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**Restorative Regulation of Human Rights Compliance
Considering the Treatment of Prisoners in the Philippines**

LLM THESIS

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Contents

Chapter I: Introduction.....	3
Chapter II: International Regulatory Framework.....	6
Chapter III: Regulatory Framework in the Philippines.....	24
Chapter IV: Compliance Theory.....	45
Chapter V: Restorative Justice.....	70
Chapter VI: Philippines Case Study.....	105
Chapter VII: Restorative Justice Applied.....	121
Chapter VIII: Conclusion.....	135
Bibliography:	138

Abstract

The focus of this thesis is the ill-treatment of prisoners in the Philippines, the realities of which reflect the failings of the international human rights framework more generally. This framework is examined and evaluated in terms of how it can better facilitate compliance, and the proper treatment of Filipino prisoners specifically. To that end, this thesis considers poor regulatory performance in terms of compliance theory and interdisciplinary international legal scholarship. On this basis, it proposes the employment of restorative justice, which seeks to avoid regulatory ritualism on the one hand and imperialism on the other, and seeks to enhance human rights compliance in an empowering, relational way.

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Chapter I

Introduction

The focus of this thesis is the ill-treatment of prisoners in the Philippines, the realities of which reflect the failings of the international human rights framework more generally. This framework is examined and evaluated in terms of how it can better facilitate compliance, and the proper treatment of Filipino prisoners specifically. To that end, this thesis considers poor regulatory performance in terms of compliance theory and interdisciplinary international legal scholarship. On this basis, it proposes the employment of restorative justice, which seeks to avoid regulatory ritualism on the one hand and imperialism on the other, and seeks to enhance human rights compliance in an empowering, relational way.

The genesis of this thesis question is a personal experience. In 2016, I visited the local city jail in Ma'a, Davao. This jail was built for 600 people but held over 2000. It failed to provide clean water or sufficient food, let alone beds and adequate living quarters, while prisoners waited up to 10 years for a hearing. Not only does international human rights law prohibit these conditions, but the Philippines is a signatory to all such international instruments. Indeed, this calls into question the efficacy of international human rights law at a practical level.

Anthea Roberts suggests that, “The regulatory function of [international human rights law] is doubtful because it appears merely to set up aspirational aims rather than realistic requirements about action”.¹ More cynically, Geoffrey Robertson argues that, “International law cannot be said to rule: it lays down a standard which independent states may in practice ignore, and often do, without suffering anything more than diplomatic embarrassment”.² Of course, an examination of the history of international politics explains the sensitivity to state sovereignty today. On the other hand, “Fundamental to the project of international law is the assumption that legal commitments meaningfully condition the exercise of state power”.³

Testing the degree to which international law conditions states' human rights practices, Oona Hathaway finds that signing such instruments can lead, in certain cases, to worse practices.⁴ After considering existing theories, Hathaway explains

¹ Anthea Roberts “Traditional and Modern Approaches to Customary International Law: A Reconciliation” (2001) 95 Am J Int L 757 at 769.

² Geoffrey Robertson *Crimes Against Humanity* (2nd ed, Penguin Press, London, 2000) at 37.

³ Ryan Goodman and Derek Jinks “Measuring the Effects of Human Rights Treaties” 14 EJIL 171 at 171.

⁴ Oona A Hathaway “Do Human Rights Treaties Make a Difference” (2001–2002) 111 Yale LJ 1935 at 1940.

this alarming reality according to the incoherence of the expressive and instrumental roles of international human rights law. Essentially, the expression of rights and obligations does not translate into actual practice. An examination of the existing regulatory situation, both internationally and in the Philippines, confirms this to be true.

Incoherence of expression and practice can be caused by a cynicism or regulatory ritualism on the part of both regulating and regulated actors. It can also be aggravated by the complex and context-specific nature of human rights violations, which external instruments and mechanisms fail to address. Steiner explains that human rights violations often have a systemic character that reflects deeper aspects of that state's social, cultural and political structure. He concludes that:⁵

These characteristics demonstrate the need for a different and expanded conception of what the protection of human rights amounts to through the universal human rights system. Such a conception would emphasise pressures against a state to arrest violations, but at the same time, would urge assistance to that state to find plausible paths toward reform and compliance....The task of protection would incorporate strategies traditionally associated with fostering processes of social and cultural transformation. It could not be analogised to conventional modes of protection in developed countries like arrest in criminal trial or tort remedies. It requires a grasp of context, persistence and time.

This vision invites an approach informed by restorative justice principles and practices. Restorative justice responds to harm done in a collaborative and constructive way, with an emphasis on relationship and accountability.⁶ Such an approach creates the scope for addressing underlying issues and finding paths to compliance in a context-specific and culturally sensitive manner. To the extent that existing regulatory measures are dialogical and non-punitive, they are compatible with a restorative approach. To the extent that they are ineffective, however, they have reduced regulatory engagement to an end in itself. Restorative engagement can realign regulatory measures with practical objectives, and expressive gestures with instrumental realities. Ultimately, this can enhance human rights compliance.

The treatment of prisoners in the Philippines is considered as a case study in this context. Chapters Two and Three establish the existing regulatory framework, internationally and in the Philippines respectively. Chapter Four examines existing

⁵ Henry Steiner "International Protection of Human Rights" in Malcolm Evans (ed) *International Law* (3rd ed, Oxford University Press, Oxford, 2010) at 800.

⁶ John Braithwaite *Restorative Justice and Responsive Regulation* (Oxford University Press, Oxford, 2002) at 12.

compliance theory and interdisciplinary international legal scholarship, and proposes a new generation of such scholarship in light of Hathaway's findings. Chapter Five presents restorative justice principles and practices and proposes a new model of restorative regulation. This new model is informed by both the criticisms of existing models and the particular challenges of human rights compliance.

Chapter Six then examines the Philippines in terms of the insights and opinions of local stakeholders, with a view to realising the type of communitarian engagement that is central to a restorative approach.⁷ Chapter Seven re-evaluates international regulatory engagement to consider what restorative regulation looks like in practice. It identifies the special rapporteur as the mechanism most compatible with restorative regulation, but also identifies five commitments for restorative regulatory engagement more generally. Of course, a restorative approach will be necessarily context-specific, but these commitments can help inform the process by which an appropriate response is developed in another setting.

⁷ Braithwaite, above n 6, at 24.

Chapter II

International Regulatory Framework

This chapter establishes the international human rights regulatory framework. It considers the relevant instruments and mechanisms, and examines their effectiveness. It sets out the instruments that provide for prisoners' rights and the mechanisms that implement those instruments. Ultimately, it illustrates that while provision is made for the proper treatment of prisoners at an expressive level, this often fails to translate into practice. To that extent, international human rights law fails to achieve its objectives.

A Legal Instruments

1 Universal Declaration of Human Rights⁸

The Universal Declaration of Human Rights (UDHR) sets out various rights relevant for prisoners. Article 5 calls for freedom from torture and from cruel, inhuman or degrading treatment or punishment, and art 9 calls for freedom from arbitrary arrest, detention or exile. Article 7 speaks of equality before the law, and art 8 calls for effective remedies in respect of any violation of rights. Article 10 sets out the right to a fair hearing, and art 11 sets out the right to be presumed innocent until proved guilty, and to all the guarantees necessary for defence.

These rights articulate the “dignity and worth of the human person” as established by the Charter of the United Nations.⁹ Though unenforceable, the UDHR is “the UN’s foundational human rights document and the cornerstone for the international human rights system, setting a framework...that has stood the test of time”.¹⁰ It is also “the single most cited human rights instrument”.¹¹ However, its impact in respect of prisoners’ rights is negligible.¹² It expresses friendly relations between nations as the priority, which allows its provisions to be subjected to diplomacy. When this happens, the rights of prisoners are the first to be denied.¹³

⁸ Universal Declaration of Human Rights [1948] PITSE 8 (adopted 10 December 1948).

⁹ Charter of the United Nations, preamble.

¹⁰ Ilias Bantekas and Lutz Oette *International Human Rights Law and Practice* (2nd ed, Cambridge University Press, Cambridge, 2016) at 15–16.

¹¹ Philip Alston and Ryan Goodman *International Human Rights* (Oxford University Press, Oxford, 2013) at 142.

¹² Robertson, above n 2, at xvii.

¹³ Robert F Drinan *The Mobilization of Shame* (Yale University Press, New Haven, 2001) at 141.

2 *The International Covenant on Civil and Political Rights (and Optional Protocol)*¹⁴

Where the UDHR is implicit about the rights of prisoners, the International Covenant on Civil and Political Rights (ICCPR) sets out unequivocally that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (art 10). In addition, the ICCPR is binding in force and establishes a remedial structure.¹⁵ Article 2 requires state parties to ensure the realisation of the rights contained therein the ICCPR, and to ensure effective remedy for their violation.

Article 6 sets out the right to life, and art 7 provides for freedom from torture or other cruel, inhuman or degrading treatment or punishment. Article 9 provides for freedom from arbitrary arrest (art 9(1)), the right to be informed of the reasons for arrest (art 9(2)), the right to trial within a reasonable time or to release (art 9(3)), and the right to test the lawfulness of detention and order release if it is not lawful (art 9(4)).

Article 14 sets out equality before the courts (art 14(1)), the right to be presumed innocent until proven guilty (art 14(2)), the right to be informed of charges (art 14(3)(a)), the right to an adequate defence (art 14(3)(b)), the right to trial without undue delay (art 14(3)(c)), and the right to have a conviction and sentence reviewed (art 14(5)). Article 26 provides for access to equal protection in law without discrimination.

The ICCPR sets out limitations to the obligations of state parties in certain circumstances, except in respect of rights defined as non-derogable (art 4). Non-derogable rights include the rights to life (art 6) and freedom from torture and other cruel, inhuman or degrading treatment or punishment (art 7). The ICCPR is considered legally binding, however some commentators suggest that this status is compromised by a lack of enforcement.¹⁶

The HRCtee established by the ICCPR (art 28) to provide “institutional support to the Covenant’s norms”,¹⁷ imposes certain procedural obligations on state parties. These include the submission of periodic reports (art 40). These procedural obligations are relevant to the extent that they regulate compliance with substantive

¹⁴ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); Optional Protocol to the International Convention on Civil and Political Rights [1966] PITSE 3 (opened for signature 16 December 1966, entered into force 23 March 1976).

¹⁵ Alston and Goodman, above n 11, at 159.

¹⁶ At 158.

¹⁷ Ibid.

obligations in the instrument. There is a tension here. It is desirable to make the procedural obligations nonthreatening, and to incentivise both ratification and reporting. However, it is also necessary to preserve the integrity of the substantive norms, and to avoid institutionalisation of noncompliance.¹⁸

The ability to identify compliance issues is constructive to the extent that these issues are addressed. At the same time, states would not ratify instruments, nor comply with reporting obligations, if it were to expose them to crippling liability. The ICCPR also includes provision for communications from state parties in respect of alleged violations by other state parties (art 41). Interestingly, this provision has never been used.

The Optional Protocol to the ICCPR (ICCPR-OP1) establishes the competence of the HRCtee to receive and consider communications from individuals in respect of rights violations (art 1). The jurisdiction of the HRCtee in this regard is limited to matters not being examined under other international procedures, where domestic remedies have either been exhausted or the application of such remedies has been unreasonably prolonged. The HRCtee is required to bring communications to the attention of the relevant state party (art 4(1)) and the state party is required to respond within six months (art 4(2)).

The ICCPR-OP1 does not allow communications in respect of the rights of groups or legal persons as opposed to individuals,¹⁹ but it does accept communications brought forth by advocacy groups on behalf of individual victims.²⁰ Of course, for prisoners, issues around awareness, access and vulnerability to retaliation render this mechanism largely ineffective.

3 *The Standard Minimum Rules for the Treatment of Prisoners*²¹

The Standard Minimum Rules for the Treatment of Prisoners (SMRs), although not binding, have helped develop standards and define rights provided for in other instruments. In this sense, the SMRs have a positive expressive and instrumental effect. Treaty bodies have frequently invoked these rules to determine violations of

¹⁸ Hilary Charlesworth "Swimming to Cambodia Justice and Ritual in Human Rights after Conflict Kirby Lecture in International Law" (2010) 29 Aust YBIL 1 at 12.

¹⁹ Bantekas and Oette, above n 10, at 298.

²⁰ At 331.

²¹ Standard Minimum Rules for the Treatment of Prisoners [1955] PITSE 1 (adopted 30 August 1955).

relevant rights.²² Thus, the SMRs have helped shape the jurisprudence on the rights of prisoners and on acceptable conditions of detention.

A breach of the SMRs does not necessarily constitute a breach of human rights obligations but “the more serious or widespread the breach of the Rules, the more likely will be a finding of a violation of one of these rights”.²³ In the document itself it is acknowledged that the SMRs are not capable of application in all places at all times, but that they should stimulate a constant endeavour to overcome difficulties in the way of their implementation (preliminary observation 2). Of course, this increases the accessibility of the SMRs, but limits their expressive and functional effect.

In terms of basic principles, the SMRs prohibit torture and other cruel, inhuman or degrading treatment or punishment (r 1) and stipulate that the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in the deprivation of liberty (r 3). They establish that the period of imprisonment should be used to ensure reintegration into society (r 4), and that the prison regime should minimise any differences between prison life and life at liberty (r 5).

The SMRs also require accommodation to meet all relevant health requirements (r 13), and sanitary installations to enable every prisoner to comply with the needs of nature (r 15). They establish that well prepared food of nutritional value shall be provided by the prison at the usual hours, and that drinking water shall be available to every prisoner whenever they need it (r 22). They also require the proper provision of health, without charge or discrimination (r 24).

Every prisoner is to be promptly provided with written information about their legal rights (r 54), and have the opportunity to make requests or complaints to prison staff each day, and to the inspector periodically, in full confidentiality (r 56). This right of request and complaint is extended to the legal advisor of the prisoner, or a family member or other person with the necessary knowledge (r 56), and prisoners are to be located, to the extent possible, close to their homes or places of social rehabilitation (r 59).

Prisoners are to be provided with adequate opportunity for consultation with a legal advisor of their choice, or a legal aid provider, in full confidentiality on any legal

²² Daniel Moeckli and others *International Human Rights Law* (Oxford University Press, Oxford ; New York, 2010) at 218.

²³ Ibid.

matter (r 61). The system for inspection is to be both internal and external, the former conducted by central administration and the later by an independent body “which may include competent international or regional bodies” (r 83). Every inspection is to be followed by a written report, which may be made public, and the relevant authorities are to indicate, within a reasonable time, whether they intend to implement the recommendations (r 85).

The SMRs set out, in detail, the generally accepted principles and practices for attending to the daily individual needs of prisoners. These are not considered binding obligations but should stimulate constant endeavour. This presents a particular challenge, in terms of the authority and impetus for regulating practice.

It is hard to gauge the (largely indirect) impact of the SMRs. In any case, the unnecessarily deferential language appears to unhelpfully subjugate the basic rights and needs of prisoners to practical considerations, even in terms of expressive effect. It is important to accommodate and account for such considerations, but this should not be done in such a way that the standards themselves are negated in the first place.

4 *The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (and Optional Protocol)*²⁴

The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is an instrument primarily for prisoners, if only by implication, as imprisonment is generally the prerequisite for torture. Article 1 of the CAT establishes a broad purpose element, which defines torture as the intentional infliction of pain or suffering, in the context of abuse of power.²⁵

The CAT concerns only pain or suffering inflicted or instigated by or with the acquiescence of a public official, and excludes that arising from lawful sanctions (art 1(1)). Article 2 of the CAT requires state parties to take effective legislative measures to prevent torture in any territory under its jurisdiction, and establishes that no exceptional circumstances whatsoever may be invoked as a justification of torture. Further to this end, art 4 explicitly requires state parties to ensure that all acts of torture are offences under its criminal law.

²⁴ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [2002] PITSE 10 (opened for signature 18 December 2002, entered into force 22 June 2006).

²⁵ Bantekas and Oette, above n 10, at 359.

There is uncertainty around the meaning and interpretation of art 1. It is unclear whether liability for acquiescence includes liability for failing to prevent the continuation of relevant acts. Some commentators suggest that the lack of due diligence to prevent such continuation “constitutes the crucial nexus that potentially broadens the scope of torture to a wider range of actors”.²⁶

There is also uncertainty around the second sentence of art 1, excluding pain or suffering arising from lawful sanctions. For example, this provision could be read as justifying any sanctions established by domestic law, but that would effectively give states the scope to legislate for torture. For this reason, most commentators consider that international law informs the correct interpretation of ‘lawful’, even though such an interpretation renders this provision somewhat redundant.²⁷

Articles 10, 11, 15 and 16 are particularly significant, among the various practical measures for preventing torture. Article 10 requires state parties to ensure that education about the prohibition of torture is included in the training of anyone who may be involved in the detention, interrogation or treatment of any individual subjected to imprisonment. Article 11 requires state parties to keep arrangements for the custody and treatment of persons subjected to imprisonment under review. Article 15 requires state parties to ensure that any statement made as a result of torture is not invoked as evidence in any proceeding, except against a person accused of torture. Article 16 requires state parties to undertake to prevent other acts of cruel, inhuman or degrading treatment or punishment, which do not amount to torture.

Article 17 of the CAT establishes the Committee against Torture (CtAT), which is examined further below. Article 22 provides for individual complaints where domestic remedies have been exhausted. This article comes into force only by express declaration of state parties. Article 21 (similar to art 41 of the ICCPR) provides for communications to the CtAT from state parties alleging violations of the CAT by other state parties. Again, as with art 41 of the ICCPR, this provision has never been used. In fact, to date no communications have been made in the form of inter-state complaints under any of the UN treaties.²⁸ This is reflective of a wider reluctance to engage in regulation of human rights compliance.

The Optional Protocol to the CAT (OPCAT) establishes a complementary two-pillared system for monitoring places of detention.²⁹ It institutes the Subcommittee on Prevention of Torture, and other Cruel, Inhuman or Degrading Treatment or

²⁶ Bantekas and Oette, above n 10, at 359.

²⁷ At 362.

²⁸ Moeckli and others, above n 22, at 410.

²⁹ Ibid.

Punishment (SPT), and requires state parties to institute national preventive mechanisms (NPMs). Article 14 of the OPCAT requires state parties to grant the SPT unrestricted access to all places of detention, and to all information concerning the conditions of detention and treatment of individuals deprived of their liberty, subject to a limited right of objection.

Article 18 requires state parties to guarantee the functional independence, professional competence, and practical capacity of NPMs. Article 19 requires state parties to grant NPMs the power to regularly examine places of detention, to make recommendations to the relevant authorities, and to submit proposals concerning legislation. Article 20 requires state parties to grant NPMs access to all places of detention, and all relevant information, with no right of objection. The functional effect and effectiveness of these bodies will be examined further below.

5 *The Rome Statute of the International Criminal Court*³⁰

Another safeguard for the rights of prisoners is provided by the International Criminal Court, under the Rome Statute. This represents a court of universal jurisdiction in respect of genocide, crimes against humanity and war crimes. Under art 7 of the Rome Statute, crimes against humanity include imprisonment in violation of fundamental rules of international law, torture, and other inhumane acts intentionally causing great suffering or serious injury, “when committed as part of a widespread or systematic attack”. This international judicial body is instrumental to the UN human rights system, in terms of holding individuals accountable for mass violations. However, it is not an accessible or effective mechanism for prisoners subject to ordinary ill-treatment.

B UN Charter-based Bodies

The relevant human rights instruments are only half the picture, with regulatory mechanisms attending to the actual implementation of these rights and norms. The important bodies in respect of prisoners’ rights are either UN Charter-based or treaty-based. The UN Charter originally prioritised state sovereignty, but it is increasingly being interpreted with a preference for human rights.³¹ For example, art 2(7) of the Charter, which prohibits interference with the domestic affairs of states, “necessarily now excludes human rights violations from its ambit”.³²

³⁰ Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002).

³¹ Bantekas and Oette, above n 10, at 154.

³² At 155.

The operation of charter-based bodies can have a direct impact on the implementation of specific instruments, and can create a culture of accountability, or one of impunity. Thus, it is necessary to examine the nature of Charter-based regulatory engagement, and to consider its overall effect on human rights practices in terms of the treatment of prisoners.

1 Human Rights Council

The Human Rights Council (HRC) was established by resolution of the UN General Assembly (GA) in 2006.³³ The HRC replaced the Commission on Human Rights (CHR), which had become overtly politicised and had lost both capacity and credibility to protect human rights.³⁴ As an overarching body, the HRC is designed to engage with human rights at a higher level, to examine states and thematic issues more broadly. The HRC is designed to be “impartial, objective, transparent and results-oriented”, such that it should have the ability to address prisoners’ rights.³⁵

The selection process for members of the HRC reflects an intended preference for political neutrality. Membership is open to all UN members, but the GA is required to “take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto”.³⁶ Election of members requires only a simple majority but membership can be suspended. This measure of suspension was taken in respect of Libya in 2011, substantiating both the expressive and functional effect of this regulatory mechanism.³⁷ However, it remains unlikely that this measure would be taken in response to violation of prisoners’ rights.

(a) Universal Periodic Review

The HRC is responsible for a range of mechanisms, including the universal periodic review (UPR). The UPR mechanism reviews each member state every four years. This review is based on a national report, a compilation of UN information, and a summary of stakeholders’ information.³⁸ The state under review prepares the national report, and the Office of the High Commissioner for Human Rights

³³ *Resolution on the Human Rights Council* GA Res 60/251, A/Res/60/251 (2006).

³⁴ Kofi Annan *Report of the Secretary-General* A/59/2005 (2005) at [181].

³⁵ Bantekas and Oette, above n 10, at 162.

³⁶ *Resolution on the Human Rights Council*, above n 33, at [8].

³⁷ *Suspension of the rights of membership of the Libyan Arab Jamahiriya in the Human Rights Council* GA Res 65/265, A/Res/65/265 (2011).

³⁸ *Institution-building of the United Nations Human Rights Council* HRC Res 5/1, A/HRC/Res/5/1 (2007) at Annex, Part I, D(1).

(OHCHR) prepares both the UN information and stakeholders' information summaries, the latter on the basis of shadow reports provided by local stakeholders.

Largely, states reviewed by the UPR mechanism have engaged in “a constructive and open dialogue with the Council”, and outcome reports contain numerous practical recommendations, “covering a wide range of issues”.³⁹ There are questions, however, about the functional effect of this mechanism in terms of results. The recommendations made are often unrealistic in substance, scope or number. They also lack authority and enforceability when states simply reject them.⁴⁰

Furthermore, there is a legitimate concern that the UPR mechanism undermines the effectiveness of other regulatory mechanisms, rendering it disruptive rather than constructive. The outcome reports do not criticise states as such, but offer “suggestions for improvement”.⁴¹ In practice, this means that a statement made by a treaty-based regulatory body could be called into question by the UPR, by means of its reiteration as an unauthoritative recommendation.⁴² This also gives the state an opportunity to reject it.

This is of particular concern in terms of prisoners' rights, the violation of which is often less easily exposed and more easily disputed. The UPR mechanism is designed to be participatory, cooperative and non-confrontational, as articulated in its principles.⁴³ This is desirable insofar as it encourages engagement, but not to the extent that it undermines the effectiveness of regulation.

Hilary Charlesworth cites the dangers of regulatory ritualism in this context.⁴⁴ She describes it as “acceptance of institutionalised means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves”.⁴⁵ Again, this is a greater risk in respect of prisoners' rights, the violation of which is less visible for both the regulated actor and the regulator. That is not to say, however, that the rights of prisoners must be protected by coercive means.

Elvira Dominguez-Redondo suggests that cooperation is the strength of the UPR, and that “some of the features of this procedure provide space to argue for the legal [force] of the outcomes of the reviews, particularly when the unilateral acts of states

³⁹ Moeckli and others, above n 22, at 396.

⁴⁰ Ibid.

⁴¹ Bantekas and Oette, above n 10, at 166.

⁴² Ibid.

⁴³ *Institution-building of the United Nations Human Rights Council*, above n 38, at Annex, [3].

⁴⁴ Charlesworth, above n 18, at 11–12.

⁴⁵ At 12.

are considered as sources of international obligations”.⁴⁶ This identifies the expressive value of the UPR. However, the issue is compliance with existing obligations, rather than their scope. As such, this expressive value is of little consolation to ill-treated prisoners.

(b) Examination of Country-Specific Issues

HRC examination of country-specific issues requires the support of at least 16 out of 47 HRC members. It can be difficult to secure this support. Attempts by HRC members to convene a special session on Zimbabwe, for example, were unsuccessful.⁴⁷ Even when a special session on Sri Lanka was held in 2009, after initial difficulty in soliciting support, “the outcome was disappointing for many and considered too mild by Western observers”.⁴⁸

Meanwhile, between 2006 and 2010, approximately half of the special sessions held concerned the Israeli Occupied Territories.⁴⁹ Aside from the legitimate human rights issues in that area, including those concerning prisoners, this unbalanced agenda suggests that, “the politicisation which bedevilled much of the work of the former Commission has crept into the Human Rights Council’s examination of country situations”.⁵⁰ The rights of prisoners ordinarily are perhaps less polarising, but are also less likely to solicit the requisite support as an issue of priority.

(c) Complaints Procedure

The HRC complaints procedure succeeds that of the CHR, which had become politicised and ineffective.⁵¹ Unlike its predecessor, the HRC procedure admits communications in respect of any rights, provided that their violation is gross.⁵² This procedure is also considered victim- and results-oriented, involving the complainant and requiring a response from the accused state within three months, and an outcome from the HRC within two years.⁵³ Generally, it is considered that “the revamped...complaints procedure has remedied many of the defects of its predecessor”.⁵⁴

⁴⁶ Elvira Dominguez-Redondo “The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation” (2012) 2012 NZ L Rev 673 at 674.

⁴⁷ Moeckli and others, above n 22, at 397.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Bantekas and Oette, above n 10, at 168.

⁵² *Institution-building of the United Nations Human Rights Council*, above n 38, at Annex, [85].

⁵³ Bantekas and Oette, above n 10, at 169.

⁵⁴ Ibid.

A two-year timeframe is unsatisfactory in respect of urgent situations. Of course, complaints concerning gross violations, such as torture, are often urgent. Arbitrary detention is not urgent in the same way, but a two-year timeframe aggravates the trauma of this violation. At best, the complaints procedure serves as a complementary mechanism, but relies on others for decisive regulatory action. This procedure is confidential but can be made public in situations of “manifest and unequivocal lack of cooperation”, to increase regulatory pressure.⁵⁵

(d) Special Procedures

The Special Procedures mechanism of the HRC is perhaps the most responsive, flexible and effective of all Charter-based mechanisms. Unlike the others, these procedures are carried out by mandate-holders who are completely independent of any government.⁵⁶ Mandate-holders may serve in the capacity of a special rapporteur, special representative of the Secretary-General, independent expert, or member of a working group. Mandates may be thematic, concerning the regulation of human rights compliance, the impact of contemporary issues on the realisation of rights, or the viability of emerging and evolving rights.⁵⁷

Regarding the rights of prisoners, the mandates on torture and arbitrary detention are particularly relevant. However, mandate-holders are required to pay equal attention to all human rights and address areas that constitute thematic gaps.⁵⁸ Mandate-holders engage in a range of activities, of which country visits and fact-finding missions are most important. The functional value of this mechanism is significant, but it could be increased further by developing a more restorative role. This will be considered in the final chapter.

Currently, 118 states have extended ‘standing invitations’ to mandate-holders for all thematic special procedures.⁵⁹ In the absence of a standing invitation, a specific invitation to visit must be extended. Before a country visit, the terms of reference are negotiated with the relevant government. Ideally, during a visit, mandate-holders will meet with all relevant stakeholders and have access to all relevant places and information. In practice, it is difficult to obtain unrestricted access, particularly in prisons. At the conclusion of a country visit, mandate-holders debrief the authorities

⁵⁵ *Institution-building of the United Nations Human Rights Council*, above n 38, at Annex, [104].

⁵⁶ At Annex, [46].

⁵⁷ Bantekas and Oette, above n 10, at 171.

⁵⁸ *Institution-building of the United Nations Human Rights Council*, above n 38, at Annex, [58].

⁵⁹ Office of the High Commissioner for Human Rights “Standing Invitations” (13 July 2017) <www.ohchr.org>

and media on their findings, and produce a comprehensive report which includes concrete recommendations.

There is a difficult balance to be struck between objectivity and partiality. It is important that an actor feels understood, and feels that the regulator has given due consideration to its particular circumstances throughout the process. Otherwise, the critical nature of recommendations can engender a defensive response. The Government of Kenya's response to the Special Rapporteur on extrajudicial, summary or arbitrary executions, for example, rejected the latter's recommendations as "paternalistic, unhelpful and uncalled for".⁶⁰ At the same time, however, it is important not to undermine the value of the standards in question.

This tension is particularly difficult in respect of prisoners' rights. It is likely that, in cases of ill-treatment by virtue of poor conditions, the staff know that prisoners' rights are being denied but can do little about it. A constructive regulatory approach should acknowledge this, and avoid an excessively critical approach, without neglecting the urgent needs and rights of prisoners and without denying the responsibility of the relevant actors.

2 *General Assembly*⁶¹

As the parent body of the HRC, and the principal organ of the UN, the General Assembly (GA) is more administrative. That said, it also plays an expressive and functional role in standard-setting. The GA has passed numerous resolutions for the rights of prisoners. For example, in 2010 it requested,⁶² and in 2015 adopted an updated version of the SMRs.⁶³ Membership is universal in the GA, such that all unanimous or near-unanimous resolutions are highly persuasive.⁶⁴ This also means, however, that members are cautious in their statements and endorsements.

Nonetheless, the GA can be credited with some particularly bold resolutions, including a recommendation to suspend Spain from UN membership in 1946,⁶⁵ and the recommendation to suspend Libya from HRC membership in 2011.⁶⁶ Again, these measures are less likely to be taken for violations of prisoners' rights. The

⁶⁰ Alston and Goodman, above n 11, at 718.

⁶¹ Charter of the United Nations, Chapter IV.

⁶² *Resolution of the General Assembly* GA Res 65/230, A/Res/65/230 (2010).

⁶³ *Resolution of the General Assembly* GA Res 70/175, A/Res/70/175 (2015).

⁶⁴ Bantekas and Oette, above n 10, at 179.

⁶⁵ *Resolution on the Relations of Members of the United Nations with Spain* GA Res 39, I (1946).

⁶⁶ *Suspension of the rights of membership of the Libyan Arab Jamahiriya in the Human Rights Council* GA Res 65/265, A/Res/65/265 (2011).

representative nature of the GA is such, however, that it can provide a forum for facilitating a more holistic and responsive regulatory process.

3 *Security Council*⁶⁷

The Security Council (SC) has primary responsibility for the maintenance of international peace and security.⁶⁸ Its resolutions are binding on all UN member states.⁶⁹ As such, “the UNSC has the potential to be the most effective institution in the protection of human rights”.⁷⁰ In theory, this includes the rights of prisoners but the SC is overtly political and, again, any preference for such issues is unlikely.

The SC typically only responds to crises situations on an ad hoc basis. This is because it is designed to be a quick-response mechanism for decisive action,⁷¹ yet such action is occasional throughout its history. During the Cold War, the SC exercised a much compromised role, and later it failed to respond to such crises as mass genocide in Rwanda and Bosnia.⁷² This reflects the fact that, ultimately, as a political body the SC is susceptible to politics. Thus, human rights issues are often reduced to political means or used to justify politically-motivated action.

For example, resolution 688 on the Iraqi repression of the Kurdish population,⁷³ was subsequently relied on for “unilateral coercive measures” by SC members.⁷⁴ Such measures were unlawful in international law, and reflect the problematic nature of politics within the SC. These excessive and unauthorised measures also reflect a lack of internalisation of the relevant norms on the part of regulators, who remain instead subject to politics. In other cases, this lack of internalisation causes a “persistent lack of political will by Member States to act, or to act with enough assertiveness”.⁷⁵

Despite its potential to be the most effective mechanism in protection of human rights, those of prisoners included, the SC often fails to assume an active or effective role of responsibility. Efficacy also requires that measures taken are consistent with their regulatory objectives. Ultimately, expressive and functional roles must be aligned. There is doubt as to whether this can be achieved with such a blunt, political tool.

⁶⁷ Charter of the United Nations, Chapter V.

⁶⁸ At art 24.

⁶⁹ At art 25.

⁷⁰ Bantekas and Oette, above n 10, at 180.

⁷¹ At 181–182.

⁷² Alston and Goodman, above n 11, at 747.

⁷³ *Resolution on Iraq* SC Res 688, S/Res/688 (1991).

⁷⁴ Bantekas and Oette, above n 10, at 182.

⁷⁵ Alston and Goodman, above n 11, at 747.

Even economic sanctions such as import embargos can impede the availability of basic food and medicine and negatively impact the vulnerable, whose rights these measures are aimed at protecting in the first place.⁷⁶ Bureaucratic sanctions, which would be most compatible with human rights objectives, are most susceptible to politics and therefore most unreliable.

4 *International Court of Justice*⁷⁷

Initially, as with the SC, the International Court of Justice (ICJ) “exerted a relatively marginal influence over the understanding and interpretation of international human rights law”.⁷⁸ More recently, it has “adopted a series of judgments of major importance in terms of their contribution to an understanding of aspects of the international human rights regime”, including those in respect of prisoners’ rights.⁷⁹

Where the SC has adopted a mix of political decisions and legal measures in the context of human rights, so too the ICJ has, “on many occasions addressed violations through the prism of state responsibility, while at the same time taking the opportunity to elaborate upon relevant human rights rules”.⁸⁰ Of course, this approach carries more credibility in a context that is intentionally objective rather than overtly political.

The ICJ also facilitates a procedure for inter-state litigation in respect of human rights. Interestingly, where parties have abstained from using inter-state complaints mechanisms, inter-state litigation before the ICJ is not unheard of. The case of Serbia and Montenegro against Bosnia and Herzegovina is an example.⁸¹ In terms of prisoners’ rights, the ICJ is of greater expressive than instrumental value. It is not an immediately accessible mechanism, but a highly authoritative one for establishing customary international law. This can contribute to a culture of accountability, but does little to address the problem of ill-treatment of prisoners and poor conditions in prisons on a practical level.

C *UN Treaty-based Bodies*

⁷⁶ Morten B Pedersen and David Kinley *Principled Engagement* (Ashgate Publishing Company, Surrey, 2013) at 22.

⁷⁷ Charter of the United Nations, Chapter XIV.

⁷⁸ Alston and Goodman, above n 11, at 692.

⁷⁹ *Ibid.*

⁸⁰ Bantekas and Oette, above n 10, at 158.

⁸¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 108.

The UN treaty-based human rights system is responsible for the implementation of the corresponding treaty rights and norms. Treaty bodies are composed of independent experts, biannually elected on the basis of “their moral authority and expertise in the field of human rights”.⁸² These bodies monitor compliance with the relevant treaty obligations and facilitate review, reporting and complaints procedures. Thus, it is necessary to examine them in terms of their overall effect on prisoners’ rights.

1 Human Rights Committee (and Special Rapporteur)

The Human Rights Committee (HRCtee) established by the ICCPR, has four main functions: consideration of states’ reports (art 40), adoption of general comments (art 40), examination of inter-state complaints (art 41) and examination of individual complaints (ICCPR-OP1). Each of these functions is relevant to the rights of prisoners, albeit that the inter-state complaints procedure has never been used. The HRCtee is criticised as over-generous towards states in the past, but has more recently made bold general comments regarding a variety of issues, including violations of prisoners’ rights.⁸³ Such comments, “while not legally binding...are frequently invoked by states and complainants in the context of reporting and complaints procedures, and sometimes by national courts in their judgments”.⁸⁴

Where the HRCtee does condemn state practice, uphold complaints and recommend compensation, the challenge is then to give effect to this. To that end, the HRCtee has introduced a Special Rapporteur for follow-up on the general comments and recommendations that it makes.⁸⁵ This certainly strengthens the functional value of any outcome if not, as some commentators suggest, its “legal value”.⁸⁶

In terms of the authority of the HRCtee, some describe its general comments and recommendations as “a new species of soft law”.⁸⁷ Conversely, others suggest that the part-time, consensus-based nature of its work, and the absence of robust provisions for conflicts of interest, are such that the HRCtee cannot be properly considered a ‘judicial’ or ‘quasi-judicial’ authority.⁸⁸ Indeed, perceptions of authority have significant implications in the context of regulation.

⁸² Moeckli and others, above n 22, at 404.

⁸³ Alston and Goodman, above n 11, at 793–794.

⁸⁴ Moeckli and others, above n 22, at 409.

⁸⁵ At 413.

⁸⁶ Ibid.

⁸⁷ At 409.

⁸⁸ Alston and Goodman, above n 11, at 767.

