

## **Alternatives to Custodial Sentences: A *Maqasidi* Approach**

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### **ABSTRACT**

This article discusses issues related to custodial sentences. It addresses jurists' arguments against these sentences on the ground of their inconsistency with the aim of criminal justice. The article is more concerned with the Muslim jurists' position; hence, it focuses on examining the consistency of custodial sentences with *maqasid al-Shariah* to determine their appropriateness to the enforcement of criminal justice and the safeguard of public interest. It also assesses the consistency of this concept with the philosophy of Islamic criminal law and the viability of its application in light of the concept of crime and punishment. For this purpose, the article defines custodial sentences in contemporary legislations. It then analyses the concept of imprisonment in the Quran and the Sunnah, and the practices of the Companions. It also assesses the impacts of custodial sentences in modern practices with the aim to identify the conditions and parameters for alternatives to these custodial sentences within the framework of *maqasid al-Shariah* in general, and the *maqasid* of punishments in particular. The article found that although considered as necessary to establish justice and protect society, custodial sentences are not in line with the Shariah principals and objectives. It also proposes a number of *Maqasidi*-driven parameters that serve as building blocks for the implementation of alternative custodial sentences.

*Keywords:* Islamic law, criminal justice, custodial sentences, *Maqasid al-Shariah* and freedom

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### **INTRODUCTION**

One of the ultimate aims of the criminal justice, as propagated in criminal justice legislation and legal literatures, is to deter criminals from causing harm to public. The sentences available to the courts are considered necessary measures that ensure public protection. These sentences range

from low to severe sentences. Among the severe sentences are custodial sentences, which are defined as, “Sentences imposed by a court in a criminal case. They require mandatory custody of the convict, either in prison (incarceration) or in some other closed therapeutic and/or (re)educational institution such as a reformatory, psychiatric counselling or drug treatment programmes. This is opposed to a deterrent sentence, which does not impose confinement, but serves as a warning through alternate punishment such as community service or a fine” (definitions, US Legal). The justification for these reserved offences is that they are “so serious that neither a fine alone nor a community sentence can be justified for the offence” (UK Legislation, n.d.). Despite all the justifications presented for these custodial sentences, they have been challenged by many contemporary legal experts, criminologists and sociologists in the conventional arena, indicating the overwhelming negative end results of these sentences. They have also been criticised by many Muslim Jurists on the ground that such sentences are inconsistent with the concept of imprisonment in Islam and do not serve the higher objectives of the Islamic law (*maqasid al-Shariah*). This paper is more concerned with the Muslim jurists’ position; hence, it focuses on examining the consistency of custodial sentences with *maqasid al-Shariah* to determine their appropriateness to the enforcement of criminal justice and the safeguard of public interest.

In the first part, the article examines the higher objectives of the Shariah with special focus on freedom – as opposed to custody – as one of the fundamentals related to the *maqasid al-Shariah*. The second part highlights the concept of custody in the Islamic law as compared to that applied at present. It presents the contextual implementation of custodial sentences in the traditional Islamic law. The third part examines major impacts of the presently applied custodial sentences on the convicted, his family, the government and the general public. This part paves the way for the proposition of alternatives to the currently practiced custodial sentences. The final part proposes some *maqasidi*-driven parameters for these alternatives. It sets a framework for future exploration of the detailed alternatives.

#### *Custodial Sentences in Light of the Higher Objectives of the Shariah (Maqasid al-Shariah)*

##### **Definition of Maqasid al-Shariah**

*Maqasid al-Shariah* is an independent discipline that addresses aspects of Islamic law from a macro perspective. The *maqasid* approach to law is a combination of an epistemological and legal framework that sets the philosophy of the Islamic law to ensure a holistic approach to its aspects.

The ultimate objective of *maqasid al-shari’ah* as established in the Quran and the Sunnah is to serve the interests (*jalb al-masalih*) of all human beings and to save them from harm (*daf’ al-mafasid*), they choose to define *maqasid al-shari’ah* from

a different perspective (Chapra, 1992). Abu Hamid al-Ghazali (d.111) defined *maqasid* by stressing the Shariah concerned with safeguarding five objectives by stating that:

“The very objective of the Shari’ah is to promote the well-being of the people, which lies in safeguarding their faith (*diin*), their lives (*nafs*), their intellect (*‘aql*), their posterity (*nasl*), and their wealth (*maal*). Whatever ensures the safeguarding of these five serves public interest and is desirable, and whatever hurts them is against public interest and its removal is desirable.” (Al-Ghazali, 1973)

The same has been highlighted by al-Iz Ibn Abdessalam and al-Shatibi with regards to serving the interests of all human beings and to save them from harm by preserving five essentials (‘Izz al-Din ‘Abd al-Salam, 1999; al-Shatibi, 1975).

