



Geneva Centre for the Democratic Control of
Armed Forces (DCAF)

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The Role of Penal Reform in Security Sector Reform

Megan Bastick

**GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF
ARMED FORCES (DCAF)**

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List of Abbreviations

BINUB	UN Integrated Office in Burundi
DDR	Disarmament, Demobilisation and Reintegration
DPKO	UN Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
EU	European Union
EULEX Kosovo	EU Rule of Law Mission in Kosovo
ICPS	International Centre for Prison Studies
ICRC	International Committee of the Red Cross
MINUSTAH	UN Stabilization Mission in Haiti
MONUC	UN Organization Mission in the Democratic Republic of the Congo
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OECD DAC	OECD Development Assistance Committee
OSCE	Organization for Security and Co-operation in Europe
PRI	Penal Reform International
SSR	Security Sector Reform
UN	United Nations
UNAMA	UN Assistance Mission in Afghanistan
UNDP	UN Development Programme
UNMIK	UN Interim Administration Mission in Kosovo
UNODC	UN Office on Drugs and Crime

The Role of Penal Reform in Security Sector Reform

*Megan Bastick*¹

Introduction

Penal reform activities have been carried on in Europe and the United States since at least the late eighteenth century. Security sector reform (SSR), a much newer concept, is a governance-driven approach that looks to strengthen the roles of both state and non-state actors to deliver security to individuals and communities. As such, attention to the penal system is important in any comprehensive SSR process. However, much SSR programming overlooks penal elements, and lessons learnt through long experience in penal reform have not been applied to other SSR activities. There is limited discourse between the penal reform community of practice and the wider SSR community.

Separately, SSR and penal practitioners acknowledge this as a serious problem. Those working on penal reform often find that structural problems related to other parts of the security system – such as inadequate and inappropriate laws, absence of proper administrative systems and management capacity in the court systems, and inappropriate policing methods – must be addressed to make progress on improving prison conditions. Equally, in many post-conflict SSR environments, such as Afghanistan, Burundi, Côte d'Ivoire, the Democratic Republic of the Congo (DRC), Haiti and Liberia, inadequate attention to penal reform has undermined efforts at police or judicial reform.

This paper seeks to initiate a dialogue concerning the relationship between penal reform and wider security sector reform and governance. It is based on desk research and a number of interviews with penal reform practitioners. A draft of this paper was discussed by a group of penal reform and SSR experts at a workshop in November 2009.

Section I of the paper gives an overview of understandings of penal reform and SSR, and maps out the current disconnect between penal reform and SSR programming. It then explores a conceptual framework for understanding the linkages between penal reform and a comprehensive approach to SSR, asking why penal reform is important when applying a system-wide approach to reform, how penal reform might be strengthened by applying security sector governance and SSR perspectives, and what concerns might arise in situating penal reform within SSR. Section II gives an overview of some of the main challenges of penal reform, globally and in particular contexts, and challenges to external support to penal

¹ The author would like to thank the following for their helpful input on a draft of this paper: Dr Uju Agomoh, Professor Hans-Jörg Albrecht, Paul Biddle, Professor Andrew Coyle, Isabel Hight, Stephen Johnston, Richard Kuire, Mary Murphy, Darko Stancic and Everett Summerfield, as well as colleagues within the DCAF Research Division, Alan Bryden, Fairlie Chappuis and Dr Heiner Hänggi.

reform processes, including in post-conflict contexts. Section III examines possible ways to strengthen both penal reform and wider SSR efforts through better understanding of the potential contributions of penal reform to comprehensive SSR. Section IV concludes with some suggestions for further research, and for how those guiding SSR processes might better recognise and coordinate with relevant aspects of penal reform.

1. Definitions and Concepts

1.1 Penal reform

By ‘penal reform’ is meant reform of the penal system of a country or part of a country. ‘Penal’ means ‘of or relating to punishment’. The penal system thus includes prisons, but also alternatives to custody, such as systems for bail and community service orders, as well as (where existing) elements such as parole boards, probationary services and inspectorates, and traditional and informal sanctions systems.

Any discussion of penal reform should appreciate that the Western notion of the centrality of prisons within a penal system is not a universal one. Coyle suggests that many developing countries that were formerly dominated by colonial powers have no indigenous concept of imprisonment:

The notion of taking a large number of able bodied young men, who should be contributing to the economic and social good of the nation, and depriving them of their liberty in private places, where they become a burden on society and give little or no satisfaction to the victims of crime, is seen as very odd in these cultures.²

According to Albrecht, the penalty of imprisonment was not known in Asia, South America or Africa before colonial times. Nonetheless, prisons have spread and are today pillars of criminal-law-based social control in most world regions.³ As such, they are an important area of attention within any penal reform agenda.

Penal systems pursue a number of aims simultaneously through their particular sentencing philosophy. In most countries, although terminology may differ, these are a combination of retribution, deterrence, exclusion/isolation and rehabilitation.⁴ The relative weight afforded to the different rationales varies between countries (even within the same region), and changes over time. *Retribution*, in its modern sense, rests on the belief that courts have an obligation to display society’s collective disapproval of crime. On this basis, penal sanctions punish offenders in proportion to their culpability for criminal activity (at times represented as the ‘proportionality’ approach). *Exclusion* or *isolation* aims to protect mainstream society from dangerous and violent offenders. *Deterrence* aims to deter

² Coyle, A. (2004) ‘Prison reform efforts around the world: The role of prison administrators’, *Pace Law Review*, 24: 826.

³ Personal correspondence from Professor Hans-Jörg Albrecht, 2 December 2009.

⁴ The following summary draws upon Terrill, R. J. (1999) *World Criminal Justice Systems: A Survey*, 4th edn, Cincinnati, Ohio; Anderson Publishing Co, pp. 75-76.

people from violating the law, on the premise that if the public know about the sanctions imposed for committing a particular offence, they will be discouraged from doing so. The concept of *rehabilitation* is much contested, but implies re-establishment or restoration of the person who has offended to normal, non-criminal life. It can generally be understood as striving to prepare the offender for his or her reintegration into the community, seeing criminal sanctions as an opportunity to transform the offender. Each country tends to have its own traditions shaping how these different values are reflected in sentencing, in the types of punishments and programmes available and in prison regimes.

Penal reform is situated within a well-developed framework of international standards governing the objectives, management and conditions within the penal system. These international standards include the UN Standard Minimum Rules for the Treatment of Prisoners, Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment, Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rules for the Protection of Juveniles Deprived of Their Liberty, Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) and Code of Conduct for Law Enforcement Officials. Moreover, key international human rights instruments such as the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities are understood as having important application to the penal system. Penal reform is the process of changing a penal system to bring it into line with this rule of law and international human rights framework. It aims to ensure sanctions that are proportionate, non-discriminatory and rehabilitative. It aims to change prison institutions into places that respect individual human dignity, ensure that those imprisoned are afforded their legal rights, strengthen the appropriate use of alternatives to imprisonment and promote social reintegration of people who have offended.⁵

Penal reform processes are extremely varied across different contexts in terms of actors, timeframes and specific objectives. Criminologists and other commentators within a country may discuss penal reform in light of ongoing incremental changes to the penal system. At the same time, there is a nascent discourse on supporting prison development in post-conflict peacebuilding, which may envision sweeping reform or reconstruction. It should be understood that penal reform refers to a broad spectrum of processes: from gradual to rapid changes; from mere improvements in conditions to reform of governance structures; from changes instituted by local prison authorities to reform led by international actors. In many contexts it may be more appropriate to refer to ‘penal development’ – acknowledging that change is gradual – or, when prisons

⁵ See, for example, Coyle, A. (2009) *A Human Rights Approach to Prison Management: Handbook for Prison Staff*, 2nd edn, London: International Centre for Prison Studies, for an outline of how these particular instruments guide prison management; for application of the international standards to the prison system, detention prior to adjudication, alternatives to incarceration and social reintegration, see the UNODC *Criminal Justice Assessment Toolkit*, available at: www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html.

alone are the focus of attention, to ‘prison reform’ or ‘support to prison development’.

The UN Office on Drugs and Crime (UNODC) *Criminal Justice Assessment Toolkit* lists the following areas of technical assistance concerning prisons, giving an overview of the types of activities that characterise penal reform.⁶

- Legislative reforms introducing and increasing the scope of alternatives to imprisonment, decriminalising certain acts and reducing sentences for selected offences in the penal statutes;
- Improving organizational design and management processes relating to the implementation of penal legislation;
- Legislative and structural reforms enabling the transfer of the prison service from the ministry responsible for investigating charges to a separate ministry responsible for the management of prisons (e.g. from the Ministry of Interior to the Ministry of Justice) and demilitarisation of the system;
- Improving mechanisms of coordination between criminal justice agencies, as well as between prison authorities and social welfare and/or probation services;
- Legislative reforms to improve legal safeguards for prisoners and training for relevant law enforcement agencies in the application of these safeguards;
- Developing training curricula for prison service staff and providing technical assistance to training;
- Developing constructive prisoner programmes/improved prison regime;
- Improving access to justice, particularly for the poor, by providing technical assistance to develop procedures and management of legal aid programmes and supporting NGOs and others providing paralegal advisory services;
- Strategies to combat TB and HIV/AIDS among prisoners effectively; development of TB and HIV management programmes; improvement of on-entry health screening measures and health services in prisons;
- Improving inspection procedures; training and technical capacity building for independent inspection bodies;
- Designing special projects aiming to increase and improve the support to special categories and vulnerable groups;

⁶ UNODC, *ibid.*, ‘The prison system’, pp. 3-4.

- Enhancing capacity to develop and manage planning, research and information management;
- Increasing public awareness about imprisonment and alternatives to prison; increasing community participation in the criminal justice process.

In a small number of countries, including the United States and Canada, the terms ‘corrections’ and ‘correctional reform’ are used in place of the ‘penal system’ and ‘penal reform’. The term ‘corrections’ encompasses custody, parole and probation, but whether a state refers to its penal system as ‘correctional’ does not any longer (if it ever did) correlate with the rehabilitative emphasis of the system. UN documents, norms, standards and rules refer to the penal or prison system rather than corrections.

The term ‘prison’ will be used throughout this paper for places where people are physically confined on charge of having committed a crime or after sentencing for commission of a crime. Other terms for a prison include ‘remand centre’, ‘correctional facility’, ‘detention centre’, ‘jail/gaol’, ‘penal colony’ and ‘penitentiary’. Use of these different terms in some countries can denote whether a place of detention holds people who are awaiting trial, who have been convicted or who are subject to different conditions of security, and/or a prison under a particular jurisdiction. In the United States, for example, places which hold persons who are awaiting trial at minor courts or who have been sentenced to short sentences are usually described as ‘jails’; those holding convicted prisoners are often called ‘correctional institutions’. In general, this paper will use the term ‘prison’, unless the specific meaning ascribed to an alternative term is important for the discussion.

There are other places where people are deprived of their liberty that are not called prisons. These include police lock-up cells, where people are held (ideally) for short periods before being released or transferred to a prison, closed psychiatric wards and immigration detention facilities. The governance and reform of these facilities are not examined in this paper. Military prisons and prisoner-of-war camps are commonly administered by military authorities quite separately from the mainstream, usually civilian, penal system. These too are not examined in this paper.

1.2 Security sector reform

SSR is a relatively new concept, essentially aimed at the effective and efficient provision of state and human security within a framework of democratic governance. It is driven by an understanding that an ineffective, inefficient and poorly governed security sector is an obstacle to development, democratisation and conflict prevention, and – in post-conflict states – to peacebuilding.⁷ The concept of SSR emerged primarily from the donor development community, but

⁷ Hänggi, H. (2009) ‘Security sector reform’, in V. Chetail (ed.) *Post-Conflict Peacebuilding: A Lexicon*, Oxford: Oxford University Press, p. 337.

has been adopted by the United Nations and other international and regional organisations, and is increasingly used by governments and civil society to describe development and reform processes within their own nations.

While the security sector can be defined in broader or narrower terms, a broad understanding of SSR defines the sector as comprising *all state institutions and other entities with a role in ensuring the security of the state and its people, including justice and penal institutions, non-state armed groups and civil society organisations providing security services or engaged in oversight activities*. This broad conception of the security sector acknowledges that individuals' security is often provided by non-state mechanisms and actors, such as traditional justice bodies, community security groups, armed non-state actors and private security services. Moreover, it emphasises the important roles of civil society, on the one hand in delivering security to people (for example, support to prisoners) and on the other in monitoring state security provision (for example, as human rights advocates). This understanding of the security sector has been adopted by most proponents of the SSR concept, including members of the Organisation for Economic Co-operation and Development (OECD), international organisations and non-governmental organisations, and thus reflects a widely used definition of SSR.⁸

SSR recognises that the security of individuals and that of the state are not necessarily identical, and that not all security problems have a state-centric solution. By keeping the focus on individuals and communities, distinct from the state, as the ultimate beneficiaries, and by stressing the potentially important roles of civil society groups in both oversight and security provision, SSR allies itself with the aims of a 'human security' approach. Nonetheless, SSR does emphasise the vital role of the state as a security provider, and the need to ensure that the state can play this role effectively.⁹ Central to the concept of SSR is an understanding of the security sector as a component of the public sector, accountable to government authority, which, in the words of former UN Secretary-General Kofi Annan, 'should be subject to the same standards of efficiency, equity and accountability as any other [public] service'.¹⁰

SSR attempts to address a dysfunctional security sector: one that does not provide security to the state and its people in an efficient and effective way, or is itself a cause of insecurity. Importantly, efficiency and effectiveness themselves do not characterise a well-functioning security sector for SSR purposes. A brutal regime may well be efficient and effective in its brutality. A security sector is considered dysfunctional if it is deficient in terms of democratic governance, for example through poor democratic oversight, protection of human rights or promotion of the rule of law. Bryden and Hänggi assert that 'By definition, SSR-related activities must be aimed at improving the governance of the security sector.'¹¹ As such,

⁸ Some agencies, such as the OECD, prefer the term 'security system reform' to security sector reform, emphasising the multisectoral nature of the security and justice system. Other alternative terms to SSR include 'security sector transformation' and 'security sector reconstruction'. *Ibid.*, p. 340.

⁹ Law, D. M. (2005) 'Human security and security sector reform: Contrasts and commonalities', *Sicherheit und Frieden*, 23(1): 17.

¹⁰ Quoted in Bryden, A. and H. Hänggi (2005) 'Reforming and reconstructing the security sector', in A. Bryden and H. Hänggi (eds) *Security Governance in Post-Conflict Peacebuilding*, Münster: LIT Verlag, p. 25.

¹¹ *Ibid.*, p. 27.

reforms aiming to modernise or improve the capacity of security institutions without ensuring their democratic accountability and good governance are *not* consistent with the SSR concept as commonly understood. Taking an example from the penal system, building new prison facilities or providing security equipment without attention to the good governance and accountability of the institutions concerned is not SSR. This linking of measures aimed at increasing efficiency and effectiveness of security services to overriding concerns of democratic governance is a core contribution of the SSR approach.

The objectives of SSR necessarily vary between reform contexts, but generally include promoting an accountable and effective security sector. In considering SSR from a donor perspective, the OECD has identified three major objectives:

- the improvement of basic security and justice service delivery;
- the establishment of an effective governance, oversight and accountability system;
- the development of local leadership and ownership of a reform process to review the capacity and technical needs of the security system.¹²

SSR has gained much practical relevance in the context of externally assisted reconstruction of states emerging from armed conflict. For multilateral peace operations that are involved in reform and reconstruction of the security sector, the SSR concept usefully addresses a range of post-conflict security governance challenges within a coherent framework. Within the UN system, SSR is increasingly viewed as a key factor for success in post-conflict peacebuilding.¹³

1.3 SSR as a means to promote human rights

Promotion of respect for human rights is an implicit goal of SSR. This is highlighted in the understanding of SSR embodied in the UN Secretary-General's report on SSR, which describes it as:

a process of assessment, review and implementation as well as monitoring and evaluation led by national authorities that has as its goal the enhancement of effective and accountable security for the State and its peoples without discrimination and with full respect for human rights and the rule of law.¹⁴

Security itself is a fundamental human right: Article 9(1) of the International Covenant on Civil and Political Rights states that 'Everyone has the right to liberty and security of person.'

¹² OECD Ministerial Statement (2007) 'Key policy and operational commitments from the Implementation Framework for Security System Reform', signed by OECD DAC ministers and heads of agency, Paris, 4 April.

¹³ Hänggi, note 7 above, p. 338.

¹⁴ United Nations (2008) 'Securing peace and development: The role of the United Nations in supporting security sector reform', report of the Secretary-General, UN Doc. A/62/659-S/2008/39, p. 6.

Unfortunately, the security sector remains a leading perpetrator of serious and systematic human rights abuses in many states, not least within the prison system. This is the case even in stable democracies, as human rights abuses associated with the fight against terrorism have demonstrated. SSR processes can be an important opportunity to integrate human rights standards and protection within security sector institutions. Among the key principles of SSR are *effectiveness*, *professionalism* and *accountability*. The following are examples of how the promotion of these principles through SSR can promote human rights, including respect of human rights by security sector actors.¹⁵

Effectiveness

- Where states do not have the ability or resources to fulfil their human rights obligations, SSR processes can help build this state capacity. For example, SSR can make police services better able to respond to rights violations through initiatives to strengthen investigation and prosecution capacities.
- Reform of security institutions can reduce discrimination by providing opportunities to increase the participation of women, different ethnic and religious groups and other minorities. This can, in turn, make security institutions better able to respond to the particular security needs of these groups.
- By encouraging better and more efficient resource allocation on the part of states, SSR processes can help free resources for under-funded sectors crucial to realisation of human rights, such as health and education.

Professionalism

- Human rights standards can be integrated into laws and mandates governing the operation of the security sector.
- Civilian control of security institutions, clear procedures and codes for behaviour and clear chains of command mean that standards are more likely to be enforced throughout an institution and reduce the risk of human rights violations by ‘rogue’ officers or units.
- Vetting of staff of reformed security services for human rights violations helps to build trust among the population. This trust can be buttressed by training that emphasises professionalism and respect for human rights, and recruitment that reflects the diversity of communities.

Accountability

- Security sector accountability and oversight procedures reduce impunity for human rights violations and help to ensure compliance with legal

¹⁵ The following points are adapted from the DCAF Backgrounder ‘SSR and human rights’ (forthcoming, 2010).

standards. Accountability procedures fostered through SSR may include both internal measures (for example compliance procedures, inspectors general and whistleblower protection) and external measures (for example robust oversight by parliament, an ombudsperson, the judiciary and/or civil society).

1.4 Understandings of penal reform within SSR policy and approaches

Institutional policy guidelines on SSR do generally include penal institutions as a part of the security sector and, as such, as institutions that might be part of SSR processes. However, there are divergent representations of penal reform within such SSR documents: in some contexts its relevance is seemingly seen as limited to prisons, in others, aspects such as probation and reintegration of offenders are embraced. For example, the UN Secretary-General's report on SSR included prison reform and administration in post-conflict and peacebuilding contexts within its review of UN experience in supporting SSR.¹⁶ The OECD Development Assistance Committee (OECD DAC) *Guidelines on SSR* include prisons within the security system as a justice and law enforcement institution, and the OECD DAC *Handbook on SSR* includes a chapter on prison reform.¹⁷ The European Union (EU) 'Concept for ESDP support to security sector reform' proposes that in strengthening justice/rule-of-law elements in SSR the EU might provide support in 'identifying the needs of the... penitentiary system and... developing a comprehensive development strategy' and 'identifying administrative, human and material resources required for the... penitentiary system'.¹⁸ The European Commission's SSR policy includes work on the prison system within justice reform, which is itself treated as a category of SSR.¹⁹

Surveying some donor-state SSR policies, they too include penal institutions, in some cases beyond just prisons. Canada claims to promote 'a coherent and comprehensive approach to security system reform, which recognizes the interconnectedness of the military, policing, justice, corrections, border management, and customs sectors'.²⁰ The Dutch policy on gender and security sector reform includes a section on the prison system and probation service.²¹ The United Kingdom's recent white paper 'Eliminating world poverty: Building our common future' includes a commitment to work with prisons and probation officers as part of addressing conflict and state fragility.²² Prisons are recognised as key in UK policy documents that guide both SSR and 'security, safety and access

¹⁶ United Nations, note 14 above, p. 8.

¹⁷ OECD DAC (2005) *Security System Reform and Governance*, Paris: OECD, p. 20; OECD DAC (2007) *Handbook on SSR: Supporting Security and Justice*, Paris: OECD.

¹⁸ Council of the European Union (2006) 'EU concept for ESDP support to security sector reform (SSR)', Doc. 12566/4/05, p. 15.