By way of illustration, a complaint was communicated under the ICCPR-OP1 concerning procedural justice in respect of death sentences in the Philippines.⁸⁹ The HRCtee issued the state party with a request to abstain in the interim from executing the complainants. This was disregarded and the complainants executed before the HRCtee could properly consider the matter. The HRCtee commented that the state gravely breached ICCPR-OP1 in failing to follow this request. The decision suggests that the HRCtee operates with a ‘judicial authority’ sufficient for interim measures to be binding. This is of limited value, however, where the HRCtee fails to be regarded as authoritative by regulated actors. Furthermore, where the ill-treatment of prisoners is a problem of practical compliance, rather than a question of law, opinions and recommendations are of little influence.

2 *Committee against Torture, Subcommittee on the Prevention of Torture and National Preventative Mechanisms*

The CAT is the most detailed instrument in respect of torture, and as such the CtAT is potentially the most effective in this regard. This is particularly relevant for prisoners. That said, the CtAT is relatively passive when it comes to adopting general comments. While other treaty bodies typically issue statements every two years, the CtAT has done so only three times in over 20 years.⁹⁰ This may relate to a lack of reporting by state parties, but also reflects a lack of proactivity on the part of the CtAT.

In terms of individual complaints, the CtAT has been more active and engaging. The latest available statistical survey on individual complaints shows that, “by 15 May 2015 the CtAT had concluded 525 cases, finding a violation in one hundred out of the 261 cases in which it rendered a decision”.⁹¹ As an interesting point of reference, a total of 84 states were examined under the complaints procedure of the Commission on Human Rights, between 1974 and 2005, of which only seven cases attracted condemnatory resolutions.⁹²

The CtAT’s examination of complaints has generated comments on important issues, with an overall preference for strengthening protections against torture. The CtAT has repeatedly specified state parties’ obligation to investigate allegations of torture and to provide reparation.⁹³ “These cases show the potential of [the CtAT] to contribute significantly to the jurisprudence on the prohibition of torture, particularly

⁸⁹ *Piandiong v The Philippines* Communication No. 869/1999, CCPR/C/70/D/869/1999 (2000).

⁹⁰ Bantekas and Oette, above n 10, at 209–210.

⁹¹ At 222.

⁹² At 168.

⁹³ Bantekas and Oette, above n 10, at 222.

if it engages in more in-depth considerations of the normative questions posed in a given case”.⁹⁴ Such in-depth engagement is not guaranteed however, and the CtAT has been criticised for the “cursory treatment that is characteristic of some of its decisions”.⁹⁵ Furthermore, even when comments of expressive value are adopted, and violations are established, “claimants frequently face state impunity as an often insurmountable barrier to holding states accountable”.⁹⁶

The SPT and NPMs, as established by the OPCAT, are thus particularly important, in terms of overcoming state impunity and implementing the right to be free from torture on a practical level. Some commentators describe these mechanisms as representative of “a new generation of UN treaty bodies”.⁹⁷ Of course, access to the relevant places and information, and even the establishment of NPMs, is likely to be an issue for states whose human rights practices are problematic. This includes the Philippines, as below. Yet even in these cases, or perhaps especially so, dialogue and cooperation are constructive means for enhancing human rights compliance, and these mechanisms are inherently fit for this purpose.

Silvia Casale, who previously served as President of the SPT, explains that “the dialogue about prevention is a long-term on-going enterprise, continuing from one visit to the next”, and that, “in order for the cooperative dialogue to work, it is important to build mutual confidence”.⁹⁸ She explains that the mandate for unrestricted access is powerful and potentially intrusive, and that it is important to demonstrate neutrality, expertise, and an experience of custodial settings.⁹⁹ This refers again to the need for a delicate balance between objectivity and partiality, a balance successfully struck within the context of relationship.

D Conclusion

Overall, the influence of international human rights instruments and mechanisms can be described as positive, if not particularly practical. Where these rights and procedures fail to effect tangible change, they at least provide a reference point for human rights compliance, and theoretically enhance awareness and understanding around the issues. On the other hand, such expression of rights without translation into practice can perpetuate a disconnect by which continued noncompliance is

⁹⁴ At 223.

⁹⁵ Ibid.

⁹⁶ Bantekas and Oette, above n 10, at 608.

⁹⁷ Silvia Casale “The Importance of Dialogue and Cooperation in Prison Oversight Opening Up a Closed World: A Sourcebook on Prison Oversight: The International Experience with Prison Oversight” (2009–2010) 30 Pace L Rev 1490 at 1490.

⁹⁸ At 1494.

⁹⁹ At 1494–1495.

accommodated. The articulation of rights needs to be complemented with a coherent and credible implementation of those rights in context. The further elaboration of the expressive value of such rights is constructive only to the extent that it informs and gives effect to practical change. In respect of living conditions in prisons, for example, it is not enough to simply communicate rights and obligations in general terms. Something more specific and practical needs to be realised, for these instruments and mechanisms to have any substantive value and to assist prisoners in any genuine way.

Chapter III

Regulatory Framework in the Philippines

The Philippines has signed all of the above human rights instruments, such that this international framework applies. However, these instruments often require internal legislative implementation. Also, the expressive and functional nature of domestic legislation often reflects a state's willingness to pursue ideals not yet achieved in practice. If a state's domestic legislation, unlike its practice, is consistent with its international commitments then this suggests a will to meet the standard but an inability to do so. By contrast, if a state's domestic legislation, as with its practice, contradicts its international commitments then this suggests the latter to be disingenuous. The domestic legislation of the Philippines can be described as *somewhat* consistent with its international commitments. This suggests a genuine willingness to pursue such ideals, but an inability to do so and a lack of internalised commitment.

A Legal Instruments

1 Constitution of the Philippines 1987

Article III of the 1987 Constitution sets out the Philippine Bill of Rights.¹⁰⁰ This incorporates usual articulations of rights and guarantees, including equality before the law (s 1), access to courts and legal representation (ss 11, 12(1)), freedom from torture (s 12(2)), and the presumption of innocence until proven guilty (s 14). In terms of procedural justice, s 14(1) provides that "No person shall be held to answer for a criminal offense without due process of law".¹⁰¹ These provisions are positive as expressions of rights but, in practical terms, fail to establish procedures or mechanisms for their realisation.

There is no mention of arbitrary detention, other than in s 18(1) which provides that, "No person shall be detained solely by reason of his political beliefs and aspirations".¹⁰² This provision is unhelpful from both an expressive and functional perspective. It could be taken to imply, for example, that detention solely by reason of alternative accusation is sufficient. Indeed, in practice in the Philippines, political prisoners are often detained on the pretence of trumped up charges.¹⁰³

¹⁰⁰ The Constitution of the Philippines, 1987, art 3.

¹⁰¹ At s 14(1).

¹⁰² At s 18(1).

¹⁰³ Karapatan "Release ALL political prisoners, stop filing trumped up charges vs civilians and activists" (July 2017) Karapatan < <http://www.karapatan.org>>.

The Constitution establishes the Commission on Human Rights,¹⁰⁴ and mandates the Commission to “exercise visitorial powers over jails, prisons, or detention facilities”.¹⁰⁵ This function is included in the Commission’s Organizational Performance Indicator Framework, in terms of “monitoring of jails/detention centers”.¹⁰⁶ However, the Commission proposes no budget for this function and appears not to operationalise it, let alone prioritise it.¹⁰⁷

2 *Ombudsman Act 1989*

The Ombudsman Act establishes the Office of the Ombudsman, which at s 3 includes “other Deputies as the necessity for it may arise, as recommended by the Ombudsman”.¹⁰⁸ On this basis, the Office of the Deputy Ombudsman for the Military and Other Law Enforcement Offices was introduced, whose jurisdiction includes the Philippine National Police, the Bureau of Jail Management and Penology, and the Bureau of Corrections.¹⁰⁹ This provides for the investigation of complaints and facilitates a process for redressing those complaints.¹¹⁰ Similarly, complaints and correspondence can be filed directly with the Bureau of Corrections,¹¹¹ and with the Bureau of Jail Management and Penology.¹¹² Of course, an individual must have the agency and awareness to utilise such mechanisms, and a prisoner will often lack these by virtue of incarceration.

3 *Anti-Torture Act 2009*

Unlike the Constitution, the Anti-Torture Act provides explicitly and extensively for prisoners’ rights. This legislation gives credibility to the Philippines’ international expressions of commitment. It also suggests that domestic implementation is a time-exhausting process. The Philippines ratified the CAT in 1986, 23 years before introducing this legislation. The Philippines then adopted OPCAT in 2012, another three years after passing the Anti-Torture Act.

¹⁰⁴ The Constitution of the Philippines, 1987, art 13, s 17.

¹⁰⁵ At s 13.

¹⁰⁶ Philippine Department of Budget and Management *Organizational Performance Indicator Framework 2012* at 822.

¹⁰⁷ At 823.

¹⁰⁸ The Ombudsman Act of 1989, s 3.

¹⁰⁹ Rommel Abitria “Imprisonment and Human Rights: A Comparative Study on the Development and Concept of Imprisonment, with special focus on the Philippines” (LLM, University of Kent, 2013) at 72.

¹¹⁰ Office of the Ombudsman *Citizen’s Charter* (September 2017) at 1.

¹¹¹ Bureau of Corrections *Citizen’s Charter 2012*.

¹¹² Bureau of Jail Management and Penology *Citizen’s Charter 2013*.

Although the establishment of the NPM required under OPCAT is pending, this timeline suggests that it could still come to completion. However, long-term political instability in the Philippines casts serious doubt on this. Under the presidency of Duterte, it is more likely that the two bills introduced for the enactment of the NPM will be struck down.¹¹³ Nonetheless, there exists a willingness on the part of some state actors to pursue better human rights protections. Any effective regulatory response must harness this momentum, however piecemeal and precarious it may be.

B Penal Framework

1 Penal Code

The Penal Code of the Philippines was first inherited from its coloniser in 1887, with an adapted version of the Spanish “Codigo Penal”.¹¹⁴ This incorporated the logic of imprisonment as punishment.¹¹⁵ That was replaced with a Revised Penal Code in 1930.¹¹⁶ The revised code prohibited practices like chaining, but retained the death penalty and an emphasis on punitive measures.¹¹⁷ The revised code informed a correctional approach to imprisonment, but indeed correction by means of punishment. The death penalty was abolished in 2006.¹¹⁸ Despite the Philippines having signed the second optional protocol to the ICCPR, which prohibits the death penalty, it is currently considering its reintroduction.¹¹⁹ This reflects a persisting punitive attitude.

Throughout its history of repeated colonisation (at the hands of Spain, Japan and the United States) the Philippines suffered the excesses of unregulated centralised power. Under the dictatorial presidency of Ferdinand Marcos, this dynamic was solidified with the declaration of martial law.¹²⁰ When Marcos was overthrown, a reactionary decentralisation of power occurred by which, among other things, prison management was dispersed between national, provincial and city agencies.¹²¹

¹¹³ Balay Rehabilitation Center “Briefing Paper on National Preventive Mechanism” Balay (undated) <ayph.net>.

¹¹⁴ Codigo Penal Filipinas 1887.

¹¹⁵ Abitria, above n 109, at 63.

¹¹⁶ Revised Penal Code 1930.

¹¹⁷ Abitria, above n 109, at 67.

¹¹⁸ An Act Prohibiting the Imposition of Death Penalty in the Philippines 2006.

¹¹⁹ Felipe Villamor “Philippines Moves Closer to Reinstating Death Penalty” New York Times (March 2018) <www.nytimes.com>.

¹²⁰ Abitria, above n 109, at 68.

¹²¹ Ibid.

The (national) Bureau of Prisons was replaced with the Bureau of Corrections (BuCor), under the supervision of the Department of Justice,¹²² whose jurisdiction was reduced to exclude provincial jails, and limited to national prisons for sentences of more than three years.¹²³ Provincial authorities were charged with the management of provincial jails, under the Local Government Code of 1991.¹²⁴ At the same time, the Office of Jail Management and Penology was replaced by the newly established Bureau of Jail Management and Penology (BJMP), with a mandate for the management of municipal and city jails, under the supervision of the Department of Interior and Local Government.¹²⁵ In theory, this brought city jails out from under the direct supervision of National Police, which became a subsidiary of the Department of Interior and Local Government. In practice, however, budget and personnel constraints are such that more than half of the municipal jails are managed by the Philippine National Police (PNP).¹²⁶

Provincial, municipal and city jails provide for those who are awaiting trial or sentence, and those who have been sentenced to three years or less. In practice, judicial delays are such that these jails often detain individuals for upwards of 10 years.¹²⁷ The proposed “Jail Integration Act of 2008” sought to consolidate national, provincial, municipal and city jails under a new Bureau of Correctional Services, however this bill was not passed.¹²⁸ For convenience, this thesis uses the term “prison” to refer to both jails and prisons of all descriptions. It does not examine the conditions of detention or youth centres.

2 *Bureau of Jail Management and Penology Comprehensive Operations Manual*

The BJMP Comprehensive Operations Manual, updated in 2015, is said to prioritise the “humane safekeeping and development of inmates”, and seeks to “provide for the basic needs of inmates” and “improve jail facilities and conditions”.¹²⁹ The expressive effect of such language is positive. This gives further credibility to international expressions of commitment, and signals a willingness to translate them into practice. There are other provisions that are unhelpful, however. For example,

¹²² Administrative Code 1987, s 26.

¹²³ Abitria, above n 109, at 68.

¹²⁴ An Act Providing for a Local Government Code of 1991, s 447 (xv).

¹²⁵ Department of Interior and Local Government Act of 1990, s 6.

¹²⁶ Raymund Narag *Freedom and Death Inside the Jail: A Look into the Condition of Quezon City Jail* (Supreme Court of the Philippines, Philippines, 2005) at 4.

¹²⁷ At 5.

¹²⁸ Senate Bill No. 2610, Jail Integration Act of 2008.

¹²⁹ The Bureau of Jail Management and Penology Comprehensive Operations Manual, 2015 edition, r 1.

the Manual defines an offender as “a person who is accused”.¹³⁰ It is hard to gauge the functional effect of this provision, but it certainly calls into question the presumption of innocence and such language could well influence the perception of prison authorities and their preference for prisoners’ rights.

Section 27 of the BJMP Manual provides for “close [sic] confinement...in the case of an incorrigible inmate”.¹³¹ This provision appears to permit solitary confinement, contrary to its express prohibition in s 2(c) of the Anti-Torture Act. Another point of concern is the priority given to the reputation of the BJMP. Section 30 establishes as an offence of moderate seriousness, the spreading of rumours to besmirch the honour of BJMP personnel.¹³² This informs search and censorship policies and, ultimately, leads to the conclusion, “Never trust inmate [sic]”.¹³³ Such provisions undermine relationship and respect, as well as any positive sense of responsibility for prisoners’ rights, on the part of authorities.

3 *Bureau of Corrections Operating Manual*

The BuCor Operating Manual is perhaps less aspirational, more pragmatic in approach. This is not necessarily to say that it is less positively predisposed to prisoners’ rights. Again, however, there are areas of concern. The provisions for censorship are similarly problematic. Additionally, the BuCor Manual describes the prisoner’s right to complain as the right “to ventilate his grievances”.¹³⁴ This is further provided for only to the extent that an inmate complaints center “shall act on all written complaints that are not palpably frivolous”.¹³⁵ There appears to be no provision for due process and no mention of a right to appeal.

The BuCor Manual also establishes an inmate council, to serve as an advisory body to the Superintendent.¹³⁶ Apparently, this body does not participate in the imposition of disciplinary measures;¹³⁷ yet again, the lack of clarity around this puts prisoners in a precarious position. Similarly, in terms of punishment, the BuCor Manual prohibits the deprivation of exercise,¹³⁸ but allows for the cancellation of recreation and entertainment.¹³⁹ Presumably, such cancellation of activities cannot amount to deprivation of exercise, but the functional effect of these provisions is unclear.

¹³⁰ At r 1.

¹³¹ The Bureau of Jail Management and Penology, above n 129, at r 3, s 27.

¹³² BJMP Comprehensive Operations Manual, r 3, s 30.

¹³³ At r 6, s 45.

¹³⁴ Bureau of Corrections Operating Manual, Pt 3, Chp 1, s 1.

¹³⁵ At pt 3, Chp 11, s 1.

¹³⁶ At pt 3, Chp 11, s 2.

¹³⁷ At pt 3, Chp 11, s 3.

¹³⁸ At pt 3, Chp 2, s 3.

¹³⁹ At pt 3, Chp 2, s 4.

Certainly, it is possible that the implementation of these provisions in practice imposes disciplinary duties on prisoners and deprives them of the right to exercise. Ultimately, the ambiguity of the BuCor Manual not only compromises its functional effect but also indicates ambivalence towards the rights of prisoners.

4 *Drugs-related legislation*

These issues are exacerbated by highly punitive drugs laws. The Comprehensive Dangerous Drugs Act imposes life imprisonment, on a largely indiscriminatory basis, for importing any dangerous drug, “regardless of the quantity and purity”.¹⁴⁰ Similarly, it imposes life imprisonment for selling, trading or delivering any dangerous drug, again “regardless of the quantity and purity”.¹⁴¹ The legislative response to possession is also highly punitive. Any quantity less than 300 grams of marijuana attracts between 12 and 20 years imprisonment, more than 300 grams attracts a sentence of between 20 years and life, and more than 500 grams attracts life imprisonment.¹⁴² This, alongside President Duterte’s “war on drugs”, contributes to a prison population by which more than two thirds of prisoners are charged with drugs-related offences.¹⁴³

There have been attempts to address these issues through legislative change. The Speedy Trial Act establishes a maximum trial period of 180 days.¹⁴⁴ Of course, in reality inmates continue to wait unconvicted for over 10 years.¹⁴⁵ The Revised Guidelines for Continuous Trial of Criminal Cases further limits the trial period for drugs cases to 60 days.¹⁴⁶ The Guidelines also provide for the hearing and resolution of a petition for bail within between 20 and 30 days of arraignment, and arraignment within between 10 and 30 days of filing, depending on the type of case.¹⁴⁷ The Revised Guidelines took effect in September 2017 and, as at the time of writing this thesis, it is too early to assess their effect. Without being pessimistic, however, the fact that pre-existing delays already exceeded maximum trial periods prescribed by the Speedy Trial Act, suggests that the problem is more than one of scheduling.

C *Concluding Observations*

¹⁴⁰ The Comprehensive Dangerous Drugs Act of 2002, s 5.

¹⁴¹ At s 6.

¹⁴² At s 11.

¹⁴³ Andrew Marshall “Philippines drug war turns a teeming jail into a haven” (November 2016) Reuters <www.reuters.com>.

¹⁴⁴ The Speedy Trial Act of 1998, s 9.

¹⁴⁵ Narag, above n 126, at 5.

¹⁴⁶ Supreme Court Circular “Revised Guidelines for Continuous Trial of Criminal Cases” (16 May 2017) OCA 101-2017 at [11].

¹⁴⁷ At [17].

Similar to the existing international regulatory framework, the domestic framework of the Philippines is more effective at an expressive than instrumental level.¹⁴⁸ A constructive regulatory response must translate expressions into practice. While it should utilise existing strengths in a capacity-building way, it should not abide superficial gestures of commitment. The expressive value of such gestures may appear positive but the long-term (expressive and functional) effect can undermine accountability and institutionalise noncompliance.

D International Regulatory Engagement with the Philippines

This section examines the regulatory engagement between international human rights mechanisms and the Philippines. Having established the existing framework at an international and domestic level, this section looks at the interaction between actors and mechanisms of these different levels. The purpose of this exercise is to evaluate the effectiveness of international regulation, with a view to enhancing compliance.

1 Human Rights Council: Universal Periodic Review

(a) First Cycle of the UPR of the Philippines¹⁴⁹

The first cycle of the UPR of the Philippines in 2008 produced 19 recommendations, of which 11 were supported by the state party, four were noted, and four rejected.¹⁵⁰ Of those rejected, two recommended the visitation of the Special Rapporteur (58.3 and 58.15), and one recommended the provision of follow up reports on extrajudicial killings (58.6). The other recommended addressing root causes of the failed witness protection programme, in terms of reform of the judiciary and armed forces (58.11). Notwithstanding these rejections, the state party accepted recommendations to train security forces in respect of human rights (58.2), to eliminate torture and extrajudicial killings (58.6), and to fully involve civil society in the follow-up of the UPR (58.12). It also accepted a recommendation to ratify the OPCAT and, indeed, this recommendation was subsequently acted on.

(b) Second Cycle of the UPR of the Philippines¹⁵¹

¹⁴⁸ This examination excludes the regional ASEAN framework, which remains only consultative and lacks the capacity to regulate human rights compliance: Pavin Chachavalpongpun “Is Promoting Human Rights in ASEAN an Impossible Task?” (January 2018) *The Diplomat* <thediplomat.com>.

¹⁴⁹ Human Rights Council *Report of the Working Group on the Universal Periodic Review: Philippines*, A/HRC/8/28 (2008).

¹⁵⁰ Human Rights Council *Report of the Working Group on the Universal Periodic Review: Philippines: Addendum*, A/HRC/8/28/Add.1 (2008).

¹⁵¹ Human Rights Council *Report of the Working Group on the Universal Periodic Review: Philippines*, A/HRC/21/12 (2012).

The second cycle of the UPR of the Philippines in 2012 produced 88 recommendations, of which 47 were fully accepted, 11 accepted but considered to have been implemented in part or full already, four partially accepted, 25 noted and one rejected.¹⁵² Two of the noted recommendations referred to engagement with the Special Rapporteurs and UN human rights mechanisms (131.14 and 131.15). The state party's response expressed that "The Philippine Government is open to constructive dialogue and cooperation with the special procedures of the Human Rights Council. The Philippine Government shall continue to study and issue invitations to special procedures mandate holders on a case-by-case basis".¹⁵³ The state party accepted recommendations to further consolidate its national human rights infrastructure and improve its capacity to uphold human rights (129.1), and to endorse a closer cooperation between national and international human rights mechanisms (129.5). It also accepted a recommendation to prevent torture in facilities of detention through the provision of legal safeguards for detainees and the prosecution of such crimes (129.18).

(c) Third Cycle of the UPR of the Philippines¹⁵⁴

The third cycle of the UPR of the Philippines in 2017 produced 257 recommendations, of which 103 were accepted, 99 noted, and 55 rejected.¹⁵⁵ Of those noted, the state party advised that it could essentially support them, but that it could not guarantee or commit to their implementation as this relies on processes beyond the control of the government.¹⁵⁶ It further advised that of the 99 recommendations noted, "were those perceived to insinuate, advertently or inadvertently, that the State has not taken any action whatsoever on the concerns raised".¹⁵⁷ This could perhaps include the noted recommendation to take steps to meet the minimum standards for the treatment of prisoners (133.127). It is more difficult to infer any such insinuation in respect of noted recommendations to take all necessary measures to prevent torture and other cruel, inhuman or degrading treatment in detention facilities (133.123) and to improve detention facilities, in particular to address overcrowding and sanitation problems (133.128).

¹⁵² Human Rights Council *Report of the Working Group on the Universal Periodic Review: Philippines*, A/HRC/21/12/Add.1 (2012).

¹⁵³ At [3].

¹⁵⁴ Human Rights Council *Report of the Working Group on the Universal Periodic Review: Philippines*, A/HRC/36/12 (2017).

¹⁵⁵ Human Rights Council *Report of the Working Group on the Universal Periodic Review: Philippines*, A/HRC/36/12/Add.1 (2017).

¹⁵⁶ At [2].

¹⁵⁷ Ibid.

Rejected recommendations include the recommendation to combat illegal drug-use with prevention and alternative sanctions (133.49), that to publically denounce extrajudicial killings and other abuses in the anti-drug campaign (133.118) and that to grant access to the Special Rapporteur on extrajudicial, summary or arbitrary executions (133.119). More positively, accepted recommendations include the recommendation to strengthen criminal justice reform efforts in order to ensure a speedy and fair trial for all accused (133.132). Indeed, this has since been acted on with the introduction of the Revised Guidelines for Continuous Trial of Criminal Cases.

The Philippines in its response expressed appreciation for recommendations “which reflect recognition and respect for the State’s implementation of its human rights commitments and do not seek to impose a certain standard on the State’s pursuit of human rights”.¹⁵⁸ This reveals a sensitivity about state sovereignty, and perceptions of overt external pressure to conform. Constructive regulatory engagement must account for this, without allowing it to justify a disregard for human rights.

(d) Evaluation of the UPR of the Philippines

More generally, an assessment of the three cycles of the UPR of the Philippines suggests that this mechanism can facilitate an improvement in human rights practice through a participatory regulatory process. The ratification of the OPCAT and the introduction of the Revised Guidelines for Continuous Trial are practical examples of such improvement. In terms of the concerns about this mechanism undermining others, it cannot be denied that the UPR provides a forum for rejecting otherwise authoritative statements, and justifying noncompliance. For example, where the CtAT concluded in 2016 that the Philippines should “issue a public statement at the highest level affirming unambiguously that torture will not be tolerated”,¹⁵⁹ this recommendation as similarly articulated by Iceland in the third UPR (133.118) was rejected. As such, its status in either context is unclear and its realisation unlikely. On the other hand, certain recommendations pertaining to engagement with other mechanisms have been favourably received and responded to.

In terms of the development of the UPR, the proliferation of recommendations appears to compromise its effectiveness. The percentage of accepted recommendations has steadily decreased with this development, from 60 percent of 20 recommendations in 2008, to 53 percent of 88 recommendations in 2012, and

¹⁵⁸ Human Rights Council, above n 160, at [4].

¹⁵⁹ Committee against Torture *Concluding Observations on the Third Periodic Report of the Philippines*, CAT/C/PHL/CO/3 (2016) at [3].

then 40 percent of 257 recommendations in 2017. Of course, this is not simply a matter of mathematical calculations and, in any case, these figures can be manipulated. For example, the percentage of accepted recommendations in 2012 could be as high as 70 percent depending on whether partially accepted recommendations are included. It could also be said that, where the first cycle of the UPR produced only 12 accepted action points, the second produced at least 47, and the third 103. Nonetheless, these percentages reflect a dilution of important issues.

Indeed, this proliferation limits the UPR's capacity to analyse problems and engage with actors in a substantive way. Ultimately, this encourages a regulatory ritualism, by which a state party can accept nonthreatening recommendations as a (nominal) gesture of commitment, while rejecting those recommendations that require substantial change in practice. The advocacy of local stakeholders is also diluted by this proliferation, and by the fact that stakeholder engagement is isolated from engagement with the state party itself.

As a result of this development, the Philippines can simply advise that “non-governmental and civil society organisations [have] been encouraged to join the efforts of the Government in promoting compliance with human rights obligations”,¹⁶⁰ and this has to be taken at face value. Similarly, the state party can advise that concerns raised “were already addressed in the interactive dialogue”.¹⁶¹ Regulatory engagement is spread so thinly across such a vast range of issues, that the mechanism lacks cohesion, precision and purpose. Furthermore, the repetition of accepted recommendations, such as those in respect of torture, suggests a failure to follow through. This is also accommodated by the proliferation of recommendations and the dilution of issues, and further contributes to a regulatory ritualism.

The UPR is not set up to address prisoners' rights in any detail. At best, it provides a high-level review that identifies a range of issues including this one. Of course, the dilution and regulatory ritualism described above further marginalise prisoners' rights. The first two cycles of the UPR of the Philippines mention only torture or ill-treatment. The third makes mention of overcrowding in prisons and undue delays in the dispensation of justice, but fails to analyse these issues in any depth. In the context of a country crippled by impunity and extrajudicial killings, ill-treatment of prisoners is perhaps not the first priority. That said, it is this impunity that facilitates such gross ill-treatment of prisoners, and just as “the already entrenched culture of impunity [has] been reinforced by sloppy investigations into alleged abuses” in the

¹⁶⁰ Human Rights Council, above n 159, at [6].

¹⁶¹ At [5].

Philippines,¹⁶² so too surface-level regulatory engagement can further reinforce this culture.

The advantage of the breadth of scope of the UPR, in terms of prisoners' rights is that it has the ability to identify related issues and causes. The National Council of Churches of the Philippines articulated that the unacceptable overcrowding in prisons has been further aggravated by the war on drugs, and that the excessive delays in delivering justice often lead to prolonged trauma.¹⁶³ These insights informed the final recommendations to the extent that they made explicit mention of overcrowding in prisons and abuses in the anti-drug campaign, however the former was only noted and the latter rejected, without any scope to further engage. Therefore, while the UPR is able to identify a wide range of issues, and their interconnection, it lacks the ability to address those issues in a constructive way.

2 *Human Rights Council: Special Rapporteur*

(a) Mission to the Philippines 2007¹⁶⁴

The Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, visited the Philippines in 2007. A range of issues were identified, from the killing of leftist activists to the Davao death squads and the culture of impunity. In the follow-up report, Alston observes that, while the government of the Philippines has sent an important informal message to the military about extrajudicial killings, as recommended, “most of the Government’s formal actions in response to the Special Rapporteur’s recommendations have been symbolic, and lack the substantive and preventive dimensions necessary to end the culture of impunity”.¹⁶⁵ He further observes that, while the government of the Philippines claims a need to take its time and “not force convictions simply for the sake of announcing achievements”, it has proven its ability to progress prosecutions quickly and effectively on other matters.¹⁶⁶

Alston also identifies the stalling of Congressional measures to strengthen the witness protection programme, the lack of substance of Presidential orders, and the

¹⁶² Human Rights Council *Summary of Stakeholders’ Submissions: The Philippines*, A/HRC/WG.6/27/PHL/3 (2017) at [6].

¹⁶³ Human Rights Council, above n 162, at [5].

¹⁶⁴ Human Rights Council *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Mission to Philippines*, A/HRC/8/3/Add.2 (2008).

¹⁶⁵ Human Rights Council *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Follow-up to country recommendations – Philippines*, A/HRC/11/2/Add.8 (2009) at [5].

¹⁶⁶ *Ibid.*

failure of the military and police to intensify investigations.¹⁶⁷ In terms of relevant contextual factors, Alston identifies as most significant the state party's failure to institutionalise the necessary reforms.¹⁶⁸ He commends the Supreme Court and Commission on Human Rights for the preliminary steps they have taken, but emphasises that in the absence of institutionalisation, "the progress that has been made remains fragile and easily reversed".¹⁶⁹

(b) Evaluation of the Special Rapporteur in respect of the Philippines

Obviously, there is a limit to what any regulatory mechanism can do, and the Special Rapporteur cannot itself effect the necessary change. That said, the measures it takes to not only identify the relevant steps, but follow-up on progress, are conducive to substantive and sustainable improvement. In addition, the fact that this mechanism prevents a state party from artificially asserting compliance mitigates regulatory ritualism. For example, Alston refers to the fact that "too many cases [of extrajudicial killings] continue to be reported and far too little accountability has been achieved for the perpetrators", and that, "the Government's denial of the existence of such death squads continues to undermine its credibility and inhibit efforts to address the problem".¹⁷⁰

On the other hand, the intensity of investigation and follow-up, and the intolerance for noncompliance can render the Special Rapporteur a threat. Inevitably, this engenders a defensive response, which can undermine any relationship or dialogue of trust. Indeed, recommendations made by this mechanism have frequently been rejected, and Special Rapporteurs themselves personally criticised. That said, while the Philippines challenged many of the findings and recommendations made by the Special Rapporteur in 2007, the number of extrajudicial killings of members of civil society organisations subsequently decreased, as reported by Alston himself.¹⁷¹

However, as of yet, the newly appointed Special Rapporteur for this mandate has been denied entry into the Philippines for the purpose of a fact-finding mission. This denial can be attributed, perhaps, to the adversarial nature of an official country visit, which requires unrestricted access to relevant stakeholders. The Philippines as a state party has sought to mitigate this by suggesting its own conditions, including provision for a public debate between the Philippine President and the Special Rapporteur, in the course of which the former promises to make the latter "look like

¹⁶⁷ At [5]-[6].

¹⁶⁸ At [12].

¹⁶⁹ Human Rights Council, above n 165, at [12].

¹⁷⁰ Ibid.

¹⁷¹ At [5].

a fool”.¹⁷² Of course, the Special Rapporteur should not accept such preposterous conditions, nor has she done so, but this aggressive response reflects the threatening nature of this mechanism.

The Special Rapporteur on extrajudicial, summary or arbitrary executions is the only one to have visited the Philippines. In terms of prisoners’ rights, this mechanism is helpful to the extent that it challenges a culture of impunity. Ultimately, its effectiveness depends on the state party’s ability and willingness to implement recommendations. Of course, all of the challenges around access are particularly significant in respect of prisons.

To the extent that an identification of the issues and solutions is necessary to address a regulatory problem, this mechanism enhances state capacity and ability to comply. The intensive engagement and follow up involved in this process also mitigates regulatory ritualism. The effect of this dynamic is difficult to assess. On the one hand, it precludes artificial expressions of compliance, and attaches value to substantive, instrumental improvements in practice. On the other hand, it can appear adversarial and threatening, and this perhaps explains the refusal of the Philippines to invite the current Special Rapporteur.

3 *Human Rights Committee: Concluding Observations*

(a) First Periodic Report of the Philippines¹⁷³

The concluding observations of the Human Rights Committee on the first periodic report of the Philippines, in 1989, prioritised praise and encouragement. Given that the reporting took place only three years after the dictatorship of President Marcos ended, it was considered that the state party had made commendable efforts towards restoring the primacy of human rights. These efforts included the ratification of a new constitution, which included a bill of rights, the successful facilitation of democratic elections, and the reorganisation of the judicial system. The HRCtee accepted that “insurgency...threatened the recently restored democracy” and celebrated the fact that “these attempts to destabilise the Government had been repulsed”.¹⁷⁴

In respect of torture, the HRCtee largely accepted the state party’s assertions that the Constitution prohibited the ill-treatment of detainees, and that, “although sporadic

¹⁷² Patricia Lourdes Viray “Callamard hits back: UN visit not a vehicle for politicking” (August 2017) PhilStar <www.philstar.com>.

¹⁷³ Human Rights Committee *Report of the Human Rights Committee*, A/44/40 (1989).

¹⁷⁴ At [72].

violations of human rights did take place, torture was not a widespread practice or policy”.¹⁷⁵ It also accepted assertions that the Commission on Human Rights “regularly visited places of detention in order to prevent the practice of torture”.¹⁷⁶ However, in reality this was not the case, nor is it so today.¹⁷⁷ In fairness to the HRCtee, it did identify areas of continuing concern, including a rising number of torture victims.¹⁷⁸

(b) Second and Third Periodic Report of the Philippines¹⁷⁹

The concluding observations of the Human Rights Committee on the second and third periodic reports of the Philippines were consolidated into a single document in 2003. These observations were far less generous in their assumptions, commendations and recommendations, perhaps owing to grave breaches of the ICCPR that had occurred in the interim. Firstly, the failure to report to the HRCtee for over 14 years represented a breach of art 40 of the ICCPR.¹⁸⁰ Secondly, the failure of the Philippines to follow the HRCtee’s requests for interim measures in *Piandiong, Morillos and Bulan v Philippines* represented a grave breach of ICCPR-OP1.¹⁸¹

In these concluding observations the HRCtee made more detailed and demanding recommendations. It called for procedures to implement the Views of the HRCtee and to ensure compliance with both the ICCPR and interim measures under ICCPR-OP1.¹⁸² It also referred to persistent and widespread torture and ill-treatment of detainees, the lack of legislation specifically prohibiting torture and the lack of an effective monitoring system, notwithstanding assertions of frequent and effective self-regulation.¹⁸³ To this end, it recommended instituting an effective monitoring system, and ensuring that all allegations of torture are properly investigated, and victims appropriately compensated.¹⁸⁴ It also recommended free access to legal counsel at all stages of arrest and detention.¹⁸⁵

¹⁷⁵ Human Rights Committee, above n 173, at [78].

¹⁷⁶ Ibid.

¹⁷⁷ Abitria, above n 109, at 72.

¹⁷⁸ Human Rights Committee, above n 173, at [81].

¹⁷⁹ Human Rights Committee *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant*, CCPR/CO/79/PHL (2003).

¹⁸⁰ At [1].

¹⁸¹ At [2].

¹⁸² Ibid.

¹⁸³ At [3]-[4].

¹⁸⁴ Ibid.

¹⁸⁵ At [4].

(c) Fourth Periodic Report of the Philippines¹⁸⁶

The concluding observations of the HRCtee on the fourth periodic report of the Philippines, in 2012, welcomed the abolition of the death penalty in 2006, the ratification of ICCPR-OP2 in 2007, and the ratification of OPCAT in 2012.¹⁸⁷ The HRCtee then expressed concern at the lack of clarity around the status of the ICCPR in domestic law, and the continued absence of a procedure or mechanism for implementing the HRCtee's Views under the ICCPR-OP1, notwithstanding its previous recommendation to this effect.¹⁸⁸ It recommended taking all necessary measures to ensure legal clarity on the status of the ICCPR in domestic law, and concrete steps to implement the Views of the HRCtee, including the establishment of a mechanism for this purpose.¹⁸⁹

The HRCtee also identified the continued allegations of torture, notwithstanding a lack of data on the incidence of torture, and recommended appropriate measures to improve investigations into torture and ill-treatment by law enforcement personnel.¹⁹⁰ In addition, it recommended measures to improve the conditions of detained persons and prisoners and, specifically, measures to address overcrowding and poor sanitation in prisons as a matter of priority, "including through resort to the wider application of alternative forms of punishment".¹⁹¹ Unfortunately, this recommendation of alternative punishment was rearticulated in the third cycle of the UPR (133.49) and rejected, as above.

