

# Chapter 2

## The Protection of Detained Persons under International Law

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### 2.1 Introduction

The number of international instruments which contribute to the advancement of confined persons' rights and the prevention of their ill-treatment has increased enormously in the second half of the twentieth century. These developments have been strongly linked to the enormous expansion of human rights law, both at the universal and regional levels, and fall under the umbrella-principle of respect for human dignity and, more specifically, under the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

The purpose of this chapter is to provide an outline of the legal protection of confined persons and the recognition of their rights under international law. It is not the purpose of this chapter to review the domestic practice in this regard which, in many places in the world, does not conform to such minimum guarantees. Nor is it the purpose of this chapter to provide an exhaustive overview of the different

instruments and bodies that have influenced the advancement of confined persons' rights under international law. Specialised studies have dealt with the position of detainees and prisoners under international law.<sup>1</sup> Moreover, others would certainly have emphasised different international and regional developments in the field, or would have left out certain parts. Rather, the aim of this chapter is to summarise the developments that have led to the current status of detainees' legal protection under international law to the extent that those developments are relevant to the legal position of persons detained on the authority of international criminal tribunals. Such an overview may then serve as a point of reference when discussing the latter persons' legal position in subsequent chapters. It must be stressed, however, that the bindingness and legal relevance of the monitoring bodies' decisions or communications varies considerably.

Some matters which, although related to the issue of the treatment of detained persons under international law, are not specifically connected to the subject matter of this research, have been left out. Such matters are the developments in the field of international humanitarian law dealing with the protection of detained individuals during armed conflicts,<sup>2</sup> and issues of international human rights law that are more appropriately discussed within the framework of substantive criminal law or the law of international criminal procedure, such as matters relating to sentencing, early release and issues bearing on modes of punishment (e.g. the extensive debates on the death penalty and life imprisonment). As outlined in the general introduction, this research focuses on the 'internal legal position' of internationally detained individuals, i.e. their intramural treatment and the conditions of their detention, rather than on the question of how these individuals "get in and out of jail".<sup>3</sup>

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<sup>1</sup> See, e.g., Rodley and Pollard 2009.

<sup>2</sup> See, however, the SCSL President's remarks in *Norman*, where he held that '[t]he actual administration of the conditions of detention must comply with the Rules of Detention, which are designed to provide for a regime of humane treatment for unconvicted prisoners, subject to restrictions and discipline necessary for security, good order, and for the fairness of ongoing trials. They should conform with the provisions of the 1949 Geneva Conventions, suitably updated (the right to smoke cigarettes, for example, regarded as virtually inalienable in 1949, may be qualified because of more recent health concerns about fellow detainees)' (emphasis added); see SCSL, Decision on Motion for Modification of the Conditions of Detention, *Prosecutor v. Norman*, Case No. SCSL-2003-08-PT, President, 26 November 2003, para 5.

<sup>3</sup> Of course, one must recognise the major contributions those discussions have made to a heightened awareness for the vulnerable position of confined persons and to the betterment of their treatment.

## 2.2 International Developments

### 2.2.1 General Developments

The fight against torture and other forms of ill-treatment of prisoners in the domestic context finds its way back to the English Bill of Rights of 1686, the *Déclaration des Droits de l'Homme et du Citoyen*<sup>4</sup> and the Eighth Amendment to the Constitution of the United States. In the international context, apart from earlier developments in the field of international humanitarian law, the 'great leap forward' occurred after 1945 in reaction to the horrors of the Second World War,<sup>5</sup> which marked the birth of a new sensitivity towards respect for human dignity.

Under the United Nations' predecessor, the League of Nations, efforts had been made to advance prisoners' rights and, to this end, the International Penal and Penitentiary Commission had set forth standards for decent treatment which, in turn, were endorsed by the Assembly of the League in 1934. However, these efforts were thwarted by the 'crime control' spirit of the age and, eventually, like most pre-World War II efforts to advance human rights, received the stigma of failure due to the atrocities committed during the Second World War.

After World War II, the establishment of the United Nations together with the primacy afforded in the U.N. Charter to the promotion of human rights heralded a new era, with the Universal Declaration of Human Rights (UDHR)<sup>6</sup> epitomising the organisation's fundamental values. In its Preamble, the Charter stresses the founders' determination to shield succeeding generations 'from the scourge of war' and 'to reaffirm faith in fundamental human rights' and 'in the dignity and worth of the human person'. The drafters further sought to 'promote social progress and better standards of life in larger freedom'. Article 1 of the U.N. Charter outlines the United Nations' purposes and cites amongst these under Paragraph 3 the achievement of 'international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. As will become clear from the discussion below,

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<sup>4</sup> Article 7 of the Declaration provides that '[n]ul homme ne peut être accusé, arrêté ni détenu que dans les cas déterminés par la loi, et selon les formes qu'elle a prescrites. Ceux qui sollicitent, expédient, exécutent ou font exécuter des ordres arbitraires doivent être punis; mais tout citoyen appelé ou saisi en vertu de la loi doit obéir à l'instant : il se rend coupable par la résistance'. See also Article 8 stating that 'La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée' and Article 9 which provides that 'Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi'.

<sup>5</sup> See the First Report of the U.N. Special Rapporteur on Torture, U.N. Doc. E/CN.4/1986/15, para 2.

<sup>6</sup> Adopted by U.N. G.A. resolution 217 A (III) of 10 December 1948.

the United Nations' concern with confined persons' rights is grounded in both the promotion of human rights and its affiliation with social development. In this respect, Article 55(b) of the U.N. Charter stresses the organisation's concern with promoting 'solutions of international economic, social, health, and related problems; and international cultural and educational co-operation', whilst Paragraph (c) provides that the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'. These provisions are, however, rather imprecise in their formulation, in that they do not define 'human rights' or social development programmes.

A more detailed catalogue of rights is provided in the UDHR,<sup>7</sup> which in its Preamble refers to the general purposes in the U.N. Charter concerning the promotion of human rights and social progress, and provides a translation of the general provisions in the U.N. Charter into a detailed catalogue of rights. The Preamble of the UDHR stresses the recognition of the 'inherent dignity and of the equal and inalienable rights of all members of the human family', which is affirmed in Article 1. Many of the UDHR's provisions are directly relevant to the issue of detention. In this respect, Articles 2 and 7 (prescribing equal treatment and prohibiting discrimination on any status), 3 (protecting the right to life, liberty and security of person), 5 (prohibiting torture and cruel, inhuman or degrading treatment or punishment), 8 (the right to an effective remedy) and 9 (prohibiting arbitrary arrest, detention or exile) are of particular significance. Other important provisions to detainees are Articles 10 (right to a fair and public hearing by an independent and impartial tribunal) and 11 (stipulating, *inter alia*, the presumption of innocence). Since detention touches upon all aspects of a person's life, other, more general rights set forth in the UDHR are also relevant, including in particular Articles 12 (providing, *inter alia*, for the right to be free from arbitrary interference with one's privacy, family or correspondence), 16 (the right to marry and to found a family), 18 (the right to freedom of religion and the right to practicing or worshipping such religion), 19 (the right to freedom of expression, including the right to 'hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'), 20 (the right to associate), 23 (the right to work and to 'favourable conditions of work') and 26 (the right to education). Moreover, Article 28 stipulates every person's right 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'.

Although as a General Assembly resolution, the UDHR cannot itself be considered binding (in view of the fact that the U.N. General Assembly does not have legislative powers), the binding quality of the norms found in the declaration has been argued by pointing to the document's purpose as further defining the obligations laid down in the U.N. Charter, and by pointing to the customary law status of most of the UDHR's norms.

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<sup>7</sup> U.N. G.A. resolution 217 A (III) of 10 December 1948.

With the adoption in the 1960s of the two major Covenants, the ICCPR and the ICESCR, an international ‘Bill of Rights’ came into existence. Of particular importance to the rights of incarcerated persons is Article 10(1) of the ICCPR, which expressly provides that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. The importance of this provision should not be underestimated. First, the ICCPR is binding on all States parties. Second, as noted by Van Zyl Smit, because the notion of ‘human dignity’ lies at the very heart of all human rights, Article 10(1) appears to constitute an argument for a holistic approach towards all aspects of confinement from a human rights perspective.<sup>8</sup> Pursuant to such an approach, the more general human rights, i.e. not only those dealing specifically with the detention situation, find application in the ‘prison sphere’ including, for example, the rights to life, privacy, family life, personal integrity, effective remedies and the prohibition of slavery and forced labour. It is, furthermore, important to note that all paragraphs of Article 10 place positive duties on member States.<sup>9</sup> The recognition of positive obligations on detention authorities is essential for the actual realisation of human rights in the context of detention. Since confined individuals are wholly dependent on the detention authorities for even the most trivial matters, without such positive obligations their rights would only exist on paper. The Human Rights Committee (HRC), which under the First Optional Protocol is vested with the power to receive and consider complaints from individuals, endorsed such interpretation in its General Comment on Article 10, where it stated that ‘Article 10, Paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in Article 7 of the Covenant. Thus not only may persons deprived of their liberty not be subjected to treatment that is contrary to Article 7 (...) but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment’.<sup>10</sup> Furthermore, Article 10 stipulates in Paragraph (3) the basic philosophy that must underlie all situations of confinement in a penitentiary context, by stating that ‘[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’.

<sup>8</sup> Van Zyl Smit 2005, p. 362; Van Zyl Smit 2002, p. 5; Suntinger 1999, p. 138.

<sup>9</sup> Möller 2003, p. 665. See, also, HRC, General Comment 21, Article 10, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), of 10 April 1992, para 3.

<sup>10</sup> HRC, General Comment 21, Article 10, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), of 10 April 1992, para 3.

The HRC has on numerous occasions found the detention conditions in States parties to have fallen short of the norm of Article 10(1).<sup>11</sup> For example, in the case of *Leonid Komarovski v. Turkmenistan*, in which Mr. Komarovski, *inter alia*, complained that the cell in which he had been detained was ‘very small, lacked natural light and water in the toilet and was infested by roaches’, and that he had been denied medical care despite suffering from diabetes,<sup>12</sup> the HRC found that he had been treated ‘inhumanely and without respect for his inherent dignity, in violation of Article 10, Paragraph 1, of the Covenant’.<sup>13</sup> In the case of *Fongum Gorji-Dinka v. Cameroon*, Mr. Fongum Gorji-Dinka complained that he had been detained in a ‘wet and dirty cell without a bed, table or any sanitary facilities’. The HRC reiterated ‘that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners (1957)’, and concluded that the said detention conditions were in breach of Article 10(1) ICCPR.<sup>14</sup>

Other conventions have also contributed to the advancement of detainees’ rights, including the Convention on the Rights of the Child,<sup>15</sup> the International Convention on the Elimination of All Forms of Racial Discrimination<sup>16</sup> and the Convention on the Elimination of All Forms of Discrimination against Women.<sup>17</sup> The ICESCR deserves specific mention. Article 11, which provides for the right to an adequate standard of living, including the right to adequate food, clothing and housing, and Article 6, which provides for the right to work, are also relevant to the detention context. Nevertheless, such economic, social and cultural rights (more so than the ICCPR-based political rights) depend for their concrete application to a great extent on the economic, cultural and social context, as is evident from (and allowed by) Article 2 of the ICESCR, which provides that ‘[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to

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<sup>11</sup> Möller concludes, on the basis of an analysis of HRC decisions, that ‘[i]n spite of apparent inconsistencies, the following basic approach appears to be emerging: bad prison conditions (...) lead to a finding of a violation of Article 10(1). Added cruelty or brutality by the police, guards or warders, such as beatings, will normally, but not always, lead to a finding of a violation of Article 7 as well. A consistent case law established during the Uruguay years is that detention incommunicado violates Article 10(1)’; Möller 2003, p. 667.

<sup>12</sup> HRC, *Leonid Komarovski v. Turkmenistan*, views of 24 July 2008, communication 1450/2006, para 3.5.

<sup>13</sup> *Id.*, para 7.5.

<sup>14</sup> HRC, *Fongum Gorji-Dinka v. Cameroon*, views of 17 March 2005, communication 1134/2002, para 5.2.

<sup>15</sup> Convention on the Rights of the Child, adopted by U.N. G.A. resolution 44/25 of 29 November 1989, entry into force on 2 September 1990.

<sup>16</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted by U.N. G.A. resolution 2106 (XX) of 21 December 1965, entry into force on 4 January 1969.

<sup>17</sup> Convention on the Elimination of All Forms of Discrimination against Women, adopted by U.N. G.A. resolution 34/180 of 18 December 1979, entry into force on 3 September 1981.

the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'.<sup>18</sup>

To the extent that the provisions of the aforementioned conventions constitute part of customary international law or represent general principles of law,<sup>19</sup> they are arguably binding on subjects of international law even where these are not parties to the specific convention.<sup>20</sup>

The human rights implementation and monitoring machinery that exists on the international plane is as diverse as the instruments are numerous. Furthermore, the bindingness and legal relevance of these bodies' decisions or communications varies considerably. On the one hand, there are the mechanisms directly based on specific treaties as, for example, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights. The practice of these bodies—particularly their general comments, recommendations and communications—provides authoritative guidance on interpreting the different provisions of the respective treaties. On the other hand, there are the various mechanisms that find their basis in the U.N. Charter. These include the examinations of patterns of gross and systematic alleged violations of human rights by the Human Rights Council (formerly the Commission on Human Rights),<sup>21</sup> as well as other bodies established by or individual officials appointed by the Council, with geographic or thematic mandates. These include the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Torture and other Cruel, Inhuman or

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<sup>18</sup> See, also, the various General Comments on the implementation of ICESCR rights as adopted by the Committee on Economic, Social and Cultural Rights. See, in connection to the right to the enjoyment of the highest attainable standard of physical and mental health under Article 12, General Comment No. 14 (2000), U.N. Doc. E/C.12/2000/4 of 11 August 2000 (see, in particular, para 34, which holds that 'States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees' (emphasis in the original)).

<sup>19</sup> Rodley argues that the norm contained in Article 10(1) ICCPR (and Article 5 of the ACHR) is (a non-derogable) rule of general international law. He points, *inter alia*, to the General Comments of the HRC on Articles 7 and 10, which both provide that these provisions supplement each other. See Rodley 1999, p. 278. In the third edition of this work, Rodley refers to HRC General Comment 29, where the HRC holds that it 'believes that here the Covenant expresses a norm of general international law not subject to derogation'; see Rodley and Pollard 2009, p. 381, footnote 7. See HRC, General Comment No. 29, of 31 August 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11, para 13(a). In *Barayagwiza*, the ICTR Appeals Chamber more generally held that '[t]he International Covenant on Civil and Political Rights is part of general international law and is applied on that basis'; see ICTR, Decision, *Barayagwiza v. the Prosecutor*, Case No. ICTR-97-19-A, A. Ch., 3 November 1999, para 40.

<sup>20</sup> See, further, *infra*, Chap. 3.

<sup>21</sup> Established pursuant to ECOSOC resolution 1503 (XLVIII), of 27 May 1970, as amended by resolution 2000/3 of 16 June 2000.

Degrading Treatment or Punishment, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the Working Group on Arbitrary Detention.

Further, the influence of NGOs such as Amnesty International and Human Rights Watch is worth mentioning. Their attention to detainees' and prisoners' rights and their commitment to denouncing cases of ill-treatment inflicted by national authorities have significantly contributed to the placing of the protection of confined persons high on the human rights agenda.

### ***2.2.2 The Prohibition of Torture and Other Inhuman and Degrading Treatment or Punishment***

#### **The UDHR, the ICCPR and the 1975 Declaration**

As stated above, one of the paradigms within which the improvement of treatment of prisoners and detainees and the conditions of their detention has developed is the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Article 5 of the UDHR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This prohibition is provided for in Article 7 of the ICCPR, which specifies further that 'no one shall be subjected without his free consent to medical or scientific experimentation'. In its General Comment on Article 7, the HRC stipulates the duty on States 'to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'.<sup>22</sup> It further states that the 'prohibition in article 7 is complemented by the positive requirements of article 10, Paragraph 1, of the Covenant'.

The HRC has held certain modes of treatment of detained persons to be in breach of Article 7. For example, in the case of *Edriss El Hassy (on behalf of his brother, Abu Bakar El Hassy) v. Libyan Arab Jamahiriya*, in respect of the incommunicado detention of Abu Bakar El Hassy, the HRC held that to keep a person in captivity and to prevent him or her from communicating with his or her family and the rest of the outside world constitutes a violation of Article 7.<sup>23</sup> It also found a violation of Article 7 on the grounds that Abu Bakar El Hassy had been severely and systematically beaten during interrogation.<sup>24</sup> Another case of detention incommunicado is that of *Ali Medjnoue (on behalf of his son Malik Medjnoue) v. Algeria*. Again, the HRC held that preventing a detained person from communicating with his or her

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<sup>22</sup> HRC, General Comment 20, Article 7, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003), 10 March 1992, para 2.

<sup>23</sup> HRC, *Edriss El Hassy, on behalf of his brother, Abu Bakar El Hassy v. Libyan Arab Jamahiriya*, views of 24 October 2007, communication 1422/2005, para 6.2.

