Lorna McGregor, *Detention and its Alternatives under International Law*

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Chapter 9

Conclusion: Commonalities and Differences in Detention and Its Alternatives under International Law

1. Introduction

Notwithstanding the frequent characterisation of detention as a measure of last resort, this book has demonstrated that the formulation and implementation of this principle vary significantly, with some forms of detention subject to an absolute prohibition and others in receipt of differing levels of scrutiny of their necessity and proportionality. Each thematic chapter in this book analyses the state of international law on major forms of detention and their alternatives, engaging with key critiques and identifying normative and implementation gaps. Analysis of the adequacy and effectiveness of the international law applicable to specific detention regimes is critical, not least because states employ detention as policy tool within particular domains. However, an overall analysis of detention and its alternatives complements these discrete studies by revealing common gaps, challenges, and shortcomings that cut across different policy areas. The holistic study of detention and its alternatives under international law enables the cross-fertilisation of normative and implementation developments in one domain that could resolve challenges or shortcomings in another, or that could be generalisable into common standards and norms applicable to all forms of detention. It also captures the interaction between detention regimes as well as the transplantation of doctrines, strategies, and approaches from one detention regime to another, often without an explicit assessment of the impact or appropriateness of doing so. Equally, by examining the international law on detention and its alternatives in the round, it becomes possible to identify where points of distinction and boundaries between different detention regimes need to be maintained.

Across detention regimes, procedural safeguards constitute a critical baseline protection against arbitrary detention and the violation of other human rights, such as the prohibition of

torture and other cruel, inhuman or degrading treatment or punishment.[1] The scale of complaints to supranational bodies alleging the denial of procedural rights highlights ongoing protection gaps.[2] These gaps underscore the need for the normative development and implementation of procedural safeguards to remain a priority within international law. At the same time, as this book has found, the focus on proceduralism without equal attention to the substantive legitimacy of detention regimes constitutes a recurring critique across different forms of detention.[3] In this final chapter, I identify four key takeaways from the study of detention and its alternatives that invite international law and its institutions to go beyond proceduralism, if the principle of detention as a measure of last resort is to be realised.

First, this book demonstrates that whether detention constitutes an exceptional measure is in the first instance shaped by the underlying policy within which it is employed. The thematic chapters offer insights into how underlying policies aimed at the removal of individuals and groups deemed to present a danger or risk to society can drive exclusion, othering, and structural discrimination, and thus undermine the exceptionality of detention. These chapters reveal how the reframing of underlying policies to align with human rights standards and norms can displace the centrality accorded to detention and other coercive measures within state policy, often replacing them with the provision of support and services within the community. Accordingly, these chapters emphasise the importance of starting with the human rights compatibility of the policies which employ detention as a tool before addressing the necessity and proportionality of decisions to detain.

Second, and connected, the thematic chapters document supranational bodies' increasing recognition of the overrepresentation of particular groups within and across different detention regimes.[4] Despite this recognition, international law is only beginning to grapple with the role of institutional and structural forms of discrimination in shaping pathways to, and decisions to detain. Drawing on developments within individual detention regimes, this chapter argues that international law needs to develop and mainstream a multi-layered approach to the prevention, accountability, and remedying of overrepresentation and structural discrimination as a central part of securing the exceptionality of detention.

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[1] For a fuller discussion of procedural safeguards, see chapter 3.3.B.
[2] Jared Genser, *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice* (2019), chapter 5.
[3] For a discussion of this critique, *see* Chapters 4.3, Chapter 5.3, Chapter 7.
[4] *See,* chapters 4, Chapter 5.4.A.1., Chapter 7.1.

Third, the thematic chapters critique how the nature, vagueness, or breadth with which the grounds to detention are framed can adversely impact the realisation of detention as a measure of last resort by enabling over-application, bias, and discrimination in decisions to detain. Further, the chapters point to the relatively low scrutiny applied to states' evidentiary basis to justify a decision to detain, despite the risks of error and bias in both the factors they rely upon as risk indicators and the methodologies they employ to predict future risk. In this regard, this final chapter argues for a narrowing of grounds for detention in international law alongside clarification of the role of vulnerability determinations and stricter scrutiny of the evidence used to support decisions to detain as a further tool to prevent automatic resort to detention generally, and for particular groups.

Fourth, the book finds that across different policy areas, international law takes a binary approach to detention and its alternatives despite the significant variances in the nature and severity of different forms of alternatives. Drawing on analysis developed in the thematic chapters to this book, in this final chapter, I offer a structural approach to decision-making on detention and its alternatives, starting with the requirement that alternatives should only be considered once grounds to detain have been established to prevent net-widening practices, and placing the burden on states to offer clear and convincing evidence of why each alternative cannot meet its objectives through a gradation approach from the least to most restrictive alternative. To prevent states pursuing coercive measures falling just short of detention as a way of avoiding the scrutiny and oversight applied to detention, I argue that international law needs to articulate clear standards on the human rights compatibility of alternatives to detention, particularly, but not exclusively, in the form of new and emerging technologies.

2. The Human Rights Compatibility of the Underlying Policy as the Starting Point for Realising the Principle of Detention as a Measure of Last Resort

Most studies on detention examine its exceptionality through the lens of the prohibition of arbitrary detention. However, this book demonstrates that before even assessing the legality, necessity, and proportionality of a decision to detain, the underlying policies which employ detention as a tool need to be considered. This is because the nature of these underlying policies shapes the prominence given to detention as well as the availability, application, and form of

alternative to detention. In this part of the chapter, I first examine how the underlying policies employing detention as a tool influence whether it constitutes an exceptional measure in practice. I then show how international law has advanced a human rights-based approach to certain underlying policy areas and in doing so, has resigned detention to the periphery, thereby providing a route to securing the exceptionality of detention.

A. The Instrumentalisation of Detention within State Policies

This book started with the acknowledgement that international law and its institutions typically defer to states on their reasons for detention.[5] However, several thematic chapters demonstrate the centrality of underlying state policies to the place and prominence given to detention regimes within society. The former UN Special Rapporteur on the Right to the Highest Attainable Standard of Physical and Mental Health ('UN Special Rapporteur on the Right to Health') highlights that '[c]onfinement has become an institutional response to complex social problems'.[6] For example, expansions in the scope of the criminal law, including with regard to specific crimes, such as drug-related offences, have led to greater resort to pre-trial detention and custodial sentences.[7] Similarly, the detention of migrants has increased and spread through the global securitisation of borders.[8] Many underlying policies focus on risk management and employ detention and other restrictive measures as a key means to contain people who are considered 'dangerous' or a risk to society.[9] While some underlying policies are influenced by national politics, others such as national security and migration, can assume global, and networked, dimensions or be shaped by the policies and practices of other states and international organisations.[10]

The prioritisation of the removal of risk from society connects different detention regimes in their function as devices to exclude people from society.[11] In this regard, the selection of