(d) Evaluation of the Human Rights Committee in respect of the Philippines

A general assessment of the HRCtee's concluding observations suggests an ability both to communicate praise and criticism, and to make detailed recommendations for addressing regulatory issues. Although the ICCPR covers a range of rights and issues, the recommendations contained within these observations are more manageably numbered and more appropriately substantiated. For example, the 2003 report contains 23 recommendations, and the 2012 report contains 22. The recommendations themselves are specific to existing legislation and cases. The change in tone between the first and subsequent observations also demonstrates an ability to escalate, and to increase pressure rather than continuing to presume compliance. With the benefit of hindsight, the repulsion of insurgency commended

¹⁸⁶ Human Rights Committee *Concluding Observations on the Fourth Periodic Report of the Philippines*, CCPR/C/PHL/CO/4 (2012).

¹⁸⁷ At [1]-[2].

¹⁸⁸ Human Rights Committee, above n 186, at [2].

¹⁸⁹ Ibid.

¹⁹⁰ At [4]-[5].

¹⁹¹ At [5].

in 1989 was itself a possible perpetuation of human rights abuse. The increasing attention paid to torture across the HRCtee's reported observations reflects a growing awareness of this issue.

The failure of the Philippines to implement recommendations need not necessarily negate the efficacy of this mechanism. Again, the HRCtee cannot itself implement the necessary changes. However, the absence of any timely follow-up mechanism does limit the HRCtee's ability to facilitate regulatory improvement. That it relies on the state party itself to submit a report, results in the sort of delays that occurred between 1989 and 2003 in this case. While it is important that regulatory mechanisms provide for voluntary participation, the HRCtee could nonetheless be more proactive in soliciting that participation. Otherwise, this mechanism relies on the proactivity of the state party, both in terms of reporting and implementing recommendations, in the absence of which improvement is unlikely. The mechanism also fails to engage local stakeholders whose input may further inform the reporting stage of this process, and whose participation may ensure accountability and the actual realisation of recommendations.

In terms of prisoners' rights, this mechanism has the capacity to identify the relevant issues and necessary steps. In the most recent concluding observations, the HRCtee did exactly this. Of course, the absence of regulator-initiated action and follow-up are both particularly problematic in respect of prisoners' rights, given the systemic nature of ill-treatment and the hidden nature of this issue. The fact that poor sanitation and overcrowding were only identified as issues in the most recent observations also reflects a lack of proactivity in respect of prisoners' rights specifically. The exclusion of other relevant stakeholders contributes to this.

4 *Committee against Torture: Concluding Observations*

(a) First Periodic Report of the Philippines¹⁹²

The CtAT's concluding observations on the first periodic report of the Philippines, in 1989, noted the recent democratisation of the Philippines, and commended the state party on initial progress in prohibiting and preventing torture.¹⁹³ It also acknowledged the challenges identified by the state party, which included widespread poverty, significant foreign debt, and insurgency.¹⁹⁴ Nonetheless, it concluded that, "the existence of internal unrest could not justify the use of

¹⁹² Committee against Torture *Report of the Committee against Torture*, A/44/46 (1989).

¹⁹³ At [25].

¹⁹⁴ At [26].

torture”.¹⁹⁵ The CtAT sought information on the practical application of the CAT in the context of insurrection, and on whether measures had been taken to prevent the practice of torture in areas under rebel control, and to investigate any cases of torture that had occurred.¹⁹⁶

In response to the inquiries made by the CtAT, the state party pointed to the visitorial powers of the Commission on Human Rights, in prisons and detention facilities.¹⁹⁷ The Human Rights Commission and other relevant government agencies were said to be doing all they could to monitor these places and investigate any incidents of torture. Ultimately, however, the state party advised that “although the Government had succeeded in establishing certain general principles and guidelines against torture and other inhuman treatment or punishment, much still remained to be done to ensure that those principles were translated into practice”.¹⁹⁸ The CtAT welcomed this progress and expressed hope that the envisaged measures would be taken, but also called for greater emphasis on education and monitoring.¹⁹⁹

(b) Second Periodic Report of the Philippines²⁰⁰

The CtAT’s concluding observations on the second periodic report of the Philippines, in 2009, expressed appreciation for the extensive written responses to its list of issues, and also for the comprehensive and constructive dialogue.²⁰¹ At the same time, it expressed concern at the absence of statistical and practical information on the implementation of the CAT and related domestic legislation.²⁰² It also expressed concern that the state party’s report was 16 years late.²⁰³ It welcomed the ratification of ICCPR-OP1 in 1989 and ICCPR-OP2 in 2007, and the abolition of the death penalty in 2006.²⁰⁴ It also noted the Access to Justice for the Poor Project, and the Justice on Wheels programme of the Supreme Court, to promote human rights and justice in a practical way.²⁰⁵ In addition, the CtAT acknowledged steps taken by the BJMP to improve conditions of detention, including the release of 3,677 inmates in 2008, representing nearly 10 percent of its prison population.²⁰⁶

¹⁹⁵ At [30].

¹⁹⁶ At [26].

¹⁹⁷ At [28].

¹⁹⁸ Committee against Torture, above n 192, at [28].

¹⁹⁹ At [30].

²⁰⁰ Committee against Torture *Concluding Observations of the Committee against Torture: The Philippines*, CAT/C/PHL/CO/2 (2009).

²⁰¹ At [1].

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ At [2].

²⁰⁵ Ibid.

²⁰⁶ At [7].

In terms of concerns and recommendations, the CtAT identified the issue of torture and ill-treatment in detention, aggravated by a failure to bring detainees promptly before a judge, an absence of systematic registration of detainees, and restricted access to lawyers and doctors.²⁰⁷ It called on the state party to remedy these matters, and recommended that it “announce a policy of total elimination in respect of any ill-treatment or torture by State officials”.²⁰⁸ It recommended the implementation of measures to ensure that all detainees are afforded all fundamental legal and practical safeguards from the outset of their detention.²⁰⁹ It also recommended mechanisms to provide compensation and rehabilitation to victims of torture.²¹⁰

The CtAT identified the de facto practice of detention of suspects and recommended measures to further reduce the duration of detention before charges were brought, and alternative measures to detention in the first place.²¹¹ It called for continued efforts to alleviate overcrowding through alternatives to imprisonment and an increase in budgetary allocations to renovate facilities.²¹² It also identified the culture of impunity, and recommended the prompt, effective and impartial investigation of all allegations of torture and ill-treatment.²¹³ To this end, it also recommended steps to strengthen the mandate of the Commission on Human Rights, including through the allocation of sufficient resources and unrestricted access to detention facilities.²¹⁴ Finally, it recommended the compilation of statistical data relevant to the monitoring the implementation of the CAT and investigating allegations.²¹⁵

(c) Third Periodic Report of the Philippines²¹⁶

The CtAT’s concluding observations on the third periodic report of the Philippines, in 2016, welcomed the enactment of the Anti-Torture Act of 2009, and the ratification of the Rome Statute in 2011 and the OPCAT in 2012.²¹⁷ It commended the Philippines on the establishment of a Human Rights Affairs Office, under the Directorate for Inmate Welfare and Development in 2010, and the establishment of a

²⁰⁷ At [3].

²⁰⁸ Ibid.

²⁰⁹ Committee against Torture, above n 200, at [3].

²¹⁰ At [8].

²¹¹ At [5].

²¹² At [7].

²¹³ At [4].

²¹⁴ At [7].

²¹⁵ At [11].

²¹⁶ Committee against Torture *Concluding Observations on the Third Periodic Report of the Philippines*, CAT/C/PHL/CO/3 (2016).

²¹⁷ At [1].

human rights desk in BJMP jails in 2011.²¹⁸ It also commended the banning of corporal punishment and of devices used for this purpose, by the BJMP in 2013.²¹⁹

In terms of concerns and recommendations, the CtAT identified the continued culture of impunity and the fact that, notwithstanding the increase in the number of cases of torture reported to the Commission on Human Rights, “only one person has been convicted...more than six years since the Act was adopted”.²²⁰ It also identified the fact that the committee created under s 20 of the Anti-Torture Act was not yet fulfilling its function.²²¹ It recommended a public statement issued at the highest level to the effect that torture would not be tolerated.²²² As above, this was rearticulated in the course of the UPR, but rejected by the state party. It also recommended operationalising the oversight committee created under the Anti-Torture Act, and establishing an additional independent body to receive and investigate allegations of torture.²²³ It repeated its recommendation of an effective compensation mechanism for victims.²²⁴ The CtAT then identified the persisting lack of fundamental legal safeguards and reiterated recommendations for this to be remedied.²²⁵

The CtAT again expressed concern at the excessive length of pre-trial detention, and observed that this “sometimes exceeds the maximum penalty for the offence and can be as long as 16 years”.²²⁶ It also observed that persons in pre-trial detention account for approximately 85-90% of detainees, and attributed this largely to the strict application of the Comprehensive Dangerous Drugs Act of 2002.²²⁷ It recommended the urgent release of persons whose pre-trial detention had already exceeded the maximum penalty for the offence charged, and a review of the legality of this practice of pre-trial detention more generally.²²⁸

It recommended also a range of other detailed and specific measures, to address excessive pre-trial detention and overcrowding in detention facilities. These included amending legislation and using pre-trial detention only as an exception for limited periods of time.²²⁹ They also included expediting cases relating to charges brought

²¹⁸ At [2].

²¹⁹ Ibid.

²²⁰ At [3].

²²¹ Committee against Torture, above n 216, at [3].

²²² Ibid.

²²³ Ibid.

²²⁴ At [6].

²²⁵ At [4].

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ At [5].

²²⁹ Ibid.

under the Comprehensive Dangerous Drugs Act and, again, replacing pre-trial detention with non-custodial measures.²³⁰ The CtAT called, again, for an increase in resourcing for the Commission on Human Rights, to allow it to fulfil its wide-ranging mandate.²³¹ It also called for the establishment of the NPM required under OPCAT, which had been ratified more than four years before this report was submitted.²³²

(d) Evaluation of the Committee against Torture in respect of the Philippines

A general assessment of the CtAT engagement with the Philippines suggests that it has effected positive change in significant areas of practice, contributing to increasing protections against torture and ill-treatment. The identification of international instruments ratified, and domestic policies adopted and implemented, illustrates this to be the case, over the 26-year reporting period. It should be reiterated that in 2017 the Philippines took steps to expedite drugs cases, as recommended in the most recent reporting cycle. That said, allegations of torture, and conditions of detention amounting to ill-treatment, continue to prevail. The repeated identification of such issues, and the repetition of basic recommendations, could be said to illustrate a failure to effect the fundamental prohibition and prevention of torture. Again, however, the external regulatory mechanism cannot itself implement the necessary change.

The CtAT is specific and practical in its recommendations, and therefore geared towards tangible regulatory improvement. On the other hand, the proliferation of recommended legislative measures can facilitate a regulatory ritualism in a similar way to the proliferation of recommendations in the UPR. The Philippines has introduced human rights plans, projects and desks, and anti-torture legislation and committees, but it continues to accommodate a culture of impunity in respect of torture and ill-treatment. It also continues to maintain a prison, pre-trial detention and judicial system that perpetuates ill-treatment.

This criticism is not to deny the necessity of identifying specific problems and specific measures to address them. However, effective regulation needs to sustain engagement with a particular issue, so as to effect lasting change. The irregularity of the CtAT's regulatory engagement with the Philippines, and the proliferation of recommended measures, are such that the process easily becomes removed from the reality of the situation. Indeed, it is easier for the state party to introduce legislation

²³⁰ Ibid.

²³¹ At [9].

²³² Ibid.

and institute committees, than it is to substantially change entrenched practice, and challenge actors in positions of authority.

In terms of prisoners' rights, the CtAT's focus is largely geared towards this cause, such that any improvement in practice represents an improvement in the protection of prisoners' rights. This mechanism also has an inherent ability to engage with prison specific issues in greater depth, given its focus. For example, in the course of considering reports and making concluding observations it has identified not only overcrowding and excessive delays, but also the underlying policy approach and budget allocation issues that create these problems. In the face of impunity, this mechanism can only continue to challenge that culture, but where the problems relate to a power dynamic by which prisoners are denied their basic dignity and rights, this mechanism could better give voice to their particular needs and interests.

E Conclusion

The domestic regulatory framework of the Philippines reflects a degree of willingness to comply with international human rights commitments. However, the expressive inconsistencies throughout this framework and the reality in practice reveal both a superficiality of commitment and an inability to implement the necessary practical changes. Where this willingness and ability is absent at a local level, existing international engagement largely fails to effect regulatory improvement. Nonetheless, modes of engagement that are personalised, focused on specific issues and sustained with follow-up mechanisms, appear better able to do so than those that are fixed and formal in manner, and general in scope.

Chapter IV

Compliance Theory

Primarily, the ill-treatment of prisoners in the Philippines reflects a failure on the part of the state itself, in respect of its international obligations. The various international regulatory bodies have repeatedly articulated this. Yet, noncompliance and ill-treatment of prisoners continues, and the international human rights regime appears unable to effect improvement. Ultimately, this represents a regulatory failure on the part of international human rights law.

Hans Morgantheau's traditional view would blame this problem on the lack of authoritative interpretation and enforcement of the law by regulatory bodies.²³³ However, such authoritative regulation of international law requires "either self-regulation or hegemonic dominance".²³⁴ The absence of effective self-regulation and the undesirability of "hegemonic dominance" call for a more nuanced approach. Robert Howse and Ruti Teitel consider that actors and regulators interact in the shadow of the law, and suggest that instead of state actors simply 'complying' with international human rights law, they bargain in light of it.²³⁵ This invites a more dialogical approach to regulation.

Eric Posner distinguishes between compliance and causation. He explains that an improvement in human rights practice does not necessarily constitute compliance, and should not be counted as success where it does not.²³⁶ This rejects an approach that pursues any improvement short of full compliance. On the other hand, Jack Goldsmith and Stephen Krasner warn against reductive idealism. They suggest that it is better to have a half loaf of justice that accords with the interests of actors and regulators, than to hold out for a full loaf of neutral justice that will never come.²³⁷ In fact, they suggest that a full loaf approach actually undermines the human rights regulatory framework.²³⁸

Certainly, where the objective is commitment to human rights rather than hegemonic dominance, this requires a consideration and accommodation of local interests and

²³³ Alston and Goodman, above n 11, at 1249.

²³⁴ Jack Goldsmith and Stephen D Krasner "The Limits of Idealism" (2003) 132 *Daedalus* 47 at 62.

²³⁵ Robert Howse and Ruti Teitel "Beyond Compliance: Rethinking Why International Law Really Matters" (2010) 1 *Global Policy* 127 at 127.

²³⁶ Eric A Posner "Some Skeptical Comments on Beth Simmon's Mobilizing for Human Rights Symposium: The 17th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: From Rights to Reality: Mobilizing for Human Rights and its Intersection with International Law" (2011–2012) 44 *NYU J Intl L & Pol* 819 at 824.

²³⁷ Goldsmith and Krasner, above n 234, at 57.

²³⁸ *Ibid.*

power dynamics. Howse and Teitel consider that issues around compliance are caused by interpretation. They suggest that interpretation within a dynamic cultural setting creates a regulatory context that is itself dynamic and varied, “and results in the construction of new meanings”.²³⁹

Therefore, it is necessary to examine compliance with respect to the role of international human rights law in casting shadows and creating obligations. It is necessary to reject the logic of hegemonic dominance, and the full loaf of neutral justice that fails to account for subjective considerations, particularly those specific to the local context. The following sections will consult interdisciplinary international legal scholarship and compliance theory, with a view to understanding interpretation within a dynamic cultural context. The chapter will then turn to prison-specific considerations, and finally the Philippines, to understand this question of compliance.

A *Evolution of Interdisciplinary International Legal scholarship*

Harold Koh considers that a first generation of interdisciplinary international legal scholarship developed with the collapse of the Berlin Wall and the introduction of international relations theory.²⁴⁰ He concurs with Ryan Goodman and Derek Jinks that this scholarship is defined by the dichotomy between realism and constructivism, where the former pursues compliance through coercion and the latter through persuasion.²⁴¹ He describes this dichotomy as “now-familiar, but increasingly tired”.²⁴²

Koh then points to the work of Goodman and Jinks as constituting a second generation of interdisciplinary international legal scholarship.²⁴³ This introduces sociology to examine the micro-processes of social influence that contribute to “norm-internalisation”, a phenomenon of socialisation.²⁴⁴ According to Koh, the work of Goodman and Jinks proves that the perceived dichotomy between coercion and persuasion actually conceals a *trichotomy* between coercion, persuasion and acculturation.²⁴⁵ Acculturation represents the process by which social and societal

²³⁹ Robert Howse and Ruti Teitel “Beth Simmons’s Mobilizing for Human Rights: A Beyond Compliance Perspective Symposium: The 17th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: From Rights to Reality: Mobilizing for Human Rights and its Intersection with International Law” (2011–2012) 44 NYU J Intl L & Pol 813 at 817.

²⁴⁰ Harold Koh “Internalization through Socialization” (2004–2005) 54 Duke LJ 975 at 976–977.

²⁴¹ Ryan Goodman and Derek Jinks “How to Influence States: Socialization and International Human Rights Law” (2004–2005) 54 Duke LJ 621 at 624.

²⁴² Koh, above n 240, at 976.

²⁴³ Ibid.

²⁴⁴ At 977.

²⁴⁵ Ibid.

pressures influence a state to adopt a particular normative standard.²⁴⁶ This approach integrates an understanding of the complex interaction between process and ideas by which preferences form and change, and to this extent Koh describes it as “constructivist”.²⁴⁷

Koh considers that the first generation of scholarship asks the question, “Does international law matter?” while the second asks, “Given that international law matters, what are the social mechanisms that help make international law matter?”²⁴⁸ Koh also considers that this second generation develops the sociological model of state sovereignty, which understands the state as an institutionalised organisation within a global cultural order. According to this model, the state identifies with a global referent group and identifies accordingly with a particular community standard, to which it then adheres.²⁴⁹

B Acculturation

Acculturation is described as the process by which an actor adopts the norms of the surrounding culture, reflecting a commitment not to the norms themselves but to that social culture.²⁵⁰ Where coercion requires escalating the benefits of conformity through material rewards, or escalating the costs of nonconformity through material punishments, acculturation induces behavioural change through social pressure.²⁵¹ Where persuasion requires an active assessment and acceptance of the validity or legitimacy of norms, acculturation operates tacitly and requires only a perception that norms are important to the referent group.²⁵²

According to Goodman and Jinks, coercion fails to grasp the complexity of the social environment within which states operate, and persuasion fails to account for the various ways in which norms are adopted.²⁵³ They consider that first generation interdisciplinarity relies on unfounded assumptions about the role of law, the relationship between state preferences and international norms, and the processes by which external influence may be more or less effective.²⁵⁴ As such, acculturation

²⁴⁶ Goodman and Jinks, above n 241, at 638.

²⁴⁷ Koh, above n 240, at 977.

²⁴⁸ Ibid.

²⁴⁹ At 978.

²⁵⁰ Goodman and Jinks, above n 241, at 626.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ At 625.

²⁵⁴ Ibid.

seeks to integrate a better understanding of these factors, particularly the role of law in state preference formation.²⁵⁵

Upon examination, Goodman and Jinks conclude that states are influenced most significantly by what they describe as the international logic of political citizenship.²⁵⁶ They consider that the influence of internal factors is negligible, and understand the role of international human rights law accordingly.²⁵⁷ This role is not to engage with internal factors but create an external environment that (tacitly) induces compliance. Goodman and Jinks understand that this can result in “outward conformity...without private acceptance”, but consider this sufficient.²⁵⁸

Koh applauds this attempt to develop interdisciplinary compliance theory in the context of international human rights law. He acknowledges the lack of reciprocity and large enforcement deficit that characterises this area of law and complicates compliance.²⁵⁹ He considers, however, that acculturation is really an intermediate way between coercion and persuasion, “a form of incomplete internalisation that results from incomplete persuasion”.²⁶⁰ He further considers that these three approaches are not distinct alternatives, but related stages in an evolutionary process, “whereby persuasion often occurs in the shadow of coercion, and acculturation often occurs in the shadow of persuasion”.²⁶¹

Goodman and Jinks themselves describe acculturation as “incomplete internalisation”.²⁶² They even suggest that, ideally, regulation should integrate components of coercion, persuasion and acculturation acting together, to “reinforce each other through a dynamic relationship”.²⁶³ However, they identify structural limitations that prevent the full institutionalisation of coercion- and persuasion-based regimes in human rights law,²⁶⁴ and consider that, in light of limited resources and in the interests of efficacy, it is necessary to prioritise acculturation.²⁶⁵

²⁵⁵ Goodman and Jinks, above n 241, at 624.

²⁵⁶ At 650.

²⁵⁷ Ibid.

²⁵⁸ At 643.

²⁵⁹ Koh, above n 240, at 979.

²⁶⁰ At 980.

²⁶¹ At 981.

²⁶² Goodman and Jinks, above n 241, at 642.

²⁶³ At 627.

²⁶⁴ At 702.

²⁶⁵ At 689.

C *Third Generation of International Legal scholarship*

With reference to acculturation as an intermediate way, and the ideal of integrating all three approaches, a third generation of interdisciplinary international legal scholarship is proposed in this thesis. As above, the first generation is represented by the question, “Does international law matter?” and the second by the question, “Given that international law matters, what are the social mechanisms that help make it matter?”²⁶⁶ A third generation is required to consider the question: *Given that there are social mechanisms that help make international law matter, what are the processes that make them not only important but also effective, in a particular setting?*

Without overstating the distinction between these different generations, the first is largely concerned with interests (coercion) and ideas (persuasion), whereas the second introduces identity (acculturation) as another useful basis of influence. A third generation is required to elect interpersonal relationship (and relational encounter) as a basis for empowerment and capacity-building.

Of course, there is significant overlap between the different generations so defined, but this evolution of international legal scholarship is a movement from an understanding of the state as a unitary actor in an anarchic international environment (first generation), governed by individual (national) interests and ideas and relative state power, to an understanding of the state as a social actor in an institutional international environment (second generation), governed by collective (international) interests and ideas according to a political sense of identity. The evolution towards an understanding of the state as a responsive actor in a relational international environment, governed by specific (interpersonal) interests and ideas according to relationship and dialogue, implies a third generation.

The first generation is characterised by the dichotomy between coercion and persuasion, and the second by the trichotomy between coercion, persuasion and acculturation. A third generation should reveal, less a tetrachotomy than a true trichotomy, the essence of which evades the second generation. This true trichotomy exists between coercion, persuasion and what can be called restorative engagement.

Before turning to restorative justice in the following chapter, the theory of “principled engagement” as developed by Morten Pedersen and David Kinley, can also help inform an understanding of restorative engagement. These scholars advocate a deeply communicative and partnership-based approach, which assesses

²⁶⁶ Koh, above n 240, at 977.

needs, builds capacity and empowers local stakeholders.²⁶⁷ They suggest that this approach should combine the logic of tolerance with that of punishment, to treat causes rather than symptoms but avoid undermining the collaborative relationship necessary to realise improvement.²⁶⁸

This approach, informed by a third generation of interdisciplinary international legal scholarship, ultimately points to restorative justice. The principles and practices of restorative justice are such that shame can be used in a reintegrative way, and (interpersonal) socialisation in a more effective and empowering way (than acculturation), to give obligations a tangible, relational meaning. This model relies on the voluntary expression of commitment by actors, but creates an environment that can engender (rather than impose) a sense of accountability conducive to such expressions.

D Existing Theories

Existing scholarship transcends itself by implication of a third generation. This further iteration of interdisciplinarity invites a restorative approach, which can enhance the regulation of international human rights law. In this regard, it is helpful to consider Hathaway's six-fold taxonomy of rationalist and normative theories. Hathaway uses that taxonomy as a framework for evaluating the effectiveness of international human rights treaties. This evaluation suggests both the ineffectiveness of international human rights law on a practical level, and the inability of existing theories to explain that. A constructive, restorative approach must be able to explain and address such regulatory problems.

1 Rationalist theories

(a) Compliance as coincidence²⁶⁹

Hathaway's first rationalist theory suggests that treaties are drafted and ratified only if they benefit (powerful) states.²⁷⁰ It understands states as unitary actors that approach an international environment according to a rational choice, cost-benefit calculus.²⁷¹ The theory suggests that international human rights law is largely inconsequential, and that compliance occurs only if and to the extent that it is

²⁶⁷ Pedersen and Kinley, above n 76, at 8.

²⁶⁸ At 22.

²⁶⁹ Hathaway, above n 4, at 1944.

²⁷⁰ Ibid.

²⁷¹ At 1945.

consistent with the interests of actors, as dictated by a global order of anarchy and disparate state power.²⁷²

(b) Compliance as strategy²⁷³

The second rationalist theory takes international human rights institutions more seriously and understands states as unified actors whose behaviour is informed by conscious calibration of interests.²⁷⁴ Such behaviour may include sacrificing short-term gains or power maximisation for long-term benefits.²⁷⁵ International human rights institutions are understood as “rational, negotiated responses to the [collective] problems international actors face”.²⁷⁶ Nonetheless, as with the first theory, compliance is about interests and power rather than the legitimacy of the relevant law or underlying ideology.²⁷⁷

(c) Compliance as a by-product of domestic politics²⁷⁸

The third rationalist theory understands states as the sum of many different parts and considers that societal ideas, interests, and institutions have a direct and dominant influence on state behaviour.²⁷⁹ This influence is understood in terms of the formation of state preferences, which are seen to underpin the actions and strategic calculations of states.²⁸⁰ While legitimacy and ideology are relevant, compliance occurs only to the extent that it is caused by domestic politics. Hathaway considers that this theory more accurately explains the influence of human rights treaties with regard to preference for compliance.²⁸¹

Unlike the first two rationalist theories, the third contemplates compliance where the cost outweighs the benefit.²⁸² Still, however, Hathaway considers that “human rights treaty compliance may be more complicated than [this analysis] suggests”.²⁸³ That is particularly so in respect of newly established or unstable democracies, which may

²⁷² Hathaway, above n 4, at 1946.

²⁷³ Hathaway, above n 4, at 1947.

²⁷⁴ At 1948.

²⁷⁵ Ibid.

²⁷⁶ Barbara Koremenos, Charles Lipson and Duncan Snidal “The Rational Design of International Institutions” (2001) 55 *International Organization* 761 at 768.

²⁷⁷ Hathaway, above n 4, at 1950.

²⁷⁸ At 1952.

²⁷⁹ Douglass Cassel “Does International Human Rights Law Make a Difference International Human Rights Law in Practice” (2001) 2 *Chi J Intl L* 121 at 1952.

²⁸⁰ Andrew Moravcsik “Taking Preferences Seriously: A Liberal Theory of International Politics” (1997) 51 *International Organization* 513 at 513.

²⁸¹ Hathaway, above n 4, at 1954.

²⁸² At 1951.

²⁸³ At 1954.

try to secure democratic rule through the ratification of human rights treaties, even when compliance is not feasible.²⁸⁴ The Philippines, at least in its approach to signing international human rights law, could be described in these terms.

2 *Normative theories*

(a) Norm of compliance, fostered by persuasive discourse²⁸⁵

The first normative theory presented, as developed by Abram and Antonia Chayes, emphasises the importance and influence of ideas and the persuasive power of legitimate legal obligations.²⁸⁶ It considers that coercive (economic and military) sanctions are too costly and arbitrary to be legitimate or effective.²⁸⁷ Furthermore, it assumes that states have a propensity to comply and that noncompliance indicates a lack of information or capacity.²⁸⁸ It understands sovereignty as dependent on good standing within the context of a complex web of interactions and arrangements on a global scale,²⁸⁹ and considers this as key to compliance.²⁹⁰ As Hathaway observes, however, actors with good standing, sufficient information and capacity do not necessarily comply.²⁹¹

(b) Compliance occurring when rules are legitimate and just²⁹²

The second normative theory considers law as rhetoric, and suggests that its persuasiveness depends on consistency with already-accepted norms, and perceptions of fairness and transparency.²⁹³ It emphasises both substantive and procedural fairness, and attaches significance to factors of determinacy, coherence, adherence to the rules of process, and symbolic validation.²⁹⁴ Hathaway observes that coherence and determinacy depend upon impartiality of application, and that the international human rights regime may be less legitimate in practice than it appears in form. She suggests that, according to this theory, “the greatest strength of human rights regimes is arguably their symbolic validation”.²⁹⁵

²⁸⁴ Andrew Moravcsik “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe” (2000) 54 *International Organization* 217 at 228.

²⁸⁵ Hathaway, above n 4, at 1955.

²⁸⁶ *Ibid.*

²⁸⁷ At 1956.

²⁸⁸ *Ibid.*

²⁸⁹ Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (Harvard University Press, Cambridge, 1995) at 27.

²⁹⁰ Hathaway, above n 4, at 1957.

²⁹¹ At 1958.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ At 1959.

²⁹⁵ *Ibid.*

(c) Compliance occurring when norms are internalised²⁹⁶

The third normative theory, as developed by Koh, considers that patterns of activity lead to norms of conduct, which in turn generate self-reinforcing patterns of compliance.²⁹⁷ This iterative transnational legal process reconstitutes the interests and identities of states such that compliance can occur “even in the face of contrary self-interest”.²⁹⁸ The theory suggests that the effectiveness of human rights law depends upon internally felt norms, rather than externally imposed pressures or sanctions.²⁹⁹

3 *Existing theories and generational scholarship*

(a) First generation

The three versions of rationalist theory, and the first two versions of normative theory, represent the first generation of interdisciplinary international legal scholarship. The first two versions of rationalist theory rely primarily on techniques of coercion, while the third version of rationalism and the first two versions of normative theory rely primarily on techniques of persuasion.

(b) Second generation

To the extent that the third rationalist and first two normative theories consider which social mechanisms make international human rights law important, they could also be said to contribute to the second generation of scholarship. In particular, the first version of normative theory, as developed by Chayes and Chayes, contributes significantly to the (second generational) sociological model of state sovereignty. Ultimately, however, the first five theories of Hathaway’s taxonomy rely on first generational approaches to compliance.

The third version of normative theory, as developed by Koh, represents the second generation of scholarship. At the same time, this theory calls for a development of domestic channels of influence, by which “internalisation on the ground” can be achieved.³⁰⁰ To this end, he calls for the use all available tools, and the participation

²⁹⁶ Hathaway, above n 4, at 1960.

²⁹⁷ At 1961.

²⁹⁸ Ibid.

²⁹⁹ Harold Koh “How Is International Human Rights Law Enforced Addison C Harris Lecture” (1998–1999) 74 Ind LJ 1397 at 1407.

³⁰⁰ Koh, above n 240, at 981.

of all relevant stakeholders including intergovernmental, nongovernmental and private.³⁰¹ Thus, this theory seeks to realise the importance of international human rights law, not only for the global referent group, but also for the local.

(c) Third generation

Koh advocates an iterative process of interaction, interpretation and internalisation, which “leads to the reconstitution of the interests and identities of the participants”.³⁰² Of course, the emphasis on interests and identities is second generational, and the preference for (tacit) unilateral influence represents acculturation. However, the notion of an ongoing iterative process that facilitates interaction and interpretation points to something more substantive than acculturation, and provides for something more culturally specific and sustainable than imposition of foreign norms. In this sense, Koh comes close to a third generational approach.

The third rationalist theory also informs a third generational approach to the extent that it considers the societal ideas, interests, and institutions that influence state preferences. Where Goodman and Jinks seek to examine the role of law in forming and transforming these state preferences, their failure to consider these societal factors is fatal. The third generation must integrate these factors, with reference also to the personal and interpersonal dynamics involved. This third rationalist theory “is susceptible to the charge that although it can provide explanations for government actions after the fact, it has difficulty generating predictions *ex ante*”.³⁰³ However, such a limitation need not be detrimental, where the regulatory response is able to adapt according to the actor and its actions. In fact, the inability to predict actor behaviour is evidence itself of the need for another generation of legal scholarship, which accommodates responsiveness in this regard.

The first normative theory, as developed by Chayes and Chayes, is another useful point of reference in the evolution of interdisciplinary international legal scholarship. This theory recognises a complex web of arrangements, and refers to the multi-dimensional processes and various stakeholders involved in the regulation of international human rights law. It engages with the third generational question as to what makes social mechanisms not only important but also effective, and both identifies and addresses issues that inhibit this effectiveness. Of course, it ultimately fails to recognise that relationship and accountability are necessary components to

³⁰¹ Hathaway, above n 4, at 1961.

³⁰² At 1960.

³⁰³ At 1953.

sustainable self-regulation. The third generation of scholarship should seek to redress this.

The second normative theory's emphasis on fairness and legitimacy is also relevant. Such an approach, however, is likely to be less about objective symbolic validation and coherence, than doing justice to local wisdom and domestic processes. This theory recognises distinct individual (national) interests, rather than simply collective (international) interests, which is the problem with the second generation. That said, the theory fails to integrate these interests into a relational international context. As such, it ultimately fails to engage with the reality of international human rights law. More fundamentally, this theory fails to incorporate the needs and interests of the direct beneficiaries of international human rights law, into the concept of fairness. Third generational scholarship must expand this concept and referent group accordingly.

4 *Existing theories and generational scholarship in light of empirical evidence*

(a) First generation

Hathaway finds that all of the existing theories are inconsistent with empirical evidence, in some way or another. In respect of human rights practice subsequent to ratification of international instruments, her results identify improvement for some states, a negligible difference for some, and deterioration for others.³⁰⁴ The three rationalist theories and the first two normative theories fail to explain why human rights treaties effect an improvement in states where compliance is contrary to self-interest.³⁰⁵ The rationalist theories could contemplate deterioration in practice where, perhaps, long-term goals no longer coincide with compliance, or where strategy or social interests change such that compliance is no longer a priority. However, these theories cannot explain a negative correlation as such. Hathaway observes that,³⁰⁶

Existing theories of international legal compliance are unable to explain the empirical evidence regarding state behavior...This failure is due, at least in part, to a key oversight...Existing theories fail to see that countries comply (or fail to comply) with treaties not only because they are committed to or benefit from the treaties, but also because they benefit from what ratification says to others...the expressive effect of treaties.

³⁰⁴ Hathaway, above n 4, at 1989.

³⁰⁵ At 1961–1962.

³⁰⁶ Oona A Hathaway “Testing Conventional Wisdom” (2003) 14 EJIL 185 at 186.

(b) Second generation

The theory of acculturation contemplates compliance that is contrary to self-interest, but also fails to foresee deterioration as an effect.³⁰⁷ However, it inadvertently reveals the essence of the problem. Indeed, it is precisely the pressure to endorse human rights norms contained in treaties, coupled with the absence of effective monitoring, which encourages states to ratify treaties and ignore them in practice.³⁰⁸ Of course, this is successful in terms of securing outward (expressive) conformity, but it ultimately undermines the realisation of human rights.

In defence of acculturation, Goodman and Jinks assert that ratification of human rights treaties in and of itself plays a significant part in the process of building an international culture of compliance.³⁰⁹ In light of Hathaway's findings, they warn that measures to mitigate this negative correlation by raising the costs of ratification "may well disrupt the gradual process of constructing a global normative order".³¹⁰ However, Hathaway's point is that the international culture of human rights is itself superficial, or at least that its expressive and instrumental functions fail to cohere with each other. As such, this process of building a global normative order is unconstructive in terms of tangible regulatory improvement.

Therefore, while Goodman and Jinks may contribute to the clarification of the role of international human rights law in state preference *formulation* (expression), they fail to do so in respect of substantive (instrumental) state preference formation and transformation. Similarly, while they can be said to have examined the conditions under which external pressure *can influence* state behaviour, they have failed to examine or differentiate the varying degrees of such external influence.

Ultimately, Goodman and Jinks conclude that, "we still do not satisfactorily know the full effects of human rights treaties", and consider that, "[a]bsent such knowledge, the best assumption remains the conventional one: human rights treaties advance the cause they seek to promote, not the other way around".³¹¹ Therefore, notwithstanding their objective of challenging unexamined assumptions about foundational matters, they continue to rely on such assumptions themselves. The

³⁰⁷ Hathaway, above n 4, at 1989.

³⁰⁸ Hathaway, above n 306, at 195.

³⁰⁹ Goodman and Jinks, above n 3, at 182.

³¹⁰ Ibid.

³¹¹ At 183.

third generation of interdisciplinary international legal scholarship also continues to rely on assumptions, however it accommodates a relational framework within which the regulatory response can be adjusted when the reality rebuts such assumptions.