<sup>24</sup> *Id.*, para 6.3.



family and with the outside world more generally constitutes a violation of Article 7 of the ICCPR.<sup>25</sup> In the case of *C. v. Australia*, the HRC accepted as a fact that the complainant's psychiatric illness had developed due to the protracted period of immigration detention. At some point, the complainant's 'illness had reached such a level of severity that irreversible consequences were to follow'. The Committee held that 'the continued detention of [the complainant] when the State party was aware of [his] mental condition and failed to take the steps necessary to ameliorate [his] mental deterioration constituted a violation of his rights under article 7 of the Covenant'.<sup>26</sup>

Neither the UDHR, nor the ICCPR define torture or the other forms of ill-treatment. A definition of torture was provided for in Article 1 of the 1975 U.N. General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>27</sup> according to which 'torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners'. The other forms of ill-treatment were left undefined, although Article 1(2) states that '[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'. In Article 2, torture or other cruel, inhuman or degrading treatment or punishment is declared 'an offence to human dignity (...) as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights'. A general prohibition of torture and the other forms of ill-treatment is provided for in Article 3, whilst Article 4 prescribes all member States to take positive action to prevent torture and cruel, inhuman or degrading treatment or punishment. Other provisions provide, *inter alia*, for States' investigatory obligations, the right of victims to redress and compensation, to submit complaints and the corresponding right to have such complaints adequately investigated by the authorities.

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<sup>25</sup> HRC, *Ali Medjnoune (on behalf of his son Malik Medjnoune) v. Algeria*, views of 14 July 2006, communication 1297/2004, para 8.4.

<sup>26</sup> HRC, *C. v. Australia*, views of 28 October 2002, communication 900/1999, para 8.4.

<sup>27</sup> U.N. G.A. resolution 3452, of 9 December 1975.

### **The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Committee**

The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted in 1984.<sup>28</sup> According to its Preamble, the Convention is grounded in existing international law, pointing at the UDHR, the ICCPR and the 1975 Declaration. Pursuant to Article 17, the Committee against Torture was established, which consists of a team of experts and which operates as a monitoring body. Under Article 19, States parties are obliged to submit reports on measures they have taken to implement the obligations under the Convention. The Committee may make general comments on such reports and communicate these to the State party concerned. Article 19(4) allows the Committee to include such comments together with the replies received from the State parties concerned in its annual report. Article 20(1) further provides that '[i]f the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned'. The Committee may then designate one of its members to make a confidential inquiry and report to the Committee on that basis. Article 22 provides for an optional individual complaints procedure.<sup>29</sup> Article 2 of the Convention obliges States to take steps in order to prevent torture, whilst Article 16 prescribes States parties to prevent all acts of cruel, inhuman or degrading treatment or punishment 'when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.

Article 16 is particularly important in light of the high threshold that must be reached before detention conditions may be found to violate the prohibition of torture. A violation of the prohibition of cruel, inhuman and degrading treatment or punishment may arise from negligence or acquiescence,<sup>30</sup> without the need for any of the requirements listed in Article 1 to be met. These requirements imply that, in order for the pain or suffering in question to fall into the category of torture, it must be inflicted 'for such purposes as obtaining from the victim or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind'.

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<sup>28</sup> Adopted by U.N. G.A. resolution 39/46 of 10 December 1984, entered into force on 26 June 1987.

<sup>29</sup> Under Article 22(1), the individual complaints procedure is subject to a declaration by State parties in which they recognise the Committee's competence.

<sup>30</sup> Nowak and McArthur 2008, p. 558.

It follows from the wording of Article 16<sup>31</sup> that the obligations under Articles 10–13 apply both to the prohibition of torture and the prohibition of other cruel, inhuman and degrading treatment or punishment, as a result of which these norms are applicable to detention situations that do not reach the threshold necessary for them to be qualified as torture.<sup>32</sup>

The Committee has criticised certain conditions of detention for violating the prohibition of cruel, inhuman and degrading treatment, including the use of solitary confinement,<sup>33</sup> prison overcrowding<sup>34</sup> and lack of adequate medical facilities.<sup>35</sup> According to the Committee, the obligation to prevent ill-treatment also includes positive obligations for prison authorities. As stated above, Article 16 declares the obligations listed in Articles 10–13 to be applicable to the prohibition of inhuman and degrading treatment. In this regard, the right provided for in Article 13 for victims to submit complaints to and to have their case promptly and impartially examined by the competent authorities' is applicable to all forms of ill-treatment under the Convention. Where Article 16 states that the obligations under

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<sup>31</sup> Article 16(1) provides that '[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment'.

<sup>32</sup> Since Article 16 uses the term 'in particular', the citation must, arguably, not be regarded as exhaustive; see Nowak and McArthur 2008, p. 570. These authors point out that at least the obligations concerning the use of criminal law in the articles 4–9 apply solely to the prohibition of torture.

<sup>33</sup> See, for instance, in respect of Denmark, CAT, A/52/44, of 10 September 1997, para 186 (the Committee stated that '[e]xcept in exceptional circumstances, inter alia, when the safety of persons or property is involved, the Committee recommends that the use of solitary confinement be abolished, particularly during pre-trial detention, or at least that it should be strictly and specifically regulated by law (maximum duration, etc.) and that judicial supervision should be introduced' (emphasis in the original). See, further, in respect of Sweden, CAT, A/52/44, of 10 September 1997, para 225 (it was held that '[w]hile the Committee welcomes the information that the question of "restrictions", including solitary confinement, during pre-trial detention is under review by the Swedish authorities, it recommends that the institution of solitary confinement be abolished, particularly during the period of pre-trial detention, other than in exceptional cases, inter alia, when the security or the well-being of persons or property are in danger, and the measure is applied, in accordance with the law and under judicial control'.

<sup>34</sup> See, for instance, in respect of Cameroon, CAT/C/CR/31/6, of 5 February 2004, para 4(b), where the Committee held that '[t]he continued existence of extreme overcrowding in Cameroonian prisons, in which living and hygiene conditions would appear to endanger the health and lives of prisoners and are tantamount to inhuman and degrading treatment'. See, further, in respect of detention conditions in Greece, CAT/C/CR/33/2, of 10 December 2004, para 5(i).

<sup>35</sup> See, in respect of conditions of detention in Paraguay, CAT/C/SR.418, of 11 January 2001, paras 18, 38. See, also, in respect of Nepal, CAT/C/NPL/CO/2, of 13 April 2007, para 31, where the Committee states that it was 'concerned about allegations of poor conditions of detention, in particular overcrowding, poor sanitation, staffing shortages and lack of medical attention for detainees (art. 16)'.

Articles 10–13, *in particular*, are applicable to the duty to prevent inhuman and degrading treatment, it appears from the wording of this Article that the said obligations are not meant to be exhaustive.<sup>36</sup> The Committee has on a number of occasions evaded this more controversial viewpoint by interpreting Article 16 very broadly, as, for example, encompassing the right to adequate redress and compensation to victims.<sup>37</sup>

It is widely recognised that the prohibition of torture forms part of customary international law and even that it constitutes a peremptory norm of international law or *ius cogens*.<sup>38</sup> In light of the high threshold that must be reached for detention conditions to be classified as torture, it is relevant whether the prohibitions of the other forms of ill-treatment, i.e. inhuman and degrading treatment, have likewise been recognised as forming part of customary international law and, as such, are binding on non-signatories to the Convention. There is quite some evidence for assuming that this is the case. In the first place, there is the broadly held view that various provisions in the UDHR, particularly the prohibition of *torture or cruel, inhuman and degrading treatment or punishment* under Article 5, form part of customary law.<sup>39</sup> Evidence can be found, for example, in the Proclamation of Tehran adopted at the International Conference on Human Rights on 13 May 1968, according to which '[t]he Universal Declaration of Human Rights

<sup>36</sup> Nowak and McArthur 2008, p. 570.

<sup>37</sup> See Committee Against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia*, Complaint No. 161/2000, para 9.6, where it was held that '[c]oncerning the alleged violation of article 14 of the Convention, the Committee notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, para 1, of the Convention while specifically referring to articles 10, 11, 12, and 13, does not mention article 14 of the Convention. Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation'.

<sup>38</sup> See the First Report of the First U.N. Special Rapporteur on Torture, U.N. Doc. E/CN.4/1986/15, para 3; and the CAT, General Comment No. 2, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007. See, further, Nowak and McArthur 2008, pp. 117–118; Office of the United Nations High Commissioner for Human Rights 2005, p. 8. See, also, Evans and Morgan 1998, p. 63, where they state that '[i]t is widely accepted that (...) Article 5 of the UDHR is an example of an obligation *erga omnes* (...)'. Further evidence can be found in the Opinions of the Lords of Appeal for Judgment in the *Cause of Regina v. Bartle and the Commissioner of Police for the Metropolis and others (Appellants) Ex Parte Pinochet (Respondent); Regina v. Evans and another and the Commissioner of the Police for the Metropolis and others (Appellants) Ex Parte Pinochet (Respondent)* (On Appeal from a Divisional Court of the Queen's Bench Division) of 24 March 1999; and in ICTY, Judgement, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, T. Ch., 10 December 1998, para 153.

<sup>39</sup> Office of the United Nations High Commissioner for Human Rights 2005, p. 8; Tomuschat 2003, p. 35.

states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and *constitutes an obligation* for the members of the international community'.<sup>40</sup> Further, the U.N. General Assembly in 2008 took note of the fact that 'a number of international, regional and domestic courts, including the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, have recognised that the prohibition of torture is a peremptory norm of international law *and have held that the prohibition of cruel, inhuman or degrading treatment or punishment is customary international law*'.<sup>41</sup> The HRC, in its General Comment 24[52], stipulated that the 'provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment (...)'.<sup>42</sup> Finally, Article 5 UDHR, Article 7 ICCPR, the 1975 U.N. Declaration against Torture, Article 3 ECHR, Article 5(2) ACHR and Article 5 of the ACHPR all adopt the 'wider definition', which includes 'inhuman and degrading treatment or punishment'. Arguably, each of these provisions concern one and the same prohibition. Most telling in this regard is perhaps the 1975 U.N. Declaration Against Torture, which states in Article 2 that '[a]ny act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights'. Although the U.N. Convention against Torture deals with torture and inhuman and degrading treatment under distinct provisions, this should, arguably, not be understood to negate the customary law status of the prohibition of inhuman and degrading treatment. Nowak and McArthur argue that such a reading would not be in line with the purpose of the Convention, i.e. to make more effective the struggle against torture and cruel, inhuman or degrading treatment.<sup>43</sup> In light of this purpose and the Convention Preamble's explicit references to Article 5 UDHR, Article 7 ICCPR and the 1975 Declaration against Torture, it would, according to those scholars, be illogical to argue that the drafters of the CAT intended to curtail the legal protection against the other forms of ill-

<sup>40</sup> Proclamation of Tehran, para 2. Emphasis added.

<sup>41</sup> U.N. G.A. resolution of 4 March 2008, U.N. Doc. A/RES/62/148. Emphasis added. See, also, the Preamble to the U.N. G.A. resolution of 21 February 2006, U.N. Doc. A/RES/60/148.

<sup>42</sup> HRC, General Comment 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 8.

<sup>43</sup> See the Preamble to the Convention, which states that the Convention's purpose is the desire 'to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world'. See Nowak and McArthur 2008, pp. 118–119.

treatment.<sup>44</sup> Moreover, McArthur and Nowak argue that one may conclude from the absence of an explicit prohibition of torture and of inhuman or degrading treatment or punishment in the text of the Convention that the drafters did not appear to deem necessary the inclusion of the prohibition, apparently because they were convinced of the existence of such a proscription under international law.<sup>45</sup> Finally, evidence of the existence of such a prohibition under international law can be found in the fact that many States have laid down the prohibition in their domestic law.<sup>46</sup>

### **The Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Endeavours to outlaw torture and other cruel, inhuman or degrading treatment or punishment have also led to the establishment of bodies whose focus is the prevention of ill-treatment, rather than establishing violations of the prohibition after the fact. For example, the objective of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>47</sup> is to establish ‘a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment’.<sup>48</sup> For this purpose, Article 2 provides for the establishment of a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, whose purpose it is to visit places where people are detained or imprisoned and which may, *inter alia*, make recommendations and give advice to States parties regarding the protection of individuals against ill-treatment. Another task of the Subcommittee is to co-operate with other United Nations bodies and other international and regional bodies in preventing ill-treatment in situations of confinement.<sup>49</sup> Articles 3 and 17 of the Optional Protocol require that each State party establishes or maintains at the national level monitoring bodies for the prevention of torture and inhuman and degrading treatment. Article 18(1) provides that States parties ‘shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel’. Further, States must make available the necessary resources for

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.*, p. 61.

<sup>46</sup> See Rodley and Pollard 2009, pp. 70–71. See, also, for an impressive overview of domestic legislation, case law and other practice, Henckaerts and Doswald-Beck 2005, pp. 2121–2140.

<sup>47</sup> The OPCAT was adopted by the U.N. G.A. in resolution 57/199 of 18 December 2002, and entered into force on 23 June 2006 after twenty State parties had ratified the Convention in accordance with Article 28(1) of the OPCAT.

<sup>48</sup> Article 1 of the OPCAT.

<sup>49</sup> See SPT, First Annual Report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, CAT/C/40/2, 14 May 2008, para 7.

the functioning of these national preventive mechanisms and 'ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge'.<sup>50</sup> Articles 19 and 20 stipulate that these national preventive mechanisms must be provided with some minimum powers for their well-functioning, such as access to all places of detention and the opportunity to confidentially interview individuals detained in those places. Important to the effectiveness of the Optional Protocol is the national preventive mechanisms' right under Article 20(f) to 'have contacts with the Subcommittee on Prevention, to send it information and to meet with it'. Also essential is the States parties' obligation under Article 23 'to publish and disseminate the annual reports of the national preventive mechanisms'.

Article 14 of the Optional Protocol grants considerable powers to the Subcommittee, where States Parties undertake to grant the Subcommittee '(a) Unrestricted access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location; (b) Unrestricted access to all information referring to the treatment of those persons as well as their conditions of detention; (c) Subject to Paragraph 2 below, unrestricted access to all places of detention and their installations and facilities; (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the Subcommittee on Prevention believes may supply relevant information; (e) The liberty to choose the places it wants to visit and the persons it wants to interview'. Paragraph 2 provides an exhaustive list of exceptions to the States parties' obligations, recognising only 'urgent and compelling grounds of national defence, public safety, natural disaster or serious disorder in the place to be visited that temporarily prevent the carrying out of such a visit'. The Optional Protocol entered into force in June 2006 and from that date the Subcommittee was established. Ten experts were elected by the States parties, who came together for the first time in February 2007. In its First Annual Report, the Subcommittee set out its guiding principles, *i.e.* confidentiality, impartiality, non-selectivity, universality and objectivity,<sup>51</sup> and affirmed its endeavour to engage in an ongoing dialogue with the national authorities, with the objective of preventing torture and other forms of ill-treatment. In line with the principle of confidentiality, reports are, in principle, not published. The most far-reaching sanction available to the Subcommittee is laid down in Article 16(4) of the Optional Protocol, which provides that '[i]f the State Party refuses to co-operate with the Subcommittee on Prevention according to articles 12 and 14, or to take steps to improve the situation in the light of the recommendations of the Subcommittee on Prevention, the Committee against Torture may, at the request of the Subcommittee on Prevention, decide, by a majority of its members, after the State Party has had an opportunity to make its views known, to

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<sup>50</sup> Article 18, paras (2) and (3).

<sup>51</sup> See SPT, First Annual Report of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment of Punishment, CAT/C/40/2, 14 May 2008, para 11.



make a public statement on the matter or to publish the report of the Subcommittee on Prevention'. As stated above, the Subcommittee's mandate is of a preventive nature and its main aim, as is the case with the CPT on the European level, is to strive to correct any condition of detention which may develop into torture or inhuman or degrading treatment or punishment. As such, the Subcommittee necessarily has a more encompassing subject-matter than that of the Committee, which is limited to establishing *ex post facto* violations of the prohibition.<sup>52</sup> In the first years of its existence, the Subcommittee has visited such countries as Mauritius, Sweden, Benin, Mexico, Paraguay, Cambodia and Liberia and has chosen as one of its focal points the establishment or maintenance of national preventive mechanisms.<sup>53</sup> To this end, the Subcommittee drafted a set of guidelines on such national mechanisms in which it emphasised, *inter alia*, the need for a clear basis in national law, the active participation of civil society in such mechanisms, their independence and the need for adequate resources.<sup>54</sup> Both the fact-finding and standard-setting functions of the Subcommittee may in the future prove helpful to such bodies as the HRC and regional human rights courts.<sup>55</sup> It has been recognised that the mandates of different monitoring bodies established under various conventions may overlap and lead to duplicated efforts. In this regard, Article 31 provides that '[t]he provisions of the present Protocol shall not affect the obligations of States Parties under any regional convention instituting a system of visits to places of detention. The Subcommittee on Prevention and the bodies established under such regional conventions are encouraged to consult and co-operate with a view to avoiding duplication and promoting effectively the objectives of the present Protocol'.

### **The U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>56</sup>**

In its resolution 1985/33, the U.N. Commission on Human Rights held that, in being 'determined to promote the full implementation of the prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment',<sup>57</sup> it would appoint a Special Rapporteur on

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<sup>52</sup> *Id.*, para 12.

<sup>53</sup> *Id.*, para 24.

<sup>54</sup> *Id.*, para 28.

<sup>55</sup> When discussing the CPT further below, it will be seen that the Committee's work which rests on a preventive mandate likewise the Subcommittee's under the OPCAT, has been of much assistance to the European Court of Human Rights.

<sup>56</sup> Established by the U.N. Commission on Human Rights in resolution 1985/33, based on ECOSOC resolution 1235 (XLII).

