# Unwholesome Prison Blues: A Call to Protect International Prisoners' Rights and Standardise Conditions of Detention

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***Abstract***

With an ever-increasing focus on human rights to deal with violations and atrocities across the world, prisoners and their rights are left by the wayside too often. While deprivation of liberty is expected upon incarceration, prisoners are still entitled to certain basic and universal human rights. Despite this, and despite the international community having a set of standard rules, popular opinion and general vindictive behaviour sees prisoners being stripped of their basic human rights. Not only should these rights be afforded to them based on principles of justice, but if rehabilitation is to be rightly effected, then it is essential that standards for the treatment and conditions of detention of prisoners exist – and that these standards are enforced, and not just suggested. As such, a justice system which reacts to violations is inefficient, and the minimum standards in place, which are more like guidelines, need to be replaced by a proactive system and by mandatory international standards that can be effected in any State despite circumstance or resources. Such will result in a prison system that not only maintains and encourages the humanity in prisoners, allowing them to re-enter society, but also humanises society itself.

## INTRODUCTION

In the scope of human rights law, the Universal Declaration of Human Rights (UDHR) is the supreme authority.[1] Now in its 70th anniversary, it is perhaps more important than ever to ensure the promotion of human rights for all. The interest in, and discourse of, human rights has been growing exponentially, in particular since the fall of Nazi Germany, in an effort to avoid the atrocities committed during that era. However, it is apparent that,

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1 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) (hereafter UDHR) <https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> accessed 20 April 2018.

although human rights are intended for all people, not all people are given the equal protection thereof. Perhaps the most overlooked individuals in this regard are prisoners.[2] Secondary to the UDHR is an international set of rules and minimum standards, known as the Standard Minimum Rules (SMR) for the Treatment of Prisoners, drafted by the United Nations[3] (UN). The SMR is treated as a guideline, which provides – based on contemporary thought – the generally accepted good principles and practices for both the treatment of prisoners and prison management.[4] Although these rules are not mandatory, due to the legal, social, economic, and geographic context of States differing greatly, these rules are provided to stimulate on-going developments in terms of the treatment of prisoners, and also attempt to overcome the difficulties in their application.

These rules serve as the foundation for the conditions of detention for prisoners on the international level and while they do not prevent adaptation, experimentation, and development, their non-binding nature has resulted in their painfully lacklustre enforcement. While these rules form the basis for an international standard, it is essential considering their spirit and purport,[5] to forge a path towards the development of global enforcement, and to truly create a standard minimum across the board, despite the divergent contexts between States. Too often, the violations of prisoners' rights only come under inspection when an appeal manages to find its way to a court of justice. One thing that must be acknowledged is that when someone's liberty is justly deprived, this entails a moral and legal duty of care on the depriver, specific attention should be paid to the conditions of imprisonment.[6]

The constant violation of prisoners' rights globally calls for a need to evaluate the current international laws in effect; how they regulate the conditions of detention of prisoners, as well as the responsibility of States in terms of upholding and improving these standards. The stigma attached to incarceration exacerbates the issue of how prisoners are treated within prison and once they are released.[7] This is coupled with the apparent need for a harsher stance from politicians regarding prisoners. However, while being harsh towards inmates to 'rehabilitate' them is to an extent the popular opinion, studies reveal that harsher prison conditions increase recidivism and worse conditions do not dissuade individuals who have already been

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2 John Fliter, *Prisoners' Rights* (Greenwood Press 2001) xi.

3 UNGA Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela rules) RES 70/175 (8 Jan 2016) (hereafter SMR).

4 ibid, Preliminary Observation 1.

5 SMR (n 3) Preliminary Observations 1–4, Rule 1.

6 Thomas Hammarberg, *Human Rights in Europe: No Grounds for Complacency* (Council of Europe 2011) 242.

7 Kelly Moore, Jeffrey Stuewig and June Tangney, 'The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediational Model' (2016) 37 Deviant Behavior 2 196–218.

incarcerated.[8] The aim of this article, therefore, is to highlight and prove an obligation on the part of the international community, and individual States, to maintain and enforce a true minimum standard for conditions of detention.

More than 10.5 million people are in prison around the world – for perspective, that is more than the entire population of Portugal.[9] This number does not include the number of people on parole, and a country like the United States, for example, has a prison population that is almost 20 per cent of the global total. This 10.5 million is a sizeable portion of the global community in dire need of protection.

South Africa will be used as the initial point of analysis in this article, being a relatively young democracy with progressive human rights laws and attitudes. From a South African perspective, the Constitution of the Republic of South Africa, 1996[10] as one of the youngest constitutions in the world, provides a great level of protection for its people. The Constitution seeks to provide protection and a standard for all people, where there previously had been little for black people during apartheid. Aside from the entirety of Chapter II (the Bill of Rights),[11] the specific provision relevant to prisoners' conditions of detention is outlined in section 35.

In Canada, and many other countries, with the abolition of the death penalty, imprisonment has become the most severe form of punishment. While many aspects of the prison system have 'ebbed and flowed… some version of rehabilitation has never been far from the official agenda'.[12] Yet, during imprisonment, when events, incidents, or experiences that are excessively harsh, unjust, or severe are encountered by the prisoners, the integrity of the sentence is compromised, and the mandate to rehabilitate is brought into question. While the Canadian Charter of Rights and Freedoms 'guarantees the rights and freedoms set out in it',[13] there is a major problem facing Canadian inmates in the form of segregation. While deprivation of liberty is expected upon incarceration – considering *The Woolf Report* (which makes 12 recommendations for more humane conditions in prisons),[14] and notably the case of *Suave v Canada* – it was provided that segregation can be described as 'the most individually destructive,

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8 Francesco Drago, Roberto Galbiati and Pietro Vertova, 'Prison Conditions and Recidivism' (2011) 13 American Law and Economics Review 1, 107.

9 World Prison Brief, 'Highest to Lowest – Prison Population Total' (2018) <http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All> accessed 20 April 2018; Worldometers, 'Population by Country (2018)' <http://www.worldometers.info/world-population/population-by-country/> accessed 20 April 2018.

10 Constitution of the Republic of South Africa, 1996 (hereafter CRSA).

11 ibid Chapter 2 ('Bill of Rights').

12 Jayshree Ghedia, 'Prisoners: Rights, Rhetoric and Reality' (LLM Dissertation, University of British Columbia 2002).

13 Ghedia (n 12) 20; see also Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Douglas & McIntyre 2002) 44.

14 Ghedia (n 12) 43; see also Woolf Inquiry Report, *Prison Disturbances April 1990* Cmnd.1456 (1991) para 14.09.

psychologically crippling and socially alienating experience that could conceivably exist within…[a country]'.[15] It is therefore clear that the injustices facing prisoners are not limited to poor living arrangements, abuse, or health and safety concerns.

Norway is one of the few outliers when it comes to prisoners' rights and the effectiveness of the rehabilitative nature of prisons. Norway is reported to have the lowest recidivism rate, not only in Europe, but globally.[16] It should also be noted that Norway has a similar structure of law to South Africa. Due to the apparent success of Norwegian prisons, the low recidivism rate, and the similarity to a South African system of law, Norway and its approach to imprisonment and prisoners' rights will be used as a successful example and strong comparison later in this article.

