: Economic development and political legitimacy."* American political science review 53, no. 1 (1959): 69-105; .
Whalt Whitman Rostow. "*The stages of economic growth: A non-communist manifesto*." Cambridge university press, 1990; .
Luis Eslava. "*Local space, global life*." Cambridge University Press, 2015; .
George B. Radics. *"(Cr) Immigration and Merit-Based Migration in Singapore: The Permanent "State of Exception"."* In *Criminal Legalities and Minorities in the Global South: Rights and Resistance in a Decolonial World*, pp. 105-125. Cham: Springer International Publishing, 2023.

3 (a)(ii). Decolonisation and Criminological Outcomes

As mentioned, histories like this mean that though we may see similar criminal justice outcomes in the North and South, the means to these ends often look vastly different. For instance, Northern criminological theories often delve into economic inequalities (in some cases, tied to neoliberalism) and how minorities and disadvantaged communities experience strain. These communities, being unwanted and statistically more likely to turn to crime due to said strain, often become collateral damage when politicians use them as scapegoats when politicising crime as a means of solidifying their legitimacies.[428] This has led to the disproportionate imprisoning of minority groups, the perpetuation of inequalities, heightened punitiveness, and the aforementioned policies like zero-tolerance where low-level dramatic street crimes are targeted.

Such criminological outcomes and trends are also seen in the South, as they also disproportionately crack down on minorities. However, instead of political cultures, social inequalities, or performative politics (or rather, the combination of all three), this phenomenon in the South is often intrinsically tied to decolonisation violence and painful colonial legacies. In the recent history of Colombia, for example, approximately 10,000 civilians were estimated to have been killed between 2002 and 2010.[429] Its oppressive, authoritarian regime – a result of decolonisation – was determined to solidify its position of power by getting rid of potential opposing guerrilla forces.[430] The regime does so by incentivising military units to deliver high body counts through offers of money, medals,

[428] Jeffrey Reiman, Jeffrey and Paul Leighton. "*Rich get richer and the poor get prison, the (subscription): Ideology, class, and criminal justice*." Routledge, 2015; .
Ruth Garland. *"Between media and politics.",* 1997; .
Richard Young. *"The Culture of Control: Crime and Social Order in Contemporary Society."* (2002): 143-147; .
Richard Sparks. *"States of insecurity: punishment, populism and contemporary political culture."* In *The use of punishment*, pp. 149-174. Willan, 2013.
[429] Gustavo Rojas-Páez. *"Between Denial and Memory: A Socio-Legal Reading of Securitization Narratives in Transitional Colombia."* In *Criminal Legalities and Minorities in the Global South: Rights and Resistance in a Decolonial World*, pp. 63-82. Cham: Springer International Publishing, 2023.
[430] Ibid.Gustavo Rojas-Páez. *"Between Denial and Memory: A Socio-Legal Reading of Securitization Narratives in Transitional Colombia."* In *Criminal Legalities and Minorities in the Global South: Rights and Resistance in a Decolonial World*, pp. 63-82. Cham: Springer International Publishing, 2023.

and additional holiday leaves.[431] In doing so, the extrajudicial execution of civilians – most of them unwanted minority males falsely painted as guerrilla fighters – occurred on a massive scale. To then justify these killings, the government trumped up charges of drug trafficking and other dramatic street crimes associated with these minorities, amping up the regime's punitiveness on paper.[432] Hence, we see that the cracking down on low-level crimes and corresponding marginalised groups happen both in the North and South, but for vastly different reasons. Northern theories pin the cause of this phenomenon on political performances to appease democratic crowds. In the South, however, targeting minorities could be but a façade to cover up prolonged periods of state-sponsored violence that had long oppressed citizens.

Even when we steer clear of extreme cases like the ones seen in Colombia, we see once again a different kind of struggle tied to past legacies of colonialism undergirding the criminological tyranny towards the minorities in other Southern nations. In British Malaya, the British brought labourers from China and India into Singapore. During this process, they constructed this notion of a 'Malay problem", which is essentially the narrative of the '"lazy native'". The Chinese and Indian populations in the land were regarded as hardworking while the original Malay population was seen as lazy, unwilling, and unable to contribute to the economy.[433] This creation and perpetuation of such stereotypes had long-lasting impacts on the Malay community as members internalised such notions while also facing lessened opportunities within society. At the same time, the importation of labour also meant that some other migrant communities (i.e., the Indian foreign workers) have historically come to be seen as second-class citizens associated with poverty and manual labour. This status degradation has also tied them to stereotypes of vices and illegal activities.[434] Law enforcement is then coloured by all of these structural inequalities, and we see a disproportionate

[431] Mariana Palau. *"The 'False Positives' Scandal That Felled Colombia's Military Hero."* The Guardian, December 7. 2020. https://www.theguardian.com/world/2020/nov/19/colombia-false-positives-killings-general-mario-montoya-trial.
[432] Ibid.., 23.
[433] Syed Hussein Alatas. "*The Myth of the Lazy Native: A Study of the Image of the Malays, Filipinos and Javanese from the 16th to the 20th Century and Its Function in the Ideology of Colonial Capitalism*." Routledge, 2013.
[434] Ibid.., 5.

representation of minority groups in prison as race-based discrimination towards Malays and Indians that began with British rule continues to proliferate in Singaporean society.[435]

These examples highlight how the study of the Global South decolonises the same kinds of phenomena seen in the Global North. This decolonisation lens bring forth vastly different, alternative causal explanations to Northern theories, henceforth serving as a foil to their universality and a testament to the need to analyse localised contexts within the discipline of criminology.

3 (b). Sharpening of Northern Theories and Affirming the Need to Look at Individual Local Contexts

This is not to say that theories of the North cannot be applied to the South. If anything, studying the South can also serve as a welcome surprise whenever results affirm Northern theories and hence sharpen extant knowledge in the field. At the end of the day, it is a sweeping statement to conclude that Southern criminology completely rejects Northern theories; and Northern theories sometimes do not even work in the North, let alone a vastly different South. After all, a hint of Cavadino and Dignan's theory can be seen in how the rise of neoliberal ideology is positively correlated with the rise of punitiveness when we examine Southern territories like Brazil.[436] Exciting results like this only serve to further affirm why there is a need to look at local contexts in research agendas because even studies in the South should be undertaken on a case-by-case basis. Just like how it is problematic to assume that Northern theories will work when applied across similar Northern nations, it is also problematic to assume the same of Southern theories in the South. It is integral to acknowledge that the South is no more one place or experience than the North is, and hence similar experiences or

[435] Narayanan Ganapathy and Lavanya Balachandran. *""Racialized masculinities": A gendered response to marginalization among Malay boys in Singapore." Australian & New Zealand Journal of Criminology* 52, no. 1 (2019): 94-110; .
Narayanan Ganapathy. *"Racial Minorities and Crime."* In *Gangs and Minorities in Singapore*, pp. 29-59. Bristol University Press, 2023.
[436] Loïc Wacquant. *"The militarization of urban marginality: Lessons from the Brazilian metropolis."* International political sociology 2, no. 1 (2008): 56-74.

characteristics between two Southern countries may not necessarily produce the same criminological or legal outcomes.

A prominent example lies in Pakistan and Bangladesh, both formerly part of British India. Both countries inherited Section 497 of the Penal Code, where sexual intercourse between a man and another man's wife is criminalised, from the British. Yet, they had come to take on drastically different approaches to this same law over time.[437] The law remains enforced to this day in both countries, with Bangladesh interpreting it as favourable towards women and sentencing perpetrators to up to five years in prison along with a fine. On the other hand, Pakistan took an extreme, religious stance towards adultery following the influence of Islamisation in the country. Adulterers, both men and women, have been subjected to honour killings, where they get stoned to death in their communities, ironically producing a new category of crime in their attempts to uphold the law and its tenets.[438] Such drastic differences undermine the principle of looking out for similarities as a basis for comparative studies. Similar colonial legacies in different countries may provide comparative prospects in the Global South, but caution must still be undertaken. Bangladesh and Pakistan have shown that the notion of identifying what is similar in different countries, proceeding with comparative studies based on such similarities, and then applying resulting theories to other similar contexts could potentially sabotage the criminological inquiry.

Hence, importing Southern criminology into the literature first serves the very function of rectifying any loophole or omission that 'universal" Northern theories had overlooked. This is seen in the alternative causative theories of minority oppression produced in Colombia and Singapore. It also challenges the feasibility and boundaries of comparative research common to the North. Comparative studies based on similarities may work with the U.S. and the UK, but Southern countries like Pakistan and Bangladesh paint a different picture. In this sense, the South, as a dynamic entity that provides many interesting permutations of the same outcomes, brings about a broader

[437] Anisur Rahman. *"Criminalising adultery in colonial India."* In *Criminal Legalities in the Global South: Cultural Dynamics, Political Tensions, and Institutional Practices* (2019).
[438] Ibid.., 30.

expansion of the criminological research agenda as our knowledge becomes stretched and more diverse.

3 (c). Globalisation and How the South Affects the North

Finally, beyond the politicisation of crime observed in the North, the marginalisation of minorities in the North can be explained by the reiteration of colonial anxieties, this fear of an exotic other. Globalisation and porous borders have brought about influxes of immigrants, refugees, asylum seekers, and cultures across borders. The Global North finds itself receiving sojourners, displaced individuals, and victims of the war from the South.[439] This, unfortunately, but also unsurprisingly, brings back the return of colonial logic, where migrant populations, racial minorities, and the underclass are marginalised and disproportionately incarcerated in attempts to control and subjugate these groups.[440]

Studying criminological trends in the South would allow for the uncovering of any notable subculture, cultural differences that may lead a Southerner to be perceived as deviant and dangerous in the North, citizens' attitudes, war, and political conflicts, as well as displacement. This will then allow for a better understanding of what could be contributing to the 'othering' and colonial logic that so characterise modern-day Northern law enforcement.

4. Conclusion

In sum, the field of criminology stands to benefit when dominant Northern criminological discourse becomes displaced. The self-proclaimed universality and subsequent imposition of Northern theories fall short because criminological phenomena are as much shaped by local contexts as they are by global trends. This (unintentional)

[439] Zygmunt Bauman. *"Wasted Lives"* Cambridge. Polity 41 (2004).
[440] Dario Melossi. *"In a Peaceful Life' Migration and the Crime of Modernity in Europe/Italy."* Punishment & Society 5, no. 4 (2003): 371-397; .
Mary Bosworth. *"Can immigration detention centres be legitimate? Understanding confinement in a global world."* In *The borders of punishment: Migration, citizenship, and social exclusion* (2013): 149-165.

side-lining of said individual contexts and Southern criminology robs the discipline of its grand potential and rigour. Importing Southern criminology allows for supplementing research gaps and methodology in providing alternative independent variables undergirding certain phenomena. Some of these independent variables may not even be found in the North itself – this is true for those pertaining to decolonisation and post-colonial nation-building struggles, henceforth allowing theories of the South to challenge Northern theoretical hegemony.

In some cases, concepts that have already emerged out of the North can also be supplemented by Southern criminology as well. For example, neoliberalism does indeed affect punitiveness in some parts of the South as it did in some parts of the North. When Southern case studies support Northern theories, it allows for a further sharpening and honing of relevant theories in question. Southern criminology also stretches the boundaries and bases for comparative studies by reifying how countries with similar historical backgrounds may not produce results that are as homogenous as we would expect to find them in the North. Finally, it also allows for a better understanding of Northern phenomena given that the North is constantly importing the peoples and characteristics of the South.

Hence, it can be said that Southern criminology challenges Northern dominant discourses, but in so doing, it fills in gaps overlooked by the North and simultaneously brings Northern theories to compelling new heights rather than simply rejecting completely Northern works. It should be seen as a much-welcomed expansion of the horizons within the discipline of criminology.

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Research Article

A new EUtopia – Understanding Common European Asylum System (CEAS) and the criminalisation of migration in Europe

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Abstract

The aim of this paper is to expound and critically analyse the proposed reform of the Common European Asylum System (CEAS) in December 2023. Drawing on insights from migration science and political philosophy, it argues that political agreement on the controversial reform can best be understood through a Foucauldian lens, conceptualising the European border regime as a biopolitical space in which migrant lives are contested. Against the background of the ever-expanding criminalisation and securitisation of migration, analyses of disciplinary and biopower offer unique insights into modern-day European asylum and border politics. The article criticises the bifurcation of European rights discourses in light of this trend, and calls for differentiated engagement with developments in European asylum politics.

Keywords Common European Asylum System • criminalisation • securitisation • migration • biopolitics • disciplinary power

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1. Reforming the Common European Asylum System

On December 20th, 2023, following months of political discord between the European Union (EU)'s co-legislators, the European Council ("the Council") and the European Parliament ("the Parliament", "EP") proudly announced the reform of the Common European Asylum System ("CEAS"). The reform had been in the making for seven years, with prior political agreements mirroring many of the changes that are now to be consolidated into a piece of legislation.[442] Responses from EU decision-makers have overwhelmingly been positive, with the President of the EU Parliament Roberta Metsola hailing the deal as "historic" and the Council as a "breakthrough".[443] Contrarily, civil rights organisations have highlighted the devastating consequences of the reform for the right to asylum, contesting that it will likely create "an ill-functioning, costly, and cruel system that falls apart on implementation and leaves critical issues unaddressed".[444]

Without pre-empting a more detailed analysis, the CEAS reform must necessarily be considered within its socio-political context and, in particular, in light of trends of criminalising and securitising migration. Whilst such links are well-established in the literature, current amendments to the European asylum system constitute a significant expansion of previous criminal logics.[445] For example, wider access for law enforcement

[442] European Council on Refugees and Exiles, 'A Possible Agreement on the Reform of CEAS at the Council in June: What Is at Stake?', June 2023, https://ecre.org/wp-content/uploads/2023/06/CEAS-EXPLAINER.pdf.

[443] Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System', 20 December 2023, https://www.consilium.europa.eu/en/press/press-releases/2023/12/20/the-council-and-the-european-parliament-reach-breakthrough-in-reform-of-eu-asylum-and-migration-system/; Jon Henley, 'EU Reaches Asylum Deal That Rights Groups Say Will Create "Cruel System": Plan Is Aimed at Spreading Cost of Hosting Asylum Seekers across Bloc and Limiting Number of Arrivals', *20 December, 2023*, n.d., https://www.theguardian.com/world/2023/dec/20/eu-reaches-asylum-deal-human-rights-groups-cruel-system.

[444] Border Violence Monitoring Network, 'New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum', 20 December 2023, https://borderviolence.eu/app/uploads/New-Pact-Final-Outcome.pdf; N.A., 'Over 50 NGOs Pen Eleventh-Hour Open Letter to EU on Human Rights Risks in Migration Pact', PICUM, 18 December 2023, https://picum.org/blog/open-letter-eu-human-rights-risks-migration-pact/.

[445] See for example Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law*, 1st ed. 2015 (Cham: Springer International Publishing, 2015), https://doi.org/10.1007/978-3-319-12658-6.

authorities to a palette of personal data can only be understood under the pretext of preventing crime and securing the EU's external borders.[446]

The present submission analyses the CEAS reform decided in December 2023, shedding light on key elements of criminalisation and securitisation therein by adopting a biopolitical lens on migration. The paper has a tripartite aim, explaining key developments in EU migration policy, fostering awareness amongst the readership, and exposing insincerities in EU rights discourses. Considering the bifurcated rights narratives employed in the European context, whereby infringements on the rights of some ("irregular" migrants) are used to justify the protection of the rights of others (EU citizens), it is argued that the Foucauldian concept of biopolitics is better-suited than conventional rights accounts, for understanding the increasing criminalisation and securitisation of migration. Given the focus on racialised migration politics below, the discussion extends beyond asylum applicants to other forced migration identities or racialised groups of third-country nationals ("TCNs"). Insofar as racial logic functions as independent of legal reasonings, European migration policy produces similar effects for people with different identities. In particular, limitations on accessing asylum procedures highlight the importance of expanding the conversation beyond individuals who successfully lodged an asylum application. For this reason, reference will similarly be made to other identities, with the term "migration" in the present context denoting avenues for individuals with a forced migration background.

Given that the literature is already replete with analyses of rights threatened by a repressive European migration policy, the present submission abstains from reproducing them.[447] Nevertheless, it should be noted that, in a jungle of legal liability, individuals have failed to successfully bring actors such as the European Border and Coast Guard Agency, Frontex, to justice.[448] Similarly, border activities of Member States ("MS") have rarely been subject to intense scrutiny by European courts, with collective

[446] Cf. Mitsilegas; Daniel Thym, *European Migration Law*, 1st ed. (Oxford: Oxford University Press, 2023).
[447] See for example Mitsilegas, *The Criminalisation of Migration in Europe*; Thym, *European Migration Law*.
[448] See WS and Others v European Border and Coast Guard Agency (Frontex), No. Case T-600/21 (Court of Justice of the European Union 6 September 2023).

expulsions (or “pushbacks”), for example, not contravening applicants’ rights where they are due to a person’s “own conduct”.[449]

These insights highlight that rights discourses are inadequate for exhaustively explaining the inherent logic of European migration policy. In the context of the CEAS reform, this justifies recourse to a Foucauldian approach, which offers a more sound basis for understanding the present trajectory of European migration and border politics.

The remainder of the paper is structured as follows. Section 2 discusses the use of Foucauldian approaches in migration research, as well as criminalisation and securitisation trends that have emerged in EU migration policy over the last decade. This provides the background for a brief overview of key components of the CEAS reform. Section 3 engages with relevant criticism of the reform and places this in the context of the biopolitics of migration. Finally, section 4 concludes by discussing implications of the present analysis, highlighting that a biopolitical understanding of migration can stimulate wider critical engagement with the topic, which is crucial for opening up the possibility for discourses beyond rights-based approaches in light of criminalisation and securitisation logics.

2. The politics of migration

a. The dialectic criminalisation and securitisation of migration

Processes of criminalisation and securitisation in European migration policy have been analysed at length.[450] Following Mitsilegas, this paper adopts a threefold definition of the criminalisation of migration, constituted by (i) recourse to substantive criminal law for regulating migration, (ii) the application of crime governance methods, and (iii) the use of preventative measures.[451] Their prevalence in European migration policy is evidenced

[449] N.D. and N.T. v Spain, Nos. Cases 8675/15 and 8697/15 (European Court of Human Rights 13 February 2020).
[450] E.g., Mitsilegas, *The Criminalisation of Migration in Europe*.
[451] Mitsilegas.

throughout the discussion below, with crime governance methods like surveillance or detention particularly emphasised.[452]

Criminalisation is closely intertwined with a securitisation discourse at the EU level. Controlling borders and immigration is justified by national security objectives, with techniques heavily drawing on traditional criminal law enforcement tools, such as detention or surveillance.[453] Against the logic of securitisation, strengthening border security is a reasonable response to migration as a threat to European sovereignty.[454] A key development in the European context is the use of advanced technology and databases, which rely on the input of vast amounts of personal information. Cutting-edge technology is a key requirement for ensuring the operability of borders, as individual border crossings in the 21st century substantially exceed human processing capacities.[455] In this context, data stored in the Schengen Information System, for example, permits MS at external borders to enforce entry-bans issued by other EU countries.[456]

Whilst large-scale employment of technology is *per se* legitimate, it can become problematic when information is made available to different law enforcement authorities beyond the original purpose for its collection to enable the interoperability of different databases.[457] Concerns about data privacy are silenced by claims of combating crime and terrorism.[458] One example of how the securitisation of migration functions in this regard is through the obligations imposed on carriers to furnish immigration authorities with passenger registries, which can then be cross-referenced with information stored in a diverse array of databases.[459] MS thereby outsources immigration control to private actors that have little incentive to permit access to EU territory to individuals who fail to fulfil particular entry requirements, such as potential asylum applicants lacking a valid

[452] Cf. Mitsilegas.
[453] Mitsilegas.
[454] Nick Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond* (Oxford: Oxford University Press, 2017).
[455] Cf. Thym, *European Migration Law*.
[456] Thym.
[457] Mitsilegas, *The Criminalisation of Migration in Europe*.
[458] Thym, *European Migration Law*.
[459] Mitsilegas, *The Criminalisation of Migration in Europe*; Thym, *European Migration Law*.

visa. Such processes indicate decentralised migration management, examined in greater depth in the following section through the Foucauldian lens of “biopolitics”.

b. Biopolitics and migration

Following the well-known philosopher Michel Foucault’s ideology, power is relational, produced by repeated confrontations at a decentralised level throughout society.[460] More specifically, “biopower” denotes “numerous and diverse techniques for achieving the subjugation of bodies and the control of populations”, a phenomenon primarily discussed by Foucault with respect to industrialisation.[461] Similarly, Foucault uses the concept of “biopolitics” to describe collective mechanisms for disciplining bodies. At the heart of this are biological processes such as births and deaths, supervised through repeated and incisive interventions aimed at governing the population of industrialised societies.[462] Viewed as such, biopower constitutes the ability to control the life of particular populations, both by fostering or denying it (i.e., death).[463]

Biopolitics as a modern exercise of power, centred around caring for and maximising life, therefore represents a shift from prior expressions of sovereign power as the right to “take life or let live”.[464] In this sense, biopower is also distinct from disciplinary power, which in the Foucauldian sense constitutes power directed towards the individual, commonly including elements of surveillance and control.[465] In its most profound form, disciplinary power does not require constant monitoring of the individual but derives its potency from the threat or possibility of being monitored, which causes individuals to regulate their behaviour under the expectation of punishment for deviance.[466]

[460] Michel Foucault, *The History of Sexuality. Volume 1, The Will to Knowledge*, trans. Robert Hurley (London: Penguin Books, 2020).
[461] Foucault, 140-141.
[462] Foucault.
[463] Foucault.
[464] Foucault, *The History of Sexuality. Volume 1, The Will to Knowledge*, 140.
[465] Cf. Vaughan-Williams, *Europe’s Border Crisis Biopolitical Security and Beyond*.
[466] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (London: Penguin Books, 2019).