¹⁹ European Commission (2006) 'A concept for European Community support to security sector reform', communication from the Commission to the Council and the European Parliament, SEC(2006) 658.

²⁰ Department of Foreign Affairs and International Trade Canada website: www.international.gc.ca/glynberry/reform-reforme.aspx?lang=eng.

²¹ Netherlands Ministry of Foreign Affairs (2007) 'Developing the security sector: Security for whom, by whom? Security reform and gender', p. 24, available at: www.minbuza.nl/dsresource?objectid=buzabeheer:32219&type=pdf.

²² UK Department for International Development (2009) 'Eliminating world poverty: Building our common future', p. 75, available at: www.dfid.gov.uk/Documents/whitepaper/building-our-common-future-print.pdf.

to justice' programming, but it is only in relation to 'security, safety and access to justice' work that instruments also refer to other parts of the penal system, such as prosecution services and agencies responsible for non-custodial sentences.²³ In practice, UK work supporting penal reform in Africa has been conducted within rule-of-law/justice sector programmes, while provision of prison advisers in Afghanistan has been characterised as SSR.²⁴ The US policy on stability operations includes a broad range of activities to support the penal system within SSR, including increasing civilian oversight of the corrections system and promoting rehabilitation and reintegration of detainees. Simultaneously, this policy framework defines prisons as part of the 'justice and reconciliation' sector, rather than the security sector or the 'governance and participation' sector.²⁵

Within the UN system, the Department of Peacekeeping Operations (DPKO), the lead agency for penal reform, normally employs the term SSR to refer to police, defence and intelligence reform, and the term 'rule of law' when referring to activities related to judicial and penal systems.²⁶ DPKO headquarters prison staff are located within the Criminal Law and Judicial Advisory Section of the Office of Rule of Law and Security Institutions. In mandates for UN peacekeeping up to early 2007, reform of judicial and prison systems was listed as a separate component of a mission rather than as part of SSR.²⁷ In the February 2007 Security Council debate on SSR, the Canadian representative emphasised that:

Building a well-managed security sector requires not only military and police reforms, but also the construction of an impartial and accessible judicial and corrections sector... For the most part, the mandates approved by this body recognize the importance of military and police reform as the cornerstone of effective security sector reform. However, other equally critical and complementary elements of security sector reform, notably justice and corrections, are not consistently addressed.²⁸

While some mandates since that time (e.g. MINUSTAH's October 2008 mandate in Security Council Resolution 1840) have included judicial and penal reform under SSR, this has not been consistent. For example, the December 2008 MONUC mandate to assist the Congolese government in planning SSR emphasises only military and police elements among SSR tasks.²⁹ MONUC's mandate to advise 'in strengthening the capacity of the judicial and correctional

²³ UK Department for International Development (2007a) 'Security and justice sector reform programming in Africa', p. 1, available at: www.dfid.gov.uk/Documents/publications/evaluation/sjr.pdf. See also UK Department for International Development (2002) 'Safety, security and accessible justice', available at: www.gsdrc.org/docs/open/SSAJ23.pdf; UK Department for International Development (2007b) 'Explanatory note on security and access to justice for the poor', available at: www.dfid.gov.uk/Documents/publications/security-access-justice.pdf.

²⁴ UK Department for International Development (2007a), *ibid.*, mapping matrix, p. 64; Ball, N. and L. van de Goor (2008) 'Promoting conflict prevention through security sector reform: Review of spending on security sector reform through the Global Conflict Prevention Pool', Global Conflict Prevention Pool and PriceWaterhouseCoopers, London, April, p. 30, available at: www.ssrnetwork.net/documents/Publications/PromConfPrevThruSSR/GCPP%20SSR%20Report%20Final%209Apr08.pdf.

²⁵ US Department of Defense (2008) 'Stability operations: FM 3.07', October, paras 2.30, 3.29, 6.4, 6.99, available at: <http://usacac.army.mil/cac2/repository/FM307/FM3-07.pdf>.

²⁶ Hänggi, H. and V. Scherrer (2008) 'Recent experience of UN integrated missions in security sector reform', in H. Hänggi and V. Scherrer (eds) *Security Sector Reform and UN Integrated Missions*, Zürich, LIT VERLAG, p. 5.

²⁷ *Ibid.*, p. 11.

²⁸ S/PV.5632 (Resumption 1), pp. 11-12.

²⁹ S/RES/1856 (2008) para. 3(l).

systems' is in a different section of the resolution.³⁰ The UNAMA mandate of March 2009 refers only to the Afghan National Army and the Afghan National Police in the context of 'increasing... the functionality, professionalism and accountability of the Afghan security sector'.³¹ Reconstruction and reform of the prison sector are handled within the context of justice and rule of law. Similarly, in BINUB work on juvenile justice and prison conditions is addressed as part of justice programming, distinct from SSR.³² There is no uniformity within missions as to whether the prison support staff are situated within the 'justice sector' or 'rule of law', or as an independent 'prisons advisory unit'.³³

Moreover, in the UN's actual SSR programming there seemingly remains some uncertainty about the place of penal reform. Johnston's 2008 survey of the perceptions of 39 UN prison personnel with experience across eight different missions found most believe that police and military rarely or never acknowledge that (even) prison reform should be included in SSR mandates.

One [interviewee] described SSR as a closed shop, with security personnel from not only police and military, but also civilian security planners and security analysis experts failing to understand prisons as a security agency. One reason offered to support this was that traditional security personnel associate prisons within rule of law components of peace missions.³⁴

At the same time, a significant number of the prison personnel participating in the study did not fully understand the concept of SSR.³⁵ Training courses for SSR practitioners tend to focus on armed forces, police and the judiciary, but not prisons, and it seems likely that few penal practitioners have been exposed to SSR training.

SSR academics and penal practitioners alike have called for penal reform to be considered an integral part of SSR, and for better integration of penal reform elements within SSR programmes.³⁶ Such calls do not suggest that work on penal issues should be removed from a justice or rule-of-law framework, but that relevant dimensions are taken proper account of within SSR as well. As such, there is a need to examine the linkages between penal reform and a comprehensive approach to SSR. This examination should be grounded in an understanding of the relations between penal institutions and their management and other parts of the security sector, and the security governance dimensions of penal reform. It might usefully consider in which areas penal reform may benefit

³⁰ S/RES/1856 (2008) para. 4(g).

³¹ S/RES/1868 (2009).

³² BINUB outline of joint programmes, available at: http://binub.turretdev.com/en/index.php?option=com_content&task=view&id=20&Itemid=48.

³³ Interview with Richard Kuuire, Corrections Policy Officer, Criminal Law and Judicial Advisory Section, Office of Rule of Law and Security Institutions, DPKO, 23 September 2009.

³⁴ Johnston, S. (2008) 'Improving security: The positive impact prison reform within post-conflict interventions would have on the stability of the peace process if incorporated into security sector mandates', MSc dissertation in security and risk management, University of Leicester, p. 44.

³⁵ Ibid., pp. 35-37.

³⁶ E.g. *ibid.*; Hänggi, H. and V. Scherrer (2008) 'UN integrated missions and security sector reform: the way ahead', in H. Hänggi and V. Scherrer (eds) *Security Sector Reform and UN Integrated Missions*, Zürich, LIT VERLAG, p. 232.

from employing a security governance perspective, and what an SSR perspective might offer. At the same time, it should explore whether there might be limitations to the utility or advisability of conceptualising penal reform within SSR. These issues will be examined in the following subsections.

1.5 Why is penal reform important from the perspective of the entire security sector?

The operation of the penal system has wide-reaching impacts upon policing, prosecution services, courts and the judiciary, and as such upon the functioning of the entire security sector. As mentioned in the introduction, experience shows that inadequate attention to penal reform can undermine efforts at reform in other parts of the security sector. In particular, police reform flounders if there are no proper facilities for housing arrested persons. Judicial reform is limited by inadequate records of time served in prison and the absence of agencies capable of supervising alternative sanctions to custody. If the penal system fails in achieving its rehabilitative goals, and instead contributes to recidivism, this increases the pressure on policing, prosecution services and courts. Likewise, where organised crime thrives within prisons, public safety is compromised and pressure on the capacity of the entire criminal justice system increases. When prisoners escape or are arbitrarily released from custody, the legitimacy of the entire judicial process is undermined.

Equally, penal reform is itself limited by dysfunction in other parts of the security sector. As described in a recent editorial on promised prison reform in Nigeria:

without adequate judicial reform aimed at complete overhauling of the country's criminal justice system, efforts at decongesting our prisons or ameliorating the plight of Awaiting Trial Inmates in our prisons would come to naught. If crime investigation continues to drag on endlessly, if the police continues to dump suspects in prison on trumped-up charges, if court trial is stalled by endless adjournments at the instance of the prosecution for lack of vital evidence to prosecute the suspects, if the Magistrates who lack the jurisdiction to try certain offences like murder charges continue to remand suspects in prisons under the cover of 'Holden Charge', there is no way the Nigerian prisons can be reformed.³⁷

Lalá, too, notes the linkages between weaknesses in the justice system (such as excessive court delays and long pre-trial detention), long sentences for minor offences and the major problem of prison overpopulation in Africa.³⁸ In Latin America the fact that criminal procedure still emphasises written confessions rather than other evidence contributes to misuse of and abuse within the penal system, as police are encouraged to detain suspects in order to coerce confessions.³⁹

³⁷ This Day (2009) 'Nigeria: Another chance for prison reforms', editorial, This Day, 20 August, available at: <http://allafrica.com/stories/200908210638.html>.

³⁸ Lalá, A. (2004) 'Picturing the landscape: Police, justice, penal and intelligence reforms in Africa', in C. Ferguson and J. O. Isima (eds) *Providing Security for People: Enhancing Security through Police, Justice, Penal and Intelligence Reforms in Africa*, Shrivensham: GFN-SSR, pp. 8-9, 13.

³⁹ Comment attributed to Ligia Bolívar in the summary of a workshop on Rule of Law and the Underprivileged in Latin America, Helen Kellogg Institute for International Studies, University of Essex, 9-11 November 1996.

Likewise, improvements in policing and the justice system, such as more efficient arrests and criminal trials, can lead to overcrowded prisons. In Haiti, more proficient policing from the end of the 1990s, including special measures against urban gangs and organised crime, has contributed to a surge in arrests. The courts are unable to keep up, and prisons are dangerously overcrowded with people awaiting trial. Prison management and reform are intrinsically linked to how the criminal justice system as a whole is managed, and indeed what pressures that system is under from politicians and the public. Attempts to reform the prison system thus need to be undertaken as part of a comprehensive programme that addresses challenges in the entire criminal justice system.

Beyond its impact on the rest of the security sector, the good operation of the penal system, in particular prisons, has profound impacts upon community safety and social cohesion. The OECD DAC *Handbook on SSR* recognises that: ‘Developing civilian-run prisons linked to the national health and welfare systems, and with strong links to assist social reintegration and rehabilitation, can make an important contribution to crime control and community peace and stability.’⁴⁰ Indeed, the Economic Community of West African States has identified prison reform as an element of conflict prevention. The ECOWAS Conflict Prevention Framework includes commitments to:

adopt and implement security governance reforms to ensure that the practices of... prison services are in strict conformity with the requirements of human rights and the rule of law, and are subject to democratic control.

develop, reform and implement policies on prisons, spelling out minimum acceptable conditions for detention camps, prisons and rehabilitation centers, access to legal aid and corrective programmes, gender sensitivity in prisons, and all other rights of prisoners and detainees, as well as the responsibilities of prison guards and wardens.⁴¹

The US counterinsurgency manual claims that functioning and credible prisons which protect the rights of individuals are necessary for civil security to ‘hold’, and warns that abuse of prisoners can threaten the popular support and legitimacy of the government.⁴²

While the importance of penal reform to state and citizen security is acknowledged, there is concern that inclusion of penal reform in any SSR agenda should not lead to a privileging of the ‘security’ elements of the penal reform agenda to the detriment of its human rights focus. In this effort to understand better commonalities between penal reform and other areas of SSR, it is essential that penal reform should not be conceptualised solely as a security issue. On the one hand, security issues are only one dimension of the concerns that penal reform seeks to address: the penal system has broad social and economic dimensions which should be reflected in any reform strategy and planning

⁴⁰ OECD DAC (2007), note 17 above, p. 199.

⁴¹ Bryden, A., B. N’Diaye and F. Olonisakin (eds) (2008) *Challenges of Security Sector Governance in West Africa*, Geneva: DCAF, Annex A(iv).

⁴² US Department of the Army (2006) ‘FM 3-24: Counterinsurgency’, Washington, DC: Department of the Army, paras 3.29, 6.63, 7.28, available at www.usgcoi.org/library/doctrine/COIN-FM3-24.pdf.

process. Proper functioning of the penal system requires the involvement of health, education, training and welfare services within prisons and in non-custodial programmes. Poor health conditions in prisons undermine public health in the entire community. Overuse of imprisonment has a dire impact upon families, its adverse effects affecting the development of children long after a parent's prison term is served. The amounts spent on penal services and their success in rehabilitating criminals impact upon a country's economic productivity. On the other hand, it should be acknowledged that the contribution of the penal system to ensuring a safer society is limited: reducing crime and other forms of insecurity requires investment in social measures that address the causes of crime, as well as investment in the penal system.⁴³ This concern to maintain the human rights focus of penal reform will be returned to at the end of this section.

1.6 What are the security governance dimensions of penal reform?

While there is a wealth of academic writing on policies of penal reform in the West, much of the guidance and literature on supporting penal reform in developing and post-conflict contexts is extremely practical in focus. Compared to resources for police, defence or justice reform, there are very concrete guidelines for prison staff and others responsible for prisoner care (e.g. International Centre for Prison Studies *Human Rights Approach to Prison Management*⁴⁴, Penal Reform International *Making Standards Work*⁴⁵) and 'how-tos' for UN prison advisers (DPKO *Prison Support Guidance Manual*⁴⁶, International Corrections and Prisons Association *Practical Guidelines on the Establishment of Correctional Services within United Nations Peace Operations*⁴⁷). Standard training modules for prison staff have been developed for universal application (e.g. International Scientific and Professional Advisory Council of the UN Crime Prevention and Criminal Justice Programme/International Corrections and Prisons Association *Basic Training Manual for Correctional Workers*⁴⁸). However, these guidelines are largely limited to questions of prison management, rather than management and reform of the broader penal system, and there has been little analysis of the security governance dimensions of penal reform.

Hänggi describes 'security governance' as 'an analytical perspective which helps to capture complex governing mechanisms in a given issue-area characterised by a

⁴³ International Centre for Prison Studies (2005) 'Guidance Note 1: Penal reform projects and sustainable change', London, p. 2.

⁴⁴ Coyle, A. (2009) *A Human Rights Approach to Prison Management: Handbook for Prison Staff*, 2nd edn, London: International Centre for Prison Studies.

⁴⁵ Penal Reform International (2001) *Making Standards Work: an international handbook on good prison practice*, 2nd edn, London: Penal Reform International.

⁴⁶ DPKO (2006) *Prison Support Guidance Manual*, DPKO. Available at: <http://ar.unrol.org/files/FinalPrisonGuidanceManual20April2006.pdf>.

⁴⁷ International Corrections and Prisons Association *Practical Guidelines on the Establishment of Correctional Services within United Nations Peace Operations*, Ottawa: International Corrections and Prisons Association.

⁴⁸ International Scientific and Professional Advisory Council of the UN Crime Prevention and Criminal Justice Programme/International Corrections and Prisons Association (2006) *Basic Training Manual for Correctional Workers*. Available at: http://www.icpa.ca/tools/download/388/ISPAC-ICPA_Basic_Training_Manual_for_Correctional_Workers.pdf

constellation of different actors operating at different levels of interaction'.⁴⁹ Consideration of security governance gives a useful perspective on any type of SSR work, illustrating the actors and processes by which change in the sector can be driven and influenced. A focus on governance draws one to examine the different dimensions through and levels at which an organisation steers itself. Hänggi describes 'horizontal' and 'vertical' dimensions:

Horizontally, [the governance concept] refers to the multiplicity of non-state actors such as international organisations and private actors, with the latter ranging from non-governmental organisations (NGOs) to multinational corporations... vertically, it signals the growing interaction of these actors at various territorial levels – national as well as subnational and international...⁵⁰

Penal reform manifests complex horizontal and vertical governance dimensions. At the national level, security governance refers to the organisation and management of the security sector, and is generally described as 'security sector governance'. Penal reform in any functioning state will be led by the assigned government ministry – usually the ministry of justice or the ministry of the interior and/or ministry of public security.⁵¹ However, reform processes also involve actors from different parts of the security sector: police, prosecutors, judges and at times the military.

Parliament and the judiciary play important roles in developing and interpreting national penal standards, and in inquiries into conditions or particular occurrences in prisons. Furthermore, there is a tradition of civil society involvement stretching back to the beginnings of penal reform itself: penal reform has been and often is initiated in response to advocacy on the part of local civil society groups. In states with informal or traditional justice systems, these may be linked to the penal system. In a number of Latin American and former Soviet countries, criminal organisations are heavily involved in prisons, effectively managing prisons or parts of them. In some countries the private sector is playing an important role in the penal system, providing services within prisons and in some cases going so far as to construct, design, finance and manage entire prisons on behalf of the government. The general public, the media and politicians are recognised to play key roles in shaping penal policies.

Looking at vertical dimensions of governance of penal reform, states vary as to the degree to which their national-level penal system is fractured on a sub-state level. Some countries, such as the Philippines, the People's Republic of China and

⁴⁹ Hänggi, H. (2005) 'Approaching peacebuilding from a security governance perspective', in A. Bryden and H. Hänggi (eds) *Security Governance in Post-Conflict Peacebuilding*, Münster: LIT Verlag, p. 9. For a fuller explanation of the concepts of security governance and security sector governance see Hänggi, H. (2003) 'Making sense of security sector governance', in H. Hänggi and T. Winkler (eds) *Challenges of Security Sector Governance*, Münster: LIT Verlag, pp. 3-22.

⁵⁰ Hänggi (2005), *ibid.*, p. 7.

⁵¹ It is increasingly the case that prisons are the responsibility of the ministry of justice. This is the case in 46 of the 47 countries of the Council of Europe (Spain being the exception), in most of the Americas, much of Africa and some of Asia. Some countries of the former Soviet Union have moved prisons to the ministry of justice, while in others they are under the authority of the ministry of the interior. In the Middle East, the ministry of the interior more commonly holds responsibility: International Centre for Prison Studies (2008) 'International experience in reform of penal management systems', London, para. 5.

the United States, have a number of prison systems in operation, independent from one another to varying degrees, e.g. a federal system, a state prison system and county, district or local prison systems. Others have a prison system that is organised nationally, with the central prison administration having full authority over the regional and local administrative departments.

On the *regional level*, examination of security governance refers to broad dynamics in the development of security arrangements in a given region. In Africa a special rapporteur on prison conditions, appointed by the African Commission on Human and Peoples' Rights, carries out inspections of prison systems and publishes reports detailing both problems found and good practices observed. In the 47 member states of the Council of Europe, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment exerts considerable influence on the improvement of conditions of detention and imprisonment through regular visits and promulgation of standards. The EU, Council of Europe and Organization for Security and Co-operation in Europe (OSCE) support penal reform activities in many countries in the broader European region. The Inter-American Commission on Human Rights has since 2004 had a rapporteur on the rights of persons deprived of their liberty, and in 2008 adopted the 'Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas'. In Europe and the Americas, the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, are increasingly influential in setting standards for the penal system.

On an *international level*, there is an even better-developed network of actors involved in cooperation on penal reform. Within the UN system, the UN Crime Commission leads in developing norms and standards. The UNODC *inter alia* produces good practice guides, provides technical assistance and collects and analyses data on prisons. UN agencies, including the DPKO, UNDP and UNODC, support penal reform activities in post-conflict and developing country contexts. The UN Committee Against Torture and UN Human Rights Committee can consider individual complaints of torture or degrading and inhumane treatment within the penal system, respectively. The Committee Against Torture's Subcommittee on Prevention has a mandate to visit places where persons are deprived of their liberty. Various UN special rapporteurs also inspect (with the consent of the country concerned) and comment upon prison conditions, notably the special rapporteur on torture, but also the special rapporteur on violence against women and the special rapporteur on the right to education. The International Committee of the Red Cross (ICRC) plays an important role in monitoring and improving prison conditions in conflict-affected and transitional countries, and where humanitarian need is identified. The International Corrections and Prisons Association, formed of prison professionals, convenes regular meetings where good practices are shared. There are moreover a number of strong academic and civil society organisations involved in supporting penal reform, such as the International Centre for Prison Studies (ICPS) and Penal Reform International (PRI). International NGOs like Amnesty International and Human Rights Watch monitor and report on penal conditions.