Germany is another example of relative success and maintaining a high standard with regards to prisoners' rights. The Constitution of the Republic of South Africa, 1996 was influenced by the German Constitution, and as such makes comparison simpler. Further, Germany focuses on the reintegration of prisoners into society (using the term 'resocialisation' instead of the typical 'rehabilitation'),[17] through its treatment of prisoners and the conditions in which they are detained, the effect of which is evident in their low recidivism rate.[18] Germany will, therefore, be used as another successful example for comparison in this article.

America, as one of the most powerful countries in the world, as well as one that has enshrined human rights into their constitution, should serve as another good example. However, America has a disturbingly high recidivism rate and has a poor record of enforcing and protecting prisoners' rights.[19] Thus, America will serve as an example of the fact that State wealth is not necessarily a determining factor for adequate compliance with international guidelines.

Russia and a number of formerly Eastern Bloc countries (including Ukraine and Hungary) will be discussed in this article as a comparison against a number of Western European countries and the global standard as laid down by the SMR. Although the likes of Russia, Ukraine, and Hungary,

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15 Elihu Rosenblatt, *Criminal Injustice* (South End Press 1997) 98; Ghedia (n 12) 75; also see *Suavé v Canada* (*Chief Electoral Officer*) 2002 SCR 3 (Supreme Court of Canada) 151 para 63, and 243, for a detailed analysis of solitary confinement in Canada since the 1970s.

16 Seena Fazel and Achim Wolf, 'A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice' (2015) 10 PLoS One 6.

17 Jameelah Omar, 'A Prisoner's Right? The Legal Case for Rehabilitation' (2011) 37 South African Crime Quarterly 19–26.

18 Spiegel Online, 'Crime Study: One of Three Offenders is Relapsed' (14 February 2014) <http://www.spiegel.de/panorama/justiz/kriminalitaetsstudie-von-drei-straftaetern-wird-einer-rueckfaellig-a-953533.html> accessed 20 May 2018.

19 Mariel Alper, Matthew R Durose and Joshua Markman '2018 Update on Prisoner Recidivism: A 9-year Follow-up Period (2005–2014)' *Bureau of Justice Statistics* (23 May 2018).

are not part of the European Union ('EU'), they have assented to the jurisdiction of the Council of Europe.[20] Furthermore, these countries are also notorious when it comes to prisoners' rights and their conditions of detention, which will be discussed later in this article, thus serving as strong negative examples of compliance with international guidelines.

The first rule of the SMR states:[21]

> All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification. The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times.

This is the fundamental principle upon which the rules are based: further, this rule strongly embodies the principles laid out in the UDHR.[22] However, the rights of a prisoner are often violated or ignored. Therefore, we overlay the core question of this article with the fundamental principles of human rights. In short, this article aims to identify where the current systems protecting prisoners' rights fall short, and where these violations are of such a nature and extent that they impede human rights in general.

The core hypothesis in this article, which posits the generally fallible nature of the international standard, has been adequately developed in the above summary and introduction. In summary, our hypothesis proposes that without the current SMR achieving mandatory status, and this mandatory status being properly enforced at every level, the violations facing prisoners will continue and worsen. The current manner in which the international community, specifically the UN, has dealt with violations and development has been insufficient, and has thus resulted in an expanding void in the protection of prisoners' rights, and thus human rights as a whole. This hypothesis is built on several supplementary assumptions which deserve brief mentioning. First, while it is evident that international standards exist, it is assumable that the enforcement thereof is often enforced on a case-by-case basis, and when a violation is brought to a court's attention (despite evidence of continuous violations), its resolution is often left to the jaded attention of States themselves. Secondly, through an analysis of prison systems and prisoners' rights on municipal levels in countries across the globe, with a contextual emphasis placed on South Africa, it will be made clear that these violations are systemic of a lack of enforcement and an apparent apprehension to rehabilitate. Third, it can therefore be argued that

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20 Council of Europe, '47 Member States' (2018) <https://www.coe.int/en/web/portal/47-members-states> accessed 14 May 2018.

21 SMR (n 3) Rule 1.

22 UDHR (n 1) preamble.

the UN and other human rights organisations are found lacking in terms of their proper authority and intention to enforce and maintain global standards, – standards that are essential in fostering a holistically improved environment for detained prisoners at both the international and municipal level.

## BUILDING BLOCKS: HISTORY AND FOUNDATION

The idea that every person, by virtue of their humanity, has certain inherent and inalienable rights is a relatively young concept compared to the history of humanity. Yet, although it took World War II to fuel human rights development to the level it is today and to entrench it into the conscience of every State and citizen, the origins of human rights are far older. Most societies and cultures have had one form or another of what we now know as human rights, describing the rights and responsibilities of people. The Hindu Vedas, the Analects of Confucius, and even the Bible, all describe to an extent the rights and duties of people.[23] In legal terms, there are four major written texts which are the precursors to individual rights: The Magna Carta;[24] the English Bill of Rights;[25] the French Declaration on the Rights of Man and Citizen;[26] and the US Constitution and Bill of Rights.[27]

It is necessary to briefly discuss the philosophy that most effected the development of human rights and thus prisoners' rights. The first real jurisprudential approach ascribing moral standards to human behaviour – derives from natural law.[28] This approach sees the standards of human behaviour as deriving from the nature of the world, and thus the standards which govern people are from the rational nature inherent to humans. Aquinas most aptly provided that 'the rule and measure of human acts is the reason, which is the first principle of human acts'.[29] Thomas Aquinas is said to be the father of classical natural law theory, and it is this theory which strongly influenced the development and codification of human rights today. The 20th century saw the revival of natural law theory, understandably in the response to the human rights violations during the first half of that century. The idea is/was that, should humans, when creating laws, stray from incorporating the 'law of nature', then it is no longer law but a perversion thereof.[30] Thus, with the revival of natural law, the perversion of

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23 Nancy Flowers, 'A Short History of Human Rights' (1999) <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Default.htm> accessed 2 February 2018.

24 Magna Carta,1215.

25 English Bill of Rights, 1689.

26 Declaration of the Rights of Man and of the Citizen, 1789.

27 Constitution of the United States, 1789.

28 See, for a more in-depth discussion on the origins of natural law moral theory and natural law legal theory, Kenneth Himma 'Natural Law' *Internet Encyclopedia of Philosophy* <https://www.iep.utm.edu/natlaw/> accessed 9 April 2018.

29 Thomas Aquinas, *On Law, Morality, and Politics*, trans RJ Regan (Hackett Publishing 2003), 10–11.

30 Aquinas (n 29) 54.

law that allowed for the human rights violations had to be corrected, and a more morally-guided law created. In fact, it can justly be argued that 'human rights presuppose a natural law'.[31] It should seem evident that a strong core of human rights is essential to justice and the maintenance of humanity within our society.[32] The manifestation of this natural law approach is evident in the UDHR,[33] and the very essence of the new international society created by the Charter of the UN,[34] in that these rights and laws 'derive from the inherent dignity [and nature] of the human person'.[35] It has been highlighted that human rights are inherent and immutable by the 'virtue of being a "member of [the] human family" irrespective of any consideration', which is a clear implication of the same inherent rights applying to prisoners by virtue of their being a member of humanity.[36] It should be noted that prisoners are, therefore, 'not wholly denuded of their fundamental rights' and that certain rights, other than the obvious right to liberty, should not be curtailed unjustifiably or violated.[37]

It was only after the atrocities of World War II and Nazi Germany that the UN was created, and the UDHR was born.[38] The UDHR was adopted in 1948, by the then 56 member States of the UN, by unanimous vote.[39] This document, which assigns responsibility to the international community for how States govern their citizens, birthed a set of indivisible, inalienable, and interdependent rights, with its preamble stating:[40]

> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

It is important here to note that "all members of the human family" have these inherent rights, and it is from this principle that many other documents relating to the rights of human beings are based.