(c) Two-type socialisation

In terms of varying degrees of influence, the two-type socialisation theory developed by Jeffrey Checkel is a useful point of reference. Checkel describes type I socialisation as roleplaying and explains that actors in this category behave according to what is socially expected, “irrespective of whether they like the role or agree with it”.³¹² In contrast, type II socialisation refers to actors who accept social norms within a particular context as “the right thing to do”.³¹³ Thomas Risse and Kathryn Sikkink suggest, “Type 1 socialisation is sufficient for compliance”.³¹⁴ That may well be the case. Hathaway’s findings, however, suggest a third type of socialisation effected by acculturation. Type III socialisation, as implied, could be described in terms of appeasement, by which actors assent to social norms in words, with no intention to comply in practice. A third generational approach should be alive to these differences, avoid types I and III socialisation, and create an environment conducive to type II.

5 *Alternative theories*

(a) Ability and willingness

Risse and Sikkink consider that countries comply or fail to comply according to their ability and willingness. In terms of ability, Risse and Sikkink identify greater centralisation of rule implementation, and greater state capacity, as contributing to a higher probability of compliance.³¹⁵ In terms of willingness, they identify a higher level of material or social vulnerability and a higher level of democratisation as also contributing to a higher probability of compliance.³¹⁶ However, this calculus measures ability and willingness according to the two-type socialisation model above, by which an actor either accepts social norms as “the right thing to do”, or accepts social expectations as the relevant code of conduct. This calculus does not predict the third type of socialisation, by which actors will assent in words, either to

³¹² Jeffrey Checkel “International Institutions and Socialization in Europe: Introduction and Framework” (2005) 59 *International Organization* 801 at 804.

³¹³ *Ibid.*

³¹⁴ Alston and Goodman, above n 11, at 1246.

³¹⁵ At 1247.

³¹⁶ *Ibid.*

appease external regulators or to benefit from the expressive effect of treaties, without following through in practice.

(b) Regulatory ritualism

Charlesworth describes this third type of socialisation as regulatory ritualism, “understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses”.³¹⁷ She observes that, “in the field of human rights...ritualism is a more common response than an outright rejection of human rights standards and institutions”.³¹⁸ She also considers that, “[t]he international community has tacitly endorsed this ritualism, perhaps as the path of least resistance in a political system that is inhospitable to human rights claims”.³¹⁹ As Hathaway illustrates, this ritualism manifests in the form of international human rights treaty ratification without practical compliance.

Hathaway’s findings suggest that ritualism is particularly likely in countries with worse human rights practices. The cost of implementing treaties and human rights standards is obviously greater for such countries. Similarly, the cost of ratifying a treaty is also greater, to the extent that it is monitored and enforced. The cost in terms of reputational accountability, however, is likely to be less as “they may have less reputational capital to lose”.³²⁰ Conversely, the benefits of ratification are greater for such countries. Hathaway explains that this is particularly so when they face significant external pressure to adhere, and to express a commitment to human rights.³²¹

Thus, Hathaway suggests that as long as the expressive and instrumental roles of international human rights law fail to cohere with each other, regulatory ritualism will prevail.³²² In terms of achieving this coherence, she considers that regulators need to enhance the cost of noncompliance,³²³ while increasing support to ease the transitional cost of implementing change.³²⁴ This means ensuring that expressive benefits are more closely tied to a fulfillment of instrumental obligations, and that

³¹⁷ Charlesworth, above n 18, at 12.

³¹⁸ *Ibid.*

³¹⁹ At 13.

³²⁰ Hathaway, above n 4, at 2013.

³²¹ *Ibid.*

³²² At 2006.

³²³ At 2011.

³²⁴ At 2025.

such benefits themselves increase incentive and capacity to comply. Indeed, this requires a greater and more coherent (expressive and instrumental) commitment on the part of both the regulatee and the regulator. It also suggests that effective regulation of international human rights compliance must be both less tolerant and more understanding.

Avoiding tolerance and enhancing the cost of noncompliance is tricky business, however, and Charlesworth observes that increased criticism can cause an actor to abandon ritualism not for commitment but for active resistance.³²⁵ She illustrates this point with reference to Cambodia, but the Philippines is a similarly apt example. Thus, Charlesworth advocates “incremental, constantly monitored steps, rather than great leaps forward”.³²⁶ She hastens to add, however, “There is a need to guard against the process of continuous improvement itself becoming ritualised”.³²⁷ She refers again to Cambodia, which “remains in a type of permanent human rights transition”.³²⁸

Charlesworth’s concern about the ritualisation of continuous improvement and the entrenchment of transition as a permanent state is less about an expressive-instrumental split, and more about an approach to external regulation that is fundamentally disempowering. Charlesworth identifies the predominant perspective that “Cambodian culture is inhospitable to ideas of human rights”, and the corresponding view that “protection of human rights requires professional...international, assistance”.³²⁹ She argues, “The effect of this approach has been to prevent the development of local human rights expertise”.³³⁰

(c) Vernacularisation

Charlesworth identifies the need for human rights to be translated into the local context. This represents a process of “connecting the international standards to specific political and social structures and understanding human rights principles as cultural practices [rather] than a top-down regulatory regime”.³³¹ In this regard, Charlesworth refers to the concept of vernacularisation developed by Sally Merry.³³² Vernacularisation is best described by way of contrast. It is the antithesis to Koh’s

³²⁵ Charlesworth, above n 18, at 13.

³²⁶ At 15.

³²⁷ Ibid.

³²⁸ At 11.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ At 15.

³³² Sally Merry *Human Rights and Gender Violence* (University of Chicago Press, Chicago, 2006) at 228–229.

“transnational” theory of international human rights as “an aspect of the broader globalisation of culture and language, which, as much as particular ideas, has the potential to define and redefine the legitimate purposes of the nation-state”.³³³ Essentially, Koh advocates a top-down, unilateral regulatory approach that seeks to impose predetermined, absolute norms. To the extent that Hathaway advocates unilateral engagement, her theoretical approach can also be described as top-down.

The problem with a top-down approach, however well executed, is that it fails to create the constructive, generative environment necessary for sustainable self-regulation and internalised commitment to human rights. Even in the case of Type II socialisation, by which an actor believes in a particular obligation as “the right thing to do”, they may nonetheless fail to translate it into practice in a culturally appropriate way, without vernacularisation. This results in the sort of “permanent transition” that Charlesworth warns about. The problem of permanent transition is caused not only by a failure to develop local expertise, but also by the logic of top-down unilateral engagement more generally. Similarly, the problem of ritualism is created not only by an expressive-instrumental split, but also by failing to engage local stakeholders in an authentic and culturally sensitive way. As such, external regulation must seek to empower local actors and facilitate vernacularisation in terms of the development of an internally generated commitment to human rights.

E Postcolonial Legal scholarship

Postcolonial legal scholar, Ratna Kapur, suggests that the top-down approach to international human rights law relies on the assumption that “the world has emerged from a backward, more uncivilized era”, and that “progress has emanated from the heart of Europe”.³³⁴ She suggests that this “sustains the imperial messianic myth”,³³⁵ and justifies an international legal framework “structured by the colonial encounter and its distinction between the civilised and uncivilised”.³³⁶ According to Kapur, this results in three modes of unilateral regulatory engagement, all of which are disempowering. The first mode is *assimilation*, which seeks to permanently translate the “other” into a familiar medium.³³⁷ The second mode is *essentialisation*, which seeks to manage the “other” as an actor lacking the capacity to reason, or to rationalise the relevant norms in a principled way.³³⁸ The third mode is

³³³ Koh, above n 240, at 978.

³³⁴ Ratna Kapur “Human Rights in the 21st Century: Take a Walk on the Dark Side Special Issue - Gender, Sexuality and Reproduction” (2006) 28 Sydney L Rev 665 at 668.

³³⁵ At 685.

³³⁶ At 674.

³³⁷ At 676.

³³⁸ At 678.

incarceration, which seeks to cast the “other” outside of the relevant social or political context.³³⁹

Explicit unilateral engagement could be said to resemble assimilation, while acculturation could be said to resemble essentialisation. Both modes of regulation fail to engage the actor as reasonable or rational in its own right, and in so doing fail to support the actor towards sustainable self-regulation or commitment. It could also be said that a condemnatory, but conveniently formal and removed, external regulatory response resembles incarceration, and to this extent is disempowering. Kapur explains that “[t]hese are not rigid and absolute categories, but frequently overlap and leak into one another”.³⁴⁰

Kapur concludes that it is important to recognise that, “human rights are a site of power”, and that “[i]t is this power in the hands of those who use it that must be understood – not its ability nor lack of ability to transform peoples lives, nor its potential to bring about change”.³⁴¹ This suggests that compliance theory is asking the wrong question. Indeed, successful regulatory engagement or even vernacularisation can be counter-productive, if not destructive, where it perpetuates what Kapur calls the dark side of the international human rights regime.³⁴² As such, Kapur suggests that “a major shift in the location of the project, who is telling the story and how the story is told, can provide a different and critical trajectory from which to view human rights”.³⁴³ In fact, without this major shift, she suggests that, “human rights are being reduced to a body without a soul”.³⁴⁴

This postcolonial critique of the international human rights regime is an important reminder of the underlying power dynamics, which can serve to reinforce structural inequalities. This also informs an understanding of actor resistance, as a defence-mechanism in protection of sovereignty. Indeed, “it is as much the idea of the state, as the state itself, that warrants loyalty”.³⁴⁵ Goodman and Jinks suggest that the scope and content of sovereignty, as authority, are defined and legitimised by global cultural processes, such that resistance to external regulation on the basis of state

³³⁹ At 679.

³⁴⁰ Kapur, above n 334, at 675.

³⁴¹ At 683.

³⁴² At 684.

³⁴³ At 685.

³⁴⁴ At 683.

³⁴⁵ Margaret Keck and Kathryn Sikkink *Activists beyond Borders* (Cornell University Press, Cornell, 1998) at 215.

sovereignty is contradictory.³⁴⁶ However, where the issue of sovereignty is “deeply embedded in the issue of structural inequality”, this answer is unsatisfactory.³⁴⁷

More consistent with Kapur’s postcolonial analysis is the idea that “sovereignty inheres ultimately not in the state but in the citizenry”.³⁴⁸ Therefore, sovereignty itself implies accountability in respect of human rights compliance. As such, sovereignty cannot be said to cause or exacerbate the regulatory problem. Rather, international indifference in respect of underlying power dynamics is such that external regulation fails both to respect and give effect to state sovereignty at a local level. Hathaway herself alludes to this when she observes that international human rights treaties suffer from “indifferent enforcement” because of their “charitable character” and the fact that they are “designed to benefit people other than the ones whose gratification is the payment for passage”.³⁴⁹

Yet even Kapur describes international human rights law as a powerful vocabulary.³⁵⁰ Her concern is that, “good intentions, passions and progressive swords may have turned into boomerangs”.³⁵¹ Similarly, Charlesworth articulates that “[w]hile human rights norms can be manipulated to serve particular economic and political projects...they nevertheless retain moral and social value”.³⁵² Thus, although Kapur describes the international human rights regime as a body without a soul, it might be more accurately described as a soul, with significant expressive value, without a functional body. This illustrates the fact that the functional role of international human rights law is either easily dismissed or manipulated. Similarly, this image of a soul without a body could describe the charitable intentions of international human rights law, in the absence of any genuine connection to, or consideration for the corporeal, cultural reality within the context of which the former must be realised.

A third generational approach to regulatory engagement must locate the body of the human rights regime in the relevant cultural context. Therefore, it must avoid the disempowering dynamics perpetuated by the three modes of colonial engagement. Persuasion oriented towards unilateral imposition can be said to resemble assimilation, to the extent that it seeks to translate the other into a familiar medium,

³⁴⁶ Ryan Goodman and Derek Jinks “Toward an Institutional Theory of Sovereignty” (2002–2003) 55 *Stan L Rev* 1749 at 1787.

³⁴⁷ Keck and Sikkink, above n 345, at 215.

³⁴⁸ Richard Falk “Sovereignty and Human Dignity: The Search for Reconciliation” in Francis Deng and Terrence Lyons (ed) *African Reckoning: A Quest for Good Governance* (Brookings Institution Press, Washington, 1998) at 12.

³⁴⁹ Hathaway, above n 4, at 2007.

³⁵⁰ Kapur, above n 334, at 683.

³⁵¹ At 665.

³⁵² Charlesworth, above n 18, at 10.

by way of reconstituting its identity. Even if this is successful in achieving acceptance, it denies local wisdom and cultural competency, which is essential to the effective implementation of human rights practice. Coercion and punishment are two sides of the same coin, and the latter is often adopted as a means of inducing compliance. To the extent that this approach differentiates and condemns the actor, even if only as a temporary measure, it resembles incarceration. Finally, acculturation can be said to resemble the essentialisation of difference, to the extent that it refuses to engage in a sustained, principled way. At best, this approach solicits outward conformity, but it fails to engender authentic, substantive and sustainable commitment.

F Concluding Observations

Koh describes the second generation's emphasis on the international "referent group", according to which actors try to "keep up with a community standard in global affairs".³⁵³ A third generation is necessary to expand the referent group, so as to include the beneficiaries, whose needs and interests are the basis of the relevant community standard. Therefore, where the focus of first generational scholarship is compliance (coercion) and acceptance (persuasion), and that of second generational scholarship is conformity (acculturation), the focus of third generational scholarship must be commitment. Such commitment, if it is to be authentic and sustainable, must be internally generated rather than externally imposed.

Vernacularisation is a useful concept in this regard, but as Kapur advises, any international approach can perpetuate the dark side of human rights, by virtue of the power that external regulators wield. Therefore, any process by which such regulators seek to engender accountability and achieve compliance should be empowering and agency enhancing, and should allow for culturally specific expressions to develop. The process must also respect and give full effect to sovereignty inhering in the citizenry. Finally, as suggested by Hathaway, the third generation of international legal scholarship must align the expressive and instrumental roles of international human rights law. However, as the following chapter will illustrate, this alignment of expression and practice must be realised in a restorative, rather than unilateral way.

G Considerations Particular to the Prison Setting

³⁵³ Koh, above n 240, at 978.

The distance and disconnect between the expressive and instrumental realities of international human rights law is particularly evident in respect of prisoners' rights. The limitations of first and second generational scholarship are also emphasised, in that these schools of thought represent a referent group and regulatory context that excludes prisoners and their realities. In addition, Hathaway's six-fold taxonomy of rational and normative theories, fails to contemplate the regulatory challenges specific to the prison and the treatment of prisoners.

1 *Power and distance*

As such, it is helpful to consider Michel Foucault's theory about the purpose and function of the prison. Foucault describes the prison as an instrument and vector of power,³⁵⁴ but also as a means of establishing distance between the punishing power and the criminal.³⁵⁵ He suggests that while the prison fails in respect of reducing crime and reforming criminals, it is effective in terms of distinguishing criminals from the rest of society and differentiating between different types of criminal.³⁵⁶ In this regard, nominal penal reform can perpetuate the oppressive technology of power within the prison system, to the extent that it justifies and maintains its continued existence.³⁵⁷

2 *Solidarity*

Thomas Mathiesen suggests that the prison purges from society those whom we do not wish to see, and enables us to see ourselves as virtuous.³⁵⁸ He further suggests that the prison gives us a sense of relief that something is being done about crime and alleviates an anxiety that derives from a selective dependence on mass media images.³⁵⁹ Mathiesen claims that the penal ideology, which justifies the prison, requires non-recognition of the ongoing degrading treatment or punishment of prisoners.³⁶⁰ This suggests that something of the solution, in respect of effective regulation of the treatment of prisoners, concerns perception and visibility. In fact, Mathiesen identifies solidarity and compensation in this regard.³⁶¹

Mathiesen defines solidarity in terms of instrumental (task-oriented) and expressive (empathetic emotional) relationships, and compensation in terms of the mechanisms

³⁵⁴ Michel Foucault *Discipline and punish* (2nd ed, Vintage Books, New York, 1995) at 30.

³⁵⁵ Foucault, above n 354, at 57.

³⁵⁶ At 272.

³⁵⁷ At 271.

³⁵⁸ Thomas Mathiesen *Prison on Trial* (3rd ed, Waterside Press, Winchester, 2006) at 165.

³⁵⁹ At 168.

³⁶⁰ At 144.

³⁶¹ At 145.

that translate solidarity into practice.³⁶² Without overstating its significance, the identification of *instrumental* and *expressive* relationships as the two fundamental components of solidarity, which itself is presented as the solution to the abuse of prisoners, is no coincidence. Indeed, it suggests that solidarity is key to the necessary alignment of expression and practice in international human rights more generally, as identified by Hathaway.

It is also significant, in this regard, that Mathiesen considers, “Solidarity...implies that politically or socially weak members of the group...are included in the sense that tasks are to be performed for them and emotional support is to be given to them”.³⁶³ This is consistent with Hathaway’s observation that “[t]he UN...could play an important role in furthering treaty compliance and effectiveness if [it] not only better monitored treaties, but also provided countries with assistance in improving their human rights practices”.³⁶⁴ It is also consistent with the implication that indifference on the part of the regulator is partially to blame for the compliance problem at hand.³⁶⁵

3 *Visibility*

In terms of solidarity, Foucault’s historical analysis shows that visibility, even in the context of public execution, actually engenders solidarity.³⁶⁶ In fact, he claims that the sovereign’s decision to replace public execution with private punishment was motivated by a fear of common solidarity with the convicted.³⁶⁷ In any case, both Mathiesen and Foucault imply that visibility engenders solidarity, and that this provides the basis for improving the treatment of prisoners. Indeed, visibility can address the problems of non-recognition, ignorance and indifference. It can also empower and provide a platform for prisoners themselves, in the regulatory process.³⁶⁸ Most importantly, however, it engages the wider public whose opinions, according to Vivien Stern, mark out the actual boundaries of the prison.³⁶⁹

4 *Institutionalised abuse*

³⁶² Ibid.

³⁶³ At 146.

³⁶⁴ Hathaway, above n 4, at 2025.

³⁶⁵ At 2007.

³⁶⁶ Foucault, above n 354, at 61.

³⁶⁷ At 65.

³⁶⁸ Hathaway, above n 4, at 2007.

³⁶⁹ Vivien Stern *A Sin Against the Future: Imprisonment in the World* (Penguin Books, London, 1998) at 272.

Stern refers to sociologist Zygmunt Bauman who, in reference to the holocaust, identifies three preconditions for institutionalised abuse of human rights. The first is that the abuse is authorised from above, such that it is seen as legitimate.³⁷⁰ The second is that the abuse is part of the routine, in that it becomes regularised and normalised.³⁷¹ The third is that the victims of abuse are dehumanised and differentiated from those in positions of authority, such that the latter can say, “These people are not like us”.³⁷² On this basis, Stern concludes, “Prison is a very high-risk environment for ill-treatment”.³⁷³

Indeed, prison staff members belong to a hierarchy, in the context of which obedience is valued over initiative. Inevitably, by virtue of a lack of resources and possibilities, interactions are repeated and become quickly regularised. Finally, the nature of the prison is such that it differentiates prisoners from others, and heavily restricts prisoners’ ability to express themselves as individuals. Stern observes that, “prison is a prime place for dehumanisation”.³⁷⁴ Thus, any effective regulation of the treatment of prisoners must have particular regard for the power- and relationship-dynamics inherent in the prison system. Specifically, such regulation must seek to rebalance relationships skewed by either hierarchy or routine, and restore relationships undermined by a dehumanising separation and degrading essentialisation of prisoners.

H Testing the Existing Theories with the Philippines

1 Empirical evidence

In terms of torture in the Philippines, Hathaway’s findings suggest an improvement in human rights practice between 1985 and 1999. Significantly for the purposes of this thesis, however, Hathaway “did not code widespread poor prison conditions (e.g., overcrowding, inadequate food, lengthy detentions prior to trial) as torture unless the conditions of detention were so severe as to constitute mistreatment or abuse aimed at intimidating, penalising, or obtaining a confession from detainees”.³⁷⁵ Therefore, international human rights compliance in terms of the ordinary treatment of prisoners is largely beyond the scope of Hathaway’s research. These empirical results are also already very dated.

³⁷⁰ At 193.

³⁷¹ Ibid.

³⁷² Ibid.

³⁷³ At 194.

³⁷⁴ Stern, above n 369, at 194.

³⁷⁵ Hathaway, above n 4, at 1970.

Nonetheless, Hathaway's findings and analysis are relevant to an understanding of the international human rights regulatory context. It is important to note, however, that in recent years the conditions have deteriorated in Philippine prisons in terms of overcrowding, inadequate food and pre-trial delays.³⁷⁶ This deterioration may not be so extensive as to render negative the correlation between international treaty ratification and human rights practice, but it is significant. In any case, the negative correlation as a trend is fundamental to an understanding of international regulatory dysfunction, of which the situation in Philippine prisons is symptomatic.

2 *Hathaway's six-fold taxonomy*

(a) Rationalist theories

Each of Hathaway's six theories could be used to explain the persisting reality of ill-treatment of prisoners in the Philippines. According to the first rationalist theory, it could simply be said that prisoners' rights compliance does not occur because it does not coincide with the path dictated by national self-interest. According to the second, it could be said that the pursuit of long-term goals does not require short-term sacrifice by way of prisoners' rights compliance. According to the third, it could be said that societal ideas, interests, and institutions are such that state preferences exclude prisoners' rights compliance.

Of these three rationalist theories, the third is most informative. It is unlikely that any state, the Philippines included, is so uncalculating in its conduct as to relegate compliance with ratified international human rights instruments to mere coincidence, as the first theory suggests. It is also unlikely that any approach to compliance is the reserve of rational principal actors, removed from the consideration of domestic political dynamics, as the second theory suggests. Even if compliance is strategic, it is likely to be informed by domestic political and societal factors.

However, the third theory's reference to societal ideas, interests and institutions, identifies only the tip of the iceberg. At an extreme, "the theory can be reduced to the unenlightening truism that if a country acts in a particular way, it must be because

³⁷⁶ Ginny Stein "Philippine prisons overflowing with hungry inmates as Duterte's drug war intensifies" (September 2017) ABC News <www.abc.net.au>.

domestic politics made it do so”.³⁷⁷ This theory explains the ill-treatment of prisoners in terms of international human rights law failing to “affect state action by affecting domestic interests”, but it offers no insight as to how this might be realised successfully.³⁷⁸

(b) Normative theories

The normative theories are more instructive in this regard. Of course, noncompliance in the Philippines denies the first theory’s assertion that “states obey treaties largely because their prior agreement to do so has created a normative obligation they cannot ignore”.³⁷⁹ That said, this approach offers a possible explanation, in terms of “insufficient information or capacity on the part of the [Philippines]”.³⁸⁰ Similarly, the second normative theory offers an explanation, in terms of an actual or perceived lack of legitimacy and fairness on the part of the international human rights regime. The third normative theory would suggest that the process by which the Philippines has received international prisoners’ rights has failed to create an obligation to comply.

Of the normative theories, the third type best describes how noncompliance comes about, and how it can be remedied. The first two suggest that ambiguity in terms of a lack of information or determinacy is a major source of noncompliance.³⁸¹ While such ambiguities may exist in the Philippines in respect of prisoners’ rights, the extent of noncompliance is such that ambiguity alone cannot explain it. Other factors, such as a lack of capacity (as suggested by the first normative theory) and a lack of legitimacy or fairness (as suggested by the second) also play a role.

As Vivien Stern articulates, “People from poor countries...have even more reason to question the rules. Why should prisoners get enough to eat and be given medical care when those who have not broken the law often do not have enough to eat and cannot afford any medical care for themselves or their children?”³⁸² Again, however, the extent of noncompliance suggests that such factors alone cannot explain it, and ultimately a lack of internalised or internally generated commitment is the only explanation that comes close to understanding this reality.

3 *Ability and Willingness*

³⁷⁷ Hathaway, above n 4, at 1953–1954.

³⁷⁸ At 1954.

³⁷⁹ At 1956.

³⁸⁰ Ibid.

³⁸¹ Hathaway, above n 4, at 1959.

³⁸² Stern, above n 369, at 223.

In terms of Risse and Sikkink's theory of ability and willingness, the Philippines is predictably unlikely to comply. With two separate bureaus for prison management, "vague and complex laws" and high levels of corruption,³⁸³ projected actor ability suggests a low probability of compliance on this basis. With vulnerability in terms of high incidence of poverty,³⁸⁴ but an authoritarian (though democratically-elected) government,³⁸⁵ projected actor willingness suggests a medium probability of compliance on this basis. In reality under President Duterte, the Philippines has proven decidedly unwilling to comply, notwithstanding vulnerability. That can be explained, according to this calculus, in terms of the social security that Eastern political allies Russia and China have provided. This alternative political security may well offset material vulnerability.

I Conclusion

Hathaway's theory in terms of the incoherent *expressive* and *instrumental* roles of international human rights law, by which treaty ratification can serve to offset pressure for real changes in practice, offers the most plausible explanation for the ill-treatment of prisoners in the Philippines. Indeed, the global normative order emphasises the expressive role of the law, but fails to do justice to the instrumental. As such, for a state party like the Philippines, expressive compliance becomes a priority, and an achievable objective. Implementation of practical change depends upon a range of local factors not yet examined, but for the purposes of this chapter it should suffice to say that existing theories do not inform an approach conducive to practical compliance. This requires a third generational approach, which integrates the wisdom of restorative justice.

³⁸³ GAN Integrity "The Philippines Corruption Report" (October 2017) GAN Business Anti-Corruption Portal <<http://www.business-anti-corruption.com/>>.

³⁸⁴ Philippine Statistics Authority "Poverty Incidence among Filipinos" (18 March 2016) <www.psa.gov.ph>.

³⁸⁵ Agence France-Presse "Duterte offers authoritarianism as PH panacea" (29 March 2017) Inquirer.net <www.inquirer.net>.

Chapter V

Restorative Justice Principles and Practices

Restorative justice offers a theoretical framework for responding to human rights noncompliance in a principled, productive and interpersonal way. It seeks to address causes rather than symptoms, and to be both reparative and preventive in its approach. It can contribute the logic of personal relationships and personal accountability to the task of human rights regulation in an effective and empowering way. It can also contribute to the realignment of the expressive and instrumental roles of international human rights law more generally, by which the expression of rights and duties carries credibility, without relying on overly punitive sanctions.

This chapter will first examine the theory and development of traditional restorative justice and consider variations in restorative practice. It will examine Braithwaite's responsive regulatory model, which informs a "restorative and responsive regulation of human rights [compliance]".³⁸⁶ The chapter then considers the precedent for restorative justice specifically within the international human rights regime. It will pay attention to concerns about the perpetuation of colonialism and the difficult dynamic between international law and domestic culture. This analysis will ultimately inform the consideration of prisoners' rights in the Philippines in the following chapter.

A Theory of Restorative Justice

Restorative justice seeks to address crime and conflict in a relational way. It can be defined as "a theory of justice that emphasises repairing the harm caused or revealed by unjust behaviour".³⁸⁷ It relies on the voluntary participation of affected parties and the support of relevant stakeholders. Restorative justice prioritises the reparation of harm, but also the restoration of relationship and the prevention of future harm. Narrowly, restorative justice refers to victim-offender mediation within the context of criminal justice.³⁸⁸ More broadly it is used as "a theory of reparation and prevention" in response to noncompliance of any shape or form.³⁸⁹ Ultimately, it rests on "a belief that the preferred response to all conflict...is peacebuilding through dialogue and agreement of the parties".³⁹⁰ At every level, restorative justice is about engendering accountability through relational commitment. It is also about returning

³⁸⁶ Braithwaite, above n 6, at 201–202.

³⁸⁷ Daniel Van Ness *RJ City: Phase 1, Final Report* (Centre for Justice and Reconciliation, Prison Fellowship International, August 2010) at 9.

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

the responsibility for regulation of the community to the community itself, recognising that the community is made up of interpersonal relationships.³⁹¹

Restorative justice has been informed by many sources, including indigenous justice and Christian ethics, but it is this model's capacity for adapting to different settings, accommodating the needs of a particular situation, and integrating local wisdom that makes it so distinctive. Of course, like any relational model, it is susceptible to the dysfunctions of interpersonal power dynamics and has its limitations. That said, empirical research in the criminal context shows that restorative justice is more effective than traditional models in terms of key outputs.³⁹² It yields greater victim satisfaction, higher compliance with reparation agreements and lower rates of offender recidivism.³⁹³ Admittedly the evidence is limited by a self-selection bias, as those who voluntarily participate are more positively predisposed to such outcomes.³⁹⁴ But that is largely irrelevant in the context of this thesis, where the problem is less about participation than compliance.

States, like the Philippines, that have signed the relevant international human rights instruments, have already voluntarily selected these obligations. Hathaway's empirical evidence suggests, however, that this process of selection fails to engender accountability or ensure compliance. Existing regulatory models also fail to effect accountability or compliance, and the rights at the basis of the regime are persistently denied. This calls for a regulatory approach that prioritises repairing the harm over incentivising compliance.

B Development of Restorative Justice

Applying restorative justice in the criminal context represents a paradigm shift away from viewing crime as a violation of the law towards seeing it as a violation of individuals and relationships.³⁹⁵ It is therefore more process than outcomes driven (in contrast with commercial mediation, for example).³⁹⁶ The emphasis is on creating an encounter between parties to enable them to hear each other's perspective, to identify the underlying issues, and to reach an agreement on what can be done to redress

³⁹¹ Donna Hall "Restorative Justice: A Maori Perspective" in Jim Consedine and Helen Bowen (ed) *Restorative Justice* (Ploughshares Publications, Lyttelton, NZ, 1998) at 28.

³⁹² Jeff Latimer, Craig Dowden and Danielle Muise "The Effectiveness of Restorative Justice Practices: A Meta-Analysis" (2005) 85 *Prison J* 127 at 142.

³⁹³ *Ibid.*

³⁹⁴ Latimer, Dowden and Muise, above n 397, at 138–139.

³⁹⁵ Helen Bowen "Making Justice Work" in Jim Consedine and Helen Bowen (ed) *Restorative Justice* (Ploughshares Publications, Lyttelton, NZ, 1998) at 18.

³⁹⁶ At 19.

harm done and prevent future harm. This process is facilitated by a trained third party and ideally supported by family, friends or relevant community members.³⁹⁷

The relational encounter, ideally face-to-face, is a core component of restorative justice.³⁹⁸ It introduces a personal dimension by which fears can be dispelled, the incident can be demystified, and transformation can occur.³⁹⁹ The offender is confronted with the consequences of their actions, often in the form of an upset or angry victim. Where the retributive system often “reinforces denial and de-personalises the offending”, restorative justice engenders shame, which can give effect to personal accountability.⁴⁰⁰ Some commentators perceive this element of shaming as potentially oppressive.⁴⁰¹ Braithwaite insists, however, that the presence of a trained facilitator and support people ensures such shaming is reintegrative rather than disintegrative; it results in the restoration of the offender to the community rather than their exclusion.⁴⁰² Instead of festering into guilt, shame is thus transformed into a productive sense of personal accountability.

As noted, restorative justice draws on various sources of inspiration and authority, including indigenous conceptions of justice. Donna Hall explains that a sustainable approach to justice in New Zealand, for example, must empower Maori communities “to operate in ways that will fortify and affirm their members”.⁴⁰³ Maori must have a stake in the system for them to respect it, and must be given authority if their strengths are to be harnessed.⁴⁰⁴ Hall also suggests that restorative justice can help to interrupt the dynamic of disadvantage stemming from colonialism, by which Maori are overrepresented in negative crime statistics.⁴⁰⁵ This implies “going back to the future”, as Hall describes it, by empowering those who have inherited the customary principles and practices of the past to adapt them to the future.⁴⁰⁶ This approach resembles vernacularisation, and stands in stark contrast to the unilateral imposition of a foreign agenda. In this regard anthropologist Felix Keesing says:⁴⁰⁷

Studies of cultural processes would seem to indicate that only as change is self-motivated is it really effective. Groups and individuals cannot be compelled by law or by force to modify their customary ways of life and thought. Conversely,

³⁹⁷ Bowen, above n 395, at 18.

³⁹⁸ At 19.

³⁹⁹ Ibid.

⁴⁰⁰ At 20.

⁴⁰¹ Braithwaite, above n 6, at 140.

⁴⁰² At 140–141.

⁴⁰³ Hall, above n 391, at 28.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Felix Keesing “Applied Anthropology in Colonial Administration” in Ralph Linton (ed) *The Science of Man in the World Crisis* (Colombia University Press, New York, 1945) 373 at 394.

they cannot be held back when they want to change. At most, attempts to direct behaviour in these arbitrary ways will produce overt conformity to the demanded forms of conduct – when someone is checking up.

Keesing's commentary exposes again the inherent superficiality of acculturation, as examined in the previous chapter. At the same time, it invites a restorative process that respects and gives effect to cultural autonomy and community responsibility. It shifts the focus to encounter, engagement and collaboration rather than compliance or performance for the sake of measurable success. Experimental research on students suggests that overt pressure to conform or comply with rules is not only ineffective but also counterproductive, because it reduces feelings of self-determination and undermines motivation.⁴⁰⁸

Accordingly the facilitator of the restorative justice conference focuses on creating an environment and facilitating a process rather than imposing solutions or contriving outcomes. Advocates of this model admit that this will not necessarily produce resolution of the conflict or forgiveness on the part of the victim.⁴⁰⁹ But, regardless of the outcome, it gives the community a mechanism for holding its members accountable and for empowering victims to voice their own needs and interests.

While restorative justice practices are still in their infancy, the aspiration for an integrated, cross-cultural approach has much to offer international regulatory models, including in the context of human rights compliance generally and the treatment of prisoners specifically. Restorative justice is essentially about repairing harm by restoring relationship, which requires sensitivity to relational dynamics and power disparities, and the involvement of all relevant stakeholders.⁴¹⁰ Actors responsible for human rights abuses will resemble individuals responsible for serious offences. It is important to make their guilt explicit and address it in a reintegrative way. Prisoners, as a vulnerable group, should be included in an empowering but safe and supported way. This will be considered in greater depth below.

C Different Modes of Restorative Justice

1 Models of practice

Restorative justice has developed different models of practice, including family group conferencing, victim-offender mediation and circle processes, while emerging

⁴⁰⁸ Braithwaite, above n 6, at 106.

⁴⁰⁹ Bowen, above n 395, at 19.

⁴¹⁰ Ibid.

models include surrogate processes and video-letters.⁴¹¹ All models incorporate three basic principles: the repair of harm, the direct involvement of stakeholders, and accountability through community.⁴¹² The basic purpose of any restorative justice process is to facilitate restorative dialogue, which has three basic characteristics: 1) it is inclusive and participatory, and it is able to adjust to the needs and interests of relevant stakeholders; 2) it is grounded in restorative principles, including respect, responsibility, sensitivity and compassion; and 3) it facilitates the free and safe communication of experiences, perceptions, emotions and perspectives.⁴¹³

2 *Categories of restorative dialogue*

Barbara Raye and Ann Roberts identify six major categories of restorative dialogue. The first is *indirect dialogue*, by which the victim and offender communicate only through a third party, usually a facilitator.⁴¹⁴ The second, third and fourth categories represent *facilitated dialogue* with at least the victim and offender (second category), or with the addition of support parties (third category) and community members (fourth category).⁴¹⁵ The fifth category represents *guided dialogue*, where the facilitator is more active with questions, observations and summaries.⁴¹⁶ This model resembles the circle processes used by aboriginal communities in North America.⁴¹⁷ Finally, the sixth category represents *directed dialogue*, by which the facilitator not only guides the conversation but also makes the ultimate decision.⁴¹⁸ There are strengths and weaknesses to each category; they are also likely to overlap. Restorative justice prefers facilitated face-to-face encounters, but serious concerns in terms of safety may inform an indirect approach, while concerns in terms of power disparities may invite a guided or directed approach. Whatever the situation, a restorative mode of dialogue is always available.

3 *Restorative city*

Daniel Van Ness envisions a restorative city of different spheres in which restorative justice operates. He identifies the resolution sphere, wherein actors respond to different kinds of harm, investigate crimes, and facilitate resolution.⁴¹⁹ This incorporates both cooperative processes, by which parties work together in a

⁴¹¹ Barbara Raye and Ann Roberts “Restorative Processes” in Gerry Johnstone and Daniel W Van Ness (ed) *Handbook of Restorative Justice* (Willan Publishing, Cullompton, 2007) at 212.

⁴¹² At 217.

⁴¹³ At 218.

⁴¹⁴ At 218–219.

⁴¹⁵ At 219–221.

⁴¹⁶ At 222.

⁴¹⁷ Ibid.

⁴¹⁸ At 222–223.

⁴¹⁹ Van Ness, above n 387, at 15.

restorative way, and adjudicative processes, which serve as a safeguard for when the former are not effective or not feasible.⁴²⁰ Van Ness then identifies the community-building sphere, wherein actors assist victims in recovery and offenders in reintegration, and seek to build capacity for respectful interaction and dialogue.⁴²¹ Thirdly, he identifies the order sphere, wherein actors maintain order and safety by way of decision-making, norm setting, crisis response, and law enforcement.⁴²² Each of these spheres is interconnected and interdependent with the others, rather than representing a sharply distinctive space. This is a useful description of the different aspects of restorative justice. Alongside the distinction of categories in terms of facilitation, guidance and direction, this provides a reference point for escalation of regulatory measures within a restorative framework.