Ibn ‘Ashur (1973), on the other hand, defines *Maqasid* from a broader dimension. He stated that:

“The all-purpose principle (*maqasid ‘amm*) of Islamic legislation is to preserve the social order or the community and insure its healthy progress by promoting the well-being and righteousness (*salah*) of the human being. The well-being and virtue of human beings consist of the soundness of their intellects and the righteousness of their deeds, as well as the goodness of the things of the world where they live that are put at their disposal” (Muhammad El-Tahir Al-Misawi, 2006).

The same approach has been adopted by ‘Allal al-Fassi (d.1974) as he stressed that the uppermost objectives of Shari’ah

rest within the concept of compassion and guidance that seeks to establish justice, eliminate prejudice and alleviate hardship. He stated that:

“The overall objective of Islamic Law is to populate and civilize the earth and preserve the order of peaceful coexistence therein; to ensure the earth’s ongoing well-being and usefulness through the piety of those who have been placed there as God’s vicegerents; to ensure that people conduct themselves justly, with moral probity and with integrity in thought and action, and that they reform that which needs reform on earth, tap its resources, and plan for the good of all” (Alaal Al-Fasi, 1993).

### ***Freedom and Maqasid Al-Shariah***

Freedom is a core fundamental of the *maqasid al-Shariah* and among its essential aspects. It is strongly related to custodial sentences, which is the issue of concern in this paper, therefore, necessitates to be elucidated in order to acquire a better understanding of the issue in relation to the concept of *maqasid al-Shariah* to mean many things.

The word “Freedom” is used in the Arabic literature such as “original or authentic; Arabs say a free horse (*farasun hurrun*) to mean a thoroughbred horse. They say a free clay (*Teenun Hurun*) to mean a clay pure and without sand in it. They also say a “free boy” (*waladun muhararun*) – as mentioned by the wife of *Imraan* – to mean a boy consecrated for the service of Allah” (Ibn Manthour, 1993). However, the usage of the concept as an attribute of a person has two meanings:

**The first meaning:** Freedom is used as the opposite of the word “slavery”. It refers to the original ability of all rational and mature people to handle their affairs themselves without depending on the consent of someone else.

**The second meaning:** It is derived from the first by metaphorical usage. It denotes one’s ability to act freely and handle one’s affairs as one likes, without opposition from anyone (Ibn Ashour, 2006).

*The Protection of Freedom as a Fundamental Part of the Maqasid al-Shariah*

Though the vast majority of Muslim jurists did not consider freedom as a stand-alone objective of Shari’ah, as opposed to the five necessities (*ad-daruriyyat al-khamsah*), yet, freedom is considered as part and parcel of these five necessities and a prerequisite for their establishment and existence. This is because the objective of the Shari’ah, as stated in Islamic jurisprudential literatures, is to serve the interests (*jalb al-masalih*) of all human beings that include the protection of their faith (*diin*), their lives (*nafs*), their intellect (*‘aql*), their posterity (*nasl*) and their wealth (*maal*) (Al-Ghazaali, 1973; ‘Izz al-Din ‘Abd al-Salam, 1999; al-Shaatibi, 1975; Ibn Ashour, 2006).

Since freedom is a human instinct that is paramount to the meaningfulness and validity of actions, the manifestation of freedom in the five necessities is evident as:

- The basis for the protection of faith promoted by Shari’ah is to avoid coercion in one’s belief as “there is no compulsion in religion” (Surah

Al-Baqarah: 256). Hence, belief cannot be achieved unless there is freedom of embracing it.