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31 Jean Porter, 'From Natural Law to Human Rights: Or, Why Rights Talk Matters' (1999-2000) 14 Journal of Law and Religion 1, 77–96.

32 Porter (n 31) 95–96.

33 UDHR (n 1).

34 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 (hereafter UNC).

35 Cited in *Regina v Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte, (No.3)*, [2000] 1 A.C. 147 (House of Lords).

36 Pooja Mishra, Megha Pradhan and Shashankshri Tripathi, 'Prisoner's Right: Evolving Jurisprudence' (2017) 3 International Journal of Legal Developments and Allied Issues 3, 73–81.

37 *Sunil Batra Etc vs Delhi Administration and Ors. Etc*, 1978 A.I.R. 1675 (Supreme Court of India).

38 UDHR (n 1).

39 Although 8 States did abstain from this vote.

40 UDHR (n 1).

Prisoners' rights are a natural development from the human rights doctrine, especially considering the many atrocities against those whose humanity was violated as prisoners during the war and in concentration camps. Prisoners' rights are governed by both international and domestic law. Some of the more important international conventions include the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[41] International Covenant on Civil and Political Rights,[42] and the UN's SMR.[43]

However, it is disconcerting that many (if not the majority) of countries in the world still follow a penal philosophy, which can be traced back to the Code of Hammurabi.[44] This document, dating from the 18th Century BCE, has a codified set of laws, specifically relevant for the modern attitude towards prisoners, the well-known maxim: 'If a man put out the eye of another man, his eye shall be put out' (an eye for an eye).[45] This archaic approach to justice, which determines guilt by whether or not an accused can float,[46] should have little to no bearing on human rights and justice today.

It goes without saying that prisoners are still human beings deserving human rights. However, due to the arguably essential deprivation of liberty that comes with imprisonment, it is necessary to re-establish what prisoners' specific rights are, as well as how to ensure that there are no violations of their rights, or any other limitation, other than what is essential to imprisonment. This is the crux of the need for development within the field of prisoners' rights. Aside from the deprivation of liberty, the human rights to which prisoners are entitled, and should be afforded, should not differ from those afforded any other human. Distinct protection and attention should be given to prisoners, such that the stigma attached to their status does not allow for, or encourage, the violation of their basic human rights. These specifically include the rights to life, human dignity, integrity of person, due process, health, etc.[47] While there are provisions for the

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41 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (entered into force 26 November 1987) (European Convention for the Prevention of Torture) ETS 126 (CPT).

42 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); UNHCR, *ICCPR International Covenant on Civil and Political Rights: Quick Reference Guide – Statelessness and Human Rights Treaties*, October 2016.

43 SMR (n 3).

44 *The Code of Hammurabi*, (trans LW King); Brandon Mathews, 'The Surprising Reason Our Correctional System Doesn't Work' (2017) <https://www.tedxmilehigh.com/speaker/brandon-w-mathews/> accessed 19 April 2018.

45 *The Code of Hammurabi* (n 44) Rule 196.

46 ibid Rule 2: 'If anyone bring an accusation against a man, and the accused go to the river and leap into the river, if he sink in the river his accuser shall take possession of his house.'

47 Penal Reform International, *Making Standards Work: An International Handbook on Good Prison Practice* (2 edn, Penal Reform International 2001) 5.

protection of prisoners' rights, and these have developed almost parallel to human rights, there appears to be an atrocious number of violations of prisoners' rights based solely on the fact they are prisoners. Thus, it can be argued that there is a need for further development and enforcement.

## Aim of Imprisonment: Rehabilitation or Punishment

Many penal strategies have been theorised and utilised. Broadly speaking, these can be categorised in two major governing principles: rehabilitation and punishment. While these principles are not mutually exclusive, and there is a requirement for balance, they are often conflicting in the search for justice. The need to balance the two in terms of fairness and justice is essential, as one without the other will cause the whole system to collapse, for it is 'the "precious balm" which will "break our head"'.[48] Rehabilitation, as a means of 'curing' the offender and allowing them to re-enter society without a criminal inclination, or at least a diminished inclination thereof, in the utilitarian sense, was historically justified not only in terms of societal and moral interests but also was 'legitimated as a productive investment' in terms of increased social utility.[49] Rehabilitation has seen many iterations and new evolutions of itself, while utilitarian rehabilitation can be seen as the more traditional interpretation; managerial rehabilitation and expressive rehabilitation both serve as alternate interpretations.[50] Managerial rehabilitation is a more risk-tolerant approach, and according to the contemporary model of 'offender management', this entails a tiered framework with four different approaches toward offenders; to 'punish', 'help', 'change', and 'control'. Yet 'change' is the only part therein that contains a rehabilitative element, and is only aimed at medium-high risk offenders.[51] Expressive rehabilitation, rather than having the goal of reducing crime or rehabilitating the offender into a better person, has the aim of communicating to the offender and society about the 'moral wrong inherent in the offender's actions'.[52] Generally, this form of rehabilitation is more focused on punishment, where the punishment serves to rehabilitate the individual's view on society and reprehensible or punishable acts. The rehabilitative approach can thus be defined as preparing a person, who has violated the law, to not repeat this action and to successfully re-enter

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48 Clive Staples Lewis, 'The Humanitarian Theory of Punishment' (1987) 13 Issues in Religion and Psychotherapy 1, 147–153.

49 Gwen Robinson 'Late-modern Rehabilitation: The Evolution of a Penal Strategy' (2008) 10 Punishment & Society 4, 429–445.

50 For a more in-depth discussion on these three categories of rehabilitation, see Robinson (n 49) 430–438.

51 Robinson (n 49); See also, for the official document: National Offender Management Service, 'The NOMS Offender Management Model' (2006) < https://www.swmcrc.co.uk/wp-content/uploads/2010/05/offender_management_model_1.pdf> accessed 06 July 2019.

52 Robinson (n 49) 435.

society.[53] This concept of rehabilitation, which emerged in the 20th century, encourages prisoners' rehabilitation for their own benefit, for the good of society, and for the reduction of recidivism.[54] Therefore, it is this simple definition which will be used in the argument of this article.

Punishment, as an aim of imprisonment, can be split into two main approaches, namely retribution and deterrence. Retribution, as a theory of punishment, can be traced as far back as the Code of Hammurabi,[55] and essentially equates to the principle of 'just desserts'. The goal of this approach is to punish the offender, generally to an equal degree of the offence. The concept of retribution could be argued to provide a victim with some solace. However, while victim participation in a retributive model can provide some insight and benefits,[56] it has often been shown that victim motivation is generally driven by vindication and revenge.[57] Despite this retributive approach, most forms of punishment regarding imprisonment purport to follow an approach aimed at deterrence.

The deterrence approach can be defined as discouraging further violations of the law through fear, and by being as harsh as possible on those who have been convicted. This is arguably the oldest approach to punishment – a system of retribution which requires an overly harsh sentence. At this point, it is necessary to highlight the fact that studies have shown that harsher sentencing and harsher prison conditions do not deter crime or recidivism, and that harsher conditions have actually been linked to an increase in recidivism.[58]

Most member States of the UN would appear to subscribe to a more human rights centric model, and should thus arguably favour rehabilitation. However, reality suggests otherwise, as increased reports of poor conditions and protections afforded to prisoners, coupled with high recidivism rates, are present in most countries.[59] Rehabilitation would thus appear to be neither the implemented, nor the favoured approach. In many instances, punishment is seen as the foundation of the criminal justice and prison systems, with rehabilitation and restoration often considered as an afterthought. This is a fundamental problem within a system that should be

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53 Zoran Kanduč, 'The Idea of Rehabilitation: A Criminological View' (1996) 4 Kriminolgija i Socijalna Intergacija 2, 149–156.