4 *Iterations of restorative justice applied*

Finally, Braithwaite presents three iterations of restorative justice in practice. The first is (traditional) restorative justice within the criminal context, as described above. The second is responsive regulation, which applies predominantly in the context of civil and commercial regulation. The third is peacemaking, which applies in an international political context. In terms of peacemaking, Braithwaite envisions a “restorative and responsive regulation of human rights”, but does not develop this beyond identifying bottom-up restorative diplomacy and re-integrative use of praise and shame as features.⁴²³ That brings us, then, to a consideration of the responsive regulatory model for regulating human rights compliance. This requires first an understanding of responsive regulation.

D *Responsive Regulation*

The responsive regulatory model assumes that approaches to regulation that “seek to identify important problems and fix them work better and more humanely than approaches oriented to imposing the right punishment.”⁴²⁴ In this sense, it extends the application of restorative justice principles and practices to a wider (civil) regulatory context. Indeed, there is such overlap between the traditional restorative justice model and the responsive regulatory model that Braithwaite uses the terms almost interchangeably across his works.⁴²⁵

⁴²⁰ Van Ness, above n 387, at 15.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ Braithwaite, above n 6, at 201–202.

⁴²⁴ At x.

⁴²⁵ In *Restorative Justice and Responsive Regulation*, above n 6, Braithwaite describes regulation of the nursing home industry as a restorative justice approach (at 17); in “The Essence of Responsive

Responsive regulation recognises that different regulatory measures are appropriate for different actors and behaviours, and that “both consistent punishment and consistent persuasion are foolish strategies”.⁴²⁶ The model is highly flexible. It allows for escalation to more coercive measures such as sanctions and shaming, but also de-escalation and recognition of positive behaviour with praise and rewards.⁴²⁷ The initial presumption is that an actor is virtuous and receptive to support, but if it fails to respond favourably it will be treated with increasingly restrictive measures. This model thus represents a regulatory shift from prescriptive regulation to a more flexible, dialogical approach.⁴²⁸

Where existing regulatory models are unable to accurately predict compliance in the context of international human rights, a more responsive and flexible approach is needed. Such an approach is compatible with existing modes of regulation, to the extent that they prioritise dialogue and discourage sanctions. However, where such a non-escalatory approach is unresponsive, it lacks the credibility necessary to be effective.

1 Regulatory pyramids

The responsive regulatory model was originally envisaged as a regulatory pyramid (see Figure 1.1), the base of which represents restorative, support-oriented measures, and the peak of which represents the more restrictive, sanction-oriented measures.⁴²⁹

Regulation Fasken Lecture”, below n 430, he describes this as a responsive regulatory approach (at 478).

⁴²⁶ Braithwaite, above n 6, at 29.

⁴²⁷ Ibid.

⁴²⁸ At 17.

⁴²⁹ At 32.

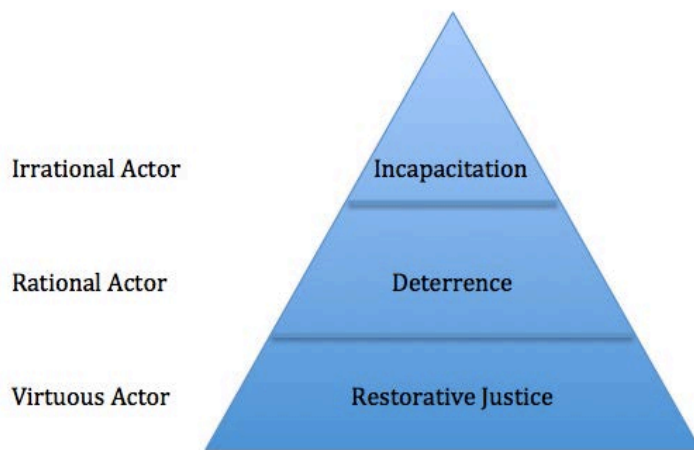


Figure 1.1

Braithwaite subsequently introduced a second pyramid (see Figure 1.2), in which support can continue to be offered alongside increasingly restrictive regulatory measures.⁴³⁰ This dual pyramidal model reflects the complicated nature of regulatory behaviour, by which a single regulated entity may include both virtuous individuals, who respond favourably to regulation and deserve support, and also rational or irrational individuals whose behaviour warrants sanctions or even incapacitation.

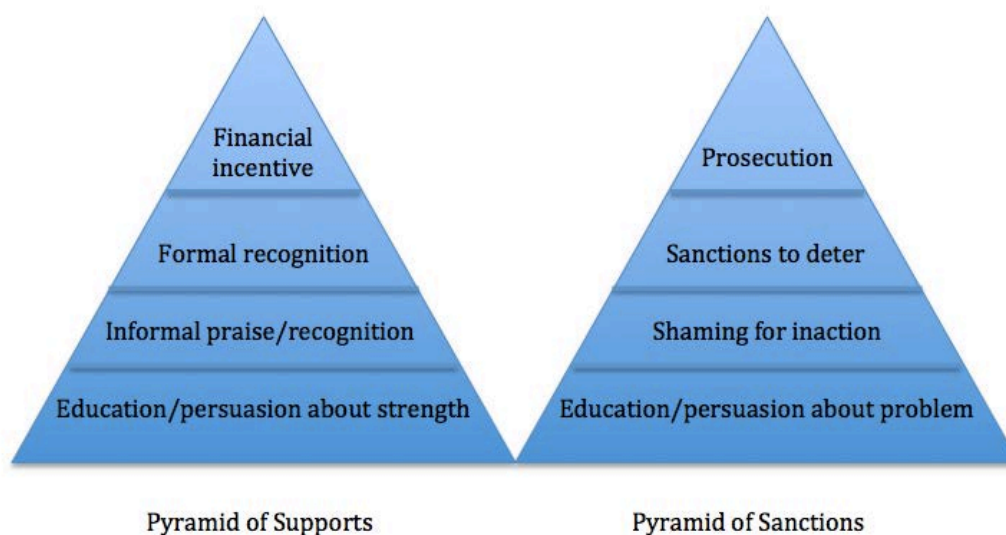


Figure 1.2

Whatever the nature of the noncompliance, responsive regulation always presumes that the underlying issues can be resolved in a collaborative and restorative way. This

⁴³⁰ John Braithwaite “The Essence of Responsive Regulation Fasken Lecture” (2011) 44 UBC L Rev 475 at 482.

presumption renders the responsive regulatory model both effective and efficient, particularly where noncompliance reflects a simple lack of information or competence.⁴³¹ Such issues can be quickly and easily addressed by providing the necessary support in the form of training or resources. Only if this approach fails to achieve compliance is the regulator then required to employ more cost- and time-intensive, interventionist measures. In the words of Braithwaite himself, “The pyramidal presumption...gives the cheaper, more respectful option a chance to work first. More costly punitive attempts at control are thus held in reserve for the minority of cases where [that] fails”.⁴³²

2 *Responsive regulation and restorative justice*

In his now dated text, *Restorative Justice and Responsive Regulation*, Braithwaite presents “responsive regulation as a framework for checking the abuses and limitations of restorative justice”.⁴³³ Accordingly he confines “restorative justice” approaches to the bottom of the pyramid. In more recent works, however, he applies restorative justice principles and practices across the entirety of the pyramid.⁴³⁴ He also refers to the responsive regulatory philosophy of the Australian Office of Transport Safety, which at the peak of its pyramid employs prosecution (as with Figure 1.1).⁴³⁵ Of course, prosecution is the setting for restorative justice in the criminal context. Thus, in the context of civil or commercial regulation, one can also envision the application of restorative justice principles and practices in respect of more intensive and interventionist measures.

The variation in restorative dialogue, from facilitation through guidance to direction (or arbitration), is a useful point of reference with respect to escalation. Even if restrictive measures are required, these can be implemented in the course of a directed dialogue between those that suffered harm, those that caused harm, and other relevant stakeholders, which continues to provide for community engagement, and the possibility of engendering commitment and accountability. Van Ness’s spheres, and the different actors and activities they represent, are also relevant. Escalated measures are implemented largely within the order sphere, often to ensure public safety. These measures may not be restorative themselves, but they exist within a restorative framework such that “when order is increasingly relied upon to

⁴³¹ Braithwaite, above n 430, at 484.

⁴³² Ibid.

⁴³³ Braithwaite, above n 6, at vii.

⁴³⁴ Braithwaite, above n 430, at 478.

⁴³⁵ At 483.

secure safety, renewed attention is given to strengthening the health of its communities”.⁴³⁶

This is not simply a matter of semantics. It is an overarching restorative approach that maintains relationship and dialogue between parties, and thus preserves and prioritises the opportunity for harm to be redressed and for parties that have caused harm to be reformed. Thus, an overarching restorative justice approach uses sanction-oriented measures only as a means of repairing harm, or removing the opportunity to cause harm, while still offering an opportunity to enhance capacity in a restorative way. This approach has an ability both to augment and to integrate regulatory measures, and so address the plurality of underlying problems in a restorative way. This is what makes the responsive regulatory approach so effective. Crime and noncompliance alike have multiple causes and create polycentric problems, and only a restorative regulatory approach can hope to identify and address these.⁴³⁷

In the context of international human rights law, this implies both a less tolerant and a more understanding, flexible approach. Escalation must not be avoided for the sake of diplomacy as if an end in itself. Rather, restorative dialogue and diplomacy must inform and influence the nature of escalation if and when it is necessary. Indeed, an increasingly restrictive and intensive regulatory approach can continue to provide for community engagement and constructive encounter between relevant stakeholders, within a framework of support and reintegrative shaming. Braithwaite describes this overarching approach in terms of a disparate range of action possibilities integrated into a mutually reinforcing package of regulatory responses.⁴³⁸ Neither prescriptive regulation nor a strictly judicial-legal process can offer this.

3 *Compliance and crime prevention theory*

Braithwaite suggests that a judicial-legal process can only determine yes-no problems, like “Are they guilty?” or more-less problems, like “How much should be paid?”⁴³⁹ Prescriptive regulation can only apply regulatory measures on the basis of such fixed, categorised assessment of problems.⁴⁴⁰ Furthermore, where this surface-level problem solving fails to prevent noncompliance, law enforcement agencies are given absolute discretion, and are thus made susceptible to capture and corruption.⁴⁴¹

⁴³⁶ Van Ness, above n 387, at 51.

⁴³⁷ Braithwaite, above n 6, at 90, 99.

⁴³⁸ At 99.

⁴³⁹ At 90.

⁴⁴⁰ At 17, 90.

⁴⁴¹ At 91.

This explains the importance of sustained community engagement, even at the final stages of escalated regulation, or even in the face of seemingly insurmountable noncompliance. Otherwise, such regulatory engagement may be reduced to “elite diplomacy” or apathy, if not corruption.⁴⁴² While Braithwaite presents such considerations within the context of “crime prevention theory”, he recognises that they also apply to civil regulation.⁴⁴³

4 *Reactance*

In terms of compliance, responsive regulation identifies “reactance” as a key consideration missing from alternative models.⁴⁴⁴ Reactance is the effect by which an actor is discouraged from developing an internal commitment by external factors that seek to influence behaviour and therefore diminish agency and self-determination.⁴⁴⁵ Where existing theories seek to influence regulatory behaviour in terms of deterrence and encouragement (the latter in the form of either persuasion or acculturation), responsive regulation understands that such a dynamic reduces self-determination and therefore undermines an actor’s motivation to commit to long-term compliance. Acculturation comes closer to an understanding of this, by refraining from directly challenging self-determination and seeking only to influence actors implicitly. The fact that *feelings* of self-determination are not reduced by acculturation, however, does not mean that self-determination *itself* is not reduced. Acculturation ultimately fails to foster long-term commitment to compliance, or internal motivation, in the absence of rewards or external influence.

Responsive regulation seeks to respect self-determination by presenting actors with an opportunity to repair harm and restore relationships, which appeals to self-determination. The basis for compliance is not rewards and punishment, nor cultural conformity, but the relational accountability inherent in such self-determination. Responsive regulation thereby harnesses the strength of soft sanctions. Not only does this mitigate the common lack of enforcement capacity, it is effective and efficient as well. It recognises that there are various actors of varying dispositions. There are “hard actors” who cannot even be deterred by maximum sanctions.⁴⁴⁶ There are “vulnerable actors” who may be deterred by heavy sanctions, but are largely unreliable in light of conflicting loyalties.⁴⁴⁷ Then there are “soft targets”, for whom

⁴⁴² Braithwaite, above n 6, at 187-188.

⁴⁴³ At 91.

⁴⁴⁴ At 106-107.

⁴⁴⁵ At 106.

⁴⁴⁶ At 109.

⁴⁴⁷ Ibid.

relationship and responsibility are important.⁴⁴⁸ They will respond favourably to “the mere exposure of the fact that they have failed to meet some responsibility they bear”.⁴⁴⁹ Responsive regulation prioritises engagement with this third category of actors, which will likely exist even within a flagrantly noncompliant entity. Responsive regulation also seeks to engage with other actors, but uses the momentum built with those in this third category to do so.⁴⁵⁰

Responsive regulation also prioritises a restorative mode of engagement. As Braithwaite articulates, “when we treat people as knaves, they are more likely to become knaves”.⁴⁵¹ A responsive regulatory experiment within the context of Australian nursing homes found that, “inspectors who treated nursing homes with trust, used praise when improvements were achieved, and had a philosophy of reintegrative shaming achieved higher compliance with the standards two years later than inspectors who did not”.⁴⁵²

5 *Communitarian engagement*

The Australian Trade Practices Commission provides one of the most striking examples of successful responsive regulation in addressing “one of the most widespread and serious consumer protection frauds ever to come before [it]”.⁴⁵³ Braithwaite himself advised against a restorative approach in this case, believing the conduct to be so serious that formal criminal charges were warranted. However, he observes:⁴⁵⁴

This process was so broad in its ramifications precisely because it was restorative... What would have happened if we had prosecuted this case criminally? At best the company would have been fined a fraction of what it actually paid out, and there would have been a handful of follow-up civil claims by victims. At worst, illiterate Aboriginal witnesses would have been humiliated and discredited by uptown lawyers, the case lost, and no further ones taken. The industry-wide extensiveness of a pattern of practices would never have been uncovered; that was only accomplished by the communitarian engagement of many locally knowledgeable actors.

Responsive regulation could help the international human rights regime to better realise the communitarian engagement of locally knowledgeable actors in that

⁴⁴⁸ At 110.

⁴⁴⁹ Braithwaite, above n 6, at 110.

⁴⁵⁰ Ibid.

⁴⁵¹ At 106.

⁴⁵² At 18.

⁴⁵³ At 22.

⁴⁵⁴ At 24.

context. It is not simply a matter of providing such actors with the opportunity to submit correspondence. It is a matter of including them in the regulatory process itself, by which they are recognised as credible participants who can contribute to an environment of community accountability. If an actor then fails to respond favourably, regulatory measures can be escalated with pressure from informed local stakeholders as well as regulators. It is precisely this restorative but also responsive regulatory environment that can uncover and addresses the extensive and systemic causes of persisting noncompliance.

E Criticisms of Responsive Regulation

There are various criticisms made of the responsive regulatory model. These criticisms cover the spectrum from those that claim the model is too permissive to those that claim it is too punitive. Some suggest that the model is too responsive, others that it is not responsive enough. There are elements of truth to each of these criticisms suggesting the need for a more integrated, holistic approach.

1 Too permissive

The criticism that the responsive regulatory model is *too permissive* relies on the assumption that actors are purely rational and will behave according to a cost-benefit analysis, such that any leniency in the name of restorative justice will be exploited.⁴⁵⁵ But, as already established in the previous chapter, such an understanding of regulatory behaviour fails to account for compliance that is contrary to an actor's interests. Furthermore, the option of escalation in the event of continued noncompliance means that, where an actor does behave rationally rather than virtuously, the regulator can respond accordingly. Rather than presuming that all actors behave in such a self-interested way, and thus encouraging them to do so, responsive regulation presumes them to be virtuous, appeals to their self-determination, and reserves the more costly regulatory measures for when they fail to respond in good faith.

2 Too punitive

The criticism that the responsive regulatory model is *too punitive*, or rather that it is unjustifiable to the extent that it is punitive at all, is less easily dismissed. This criticism questions the extent to which sanctions are compatible with an overarching restorative approach.⁴⁵⁶ There is a valid concern that “threat and coercion undermine

⁴⁵⁵ Braithwaite, above n 430, at 488.

⁴⁵⁶ Ibid.

goodwill and therefore the trust that makes cooperative compliance work”.⁴⁵⁷ Braithwaite argues, in response, that even traditional restorative justice in the criminal context relies on some level of coercion in the form of detection, arrest and the specter of a pending criminal trial.⁴⁵⁸ He also notes the disproportionately weighted nature of current Western justice systems by which regulators fail to engage in a credible way until noncompliance crosses a particular (arbitrary) threshold, and the response is then immediately (and unpredictably) escalated.⁴⁵⁹ He suggests that responsive regulation instead communicates a more appropriate impression of inexorability, by which steady escalation is understood to be inevitable in the face of noncompliance, though not overtly threatened.⁴⁶⁰

Braithwaite describes inexorability as “a specter of punishment...threatening in the background but never threatening in the foreground”.⁴⁶¹ This approach calls to mind Theodore Roosevelt’s ideology of “speak softly and carry a big stick”.⁴⁶² While Braithwaite never fully explores the tension between restorative justice and punishment, he argues that, “to the extent that we can absolutely guarantee a commitment to escalate if steps are not taken to prevent the recurrence of law-breaking, then escalation beyond the lower levels of the pyramid will rarely occur”.⁴⁶³

However, the regulator should not be emphasising its commitment to escalate, but rather its commitment to engage and resolve the issue collaboratively. Rather than presenting an “image of invincibility”,⁴⁶⁴ as Braithwaite suggests, the regulator should communicate its resolve to respect its relationship with the regulated actor. Perhaps this requires an image of interminability, but not invincibility. Such resolve may still include increasingly intensive and interventionist regulatory measures, or increasingly directive restorative dialogue. It may even include law enforcement alongside community building, but such resolution must be persistently restorative.

This still begs the question as to whether such escalated measures can be legitimately punitive at all within a restorative framework and, if so, what the difference is between “punishment” per se and “restorative punishment”. The former represents a purely punitive approach where the focus is on the infliction of punishment as a

⁴⁵⁷ Braithwaite, above n 6, at 34.

⁴⁵⁸ Braithwaite, above n 6, at 34.

⁴⁵⁹ At 35.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Richard Collin “Symbiosis versus Hegemony: New Directions in the Foreign Relations Historiography of Theodore Roosevelt and William Howard Taft” (1995) 19 *Diplomatic History* 473 at 477.

⁴⁶³ Braithwaite, above n 6, at 34.

⁴⁶⁴ Ibid.

regulatory end in itself. A restorative approach is where regulatory measures may have a punitive impact, but only in the interests of a larger restorative objective. For example, the maintenance of public safety may require increasingly restrictive measures, which inevitably have a punitive effect on the actor concerned.⁴⁶⁵ Similarly, restoration of relationship and reparation of harm may require financial compensation, which has something of a penalty effect.⁴⁶⁶ As long as these measures maintain relationship and the opportunity for reform, they are compatible with an overarching restorative approach.

3 *Too responsive*

The criticism that the responsive regulatory model is *too responsive* relates to its practical inconsistency in terms of law enforcement.⁴⁶⁷ Such inconsistency emerges across the regulation of different entities where regulatory measures vary depending on indeterminate factors of circumstance and subjective interpretations of behaviour.⁴⁶⁸ Inconsistency also emerges within the context of a single regulated entity, where certain issues or individuals attract sanctions and others support.⁴⁶⁹ It is hard to sustain the allegation that this communicates mixed messages, however, if it is increasingly responsive to regulatory behaviour. The “smart” regulatory model seeks to “take regulation beyond the punitive pyramid and to think laterally”, so as to achieve a more holistic approach.⁴⁷⁰ This involves non-state controls and quasi-regulators, as and when appropriate.⁴⁷¹ Such an approach is less conducive to consistency, but more so to credibility and effectiveness. Braithwaite has sought to follow suit in this regard, in terms of networking and engaging an increasing community of stakeholders and non-state actors.⁴⁷² In this way, the lack of formalism is mitigated by an increasingly integrated, participatory and representative regulatory approach.

The fact that the responsive regulatory model is seen as “less than law” and as lacking a “rule of regulation”⁴⁷³ does not necessarily mean that it is incoherent or unreliable. Braithwaite insists that the model is not designed to maximise consistency but was developed in response to the futility of overly prescribed regulatory

⁴⁶⁵ Van Ness, above n 387, at 51.

⁴⁶⁶ At 43.

⁴⁶⁷ Braithwaite, above n 6, at 29.

⁴⁶⁸ Julia Black “Critical Reflections on Regulation” (2002) 27 *Austl J Leg Phil* 1 at 32.

⁴⁶⁹ Braithwaite, above n 430, at 504.

⁴⁷⁰ Robert Baldwin and Julia Black “Really Responsive Regulation” (2008) 71 *Mod L Rev* 59 at 65.

⁴⁷¹ *Ibid.*

⁴⁷² John Braithwaite *Global Business Regulation* (Cambridge University Press, Cambridge, 2000) at 504.

⁴⁷³ Black, above n 468, at 32.

approaches.⁴⁷⁴ Nonetheless, there still needs to be consistency in terms of overarching values or principles.⁴⁷⁵ Otherwise, a responsive regulatory approach can undermine both the rule of law and broader constitutional values.⁴⁷⁶ The “risk-based” regulatory model pursues and prioritises regulation “on an assessment of the risks that a regulated person or firm poses to the regulator’s objectives”.⁴⁷⁷ In this way, the risk-based model constitutes “a systematic framework that allows regulators to relate their enforcement activities to the achievement of objectives”.⁴⁷⁸ A restorative regulatory model should similarly relate regulatory measures to explicitly restorative objectives.

4 *Not responsive enough*

The criticism that responsive regulation is *not responsive enough* is well substantiated. Julia Black and Robert Baldwin identify policy-based, practical and principled grounds for this criticism. In terms of policy, they argue that the risks associated with a presumption of virtue, a preference for dialogue and a policy of incremental escalation are potentially catastrophic.⁴⁷⁹ For example, such an approach could enable gross human rights violations to be carried out unopposed. Black and Baldwin also note that even if escalation does not undermine dialogue, it can prejudice the regulatory relationship and compromise voluntary participation on the part of the regulated actor, such that the notion of de-escalation is fraught, if not artificial.⁴⁸⁰ In terms of practical limitations, they suggest that there may be insufficient repeat interactions between regulatory parties to facilitate a pyramidal strategy of escalation.⁴⁸¹ As principled criticism, they refer to the lack of formalism by which inconsistency implies a lack of fairness in a particular regulatory situation.⁴⁸²

These criticisms, however, are not fatal to the success of the responsive regulatory model. An appropriately responsive regulator will have the ability to escalate promptly and appropriately in the face of catastrophe. There is no suggestion that this needs to involve multiple iterations of escalation. In terms of potential prejudice to the regulatory relationship, this is largely dealt with above. But it is worth reiterating that an overarching restorative approach to escalation will protect the relationship

⁴⁷⁴ Braithwaite, above n 6, at 29.

⁴⁷⁵ Black, above n 468, at 32.

⁴⁷⁶ Baldwin and Black, above n 470, at 64.

⁴⁷⁷ At 66.

⁴⁷⁸ Ibid.

⁴⁷⁹ At 62–63.

⁴⁸⁰ At 63.

⁴⁸¹ At 64.

⁴⁸² Ibid.

and ensure that regulatory measures are primarily restorative and reintegrative. Where such measures are punitive or restrictive, it will be made clear to the regulated actor that the primary intention is to repair harm or ensure public safety, for example. If dialogue is maintained, and this message communicated, there is no reason for the relationship or for de-escalation to be prejudiced. The practical concern about repeat interactions is valid, but this is something that can be addressed in practical terms, provided that time and resources are available. Finally, the repeated concern about a lack of formalism only further emphasises the need for an increasingly integrated and representative approach, which relates regulatory measures to restorative objectives.

More fundamentally, however, Black and Baldwin complain that responsive regulation represents a “tit for tat” approach that responds only to the behaviour of a regulated actor, without taking into account other relevant considerations.⁴⁸³ For regulation to be “really responsive”, it needs to respond to the actor’s own operating framework and attitudinal setting, to the broader institutional environment of the relevant regulatory regime, to the different logics of regulatory tools and strategies, to the regime’s own performance, and to any changes in each of these elements.⁴⁸⁴ In a similar vein, Jonathan Kolieb criticises Braithwaite’s model as overly state-centric and compliance-oriented, such that it fails to embrace a full conception of regulation.⁴⁸⁵ Kolieb argues that the responsive regulatory model fails to “capture the full extent of what regulation is, [or] its theoretical potential, even as conceived by the theory’s own authors”.⁴⁸⁶ On this basis he presents his own evolutionary regulatory diamond.

F The Regulatory Diamond

Kolieb considers regulation in terms of “maximising opportunities, not merely minimising risks, in the conduct of regulated actors”, and “the possibility of regulating for altruistic goals, for example to protect human rights or social solidarity”.⁴⁸⁷ He suggests that responsive regulation fails to give effect to this conception, despite Braithwaite’s claim that it concerns “that large subset of governance that is about steering the flow of events”.⁴⁸⁸ Kolieb attributes this limitation to its state-centric and compliance-oriented approach, which fails to engage with wider societal needs and desires, and therefore ultimately fails “to seek

⁴⁸³ Baldwin and Black, above n 470, at 59, 62.

⁴⁸⁴ At 61.

⁴⁸⁵ Jonathan Kolieb “When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond” (2015) 41 Monash U L Rev 136 at 142, 144–145.

⁴⁸⁶ At 145.

⁴⁸⁷ At 147.

⁴⁸⁸ At 145.

continuous improvement in the behaviour of those being regulated”.⁴⁸⁹ In this regard, he also considers that the dual pyramidal model discussed above serves only to further emphasise regulation as about compliance (in that complementary support measures seek singularly to ensure compliance).⁴⁹⁰

In addition, Kolieb suggests a failure to clarify and properly employ the roles of law and virtue in the regulatory context. He observes that the baseline of the pyramidal model is assumed to represent the relevant legal standards, but that the role of actual law enforcement is reserved for the apex of the pyramid.⁴⁹¹ He implies that this is both conceptually and practically incoherent.⁴⁹² Instead, he suggests that the (limited but legitimate) role of law should be clarified and centralised, such that it represents the (definitive) border between compliance and aspiration.⁴⁹³ He also objects that “law-abiding conduct...is erroneously described in responsive regulation theory as virtuous”,⁴⁹⁴ and advocates instead a “market for virtue”.⁴⁹⁵ Such a market refrains from inferring virtue on the basis of mere compliance with minimum standards, but understands that it is desirable to be seen as acting virtuously.⁴⁹⁶

Kolieb’s alternative model of a regulatory diamond (see Figure 2.1)⁴⁹⁷ incorporates “both minimum behavioural standards and idealised behavioural goals, and regulatory mechanisms that seek to attain both”.⁴⁹⁸ The minimum legal standards are represented by the midline. The mechanisms to enforce those standards inhabit the lower half of the diamond, and the mechanisms that incentivise higher aspirational goals inhabit the upper half of the diamond.⁴⁹⁹ The breadth of the midsection reflects the fact that this area is where the bulk of regulatory interaction occurs.⁵⁰⁰ The lower apex represents the most punitive measures and the upper apex the most rewarding measures.⁵⁰¹ The lower half of the diamond is modeled on Braithwaite’s sanctions pyramid (inverted), and the upper half is modeled on his supports pyramid.⁵⁰² According to Kolieb, this better conceptualises the “continuous improvement goal of regulation”.⁵⁰³

⁴⁸⁹ At 143.

⁴⁹⁰ At 148.

⁴⁹¹ Kolieb, above n 485, at 143.

⁴⁹² At 143, 144.

⁴⁹³ At 152.

⁴⁹⁴ At 145.

⁴⁹⁵ At 162.

⁴⁹⁶ At 159.

⁴⁹⁷ At 150.

⁴⁹⁸ At 151.

⁴⁹⁹ Ibid.

⁵⁰⁰ At 152.

⁵⁰¹ Ibid.

⁵⁰² At 153–154.

⁵⁰³ At 154.

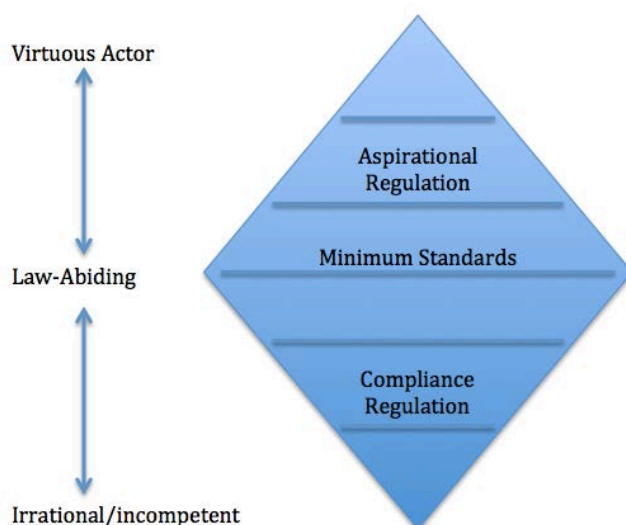


Figure 2.1

However, despite the orientation towards continuous improvement, the nature of the regulatory diamond is such that compliance and aspiration remain distinct and disconnected. The explicit inclusion of aspirational regulatory measures may well “pull actors up, above and beyond the requirements of the law, to embrace behavioural change that positively contributes to the problem or issue that is being regulated”.⁵⁰⁴ Yet, what is needed is a more inclusive, integrated and open space, rather than a more aspirational scale of escalation, or a “more optimistic tone”.⁵⁰⁵ While Kolieb cites innovative self-regulatory measures in the workplace as evidence of the positive effect of aspirational regulatory goals,⁵⁰⁶ such initiatives are possible even within the context of noncompliance, if individual actors are committed to resolving an issue. Where Braithwaite’s dual pyramidal model can at least offer such initiatives a measure of support, while simultaneously imposing sanctions for noncompliance, Kolieb’s strictly linear model of regulatory engagement and escalation cannot.

In terms of continuous improvement, however, more is needed than a combination of side-by-side regulatory measures. An environment conducive to continuous improvement must understand both the need to escalate to increasingly intensive and restrictive regulatory measures, and also that of variation between sanctions and

⁵⁰⁴ Kolieb, above n 485, at 154.

⁵⁰⁵ At 151.

⁵⁰⁶ At 155.

supports, shame and socialisation. Crucially, the regulator's ability to negotiate a regulatory problem and navigate that environment must not be limited to an incremental, one-dimensional mode of escalation. In this sense, it is not the *expressive* role of the law that needs to be brought out of the shadows, as Kolieb suggests.⁵⁰⁷ Rather, it is the *instrumental* role that needs to be realigned with the expressive. This requires not a clarification of the minimum legal standard, at either the baseline or midline of the model, but a non-linear mode of law enforcement by which the appropriate regulatory response can be applied at any time in conjunction with other complementary measures.⁵⁰⁸ A non-linear approach also enables engagement with the various contextual factors identified by Black and Baldwin.⁵⁰⁹ Such an approach is contrary to one that confines law enforcement to a particular stage in the pyramid or diamond, and reserves support for self-regulated initiatives to the stage at which actors have exceeded minimum standards.

In terms of virtue, Kolieb fails to understand the essence of the responsive regulatory model, which seeks to engender a commitment to self-regulation. Kolieb reduces virtue to an incentive for regulation within a rationalist theoretical framework, according to which a cost-benefit analysis “remains the most powerful motivator”, and virtue is “sometimes good for business”.⁵¹⁰ He cites two cases of self-regulatory initiative, which he describes as driven by rational business considerations, and concedes only as an afterthought that, “there may [also] have been an element of virtue motivating some industry executives”.⁵¹¹ This analysis ultimately undervalues virtue and commitment, and denies the reality of non-rational regulatory behaviour. This is particularly detrimental in the context of international human rights compliance, wherein a rational approach to regulation and a market for virtue solicit expressive commitments that are increasingly misaligned with instrumental obligations.

Nonetheless, Kolieb's diamond represents a further iteration of evolutionary regulatory design, which serves as an important point of reference in the context of international human rights compliance. It identifies the distinct components of compliance and aspiration, which should inform a complementary (rather than consecutive) restorative approach. His model also identifies the limited role of law, which should inform an approach to law enforcement that is both non-linear and non-singular. Furthermore, this model identifies and seeks to give effect to the expansive role of regulation, an analysis of which points in the direction of an

⁵⁰⁷ Kolieb, above n 485, at 152.

⁵⁰⁸ Van Ness, above n 387, at 15.

⁵⁰⁹ Baldwin and Black, above n 470, at 61.

⁵¹⁰ Kolieb, above n 485, at 159.

⁵¹¹ At 161.

increasingly restorative approach. In this regard, Kolieb also articulates the importance of a hybrid approach, which “highlights not simply the punitive measures [actors] risk for non-compliance, but also the rewards, incentives and other regulatory techniques they may be subject to, which may encourage them to go beyond compliance”.⁵¹² While Kolieb fails to integrate such measures and techniques, and fails to give effect to virtue as its own reward, he provides a pathway for doing both.

G Pyramids and Circles

Before turning to a further iteration of restorative regulatory design, it is necessary to return to more fundamental criticisms. Braithwaite himself acknowledges that the responsive regulatory model is an approach designed in developed countries, such that it is of limited suitability in a developing world.⁵¹³ As a solution, he proposes a responsive escalation of networked regulation, by which weak actors can become stronger through networking with other weak actors, and enrolling the power of strong protagonist actors (against strong antagonist actors).⁵¹⁴ Braithwaite considers this specifically in the context of corporate human rights compliance, and illustrates the model with a regulatory pyramid, supplemented by networking circles (see Figure 1.3).⁵¹⁵ This is a useful illustration of an increasingly inclusive and open regulatory space. The fact that the peak of the pyramid represents only increasingly intensive naming and shaming also offers another practical example of escalated measures that are compatible with restorative justice, provided that shaming is re-integrative.

⁵¹² Kolieb, above n 485, at 161.

⁵¹³ John Braithwaite “Responsive Regulation and Developing Economies” (2006) 34 World Development 884 at 884.

⁵¹⁴ At 892.

⁵¹⁵ Ibid.

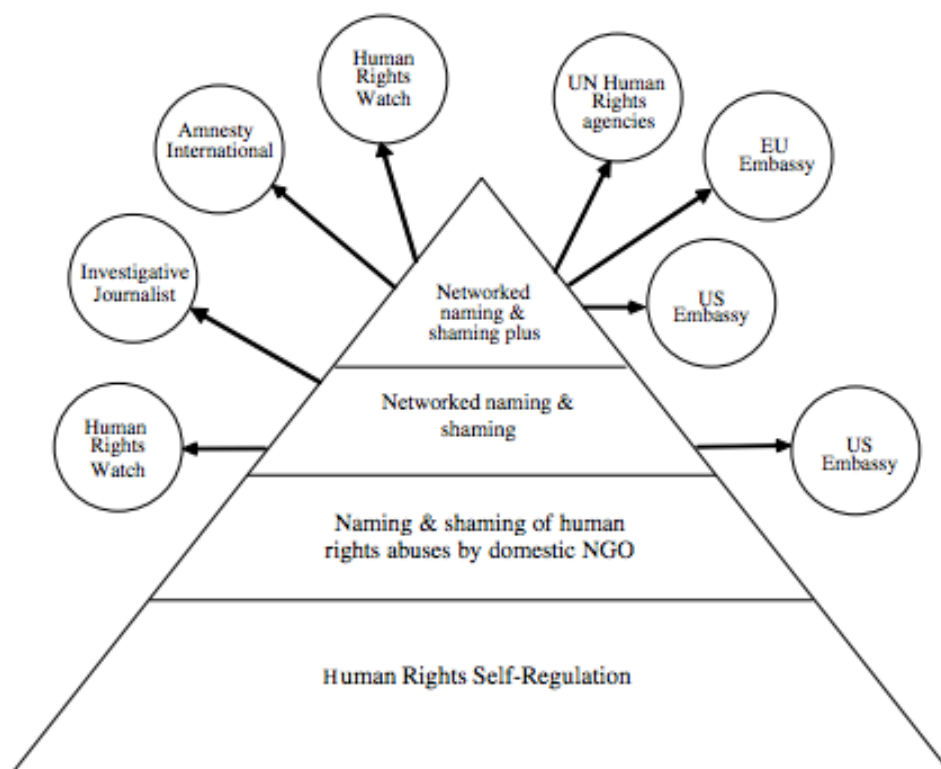


Figure 1.3

The fact that the model remains predominantly triangular, however, reflects the fact that it continues to rely predominantly on extant power structures and networked governance structures.⁵¹⁶ Hall describes “the hierarchical nature of Western law as a pyramid of power” and contrasts this with restorative justice as symbolised by the circle, which “shows equality in relationships and implies that discussion within the circle promotes the respect required for a decision by consensus”.⁵¹⁷ This highlights the need for a more thoroughly inclusive, democratic and equitable regulatory model. It also raises the question as to whether restorative regulation can be given effect in an unjust world,⁵¹⁸ which is particularly pressing in the context of international human rights law.