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[5] See chapter 3.2.
[6] Human Rights Council, 'Report of the Special Rapporteur on the Right of Everyone to the Highest Attainable Standard of Physical and Mental Health' A/HRC/38/36 (10 April 2018), at §8.
[7] Human Rights Council, 'Arbitrary detention relating to drug policies: Study of the Working Group on Arbitrary Detention', A/HRC/47/40 (18 May 2021) at §8; Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2020* (2020), at 11.
[8] *See,* Chapter 6, introduction and conclusion.
[9] *See,* Hallie Ludsin, *Preventive Detention and the Democratic State* (2016).
[10] Human Rights Council, 'Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance' A/HRC/38/52 (25 April 2018), at §94.
[11] Mary Bosworth, 'Immigration Detention, Punishment and the Transformation of Justice' 28 *Social and Legal Studies* 81 (2019) at 93.

detention as a central tool can be shaped by, and shape, the stigmatisation and othering of particular groups who are the focus of a particular detention regime, such as people with disabilities,[12] migrants,[13] and individuals with an infectious virus or disease,[14] as well as result in the targeting and disproportionate detention of members of certain groups, thus embedding structural inequalities and discrimination into the underlying policy and construction of detention regimes.[15]

In this regard, several thematic chapters analyse the challenges in securing the exceptionality of detention where risk management, exclusion, and discrimination sit at the heart of the state policy,[16] which can incentivise overreach in resort to detention rather than confining it to a measure of last resort.[17] Accordingly, this book underscores the importance of starting with a macro view of the policies that underpin detention regimes if the principle of detention as a measure of last resort is to be realised in practice.

B. The Emergence of Frameworks within International Law which Displace Detention as a Central Tool

As detailed in the thematic chapters, in some instances, critiques of underlying policies which employ detention as a tool have resulted in the emergence of alternative rights-based frameworks which reshape the approach to a particular social policy, and as a consequence, either prohibit or relocate detention from the centre to the margins as a measure of last resort.[18] These approaches typically start with the rights of the people most affected by the policies and thus counter approaches that foreground risk and exclusion and result in the stigmatisation of particular groups and communities, structural forms of inequality and discrimination, and intergenerational harm.[19]

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[12] Chapter 7.1. and 7.4.
[13] *See,* Chapter 6.1; *see also,* chapter 8.3.B (discussing the risks that discrimination against individuals and groups in the imposition of quarantine measures).
[14] Chapter 8.3.B.
[15] Shreya Atrey, 'Structural Racism and Race Discrimination' 74 *Current Legal Problems* 1 (2021) at 5 (discussing structural racism).
[16] *See,* Chapter 5.2.D., Chapter 6.2.B. Chapter 6 conclusion, Chapter 7.5.
[17] Chapter 7.5.
[18] Chapter 6 conclusion, Chapter 7.4., Chapter 8.3.C.2, 8.3.D.1 and 8.3.D.2.
[19] Lukas Muntingh and Jean Redpath, *The Socio-Economic Impact of Pre-Trial Detention in Kenya, Mozambique and Zambia,* Open Society Initiative for Southern Africa (2016),

For example, the rejection of risk-based frameworks that discriminate against people with disabilities and their replacement with the rights of people with disabilities to live and participate in their communities with support has undermined the case for detention within mental health and social care law and policy.[20] By moving away from paternalistic, medical models of disability, and replacing them with a rights-based frameworks, some supranational bodies have interpreted detention as inherently arbitrary,[21] while other actors continue to explore the possibility of detention in highly exceptional and so-called 'hard' cases, without discriminating against people with disabilities in practice.[22] By contrast, other supranational bodies' attempts to frame the detention of people on mental health and social care grounds as exceptional without addressing the critiques of underlying risk-based frameworks have struggled to advance a convincing case that the frameworks they employ prevent discrimination and can contain detention to a very limited set of 'hard' cases.[23]

Similarly, the development of rights-based approaches to public health[24] and the use of drugs[25] has shifted underlying policies away from the removal of people from society to the provision of community-based support, including through the realisation of social rights. A human rights-based approach to migration governance, particularly through community support, a social work model of case-management, partnership, and cooperation also offers an alternative structure to one based on coercion and exclusion.[26] By challenging and reframing the underlying policies, these approaches disrupt the role of detention as a central tool of state policy.

International law has been less direct in advancing a rights-based framework to detention within the criminal justice system. As with other areas of detention, prison abolition theorists highlight the structurally discriminatory nature of imprisonment which is intricately connected to wider inequalities and discrimination in society.[27] While international law increasingly addresses the scale and reach of criminal justice policies, both through requiring the adoption

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[20] *See,* chapter 7.
[21] Chapter 7.4.
[22] Chapter 7.5.C.2.
[23] Chapter 7.5.C.1.
[24] Chapter 8.3.C.2, 8.3.D.1 and 8.3.D.2.
[25] International Centre on Human Rights and Drug Policy, OHCHR, UNAIDS, WHO and UNDP, *International Guidelines on Human Rights and Drug Policy* (2019), at 4 and Guideline 1. Principle 7(i).
[26] Chapter 6 conclusion.
[27] Isobel Renzulli, 'Prison abolition: international human rights law perspectives' 26 *International Journal of Human Rights* 100 (2022), at 110.

of reductionist policies where prisons are overcrowded,[28] and through standards and norms which promote the use of prisons for only a limited category of offences,[29] as Isobel Renzulli demonstrates, international law has failed to enter into any form of sustained engagement with such critiques, thus reflecting a protection gap.[30]

Where detention remains a possibility, its location within a rights-based framework not only structurally confines it to the margins but can also mean that where the wider framework works effectively, the grounds for detention may not reach the point of invocation. For example, as noted above in relation to mental health detention, some scholars and practitioners examine whether a disability-neutral basis for detention could exist to deal with 'hard' cases, if tightly defined.[31] However, where states establish effective community-based services and support, such provision can prevent people reaching a point of crisis or emergency.[32] Accordingly, this book emphasises that the starting point for examinations of whether detention constitutes an exceptional measure lies with assessments of the human rights-compatibility of the underlying policies which employ detention as a tool.

3. The Overrepresentation of Particular Groups in Detention

In addition to the role of structural discrimination in the construction of certain detention regimes as discussed in the previous section, structural discrimination can shape pathways to detention and individual decisions to detain.[33] While the right to non-discrimination theoretically forms a core and integral part of the prohibition of arbitrary detention under international law, this book finds that supranational bodies have historically neglected this right when examining states' detention practices.[34] Moreover, where they have assessed detention practices through the lens of equality and non-discrimination, they have tended to focus on overt individual cases of discrimination, without capturing or contextualising an individual

[28] Chapter 4.3.C.1
[29] Chapter 4.3.A.
[30] Isobel Renzulli, 'Prison abolition: international human rights law perspectives' 26 *International Journal of Human Rights* 100 (2022); see also, Sharon Dolovich, 'Exclusion and Control in the Carceral State' 16 *Berkeley Journal of Criminal Law* 259 (2011), at 335.
[31] Chapter 7.5.C.2.
[32] Chapter 7.4.B (although as discussed in chapter 7, this point also depends on how points of crisis or emergency are defined, with the risk that they are characterised broadly).
[33] See chapter 4.2.A.
[34] *See,* chapter 3.

case within wider institutional and structural patterns of inequality and discrimination.[35] These deficiencies not only impact the identification of discriminatory practices but also the formulation of reparation, especially guarantees of non-repetition through structural reform as discussed in chapter 3.[36]

International law and its institutions now more frequently analyse individual cases and wider state practice through the lens of inequality and non-discrimination.[37] However, assessments of the role of institutional and structural discrimination within detention regimes remain sporadic rather than systematic. In this part of the chapter, I first discuss the increasing emphasis supranational bodies place on the collection of disaggregated data as a means of documenting discriminatory practices before assessing the need for international law to consistently require states to assume a multi-layered approach to assessing the causes of overrepresentation and to prevent, account for, and remedy structural inequality and discrimination as a key part of realising the principle of detention as a measure of last resort.