- The preservation of life has similar interrelation with freedom as it cannot be achieved unless the person has the freedom of action in all his personal affairs, independent of any types of coercion and enslavement.
- This preservation of intellect cannot be achieved unless the person has the freedom of choice, as intellectual competence is the cornerstone of responsibility and the core condition for the validity of actions.
- The protection of posterity cannot be achieved unless the person has the freedom to choose a partner who shares with him/her the responsibility of building a family and raising kids to ensure the continuation of mankind.
- Wealth protection, which is the fifth of the Muslim jurist classification of necessities, enjoys the same consideration with regards to freedom as wealth protection cannot be achieved unless a person has the right on his ownership and has full freedom of access on his wealth and property. This is of course within the parameters of Shariah. Al-Shafii, in elucidating this meaning, says, “People are given power over their wealth; no one has the right over it except where they are commanded to do so [*Zakat*]” (al-Shafi‘i, 1973).

Thus, we can conclude that the preservation of freedom is considered as the basis for all the five necessities representing

the core of the Shari'ah objectives since one of the major objectives of the Shari'ah is to put an end to slavery and establish permanent freedom. Allah established the objective of freedom in terms of establishing its requisites and eliminating its obstacles (Ibn Ashour, 2006).

In establishing the requisites of freedom, Allah has created human beings with free will. The Shari'ah then prescribed a number of rules to ensure the sustainability of freedom in all stages of human life. Among these rulings are:

- Considering any assault on freedom as a grave act of injustice and a harm that should be eliminated. The verse related to freedom of belief says, "There is no compulsion in religion" (Surah Al-Baqarah: 256) and the statement of Umar Ibn Al-Khatab that says, "*When did you start turning people into slaves when their mothers gave birth to them as free human beings?*", (Al-Kandahlawi, 2003) are clear manifestation of these facts.
- Putting in place rulings and procedures that would abolish the practice of slavery. Numerous texts recommending the freeing of slaves and prescribing the freeing of slaves as a condition to correct some breaches. For instance, compensation of the family of the victim in an accidental homicide (*Al-qatl –al-khataa*) in the verse that says: "*It is not for a believer to kill a believer unless [it be] by mistake. He*

*who has killed a believer by mistake must set free a believing slave, and pay the blood-money to the family of the slain, unless they remit it as a charity*" (Surah Al-Nisa': 92), the expiation from a deliberate oath (*kafarat al-yamin*) in the verse that says: "Allah will not take you to task for what is unintentional in your oaths, but He will take you to task for the oaths which you swear in earnest. The expiation thereof is to feed ten of the needy with the average of that with which you feed your own people, or to clothe them, or to free a slave, and for him who finds not [the wherewithal to do so] then a three days' fast" (Surah Al-Ma'idah: 89). Sexual intercourse in the fasting month, in the verse that says: "Those who put away their wives [by saying they are as their mothers] and afterward would go back on what they have said, [the penalty] in that case [is] the freeing of a slave before they touch one another. To this, you are exhorted; and Allah is Informed of what you do" (Surah Al-Mujadalah: 3], etc.

In terms of eliminating any obstacles to the establishment of freedom, the Shari'ah sets provisions to preserve the objective of freedom. Among these provisions are:

- Prohibiting all forms of coercion, either in belief, marriage, or business transaction, unless it is a legitimate coercion that serves the whole community.

- Putting in place special provisions for the coerced such as nullifying transactions made under such coercion.
- Prohibiting the wrongful restriction of people's freedoms (Abu Zaid, 2014).
- Occasional restriction of the freedom of individuals to avoid harming public interest as a whole and maintaining the right to freedom for everyone such as the restriction imposed on the weak-minded (*safih*) in using his property (Ibn Ashour, 2006).

Hence, we can conclude that freedom is a discernment bestowed by Allah to mankind from the first day of their birth. It is also the core fundamental of legislation, and one of the objectives of the Shari'ah.

Based on the above premises promoting freedom, the questions to be answered are:

- What is the position of imprisonment in Islam?
- Is it an original punishment or a precautionary measure prior to the decided punishment?
- And to what extent is it considered to be valid to punish the offender by depriving him of his liberty?

#### *The Concept of Custodial Sentences in the Islamic Law*

The issue of custodial sentences is well-addressed in classical Muslim Jurists' writings. They refer the concept of custodial sentencing to the following three major meanings:

**First:** To impede a person to act upon himself by placing him in a house or in a mosque or in a place dedicated to detention (prison).