H The Regulatory Venn-Diagram

Instead of conceptualising regulation in terms of pyramids or diamonds, it is proposed in this thesis that restorative regulation can be more appropriately illustrated by a venn diagram (see Figures 3.1, 3.2, 3.3). The regulatory venn diagram seeks to integrate the lessons learnt from existing theories of compliance

⁵¹⁶ Braithwaite, above n 513, at 891–892.

⁵¹⁷ Hall, above n 391, at 32.

⁵¹⁸ UN Office on Drugs and Crime *Handbook on Restorative Justice Programmes* 2006 at [105].

with the evolving scholarship of interdisciplinary international law. It represents a further iteration of regulatory design, which is specific to the context of international human rights compliance. At the same time, this model may also inform a restorative regulatory approach outside of international human rights.

1 Third generation

Essentially, the diagram seeks to conceptualise a process by which the social mechanisms that make international human rights law *important* can also make it *effective* in a particular setting (third generation of interdisciplinary international law scholarship). This requires an alignment of the expressive and instrumental roles of international human rights law, which implies a non-linear and non-singular approach to law enforcement.⁵¹⁹ Responsive regulation begins to demonstrate what a non-linear, non-singular approach might look like. The criticisms of this model do not reflect the inadequacies of restorative justice, but the need to extend the application of restorative principles and practices across the entire regulatory model. Such an approach ensures that escalated regulatory measures are primarily restorative and that regulatory rewards encourage compliance, rather than creating a rational market for virtue. The regulatory venn diagram seeks to engender interpersonal commitment rather than self-interested regulatory behaviour on the basis of either fear or desire for incentives. It seeks to give effect to accountability, and to virtue as its own reward.

⁵¹⁹ Hathaway, above n 4, at 2006.

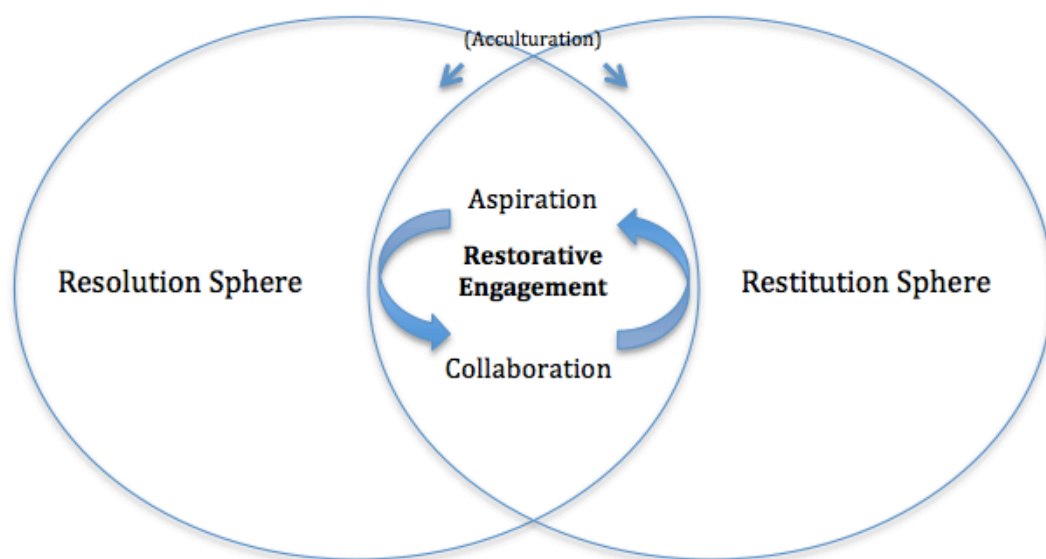


Figure 3.1

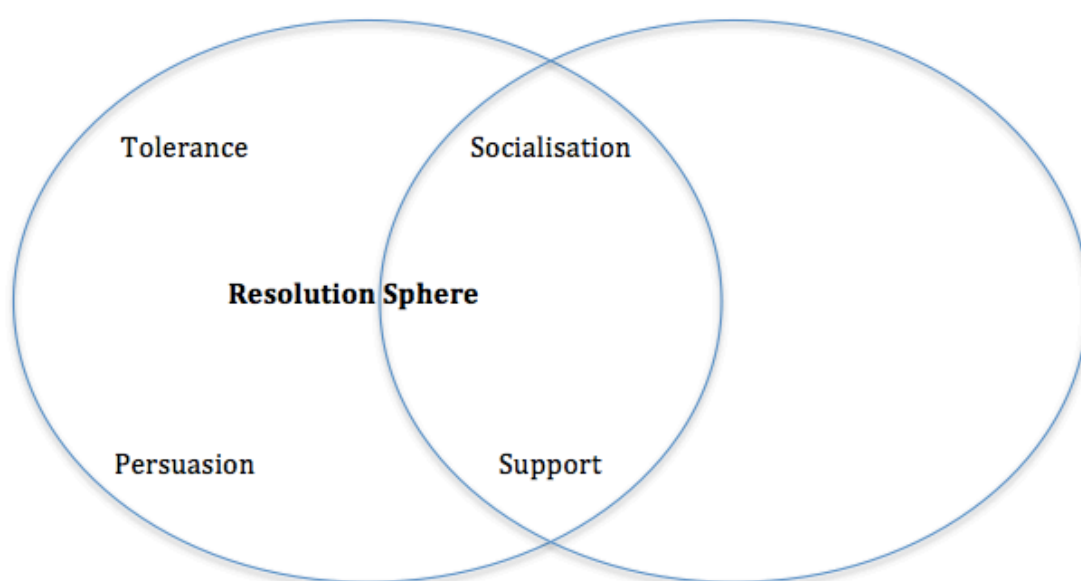


Figure 3.2

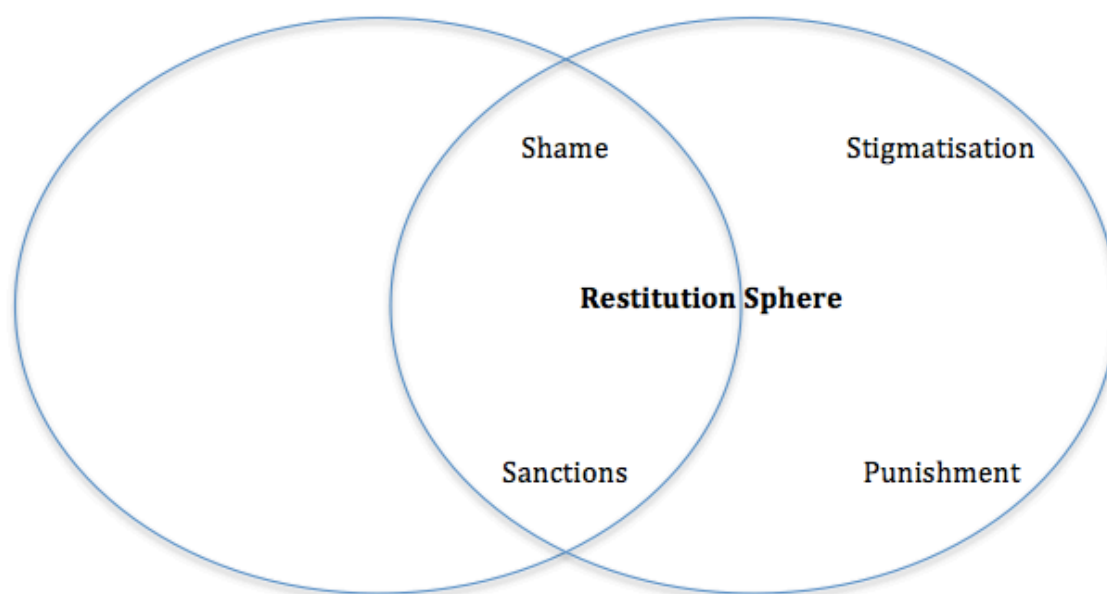


Figure 3.3

2 *Collaboration*

In this model, the midline representing an immutable legal standard has been removed, and with it the segregated sections of compliance regulation and aspirational regulation.⁵²⁰ Instead, the model incorporates a dynamic process, based not on compliance but collaboration, and oriented not towards a fixed aspirational space but one that can truly continuously improve. This illustrates a non-linear approach that seeks to realign the expressive and instrumental roles of international human rights law, as above. It implies an agreed minimum regulatory standard, reached through a participatory process, with due regard for both the relevant law and contextual factors.

3 *Solidarity*

This consensus-based approach gives effect to Mathiesen's instrumental (task-oriented) relationship.⁵²¹ It also generates the restorative dialogue that gives effect to Mathiesen's expressive (empathetic emotional) relationship.⁵²² Together, these contribute to a sense of solidarity and an environment conducive to the crucial realignment of expressive and instrumental dynamics. Mathiesen also identifies compensation and inclusion as necessary, in terms of translating solidarity into

⁵²⁰ Kolieb, above n 485, at 151.

⁵²¹ Mathiesen, above n 358, at 145.

⁵²² Ibid.

practice.⁵²³ Compensation points to the necessary implementation of sanction-oriented regulatory measures. Inclusion points to the necessary implementation of support-based regulatory measures. If these are to give effect to solidarity, they must be implemented in an empowering and restorative way, which engenders accountability but also enhances capacity for self-determination.

4 *Circular process*

The relationship between collaboration and aspiration is circular, which also contributes to the realignment of expressive and instrumental dynamics. Collaboration gives aspiration a practical grounding, whereas aspiration gives collaboration an impetus for outcome. Also, as a particular agreed aspirational standard is achieved, a new aspirational regulatory goal can be set and pursued through further collaboration. This process of continuous improvement is particularly appropriate in the context of human rights compliance, where legal standards are themselves often aspirational.⁵²⁴ It is important to distinguish collaboration from collusion with noncompliance. The regulator must not capitulate to regulatory resistance, but take into consideration the relevant contextual factors, and seek to build momentum and motivation for improvement.⁵²⁵ An approach that fails to consider such factors, which may render the relevant legal (or aspirational) standard unrealistic, can alienate the regulated actor and lead to disengagement.

5 *Integrated approach*

This model suggests a fully integrated, restorative approach. This approach is represented by the engagement space that occupies the overlap between the “resolution” and “restitution” spheres. These terms are used according to their classical definitions, by which resolution means release, and restitution means to return, re-establish or pay reparation.⁵²⁶ These spheres thus represent complementary component parts of a holistic, restorative regulatory approach. While there may be an inherent tension between these spheres, a truly restorative approach must balance such considerations and integrate them into solidarity-based, sustained engagement. Where Braithwaite’s dual pyramidal model suggests offering support-oriented measures alongside sanction-oriented measures,⁵²⁷ the regulatory venn diagram suggests measures that are both supportive and restrictive, or both intensive and

⁵²³ Mathiesen, above n 358, at 145.

⁵²⁴ Roberts, above n 1, at 769.

⁵²⁵ Baldwin and Black, above n 470, at 61.

⁵²⁶ Angus Stevenson and Maurice Waite (ed) *Concise Oxford English Dictionary* (12th ed, Oxford University Press, Oxford, 2011) at 1224, 1226.

⁵²⁷ Braithwaite, above n 430, at 482.

empowering. This reflects the logic of Van Ness's restorative city, by which order (in the context of non-linear law enforcement) is only one of three interconnected and interdependent restorative spheres.⁵²⁸ A commitment to resolving a regulatory issue need not imply a commitment to escalation and, equally, escalation need not imply punishment. As such, the regulatory venn diagram eschews the linear, one-dimensional conception of regulatory escalation.

6 *Resolution sphere*

Within the resolution sphere (Figure 3.2), the regulatory venn diagram incorporates socialisation and support. Socialisation does not imply acceptance or endorsement of actors, regardless of their regulatory practice, but facilitates encounters and exchanges that engender interpersonal commitment and accountability. Support is also offered, which is increasingly intensive as necessary, in the form of both expressive and instrumental measures and resources. Within this sphere, the non-restorative regulatory measures of tolerance and persuasion sit outside the engagement space. Indeed, it is important that socialisation does not equate to tolerance, which will not improve an actor's regulatory behaviour. Similarly, it is important that support does not resemble unilateral persuasion, which seeks to impose behavioural standards and norms in a way that undermines the autonomy necessary for long-term commitment.

Restorative regulatory measures should empower regulated actors and appeal to their self-determination, supporting them in the opportunity to exercise agency through repairing harm and restoring relationships. That is not to deny the persuasive power of normative standards, nor the reasonable limitations placed upon self-determination by such standards.⁵²⁹ However, for regulatory engagement to be equitable and sustainable, it should accommodate a more dialogical process of applying international human rights norms to a particular context.

7 *Restitution sphere*

Within the restitution sphere (Figure 3.3), the regulatory venn diagram incorporates shame and sanctions. Even if an actor is far from the relevant regulatory standard, escalated sanctions will be applied only to the extent necessary. This gives effect to the restorative justice presumption of virtue.⁵³⁰ It also makes provision for vulnerability, by which punishment of noncompliance may further destabilise the

⁵²⁸ Van Ness, above n 387, at 15.

⁵²⁹ Hathaway, above n 4, at 1955.

⁵³⁰ Braithwaite, above n 430, at 484.

regulatory environment.⁵³¹ At the same time, it uses sanctions to protect the interests and safety of the public and restrict the actor's capacity to cause harm. Within this sphere, the non-restorative measures of stigmatisation and punishment sit outside the regulatory space. To avoid stigmatisation, it uses shame in a reintegrative way, by which it attempts to emphasise the harm done and the responsibility to redress that harm.⁵³² It also ensures that any punitive effect of sanctions is in the interests of a restorative objective. These measures must also be balanced with those of support and socialisation.

8 *Acculturation*

This model thus transcends the first generational dichotomy of punishment and persuasion. It also transcends the second generational trichotomy of punishment, persuasion and acculturation. Acculturation can be visualised as the borderline around the restorative engagement space (as illustrated with a label in brackets and arrows, see Figure 3.1). Such an approach understands regulation and norm setting as characterised by a complex social environment, and seeks to avoid the coercive and overtly unilateral regulatory measures that fail to grasp this.⁵³³ However, as Koh articulates, acculturation itself is really an intermediate way between punishment and persuasion, a form of incomplete internalisation that results from incomplete persuasion (or limited coercion through punishment).⁵³⁴ Therefore, acculturation (as an intermediate way) only borders an integrated approach that seeks to synthesise the regulatory wisdom of both resolution- and restitution-oriented measures, within an overarching restorative framework. Restorative regulation encourages an internally generated commitment to human rights and, unlike acculturation, understands that this cannot be unilaterally imposed.

9 *Authority in terms of accountability*

An integrated restorative approach locates authority within the context of accountability, normalising restorative dialogue and humanising those who have suffered harm. It centralises dialogue around rule implementation (in an inclusive and community-oriented way) and seeks to enhance actor capacity, while mitigating vulnerability with support for compliance, and giving effect to the democratic ideals of engagement and participation.⁵³⁵ This increases an actor's likely ability and

⁵³¹ Hathaway, above n 4, at 1956.

⁵³² Braithwaite, above n 6, at 140.

⁵³³ Goodman and Jinks, above n 241, at 626.

⁵³⁴ Koh, above n 240, at 980.

⁵³⁵ Hall, above n 391, at 32.

willingness to conform.⁵³⁶ It also reduces the likelihood of institutionalised human rights abuse, according to Bauman's three preconditions of the Holocaust.⁵³⁷

10 *Restorative dialogue*

The restorative engagement space also incorporates the various modes of restorative dialogue, and Van Ness's interconnected spheres of restorative justice. This further contributes to an empowering, all-inclusive approach that achieves solidarity through participation and humanisation. It also provides for regulatory restrictions. To empower parties means to facilitate a process by which positive outcomes can be pursued. While acknowledging that outcomes are not the focus, and that positive outcomes may not always come to fruition, it is important to create an environment conducive to their realisation, an environment in which such outcomes are and appear to be within reach.⁵³⁸ This implies putting parameters in place.⁵³⁹ Of course, these parameters are largely self-imposed, in that regulators should refrain from employing measures outside of the restorative space. However, where parties to participatory processes seek to employ regulatory measures more punitive than those compatible with a restorative approach, the regulator should prevent this with more directed dialogue.

11 *Regulatory ritualism*

The venn model also avoids reductive ritualism. Such ritualism takes either the form where an actor embraces regulatory language precisely to avoid accountability, or that of ritualistic regulation.⁵⁴⁰ For example, ritualistic retribution imposes punishment as an end in itself, justified as a symbol of the idealised reconciliatory exchange.⁵⁴¹ Similarly, one can imagine regulatory measures that become removed from their objectives, and are justified as symbols of idealised diplomacy in the interests of a global regulatory order, for instance. This could explain the apparent indifference as to outcomes on the part of regulators themselves.⁵⁴² A restorative approach seeks to balance the needs and interests of the parties who have suffered harm, represented by the restitution sphere, and those of the parties who have caused harm, represented by the resolution sphere. This ensures an integrated approach by which regulatory measures align with their objectives and achieve restoration.

⁵³⁶ Alston and Goodman, above n 11, at 1247.

⁵³⁷ Stern, above n 369, at 193.

⁵³⁸ Bowen, above n 395, at 19.

⁵³⁹ Braithwaite, above n 6, at 13.

⁵⁴⁰ Charlesworth, above n 18, at 11–12.

⁵⁴¹ Kimberley Brownlee "Retributive, Restorative and Ritualistic Justice" (2010) 30 Oxf J Leg Stud 385 at 387.

⁵⁴² Hathaway, above n 4, at 2007.

I Restorative Justice and the International Human Rights Regime

1 Power disparities

A truly restorative regulatory approach must not only avoid ritualism and unilateralism, it must avoid also the perpetuation of power disparities. This infers an interruption of the dynamics of colonialism, which Hall believes restorative justice can achieve.⁵⁴³ On the other hand, power disparities are not only global, they exist also at a local level. It is all very well to empower local actors or to realise community engagement, but if this amplifies existing tensions it will not have a restorative effect. Regulatory restrictions will not necessarily prevent this. As the UN Office on Drugs and Crime notes:⁵⁴⁴

It cannot always be assumed that restorative justice practices will necessarily have a healing and transformative effect, irrespective of the situation in which a community finds itself. In some instances, existing social tensions, inequities and inequalities, power differentials and various forms of exclusion, discrimination or ostracism may possibly be exacerbated rather than alleviated by introducing a participatory justice programme.

2 Restorative values in international human rights law

The risk of enabling antagonist actors is inherent in a restorative approach.⁵⁴⁵ Braithwaite suggests that international human rights law can temper this approach, by giving “guidance on the values restorative justice ought to observe”.⁵⁴⁶ He considers that human rights law overlaps with restorative justice, and identifies restorative values such as “freedom, justice and peace” in the UDHR.⁵⁴⁷ He identifies “transformative aspirations” in the ICCPR and considers these essentially restorative.⁵⁴⁸ He acknowledges that such values and aspirations are often vague, but suggests, “Standards must be broad if we are to avert legalistic regulation...which is at odds with the philosophy of restorative justice”.⁵⁴⁹ He acknowledges, however, the unsatisfactory interpretation of human rights and considers that, “the challenge for restorative justice advocates is to take the tiny anti-punitive space...in global human

⁵⁴³ Hall, above n 391, at 28.

⁵⁴⁴ UN Office on Drugs and Crime, above n 518, at [57].

⁵⁴⁵ Braithwaite, above n 6, at 146.

⁵⁴⁶ At 13.

⁵⁴⁷ Ibid.

⁵⁴⁸ At 14.

⁵⁴⁹ At 15.

rights discourse and expand its meaning”.⁵⁵⁰ This implies a mutual relationship between restorative justice and international human rights law, but one with an increasing preference for the former.

3 *Empowerment*

Of course, the act of expanding this space and strengthening protections must itself be restorative, or else it defeats the purpose of the exercise. This need not be a catch-22; rather it relates what Hall is describing when she explains that the process for solving the problem must itself integrate an understanding of the nature of the problem, so as not to perpetuate it.⁵⁵¹ Ultimately, it requires a process that effects accountability by empowering local actors, and expands the anti-punitive space by engaging in an anti-punitive way. A previous vice-president of Fiji, Ratu Joni Madraiwiwi, speaks of the “resentment about the concept of human rights” in the Asia and Pacific region and concludes that, “it is not the downtrodden, the oppressed or the marginalised...[but] those of us who are part of established power structures that query the applicability of these rights”.⁵⁵² Thus, it is a matter of empowering specifically those local actors who have been denied a voice. For example, if community bodies are typically constituted of a privileged male class, it will be necessary to facilitate greater participation by women.⁵⁵³

4 *Robust fact-finding*

Averting legalistic regulation and empowering local actors, however, does not mean doing away with robust fact-finding. Restorative justice itself requires the accurate identification of the problem, and relies on the willingness of the actor who has caused harm to admit it and seek to redress it. Thus, reliable fact-finding is essential. However, even at this stage, restorative justice principles and practices can enhance the regulatory process.⁵⁵⁴ The existing fact-finding process facilitated by special rapporteurs is unnecessarily invasive and adversarial. This has often solicited a strongly defensive reaction from state parties.

Of course, the regulatory process should not be subject to the whims of an unreasonable state actor, but it may be possible to engender a more forthcoming response if the starting point is less intimidating. Braithwaite refers to Native

⁵⁵⁰ Braithwaite, above n 6, at 14.

⁵⁵¹ Hall, above n 391, at 32.

⁵⁵² Ratu Joni Madraiwiwi “Rights and Rites: A Discourse”, (presented to New Zealand Law Commission Custom and Human Rights Workshop, Nadi, May 2006).

⁵⁵³ UN Office on Drugs and Crime, above n 518, at [30].

⁵⁵⁴ Braithwaite, above n 6, at 25.

American healing circles, stories of which “challenged assumptions [he] strongly held...that the traditional Western criminal process was superior at fact-finding with justice than restorative processes”.⁵⁵⁵ He presents the example of Hollow Water, involving both an endemic of alcohol abuse and the systemic sexual abuse of children. Through a healing circle process, fifty-two adults out of a community of 600 formally admitted to criminal responsibility for sexually abusing children.

5 *Restorative justice applied in international human rights law*

In terms of the international human rights regime specifically, the UN Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, and the UN Handbook on Restorative Justice Programmes all advocate the expansive application of restorative justice. The Handbook on Restorative Justice articulates that what makes an approach restorative is “not so much a specific practice or process, but rather its adherence to a set of broad objectives that provide a common basis for the participation of parties in responding to a criminal incident and its consequences”.⁵⁵⁶

These objectives are identified as a) empowering victims, b) repairing damaged relationships, c) denouncing criminal behaviour and reaffirming community values, d) encouraging responsibility on the part of all parties and particularly offenders, e) identifying forward-looking outcomes, f) reducing recidivism by encouraging transformation and reintegration, and g) identifying underlying factors and informing authorities responsible for crime reduction strategy. Beyond the emphasis on criminal incidents, crime reduction and recidivism, these objectives reflect the restorative justice agenda at large.

6 *Harmonisation*

Returning to Hall’s commentary about restorative justice creating an opportunity to interrupt colonialism, and recalling Kapur’s concerns about the perpetuation of this colonial dynamic within the international human rights regime itself, it is perhaps useful to frame the restorative solution in terms of harmonisation. In a Law Commission Report on human rights and customary law in the Pacific, New Zealand legal scholars conclude that harmonisation of human rights values and customary

⁵⁵⁵ Braithwaite, above n 6, at 25.

⁵⁵⁶ UN Office on Drugs and Crime, above n 518, at [9].

values will resolve the tension between them and maintain the integrity of both.⁵⁵⁷ They consider that, “while the values underlying human rights may be worded differently than Pacific values, both express similar aspirations”.⁵⁵⁸

The commissioners of this report identify the value of respect for the dignity of all persons as that most emphasised in both international human rights law and Pacific customary law, but identify also other values relating to sharing, caring, reciprocity in human relations and community decision making.⁵⁵⁹ As Pacific values these are “all expressed in terms that denote a coherent, underlying philosophy”.⁵⁶⁰ This thesis does not presume that restorative justice is that underlying philosophy, but simply that restorative justice can facilitate a process by which that underlying philosophy can be given effect to. Where the commissioners suggest that, “human rights can lead to a social order in which customary ideals are more likely to be realised”,⁵⁶¹ this thesis proposes that restorative justice can act as the vehicle for that development.

7 *Universalism and relativism*

A restorative process of harmonisation involves cross-cultural dialogue, by which actors are able to move beyond polarisation and enhance the cultural legitimacy of international human rights norms in recognition of preexisting rights and relationships.⁵⁶² The typical tension between cultural integrity and international law reflects a deeper ideological tension between universalism and relativism.⁵⁶³ Universalism suggests that human rights norms are absolute and applicable to all societies unconditionally, while relativism suggests that they are a liberal Western construct not to be imposed. It is important to note that both schools of thought have helped dismantle overt colonialism.⁵⁶⁴ Universalism exposed double standards in respect of the treatment of colonised people, while relativism dispelled the myth of “inferior” or “primitive” cultures.⁵⁶⁵

However, relativism fails to see cultures as interdependent and interconnected, while universalism fails to see that even common fundamental values need to be interpreted within an active cultural context. A restorative justice approach is needed

⁵⁵⁷ Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at 12, 71.

⁵⁵⁸ Law Commission, above n 557, at 12.

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

⁵⁶² At 60, 69-70.

⁵⁶³ At 69-70

⁵⁶⁴ At 70.

⁵⁶⁵ *Ibid.*

to accommodate cultures as dynamic, “developing and changing through actions and struggles over meaning”.⁵⁶⁶ A relational encounter within the context of restorative justice can serve as a foundation for this process of dynamic cultural dialogue and development. This can also help identify the “values, norms and processes of change belonging to the relevant cultural tradition” that will ground international human rights in the local context and enhance their cultural legitimacy.⁵⁶⁷

8 *Responsive and receptive*

A restorative justice approach cannot itself prescribe a culturally specific expression of human rights. Indeed, “the lesson of [colonial] history is that [local] people should themselves be in control of change in their societies”.⁵⁶⁸ Therefore, a restorative approach must not only be responsive, but also receptive. This does not mean tolerating human rights abuses. Rather, it requires a sustained and sensitive *two-way* dialogue, which can empower local actors and engender a sense of both commitment and competency. It requires an amount of trust and goodwill.

The Bangkok Declaration stated that, “human rights...must be considered in the context of a dynamic and evolving process...bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”.⁵⁶⁹ Some commentators view this statement as “an attempt by some Asian states to weaken human rights in the name of protecting Asian values”.⁵⁷⁰ However, it is precisely this process-oriented consideration of human rights that can facilitate harmonisation, which will provide for strong and sustainable commitment to human rights in the long term.

Makau Mutua describes the process of developing universal human rights as “analogous to the proverbial description of the elephant by blind people: each, based on their sense of feeling, offers a differing account”.⁵⁷¹ This is not much different from Braithwaite’s description of human rights as a foundation for restorative justice, which facilitates a gradual, global social movement, as above. However, as Mutua articulates, it is important that “even after agreement, the doors must remain open for further inquiry, reformulation and revision”.⁵⁷²

⁵⁶⁶ At 70.

⁵⁶⁷ Law Commission, above n 557, at 71.

⁵⁶⁸ At 17.

⁵⁶⁹ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok, April 1993) at [8].

⁵⁷⁰ Law Commission, above n 557, at 72.

⁵⁷¹ Makau Mutua *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, Philadelphia, 2002) at 74.

⁵⁷² *Ibid.*

In consideration of the changing, interconnected nature of cultures, and the historically created, transnationally redefined nature of human rights, Merry concludes that it is impossible to draw sharp distinctions between culture and rights.⁵⁷³ Rather than drawing a distinction, a restorative approach must seek to build bridges. In this sense, restorative regulation must be both responsive and receptive with a view to harmonisation. This represents a two-way, cross-cultural dialogue that avoids ritualism and unilateralism, as well as a disempowering framework of “charity”.⁵⁷⁴

J Conclusion

A truly restorative regulatory approach is both responsive and receptive. The regulatory venn diagram realises this two-way ideal in the process of consensus-based standard setting, and also in the context of restorative dialogue, which is necessarily a two-way process. In addition, it is able to accommodate the needs and interests of the relevant stakeholders and empower all parties, according to an understanding of sovereignty in terms of citizenry and authority in terms of accountability. However, this process must be collaborative and dialogical at every stage, including the developmental. Otherwise, a definitive approach as informed by a conceptually fixed model can only solicit a response, without giving effect to local initiative.

Within an international human rights regulatory context, in respect of prisoners’ rights in particular, the inherently dysfunctional relationships and power dynamics at play are also relevant. These dynamics are specific to each cultural context, such that broad-sweeping generalisations cannot be made. With respect to the Philippines, a restorative approach should seek to identify preexisting restorative principles and practices, and prevailing cultural values, and harmonise these with the international human rights regulatory framework, in a way that gives effect to prisoners’ rights. The regulatory venn diagram suggests that this should integrate resolution- and restitution-oriented measures, which should harmonise the needs and interests of all parties, and pursue continuous improvement on the basis of agreed standards, and non-linear law enforcement. The next chapter will consider these hypotheses in terms of the concrete realities of the Philippines, by means of communitarian engagement.

⁵⁷³ Law Commission, above n 557, at 71.

⁵⁷⁴ ICRC *Even Wars Have Limits: Connecting IHL with the Pacific Way* (draft paper, June 2005).

Chapter VI

Case Study Substantive: The Philippines

The persisting ill-treatment of prisoners in the Philippines does not necessarily represent Hathaway's "usual case" of "little monitoring or enforcement, combined with strong pressure to comply with norms".⁵⁷⁵ Indeed, the history of international regulatory engagement with the Philippines demonstrates a repeated, if irregular, monitoring of human rights practice. The nature of such engagement even demonstrates a preference for "approaches to regulation that seek to identify important problems and fix them" rather than "approaches oriented to imposing the right punishment".⁵⁷⁶ Also, in light of the risks of colonialism inherent in foreign interference, there is a limit to what regulatory bodies can do, which prevents them from effecting or enforcing the relevant human rights practices themselves.⁵⁷⁷

On the other hand, a failure to facilitate effective regulatory engagement can perpetuate impunity and collude with local antagonists. This is particularly so in the context of the prison, which represents an already problematic power dynamic. Thus, there is a need to not only monitor state actors, but ensure that regulatory measures are aligned with human rights objectives and that actors are engaged in an accountable way. Indeed, this calls for an approach that is both less tolerant of human rights abuse and more understanding of contextual factors, and gives effect to sovereignty as inhering in the citizenry. This requires the restorative communitarian engagement envisaged by Braithwaite, which is informed by the sort of international logic of personal relationship suggested by this thesis.⁵⁷⁸

Ultimately, such an approach implies "a major shift in the location of the project, who is telling the story and how the story is told", which will in turn provide "a different and critical trajectory from which to view human rights".⁵⁷⁹ This requires further consideration of the local cultural and contextual factors specific to human rights compliance and the treatment of prisoners in the Philippines. As such, the following discussion incorporates a component of localised fieldwork and research in Davao and Manila and draws on the opinions, insights and interests of relevant local actors and stakeholders. This includes interviews with prisoners, whose voices are crucial to the credibility of an inclusive restorative approach.

⁵⁷⁵ Hathaway, above n 4, at 2002.

⁵⁷⁶ Braithwaite, above n 6, at x.

⁵⁷⁷ Law Commission, above n 557, at 17.

⁵⁷⁸ Braithwaite, above n 6, at 24.

⁵⁷⁹ Kapur, above n 334, at 685.

A *Opinions and Insights of Local Stakeholders*

1 *Commission on Human Rights*⁵⁸⁰

Chito Gascon, Chair of the Commission on Human Rights, described the campaign against illegal drugs as one informed by a “sovereign approach”, which seeks to assert political autonomy and calibrate human rights practices in terms of its state priorities. This does not necessarily imply rationalism, but reflects the fact that commitments include local interests and loyalties to eastern allies. Such an approach resists criticism, but is less opposed to investment and aid for the sake of improving human rights. The Philippines has long demonstrated a desire to comply with human rights obligations, at least rhetorically. This is largely still the case, notwithstanding the increasing reference to excuses for noncompliance. Ultimately, however, Gascon concluded that the conversation around human rights and prisoners’ rights is a national one, and that international regulation has little influence.

Gascon suggested that the point of entry for international bodies is the increasing need for rehabilitation facilities. Such facilities would alleviate the pressure on overcrowded prisons and also begin to address drug abuse in a constructive way. Aid and investment for this purpose could contribute to an improvement in human rights practices and an improvement in the treatment of prisoners, without threatening the state’s sovereignty or political autonomy. The state’s more favourable response to the European Union’s aid-oriented engagement, compared with its oppositional response to the criticism of the United States, apparently illustrates this. Furthermore, the European Union’s Generalised Scheme of Preferences (GSP+) adopted as criteria for considering funding projects, ensures that such an aid-oriented approach still gives effect to accountability in respect of human rights practices.

2 *Amnesty International*⁵⁸¹

Wilnor Papa, Human Rights Officer at Amnesty International, described a deterioration in the levels of cooperation and communication between government agencies and civil society organisations. Before the campaign against illegal drugs, monthly meetings were held between the Department of Justice, the Department of Interior and Local Government, the Police, and non-governmental organisations. At present, such cooperation exists only in the limited context of technical working groups in Congress. Human rights advocacy and activism has come to be seen as a

⁵⁸⁰ Interview with Chito Gascon, Chair of Commission on Human Rights Philippines (Daniel Kleinsman, 12 October 2017).

⁵⁸¹ Interview with Wilnor Papa, Human Rights Officer at Amnesty International (Daniel Kleinsman, 3 October 2017).

barrier to good governance and development. This state of affairs calls not for sanctions but for measures to help state actors realise that noncompliance with human rights obligations adversely affects the economy, development and good governance.

3 *Karapatan*⁵⁸²

In a 2016 self-published report, Karapatan identified and condemned the human rights abuses of Duterte, but at the same time supported the latter in “denouncing the US and EU for human rights hypocrisy and for their hypocritical use of human rights as a tool for destabilising regimes that assert independence from imperialist dictates”.⁵⁸³ While calling on the administration to cease publicly condoning extrajudicial killings, the organisation also called on the public to “remain vigilant against moves by foreign governments to unseat Duterte because of his independent stance”.⁵⁸⁴ Attorney Sol Taule of Karapatan explained to me that as the situation in respect of human rights has deteriorated, this organisation has become far more critical of the Duterte administration. However, it is important to note the emphasis on sovereignty and persisting skepticism in respect of foreign interference. This is consistent with the insights of the Commission on Human Rights in terms of sovereignty.

4 *Centre for Trade Union and Human Rights*⁵⁸⁵

The Centre for Trade Union and Human Rights (CTUHR), in a self-published report, paint a bleak picture of the prevailing culture of impunity and an increasing climate of fear and suspicion. They quote a Social Weather Stations’ survey that found 73 percent of Filipinos are afraid of falling victim to extrajudicial killings even though they have nothing to do with illegal drugs.⁵⁸⁶ Daisy Arago also referred to the story of a barangay (village) captain who failed to furnish authorities with a list of “drug pushers and addicts” in his area. He was consequently listed as a “drug protector” and shot dead. People fear for their lives without being listed as “drug protectors”, and are frightened out of advocating prisoners’ rights, even if they are so inclined.

⁵⁸² Interview with Sol Taule, Attorney at Karapatan (Daniel Kleinsman, 5 October 2017).

⁵⁸³ Karapatan *2016 Karapatan Year-End Report on the Human Rights Situation in the Philippines* (Karapatan, Quezon City, 2016) at 64.

⁵⁸⁴ At 64-65.

⁵⁸⁵ Interview with Daisy Arago, Executive Director of Center for Trade Union and Human Rights (Daniel Kleinsman, 4 October 2017).

⁵⁸⁶ Center for Trade Union and Human Rights *A Violent (Dis)order Deepening Poverty* (Center for Trade Union and Human Rights, Quezon City, 2017) at 7.

However, Arago identified also a punitive culture, by which people assume those in prison deserve the deprivation of their liberty and whatever other treatment they receive. They assume that those in prison are not worthy of “human rights”. This culture is intensified by widespread poverty and poor allocation of government resources. People feel there is little enough for them let alone “criminals”. Yet the campaign against crime and illegal drugs was itself described as “a war on the poor”, in which authorities target low level drug users and dealers but are lenient on those who are wealthy.⁵⁸⁷ As such, this punitive culture conceals a hypocrisy. It relies on that prevailing sense of fear cultivated predominantly amongst the poor, as those rendered vulnerable by targeted violence. Meanwhile, a culture of suspicion towards the poor, amongst the wealthy, relies on the selective dependence on sensationalised media.