A. Requirements to Collect Disaggregated Data

The collection of disaggregated data on detention and its alternatives constitutes a critical baseline to identifying and addressing patterns of discrimination. Writing on race discrimination, Shreya Atrey argues that statistics 'help reveal race discrimination when race is coded into the very procedures which are meant to be applicable as non-racial and neutral'.[38] They thus reveal patterns which cannot be captured by individual cases, such as where discrimination against particular groups is embedded into conceptions of criminality or propensity of risk. Where published in anonymised form, independent bodies such as equality bodies, national human rights commissions, law societies, and civil society can also use the data within their own advocacy, legal, and policy work, as well as challenge the methods used and conclusions drawn from the data, for example, where it appears to omit specific groups or fails to capture intersectionality.

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[35] Atrey (n15); Leigh Toomey, 'Detention on Discriminatory Grounds: An Analysis of the Jurisprudence of the United Nations Working Group on Arbitrary Detention' 50 *Columbia Human Rights Law Review* 185 (2018).
[36] Toomey, ibid, at 243.
[37] See for example, Human Rights Council, (n7), at §51; Human Rights Council, 'Report of the Working Group on Arbitrary Detention: Addendum: Mission to New Zealand' A/HRC/30/36/Add.2 (6 July 2015) at §54.
[38] Atrey (n15), at 13.

Supranational bodies increasingly recommend the collection of disaggregated data on detention.[39] For example, the UN Office of the Human Commissioner for Human Rights recommends that states 'collect up-to-date, comprehensive, disaggregated and transparent data on persons with increased vulnerability who are deprived of their liberty'.[40] It proposes the disaggregation of data by group as well as collection of information on offences (if within the criminal justice system) or 'reasons for detention' if administrative, duration, detention conditions, languages, 'the profile of lawyers assigned to provide counsel', and 'other factors pertinent to the individual characteristics of detainees with increased vulnerability'.[41]

However, as discussed in chapter 2, in some instances, states may not define practices as detention, even where the fact pattern meets international legal tests on deprivation of liberty. This can result in the exclusion of certain practices, including de facto forms of detention, from official data. For example, Monica Pinilla-Roncancio et al point to 'the weak consensus on how concepts such as disability, institution, guardianship, independent living, criminal responsibility and consent are defined in national legislation and policies' and the categorisation of practices such as 'the use of independent living to refer to institutional settings'.[42] They emphasise that such definitions can result in certain practices being excluded from data collection and analysis.[43] Similarly, the collection of disaggregated data on formal or de facto forms of detention may be too narrow in that it may overlook discriminatory practices in who is denied access to alternatives to detention, and who is subject to restrictive forms of alternatives to detention.[44] These risks indicate the importance of data collection on detention (both formal and de facto) and alternatives to detention in the round.

While the collection of disaggregated data reflects a critical step in identifying overrepresentation within detention regimes and their alternatives, supranational bodies have

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[39] See, for example, CRPD Committee Concluding Observations, Australia, CRPD/C/AUS/CO/2-3 (2019), at §28(c) (requiring Australia to '[c]ollect data on the number of persons indefinitely detained and on the number of such persons detained on an annual basis, disaggregated by the nature of the offence, the length of the detention, disability, Aboriginal and other origin, sex, age and jurisdiction, with the aim of reviewing their detention'); Monica Pinilla-Roncancio, Maria Goméz-Castillo & Eilionoir Flynn, 'Data and human rights for persons with disabilities: the case of deprivation of liberty' 24 *International Journal of Human Rights,* 828 (2020), at 844.

[40] Human Rights Council, 'Non-discrimination and the protection of persons with increased vulnerability in the administration of justice, in particular in situations of deprivation of liberty and with regard to the causes and effects of overincarceration and overcrowding' (21 August 2017) at §53.

[41] Ibid. at §54.

[42] Pinilla-Roncancio et al (n39), at 841.

[43] Ibid.

[44] Chapters 4.2.B.2, chapter 5.4.B., chapter 6 introduction and 6.2.B.3.

not routinely required states to collect such data. To date, such recommendations have only been made to individual states or when analysing specific detention regimes. This reflects a gap in the monitoring and supervisory functions of supranational bodies which could be strengthened by more proactively and routinely requiring states to provide disaggregated data on detention and its alternatives within periodic reviews on their compliance with their treaty obligations, rather than relying on individuals or third parties, like civil society, to draw patterns of discrimination to their attention.

B. Multi-layered Strategies to Prevent, Account for, and Remedy Institutional and Structural Forms of Inequality and Discrimination

The disaggregation of data provides a way in which to document and visualise institutional and structural inequality and discrimination within pathways and decisions to detain or impose alternatives. However, the question then arises of how that data is mobilised to secure accountability and effect change. Writing on the root cause of human rights violations, including arbitrary detention, Susan Marks argues that human rights actors often only partially engage 'with the question of why abuses occur, how vulnerabilities arise, and what it will take to bring about change',[45] failing to take the 'analysis of causes … far back enough' or assessing the 'conditions that engender and sustain those vulnerabilities' and the 'larger framework within which those conditions are systematically reproduced'.[46]

This is an important reflection in determining the source(s) of structural inequality and discrimination that can lead to overrepresentation within detention regimes. Sandra Fredman's model of transformative equality 'to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate different and achieve structural change',[47] indicates the multi-layered nature and complexity of the task of identifying and addressing overrepresentation in detention. To date, international law and its institutions have dedicated little attention to this question which cuts across detention regimes. Writing in the closely related field of torture, Lutz Oette depicts the treatment of structural inequality and discrimination within international law as often 'formulaic' and failing to '[e]ngage with notions such as State crime, social control of crime, failing criminal justice

[45] Susan Marks, 'Human Rights and Root Causes' 74 *Modern Law Review* 57 (2011), at 70.
[46] Ibid. at 71.
[47] Sandra Fredman, 'Substantive Equality Revisited' 14 *I.CON* 712 (2016), at 713.

systems and structural violence' which he argues 'is an indispensable prerequisite for identifying causes, patterns and factors that can be used to inform States' obligations and legal responses'.[48]