Applying this to migration, several authors have described disciplinary and biopolitical practices in European migration and border governance. Mitsilegas, a scholar in this area, explores the criminalisation of migration through Foucauldian tools like surveillance and detention.[467] Beyond disciplinary mechanisms, Vaughan-Williams conceptualises EU asylum politics as "Janus-faced", insofar as "irregular" migrants find themselves in the limbo of being framed either as a (security) threat themselves or as an individual whose life is threatened.[468] Similarly, Gebhardt focuses on the biopolitical power of fostering migrant life or disallowing it in the context of European border politics. Combining the Foucauldian analysis of biopower with Mbembe's analysis of postcolonial necropolitics, Gebhardt argues that European migration policy has shifted from the management of migrant life to managing migrant death.[469] This is most apparent in spaces such as the Mediterranean, considered one of the most lethal border areas in the world.[470]

The analysis above exposes the effects of criminalisation and securitisation discourses on migrant bodies. Generalised controls of migrant populations both arise from and are enabled by an increasing unwillingness in the European political arena to protect individuals on the move. This warrants a particular focus on the most recent CEAS reform as symbolic of how overlapping understandings of biopolitics and biopower inform European migration governance. The ensuing section considers this, in parallel with broader insights concerning criminalisation and securitisation trends in migration policy.

c. Key components of the CEAS reform

The CEAS reform agreed upon in December 2023 is based on five pillars, amending previous asylum legislation while simultaneously expanding it. Each pillar is discussed

[467] Mitsilegas, *The Criminalisation of Migration in Europe*.
[468] Vaughan-Williams, 43.
[469] Mareike Gebhardt, 'To Make Live and Let Die: On Sovereignty and Vulnerability in the EU Migration Regime', *Redescriptions: Political Thought, Conceptual History and Feminist Theory* 23, no. 2 (15 December 2020): 120–37, https://doi.org/10.33134/rds.323; Achille Mbembe, 'Necropolitics', *Public Culture* 15, no. 1 (1 January 2003): 11–40, https://doi.org/10.1215/08992363-15-1-11.
[470] Gebhardt, 'To Make Live and Let Die'.

below with respect to its most prominent elements and significant changes to previous instruments.

Firstly, the legislators have decided to replace the 2013 Asylum Procedures Directive with the Asylum Procedure Regulation ("APR"), thereby increasing the level of harmonisation between MS in handling asylum applications.[471] The APR fundamentally transforms the asylum procedure through the introduction of a mandatory border procedure. This operates as a "fast-track" procedure, whereby asylum applications considered as unfounded or inadmissible can be dealt with more efficiently, permitting authorities to directly return or transfer applicants to a third state.[472] The APR will mandate the application of the procedure in instances where an applicant is considered a danger to national security or public order, or where they have furnished false or incomplete information, but also for applicants from countries with a recognition rate below 20%.[473]

Secondly, the Asylum and Migration Management Regulation ("AMMR"), replacing the existing Dublin Regulation, governs the responsibilities of countries for handling asylum applications. Similar to the Dublin system, applicants must be processed by the MS of first entry or legal stay.[474] The AMMR does not introduce mandatory relocation mechanisms; instead, these only constitute one of the measures through which countries can express support for other EU states. Further options constitute financial contributions, either to MS directly or to third countries, and alternative measures such as deploying personnel or capacity building.[475] States have absolute discretion as to their choice of solidarity mechanisms.

[471] Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System'.
[472] Council of the EU; Border Violence Monitoring Network, 'New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum'.
[473] Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System'.
[474] Council of the EU.
[475] Council of the EU.

Thirdly, the Screening Regulation seeks to increase control at the EU's external borders by collecting biometric data from migrants and conducting mandatory security and health checks.[476] It aims to identify migrants not fulfilling the required entry conditions, thereby allowing their swift return. During the screening process, migrants are prohibited from entering the MS and "must remain at the disposal of the authorities", with the possibility of being placed in detention.[477]

Closely connected to the screening process is, fourthly, the Eurodac Regulation. This serves as the legal basis for collecting biometric data, such as facial images or fingerprints, with the purpose of "better tackl[ing] irregular movements and monitor[ing] the paths of asylum seekers and persons in an irregular situation".[478] Beyond expanding data collection to children from the age of 6 onwards and beneficiaries of temporary protection, the new Eurodac Regulation will also significantly enhance access to personal data for law enforcement authorities.[479]

Lastly, the Crisis Regulation constitutes a novel invention, permitting states to deviate from the applicable legal framework in situations of crisis, *force majeure*, or where migrants are being "instrumentalized", e.g., by a hostile regime. The Crisis Regulation substantially lowers procedural safeguards for applicants in such instances and allows MS, inter alia, to raise the recognition rate from 20 to 50% (i.e., fast-tracking applicants from countries with recognition rates below 50%).[480] Below, these legislative interventions are examined through a Foucauldian lens.

3. A Foucauldian approach to the CEAS reform

The present analysis consists of two parts. Section (a) examines the disciplinary character of the reforms under the new CEAS, many of which exhibit close links to discourses of securitisation and criminalisation. Section (b) focuses on the biopolitical

[476] Council of the EU.
[477] Council of the EU.
[478] Council of the EU.
[479] Council of the EU.
[480] Council of the EU.

elements of European asylum politics, emphasising the managerial character of the EU's new border regime. As will become evident, disciplinary and biopower are not mutually exclusive, and links between both will be made.

a. Disciplinary elements of the CEAS reform

The criminal law methods of surveillance and detention of potential asylum applicants, both expressions of disciplinary power, have primarily become relevant in the context of enabling the enhanced mobility of European citizens and other "benign" travellers.[481] Disciplinary elements are, thus, a byproduct of an increasingly stratified mobility regime of a biopolitical quality, which "allow[s] circulations to take place, […] control[s] them, sift[s] the good from the bad".[482] "Irregular" migration in this context is presented as a threat to European sovereignty, which has necessitated the investment in sophisticated surveillance technology and military-style interventions, primarily through the activities of Frontex.[483] Vaughan-Williams points to the dialectic character of technological developments and restrictive migration policy, arguing that the former both responds to and facilitates the latter.[484] Beyond military-style aerial surveillance technologies such as drones, satellites, and GPS tracking, another important disciplinary mechanism of European migration politics is outsourcing border security to private actors, as discussed above.[485] Given that such systems of pre-border control largely limit possibilities to access international protection, their incompatibility with the EU asylum *acquis* has been stressed repeatedly.[486] Following Moreno-Lax, processes that deny potential applicants for international protection access to MS territory are counterintuitive insofar as they largely deprive the right to asylum of its *effet utile*.[487]

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[481] Cf. Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond*.
[482] Vaughan-Williams, 39; Thym, *European Migration Law*.
[483] Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond*.
[484] Vaughan-Williams.
[485] Vaughan-Williams.
[486] Violeta Moreno-Lax, "The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law", in *Research Handbook on EU Migration and Asylum Law*, eds. Evangelia Tsourdi and Philippe De Bruycker (Northampton: Edward Elgar Publishing, 2022); Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford: Oxford University Press, 2017).
[487] Moreno-Lax, "The Informalisation of the External Dimension of EU Asylum Policy: The Hard Implications of Soft Law".

Similar effects can be observed for humanitarian visas. In *X and X v État belge*, the Court of Justice of the European Union ("CJEU") indirectly confirmed the legality of denying visas to individuals for the intended purpose of applying for international protection.[488] Such logic extends beyond the EU's external borders to cooperations with third states, which receive funding in exchange for the promise to immobilise people on the move.[489] These create further uncertainty around the legal accountability of actors in the migration field, thereby limiting the availability and accessibility of remedies for rights infringements.

Elements of the trend towards enhanced surveillance and disciplining the movement of migrants are constitutive of the CEAS reform. The reformed APR permits the large-scale detention of people, including families with children, as part of the border procedure.[490] Screening, in particular, operates under the legal fiction of "non-entry", creating a further incentive for border guards to detain individuals for its duration.[491] The strength of the securitisation and criminalisation mechanisms at play is aptly illustrated by the limited procedural safeguards for applicants during detention: they have no access to legal representation, and their right to appeal decisions taken during border asylum procedures lacks suspensive effect, thereby stripping it of its utility.[492] Investments in detention mechanisms and border surveillance activities will likely be strengthened by MS who are unwilling to support the relocation of asylum applicants from border states to their own territory, as the new "solidarity mechanism" under the AMMR provides them with full discretion in opting for financial measures which support the construction of further detention centres (both at the border or in third states).[493]

[488] X and X v État belge, No. Case C-638/16 PPU (Court of Justice of the European Union 7 March 2017).
[489] See for example the EU-Turkey Statement, discussed in Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalisation of Migration Policy before the EU Court of Justice', *Journal of Refugee Studies*, no. 2 (8 December 2017): 216–239, https://doi:10.1093/jrs/fex038.
Achille Mbembe, 'Necropolitics', *Public Culture* 15, no. 1 (1 January 2003): 11–40, https://doi.org/10.1215/08992363-15-1-11.
[490] European Council on Refugees and Exiles, 'A Possible Agreement on the Reform of CEAS at the Council in June: What Is at Stake?'
[491] Border Violence Monitoring Network, 'New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum'.
[492] Border Violence Monitoring Network.
[493] Cf. Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System'.

A less visible disciplinary intervention in the trajectories of migrants is the augmented retention of personal data. Establishing and operating vast immigration databases under the pretext of security and crime prevention is not a novelty but has significantly contributed to securitising migration for the past decade or two.[494] The overarching preventative logic has expanded access for law enforcement authorities to personal data across different databases, questioning whether the use of such data is still related to the purpose for which it was collected.[495] Legitimate day-to-day activities such as visa applications are subjected to intense scrutiny, permitting the construction of elaborate "risk profiles". This particular aspect of securitising migration has important consequences for individuals whose data is collected. Not only does the criminal prevention logic *prima facie* void a presumption of innocence, but the risks of racial profiling are also similarly high.[496] Applicants have no means of knowing which data is being collected in order to contest its use.[497] Correspondingly, they are under a constant threat of supervision, resulting in a form of digitised panopticism.

Concerning the CEAS reform, this is particularly visible in the amended Eurodac Regulation. The database substantively expands the range of profiles captured (e.g., of people engaged in secondary movements or minors from the age of 6 onwards), as well as introduces new categories of data stored (particularly biometrics) and enhances access thereto for law enforcement authorities.[498] This permits the mass surveillance of movements into and throughout Europe for most people without a European passport, which constitutes a gross violation of their privacy. Overlaps between migration and criminal databases under the rationale of interoperability further strengthen the existing trends of criminalising and securitising migration in a European context.[499] Section (b) below examines how such disciplinary measures are situated within the context of the EU's biopolitical border management.

[494] Mitsilegas, *The Criminalisation of Migration in Europe*.
[495] Mitsilegas.
[496] Mitsilegas.
[497] Mitsilegas.
[498] Border Violence Monitoring Network, 'New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum'.
[499] Border Violence Monitoring Network; Mitsilegas, *The Criminalisation of Migration in Europe*.

b. The biopolitics of the European border system

At the nexus of European sovereignty and cross-border movements, biopolitics determines the forms of migration considered as "healthy" for a European population.[500] The resulting legal-political distinctions separate migrants into different categories ("regular" or "irregular"), thereby producing social realities and subjectivities which have significant consequences for individual trajectories.[501] A "successful" European border control in this context is defined by the number of "irregular" migrants identified.

The paradoxicality of this process, whereby curbing "irregular" migration is contingent on a greater number of "irregular" migrants apprehended, is evident with respect to the concept of "adequate capacity" under the reformed APR.[502] The adequate capacity of MS is established in reference to the number of "irregular" border crossings and entry refusals.[503] This figure is then used to calculate the maximum amount of asylum applications MS are required to evaluate in the border procedure.[504] Rather than being responsive to current protection needs and activity on migratory routes, this strictly numerical approach betrays the biopolitical management of Europe's borders.

A further element of European migration politics laid bare by the CEAS reform is its inherent racism. Building on Foucault, Gebhardt argues that the biopolitical border regime operates on the basis of racial processes of Othering, whereby migrants are excluded from European life by virtue of being deemed a threat thereto.[505] In this context, European sovereignty must be defended through the identification and elimination of the racialised migrant Other which threatens it.[506] It is important to note that, in the Foucauldian sense, "killing" describes not only the direct taking of a life but also exposing others to death or expelling individuals to territories considered unsafe.[507]

[500] Cf. Gebhardt, 'To Make Live and Let Die'.
[501] Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond*.
[502] Vaughan-Williams.
[503] Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System'.
[504] Council of the EU.
[505] Gebhardt, 'To Make Live and Let Die'.
[506] Gebhardt.
[507] Michel Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975-76*, ed. Mauro Bertani and Alessandro Fontana, trans. David Macey, 2020.

Correspondingly, a restrictive European migration regime which denies entry to some or removes individuals from MS territory to "safe third countries" corresponds to a Foucauldian logic of making life and letting die.[508] Racism, in this context, is a necessary precondition for allowing the death of some.[509]

Rather than constituting a philosophical surmise about the nature of European migration policy, the CEAS reform provides evidence for this racialised border management. As noted above, the Eurodac Regulation expands data collection to a wide variety of TCNs under the pretext of ensuring temporal limits on their retention. However, Ukrainian refugees who have been awarded temporary protection are exempt from this.[510] The Council fails to provide its reasoning for this stratified data collection, suggesting an absence of juridical-categorical justifications.

An additional element of the CEAS reform, which highlights the prioritisation of biopolitical border management over rights protection and legal certainty, is its inbuilt flexibility mechanisms. As outlined above, the Crisis Regulation, in particular, permits substantial deviations from the "conventional" procedural framework. The discursive construction of situations of "mass arrival" as a crisis denies the reality of migration as endemic to human existence.[511] This practice of redefining further deflects responsibility for addressing the root causes of this phenomenon (beyond European practices of providing financial assistance to third countries for hindering people on the move from reaching Europe).

In a biopolitical sense, lowered safeguards for applicants in situations of crisis are justified by the purpose of "easing the burden on overstrained national administrations".[512] In such circumstances, detention and surveillance mechanisms act as a shield for national sovereignty and security, however, with questionable effects for

[508] Foucault; Gebhardt, 'To Make Live and Let Die'.
[509] Foucault, *Society Must Be Defended*.
[510] Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System'.
[511] Cf. Gebhardt, 'To Make Live and Let Die'.
[512] Council of the EU, 'The Council and the European Parliament Reach Breakthrough in Reform of EU Asylum and Migration System'.

asylum seekers. The applicability of the Crisis Regulation to situations of "instrumentalisation", in particular, exposes the dehumanisation of European border politics, whereby the potential hostility of third states, or even non-governmental organisations engaging in search and rescue operations, takes priority over the right of individuals to apply for asylum.[513] In this environment, biopower is transformed into "necropower", i.e., the ability to expose some people to death, with European sovereignty correspondingly constituting the *raison d'être* for being able to determine the disposability of certain bodies over others.[514] Or, as Commission president Von der Leyen puts it, "Europeans will decide who comes to the EU and who can stay".[515]

Against this background, exceptions under the Crisis Regulation, according to which instrumentalisation situations permit MS to streamline all applicants into the border procedure, effectively eradicate the substantive content of applicants' right to asylum.[516] Such instances of biopolitical border management may partially be the consequence of MS' experiences with border instrumentalisation by hostile third states such as Belarus in the early 2020s.[517] This, however, runs counter to the jurisprudence of the CJEU in *Commission v Poland and Hungary*, where the Court ruled that unexpected and significant increases in applications for international protection do not justify systematic infringements of the right to asylum by MS.[518] This highlights that even courts may be powerless insofar as legislative reform strengthens the biopolitical management of European migration.

[513] Border Violence Monitoring Network, 'New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum'.
[514] Mbembe, 'Necropolitics'.
[515] Henley, 'EU Reaches Asylum Deal That Rights Groups Say Will Create "Cruel System": Plan Is Aimed at Spreading Cost of Hosting Asylum Seekers across Bloc and Limiting Number of Arrivals'.
[516] Border Violence Monitoring Network, 'New Pact on Migration and Asylum: European Parliament Concedes to Council Position in a Devastating Blow to the Right to Asylum'.
[517] Urszula Glensk and Ed Vulliamy, "On the frozen frontiers of Europe with the migrants caught in a lethal game: Asylum seekers are pawns in a conflict between Poland and Belarus", *The Guardian*, November 7, 2021, https://www.theguardian.com/world/2021/nov/07/on-the-frozen-frontiers-of-europe-with-the-migrants-caught-in-a-lethal-game.
[518] European Commission v Poland, Hungary and the Czech Republic, No. Joined Cases C-715/17, C-718/17 and C-719/17 (Court of Justice of the European Union 2 April 2020).

4. The way forward?

While the Global Approach to Migration and Mobility in 2011 still called for a "migrant-centred approach" to European asylum politics, such discourses have been scarce in recent policy documents, with similar conclusions to be drawn for rights-based narratives.[519] Correspondingly, what Vaughan-Williams calls the "chronic continuum of border violence that continues to beset EUrope in the twenty-first century" can best be explained by examining the biopolitical structures of European migration management.[520] The most recent iteration of draconic measures, constitutive of the continuing trend of criminalising and securitising migration matters, is exemplary thereof. Surveillance and detention mechanisms, which form an integral part of the CEAS reform agreed upon in 2023, are apt for comparisons with Foucauldian disciplinary power. Equally, the clinical management of migration according to predefined quotas can best be understood in the context of biopolitics and biopower.

This paper has made the case for adopting a Foucauldian lens on European migration policy and examined the CEAS reform in light of this against general trends of criminalising and securitising migration. It has argued that, whilst processes like large-scale deployments of technology or cooperation with third states are unproblematic *per se*, under the pretext of safeguarding national sovereignty, such mechanisms are employed at the expense of potential asylum applicants. Similarly, rights protection is eroded under the CEAS reform through biopolitical border management, for example, in the context of instrumentalisation discourses.

Whilst the above-employed conceptual tools help understand recent developments in EU migration policy, they should not be taken as a justification thereof. Instead, they serve to highlight the consequences of bifurcated EU human rights politics, whereby the propagation of the rights (or "life") of some takes place at the expense of the rights of

[519] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Global Approach to Migration and Mobility', 18 November 2011, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0743.
[520] Vaughan-Williams, *Europe's Border Crisis Biopolitical Security and Beyond*, 34.

others (curbing their right to life). As employing a Foucauldian lens is primarily useful for problematising this process, rights discourses remain relevant for developing tangible solutions thereto. When combining these two perspectives and adopting a relational understanding of power, there is a possibility for formulating alternative discourses around migration across various fora in European society.

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Research Article

Should military robots designed to evacuate injured soldiers from the battlefield carry small arms for self-defence and are the technological challenges involved insurmountable?