1.7 Why approach penal reform from a security sector governance perspective?

There is clearly multilevel governance of penal reform, with a particularly broad field of actors at national, regional and international levels. On a national level, approaching penal reform from a security sector governance perspective assists in illustrating that the penal system is not just prisons and prison authorities, but mechanisms for alternatives to imprisonment, rehabilitation and reintegration, including community-led and/or informal activities, and the bodies responsible for management, oversight and control of all these elements. The latter include elected or appointed authorities, such as the executive government, the relevant ministry or ministries, the parliament and relevant specialised committees, as well as judicial authorities and special oversight bodies, such as human rights commissions, ombudspersons and prison inspectors. The role of these bodies is normative: to ensure that the penal system is managed in an efficient and effective way and is held accountable to applicable rule-of-law standards. Seeing penal reform as a governance process can aid application of normative principles of *good governance* and *democratic governance and accountability*.

1.7.1 Good governance

Penal reform is often cited as an aspect of good governance – a step towards well-functioning and accountable penal institutions and processes which citizens regard as legitimate. However, penal reform itself is often focused on concrete indicators, such as reducing the number of detainees or reoffenders, rather than good governance objectives. The UN Commission on Human Rights identified the foundation of good governance as ‘transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people’.⁵²

Decisions concerning sentencing and release of prisoners are in many contexts far from transparent, although some penal reforms have sought to address this. Prison regimes and conditions are also often shrouded in mystery, if not actual secrecy. Attention to transparent and accountable penal institutions in penal reform would lead to a strong focus on effective complaint mechanisms, independent oversight and public accountability. It is interesting to interrogate what a ‘responsible’ penal system is: responsible not only to the public, whether as taxpayers, victims of crime or friends and relatives of prisoners, but responsible towards the prisoners in its care. The need for an attitude of care and responsibility is paramount in managing prisoners, bearing in mind also that in so many countries prisons house the mentally ill, the marginalised and the disadvantaged. Such an ethic of care could be a strong antidote to the punitive approaches to imprisonment in many countries.

Prisons are not generally understood as ‘participatory’ institutions (although in some countries reforms such as victim impact statements have made the

⁵² UN Commission on Human Rights (2000) ‘The role of good governance in the promotion of human rights’, Resolution 2000/64.

sentencing process more participatory). However, participation can be fostered by opening prisons to civil society groups, involving civil society in formal oversight bodies and, more radically, by moving away from prisons towards community-based corrections. The UN Secretary-General described the participatory aspect of good governance as institutions ‘through which citizens participate in decisions that affect their lives’, and added to this the notion of institutions ‘by which they are empowered’.⁵³ This challenges one to consider how prisoners themselves participate in decisions affecting their lives, and are empowered by the penal system. Some prison rehabilitation and education programmes do expressly attempt to empower prisoners.

1.7.2 Democratic governance and accountability

Various international norms mandate democratic governance of the public sector. Regional institutions such as the OSCE, North Atlantic Treaty Organization, EU, Council of Europe and Summit of the Americas, and other intergovernmental groupings including the Community of Democracies and Club of Madrid have articulated democratic governance of the security sector as a political standard.⁵⁴ While these normative declarations do not amount to a unified model of democratic security governance, and moreover refer largely to the military, some general principles emerge. The UNDP’s *Human Development Report* of 2002 proposed a set of principles of democratic governance in the security sector that included the following.

- Ultimate authority on key security matters must rest with elected representatives.
- Security organizations should operate in accord with international and constitutional law and respect human rights.
- Information about security planning and resources must be widely available, both within government and to the public...
- Civil society must have the means and capacity to monitor security forces and provide constructive input into the political debate on security policy.
- Security personnel must be trained to discharge their duties professionally and should reflect the diversity of their societies – including women and minorities...⁵⁵

Application of these principles of democratic governance to penal reform reinforces a number of key values. For example, the penal system should be under the effective authority of the executive and parliament, rather than the military or the judiciary (although the judiciary can play important roles in the penal system,

⁵³ United Nations (1998) ‘Report of the Secretary-General on the work of the organization’, UN Doc. A/53/1, para. 114.

⁵⁴ Hänggi (2003), note 49 above, pp. 12-15.

⁵⁵ UNDP (2002) *Human Development Report*, New York: Oxford University Press, p. 90.

ensuring that it operates in accordance with constitutional, human rights and other legal standards). Penal systems should strive to meet the standards set by international penal and human rights norms. Information about penal planning and resources must be widely available to government, parliament, the media, civil society and the general public. Civil society should be formally involved in monitoring of the penal system and in debate on penal policy. Penal personnel should be recruited from all parts of the community, including women and men, ethnic, religious and linguistic minorities, indigenous people and people with disabilities.

A focus on democratic *accountability* as an objective of penal reform reinforces more particularly the necessity for effective oversight, not only as concerns conditions within prisons, but expenditure, strategic planning and all aspects of the penal process. It requires that the executive government be accountable to citizens for all matters of penal policy and management. It highlights the importance of parliamentary involvement: as the gatekeepers of a working democracy, parliamentarians should play an active part in shaping penal policy and planning, adopting appropriate penal laws, ratifying international agreements on penal issues, scrutinising penal budgets and monitoring conditions in prisons. Parliamentary debates, questions and inquiries can all be important oversight tools. Most parliaments have a justice committee or similar that should keep informed debate on the penal system and penal reform on the political agenda.⁵⁶ Moreover, democratic accountability is widely recognised as requiring independent media, able to access and report information on the penal system, and civil society that is free to criticise government policy. Romdhane argues that ‘If detainees are the responsibility of the state, which condemned and/or imprisoned them, it is the moral responsibility of the whole society to participate in their rehabilitation process.’⁵⁷ This underscores that accountability for penal policy also has personal dimensions.

1.8 Why approach penal reform from an SSR perspective?

Moving from a broader security sector governance perspective to an SSR perspective introduces a further set of principles that may be useful to consider within penal reform. Penal reformers will be familiar with many of the key principles of SSR, and have long experience in working with them. Some of these general SSR principles may have been approached differently or less emphasised, however, inviting examination of how SSR principles apply to penal reform activities.

Drawing upon Hänggi’s analysis of policy statements and study reports developed by intergovernmental and non-governmental policy actors, key principles of SSR include the following.⁵⁸

⁵⁶ International Centre for Prison Studies, note 43 above, p. 6.

⁵⁷ Romdhane, D. (2004) ‘Supporting penal and prison reform in North Africa: Algeria and Morocco’, in C. Ferguson and J. O. Isima (eds) *Providing Security for People: Enhancing Security through Police, Justice, Penal and Intelligence Reforms in Africa*, Shrivvenham: GFN-SSR, p. 74.

⁵⁸ Hänggi, note 13 above, pp. 345-348.

- SSR must be addressed holistically, taking into account all institutions and actors that play a role in security sector governance, and SSR programmes need to be designed and implemented in light of the complex interdependencies of the security sector. This reinforces the observations, discussed above, by those working within penal reform that dysfunction in the rest of the security system limits the possibilities for successful reform. Approaching penal reform from an SSR perspective presents a framework within which to coordinate reform of the penal system, policing, courts and other relevant actors.
- SSR must integrate a gender-sensitive approach that addresses the different needs of women, men, boys and girls; the marginalisation of women and children in security decision-making, determination of security priorities and resource allocation; and full and equal participation of women in the security sector and SSR processes. Concern for the particular needs of women and children in prison has long been a focus of civil society involvement in penal reform. However, in many countries appropriate, separate facilities for women and children and women with children are still lacking. In some countries efforts have been made to address gender-based violence (such as sexual violence against men or women) in prisons, but this remains a major problem. Moreover, while there are women prominent in penal reform, gendered analysis of penal policy is lacking. How do the views of women and men on the role of punishment and prisons differ? Are women and men equally involved in the formation of penal policy and the execution of penal reform? Situating penal reform within an SSR perspective introduces a broader notion of gender sensitivity than only addressing the needs of women prisoners.
- The context of SSR determines how it can be approached and implemented. Where a country has embarked upon a process of long-term democratisation and development, or where in the aftermath of conflict there is local will to engage with SSR and international peace operations, there may be a basis for sustainable SSR. Insights gleaned from SSR on the enabling factors for successful reform may be useful for those considering external support to penal reform.
- SSR depends upon 'local ownership': while external actors might support or even initiate reform efforts, local actors must shape and drive reform for it to be effective and sustainable. It follows that SSR should build upon national frameworks and local knowledge. In relation to supporting penal reform, a PRI staff member has articulated this as requiring 'modesty':

The purpose is not to substitute the national authorities in their reform process. It is to support, orientate and strengthen an ongoing reform policy, in accordance with the context. It is especially valid in this area of national sovereignty where sensitivity is

needed. Structural and behavioural changes can be achieved only after a long and exacting job with strong and permanent effort.⁵⁹

Experiences could usefully be shared between the SSR and penal reform communities as regards ways to ensure local ownership of reform processes.

- SSR is highly political and sensitive, involving redistribution of means of power within a state. Where external actors are involved, they should thus proceed with sensitivity, care and caution, and act in a coherent and coordinated way. As with other types of SSR activities, penal reform is at times framed as an essentially technical activity. However, even small measures to improve prison conditions will alter power dynamics within and surrounding the prison. (Where, for example, prison administrators profit from payment for essential items within the prison, external provision of these items risks being obstructed or diverted for corrupt purposes.) Acknowledging that penal reform, as much as police or defence reform, is a sensitive, political activity helps to identify potential ‘spoilers’ and motivate coordination between external actors.
- Building on the previous point, external assistance to SSR needs to be well coordinated, both between local and external actors and among external actors. Where there are wider SSR coordination mechanisms, particularly involving the policing and justice sectors, penal actors should be included. Penal reform projects should also be well coordinated within the penal sector, giving due attention to the need for wide consultation and communication. SSR programmes offer models for system-wide and community-linked coordination.
- SSR must be conceived as a long-term endeavour, requiring substantial resources and commitment. Hänggi argues that ‘A host of security needs might be urgent but there is never a quick-fix solution. Short-term targets lead to dysfunctional and unsustainable outcomes.’⁶⁰ Some penal reform experts might question the applicability of this principle to prison reform, where some ‘quick wins’ are seen as being helpful and the extremity of the needs of prisoners as demanding immediate action. At the same time, experience in supporting prison development demonstrates the need for long-term engagement and planning.

There are also potential practical advantages to including penal reform within a wider SSR agenda – the following are some examples.

- Increasing possibilities for the penal system to be included in national security strategies, poverty-reduction strategies or national development plans that guide reform processes. At present these are often silent on the penal system,

⁵⁹ Romdhane, note 57 above, pp. 73-74.

⁶⁰ Hänggi, note 13 above, p. 348.

address it only marginally or fail to recognise it as distinct from the justice system.

- Forging a more integrated and coordinated approach to the development of the criminal justice system by national actors and authorities. In particular, there needs to be more awareness by police and judicial actors of the impact of their decisions on the capacity of (and thus conditions within) the prison system and the implications of this for public security, and better engagement by prison authorities with police, prosecutors, judicial authorities and government could help to find solutions to pervasive problems of prison overcrowding.
- Forging a more integrated and coordinated approach to support to the development of the criminal justice system by donors and international and regional organisations. For example, it is not uncommon to find rising prison populations as a consequence of limited investigation capacity within national police services. Understanding this linkage could reduce the likelihood that donors would fund programmes for recruitment and basic training of police without also training police/prosecutors in investigation and prosecution.
- Extending debates about governance development to penal reform, leading to a stronger focus on internal and external oversight.
- Engaging more and new players in debates about penal reform.

1.9 Concerns in situating penal reform activities as part of SSR programming

Nonetheless, there is concern expressed by some within the penal reform community that situating penal reform within an SSR framework might lead to penal reform activities becoming concentrated around physical security, equipment and security training, to the detriment of human-rights-led approaches. These concerns are sharpened by the existing struggle to maintain promotion of human rights as the guiding rationale for prison management in the face of both unease and limited maturity on the part of many national authorities in determining how to manage the risks that terrorist behaviour presents to prison administrations. The PRI has noted the challenge to penal reform work of ‘an ever-increasing anxiety to deal with safety and security issues in the new global order’.⁶¹

In responding to these concerns, the SSR concept as outlined in this section is focused on promoting the security of individuals as well as of the state, and as such promotion of human rights is a core objective of SSR. On a conceptual level, there are thus strong synergies between the goals of SSR and penal reform. In

⁶¹ Penal Reform International (2008) ‘Annual report’, available at: www.penalreform.org/resources/PRI_annualreport_2008_en.pdf.

translating this conceptual coherence into programming, it is essential that this broad understanding of SSR is operationalised, and that applying an ‘SSR lens’ to penal reform should not lead to privileging of narrow security elements.

External support to prisons is perceived in some cases as exporting Western models of the (over)use of imprisonment, which are on the whole unsuccessful in their own countries and inappropriate to developing countries (as will be discussed in Section III). There is a need for development of better models for providing support to penal reform, and in particular prison development, that build upon the pre-existing traditions and approaches of the country concerned. One aspect of this may be linking with informal and traditional justice systems. These tend to focus on restitution, reconciliation between the parties and the rehabilitation of the offender, rather than punishment. As such, they might offer alternative sanctions to imprisonment for less serious crimes. With models for external support ill-developed, penal reform shares with the broader SSR agenda the need to avoid entrenching Western models in the developing world.

As discussed above, there is recognition on the policy level that SSR processes should be grounded in local ownership and leadership, although in practice creating and sustaining local ownership remains continuously challenging. There is also growing recognition among SSR practitioners who engage with justice issues of the importance of engagement with informal or traditional systems.⁶² While at times informal and traditional justice systems fail to meet international human rights standards, for example in condoning violence against women and girls, they are generally more accessible to local communities and considered more appropriate to deal with minor offences. Nonetheless, in delegating any powers to informal or traditional systems, the state must retain and uphold its responsibility for ensuring security and access to justice. How penal reform can better engage with and build upon informal and traditional justice systems requires more examination.

What emerges from the foregoing is that approaching penal reform from an SSR perspective might allow us to build upon the commonality of key values between penal reform and SSR, such as the need for coordinated and holistic approaches, local ownership and sustainability, and the importance of focusing on gender. Furthermore, there are practical ways in which penal reform could be strengthened by an association with broader SSR. However, for these positive outcomes to be recognised and perceived risks avoided, the SSR framework guiding programming should be explicitly focused on the promotion of human rights and actually grounded in local ownership and approaches, including links to traditional and informal justice systems.

⁶² See, for example, UK Department for International Development (2004) ‘Non-state justice and security systems’, DFID Briefing, May; Scheye, E. (2009) ‘Pragmatic realism in justice and security development: Supporting improvement in the performance of non-state/local justice and security networks’, Clingendael Conflict Research Unit, July; D. Isser, S. Lubkemann and S. N’Tow (2009) *Looking for Justice: Liberian Experiences and Perceptions of Local Justice Options*, Washington, DC: US Institute of Peace.

Moreover, it is clear that penal reform spans a broad range of activities, many of which would sit more comfortably within governance, rule of law, justice, health or welfare programming than SSR. Applying an SSR perspective to penal reform should not be an attempt to ‘capture’ or ‘enclose’ penal reform within the SSR concept, as accommodating as it is. It should rather focus upon building meaningful synergies. Furthermore, while application of SSR approaches could strengthen penal reform, equally SSR practitioners and programmes can learn much from principles and approaches developed in penal reform. Such areas of learning will be discussed in Section III. Firstly, however, Section II will review key challenges of penal reform.

2. Challenges of Penal Reform

Many SSR practitioners have had little exposure to penal reform issues, and as such may have difficulty in understanding the intersections with other aspects of governance and reform of the security sector. To lay the ground better for mutual exchange between SSR and penal reform practitioners, this section outlines some of the recurrent challenges that penal reform attempts to address and that penal reform processes themselves encounter. Some of the challenges set out in the first two subsections relate to the penal system as a whole, while others are specific to prison management. The third subsection considers challenges associated with external support to penal reform. The fourth part considers the distinctive experiences of international peacebuilding missions in supporting prison development in post-conflict contexts.

While there are many universally (or almost universally) shared challenges to penal systems and reform processes, different types of contexts also present particular challenges. In the general SSR literature, three types of contexts have been identified to contain a number of similar cases.⁶³

1. *Countries in transition* from an authoritarian (usually communist) political system to a democratic system.
2. (Relatively stable) socio-economically *developing countries*.
3. Countries engaged in rebuilding the state *after armed conflict*.

These categories are not clear-cut: there are differing typologies of development, many developing countries are also in transition from authoritarian regimes and most post-conflict countries are also developing. Nonetheless, the following discussion of challenges of penal reform will at times employ these categories, highlighting some ways in which these particular contexts impact upon penal reform processes..

2.1 Common challenges to the good functioning of the penal system

2.1.1 Overuse of imprisonment

As of December 2008, more than 10.65 million people were being held in penal institutions throughout the world, either as pre-trial detainees (remand prisoners), having been convicted and sentenced or in some form of ‘administrative detention’. More than half of these were in three countries: the United States, Russia and China. The overall world prison population rate was 158 prisoners per

⁶³ That is, while the framing conditions, nature of external involvement, specific security sector problems and challenges and possibilities for SSR are invariably unique to each country, problems and possibilities for SSR tend to display similarities within these three types of contexts. Bryden and Hänggi, note 10 above, pp. 28-30.

100,000 people.⁶⁴ Table 1 gives a global overview of national prison population rates by region as of December 2009.

Table 1: Overview of global imprisonment rates by region

Region	Lowest prison population per 100,000 people	Highest prison population per 100,000 people
World	20 (Timor-Leste and Liechtenstein)	760 (United States)
Africa	23 (Burkina Faso)	593 (Rwanda)
Asia	24 (Nepal)	382 (Kazakhstan)
Caribbean	83 (Haiti)	660 (St Kitts and Nevis)
Central America	59 (Guatemala)	476 (Belize)
Europe	20 (Liechtenstein)	618 (Russian Federation)
Middle East	55 (Qatar)	325 (Israel)
North America	116 (Canada)	760 (United States)
South America	80 (Bolivia)	365 (French Guiana/Guyane-France)
Oceania	20 (Timor-Leste)	478 (Palau)

Source: World Prison Brief, 23 December 2009, available at: www.kcl.ac.uk/depsta/law/research/icps/worldbrief

As Table 1 shows, prison population rates vary considerably between different regions of the world, and between different parts of the same continent. This makes it difficult to generalise about prison populations on the basis of region or level of socio-economic development. For example:

- in Africa the median rate for Western African countries is 35, whereas for Southern African countries it is 231;
- in the Americas the median rate for South American countries is 154, whereas for Caribbean countries it is 324;
- in Asia the median rate for South Central Asian countries (mainly the Indian subcontinent) is 53, whereas for (ex-Soviet) Central Asian countries it is 184;
- in Europe the median rate for Southern and Western European countries is 95, whereas for the countries spanning Europe and Asia (e.g. Russia and Turkey) it is 229;
- in Oceania the median rate is 102.⁶⁵

There was a general trend during the 1990s for prison populations to rise, often by 40 per cent over the decade. In Western, Central and Eastern Europe the growth

⁶⁴ Walmsley, R. (2009) *World Prison Population List*, 8th edn, London: ICPS.

⁶⁵ *Ibid.*

was over 20 per cent almost everywhere, and at least 40 per cent in half the countries. Of the 33 large European countries, there was growth in 28. Prison population growth was between 60 and 85 per cent in five of the six most populous countries in the Americas: the United States, Mexico, Argentina, Brazil and Colombia. Prison populations in the Asia-Pacific region also increased: growing over 50 per cent in Australia, 38 per cent in New Zealand and 10 per cent in Japan, for example.⁶⁶ More recent data confirm the continued growth of prison populations in Europe, the Americas and Oceania, as well as in two-thirds of African countries and three-quarters of Asian countries.⁶⁷

Data from many countries confirm that crime rates alone cannot explain movements in prison populations. In many countries where the prison populations have been steadily rising, crime rates, including rates for more serious crimes, have been stable or even decreasing. Independently of crime rates, judges are making generous use of pre-trial detention, sending more offenders to prison and for longer periods, and in some countries making less use of parole or conditional release. Increasing use of imprisonment is widely attributed to pressure by the public and politicians towards harsher penal policies.⁶⁸ Another way of understanding this is as a belief by the public and politicians that prison is better than the alternatives. Complex reasons lie behind these changes in public and political attitudes, which might be different in different societies. Kuhn identifies ‘an increased fear of crime, a loss of confidence in the criminal justice system, disillusionment with positive treatment measures, the strength of retributionist philosophies of punishment’.⁶⁹ Attempts to use imprisonment as a means of dealing with drug problems in society have led to massive increases in prison populations. In some countries more than 50 per cent of all prisoners are detained for non-violent drug-related offences.⁷⁰ Albrecht also ascribes increased prison rates in Europe to increases in the size of ‘precarious populations’ – groups more likely to receive prison sentences, such as immigrants, migrants and long-term unemployed.⁷¹

The overuse of imprisonment is of particular concern where people are detained before they have been tried, or when juveniles or parents of young children are detained. In 40 countries in the world, the *majority* of people in prison have not yet been tried.⁷² Many pre-trial detainees have little or no access to adequate legal assistance, or to treatment or rehabilitation programmes within the prison.