54 Robinson (n 49) 430.

55 *The Code of Hammurabi* (n 44).

56 David Starkweather, 'The Retributive Theory of "Just Desserts" and Victim Participation in Plea Bargaining' (1992) 67 Indiana Law Journal 3 853–878.

57 Lynne Henderson, 'The Wrongs of Victim's Rights' (1985) 37 Stanford Law Review 4 937–1021.

58 Drago (n 8); Keith Chen and Jesse Shapiro, 'Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach' (2007) 9 American Law and Economics Review 1 1–29.

59 Denis Yukhnenko, Shivpriya Sridhar and Seena Fazel, 'A Systematic Review of Criminal Recidivism Rates Worldwide: 3-year Update' (2019) 28 Wellcome Open Res 4.

aimed at justice as a core concept, rather than punishment. When rehabilitation is disregarded for a more punitive approach, not only is there a violation of prisoners' rights but, the chances of rehabilitation and reformation are severely diminished.[60]

## The South African Approach

Prisoners' rights in South Africa are enshrined in the Constitution and are provided for in other domestic legislation.[61] This inclusion of rights and protections for prisoners is understandable considering the context of apartheid; the atrocities committed generally and against political prisoners, the many wrongfully imprisoned, and severely mistreated victims of apartheid. The Constitution is founded on three core principles, namely human dignity, freedom and equality. However, for prisoners there is a 'huge gap… between the constitutional promise of… dignity and respect, and the actual lived reality of [prisoners]'.[62] The Constitution, as the supreme law of the land,[63] provides for many fundamental and socio-economic rights, and specifically provides that prisoners (and detainees) have the right to 'conditions of detention that are consistent with human dignity…'[64] While this protection is provided in section 35, and mandates a standard which does not infringe human dignity, the Constitution allows and provides for the creation of further legislation to more comprehensively prescribe and protect the rights contained within it.

Prisoners' rights are regulated in South Africa by a number of Acts.[65] Specifically relating to the treatment of adult prisoners, the most important Act is arguably the Correctional Services Act 111 of 1998.[66] It is specifically

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60 Saumas Miller, 'Retribution, Rehabilitation, and the Rights of Prisoners' (2009) 28 Criminal Justice Ethics 2.

61 Pertaining to the South African discourse on prisoners' rights is the globally controversial issue of privatisation of prisons, although this article is not focused on privatisation and the pros or cons of it versus public management, the following provide a more detailed discussion into such: Julia Sloth-Nielsen, 'Policy and Practice in South African Prisons: An update' (2005) 9 Law, Democracy & Development 1, 1–19; Julie Berg, 'Private Prisons: The International Debate and its Relation to South Africa' (2001) 14 Acta Criminologica 3, 2–12

62 Pierre De Vos, 'Prisoners' Rights Litigation in South Africa since 1994: A Critical Evaluation' (2005) 9 Law, Democracy & Development 1, 89–112.

63 CRSA (n 10) s 2.

64 ibid s 35(2)*(e)*.

65 Provision, or reference, is made for prisoners in Acts such as the Mental Health Care Act 17 of 2002, and the Criminal Procedure Act 51 of 1977. Specifically relating to juvenile offenders, provision is made in the Child Justice Act 75 of 2008. As this article focuses on adult prisoners, for further discussion on the rights relating to juvenile offenders and prisoners, see Julia Sloth-Nielsen and Jacqui Gallinett, '"Just Say Sorry?" Ubuntu, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008' (2011) 14 Potchefstroom Electronic Law Journal 4, 63–90.

66 Hereafter CSA.

provided therein that the entire purpose of the correctional system is to maintain and protect a just, peaceful and safe society by:[67]

> …
> *(b)* detaining all inmates in safe custody whilst ensuring their human dignity; and
> *(c)* promoting the social responsibility and development of all sentenced offenders.

Beyond the above, the Act, among other provisions, also stipulates that accommodation must be adequate for imprisonment while prescribing conditions for human dignity,[68] adequate nutrition,[69] hygiene,[70] and healthcare.[71]

By and large, overcrowding is the biggest threat in South Africa to prisoners' rights, specifically regarding their conditions of detention. The occupancy levels of South African prisons are at 136 per cent. This number of prisoners is the highest in Africa, despite South Africa only being the sixth most populated country in Africa.[72] In some cases, overcrowding is as high as 300 per cent, with understaffing at other facilities resulting in occupancy levels at 51 per cent.[73] While not all prisons in South Africa are operational, even if they were to be made so, the figures above suggest that the number of prisoners would still exceed the national prison system's total capacity. It is perhaps then unsurprising, despite the overarching Constitution and other legislative protection, that there are many problems which plague South African prisons and, by extension, prisoners' rights. The issue of overcrowding in South African prisons was declared unconstitutional in the landmark case between Sonke Gender Justice and Pollsmoor prison.[74] However, while the number of prisoners in South Africa has declined over the last decade,[75] and the factors resulting in high numbers of prisoners cannot be solved overnight, the issue of overcrowding can at the least be alleviated somewhat, especially considering the case brought by Sonke Gender Justice.

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67 CSA, s 2.
68 CSA, s 7.
69 CSA, s 8.
70 CSA, s 9.
71 CSA, s 12.
72 World Prison Brief (WPB), 'South Africa' (2018) <http://www.prisonstudies.org/country/south-africa> accessed 24 April 2018; Worldometers, 'African countries by population' (2018) <http://www.worldometers.info/population/countries-in-africa-by-population/> accessed 24 April 2018.
73 Civil Society Prison Reform Initiative, Just Detention International, Lawyers for Human Rights, and NICRO, *Thematic Report on Criminal Justice and Human Rights in South Africa*. (Geneva, March 2016) 4.
74 *Sonke Gender Justice v the Government of the Republic of South Africa and the Head of Pollsmoor Center Remand Detention Facility* (23 February 2017) WCC (24087/15).
75 WPB (n 72).

Overcrowding, which is a clear violation of international and domestic law, and a clear violation of human rights, is not the only issue facing prisons in South Africa and abroad. There are other issues which violate prisoners' rights and can lead to an increase in recidivism. These include poor health and the spread of infectious diseases (of which overcrowding can be a cause),[76] assault and torture, and segregation. Regarding health and disease, the Constitution does provide for healthcare specifically,[77] which also applies to prisoners. As indicated above, the CSA, along with other domestic and international legislation[78], makes provision for prisoners' wellbeing by classifying healthcare as an essential service to prisoners – one that is provided at the expense of the government. The *Lee* case held, and reinforced, that the state had a duty to take care of prisoners' health, with health services having to comply with a standard that upholds human dignity. *In casu*, Lee had contracted tuberculosis and held the Minister of Correctional Services liable for not implementing and maintaining measures required by law to lower or prevent the risk of disease in prison. The issue at hand was decided by the Constitutional Court (CC) on appeal, such that responsible authorities must provide adequate health care services to prisoners. The CC also found that the Pollsmoor authorities were reasonably aware of the health risks.[79] Notably, in upholding the appeal from the Supreme Court of Appeal (SCA), the CC highlighted the flexible nature intended for the test of factual causation,[80] specifically in the case of prisoners who would most likely struggle to overcome the challenges of causation and who have no effective alternate remedies available. Such a decision is a step forward for prisoners' rights and allows the possibility of better protection and enforcement thereof in future.