<sup>57</sup> U.N. Commission on Human Rights resolution 1985/33 of 13 March 1985, Preamble. The reference to other cruel, inhuman or degrading treatment or punishment was deleted during the revival of the original draft resolution; see U.N. Doc. E/CN.4/1985/L.44. The Special Rapporteur noted in his first report that it would, therefore, appear 'quite clear that the intention of the



Torture for the duration of 1 year to examine questions relevant to torture.<sup>58</sup> The Special Rapporteur's mandate was extended in the years thereafter.<sup>59</sup> In 2006, the Human Rights Council succeeded the Commission on Human Rights and embarked on a review of all special mandates.<sup>60</sup> In 2008, the Council extended the mandate of the Special Rapporteur for another 3 years.<sup>61</sup> The Special Rapporteur's mandate encompasses State visits for the purpose of fact-finding and communicating to States, in respect of individuals who at the specific moment are at risk of torture, as well as of alleged instances of torture, i.e. that have already occurred.<sup>62</sup> The Special Rapporteur may take urgent action when he or she receives credible information that an individual or a group of individuals runs the risk of being tortured and may in such cases contact the national authorities and urge them to protect the person(s) in question. As far as such cases of 'urgent appeal' are concerned, the focus is on issues of corporal punishment, means of restraint contrary to international standards, prolonged incommunicado detention, solitary confinement, torturous conditions of detention, the denial of medical treatment and adequate nutrition, imminent deportation to a country where there is a risk of torture, the use or excessive use of force or the threat thereto by law enforcement officials, as well as the enactment of legislation that may undermine the prohibition of torture (e.g. providing impunity for acts of torture).<sup>63</sup>

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(Footnote 57 continued)

Commission was to restrict the Special Rapporteur's mandate to "the question of torture"; see Report of the First U.N. Special Rapporteur on Torture, U.N. Doc. E/CN.4/1986/15, 19 February 1986, paras 22. Nevertheless, in later practice, the Special Rapporteur did not appear to have felt in any way restricted to examining only instances of torture. Later, he was explicitly invited by the Commission to also examine cases of cruel, inhuman or degrading treatment or punishment; see, e.g., Report of the Special Rapporteur, Mr. Nigel S. Rodley, U.N. Doc. E/CN.4/1998/38, 24 December 1997, paras 22–23; U.N. Doc. E/CN.4/RES/1999/32, paras 22–23, and U.N. Doc. E/CN.4/RES/2000/43, paras 26–27.

<sup>58</sup> See U.N. Commission on Human Rights resolution 1985/33 of 13 March 1985, para 1.

<sup>59</sup> From 1992 onwards, the mandate was regularly extended, each time for a period of 3 years: in 1992, 1995, 1998, 2001 and 2004.

<sup>60</sup> See U.N. G.A. 60/251 of 3 April 2006, para 1 of the resolution, which provides that the U.N. G.A. '[d]ecides to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly' (emphasis omitted). The institution-building and review programme was set out in Human Rights Council resolution 5/1.

<sup>61</sup> See U.N. Doc. A/HRC/RES/8/8, para 3. The new mandate refers to the Special Rapporteur as the 'Special Rapporteur on torture *and other cruel, inhuman or degrading treatment or punishment*'. Emphasis added.

<sup>62</sup> See Report of the Special Rapporteur on the question of torture, Theo van Boven, U.N. Doc. E/CN.4/2003/68, 17 December 2002, para 3. See, further, the Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, U.N. Doc. A/HRC/7/3, 15 January 2008, paras 5 and 6.

<sup>63</sup> See <http://www2.ohchr.org/english/issues/torture/rapporteur/appeals.htm> (last visited by the author on 11 May 2011).

Although State visits are, in principle, conducted upon invitation of the national authorities concerned, the Special Rapporteur may beseech such an invitation when he or she has received sufficient credible information that such a visit is necessary. Certain guarantees must be provided by the national authorities before a visit takes place. These include, *inter alia*, that the Special Rapporteur has freedom of movement within the respective State, that he or she has access to all places of detention, imprisonment and interrogation, and that he or she has confidential and unsupervised access to incarcerated individuals.<sup>64</sup> Interestingly, a public list is maintained of States that have received from the Special Rapporteur a request to conduct a country visit, but who have not (yet) responded.<sup>65</sup>

A set of General Recommendations has been adopted by the Special Rapporteur ranging from such topics as interrogations and inspection of places of detention to measures for the prevention of violence between inmates.<sup>66</sup>

### ***2.2.3 The United Nations Crime Prevention and Criminal Justice Program and its Standard Setting Work***

The United Nations' concern with criminal justice is easily explained by reference to that organisation's preoccupation with promoting human rights. Nonetheless, its pursuit for social development has been the catalyst for much of the standard-setting in the area of crime prevention and the treatment of offenders. The standards developed fall under either one of these two headings.<sup>67</sup> Along with the growing awareness that crime is both an impediment to social and economic development and that it is caused to a large extent by social and economic conditions, over the years, the organisation's scope of concern for criminal justice matters has expanded. United Nations criminal policy has covered such subjects as, *inter alia*, genocide, juvenile delinquency, the treatment of offenders, the training of law enforcement personnel, prison labour, alternatives to imprisonment, habitual offenders, transnational organised crime (in particular, the traffic in illicit drugs), after-care treatment of prisoners, capital punishment, community participation in criminal justice, social aspects of crime, (transnational) terrorism, torture and cruel, inhuman or degrading treatment or punishment, abuse of power and victims of crime. As noted, international co-operation on crime prevention issues may sometimes fit into the category of 'social development', while at other times (as, for example, with the adopting of the Standard Minimum Rules for the Treatment of Prisoners) fall under the task of

<sup>64</sup> See <http://www2.ohchr.org/english/issues/torture/rapporteur/visits.htm> (last visited by the author on 11 May 2011).

<sup>65</sup> *Ibid.* Listed is, for instance, Algeria which received a first request back in 1997.

<sup>66</sup> Report of the Special Rapporteur on the question of torture, Theo van Boven, U.N. Doc. E/CN.4/2003/68, 17 December 2002, para 26.

<sup>67</sup> See Clark 1989, p. 69.

promoting human rights.<sup>68</sup> As to the latter, it was stated above that the U.N. Charter's general and vaguely formulated provisions, stipulating the organisation's concern with promoting human rights, were authoritatively defined in the UDHR. The United Nations Department of Public Information has held in this regard, that the rights as defined in the UDHR 'posit the right of the people of the world to enjoy domestic tranquility and security of person and property without the encroachment of criminal activity. At the same time, they predicate efficient criminal justice systems that do not deprive citizens of their rights'.<sup>69</sup> As such, both effective law enforcement and a humane criminal justice system fall within the United Nation's mandate in the area of criminal justice.

In its Resolution 415(V) of 1 December 1950, the General Assembly approved of the transfer of the functions of the International Penal and Penitentiary Commission to the U.N.<sup>70</sup> The General Assembly decided that the organisation would 'convene every five years an international congress similar to those previously organized by the IPPC'.<sup>71</sup> It further called for an international experts group to be set up to provide both the Secretary-General and the Social Commission of ECOSOC with assistance.<sup>72</sup> In 1971, the experts group, which had existed since 1965 as the Advisory Committee of Experts on the Prevention of Crime and the Treatment of Offenders, became the Committee on Crime Prevention and Control and, as such, a subsidiary organ of ECOSOC.<sup>73</sup> In 1991, the Committee was replaced by an intergovernmental commission.<sup>74</sup>

One of the main functions of the Committee and its predecessors was to prepare congresses and to set the congresses' agenda.<sup>75</sup> These U.N. congresses in the area of criminal justice have contributed significantly to the setting of international standards. In 1955, the First United Nations Congress adopted the United Nations

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<sup>68</sup> Van Zyl Smit and Snacken 2009, p. 6. See, further, Clark 1994, p. 7.

<sup>69</sup> Cited in Clark 1994, p. 11. See, also, *The United Nations and Crime Prevention*, United Nations, New York 1991, p. 11.

<sup>70</sup> U.N. G.A. resolution 415(V), of 1 December 1950, para 1. The U.N. did not wish to be directly affiliated with the IPPC, because of the latter's reputation being severely damaged due to both its 1935 congress, which was held in Berlin and was dominated by adherents to the Nazi movement, and the strong representation in the IPPC of fascist ideologies during the war years. See *The United Nations and Crime Prevention*, United Nations, New York 1991, p. 4.

<sup>71</sup> U.N. G.A. resolution 415(V), of 1 December 1950, Annex, sub d.

<sup>72</sup> *Id.*, sub a-b.

<sup>73</sup> Clark 1994, pp. 19–20.

<sup>74</sup> U.N. G.A. resolution 46/152 of 18 December 1991.

<sup>75</sup> Clark 1994, p. 23.

Standard Minimum Rules for the Treatment of Prisoners (SMR),<sup>76</sup> which were derived from standards developed three decades earlier by the International Penal and Penitentiary Commission and had been adopted, subject to some minor adjustments, by the League of Nations.<sup>77</sup> The Rules seek ‘to set out what is generally accepted as good principle and practice in the treatment of prisoners and the management of institutions’ and ‘represent (...) the minimum conditions which are accepted as suitable by the United Nations’.<sup>78</sup> In 1977, a Rule 95 was added to the SMR which aimed at extending the applicability of the rules to persons held without charge or conviction.<sup>79</sup> The congresses, which operated at some distance from national political concerns,<sup>80</sup> were the ideal platform for improving detainees’ and prisoners’ rights and the conditions of their detention.<sup>81</sup> The fact that the Committee on Crime Prevention and Control consisted of experts and that many participants of the congresses were experts, i.e. a mix of academics, members of the judiciary, government officials, rather than diplomats, has benefited both the realisation and the success of the standards adopted in this field.<sup>82</sup> As argued by Clark, ‘[t]he appeal to professionalism exists as a strong force permeating the standards’.<sup>83</sup>

The SMR contain a number of principles of detention practice as well as both substantive and procedural rights. From a strictly legal perspective, the instrument itself is not binding on States.<sup>84</sup> After being adopted by the congress, the SMR were in 1957 ‘approved’ by ECOSOC resolution 663 C (XXIV). The General Assembly in its resolution 2858 (XXVI) *invited* ‘the attention of Member States to the Standard Minimum Rules for the Treatment of Prisoners’ and *recommended* a ‘favourable consideration to be given to their incorporation in national

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<sup>76</sup> The SMR were unanimously adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and were approved by the Economic and Social Council by its resolutions 663 C (XXIV), of 31 July 1957 and 2076 (LXII), of 13 May 1977. See, for more details on the first congress, López-Rey 1956. See, for an extensive commentary on the adoption and drafting processes, Report by the Secretariat, Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders Geneva 1955, United Nations, U.N. Doc. A/CONF.6/C.1/L.1, 14 February 1955.

<sup>77</sup> League of Nations, resolution of 26 September 1934.

<sup>78</sup> Preliminary Observations, paras 1 and 3.

<sup>79</sup> ECOSOC resolution 2076 (LXII) of 13 May 1977.

<sup>80</sup> Bassiouni 1987, p. 516.

<sup>81</sup> See Bouloukos and Dammann 2001, p. 757. See also Viljoen 2005, p. 126.

<sup>82</sup> Clark 1994, p. 102. See, also, Bassiouni 1987, p. 516, and Report Prepared by the Secretariat, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August–3 September 1955, United Nations Department of Economic and Social Affairs, New York 1956, paras 3, 5.

<sup>83</sup> Clark 1995, p. 293.

<sup>84</sup> Hence the term ‘instrument’ as used here does not necessarily refer to *legal* instruments.

legislation'.<sup>85</sup> Such cautious phrasing together with the fact that the General Assembly and ECOSOC have no legislative (binding) powers under the U.N. Charter, support the categorisation of the document as non-binding, or as soft law. In Rule 2 it is even stated that '[i]n view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times'.

Since the SMR, as an instrument, must be considered as soft law, its discussion in this chapter is, strictly speaking, incorrect.<sup>86</sup> Nevertheless, some of the norms laid down in the SMR arguably reflect customary international law and may on that basis be binding on subjects of international law.<sup>87</sup> That norms in soft-law instruments may be an expression of existent customary law or may develop as such is evident from the widely shared view that most of the UDHR and the 1975 U.N. Declaration against Torture form a part of customary law. As to the SMR, a more plausible view is that some, but not all of its provisions either reflect norms that are part of customary international law or represent general principles of law.<sup>88</sup> One may also argue that some of the rules represent a translation of binding, but more general, U.N. Charter provisions,<sup>89</sup> and of the UDHR.<sup>90</sup> In order to determine which rules of the SMR reflect norms of customary international law, one has to take a close look at each individual rule and to determine the existence of both state practice and *opinio iuris*. In the first place, one may look to the norms and obligations constituting part of the customary law prohibition of torture and other cruel, inhuman or degrading treatment or punishment as reflected, for example, in the norm underlying Rule 31 of the SMR, which prohibits corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or

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<sup>85</sup> In most cases, the actual content of the standards adopted is not even reproduced in the resolution, which refers only in broad terms to the Rules' adoption by the congress.

<sup>86</sup> This, of course, also applies to reports by for instance the Special Rapporteur on Torture. Soft-law instruments *as such* do not fit into one of the categories of the customary norm underlying Article 38 of the ICJ Statute and may, therefore, be argued not to be formally governed by international law; see Schachter 1977, p. 300. See, for an opposing view, Hillgenberg, who argues that '[i]f the parties expressly or implicitly do not want a treaty, the provisions of the Vienna Convention do not apply. However, this does not necessarily mean that all non-treaty agreements only follow 'political' or moral rules. There is no provision of international law which prohibits such agreements as sources of law, unless—obviously—they violate *jus cogens*'; Hillgenberg 1999, p. 503.

<sup>87</sup> See Rodley and Pollard 2009, pp. 383–384. See, further, Clark 1994, p. 99, footnote 9. See, also, Kreß and Sluiter, *Imprisonment*, 2002a, p. 1769; and Clark, *Article 106*, 2008, p. 1663.

<sup>88</sup> Clark 1995, p. 300. It is important to note, in this respect, that universal practice is not required for a norm to be considered part of customary international law; Bernard 1994, p. 786.

<sup>89</sup> See Clark 1994, p. 142; Rodley and Pollard 2009, p. 384.

<sup>90</sup> The argument was made by in: Bassiouni 1985, p. 528. See, further, Clifford 1972, p. 234. Clifford states with respect to the SMR that '[t]hey have what I believe is a peculiar characteristic in that they are regulations without the ensuing mandate of a law, unless perhaps you consider the Declaration of Human Rights as providing that mandate'. See, also, Bernard 1994, p. 773.

degrading punishments.<sup>91</sup> Other norms in the SMR may also reflect or be developing into customary law.<sup>92</sup> The dissemination and affirmation of those norms in subsequent resolutions of the different U.N. organs,<sup>93</sup> by monitoring bodies and by regional and national courts may be used as evidence of State practice. The remaining Rules then, belong to the non-legal category of soft law, which is not to say that their obligatory character cannot be argued on moral or political grounds.<sup>94</sup> As held by Clifford '[t]hey are a conscience if nothing else and, in some parts of the world, they are much more than that'.<sup>95</sup> Determining which Rules of the SMR belong to which one of these categories is not an easy undertaking and is beyond the scope of this research. However, that the Rules may be differentiated on this basis is supported by the fact that on numerous occasions it has been suggested that the SMR be divided into two categories.<sup>96</sup> The first category would cover the fundamental rules which could find their way into a (binding) convention. The second category would consist of those Rules which should be regarded as being more of a guiding nature in the pursuit for a more progressive or liberal policy.<sup>97</sup> Whilst in 1990 the U.N. General Assembly recognised the usefulness of drafting a declaration on the human rights of prisoners,<sup>98</sup> in 2003 the U.N. Commission on Crime Prevention and Criminal Justice adopted a draft Charter of *Fundamental Rights of Prisoners*.<sup>99</sup> The latter starts with mentioning the right to

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<sup>91</sup> See, e.g., in respect of outlawing corporal punishment, the following HRC decisions: HRC, *Balkissoon Soogrim v. Trinidad and Tobago*, views of 8 April 1993, communication 362/1989, para 14; HRC, *Nicholas Henry v. Jamaica*, views of 20 October 1998, communication 610/1995, para 7.3; and HRC, *Silbert Daley v. Jamaica*, views of 31 July 1998, communication 750/1997, para 7.2. See, also, para C of the General Recommendations of the Special Rapporteur on Torture in U.N. Doc. E/CN.4/2003/68, para 26.

<sup>92</sup> See, in a similar vein, Clark 1994, pp. 142–143 and 300. It is recalled that it is not the aim of this research to discern all the international customary norms that govern detention conditions. Further, no methodology is advanced here for determining the content of these international norms.

<sup>93</sup> See, e.g., U.N. G.A. resolution 2858 (XXVI) of 20 December 1971; and U.N. G.A. resolution 3144 of 14 December 1973. See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits—Judgment, I.C.J. Reports 1986, p. 14, para 203.

<sup>94</sup> Clark 1994, p. 300.

<sup>95</sup> Clifford 1972, p. 234.

<sup>96</sup> See: Working paper prepared by the Secretariat, *The Standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field*, Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Kyoto, Japan, 17–26 August 1970, United Nations, U.N. Doc. A/CONF.43/3, New York 1970, para 37, where it is stated that the 'problem of a balance between the basic, unchangeable core of the Rules and the variable or more pliant sections of the document might be approached more effectively if the Rules were structurally divided into the two categories, fundamental and non-fundamental'.