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Abstract

While medical personnel are protected from attack under the laws of war, they are permitted to carry small arms for self-defence and the defence of those in their care in acknowledgement of the reality that they are sometimes unlawfully targeted. Robots whose function is to extract wounded combatants are being developed and, like human medical personnel, are at risk of being unlawfully targeted. This article argues that extraction robots should be armed to protect themselves and those in their care to achieve the goals of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the Convention) to the fullest extent. However, there are also technological challenges to be assessed. Ultimately, this paper argues that the technological challenges are not insurmountable, although further work and development of the technology is required to achieve a satisfactory standard. First, being armed enables the robot to avoid incapacitation which in turn allows it to continue to assist the wounded, reducing human suffering and enhancing the dignity of the wounded. The ability to defend wounded in its care achieves the same ends. Taking into account the challenges involved in translating rules of war into code, programming should set a high threshold of certainty of unlawful attack before force is used in order to recognise the complexity and confusion of combat situations and avoid the possibility of

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the robot losing protected status. In addition, to comply with proportionality and necessity requirements under the doctrine of self-defence, and to further minimise the chance of illegitimate force (particularly lethal force) being exerted, ERs should be equipped with communicative capabilities and non-lethal response options. Technology therefore has a role in limiting potential negative consequences of arming ERs.

Keywords extraction robots • self-defence • Geneva Convention • technological challenges • arming robots

I Background

Under the laws of war, medical personnel, medical equipment, and the wounded and sick are absolutely protected from attack.[522] However, the laws of war are not always respected.[523] In order to counter this reality, human military medical personnel are permitted to carry personal weapons to defend themselves and those in their care.[524]

Extraction robots (ERs) designed to evacuate wounded soldiers from the battlefield are being developed.[525] However, as with human personnel, issues of unlawful targeting of these robots remain. Thus, the question arises as to whether ERs should also be given the capability to use potentially lethal force to defend themselves and patients. Especially considering the technological challenges related to programming complex rules and the potential difficulty in locating liability when things do go wrong.

The essay proceeds on the basis that ERs, if armed, would make the decision about whether to use force autonomously. The basis for this premise is that military technology

[522] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), article 12.
[523] Ronald Arkin, "Lethal Autonomous Systems and the Plight of the Non-Combatant", in *The Political Economy of Robots*, ed. Ryan Kiggins (Cham: Palgrave Macmillan, 2018), 319.
[524] Geneva Convention, articles 15 and 22.
[525] Barb Ruppert, "Robots to Rescue Wounded on Battlefield", United States Army, published 22 November 2010, https://www.army.mil/article/48456/robots_to_rescue_wounded_on_battlefield; Charles J Murray, "Robotic Lifesaver", *Design News* 61, no. 6 (2006); Gary Martinic, "Glimpses of Future Battlefield Medicine: the Proliferation of Robotic Surgeons and Unmanned Vehicles and Technologies", *Journal of Military and Veterans' Health* 22, no. 3 (2014): 8.

trends towards autonomy.[526] For example, the Battlefield Extraction Assist Robot (BEAR) can carry a wounded soldier out of the battlefield but is currently controlled by a human operator.[527] However, there are plans to increase BEAR's autonomy.[528] For the purposes of the following discussion, autonomy means the robot can determine whether to use force without human intervention.[529]

This essay argues ERs should be armed to protect themselves and the soldiers they are removing from the battlefield. While robots do not have a self-preservation interest as humans do, they should nevertheless be capable of self-defence to achieve the goals of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (the Convention) to the fullest extent. A self-defence capacity ensures the robot is able to assist the maximum number of injured soldiers by avoiding its own incapacitation. It may then go on to remove soldiers from the field for further treatment, reducing human suffering and enlarging the dignity of the wounded. The ability to defend wounded in its care achieves the same ends. In addition, the Convention's requirement to protect the wounded supports defensive ability.

However, recognising some challenges with the technology in operationalising ERs with defensive capabilities, programming should set a high threshold of certainty of unlawful attack before force is used in order to recognise the complexity and confusion of combat situations and avoid the possibility of the robot losing protected status. Doing so also recognises the ambiguity and value judgments inherent in the laws of war which can be difficult to "translate" into programming. Setting higher thresholds before force is used reduces the chance of mistakes when applying coded ethics to the real world. For the

[526] Human Rights Watch, *Losing Humanity: the Case Against Killer Robots* (United States of America: Human Rights Watch, 2012), 3.
[527] The Economist, "Caught in a BEAR Hug", *The Economist* 398 (2011); Martinic, "Glimpses of Future Battlefield Medicine", 8.
[528] Ruppert, "Robots to Rescue Wounded on Battlefield"; Murray, "Robotic Lifesaver"; Martinic, "Glimpses of Future Battlefield Medicine", 8.
[529] Georg Heppner and Reudiger Dillmann, "Autonomy of Mobile Robots" in *Dehumanisation of Warfare* eds. Wolff Heintschel von Heinegg, Robert Frau and Tassilo Singer (New York: Springer International Publishing, 2018), 80-81; Ronald Arkin, *Governing Lethal Behaviour in Autonomous Robots* (New York: CRC Press, 2009), 37.

same reasons, ERs should also be equipped with defensive capabilities short of lethal means, with lethal force only used as a last resort.

The following discussion is related to, but distinct from, the debates around the use of autonomous weapons systems in armed conflict. Briefly, there are a range of concerns with lethal autonomous weapons systems.[530] Loss of clear lines of liability is one concern,[531] as is the possibility of making war worse, as killing is made easier when responsibility can be passed on to an autonomous system (putting the proportionality requirement of military action under threat).[532] Lethal autonomous weapons systems also may make war more likely, as they may reduce death and injury to human soldiers of the belligerent using the system, so the cost of waging war is reduced.[533] If war is seen as a less costly exercise in terms of sacrifice of the population,[534] it becomes a more palatable response and political barriers are removed.[535] In addition, the proliferation of arms may be exacerbated if the development of lethal autonomous weapons systems leads to an arms race.[536]

While these debates inform broader context, this paper focuses on a slightly different facet of the use of automated force. Instead of engaging with the question of offensive force and active waging of war, this paper is concerned with responsive and protective force. The focus here is twofold. First, whether it is at all justifiable to use automated defensive force in circumstances where there is an attack on a protected activity (in this case, providing medical care). Second, if justifiable, the technological challenges which need to be overcome and the technological solutions that might address some of those challenges. While I do use an analogy to offensive lethal autonomous weapons systems, it is primarily because many of the same *technical* challenges arise. For

[530] See for example Vincent C Muller, "Autonomous Killer Robots are Probably Good News" in *Drones and Responsibility: Legal, Philosophical and Socio-Technical Perspectives on the Use of Remotely Controlled Weapons* eds. Ezio Di Nucci and Filippo Santoni de Sio (London: Ashgate, 2016), 79-81.
[531] Peter W Singer, "Military Robots and the Laws of War", *The New Atlantis* 23, (2009): 46.
[532] Muller, "Autonomous Killer Robots", 79.
[533] Gary E. Marchant et al., "International Governance of Autonomous Military Robots" *Columbia Science and Technology Law Review* XII (2011): 285; Singer, "Military Robots", 42.
[534] Marchant et al., "International Governance", 185.
[535] Muller, "Autonomous Killer Robots", 80.
[536] Muller, "Autonomous Killer Robots", 80.

example, where liability is located for errors, and the difficulty of turning laws of war into programming.

II The Convention

A Protections and obligations

It is first important to understand the Convention, as it provides the context in which ERs operate. The Convention creates protections against direct attack for military medical personnel, equipment, and wounded or sick combatants.[537] The underlying rationale is to protect human dignity and minimise human suffering during armed conflict.[538] Ultimately, any decision as to whether ERs should be armed for defence purposes should further the Convention's underlying aim.

Medical personnel are afforded absolute protection by Article 24.[539] Without protection, their ability to carry out their work to achieve the purpose of the Convention would be significantly negatively impacted.[540] Patients are also afforded absolute protection under Article 12, requiring the wounded or sick "shall be respected and protected in all circumstances".[541] Attempts on wounded or sick soldiers' lives are strictly prohibited, as is other violence against them.[542]

[537] Laurent Gisel, "Can the Incidental Killing of Military Doctors Never be Excessive?" *International Review of the Red Cross* 95, no. 889 (2013): 215.
[538] Lindsey Cameron, Bruno Demeyere, Jean-Marie Henckaerts, Eve La Haye and Heike Niebergall-Lackner, "The Updated Commentary on the First Geneva Convention – a New Tool for Generating Respect for International Humanitarian Law", *International Review of the Red Cross* 97, no. 900 (2015): 1210 and 1219.
[539] Geneva Convention, article 24.
[540] International Committee of the Red Cross, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge: Cambridge University Press, 2016), 194; Cameron et al, "Updated Commentary", 1211.
[541] Geneva Convention, article 12.
[542] International Committee of the Red Cross, *Commentary,* 1397.

Article 12 also imposes obligations on others in relation to the wounded. While the concept of respect requires a negative action in refraining from attacking,[543] the concept of protecting imposes positive obligations of coming to someone's defence.[544] To best achieve the Convention's aims, the obligation to protect should be interpreted broadly to include protection against harm by others, combat situations, natural hazards, and dangers arising from their medical condition.[545]

Article 15 imposes obligations to search for and collect the wounded and sick[546] to ensure they are not left without medical attention, which again reflects the purpose of the Convention as a whole.[547] Under the Article 15 obligation, medical personnel are called on to guard and protect the wounded, potentially resorting to weapons if necessary.[548] Although not explicit in the article itself, the protection is likely to be against friendly and enemy forces.[549]

B Use of weapons

To facilitate their important role in operationalising the aims of the Convention, human military medical personnel are permitted to carry and use weapons. The arming of medics recognises they are increasingly the object of attacks during wartime.[550] The arming of medical personnel for defensive purposes does not deprive them of their protected status,[551] because medical personnel cannot be asked to sacrifice themselves when unlawfully attacked.[552] The general understanding (in the absence of explicit

[543] Alexander Breitegger, "The Legal Framework Applicable to Insecurity and Violence Affecting the Delivery of Health Care in Armed Conflicts and Other Emergencies", *International Review of the Red Cross* 95, no. 889 (2013): 108.
[544] Gisel, "Incidental Killing of Military Doctors", 222.
[545] International Committee of the Red Cross, *Commentary,* 1361.
[546] Geneva Convention, article 15.
[547] International Committee of the Red Cross, *Commentary,* 1479.
[548] International Committee of the Red Cross, *Commentary,* 1499; Henri Coursier, Oscar M Uhler, and Jean Pictet, *The Geneva Conventions of 12 August 1949: Commentary* (Geneva: International Committee of the Red Cross, 1952), 152.
[549] International Committee of the Red Cross, *Commentary,* 1498.
[550] Vivienne Nathanson, "Medical Ethics in Peacetime and Wartime: the Case for a Better Understanding" *International Review of the Red Cross* 95, no. 889 (2013): 209.
[551] Geneva Convention, article 22.
[552] Coursier, Uhler, and Pictet, *Commentary,* 203.

guidance in the Convention itself) is that only small, personal weapons are permitted for use in this manner.[553]

"Defence" in this context is to be understood narrowly to respond to unlawful violence against the medical personnel or their patients,[554] and therefore excludes acts harmful to the enemy.[555] Defence also does not cover situations where the enemy advances and seizes control of the area in which the medical activities are being carried out, nor in situations of capture of the medical personnel and patient.[556] In addition, resistance to verification procedures by the enemy to ensure medical activities are indeed being performed is not legitimate.[557] Force must only be resorted to when it is obviously necessary.[558]

C Non-discrimination

Under Article 12, the wounded or sick must be treated on the basis of non-discrimination, requiring even enemy combatants to be cared for to the same standard as allied soldiers.[559] The only permissible distinction is grounded in principles of medical triage,[560] so the provision of care is based on medical need rather than affiliation.[561] This obligation is augmented by general medical ethics, which continue to apply in wartime.[562]

[553] International Committee of the Red Cross, *Commentary*, 1864. The understanding was reached around the time of the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
[554] International Committee of the Red Cross, *Commentary,* 1866.
[555] International Committee of the Red Cross, *Commentary,* 1867.
[556] International Committee of the Red Cross, *Commentary,* 1867.
[557] International Committee of the Red Cross, *Commentary,* 1867.
[558] Coursier, Uhler, and Pictet, *Commentary,* 203.
[559] International Committee of the Red Cross, *Commentary,* 1337 and 1392.
[560] Coursier, Uhler, and Pictet, *Commentary,* 140.
[561] Nathanson, "Medical Ethics", 196.
[562] Leonard S Rubenstein, "A Way Forward in Protecting Health Services in Conflict: Moving Beyond the Humanitarian Paradigm", *International Review of the Red Cross* 95, no. 890 (2013): 334; World Medical Association's Declaration of Geneva, 2017; Nathanson, "Medical Ethics", 196; M Goniewicz and K Goniewicz, "Protection of Medical Personnel in Armed Conflicts", *European Journal of Trauma and Emergency Surgery* 39 (2013): 108.

As a result of the non-discrimination principle found in the Convention, any defence capability exercisable by ERs would need to be equally applicable against its own forces as enemy combatants. The reality of the non-discrimination principle in this context means as a policy decision, militaries may not want to develop ERs with defence capabilities if it runs the risk of operating against their own soldiers. However, as a principled argument against ER defence capabilities, it is not a particularly strong one because human medical personnel have the same obligations to use force against their own side if necessary to protect those in their care. Consequently, an ER with defence capacities which are compliant with the non-discrimination principle found in the Convention would have the same effect as a human performing medical duties in the field – the possibility that those defensive capabilities will be exercised against their own side.

III Defence and ERs

The use of ERs without defensive capabilities already facilitates the achievement of the Convention's aims. The obligation to collect the wounded is not absolute, and medics are not required to put themselves at risk disproportionately.[563] Consequently, medical personnel are not expected to continue despite danger.[564] Using ERs therefore reduces risk to humans who are no longer required to enter dangerous areas to find and retrieve casualties.[565] In addition, ERs may be used in situations where it would be too risky to require humans to perform recovery operations (or where the terrain is inaccessible), meaning the wounded are collected when they might otherwise be left in the field.[566] An ER therefore creates opportunities for assistance that may otherwise not be possible.[567] From this position, the use of ERs can already be said to aid in the achievement of the

[563] International Committee of the Red Cross, *Commentary,* 1487.
[564] Nathanson, "Medical Ethics", 209; Breitegger, "Legal Framework", 110.
[565] Andrew C Yoo, Gary R Gilbert, and Timothy J Broderick, "Military Robotic Combat Casualty Extraction and Care" in *Surgical Robotics: Systems Applications and Visions,* eds. Jacob Rosen, Blake Hannaford, Richard M Satava (New York: Springer, 2011), 13 at 15.
[566] Charles HC Pilgrim and Mark Fitzgerald, "Novel Approaches to Point of Injury Case Utilising Robotic and Autonomous Systems", *Journal of Military and Veterans' Health* 30, no. 4 (2022): 8.
[567] Yoo, Gilbert, and Broderick, "Extraction and Care", 16.

goals of the Convention, even without defence capabilities as medical personnel and the wounded both benefit.

However, the benefit of creating opportunities for extraction by ERs where it would otherwise not be possible is impacted by the reality that medical workers are increasingly the object of unlawful attacks.[568] Similarly, it is likely that ERs would also be targeted, and therefore limiting the circumstances in which extractions are successful. While the fact that rules are broken does not lead to the conclusion they are irrelevant,[569] meaning that we should continue to insist that they are followed, we need to be mindful of the reality of the situation. Recognising the reality that rules are broken should be accounted for where possible to allow for maximisation of the Convention's objectives, even in the face of unlawful attacks. In fact, this is recognised by the rule itself allowing for human medical personnel to respond to attacks on themselves and their patients. Some of the negative effects of unlawful attacks can therefore be further mitigated by allowing ERs to also benefit from the use of small weapons in defence of themselves and patients.

A Self-defence

Traditional principles underpinning the Convention and self-defence appear to tell against the ability for an ER to use force in self-defence. The Convention is anthropocentric:[570] its principles are humanity, dignity, reduction of suffering, and preservation of life.[571] It is these principles which justify permitting medical personnel to use weapons defensively.[572] The principles of protection of autonomy and the right to life underpinning the doctrine of self-defence generally also suggest self-defence is

[568] Nathanson, "Medical Ethics", 209.
[569] Martin Cook, "Ethical Issues in War: an Overview", *U.S. Army War College Guide to National Security Policy and Strategy* (Strategic Studies Institute, US Army War College, 2006), 21.
[570] Tim McFarland, "Factors Shaping the Legal Implications of Increasingly Autonomous Military Systems", *International Review of the Red Cross* 97, no. 900 (2015): 1336; Peter Asaro, "On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanisation of Lethal Decision Making", *International Review of the Red Cross* 94, no. 886 (2012): 700.
[571] Goniewicz and Goniewicz, "Protection of Medical Personnel", 109.
[572] International Committee of the Red Cross, *Commentary,* 1948.

fundamentally tied to humanity.[573] These considerations are not applicable to a piece of equipment like a robot, such that there is little legitimacy in any use of force to defend itself. In addition, there is no personal danger to the robot and no drive for survival.[574] We allow the arming of medical personnel because we do not expect them to completely ignore their own interests and sacrifice themselves in the face of an unlawful attack.[575] General self-defence doctrine also sometimes justifies force on the basis that there is choice between self-preservation and violence to another.[576] Again, the lack of self-interest on the part of the robot points away from the necessity of self-defensive capabilities. Cumulatively, the anthropocentric nature of the Convention and self-defence doctrine, and the lack of a self-interest might indicate an ER should not defend itself against attack.

However, the situation is more complex. Medical personnel are afforded protection even when not actively treating a patient in recognition that their services will have future benefit to the sick and wounded.[577] Other parts of the Convention supplement the conclusion that future assistance is a relevant consideration for whether ERs should be permitted to defend themselves: Article 35 protects medical transports from attack whether or not there are wounded soldiers on board,[578] and further requires the transport not be held up or obstructed.[579] Otherwise, the wounded would not be able to be quickly and safely moved to a location where care is available.[580] As to weapons attached to medical transports, Article 35 does not expressly permit medical transports to be armed but the reality is they may require weapons to protect against unlawful attack,[581] particularly since they are likely to be travelling through volatile areas.[582]

[573] Robert Leider, "Justifying Self-Defence, Defence of Others, and the Use of Force in Law Enforcement" (Doctor of Philosophy Dissertation, Georgetown University, 2009).
[574] Patrick Lin, George Bekey, and Keith Abney, *Autonomous Military Robotics: Risk, Ethics, and Design* (California: United States Department of Navy, Office of Naval Research, 2008), 25.
[575] Coursier, Uhler, and Pictet, *Commentary,* 203.
[576] Leider, "Justifying Self Defence", 61.
[577] International Committee of the Red Cross, *Commentary,* 1948; Breitegger, "Legal Framework", 108.
[578] International Committee of the Red Cross, *Commentary,* 2367.
[579] International Committee of the Red Cross, *Commentary,* 2387.
[580] International Committee of the Red Cross, *Commentary,* 2367.
[581] International Committee of the Red Cross, *Commentary,* 2394.
[582] International Committee of the Red Cross, *Commentary,* 2395.

Protection for medical transports before they are actively being used to transport soldiers, and the ability to defend transports against unlawful attacks suggests the justifications for primary defence (rather than defence of a third party) are grounded not just in human value, but in the ability to provide future care. Relevant considerations in relation to self-defence of a robot are therefore broader than simply whether a human life is at stake.

The principles of the Convention provide a sound basis for allowing robots to act in their own self-defence when subject to an unlawful attack in the interests of furthering future benefit to the wounded. On this basis ERs should be permitted to use force in self-defence.

B Defence of others

The wounded are also targeted directly during times of war, even while enjoying protections afforded by the Convention.[583]

The justifications for using force to defend patients is more straightforward and provides a stronger argument in favour of arming ERs. Clearly, defence of a patient satisfies the anthropocentric underpinnings of the Convention and the doctrine of self-defence set out above since a human life is at stake. Acting to prevent that person's life being taken as a result of an unlawful attack respects the inherent human worth of the individual and their dignity. In addition, the potential victim's interest in self-preservation and right to life interest may not be able to be vindicated by their own action, due to wounds. An ER is therefore justified in stepping in to act on the wounded individual's behalf to protect those interests.

Furthermore, the Convention has several places where an obligation to come to the defence of a wounded soldier is imposed.[584] These obligations to actively protect and

[583] Vincent Bernard, "Violence Against Health Care: Giving in is Not an Option" *International Review of the Red Cross* 95, no. 889 (2013): 5.
[584] Geneva Convention, articles 12 and 15.

defend the wounded suggest a *requirement* that an ER, if possible, should defend patients in its care.[585] A robot with the ability to defend patients with force therefore contributes to the attainment of the goals set out in the Convention and should be permitted.