Assault and torture in prisons is another gross violation of prisoners' rights and while legislation was enacted relatively recently regarding the prevention of torture,[81] assault is among the most common of complaints reported to the Judicial Inspectorate for Correctional Services, with more than 6000 complaints for assault or torture, and more than 200 prisoners having died of unnatural causes (between 2007–2011).[82] These statistics have not decreased, but rather increased yearly. Between 2015 and 2018, there was a 29 per cent increase in assault complaints, and unnatural deaths

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76 See here the *Lee v Minister of Correctional Services* 2013 (1) SACR 213 (CC), the prison in question being Pollsmoor.

77 CRSA (n 10) s 27.

78 CSA (n 66) s 12 read with ss 6–10; National Health Act 61 of 2003, s 3; SMR (n 3) Rule 24.

79 *Lee* (n 75) para 43.

80 ibid.

81 Prevention and Combating of Torture of Persons Act 13 of 2013.

82 Malose Langa, Analysis of Existing Data on torture in South Africa – With Specific Focus on Annual Reports Published by IPID and JICS (The Centre for the Study of Violence and Reconciliation 2013).

had increased to almost 300 incidents between 2013 and 2018.[83] This increase over the last decade indicates that the current methods are failing, and that standards are not being maintained adequately.

The last major threat facing prisoners' rights is segregation, also known as isolation or solitary confinement. While segregation does not inherently violate prisoners' rights, it is commonly utilised as a means of torture, and can therefore been seen as a threat worth noting and curtailing.[84] The CSA does provide strict guidelines for when segregation is permissible and the requirements thereof,[85] yet as noted earlier, compliance with standards and requirements is a major concern. In a submission to the UN, it was poignantly noted that the provision of segregation was a 'guise' for solitary confinement, allowing for serious restriction of access to amenities, and extended periods of isolation which can be over the accepted duration.[86] The CSA allows for periods of segregation of up to 42 days,[87] and in maximum security prisons, solitary confinement is frequently utilised for extended periods. Despite the provisions in the CSA regarding segregation, violations are prevalent; a prime example of this is C-Max in Pretoria, where prisoners are locked in solitary for periods of six months or more, spending up to 23 hours a day without human contact.[88]

## International law

There are many sources in international law which govern the application and enforcement of prisoners' rights. The foremost of these are the SMR,[89] the International Covenant on Civil and Political Rights,[90] and the Convention on the Prevention of Torture,[91] which are all built on the foundation of the UDHR.[92] The SMR is, unfortunately, only a collection of guidelines, and while they set out the minimum suitable conditions accepted by the UN, they are only there to provide a model prison system.[93] However, they form the basis of prisoners' rights as we understand them today. The first rule of the SMR is frequently echoed in domestic legislation, stating that 'All prisoners shall be treated with the respect due to their inherent dignity and

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83 Johann van der Westhuizen, 'Annual Report: 2017/18 Financial Year' (The Judicial Inspectorate for Correctional Services 2018).

84 Langa (n 82) s 24.

85 CSA (n 66) s 30.

86 Thematic report on criminal justice and human rights (n 73) 25–27.

87 CSA (n 66) s 24(5)*(d)* read with s 24(5)*(b)–(c)*.

88 *Kruger v Minister of Correctional Services and Others* (7117/02) [2005] ZAGPHC 24; 'The Place Still Haunts Me' *Mail and Guardian* (15 Nov 2004) <https://mg.co.za/article/2004-11-15-the-place-still-haunts-me> accessed 1 May 2018.

89 SMR (n 3).

90 ICCPR (n 42).

91 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 4 February 1985, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

92 UDHR (n 1).

93 SMR (n 3) Preliminary observation 1.

value as human beings'.[94] Perhaps the most poignant rule regarding the conditions of detention of a prisoner can be seen in Rule 5 of the SMR which provides:[95]

> The prison regime should seek to minimise any differences between prison life and life at liberty that tend to lessen… the respect due to their dignity as human beings.

Rule 42 of the SMR provides that 'general living conditions… shall apply to all prisoners without exception'.[96] The reason these rules are so important to the treatment of prisoners and their conditions of detention, as discussed earlier, is that the harsher treatment of prisoners and poor conditions do not reduce recidivism and have been linked to the increased risk of criminal activities upon release. This should come as no shock then that, excluding the essential deprivation of liberty, should prison conditions mimic the conditions of liberty as close as possible, it would only serve to better the chances of prisoners being able to re-enter society. Without proper adherence to these guidelines, the resulting deplorable conditions will almost certainly result in human and prisoners' rights violations, which will in turn lead to a decrease in the effective rehabilitation of prisoners.

Rule 12 of the SMR specifically states that it is not desirable to have two prisoners in a cell or room.[97] This rule is particularly significant as, in the global context, overcrowding is one of the most pervasive issues violating prisoners' rights and their conditions of detention. A 2016 report by the UN revealed that there were 115 countries with occupancy capacities that measured above 100 per cent in their prisons.[98] As mentioned in the introduction, Norway and Germany are good examples of ensuring compliance with Rule 12. Notably then, both States have statistically lower recidivism and prison violence.[99] Only in cases were prisons make use of dormitories is it provided that multiple inmates may reside together, and even then, a careful selection is necessary.

Rules 13 to 35 provide for further conditions which must meet all requirements of health, hygiene, sanitation, healthcare and the like.[100] These general living conditions, without exception, must apply to every prisoner.[101] Solitary confinement is also prohibited for prolonged periods of time and

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94 SMR (n 3) Rule 1.
95 ibid Rule 5.
96 ibid Rule 42.
97 ibid Rule 12.
98 UN Office on Drugs and Crime, 'The Nelson Mandela Rules – Infographic' (2016) < https://www.un.org/en/events/mandeladay/assets/pdf/16-00403_Mandela_rules_infographic.pdf.> accessed 06 July 2019.
99 See (n 16) and (n 18).
100 SMR (n 3) Rules 13–17.
101 ibid Rule 42.

shall not exceed 15 consecutive days, nor be for longer periods than 22 hours a day without substantial human interaction.[102]

The International Covenant on Civil and Political Rights, which was adopted in 1966 and has been in force for almost 50 years, applies to all member states of the UN, and it is emphasised therein that these rights derive from the inherent dignity of human beings.[103] Article 7 provides that no person shall be subjected to 'torture or to cruel, inhuman or degrading treatment or punishment',[104] and the convention goes on to state that:[105]

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
> …
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation

The Convention Against Torture (CAT) has been in force since 1987 and is binding on all member States.[106] The CAT was developed alongside, and to give greater effect to, the UNC,[107] the UDHR,[108] and the Declaration on the Protection of All Persons from being subjected to Torture;[109] all granting greater protection to all people, including prisoners. The CAT defines torture as:[110]

> … any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining… a confession, punishing him for a [committed or suspected] act, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or [instigated by] … a public official or other person acting in an official capacity.