<sup>97</sup> Clark 1994, p. 148.

<sup>98</sup> U.N. G.A. resolution 45/111 of 14 December 1990.

<sup>99</sup> See U.N. Doc. E/CN.15/2003/CRP.9 of 19 May 2003.

inherent dignity which, according to the text of the draft, includes both the prohibition of discrimination and the importance of respecting the religious beliefs and cultural precepts of a group to which a prisoner belongs. It further prescribes that '[a] prisoner must be treated by the prison system strictly in accordance with the conditions imposed in the prison sentence without further aggravating the suffering inherent in such a situation'.<sup>100</sup> Article 2 sets forth the right to be separated on the grounds of a person's sex, age, criminal record, the legal reason for his or her detention and necessities of treatment. In respect of remand detainees, the presumption of innocence is declared applicable, whilst such persons '*shall not be obliged* to be part of the treatment and rehabilitation programme in the juvenile justice administration or prison system'.<sup>101</sup> Other rights laid down in the draft are those to humane accommodation, decent food, health and medical care (without discrimination on the grounds of the prisoners' legal situation), legal consultation (which entails the right to communicate and consult with counsel and 'resort to the services of an interpreter to exercise this right effectively'), and the right to be 'promptly heard by a judicial or other authority with a power to review as appropriate the continuance of detention, including release pending trial'. Article 7 provides for the right to independent inspections and prescribes that the persons conducting such inspections should be 'appointed by, and responsible to a competent authority distinct from the authority in charge of the administration of the place of detention or imprisonment'. It further provides for the right 'to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment, subject to reasonable conditions to secure security and good order in such places'.<sup>102</sup> Finally, the draft Charter provides for the right to reintegration, which entails, within the limits of available resources, 'reasonable quantities of educational, cultural and informational material, including instructional material on exercising persons' rights', and the right to employment. The purpose of the latter right is to increase the confined persons' self-respect, facilitate their reintegration and enable them to financially support themselves and their families. A further aspect of detention life which falls under the right to reintegration is that of contact with the outside world. In this regard, the draft Charter prescribes that '[e]xisting barriers should be limited and contact with families, friends, and the general outside community should be encouraged and increased'.<sup>103</sup>

The norms in the draft Charter reflect or build upon those listed in the UDHR, the Beijing Rules, the Tokyo Rules, the ICCPR, the SMR, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>104</sup>

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<sup>100</sup> *Id.*, Annex sub I.

<sup>101</sup> *Id.*, Annex sub II. Emphasis added.

<sup>102</sup> *Id.*, Annex sub VII.

<sup>103</sup> *Id.*, Annex sub VIII.

<sup>104</sup> Adopted by the U.N. G. A. in resolution 43/173 of 9 December 1988.



and the Basic Principles for the Treatment of Prisoners.<sup>105</sup> Nevertheless, the draft Charter has not yet been adopted as a binding instrument.

ECOSOC has carried out various surveys on the implementation of the SMR, in order to ensure a greater degree of implementation by States. The low number of responses by national authorities to the questionnaires, however, renders the information received of less use for drawing general conclusions.<sup>106</sup> Further, it is questionable whether the information received from national governments adequately (and honestly) reflects State practice.<sup>107</sup> The General Assembly has repeatedly asked States to implement the SMR in their national legislation.<sup>108</sup> Since the 1960s, the U.N. has further focused on providing training and technical assistance and on the dissemination of the SMR. In 1984, ECOSOC approved the Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners.<sup>109</sup> The document contains 13 Procedures with commentaries. Procedure 1 calls on all States whose detention standards fall short of those defined in the SMR to adopt the Rules, whereas Procedure 2 stresses that the SMR must be embedded in national legislation and other regulations.<sup>110</sup> Although it permits domestic law to take into account existing laws and culture, it may not deviate 'from the spirit and purpose of the Rules'. Procedure 3 calls for making the rules available to persons responsible for their implementation, 'in particular law enforcement officials and correctional personnel'. Procedure 4 focuses on the information provided to detained persons, and prescribes that the SMR be made available and understandable to them, both upon admission and during confinement. Under Procedure 5, States are instructed to inform the U.N. Secretary-General on the implementation of the Rules and on possible difficulties affecting

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<sup>105</sup> Adopted by the U.N. G. A. in resolution 45/111 of 14 December 1990.

<sup>106</sup> The 1967 survey, for instance, generated 44 responses. In the 1974 survey 62 responses were registered; the 1980 survey got only 37 responses. In 1984 there were 62 responses, whereas to a 1989 survey, only 49 countries responded.

<sup>107</sup> See, in a similar vein, López-Rey 1985, p. 62.

<sup>108</sup> See, e.g., U.N. G.A. resolution 3144 of 14 December 1973, and U.N. G.A. resolution 2858 of 20 December 1971.

<sup>109</sup> ECOSOC res. 1984/47 of 25 May 1984. The Procedures were approved in ECOSOC resolution 1984/47 of 25 May 1984. The U.N. G.A. endorsed the Procedures in its resolution 39/118 of 14 December 1984. See, also, other U.N. General Assembly resolutions which stress the need for an advanced implementation of the SMR as, for instance, U.N. G.A. resolution 40/146 of 13 December 1985, paras 4–5, where it is held that the General Assembly considered 'with appreciation the recommendations made by the Seventh Congress with a view to ensuring more effective application of existing standards, in particular the Standard Minimum Rules for the Treatment of Prisoners (...)'. See, also, U.N. G.A. resolutions 2858 (XXVI) of 20 December 1971, 3144B (XXVIII) of 14 December 1973 and 3218 (XXIX) of 6 November 1973. See, further, Bassiouni 1985, pp. 525–539.

<sup>110</sup> The Commentary to Procedure 1 points to U.N. G.A. resolution 2858 (XXVI) of 20 December 1971, which already recommended member States to effectively implement the SMR and incorporate them in domestic law.



implementation every 5 years.<sup>111</sup> The Secretary-General then prepares periodic reports on the progress made, and may for this purpose seek the co-operation of specialised agencies and NGOs. Under Procedure 7, the Secretary-General is instructed to disseminate the SMR and the Procedures to all States as well as intergovernmental and non-governmental organisations, in as many languages as possible. The Secretary-General, under Procedure 8, is requested to do the same in respect of the periodic reports on the implementation of the Rules. Procedure 9 further instructs the Secretary-General to 'ensure the widest possible reference to and use of the text of the Standard Minimum Rules by the United Nations in all its relevant programmes, including technical cooperation activities'.<sup>112</sup> Other Procedures provide, *inter alia*, for assistance to States in implementing the SMR through development programmes by providing services of experts and interregional advisors, and for the (former) Committee on Crime Prevention and Control to continue to review the SMR. Nevertheless, there exists no legal obligation on States to co-operate with the implementation mechanism, which may explain why the system has generated only limited success.

Although the different congresses have constantly stressed the importance of implementation,<sup>113</sup> in light of the low number of reactions to the surveys held over the years, it is difficult to assess the SMR's success in terms of implementation in national legal systems. Of the States that did respond to the surveys, many have indicated that they had either adopted the Rules, or that their penitentiary legislation reflects the content or the spirit of the Rules.<sup>114</sup> Where States indicated non-

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<sup>111</sup> ECOSOC resolution 663c (XXIV) of 31 July 1957 recommended that such reporting on the implementation of the Rules to the U.N. Secretary-General be carried out every 5 years, and permitted the Secretary-General to draw up reports and seek additional information.

<sup>112</sup> In U.N. G.A. resolution 39/118 of 14 December 1984, the U.N. G.A. requested the Secretary-General to 'discharge fully his tasks in connection to the implementation' of the SMR, 'particularly with regard to procedures 7, 8, 9 and 10'. Article 98 of the U.N. Charter provides for the General Assembly's authority to entrust the Secretary-General with specific functions. See Sloan 1991, p. 19.

<sup>113</sup> See, e.g., Report of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cairo, Egypt, 29 April–8 May 1995, U.N. Doc. A/CONF.169/16, 12 May 1995, pp. 17–18.

<sup>114</sup> In the Report by the Secretariat, Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders Geneva 1955, United Nations, U.N. Doc. A/CONF.6/C.1/L.1, 14 February 1955, para 14, it is stated that '[a]lthough the Advisory Committee, at its meeting in 1953, considered the possibility of classifying the Minimum Rules, as adopted by the regional conferences, into several groups (...) the study carried out by the Secretariat has shown that such a classification is unnecessary, as there are very few instances, in fact, where substantial differences of a regional, geographical, cultural or administrative nature necessitate special provisions'. Debates during the drafting process on the term 'minimum' in the title of the draft, led to the conclusion that 'it is only financial difficulties (...) that still prevent certain countries from giving all the stipulated rules practical effect. No Government has raised any objections regarding the principle of their application', *id.*, p. 8. See, further, Report of the Secretary-General, Implementation of the United Nations Standards Minimum Rules for the Treatment of Prisoners, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August to 6

compliance with the SMR, the reasons provided were mainly grounded in a lack of resources,<sup>115</sup> whilst, in principle, agreeing on the Rules' universal applicability.<sup>116</sup>

The SMR have, however, been successful in other ways. International and regional monitoring bodies have referred to the Rules and used them as a yardstick in assessing whether a particular State violated a (binding) treaty obligation. This may give the Rules something of an 'indirectly binding character', at least for the State concerned whose practice is examined on the basis of the SMR. As noted by Rodley '[a]lthough not every rule may constitute a legal obligation, it is reasonably clear that the SMR can provide guidance in interpreting the general rule against cruel, inhuman, or degrading treatment or punishment'.<sup>117</sup>

Where a specific SMR Rule forms part of general international law, violating that Rule constitutes a breach of an international obligation. Where the specific Rule has not (yet) attained the status of international law, *gross* non-compliance with that Rule may reach the threshold level of inhuman or degrading treatment or punishment, particularly when accompanied with non-compliance with other SMR

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(Footnote 114 continued)

September 1985, U.N. Doc. A.CONF.121/15, 31 May 1985, paras 10, 11. See, also, Working paper prepared by the Secretariat, Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners, Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Caracas, Venezuela, 25 August-5 September 1980, U.N. Doc. A/CONF.87/11, 10 July 1980, paras 10, 52.

<sup>115</sup> See López-Rey 1985, p. 64. He states that '[g]enerally the factors preventing a satisfactory application of the fundamental rules are the increase of prison populations, which in most cases means overcrowding even in some developed countries; lack of financial means; shortage of trained personnel; and, although not specifically mentioned, political instability and the lack of interest of dictatorial regimes in improving institutional and non-institutional treatment'. See, also, Working paper prepared by the Secretariat, The Standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field, Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Kyoto, Japan, 17-26 August 1970, United Nations, New York 1970, U.N. Doc. A/CONF.43/3, para 55.

<sup>116</sup> Report of the Secretary-General, Implementation of the United Nations Standards Minimum Rules for the Treatment of Prisoners, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 26 August to 6 September 1985, U.N. Doc. A.CONF.121/15, 31 May 1985, paras 21-23, 27, 40, 46, 48-49, 56 and 60. In 'Working paper prepared by the Secretariat, The Standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field, Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Kyoto, Japan, 17-26 August 1970, United Nations, U.N. Doc. A/CONF.43/3, New York 1970, para 57', it is stated that the concern about relevance was something which derived from the self/critical attitudes of the people from the countries which had been represented in the drafting of the Rules, rather than from the several cultures which had been asked to consider their adoption without having had the opportunity to influence their drafting. The experts from all parts of the world do not appear to have felt that these Rules need fundamental re-orientation to take more effective account of cultural variations'. Moreover, it is stated in para 105 that the SMR 'have already established themselves as universal guidelines. Countries have accepted them, whether or not they are in a position to implement all the provisions fully'.

<sup>117</sup> Rodley and Pollard 2009, p. 383.

and when such gross non-compliance is of a longer duration.<sup>118</sup> Furthermore, it is easier to establish a violation of the customary norm underlying Article 10(1) ICCPR and Article 5 of the ACHR than it is to establish a breach of the prohibition of torture, due to high threshold that must be met before detention conditions may be said to qualify as such.<sup>119</sup>

As such, the SMR can provide valuable guidance when interpreting some of the more general rules of international law. To this end, the SMR have been used, for example, by the HRC. In its General Comment on Article 10, the Committee has stated that ‘States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (1982)’.<sup>120</sup> In addition, the HRC has, on a number of occasions, used the SMR for guidance to rule on alleged breaches of ICCPR provisions in concrete cases. Regarding Article 7 ICCPR, the Committee held in *Leon R. Rouse v. The Philippines* that ‘States parties are *under an obligation* to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 22 (2) of the Standard Minimum Rules for the Treatment of Prisoners’.<sup>121</sup> The Committee concluded from Mr. Rouse’s account, which was not contested by the Government of the Philippines, that during his imprisonment he had ‘suffered from severe pain due to aggravated kidney problems, and that he was not able to obtain proper medical treatment from the prison authorities’.<sup>122</sup> Because Mr. Rouse had to endure this suffering for a period of 2 years, the Committee found that he had been a victim of cruel and inhuman treatment in violation of Article 7 of the ICCPR.<sup>123</sup> In the case of *Safarmo Kurbanova*

<sup>118</sup> See, for the relevance of the duration of a practice, e.g., ECtHR, *Kostadinov v. Bulgaria*, judgment of 7 February 2008, Application No. 55712/00, para 56; ECtHR, *Kalashnikov v. Russia*, judgment of 15 July 2002, Application No. 47095/99, paras 95, 102; and ECtHR, *Kehayov v. Bulgaria*, judgment of 18 January 2005, Application No. 41035/98, para 64.

<sup>119</sup> Admittedly, it is not always self-evident from examining HRC cases why certain conditions of detention lead to violations of Article 10 instead of Article 7 and vice versa.

<sup>120</sup> HRC, General Comment 21, Article 10, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1994), of 10 April 1992, para 5.

<sup>121</sup> HRC, *Leon R. Rouse v. The Philippines*, Communication No. 1089/2002, U.N. Doc. CCPR/C/84/D/1089/2002 (2005), views of 25 July 2005, para 7.8. Emphasis added.

<sup>122</sup> *Ibid.*

<sup>123</sup> See, also, HRC, *Albert Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994), views of 21 July 1994, para 9.3, where the Committee stated in respect of an Article 7 violation that ‘certain minimum standards regarding the conditions of detention must be observed regardless of a State party’s level of development. These include, in accordance with Rules 10, 12, 17, 19 and 20 of the U.N. Standard Minimum

(on behalf of her son, *Abduali Ismatovich Kurbanov*) v. *Tajikistan*, Ms. Kurbanova had submitted a complaint on behalf of her son, who had been sentenced to death and was being detained in Tajikistan pending his execution when the HRC presented its views.<sup>124</sup> Apart from the allegation that he had been subjected to torture which would have made him confess a triple murder, the complaint dealt with the son's conditions of detention after his conviction. The Committee, in this regard, noted that '[t]he State party has not provided any explanations in response to the author's fairly detailed allegations of the author's son's condition of detention after conviction being in breach of article 10 of the Covenant. In the absence of any explanation from the State party, due weight must be given to the author's allegations according to which her son's cell has no water, is very cold in the winter and hot in the summer, has inadequate ventilation and is infested with insects, and that the author's son is allowed to leave his cell only for half an hour a day. *With reference to the United Nations Standard Minimum Rules for the Treatment of Prisoners, the Committee finds, that the conditions as described amount to a violation of article 10, paragraph 1, in respect of the author's son*'.<sup>125</sup> In *Fongum Gorji-Dinka v. Cameroon*, the HRC stressed, in relation to an established breach of Article 10(1), that 'persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners'.<sup>126</sup> It is apparent from these cases that the SMR are used as an interpretative tool in respect of the Convention's provisions.

The U.N. Special Rapporteur on Torture has, on a number of occasions, also promoted the implementation of the SMR and used the Rules to assess State practice. In 1989, with respect to Turkey, the Special Rapporteur recommended that '[t]raining programmes for law enforcement personnel should give high priority to the necessity of respecting basic human rights under all circumstances. In this context it may be recommended that the Code of Conduct for Law Enforcement Officials and the Standard Minimum Rules for the Treatment of Prisoners should be translated into Turkish and used as material in the teaching

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(Footnote 123 continued)

Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult' (footnote omitted).

<sup>124</sup> HRC, *Safarmo Kurbanova on behalf of her son, Abduali Ismatovich Kurbanov, v. Tajikistan*, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002 (2003), views of 6 November 2003.

<sup>125</sup> *Id.*, para 7.8. Emphasis added.

<sup>126</sup> HRC, *Fongum Gorji-Dinka v. Cameroon*, Communication 1134/2002, U.N. Doc. CCPR/C/83/D/1134/2002 (2005), views of 17 March 2005, para 5.2. The same remarks were made by the Committee in HRC, *Abdelhamid Benhadj v. Algeria*, Communication No. 1173/2003, U.N. Doc. CCPR/C/90/D/1173/2003, views of 20 July 2007, para 8.5.

programmes'.<sup>127</sup> In 1992, the Special Rapporteur stated that '[n]o member of the judiciary can be in doubt any longer as to the rights which a person in detention has under international law, and which consequently have to be ensured to him. The international community has formulated these standards in a number of highly important instruments, ranging from the United Nations Standard Minimum Rules for the Treatment of Prisoners approved by the Economic and Social Council in 1957 and 1977, to the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, approved by the General Assembly in 1988'.<sup>128</sup> In his 1999 Report to the U.N. General Assembly, the Special Rapporteur outlined the legal standards that guide him in his work: '[t]he Special Rapporteur is guided by international legal standards. The main substantive legal framework, as indicated by the Commission on Human Rights in its resolution 1999/32, consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Relevant provisions of other international human rights instruments such as (...) the Standard Minimum Rules for the Treatment of Prisoners [and] the Body of Principles for the Treatment of Prisoners, (...) are also taken into consideration by the Special Rapporteur'.<sup>129</sup> The Commission on Human Rights, when discussing the Special Rapporteur's mandate, has also made reference to the SMR.<sup>130</sup>

The SMR's relevance to the work of monitoring bodies is not surprising in view of the fact that the 1975 Declaration against Torture explicitly refers to the SMR in its definition of torture. The Declaration stipulates in Article 1(1) that the definition of torture 'does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners'.