IV Technical issues

Although on a principled level we may want to equip ERs defensive abilities, their operation in practice may go against the desirability of such a capability. If armed ERs are unable to meet Convention and self-defence standards, then they will cause more harm than good and should not be permitted.

A Programming

As with lethal autonomous weapons systems (LAWS), ERs able to use lethal force require ethical decision-making because they can take a human life. Any use of force must be compliant with legal and ethical constraints.[586] The following discussion will use literature on LAWS when assessing whether ERs should be able to use defensive force, since in both applications human life is at stake and action needs to be constrained by the laws of war.[587] While the rules legitimising the use of force are different, there are comparable underlying concerns about programming being able to implement the laws of war.

There is significant debate about whether the principles of discrimination and proportionality can be programmed into LAWS,[588] and regardless is a huge

[585] Geneva Convention, articles 12 and 15.
[586] Arkin, *Governing Lethal Behaviour,* 10; Robert Sparrow, "Killer Robots: Ethical Issues in the Design of Unmanned Systems for Military Applications" in *Handbook of Unmanned Aerial Vehicles* eds. Kimon P Valavanis and George J Vachtsevanos (Dordrecht: Springer, 2015), 2972.
[587] Peter Asaro for example argues that concerns about autonomous lethal weapons in armed conflict can also be applied to autonomous systems used for domestic policing, crowd control, and other security applications related to the use of force: see Asaro, "On Banning Autonomous Weapons Systems", 689.
[588] See generally Arkin, *Governing Lethal Behaviour* and Noel Sharkey, "The Inevitability of Autonomous Robot Warfare", *International Review of the Red Cross* 94, no. 886 (2012).

programming challenge.[589] The laws of war are abstract, and require situational evaluation and interpretation not easily reduced to a programmatic process.[590] In particular, the Convention does not easily translate into binary options for execution by the robot.[591] "Rules" have a number of exceptions and are open to different understandings even within the same context,[592] and often guidance on how to apply the Convention does not give firm answers but a means of navigating many levels of contextual considerations.[593] Sometimes rules conflict.[594] As with proportionality and discrimination in targeting decisions under the laws of war, rules related to the protection of the wounded and self-defence are not as straightforward as they might appear, meaning similar concerns about their ability to be operationalised in programming apply.

The right to self-defence is limited for both humans and robots.[595] As set out in more detail above, "defence" is to be understood narrowly,[596] only being permitted in order to respond to unlawful violence against the medical personnel or their patients.[597] In addition, force must only be resorted to when it is obviously necessary.[598] Defence under the Convention is extremely nuanced with multiple parameters and exceptions, and the ER needs to be able to distinguish between all of these situations. Acting outside of these parameters will lead to the ER committing a harmful act towards the enemy, and result in loss of protection.[599] Losing its protection would be detrimental to the ER's role in achieving the goals of the Convention as it would place it in a worse

[589] Jakob Kellenberger and Philip Spoerri, "International Humanitarian Law and New Weapon Technologies", *International Review of the Red Cross* 94, no. 886 (2012): 812.
[590] Arkin, *Governing Lethal Behaviour,* 93-94; Hans Geser, "Military Robots in Today's Asymmetric Wars", Hans Geser: Online Publications, published January 2011, http://geser.net/internat/t_hgeser8.pdf, 17.
[591] Peter W Singer, "Military Robots and the Future of War", 4 March 2009, TED Talk.
[592] Arkin, *Governing Lethal Behaviour,* 93-94.
[593] Asaro, "On Banning Autonomous Weapons Systems", 698.
[594] Thomas Hellström, "Terminator ethics What's right and wrong with killer robots?", Department of Computing Science Umeå University Sweden, published 2010, https://people.cs.umu.se/thomash/reports/Terminator%20ethics%20DRAFT.pdf.
[595] Singer, "Military Robots and the Laws of War", 46.
[596] For example it excludes acts harmful to the enemy, defending against advances of the enemy, defending against capture by the enemy, and defending against verification procedures – see Geneva Convention.
[597] International Committee of the Red Cross, *Commentary,* 1866.
[598] Coursier, Uhler, and Pictet, *Commentary,* 203.
[599] Breitegger, "Legal Framework", 112.

position than if it did not have defence capability. In arming ERs we therefore need to be confident of compliance with the Convention.

Further complexity arises from the doctrine of self-defence itself. Force must be necessary and proportionate.[600] United States Marine Corps training shows the difficulty involved in making defensive assessments in wartime: imminent does not necessarily mean immediate, and proportionality requires use of force that is reasonable in type, length and scope.[601] These are all value judgments which can be open to interpretation. Failure to assess these factors can lead to unnecessary harm to a human, which works against the aims of the Convention and delegitimizes the arming of ERs.

Obtaining sufficient and accurate information to even begin to make these decisions is itself an issue in the context of war. Systems require high quality inputs to make acceptable decisions.[602] Environmental factors like low visibility and video quality can reduce reliability of visual sensors in recognising objects.[603] Accuracy and clarity in terms of visual sensors is important for identifying features in the environment that may indicate aggression, as opposed to an approach for the purposes of capturing the ER and patient. If audio sensors are used, ambient noise and emotions in the voices of those the robot interacts with can distort the reliability of speech recognition.[604] Interpreting speech is particularly important because soldiers interacting with an ER may be attempting to communicate and if this is incorrectly categorised as threatening, an illegitimate use of force may occur. If accuracy cannot be assured, ERs should not be armed.

[600] Marco F Bendinelli and James T Edsall, “Defense of Others: Origins, Requirements, Limitations and Ramifications”, *Regent University Law Review* 5, (1995): 166 and 168; Leider, “Justifying Self-Defence”, 5.
[601] United States Marine Corps Training Command, *Introduction to Rules of Engagement* (United States Marine Corps, Student Handout B130936), 21.
[602] Arkin, *Governing Lethal Behaviour*, 4.
[603] Abhinav Kumar and Feras A Batarseh, “The Use of Robots and Artificial Intelligence in War”, London School of Economics, published 17 February 2020, https://blogs.lse.ac.uk/businessreview/2020/02/17/the-use-of-robots-and-artificial-intelligence-in-war/.
[604] Kumar and Batarseh, “Use of Robots”.

While the limitations of obtaining sufficient and accurate information discussed above are a challenge, there are also other sources of information available to ERs which may enhance the information gathering capability of an ER. While sensors based on human senses described above may not provide enough information or sufficiently high-quality information, there is also the possibility future development will lead to information gathering options better than human senses.[605] Arkin identifies wall-penetrating radars as one such technology.[606] Greater information will therefore be available to an ER about the nature of a threat than might otherwise be discernible by a human. Added to this, robots can synthesise larger amounts of information faster without emotional clouding, and decisions are more likely to be better informed and rational than a human's response.[607] All this information can also accommodate contrary indications, rather than humans who may fall victim to "scenario fulfilment" where information contrary to their interpretation of a situation is excluded from consideration or fitted to the existing belief.[608] In this respect, robots may be able to perform "better" than a human by avoiding a potentially illegitimate self-defence action and so should be equipped with defensive capabilities. It will be a matter of assessing the adequacy of information tools that ERs have available to them and how they perform in war zones as they develop and become more advanced.

In addition, perfection is not necessarily the goal. As Arkin comments, humans themselves are imperfect, but if robots can outperform them (which seems possible) then some level of residual fallibility remains acceptable, given there is still an overall improvement.[609] This is an achievable but crucial threshold to meet.[610] With continual technological development, it is also reasonable to assume autonomous systems will improve and be appropriate for use in a greater number of situations.[611] Consequently, arming ERs should not be precluded on the basis programming might not be able to

[605] Arkin, *Governing Lethal Behaviour,* 29.
[606] Arkin, "Lethal Autonomous Systems and the Plight of the Non-Combatant", 319.
[607] Arkin, *Governing Lethal Behaviour,* 29-30.
[608] Arkin, *Governing Lethal Behaviour,* 30.
[609] Arkin, *Governing Lethal Behaviour,* 39.
[610] Lin, Bekey, and Abney, "Autonomous Military Robotics", 2.
[611] Jeffrey S Thurnher, "Feasible Precautions in Attack and Autonomous Weapons" in *Dehumanisation of Warfare,* eds. Wolff Heintschel von Heinegg, Robert Frau and Tassilo Singer (Cham: Springer, 2018), 115.

account for every situation. Where there are residual concerns, further mitigations can be embedded in the ER's programming to ensure the chance of a mistake is minimised and support the benefit of arming ERs for defence.

B Thresholds

Concerns around uncertainty about what the rules permit and understanding of context can be addressed by setting particular thresholds before any force will be used. A robot is more able to act conservatively when information is unclear or in borderline cases.[612] This mitigates against the argument that information may be unreliable and actions misinterpreted, as well as the issue of rules being uncertain as to what is permitted. In this respect, errors can be avoided in cases where it is not clear use of force is warranted.

Another insulating factor is the lack of a drive for self-preservation in an ER and its durability. ERs are more durable than humans and can take direct fire at greater quantities and for longer.[613] ERs can therefore employ tactics to draw out true intentions of an approaching combatant before making a decision to respond, since it does not need to preserve itself at such an early stage.[614] Strong evidence of hostility could therefore be required before action is taken.[615] For example, the ER could wait to actually come under fire before returning fire, eliminating the need for pre-emptive action the way a human may consider necessary. This is also a benefit in defending others, as the ER can place itself between the patient and fire before responding with its own force. Performing reactive rather than proactive defence means complex assessments may be less necessary since reactive responses are more likely to be within the rules of war.[616] ERs can therefore require a high degree of certainty before force is applied, facilitated by their durability and lack of self-interest, meaning in clear

[612] Arkin, *Governing Lethal Behaviour,* 29.
[613] Martinic, "Glimpses of Future Battlefield Medicine", 4; Singer, "Military Robots", 43.
[614] Arkin, *Governing Lethal Behaviour,* 46.
[615] Arkin, *Governing Lethal Behaviour,* 120.
[616] Geser, "Asymmetric Wars", 13.

cases the goals of the Convention are furthered without creating unnecessary harm against those same goals in ambiguous situations.

Added mitigations against inappropriate lethal defensive force can also be incorporated into an ER. Communicative functions and non-lethal response options can further reduce potential harm.[617] Generally under self-defence doctrine, de-escalation and non-lethal options are alternatives that should be considered and acted on if appropriate.[618] Again, durability of the robot facilitates taking these de-escalation and non-lethal measures before (lethal) force is employed, respecting the human-centred nature of the Convention and self-defence doctrines by preserving human life even where that human is presenting a threat.

Use of these safeguards warrant ERs being armed for defence, as the ends of the Convention can be better achieved while simultaneously minimising the risk that unauthorised force will be used.

C Liability issues

Despite precautions able to be taken in relation to the use of force by an ER, locating responsibility for when things go wrong is key. Increasing autonomy of artificially intelligent systems can create a greater responsibility gap,[619] but delegation of decisions to technology should not allow individuals to shift their moral and legal responsibility to comply with the Convention.[620] While some accountability gaps in legal regimes are acceptable, persistent or frequent gaps are generally undesirable.[621] Failure to identify an appropriate locus of responsibility when ERs use force inappropriately may be a

[617] Sparrow, "Killer Robots", 2978.
[618] United States Marine Corps Training Command, *Introduction to Rules of Engagement,* 21.
[619] Daniel W Tigard, "Artificial Moral Responsibility: How We Can and Cannot Hold Machines Responsible", *Cambridge Quarterly of Healthcare Ethics* 30, no. 3 (2021): 435; Human Rights Watch, *Losing Humanity*, 42.
[620] Vincent Bernard, "Science Cannot be Placed Above its Consequences", *International Review of the Red Cross* 94, no. 886 (2012): 464.
[621] Muller, "Autonomous Killer Robots", 76-77.

relevant reason to deny their use of weapons. Nevertheless, the accountability issues created by an autonomous ER using force impermissibly may be over-stated.

Having a level of autonomy, it might be appropriate to hold the ER itself accountable. While we may be able to assign moral responsibility to a robot because it takes morally significant actions,[622] Sharkey points out there is no significant way to punish a robot,[623] and Arkin suggests doing so does not seem realistic under the current state of technology.[624]

However, it is not necessary to hold autonomous robots responsible for their actions. Even autonomous machines are just tools used by humans,[625] and robots are designed and used by humans such that engineers and commanders could remain liable under product liability and chain of command principles respectively.[626] In addition, as tools become more technical, there is a wider class of people who may have contributed to its creation, purchase, and use.[627] The class of those potentially liable is broadened beyond the military chain of command and combatants to include scientists, programmers and political actors.[628] The issue then is not lack of potentially responsible actors, but locating liability in a broad range of actors.[629]

A commander or other individual in the command chain is commonly identified as a locus of responsibility.[630] Programmers are also at times identified.[631] Some argue it would be unjust to hold these actors accountable because they do not have effective

[622] Tigard, "Artificial Moral Responsibility", 436.
[623] Noel Sharkey, "The Moral Case Against Autonomous and Semi Autonomous UAVs" in *Handbook of Unmanned Aerial Vehicles* eds. Kimon P Valavanis and George J Vachtsevanos (Dordrecht: Springer, 2015), 2930.
[624] Arkin, *Governing Lethal Behaviour,* 40.
[625] McFarland, "Legal Implications", 1316.
[626] Yoram Dinstein, "Autonomous Weapons and International Humanitarian Law" in *Dehumanisation of Warfare* eds. Wolff Heintschel von Heinegg, Robert Frau and Tassilo Singer (Cham: Springer, 2018), 20.
[627] Bernard, "Science", 464; Philip Alston, "Lethal Robotic Technologies: the Implications for Human Rights and International Humanitarian Law", *Journal of Law, Information and Science* 21, (2011): 51.
[628] Bernard, "Science", 464.
[629] Didier Danet, "Do Not Ban Killer Robots!", *International Conference on Military Technologies* 716, (2017): 720.
[630] Kellenberger and Spoerri, "New Weapon Technology", 816.
[631] Human Rights Watch, *Losing Humanity*, 4.

control over the decisions made by the system.[632] However, this does not preclude a policy decision to allow for liability to be found. We frequently allow humans to be bound to obligations through informed consent even though there may be no inherent moral duty to be subject to those responsibilities.[633] We could allocate a deliberate assumption of responsibility for the defensive actions of ERs to other parties, including politicians, military officials, soldiers, designers or programmers.[634] Where no one is willing to explicitly accept this liability, we can say the technology should not be deployed.[635] In this respect, lack of liability alone is not a justification for precluding the arming of ERs for defence.

Another argument asserting it is unfair to hold a particular individual or group accountable is based on the fact the error could equally be attributed to other actors.[636] This understanding fails to recognise normal fault attribution which occurs in legal settings regularly. Commanders can continue to be responsible for authorising use of robots in circumstances where a reasonable person may guess harm will occur.[637] Whereas if a failure to include in the programming a parameter of the law is the cause of the error, then it is more appropriate to hold the developer or manufacturer accountable.[638] Before ERs with defensive capabilities are introduced, clear lines of accountability should be established and parties involved in the creation and use of the technology should assume responsibility as appropriate in line with normal fault attribution principles.

Arguments that responsibility gaps should preclude the use of autonomous robots capable of using lethal force are, for the reasons above, insufficient to say that ERs

[632] Arkin, *Governing Lethal Behaviour,* 38; Human Rights Watch, *Losing Humanity*, 4.
[633] Marc Champagne and Ryan Tonkens, "Bridging the Responsibility Gap in Automated Warfare", *Philosophy and Technology* 28 (2015): 127.
[634] Arkin, *Governing Lethal Behaviour,* 40.
[635] Champagne and Tonkens, "Responsibility Gap", 136.
[636] Sharkey, "Inevitability of Autonomous Robot Warfare", 790-791.
[637] Singer, "Military Robots", 47.
[638] Gary E Marchant, Braden Allenby, Ronald Arkin, Jason Borenstein, Lyn Gaudet, Orde Kittrie, Patrick Lin, George Lucas Jr, Richard O'Meara and Jared Silberman, "International Governance of Autonomous Military Robots" in *Handbook of Unmanned Aerial Vehicles* eds. Kimon P Valavanis and George J Vachtsevanos (Dordrecht: Springer, 2015), 2886.

should not be equipped with small arms for defensive purposes. Any responsibility gaps can be managed through existing laws governing liability, or by introducing a legal scheme specific to this kind of technology which allocates responsibility.

V Conclusion

Autonomous robots used to extract battlefield casualties should be equipped with small arms for defensive purposes in the same way human medics are. The ability to defend themselves and those in their care, while not based on traditional self-defence justifications, nevertheless is justifiable on the principle of maximisation of the goals of the Convention to reduce human suffering and enlarge human dignity during war.

Currently, the technological and practical ability of ERs to be armed presents further challenges, but also provides some answers. There are limitations in relation to sensors for information gathering within a difficult context of war, as well as the evaluative nature of the law of war not easily being translatable into programming. However, technology can be tailored to manage these limitations. Defensive capabilities should be defined narrowly to avoid mistakes arising out of unreliability of data or ambiguity arising out of the abstract nature of the laws of war. In addition, to comply with proportionality and necessity requirements under the doctrine of self-defence, and to further minimise the chance of illegitimate force (particularly lethal force) being exerted, ERs should be equipped with communicative capabilities and non-lethal response options. Ultimately, technology is not necessarily a complete bar to arming ERs for self-defence and defence of those in their care, but more work needs to be done around practical programming solutions in order to achieve the ideals advocated for in this paper. Until we can be satisfied that the technology works appropriately and within suitable constraints, we should err on the side of caution and continue to rely on human or non-defensive ERs in the field. Prematurely introducing ERs with defensive capabilities carries the risk of degrading the status quo, rather than improving it.

Finally, accountability to ensure punishment for any breaches of the laws of war should also be assured through explicit assumption of responsibility by users of the technology if it is to be deployed. Explicit allocation of responsibility may be done consistently with normal fault attribution principles, depending on the type of fault which caused the error. For example, it may be most appropriate to hold developers responsible if they fail to include parameters which clearly need to be included to comply with the laws of war, whereas inappropriate use in the circumstances may be more readily attributed to commanders in the field who made the decision to use the ER.

All of this is not to negate the importance of continuing to advocate for observation of the laws of war as they relate to medical workers and those under their care. Although ERs present a potential partial solution to reduce the impacts of belligerents who ignore fundamental principles of the Convention, they are not a panacea and are unlikely to be operational in the immediate future. Issues around targeting of medical personnel and patients are current problems which need addressing in the present, particularly with ongoing concern about the targeting of medical personnel (and other protected individuals and groups) in Gaza.[639] To that end, continued international political pressure and legal accountability for individuals and states responsible are also pieces of the solution.

[639] See for example "Gaza: 'Facilities and Healthcare Workers are Being Targeted'", Médecins Sans Frontières, 24 January 2024, https://msf.org.au/article/statements-opinion/gaza-facilities-and-healthcare-workers-are-being-targeted; Tlaleng Mofokeng, "Gaza: UN expert condemns 'unrelenting war' on health system amid airstrikes on hospitals and health workers", Office of the United Nations High Commissioner for Human Rights, 7 December 2023, https://www.ohchr.org/en/press-releases/2023/12/gaza-un-expert-condemns-unrelenting-war-health-system-amid-airstrikes; and "WHO appeals for protection of the health system from further attacks and degradation of its capacity", World Health Organisation, 4 December 2023, https://www.emro.who.int/media/news/who-appeals-for-protection-of-the-health-system-from-further-attacks-and-degradation-of-its-capacity.html.

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Research Article

The Overstated Challenge: Analysing the Challenge of Southern Criminology to the Hegemony of Northern Criminology and its Implications for Criminological Theory in the 21st Century

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Abstract

As crime globalises, Southern criminology has moved from a marginalised field to a significant area of study, challenging the dominance of Northern criminology. This paper argues that while these challenges are noteworthy, they are often overstated. Addressing them is crucial for improving criminology's epistemological and theoretical foundations and enabling the discipline to better respond to the criminal phenomena of the 21st century. The first part of the paper explains how Southern criminology challenges the production of traditional criminological knowledge. Following this, the paper refutes the claim that Southern criminology fundamentally threatens Northern approaches, arguing that the extent of the challenge is overstated. It critiques the binary division between the global North and South, highlighting similarities in criminal phenomena. The final section proposes collaborative strategies between Northern and Southern criminology to advance the construction of modern criminological knowledge.