Article 2 prohibits any act of torture, under any circumstance – exceptional or otherwise – and provides that all member States must prevent any acts of torture.[111] It is further mandated that proper education and training must

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102 SMR (n 3) Rule 44.
103 ICCPR (n 42) Preamble.
104 ibid Article 7.
105 ibid Article 10.
106 CAT (n 91) Preamble.
107 UNC (n 34).
108 UDHR (n 1).
109 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 9 December 1975) UNGA RES/3452 (XXX).
110 CAT (n 91) Article 1.
111 ibid Article 2.

be executed for, among others, any persons involved in the treatment of any individual subjected to imprisonment.[112] It can be inferred from the above that poor conditions, and in some instances solitary confinement, could amount to torture.

Overarched by the UDHR, while the SMR are only guidelines, there are treaties, and specific provisions therein, which are binding on the conduct of States with regards to the treatment of prisoners and their conditions of detention. As such, the only logical method of complying with these provisions would be by following the rules contained in the SMR. Although, in general, the entire system of international law relies on voluntary acquiescence to international law, States tend to (for the most part) comply with international instruments like UDHR and CAT. Thus said, should the SMR be granted the same enforceable status as these binding international instruments, the pervasiveness of the violations of prisoners' rights would be diminished, and the requirements more strictly complied with.

## INSTITUTIONS DEALING WITH HUMAN AND PRISONERS' RIGHTS

Violations of prisoners' rights, like any legal matter, must be brought forward to a relevant and competent court. The first step in this process would normally be a national court. The role of courts in general is not to create law, but rather to give effect to national and international requirements. Human rights in general are best protected and promoted at the domestic level first:[113]

> The role of national Governments in the realization of human rights is particularly important. Human rights involve relationships among individuals, and between individuals and the State. Therefore, the practical task of protecting and promoting human rights is primarily a national one, for which each State must be responsible. At the national level, rights can be best protected through adequate legislation, an independent judiciary, the enactment and enforcement of individual safeguards and remedies, and the establishment of democratic institutions.

While the African Union (AU) has no treaty or convention specifically dealing with prisoners' rights, provisions are made by the AU for human rights matters which can (and should) be extended in the application of prisoners' rights. According to the African Charter on Human and People's

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[112] ibid Article 10.

[113] UNCHR 'National Institutions for the Promotion and Protection of Human Rights' (9 March 1993) UN Doc E/CN.4/RES/1993/55 (UN Fact sheet 19).

Rights (ACHPR),[114] national institutions must be established and remain independent for human rights matters:[115]

> State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

It should be further noted that a protocol to the ACHPR made provision for the creation of an African Court on Human and Peoples' Rights (African Court),[116] and the ACHPR established the African Commission on Human and People's Rights (African Commission).[117]

The American Convention on Human Rights[118] notably provides that punishment through imprisonment should be aimed at reform and rehabilitation of the prisoner.[119] This Convention further provides for the establishment of a commission for human rights,[120] and a court for human rights.[121] The Organization of American States also adopted the American Declaration of the Rights and Duties of Man,[122] which, among the rights to equality before the law and right to health and well-being,[123] also provides for a number of prisoners' rights; most importantly Article 25 which states that all persons deprived of their liberty have a right to humane treatment.[124]

The EU is – and so too are its constituent member States – bound to the treaties, conventions, or the like therefrom. The European Convention on Human Rights (ECHR) is the principle document governing human rights and binding Europe thereto.[125] The first Article therein mandates that the

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114 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (hereafter ACHPR).

115 ibid Article 26.

116 Organization of African Unity, 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' rights' (adopted 10 June 1998, entered into force 25 January 2004) (hereafter 'Protocol to the ACHPR').

117 ACHPR (n 114) Article 30, for a discourse on a new approach to human and fundamental rights, in an African context see John Mubangizi, 'Towards a New Approach to the Classification of Human Rights with Specific Reference to the African Context' (2004) 4 African Human Rights Law Journal 1, 93–107.

118 American Convention on Human Rights (Pact of San José) (entered into force 18 July 1978) OAS Treaty Series No 36 (1969) (hereafter IACHR).

119 IACHR (n 118) Article 5(1).

120 ibid Chapter 7.

121 ibid Chapter 8.

122 American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948).

123 ibid Articles II & XI.

124 ibid Article XXV.

125 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

States must secure and safeguard all rights and freedoms contained within the Convention to every person within their jurisdiction.[126] The ECHR infers that every prisoner has the right to challenge the conditions of his/her detention, which shall be decided effectively and efficiently by a court.[127] Further, the ECHR provides for the establishment of the European Court of Human Rights (ECtHR) to ensure adherence thereto.[128] It can be inferred that any prisoner claiming to have his fundamental rights violated by the conduct of a member State may approach the ECtHR, presuming all domestic legal remedies have been explored and exhausted.[129]

Human rights and prisoners' rights cannot solely be protected through legislation and administrative action, and as such, commissions are also required to be established.[130] It is these commissions and institutions which affect change on the ground, while the domestic and international legislation provide the rules and legal provisions. Thus stated, it is necessary for various establishments to implement the protection of human and prisoners' rights.[131]

Despite there being various reasons for the establishment of human rights institutions around the world, they all share several common objectives regardless of the State in which they are established, namely the protection of human rights and those characteristics and features that enable the efficacy of such institutions.[132] While there is no universal definition, the UN defines 'national human rights institutions' (NHRI) as 'bod[ies] whose functions are specifically defined in terms of the promotion and protection of human rights'.[133] NHRIs are administrative in nature, being that they serve no judicial or legislative role, and normally form a part of the executive government – although they are meant to maintain a certain level of independence, without which they would not be able to truly achieve their role.[134]

While the enforcement of human rights would primarily fall within the scope of responsibility of the judiciary, it is not within their directive to carry out activities for education or the like, nor is it normally within their mandate to investigate and resolve any violations or complaints thereof of

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126 ECHR (n 125) Article 1.

127 ibid Article 5(4) read with Article 17.

128 ibid Article 19.

129 ibid Article 34 read with Article 35.

130 For a more in-depth discussion on National Human Rights Institutions, particularly within Africa, see Waruguru Kaguongo, 'Prisoners' Rights: The Role of National Human Rights Institutions in Africa' (LLM Dissertation, University of Pretoria 2003).

131 Kaguongo (n 130) 35.

132 ibid.

133 United Nations, National Human Rights Institutions. A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights (1995) HR/P/PT4 (hereafter UN Handbook) para 36; UN Fact sheet 19 (n 113); Kaguongo (n 130) 35–37.

134 UN Fact sheet 19 (n 113); UN Handbook (n 133) para 39; Kaguongo (n 130).

their own enterprise.[135] A judiciary would also struggle where certain rights have not yet been expressly provided in the law, or where international law has yet to be ratified into domestic law, as there is therefore little redress for most courts. This will hold particularly true in countries where the judiciary is not given the mandate or discretion to consider foreign policies or international instruments.[136] However, there are some States whose laws, as is provided in the Constitution of the Republic of South Africa, 1996 which would allow a court to consider foreign or international policies and laws.[137]

In Africa, the establishment of NHRIs can be viewed as a genuine attempt at protecting and promoting human rights. For example, NHRIs have been established in Malawi and South Africa to provide for the transition from past injustices and human rights abuses, while other countries with poor human rights records, such as Nigeria and Cameroon, have NHRIs established due to international pressure.[138] In other instances, NHRIs have been essential in maintaining peace and have been included in peace agreements, such as in Sierra Leone and the *Commission Nationale des Droits de l'Homme* in Rwanda.[139]

The Principles Relating to the Status of National Institutions (the Paris Principles) set out certain guidelines for NHRIs. These include the recommendations that NHRIs should advise the government or other competent bodies on the drafting and enforcement of legislation, draw the attention of governments to violations, prepare national reports on the human rights situation domestically, and ensure that the domestic legislature of their incorporating states takes cognisance and ensure the harmonisation of international human rights law and practice.[140] Therefore, it is specifically within their recommended duties, and logically within their scope of application, to be wary and vigilant regarding prisoners' rights, specifically where an overlap exists with the human rights of prisoners.