Prison systems all over the world have been described by penal reformers as being in a state of ‘crisis’.⁷³ Goyer reflects the views of many in the penal reform

⁶⁶ Tkachuk, B. and R. Walmsley (2001) ‘World prison population: Facts, trends and solutions’, HEUNI Paper No. 15, European Institute for Crime Prevention and Control, Helsinki, p. 16.

⁶⁷ Walmsley, note 64 above.

⁶⁸ E.g. UNODC, note 5 above, ‘The prison system’, p. 1; Tkachuk and Walmsley, note 66 above, pp. 16-18.

⁶⁹ Cited in Tkachuk and Walmsley, *ibid.* p. 16.

⁷⁰ International Centre for Prison Studies/Penal Reform International (1999) ‘A new agenda for penal reform’, April, London, p. 4.

⁷¹ Albrecht, H. J. (2005) ‘Imprisonment and alternatives to prisons: Changes and prospects in a comparative perspective’, in *Derecho penal*, Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparados, UNAM-Instituto de Investigaciones Jurídicas, México, pp. 5-6, 23.

⁷² World Prison Brief, available at:

www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_pretrial.

⁷³ International Centre for Prison Studies/Penal Reform International, note 70 above, p. 4.

community in contending that ‘experience in rich and poor countries alike has shown that prisons are not sustainable. They are expensive and ineffective.’⁷⁴ In many countries with high incarceration rates, most prisoners have been to prison before, often for technical breaches of community orders, and many will reoffend after release. Recidivism rates should not be the primary indicator of the success of penal policy: the negative impacts of imprisonment on prisoners’ families, the impact of massive public spending on prisons on other public services and how penal policy builds or undermines community safety should all be considered. However, the failure of prisons to rehabilitate offenders, twinned with the enthusiastic use of imprisonment, is perhaps the most pervasive challenge to penal reform.

2.1.2 Poor use of non-custodial sanctions

The corresponding problem to the overuse of imprisonment is the inadequate or inappropriate use of non-custodial sanctions. While there has been little controlled research comparing the outcomes of prison and non-custodial sanctions and diversionary measures, many success stories from implementing alternatives to imprisonment have been reported in Europe and Africa. In Europe, fines, suspended prison sentences and probation are widely used. Community service orders and other types of community sanctions focused on compensation or restitution are used less.⁷⁵ In Africa, building upon progressive declarations and recommendations on penal reform made over recent decades,⁷⁶ a number of states are developing plans of action and guidelines for practical, cost-effective reforms to reduce the unnecessary use of imprisonment, while implementing international human rights standards. Zimbabwe, Kenya and Burkina Faso, for example, have established community service programmes.⁷⁷

At the same time, in some countries where non-custodial sanctions are used, the rationale for their use has shifted from rehabilitation to economics, accompanied by increased focus on protecting the public and preventing crime from being committed in the first place through risk assessment approaches.⁷⁸ Alternative sanctions such as electronic monitoring, adopted in the United States, England and Wales, the Netherlands, Sweden and parts of Germany, focus on control rather than rehabilitation.⁷⁹ There have been efforts to make non-custodial sanctions ‘tougher’ by adding more and more conditions and enforcing them ever more rigorously – often with the counterproductive result that those under community sanctions are imprisoned for their breach, causing the non-custodial sanction merely to delay custody and fuel the growth in the prison population.⁸⁰

⁷⁴ Goyer, K. C. (2004) ‘Incarcerating and rehabilitating offenders’, in M. Schönteich, A. Minnaar, D. Mistry and K. C. Goyer (eds) *Private Muscle: Outsourcing the Muscle of Criminal Justice Services*, Monograph 93, January, Pretoria: Institute for Security Studies, pp. 77-78.

⁷⁵ Albrecht, note 71 above, pp. 8-11.

⁷⁶ See Penal Reform International (2008) *Africa’s Recommendations for Penal Reform*: PRI.

⁷⁷ On Zimbabwe see Goyer, note 74 above, p. 89.

⁷⁸ Wodahl, E. J. and B. Garland (2009) ‘The evolution of community corrections: The enduring influence of the prison’, *Prison Journal*: Supplement to Volume 89 (1), S98.

⁷⁹ Albrecht, note 71 above, p. 27; Wodahl and Garland, *ibid.*, p. 99.

⁸⁰ Faulkner, D. (2007) ‘Prospects for progress in penal reform’, *Criminology & Criminal Justice*, 7(2): 139; Wodahl, E.J. and Garland, B., *op. cit.*, p. 100.

Availability of non-custodial sanctions can risk a proliferation of new crimes, ultimately widening the net of the prison system. Thus increased provision of non-custodial sentences of itself does not lead to reduction in prison populations (and many of those countries with low prison numbers have very limited non-custodial options available to courts). As such, the impact of non-custodial sanctions needs to be carefully monitored.

Nonetheless, alternative sanctions do have the potential to divert offenders from prisons, but many of the successful alternatives to prison are not well understood by legislators, the executive and the public, not sufficiently used by courts or criminal justice professionals and not sufficiently resourced within criminal justice systems. Penal reformers contend that where possible (and not adverse to the rights of victims) pre-trial detention and short-term prison sentences should be replaced by non-custodial alternatives, and debtors and fine-defaulters dealt with through non-custodial options. Civil society can play an important role in developing and implementing these alternatives. More broadly, far-reaching strategies to address the overuse of prisons require significant changes in other parts of the justice sector, including more use of restorative justice, alternative dispute resolution and informal and community-based justice.⁸¹

2.1.3 Balancing democratic oversight with adverse trends in public and political pressure

Section I discussed the importance of democratic oversight and accountability of the penal system, including the important roles that politicians, the media and the public play in this. However, this is also a source of tension in achieving rehabilitation outcomes. Good governance of prisons requires that there be a line of accountability, with the prison department being answerable to the ministry of which it is part, and the ministry in turn being accountable to parliament. However, as noted by the UNODC, ‘the interference of politicians in prison management may not always lead to the increased efficiency of social reintegration initiatives in prisons’.⁸² The public, and thus politicians, may be adverse to spending money on health, social welfare, education and vocational training for prisoners and other offenders. The public are not generally aware of the problems faced in prisons, or of the dangers of the uncontrolled use of imprisonment, nor of its human and financial costs.⁸³ Popular sentiment is in many countries inclined towards isolationist penal policies. Sensationalist media coverage of escapes and public fear regarding prison escapees can lead political pressure to focus on prison security, at the cost of improving treatment and other rehabilitative activities in prisons and programmes for offenders outside prison. Fear of terrorists in the community can lend added impetus to repressive penal policies.

Involving specialist civil society groups in monitoring the penal system can be one strategy to ensure public participation and accountability in a manner that tempers

⁸¹ International Centre for Prison Studies/Penal Reform International, note 70 above, pp. 8-10; D. Faulkner, *ibid.*, p. 147.

⁸² UNODC, note 5 above, ‘The prison system’, p. 1.

⁸³ Tkachuk and Walmsley, note 66 above, p. 22.

the retributive excesses of the general public. This is discussed further in Section III.

2.1.4 Establishing civilian control of the penal system

In many transitional countries, transforming prisons into civilian institutions, administered by the civil power rather than the military and controlled by a separate part of government from that which controls the police, has been a key platform for reform. Doing so helps to protect the necessary civilian nature and human rights culture of the penal system and the fairness of the trial process. Where prisons are under control of the police or military and pre-trial detention is used as part of the investigative process, there are risks of unwarranted detention, abuse and torture. Moreover, when prisons are run by the police or military, it is unlikely they have a professionally trained staff.⁸⁴

In many cases – and not only in transitional countries – this has required transfer of the penal system from the control of the ministry of the interior to the ministry of justice. One of the requirements imposed by the Council of Europe on applicant states was that the administration of the penal system should be moved from the ministry of the interior to a more appropriate location, usually the ministry of justice, creating an incentive for reform in this direction in the European region. This transfer process is extremely sensitive. According to the ICPS:

In many countries [of the former Soviet bloc] there was initially strong opposition from vested interests. In some, the Ministry of the Interior objected to losing a large part of its empire. Prosecutors and others feared that the task of investigating crime and securing convictions would become much more complicated. In many countries the Ministry of Justice was previously a small department with relatively little power and so there was a fear that there would be reductions in budgets and in influence.⁸⁵

The ICPS outline a number of benefits of transferring responsibility for prisons from the ministry of the interior to the ministry of justice, stemming from the fact that the ministry of justice ‘tends to be a more fertile locus for reform’. A ministry of justice is more able to introduce alternative sanctions, changes to criminal procedure that reduce reliance on imprisonment and improvements in prison conditions. A ministry of justice is better able to integrate management of the penal system with other parts of the justice sector, facilitating an increased role for the judiciary in decision-making about and oversight of prisons. A ministry of justice is also better placed to support involvement of the community in the rehabilitation of prisoners, oversight of prisons and development of penal policies.⁸⁶ Thus, in terms of increasing the efficiency, effectiveness and humanity of the penal system from the perspective of the good operation of the entire security system, management by the ministry of justice is to be recommended.

⁸⁴ International Centre for Prison Studies (2005) ‘Guidance Note 7: Moving prisons to civilian control: Demilitarisation’, London, p. 1; International Centre for Prison Studies, note 51 above, paras 11-16.

⁸⁵ International Centre for Prison Studies (2005), *ibid.*, p. 4.

⁸⁶ International Centre for Prison Studies, note 51 above, para. 78.

In Russia the transfer of responsibility for all institutions and agencies administering the punishment of convicted persons to the Ministry of Justice occurred in 1998. The change brought many benefits, including a substantial fall in the prison population. The ICPS attributes the fall in the prison population to three main factors: the reform of the criminal procedure code, where the decision to place suspects in pre-trial detention became a matter for the courts rather than the prosecutor; legislative reduction of the lengths of pre-trial detention and some prisons sentences, especially for women and juveniles; and introduction of alternatives to imprisonment, such as community work.⁸⁷

Many lessons can be learnt from Russia's experience. Two issues require particular attention in the transition between the Ministry of the Interior and the Ministry of Justice: resourcing before and after the transfer, and staffing. In Russia, during the three months prior to the transfer of the penal system to the Ministry of Justice, no funds were made available for the upkeep of penal institutions and agencies. Likewise, after the transfer adequate funding of the penal system can be a challenge, as in general ministries of the interior are better financed than ministries of justice. To ensure penal staff do not become dissatisfied and leave, it is important to maintain their benefits and entitlements on transfer, and consider incentives to encourage them to stay. In Russia, for some time after the transfer to the Ministry of Justice, staff recruitment, status and training continued to be regulated by the rules applying to staff of the Ministry of the Interior. Staffing for the prison system was then addressed as part of new laws that provided for a uniform system of staffing across law enforcement services.⁸⁸

Demilitarisation of prisons requires special attention to staffing issues. As part of the military organisation, prison staff often have comparatively good conditions of service, such as entitlement to free travel and excellent pension schemes, but at the same time are not paid overtime for the long and irregular hours they work. Any change has to involve renegotiation of staff salaries and benefits, which may require extra funding for staff costs. Many countries going through this demilitarisation process can ill afford these costs. Furthermore, the status of prison staff is in many countries magnified by their association with the military. On civilianisation of prisons, it is necessary to take measures to ensure that prison staff do not feel their status within the community will be diminished, and in fact feel incentivised to be part of a modern, professional, disciplined prison service. It is necessary to define a vision and goals for the new prison service, to redefine the roles of prison staff, to develop new training approaches and curricula, and most likely to enact new legislation governing the service.⁸⁹

⁸⁷ In 1998 the Russian prison population was over a million, and 688 per 100,000 people. In September 2009 it was 875,841, and 618 per 100,000 people: World Prison Brief, available at: www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=118; International Centre for Prison Studies, *ibid.*, paras 39-40.

⁸⁸ International Centre for Prison Studies, *ibid.*, paras 42, 44, 84.

⁸⁹ *Ibid.*, paras 82-88.

2.2 Common challenges to prison management

As discussed in Section II, penal reform spans a broader area of concern than prisons, which are but one component of the penal system. However, in many countries there are serious problems in prison conditions and governance, necessitating that they receive sustained attention. Article 10 of the International Covenant on Civil and Political Rights states that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person...’ The following sets out some of the challenges prisons encounter in realising this and other core human rights standards.

2.2.1 Overcrowding and human rights abuses in prisons

High prison rates lead to increased overcrowding – found in almost 60 per cent of prison systems worldwide.⁹⁰ (Although countries, like Haiti, with low imprisonment rates can also have serious overcrowding problems.) Overcrowding can mean three people crammed into a cell designed for one or – at worst – prisoners having to take turns lying down to sleep while fellow inmates tie themselves to the cell bars and sleep standing up.⁹¹ It often leads to accommodation of convicted prisoners in pre-trial detention facilities, and vice versa, and lack of proper separation of women and children.

Prison overcrowding makes it very difficult to achieve improvements in penal conditions. Speaking of prison overcrowding in Latin America, the director of the UN Latin American Institute on the Prevention of Crime and the Treatment of the Offenders noted that it was:

negatively affecting all aspects of prison functions and prison conditions in every country of the region. The issue of overcrowding affects all sectors including matters of health, hygiene, nutrition, recreation, training as well as the work and security of both inmates and personnel... until the problem of overcrowding is resolved, efforts to improve other aspects of a prison system were unlikely to have an impact and may prove completely futile.⁹²

Human rights abuses in prisons are widespread, including unhygienic conditions, insufficient bedding and clothing, lack of food and medical care, sexual and other forms of violence against prisoners and violence against staff. Such abuses within prisons take place in both rich and poor countries. With overcrowding, staff/prisoner ratios fall, leading to decreased security, increased potential for abuse of detainees and reduced ability to provide meaningful work, educational, treatment or other programmes conducive to reintegration. Poor conditions also contribute to security incidents within prisons, motivating hunger strikes and rioting.

⁹⁰ The World Prison Brief states that 112 of 188 countries for which data are available report their prison occupancy rate exceeds 100 per cent; see www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_occupancy.

⁹¹ International Centre for Prison Studies (2008) ‘Penal reform and gender’, in M. Bastick and K. Valasek (eds) *Gender and Security Sector Reform Toolkit*, Geneva: DCAF/OSCE-ODIHR/UN-INSTRAW, 2008.

⁹² Tkachuk and Walmsley, note 66 above, p. 5.

Developing countries face particular challenges in ensuring humane prison conditions. Those prison services that have their origin in colonial rule often retain in whole or in part vestiges of ‘colonial legislation’, much of which will have been drafted before the framework of international human rights standards governing detention and the treatment of prisoners came into effect.⁹³ Corporal punishment, at times amounting to torture, is commonplace in some countries in Africa, Asia and South America.⁹⁴ Prison conditions are often appalling, with governments lacking the resources to make them decent and humane. Resource constraints are compounded by a tendency not to view prisons as a priority in public services.

2.2.2 Poor healthcare, infectious disease and drug addiction in prisons

Medical care within prisons is often inadequate which – as well as being a human rights violation in itself – contributes to the spread of disease. Irritating afflictions, such as scabies and lice, are rampant. Pulmonary tuberculosis spreads quickly in crowded prison cells with poor ventilation. Rates of infectious diseases such as HIV/AIDS and hepatitis B and C can be much higher than in the population outside prison, because prisons contain a higher percentage of poor people with poor access to healthcare, as well as injecting drug users.⁹⁵ When prisoners infect their families and staff, this aggravates these public health problems in the wider community.

In many countries the number of prisoners, particularly women prisoners, in need of psychiatric care is rising. Where psychiatric institutions and services in the community are overburdened, psychiatric patients may be inappropriately imprisoned. In addition, many prisoners develop mental and psychiatric conditions as a result of the stresses of imprisonment itself. Mentally ill prisoners rarely receive appropriate treatment in prisons, and can be at particular risk of abuse from other prisoners or themselves a risk to others.

Many people enter prison with drug addictions, and in many prisons drugs are widely available. Addressing drug use is an important aspect of achieving rehabilitation objectives and preparing a prisoner for successful reintegration into society. However, most countries struggle to provide adequate treatment programmes.

2.2.3 Addressing the particular needs of vulnerable prisoners

In most countries, those who end up in prison are the poor and the marginalised. In this sense, most prisoners are vulnerable and in need of special care. Women, children (who might be offenders under the age of 18 or children in prison with

⁹³ UNODC, note 5 above, ‘The prison system’, p. 2.

⁹⁴ United Nations (2009) ‘Torture and other cruel, inhuman or degrading treatment or punishment’, interim report of the special rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/64/215, 3 August, para. 44.

⁹⁵ Goyer, note 74 above, p. 81.

their mothers), foreign nationals, gay, lesbian and transgender prisoners and prisoners from ethnic and other minorities tend to face particular difficulties in prison.

Women constitute a minority in the world's prison populations: generally between 2 and 9 per cent.⁹⁶ However, in many countries, in all regions, the rate of increase of the female prison population outstrips the increase in the male prison population.⁹⁷ Prison systems and prison regimes are almost invariably designed for the majority male population – from the architecture of prisons to security procedures, facilities for healthcare, family contact, work and training. As a result, prisons tend not to meet the needs of women prisoners, and women in prison are affected by imprisonment in a particularly harsh way. For example, because there are far fewer prison facilities for women, they are often imprisoned far from home, limiting their contact with their families, and are often held at a higher security level than necessary. Women's prisons tend to have fewer educational and vocational programmes. Women's particular healthcare and hygienic needs are often unmet, particularly if they are pregnant or nursing. The social impact of imprisonment is also often greater for women. On release, women ex-prisoners tend to experience greater stigmatisation than men, and risk being ostracised by their families and communities. When a mother is imprisoned (and most women prisoners are mothers, a large proportion to young children), the impact upon her family is often severe. Compared to when a father is imprisoned, there is a much greater likelihood that the family will break up and the children will be taken into state care.⁹⁸

In many countries, babies born to women in prison stay in prison, and young children may accompany their mothers into prison. The age at which such children leave the prison varies widely between countries, from 30 days to six years. This is a complex issue, requiring a balancing of how the best interests of the child are served by living outside the prison or by being with their mother. In prison, facilities to ensure the safety, health and development of a child are often lacking or inadequate.⁹⁹

Children under the age of 18 who are charged with or convicted of an offence (generally referred to as 'juveniles') should only be sent to prison as a last resort. However, in many countries great numbers of juveniles are imprisoned, and face particular risks of exploitation and abuse at the hands of other prisoners or staff.

⁹⁶ UNODC, note 5 above, 'The prison system', p. 27. The figure is over 20 per cent in Hong Kong, the Maldives, Monaco and Lichtenstein: World Prison Brief, available at: www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_female.

⁹⁷ For example, between 1994 and 2004 in Mexico there was a 235 per cent increase in female prison population, compared to 134 per cent for males; in Kenya there was a 100 per cent increase in female prison population, compared to 24 per cent for males. In Australia, between 1984 and 2003 there was a 209 per cent increase in female prison population, as compared to 75 per cent for males: Bastick, M. and L. Townhead (2008) *Women in Prison: A Commentary on the UN Standard Rules for the Treatment of Prisoners*, Geneva: Quaker United Nations Office, p. 1.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*, pp. 49-56.

Foreign nationals are in some countries a large proportion of the prison population: more than 25 per cent in 32 countries.¹⁰⁰ Foreign nationals are likely to be linguistically and cultural isolated in prison, and have greater difficulties negotiating the legal and penitentiary system. In countries where prisoners rely upon family members to bring them food and necessary goods, foreign prisoners are likely to allow themselves to be exploited sexually and in other ways in order to survive.¹⁰¹

Gay, lesbian, bisexual and transgender prisoners are at particular risk of violence and discrimination in prisons. In the United States, for example, they can be held in isolation, ostensibly for their own protection.¹⁰²

Furthermore, there are disproportionate numbers of racial, ethnic and other minorities, including indigenous people, in prison. For example, in Spain, Roma women comprise 1.4 per cent of the population but 25 per cent of women prisoners. In Canada, aboriginal women make up less than 2 per cent of the population but 21 per cent of federally convicted women in prison. In the United States, African American women are eight times more likely to be imprisoned than white women.¹⁰³ Such groups tend to be at particular risk of abuse and discrimination, and experience heightened isolation by imprisonment.