5 *Prisoners*⁵⁸⁸

I met with prisoners who described the poor nutrition and sanitation in prisons, the excessive congestion and delays in the dispensation of cases, as well as instances of torture, predominantly at the stage of arrest. Individuals interviewed had been subject to plastic bags held over their heads, punching and electric shocks on their spine. Such torture techniques are apparently frequently employed by police and military personnel. Hearing these first-hand accounts was harrowing, though not surprising. I had the sense that it was important for these people to share their stories and divulge the details. They needed little prompting to continue, once the initial question had been asked about instances of torture.

Prisoners also emphasised the issues around inmate politics, access for visitation and transportation to hearings. In terms of inmate politics, they explained that the different groups, recognised either in terms of cultural identity, gang affiliation, or the absence of group identity, are segregated in the prison and consulted separately on matters of prison policy. Some individuals complained that their particular group is not recognised or consulted like others, while some reported that prison staff turn groups against each other for the sake of discipline and regulation.

In terms of access for visitation, visitors are required to furnish multiple forms of official identification, depending on the number of security checks before entry. This presents an obstacle for family members of prisoners, particularly those from a lower socio-economic demographic who can not easily acquire such documentation.

⁵⁸⁷ Center for Trade Union and Human Rights, above n 591, at 7.

⁵⁸⁸ Interview with anonymous prisoners at confidential location, Philippines (Daniel Kleinsman, 5 October 2017).

In terms of transportation to hearings, it was explained that funding is not easily available for this purpose. Individuals are thus required to appeal to the good nature and generosity of prison staff so as to be able to attend their hearings. This is not always successful. It is particularly difficult for hearings held at remote locations. One individual explained that the hearings for his case are held in another province, which requires travel by plane. This creates difficulties not only in terms of cost but also security, and he said he is required to beg to be brought to the court. Inevitably, he has not been able to attend all of his hearings as scheduled and, as such, his case has been excessively delayed.

6 *Former prisoners*⁵⁸⁹

On 11 October 2017 I interviewed one former prisoner, who explained the significance of gang protection within the prison, which he had sought out of necessity. Not only do the gangs regulate social dynamics and disciplinary matters, they also control the economy. If an inmate wants access to a particular facility within the prison, he or she will need to pay the gang leader responsible. This is negotiated between gangs on behalf of their members, but individuals without affiliation are required to “sell their skin”. This means they will have to tender bids to tattoo the names of gang leaders on their skin, so as to pay for the inflated price of prison facilities. Consequently, for those who are not gang affiliated, “their skin becomes like newspaper”.

This former prisoner also described his experience of being visited by his wife, who had brought food for him. The security guard on duty snatched the food from her, and when she objected that it was not for him, threw it on the dirty ground before her husband. The man relayed this story with evident anguish, which suggested not only that it had humiliated him at the time, but that it has a lasting impact. He also disclosed that his wife had subsequently left him, after several years of waiting for his case to be heard. After six years he was found not guilty, but by this time he had lost everything, including his family and his well-remunerated career in maritime logistics. He now has a new family and a job as a taxi-driver, but is still traumatised by his experience of ill-treatment. He insisted that it was his faith that had seen him through this extended period of detention, and attaches great significance to a spiritual experience during which a Bible had fallen to his feet from the bunk bed above him.

⁵⁸⁹ Interview with anonymous former prisoner, Philippines (Daniel Kleinsman, 11 October 2017).

7 *Philippine Jesuit Prison Service*⁵⁹⁰

Fr Eli Lumbo, Executive Director of the Philippine Jesuit Prison Service, ministers to the people in the National Bilibid Prison in Muntinlupa, Manila. He described Filipino culture as having both a family- and faith-orientation, and explained that for many of the prisoners, practising their faith is of the utmost importance. This is also the case for the family, friends and support people of prisoners. In addition, Lumbo suggested that this faith orientation and religious framework influences Filipino people's approach to policy and politics, and characterises public and political debate around important issues.

The debate about the reintroduction of the death penalty, for example, is a debate between an Old Testament and New Testament approach to criminality. This reflects the fact that the Philippines is predominantly Christian. It also reflects, perhaps, the manner in which this Christian tradition was inherited, through the Spanish colonial influence. The presence of Christianity in Filipino culture is explicit and overt, but the extent to which it informs public ethics varies greatly. This offers something of a cautionary tale for the “missionaries” of international human rights law, who must seek not to impose expressive norms, but to support culture-specific and internally generated commitment to human rights. It also suggests, however, that faith and religion are important points of reference in the Philippines that should be acknowledged in a regulatory context.

8 *Regarding prison staff*⁵⁹¹

It was not possible to interview prison staff but I met with an industrial psychologist who was engaged by the BJMP for the purpose of training its staff. He described the lack of professionalism and competency amongst prison staff as an aggravating factor in terms of the poor conditions inside. But he also identified cultural values that could be harnessed for the sake of enhancing competencies and inspiring improvement. Such values include “dangal” (dignity), “biyanihan” (community) and “mañana” (flexibility).

In terms of dangal, he suggested that Filipinos attach a high degree of importance to dignity, both as self-perceived and as recognised by others. An individual's sense of dignity (or lack thereof) has an impact on those with whom they identify. This could have either a positive or negative effect in terms of regulatory behaviour, in that it

⁵⁹⁰ Interview with Fr Eli Lumbo, Executive Director of the Philippine Jesuit Prison Service (Daniel Kleinsman, 13 October 2017).

⁵⁹¹ Interview with Jamie Sumondong, Industrial Psychologist, consultant to BJMP (Daniel Kleinsman, 11 October 2017).

could motivate a commitment to compliance or undermine it through a sense of disintegrative shame.

In terms of *biyanihan*, it was suggested that Filipinos operate in a community context. This has largely positive manifestations, in the form of local networks of support and an inherent orientation towards others in the community. It also has negative manifestations, by which disintegrative shame is aggravated or corruption accommodated. In addition, it informs the development of alternative structures in the prison, which will be considered in detail below.

In terms of *mañana*, which literally means “tomorrow”, this is said to reflect a value inherited from the Spanish by which matters can always be attended to at a later time or date. Schedules and deadlines are not considered to be fixed, and delays are not considered to be problematic. This could contribute to excessive delays in the administration of justice, but it could also positively predispose Filipinos to a restorative regulatory approach, which eschews a strictly prescribed and structured process and requires patience.

9 *Department of Justice*⁵⁹²

Manuel Co, Administrator of Parole and Probation at the Department of Justice, explained that restorative justice has been formally integrated into the Philippine criminal justice system, in the context of parole and probation. An end-of-sentence restorative justice programme brings offenders and victims together, with the support of community-based stakeholders, to promote rehabilitation and reintegration into the community. This programme incorporates the indigenous practices of the Ifugao and Manobo people, as appropriate, and thus carries particular cultural credibility. Co explained that the proponents of the programme initially encountered institutional resistance, but this was quickly overcome. The more significant issue was around the competency of practitioners and a substantial investment of time and money had been necessary to address this.

Co also identified informal manifestations of restorative justice that exist at a local level in villages and small communities. *Barangay* (village) captains facilitate reconciliation between parties to minor incidents by way of a process that resembles restorative justice in practice and embodies restorative principles. Such incidents might include altercations or theft, and will only be referred to the courts if this initial process is unsuccessful. There is also a practice by which the families of

⁵⁹² Interview with Manuel Co, Administrator of Parole and Probation at Department of Justice Philippines (Daniel Kleinsman, 4 October 2017).

parties to murder can negotiate the payment of a sum to the victim's family, and formal charges can be thus avoided. Prisoners interviewed, as above, complained that this practice undermines the fair administration of justice. At the same time it reflects a capacity for a restorative alternative.

10 *Alternative structures within the prison*

(a) Overcrowding and under-resourcing

Journalist and former prisoner Raymud Narag described the social dynamics of the prison environment in his written report on the conditions of the Quezon City Jail. He explained that the BJMP is “one of the least prioritised agencies of the national government”, and that its annual budget is “tragically inadequate”.⁵⁹³ The annual funding has increased since this report was written in 2005, from P1.9 billion to P11.6 billion,⁵⁹⁴ but the prison population has also significantly increased in this time, such that the budget remains tragically inadequate. This is reflected by the rising congestion, from an occupancy rate of 392 percent in 2005,⁵⁹⁵ to one of 436 percent today.⁵⁹⁶ Not only does this limit the prison's capacity to serve its inmate population and meet its objectives as a corrections facility, it also means that the salary of prison staff is “barely enough to raise a family”.⁵⁹⁷

Narag observed that this overcrowding and under-resourcing produces problems “as basic yet as alarming as inadequacy of facilities, personnel and rehabilitation programs; loopholes in police operations; and the slow dispensation of justice”.⁵⁹⁸ These problems are basic in the sense that they are easily identified and easily described. Indeed, they are also alarming in that they carry consequences which compound and reinforce the dynamics of dysfunction and are thus difficult to address. In Narag's own words, “jail officers and inmates have set up structures [to] make jail life somewhat bearable for them...[however], these structures have evolved into problems that are even more complicated”.⁵⁹⁹

⁵⁹³ Narag, above n 126, at 7.

⁵⁹⁴ Bureau of Jail Management and Penology “DBM Approved Budget: FY 2017” BJMP Official Website <www.bjmp.gov.ph>.

⁵⁹⁵ Narag, above n 126, at 29.

⁵⁹⁶ Institute for Criminal Policy Research “World Prison Brief Data: Philippines” World Prison Brief <www.prisonstudies.org>.

⁵⁹⁷ Narag, above n 126, at 25.

⁵⁹⁸ At 29.

⁵⁹⁹ At 30.

(b) Pangkat system

The jail is largely neglected by the government and wider society, such that it both relies on its own resources and is left to its own devices. It operates on the basis of “pakikisama” (fellowship) between inmates and prison staff.⁶⁰⁰ This provides the foundation for a comprehensive social, political and economic structure, by which, in the end, “it is the entire society that is re-created in the jail”.⁶⁰¹ This alternative society is fully self-contained but highly dysfunctional. The social and political structure of the prison is characterised by the “pangkat” system.⁶⁰² The term pangkat means group, and refers to the gangs that dominate society within the prison.⁶⁰³ One of the main reasons for joining the gangs is for protection from other inmates and from the abuses of prison staff, but another significant reason is the sense of belonging and identity this brings.⁶⁰⁴

The pangkat system also institutes a political hierarchy, called the “panunungkulan”.⁶⁰⁵ This establishes three groups of prisoners, who play various roles in the regulation of the social environment.⁶⁰⁶ The “nanunungkulan” sit at the top of the hierarchy and maintain order in the cells, the “coordinators” act as a link between prison staff and prisoners, and the “trustees” assist prison staff in administrative work.⁶⁰⁷ The nanunungkulan incorporate the offices of “mayor” and “bastonero”.⁶⁰⁸ The mayor is the most powerful officer and the bastonero, as the disciplinary officer, is the most feared.⁶⁰⁹

The pangkat and panunungkulan also institute a judicial system. This “not only ensures law and order inside the jail but also supplants the jail’s lack of a program for conflict mediation and a grievance mechanism”.⁶¹⁰ The system even includes a prescribed set of rules and sanctions, called the “patakaran”, from which comes the mandate of the bastonero.⁶¹¹ Respect for staff and inmates is considered a “golden rule”, according to the patakaran.⁶¹² Respect for the hierarchy is also required and bypassing or contradicting the mayor is considered an offence.⁶¹³ Conflict mediation

⁶⁰⁰ Narag, above n 126, at 165.

⁶⁰¹ Ibid.

⁶⁰² At 79.

⁶⁰³ Ibid.

⁶⁰⁴ At 81.

⁶⁰⁵ At 84.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

⁶⁰⁸ At 87.

⁶⁰⁹ Ibid.

⁶¹⁰ At 96.

⁶¹¹ Ibid.

⁶¹² At 97.

⁶¹³ Narag, above n 126, a.

is facilitated by the mayor in an informal confidential, case-specific manner, which may include an investigation process.⁶¹⁴ The grievance mechanism incorporates a jury, which makes a decision on guilt, before the mayor chooses the appropriate penalty.⁶¹⁵ Penalties range from public apology to “skull-breaking flogging” and death.⁶¹⁶

(c) Prison economy

In terms of the economic structure of the prison, “[a]s a remedy to the jail’s inadequate budget which translates to the management’s inability to implement its programs, all cells maintain their own funds”.⁶¹⁷ These funds are acquired in a range of ways, such as fees for privileges like access to a bed, and a “tax” on any money received.⁶¹⁸ The economy relies on small businesses, which are allowed to operate within the prison, and on a “VIP system”, by which wealthy prisoners pay others to perform their duties.⁶¹⁹ This alternative society resembles society at large, with a structure by which the prison staff, gang leaders and wealthy prisoners occupy the top rungs of the hierarchy, and “poor inmates occupy the lower rungs”.⁶²⁰

(d) Collusion of staff

Prison staff are very much complicit in this system, primarily because it is necessary for the maintenance of order in the prison. The ideal ratio between custodial officers and inmates is identified as 1:7 whereas, at the time of writing, Narag reported a ratio of 1:128 in Quezon City Jail.⁶²¹ These figures are a conservative representation of pre-conviction jail populations today.⁶²² Prison staff are outnumbered by inmates to such an extent that, in the absence of self-regulation, they could not control the environment.

Collusion with the alternative structures of self-regulation also presents financial benefits to prison staff who are over-worked and poorly paid. In fact, prison staff are sometimes required to cover the prison’s operational costs.⁶²³ This, alongside a lack of professionalism and an absence of recognition or rewards, further subjects them to

⁶¹⁴ Ibid.

⁶¹⁵ At 100.

⁶¹⁶ At 100-102.

⁶¹⁷ At 104.

⁶¹⁸ At 105-107.

⁶¹⁹ At 108.

⁶²⁰ At 165.

⁶²¹ At 45.

⁶²² Ginny Stein, above n 375.

⁶²³ Narag, above n 126, at 171.

the pressures of corruption.⁶²⁴ Staff members who attempt to adhere to the relevant regulations, in direct opposition to the panunungkulan system, are resented by inmates and officers alike. In some cases, the latter coordinate riots to have such staff members removed.⁶²⁵

(e) Colonialism

Edgar Pascua from Ateneo de Davao (University) described this state of affairs from an historical perspective.⁶²⁶ A long-standing and deep-seated corruption had developed during the time of Spanish colonialism. A system was established by which public officials were subject to political assessment appointment. As such, they were compelled to court favours in anticipation of reappointment, and often compulsively acquired what they could in fear of replacement. Although the political and judicial system of the Philippines is more formalised today, it remains susceptible to these dynamics. For example, the previous chair of the Commission on Elections was recently impeached, and impeachment proceedings against the current Chief Justice of the Supreme Court and the Ombudsman are pending at the time of writing this thesis.⁶²⁷

These persisting dynamics of corruption and political instability are sustained by widespread poverty and by the tragic inadequacy of budget allocations. The Philippines is crippled by foreign debt repayments, representing nearly half of its annual budget; this means it relies on remittances from overseas workers, which make up approximately 10 percent of gross domestic product.⁶²⁸ Therefore, there is a sense in which both historical colonialism and contemporary neo-colonialism contribute to a corrupt and dysfunctional system, of which human rights abuses are symptomatic.

(f) Alternative structures indispensable

However, while such a relationship between prison management and inmates seems unthinkable in a Western setting, it is nonetheless a relationship based on interdependence and to this extent creates an environment hospitable to restorative regulatory engagement. Furthermore, these alternative structures are by now “so

⁶²⁴ Narag, above n 126, at 171.

⁶²⁵ At 152.

⁶²⁶ Interview with Edgar Pascua, Registrar at Ateneo de Davao (Daniel Kleinsman, 9 October 2017).

⁶²⁷ Josephus Jimenez “Impeaching Sereno, Bautista and Morales” (10 September 2017) The Philippine Star <www.philstar.com>.

⁶²⁸ The World Bank Group “Personal Remittances Received” (2017) The World Bank <<https://data.worldbank.org>>.

deeply entrenched that they have become a vital component of jail management”.⁶²⁹ As such, Narag argues that any sustainable approach to regulation of the prison environment, and regulatory improvement in respect of prisoners’ rights, must recognise and integrate these structures.⁶³⁰ He suggests that it is possible to incorporate these structures “in such a way that would maximise their usefulness and minimise the ill effects they bring about”.⁶³¹

Rommel Abitria, Executive Director of the Humanitarian Legal Assistance Foundation explained to me that his organisation uses these structures to facilitate the self-expedition of prisoners’ cases.⁶³² This involves training the “trustees” in basic criminal procedure to enable them to assist fellow-prisoners in progressing their cases, particularly those for whom pre-trial detention has exceeded the maximum imposable sentence. This is a useful example of how the existing structures can be harnessed for the sake of regulatory improvement. Abitria explained that this initiative relieves prison staff of the workload and pressure on them, such that they largely support it. He also explained, however, that difficulties remain in terms of the dynamics between prisoners and prison staff, and amongst prisoners themselves, which present ongoing challenges. Obviously, as above, there is an extent to which both prisoners and prison staff are invested in existing structures, and changes even in the form of regulatory improvement can threaten this and engender opposition.

B Concluding Observations

The insights and opinions of local actors and stakeholders point to the necessary “major shift in the location of the project, who is telling the story and how the story is told”.⁶³³ Primarily, the people whose rights are in question, the prisoners themselves, must tell the story. By giving a voice to their experience and suffering, regulators can prioritise regulatory measures according to their needs and interests. In addition, the “values, norms and processes of change belonging to the relevant cultural tradition” must inform the way in which the story is told.⁶³⁴ This requires a genuine and practical respect for sovereignty, but a sovereignty that inheres in the citizenry of the people, prisoners included.

⁶²⁹ Narag, above n 126, at 177.

⁶³⁰ Narag, above n 126, at 177.

⁶³¹ Ibid.

⁶³² Interview with Rommel Abitria, Executive Director of the Humanitarian Legal Assistance Foundation (Daniel Kleinsman, 2 October 2017).

⁶³³ Kapur, above n 334, at 685.

⁶³⁴ Law Commission, above n 557, at 71.

1 *Sovereignty and accountability*

These local insights reveal an inherent tension between a sovereignty that inheres in the citizenry and an international regulatory approach that attempts to hold state actors accountable. On the one hand, it is necessary to avoid the violence of imperialism and the hypocrisy of foreign unilateralism. Even for those who condemn the human rights practices of the current administration, the preservation of sovereign autonomy and the repulsion of imperialism remain a fundamental priority.⁶³⁵ This is because the political dysfunction that contributes to poor human rights practices is caused, at least in part, by a history of occupation and imperialism. On the other hand, it is equally necessary to condemn the hypocrisy of an excessively punitive approach and a “war on the poor”.⁶³⁶ The fact that almost 80 percent of prisoners in the Philippines come from poor families, whose charges are largely either robbery or drugs related, reflects this reality.⁶³⁷ Indeed, “it is not the downtrodden, the oppressed or the marginalised...[but] those...who are part of established power structures that query the applicability of [human] rights”.⁶³⁸

2 *Disrupting disadvantage*

As Hall suggests, a restorative approach associated with existing cultural models of justice “could help to interrupt the cycle of disadvantage” by which the underprivileged are over-represented in such negative statistics.⁶³⁹ This applies to the predominantly poor Filipino prisoners, to the overworked and underpaid prison staff, and also to the Philippines at large, as a state party struggling with the realities of widespread poverty. Indeed, the Philippines is rendered vulnerable by such realities, which contribute to its poor regulatory performance. A restorative approach must understand and engage with existing structures and realities, harmonise international norms with local values and priorities, and attend to the needs of all relevant actors and stakeholders.

3 *Balanced approach*

Local insight suggests that such an approach presents challenges, to the extent that existing structures are problematic, existing values susceptible to manipulation, and the needs and interests of different actors often at odds. Therefore, a balanced

⁶³⁵ Karapatan, above n 583, at 64.

⁶³⁶ Interview with Arago, above n 585.

⁶³⁷ Narag, above n 126, at 167.

⁶³⁸ Madraiwiwi “Rights and Rites: A Discourse”, above n 552.

⁶³⁹ Hall, above n 391, at 28.

approach is required, which seeks to integrate both restitution- and resolution-oriented measures, as illustrated by the regulatory venn diagram. This incorporates both sanctions and supports, as well as measures that are (simultaneously) both restrictive and supportive. It seeks to identify and address harm, including that which is historical or systemic and has contributed to the occurrence of violations in the first place. It seeks to set realistic and relevant goals in a consensus-based way, with a view to continuous improvement.

4 *Aid and investment*

For example, such measures might seek to support the Philippines generally, and prison staff specifically, by providing aid and investment to cover costs they would otherwise be required to meet, while at the same time requiring them to account for such costs and to restrict their opportunity to embezzle funds. In terms of GSP+, it may well be possible to point to the economic consequences of noncompliance, as Papa suggests, without undermining the collaborative relationship or contradicting the restorative framework for regulatory engagement.⁶⁴⁰ It may be also that such measures could provide funding specifically for compensatory mechanisms, by which damages are paid to victims, which nonetheless carry a reputational cost for regulated actors in terms of shaming.

Where such aid and investment is tied specifically to regulatory outcomes, with requirements to account for spending, this can provide both necessary support and restriction.⁶⁴¹ To avoid the disempowering dynamic of charity, external regulators must design such measures with the regulated actors and relevant stakeholders in a consensus-based way.⁶⁴² Membership with international bodies could recognise regulatory performance in a way that emphasises achievement and encourages improvement, while engendering shame for violations, which can then be addressed in a supportive, reintegrative way. Such a system of tiered membership need not undermine relationships or dialogue, provided that the focus remains on protecting human rights and redressing harm, and the regulatory response incorporates support within a context of collaboration and restorative justice.

5 *Focus on prisoners*

In terms of prisoners specifically, the regulatory process should involve them and their experiences, and regulatory measures should seek to redress their suffering and

⁶⁴⁰ Interview with Papa, above n 581.

⁶⁴¹ Interview with Gascon, above n 580.

⁶⁴² ICRC, above n 574.

improve their treatment in a direct and tangible way. While retaining the perspective to evaluate and recommend legislation, this process should seek specifically to address the “basic but alarming” realities of ill-treatment in prisons as a priority.⁶⁴³ In addition, the process itself should be user friendly for prisoners, and designed according to their needs and interests.

There are inherent risks associated with involving prisoners in the process, and threatening the self-sufficient structures in which both prisoners and prison staff are necessarily invested. Firstly, there is a concern that prisoners, as an already vulnerable group, could be re-traumatised by such a process.⁶⁴⁴ There is also a concern that they could expose themselves to further torture and ill-treatment at the hands of prison staff by voicing complaints.⁶⁴⁵ In addition, bypassing or contradicting the leadership of the alternative structures could attract persecution at the hands of other prisoners.⁶⁴⁶ Similarly, prison staff that strictly adhere to regulatory requirements, in opposition to these structures, may be rejected or even removed.⁶⁴⁷ These risks can be mitigated, but not eliminated. Therefore, they must be navigated carefully on an ongoing case-by-case basis.

6 *Harmonisation*

A harmonisation of values could perhaps recognise the community, fellowship and respect at the basis of existing alternative structures and seek to harness their strengths in terms of representation and conflict resolution, while mitigating their pathologies in terms of arbitrary power, privilege, corruption and disciplinary violence.⁶⁴⁸ Such harmonisation could also facilitate the recognition of presently unrecognised groups, and thus facilitate an increasingly restorative distribution of power.⁶⁴⁹ By recognising and integrating these structures, regulators could also help actors outside of the prison understand and engage with the former in an appropriate way. This could empower third parties to hold prisoners and prison staff accountable to restorative outcomes. It could also introduce visibility in the interests of prisoners’ rights.⁶⁵⁰ The insights of local stakeholders suggest that such third parties should include faith-based groups, who are of particular significance and influence in the Filipino context.⁶⁵¹

⁶⁴³ Narag, above n 126, at 29.

⁶⁴⁴ Interview with Co, above n 592.

⁶⁴⁵ Interview with Papa, above n 581.

⁶⁴⁶ Narag, above n 126, at 103.

⁶⁴⁷ At 152.

⁶⁴⁸ At 177.

⁶⁴⁹ Hall, above n 391, at 32.

⁶⁵⁰ Foucault, above n 354, at 61.

⁶⁵¹ Interview with Lumbo, above n 590.

Harmonisation, more generally, implies that the relevant international norms are already present in the Philippines and expressed according to specific cultural values.⁶⁵² This requires a recognition and integration of such values, which reflects again the importance of solidarity in the regulatory process.⁶⁵³ Restorative regulation is, therefore, both responsive and receptive. It is flexible within a framework of relationship; it is intimately and interpersonally invested. International human rights norms should not be reduced to commodities of a market for virtue, but aligned with regulatory measures in a process that is itself empowering and restorative. This, in turn, should align the expressive and instrumental functions of human rights law, within a context of continuous, restorative improvement.

7 *Facilitation*

Ultimately, an international restorative approach cannot prescribe outcomes, nor itself resolve the underlying root problems or structural pathologies. It can only create an environment within which the relevant local actors can be encouraged and supported to do so themselves. A restorative approach cannot guarantee compliance, because this implies (unilateral) enforcement. However, it can facilitate a process that gives voice to the people whose rights are in question and gives personal meaning to human rights obligations for the actors responsible. If this process is designed and facilitated in a consensus-based, context specific and culturally-sensitive way, it can engender accountability and empower parties to give effect to their rights and obligations, repair harm and prevent future violations, within a framework of relational commitment.

⁶⁵² Law Commission, above n 557, at 69-70.

⁶⁵³ Mathiesen, above n 358, at 145.

Chapter VII

Restorative Regulation Applied

Having considered local insight, and with the benefit of a restorative framework, it is helpful to re-evaluate international human rights regulatory mechanisms. These were initially evaluated as to how well they are regulating human rights compliance. This re-evaluation keeps the ultimate objective of compliance in sight, but looks also at how restorative these mechanisms are. The purpose of this exercise is to consider how restorative regulation might look in practice. This reveals the Special Rapporteur mechanism as that most compatible with restorative justice, in any context, and also implies five commitments for restorative regulation more generally.

A Restorative Evaluation of Existing Regulatory Engagement

1 Human Rights Council: Universal Periodic Review

The UPR mechanism is restorative in terms of its collaborative and bilateral approach. The involvement of other local stakeholders in the preliminary process, and of fellow state parties in the actual regulatory process, seeks to realise accountability in a somewhat community-oriented way. The tangible outcomes achieved as a result of this mechanism, in terms of legislation and engagement with other regulatory bodies, suggest that it facilitates a productive process towards practical regulatory improvement. The breadth of scope also enables this process to identify related issues and recurring themes, in terms of human rights abuses.

However, this process lacks the focus and depth necessary to address such issues in a substantive and constructive way. It also lacks the ability to identify these issues with sensitivity and respect, such that it engenders a defensive response. Furthermore, the volume of recommendations encourages a regulatory ritualism and thus dilutes the issues and interests identified. Ultimately, these deficiencies undermine the efficacy of this regulatory mechanism, as well as that of others, and can reinforce a culture of impunity.⁶⁵⁴ In terms of prisoners' rights, the lack of focus or personal engagement prevents this mechanism from addressing that matter in any significant way.

While the UPR's bilateral approach is positive, it could be more genuinely dialogical and should be supplemented with credible follow-up, such that when the state party expresses a commitment to a particular measure, this is supported through to

⁶⁵⁴ Human Rights Council, above n 162, at [6].

implementation.⁶⁵⁵ Where the state party indicates an openness to collaboration with other stakeholders, or defers to other actors in terms of translating recommendations into practice, this mechanism should provide for such collaboration in the course of its engagement. The involvement of non-governmental stakeholders need not be limited to the preliminary stage. Indeed, the actual regulatory review could be facilitated by local stakeholders alongside state parties, so as to better realise accountability in a *relevant* community context.

The process should be facilitated in such a way that acknowledges the state party's progress and avoids a unilateral imposition of external standards. It should also avoid a high volume of recommendations and identify instead a reasonable number of realistic regulatory goals, on the basis of consensus, with a priority for redressing harm and meeting needs. Rather than presenting recommendations for acceptance or rejection, this empowers the state party through engagement and accountability. It also avoids a ritualism by which recommendations can be accepted or rejected without commitment or follow-up.⁶⁵⁶ In addition, such an approach better prioritises prisoners' rights.

2 *Human Rights Council: Special Rapporteur*

The Special Rapporteur mechanism represents a more intensive engagement and review process, and a more proactive follow-up procedure. As such, the essence of issues are more easily and accurately identified, and the necessary actors more credibly called upon. This not only solicits a response, but assesses the nature and quality of a state party's response, in light of relevant contextual factors. Indeed, this avoids regulatory ritualism, and discourages artificial expressions of commitment or compliance. That said, this mechanism can be intimidating in terms of its intolerance for poor regulatory performance, and the intrusive nature of its fact-finding procedure. This can discourage a state party from extending an invitation, and engaging in the process. Even when a state party does engage, this approach can nonetheless engender a defensive response.⁶⁵⁷

The Special Rapporteur should be more collaborative and less threatening in its approach. This does not preclude a fact-finding mission, but informs a more collaborative approach to even this stage of the regulatory process. Indeed, as Braithwaite explains, an alternative restorative approach to investigation can actually

⁶⁵⁵ Moeckli and others, above n 22, at 413.

⁶⁵⁶ Hathaway, above n 4, at 2006.

⁶⁵⁷ Alston and Goodman, above n 11, at 718.

yield a greater depth and accuracy of findings.⁶⁵⁸ Such an approach also informs the follow-up stage of the regulatory process. This should be no less intensive but more supportive. For example, in 2009 when Special Rapporteur Alston criticised the response of the Philippines for its lack of substantive and preventive dimension, he could have helped identify what that dimension should look like.⁶⁵⁹ Similarly, where he criticised the Philippines for its lack of action in respect of impunity, he could have asked the state party, and local stakeholders, what support or resources were needed to progress prosecutions, and then facilitated this support as appropriate.

In terms of the Special Rapporteur's conditions to visit, these should not be so strict as to discourage a state party from extending an invitation in the first place. Obviously there is a balance to be struck, by which the integrity of the mechanism must be maintained. Indeed, it would be counterproductive to reduce this process to one of ritualism. However, a process that establishes a point of entry, and then proceeds to develop a relationship for (credibly) reviewing the facts and thus identifying and redressing the issues, does not resemble regulatory ritualism.

A more sensitive approach is also necessary in light of the significance attached to sovereignty by local actors, and their skepticism in respect of foreign hypocrisy and imperialism.⁶⁶⁰ The strength of this mechanism lies not in any adversarial approach or reputation. Rather, it lies in this mechanism's local, focused and sustained interpersonal approach, which follows through from fact-finding to implementation. A greater emphasis on collaboration will enhance this. Therefore, Special Rapporteur Callamard need not accept the unreasonable conditions proposed by the Philippines, nor insist upon her own strictly prescribed conditions, but should seek to reach consensus and begin to build the basis for a constructive country visit and collaborative process. There is also scope for this mechanism to address the rights of prisoners, which will be considered in greater detail below.

3 *Human Rights Committee: Concluding Observations*

The HRCtee's concluding observations represent a mechanism for communicating regulatory praise and criticism and detailed recommendations across a range of related issues. The HRCtee's concluding observations on the first periodic report of the Philippines uncritically endorse the state party's repulsion of insurgency attempts, and as such endorse the likely violation of human rights.⁶⁶¹ This reflects the

⁶⁵⁸ Braithwaite, above n 6, at 25.

⁶⁵⁹ Human Rights Council, above n 165, at [5].

⁶⁶⁰ Karapatan, above n 583, at 64.

⁶⁶¹ Human Rights Committee, above n 173, at [72].

risk of colluding with local antagonists, and perpetuating dynamics of oppression.⁶⁶² Subsequent concluding observations, however, demonstrate the HRCtee's ability to escalate and intensify critical engagement, with a growing awareness of persisting issues such as state-sanctioned torture and impunity.

The deficiencies of this mechanism, as already identified, relate to its lack of proactivity, its failure to engage local stakeholders, and the absence of any timely follow-up procedure. This is all the more detrimental in respect of prisoners' rights, the abuse of which is indeed largely hidden and entrenched.⁶⁶³ A restorative approach should seek to address these deficiencies, with an emphasis on realistic goals and relational support and a preference for communitarian engagement, oriented towards continuous improvement.⁶⁶⁴ The relevant international human rights law (the ICCPR) informs this process but, as illustrated by the regulatory venn diagram, the priority should be realistic and practical regulatory goals. These goals should be oriented towards the objectives of redressing harm and restoring rights, rather than clarifying the status of the law, for example.

4 *Committee against Torture: Concluding Observations*

The concluding observations of the CtAT integrate both praise and criticism, and seek to engage the state party in a "comprehensive and constructive" bilateral manner.⁶⁶⁵ The mechanism identifies and emphasises the necessity of practical steps towards the prohibition of torture, and in many cases provides specific, practical details in this regard. That said, while the focus of such recommendations might be practical, the nature of this regulatory process remains itself largely expressive, in light of the state party's persistent failure to action these recommendations and the CtAT's lack of follow-up.⁶⁶⁶

Of course, the CtAT cannot itself implement the necessary changes; however the regulatory process could better facilitate the actual, practical improvements, with wider and more active engagement. For example, where the CtAT calls for the lack of legal safeguards in prisons to be remedied, it could engage the necessary actors (including prison staff) so as to solicit their input and commitment to this end. It could then seek to support these actors in the implementation of such safeguards, in a collaborative and empowering way. Where the CtAT recommends a review of the legality of pre-trial detention practices, while it cannot determine this matter itself, it

⁶⁶² Kapur, above n 334, at 684.

⁶⁶³ Foucault, above n 354, at 65.

⁶⁶⁴ Braithwaite, above n 6, at 24.

⁶⁶⁵ Committee against Torture, above n 200, at [1].

⁶⁶⁶ Hathaway, above n 4, at 2006.

could better initiate the conversation, again by engaging the relevant actors and stakeholders.

Also, in some cases where the CtAT identifies the need for practical measures, it could offer further assistance in terms of what those measures might look like. For example, where it calls for legal safeguards for prisoners, as above, the community engagement process could also seek to identify what exactly those safeguards are in practice, with an emphasis on redressing harm and improving conditions.⁶⁶⁷ Similarly, where the CtAT calls for an increase in budgetary allocations for prison facilities, it could facilitate a process that seeks to identify a realistic and reasonable sum, and to solicit a commitment to this from the relevant state actors. Such a process should engender accountability, while accommodating relevant contextual factors, without undermining agency.

Furthermore, there is a need for this regulatory mechanism to give voice and visibility to the interests and experiences of prisoners, in a more substantive way.⁶⁶⁸ The CtAT's focus on torture is such that prisoners' rights are at the core of this mechanism, however the failure to engage these primary stakeholders in any practical way limits its credibility and effectiveness. The inherent risks associated with the involvement of prisoners can be managed and mitigated, and are not such that the significant benefit of engaging prisoners is outweighed.⁶⁶⁹ Even where the risks cannot be managed, the interests of these primary stakeholders can be given a voice vicariously, through the participation of former prisoners, or the friends or family of prisoners, in an indirect restorative dialogue.⁶⁷⁰

5 *The Universal Declaration of Human Rights and the Standard Minimum Rules for the Treatment of Prisoners*

Although the authority of the UDHR and SMRs is less concrete, these instruments can nonetheless contribute to the process of regulatory engagement and improvement. This is particularly so within a restorative context, which prefers flexibility to a legalistic approach, and pursues continuous improvement in a collaborative and empowering way.⁶⁷¹ In fact, as illustrated by the regulatory venn diagram, a restorative approach to regulation incorporates international human rights law as largely aspirational in any case. As such, according to this approach, the UDHR and SMRs are similar in status to those instruments that are technically

⁶⁶⁷ Committee against Torture, above n 216, at [4].

⁶⁶⁸ Foucault, above n 354, at 61.

⁶⁶⁹ Braithwaite, above n 6, at 140.

⁶⁷⁰ Raye and Roberts, above n 411, at 218.

⁶⁷¹ Braithwaite, above n 6, at 15.

binding. The point of difference is the absence of monitoring mechanisms for the UDHR and SMRs, however these instruments can be integrated into the above regulatory processes.

6 *The Security Council, the International Court of Justice and the International Criminal Court*

The restorative regulatory approach retains the option for escalation. Unlike the responsive regulatory approach, the former reserves sanctions and escalated measures for restorative objectives, rather than as means of encouraging a collaborative approach through the fear of escalation.⁶⁷² A restorative regulatory approach recognises that, in the interests of victim- and public-safety, and for the sake of redressing harm, escalated measures that might have a restrictive or punitive effect are sometimes necessary.