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135 Kaguongo.

136 ibid Chapter 3.

137 Constitution of the Republic of South Africa, 1996 (n 10) s 35, which provides: '(3) Every accused person has a right to a fair trial, which includes the right— …*(l)* not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;' Further, s 39 provides that when interpreting the Bill of Rights consideration be paid to international and foreign law. Section 232 also provides for all customary international law to automatically bind the country, and s 233 provides for the favourable interpretation of domestic legislation in light of international law.

138 Kaguongo (n 130) 29.

139 Linda Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 Harvard Human Rights Journal 3, 13–14 and 58–59; Binaifer Nowrojee, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (Human Rights Watch 2001) 249; Kaguongo (n 130) 29.

140 UNCHR, 'National Institutions for the Promotion and Protection of Human Rights' (the Paris Principles) (1994) UN Doc E/CN.4/RES/1994/54, para 3.

## INTERNATIONAL JUDICIAL POWERS AND JURISDICTIONS

As mentioned above, monitoring and judicial bodies rarely have *mero motu* investigative powers, however, when an issue is brought to the attention of such a body, the situation changes. It is then within their scope to adjudicate the matter before them and, in such adjudication, an investigation is then conducted. The major benefit of this system, other than bringing justice against violations, is that through the course of the trial, the laws and guidelines are interpreted, developed, and amended.

In some systems where case law forms binding precedent (often through the principle of *stare decisis*), such as South Africa, the judicial interpretation and striking of unconstitutional laws, and the binding of these decisions upon lower bodies, is evidently beneficial to the sphere of human rights.[141] However, despite the evident benefits that such a system presents, the major issue with any violation of rights is who has jurisdiction to settle these matters, and when can a judicial or quasi-judicial body intervene to settle these matters.

As mentioned above regarding NHRIs, it is within their scope of application and often within their mandate, upon becoming aware of violations, to bring the matter to an able decision-making body. However, in many cases it is necessary for the victim of a violation to bring the matter forward themselves for a remedy to be effected. The first step in the process is following, and exhausting, the domestic and internal remedies of a State. This stands true with the principle of subsidiarity, which stipulates that the national courts must (respectively) have the first opportunity to contemplate and attend to the alleged violations. Therefore, in States where there exists a higher international body with jurisdiction,[142] it is necessary to go through the internal system, and only when a decision has been reached in the highest court, can the matter be referred to the relevant international court.

In the case of the ECtHR, it is necessary that human rights violations be pleaded and established in the first instance before the national courts. If the court finds that there was a violation, then no subsequent application need be made to the ECtHR. However, should the national courts dismiss that matter, the matter can then be referred to ECtHR in accordance with the provisions and admission criteria of the ECHR.[143] Should this procedure not be followed, and the ECtHR be approached directly, the applicant runs the risk of the court declaring the matter inadmissible. However, this depends on the domestic law and, occasionally, whether that point of law

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141 The Constitution of the Republic of South Africa (n 10) s 39(2) read with s 165.

142 An example of such would be the State members of the Council of Europe, who thusly consent to the higher jurisdiction of the ECtHR.

143 ECHR (n 125) Article 34 (Individual Applications) and Article 35 (Admissibility Criteria).

has already been dealt with by the highest domestic court.[144] A procedural issue worth noting here is the one regarding time limits. The ECtHR has a time limit of six months within which an application to it must be made following the final domestic decision – this will however be reduced to four months following the ratification of Protocol 15 by all Member States[145] – yet currently, each EU State differs with regards to their calculation of time limits,[146] such as in the case of multiple and non-consecutive periods of pre-trial detention.[147] This inconsistency, as noted in the *Idalov* case, can lead to procedural unfairness or unfair discrimination, and a further violation of prisoners' rights.

In the Inter-American Court of Human Rights (IACtHR) an individual cannot bring an application directly to the Court, unlike in the case of applications in the ECtHR.[148] Therefore, in the case of a violation of prisoners' rights (or human rights), an application by an individual should first be brought to the Inter-American Commission of Human Rights (IAC). Upon the IAC's decision, the matter will be referred to, and fall within the jurisdiction of the IACtHR for judgement.[149] Similar to the ECtHR, in order to approach the IAC it is necessary to meet certain criteria, including:[150] to exhaust all domestic remedies (in accordance with generally recognised principles of international law); and to approach the IAC within six-months of the final domestic judgement. The opinions and decisions of the IAC can, upon condonation by the IACtHR, be final and binding;[151] otherwise, if so decided by the IAC, the matter will be brought to the IACtHR for judgement.[152] It is peculiar to the IAC that the commission may *motu proprio* (without formal request from another party) initiate the processing of an issue subject to the same admissibility criteria.[153] The IAC has exercised this power since the provision, most notably so in the *Persons deprived of their liberty in the cells at the 76th Police Precinct in Niterói,*

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144 Council of Bars and Law Societies of Europe, *The European Court of Human Rights: Questions and Answers for Lawyers* (2018) <https://www.echr.coe.int/Documents/Q_A_Lawyers_Guide_ECHR_ENG.pdf> accessed 06 July 2019.

145 ECHR (n 125) Article 35(1); Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms (2013) 213 CETS.

146 ibid.

147 *Idalov v. Russia* [GC], no. 5826/03, (2012) (European Court of Human Rights).

148 IACHR (n 118) Article 61(1).

149 IACHR (n 118) Article 44.

150 ibid Article 46 (admissibility criteria) and Article 47 (inadmissibility criteria), also see Article 48 and 50 (referral to the IACtHR).

151 ibid Article 51.

152 Rules of Procedure of the Inter-American Court of Human Rights (approved during the LXXXV period of sessions, 16–28 November 2009) ('Rules of Procedure of IACtHR'), Article 35 (Filing of the case by the Commission).

153 Rules of Procedure of the Inter-American Commission of Human Rights, (entered into force 1 May 2001) ('Rules of Procedure of IAC'), Article 23 (Consideration *Motu Proprio*).

*Rio de Jenairo v Brazil*.[154] *In casu*, the IAC initiated the processing of their *motu proprio* powers in light of the violence and dangers the detained persons were exposed to,[155] insofar as these constituted human rights violations as recognised by the IACHR.[156] The case in question raised the concern that 'at least 390 individuals were living in degrading, cruel, vermin-infested, foul-smelling, dirty, hot conditions, all of which contributed to the proliferation of physical diseases and psychological disorders', which was inexcusable conditions to subject any person to.[157]

In the African Court, it is necessary that a state party or the Commission bring forth an application. However, according to the Protocol, the ACHPR does allow for individuals or NGOs to also bring forth an application directly.[158] However, as of February 2018, only eight of the thirty State Parties to the *Protocol to the ACHPR* had declaratorily recognised the competence of the African Court to entertain applications by NGOs or individuals.[159] This means that any prisoner facing a violation of a right, which constitutes a violation of a human right in terms of the ACHPR, would most likely have to approach the African Commission first.