Some examples exist of where supranational bodies have sought to develop a more complex and layered approach to identifying and addressing structural discrimination in detention. For example, the Committee on the Elimination of Racial Discrimination issued a General Comment which sets out a detailed range of steps required of states to combat racial profiling which creates a pathway to detention, including the enactment and implementation of 'legislation against racial discrimination' and 'racial profiling by law enforcement officials'; the alignment of 'clear guidance' and 'internal policies' with human rights standards and principles; the identification of 'laws and regulations that potentially enable or facilitate racial profiling'[49]; the development of 'detailed guidelines for stop-and-search practices with precise standards in consultation with relevant groups'; the establishment of 'effective, independent, monitoring mechanisms, both internal and external' alongside regular auditing[50]; the development of 'specialized, mandatory training programmes' engaging '[s]tigmatized groups, including those representing groups experiencing intersecting forms of discrimination … in the development and delivery of such training' and complemented by institutional interventions regarding limiting discretion and increased oversight in areas vulnerable to stereotyping and biases'[51]; the development of engagement strategies 'with individuals and groups facing racial discrimination that take into account the unique context, dynamics and needs of different communities'[52]; and the creation of 'reporting mechanism for receiving complaints'.[53]

Similarly, the Inter-American Commission on Human Rights issued an extensive report on *Police Violence Against Afro-descendants in the United States,* analysing the causes of structural discrimination and issuing 33 recommendations to the state[54] which it emphasised 'must take a transformative approach. That is, actions to prevent police violence or remedies

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[48] Lutz Oette, 'The Prohibition of Torture and Persons Living in Poverty: From the Margins to the Centre'70 *International and Comparative Law Quarterly* 307 (2021), at 332.
[49] Committee on the Elimination of Racial Discrimination, General Recommendation No. 36: Preventing and Combating Racial Profiling by Law Enforcement Officials' CERD/C/GC/36 (24 November 2020), at §38.
[50] Ibid, at §39.
[51] Ibid, at §42.
[52] Ibid, at §48.
[53] Ibid, at §22.
[54] IACommHR, *African Americans, Police Use of Force, and Human Rights in the United States,* OEA/Ser.L/V/II (26 November 2018).

or reparations for police violence that have the effect of maintaining or reestablishing the same structural context of violence and discrimination are not acceptable. Rather, reparations must aim to address and redress the underlying situation of inequality and the ongoing context of racial discrimination'.[55] Recommendations included to '[u]ndertake and ensure proper funding for official studies on racial discrimination in the U.S. – at the federal, state, and local level – with the goal of contributing to the establishment of the full and public truth about violations, as well as forward-looking public policies to effective reparations for the victims, including satisfaction and guarantees of non-repetition'.[56]

However, as a general matter, structural inequality and discrimination within and across detention regimes have not received sustained attention within international law, thus impeding the prevention, accountability for, and remedying of overrepresentation in detention. The Inter-American Commission on Human Rights' report indicates the importance of multiple, intersecting approaches to identifying and addressing structural inequality and discrimination. In this regard, to produce its report, it relied upon country visits, in-person hearings, analysis of individual complaints, and reports and findings by academics, practitioners, civil society and other supranational bodies, particularly within the UN.[57] While certain methodologies lend themselves more to structural or system-wide analysis, Shreya Atrey nonetheless makes the case for assessments of structural discrimination in the litigation of individual cases 'by making individual instances of race discrimination in a case relate to the broader discourse on structural racism which gives racialised meaning to those individual instances'.[58] She maintains that 'this is only possible when those within the juridical and adversarial model of discrimination law show conceptual openness to the sociological aspects of race discrimination as connected to both the idea and reality of structural racism'.[59] In some cases, supranational bodies have attended to structural discrimination. However, as with wider approaches to identifying and addressing structural inequality and discrimination, supranational bodies have not developed clear approaches to the issue, including on evidence, standards of proof, and reparations.[60]

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[55] Ibid. at §10.
[56] Ibid at §10.
[57] Ibid, at §17-35; On the role of country visits in identifying discrimination within the criminal justice system, *see,* Genser (n2), at chapter 8.2.
[58] Atrey (n15), at 33.
[59] Ibid, at 33.
[60] IACtHR, *Acosto Martínez et al v Argentina* (31 August 2020), at §30 (acknowledging structural discrimination following admission by the state but also requiring limited reparations).

Accordingly, while international law is improving in its recognition of overrepresentation in detention and increasingly emphasises the need for the collection of disaggregated data as a first step in visualising institutional and structural inequality and discrimination, these approaches require systematisation throughout international law's treatment of detention and its alternatives. They need to be accompanied by a much deeper examination of international law's failures and limitations in preventing, addressing, and remedying individual, institutional, and structural forms of inequality and discrimination, alongside a vision for how it can effectively develop more robust approaches in the future, if the principle of detention as a measure of last resort is to apply equally to all.

This will require detailed reflection on the causes of structural inequality and discrimination within specific detention regimes, including to capture cumulative disadvantage,[61] as well as documentation and analysis of how structural discrimination affects the interaction and overlap between detention regimes, and recurs across different forms of detention. Of critical importance is the meaningful participation of communities most affected by structural forms of inequalities and discrimination both to understand how they are experienced and to develop strategies and approaches to effectively identify, understand, address, and remedy them. Such a process will then feed back into assessments of the place of detention and coercive measures falling short of it within states' policies, as discussed in the previous section. It will also require reflection on the capacity and expertise of supranational bodies to fully appreciate and understand the workings of a detention regime and its wider context and assessment of the need for greater investment in particular methodologies, such as country missions, and thematic hearings and inquiries.

4. Addressing the Scope of Grounds for Detention and their Evidentiary Base

Several chapters in this book identify how affording a wide discretion to decision-makers can lead to the automatic imposition of detention as well as the embedding of bias and discrimination into decisions on who is detained, who has access to alternatives to detention, who is released without conditions, and who is subject to restrictive alternatives, thus distorting the principle of detention as a measure of last resort generally or for particular groups.[62]

[61] Chapter 4 conclusion.
[62] Chapter 4.B.2 and Chapter 6.2.B.3.

However, international law and its institutions have dedicated little attention to addressing bias in decision-making, despite the concerns expressed in the literature.[63] While not a comprehensive approach to a complex issue, some of the thematic chapters to this book suggest that a narrowing of the grounds to justify detention, and closer scrutiny of states' evidentiary basis for detention could contribute to addressing unfairness and discrimination in decision-making.

A. Narrowing the Grounds for Detention

Several thematic chapters in this book critique the grounds for detention recognised in international law. Drawing on these critiques, some chapters propose the prohibition of certain grounds for detention, whereas others recommend the narrowing or reframing of recognised justifications for detention. Together these critiques highlight the importance of revisiting and scrutinising the justifications for detention within and across different detention regimes.

In relation to risk, one emerging proposal relates to whether detention to prevent future dangerousness or harm should only be contained within a general law on preventive detention, rather within specific policy areas, such as mental health[64] or migration laws,[65] as a means of preventing discrimination and targeting of specific groups. However, as chapter 5 on security detention problematises, general laws on security detention, whether applied in 'ordinary' times or during states of emergency or conflict can often entail discrimination and overrepresentation of particular groups.[66] Thus, while containment within a general law on preventive detention may address the formal linkages made between specific groups and dangerousness and risk, significant potential for discrimination, particularly against minorities, foreign nationals, and people with disabilities remain, circling back to the need to assess the underlying policies employing detention, pathways to detention, and decisions to detain for discrimination.