2.2.4 Corruption and gangs within prisons

In poor and wealthy countries alike, corrupt practices among prisoners are common, with prisoners having to pay leader prisoners for anything from access to particular areas in prison to food, and even to be allocated a bed. Prisoners who are unable to pay and are not protected by a stronger inmate may be subjected to physical violence, including sexual abuse.

Corruption within the prison administration is also widespread, and a particular challenge in poor countries, where prison staff tend to receive low salaries and oversight mechanisms are inadequate. Prisoners in many countries rely upon bribes to acquire basic daily necessities, as well as rights such as access to a doctor or a lawyer, or obtaining a transfer to another cell or establishment. Staff may rely upon such bribes in countries where their salaries are habitually late or unpaid. In some prison administrations, corruption is a systemised chain extending from the lowest-rank prison staff to high levels.¹⁰⁴

In many countries, corruption within prison systems is controlled by gangs within and beyond the prison walls. These have the potential to undermine prison security and governance seriously. In many Latin American countries, for example, strong prisoners rather than staff control the prisons, which are violent

¹⁰⁰ World Prison Brief, available at: www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wp_stats.php?area=all&category=wb_foreign.

¹⁰¹ Bastick and Townhead, note 97 above, pp. 95-96.

¹⁰² International Centre for Prison Studies, note 85 above, pp. 2-3.

¹⁰³ Bastick and Townhead, note 97 above, p. 99.

¹⁰⁴ UNODC, note 5 above, 'The prison system', p. 38.

and dangerous.¹⁰⁵ In Kyrgyzstan prison society is dominated by the *obshchak*, an informal association of inmates sharing a communal fund of proceeds of crimes. While the prison administration retains responsibility for meeting inmates' basic needs, the *obshchak* manages everyday life and enforces order, with the tacit consent of the administration. Leaders of the *obshchak* are major figures in the criminal underworld. With prison systems dangerously under-resourced, an uneasy dependence by the authorities on the *obshchak* to maintain prison security can develop.¹⁰⁶

2.2.5 Monitoring and inspection of prisons

Prisons tend to be isolated from society. The media and the public are often excluded on security grounds. Monitoring, independent inspection and complaints systems are often absent or inadequate. The effectiveness of prison oversight is tied to the effectiveness of the judiciary and the parliament. Where parliaments and judiciaries are weak, they have limited ability to perform effective oversight of the security sector, including prison conditions. This inextricably links measures needed to improve prison oversight with improving governance and oversight structures and capacities more broadly.

2.2.6 'Prison privatisation'

In both developed and developing countries, 'prison privatisation' has become a contentious issue. Privatisation spans a range of activities, from contracting out of certain non-custodial services within a prison to the contracting of the entire design, construct, management and financing of a prison.

France has developed a mixed model of privatisation, where private sector companies provide services within the prison such as catering, healthcare, education and work for prisoners, and public prison service personnel are responsible for supervision, rehabilitation, registration and management.¹⁰⁷ Likewise, Belgium, Brazil, Chile, Germany and Japan have prisons in which the private sector provides non-custodial services.¹⁰⁸ Even a minimal level of private provision of services within prisons needs to be closely monitored. Phone calls from a US prison, for example, can cost 20 times more than a standard phone call, creating a significant barrier to prisoners staying in contact with their families.¹⁰⁹

Contracting out the entire management of prisons began in the United States and the United Kingdom in the 1970s, with commercial companies being contracted

¹⁰⁵ The following analysis is presented in Coyle, A. (2004) 'Prison reform efforts around the world: The role of prison administrators', *Pace Law Review*, 24: 826-828.

¹⁰⁶ International Crisis Group (2006) 'Kyrgyzstan's prison system nightmare', *Crisis Group Asia Report 118*, 16 August, pp. 3-5, 10.

¹⁰⁷ Coyle, A. (2004) 'Prison privatisation', presentation to seminar at Centre for Prisoners' Rights, Tokyo, September.

¹⁰⁸ Public Services International Research Unit (2006) 'Prison privatisation report international', No. 74, October, available at www.psiru.org/justice; Nathan, S. (2003) 'Private prisons: Emerging and transformative economies', in A. Coyle, A. Campbell and R. Neufeld (eds) *Capitalist Punishment: Prison Privatization and Human Rights*, Atlanta, GA: Clarity Press, p. 191.

¹⁰⁹ Bernstein, cited in Bastick and Townhead, note 97 above, p. 33.

to build and manage immigration detention centres.¹¹⁰ In the 1980s, as the United States prison population rate more than doubled, public authorities used contracting out to private contractors as a relatively quick way to address overcrowding. By the end of 2000 almost 6 per cent of all state prisoners and nearly 11 per cent of federal prisoners were detained in private facilities.¹¹¹ The United Kingdom started contracting out the management of prisons in the early 1990s, and by October 2001 some 8 per cent of the prison population in England and Wales were held in privately managed prisons. In England and Wales prison management contracts require high levels of delivery of prisoner programmes and quality of service, and include monitoring mechanisms. Strict financial penalties are exacted when failures occur.¹¹² Australia too has commercially managed prisons.

This degree of privatisation causes immense disquiet in many circles. Deprivation of liberty and administration of other forms of punishment are philosophically regarded as something which should be kept as a state function. A public poll in the United Kingdom in 2001 found that 60 per cent of those questioned thought prisons should be brought back into the public sector; only 24 per cent thought they should not.¹¹³ While the commercial companies running prisons may intend, and be contractually required, to run prisons according to the highest international standards, their primary objective is nevertheless to make a profit. Concern has been expressed by the penal reform community that private, for-profit prisons are likely to result in pressure for an increased use of imprisonment.¹¹⁴ Even if this is not the case, relying on private sector prisons to fill gaps in the public provision of services allows governments to assure the public that as many places as are needed in prison can be provided, rather than focus on measures to decrease the use of imprisonment.

Moreover, there is a growing body of evidence questioning the assumption that private prisons provide good value for money for governments, and pointing to decreased security, poor employment standards and poor human rights protection in private institutions.¹¹⁵ Recidivism rates for publicly managed and privately contracted prisons do not seem to vary conclusively; but rather show that in either case, prisons are ineffective at reducing the incidence of crime.¹¹⁶ There are suggestions that the use of privately managed prisons has peaked in the developed world, as in England and Australia some have been taken back into public management, New Zealand has altered its legislation to forbid private prison

¹¹⁰ Wood, P. J. (2003) 'The rise of the prison industrial context in the United States', in A. Coyle, A. Campbell and R. Neufeld (eds) *Capitalist Punishment: Prison Privatization and Human Rights*, Atlanta, GA: Clarity Press, p. 18; Nathan, S. (2003) 'Prison privatization in the United Kingdom', in A. Coyle, A. Campbell and R. Neufeld (eds) *Capitalist Punishment: Prison Privatization and Human Rights*, Atlanta, GA: Clarity Press, p. 162.

¹¹¹ Wood, *ibid.*, pp. 18-19.

¹¹² Nathan, note 110 above, pp. 164-173.

¹¹³ *Ibid.*, p. 174.

¹¹⁴ International Centre for Prison Studies/Penal Reform International, note 70 above, p. 7.

¹¹⁵ A. Coyle, A. Campbell and R. Neufeld (2003) 'Introduction', in A. Coyle, A. Campbell and R. Neufeld (eds) *Capitalist Punishment: Prison Privatization and Human Rights*, Atlanta, GA: Clarity Press, p. 9.

¹¹⁶ Goyer, note 74 above, p. 88.

management and a private prison established in Ontario, Canada, was taken into public management.¹¹⁷

In recent years the challenges that governments in the developing world face in providing humane conditions within prisons have led some, including Costa Rica, Honduras, Lebanon, Lesotho, Mexico, Peru, South Africa, Thailand and Venezuela, to consider private funding of prison construction and management.¹¹⁸ Their custom, too, is actively being sought. According to Coyle:

Faced with the reality that profit margins in the developed world are likely to be restricted in future and the fact that returns on investment have to be balanced against greater levels of public scrutiny and potential for embarrassment, the small number of companies involved in the business of prison privatisation are beginning to turn their attention to developing and newly democratic countries... These are fertile grounds for private prison companies, who can come into a country, promising to relieve the government of unbearable commitments to capital funding in exchange for a revenue commitment which is attractive in the short term but which will have crippling implications in the longer term.¹¹⁹

In some cases the proposed contractors give rise to concern: a company being considered to build and manage a prison in Honduras in 2006 was reportedly run by former Israeli intelligence agents and, with experience in running military prisons, was proposing to base the prison on a military model.¹²⁰

South Africa is the only developing country yet to proceed with privatisation on the model whereby a commercial company designs, constructs, finances and manages a prison – in this case for a 25-year period. The government's motivation was to make additional prison accommodation available more quickly and flexibly than would otherwise have been possible, easing overcrowding and thus improving conditions. The government has been criticised as failing to include civil society or academic research in discussing or developing the privatisation policy.¹²¹

South Africa's two private prisons, Mangaung Prison with 3,024 places and Kutama-Sinthumule Prison with 2,928 places, are the largest private prisons in the world. Services and facilities in the private prisons far outstrip those in public prisons, permitting only two prisoners per cell and providing extensive vocational training and education. They are presenting a serious cost problem for South Africa. The per capita cost of keeping a prisoner in a private prison in 2006/2007 was R266.83, compared to R151.77 for a public prison. It can be pointed out that the cost of keeping an inmate in an extremely overcrowded prison with few facilities and services is naturally less than keeping an inmate in humane conditions, but the Department of Correctional Services also claims that South Africa's private prisons are 'not delivering better than our newest [public]

¹¹⁷ Coyle, note 101 above; Public Services International Research Unit (2005) 'Prison privatisation report international', No. 67, March, available at www.psir.org/justice.

¹¹⁸ Public Services International Research Unit (2005/2006) 'Prison privatisation report international', No. 71/72, December-April, available at www.psir.org/justice; Public Services International Research Unit, note 108 above; Nathan, note 102 above, p. 191.

¹¹⁹ Coyle, note 107 above.

¹²⁰ Public Services International Research Unit, note 108 above.

¹²¹ Berg, J. (2003) 'Prison privatization developments in South Africa', in A. Coyle, A. Campbell and R. Neufeld (eds) *Capitalist Punishment: Prison Privatization and Human Rights*, Atlanta, GA: Clarity Press, pp. 183-185.

correctional centres'.¹²² The South African government has tried to renegotiate the prison contracts, but found that they do not allow any cost savings from changes in design and operations to be shared with the Department of Correctional Services.¹²³ In November 2002 it was reported that the annual returns on the companies' investments in the prisons over the 25-year contract period could be as high as 29.9 per cent on Mangaung Prison and 25 per cent on Kutama-Sinthumule Prison. A senior adviser in the South African Treasury is reported to have commented, 'We ordered a Rolls Royce but we should have ordered a Toyota.'¹²⁴

Privatisation of the management of prisons in developing countries brings dangers which those countries are less equipped to deal with than are developed countries. Corruption, already widespread as discussed above, risks being increased in an environment where prisons are explicitly being run for profit. The capacity for strict monitoring of private prisons, as occurs in the United Kingdom for example, is less.¹²⁵ Both of the South African private prisons have a Department of Correctional Services monitor on site who is responsible for ensuring contract compliance, and fines are incurred for contract infractions. However, the effectiveness of the contracts as oversight instruments and the contract monitors as oversight agents remains to be seen.¹²⁶

Berg suggests some guidelines which might aid a country considering prison privatisation:

- experiment and debate – beginning with small institutions, involving the academic world, civil society and countries with experience in privatisation, and ensuring public and political debate;
- maintain government responsibility and oversight to ensure prisoners' human rights are upheld;
- ensure equality of treatment of all prisoners through efforts to improve the state of all prisons, rather than creation of just some better-quality (private) prisons;
- avoid involvement of state officials in for-profit activities, risking undue private influence on policy decisions.¹²⁷

However, in Goyer's words, 'Not even the wealthiest country on earth can build its way out of prison overcrowding.'¹²⁸ Instead of debating whether private capital and management are the best way to build more prisons, developing countries would do better to focus on finding viable alternatives to imprisonment.

¹²² Public Services International Research Unit, note 108 above.

¹²³ Ibid.; Coyle, A. (2008) 'Prison privatisation in the African context,' *Review of African Political Economy*, 35(118): 663.

¹²⁴ Open Society Foundation, South Africa, 2003, cited in Coyle, *ibid.*

¹²⁵ Coyle, note 123 above, p. 665.

¹²⁶ Goyer, note 74 above.

¹²⁷ Berg, note 121 above, pp. 185-187.

¹²⁸ Goyer, note 74 above, p. 88.

2.3 Challenges to effective external support to penal reform

Many donors are reluctant to fund work on the penal system in developing countries, or support is marginalised in funding for other aspects of the justice system. Cooperation programmes and projects supported by institutions such as the World Bank and International Monetary Fund often bypass penal reform.¹²⁹ In part, the lack of donor support to penal reform reflects a lack of national interest, in many countries, in addressing problems in the penal system and thus a lack of the requisite political will for reform. Secondly, donors can be discouraged by the scale of the needs in penal systems: new infrastructure and extensive staff training are potentially very costly. The OECD DAC *Handbook on SSR: Supporting Security and Justice* suggests that donors may be able to leverage funding for prison reform activities by extending assistance programmes in areas such as health, education and women's and children's rights into prisons.¹³⁰ While this might allow improvement of prison conditions, it is unlikely to address the widespread need for system-wide, governance-focused reform. Furthermore, while donors are unlikely to admit this as a reason, funding penal systems in developing countries is likely to face opposition due to concerns that the donor could be associated with inhumane practices. However, this reluctance to support penal reform itself permits inhumane practices in prison to continue.

2.3.1 In transitional countries

In the former communist bloc, prisons served as instruments of political repression. As such, in the transition to more democratic government there is often political and public will to make prisons more open and rights-respecting. Blitz highlights that prisons in these countries are an important indicator of democratic change and adherence to international standards of human rights.¹³¹ Membership of regional organisations, such as the Council of Europe, the OSCE and the EU, has also acted as a strong incentive for many transitional countries to undertake penal reform, and these regional organisations have provided some support to such efforts.

The Council of Europe has had technical cooperation projects on prison reform with Albania, Armenia, Azerbaijan, Bosnia-Herzegovina, Croatia, Estonia, Georgia, Latvia, Lithuania, Montenegro, Russia, Serbia (including Kosovo), Ukraine and the former Yugoslav Republic of Macedonia. On a normative level, it promotes the European Prison Rules. Its Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has developed a substantive set of standards regarding treatment of detainees, and periodically inspects prisons in Council of Europe states, using its reports to the state concerned as the basis for ongoing dialogue.

¹²⁹ E.g. Aeschlimann, A. (2005) 'Protection of detainees: ICRC action behind bars', *International Review of the Red Cross*, 87(857): 105; Johnston, note 34 above, p. 50.

¹³⁰ OECD DAC (2007), note 17 above, p. 205.

¹³¹ Blitz, B. K. (2008) 'Post-socialist transformation, penal reform and justice sector transition in Albania', *Southeast European and Black Sea Studies*, 8(4): 345.

The OSCE has supported prison reform in Armenia, Kyrgyzstan, Serbia and Uzbekistan. This has included activities such as training prison officers, supporting information management systems, improving healthcare and educating prisoners. The OSCE also tries to provide governance-focused support to assist the transfer of authority to ministries of justice and facilitate dialogue on penal reform as part of democratic reform.¹³²

The EU plays an active role in monitoring and promoting reform of the penal system in democratising states that seek EU membership. Blitz claims that prison, as an institution, 'is increasingly central to the European Union's growing interest in human rights as a matter of both internal and external policy'.¹³³ EU institutions have increasingly and unequivocally recorded their disapproval of human rights abuses in prisons. Alongside condemnation, the EU has supported penal reform projects such as prison twinning in the Czech Republic, Hungary and Bulgaria; development of a new prisoner records management system in Romania; and construction of prisons and capacity building for the Ministry of Justice and judiciary in Albania.¹³⁴

However, carrots and sticks applied by organisations such as the EU to promote penal reform are not unequivocally successful. Blitz describes how, despite millions of euros of EU investment and strong conditionality to motivate Albanian penal reform, torture during the pre-trial process persists, prison conditions are substandard and the state fails to prosecute acts of torture committed by public officials. Political interference and interests, non-democratic and illiberal traditions in public administration and political culture, lack of oversight and weaknesses of the Albanian state, including in governance, frustrate reform. Blitz argues that in the Albanian case there has been a 'technocratic bias' in EU approaches, rather than a focus on governance challenges. Effective penal reform requires 'tackling the absence of democratization head-on – and thus the issues of corruption, the rule of law, transparency, and clientelism'.¹³⁵ A further observed weakness of the penal reform process in Albania has been that it is not been linked to broader public sector reform, in particular judicial and social service reform initiatives.¹³⁶ This experience underscores the need for penal reform to be holistic, focused on governance and accountability, and coordinated with reform in other parts of the security sector.

2.3.2 In developing countries

A number of Western states, regional and international organisations, the ICRC, academic institutions and NGOs are involved in supporting penal reform in developing countries. The European Commission, for example, has supported

¹³² International Crisis Group (2004) 'The failure of reform in Uzbekistan: Ways forward for the international community', Crisis Group Asia Report 76, 11 March, p. 26; International Crisis Group, note 106 above, p. 21; OSCE (2002) 'Final report', Supplementary Human Dimension Meeting - Prison Reform, Vienna, 8-9 July, available at: www.osce.org/documents/odihr/2003/10/808_en.pdf.

¹³³ Blitz, note 131 above, p. 346.

¹³⁴ *Ibid.*, pp. 346-347.

¹³⁵ *Ibid.*, p. 359.

¹³⁶ *Ibid.*

reform of prison services in parts of Africa, the Caribbean and the Pacific; development of non-custodial measures in the Middle East; and improvements to prison conditions, rehabilitation and family support in Latin America.¹³⁷ The UNODC supports penal reform projects in many developing countries through advice, assessments, assistance in law reform, support to non-government organisations, institution building, training and mentoring, and development of normative guides, manuals and reports on best practice and training. Its focus areas include juvenile justice, restorative justice, alternatives to imprisonment and monitoring and civilian oversight.

In 2008 ICRC delegates visited almost 495,000 detainees in 83 countries. The ICRC's work in prisons has evolved to include a 'structural approach' to improving the administration of justice and the way places of detention are run. The ICRC often carries out an assessment of the penal system, and recommends to the authorities ways of addressing structural shortcomings. Related ICRC assistance might include, for example:

- advising on legal matters, such as prison legislation, regulations and organisation;
- advising on, and providing material support to, establishment and organisation of prison services and facilities, such as medical services and water and sanitation;
- providing training for police and security forces concerning treatment of suspects during arrest and detention, prison personnel or specialists working in prisons;
- organising and supporting regional and national seminars and workshops.

ICRC work concerning prisons may be linked to its efforts to ensure respect for essential judicial guarantees relating to arrest, investigation, trial, sentencing and appeals. Where so, it is thus closely connected to improvements in the function of policing and the courts.¹³⁸

In any type of context, external involvement must be carefully managed so that international actors are not unwittingly used merely as channels for funding and to improve a state's international image, without a genuine willingness to reform.¹³⁹ Furthermore, as noted in Section II, external support must resist the temptation to try to superimpose models from the West on to developing country penal systems. Not only are such models of questionable success, given the soaring imprisonment rates and poor outcomes in many donor countries, but they may be culturally inappropriate. In Turkey, efforts to convert dormitory-style prisons into

¹³⁷ European Commission, note 19 above, Annex 2.

¹³⁸ In 2005 approximately 75 per cent of the contexts in which the ICRC visited detainees were not situations of international or internal armed conflict. As such, the ICRC should be understood as an actor in penal reform in developing and transitional, as well as conflict and post-conflict, contexts: ICRC website, available at: www.icrc.org/web/eng/siteeng0.nsf/html/detention!Open#Annual%20Report ; Aeschlimann, note 129 above, pp. 87-90, 96-97, 101-102, 105, 117-118.

¹³⁹ Romdhane, note 57 above, p. 67.

small-cell prisons, under pressure to meet European standards, were met with hunger strikes by prisoners.¹⁴⁰ The push for European prison models led to the closure of provincial community prisons, which in fact had been good models.