Keywords Northern criminology • Southern criminology • decolonisation • hegemony • theoretical criminology

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1. Introduction

In an era marked by the escalating globalisation of crime, the influence of Southern criminology has progressively transitioned from a marginalised field to a central focus in research.[641] This transition presents theoretical challenges to criminology in the Northern Hemisphere.[642] This paper posits that while Southern criminology challenges Northern criminology's hegemony, these challenges are ultimately overstated. Recognising and addressing these challenges is imperative for improving the epistemological framework and theoretical contributions of criminology, thereby equipping it to confront 21st-century criminal phenomena more effectively. This paper provides evidence and examples from different states and indigenous groups.

This paper is structured into four distinct sections. The first section highlights that the challenges posed by Southern criminology significantly impact the conventional model of knowledge construction in the field. Under the requirement for balancing knowledge production and distribution, these challenges should be taken seriously. Following this, the paper refutes the notion that Southern criminology fundamentally challenges prevailing traditional Northern criminology approaches. It demonstrates that these views overstate the challenge Southern criminology posed to traditional Northern criminology. The paper analyses the breaking away from common dualistic thinking, which suggests a fundamental dichotomy between the global North and South, and acknowledges the similarities in critical phenomena between the two regions. The third and final sections explore strategies for Northern and Southern criminology to address these challenges collaboratively. This approach is explored through the lens of criminological research thinking, methodologies, and theoretical content, aiming to refine and improve the pattern of knowledge construction in criminology for the 21st century.

2. The significance of the challenges posed by Southern criminology to Northern criminology's hegemony

[641] Matthews, Roger. "False Starts, Wrong Turns and Dead Ends: Reflections on Recent Developments in Criminology." *Critical Criminology* 25, no. 4 (2017): 577-591.
[642] Greenberg, David F. "The Weak Strength of Social Control Theory." *Crime & Delinquency* 45, no.1 (1999): 66-81.

It is suggested that the challenges posed by Southern criminology significantly undermine the universality of Northern criminological theories.[643] Criminological knowledge refers to the understanding of crime, criminal offenders, delinquency, and the treatment of these aspects within the legal system.[644] The importance of this challenge becomes apparent when contextualising these challenges within the broader framework of constructing criminological knowledge, which cannot be overlooked by traditional Northern criminology.

2.1 The significance of the challenges to the construction of criminological knowledge

The influence of Southern criminology challenges traditional Northern criminology, and this is evident in its questioning of the Northern criminological knowledge framework.[645] This challenge takes two primary forms: contesting the asymmetry in understanding the substance of criminological knowledge and addressing the disparity in the control over the influence of said knowledge. First, as with other social sciences, criminology's knowledge base is largely dominated by Western academics, literature, and perspectives, leading to the marginalisation or overlooking of non-Western criminological scholarship.[646] This phenomenon results in a knowledge disparity between Northern and Southern criminology. The landscape of criminological knowledge, predominantly shaped by white male scholars from the US and UK, manifests the asymmetry in criminological knowledge construction through disparities in funding opportunities, access to academic journals, brain drain, and language barriers.[647]

Second, this asymmetry mirrors a broader power imbalance in the mastery of knowledge, and the influence of Southern criminology challenges the prevailing

[643] Matthews, Roger. “False Starts, Wrong Turns and Dead Ends: Reflections on Recent Developments in Criminology.” *Critical Criminology* 25, no. 4 (2017): 577-591.
[644] Laub, John H., and Robert J. Sampson. "The Sutherland-Glueck debate: On the sociology of criminological knowledge." *American Journal of Sociology* 96, no.6 (1991): 1402-1440.
[645] Matthews, Roger. “False Starts, Wrong Turns and Dead Ends: Reflections on Recent Developments in Criminology.” *Critical Criminology* 25, no. 4 (2017): 577-591.
[646] Moosavi, Leon. “Decolonising Criminology: Syed Hussein Alatas on Crimes of the Powerful.” *Critical Criminology* 27, no. 2 (2018): 229-242.
[647] Aas, Katja F. “The Earth is one but the world is not.” *Theoretical Criminology* 16, no.1 (2012): 5-20.

dominance of Northern knowledge power and its internal power dynamics.[648] Southern criminology represents a democratised epistemology, focused on combating racism, colonialism, and imperialism, and so it poses a challenge to the dominant intellectual frameworks of colonialism established by Northern criminology.[649] Therefore, Southern criminology contests the power imbalance and the privileged status of global Northern epistemology.[650] As Southern criminology seeks to integrate truth production into a reciprocal discourse with traditional Northern criminology, its impact on knowledge construction methodologies is profound, challenging the notion that truth is exclusively the purview of Northern criminology.[651] In addressing this challenge, Southern criminology aims to recalibrate the balance in the construction of criminological knowledge.

2.2 The challenge of the imbalanced criminological knowledge production posed by Southern criminology

The challenge posed by Southern criminology is evident in the pattern of knowledge production and distribution.[652] The influence of Southern criminology on the unbalanced dynamics of criminological knowledge production is significant. Knowledge production is biased in favour of the Global North, specifically, the production of global social science knowledge, much like the distribution of wealth, income, and power.[653] There is a difference between the knowledge produced by Southern criminology and that produced by Northern criminology. Southern criminological knowledge arises from localised issues, not just Northern knowledge production.

This difference is reflected in the fact that Southern criminological knowledge does not arise exclusively from Northern criminological knowledge production, but rather from

[648] Messner, Steven F. "When west meets east: Generalising theory and expanding the conceptual toolkit of criminology." *Asian Journal of Criminology* 10, no.2 (2015): 117-129.
[649] Dimou, Eleni. "Decolonizing Southern Criminology: What Can the "Decolonial Option" Tell Us About Challenging the Modern/Colonial Foundations of Criminology?" *Critical Criminology* 29, (2021): 431-450.
[650] Scott, John G, et al. "What can Southern Criminology Contribute to a Post-Race Agenda?" *Asian Journal of Criminology* 13, no. 2 (2018): 155–173.
[651] Brown, Mark. "Truth and Method in Southern Criminology." *Critical Criminology* 29, no.3 (2021) :451-467.
[652] Carrington, Kerry, et al. *Southern Criminology* (London and New York: Routledge 2018), Ch6.
[653] ibid.

localised issues.[654] There are differences between Southern criminology and Northern criminology in the production of knowledge on prison topics. For instance, currently, the crime control culture of the North favours individualism and liberalism, on the basis that a large number of prison topics exist in Northern criminology, such as a focus on overcrowding in prisons and on crime in prisons.[655] In contrast, the culture of control in the South favours collectivism, uses incarceration as the main form of punishment, and treats criminals as enemies rejected by society, adopting strict custodial measures, and the topics on prisons in Northern criminology have long been absent from the criminology of the South.[656] In addition, theoretical research in the South often brings unique perspectives, challenging the universality of conventional Northern criminological knowledge. Southern criminology focuses not only on globalisation-related criminal phenomena, such as global cybercrime, but also on issues localised in a particular region,[657] such as the criminology of mining development in Australia. Australia is endowed with a wealth of mineral resources, which has led to the emergence of a distinct field of study within Australian indigenous criminology. This field of study is concerned with the unique issues of environmental degradation, social disorder, and conflict caused by the exploitation of natural mineral resources in Aboriginal territories,[658] resulting in unique criminological knowledge that is distinct from that produced by Northern criminology.

2.3 The challenge of the imbalanced criminological knowledge distribution posed by Southern criminology

Southern criminology challenges the North's position as the centre of knowledge distribution, affecting both subject matter and distributional structure. The advent of globalisation and the associated economic and cultural interdependencies and shared risks across various regions and countries have extended the capacity for knowledge

[654] Liu, Jianhong. “Asian Criminology and Non-Western Criminology: Challenges, Strategies, and Directions.” *International Annals of Criminology* 59, no. 2 (2021):103-118.
[655] Nelken, David. “Comparative Criminal Justice: Beyond Ethnocentrism and Relativism.” *European Journal of Criminology* 6, no.4 (2009): 291-311.
[656] Carrington, Kerry, et al. *Southern Criminology* (London and New York: Routledge 2018), Ch6.
[657] ibid.
[658] Carrington, Kerry, et al. “The resource boom's underbelly: Criminological impacts of mining development.” *Australian & New Zealand Journal of Criminology* 44, no. 3 (2011): 335-354.

distribution beyond developed nations, thus rendering it more equitable.[659] For example, the rise of transnational policing and crime has catalysed the exchange of criminological knowledge between the North and the South, promoting supranational governance and steps toward addressing the power imbalance in knowledge distribution. For instance, transnational policing has promoted the exchange of criminological knowledge between the North and South.[660]

Historically, the norm has been to disseminate theories from the Global North to other regions.[661] Southern criminology fosters theoretical innovation grounded in local experiences, disrupting the traditional top-down approach and promoting a bottom-up model.[662] The top-down theoretical approach represents a methodology for introducing novel and pioneering theories when prevailing established theory falls short in elucidating extant criminal phenomena.[663] Conversely, the bottom-up theoretical approach implies a method of applying theories from the criminological body of knowledge to explain the phenomenon of crime. For instance, the occurrence of stabbings in certain Aboriginal communities in Australia cannot be adequately explained by conventional crime control theories alone. This is because stabbing, as an act, is entwined with traditional indigenous practices and is underpinned by complex historical factors that are challenging to eliminate.[664] Consequently, there has been a proposition for an innovative criminological theory based on this crime phenomenon by using the bottom-up approach, that concentrates on historical criminological theories and the historical determinants that have influenced the nature of the offence.[665]

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[659] Chan, Janet. “Globalisation, Reflexivity and the Practice of Criminology.” *Australian & New Zealand Journal of Criminology* 33, no. 2 (2000): 118-135.
[660] Bowling, B. “Transnational Policing: The Globalisation Thesis, a Typology and a Research Agenda.” *Policing* 3, no.2 (2009): 149-160.
[661] Travers, Max. “The idea of a Southern Criminology.” *International Journal of Comparative and Applied Criminal Justice* 43, no. 1 (2017): 1-12.
[662] Dimou, Eleni. “Decolonizing Southern Criminology: What Can the “Decolonial Option” Tell Us About Challenging the Modern/Colonial Foundations of Criminology?” *Critical Criminology* 29, (2021): 431-450.
[663] Liu, Jianhong. “The Asian Criminological Paradigm and How It Links Global North and South: Combining an Extended Conceptual Toolbox from the North with Innovative Asian Contexts.” *International Journal for Crime, Justice and Social Democracy* 6, no. 1 (2017): 73-87.
[664] Cunneen, Chris, and Juan Marcellus Tauri. “Indigenous Peoples, Criminology, and Criminal Justice.” *Annual Review of Criminology* 2, no. 1 (2019): 81-359.
[665] Lawrence, Paul. “Historical criminology and the explanatory power of the past.” *Criminology & Criminal Justice* 19, no. 4 (2018): 493–511.

In summary, Southern criminology fundamentally disturbs the equilibrium in the construction of Northern criminological knowledge, including the production and distribution of knowledge. Therefore, Southern criminology as a growing challenge to Northern hegemony should not be underestimated or ignored.

3. The challenge posed by Southern criminology to Northern criminology's hegemony ought not be overstated

Following the conclusion that the challenge posed by Southern criminology should not be underestimated, this section argues that it is overestimated.[666] Exploring through the lens of theoretical application, this section will illustrate how Northern criminological theory retains its explanatory relevance by encompassing Southern and Northern criminological perspectives. Considering the parallels between Northern and Southern criminology discussed so far, it can be argued that the challenges presented by the latter are overestimated.

3.1 The universal explanatory power of the social control theory

The challenges posed by Southern criminology require Northern criminological theory to encompass the crime phenomenon from the South, integrating it into the broader criminological knowledge base. However, it is suggested that Northern criminology might not be wholly inapplicable to the unique criminal phenomena in certain Southern societies.[667] Despite differences, there exist overlaps in criminal phenomena between the two hemispheres. One notable example is social control theory, which means that individuals do not commit offences resulting from the control of the external social environment, and that criminal conduct occurs when the individual's ties to society are broken.[668] The social control theory continues to offer substantial explanatory power for crime in Southern societies.[669] Northern criminological theory, which evolved as a tool of

[666] Matthews, Roger. "False Starts, Wrong Turns and Dead Ends: Reflections on Recent Developments in Criminology." *Critical Criminology* 25, no. 4 (2017): 577-591.
[667] Weis, Valeria V. "Towards a Critical Green Southern Criminology: An Analysis of Criminal Selectivity, Indigenous Peoples and Green Harms in Argentina." *International Journal for Crime, Justice and Social Democracy* 8, no. 3 (2019): 38–55.
[668] Greenberg, David F. "The Weak Strength of Social Control Theory." *Crime & Delinquency* 45, no. 1 (1999): 66–81.
[669] Fonseca, David S. "Reimagining the sociology of punishment through the global-south: postcolonial social control and modernization discontents." *Punishment & Society* 20, no. 1 (2017): 54–72.

imperialistic control,[670] conciseness aims to facilitate the social control of the relationship between individuals and society. This implies that the state leverages criminological insights for strategic guidance on crime control and the use of punitive powers, evidencing the pertinence of criminology to governance.[671] For example, there is a strong emphasis on maintaining harmonious interpersonal relationships, especially those with close social ties in Southern societies.[672] Informal social control governed by unofficial groups or individuals based on moral rules[673] might be particularly effective in addressing unique cultural features such as collectivism, political dominance, and moral norms. Northern criminology can, therefore, be applied to Southern societies, maintaining its normative and practical relevance.

Moreover, social control theory offers explanations for crime phenomena that overlap between Southern and Northern societies, that is, crime phenomena in the field of globalisation. It is suggested that organised crime in the Global South poses one of the most significant threats to human security, democratic governance, and ecological development worldwide and the seriousness of crime reflects the particularity of the crime phenomenon in southern society.[674] However, this specificity is not sufficient to negate the universality of Northern criminological theories.[675] For instance, unemployment and poverty lead to crime due to broken social relations, a phenomenon acute in Southern Europe, the industrial areas of Northern England, and the Rust Belt of the United States. This further supports the universality of Northern theories.[676]

3.2 The universal interpretive power of the decolonisation theory

[670] Agozino, Biko. “Imperialism, crime and criminology: Towards the decolonisation of criminology.” *Crime, Law and Social Change* 41, no. 4 (2004): 343-358.
[671] Garland, David, and Richard Sparks. “Criminology, Social Theory and the Challenge of our Times.” *The British Journal of Criminology* 40, no.2(2000): 189-204.
[672] Warner, Barbara D, et al. “Racially Homophilous Social Ties and Informal Social Control.” *Criminology* 53, no.2 (2015): 204-230.
[673] Lambert, Eric G, et al. “Correlates of Formal and Informal Social Control on Crime Prevention: An Exploratory Study among University Students, Andhra Pradesh, India.” *Asian J Criminology* 7, no.3 (2012) :239-250.
[674] Weis, Valeria V. “Towards a Critical Green Southern Criminology: An Analysis of Criminal Selectivity, Indigenous Peoples and Green Harms in Argentina.” *International Journal for Crime, Justice and Social Democracy* 8, no. 3 (2019): 38–55.
[675] Pereda, Valentin. “Why Global North criminology fails to explain organised crime in Mexico.” *Theoretical Criminology* 26, no.4(2022): 620-640.
[676] Carrington, Kerry, et al. *Southern Criminology* (London and New York: Routledge 2018), Ch6.

On the challenge to the dominant power of criminological knowledge in the North posed by the decolonisation movement of criminology in the South, the social phenomena of decolonisation in Southern societies can be interpreted through decolonisation theory within the Northern criminological knowledge framework. The topic of decolonisation in Southern criminology has advocated the dismantling of colonial structures and the redistribution of power, for example by focusing on the citizenship and sovereignty of marginalised groups in Southern societies.[677] Additionally, decolonialism's focus on the marginalisation of colonised identities can be explained by postcolonialism, which focused on the process of shaping the marginalised identities of colonised people since the 1980s.[678] For example, it focuses on the protection of the human rights of marginalised groups in immigrant societies, such as the United States, aligning with the topic of decolonization studies on the escape of indigenous marginalised identities.[679] In conclusion, although the decolonisation topics of Southern criminology challenge the colonialist-dominated Northern criminology,[680] the magnitude of this challenge should not be overestimated, because they do not fundamentally negate the universality of Northern criminology.

4. Acknowledging the importance of the methods of criminological theoretical research of the 21st century

Although the above-analysed challenges posed by Southern criminology to Northern criminology's hegemony do not completely invalidate the universality of Northern criminological theories, it is essential for Southern criminology to engage with them to foster the advancement of criminological knowledge in the 21st century. Primarily, and most noticeably, these challenges require traditional criminology to take criminological research thinking and methods seriously.[681]

[677] Ciocchini, Pablo, and Joe Greener. "Mapping the Pains of Neo-Colonialism: A Critical Elaboration of Southern Criminology." *The British Journal of Criminology* 61, no.6 (2021):1612-1629.
[678] Fonseca, David S. "Reimagining the sociology of punishment through the global-south: postcolonial social control and modernization discontents." *Punishment & Society* 20, no.1 (2017): 54-72.
[679] Cunneen, Chris. "Postcolonial Perspectives for Criminology." In *What is Criminology?*, edited by Bosworth, Mary and Carolyn Hoyle. Oxford University Press, 2011, pp.249-266.
[680] Ball, Matthew. "Unsettling Queer Criminology: Notes Towards Decolonization." *Critical Criminology* 27, no.1 (2019): 145-161.
[681] Liu, Jianhong. "The Asian Criminological Paradigm and How It Links Global North and South: Combining an Extended Conceptual Toolbox from the North with Innovative Asian Contexts." *International Journal for Crime, Justice and Social Democracy* 6, no. 1 (2017): 73-87.

4.1 Resisting hegemonic thinking

Decolonised criminology in the contemporary era requires that Southern criminology confront and challenge hegemonic paradigms within the process of knowledge creation, striving to address the imbalance in the power dynamics of knowledge.[682] This endeavour includes seeking parity in dialogue for the progression of Southern criminology. The predominance of the English language in Northern criminology has contributed to a disparity in the spread of criminological knowledge,[683] and reinforced the hegemony of Northern criminological research.[684] The academic development of other non-English languages in southern societies, such as Spanish and Portuguese in South America, could help to undermine Northern hegemony.[685] Consequently, there is a heightened necessity to foster Southern criminology's opposition to Northern hegemonic perspectives. This includes resisting the constraints and biases that exist against Southern criminological research in scholarly forums and organisations and acknowledging and equating research in non-English languages with that from the North.[686] Additionally, opposing hegemony compels Southern criminology to persistently engage with decolonial matters.[687] For example, the Southern criminological agenda is increasingly centred on facilitating decolonisation via societal change. This involves exploring how to disengage from the hegemonic colonisation of criminological knowledge rooted in the Northern Hemisphere through social change, such as decolonisation, and unearth indigenous criminological topics that originate locally.[688]

4.2 Resisting oppositional dualism

[682] Maldonado-Torres, Nelson. "ON THE COLONIALITY OF BEING." *Cultural Studies* 21, no.2-3 (2007): 240-270.
[683] Carrington, Kerry, and Russell Hogg. "Deconstructing Criminology's Origin Stories." *Asian J Criminology* 12, no.3 (2017): 181-197.
[684] Liu, Jianhong. "Asian Criminology – Challenges, Opportunities, and Directions." *ASIAN JOURNAL OF CRIMINOLOGY* 4, no.1 (2009): 1-9.
[685] Garland, David. "Concepts of culture in the sociology of punishment." *Theoretical Criminology* 10, no.4 (2006): 419-447.
[686] Dimou, Eleni. "Decolonizing Southern Criminology: What Can the "Decolonial Option" Tell Us About Challenging the Modern/Colonial Foundations of Criminology?" *Critical Criminology* 29 (2021): 431-450.
[687] Maldonado-Torres, Nelson. "ON THE COLONIALITY OF BEING." *Cultural Studies* 21, no.2-3 (2007): 240-270.
[688] Ciocchini, Pablo, and Joe Greener. "Mapping the Pains of Neo-Colonialism: A Critical Elaboration of Southern Criminology." *The British Journal of Criminology* 61, no.6 (2021):1612-1629.

In addition to averting a shift towards hegemonism, it is equally important to prevent falling into the extreme of creating a binary opposition between Southern and Northern criminological theories. It is necessary to eschew dualistic oppositional logic. There is a danger of hegemonic dualism, which means that Southern criminology and Northern criminology are antagonistically incompatible, and Southern criminology is unable to explain its way into the universality of Northern criminological knowledge, thereby subverting the universality of Northern criminology.[689] Notably, criminology cannot be divided only into Southern and Northern criminology - Eastern criminology, geographically and geopolitically situated between the South and the North, also plays a crucial role and cannot be disregarded.[690] Therefore, the dichotomy between Southern and Northern is neither existent nor definitive.[691]

From the perspective of Southern criminology's influence on the knowledge construction of Northern criminology, Southern criminology has impacted knowledge biases and imbalances.[692] The relationship between Southern and Northern criminology cannot be accurately captured by rigid, fixed geographical or economic binaries, as the reality is far more intricate and dynamic.[693] Therefore, the interaction between Southern and Northern criminology should be neither one of incompatibility nor antagonism, where only one can prevail, but rather a relationship that can and should be dynamically adapted.