Regional human rights courts, such as the ECtHR and the I-ACtHR, have also looked to the SMR for guidance.<sup>131</sup> It is noteworthy that the ECtHR has referred increasingly to the European Prison Rules (EPR), which duplicate and elaborate

<sup>127</sup> Report by the Special Rapporteur, Mr. P. Kooijmans, U.N. Doc. E/CN.4/1989/15, 23 January 1989, para 233 sub(g).

<sup>128</sup> See Report of the Special Rapporteur, Mr. P. Kooijmans, U.N. Doc. E/CN.4/1992/17, 27 December 1991, para 282. See, further, Report of the Special Rapporteur, Mr. Nigel S. Rodley, U.N. Doc. E/CN.4/1994/31, 6 January 1994, paras 23 and 172; Report of the Special Rapporteur, Mr. Nigel S. Rodley, U.N. Doc. E/CN.4/1995/34, 12 January 1995, para 926 sub (h); Report of the Special Rapporteur, Visit to Pakistan, Nigel S. Rodley, U.N. Doc. E/CN.4/1997/7/Add.2, 15 October 1996, paras 57, 72, 104; Report of the Special Rapporteur, Visit to Venezuela, Nigel S. Rodley, U.N. Doc. E/CN.4/1997/7/Add.3, 13 December 1996, para 85 sub(u); Report of the Special Rapporteur, Mr. Nigel S. Rodley, U.N. Doc. E/CN.4/1997/7, 10 January 1997, paras 8, 9; and E/CN.4/1998/38, para 201.

<sup>129</sup> U.N. Doc. A/54/426, para 8.

<sup>130</sup> See, e.g., U.N. Docs. E/CN.4/RES/1993/40; E/CN.4/RES/1994/37; E/CN.4/RES/1995/37; and E/CN.4/RES/1996/33.

upon the SMR. It has particularly done so after the EPR were modified in 2006. For example, in the case of *Ramirez Sanchez v. France*, the Court found ‘that the physical conditions in which the applicant was detained were proper and complied with the European Prison Rules adopted by the Committee of Ministers on 16 January 2006’ and, as such, that Article 3 had not been breached.<sup>132</sup> In other cases, such as *Ciorap v. Moldova* and *Pilčić v. Croatia*, the Court cited certain provisions of the EPR as ‘relevant non-Conventional material’, or as ‘Council of Europe sources’.<sup>133</sup>

In addition, the SMR have been applied or referred to by national courts. Presenting a full overview of national case law, however, is beyond the scope of this research. Nonetheless, it is worth noting here that the U.S. Supreme Court in *Estelle v. Gamble* referred to the SMR as ‘contemporary standards of decency’<sup>134</sup> and that Dutch courts and the *Raad voor Strafrechtstoepassing en Jeugdbescherming* (RSJ) (the appellate body in penitentiary complaints cases) have increasingly referred to the SMR and the EPR.<sup>135</sup>

<sup>131</sup> See, e.g., ECtHR, *Khudoyorov v. Russia*, judgment of 8 November 2005, Application No. 6847/02, para 97; ECtHR, *Dickson v. the United Kingdom*, judgment of 4 December 2007, Application No. 44362/04, para 30; ECtHR, *Mamedova v. Russia*, judgment of 1 June 2006, Application No. 7064/05, para 51. See, in respect of the I-ACtHR, e.g., I-ACtHR, *Juvenile Reeducation v. Paraguay*, judgment of 2 September 2004, para 154, footnote 156; I-ACtHR, *Caesar v. Trinidad and Tobago*, judgment of 11 March 2005, para 61 (the Court refers to the use made of the SMR by the U.N. Special Rapporteur on Torture); I-ACtHR, *Yvon Neptune v. Haiti*, judgment of 6 May 2008, para 131 (the Court refers to the use made of the SMR by the Committee Against Torture) and para 137 (the Court refers to findings by the Commission of non-compliance with the SMR); I-ACtHR, *Lori Berenson-Mejía v. Peru*, judgment of 25 November 2004, para 102, footnote 218; I-ACtHR, *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, judgment of 5 July 2006, para 94, footnote 153; I-ACtHR, *Raxcacó-Reyes v. Guatemala*, judgment of 15 September 2005, para 99; and I-ACtHR, *Boyce et al. v. Barbados*, judgment of 20 November 2007, para 88, footnote 84.

<sup>132</sup> ECtHR, *Ramirez Sanchez v. France*, judgment of 4 July 2006, Application No. 59450/00, para 130.

<sup>133</sup> ECtHR, *Ciorap v. Moldova*, judgment of 19 June 2007, Application No. 12066/02; ECtHR, *Pilčić v. Croatia*, judgment of 17 April 2008, Application No. 33138/06, para 24; ECtHR, *Kafkaris v. Cyprus*, judgment of 12 February 2008, Application No. 21906/04, para 73; ECtHR, *Istratii et al. v. Moldova*, judgment of 27 June 2007, Applications Nos. 8721/05, 8705/05 and 8742/05, para 31; ECtHR, *Renolde v. France*, judgment of 16 October 2008, Application No. 5608/05, paras 64–65.

<sup>134</sup> USA Supreme Court, *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>135</sup> See, e.g., RSJ, 08/1943/GA of 4 December 2008; RSJ, 08/1748/TA of 13 November 2008; RSJ, 07/3438/GB of 31 March 2008; RSJ, 07/1742/GA of 11 October 2007; RSJ, 06/3258/GA of 6 June 2007; RSJ, 07/0336/GB of 15 May 2007; RSJ, 06/3188/GB of 27 March 2007; RSJ, 06/3263/GB of 27 March 2007; RSJ, 06/3185/GB of 27 March 2007; RSJ, 06/3261/GB of 27 March 2007; RSJ, 07/0034/GB of 27 March 2007; RSJ, 06/3139/GB of 27 March 2007; RSJ, 06/3260/GB of 27 March 2007; RSJ, 06/2052/GA and 06/2053/GA of 8 January 2007; RSJ, 06/0698/GA of 22 August 2006; RSJ, 04/2401/GA of 16 December 2004; RSJ, 04/1375/GA of 19 November 2004; RSJ, 04/1406/GA of 19 November 2004; RSJ, 04/1397/GA of 19 October 2004; RSJ, 04/0976/SGA of 19 May 2004; RSJ, 03/2214/GA of 29 January 2004; RSJ, 03/2776/SGA of 11 December 2003; RSJ, 06/2052/GA and 06/2053/GA of 8 January 2007. See, further, District Court of The Hague, judgment of 14 August 2002, LJN: AE6513; District Court of The Hague, judgment of 11 December 2006, LJN: AZ4156; Dutch Supreme Court, judgment of 19 October



Finally, NGOs have often cited the SMR in their criticisms of State practice.<sup>136</sup> NGOs have, on the one hand, pushed for the development of standards in the field of crime prevention and the treatment of offenders and have greatly contributed to the standard-setting by the U.N. congresses<sup>137</sup> and, on the other, have used such standards to critically assess national practice.

Other soft-law instruments that were established in the context of the United Nations Crime Prevention and Criminal Justice Program and which are directly relevant to the treatment of detainees are, *inter alia*, the 1975 Torture Declaration,<sup>138</sup> the Model Agreement on the Transfer of Foreign Prisoners,<sup>139</sup> the Recommendations on the treatment of foreign prisoners,<sup>140</sup> the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>141</sup> the Basic Principles for the Treatment of Prisoners,<sup>142</sup> the United Nations Standard minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),<sup>143</sup> the United Nations Rules for the Protection of Juveniles Deprived of their Liberty,<sup>144</sup> the Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions,<sup>145</sup> the Declaration on the Elimination of Violence against Women,<sup>146</sup> the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,<sup>147</sup> the Code of Conduct for Law Enforcement Officials,<sup>148</sup> the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>149</sup> and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>150</sup>

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(Footnote 135 continued)

2007, LJN: BA8454; Dutch Supreme Court, judgment of 30 September 2008, LJN: BF3741; and Amsterdam Court of Appeal, judgment of 7 July 2000, LJN: AA8427.

<sup>136</sup> Clark 1989, p. 72.

<sup>137</sup> See Bassiouni 1987, p. 515. See, also, Treves 1990, p. 579.

<sup>138</sup> U.N. G.A. resolution 3452 (XXX) of 9 December 1975. See, also, López-Rey 1985, p. 13.

<sup>139</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and 'taken note of with appreciation' by the U.N. General Assembly in resolution 40/146 of 13 December 1985.

<sup>140</sup> *Ibid.*

<sup>141</sup> Adopted by the U.N. G.A. in resolution 43/173 of 9 December 1988.

<sup>142</sup> Adopted by the U.N. G.A. in resolution 45/111 of 14 December 1990.

<sup>143</sup> Adopted by the U.N. G.A. in resolution 40/33 of 29 November 1985.

<sup>144</sup> Adopted by the U.N. G.A. in resolution 45/113 of 14 December 1990.

<sup>145</sup> Recommended by ECOSOC in resolution 1989/65 of 24 May 1989.

<sup>146</sup> Adopted by the U.N. G.A. in resolution 48/104 of 20 December 1993.

<sup>147</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>148</sup> Approved by the U.N. G. A. in resolution 34/169 of 17 December 1979.

<sup>149</sup> Recommended by the U.N. G.A. in resolution 55/89 of 4 December 2000.

<sup>150</sup> Adopted by the U.N. G.A. in resolution 37/194 of 18 December 1982.

The Basic Principles for the Treatment of Prisoners were meant to outline the underlying values of the SMR, with the hope that their promulgation would encourage the implementation of the SMR.<sup>151</sup> As its first Principle, the document provides that ‘all prisoners shall be treated with the respect due to their inherent dignity and value as human beings’. Principle 2 prohibits discrimination on any basis, whereas Principle 3 states that it is ‘desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require’. Further, Principle 5 provides that ‘all prisoners shall retain the human rights and fundamental freedoms’ set out in the international Bill of Rights. Other Principles are concerned with, *inter alia*, the rehabilitation or resocialisation of prisoners, access to health services and the right to take part in education.

The text of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>152</sup> was prepared by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. Commission on Human Rights.<sup>153</sup> These Principles were concerned ‘not so much over the fate of persons charged with a criminal offence, who were already protected by many international instruments as over that of innocents who were picked up by the authorities and put away in safe houses all over the world’.<sup>154</sup> This is clear from the part of the document that states that ‘[t]hese principles apply for the protection of all persons under *any* form of detention or imprisonment’<sup>155</sup> and from the definition of the term ‘detainee’, which is very broad and includes ‘any person deprived of personal liberty except as a result of conviction for an offence’. Due to the wider scope of the Body of Principles as compared to the SMR, some of the former instrument’s norms offer a lower level of protection than the SMR does. In this respect, Treves points to the final report of the working group of the Sub-Commission, which stresses that whilst Principle 24 appears to offer a lower level of protection than Rule 24 of the SMR, this should not be interpreted as in any way modifying Rule 24.<sup>156</sup>

Finally, it is noted here that the remarks made above in relation to the binding quality of (the norms underlying some provisions of) the SMR also apply, in principle, to both the Body of Principles and the Basic Principles.

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<sup>151</sup> Clark 1994, p. 118.

<sup>152</sup> Adopted by the U.N. General Assembly in its resolution 43/173 of 9 December 1988.

<sup>153</sup> See, further, Treves 1990.

<sup>154</sup> Cited in Treves 1990, p. 580.

<sup>155</sup> Emphasis added.

<sup>156</sup> Cited in Treves 1990, p. 583.



## 2.3 Regional Developments<sup>157</sup>

### 2.3.1 General Developments

#### Europe

In addition to the international developments outlined above, prisoners' rights have increasingly found recognition and protection at the regional level. In the context of the Council of Europe, large numbers of (legally non-binding) recommendations have been adopted promulgating standards in the penitentiary field, including the European Prison Rules.<sup>158</sup> Such recommendations may be adopted on matters on which the Committee of Ministers has agreed a common policy.<sup>159</sup> In addition, a number of (binding) conventions have been adopted, including the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and the Convention on the Transfer of Sentenced Persons and its Additional Protocol.

The impetus for the advancement of prisoners' rights within the Council of Europe's Committee of Ministers and of its Parliamentary Assembly may (at least)

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<sup>157</sup> Developments in Asia are not further discussed here. The Asian region lacks a human rights convention as the ones adopted in other parts of the world and an accompanying monitoring body. The Association of Southeast Nations (ASEAN) did adopt a Charter in 2007 in which the promotion of human rights was stressed to be one of the Association's purposes (see the Preamble and the Articles 1(7), 2(2)(i)). Article 14 announces the establishment of an Asian Human Rights Body. The ASEAN Intergovernmental Commission on Human Rights (AICHR) was launched in 2009.

<sup>158</sup> See Resolution (62)2 on electoral, civil and social rights of prisoners; R(67)5 on research on prisoners considered from the individual angle and on the prison community; R(70)1 on the practical organization of measures for the supervision and after-care of conditionally sentenced or conditionally released offenders; R(79)14 concerning the application of the European Convention on the supervision of conditionally sentenced or conditionally released offenders; R(82)16 on prison leave; R(82)17 on the custody and treatment of dangerous prisoners; R(84)11 concerning information about the Convention on the Transfer of Sentenced Persons; R(84)12 concerning foreign prisoners; R(88)13 concerning the practical application of the Convention on the Transfer of Sentenced Persons; R(89)12 on education in prison; R(92)16 on the European rules on community sanctions and measures; R(92)18 concerning the practical application of the Convention on the Transfer of Sentenced Persons; R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including aids and related health problems in prison; R(97)12 on staff concerned with the implementation of sanctions and measures; R(98)7 concerning the ethical and organizational aspects of health care in prison; R(99)19 concerning mediation in penal matters; R(99)22 concerning prison overcrowding and prison population inflation; Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures; Rec(2003)22 concerning conditional release; Rec(2003)23 on the management of life-sentence and other long-term prisoners; Rec(2006)2 on the European Prison Rules; Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provisions of safeguards against abuse; Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures; CM/Rec (2010)01 on the Council of Europe Probation Rules.

<sup>159</sup> Article 15.b of the Statute of the Council of Europe, London, 5.V.1949.

partially be explained by the *judicial* bodies' initial reluctance to assess detention and prison conditions in member States on the basis of Article 3 ECHR.<sup>160</sup> Before the Court's 1975 judgment in *Golder v. the United Kingdom*, the Commission applied the inherent limitations doctrine, which held that deprivation of liberty automatically entailed a loss of rights, as a result of which prisoners were effectively excluded from the protection under the ECHR. In *Golder*, the Court rejected the inherent limitations doctrine and assessed the domestic restrictions on the applicant's right to correspondence against the general limitations clause of Article 8(2).<sup>161</sup> The Commission's and Court's initial reluctance led to an awareness that judicial intervention alone would not lead to the desired results.<sup>162</sup> As Livingstone observed in 2000, '[t]he Strasbourg institutions clearly start from the premise that Article 3 was not intended to find the inevitable deprivations resulting from everyday conditions of imprisonment as constituting inhuman or degrading treatment'.<sup>163</sup>

Since *Golder*,<sup>164</sup> the ECtHR has on countless occasions addressed the rights of incarcerated persons under different provisions of the Convention and, in doing so, has contributed significantly to the advancement of those persons' rights. Individuals may submit complaints to the Court pursuant to Article 34 ECHR. Inter-State complaints may be submitted pursuant to Article 33. It is important to note, however, that the Convention was not written with the specific context of incarceration in mind. As such, the Court has had to consider the rights of detainees and prisoners in the light of the more general provisions of the Convention. For example, in respect of the right to life under Article 2 of the Convention, the Court in the case of *Keenan v. the United Kingdom*<sup>165</sup> recalled that Article 2 not only entails the obligation on States to refrain from intentionally and unlawfully taking lives, but also 'to take appropriate steps to safeguard the lives of those within its jurisdiction', which 'extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.<sup>166</sup> In *Keenan*, which concerned the suicide of a mentally ill detainee while in detention, the Court found no fault on the part of the authorities under Article 2 since, in respect of suicide prevention, they had taken all reasonable measures that

<sup>160</sup> See, on the Court's initial reticence to examine detention conditions under Article 3, *inter alia*, Murdoch 2006, p. 46; Smaers 1994, p. 46, 55. Smaers states that the cause thereof may lie in the fact that established violations of Article 3 have serious repercussions for a State's prestige. See, further, Van Zyl Smit and Snacken 2009, p. 12.

<sup>161</sup> ECtHR, *Golder v. the United Kingdom*, judgment of 21 February 1975, Application No. 4451/70.

<sup>162</sup> Murdoch 2006, p. 31.

<sup>163</sup> Livingstone 2000, p. 314.

<sup>164</sup> See, also, Kelk 2004, p. 274.