Moreover, there is a likelihood that the resource commitments Western models require cannot be sustained. In the Dominican Republic, as a typical example, intergovernmental bodies provided capital funding to build new prisons, but without planning for the running costs involved. Some of the new units were left unused, and in others poor treatment of prisoners and corruption continued. A later, more considered approach emphasised development of new prison staff.¹⁴¹ In poor countries, solutions to problems in the penal system need to be found which do not require unrealistic injections of resources and will be sustainable in the long term.¹⁴² Baroness Stern encourages African penal reformers to:

resist the blandishments of the technical assistance officers and advisers to have a prison system modelled on the one in Denmark, a probation service just like England's; a court system like the one in the United States, all housed in new and costly buildings with the latest technology provided under some aid programme but too expensive to maintain. The way forward in developing countries is to find a system that is just and fair, relevant to the economic circumstances and expectations of the people and that does not consume all the available resources so that there is nothing left for the real job of preventing crime.¹⁴³

The ICPS suggests that the emphasis of penal reform programmes in poor countries will often be on:

- attitude change to bring about better human relations between staff and prisoners;
- management change to reduce bureaucracy and decentralise power and control so as to liberate local prison managers to seek resources and make the best use of what they have;
- increasing prisoner activities to make constructive use of the prisoners to produce goods, create valuable revenue, improve maintenance of the prison infrastructure and increase time spent out of overcrowded cells;
- involvement of civil society groups in various aspects of work to help prisoners and generate resources.¹⁴⁴

In many developing countries, successful reform efforts have focused on practical measures to reduce prison populations. Strategic changes in the right place can have a huge impact. For example, Thailand now diverts up to 20 per cent of drug-related offenders from prison each year by implementing new laws on the rehabilitation of drug addicts.¹⁴⁵ In Malawi, paralegals visit prisons to assist

¹⁴⁰ Green, P. (2002) 'Turkish jails, hunger strikes and the European drive for prison reform', *Punishment and Society*, 4: 100.

¹⁴¹ OECD DAC (2007), note 17 above, p. 207.

¹⁴² International Centre for Prison Studies, note 43 above, p. 7.

¹⁴³ Quoted in Penal Reform International (2001) *Access to Justice in Sub-Saharan Africa*, London: PRI, p. 151.

¹⁴⁴ International Centre for Prison Studies, note 43 above, p. 7.

¹⁴⁵ International Centre for Prison Studies, note 51 above, para. 54.

prisoners reduced the pre-trial prison population from 40-45 per cent to 17.5 per cent. In Bihar, India, courts come into the prisons to screen the caseload and release those held unlawfully or unnecessarily.¹⁴⁶ Cost-efficient interventions such as these can save the judiciary and the penal system significant amounts of money spent on unnecessary proceedings and caring for untried prisoners.

2.4 Challenges to supporting penal reform in post-conflict contexts

2.4.1 Urgent need for support to the prison system

As for SSR in general, post-conflict penal reform presents specific challenges. Prisons are usually in desperate need of support, and so attention tends to be focused on this part of the penal system, at least initially. Often prisons will have been abandoned or severely neglected, with any remaining prisoners in urgent need of care. In the post-conflict phase, it is essential to have somewhere credible and legitimate to imprison people suspected of war crimes and other serious abuses and other criminals who might otherwise be spoilers of the peace process. If the prison system is not functioning, the justice system as a whole cannot function, which can exacerbate crime in the community, undermine public security and reinforce impunity for both conflict- and non-conflict-related crimes. Because UNMIK, for example, was slow in prioritising establishment of prison infrastructure in Kosovo, police were forced to release criminals due to lack of prison capacity – undermining the perception of justice.¹⁴⁷ Similarly, in East Timor, due to lack of space in detention facilities, UN civilian police had to release alleged criminals in order to detain militia accused of more serious crimes.¹⁴⁸

Johnston more particularly argues that security incidents in post-conflict prison systems can undermine a fragile peace process.¹⁴⁹ He presents a number of illustrations from post-conflict contexts, including the following.

- The escape of seven detainees from a Kosovo prison in August 2007, some of whom were later that year the subject of a major joint police and military operation that recovered the largest amount of weapons ever seized in Macedonia.¹⁵⁰
- The escape of 50 prisoners in East Timor in September 2006, including rebel leader Major Alfredo Reinado, who later led a raid on the home of President Jose Ramos Horta that resulted in the president being shot.

¹⁴⁶ Stapleton, A. (2009) 'Empowering the poor to access criminal justice - A grass-roots perspective', IDLO, Rome, pp. 5, 14.

¹⁴⁷ Stahn, C. (2004) 'Justice under transitional administration: Contours and critique of a paradigm', *Houston Journal of International Law*, 27(2): 311-344, at p. 329.

¹⁴⁸ Chesterman, S. (2004) *You, the People: The United Nations, Transitional Administration and State-Building*, Oxford: Oxford University Press, p. 172.

¹⁴⁹ Johnston, note 34 above, pp. 9-15.

¹⁵⁰ 'The seized weapons included sniper rifles, assault rifles, dynamite, hand grenades, mortars, RPG launchers and laser-guided anti-aircraft missiles which according to police... was sufficient to equip a battalion of 650 soldiers.' Reliefweb, quoted in Johnston, *ibid.*, p. 12.

- The escape of up to 1,200 prisoners from a prison in Kandahar, Afghanistan, in June 2008, raising concern that many of the prisoners were Taliban fighters who posed a serious threat to stability in the region.

2.4.2 Constraints to prison reform in a post-conflict context

Often it will not be enough simply to rebuild the prison system that existed before the conflict. The original prison system may have been dysfunctional or completely out of accord with the rule of law and basic human rights standards. It is likely to have been run by the police or military. If so, a different model of imprisonment needs to be created, but there is a danger that models from outside the country and inappropriate to its circumstances will be imported. International instruments and model codes can be a framework for prison conditions and management in a transitional phase.¹⁵¹ However, a prison system must be re-established in a manner sensitive to the cultural and social environment. Hight advocates caution in this respect, describing a lesson of DPKO support to prison development in Timor-Leste: in a post-conflict context where the prison system has collapsed, one should not consider that the situation constitutes a ‘greenfield’ site, but rather assist the national authority to re-establish the prison system as it was with respect to minimum organisation structure, routines, practices, procedures and salary arrangements. This approach recognises the power of the informal institutional culture of any system, and the importance of building upon what is understood by the staff and local community. This does not mean re-establishing routines which include ill treatment, but rather reinstating the overall framework known to the local staff, and later developing with the national authority a mid- to long-term reform and development strategy. International standards in this context provide a guiding framework.¹⁵²

In attempts to rebuild and reform a penal system, it is important to gauge local attitudes of both men and women towards prisons. Prisons may be negatively associated with detention without trial, rape, torture and execution. This can affect political and community will to develop the penal system, and make recruitment of new staff (particularly female staff) more difficult.

Any transitional authority must take great care in ensuring that their acts in relation to penal administration are legal. In situations of occupation, the Fourth Geneva Convention restrains occupying powers from undertaking institutional reforms and explicitly requires that the penal laws of the domestic courts remain in force. These rules have led to ambiguity regarding the legality of institutional changes – including the creation of a criminal court – implemented in Iraq by the Coalition Provisional Authority.¹⁵³ Similar concerns would apply to institutional

¹⁵¹ The US Institute for Peace Model Codes for Post-conflict Criminal Justice Project is working on a Model Detention Act, intended to be a resource articulating applicable human rights and fair trial standards *vis-à-vis* detention and imprisonment: O'Connor, V. (2006) ‘Rule of law and human rights protections through criminal law reform: Model codes for post-conflict criminal justice’, *International Peacekeeping*, 13(4): 517-530. Model codes for criminal justice have also been prepared by the American Law Institute and the Irish Centre for Human Rights.

¹⁵² Interview with Isabel Hight, former DPKO corrections adviser, 3 August 2009.

¹⁵³ Articles 47, 64 and 70 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, discussed in Stahn, note 147 above, pp. 319-320, 339-340.

reforms in the penal system of a country under occupation. Where a UN peacekeeping mission is mandated with executive authority, as was the case in Kosovo and East Timor, the legality of measures taken in re-establishing the penal system is no less sensitive. UNMIK was harshly criticised for its practice of ‘executive detentions’, whereby detention periods were extended without international standards of due process and judicial control being observed.¹⁵⁴

A very concrete constraint to penal reform in post-conflict contexts to date has been funding. At times, prison reform may be a high priority for new political authorities which have themselves been imprisoned by a previous regime or seek to make a symbolic break with an old system associated with human rights abuses. However, more commonly, against a background of many pressing priorities such as rebuilding the infrastructure and re-establishing basic institutions, rebuilding a prison system is seen as a low priority by national governments. Local peoples can view foreign assistance directed at prisoners as favouring ‘criminals’ over ‘victims’.¹⁵⁵ International actors too often overlook penal reform even when supporting judicial and police reform, and only a few donors have made voluntary contributions to support strengthening the penal system.¹⁵⁶ A Canadian prison expert working with the UN mission in Haiti said very frankly:

the problem is donor funding. ‘Prisons’ is not sexy. People want to build hospitals, they want to build schools, they want to put a well in the town, but nobody wants to invest in prisons.¹⁵⁷

As in other types of context, the operation of the penal system has important implications for policing and justice. The International Crisis Group warned of Haiti in May 2007: ‘Justice and police reforms could fail if prison infrastructure is not immediately improved but neither donors nor the government are taking adequate account of the correctional element of security sector reform.’¹⁵⁸

2.4.3 Prison support by UN peacekeeping missions¹⁵⁹

The DPKO has provided support to national prison systems in peacekeeping environments since 1999, although the first DPKO headquarters prison staff were engaged only in March 2003.¹⁶⁰ The DPKO’s relevant policy directive states that

¹⁵⁴ Stahn, *ibid.*, pp. 329-331.

¹⁵⁵ In Cambodia, for instance, the United Nations was perceived by the population as directing more resources to prisoners than to prison guards and villages surrounding prisons: Mani, R. (2002) *Beyond Retribution: Seeking Justice in the Shadows of War*, Polity Press, Cambridge in association with Blackwell Publishers, Oxford, p. 67.

¹⁵⁶ E.g. Mobekk, E. (2008) ‘MINUSTAH and the need for a context-specific strategy: The case of Haiti’, in H. Hänggi and V. Scherrer (eds) *Security Sector Reform and UN Integrated Missions*, Zurich, LIT Verlag, p. 133; Johnston, note 34 above, pp. 18, 38-39; Actionaid (2006) ‘MINUSTAH: DDR and police, judicial and correctional reform in Haiti: Recommendations for change’, July, London: Actionaid, p. 19; Chesterman, note 148 above, p. 172; DPKO (2005) *Supporting National Prison Systems. Lessons Learned and Best Practices for Peacekeeping Operations*, December, New York: DPKO Criminal Law and Judicial Advisory Unit, p. 20.

¹⁵⁷ Interview with chief corrections adviser for the UN Stabilization Mission in Haiti (MINUSTAH), Lisa Quirion, 30 November 2007, available at: www.international.gc.ca/START-GTSR/lisa-quirion.aspx.

¹⁵⁸ International Crisis Group (2007) ‘Haiti: Prison reform and the rule of law’, Latin America/Caribbean Briefing 15, ICG, Port-au-Prince/Brussels, 4 May, p. 1.

¹⁵⁹ The EU has supported penal reform activities in some conflict-affected states, including Georgia, Iraq, Palestine and the DRC. However, very little has been published on these projects. Therefore, this discussion focuses upon the role of the United Nations, with a brief mention of EULEX Kosovo.

¹⁶⁰ DPKO, note 150 above; Kuire, note 33 above.

the overall objective of prison support programmes is to ‘contribute to the maintenance of sustainable peace and security by providing essential support to national personnel to develop and manage a viable, safe, secure, and humane prison system free of human rights violations, through the transfer of knowledge and skills’.¹⁶¹ Mandates to structure, reform and strengthen judicial and penal systems have since been given to missions in Kosovo (UNMIK), Liberia (UNMIL), Côte d’Ivoire (ONUCI), the Democratic Republic of the Congo (MONUC), Afghanistan (UNAMA), Burundi (ONUB), Haiti (MINUSTAH) and Sudan (UNMIS). Primary prison reform activities have included mentoring (e.g. MONUC, UNMIL, UNMIS), the provision of technical assistance in drafting strategic reform plans (e.g. MINUSTAH, UNAMA), facilitating donor involvement and building community support for the prison system (e.g. UNAMA), conducting needs assessments and training (e.g. UNAMA, UNMIS), developing a national vetting system and recruitment of staff (e.g. UNMIL) and strategic and operational advice to mission management, police and human rights staff concerning prison issues (e.g. UNAMA, UNMIL). There has been great variety in the resourcing and structure of penal elements between missions. In 2005 UNAMA, for example, had one prison expert position, whereas UNMIL had 22 prison experts and four administration and budget positions. If there are few posts, they will generally be located within police or judicial units.¹⁶² Countries contributing prison experts to UN missions have included Australia, Austria, Belgium, Burkina Faso, Canada, Finland, Germany, Ghana, Italy, Kenya, Luxembourg, New Zealand, the Netherlands, Nigeria, Senegal, Sweden, Turkey, the United Kingdom, the United States and Zambia.¹⁶³ The focus of DPKO prison support is essentially on meeting basic humanitarian and security needs rather than pursuing goals of rehabilitation of offenders, at least in the first instance. A critical issue is often simply to provide food for prisons. (Prison agriculture programmes established by the missions in south Sudan and Liberia take steps towards rehabilitation, however, with the dual objectives of providing food and vocational training for prisoners.)¹⁶⁴

In some missions, prison support activities have met with some measure of success. UN support for prison development in Kosovo achieved prison conditions better than the regional average.¹⁶⁵ MONUC’s prison mentoring programme was deemed successful, such that it was to be expanded to providing the DRC authorities with mentoring across the judicial sector.¹⁶⁶

In contrast, Mobekk describes how in Haiti prison reform was not adequately supported by the UN system, international donors or the transitional government. Despite a mandate for re-establishment of the correctional system, MINUSTAH’s prisons unit suffered from understaffing and underfunding. There has been a lack of coordinated planning and work, and a lack of clear vision for prison reform

¹⁶¹ Quoted in DPKO, *ibid.*, p. 9.

¹⁶² *Ibid.*, p. 10.

¹⁶³ Hight, I. (2006) ‘Prison support in United Nations peacekeeping operations’, presentation to ICPA Conference, Vancouver.

¹⁶⁴ Kuuire, note 33 above.

¹⁶⁵ Interview with Stephen Johnston, 29 September 2009.

¹⁶⁶ Dagrendorf, N. (2008) ‘MONUC and the relevance of coherent mandates: The case of the DRC’, in H. Hänggi and V. Scherrer (eds) *Security Sector Reform and UN Integrated Missions*, Zurich, LIT Verlag, p. 84.

between different UN agencies. The result has been only limited progress in a few areas.¹⁶⁷ As of November 2008, according to the International Crisis Group, Haiti still lacked the basic capacity to detain, prosecute and sentence offenders, and prisons were ‘vulnerable to prison breaks and filled with suspects who have never seen a judge’.¹⁶⁸ Haiti’s prime minister is reported as describing its prisons as the biggest threat to security in Haiti.¹⁶⁹

Likewise, prison support in the DRC is immensely challenging. According to a February 2009 report:

The penitentiary system is almost completely dysfunctional: on the one hand overcrowded with petty criminals and the poor languishing while awaiting trial; on the other incapable of holding those found guilty of the most serious crimes, so long as they have a little money or influence. The conditions are so dire that most prisons pose a serious health risk, including malnutrition. Women and children are at risk of sexual violence from inmates and guards. Prisoners have to rely on family members being able to obtain access (usually through bribery) in order to feed them.¹⁷⁰

Over the last two years there have been mass breakouts, scores of deaths from malnutrition and widespread rape of female inmates in the DRC.¹⁷¹ Johnston’s research confirms that security incidents in prisons, including riots and escapes, hostage taking, fires, general disruption and armed attacks, are frequent across UN peacekeeping missions.¹⁷²

The length of prison support experience in Kosovo (now managed by the EU Rule of Law Mission, EULEX Kosovo) allows some lessons to be identified. Firstly, earlier strategic planning for the penal system would have allowed many of the issues that are still challenges today to have been dealt with. Donors often ask for quick results and immediate impact – but it is not effective to undertake penal reform work with a short-term view. That there are still 77 international staff posts for Kosovo prison support in EULEX Kosovo is testament to the failure to plan strategically at the outset. Secondly, some facilities were not sustainable, e.g. multimillion euro workshops were installed which are not now used because the authorities do not have resources to buy materials for them. Thirdly, there should have been greater consultation with and involvement of local personnel in decision-making within the correctional service. Today, one can see that those reform initiatives with which locals were involved have been maintained, whereas those where they were not involved have not. A corresponding issue is the importance of respecting local customs and culture in instituting programmes and facilities, as the following anecdote illustrates. The UNMIK prison management team at one stage decided, in line with international standards, to install toilets in each cell in Dubrava prison. This is a model developed for single-occupancy cells,

¹⁶⁷ Mobekk, note 156 above, p. 133.

¹⁶⁸ International Crisis Group (2008) ‘Reforming Haiti’s security sector’, Latin America/Caribbean Briefing 28, ICG, Port-au-Prince/Brussels, 18 September, p. 1.

¹⁶⁹ Quirion, note 157 above.

¹⁷⁰ Davis, L. (2009) ‘Justice-sensitive security system reform in the Democratic Republic of Congo’, International Alert/International Centre for Transitional Justice, February, Brussels, p. 23.

¹⁷¹ Johnston, note 34 above, p. 15; UNNews (2009) ‘In wake of recent rapes, UN helps reform DR Congo prisons’, UNNews, New York, 26 June.

¹⁷² Johnston, *ibid.*, p. 33.

but each cell in Dubrava was being used by five or six people. Local staff advised that the new toilets would not be culturally appropriate, in that the half-door surrounding the toilet did not afford adequate privacy. This advice was ignored, and within two weeks of the new toilets' installation, at great expense, the prisoners rioted and destroyed them.¹⁷³ Coyle highlights the importance of ensuring sensitivity to the cultural and religious background of the country concerned when it comes to operational issues such as arrangements for body searches, use of dogs and mixed-sex staffing.¹⁷⁴ Furthermore, transfer of responsibility between international organisations requires careful management. When UNMIK transferred responsibility for prison support to EULEX Kosovo, there were delays in the EU mission undertaking certain tasks, including aspects of support to prison security. Some believe that this vacuum in capacities led national prison staff to give in to prisoner demands, leading to weak security structures.¹⁷⁵

There are also underlying governance problems concerning Kosovo prisons. Monitoring and oversight are weak, in part because the judiciary is weak, and the prison system lacks proper internal investigation and disciplinary mechanisms. Nepotism undermines staffing. Many of the staff in whom the international community invested heavily have, since UNMIK handed over executive power, been systematically demoted or replaced. In hiring, UNMIK ignored civil service rules that require a university degree. This 'gap' permitted the staff they fostered to be ousted.¹⁷⁶ The need to build local ownership and focus on governance issues from the outset will be discussed further in Section IV.

In 2005 the DPKO's analysis of its experience in supporting post-conflict prison systems concluded that while much had been learnt, adequate resourcing was a key challenge. The number of positions provided had generally been insufficient, leading to weak mission capacity. It was seen as critical that UN capacity be developed to support strengthening of national prison systems 'at a similar rate to that of national police services'.¹⁷⁷ Experience from UNMIL, UNOCI, MONUC, UNAMA, ONUB and MINUSTAH was that the absence of congruent development in the penal sector undermined efforts to strengthen the national police. No doubt there were broader implications for public security and rule of law. While there has not yet been a follow-up analysis of progress in supporting post-conflict penal reform, the resourcing challenges clearly remain. In the July 2009 'new horizons' vision for the future of peacekeeping, civilian specialists for prison management were identified as being in 'critical shortage'.¹⁷⁸

While the DPKO's policy framework is notable for expressly acknowledging the contribution of well-functioning prisons to peace and security, its approach is limited in the sense that it is focused only upon prisons, not the penal system more broadly. Questions related to alternatives to detention, such as bail,

¹⁷³ Johnston, note 165 above.

¹⁷⁴ Coyle, A. (2007) 'Development of human rights standards in post-conflict penal systems', presentation to Swedish UN prison and probation officer course, February, p. 4.

¹⁷⁵ Personal correspondence from Stephen Johnston, 25 November 2009.

¹⁷⁶ Johnston, note 165 above.

¹⁷⁷ DPKO, note 156 above, pp. 22-23.

¹⁷⁸ DPKO and Department of Field Support (2009) 'A new partnership agenda: Charting a new horizon for UN peacekeeping', DPKO/DFS, New York, July, p. 27.

probation and community service, are not generally considered, at least until some time after prison support has been initiated, when it is perceived the context is stable enough.¹⁷⁹ This is to be expected, given that in a post-conflict context the bureaucracy of the penal system will be weak and a community-based supervisory structure for alternatives to prison lacking. There is nonetheless a need to consider the development of community options as soon as practicable, so as not to create a situation where people are imprisoned for minor offences in the absence of effective alternatives, rapidly leading to problems of overcrowding. Doing so, and working with informal or traditional justice systems to resolve minor disputes, might help to divert cases away from courts and prisons, lessening the pressure on both.