When it comes to sanctions, the Security Council has a chequered history.⁶⁷³ That said, in principle it has the capacity to implement sanctions and engage with states in a restorative way. Where in the past its regulatory action has been overly political or punitive, a restorative framework could inform a more measured and constructive approach. Furthermore, a restorative framework could mitigate the political nature of the SC, which perpetuates power disparities on a global scale. Without necessarily changing the structure of the SC, a more inclusive and collaborative engagement and decision making process could better align the SC with its objective of maintaining international peace and security.

In terms of the ICJ and ICC, litigation itself is not a restorative measure or process. That said, this is often the context within which restorative justice takes place. Furthermore, even litigation can be enhanced by a restorative approach that attaches significance to the voice of victims, prioritises the need to redress harm done, and facilitates a restorative dialogue, even if necessarily directed.⁶⁷⁴ Indeed, these measures are all the more important in respect of widespread human rights abuse (compared with regular criminal offences). As such, even at the ICC, prosecution should give effect to restorative measures and considerations.⁶⁷⁵ The provision for victim participation at the ICC and the fact that this is already understood in terms of

⁶⁷² Braithwaite, above n 6, at 35.

⁶⁷³ Bantekas and Oette, above n 10, at 182.

⁶⁷⁴ Raye and Roberts, above n 411, at 222-223.

⁶⁷⁵ The ICC has recently launched an inquiry into Duterte's war on drugs: Felipe Villamor "International Criminal Court Will Investigate Duterte Over Drug War" (February 2018) New York Times <www.nytimes.com>.

restorative justice is promising.⁶⁷⁶ Litigation at the ICC and ICJ could also include traditional restorative justice, in the form of a pre-hearing conference.

B A Special Rapporteur for the Treatment of Prisoners

Having evaluated the existing mechanisms, both generally and from a restorative perspective, that of the Special Rapporteur presents itself as most compatible with restorative justice and most responsive to the problem, in this context. The Special Rapporteur has the capacity to be both responsive and receptive in a proactive and personal way. Where the mechanism is overly intimidating and intrusive, a restorative framework informs a more collaborative and empowering approach.

1 Enhanced by restorative justice

An investigation and identification of the relevant issues is crucial, particularly in terms of tackling a culture of impunity. However, as Braithwaite explains, even this can be achieved in a restorative way with equal if not greater accuracy.⁶⁷⁷ Where a state party refuses to extend an invitation to visit on favourable terms, a restorative approach informs an attempt to reach consensus on reasonable but realistic conditions for country visitation, on the basis of which a relationship can then be built. This can help engender accountability itself, according to the logic of personal relationship rather than political citizenship.⁶⁷⁸

The Special Rapporteur can also appeal to the self-determination of state actors in a sensitive but challenging way, which can further encourage accountability. Where investigation identifies the need for practical measures, the Special Rapporteur can facilitate a local engagement process that seeks to determine the details, solicit commitment and create a network for effective follow-up.

2 Addressing needs of all parties

The Special Rapporteur is also best placed to give voice and visibility to prisoners and their interests and experiences, so as to prioritise redressing their suffering and realising their rights.⁶⁷⁹ At the same time, the Special Rapporteur is able to hear the experiences and perspectives of prison staff and other regulated actors, whose ability to meet their obligations is influenced by contextual factors, and whose own needs

⁶⁷⁶ Claire Garbett “The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court” (2013) 16 Contemporary Justice Review 193 at 194.

⁶⁷⁷ Braithwaite, above n 6, at 25.

⁶⁷⁸ Goodman and Jinks, above n 241, at 626.

⁶⁷⁹ Hathaway, above n 4, at 2007.

must be met in order to achieve substantive and sustainable improvement.⁶⁸⁰ The Special Rapporteur can contribute to a restorative process by which the needs and interests of all relevant actors and stakeholders are attended to. Indeed, this is necessary so as to empower all parties to generate context- and relationship-specific human rights commitments. In this regard, the Special Rapporteur can avoid a colonial or charitable approach, but also avoid the perpetuation of local power disparities.⁶⁸¹

3 *Context-specific*

Ultimately, this mechanism would need to design and develop its procedures according to the needs and interests of the local parties. It would need to integrate the alternative structures that exist within the prisons in a way that mitigates the violence and volatile power dynamics.⁶⁸² The prioritisation of issues and regulatory measures must also rely on such input. Otherwise, regulation will fail to respond to urgent needs. For example, the issue of access for family visitation, which was emphasised by the prisoners interviewed, is one not easily identified by external regulatory bodies.⁶⁸³

4 *Tentative framework*

It is possible to consider in more detail what such a regulatory process might look like, for the purposes of illustration. After acquiring permission to visit, on workable terms, the Special Rapporteur should establish and maintain a relationship with relevant state actors and local stakeholders. They should prioritise, however, meeting with prisoners and prison staff. They should listen to the stories and experiences of these people, and seek to understand their situation, their needs and interests. They should assess compliance with prisoners' rights obligations and the harm resulting from noncompliance. They should empathise with the struggles and suffering of people on both sides, but also challenge prison staff and prisoner hierarchy responsible for such harm.

The Special Rapporteur should, in collaboration with prisoners and prison staff, identify and prioritise issues in terms of urgency and significance. They should gauge the social dynamics of the prison in terms of safety and scope for inclusive participation in a restorative process.⁶⁸⁴ On this basis, and again in collaboration,

⁶⁸⁰ Narag, above n 126, at 171.

⁶⁸¹ Kapur, above n 334, at 684.

⁶⁸² Narag, above n 126, at 177.

⁶⁸³ Interview with anonymous prisoners, above n 588.

⁶⁸⁴ Narag, above n 126, at 103.

they should consider the appropriate mode of restorative dialogue for participatory engagement. Based on the insights and opinions of local stakeholders interviewed, a guided or directed mode of restorative dialogue is likely to be appropriate.⁶⁸⁵

A necessarily directed dialogue does not discharge the Special Rapporteur of a commitment to consensus-based outcomes, however.⁶⁸⁶ More intensive involvement on their part will require more care so as to maintain the opportunity for actors to exercise agency in an empowering and restorative way. The purpose of guidance or direction on the part of the Special Rapporteur is to avoid a process or outcome that perpetuates harm and power disparity.⁶⁸⁷ This may be such that outcomes are few, or even non-existent, in which case the Special Rapporteur will need to make recommendations and maintain a basis for further follow-up.⁶⁸⁸ The process may be slow and transformative change may take time, which will require patience and sustained engagement. Even in the absence of immediate outcomes, however, the process itself can empower victims and help develop constructive relationships.

The process can also create an environment for community accountability, which can provide the impetus for self-initiated change.⁶⁸⁹ This depends on the inclusion and participation of state actors and other stakeholders, which the Special Rapporteur must facilitate. Such engagement requires a similarly intensive process of meeting with groups and individuals, listening and seeking to understand and sympathise, and identifying and prioritising issues and interests. It also requires communication and collaboration with parties prior to the formal facilitated dialogue.⁶⁹⁰

The dynamics between different groups and individuals will be varied and complex, and some will be problematic. The Special Rapporteur should pay careful attention to those dynamics that exist between prisoners and prison staff, and those that exist between human rights advocates and state actors. They should use their expertise and discretion to determine whether it is safe and constructive to bring these parties together. If it is not so, the Special Rapporteur should find other ways to facilitate the representation and inclusive participation of all. Surrogate processes and video-letters are options.⁶⁹¹ Surrogate processes engage individuals who are not directly involved in the issue or incident themselves, but have experienced similar harm and are able to advocate similar needs and interests.⁶⁹² Video-letters enable participation

⁶⁸⁵ Interview with Co, above n 592.

⁶⁸⁶ Raye and Roberts, above n 411, at 222-223.

⁶⁸⁷ Braithwaite, above n 6, at 13.

⁶⁸⁸ Bowen, above n 395, at 19.

⁶⁸⁹ Hall, above n 391, at 25.

⁶⁹⁰ Raye and Roberts, above n 411, at 219-221.

⁶⁹¹ At 212.

⁶⁹² Ibid.

when actual presence is not safe or practical.⁶⁹³ Where safety concerns are ongoing, surrogate restorative dialogue is likely to be more appropriate than video.

Constructive outcomes are informed by existing harm and power dynamics, by prisoners' rights as expressed in international human rights law, and also by the practical needs and interests of the parties involved. Issues such as access for visitation and identification requirements might be prioritised because of their significance for prisoners and the relative ease with which they can be addressed.⁶⁹⁴ Progress in this regard can help to build the goodwill necessary to progress more contentious issues. For example, it may be that consensus is possible on the entry identification process but not case management and court transportation. If the former is successfully achieved then progress in respect of the latter may be more likely in future. The Special Rapporteur must navigate this with an emphasis on empowering prisoners, repairing harm, restoring and maintaining relationships and achieving long-term transformation.⁶⁹⁵

More generally, the Special Rapporteur should seek to solicit support and commitment for issues of urgency in respect of torture and intentional ill-treatment, food, hygiene, sleeping facilities, accommodation capacity, and health care, as identified in the relevant international human rights instruments. A commitment to constructive outcomes means prioritising such issues as these over issues of corruption, but doing so in a way that does not tolerate or collude with the latter. The Special Rapporteur should then seek to address case management and court transportation, as delays in cases are not only a denial of rights but also a major aggravating factor for overcrowding. Staff professionalism and training is also an issue of priority, as this determines the extent to which prison staff are competent and resilient to corruption and abuse of power.⁶⁹⁶

The Special Rapporteur must then, in relationship and collaboration with state actors and wider stakeholders, seek to solicit support for an increase in state funding of prisons, and legislative change in respect of punitive criminal laws. This will require a change in perspective and opinion at a wider public level, and engagement with underlying socio-economic issues.⁶⁹⁷ This could also include alternative solutions, such as increased funding for rehabilitation facilities, which Gascon suggests is both needed and likely to be supported.⁶⁹⁸ However, such a task as this can only be

⁶⁹³ Raye and Roberts, above n 411, at 212.

⁶⁹⁴ Interview with anonymous prisoners, above n 588.

⁶⁹⁵ Braithwaite, above n 6, at 24.

⁶⁹⁶ Interview with Sumondong, above n 591.

⁶⁹⁷ Stern, above n 369, at 267.

⁶⁹⁸ Interview with Gascon, above n 580.

undertaken in the context of relationship with all relevant parties, over a sustained period of time. Other mechanisms will also play a part in giving effect to rights and obligations, and creating an environment of accountability, but the responsive, intensive and intimate nature of the Special Rapporteur is particularly adept for the task.

C Five Key Commitments

In terms of the restorative regulation of human rights compliance more generally, five key commitments are proposed. This includes two procedural commitments, two substantive, and one overarching. The procedural commitments relate to dialogue and inclusive participation. The substantive commitments relate to the outcomes of the regulatory engagement process, which should be both constructive and consensus-based. Together, these commitments give effect to restorative regulation as “peacebuilding through dialogue and agreement of [all] parties”. That is, peacebuilding (*constructive outcomes*) through *dialogue* and agreement (*consensus-based outcomes*) of all parties (*inclusive participation*). The overarching commitment is to relationship, which gives practical effect to this.

1 Dialogue

Existing mechanisms are more bilateral than dialogical, in that they solicit input from both the regulator and regulatee. A dialogical approach should better engage, and facilitate a discussion that is both more robust and more relational.⁶⁹⁹ Where, for example, recommendations are made and a regulated actor then has the opportunity to accept or reject these, a commitment to dialogue would put more emphasis on discussing the issues raised, identifying relevant contextual factors and understanding the situation in terms of harm done and outstanding obligations.⁷⁰⁰

2 Inclusive participation

Existing mechanisms are also more representative than inclusive or participatory, in that they accommodate input from a range of actors. It has already been suggested that this should include the voices of those whose rights are in question in the first place, in a safe and appropriate way. A restorative approach, however, requires active and inclusive participation by which all actors have the opportunity to communicate their interests and perspectives.⁷⁰¹ Where non-state actors and

⁶⁹⁹ Raye and Roberts, above n 411, at 218.

⁷⁰⁰ Baldwin and Black, above n 470, at 61.

⁷⁰¹ Braithwaite, above n 6, at 24.

stakeholders have the opportunity to submit shadow reports, a commitment to inclusive participation would put more emphasis on their actual participation in the discussion and decision making process, in terms of addressing issues and redressing harm.

These procedural commitments to dialogue and inclusive participation can help create the environment necessary for restorative engagement, as illustrated by the regulatory venn diagram. Genuine dialogue and inclusive participation are far more likely to achieve positive socialisation, and to do so in an empowering and sustainable way. In addition, these commitments require a level of active investment on the part of facilitators and regulators, such that inherently they offer actors support for compliance.⁷⁰² Dialogue and participation can also prevent regulatory engagement from being reduced to ritualism (tolerance) or unilateralism (persuasion). In terms of sanctions and shaming, a dialogical and inclusive environment can ensure that such measures are aligned with restorative objectives, and that they do not become disintegrative (stigmatisation) or excessively punitive (punishment).

3 *Constructive outcomes*

That outcomes should be constructive refers to the need to redress harm done, and address underlying issues in a practical way.⁷⁰³ Recommendations should be comprehensive, but also realistic and not excessive in number, nor repetitive in nature. Where existing mechanisms provide for member states to contribute their own suggestions, a commitment to constructive outcomes can accommodate this but as part of a process that informs more specific and coherent final recommendations.

The objectives listed in the UN Handbook on Restorative Justice Programmes inform an understanding of constructive outcomes in terms of a) empowering victims, b) repairing damaged relationships, c) denouncing [human rights abuses] and reaffirming community values, d) encouraging responsibility on the part of all parties and particularly [state actors], e) identifying forward-looking outcomes, f) reducing [noncompliance] by encouraging transformation and reintegration, and g) identifying underlying factors.⁷⁰⁴

⁷⁰² Hathaway, above n 4, at 2007.

⁷⁰³ Van Ness, above n 387, at 9.

⁷⁰⁴ UN Office on Drugs and Crime, above n 518, at [9]-[11].

4 *Consensus-based outcomes*

That outcomes should be consensus-based goes to the heart of a restorative approach.⁷⁰⁵ The logic of personal accountability informs this commitment, but so too does the logic of relationship and reintegration. To achieve real and lasting transformation, actors must accept responsibility and agree to resolution. In some cases, non-consensual restrictive measures might be necessary.⁷⁰⁶ Even in such cases, however, this commitment requires that restrictive measures are first legitimised by local stakeholders, and regulated actors are given the opportunity to avoid sanctions by complying with realistic requirements.

These substantive commitments to constructive and consensus-based outcomes promise support and can further contribute to the environment necessary for restorative engagement, according to the regulatory venn diagram. A commitment to constructive outcomes can further prevent a regulatory ritualism (tolerance) by ensuring that measures are oriented towards long-term outcomes. Such a commitment can also further prevent disintegrative shaming (stigmatisation) and an excessively punitive approach (punishment) by ensuring that measures prioritise the repair of relationships and empowerment of parties. In addition, a commitment to consensus-based outcomes can further prevent unilateralism (persuasion) by attaching substantive value to dialogue. As established, this requires both responsiveness and receptiveness on the part of the regulator. Ideally, that can engender the same in the regulated actor.

5 *Relational focus*

The overarching commitment to relationship informs each of the other commitments, and every measure taken in the context of restorative regulation. Dialogue and inclusive participation must be characterised by a relational focus. Likewise, constructive and consensus-based outcomes must be realised by means of this relationship-oriented process. Relationship is expressed by these procedural and substantive commitments, but it is more than the sum of these. Relationship is itself about a commitment on the part of the regulator, in this case to the welfare of the regulated actor and those the latter represents. As suggested, restorative regulation must be informed by a third generation of interdisciplinary legal scholarship, the focus of which is commitment. Relationship can give effect to this.

⁷⁰⁵ ICRC, above n 574.

⁷⁰⁶ Van Ness, above n 387, at 15.

According to the regulatory venn diagram, restorative engagement is characterised by a circular process involving collaboration and aspiration, over agreed minimum standards and aspirational goals. The procedural and substantive commitments contribute to this process, but relationship is what holds it together. This relational commitment is informed by Mathiesen's conceptions of instrumental and expressive solidarity.⁷⁰⁷ It is also informed by the risks of colonialism and charity, in that it must seek to avoid such dynamics.⁷⁰⁸ Thus, relationship can also give effect to the non-linear mode of regulation by which the expressive and instrumental roles of international human rights law are realigned.⁷⁰⁹

⁷⁰⁷ Mathiesen, above n 358, at 145.

⁷⁰⁸ ICRC, above n 574.

⁷⁰⁹ Van Ness, above n 387, at 15.

Chapter VIII

Conclusion

Having examined the existing regulatory framework, in a local and international context, it is evident that human rights law is more effective at an expressive than instrumental level. The ill treatment of prisoners in the Philippines is indicative of human rights noncompliance more generally, as illustrated by Hathaway's empirical findings.⁷¹⁰ Existing regulatory theories fail to comprehend these findings, which include a negative correlation between treaty ratification and human rights practices.⁷¹¹

Hathaway explains these findings in terms of the expressive and instrumental roles of international human rights law failing to align.⁷¹² This can be caused by regulatory ritualism, where expressive measures become ends in themselves, removed from practical commitments and realities.⁷¹³ However, an examination of the history of international politics and of post-colonial legal scholarship, reveals that imperialism can contribute to the dynamics that cause human rights violations in the first place.⁷¹⁴ This examination also reveals, therefore, that the realignment of expressive and instrumental measures cannot be unilaterally imposed.

Such realignment calls for Steiner's "different and expanded conception" of human rights protection.⁷¹⁵ In this regard, the evolution of interdisciplinary international legal scholarship points to a third generational approach, recognising the presence of social mechanisms that make international human rights law important, and seeking to establish the *processes* that make it also *effective*. Where a first generational approach is characterised by interests and ideas, and a second generational approach by identity, the third is characterised by *commitment*.

This evolution of interdisciplinary international legal scholarship paves the way for the restorative regulation of human rights compliance. Restorative processes, characterised by a relational commitment, can make international human rights law not only important at an expressive level but also effective at an instrumental level. This rejects a regulatory ritualism but also avoids a unilateral imperialism, in the

⁷¹⁰ Hathaway, above n 4, at 1989.

⁷¹¹ Hathaway, above n 306, at 186.

⁷¹² Hathaway, above n 4, at 2006.

⁷¹³ Charlesworth, above n 18, at 11–12.

⁷¹⁴ Kapur, above n 334, at 674.

⁷¹⁵ Steiner, above n 5, at 800.

course of realigning expression and practice. The key to such a restorative process of realignment is (expressive and instrumental) solidarity, as defined by Mathiesen.⁷¹⁶

Braithwaite envisions a “restorative and responsive regulation of human rights” but does not develop this beyond bottom-up diplomacy and reintegrative shaming.⁷¹⁷ An examination of the responsive regulatory model illuminates this vision, with a preference for dialogue and collaboration, an ability to escalate and de-escalate, and the engagement of all relevant stakeholders. Where this model fails to achieve constructive outcomes, it points not to the deficiency of restorative justice, but rather the need to apply restorative principles and practices across the entirety of the engagement process.

The regulatory venn diagram illustrates the holistic and balanced approach to noncompliance that restorative justice informs. This responds to violations of human rights with measures that integrate sanctions and supports, positive socialisation and reintegrative shaming. The focus is to redress harm, address underlying issues, and prevent future violations in a context-specific, community-oriented and capacity-enhancing way. It seeks to give effect to accountability in terms of a sovereignty inhering in the citizenry.⁷¹⁸ Such an approach is necessarily collaborative and dialogical. This implies Braithwaite’s “communitarian engagement of many locally knowledgeable actors”.⁷¹⁹

In the context of the Philippines, this thesis has attempted to incorporate such a communitarian engagement of locally knowledgeable actors. The insights of such actors and stakeholders suggest that state sovereignty and cultural autonomy are of high importance.⁷²⁰ This requires a restorative approach by which cultural values and local practices can be harmonised with international regulatory processes in a collaborative and consensus-based way.⁷²¹ Restorative values and practices exist both formally and informally in the Philippines, and these should be integrated into a context-specific approach.⁷²²

Alternative structures that exist in Philippine prisons are significant and so deeply entrenched that these must also be integrated, to the extent that they are positive and restorative.⁷²³ This presents something of a challenge, but one that cannot be

⁷¹⁶ Mathiesen, above n 358, at 145.

⁷¹⁷ Braithwaite, above n 6, at 201–202.

⁷¹⁸ Falk, above n 348, at 12.

⁷¹⁹ Braithwaite, above n 6, at 24.

⁷²⁰ Karapatan, above n 583, at 64.

⁷²¹ Law Commission, above n 557, at 12, 71.

⁷²² Interview with Co, above n 592.

⁷²³ Narag, above n 126, at 177.

avoided. Indeed, the success of restorative regulatory engagement in this context relies on the ability of regulators to understand and engage with actors and stakeholders who are located within these structures.

The special rapporteur mechanism is best suited to realise such restorative regulatory engagement. This is primarily because of the personal, responsive and sustained nature of its engagement. Where it is threatening in its investigation, reporting and follow-up, a restorative model informs a more dialogical and collaborative approach. In respect of prisoners in the Philippines, the Special Rapporteur should prioritise matters of urgency, but also those more easily resolvable, to build momentum and relationship for more contentious issues.

Generally, all regulatory mechanisms can be restorative if they apply holistic, integrated measures as suggested by the regulatory venn diagram. Practically speaking, this requires adherence to the five commitments identified in the previous chapter. These include procedural commitment to dialogue and inclusive participation, and substantive commitment to constructive and consensus-based recommendations. They also include an overarching commitment to relationship.

Restorative regulation represents an approach to human rights compliance that is both less tolerant of violations and more understanding of the local situation. It is characterised by an increased commitment, both on the part of the regulator and the regulated actor. It employs regulatory measures not as ends in themselves, but as oriented towards constructive and restorative outcomes. Such outcomes cannot be imposed, nor their realisation prescribed.

This thesis attempts to engage with a desperately practical problem, in terms of the ill-treatment of prisoners in the Philippines. At the same time, this thesis can only go so far. The work itself needs to be done on a practical level, in a relational context. This can be identified and envisioned on paper, but for the expressive and instrumental roles of international human rights law to align, and for human rights practices to improve in a tangible and sustainable way, this can only be realised in practice.

Bibliography

A *International Instruments*

Charter of the United Nations 1945.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987).

Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (1993).

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [2002] PITSE 10 (opened for signature 18 December 2002, entered into force 22 June 2006).

Optional Protocol to the International Covenant on Civil and Political Rights [1966] PITSE 3 (opened for signature 16 December 1966, entered into force 23 March 1976).

Universal Declaration of Human Rights [1948] PITSE 8 (ratified 10 December 1948).

Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002).

Standard Minimum Rules for the Treatment of Prisoners [1955] PITSE 1 (adopted 30 August 1955).

B *International Law Materials*

1 Committee against Torture

Concluding Observations of the Committee against Torture: The Philippines, CAT/C/PHL/CO/2 (2009).

Concluding Observations on the Third Periodic Report of the Philippines, CAT/C/PHL/CO/3 (2016).

General Comment No. 3 of the Committee against Torture CAT/C/GC/3 (2002).

Report of the Committee against Torture, A/44/46 (1989).

2 General Assembly

In Larger Freedom: Towards Development, Security and Human Rights for All, *Report of the Secretary-General* A/59/2005 (2005).

Resolution on the Human Rights Council GA Res 60/251, A/Res/60/251 (2006).

Resolution on the Relations of Members of the United Nations with Spain GA Res 39, I (1946).

Suspension of the rights of membership of the Libyan Arab Jamahiriya in the Human Rights Council GA Res 65/265, A/Res/65/265 (2011).

3 *Human Rights Committee*

Concluding Observations on the Fourth Periodic Report of the Philippines, CCPR/C/PHL/CO/4 (2012).

Consideration of Reports Submitted by State Parties under Article 40 of the Covenant, CCPR/CO/79/PHL (2003).

Piandiong v The Philippines Communication No. 869/1999, CCPR/C/70/D/869/1999 (2000).

Report of the Human Rights Committee, A/44/40 (1989).

4 *Human Rights Council*

Institution-building of the United Nations Human Rights Council HRC Res 5/1, A/HRC/Res/5/1 (2007).

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Mission to Philippines, A/HRC/8/3/Add.2 (2008).

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston: Follow-up to country recommendations – Philippines, A/HRC/11/2/Add.8 (2009).

Report of the Working Group on the Universal Periodic Review: Philippines, A/HRC/8/28 (2008).

Report of the Working Group on the Universal Periodic Review: Philippines, A/HRC/21/12 (2012).

Report of the Working Group on the Universal Periodic Review: Philippines, A/HRC/36/12 (2017).

Summary of Stakeholders' Submissions: The Philippines, A/HRC/WG.6/27/PHL/3 (2017).

5 *International Court of Justice*

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 108.

South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase) [1966] ICJ Rep 6.

6 Security Council

Resolution on Children and Armed Conflict SC Res 1261, S/Res/1261 (1999).

Resolution on Iraq SC Res 688, S/Res/688 (1991).

Resolution on Libya SC Res 1973, S/Res/1973 (2011).

Resolution on South Africa SC Res 418, S/Res/418 (1977).

C **Legislation (Philippines)**

1 *Statutes*

Act Prohibiting the Imposition of Death Penalty in the Philippines 2006.

Act Providing for a Local Government Code of 1991.

Administrative Code 1987.

Codigo Penal Filipinas 1887.

Comprehensive Dangerous Drugs Act.

Constitution of the Philippines 1987.

Department of Interior and Local Government Act of 1990.

Juvenile Justice and Welfare Act of 2006.

Ombudsman Act 1989.

Revised Penal Code 1930.

Speedy Trial Act of 1998.

2 *Subordinate Legislation*

BJMP Comprehensive Operations Manual.

Bureau of Corrections *Citizen's Charter* 2012.

Bureau of Corrections Operating Manual.

Bureau of Jail Management and Penology *Citizen's Charter* 2013.

Bureau of Jail Management and Penology Comprehensive Operations Manual 2015.

Office of the Ombudsman *Citizen's Charter* 2017.

Supreme Court Circular "Revised Guidelines for Continuous Trial of Criminal Cases" (16 May 2017) OCA 101-2017.

3 *Bills*

Senate Bill No. 2610, Jail Integration Act of 2008.

D *Secondary Sources*

1 *Texts*

Rommel Abitria “Imprisonment and Human Rights: A Comparative Study on the Development and Concept of Imprisonment, with special focus on the Philippines” (LLM, University of Kent, 2013).

Philip Alston and Ryan Goodman *International human rights* (Oxford University Press, Oxford, United Kingdom, 2013).

Ilias Bantekas and Lutz Oette *International Human Rights Law and Practice* (second edition. ed, Cambridge University Press, Cambridge, United Kingdom, 2016).

John Braithwaite *Global Business Regulation* (Cambridge University Press, Cambridge, 2000).

John Braithwaite *Restorative Justice and Responsive Regulation* (Oxford University Press, Oxford ; New York, 2002).

Center for Trade Union and Human Rights *A Violent (Dis)order Deepening Poverty* (Center for Trade Union and Human Rights, Quezon City, 2017).

Jim Consedine and Helen Bowen *Restorative Justice* (Ploughshares Publications, Lyttelton, NZ, 1998).

Abram Chayes and Antonia Handler Chayes *The New Sovereignty* (Harvard University Press, Cambridge, Mass, Cambridge, MA, 1995).

Richard Falk “Sovereignty and Human Dignity: The Search for Reconciliation” in Francis Deng and Terrence Lyons (ed) *African Reckoning: A Quest for Good Governance* (Brookings Institution Press, Washington, 1998).

Michel Foucault *Discipline and punish* (2nd vintage books ed. ed, Vintage Books, New York, 1995).

ICRC *Even Wars Have Limits: Connecting IHL with the Pacific Way* (draft paper, June 2005).

Gerry Johnstone and Daniel W Van Ness *Handbook of Restorative Justice* (Willan Publishing, Cullompton, 2007).

Karapatan *2016 Karapatan Year-End Report on the Human Rights Situation in the Philippines* (Karapatan, Quezon City, 2016).

Margaret E Keck and Kathryn Sikkink *Activists beyond Borders* (Cornell University Press, 1998).

Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006).

- Ratu Joni Madraiwiwi “Rights and Rites: A Discourse”, (paper presented to New Zealand Law Commission Custom and Human Rights Workshop, Nadi, May 2006).
- Thomas Mathiesen *Prison on Trial* (3rd ed, Waterside Press, Winchester, 2006).
- Sally Merry *Human Rights and Gender Violence* (University of Chicago Press, Chicago, 2006).
- Daniel Moeckli and others *International Human Rights Law* (Oxford University Press, Oxford ; New York, 2010).
- Makau Mutua *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, Philadelphia, 2002).
- Raymund Narag *Freedom and Death Inside the Jail: A Look into the Condition of Quezon City Jail* (Supreme Court of the Philippines, Philippines, 2005).
- Morten Pedersen and David Kinley *Principled Engagement* (Farnham, Surrey, England, Ashgate Publishing Company, 2013).
- Geoffrey Robertson *Crimes against Humanity* (2nd ed, Penguin, London, 2000).
- Vivien Stern *A Sin Against the Future: Imprisonment in the World* (Penguin Books, London, 1998).
- UN Office on Drugs and Crime *Handbook on Restorative Justice Programmes* 2006.
- Daniel Van Ness *RJ City: Phase 1, Final Report* (Centre for Justice and Reconciliation, Prison Fellowship International, August 2010).

2 Articles

- Robert Baldwin and Julia Black “Really Responsive Regulation” (2008) 71 Mod L Rev 59.
- Julia Black “Critical Reflections on Regulation” (2002) 27 Austl J Leg Phil 1.
- John Braithwaite “Responsive Regulation and Developing Economies” (2006) 34 World Development 884.
- John Braithwaite “The Essence of Responsive Regulation Fasken Lecture” (2011) 44 UBC L Rev 475.
- Kimberley Brownlee “Retributive, Restorative and Ritualistic Justice” (2010) 30 Oxf J Leg Stud 385.
- Silvia Casale “The Importance of Dialogue and Cooperation in Prison Oversight Opening Up a Closed World: A Sourcebook on Prison Oversight: The International Experience with Prison Oversight” (2009–2010) 30 Pace L Rev 1490.
- Hilary Charlesworth “Swimming to Cambodia Justice and Ritual in Human Rights after Conflict Kirby Lecture in International Law” (2010) 29 Aust YBIL 1.
- Jeffrey T Checkel “International Institutions and Socialization in Europe: Introduction and Framework” (2005) 59 International Organization 801.

- Richard Collin “Symbiosis versus Hegemony: New Directions in the Foreign Relations Historiography of Theodore Roosevelt and William Howard Taft” (1995) 19 *Diplomatic History* 473.
- Elvira Dominguez-Redondo “The Universal Periodic Review - Is There Life beyond Naming and Shaming in Human Rights Implementation” (2012) 2012 *NZ L Rev* 673.
- Claire Garbett “The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court” (2013) 16 *Contemporary Justice Review* 193.
- Jack Goldsmith and Stephen D Krasner “The Limits of Idealism” (2003) 132 *Daedalus* 47.
- Ryan Goodman and Derek Jinks “How to Influence States: Socialization and International Human Rights Law” (2004–2005) 54 *Duke LJ* 621.
- Ryan Goodman and Derek Jinks “Measuring the Effects of Human Rights Treaties” 14 *EJIL* 171.
- Ryan Goodman and Derek Jinks “Toward an Institutional Theory of Sovereignty” (2002–2003) 55 *Stan L Rev* 1749.
- Oona A Hathaway “Do Human Rights Treaties Make a Difference” (2001–2002) 111 *Yale LJ* 1935.
- Oona A Hathaway “Testing Conventional Wisdom” (2003) 14 *EJIL* 185.
- Robert Howse and Ruti Teitel “Beth Simmons’s Mobilizing for Human Rights: A Beyond Compliance Perspective Symposium: The 17th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: From Rights to Reality: Mobilizing for Human Rights and its Intersection with International Law” (2011–2012) 44 *NYU J Intl L & Pol* 813.
- Robert Howse and Ruti Teitel “Beyond Compliance: Rethinking Why International Law Really Matters” (2010) 1 *Global Policy* 127.
- Ratna Kapur “Human Rights in the 21st Century: Take a Walk on the Dark Side Special Issue - Gender, Sexuality and Reproduction” (2006) 28 *Sydney L Rev* 665.
- Felix Keesing “Applied Anthropology in Colonial Administration” in Ralph Linton (ed) *The Science of Man in the World Crisis* (Columbia University Press, New York, 1945) 373.
- Harold Koh “How Is International Human Rights Law Enforced Addison C Harris Lecture” (1998–1999) 74 *Ind LJ* 1397.
- Harold Koh “Internalization through Socialization” (2004–2005) 54 *Duke LJ* 975.
- Jonathan Kolieb “When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond” (2015) 41 *Monash U L Rev* 136.

- Barbara Koremenos, Charles Lipson and Duncan Snidal “The Rational Design of International Institutions” (2001) 55 *International Organization* 761.
- Jeff Latimer, Craig Dowden and Danielle Muise “The Effectiveness of Restorative Justice Practices: A Meta-Analysis” (2005) 85 *Prison J* 127.
- Andrew Moravcsik “Taking Preferences Seriously: A Liberal Theory of International Politics” (1997) 51 *International Organization* 513.
- Andrew Moravcsik “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe” (2000) 54 *International Organization* 217.
- Eric A Posner “Some Skeptical Comments on Beth Simmons’s Mobilizing for Human Rights Symposium: The 17th Annual Herbert Rubin and Justice Rose Luttan Rubin International Law Symposium: From Rights to Reality: Mobilizing for Human Rights and its Intersection with International Law” (2011–2012) 44 *NYU J Intl L & Pol* 819.

3 *Internet Materials*

- Balay Rehabilitation Center “Briefing Paper on National Preventive Mechanism” Balay (undated) <ayph.net>.
- Bureau of Jail Management and Penology “DBM Approved Budget: FY 2017” BJMP Official Website <www.bjmp.gov.ph>.
- Pavin Chachavalpongpun “Is Promoting Human Rights in ASEAN an Impossible Task?” (January 2018) *The Diplomat* <thediplomat.com>.
- GAN Integrity “The Philippines Corruption Report” (October 2017) GAN Business Anti-Corruption Portal <<http://www.business-anti-corruption.com/>>.
- Institute for Criminal Policy Research “World Prison Brief Data: Philippines” World Prison Brief <www.prisonstudies.org>.
- Josephus Jimenez “Impeaching Sereno, Bautista and Morales” (10 September 2017) *The Philippine Star* <www.philstar.com>.
- Karapatan “Release ALL political prisoners, stop filing trumped up charges vs civilians and activists” (July 2017) Karapatan <<http://www.karapatan.org>>.
- Andrew Marshall “Philippines drug war turns a teeming jail into a haven” (November 2016) Reuters <www.reuters.com>.
- National Council of Churches in the Philippines, “Philippine UPR Watch: Climate of impunity getting worse in PH” (28 April 2017) Oikoumene NCCP <ccphilippines.org>.
- Office of the High Commissioner for Human Rights “Standing Invitations” (13 July 2017) <www.ohchr.org>.
- Patricia Lourdes Viray “Callamard hits back: UN visit not a vehicle for politicking” (31 August 2017) PhilStar <www.philstar.com>.

Philippine Statistics Authority “Poverty Incidence among Filipinos” (18 March 2016) <www.psa.gov.ph>.

Agence France-Presse “Duterte offers authoritarianism as PH panacea” (29 March 2017) Inquirer.net <www.inquirer.net>.

Ginny Stein “Philippine prisons overflowing with hungry inmates as Duterte's drug war intensifies” (September 2017) ABC News <www.abc.net.au>.

Felipe Villamor “International Criminal Court Will Investigate Duterte over Drug War” (February 2018) New York Times <www.nytimes.com>.

Felipe Villamor “Philippines Moves Closer to Reinstating Death Penalty” New York Times (March 2018) <www.nytimes.com>.

The World Bank Group “Personal Remittances Received” (2017) The World Bank <<https://data.worldbank.org>>.

4 *Interviews*

Anonymous former prisoner, 11 October 2017.

Anonymous prisoners, 5 October 2017.

Chito Gascon, Chair of Commission on Human Rights Philippines, 12 October 2017.

Daisy Arago, Executive Director of Center for Trade Union and Human Rights, 4 October 2017.

Edgar Pascua, Registrar at Ateneo de Davao, 9 October 2017.

Fr Eli Lumbo, Executive Director of the Philippine Jesuit Prison Service, 13 October 2017.

Jamie Sumondong, Industrial Psychologist, consultant to BJMP, 11 October 2017.

Manuel Co, Administrator of Parole and Probation at Department of Justice Philippines, 4 October 2017.

Rommel Abitria, Executive Director of the Humanitarian Legal Assistance Foundation, 2 October 2017.

Sol Taule, Attorney at Karapatan, 5 October 2017.

Wilnor Papa, Human Rights Officer at Amnesty International, 3 October 2017.