[63] See discussion of literature in Chapters 4.B.2., Chapter 6.2.B.2.c.
[64] Chapter 7.5.C.2.A.
[65] CMW, 'General comment No. 5 (2021) on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights' CMW/C/GC/5 (23 September 2021) (excluding these grounds entirely).
[66] Chapter 5.4.A.

In addition to the exclusion of certain forms of detention, or the detention of particular groups, such as people with disabilities, as discussed above, the thematic chapters point to efforts to narrow the grounds for detention as a means to realise the principle of detention as a measure of last resort in practice. For example, as discussed in chapter 4, the Inter-American Commission on Human Rights has recommended a study into the 'possibility of increasing the crimes or offenses for which pretrial detention cannot be legally applied' in order to support its exceptionality in practice.[67] Other international standards and norms have sought to define the types of crimes for which imprisonment should not be imposed.[68] However, chapter 4 also recognises the risk that the prohibition – or presumption against - pre-trial detention or imprisonment for certain offences, results in the automatic imposition of detention for offences not falling within this category, thereby impeding the exceptionality of detention at the other end of the spectrum.[69] This point highlights the importance of placing individual approaches to dealing with the over-application of detention within a wider context to avoid unintended consequences.

In addition to the exclusion of certain grounds for detention, the vague or overly broad construction of certain grounds for detention can create a relatively low threshold for states to establish that their decision to detain pursues a legitimate aim with the risk that they take an expansive approach to detention, thus undermining the principle of detention as a measure of last resort. In this regard, the thematic chapters point to divergences within international law on the threshold required to establish a risk or threat to society, with only some sources requiring risk to be at an elevated level. For example, the Dublin III Regulation raised the risk threshold for the detention of migrants to '*significant* risk of absconding' in response to critiques of the low threshold to risk contained in earlier regulations and international law more broadly.[70] Similarly, in contrast to the European Court of Human Rights which accepts detention where 'the spreading of infectious disease is [deemed] dangerous to public health or safety',[71] the Siracusa Principles on the Limitation and Derogation of Provisions in the

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[67] IACommHR, *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas* OEA/Ser.L/V/II.163 (3 July 2017), at §25.
[68] See discussion in chapter 4.3.A.1.
[69] See discussion in chapter 4.3.A.1; Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (2009), at 61.
[70] EU Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), Article 28(2) (emphasis added).
[71] Article 5(1)(e) European Convention on Human Rights 1950.

International Covenant on Civil and Political Rights require the 'threat to the health of a population or individual members of the population' to be 'serious'.[72] These variances raise the question of whether international law needs to establish uniform – and elevated – risk thresholds within and across different detention regimes, to prevent the over-application of detention in practice.

Other supranational bodies have moved away from broad risk categories to more concrete and specific iterations of risk. For example, the UN Committee on the Rights of Migrant Workers and their Families has replaced the broad framing of a risk of absconding with a more precise formulation focused on 'a risk that the migrant will avoid immigration proceedings or to guarantee the implementation of a deportation order'.[73] Such formulation may offer greater protection to individuals by requiring states to offer concrete evidence as to why a person constitutes a specific risk, such as avoiding judicial or administrative proceedings, rather than relying on broad assertions of risk drawn from subjective assumptions about a person's character, nationality, or migration status. A precise formulation of risk also provides a more concrete basis for individuals to contest the state's claim or to explain why they might struggle to attend a hearing, for example, due to employment, caring responsibilities, or financial circumstances.[74] This evidence then enables courts to assess how the person might be supported to attend the hearing, rather than automatically reaching for detention. While this example focuses on migration detention, the approach of the Committee on the Rights of Migrant Workers and their Families is ripe for cross-fertilisation in other areas of detention in which similar grounds are relied upon to justify detention, such as pre-trial detention.

Accordingly, across different areas of detention, this book demonstrates the importance of revisiting grounds for detention as part of critical assessments of the implementation of the principle of detention as a measure of last resort in practice. In some cases, the revisiting of these grounds may result in the prohibition of detention or its further containment, whereas in others scope may exist to more precisely formulate the ground for detention and thereby more clearly focus the evidence and counter evidence that can be submitted as part of the decision-

[72] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984) at §25.
[73] CMW, GC5 (n65), at §20.
[74] *See also,* 4.2.C.3, Chapter 6.2.B.3.

making process. However, the exclusion or tightening of grounds for detention needs to be critically assessed for unintended consequences.

B. Evidencing of Grounds for Detention

Intertwined with the normative formulation of grounds for detention, questions also arise about how such grounds are evidenced. In this regard, chapter 7 maps research questioning the sufficiency of available evidence on whether it is even possible to predict future risk or 'dangerousness'.[75] While focused on mental health detention, a lack of, or deficiencies in the scientific evidence to support grounds for detention constitutes a critical point of analysis when assessing any ground for detention and their alternatives. It is even more important given the risk of subjective,[76] erroneous, discriminatory, stereotyped, and overly broad assumptions of risk, even if purportedly scientifically-based.[77] Yet, this question has received little attention within international law.

Moreover, international law has not consistently assessed the types of factors states can – and cannot – rely upon when determining risk. Where they have, the potential for ostensibly neutral factors to result in discrimination and unfairness is evident. For example, international law accepts the presentation of factors such as a person's history, character, employment, home and family circumstances, and connection to the state to establish a low risk of absconding.[78] However, by implication, the absence of these factors may lead to the assumption that a person presents a high risk, simply on the basis of their socio-economic or family circumstances, thus embedding inequality and discrimination into decision-making.[79] While the European Court of Human Rights has found that the absence of such factors cannot form the basis for a decision to detain, in practice, it is difficult to understand how such factors can positively establish low-risk but in their absence have a neutral effect on decision-making. Moreover, the thematic chapters demonstrate that certain factors can be overweighted, such as previous contact with the law,[80] potentially resulting in old or minor offences and arrests without subsequent conviction outweighing other factors, even where an individual can advance evidence of

[75] Chapter 7.3.A.
[76] UN SR Health (n6), at §85.
[77] Chapter 8.3.C.1.
[78] Chapter 4.2.B.1 and Chapter 6.2.B.A.
[79] Chapters 4.2.B.1, Chapter 6.2.a.
[80] Chapter 4.B.2.2.

rehabilitation.[81] Accordingly, these critiques indicate the need for much greater scrutiny within international law of the evidentiary basis on which grounds for detention can be established within and across different forms of detention.

Further, international law increasing recognises that some individuals and groups are in positions of particular vulnerability,[82] and require such vulnerability to be taken into account within decision-making processes,[83] for decisions to detain to be approached with 'strict scrutiny',[84] and for 'non-custodial measures' to be preferred.[85] In theory, these standards and norms suggest a high bar for states to overcome to justify the detention of a person in a position of vulnerability. However, where a state can establish a prima facie ground for detention, international law is unclear on whether and how a vulnerability assessment impacts the decision-making process.[86] For example, as discussed in chapter 6, while the European Court of Human Rights generally rejects the detention of migrant children and their families, where the state claims that an accompanying adult presents a risk, it has not found the detention of the children and the family to be arbitrary.[87] The potential for the redundancy of vulnerability determinations where a state can establish grounds for detention indicates that the need for much more analysis into the normative relationship between determinations of risk and vulnerability.