**Second:** To not allow a person to leave his house (house arrest) or prohibit him from travelling outside his city, or to assign a security guard to accompany him whenever he wants to go out. It is termed in classical Jurisprudence writing (*al-tarsiim*) that refers to House arrest.

**Third:** To inhere the debtor to the creditor until he pays his debt, and the inherence here should be a result of a legal judgement (*Al-Ahmad*, 2011).

The above types, as discussed by Muslim jurists, mean that custodial sentences in the Islamic law are broader in meaning than the currently applied. This view is supported by Ibn Hazm and some Hanbali jurists including Ibn Taimiyyah. Ibn Hazm says, "with regards to prison no one disagreed that the prophet (Peace be upon him) had never had a prison" (Ibn Hazm. N.d). Ibn Taimiyyah, for instance, in explaining this broader meaning says, "Prison in Shari'ah is not confined to the placement of a person in a narrow place; it is rather restricting a person by forbidding him to act in his affairs, either by restricting him to his house, the mosque or to give the power of attorney to the debtor or his agent to do so, and that is why the Prophet, peace be upon him, called him a captive". He evidenced his opinion by the hadith reported by Abu Daud and Ibn Majah that the grandfather of Hirmas ibn Habib said, "I brought my debtor to the Holy Prophet (peace be upon him). He said to me, Stick to him. He again said to me: O brother of Banu Tamim, what do you want to do with your prisoner". He concluded his view



by saying, “This is the prison in the time of the prophet, and there was no specific dedicated place used for imprisonment in the time of the prophet and the time of Abu Bakar. However, when there was a disperse of citizen in the time of Umar, he bought a house in Mecca and used it as a prison. He also said, “Imprisonment does not mean keeping him in a jail; it is rather preventing him from his normal activities” (Fatawa Ibn Taimiyyah, 1985).

#### *Causes of Custodial Sentences in the Islamic law*

Classical Islamic criminal law literature highlighted many causes for custodial sentences. Among them are:

1. Failure to pay off a debt: Muslim jurists when discussing custodial sentences, often refer to the failure of paying debts. So the debtor will be detained until he pays off his debt. In this respect, Muslim jurists differ on the conditions and the period of this imprisonment. As they differentiate between the person known to be of good character, the person known to have prior criminal history and the person who is unknown as he may be a foreigner. They also differ on the maximum period of imprisonment to determine his status (Al-Mawardi, n.d.).
2. Investigating an accusation: In this regard, Muslim jurists confine the accusation that necessitates a temporary imprisonment to serious accusations such as a murder or a robbery. Hence, when the investigation is completed, the accused will either be released or executed. This is clearly narrated in *hadith* Bahz bin Hakim that “the Prophet (peace be upon him) imprisoned a man for an accusation, and then let him go” (Ibn Al-Qayyim, 2008). Imprisonment here is restricted to necessity (*darurah*) that is to be terminated by the result of the investigation. Ahmad Ibn Hanbal in commenting on the *hadith* of Bahz said, “These custodial sentences are temporary procedures until the ruler receives full information on his case” (Ibn Al-Qayyim, 2008).
3. To use the prison as a means to assist the prisoner to repent from his sins or to return the rights of others. Thus, if he repents or returns the rights of others, he should be released.
4. To prevent the person who has been sentenced from escaping so that the punishment of *hadd* or *qisas* may be executed.
5. To restrict the person who presents a threat to people’s lives and property so that he will be placed in a prison to prevent his threat (Al-Ahmad, 2011).

It is noteworthy that these reasons are not a matter of agreement among Muslim jurists. It is rather a compilation of what has been highlighted in Islamic jurisprudential books.

### *Temporary Custodial Sentences as Ijtihadi Measures (ta'ziri)*

Based on the established premise that freedom is the basis for the five necessities of the Shari'ah, considered a stand-alone Shari'ah objective, and based on the above stated meaning and causes of custodial sentences in the Islamic law that is used in general as a precautionary and temporary measure, we can say that it is difficult to justify the contemporary conceptualised and implemented custodial sentences from the text of the Quran and the Sunnah, and in the judicial rulings of the Prophet's Companions and their successors. Thus, it can be said that the custodial sentences currently practised in Muslim countries applying the Shari'ah law were adopted from the conventional laws as some of them have their effective acts dated before independence. Consequently, they were developed to be an integral part of Muslim law under the concept of *ta'zir*, where the ruler or judge has the discretion to apply his *ijtihad* in introducing punishment even if it is not stated in the Quran and the Sunnah with the condition that they do not contradict the general fundamentals of the Shari'ah.