4.3 The role of empirical research

Regarding the influence on criminological research methodologies in the 21st century, it is acknowledged that criminology, as both a theoretical and empirical endeavour, ought to recognise and value the contributions of Southern criminology in terms of research samples, including the diversity and difference of Southern criminal phenomena as

[689] Donnermeyer, Joseph F. "The Place of Rural in a Southern Criminology." *International Journal for Crime, Justice and Social Democracy* 6, no.1(2017): 118-132.
[690] Piacentini, Laura, and Gavin Slade. "East is East? Beyond the Global North and Global South in Criminology." *The British Journal of Criminology* 64, no.3 (2023): 521-537.
[691] Moosavi, Leon. "A Friendly Critique of 'Asian Criminology' and 'Southern Criminology." *The British Journal of Criminology* 59, no.2 (2019): 257-275.
[692] Donnermeyer, Joseph F. "The Place of Rural in a Southern Criminology." *International Journal for Crime, Justice and Social Democracy* 6, no.1(2017): 118-132.
[693] Carrington, Kerry, and Russell Hogg. "Deconstructing Criminology's Origin Stories." *Asian J Criminology* 12, no.3 (2017): 181-197.

research samples.[694] Empirical research methods, while dominant in criminological research,[695] should be approached with caution. This is especially true in the context of Southern criminology, where inherent limitations, such as incomplete statistical samples due to researchers' value preferences, can be significant. The empirical findings on criminological issues specific to the South often raise questions about their broader applicability to other world regions.[696] There is a need for heightened awareness of regional variations in research samples and the potential impact of cultural differences on the veracity of data.[697] For instance, Aboriginal crime includes high rates of criminal activity, incarceration, and recidivism among Aboriginal Australians. The factors affecting Aboriginal crime are rooted in the local socio-economic and cultural environment and do not exist in other parts of the world.[698] Therefore, in conducting an empirical analysis of factors affecting Aboriginal crime, it is crucial to consider the impact of local Aboriginal people's special historical and cultural characteristics.[699] In summary, the results of the application of empirical research methods in Southern criminology do not apply to Northern criminology.

5. Addressing the evolving theoretical content in 21st-century criminology

Beyond the impacts on research thinking and methodologies, it is also crucial for 21st-century criminology to address the imbalance in the construction of criminological knowledge as a way of progressing and developing further. This means incorporating Southern criminology into the theoretical system of 21st-century criminology, thereby enriching its theoretical content.

5.1 Collaborative development of restorative justice theory

[694] Travers, Max. "The idea of a Southern Criminology." *International Journal of Comparative and Applied Criminal Justice* 43, no. 1 (2017): 1-12.
[695] Tewksbury, Richard, et al. "The Prominence of Qualitative Research in Criminology and Criminal Justice Scholarship." *J Crim Just Educ* 21, no.4 (2010): 391-411.
[696] Travers, Max. "The idea of a Southern Criminology." *International Journal of Comparative and Applied Criminal Justice* 43, no. 1 (2017): 1-2.
[697] Chin, Jason M, and Alex Holcombe. "Rethinking Replication in Empirical Legal Research." *UW Austl L Rev* 49, no.2 (2022): 76-112.
[698] Ralph, Folds. "Aboriginal crime at the cultural interface in Central Australia." *Crime, Media, Culture* 15, no.1 (2019): 107-124.
[699] Warren, Ian, and Emma Ryan. "Southern Criminologist, Indigenous Stories and Qualitative Research." *J Crim Just Educ* 33, no.2 (2022) :230-246.

Restorative justice theory has made some progress in northern criminological theory in the 21st century, such as the victim rights legislation in Scotland.[700] Restorative justice in Northern criminological theory is characterised as a process where those directly impacted determine the optimal means to rectify the harm caused by an offence, thereby helping communities to re-establish a sense of security that crime has compromised.[701] As an advanced judicial trend that strengthens human rights protection, restorative justice theory is poised to be integrated into the developmental trajectory of Southern criminological theories, increasing the contribution of Southern criminology to the broader knowledge construction of restorative justice theory.[702] Despite the divergent historical, cultural, and international backgrounds of Northern and Southern criminology, there exists both a necessity and a potential for the collaborative development of restorative justice. This collaborative effort could significantly contribute to bridging the knowledge gap between Northern and Southern criminology.[703] The shared values and cultural elements present in Northern and Southern societies render the joint development of restorative justice feasible. For instance, in New Zealand, Maori and other indigenous dispute resolution methods reflect a more restorative model of victim protection, including victim-offender mediation and family group conferencing, enriching the model of restorative justice in practice.[704] In contrast to previous time periods, when the only recourse available to victims was through the formal justice system,[705] these approaches align with both the Southern emphasis on maintaining harmonious social relationships and the Northern values of independence and individual rights.[706]

[700] Victims' Rights (Scotland) Regulations 2015.
[701] Daniels, Griff. "Restorative Justice: Changing the Paradigm." *Prob J* 60, no.3 (2013): 302-315.
[702] Ame, Robert K, and Seidu M Alidu. "Truth and Reconciliation Commissions, Restorative Justice, Peacemaking Criminology, and Development." *Crim Just Stud* 23, no.3 (2010): 253-268.
[703] Liu, Jianhong. "The Asian Criminological Paradigm and How It Links Global North and South: Combining an Extended Conceptual Toolbox from the North with Innovative Asian Contexts." *International Journal for Crime, Justice and Social Democracy* 6, no.1 (2017): 73–87.
[704] Matthews, Roger. "False Starts, Wrong Turns and Dead Ends: Reflections on Recent Developments in Criminology." *Critical Criminology* 25, no.4 (2017): 577-591.
[705] Wendy, Drewery. "Restorative Practice in New Zealand Schools: Social development through relational justice" *Educational Philosophy and Theory* 48, no. 2, (2016): 191-203.
[706] Ashworth, Andrew. "Responsibilities, Rights and Restorative Justice." *Brit J Criminology* 42, no.3 (2002): 578-595.

5.2 Rethinking social control theory in the context of immigration

The expanding realms of criminology in the 21st century encompass diverse fields such as immigration, postcolonialism, green criminology, and queer criminology.[707] Notably, Southern criminology confronts specific challenges related to immigration and environmental threats– issues that Northern societies cannot be overlooked by Northern societies due to their global impact.[708]

Contemporary, 21st-century social control theories in criminology need to address the challenges posed by global migration. This includes strategies to manage the risks and violence associated with migratory flows,[709] delineating safe boundaries between immigrants and non-immigrants, and formulating immigration policies that increase or decrease the rate of migration as appropriate.[710] Northern societies such as France, Germany, and Italy, which primarily receive immigrants,[711] act not only to address the correlation between immigration and crime rates by attempting to reduce crime rates associated with immigration but also strive to restore stable interracial relations that have been disrupted by immigration.[712] Conversely, Southern societies characterised by a higher emigration rate should address the related causes and consequences.[713] This includes factors like seeking asylum in Northern societies due to poverty or the ramifications of war, broadening the scope of research topics concerning immigration-related crimes.[714] To sum up, the theory of social control in the context of

[707] Carrington, Kerry, et al. “Criminology, Southern Theory and Cognitive Justice.” In *The Palgrave Handbook of Criminology and the Global South*, edited by Carrington, Kerry, Russell Hogg, John Scott and Máximo Sozzo. Palgave Macmillan, 2018, pp.3-17.
[708] Connell, Raewyn. “The Northern Theory of Globalization.” *Sociological Theory* 24, no.4 (2007) :368-385.
[709] Campesi, Giuseppe, and Giulia Fabini. “Immigration Detention as Social Defence: Policing ‘Dangerous Mobility’ in Italy.” *Theoretical Criminology* 24, no.1(2020) :50-70.
[710] Lyons, William T, and Lisa L. Miller. “Putting Politics in Its Place: Reflections on Political Criminology, Immigration and Crime.” *Stud L Pol & Soc'y* 59, (2012) :123-154.
[711] Ignatans, Dainis, and Roger Matthews. “Immigration and the Crime Drop.” *Eur J Crime Crim L & Crim Just* 25, no.3 (2017) :205-229.
[712] Smith, Justin. “Racial Threat and Crime Control: Integrating Theory on Race and Extending Its Application.” *Critical Criminology* 29, no.2 (2021) :253-271.
[713] Cheong, Pauline H, et al. “Immigration, Social Cohesion and Social Capital: A Critical Review.” *Critical Soc Pol'y* 27, no.1 (2007) :24-49.
[714] ibid.

migration emphasises the restoration of social relations between migrants and non-migrants, which requires that Northern and Southern societies collaboratively re-evaluate how they approach these issues to prevent the erosion of societal coherence and stability in these regions.[715]

5.3 Rethinking green criminology in light of Southern development

In the context of increasing globalisation, Southern and Northern societies should collaboratively address environmental challenges. The advent of green criminology theory in Southern societies, a significant development in the 21st century, offers essential insights for research in Southern criminology. This perspective is crucial, as the environmental conditions in Southern societies indirectly influence those in the North.[716] Traditional Northern green criminology should adapt to include issues of green crime, particularly considering the specific developmental level of Southern societies. For instance, the effects of Southern green cultural criminology's examination of environmental degradation have been explored from an indigenous perspective, suggesting that saving indigenous culture can serve as a way to achieve ecological justice and prevent green crime.[717] In conclusion, theoretical criminology should proactively respond to the challenges posed by Southern criminology. This is particularly evident in global criminal challenges, such as those related to immigration and environmental concerns, which necessitate a collaborative approach. This approach also fosters the evolution of both social control theory and green criminology theory, ensuring they are attuned to and provide guidance for the specifics of Southern society.

6. Conclusion

In conclusion, this paper demonstrates that Southern criminology presents challenges to Northern criminology, influencing the previously imbalanced knowledge framework.

[715] Chan, Janet. "Globalisation, Reflexivity and the Practice of Criminology." *Australian & New Zealand Journal of Criminology* 33, no.2 (2000): 118-135.
[716] Lynch, Michael J, et al. *Green Criminology: Crime, Justice, and the Environment* (University of California Press 2017), 21-47.
[717] Goyes, David R, et al. "Southern Green Cultural Criminology and Environmental Crime Prevention: Representations of Nature Within Four Colombian Indigenous Communities." *Crit Crim* 29, no.1 (2021): 469-485.

However, these challenges are ultimately overstated because Southern criminology could be incorporated into Northern criminological understandings and universalities. The theories of social control and decolonisation in Northern criminology still have general explanatory power over Southern criminology. The influence of Southern criminology on 21st-century criminological theory warrants serious consideration for the enrichment of the overall field of criminology. Notably, criminological research thinking should confront hegemonism, abandon binary opposition, and seek to apply empirical research methods systemically. These challenges are particularly evident in globally relevant crime issues such as environmental crime and immigration, underscoring the need for Northern criminological theories to adequately address Southern crime concerns. Theoretical criminology should proactively respond to the challenges presented by Southern criminology, thereby fostering the concurrent development of Northern and Southern criminological perspectives.

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Research Article

A Comparative Analysis of the Prosecutorial Strategies Employed by the United States of America and Germany in the Prosecution of IS-Affiliated Women on Terrorism-Related Charges

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Abstract

This article aims to elucidate the similarities and differences between the prosecutorial strategies employed by the United States of America and Germany in the prosecution of IS-affiliated women on terrorism-related charges. By using comparative and doctrinal legal research methods, this article reviews and dissects the criminal proceedings against seven American and seven German IS-affiliated women prosecuted on terrorism-related charges. The article first highlights the fluctuating role of IS-affiliated women, thereby exhibiting the broad spectrum of female engagement in ISIS, ranging from passive participants to active facilitators of violence. Following this, the article presents the international obligations stemming from terrorism-centred UNSC Resolutions and their subsequent transposition into domestic law, amending §2339A and §2339B of the United States Code and §129a and §129b of the German Criminal Code. Finally, the article compares the prosecutorial strategies employed by the two States on the following four grounds: (1) types of evidence, (2) charges, (3) mitigating and aggravating factors, and (4) sentencing. Ultimately, a juxtaposition of the prosecutorial strategies employed by the United States of America and Germany in the prosecution of IS-affiliated women on terrorism-related charges identifies contrasting,

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albeit at times similar, approaches to prosecution primarily as a result of the time at which initiation of criminal proceedings ensues.

Keywords prosecutorial strategies • IS-affiliated women • terrorism charges • comparative legal research • sentencing differences

Introduction

In 2014, succeeding the declaration of the caliphate by Abu Bakr al-Baghdadi, the then caliph, thousands of men, women, and children travelled to Syria and Iraq to join the newly established Islamic State of Iraq and al-Sham (ISIS).[719] Muslims, supporters, and converts worldwide mobilised to join an organisation they perceived as a legitimate representation of their Islamic beliefs. While countless nationals and citizens from neighbouring States, such as Lebanon and Turkey, travelled to join ISIS, so did numerous nationals and citizens from the Western States, such as the United States of America (the U.S.) and Germany.[720] Accordingly, the German authorities acknowledge that approximately 1,150 Germans travelled or attempted to travel to Syria and Iraq as a result of Islamic motivations.[721] By contrast, the U.S. authorities estimate that approximately 300 Americans had travelled or attempted to travel to Syria and Iraq.[722]

However, following the Islamic State's territorial losses in 2019, countless States whose nationals and citizens had once joined ISIS faced the dilemmas of repatriating and prosecuting their nationals, specifically the women and children.[723] Varying approaches have been utilised in these regards, ranging from active repatriation and subsequent

[719] Roel de Bont, Daan Weggemans, Ruud Peters, and Edwin Bakker. "Life at ISIS: The roles of western men, women and children." *Security and Global Affairs* 2017 (2017): 3.
[720] ibid.
[721] Sofia Koller. 2022. "Gendered Differences in the Prosecution of Daesh Returnees in Germany." In *Gender in Terrorism and Counterterrorism: Gendered Dynamics in Military Effectiveness, Prosecution and Radicalisation, Ankara, 2022,* 27-30. Ankara: NATO Centre of Excellence Defence Against Terrorism.
[722] Tanya Mehra, Merlina Herbach, Devorah Margolin, and Austin C. Doctor. "Trends in the Return and Prosecution of ISIS Foreign Terrorist Fighters in the United States." *ICCT/NCITE Report* 2023 (2023): 1.
[723] Anne Speckhard and Molly Ellenberg. "Perspective: Can we repatriate the ISIS children?." *Horizon Insights* (2020): 17.

prosecution to revoking citizenship.[724] In terms of prosecution, there appear to be two overarching prosecutorial strategies. While some States opt for a proactive strategy by prosecuting IS-affiliated women preceding a departure to IS-controlled territory, others rely on a reactive strategy by making prosecution a precondition for repatriation. These prosecutorial strategies are not mutually exclusive, allowing for simultaneous application in certain States.

In light of the differences between the prosecutorial strategies of the U.S. and Germany, this article aims to provide a comparative analysis of the approaches utilised by the respective States in prosecuting IS-affiliated women on terrorism-related charges. Given the limited comparative academic discourse on this subject matter, this article intends to highlight the difficulties associated with prosecuting female foreign terrorist fighters. While the U.S. adopts a proactive and reactive stance towards prosecuting American IS-affiliated women, Germany predominantly acts reactively. Despite this difference, both States faced difficulties in assessing how the engagements of IS-affiliated women fit within the existing criminal law framework, given ambiguities regarding the evidentiary threshold, the application of criminal provisions, and the imposition of punishment. Accordingly, this article intends to answer the following research question: *To what extent do the prosecutorial strategies of the U.S. and Germany in the prosecution of IS-affiliated women on terrorism-related charges juxtapose?*

Methodology

In light of the limited literature comparing the prosecution of IS-affiliated women in different States, this article utilises a combination of legal research methods, namely, comparative legal research (CLR) and doctrinal legal research (DLR). At its core, CLR "contemplates [a] comparison of systems," thereby having its relevance lie in "the comparative evaluation of human experience occurring in the legal domains of different situations and jurisdictions."[725] The DLR, which "relies extensively on using court

[724] Alexis March. "Far from Home: Overcoming the Challenges to Repatriating Foreign Women Who Joined the Islamic State." *U. Ill. L. Rev.* (2021): 1170.
[725] P. Ishwara Bhat. 2020. *Idea and Methods of Legal Research.* Oxford: Oxford University Press.

judgements and statutes to explain [the] law," is primarily employed to support the CLR.[726] By comparatively examining court judgements and statutes from the U.S. and Germany, this article aims to elucidate the similarities and differences between the prosecutorial strategies employed by the respective States.

The limitations of the research primarily centre around the accessibility and availability of court documentation. In Germany, the Higher Regional Court of Düsseldorf functions as one of the few courts publicising terrorism-related judgements in an anonymised manner. Following an access request to the Higher Regional Courts of Munich and Berlin, the corresponding courts provided the two requested anonymised judgements. Access requests to other Higher Regional Courts, however, remained unfulfilled given the cited classified and sensitive nature of these cases. Accordingly, the prime limitation of the German cases centres around spatial confinement in that the ensuing analysis solely premises on judgements from the Higher Regional Courts of Düsseldorf, Munich, and Berlin. The access to German court documentation is further limited in that, unlike the access provided by the U.S. authorities, the German authorities only granted access to the judgements. The restrictions concerning access to court documentation in the U.S. focalise on the following:

(1) succeeding a fee exemption application to twelve U.S. District Courts, six provided such an exemption, thereby generating spatial confinements; and
(2) Although there is access to several court documents such as criminal complaints, orders of detention, sentencing memorandums, etc., other documents are classified and therefore inaccessible.

In light of these limitations, there is an omission of argumentative generalisations with the analysis premising on seven American and seven German cases against IS-affiliated women. Lastly, given that Germany practises anonymisation in case judgements, the American cases have been anonymised as a means to establish consistency throughout the article.

[726] Mike McConville and Wing Hong Chui. 2007. "Introduction and Overview." In *Research Methods for Law,* edited by Mike McConville and Wing Hong Chui, 1-18. Edinburgh: Edinburgh University Press.

The Fluctuating Role of IS-Affiliated Women

The two overarching perceptions, perceiving IS-affiliated women as naïve victims versus active facilitators and perpetrators of violence, have caused interpretive and applicable contentions. In criminal proceedings, the discrepancy between the two perceptions is most evident given that the prosecution primarily relies on the latter perception, whereas the defence entrusts the former. Given ISIS's strict interpretation of Sharia Law and consequent employment of gendered stereotypes, women's lives in the Islamic State starkly contrast those of men. Whether arriving in IS-controlled territory married or unmarried, the future of IS-affiliated women "is one of serving society from behind the scenes."[727] Such servitude includes maintaining the household, obeying the husband, and raising as many children as possible with the aim of expanding the Islamic State.[728] Ultimately, IS-affiliated women are encouraged to "live a sedentary existence."[729]

Although the primary responsibility of women in ISIS is that of servitude, research has exposed several other roles occupied by IS-affiliated women within the organisational structure of the Islamic State. Accordingly, IS-affiliated women have also engaged in the following areas:

(1) online propaganda by attempting to recruit other women and girls;
(2) education and healthcare given the gendered separations in accordance with Sharia Law;
(3) an expectation of engaging in armed jihad following a legal directive; and
(4) joining the all-female *Al-Khansaa* brigade tasked with the enforcement of ISIS's laws.[730]

Correspondingly, "not all ISIS women hold 'back seat' roles" in the organisation, thereby highlighting the fluctuating nature of women's engagement in ISIS.[731]

[727] De Bont, Weggemans, Peters, and Bakker, 10.
[728] ibid.
[729] ibid.
[730] De Bont, Weggemans, Peters, and Bakker, 10-11.
[731] ibid, 13.