The need for direction on how grounds for detention are evidenced and reviewed is even more pertinent given the increasing reliance on algorithmic risk assessments to support decision-making on detention. As discussed in chapters 4 and 6, the introduction of algorithmic risk assessments in the US was reported to have been initially welcomed as a means to shift towards evidence-based decision-making and thus reduce the role of discretion in decision-making,[88] although for the most part, algorithmic risk assessments are associated with a wider policy shift to risk management, as discussed above. Regardless of their origins, the thematic chapters in this book highlight the frequent inaccuracies of algorithmic risk assessments.[89] They also point

[81] Chapter 2.B.2.A.
[82] Chapter 4.3.A.1.; Chapter 6.2.B.2.b and Chapter 6.3.
[83] See chapter 4.3.A.1. and 6.B.2.b.
[84] Chapter 6.B.2.b.
[85] Ibid. UNGA,UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), Resolution 45/110 (14 December 1990), annex at 9.
[86] Chapter 4.3.A.2. *See also,* Atrey (n15) at 26.
[87] Chapter 6.3.A.
[88] Chapters 4.2.B.1, Chapter 6.2.B.2.c.
[89] Chapter 4.2.B.2, Chapter 6.2.B.2.c.

to their role in accentuating or introducing new forms of discrimination, which can emanate from discriminatory and incomplete data sets, which may be overinclusive of particular groups due to institutional and structural discrimination, such as over-policing of particular neighbourhoods.[90] The way in which the algorithm is programmed may also build in discriminatory assumptions about the relationship between predicted risk of violence and particular groups, such as people with disabilities, or the likelihood of absconding based on nationality or migration status, as noted above. Further, how algorithmic risk assessments weigh different factors can produce discriminatory outcomes in an untransparent way, foreclosing the possibility of cross-examination.

As highlighted in the chapter on the detention of migrants, where algorithmic risk assessments are introduced into contexts already mired by discrimination and policies aimed at exclusion, they may be designed and programmed to meet these goals.[91] Both the chapters on migration and the criminal justice system also highlight that as the human in the process retains overall decision-making authority – and thus discretion – it is possible that they instrumentalise the risk assessment to reflect their own objectives or biases.[92] Thus, if the risk assessment projects a lower risk than the human decision-maker, the risk assessment may be overlooked, whereas if it forecasts a higher risk, the human decision-maker may adhere to its prediction. Equally, the chapter on criminal justice also suggests that human decision-makers may mediate the possibility of algorithmic risk assessments projecting a high risk of future crime or violence out of awareness of historical and ongoing discrimination against particular groups which may be embedded within the algorithmic risk assessment process.[93]

The concerns about the use of algorithmic risk assessments in areas as significant to human rights as the right to liberty raise the question of whether they should be used at all,[94] or whether the nature of states' detention policies, the wider regulation of algorithmic risk assessments, and the establishment of monitoring and oversight processes over their use should dictate their

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[90] chapter 4.2.A.
[91] Chapter 6.B.2.c.
[92] Chapter 4.2.B.2. and Chapter 6.B.2.c.
[93] Ibid.
[94] Pretrial Justice Institute, Updated Position on Pretrial Risk Assessment Tools 2.7.2020 https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf; *See also,* Lorna McGregor, Daragh Murray, and Vivian Ng, 'International Human Rights Law as a Framework for Algorithmic Accountability' 68 *International and Comparative Law Quarterly* 309 (2019) (analysing the circumstances in which the impact of algorithmic decision making on human rights may result in a red-line prohibiting their use at all, or only in circumstances in which adequate and effective safeguards can be put in place).

place within decision-making processes. These are questions that are only beginning to be considered within wider debates and regulatory initiatives on algorithmic decision-making,[95] but are especially urgent to resolve in areas with such significant consequences as detention, particularly if they embed and accentuate existing inequalities and discrimination.

However, the current focus on the role of algorithmic risk assessments also provides the opportunity to more fully examine how grounds for detention are evidenced and the way in which decisions to detain are made which as noted at the outset of this section is lacking within international law. Indeed, Sandra Mayson observes that reforms focused on addressing the impact of algorithms within the criminal justice are 'superficial'.[96] She argues that the central issue that requires sustained consideration is the role of prediction – whether by new and emerging technologies or humans – in 'project[ing] inequality of the past into the future', noting that '[a]lgorithms, in short, shed new light on an old problem'.[97] She therefore promotes a more fundamental assessment of the conception and response to risk within the criminal justice system, a point which resonates across all forms of detention and is thus generalisable. In particular, this point returns to the question of whether justifications for detention can be maintained if they cannot be evidenced in a fair and non-discriminatory way.

5. Moving Away from a Binary Approach to Detention and its Alternatives

The fourth takeaway from this book derives from the challenges associated with international law's binary treatment of detention on the one hand, and alternatives to detention on the other. In this regard, practices that meet the definition of detention under international law are subject to substantive and procedural safeguards. However, while supranational bodies regularly reference states' obligations to consider less invasive means to detention, they tend to treat them as a homogenous whole, without recognition of the range of alternatives from community-based support to highly coercive and intrusive measures falling short of detention, such as electronic monitoring. Jennifer Daskal submits that 'liberty interests that do not involve

[95] For example, *see,* European Commission, 'Proposal for a Regulation of the European Parliament and of the Council: Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts' COM(2021) 206 final, 2021/0106 (COD) (Title II, laying out prohibited artificial intelligence practices using a risk-based approach); *see also,* campaigns to ban the use of live facial recognition technologies, EDRi, Reclaim Your Face Campaign, https://reclaimyourface.eu, Amnesty International, Ban the Scan Campaign, https://www.amnesty.org/en/petition/ban-the-scan-petition/
[96] Sandra Mayson, 'Bias In, Bias Out' 128 *Yale Law Journal* 2218 (2019).
[97] Ibid.

physical incapacitation or bodily intrusions are rarely considered "core" and tend to be both undervalued and undertheorized'.[98] This can lead to the application of overly restrictive alternatives as well as the transplantation of problematic forms of alternatives, such as financial bail and electronic monitoring, from one detention regime to another, without acknowledgment of movements, including within international law, away from these alternatives due to human rights concerns.[99]

This book proposes a framework for addressing the relationship between detention and its alternatives. Drawing on the thematic chapters, it submits that alternatives should only be considered once states have established that they have legitimate grounds to detain.[100] This starting point is aimed at avoiding the introduction of net-widening measures whereby states resort to new methods of control or surveillance in cases in which they previously would not have been able to put in place any form of restriction. This is particularly important given the claims by some authors that states may deliberately impose highly coercive measures falling just short of detention to avoid triggering the protection of international law on detention.[101]

From this starting point, this section argues that the burden of proof should be placed on states to demonstrate, through a gradation approach, their systematic consideration of alternatives to detention, from the least invasive to the most restrictive. Moreover, how international law applies to alternatives to detention is currently poorly articulated. This chapter therefore proposes the development of clear standards and norms, particularly to prevent states employing alternatives to detention falling just short of detention to avoid the substantive and procedural safeguards required of deprivations of liberty.