One may agree that the ruling of imposing a punishment that is not stated in the Quran and the Sunnah based on the judge's personal qualified discretion and personal reasoning (*ijtihad*) is a valid one. However, the question that needs to be posed is: Does the application of the punishment of custodial sentences, as it is excessively applied currently, fulfil the general fundamentals of the Shari'ah or the *Maqasid* of Shari'ah?

### *Custodial Punishments: Proponents versus Opponents*

It is an established fundamental in *Usul al-Fiqh and Maqasid al-Shariah* that in the case of an *ijtihadi* matter that has no explicit and definitive ruling in the *Quran, Sunnah* and *Ijmaa*. The ruler has to apply *ijtihad* on the issue based on the calculus between benefits and harms of the subject matter at hand. Hence, by examining the benefits promoted by the proponents of custodial sentences and the harms promoted by the opponents, we will be able to make our preference based on the calculus between harms and benefits.

#### *Proponents of Custodial Sentences*

The proponents of the custodial sentences agree that on the one hand, "The custodial punishment is reserved to crimes so serious that neither a fine alone nor a community sentence can be justified for the offence" (UK Legislation, n.d.). However, they stress that a custodial punishment plays an important role in reducing crime and protecting the people. Their arguments can be summarised in the following:

- Surveys indicate that both the public and offenders consider prison to be the most severe or effective punisher of criminal behaviour.
- The expectations of the public and policymakers are that incarceration has powerful deterrent effect.
- Individuals experiencing a more severe sanction are more likely to reduce their criminal activities in the future.



- Incarceration imposes direct and indirect costs on inmates, thus, faced with the prospect of going to prison or after having experienced prison life, a rational individual would choose not to engage in further criminal activities.
- Studies support the prison as punishment. An ecological study by Fabelo in 1995, where the results are based on rates or averages (aggregate data), reported a 30% increase in the incarceration rates across 50 U.S. states, corresponding to a decrease of 5% in the crime rate for a five-year period (Gendreau & Goggin, 1999).

#### *The Opponents of Custodial Punishments*

Custodial punishments though promoted as a measure to protect people by preventing criminals from causing harm to them, the reality of this measure on the ground as promoted by the opponents and the facts and numbers regarding its negative impact on the prisoner, his family, the government and society at large, refute the arguments upheld by the proponents. For instance, the negative impacts on prisoner can be seen as follows:

- The prisoner will experience damaging exposure as each prisoner will convey his experience in crimes to other prisoners. This means that the prisoner, instead of correcting his behaviour, will be exposed to new criminal ideas and experiences. Therefore, he will be released from jail with additional criminal experiences. That is why the

opponents call prisons as “schools of crime”. Bentham, De Beaumont and de Tocqueville, Lombroso and Shaw for instance, suggested that prisons were breeding grounds for crime. It also reinforces the notion that prisons are mechanistic, brutal environments that would likely increase criminality (Mason, 1998).

- Prisons have shown a poor record for reducing the number of prisoners reoffending. For instance in the UK, 46% of UK adults are reconvicted within one year of release. Those serving sentences of less than 12 months increased to 58%. Over two-thirds (67%) of the prisoners under 18 year-olds are reconvicted within a year of release (Prison Reform Trust, 2014).
- Furthermore, some studies have shown that what is called “coincidence crimes” turn in to professional crimes, as it has been noted that 29% of those committing ethical crimes turn to theft crimes and some of them turn to drug crimes. The study advocates these developments to prison environment and its negative consequences on personal ethics and conduct that create additional criminal and crime expertise (Ahmad, 2012).
- Prison disables prisoners from engaging in their normal occupation to earn his living.
- It prevents him from developing his skills and deprives the society from benefiting from his area of expertise.

- The prisoner usually faces health problems due to the large number of prisoners who are usually put in one cell in addition to the deterioration of health services.

As for the negative impacts on the family, a custodial punishment deprives the prisoner's family of financial income in the case where the prisoner is the family's breadwinner. For instance, approximately 200,000 children in England and Wales had a parent in prison at some point in 2009. This is more than double the number of children affected in the same year by divorce in the family. This usually leads family members to deviation (Prison Reform Trust, 2014).