<sup>165</sup> ECtHR, *Keenan v. The United Kingdom*, judgment of 3 April 2001, Application No. 27229/95.

<sup>166</sup> *Id.*, para 89.

could be expected from them in the specific circumstances. Nonetheless, it subsequently examined the standards of care under Article 3 and, after noting that ‘authorities are under an obligation to protect the health of persons deprived of liberty’,<sup>167</sup> it concluded that this provision had been violated. Among other things, the authorities had belatedly imposed a serious disciplinary punishment on a detainee, whose psychiatric disorders and suicidal inclinations were known to the authorities, a decision ‘which may well have threatened his physical and moral resistance’ and which was therefore ‘not compatible with the standard of treatment required in respect of a mentally ill person’.<sup>168</sup> In *Renolde v. France*, the ECtHR held that ‘Article 2 may imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual from another individual or, in particular circumstances, from himself’.<sup>169</sup> Moreover, in *Paul and Audrey Edwards v. the United Kingdom*, Article 2 was found to have been violated in a case involving violence between inmates, which resulted in the death of Mr. Christopher Edwards.<sup>170</sup> The victim’s parents appealed to the ECtHR which, in its judgment, noted the obligation resting on states to take measures to safeguard the lives of incarcerated individuals, particularly in light of the vulnerable position of such individuals.<sup>171</sup>

It has further been established by the Court that, in combination with Article 13’s right to an effective remedy, Article 2 obliges States to ensure that an effective and independent investigation is carried out into deaths occurring in detention.<sup>172</sup>

Furthermore, in *Ezeh and Connors v. the United Kingdom* the Court found that the notion of ‘criminal charge’ in Article 6 may well be applicable to prison disciplining, depending on the nature of the offence as well as the degree of severity and nature of the sanction imposed, i.e. the ‘Engel-criteria’ (which are not necessarily cumulative).<sup>173</sup> In the cases of *Whitfield and others v. the United Kingdom*<sup>174</sup> and *Young v. the United Kingdom*,<sup>175</sup> the Court likewise held that in the specific circumstances of those cases, the notion of ‘criminal charge’ applied to prison disciplining. In both cases, the Court found that there had been no ‘structural independence between those charged with the roles of prosecution and

<sup>167</sup> *Id.*, para 111.

<sup>168</sup> *Id.*, para 116.

<sup>169</sup> ECtHR, *Renolde v. France*, judgment of 16 October 2008, Application No. 5608/05, para 81.

<sup>170</sup> ECtHR, *Paul and Audrey Edwards v. The United Kingdom*, judgment of 14 March 2002, Application No. 46477/99.

<sup>171</sup> *Id.*, paras 54–56.

<sup>172</sup> See, e.g., ECtHR, *Bazorkina v. Russia*, judgment of 27 July 2006, Application No. 69481/01, para 161; ECtHR, *Baysayeva v. Russia*, judgment of 5 April 2007, Application No. 74237/01, para 155.

<sup>173</sup> ECtHR, *Ezeh and Connors v. the United Kingdom*, judgment of 9 October 2003, Applications nos. 39665/98 and 40086/98, para 86; ECtHR, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

<sup>174</sup> ECtHR, *Whitfield and others v. the United Kingdom*, judgment of 12 April 2005, Application nos. 46387/99, 48906/99, 57410/00 and 57419/00, paras 38–41.

<sup>175</sup> ECtHR, *Young v. the United Kingdom*, judgment of 16 January 2007, Application No. 60682/00.

adjudication' and therefore that 'doubts about the independence and impartiality of their adjudications were objectively justified, that their adjudications were consequently unfair and that there had been therefore a violation of Article 6'.<sup>176</sup> In both cases, the Court further found that the lack of legal representation in prison adjudication hearings amounted to a violation of Article 6.<sup>177</sup>

Breaches have also been found in respect of Article 8, regarding the right of confined persons to respect for their family and private life. In *Campbell v. the United Kingdom*, for example, the national authorities were found to have violated Article 8, because the custodial institution's authorities had read the detainee's correspondence with his solicitor despite the absence of a pressing social need.<sup>178</sup>

The European Social Charter (ESC) was adopted in 1961 by the Council of Europe and revised in 1996.<sup>179</sup> The Charter is meant to complement the classic rights in the ECHR by providing for economic and social rights, such as the right to work and to just, safe and healthy working conditions, the right to protection of health and the right of the family to social, legal and economic protection. The Charter established the European Committee of Social Rights, whose task it is (pursuant to Article 24, as revised by the 1991 Turin Protocol), to determine on the basis of States' reports whether member States' practice is in compliance with the Charter. The Committee may make recommendations to individual States and its conclusions are made public annually. Further, a 'collective complaints procedure' was provided for in an Additional Protocol which entered into force in 1996.<sup>180</sup> Certain trade and employers' organisations, NGOs ('which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee') and trade unions are permitted to lodge complaints (Article 1 of the Additional Protocol) with the Committee. Pursuant to Article 8 of the Additional Protocol, the Committee's report on the complaint must be forwarded to the parties and to the Committee of Ministers of the CoE and made public.

The reasons for adopting a European variant of prison standards following the adoption of the SMR were to boost the application of the norms contained in the SMR in Europe and to convey contemporary penal policy more accurately.<sup>181</sup>

<sup>176</sup> *Id.*, para 43; ECtHR, *Whitfield and others v. the United Kingdom*, judgment of 12 April 2005, Application nos. 46387/99, 48906/99, 57410/00 and 57419/00, para 46.

<sup>177</sup> ECtHR, *Young v. the United Kingdom*, judgment of 16 January 2007, Application No. 60682/00, para 43. ECtHR, *Whitfield and others v. the United Kingdom*, judgment of 12 April 2005, Application nos. 46387/99, 48906/99, 57410/00 and 57419/00, para 48.

<sup>178</sup> ECtHR, *Campbell v. The United Kingdom*, judgment of 25 March 1992, Application No. 13590/88, para 53.

<sup>179</sup> Council of Europe, European Treaty Series No. 035 of 18 October 1961, entry into force 26 February 1965; the ESC was revised by European Treaty Series No. 163 of 3 May 1996, entry into force 1 July 1999.

<sup>180</sup> Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, European Treaty Series No. 158 of 9 November 1995, entry into force 1 July 1998.

<sup>181</sup> Van Zyl Smit 2006, p. 110. See, also, Coyle 2006, p. 101.

The EPR were first adopted in 1973<sup>182</sup> and were revised in 1987<sup>183</sup> and, more recently, in 2006.<sup>184</sup> As such, compared to the U.N. standards, the EPR provide a more up-to-date vision on penal policy, reflecting the views and practice of the 47 member States of the Council of Europe.<sup>185</sup>

The drafters of the 2006 version of the Rules, as stipulated in their Preamble, took into account the views of the CPT and the recent case law of the ECtHR. The Preamble formulates the philosophy lying at the heart of the Rules as follows: “[s]tressing that the enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and discipline while also ensuring prison conditions which do not infringe human dignity and which offer meaningful occupational activities and treatment programmes to inmates, thus preparing them for their reintegration into society”. In this way, the EPR recognise the complex intertwining of (oftentimes opposed) values and objectives, which characterises the detention context. An extensive commentary by the Committee on the Rules provides further authoritative guidance on their interpretation.<sup>186</sup>

As noted earlier, the ECtHR has increasingly referred to the EPR in its case law, particularly since the new version of the EPR was adopted in 2006. Since the Court’s judgment is binding on the Member State that is party to the dispute, by applying and referring to the EPR, the Court heightens the status of these Rules. In this light, it becomes increasingly difficult to sustain the view that these Rules have no binding quality whatsoever on the member States of the Council of Europe.

In more recent years, the Parliamentary Assembly has pushed for the establishment of a European Prisons Charter which, unlike the EPR, would be binding on the signatories.<sup>187</sup> However, the idea appears to have lost momentum since the adoption of the revised EPR in 2006.<sup>188</sup> The Council of Europe’s European Committee on Crime Problems (CDPC) concluded in 2006 that at the time, ‘a

<sup>182</sup> CoE, Resolution (73)5, Standard Minimum Rules for the Treatment of Prisoners, adopted by the Committee of Ministers on 19 January 1973 at the 217th meeting of the Ministers’ Deputies.

<sup>183</sup> CoE, Recommendation (87)3, on the European Prison Rules, adopted by the Committee of Ministers on 12 February 1987 at the 404th meeting of the Ministers’ Deputies.

<sup>184</sup> CoE, Recommendation (2006)2, on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.

<sup>185</sup> See, e.g., Murdoch 2006, p. 15, who states that ‘these European steps are well in advance of international and other regional developments’. In 2011, the Council of Europe had 47 member States.

<sup>186</sup> CoE, Recommendation (2006)2, on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies.

<sup>187</sup> See CoE, Parliamentary Assembly Recommendation 1656 (2004), on the situation of European prisons and pre-trial detention centres, 9 June 2004.

<sup>188</sup> See De Jonge 2008, p. 571, who suggests that the member States look with a renewed interest at the proposal for a binding document, particularly in light of the European Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union (7307/05 COPEN 54, of 12 April 2005) which will lead to an increased transfer of sentenced prisoners to their country of origin in order for them to serve

binding European Prison Charter was not a feasible proposition'.<sup>189</sup> It was held that 'it would be difficult for the states to reach a consensus on more than a very limited number of legal rules which could have the result of impoverishing and stigmatising existing standards and could moreover lead to weakening the importance and the impact of the EPR on the work of the prison administrations in the member states and at the European level in general'.<sup>190</sup>

The Council of Europe's Commissioner for Human Rights is also worth mentioning in the current context. The Commissioner is mandated, *inter alia*, to promote the observance and enjoyment of human rights in the member States and to identify possible shortcomings in the law and practice of member States regarding their compliance with human rights.<sup>191</sup>

Growing concern for the treatment of detainees and their conditions of detention can also be discerned within the arena of the European Union, particularly in the European Parliament.<sup>192</sup> The European Union Charter of Fundamental Rights was signed and proclaimed in Nice in 2000 by the Presidents of the European Parliament, the Council and the Commission. Its Preamble provides that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice'. The Charter stipulates in Article 1 that '[h]uman dignity is inviolable' and 'must be respected and protected'. The Charter's first chapter entitled 'dignity' further provides for the right to life, to the integrity of the person, for the prohibition of torture and inhuman or degrading treatment or punishment and the prohibition of slavery and forced labour. The second chapter is dedicated to 'freedoms' and sets

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(Footnote 188 continued)

their sentence. A matter of concern, in this respect, is the diverging quality of conditions of detention and the treatment of confined persons in the various member States.

<sup>189</sup> CoE, 27th Conference of European Ministers of Justice, Report presented by the Secretary General of the Council of Europe, Follow-up to resolutions Nos. 1, 2, 3, 4 and 5, adopted in Helsinki at the 26th Conference of European Ministers of Justice, Yerevan (12–13 October 2006), MJU-27(2006)2, p. 21.

<sup>190</sup> *Ibid.*

<sup>191</sup> Instituted by CoE resolution (99)50, accepted by the Committee of Ministers on 7 May 1999.

<sup>192</sup> See, e.g., EU, European Parliament resolution of 26 May 1989 on women and children in prison; EU, European Parliament resolution of 18 January 1996 on poor conditions in prisons in the European Union; EU, European Parliament resolution of 17 December 1998 on prison conditions in the European Union: improvements and alternative penalties, A4-0369/98; EU, European Parliament recommendation to the Council of 9 March 2004 on the rights of prisoners in the European Union, 2003/2188(INI); EU, European Parliament legislative resolution on the initiative by the Republic of Austria, the Republic of Finland and the Kingdom of Sweden for adoption of a Council framework decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union (7307/2005–C6–0139/2005–2005/0805(CNS)), 15 May 2006; and EU, European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life, 2009/C 66 E/09.

forth, *inter alia*, the rights to liberty and security, private and family life, the protection of personal data, the right to marry and found a family, the right to education and to engage in work, as well as a number of freedoms including the freedom of thought, conscience and religion, expression, assembly and that of association. The third chapter, entitled 'equality', stresses such principles as, *inter alia*, equality before the law, non-discrimination and respect for cultural and religious diversities. It also provides for the equality between men and women, and stipulates that the E.U. is under a duty to respect the rights of children, elderly and persons with disabilities. The fourth chapter sets forth some more socio-economic rights, such as the right to fair and just working conditions, the family's right to legal, economic and social protection and the right to health care. In Chap. 5, a number of citizens' rights are listed, including the right to vote and to good administration, whilst chapter six concerns matters relating to 'justice' and provides for the rights to a fair trial and an effective remedy, and for the principles of *ne bis in idem*, proportionality of criminal punishments, *nullum crimen, nulla poena* and the presumption of innocence.

The principle of 'mutual recognition', which lies at the basis of instruments regarding co-operation in criminal matters within the E.U.,<sup>193</sup> presupposes a basic level of trust among the member States in each other's penal systems. The principle is also relevant to the penitentiary field.<sup>194</sup> In this respect, the European Parliament in 2004 adopted a recommendation on the rights of prisoners in which it recommended that the European Council would 'encourage, on the basis of a joint contribution subscribed to by all the EU Member States, the drafting of a European Prisons Charter covering all the Council of Europe's Member States', and 'declare that should this exercise not be completed in the near future, or should the outcome prove unsatisfactory, the European Union will draw up a Charter of the rights of persons deprived of their liberty which is binding on the Member States and which can be invoked before the Court of Justice'.<sup>195</sup> In its recommendation of 13 March 2008, on the particular situation of women in prison and

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<sup>193</sup> See, e.g., Article 82 of the Treaty on the Functioning of the European Union, which provides, as far as relevant, that '[j]udicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions'. See, further, Para 2 of the Preamble to the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA). See, also, Para 2 of the Preamble to the European Union and E.U. Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

<sup>194</sup> In a similar vein, see Van Zyl Smit 2006, p. 113. See, also, Van Zyl Smit 2005, p. 364. Bouloukos and Dammann state that the SMR 'have provided the basis for bilateral and multilateral co-operation'; see Bouloukos and Dammann 2001, p. 761.

<sup>195</sup> EU, European Parliament recommendation to the Council of 9 March 2004 on the rights of prisoners in the European Union, 2003/2188(INI), sub 1(b), 1(d).



the impact of the imprisonment of parents on social and family life, the European Parliament reiterated its call upon the Council and the Commission to adopt a Framework Decision on minimum standards to protect the rights of prisoners, and for these bodies to promote the EPR in order to further harmonise prison conditions in Europe.<sup>196</sup> In 2009, the European Parliament held that ‘to be fully effective, the mutual recognition principle largely depends on the creation of a common European judicial culture based on mutual trust, common principles, cooperation and a certain level of harmonisation—for instance, in the definition of certain crimes and in the sanctions—and by a genuine protection of fundamental rights, notably with regard to procedural rights, minimum standards for conditions and review of detention, prisoners’ rights and accessible mechanisms of redress for individuals’.<sup>197</sup> It recommended the Council to adopt, without delay, ‘measures to fix minimum standards for prison and detention conditions and a common set of prisoners’ rights in the EU, including, among others, the right of communication and consular assistance’.<sup>198</sup>

## The Americas

In respect of the Americas, various instruments and enforcement mechanisms are worth mentioning. In 1948, the Organization of American States adopted the American Declaration of the Rights and Duties of Man.<sup>199</sup> The Declaration starts by prescribing in Article 1 the right to life, liberty and security of the person. Other rights set forth in the Declaration include those of equality before the law, to protection of family life and one’s privacy, to establish a family, to the inviolability and transmission of correspondence, to the preservation of health and to well-being, to education and to a fair remuneration. Although not uncontroversial, the Declaration is nowadays generally considered to be binding on OAS member States.<sup>200</sup> The Declaration provides for a plethora of other rights that are relevant in the detention context, including, in particular, Article 25, which provides for the right to humane treatment of all persons deprived of their liberty. The American Convention on Human Rights (ACHR)<sup>201</sup> aims to protect such rights as the right to

<sup>196</sup> EU, European Parliament resolution of 13 March 2008 on the particular situation of women in prison and the impact of the imprisonment of parents on social and family life, 2009/C 66 E/09, para 2.

<sup>197</sup> EU, European Parliament recommendation of 7 May 2009 to the Council on development of an EU criminal justice area (2009/2012(INI)), P6\_TA(2009)0386, sub K.

<sup>198</sup> *Id.*, sub 1(a).

<sup>199</sup> Adopted by the Ninth International Conference of American States, Bogota, Colombia, 1948.

<sup>200</sup> See Cassel 2000, p. 397.

<sup>201</sup> Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, on 22 November 1969, entry into force on 18 July 1978.



life,<sup>202</sup> freedom of slavery,<sup>203</sup> personal liberty,<sup>204</sup> fair trial,<sup>205</sup> compensation,<sup>206</sup> privacy,<sup>207</sup> freedom of conscience and religion,<sup>208</sup> freedom of thought and expression,<sup>209</sup> freedom of association,<sup>210</sup> rights of the family<sup>211</sup> and to both equal<sup>212</sup> and judicial<sup>213</sup> protection. Of particular importance in the context of detention is Article 5, which provides for the right to humane treatment. Paragraph 2 of Article 5 states that '[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment'. It further provides that '[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person'. Paragraph 4 stipulates that '[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons'. Further, 5 deals with minors in prisons, whilst 6 outlines the philosophy that must underlie imprisonment by stipulating that '[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners'.