A. Placing the Burden of Proof on States to Consider a Gradation of Measures

A significant constraint to realising the principle of detention as a measure of last resort is the failure of states to establish or implement alternatives to detention generally or in relation to specific groups.[102] These findings highlight the ongoing implementation gaps impeding the

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[98] Jennifer Daskal, 'Pre-Crime Restraints: The Explosion of Targeted, Non-Custodial Prevention' 99 *Cornell Law Review* 327 (2014), at 332.
[99] *See,* chapters 4.2.C.2 and 3 and Chapter 6.2.B.3.
[100] Chapter 6.2.B.3.
[101] Chapter 5.4.B.
[102] Chapter 4.2.B.2., Chapter 4.2.C.3, Chapter 6.2.B.3.

exceptionality of detention in practice. Where alternatives are considered, researchers have also identified the risk that decision-makers only consider the most restrictive forms of alternatives, even though the potential measures falling under the umbrella of 'alternatives to detention' range from community-based support to highly intrusive and coercive measures which some people report as the same experience as detention but with wider effects on their families and communities.[103] Notwithstanding these differences, international law typically refers to alternatives to detention as a monolith without considering the differences between them.[104] This is despite some international legal standards, such as the Tokyo Rules, requiring a 'clear framework' for 'the selection of the non-custodial measure' with established criteria, guided by the 'principle of minimum intervention',[105] to prevent non-custodial measures having a 'net-widening effect'.[106] Moreover, within the context of migration, a gradation model has been proposed which would require states to systematically assess alternatives to detention, starting with the least restrictive form and working up to the most restrictive, thus preventing states from only applying the most restrictive form of alternative available[107] and overcoming a binary distinction between detention and alternatives by allowing for a clear distinction between alternatives.[108]

A gradation model also provides a structural way in which to require states to assess why some individuals may find it difficult to comply with alternatives to detention, such as reporting or court attendance due to socio-economic circumstances, employment, or caring responsibilities, or health treatment in the case of infectious disease.[109] Rather than determining that alternatives are unavailable, states can address these barriers either by changing the nature of the alternative or by providing access to financial support and wider support services. Such an approach would also facilitate the identification of situations in which states deny access to alternatives on unequal or discriminatory grounds, such as where individuals are unable to afford financial bail or pay for electronic monitoring,[110] or where stereotypes or discrimination results in decision-makers deeming alternatives unable to address the particular risk identified. While these

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[103] *See,* for example, Fatma E. Marouf, 'Alternatives to Immigration Detention', 38 *Cardozo Law Review* 2141 (2017), at 2143.
[104] Chapter 4.3.B. and Chapter 6.2.B.3.
[105] UN, *Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* (1993), at 11 (citing Rule 3.2, 1.4. and 2.6).
[106] Ibid, at 7.
[107] *See,* Marouf (n103), at 2143.
[108] Chapter 6.2.B.3 and conclusion.
[109] See Chapter 4.2.C.2, Chapter 6.2.B.3, Chapter 8.3.D.2.
[110] Chapter 4.2.C.3, Chapter 6.2.B.3

approaches are advanced within specific policy areas, the generalisation of the gradation model to all forms of detention would offer a structural approach to realising detention as an exceptional measure of last resort.

B. Clearly Articulating How International Law Applies to Alternatives

As discussed throughout this book, some forms of alternatives present significant risks to human rights, raising the question of how the necessity and proportionality of alternatives to detention are assessed and the human rights standards attaching to their use. In this regard, this book identifies several cross-cutting questions on the legitimacy of alternatives.

First, the thematic chapters emphasise the potential for bias and discrimination to impact whether particularly groups are subject to highly restrictive forms of alternatives or denied access to community-based services and support.[111] Similarly, the form of alternative or the way in which it is imposed may attract stigma, for example, where migrants are required to report to a police station rather than 'administrative facilities'.[112]

Second, the imposition of certain alternatives to detention, such as reporting obligations, can interfere with the exercise of social rights, such as education and work, as well as caring responsibilities, thus impacting the rights of children, people with disabilities, and older people, as discussed above. This is in addition to financial conditions attaching to bail or electronic monitoring either impeding access to alternatives or placing financial burdens on families, including debt and deepening poverty.

Third, some forms of alternatives can extract and analyse data, including biometric data, about the individual subject to the measures as well as their families, associates, and communities. Penal Reform International observes that in contrast to an increasing focus on ensuring that imprisonment pursues rehabilitative objectives, non-custodial measures, particularly through the use of 'new technologies … tend to place excessive emphasis on control and security, rather than on rehabilitation'.[113] Privacy International has also found that with the shift from radio-frequency forms of electronic monitoring to GPS, states have the opportunity to both deepen

[111] Chapters 4.2.B.2, chapter 5.4.B., chapter 6 introduction and 6.2.B.3.
[112] Chapter 6.2.B.3.
[113] Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2020* (2020), at 45.

their surveillance of the person subject to monitoring and their families, associates and communities as well as use the GPS for multiple purposes, including 'crime mapping, intelligence gathering and enriching with other data such as CCTV and automated number plate recognition (ANPR) records'.[114] These risks not only arise from technologies such as electronic monitoring, but also from telephone reporting, which Petra Molnar argues can entail the collection of voiceprints.[115] Surveillance and monitoring forms of alternatives adversely impact the privacy of the person subject to such measures as well as potentially interfering with the privacy of their families and even communities and can have a chilling effect on their exercise of freedom of association and expression.[116] Researchers have also documented the effects such measures can have on physical and mental health, particularly where a person experiences the alternatives in the same way as a deprivation of liberty.[117]

The significant human rights posed by alternatives to detention highlights the importance of clear standards on their necessity and proportionality. Some international standards and norms exist on certain forms of alternatives or within specific detention regimes.[118] For example, in 2014, the Council of Europe developed detailed guidance on the use of electronic monitoring within the criminal justice system.[119] The UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) require states to develop '[g]ender-specific' alternatives to pre-trial detention 'taking account of the history of victimization of many women offenders and their caretaking responsibilities'.[120] A focus on specific uses of alternatives within specific contexts allows for the integration of alternatives into the wider governance of detention regimes. Examining the role of alternatives within particular detention regimes is also important to prevent a bifurcation in approach, for example, where international law either prohibits or restricts the use of detention to highly exceptional cases, but states then begin to employ highly restrictive alternatives in place of detention rather

[114] Privacy International, 'Electronic monitoring using GPS tags: a tech primer' (9 February 2022).
[115] Petra Molnar, 'Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up' *EDRi and Refugee Law Lab* (2020), at 21.
[116] Chapter 5.4.B, Chapter 6.2.B.3.
[117] Chapter 6.2.B.3.
[118] For example, the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) General Assembly resolution 45/110, annex; CoE, Recommendation CM/Rec(2014)4 of the Committee of Ministers to member states on electronic monitoring (19 February 2014), Part III.
[119] CoE, ibid.
[120] UNGA, 'United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)', Resolution 65/229, A/RES/65/229 (16 March 2011), Rule 57.

than establish community-based services and support.[121] Accordingly, there is merit in wider assessments of the necessity and proportionality of alternatives to detention within different detention regimes.