¹⁷⁹ Kuire, note 33 above.

3. Opportunities for Better Coordination and Lesson Sharing Between Penal Reform and SSR

The experiences outlined in Section II highlight how in developed, transitional, developing and post-conflict contexts alike, many of the challenges to penal reform are intrinsically linked to weaknesses in other parts of the security sector, including the governance of the security sector. Paying more attention to penal reform dimensions of a broader SSR agenda offers opportunities to improve coordination and share lessons learnt between the penal sector and other parts of the security sector. On one hand, SSR should become more ‘penal sensitive’ – more inclusive of the penal dimensions of any SSR context and supportive of penal reform initiatives. On the other, penal reform should become more ‘SSR sensitive’ – grounded in a more holistic approach to the governance and functioning of the security sector. This section will consider some strategies that may help achieve this, at times drawing upon good practice that has been documented in post-conflict contexts. The latter part of the section will consider recommendations specific to supporting penal reform in post-conflict contexts.

3.1 Recognising penal reform within a comprehensive and integrated approach to SSR

While a comprehensive understanding of the security sector may be inherent in the SSR concept, it is far from the norm in SSR programming, which often focuses on one particular security sector agency. As all parts of the sector are interlinked, this limits progress. In Afghanistan, for example, the sectoral approach to SSR, which separates work in the police, prosecutorial and justice sectors, has undermined programming in each.¹⁸⁰ While not all of the broad range of activities that might be characterised as penal reform necessarily lend themselves to implementation within an SSR framework, there is a clear need for greater coherence between penal reform activities and other aspects of SSR. Some practical steps that might help ensure that relevant aspects of penal reform are recognised within SSR programming are suggested below.

3.1.1 Including prisons in assessments

The penal sector should be included in any SSR assessment, to understand its needs and ensure its inclusion in a comprehensive SSR strategy. Such assessments must be comprehensive: looking beyond issues such as secure prison facilities and security routines and procedures to understanding the impacts of different security agencies on the penal system, as well as linkages with health, welfare and education agencies. It is also necessary to understand governance weaknesses beyond the penal system: if executive or parliamentary oversight is weak, fiscal management poor or human rights monitoring suppressed, this will constrain successful penal reform.

¹⁸⁰ Fair, C. C. and S. G. Jones (2009) ‘Securing Afghanistan, getting on track’, US Institute for Peace, Washington, DC, January, p. 18.

Simultaneously, it has been observed that prisons ‘can be useful indicators and barometers of community mood and key issues, including issues that may jeopardize the peace and community security’.¹⁸¹ Focus groups within prisons, for example, could provide valuable perspectives on experiences and causes of insecurity within the community.

3.1.2 Drawing on specialist expertise in penal reform issues

Effectively addressing penal reform within any broader SSR framework requires that appropriate specialist expertise is sourced. At the assessment stage, it must be recognised that there is a body of knowledge concerning penal reform based on academic enquiry and practical experience that informs this profession, and that generalist understanding (or understanding of policing or judicial systems) is not adequate to develop an effective assessment of a penal system. Where support to prison management is concerned, practitioners insist this requires actual hands-on experience in managing prisons. This requires organisations that support penal reform processes to develop their human resources as concerns prison management and penal system expertise.

3.1.3 Bringing together stakeholders from different parts of the security sector, and from other sectors

Joint working groups, steering committees, task forces and the like can be effective in ensuring that reforms in the penal, justice and police sector support each other, and could also include relevant ombudspersons, civil society representatives and others involved in oversight. The United Kingdom has found this an effective strategy in supporting justice system reform in southern Iraq, resulting in not only better coordination but also improved trust between the actors involved and strengthened local ownership of the reform process:¹⁸²

A significant obstacle to a functioning justice system in Southern Iraq was the lack of trust, communication, co-operation and co-ordination between the different elements of the rule of law system, including the police, prosecutors, judiciary and prisons. This resulted in, amongst other things, detainees being left in pre-trial and police detention for unacceptable lengths of time and not being produced at court for trial.

To address this, the international military, police, prisons and justice components worked to encourage the region’s chiefs of police, prison governors, senior prosecutors and senior judiciary to hold weekly meetings in the main court house. These were chaired by the senior judge and by senior representatives of the police, prisons and prosecution, along with international police and military personnel.

These co-ordination meetings meant that problems could be raised with all the relevant parties; and that those parties could give public undertakings as to how they planned to resolve them. Levels of ‘buy-in’ varied across the region; but, where there was a reasonable level of engagement, the meetings had a significant positive impact and encouraged local officials to take ownership of the reform process.

¹⁸¹ DPKO, note 156 above, p. 6.

¹⁸² UK Foreign and Commonwealth Office (2007) ‘Peace support operations: Information and guidance for UK police personnel’, FCO, London, p. 42, available at: www.ukinternationalpolicing.com/edocs/ipo_guidelines.pdf?CFID=1100842&CFTOKEN=87038033.

In post-conflict Liberia, for example, to address a glut of pre-trial detainees and consequent prison overcrowding, UNMIL corrections staff initiated establishment of a case flow committee including representatives of the Liberian Department of Justice and Liberian Bureau of Corrections to assess any person who had been in detention more than 28 days.¹⁸³

At the same time, it will be necessary to bring those engaged in penal reform together with stakeholders from other sectors, such as health and welfare. One practitioner experienced in supporting development of prison systems has observed that the process and content has at least as much in common with development of a health system or education system as it does with re-establishing a police or judicial system: the former share numerous common features, in that each employs one set of people to manage and deliver services to another, dependent, set of people.¹⁸⁴

3.1.4 Applying a proper understanding of penal issues to evaluation of security sector performance

Measuring police or judicial performance by the numbers of persons arrested or incarcerated can act to incentivise the use of prison and contribute to prison overcrowding. Other methods of evaluating the effectiveness of the police and the courts must be devised.¹⁸⁵ These should reflect the objectives of policing and the justice system – measuring factors such as community perceptions of safety and justice, and access to justice by marginalised groups and the poor – and should attempt to incentivise diversion of offenders from prison.

In evaluating the performance of the penal system, in particular prisons, indicators should be developed that gauge the impact of imprisonment on public safety and security – measuring recidivism and evaluating reintegration, for example. While issues of security within the prison are important (e.g. data on escapes, violent incidents and suicides), evaluation should be oriented towards a wide understanding of security.

3.1.5 Including prisons in intelligence sharing

In many countries there is hesitancy by police to share information about prisoners with prison management, which prison administrators see as lessening their capacity to ensure prison security. At the same time, prisons can be a breeding ground for organised crime, but in many cases prison systems have little capacity to gather, analyse, share and act on intelligence. SSR approaches could make a contribution in developing appropriate mechanisms for intelligence sharing between police and intelligence services and prisons, and ensuring the integrity of such systems.

¹⁸³ Johnston, note 165 above.

¹⁸⁴ Personal correspondence from Isabel Hight, 20 November 2009.

¹⁸⁵ International Centre for Prison Studies/Penal Reform International, note 70 above, p. 12.

A particular gap has been identified in links between prison systems and efforts to address organised crime and corruption. International protocols and rules for dealing with corruption and organised crime address judges, prosecutors, police and customs, but overlook the need to involve probation, parole and prison services. Once an organised crime figure is imprisoned, political, police and judicial authorities consider the problem solved. Rather, prison is in many cases a fertile base for organised crime to continue and flourish. In several countries, as discussed in Section III, organised crime figures all but run prisons, and the institutional conditions and power base for such ‘protected’ individuals facilitate recruitment of other prisoners into the organised crime network.¹⁸⁶

In a similar vein, counterterrorism strategies should include prison authorities where radicalisation within prisons is a concern. Gang culture and corruption within prisons can facilitate recruitment of prisoners (and prison staff) to extremist groups. In Indonesia, prison administrators are now included in counterterrorism training programmes. Effective responses also require coordination between prison officials, the courts and the police in cases of those arrested for terrorism-related crimes, in terms of sharing background information on prisoners and tailoring prison programmes and supervision accordingly.¹⁸⁷

3.1.6 Reviewing staffing across the security sector

In discussing the challenges of moving responsibility for prisons from the ministry of justice to the ministry of interior in Section III, problems related to staffing were touched upon. In any SSR process, changes to staff conditions and entitlements are an area of great sensitivity, as a perception that the reforms will not be good for staff can inhibit the necessary will to reform within the institution. Russian experience suggests that it can be helpful when undertaking reforms in some parts of the security sector to review staffing across the entire sector. A new law on law enforcement services that provided for a uniform, centralised system of staff with grades and classes comparable to the military helped to reverse a trend of staff leaving the prison service.¹⁸⁸ This approach, however, must not preclude any necessary reform to ‘demilitarise’ the culture of the prison service.

3.2 Applying good practice from penal reform to SSR

While overlooked by many in the security community, penal reform nonetheless has a long history. Many lessons have been learnt by national and international actors alike concerning successful approaches to penal reform that could strengthen SSR programming. The following is not an exhaustive list, but some initial suggestions for ways in which the norms and approaches guiding penal reform might be applied to SSR.

¹⁸⁶ Tkachuk and Walmsley, note 66 above, p. 9.

¹⁸⁷ International Crisis Group (2007) “‘Deradicalisation’ and Indonesian prisons”, Crisis Group Asia Report 142, ICG, 19 November, Jakarta/Brussels, p. i.

¹⁸⁸ International Centre for Prison Studies, note 51 above, para. 44.

3.2.1 Human-rights-led approaches

Prison conditions and management have been the subject of extensive international and regional standard-setting. Relevant international standards and human rights instruments were set out in Section II. It is widely accepted that the assessment of whether a prison system is well managed will be based on the extent to which the standards set out in these documents are being put into practice.

Within penal reform, there is a broad acceptance that grounding prison management in human rights standards is not only the right thing to do ethically, but is the most effective and safest way of managing prisons. There is a practical understanding that failure to respect and promote the human rights of staff and prisoners undermines prison security and operational efficiency.¹⁸⁹ This is perhaps why, even in resource-poor countries and post-conflict environments, efforts are made to apply international and regional standards concerning human rights in prisons.

It is important to promote further the understanding that the protection of human rights is a clear SSR objective that can produce significant programming benefits. The UN Code of Conduct for Law Enforcement Officials and Basic Principles on the Use of Force and Firearms by Law Enforcement Officials could be used as standards in police reform programming, for example.¹⁹⁰ The UN Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power, Basic Principles on the Independence of the Judiciary and Guidelines on the Role of Prosecutors could be used to guide justice reform programming. The Convention on the Elimination of All Forms of Discrimination against Women could be used to guide equal opportunities for women to participate in security sector agencies. The Convention on the Rights of the Child, too, has extensive implications for policing, the military and the justice system. Taking promotion of human rights as a goal and modus operandi for SSR may thus help to ground reform programmes in meeting the needs of the communities concerned.

3.2.2 Independent inspection

It is widely accepted within penal policy that prisons should be open to inspection (although in some countries this remains contentious and/or inspections rarely occur) to prevent abuse of prisoners and ensure that as state institutions they are being appropriately run. It is also recognised that inspections can be a safeguard for prison staff, in countering any misplaced allegations of mistreatment of prisoners. Further, inspections are a mechanism whereby good practices can be identified and, through reporting, shared. The success of inspections in effecting change presumably varies considerably between countries. The chief inspector of

¹⁸⁹ The human-rights-led approach to prison management is clearly set out in Coyle, note 5 above.

¹⁹⁰ Harriott, A. (2003) 'Police and society in the Caribbean: The application of United Nations standards for law enforcement', in UNODC (ed.) *The Application of the United Nations Standards and Norms in Crime Prevention and Criminal Justice*, United Nations Office on Drugs and Crime, Vienna, pp. 91-96, is an example of using the UN codes as measures to assess police performance.

prisons for England and Wales reports that over 70 per cent of inspectors' recommendations are wholly or partially achieved within around two years.¹⁹¹

In many jurisdictions inspections are conducted by the prison administration – for example, senior personnel from the central authority. This may be supplemented by independent inspections by inspectors appointed by parliament or government, or – as in France – by judges. Some prison systems use lay volunteers in inspection teams. As discussed in Section II, governance of national prison systems is further strengthened in many regions by regional and international inspection mechanisms and standard-setting.

Inspection procedures such as these could be usefully applied in other security sector agencies where official and/or public scrutiny would enhance transparency and accountability. For example, procedures in police stations and conditions in military training establishments could be routinely subjected to independent inspection. Reports of inspections might assist parliamentary committees and others (such as an ombudsperson) responsible for oversight. Involving lay individuals or civil society representatives in such inspection mechanisms might help to build trust between these security services and the public. Models for inspection need to be robust and comprehensive, but not require intensive resources.

3.2.3 Civil society participation

Many countries have formal and informal modes of involving civil society groups in prisons. For example, in England lay volunteers make up independent monitoring boards that report to the justice secretary on conditions and programmes in each institution. Members of boards are usually magistrates, company executives, teachers and self-employed businesspeople.¹⁹² As well as a form of oversight that protects against abuse, civil society involvement can help bridge the gap between prisons and outside society. Prison visitors, as groups and individuals, in contact with the media play an important role in educating the public about the realities of prison life, and why money spent on rehabilitation measures is not money wasted. Furthermore, experience of regularly being inside a prison also allows civil society organisations (beyond individuals appointed to inspection teams) to play an informed role in prison oversight mechanisms.

Prisons in many countries engage with civil society much more broadly than through monitoring. Partnerships with civil society and educational institutions can help prison managers provide a much wider range of services to prisoners - whether vocational, recreational or in the form of psychological support. In Haiti, for example, despite the extremely poor and at times dangerous conditions in prisons, local human rights NGOs support activities for prisoners and/or their children, including meetings with prison stakeholders and schooling, vocational

¹⁹¹ Owers, A. (2008) 'Inspecting places of detention', *Criminal Justice Matters*, 71(1): 29.

¹⁹² Terrill, note 4 above, pp. 79-80.

and rehabilitation programmes.¹⁹³ Prison managers see the benefits of this in improving conditions and morale within the prison, and on a systemic level it is understood that these types of programmes and contact with persons from the outside aid prisoners' rehabilitation. Paralegals from non-governmental organisations working within prisons can be a valuable asset to the entire penal and justice system, in helping to keep cases moving and reducing the prison population.

Other security sector agencies could benefit from such an open approach to civil society engagement. Women's police stations and police services engaged in community-based policing approaches at times do work closely with civil society, and in some countries court staff refer victims and witnesses to civil society organisations. However, in general police stations, courts and military establishments are not places that are open to civil society groups. Better integration of services delivered by security agencies with services provided by civil society could have added benefits in terms of informal monitoring, strengthened capacity for civil society oversight and greater communication with the public and public trust. Engaging civil society in reform efforts is particularly important in post-conflict and transitional contexts, where the government itself may be transitional and civil society actors are likely to take formal leadership roles.

3.2.4 Developing a communications strategy

Penal reformers recognise that no strategy for penal reform can succeed without public support. Public education on the limitations of imprisonment is, for example, an important dimension of efforts to reduce the prison population. Successful reintegration of prisoners is closely linked to community perceptions regarding them. Engagement with the media on penal reform and, ideally, their access to penal institutions are helpful. In Mauritius, for example, the minister responsible for prisons aimed to increase opportunities for prisoners' social reintegration and combat the prejudice which faces ex-prisoners. He organised a week wherein prisons were open to the media, and journalists encouraged to interview prisoners and staff about the problems prisoners face on release. This stimulated useful debate about the importance of society making an effort to help ex-prisoners re-establish themselves.¹⁹⁴ In an example from an SSR context, the Prison Reform Unit of the OSCE Mission to Serbia produced a regular newsletter on prison reform activities, highlighting accomplishments so far. Such a communications strategy can be linked to independent monitoring activities and provisions for family contact. These, while requirements in meeting human rights obligations, also ensure that prisoners' families and the general public receive trusted information about prisons.

Others working in SSR could draw from this experience in developing communications strategies as part of any reform process. Communicating the

¹⁹³ International Crisis Group, note 158 above, p. 7; International Crisis Group, note 168 above, p. 20.

¹⁹⁴ Coyle, A. (2002), note 5 above, p. 84.

intentions for reform and highlighting progress help to sustain political and public support, and lessen the impact of resisters of reform.

3.3 Applying good practice from SSR to penal reform

Although a newer concept, the attention to normative standards in the SSR discourse and the wide range of experiences of SSR in different contexts and with different agencies have produced some guiding concepts that could be of use to those engaged in penal reform.

3.3.1 Local ownership

When faced with weak governance capacities and prison conditions that are every day a threat to the safety or even lives of detainees, it can be tempting as an external actor to make recommendations or even take decisions on how penal reform should be implemented without full involvement of local actors. The DPKO, for example, has acknowledged that in some missions there has been limited involvement by national staff in strategic planning and policy development, identifying a tension between responding to the immediate demands of the situation and ensuring national participation.¹⁹⁵

This type of challenge is typical of SSR, where expert outsiders may feel that they are well qualified to lead reform processes. Such an approach engenders many problems, not least a high likelihood of failure:

domination and paternalism by external actors generate resentment, resistance and inertia among local actors; local actors have little commitment to externally imposed products; these products do not adequately reflect local needs, dynamics and resources... reforms that are not shaped and driven by local actors are unlikely to be implemented properly and sustained.¹⁹⁶

The concept of 'local ownership' has thus become popular in SSR discourse, to refer to the principle that the reform of security policies, institutions and activities in a given country must be designed, managed and implemented by local rather than external actors. While no doubt many international organisations supporting penal reform have already internalised this principle, it would be useful to subject it to further interrogation as regards penal reform. Such questions might be asked as: who are the stakeholders in a penal reform process – government, penal authorities, staff, prisoners, prisoners' families, victims' groups, civil society etc.? What are the best ways to involve each in planning and implementing a penal reform process? How can one ensure participation of all these groups as well as consultation? How can one identify local initiatives that can be built upon?

¹⁹⁵ DPKO, note 156 above, p. 14.

¹⁹⁶ Nathan, L. (2007) 'No ownership, no commitment: A guide to local ownership of security sector reform', paper commissioned by Security Sector Reform Strategy of UK Global Conflict Prevention Pool, University of Birmingham, p. 3, available at: www.ssrnetwork.net/documents/Publications/No_Ownership_No_Commitment_v2.pdf.

Moreover, those supporting penal development should recognise that national authorities in developing states are not the captives they once were to external actors: in a networked world, they can participate in regional and international forums, have access to information and appreciate their position in relation to other jurisdictions and development approaches.

3.3.2 Building capacity

As in other areas of SSR, capacity building in penal reform takes time and patience. The DPKO describes how:

Prison experts are often under pressure to undertake ‘in-line’ functions relating to security and humanitarian issues. By undertaking these functions they deny national counterparts the opportunity to acquire new skills but often determine that risking negative outcomes, especially where security may be jeopardised, is not an acceptable option. They must therefore balance the consequences of delaying the acquisition of skills with the consequences of not taking specific action to deal promptly with an acute security or humanitarian situation.¹⁹⁷

Effective capacity building is a challenge not only in post-conflict contexts where substitution is a possibility. The common approach to prison staff capacity building – providing training on the international legal standards for prison conditions – has been criticised as ignoring the institutional environment of the staff concerned and their (in)ability to change within this.¹⁹⁸

The OECD DAC *Handbook on SSR* describes capacity building as a much broader concept than training and technical assistance, in that it is developing the ability of people and organisations to define strategies, set priorities, solve problems and achieve results. To support capacity development one must attend not only to individual ‘capacity gaps’ but to the enabling environment – considering incentives, leadership, the institution as a whole – as well as to national commitment to reform and the quality of governance.¹⁹⁹ Illustrating this, in Liberia UNMIL found that the absence of an institutional culture of accountability and documentation challenged the success of its mentoring programme.²⁰⁰ One should focus on capacity not only of those prison staff who attend to prisoners, but on human resources, financial and procurement personnel; and not only for day-to-day tasks, but for administration, strategic planning and change management. Unless capacity is developed in these areas, initiatives elsewhere will be undermined. Policy and practical advice on capacity building that has been developed within the OCED framework and elsewhere, and the lessons learnt in capacity building in other parts of the security sector, are likely to be highly applicable to penal reform contexts also.

¹⁹⁷ DPKO, note 156 above, pp. 4-5.

¹⁹⁸ Jefferson, A. M. (2005) ‘Reforming Nigerian prisons: Rehabilitating a “deviant” state’, *British Journal of Criminology*, 45(4): 487-503.