Although Western media often presents IS-affiliated women as "naïve individuals duped by deceptive recruiters," scholars have argued that an analysis of recruitment must consider women's engagement as being "a reasonable political option."[732] According to Kathleen German and Rosemary Pennington, "women […] drawn to jihad, view the calling as emancipatory in nature."[733] Even though there are parallels between the reasons men and women join ISIS, recruitment approaches appear to be gendered. "The ISIS materials aimed at young women and teenage girls skirt the more violent realities of life in a jihadist culture by establishing strong interpersonal contacts."[734] ISIS utilises romanticised representations of potential relationships with foreign terrorist fighters posing with "kittens or caring for the elderly" to lure young women and girls to IS-controlled territory.[735] While relationships with foreign terrorist fighters are romanticised, so are "the role[s] of women as jihadi fighters."[736] "These are not women who need saving by the West, but who will, instead, save their sisters from Western imperialism."[737] Consequently, ISIS employs a wide range of strategies to recruit women and girls, primarily relying on romanticised narratives to overshadow the terrorist organisation's violent nature.

According to Joseph Makanda, examining women's engagement in ISIS necessitates the consideration of two lines of reasoning. Firstly, by joining the organisation, "women are meant to increase the human powers and populace of the Islamic State."[738] This line of reasoning aligns with the supportive perceptions of women's engagement in ISIS and their consequent sedentary existence as household wives and mothers. The second line of reasoning posits that "by joining ISIS, women are striving to emancipate, liberate and assert their equality to men within the male-dominated arena of terrorism."[739] Unlike the former, this line of reasoning supports German's and Pennington's claim, positioning

[732] Kathleen German and Rosemary Pennington. "Sisters of the Caliphate: Media and the Women of ISIS." *Journal of Vincentian Social Action* 4, no. 2 (2019): 37.
[733] ibid.
[734] ibid, 42.
[735] ibid.
[736] ibid, 43.
[737] ibid.
[738] Joseph Makanda. "The Jihad Feminist Dynamics of Terrorism and Subordination of Women in the ISIS." *Multidisciplinary Journal of Gender Studies* 8, no. 2 (2019): 137.
[739] ibid, 138.

women's jihadi engagement as emancipatory rather than subordinate in nature. Although academia has attempted to categorise the activities and engagements of IS-affiliated women, a definitive categorisation remains challenging. This is principally due to the often interwoven, fluctuating, and intricate reasons behind women's engagement in the Islamic State.

International Obligations, §2339A and §2339B of the United States Code, and §129a and §129b of the German Criminal Code

Succeeding United Nations Security Council Resolution (UNSC Res.) 1373, the UN Member States are obliged to prosecute terrorists, ensure that domestic legislation classifies terrorist-related acts as serious criminal offences, and guarantee adequate punishment for such offences.[740] UNSC Res. 2396 further acknowledges the diverse and fluctuating roles of women in terrorist organisations, as "victims, supporters, facilitators, or perpetrators," thereby highlighting the necessity of "tailored and gender-sensitive prosecution, rehabilitation, and reintegration."[741] According to the UNSC Counter-Terrorism Committee Executive Directorate, "the challenges involved in prosecuting women who return from the Islamic State in Iraq and the Levant […] have often been cited as a reason for States' reluctance to repatriate their female citizens."[742] These challenges include, *inter alia*, the applicability of domestic terrorism provisions and the evidentiary threshold required to incriminate IS-affiliated women. Nevertheless, given the international obligations, States have opted to prosecute IS-affiliated women under varying criminal offences such as membership in a terrorist organisation, the commission of international crimes, and/or the abduction of minors.[743]

[740] S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001).
[741] S.C. Res. 2396, U.N. Doc. S/Res/2396 (Dec. 21, 2017).
[742] Counter-Terrorism Committee Executive Directorate. 2020. *Analytical Brief: The Prosecution of ISIL-associated Women.* United Nations Security Council Counter-Terrorism Committee Executive Directorate.
https://www.un.org/securitycouncil/ctc/content/cted-analytical-brief-%E2%80%93-prosecution-isil-associated-women.
[743] Counter-Terrorism Committee Executive Directorate.

In the case of terrorism-related charges in the U.S., federal prosecution "relies heavily on preventative law enforcement and material support statutes."[744] Given the international and domestic classification of terrorism-related crimes as serious criminal offences, terrorism prosecutions in the U.S. carry high conviction rates.[745] Despite this, "commentators regularly cast female terrorism offenders as naïve, gullible, susceptible targets of violent extremism, even when they admit their culpability by pleading guilty."[746] The use of gendered framing during the criminal proceedings, in turn, may influence judicial decision-making.[747] The U.S. federal courts usually resort to U.S.C. §2339A and §2339B when prosecuting IS-affiliated women. Both sections constitute material support statutes, and while §2339A "is broad, designed to prosecute individuals for specific acts," §2339B "provides [the] prosecutorial basis for attempting or conspiring to provide material support."[748]

In response to UNSC Res. 2178, Germany undertook legislative amendments to enable "law enforcement agencies […] at the state and federal levels to launch criminal investigations into individuals or groups perceived to have links to terrorist organisations."[749] In practice, these changes resulted in the prosecuting authorities opening criminal investigations into IS-affiliates preceding their repatriation.[750] Before 2017, "many prosecutors tended to search for additional evidence adding to the fact of their departure before opening a criminal investigation into German IS-affiliated women."[751] This prosecutorial hesitancy, however, changed in 2017 when "the federal prosecutor general announced that henceforth no differences between men and women will be applied."[752] Accordingly, a returnee participates as a member of a terrorist

[744] Evan Colleen Jones. "Gone Girls: Exploring the Systematic Misunderstanding of Women in ISIS and Resulting International Security Concerns." *Loy. U. Chi. Int'l L. Rev.* 16 (2020): 240.
[745] ibid.
[746] Audrey Alexander and Rebecca Turkington. "Treatment of terrorists: How does gender affect justice?." *CTC Sentinel* 11, no. 8 (2018): 24.
[747] See note 26 above, 249.
[748] ibid, 254.
[749] Daniel H. Heinke and Jan Raudszus. "Germany's Returning Foreign Fighters and What to Do about Them." Egmont Paper 101 (2018): 50.
[750] ibid.
[751] Heinke and Raudszus.
[752] ibid.

organisation abroad, criminalised under §129a and §129b of the German Criminal Code, if:

(1) the returnee takes part in the associational life of the terrorist organisation;
(2) does so over an extended period of time;
(3) finds their way into the terrorist organisation by submitting to the will of the organisation; and
(4) performs promotional activity from within the organisation.[753]

If the membership is accompanied by a violation of other criminal norms, such as participation in an execution, then these offences are to be prosecuted in addition to membership, thereby influencing the legal consequences.[754]

A Comparison of the Prosecutorial Strategies

The main difference between the investigative practices employed by the U.S. and German law enforcement authorities stems from the U.S. 's utilisation of informants and sting operations to initiate criminal proceedings against American IS-affiliated women. The U.S. law enforcement authorities primarily employ informants and sting operations in cases where a departure to IS-controlled territory has yet to occur, thereby enabling the prosecution of American IS-affiliated women preceding an emigration to Syria or Iraq. The use of informants and sting operations corroborates the U.S.'s proactive approach in prosecuting American IS-affiliated women. Based on the available case law, the German law enforcement authorities do not employ informants or sting operations; however, they do appear to rely on foreign intelligence services as a source of information. Given Germany's reactive approach in prosecuting German IS-affiliated women upon repatriation to Germany, a lack of informants and sting operations appears justified.

There are similarities and differences between the two States as to the times at which the initiation of criminal proceedings materialises. In Germany, the prosecution of

[753] Gerwin Moldenhauer. "Rückkehrerinnen und Rückkehrer aus der Perspektive der Strafjustiz." *Bundeszentrale für politische Bildung* 31 (2018): 82.
[754] ibid, 84-85.

German IS-affiliated women is a precondition for repatriation. On account of this, German law enforcement authorities operate reactively, given that prosecution only ensues following repatriation to German territory. U.S. law enforcement authorities, on the other hand, operate reactively and proactively in that they prosecute American IS-affiliated women before as well as after a departure to IS-controlled territory. In terms of the types of evidence used during the criminal proceedings *(see Tables 1 and 2)*, the two States heavily rely on testimony by the defendants and witnesses, communications via social media platforms, and miscellaneous sources such as photographs, travel documents, and sales receipts. The main difference between the two States in terms of evidence concerns the U.S. 's reliance on informants and sting operations as a source of evidence and Germany's use of expert testimony during the criminal proceedings as a means to elucidate concepts such as Islamic radicalisation and extremism.

Table 1: American IS-Affiliated Women (Types of Evidence)

Case	U.S. District Court	Types of Evidence
A[755]	Eastern District of Virginia	Cooperating witnesses and ISIS evidence recovered from the battlefield
B[756]	Middle District of Florida	Cooperating witnesses, online communication, communication with an undercover FBI employee, Facebook communication, sales receipts, USPS confirmation, and video surveillance recordings
C[757]	Eastern District of Virginia	Facebook posts, Facebook profiles/accounts, communication with an undercover FBI

[755] *United States of America v Fluke-Ekren* [2019] U.S. District Court Eastern District of Virginia 1:22-cr-00092, (2019) Document 2 Affidavit by USA as to Allison Elizabeth Fluke-Ekren; *United States of America v Fluke-Ekren* [2019] U.S. District Court Eastern District of Virginia 1:22-cr-00092, (2022) Document 36 Statements of Facts as to Allison Elizabeth Fluke-Ekren.

[756] *United States of America v Sheppard* [2018] U.S. District Court Middle District of Florida 2:18-cr-00019, (2018) Document 3 Indictment; *United States of America v Sheppard* [2018] U.S. District Court Middle District of Florida 2:18-cr-00019, (2019) Document 68 Plea Agreement.

		employee (virtual and in-person), interview with two FBI special agents, online communication, and text messages
D[758]	Eastern District of Kentucky	Facebook group, Facebook messages, letter from the defendant's daughter, letter from the defendant's friend, and testimony of the defendant
E[759]	Northern District of Indiana	Defendant's diary, video clips of interviews, audio clips of interviews, Facebook messages, email communication, Telmate messages, and testimony (of witness and defendant)
F[760]	District of Colorado	Online communication, list of contacts, and a number of items demonstrating the defendant's proficiency and certifications for a variety of specialised skills
G[761]	Eastern District of Wisconsin	Academic report, Facebook profiles, email communication, Facebook messages, FBI confidential source, Twitter accounts, character reference letters (from the defendant's son, two daughters, and sister),

[757] *United States of America v Coffman* [2014] U.S. District Court Eastern District of Virginia 3:15-cr-00016, (2014) Document 1 Criminal Complaint; *United States of America v Coffman* [2014] U.S. District Court Eastern District of Virginia 3:15-cr-00016, (2015) Document 28 Criminal Information; *United States of America v Coffman* [2014] U.S. District Court Eastern District of Virginia 3:15-cr-00016, (2015) Document 33 Statement of Facts.

[758] *United States of America v Castelli* [2017] U.S. District Court Eastern District of Kentucky 2:17-cr-00049, (2017) Document 3 Information as to Marie Antoinette Castelli; *United States of America v Castelli* [2017] U.S. District Court Eastern District of Kentucky 2:17-cr-00049, (2017) Document 7 Plea Agreement.

[759] *United States of America v Elhassani* [2019] U.S. District Court Northern District of Indiana 2:19-cr-00159, (2020) Document 23 Sentencing Memorandum by United States of America as to Samantha Elhassani (Exhibit List).

[760] *United States of America v Conley* [2014] U.S. District Court District of Colorado 1:14-cr-00163, (2014) Document 15 Information; *United States of America v Conley* [2014] U.S. District Court District of Colorado 1:14-cr-00163, (2014) Document 37 Plea Agreement and Statement of Facts.

[761] *United States of America v Dais* [2018] U.S. District Court Eastern District of Wisconsin 2:18-cr-00143, (2018) Document 1 Complaint.

		Telegram channels, and communication with an undercover FBI employee

Table 2: German IS-Affiliated Women (Types of Evidence)

Case	German Higher Regional Court	Types of Evidence
H[762]	Higher Regional Court of Düsseldorf	Witness testimony, statements by an expert, confession by the defendant, email communication, Facebook groups, internet search history, Facebook messages, and statements by a social worker
I[763]	Higher Regional Court of Munich	Facebook profile(s), Facebook posts, internet chats, statements by an expert, witness testimony, statements by the defendant, video interviews, and statements by a forensic expert
J[764]	Higher Regional Court of Berlin	WhatsApp messages, confession by the defendant, telecommunication(s), statements by an expert, witness testimony, contact list on the mobile phone, photographs, and Facebook profile
K[765]	Higher Regional Court of Düsseldorf	Facebook profile, Facebook group(s), SMS messages, WhatsApp messages, bank transfers, statements by an expert, statements by the defendant, witness testimony, photographs, and videos

[762] *7 StS 2/20* Oberlandesgericht Düsseldorf 7 StS 2/20, (2021) Urteil.
[763] *8 St 9/18* Oberlandesgericht München 8 St 9/18, (2022) Urteil.
[764] *(6) 2 StE 6/20-3 (2/20)* Kammergericht Berlin (6) 2 StE 6/20-3 (2/20), (2021) Urteil.
[765] *5 StS 2/19* Oberlandesgericht Düsseldorf 5 StS 2/19, (2019) Urteil.

L[766]	Higher Regional Court of Düsseldorf	Statements by the defendant, contents of the telecommunications surveillance, witness testimony, analysed results of the seized data carriers, statements by an expert, police investigation reports, statements by the Federal Intelligence Service, photographs, travel documents, Viber messages, Facebook profile, and Skype chats
M[767]	Higher Regional Court of Düsseldorf	Statements by the defendant on the matter, witness testimony, statements by an expert, Telegram messages, Facebook messages, testimony of the lead investigators, distribution of IS propaganda videos, and audio messages
N[768]	Higher Regional Court of Düsseldorf	Confession by the defendant, witness testimony, online communication (via email and phone), information from the registration authority portal, evaluation reports from the police headquarters, and official statement

The charges brought against American and German IS-affiliated women both correlate and diverge. While U.S. law enforcement authorities resort to material support statutes to incriminate American IS-affiliated women *(see Table 3)*, German law enforcement authorities rely on membership in a foreign terrorist organisation and international crimes provisions *(see Table 4)*. The difference in reliance appears to predominantly stem from the initiation period of criminal proceedings. In the U.S., criminal proceedings are initiated preceding and succeeding a departure to IS-controlled territory whereas in Germany prosecution is a precondition for repatriation. A reliance on material support statutes enables U.S. law enforcement authorities to act reactively and proactively,

[766] *7 StS 3/19* Oberlandesgericht Düsseldorf 7 StS 3/19, (2021) Urteil.
[767] *7 StS 3/20* Oberlandesgericht Düsseldorf 7 StS 3/20, (2021) Urteil.
[768] *7 StS 4/19* Oberlandesgericht Düsseldorf 7 StS 4/19, (2020) Urteil.

given that a departure to IS-controlled territory is not necessary for the fulfilment of the offence conduct. In contrast, the German criminal provisions, especially the international crimes provisions, necessitate emigration for criminal liability to attach.

Table 3: American IS-Affiliated Women (Charges)

Case	U.S. District Court	Charge(s)
A[769]	Eastern District of Virginia	18 U.S.C. §2339B (Conspiring to Provide Material Support to a Foreign Terrorist Organisation, Namely the Islamic State of Iraq and al-Sham)
B[770]	Middle District of Florida	18 U.S.C. §2339B(a)(1) & §2 (Attempting to Provide Material Support and Resources to a Foreign Terrorist Organisation)
C[771]	Eastern District of Virginia	18 U.S.C. §1001(a) (False Statements Involving International Terrorism)
D[772]	Eastern District of Kentucky	18 U.S.C. §875(c) and §2 (Interstate Communication of a Threat)
E[773]	Northern District of Indiana	18 U.S.C. §2339C(c)(2)(A) (Prohibitions Against the Financing of Terrorism and Aiding and Abetting)

[769] *United States of America v Fluke-Ekren* [2019] U.S. District Court Eastern District of Virginia 1:22-cr-00092, (2022) Document 35 Plea Agreement.
[770] *United States of America v Sheppard* [2018] U.S. District Court Middle District of Florida 2:18-cr-00019, (2018) Document 3 Indictment.
[771] *United States of America v Coffman* [2014] U.S. District Court Eastern District of Virginia 3:15-cr-00016, (2015) Document 32 Plea Agreement.
[772] *United States of America v Castelli* [2017] U.S. District Court Eastern District of Kentucky 2:17-cr-00049, (2017) Document 7 Plea Agreement.
[773] *United States of America v Elhassani* [2019] U.S. District Court Northern District of Indiana 2:19-cr-00159, (2019) Document 1 Information; *United States of America v Elhassani* [2019] U.S. District Court Northern District of Indiana 2:19-cr-00159, (2019) Document 2 Plea Agreement.

F[774]	District of Colorado	18 U.S.C. §371 (Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organisation)
G[775]	Eastern District of Wisconsin	18 U.S.C. §2339B(a)(1) (Attempting to Provide Material Support or Resources to a Foreign Terrorist Organisation)

Table 4: German IS-Affiliated Women (Charges)

Case	German Higher Regional Court	Charge(s)
H[776]	Higher Regional Court of Düsseldorf	§27 (Aiding); §52 (Several offences committed by one act); §53 (Joinder of offences); §129a (Forming terrorist organisations); §129b (Foreign criminal and terrorist organisations); §171 (Breach of duty of care or upbringing); and § 239 (Unlawful imprisonment) of the German Criminal Code. §7 (Crimes against humanity) and §9 (War crimes against property and other rights) of the Code of Crimes against International Law. §22a (Other penal provisions) of the War Weapons Control Act
I[777]	Higher Regional Court of Munich	§13 (Commission by omission); §23 (Criminal liability for attempt); §25 (Commission of offence); §27 (Aiding); §52 (Several offences committed by one act); §53 (Joinder of offences); §129a (Forming terrorist

[774] *United States of America v Conley* [2014] U.S. District Court District of Colorado 1:14-cr-00163, (2014) Document 37 Plea Agreement and Statement of Facts.
[775] *United States of America v Dais* [2018] U.S. District Court Eastern District of Wisconsin 2:18-cr-00143, (2019) Document 26 Plea Agreement.
[776] *7 StS 2/20* [2021] Oberlandesgericht Düsseldorf 7 StS 2/20, (2021) Urteil.
[777] *8 St 9/18* [2022] Oberlandesgericht München 8 St 9/18, (2022) Urteil.

		organisations); and §129b (Foreign criminal and terrorist organisations) of the German Criminal Code. §7 (Crimes against humanity) and §8 (War crimes against persons) of the Code of Crimes against International Law
J[778]	Higher Regional Court of Berlin	§52 (Several offences committed by one act); §53 (Joinder of offences); §129a (Forming terrorist organisations); and §129b (Foreign criminal and terrorist organisations) of the German Criminal Code. §9 (War crimes against property and other rights) of the Code of Crimes against International Law. §22a (Other penal provisions) of the War Weapons Control Act
K[779]	Higher Regional Court of Düsseldorf	§52 (Several offences committed by one act); §53 (Joinder of offences); §129a (Forming terrorist organisations); and §129b (Foreign criminal and terrorist organisations) of the German Criminal Code. §9 (War crimes against property and other rights) of the Code of Crimes against International Law. §22a (Other penal provisions) of the War Weapons Control Act
L[780]	Higher Regional Court of Düsseldorf	§25 (Commission of offence); §27 (Aiding); §52 (Several offences committed by one act); §53 (Joinder of offences); §129a (Forming terrorist organisations); §129b (Foreign criminal and terrorist organisations); §223

[778] *(6) 2 StE 6/20-3 (2/20)* [2021] Kammergericht Berlin (6) 2 StE 6/20-3 (2/20), (2021) Urteil.
[779] *5 StS 2/19* [2019] Oberlandesgericht Düsseldorf 5 StS 2/19, (2019) Urteil.
[780] *7 StS 3/19* [2021] Oberlandesgericht Düsseldorf 7 StS 3/19, (2021) Urteil.

		(Bodily harm); §239 (Unlawful imprisonment) of the German Criminal Code. §7 (Crimes against humanity) of the Code of Crimes against International Law
M[781]	Higher Regional Court of Düsseldorf	§25 (Commission of offences); §52 (Several offences committed by one act); §53 (Joinder of offences); §129a (Forming terrorist organisations); §129b (Foreign criminal and terrorist organisations); and §171 (Breach of duty of care or upbringing) of the German Criminal Code. §9 (War crimes against property and other rights) of the Code of Crimes against International Law
N[782]	Higher Regional Court of Düsseldorf	§52 (Several offences committed by one act); §53 (Joinder of offences); §129a (Forming terrorist organisations); §129b (Foreign criminal and terrorist organisations); §171 (Breach of duty of care or upbringing); and §235 (Child theft) of the German Criminal Code. §8 (War crimes against persons) of the Code of Crimes against International Law. §22a (Other penal provisions) of the War Weapons Control Act

The applied mitigating and aggravating factors in the criminal proceedings against American and German IS-affiliated women compare and contrast. The main similarities between the mitigating factors *(see Tables 5 and 6)* considered in the cases of American and German IS-affiliated women include the following:

(1) lack of a criminal record preceding the committed offence;

[781] *7 StS 3/20* [2021] Oberlandesgericht Düsseldorf 7 StS 3/20, (2021) Urteil.
[782] *7 StS 4/19* [2020] Oberlandesgericht Düsseldorf 7 StS 4/19, (2020) Urteil.