The Convention established the Inter-American Court of Human Rights (I-ACtHR).<sup>214</sup> The Inter-American Commission on Human Rights had already been established by the OAS Charter.<sup>215</sup> The Commission's functions are outlined in Article 41 of the Convention. These functions centre on 'promoting respect for and defense of human rights' and, more specifically, entail the tasks of, *inter alia*, developing awareness of human rights, making recommendations to member States, preparing studies and reports and responding to inquiries made by member States as to human rights issues. Pursuant to Articles 44–51, the Commission may receive petitions which contain 'denunciations or complaints of violation' of the ACHR from any group of persons and from nongovernmental entities. It may also receive communications from States containing allegations that another State has committed such violations, but only if States have declared to recognise the competence of the Commission to receive and examine such communications. The

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<sup>202</sup> Article 4.

<sup>203</sup> Article 6.

<sup>204</sup> Article 7.

<sup>205</sup> Article 8.

<sup>206</sup> Article 10.

<sup>207</sup> Article 11.

<sup>208</sup> Article 12.

<sup>209</sup> Article 13.

<sup>210</sup> Article 16.

<sup>211</sup> Article 17.

<sup>212</sup> Article 24.

<sup>213</sup> Article 25.

<sup>214</sup> See Part II of the Convention entitled 'Means of Protection'.

<sup>215</sup> Article 106 of the OAS Charter. The Charter was signed at the Ninth International Conference of American States of 30 April 1948, entered into force on 13 December 1951.

States parties and the Commission have the right to submit a case to the Court, once certain procedural requirements have been met. Member States may also consult the Court on the matter of interpreting the Convention's provisions.

The Additional Protocol to the Convention<sup>216</sup> obliges States parties to adopt the measures that are necessary to progressively achieve such (cultural, economic and social) rights as the right to work, social security, health and a healthy environment, food, education, the benefits of culture, the formation and protection of families, the protection of the elderly and the protection of the handicapped.

The Court has in many cases found detention conditions in member States to have fallen short of Article 5. For example, in the case of *López-Álvarez v. Honduras*, the Court held in relation to Article 5 that 'the restriction of the rights of the detainee, as a consequence of the deprivation of liberty or a collateral effect of it, must be rigorously limited; the restriction of a human right is only justified when it is absolutely necessary within the context of a democratic society'.<sup>217</sup> It recalled that 'international organizations for the protection of human rights have established that detainees have the right to live in conditions of imprisonment compatible with their personal dignity and that the State must guarantee them the right to personal integrity'.<sup>218</sup> It then held that the State is the 'guarantor of the rights of the detainees' and that it must offer them conditions of life compatible with their dignity.<sup>219</sup> The Court subsequently found that in the detention centres where Mr. Alfredo López Álvarez had been held, there was a 'situation of permanent overcrowding', that 'he had been held in a 'reduced cell, inhabited by numerous inmates', that he had had to 'sleep on the floor for a long period of time', and had not received 'an adequate diet or drinkable water, nor did he have essential hygiene conditions'.<sup>220</sup> The Court concluded that Mr. Alfredo López Álvarez had not been 'treated with the due respect to his human dignity, and that the State did not comply with the duties that correspond to it in its condition of guarantor of the rights of the detainees'.<sup>221</sup> Moreover, in respect of Article 5(4) of the Convention, the Court found that 'in the penitentiary centres where Mr. Alfredo López Álvarez was incarcerated there was no classification system for the detainees. For more than six years and four months during which he was deprived of his liberty, he remained in company of convicted inmates, without the State having invoked and proved the existence of exceptional circumstances'.<sup>222</sup> The

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<sup>216</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'), adopted at the Eighteenth Regular Session of the General Assembly of the Organization of American States on 17 November 1988, entry into force on 16 November 1999.

<sup>217</sup> I-ACtHR, *López-Álvarez v. Honduras*, judgment of 1 February 2006, para 104.

<sup>218</sup> *Id.*, para 105.

<sup>219</sup> *Id.*, para 106.

<sup>220</sup> *Id.*, para 108.

<sup>221</sup> *Id.*, para 110.

<sup>222</sup> *Id.*, para 112.

foregoing led the Court to conclude that Honduras had violated the Articles 5(1), 5(2) and 5(4) of the Convention.<sup>223</sup>

In the case of the “*Juvenile Reeducation Institute*” v. *Paraguay*, the Court held that ‘[t]he State has a special role to play as guarantor of the rights of those deprived of their freedom, as the prison authorities exercise heavy control or command over the persons in their custody’, and noted that ‘the inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity’.<sup>224</sup> It subsequently held that ‘[g]iven this unique relationship and interaction of subordination between an inmate and the State, the latter must undertake a number of special responsibilities and initiatives to ensure that persons deprived of their liberty have the conditions necessary to live with dignity and to enable them to enjoy those rights that may not be restricted under any circumstances or those whose restriction is not a necessary consequence of their deprivation of liberty and is, therefore, impermissible. Otherwise, deprivation of liberty would effectively strip the inmate of all his rights, which is unacceptable’.<sup>225</sup> More specifically in respect of the rights to privacy and family life, it noted that those rights are not absolute and may thus be restricted as a ‘consequence or collateral effect of the deprivation of liberty’.<sup>226</sup> However, it warned that, ‘[t]his restriction of rights (...) must be kept to an absolute minimum since, under international law, no restriction of a human right is justifiable in a democratic society unless necessary for the general welfare’.<sup>227</sup> The Court distinguished these from other rights, such as those to life, to a humane treatment, freedom of religion and the right to due process, on the basis of the fact that the latter group ‘cannot be restricted under any circumstances during internment, and any such restriction is prohibited by international law. Persons deprived of their liberty are entitled to have those rights respected and ensured just as those who are not so deprived’.<sup>228</sup>

Other regional conventions in the Americas relevant to the treatment and rights of incarcerated persons include the Inter-American Convention on the Forced Disappearance of Persons<sup>229</sup> and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.<sup>230</sup>

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<sup>223</sup> *Id.*, para 113.

<sup>224</sup> I-ACtHR, “*Juvenile Reeducation Institute*” v. *Paraguay*, judgment of 2 September 2004, para 152.

<sup>225</sup> *Id.*, para 153.

<sup>226</sup> *Id.*, para 154.

<sup>227</sup> *Id.*, para 154.

<sup>228</sup> *Id.*, para 155.

<sup>229</sup> Adopted at the twenty-fourth regular session of the General Assembly to the Organization of American States, Belem do Para, Brazil, on 9 June 1994, entry into force on 28 March 1996. See, also, the International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006; entry into force on 23 December 2010; U.N. Doc.A/61/488.

<sup>230</sup> Adopted at the twenty-fourth regular session of the General Assembly to the Organization of American States, Belem do Para, Brazil, on 9 June 1994, entry into force on 5 March 1995.

In 2008, the Inter-American Commission on Human Rights adopted the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.<sup>231</sup> In the instrument's Preamble, the Commission mentions the value of the notion of human dignity and of human rights more generally. It stresses that 'punishments consisting of deprivation of liberty shall have as an essential aim the reform, social readaptation and personal rehabilitation of those convicted; the reintegration into society and family life; as well as the protection of both the victims and society'. It further refers to other conventions and soft-law instruments relevant to the treatment of detained persons, including the SMR, the U.N. Body of Principles and the U.N. Basic Principles, and reaffirms in general terms the 'decisions and the jurisprudence of the Inter-American System of Human Rights'. The Principles and Best Practices consist of three sections, the first one of which is entitled 'General Principles'. It sets forth such basic values as those of humane treatment, non-discrimination, equality and due process. The second section is entitled 'Principles related to the Conditions of Deprivation of Liberty' and prescribes rules on, *inter alia*, admission procedures, health care, overcrowding, accommodation, work, education and separation of different categories of prisoners, and stipulates such prisoners' rights as those to work, education and contact with the outside world, as well as a number of freedoms (including those of conscience, religion, association and expression). The third section consists of 'Principles related to the Systems of Deprivation of Liberty' and addresses such issues as body searches, inspection of prisons, disciplinary punishment and the use of force.

## Africa

The African Charter on Human and Peoples' Rights (the Banjul Charter)<sup>232</sup> established the African Commission on Human and Peoples' Rights,<sup>233</sup> which may, *inter alia*, receive individual petitions and inter-State complaints. An African Court on Human and Peoples' Rights was established by the Protocol on the Establishment of an African Court on Human and Peoples' Rights (1998) and came into being in 2004, after the required number of States had ratified the Protocol. In June 2004, the member States decided to merge the Court with the African Court of Justice. Those permitted to submit cases to the Court are the Commission, State parties fulfilling the criteria listed in Article 5(b)–(d) of the Protocol and the African Intergovernmental Organization.

Like the ICCPR and the ACHR, the Banjul Charter provides for the right of every person to be treated with dignity. In this respect, Article 5 sets forth the right

<sup>231</sup> Approved by the Commission during its 131st regular period of sessions, held from March 3–14, 2008.

<sup>232</sup> African Charter on Human and Peoples' Rights (1981).

<sup>233</sup> See Article 30 of the Charter.

of ‘every individual to the respect of the dignity inherent in a human being’ and stipulates that ‘[a]ll forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited’. The Charter provides for a number of other rights such as the right to freedom of expression, liberty and security of the person, life, respect for the integrity of the person, health, education and the right to work.

In 1997, the Commission appointed a Special Rapporteur on Prisons and Conditions of Detention in Africa, whose task it is to visit and examine places of detention. In the past, the Special Rapporteur has undertaken visits to prisons in South Africa, Cameroon and Ethiopia and has published reports on these visits. In more recent years, however, the Special Rapporteur has been unable to undertake any visits due to resource constraints.<sup>234</sup> In his Report on prison conditions in South Africa, it was stipulated that the African Commission subscribes to the principles enunciated in the SMR.<sup>235</sup> In respect of the South African Correctional Services Act of 1998, the Special Rapporteur considered it significant that ‘the Act incorporates principles espoused by the all important Standard Minimum Rules for the Treatment of Prisoners and Kampala Declaration on Prison Conditions in Africa’.<sup>236</sup>

In September 1997, a pan-African conference was held in Kampala, Uganda, which led to the Kampala Declaration on Prison Conditions in Africa. The Declaration stipulates that ‘any person who is denied freedom has a right to human dignity’ and declares, *inter alia*, that ‘the human rights of prisoners should be safeguarded at all times’.<sup>237</sup> Similar instruments have been adopted by or on the initiative of the African Commission on Human and Peoples’ Rights, some of which refer to the SMR.<sup>238</sup>

## The Arab Region

In 2004, the League of Arab States adopted the Arab Charter on Human Rights, which entered into force in March 2008.<sup>239</sup> The original Charter had been adopted

<sup>234</sup> ACommHPR, 46th Inter-Session Activity Report on the Special Rapporteur on Prisons and Conditions of Detention in Africa, para 1. According to the Report, ‘[t]he one visit to Tunisia that had been planned was aborted due to lack of a response from the Tunisian authorities to the Commission’s request to undertake the mission’.

<sup>235</sup> Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, Mission to the Republic of South Africa, 14–30 June 2004, p. 63.

<sup>236</sup> *Id.*, p. 62.

<sup>237</sup> Article 1 of the Kampala Declaration.

<sup>238</sup> See, e.g., the Déclaration de Ouagadougou pour accélérer la réforme pénale et pénitentiaire en Afrique et Plan d’Action from 2002, which states that ‘[n]otant que ces standards africains ont été reconnus par les Nations Unies comme complémentaires de l’Ensemble de règles minima des Nations Unies pour le traitement des détenus’. See also Article 1 of the Resolution on Prisons in Africa, which was adopted at the 17th Ordinary Session, held from 13 to 22 March 1995 in Togo, and the Robben Island Guidelines.

<sup>239</sup> Arab Charter on Human Rights, adopted on 22 May 2004, entry into force on 15 March 2008.

by the League in 1994 but was not ratified by the member States, most probably due to widespread criticism of various NGOs that the Charter failed to adequately reflect international human rights law.<sup>240</sup> In 2002, the Council of the League called for a revision of the original Charter.<sup>241</sup> The Charter's Preamble reaffirms the Principles of the U.N. Charter and UDHR as well as the provisions of the ICCPR and ICESCR. It also refers to the Cairo Declaration on Human Rights in Islam. It further stipulates that the Charter is based 'on the faith of the Arab nation in the dignity of the human person (...)'. Whilst Article 3 provides for the principle of non-discrimination, Articles 11 and 12 state that all persons are equal before the law and before the courts. Article 8 contains the prohibition of 'torture or cruel, degrading, humiliating or inhuman treatment'. Its second paragraph provides that '[e]ach State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes that are punishable by law and not subject to any statute of limitations. Each State party shall guarantee in its legal system redress for any victim of torture and the right to rehabilitation and compensation'. Other provisions guarantee, *inter alia*, the right to a fair trial, liberty and security of the person, work, development, health, an adequate standard of living (including the right to a healthy environment), privacy, marriage, an effective remedy, as well as freedom of thought and religion and freedom of expression. Article 33(2) places on member States the duty to ensure 'the protection of the family' and 'the strengthening of family ties'. The principles of *nullum crimen* and *nulla poena*, the *presumptio innocentiae* and *ne bis in idem* are also provided for. Of particular relevance in the detention and prison context is Article 20 which provides that '1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. Persons in pre-trial detention shall be separated from convicted persons and shall be treated in a manner consistent with their status as unconvicted persons. 3. The aim of the penitentiary system shall be to reform prisoners and effect their social rehabilitation'. Article 45 establishes an Arab Human Rights Committee, which is competent to receive implementation reports submitted by member States (which are under a corresponding reporting duty), and to submit annual reports (which are made public) with comments and recommendations to the League's Council.

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<sup>240</sup> Rishmawi 2005, pp. 361–362.

<sup>241</sup> Some major points of critique are still valid. This concerns, for instance, Article 7(1) which provides that '[s]entence of death shall not be imposed on persons under 18 years of age, *unless otherwise stipulated in the laws in force at the time of the commission of the crime*'. Emphasis added. See, further, Rishmawi 2005, p. 376.

### 2.3.2 *The Prohibition of Torture and Other Inhuman and Degrading Treatment or Punishment*

#### Europe

The European Convention on Human Rights prohibits torture and inhuman or degrading treatment or punishment in Article 3. The ECtHR has on several occasions dealt with prison conditions and detainees' rights under this Article, notwithstanding its initial reticence to do so. In *Kalashnikov v. Russia*, for example, it stipulated that prison overcrowding may lead to a violation of Article 3.<sup>242</sup> In *Van der Ven v. The Netherlands*, the combination of routine strip-searching and other stringent security measures in a Dutch maximum security prison (the '*Extra Beveiligde Inrichting*' or '*EBI*') was found to be in breach of Article 3.<sup>243</sup> In the cases of *Soering v. UK*,<sup>244</sup> *Selmouni v. France*<sup>245</sup> and *Aksoy v. Turkey*,<sup>246</sup> the Court found certain forms of ill-treatment to be sufficiently egregious as to amount to torture under Article 3.<sup>247</sup>

In *G.B. v. Bulgaria*, the Court had to rule on the acceptability of a detention regime, which in practice amounted to solitary confinement. It noted that 'the applicant was subjected to a regime of detention which was very restrictive and involved very little human contact. During most of the period under consideration he was alone in his cell, where he spent almost twenty-three hours per day. He was not allowed to join other categories of prisoners for meals in the refectory or for other activities. Food was served in the cell. The applicant had the right to no more than two visits per month. For the applicant, human contacts were practically limited to conversations with fellow prisoners during the one-hour daily walk and occasional dealings with prison staff'.<sup>248</sup> According to the Court, the regime in question constituted a violation of Article 3.<sup>249</sup> It noted in this respect that, according to the CPT, 'all forms of solitary confinement without appropriate

<sup>242</sup> ECtHR, *Kalashnikov v. Russia*, judgment of 15 July 2002, Application No. 47095/99, paras 102–103.

<sup>243</sup> ECtHR, *Van der Ven v. The Netherlands*, judgment of 4 February 2003, Application No. 50901/99, para 63.

<sup>244</sup> ECtHR, *Soering v. The United Kingdom*, judgment of 11 July 1989, Application No. 14038/88.

<sup>245</sup> ECtHR, *Selmouni v. France*, judgment of 28 July 1999, Application No. 25803/94, para 105.

<sup>246</sup> ECtHR, *Aksoy v. Turkey*, judgment of 26 November 1996, Application No. 21987/93, para 64.

<sup>247</sup> In the case of *Soering v. The United Kingdom*, the Court considered that 'having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, [Mr. Soering's] extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3'; ECtHR, *Soering v. The United Kingdom*, judgment of 11 July 1989, Application No. 14038/88, para 111.

<sup>248</sup> ECtHR, *G.B. v. Bulgaria*, judgment of 11 March 2004, Application No. 42346/98, para 83.