The impact on the state is as negative as other impacts; this is because it burdens the government with extra budget that yields no revenue. For instance, reoffending by all recent ex-prisoners in 2007-08 cost the economy between £9.5 and £13 billion. This is in addition to the disruption of the productivity of this segment of the workforce (Prison Reform Trust, 2014).

With regards to the negative impact on the society, it is because the prisoner thinks that the society has expelled him. For such a reason, he turns against the society in all of his conducts. Therefore, he turns from being a useful member of society to a harmful one.

In short, the view of the opponents is that custodial punishments do not solve the problem of crimes nor contribute in their prevention. This is evidenced by the constant increase in the number of prisoners and the high percentage of them returning to crime after their release from prison. This

is in addition to the high negative impacts on the prisoner, his family, state and society. There is no guarantee to the limits of the damage which could be inflicted on him. These include health problems, possible dismissal from work, emotional damage caused to the prisoner's spouse, parents and children from being deprived of their legitimate rights of maintenance, and damage to the community with the increase in the number of crimes caused by the custodial punishment.

### *The Preferred Opinion*

In view of the two opinions above, with regards to custodial sentences and based on the established fundamental Shari'ah principles, we can conclude that the current custodial sentences as they are applied clash in principle with the concept of freedom that is considered a basis for the five necessities of the Shari'ah. It also contravenes the most basic objectives of punishment in Islam, that is, to deter criminals from repeating their crimes, to reform them, to compensate for the crime caused and to serve the interest of the whole society. Hence, alternatives should be considered in minimising custodial sentences. In fact, a few of them have already been already proposed in the conventional arena such as Correctional supervision and community service orders implemented in South Africa (Lukas *et al.*, 2005). However, since this paper is not concerned with proposing a detailed number of alternatives to custodial sentences, this needs another independent research. Instead, it concerned

with setting parameters for the alternatives as they are crucial to ensure a correct and comprehensive execution of these alternatives.

#### *Parameters for the Alternatives of Custodial Sentences*

Among the parameters that can be proposed for the alternatives of custodial sentences are:

- The alternatives should not contravene the higher objectives of the *Shariah* (*Maqasid al- Shariah*) in general and the objectives of punishments in Islam in particular. Freedom and extending punishment to family are instances of this contravention.
- It should be allowed by the *Shariah* as it should not contradict texts of the Quran and the Sunnah.
- It should not cause harm to the offender sentenced as that contradicts the nature and objective of the punishment.
- It should not violate his dignity as a human being or cause harm to the offender, nor should it aim to defame the offender by portraying him as a deviant person.
- It should be a supportive element that creates a balanced adaptation of the offender psychologically and socially.
- It should facilitate the development of his educational and professional levels and help him to continue his social and family role and gain income for him and his family in a dignified way.
- It should take into consideration the consequences of its application, so that if it is found that it is not appropriate and has negative consequences, it should be revised and replaced by a more appropriate alternative.
- It should be reciprocal to the type of crime committed as this is part of the fundamental of justice and fairness commanded by Allah.
- It should be appropriate with the crime so that the circumstances of the crime should be taken into consideration.
- It should consider both the personal and social circumstances of the criminals as they are not of the same personality and thus, the effect of punishment on them is not the same.

#### **CONCLUSION**

There is no doubt that sentencing the offender is essential to establish justice and protect society. However, opting for custodial sentences as a mean to sentencing the offender is not the right approach, as justified by Shari'ah principals and objectives mentioned above and the established negative facts of these sentences, especially with the clear facts that show the mega spending on prisons and prisoners' maintenances that burdens governments' budget in addition to the reverse impacts on prisoners, their families and society. Therefore, it is time to explore better alternatives that protect society in a comprehensive and balanced manner. In doing so, this article sets a number of *Maqasidi*-driven parameters that serve as

building blocks for the implementation of alternative custodial sentences. It also recommends to governments to benefit from some implemented alternatives to custodial sentences and explore new innovative alternatives that serve the society as a whole. In short, if it is considered impossible to put an end to custodial sentences, it is very possible to reduce it to the minimum, so all related parties to the prisoners including the governments will benefit in the long run.

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