¹⁹⁹ OECD DAC (2007), note 17 above, p. 86.

²⁰⁰ DPKO, note 156 above, p. 16.

3.3.3 Engaging with parliaments

Parliamentary oversight of the security sector is a key area of work within SSR. In many regions parliamentarians have been the focus of training and other support to assist them to exercise their powers of budgetary, legislative and policy oversight more effectively. As discussed in Section I under ‘Democratic governance and accountability’, parliamentarians should play an important role in shaping penal policy and exercising oversight over the penal system. Ideally prison inspectors and ombudspersons should report to parliament. However, penal reform programmes rarely attempt to involve parliamentarians; equally, the penal system is often neglected in discussions of parliamentary oversight of the security sector.²⁰¹

3.3.4 Staff representation

Recruitment, retention and advancement of female staff have been identified as a challenge in a number of penal reform environments. The international normative requirement and practical necessity for female prisoners to be attended and supervised by female staff are often thwarted by a lack of female staff at appropriate levels of seniority.

There is little policy or practical guidance on the recruitment, retention and advancement of female prison staff.²⁰² However, guidance could be derived from the broad experience in this regard of other security sector agencies, including police and armed forces. Across the security sector, increasing recruitment of female personnel requires, in many cases, special measures such as review of recruitment criteria (e.g. to ensure that they are appropriate for women’s rather than men’s prisons), targeted recruitment campaigns and institution of family-friendly working conditions. Retaining and supporting the advancement of female personnel can be assisted by female staff associations, leadership training programmes and mentoring.²⁰³

In terms of democratic governance and accountability within the penal sector, as discussed in Section II, penal personnel should not only include women and men, but be recruited from all parts of the community, including ethnic and religious minorities, indigenous people and people with disabilities. Again, this is an issue upon which guidance can be sought from the experience of reform programmes in other parts of the security sector.²⁰⁴

²⁰¹ For example, the penal system is overlooked in the DCAF/IPU (2003) *Handbook on Parliamentary Oversight of the Security Sector*, DCAF/IPU: Geneva.

²⁰² Although see ICPS, note 91 above.

²⁰³ See, for example, Denham, T. (2008) ‘Police reform and gender’, in M. Bastick and K. Valasek (eds) *Gender and Security Sector Reform Toolkit*, Geneva: DCAF/OSCE-ODIHR/UN_INSTRAW.

²⁰⁴ See, for example, DCAF (2006) ‘Multiethnic armed forces’, DCAF Backgrounder, Geneva, available at: www.dcaf.ch/publications/kms/details.cfm?lng=en&id=18416&nav1=5.

3.4 Making SSR within post-conflict peacebuilding more ‘penal sensitive’

With post-conflict contexts involving distinctive challenges and opportunities for both penal reform and broader SSR, and post-conflict peacebuilding involving a distinctive set of actors (in particular the DPKO), it is useful to examine how SSR can be made more supportive of penal reform within these contexts. Experience of support to prison development within post-conflict peacebuilding missions to date has begun to identify a number of lessons.

3.4.1 Including penal issues in pre-mission assessment

The DPKO has underscored the importance of clear mandates that identify the objectives of prison support. However, more recent mandates, discussed in Section II, continue to lack specificity. This can have its origins in the technical assessment done before a peacekeeping operation is mandated: some technical assessment teams have had no prison representatives, so no clear mandate for work on the penal system emerges.²⁰⁵ The security and other needs of a developing prison system must be considered within pre-mission planning and other types of security sector assessments for penal work to receive clear direction.

3.4.2 Ensuring that penal reform has a place at the table

There should be mechanisms and joint strategies to ensure coordination and integration between penal, police, justice, human rights and disarmament, demobilisation and reintegration (DDR) elements of peacebuilding. Including international prison personnel and senior host-country prison staff within national security councils, task forces and security agency meetings is essential to allow concerns regarding prison security and reform to be aired and addressed.

The DPKO’s lessons learned report recommended that prison components within any peacekeeping mission should report directly to the deputy special representative of the Secretary-General, to afford prison components access to decision-making and facilitate coordination. Whether this is likely to occur in practice depends upon the size of the penal component. Where penal components are so small that they must be placed within another mission component – either justice or policing – experience suggests that there is a risk that penal issues are overlooked in coordination and decision-making forums. It is incumbent upon the unit head to ensure coordination and that penal issues are given the necessary attention at management levels. It has emerged as preferable to place penal elements within justice units, keeping prison and police components separate to avoid prison personnel being tasked with police duties, and confusion over the appropriate role of each.²⁰⁶

²⁰⁵ Kuuire, note 33 above.

²⁰⁶ DPKO, note 156 above, p. 10.

3.4.3 Resourcing

The DPKO's lessons learned highlighted that penal reform mandates must be appropriately resourced. However, donors continue to be, in general, very reluctant to invest in penal reform, and often too few staff posts are established for prison support mandates and needs. Resourcing of penal reform work within peacekeeping is a challenge not only on the ground but at UN headquarters level. Although the DPKO has the global lead within the UN system on penal reform, there are only four staff working on it at DPKO headquarters. The DPKO endeavours to bolster its capacities through collaboration with other UN agencies, such as the UNODC and UNDP. (However, in the case of the UNDP, there is no coordinator for penal issues. Any UNDP penal work is done by consultants, presenting challenges of supervision and quality control.²⁰⁷)

DPKO headquarters corrections staff strive within the DPKO and externally to emphasise the need to look at police, penal, justice and prosecution issues together, and highlight how problems in the functioning of one create problems for the others. They have had some success in increasing resources for penal reform through national staff secondments to peacekeeping missions, supplementing the established posts. For example, the mission in southern Sudan has seven established posts plus 40 secondees; in eastern Chad there are seven established posts plus 25 secondees. Western states that have seconded staff include Canada (to Haiti), Sweden (to Liberia, Côte d'Ivoire and the DRC), the United States, Italy and Norway. However, it is primarily African states that are contributing penal staff, with secondments from Benin, Burkina Faso, Ghana, Kenya, Nigeria, Senegal, Tanzania, Uganda, Zambia and Zimbabwe. Jordan has also seconded staff. (In general, the DPKO finds it more difficult to source French-speaking prison staff, as in other areas of SSR.²⁰⁸) The DPKO offers standard pre-deployment training for such secondees, but the fact remains that many of the African nations seconding staff have less than exemplary prison systems. There should be close monitoring of secondments to ensure consistency of high standards.

An aspect of proper resourcing is that penal staff should be deployed early, simultaneously with police components. This avoids the need for police to cover penal functions at the outset of the mission and reduces confusion regarding roles. Moreover, the presence of penal personnel from the beginning effectively supports police work, and aids development of coherent approaches to strengthening the penal, justice and police systems.²⁰⁹

Missions incorporating penal reform within a comprehensive approach to SSR will no doubt find ways to share resources effectively between different areas. For example, training academies for police and prison staff could be co-located.

²⁰⁷ Kuuire, note 33 above.

²⁰⁸ *Ibid.*

²⁰⁹ DPKO, note 156 above, p. 5.

In engaging donor interest in SSR, penal reform should be included as a key element and donors helped to understand its linkages with justice, security, rule of law and good governance. The DPKO emphasises that long-term development partners and donors should be engaged early on, and that support for penal reform should be included in any transitional strategy. Strong advocacy on the part of mission leadership for penal reform can also encourage a host government to meet its obligations to provide for the needs of prisoners, and encourage civil society participation in the development of the prison system.²¹⁰

3.4.4 Supporting prison construction and security

Chesterman suggests that in an immediate post-conflict environment, where the law enforcement and judicial system is not functioning, the military might play an emergency role in constructing detention facilities.²¹¹ This may have a place, although any military management of civilian prisons is problematic from a governance perspective. In later stages of peacebuilding, police and military personnel within UN missions can also provide important support to prison security, such as by guarding the perimeter and being available for emergency interventions in case of serious incidents (not internal security), until sufficient prison officers within the host country have been trained to carry out these functions independently.²¹² Such arrangements are in place in Liberia and Kosovo, where international police units provide perimeter support to certain prisons. In these two cases, such support has not in the past prevented mass escapes. However, this could be attributed in part to the lack of formalised collaboration between penal and policing elements: the terms of engagement of the police units were unclear, and they did not know how far they could go to prevent escapes (for example, in using lethal force). Moreover, the police units concerned resented being deployed to operations they considered out of their mandate, translating into allocation of less well-equipped staff for this job. A formal approach to such collaboration can help prevent unclear lines of authority, eradicate reluctance by other security agencies to support prisons and better provide for capacity building of local prison staff. In Kosovo there are now agreed contingency plans concerning EULEX police support to the Kosovo prison service in case of any serious security incidents in prison facilities.²¹³

3.4.5 Including prisoners in DDR and elections

There have been disturbances in prisons as a result of the exclusion of former combatants from DDR programmes. The UN Integrated Disarmament, Demobilization and Reintegration Standards do not address the eligibility of prisoners for DDR programmes. However, it will often be the case that there are

²¹⁰ *Ibid.*, pp. 5-6.

²¹¹ Chesterman, note 148 above, p. 182.

²¹² Johnston, note 34 above, p. 51.

²¹³ *Ibid.*, pp. 45, 51; Johnston, note 165 above; Johnston, note 173 above. For suggestions on use of formed police units to support prison security see also INPROL (2007) 'Prison security in societies emerging from conflict', INPROL Consolidated Response 07-007, November, pp. 4-5, available at: www.inprol.org.

members or former members of armed forces or groups (and others eligible for support within a DDR programme) within the prison population. Many of these will likely be awaiting trial. They no doubt share the rehabilitation needs of their comrades outside prison, and have even greater needs for support in rehabilitation and reintegration. The DPKO has recommended that DDR policies support the inclusion of prisoners.²¹⁴ These policies should be developed working closely with affected communities, as there could be particular sensitivities if it were perceived that people guilty of serious crimes were benefiting unjustly from DDR.

Exclusion of prisoners from elections also has the potential to generate unrest in prisons. Where the national law retains prisoners' right to vote, national authorities should be encouraged and supported to facilitate this, including providing prisoners with sufficient information about the candidates and the polling process. In the 2009 elections in Afghanistan polling centres were set up in prisons, but prisoners serving sentences of over five years were not entitled to participate.²¹⁵

3.4.6 Developing pre-deployment training for penal experts

Many countries deploying police and armed forces personnel to peacekeeping have specialised pre-deployment training programmes. These are supported by training resources and DPKO headquarters capacity in addressing issues such as human rights and gender in pre-deployment training. However, of all the countries deploying or seconding penal experts to peacekeeping missions, so far only Canada and Sweden have given them any training on their specific role.²¹⁶ The DPKO, working with the ICPS, developed a pre-deployment training programme for penal experts in 2007, which is generally conducted twice per year for experts after being deployed to missions. An additional component was developed during 2009. However, the turnover and expansion of prison support in peacekeeping mean that not all penal experts are able to attend this training.²¹⁷ States should fulfil their responsibilities for appropriate pre-deployment training, making use of those generic tools that have been developed by the DPKO and others, and perhaps considering cooperation with other penal-expert-contributing countries.

3.5 Making penal reform within post-conflict peacebuilding more 'SSR sensitive'

3.5.1 Monitoring and oversight

US policy emphasises the importance of penal reform in post-conflict reconstruction, identifying particular tasks as part of 'initial response',

²¹⁴ DPKO, note 156 above, pp. 21-22.

²¹⁵ Ibid., p. 22; *Pajhwok Afghan News*, available at www.pajhwokelections.af/how_to_vote.php (accessed 23 December 2009); Sheerin, J. (2009) 'As it happened: Afghan election 2009', *BBC News*, available at: <http://news.bbc.co.uk/1/hi/8209279.stm>.

²¹⁶ Kuuire, note 33 above.

²¹⁷ Hight, note 152 above.

‘transformation’ and ‘fostering sustainability’.²¹⁸ Oversight and management issues are not addressed until the third phase. Similarly, the UK ‘stabilisation’ policy regarding prisons sees ‘Renovating and maintaining essential... prison buildings, and building capacity to manage, maintain and protect this infrastructure’ as part of the initial phase of achieving political stability in countries emerging from conflict. Activities to ‘limit’ deterioration in prison conditions, including human rights monitoring, are addressed later, as medium-term priorities.²¹⁹

Monitoring of prison conditions and management practices for compliance with international norms and standards must be a key aspect of prison system support from the outset, as part of a broader framework of accountability and oversight. The mistreatment of prisoners in the care of US military personnel in Abu Ghraib prison is a sobering reminder of the importance of monitoring international as well as national personnel. Monitoring should be by international and national bodies, such as human rights commissions or ombudspersons, independent of mission prison personnel.²²⁰ In Afghanistan, for example, the Human Rights Commission has been involved in joint investigations with UNAMA into prison conditions.²²¹ Leaving monitoring and oversight issues to a late phase of penal reform activities risks allowing corruption and prisoner ill-treatment to fester, undermining the possibility for embedding the right values into the penal system, as well as progress in other areas of reform. Relationships with organisations such as the ICRC can be used by peacekeeping missions as positive models for external oversight, demonstrating to prison management that external oversight can be of assistance and benefit to them.

3.5.2 Attention to governance and legitimacy

The DPKO’s lessons learnt report, while acknowledging that ‘The literature indicates sustainability is increased by the development of long-term plans and broad participation from a range of stakeholders before commencing the re-establishment of a governmental department’, advocates an ‘incremental bottom up approach’ to building a prison system – for example, beginning with the development of operational procedures, staff job roles and prisoner and management systems; and focusing on meeting the basic needs of the prison system for secure accommodation, food, water and medical care for prisoners and salaries for staff.²²² Hight argues that re-establishing a prison system in a post-conflict country can *only* be bottom up in the early transition phase: the immediate need to provide a safe, secure, humane environment requires an immediate operational response, without time for extensive consultation and development of

²¹⁸ US Department of State (2005) ‘Post-conflict reconstruction: Essential tasks’, USDS, Washington, DC, p. V-5, available at: www.state.gov/documents/organization/53464.pdf.

²¹⁹ UK Ministry of Defence, Foreign and Commonwealth Office and Department for International Development (2006) ‘Stabilisation issues note: Security sector and rule of law’, DFID, London, p. 10, available at: www.stabilisationunit.gov.uk/resources/securitysectorlaw.pdf.

²²⁰ DPKO, note 156 above, pp. 14-15.

²²¹ International Crisis Group (2003) ‘Afghanistan: Judicial reform and transitional justice’, ICG, 28 January, Kabul/Brussels p. 14.

²²² DPKO, note 156 above, pp. 5, 13.

a strategic planning framework before making decisions about how those prisoners whom the police deliver to the prison are to be managed.²²³

While basic humanitarian and security needs must be met in the early stage of peacekeeping, an SSR perspective warns that attention to governance should also be present from the outset. The penal system being rebuilt with the support of the international community must have legitimacy, must not be used as a tool for repression of legitimate government opposition, and must not gain a reputation for ill treatment if its long-term credibility is to be ensured. Bottom-up strategies common in penal reform should therefore be quickly and carefully replaced by long-term strategies, or they risk leaving key governance deficits in place. Work done in other areas of SSR programming to develop tools and training on security governance issues such as accountability, transparency, financial management and parliamentary oversight could be applied to penal reform programming to address in particular the judicial, ministerial and parliamentary aspects of oversight of the penal sector, which often remain weak after reform processes.

3.5.3 Vetting

In Sudan the integration of ex-combatants into the prison service was a particular provision of the peace agreement. Whether or not this is the case, all penal staff should be subject to vetting for serious human rights abuses (including gender-based violence). In Liberia the recruitment and vetting model for the national police was adapted for prison staff.²²⁴ Experiences in vetting new recruits for the police and military in other post-conflict contexts could also be used in developing models for the penal system.

²²³ Hight, note 152 above.

²²⁴ DPKO, note 156 above, p. 17.

4. Conclusions and Ways Forward

As the foregoing has made clear, discussions of comprehensive approaches to SSR have neglected to consider the nature of penal reform as an element of a larger SSR agenda, and much SSR programming neglects penal elements. Penal reform is also often undertaken without full consideration of its governance dimensions and linkages to other parts of the security sector. This final section will draw conclusions from this overview, in particular as regards current international approaches to penal reform and SSR. It will close by proposing some questions to guide further research and discussion.

4.1 Current international approaches to penal reform and SSR

Experience highlights a number of key considerations for international actors – be they the United Nations, regional organisations, bilateral donors or international consultancies and NGOs – when trying to improve approaches to supporting penal reform: the need for more engagement with penal reform, including resource commitment; the need for comprehensive assessment and coordination with police and justice elements; the importance of a focus on national authorities and other local stakeholders; coordination between international actors; early engagement in non-custodial solutions; the dangers of exporting a Western model that overemphasises security and/or fails to engage with local communities and build upon local approaches; and the challenge of developing the appropriate expertise to support penal development.

The international community has not adequately recognised the importance of the penal system as part of a well-functioning security sector, and as being crucial to social stability. This is reflected in under-attention to and under-resourcing of penal systems in international development support and post-conflict peacebuilding. As a result, in many countries in a process of democratic transition or governance reform, the penal system remains a knot of corruption and mismanagement, and a source of instability and social strife. Support to penal reform needs to become a more prominent part of SSR engagements, based on comprehensive assessment and local leadership, and grounded in long-term commitment.

Assessment must be more than simply inspecting prisons. Assessment should analyse *inter alia* the roles and objectives of the penal system in the particular country, the relationship between state institutions and traditional and informal approaches to dispute resolution, and linkages with policing and the justice system, welfare and other agencies and civil society. It needs to involve local communities and civil society as well as national authorities, if interventions are to be sustainable and culturally appropriate. National authorities, however, are not just to be ‘consulted’. They must own and lead any reform process. The development of national capacity may take time and require dedicated support.

Where there is support for penal reform, experience suggests that, particularly in post-conflict contexts, it is too often inadequately coordinated with reform of police and justice. For example, late provision of penal personnel leaves police performing penal roles, and inadequate judicial development means that oversight of the penal system is weak, undermining progress in all other areas. Better coordination and communication mechanisms between national agencies and other interested groups, as well as between external actors and between external actors and national agencies, are required.

What international support for penal reform does exist is often dedicated to improving prisons. While this understandably attempts to answer the urgent humanitarian need to improve prison conditions, it does not address the root cause of these poor conditions, which is often overuse of detention. International support for penal reform should attempt from the outset to encourage steps to reduce the use of imprisonment: development of alternatives to custody; paralegal services for pre-trial detainees; policies that divert parents of young children, juveniles and minor offenders from the prison system, etc. Where traditional and informal justice systems operate in parallel to the formal system, these can be involved as important means of resolving minor disputes without recourse to imprisonment. This approach goes hand in hand with care not to advocate models of the penal system developed in the West that are unlikely to be appropriate or sustainable in developing country contexts.

Finally, it is necessary to foster and utilise specialised expertise in supporting the development of the penal system.

4.2 What more do we need to know?

Research on strengthening the governance dimensions of the penal system is sorely lacking. Likewise, exchange of lessons learnt in coordinating penal reform with other aspects of SSR is scant. The following are some suggestions for research and policy work that would strengthen endeavours in this regard.

On penal reform processes

- What are the enabling conditions for effective penal reform in particular types of contexts?
- What are appropriate mechanisms for assessment of the penal system?
- What are the best approaches for engaging public and political support for penal reform processes, including alternatives to imprisonment?
- How can penal reform processes be gender-sensitive, and inclusive of all parts of the community?

- How can penal reform processes appropriately build upon informal and traditional ways of dealing with offending?
- Where there is external support for penal reform, how can local ownership of the process be ensured?
- What are the best sources of ongoing funding for penal reform, and how can international actors help ensure that reform efforts will be sustainable, including financially, once international support ends?
- How can progress be measured in penal reform, including in its governance dimensions?

On recognising penal reform elements within SSR

- How can the penal system be more comprehensively included in SSR assessments, monitoring and evaluation?
- How can penal reform best be coordinated with reform of police, the judiciary and prosecution services, and reform of general public administration?
- Where can appropriate expertise to include penal reform as part of a comprehensive SSR process be sourced?
- How can training available to SSR and penal reform practitioners better address engagement with the penal system as part of comprehensive SSR?
- How can further dialogue and exchange between SSR and penal reform communities of practice be fostered?



Geneva Centre for the Democratic Control of Armed Forces (DCAF)

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) is one of the world's leading institutions in the areas of security sector reform and security sector governance. DCAF provides in-country advisory support and practical assistance programmes, develops and promotes appropriate democratic norms at the international and national levels, advocates good practices and conducts policy-related research to ensure effective democratic governance of the security sector.

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