<sup>249</sup> *Id.*, para 88.



mental and physical stimulation are likely, in the long term, to have damaging effects, resulting in deterioration of mental faculties and social abilities'.<sup>250</sup>

In *Hénaf v. France*, a violation of Article 3 was established on the grounds that the applicant, as a detained person, had been transferred to a hospital to undergo surgery and had been kept handcuffed and chained during his entire stay in the hospital without any demonstrable necessity for such stringent security measures.<sup>251</sup> The Court held that 'having regard to the applicant's age, his state of health, the absence of any previous conduct giving serious cause to fear that he represented a security risk, the prison governor's written instructions recommending normal and not heightened supervision and the fact that he was being admitted to hospital the day before an operation, the Court considers that the use of restraints was disproportionate to the needs of security, particularly as two police officers had been specially placed on guard outside the applicant's room'.<sup>252</sup>

According to the Court, torture has a 'special stigma' attached to it, as a result of which a high threshold of egregiousness of ill-treatment must first be reached before a violation of the provision can be established.<sup>253</sup> Nonetheless, it should be noted that the Court considers the Convention to be a 'living instrument', which implies that 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future'. The Court 'takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.<sup>254</sup>

Also relevant to the protection of confined persons in the European context is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which entered into force in 1989<sup>255</sup> and which established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).<sup>256</sup> The CPT is mandated to visit any place where persons are being deprived of their liberty, in order to examine the treatment afforded in such places, in a bid to *prevent* ill-treatment in the future. It is therefore not a judicial body and was not established to identify breaches of detainees' rights *ex post facto*. In this regard, the CPT has noted that 'the Commission and the Court have as their primary goal ascertaining whether breaches of the European Convention of Human Rights have occurred. By contrast, the CPT's

<sup>250</sup> *Id.*, para 84.

<sup>251</sup> ECtHR, *Hénaf v. France*, judgment of 27 November 2003, Application No. 65436/01, para 60.

<sup>252</sup> *Id.*, para 56.

<sup>253</sup> See, e.g., ECtHR, *Ireland v. The United Kingdom*, judgment of 18 January 1978, Application No. 5310/71, para 167; ECtHR, *Aktaş v. Turkey*, Judgment of 24 April 2003, Application No. 24351/94, para 266, and ECtHR, *Vladimir Romanov v. Russia*, judgment of 24 July 2008, Application No. 41461/02, para 69.

<sup>254</sup> ECtHR, *Selmouni v. France*, judgment of 28 July 1999, Application No. 25803/94, para 101.

<sup>255</sup> Adopted by the member States of the Council of Europe, Strasbourg, on 26 November 1987.

<sup>256</sup> See Article 1 of the Convention.

task is to prevent abuses, whether physical or mental, of persons deprived of their liberty from occurring; it has its eyes on the future rather than the past'.<sup>257</sup>

The CPT consists of a multidisciplinary team of experts, including lawyers and medical practitioners,<sup>258</sup> who speak with individual detainees during visits.<sup>259</sup> Unlike the ECtHR, the CPT is not bound to substantive treaty provisions,<sup>260</sup> which allows for a flexible, more 'evolutionary' approach. The Committee's reports, drawn up after each visit, are intended to form a basis for continuing dialogue between the Committee and the respective State. According to Peukert, '[t]he CPT differs from the ECHR with regard to its underlying purposes and methodology, and to the standards it seeks to uphold. Although the Preamble to the ECPT 'recalls' Article 3 of the ECHR, the text itself does not contain any substantive provision on the question of what constitutes torture or inhuman or degrading treatment. In consequence, when exercising its functions, the CPT can refer not only to the substantive norms contained in the ECHR, but also to other human rights instruments and their interpretation by the competent authorities'.<sup>261</sup>

The reports are, in principle, confidential, but many States have waived confidentiality, which has led to these reports being published on the CPT's website.

Notwithstanding the inevitably contextual approach in its country reports, the CPT has been able to develop a set of Standards through its General Reports. The CPT felt that it was necessary to develop its own more detailed set of standards, finding that existing case law and relevant instruments did not provide clear guidance.<sup>262</sup>

Accordingly, the CPT's norms have, generally speaking, been more detailed and thus more strict than the ECtHR's case law.<sup>263</sup> Nevertheless, in its recent case law, the Court has increasingly made use of the Standards developed by the CPT and has acknowledged such Standards to constitute "relevant provisions

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<sup>257</sup> CPT, First General Report on the CPT's activities covering the period November 1989 to December 1990, CPT/Inf (91) 3, 20 February 1991, para 6.

<sup>258</sup> Van Zyl Smit and Snacken recognise that, because of such a multidisciplinary composition, the Committee could 'tackle many different aspects linked to the deprivation of liberty'. They further state that 'insight into the interaction between the characteristics of detention and the risk of inhuman and degrading treatment is based on the extensive penological literature about the psychosocial effects of deprivation of liberty'; Van Zyl Smit and Snacken 2009, p. 17.

<sup>259</sup> See, for an insider's account, Cassese 1996.

<sup>260</sup> CPT, First General Report on the CPT's activities covering the period November 1989 to December 1990, CPT/Inf (91) 3, 20 February 1991, para 6.

<sup>261</sup> Peukert 1999, p. 86.

<sup>262</sup> CPT, First General Report on the CPT's activities covering the period November 1989 to December 1990, CPT/Inf (91) 3, 20 February 1991, para 95.

<sup>263</sup> Murdoch 2006, p. 45.

concerning conditions of detention”.<sup>264</sup> The CPT’s Standards are not static but continue to develop in accordance with contemporary views on penal policy and current best practices in the different States parties.<sup>265</sup> In the light of their ‘unfolding character’, referring to those Standards may very well confirm the ECHR’s status as a ‘living instrument’ which ‘must be interpreted in the light of present-day conditions’.<sup>266</sup>

In addition, the ECtHR has used the CPT’s factual findings in its country reports,<sup>267</sup> although such findings have not always been specific enough to be helpful to the Court. The CPT findings are of a general nature, whereas the Court must individualise a situation and take into consideration the particulars of the case, including the ‘physical and mental effects [of any ill-treatment] and, in some cases, the sex, age and state of health of the victim’.<sup>268</sup>

In 2000, the CPT concluded an agreement with the ICTY to monitor the places of post-transfer imprisonment in so-called ‘Designated States’,<sup>269</sup> which makes the CPT’s Standards particularly relevant to this research.<sup>270</sup>

In addition, an agreement was concluded between the CPT and the United Nations Interim Administration Mission in Kosovo (UNMIK), whereby the CPT

<sup>264</sup> ECtHR, *Brăgădăreanu v. Romania*, judgment of 6 December 2007, Application No. 22088/04, para 74; ECtHR, *Hummatov v. Azerbaijan*, judgment of 29 November 2007, Applications Nos. 9852/03 and 13413/04, para 76; ECtHR, *Mehmet Eren v. Turkey*, judgment of 14 October 2008, Application No. 32347/02, para 40; ECtHR, *Ismoilov et al. v. Russia*, judgment of 24 April 2008, Application No. 2947/06, para 100.

<sup>265</sup> Van Zyl Smit and Snacken 2009, p. 15.

<sup>266</sup> See, e.g., ECtHR, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Application No. 5856/72, para 31, where it is held that the Court ‘cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe’. See, also, ECtHR, *Christine Goodwin v. the United Kingdom*, judgment of 11 July 2002, Application No. 28957/95, para 75, and ECtHR, *Mamatkulov and Askarov v. Turkey*, judgment of 4 February 2005, Applications Nos. 46827/99 and 46951/99, para 121.

<sup>267</sup> See, e.g., ECtHR, *Ramirez Sanchez v. France*, judgment of 4 July 2006, Application No. 59450/00, para 130; ECtHR, *Ciorap v. Moldova*, judgment of 19 June 2007, Application No. 12066/02, para 47; ECtHR, *Yakovenko v. Ukraine*, judgment of 25 October 2007, Application No. 15825/06, paras 56–60; ECtHR, *Guliyev v. Russia*, judgment of 19 September 2008, Application No. 24650/02, para 27; ECtHR, *Hummatov v. Azerbaijan*, judgment of 29 November 2007, Application Nos. 9852/03 and 13413/04, para 77; ECtHR, *Mammadov (Jalaloglu) v. Azerbaijan*, judgment of 11 April 2007, Application No. 34445/04, para 38; ECtHR, *Brăgădăreanu v. Romania*, judgment of 6 December 2007, Application No. 22088/04, para 73.

<sup>268</sup> ECtHR, *Ireland v. the United Kingdom*, judgment of 18 January 1978, Application No. 5310/71, para 162; ECtHR, *Peers v. Greece*, judgment of 19 April 2001, Application No. 28524/95, para 67. See, for the original argument, Murdoch 2006, p. 51.

<sup>269</sup> See the CPT, 15th General Report on the CPT’s Activities, CPT/Inf (2005) 17, 22 September 2005, paras 14–15. See, further, *infra*, Chap. 7.

<sup>270</sup> Although the phase of post-transfer imprisonment falls outside the scope of this research, it would be difficult for the ICTY to sustain that its own UNDU premises do not need to comply with CPT Standards while it demands such compliance from States in respect of the enforcement of sentences.

was given access to places within Kosovo where persons are being detained by UNMIK.<sup>271</sup>

## The Americas

As stated above, the American Convention on Human Rights prohibits torture in Article 5(2). In addition, the I-ACtHR has found that egregious detention conditions and treatment of detainees may amount to torture or inhuman or degrading treatment or punishment. For example, in the case of *Tibi v. Ecuador*, the Court first found that ‘classic examples of torture’ had been inflicted on Mr. Daniel Tibi ‘with the aim of obtaining his self-incrimination’, such as ‘fist blows on the body and face, cigarette burns on his legs, and electrical discharges on his testicles’.<sup>272</sup> As to the question of whether the conditions of detention amounted to torture, the Court found that Mr. Tibi had been ‘threatened and suffered harassment during the period when he was detained, and this made him feel panic and fear for his life’,<sup>273</sup> which amounted to torture under Article 5 of the Convention. The Court subsequently discussed other conditions of detention which were held to be in breach of the prohibition of inhuman treatment in Article 5, stating that ‘Daniel Tibi was incarcerated in overcrowded and unhealthy conditions for 45 days, in a cell block of the Penitenciaría del Litoral known as “the quarantine”. He had to remain there all day, with insufficient light and ventilation, and he was not given food. Afterwards, he spent several weeks in the corridor of the cell block of said penitentiary, sleeping on the ground, until he was finally able to occupy a cell, by force (...). Once, he was confined to the undisciplined inmates pavilion, where other inmates attacked him (...). There was no classification of the inmates at the penitentiary center’.<sup>274</sup> The Court also noted that ‘despite his serious physical and psychological situation, Mr. Tibi never received adequate and timely medical treatment or care at the penitentiary, and this has had adverse effects on his current health conditions. The deficient medical care received by the alleged victim constitutes a violation of Article 5 of the American Convention’.<sup>275</sup>

In the case of *García-Asto and Ramírez-Rojas v. Peru*, the I-ACtHR recalled its earlier decisions in which it had decided that ‘detention conditions where prison facilities are overcrowded, inmates are subject to isolation in a small cell, with no ventilation or natural light, without beds for resting and without adequate hygiene, and suffering lack of communication or restrictions to visits, constitute a violation

<sup>271</sup> Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on Technical Arrangements related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 23 August 2004.

<sup>272</sup> I-ACtHR, *Tibi v. Ecuador*, judgment of 7 September 2004, para 148.

<sup>273</sup> *Id.*, para 149.

<sup>274</sup> *Id.*, paras 151–152.

<sup>275</sup> *Id.*, para 157.

to humane treatment’.<sup>276</sup> With respect to medical care, the Court held that ‘the State has the duty to provide detainees with regular medical examinations, assistance, and adequate treatment whenever required. In turn, the State must provide for detainees to be administered medical assistance by a medical doctor chosen by them or by their legal representatives or guardians’.<sup>277</sup> It further noted that ‘the injuries, pain or physical damage suffered by persons while deprived of their liberty may constitute a form of cruel treatment or punishment when, due to the detention conditions, there is a detriment of the physical, mental or moral integrity, which is strictly forbidden according to Article 5(2) of the Convention’.<sup>278</sup> It concluded that ‘the detention conditions imposed to Wilson García-Asto, as well as the lack of communication, the cell isolation regime, and the restriction of visits by their next of kin amounted to cruel, inhuman, and degrading treatment which derived in the violation of his physical, mental, and moral integrity’.<sup>279</sup>

Mention must also be made of the Inter-American Convention to Prevent and Punish Torture, which entered into force in 1987.<sup>280</sup> Its aims include both the prevention and punishment of torture.<sup>281</sup> Although the Convention pays less attention to other forms of ill-treatment, Article 7 provides that States parties shall ‘take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment’. Article 8 sets forth the obligation on States authorities to immediately start an investigation where allegations of torture have been made, or where there are well-grounded reasons to believe that an act of torture has been committed. Other provisions stipulate, *inter alia*, that victims of torture should be guaranteed suitable compensation under national law, that statements elicited by acts of torture must be excluded from evidence in criminal proceedings, and that States must establish jurisdiction over acts of torture, including jurisdiction *aut dedere aut iudicare*.

## Africa

The African Charter on Human and Peoples’ Rights prohibits torture in Article 5. Of particular interest also are the ‘Robben Island Guidelines’, adopted by the

<sup>276</sup> I-ACtHR, *García-Asto and Ramírez-Rojas v. Peru*, order of 25 November 2005, para 221, citing I-ACtHR, *Raxcacó-Reyes v. Guatemala*, judgment of 15 September 2005, para 95; I-ACtHR, *Fernán Ramírez v. Guatemala*, judgment of 20 June 2005, para 118; I-ACtHR, *Caesar v. Trinidad and Tobago*, judgment of 11 March 2005, para 96.

<sup>277</sup> I-ACtHR, *García-Asto and Ramírez-Rojas v. Peru*, order of 25 November 2005, para 227.

<sup>278</sup> *Id.*, paras 223, 233 and 235.

<sup>279</sup> *Id.*, para 229.

<sup>280</sup> Adopted on 9 December 1985 by the Organization of American States; entry into force on 28 February 1987.

<sup>281</sup> Articles 1 and 6.

African Commission on Human and Peoples' Rights in 2002.<sup>282</sup> The Guidelines promote the ratification by States of international and regional anti-torture instruments<sup>283</sup> and the States' co-operation with existing international mechanisms.<sup>284</sup> They also prescribe the criminalization of torture in domestic law,<sup>285</sup> as well as the establishment of complaints and investigation procedures.<sup>286</sup> Further, the Guidelines prescribe the adoption of rules designed to contribute to the prevention of torture, including such basic safeguards as the right of detainees to notify relatives of their detention immediately after admission, the right to an independent medical examination and the right to access to a lawyer.<sup>287</sup> Guideline 33 stipulates that States should '[t]ake steps to ensure that the treatment of all persons deprived of their liberty is in conformity with international standards guided by the UN Standard Minimum Rules for the Treatment of Prisoners'.<sup>288</sup> Finally, the instrument stresses the importance of establishing independent and impartial complaints and monitoring bodies.<sup>289</sup>

Further, as stated earlier, the Special Rapporteur on Prisons and Conditions of Detention in Africa is mandated to visit and examine places where people are being detained. He or she may make recommendations to improve conditions of detention and may, if necessary, propose that urgent action be taken.<sup>290</sup>

## 2.4 Conclusion

The purpose of this chapter was to provide an overview of the protection of detainees and prisoners under international law. The overview creates the context for the analyses and findings in the following chapters. The norms aimed at guaranteeing that the confinement of persons complies with minimum standards of decency, are reflected in general principles of law and in customary law, are scattered over a myriad of conventions and soft-law standards and are subject to interpretation by a multitude of monitoring bodies. The bindingness and legal

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<sup>282</sup> Adopted by the African Commission on Human and Peoples' Rights at its 32nd Ordinary Session, on 17 to 23 October 2002.

<sup>283</sup> Guideline 1.

<sup>284</sup> Guidelines 2–3.

<sup>285</sup> Guidelines 4–14.

<sup>286</sup> Guidelines 17–19.

<sup>287</sup> Guideline 20.

<sup>288</sup> Guideline 34 adds that States should also '[t]ake steps to improve conditions in places of detention which do not conform to international standards'.

<sup>289</sup> Guidelines 38–44.

<sup>290</sup> See, e.g., the Report on the visit to Cameroon from 2002, in which the Special Rapporteur noted the widespread allegations of 'inmate beating or torture', and stated as part of his general recommendations that these practices must cease; Report to the Government of the Republic of Cameroon on the visit of the Special Rapporteur on Prisons and Conditions of Detention in Africa From 2 to 15 September 2002, CHPR/37/OS/11/437.

relevance of the latter bodies' decisions or communications varies considerably. Such diffusion is not helpful when attempting to discern the relevant norms and their precise content. At the very least, it is incontestable that international law contains norms (some of which are binding) regarding the penal field, both prohibitions to engage in specific conduct and positive duties based on respect for detained persons' inherent dignity. This, then, rebuts the outdated idea that penitentiary norms are strictly tied to the domestic sphere. In this respect, it is noted that in the European context some scholars already speak of the existence of a 'European detention law'.<sup>291</sup>

The general obligations in human rights conventions have been interpreted by monitoring bodies. The more concrete soft-law instruments, which were adopted with the domestic detention and prison context in mind, may, to the extent that their norms do not already reflect customary law or general principles of law, serve to provide authoritative guidance when interpreting such obligations. Their usefulness is apparent from the practice of various monitoring bodies, which is set out above.

Moreover, both in the international and regional contexts, the adoption of legally binding instruments in the context of detention has been advocated.

Nonetheless, it must be recognised that the existing norms relate specifically to the domestic context. None of the instruments referred to above (apart from those drafted by the international criminal tribunals themselves) address the specific situation of internationally detained individuals. The question that arises, therefore, is whether the particularities of the international context warrant a different approach to that in the domestic context. More specifically, the question arises whether such particularities demand that additional efforts be made on the part of the detention authorities detaining such individuals, in order that they be able to enjoy their rights. First, though, it needs to be established whether the norms discussed in this chapter are binding on the international criminal tribunals.

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<sup>291</sup> De Jonge 2007, p. 282.