(2) defendant's expression of remorse;
(3) conditions of detention;
(4) lack of previous radical ties or conduct; and
(5) presence of domestic violence.

Mitigating factors unique to the cases of American IS-affiliated women include:

(1) the U.S.'s consideration of the defendant's mental health;
(2) the U.S.'s acknowledgement of character reference letters; and
(3) the U.S.'s recognition of the defendant's age.

Mitigating factors unique to the cases of German IS-affiliated women include:

(1) Germany's acknowledgement of the defendant's abolishment and rejection of IS ideology and adherence;
(2) Germany's consideration of the defendant's separation from her children as a result of detention;
(3) Germany's recognition of the differing modes of participation; and
(4) Germany's awareness of stigmatising media portrayal.

Lastly, a comparison of the U.S. sentencing hearings and German judgements reveals that the German courts assess the mitigating factors more thoroughly and extensively, given each factors' consideration in light of the corresponding offence conduct. Contrastingly, the U.S. courts assess the mitigating factors holistically prior to the sentence imposition.

The main similarities between the cited aggravating factors *(see Tables 7 and 8)* by the U.S. and German courts are the following:

(1) defendant's active participation and instrumental role in the commission of the offence(s);
(2) defendant's awareness of the terrorist organisation's aims and methods; and
(3) gravity of the offence(s).

Unique to the cases in Germany are the following factors:

(1) the special dangerousness and cruelty of ISIS as a terrorist organisation;
(2) duration of ISIS membership;
(3) defendant's treatment of Yazidi slaves (where applicable); and

(4) the high degree of danger posed to the defendant's children as a result of emigration to IS-controlled territory.

The latter factor corresponds to an aggravating factor cited in the American case of E, whereby the court deemed the defendant's involvement of her underage son in activities preceding and succeeding a departure to IS-controlled territory as aggravating. In summary, the prosecutorial approaches opted for by the respective States, whether reactive or proactive in nature, the time at which initiation of criminal proceedings ensues, and the types of charges brought against American and German IS-affiliated women, influence the applicable mitigating and aggravating factors. This is because the mitigating and aggravating factors arise in response to the aforementioned elements.

Table 5: American IS-Affiliated Women (Mitigating Factors)

Case	U.S. District Court	Mitigating Factor(s)
A	Eastern District of Virginia	N/A (Transcript of Sentencing Hearing is Classified)
B	Middle District of Florida	N/A (Transcript of Sentencing Hearing is Classified)
C	Eastern District of Virginia	N/A (Transcript of Sentencing Hearing is Classified)
D[783]	Eastern District of Kentucky	Defendant's age, mental health issues, and the lack of a criminal history
E[784]	Northern District of Indiana	Defendant's expression of remorse, defendant was manipulated and abused by her husband, and defendant's imprisonment in IS-controlled territory (during which she

[783] *United States of America v Castelli* [2017] U.S. District Court Eastern District of Kentucky 2:17-cr-00049, (2020) Document 29 Transcript of Sentencing Hearing.
[784] *United States of America v Elhassani* [2019] U.S. District Court Northern District of Indiana 2:19-cr-00159, (2021) Document 46 Transcript of Sentencing Hearing.

		was subjected to inhumane conditions following her husband's death)
F	District of Colorado	N/A (Transcript of Sentencing Hearing is Classified)
G[785]	Eastern District of Wisconsin	Defendant's lack of a criminal record, defendant had been subjected to abuse, defendant was somewhat sympathetic, lack of previous radical ties/conduct, defendant's mental health issues, and the defendant's children's positive description of the defendant

Table 6: German IS-Affiliated Women (Mitigating Factors)

Case	German Higher Regional Court	Mitigating Factor(s)
H[786]	Higher Regional Court of Düsseldorf	Defendant's confession and remorse, defendant distanced herself from ISIS following her return, defendant's separation from her children because of pre-trial detention, stay of the defendant and her children in Syrian and Turkish camps, and lack of a criminal record
I[787]	Higher Regional Court of Munich	Lack of prior criminal conviction, offences occurred six years ago, defendant's partial confession, defendant had been in pre-trial detention for over three years and was unable to see her daughter grow up,

[785] *United States of America v Dais* [2018] U.S. District Court Eastern District of Wisconsin 2:18-cr-00143, (2020) Document 51 Statements of Reasons Memorandum; *United States of America v Dais* [2018] U.S. District Court Eastern District of Wisconsin 2:18-cr-00143, (2020) Document 52 Transcript of Sentencing Hearing.
[786] *7 StS 2/20* [2021] Oberlandesgericht Düsseldorf 7 StS 2/20, (2021) Urteil.
[787] *8 St 9/18* [2022] Oberlandesgericht München 8 St 9/18, (2022) Urteil.

		defendant was an accomplice, and defendant was not directly involved in one of the crimes
J[788]	Higher Regional Court of Berlin	Lack of a criminal record, defendant's partial confession, short duration of possession over a weapon of war and lack of utilisation, defendant's suffering because of ISIS engagement, defendant being a victim of domestic violence, conditions of detention while attempting to escape IS-controlled territory, defendant's separation from her son, and stigmatising media coverage of defendant
K[789]	Higher Regional Court of Düsseldorf	Defendant's comprehensive and remorseful confession, defendant's statements made a significant contribution in clarifying ISIS's structure, defendant's IS-affiliation was not based on Islamist convictions, defendant's provision of witness testimony, defendant's membership was several years ago, defendant lacked a criminal record, defendant's endurance of onerous pre-trial detention conditions, and if the defendant had not moved into IS designated property, she would have been rendered homeless
L[790]	Higher Regional Court of Düsseldorf	Defendant's confession, commission of offences was in the past, defendant regrets joining ISIS, duration of main trial was long, lack of previous criminal convictions,

[788] *(6) 2 StE 6/20-3 (2/20)* [2021] Kammergericht Berlin (6) 2 StE 6/20-3 (2/20), (2021) Urteil.
[789] *5 StS 2/19* [2019] Oberlandesgericht Düsseldorf 5 StS 2/19, (2019) Urteil.
[790] *7 StS 3/19* [2021] Oberlandesgericht Düsseldorf 7 StS 3/19, (2021) Urteil.

		defendant's positive behaviour during pre-trial detention, defendant was exposed to additional security measures and separated from her children, stigmatising media coverage of defendant, and defendant was not the principal perpetrator in one of the crimes
M[791]	Higher Regional Court of Düsseldorf	Defendant's remorseful confession, defendant joined ISIS at the request of her husband, defendant left ISIS for the well-being of her children and ceased membership, circumstances of the defendant's deportation, defendant subjected to extensive visit restrictions, defendant consented to use information she provided during the proceedings against her husband's brother, and ISIS had already appropriated the apartment the defendant was residing in
N[792]	Higher Regional Court of Düsseldorf	Defendant's early and comprehensive confession, defendant's provision of information on separately prosecuted third parties suspected of ISIS membership, defendant voluntarily ceased ISIS membership, particular sensitivity of defendant's three underage children to their mother's detention, and lack of a criminal record

[791] *7 StS 3/20* [2021] Oberlandesgericht Düsseldorf 7 StS 3/20, (2021) Urteil.
[792] 7 StS 4/19 [2020] Oberlandesgericht Düsseldorf 7 StS 4/19, (2020) Urteil.

Table 7: American IS-Affiliated Women (Aggravating Factors)

Case	U.S. District Court	Aggravating Factor(s)
A	Eastern District of Virginia	N/A (Transcript of Sentencing Hearing is Classified)
B	Middle District of Florida	N/A (Transcript of Sentencing Hearing is Classified)
C	Eastern District of Virginia	N/A (Transcript of Sentencing Hearing is Classified)
D[793]	Eastern District of Kentucky	Seriousness of the offence
E[794]	Northern District of Indiana	Defendant was instrumental in getting her husband and brother-in-law into Syria, defendant brought her son on her second trip to Hong Kong, misrepresenting the travel information to her son's biological father, defendant's awareness of the purpose behind her trips abroad, activities and engagements of the defendant's son while in IS-controlled territory (videos of the defendant's son holding a machine gun, etc.)
F	District of Colorado	N/A (Transcript of Sentencing Hearing is Classified)
G[795]	Eastern District of Wisconsin	Defendant was not just a passive participant (she hacked accounts, taught others how to hack accounts, etc.)

[793] *United States of America v Castelli* [2017] U.S. District Court Eastern District of Kentucky 2:17-cr-00049, (2020) Document 29 Transcript of Sentencing.
[794] *United States of America v Elhassani* [2019] U.S. District Court Northern District of Indiana 2:19-cr-00159, (2021) Document 46 Transcript of Sentencing Hearing.
[795] *United States of America v Dais* [2018] U.S. District Court Eastern District of Wisconsin 2:18-cr-00143, (2020) Document 51 Statements of Reasons Memorandum; *United States of America v Dais* [2018] U.S. District Court Eastern District of Wisconsin 2:18-cr-00143, (2020) Document 52 Transcript of Sentencing Hearing.

Table 8: German IS-Affiliated Women (Aggravating Factors)

Case	German Higher Regional Court	Aggravating Factor(s)
H[796]	Higher Regional Court of Düsseldorf	Special dangerousness and cruelty of ISIS, the offence lasted for four years, and the considerable impairment of the psychological and physical development of the defendant's daughter as a result of the offence
I[797]	Higher Regional Court of Munich	Special dangerousness and cruelty of ISIS, defendant attempted to travel to IS-controlled territory for a second time after having resided in Germany for two years, and the enslavement of the Yazidi slaves lasted more than one and a half months
J[798]	Higher Regional Court of Berlin	Defendant was an active rather than passive member, defendant's possession of a weapon of war was not of secondary importance, extended duration of ISIS membership, and wishful and actual possession over a weapon of war
K[799]	Higher Regional Court of Düsseldorf	Special dangerousness and cruelty of ISIS, long duration of defendant's membership participation, and defendant's return to IS-controlled territory
L[800]	Higher Regional Court of Düsseldorf	Defendant's conscious decision to emigrate to IS-controlled territory, defendant attempted to convince other individuals to join ISIS,

[796] *7 StS 2/20* [2021] Oberlandesgericht Düsseldorf 7 StS 2/20, (2021) Urteil.
[797] *8 St 9/18* [2022] Oberlandesgericht München 8 St 9/18, (2022) Urteil.
[798] *(6) 2 StE 6/20-3 (2/20)* [2021] Kammergericht Berlin (6) 2 StE 6/20-3 (2/20), (2021) Urteil.
[799] *5 StS 2/19* [2019] Oberlandesgericht Düsseldorf 5 StS 2/19, (2019) Urteil.

		defendant continuously lived in IS-controlled territory, defendant's active involvement in the enslavement (and death) of Yazidi slaves, and special dangerousness and cruelty of ISIS
M[801]	Higher Regional Court of Düsseldorf	Special dangerousness and cruelty of ISIS, offence period was of longer duration, prominent position of the defendant's husband in ISIS, and high degree of danger for the defendant's children
N[802]	Higher Regional Court of Düsseldorf	Special dangerousness and cruelty of ISIS, defendant's engagement in *Katiba Nusaiba* (women-only unit of the IS morality police), and relatively long duration of defendant's membership

In terms of the imposed punishment, the two States divaricate, given the reliance on the respective sentencing guidelines in the two States *(see Tables 9 and 10)*. While U.S. law enforcement authorities use the prescribed Sentencing Guidelines Table to calculate the applicable offence level, German law enforcement authorities resort to the codified guidelines in the criminal provisions themselves. The sentences imposed by the U.S. District Courts are significantly lengthier than those imposed by the German Higher Regional Courts, which may be due to differing approaches to punishment. A lengthier prison sentence serves to deter by preventing the offender and other potential offenders from committing the offence.[803] Conversely, a shorter prison sentence appears to opt for rehabilitation and reintegration, thereby reforming and providing the offender with a second chance at life outside incarceration.[804] In both States, there is a direct correlation

[800] *7 StS 3/19* [2021] Oberlandesgericht Düsseldorf 7 StS 3/19, (2021) Urteil.
[801] *7 StS 3/20* [2021] Oberlandesgericht Düsseldorf 7 StS 3/20, (2021) Urteil.
[802] 7 StS 4/19 [2020] Oberlandesgericht Düsseldorf 7 StS 4/19, (2020) Urteil.
[803] Vesna Stefanovska. "Surveillance and control over incapacitation, deterrence and rehabilitation effects of the punishment." *Balkan Social Science Review* 11, no. 11 (2018): 24.
[804] Stefanovska.

between the gravity of the offence and the punishment imposed, with more severe offences receiving lengthier sentences. Moreover, both States consider the following factors during the sentencing process:

(1) the personal and criminal history of the defendant;
(2) the applicable mitigating and aggravating factors; and
(3) the nature and circumstances of the committed offence(s).

Lastly, in both States, the courts summate the foregoing factors to compute an adequate and appropriate prison sentence. As evidenced by the case law, in both States, the courts benefit from a large margin of discretion, thereby enabling deviations from the official guidelines, which are often resorted to during the sentencing process. Despite the sentencing procedures varying between the two States, there are similarities in the calculation of the appropriate prison sentence and the margin of discretion enjoyed by the respective courts.

Table 9: American IS-Affiliated Women (Sentencing)

Case	U.S. District Court	Imprisonment	Supervised Release
A[805]	Eastern District of Virginia	20 years	25 years
B[806]	Middle District of Florida	5 years and 8 months	15 years
C[807]	Eastern District of Virginia	4 years and 6 months	3 years

[805] *United States of America v Fluke-Ekren* [2019] U.S. District Court Eastern District of Virginia 1:22-cr-00092, (2022) Document 66 Judgement.
[806] *United States of America v Sheppard* [2018] U.S. District Court Middle District of Florida 2:18-cr-00019, (2020) Document 74 Judgement.
[807] *United States of America v Coffman* [2014] U.S. District Court Eastern District of Virginia 3:15-cr-00016, (2015) Document 45 Judgement.

D[808]	Eastern District of Kentucky	7 years and 6 months	3 years
E[809]	Northern District of Indiana	6 years and 5 months	3 years
F[810]	District of Colorado	4 years	3 years
G[811]	Eastern District of Wisconsin	7 years and 5 months	3 years

Table 10: German IS-Affiliated Women (Sentencing)

Case	German Higher Regional Court	Imprisonment
H[812]	Higher Regional Court of Düsseldorf	4 years and 3 months
I[813]	Higher Regional Court of Munich	10 years
J[814]	Higher Regional Court of Berlin	2 years and 10 months

[808] *United States of America v Castelli* [2017] U.S. District Court Eastern District of Kentucky 2:17-cr-00049, (2020) Document 37 Amended Judgement.
[809] *United States of America v Elhassani* [2019] U.S. District Court Northern District of Indiana 2:19-cr-00159, (2020) Document 41 Amended Judgement.
[810] *United States of America v Conley* [2014] U.S. District Court District of Colorado 1:14-cr-00163, (2015) Document 79 Judgement.
[811] *United States of America v Dais* [2018] U.S. District Court Eastern District of Wisconsin 2:18-cr-00143, (2020) Document 49 Judgement.
[812] *7 StS 2/20* [2021] Oberlandesgericht Düsseldorf 7 StS 2/20, (2021) Urteil.
[813] *8 St 9/18* [2022] Oberlandesgericht München 8 St 9/18, (2022) Urteil.
[814] *(6) 2 StE 6/20-3 (2/20)* [2021] Kammergericht Berlin (6) 2 StE 6/20-3 (2/20), (2021) Urteil.

K[815]	Higher Regional Court of Düsseldorf	2 years and 9 months
L[816]	Higher Regional Court of Düsseldorf	6 years and 6 months
M[817]	Higher Regional Court of Düsseldorf	4 years
N[818]	Higher Regional Court of Düsseldorf	5 years and 3 months

Table 11 provides a reiterated overview of the comparative analysis as a means to facilitate an understanding of the analysis in a more comprehensive manner.

Table 11: Overview of the Comparative Analysis

Factor	United States of America	Germany
Investigative Practises	Use of informants and sting operations	No use of informants or sting operations but a reliance on information gathered by foreign intelligence services
Time(s) of Prosecution	Preceding and succeeding a departure to IS-controlled territory	Succeeding a departure to IS-controlled territory
Type(s) of Evidence	Testimony by defendants and witnesses, communications via social media platforms,	Testimony by defendants and witnesses, communications via social media platforms,

[815] *5 StS 2/19* [2019] Oberlandesgericht Düsseldorf 5 StS 2/19, (2019) Urteil.
[816] *7 StS 3/19* [2021] Oberlandesgericht Düsseldorf 7 StS 3/19, (2021) Urteil.
[817] *7 StS 3/20* [2021] Oberlandesgericht Düsseldorf 7 StS 3/20, (2021) Urteil.
[818] 7 StS 4/19 [2020] Oberlandesgericht Düsseldorf 7 StS 4/19, (2020) Urteil.

	miscellaneous sources (photographs, travel documents, etc.), and informants and sting operations	miscellaneous sources (photographs, travel documents, etc.), and expert testimony (experts on radicalisation and extremism)
Type(s) of Offence(s)	Material support statutes	Membership in a foreign terrorist organisation and international crimes provisions
Mitigating Factor(s)	Lack of a criminal record, the defendant's expression of remorse, the conditions of detention, a lack of previous radicalisation, the presence of domestic violence, the defendant's mental health issues, the defendant's age, and character reference letters	Lack of a criminal record, the defendant's expression of remorse, the conditions of detention, a lack of previous radicalisation, the presence of domestic violence, the defendant's abolishment of IS ideology and affiliation, the defendant's separation from her children, and the time at which the commission of the offence(s) occurred
Aggravating Factor(s)	The defendant's active participation and instrumental role in the commission of the offence(s), the defendant's awareness of the terrorist organisation's aims and methods, and the gravity of the offence	The defendant's active participation and instrumental role in the commission of the offence(s), the defendant's awareness of the terrorist organisation's aims and methods, the gravity of the offence(s), the special dangerousness and cruelty of ISIS, the duration of ISIS membership, the defendant's

		treatment of Yazidi slaves, and the high degree of danger posed to the defendant's children as a result of emigration to IS-controlled territory
Sentencing	Utilisation of the Sentencing Guidelines Table (however, courts enjoy a large margin of discretion)	Utilisation of the codified guidelines contained within the criminal provisions themselves (however, the courts enjoy a large margin of discretion)
Prosecutorial Strategy	Proactive and Reactive	Reactive

Conclusion

Although there are crucial similarities between the prosecutorial strategies employed by the U.S. and Germany in prosecuting IS-affiliated women, the prosecutorial approaches differ in several respects. The examined factors work in a chain reaction in that the time at which initiation of criminal proceedings ensues influences the types of evidence admitted during the criminal proceedings. This guides the applicability of the mitigating and aggravating factors that ultimately dictate the imposition of punishment. The materialisation of these factors premises primarily on the chosen prosecutorial strategy. By relying on material support statutes, U.S. law enforcement authorities can instigate criminal proceedings against American IS-affiliated women preceding and succeeding a departure to IS-controlled territory, thereby enabling a reactive and proactive approach to prosecution. Due to a dependence on membership in a foreign terrorist organisation and international crimes provisions, there appears to be a necessity for German law enforcement authorities to act reactively, given the requirements of emigration and repatriation for criminal liability to arise.

A juxtaposition of the prosecutorial strategies employed by the U.S. and Germany in the prosecution of IS-affiliated women on terrorism-related charges highlights contrasting, albeit at times similar, approaches to prosecution primarily as a result of discordance concerning the time at which initiation of criminal proceedings ensues. Nevertheless, the prosecutorial decisions by the States do not operate in a vacuum and are, instead, influenced by several amalgamating factors, including political choices on repatriation. While the U.S. and Germany have successfully convicted IS-affiliated women on terrorism-related charges, ambiguities concerning the extent to which women's engagements fall within the existing criminal provisions remain. The complex issue of prosecuting (repatriated) female foreign terrorist fighters would benefit from further comparative research in the areas of substantive and procedural criminal law.

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