However, as discussed throughout this book, alternatives are often transplanted from one detention regime to another, highlighting the value of considering their necessity and proportionality in the round, while reserving the possibility of their prohibition or exclusion from particular contexts. In this regard, with the emergence of new and emerging technologies, the UN Working Group on Arbitrary Detention has called for 'judicial oversight' to ensure that the use of 'modern technology' complies with the principles of necessity and proportionality and that the 'application and use of modern technology should never lead to disproportionate invasion of an individual's privacy'.[122] It has recommended that the Human Rights Council 'seek a thorough study on the use of modern technologies as alternatives to deprivation of liberty in order to provide the requisite guidance for all States'.[123] An holistic assessment of the use of new and emerging technologies as alternatives to detention allows for critical assessment of their use within and across different detention regimes, thus capturing the migration of particular forms of alternatives from one regime to another. Given the increasing sophistication of new and emerging technologies, an holistic study of their use also creates the opportunities for the imposition of limitations on the types of technological capabilities or tools employed. This point connects to wider debates on whether certain red-lines exist in the design, development, and use of new and emerging technologies.[124] While this debate has so far focused on live facial recognition technology, particularly by law enforcement, similar questions may arise with alternatives to detention. For example, as noted above, the employment of GPS technology within electronic monitoring instead of radio-frequencies potentially enables states to gain detailed insights into a person's daily routine and associations as well as to use the technology for multiple purposes beyond what electronic monitoring was originally intended to do. Similarly, telephone reporting may entail the collection of voiceprints. These possibilities raise the question not only of the necessity and proportionality of a type of alternative, such as electronic monitoring, but the necessity and proportionality of

[121] For example, see discussion on deinstitutionalisation in chapter 7 and resort to control orders where preventive detention is not legally or politically feasible in chapter 5.
[122] Human Rights Council, 'Arbitrary Detention: Report of the Working Group on Arbitrary Detention' A/HRC/45/16 (24 July 2020), at §59.
[123] Ibid, at §60.
[124] McGregor et al (n94).

how such monitoring is achieved. These questions thus indicate the importance of building upon earlier iterations of international standards on new and emerging technologies, such as the Council of Europe's recommendations on electronic monitoring, to consider new issues presented by new and emerging technologies, such as purpose-limitations and also the role of the private sector in their delivery.

At the same time, as already discussed in relation to algorithmic decision-making, a focus on the human rights impact of the use of new and emerging technologies only represents one dimension to the necessity and proportionality of alternatives to detention. In light of the multiple and intersecting issues raised by alternatives, there may be merit in developing a more comprehensive set of standards on the necessity and proportionality of alternatives which could be integrated into decisions to detain through the gradation approach discussed in the previous section. In addition to addressing specific forms of alternatives, such an approach would allow for the embedding of core principles such as procedural fairness and safeguards, including periodic review of alternatives and the right to non-discrimination, as well as systematic assessments of the foreseeable impact of the manner of implementation upon social rights and caregiving responsibilities and barriers to accessing alternatives at all (including by placing a heavy financial burden on families) or in order to travel to report or attend court to avoid inequality and discrimination 'on the basis of economic position'.[125]

Accordingly, if the principle of detention as a measure of last resort is to be realised in practice, and not replaced by highly restrictive alternatives falling just short of detention, a more systematised and holistic approach to the consideration of detention and its alternatives is required alongside more robust standards and norms on human rights-compatibility of alternatives to detention within and across different forms of detention.

6. Conclusion

International legal literature often emphasises the shift from standard-setting to implementation.[126] While implementation of existing standards remains a critical endeavour

[125] Edwards (n112), at §22. International Detention Coalition, *There are Alternatives: A handbook for preventing unnecessary immigration detention (revised edition)* (2015), at 14-15.
[126] Lorna McGregor, 'Looking to The Future: The Scope, Value and Operationalization Of International Human Rights Law', 52 *Vanderbilt Journal of Transnational Law* 1281 (2019), at 1301, 1314.

including in the field of detention and its alternatives, this book questions the adequacy and effectiveness of these standards, and provides examples of areas in which these standards may need to be revisited or more fully articulated.[127] Particularly given the prioritisation of proceduralism within the international law on detention, the historical neglect of some forms of detention, and discriminatory assumptions about the necessity and proportionality of certain forms of detention, including by some supranational bodies, the continuing evolution of the international law on detention and its alternatives remains important.

The thematic chapters to this book demonstrate the central role (quasi)judicial bodies have already played in developing a thick body of international law on procedural safeguards. Equally, they point to shortcomings in how closely these bodies critically examine the substantive necessity and proportionality of detention as well as imbalances in the volume and types of detention regimes they have considered. In some situations, the European Court of Human Rights may be the only body to have heard a case on a particular issue, raising the question of whether the decision reflects general international (human rights) law, especially in light of the Court's distinct approach to certain forms of detention. Notwithstanding these challenges, this book maintains that litigation constitutes an important site for the fuller articulation of international law on detention and its alternatives, particularly if courts adopt a more systematic approach to assessing alleged grounds for detention and its alternatives and their necessity and proportionality and locate individual cases within wider claims of structural discrimination, as proposed above. In this regard, litigation can act as a gap filler where particular issues have not been addressed as well as offering challenge to existing jurisprudence where outdated or where it fails to take into account recent developments.

However, overreliance on litigation as the vehicle for the fuller articulation of international law carries risks, particularly given the institutional pushback many face.[128] Moreover, litigation relies on the willingness – and ability – of individuals to lodge complaints before supranational bodies, which can be shaped by the funding landscape for strategic litigation which is often limited.[129] While they can locate individual cases within wider patterns, including of structural discrimination, (quasi)judicial bodies do not always reflect the optimal means – at least on their

[127] Ibid, at 1292 and 1295.
[128] Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, 'Backlash against international courts: explaining forms and patterns of resistance to international courts' 14 *International Journal of Law in Context* 197 (2018).
[129] Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (2018).

own – to reveal and effectively address structural or systemic human rights issues or to capture the interaction between different detention regimes or how they are shaped by the underlying policies which mobilise them. In this regard, if the international law on detention and its alternatives is to be more fully developed, a multi-layered approach is needed, mobilising national, regional, and international preventive, monitoring, standard-setting, and accountability processes. It also requires greater interdisciplinarity to more fully map, quantify, and analyse patterns and overrepresentation within and across detention and its alternatives and their causes. A multi-layered approach creates the possibility of a denser body of international law on detention and its alternatives, including in areas traditionally neglected by international law or where clear gaps remain, such as on the human rights-compatibility of alternatives to detention. Increasing the volume of sources creates a more conducive environment for the articulation of international law as each supranational body is able to draw on a range of sources in arriving at a new or revised position. A multi-layered approach also has value in generating points of friction and contestation between different supranational bodies' interpretation of international law, which is important for the overall evolution and progress of international law.[130] Thus, even where supranational bodies do not share unanimity on the interpretation of international law, they may still modify their original position due to challenge from other bodies.

[130] See chapter 7 as key illustration of this point.