## THE CURRENT STATUS-QUO

It is evident from the above discussion, that there is much need for improvement. While some countries (eg Belgium, USA, Ukraine, South Africa) have a low standard and level of enforcement of their prisoners' rights, there are other countries (eg Norway, Germany) that have a high standard. As such, the latter examples should be used as models on which global improvement can be based.

### High Standards – Germany and Norway

The concept of 'rehabilitation' is an important one, and while many countries use this term, Germany prefers the use of the term 'resocialisation'.[160] This recognises that the endeavour of imprisonment and rehabilitation is not to 'cure' the prisoner, but rather to mend the relationship of the offender with society and allow them to be able to reintegrate as a functioning member of society, thus reducing recidivism and the criminal element in its entire scope. As Germany has recognised this as an inherent characteristic of the law surrounding imprisonment, the State is forced to implement procedures

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154 *Persons Deprived of Liberty in the Cells at the 76th Police Precinct in Niterói, Rio de Janeiro v. Brazil,* Case 1113–06, Report No. 36/07, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007) (Inter-American Court of Human Rights), (*Rio de Janeiro v Brazil*).

155 *Rio de Janeiro v Brazil* (n 152) Section IV – Decision.

156 ibid Section I – Summary, para 1.

157 ibid Section III – Positions of the Parties, para 22.

158 *Protocol to the ACHPR* (n 116) Article 5(3).

159 The eight States which recognise the African Court's competence are: Benin; Burkina Faso; Côte d'Ivoire; Ghana; Mali; Malawi; Tanzania; and Republic of Tunisia.

160 Omar (n 17).

towards this. As such, German prisoners have the social and economic rights to State resources and focus aimed at resocialisation.[161]

This naturalistic approach towards prisoners' rights and conditions which Germany utilises, was confirmed by the German Federal Constitutional Court,[162] wherefrom it was stated that this concept is self-reflective of a society which places human dignity at the very core of its values. As such, a prisoner – even one sentenced to life-imprisonment – must be afforded the right to be prepared to reintegrate with society.[163] Thus, poor conditions and poor treatment of prisoners belie this principle.

While this judgement is evidence of a strong jurisprudential approach towards prisoners, Germany is a civil law system. Aside from the German Constitution, which puts human dignity at its core as inviolable and inalienable to all people,[164] their Prison Act makes provision that life during imprisonment should be as close as possible to general living conditions, so as to allow for reintegration.[165]

The prison population in Germany is only 78 in 100 000, and while prison capacity is near full, overcrowding is not a major issue, and the prison population has been on the decline for the last two decades.[166] There are numerous reports on the German prisons, with some notable ones conducted by the US Department of State. [167] The majority of reports show that while there may be issues, the conditions of detention for German prisoners generally meet international standards.[168] While comparing recidivism rates internationally can be complicated, Germany (with figures that take both incarceration and conviction into account) has a recidivism rate of around 35 per cent, which is quantifiable evidence of a system which is seemingly superior to other countries' approaches.[169]

Another country worth noting in this article, which offers a high standard for comparison, is Norway. Norway, which has one of the lowest recidivism rates in Europe and globally at around 20 per cent,[170] is often said to have

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161 Liora Lazarus, Contrasting Prisoners' Rights: A Comparative Examination of England and Germany (Oxford University Press 2004) 193.

162 Lazarus (n 161) 42.

163 45 BVerfGE 187 (1977) (German Federal Constitutional Court).

164 Germany: Basic Law for the Federal Republic of Germany, 23 May 1949, Article 1.

165 Germany: Act Concerning the Execution of Prison Sentences and Measures of Rehabilitation and Prevention Involving Deprivation of Liberty (Prison Act), 16 March 1976, Article 3.

166 World Prison Brief, 'Germany' (2018) <http://www.prisonstudies.org/country/germany> accessed 26 April 2018.

167 See the following for access to some of these reports: https://www.state.gov/documents/organization/160190.pdf; and https://www.state.gov/documents/organization/236740.pdf, accessed 13 May 2018.

168 Ram Subramanian and Alison Shames, 'Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States (Vera Institute of Justice, October 2013' (2013) 27 Federal Sentencing Reporter 33–45.

169 Spiegel Online (n 18).

170 Fazel (n 16) Table 2 and 3, 4–5.

luxury prisons. However, this so-called luxury approach is evidence of the beneficial impact which conditions of detention, and treatment of prisoners, has on the success rate of the rehabilitative aspect of imprisonment.

Norway follows a similar system of law to South Africa, yet despite having the second oldest Constitution in the world, it maintains relevance. While this document does not specifically provide for a few human rights, there is an Article which provides that the State must respect and ensure human rights, which will be specifically provided by law.[171] An NHRI for the promotion and protection of human rights has also been established by the State.[172] The rights of prisoners are, for the most part, specifically provided in their Execution of Sentences Act.[173] Therein, it is provided that any imprisonment that is imposed – taking into account the nature of the offence – must operate within a framework that ensures satisfactory conditions for prisoners, and must attempt to diminish the detrimental effects of such isolation, while also encouraging prisoners to play an active role during their sentence.[174] Such legislative encouragement promotes the reintegration into society.

Two well-known examples of Norwegian prisons are Bastoy and Halden Prison. Bastoy Prison is an island facility where the most severe limitation for prisoners is the one imposed on their liberty. Here, the inmates are given suitable accommodation and generally suitable conditions, education and health, with the governor of the prison, Arne Nilsen, describing it as 'an arena for developing responsibility' which is fostered by[175] 'giv[ing] prisoners respect… teach[ing] them to respect others… [in such that] when they are released they are less likely to commit crimes. That is justice for society'. Halden Prison, which is a 75-acre facility, seeks to provide as much comparative normalcy as is possible, fully equipped kitchens and educational opportunities, as well as suitable living conditions. Prison uniforms are another non-requirement, which helps to prevent the dehumanisation of the prisoners.[176] While not all prisons in Norway are the same as Bastoy and Halden, and restrictions and conditions are circumstance dependent, each facility follows the principle of resocialisation as Germany defines it.

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171 Constitution of the Kingdom of Norway, 17 May 1814, Article 110 c.

172 Act relating to the Norwegian national human rights institution, 1 July 2015.

173 Act relating to the execution of sentences etc. (The Execution of Sentences Act), (Norway) 1 March 2002.

174 The Execution of Sentences Act (n 173) ss 2 and 3.

175 Erwin James, 'The Norwegian Prison where Inmates are Treated Like People' *The Guardian* (25 February 2013) <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people> accessed 24 February 2018.

176 Christina Sterbenz, 'Why Norway's Prison System is so Successful' *Business Insider* (11 December 2014) <http://www.businessinsider.com/tour-of-halden-prison-2014-10?IR=T#surprisingly-inmates-can-use-sharp-utensils-without-supervision-13> accessed 24 February 2018.

While not all countries are in the financial situation to provide such ambitious standards, the principles of dignity and resocialisation followed by these two countries should be noted as model attempts at imprisonment, and these principles should be achievable by all States. There are numerous factors which influence the facilities around the world and the manner in which imprisonment is conducted, however, if greater focus is placed on the dignity and humanity of prisoners, and with it the improvement of conditions of detention, then surely, as is evident, recidivism can be decreased.

### Low Standards – Around Europe, Eastern Bloc, USA, and South Africa

Contrary to the above examples, there are many countries around the world that have poor standards for the treatment of prisoners – and first-world countries are not excluded from the list. For example, to draw a strong comparison within the European context, we can compare the exemplary standards of Germany and Norway to the poor standards upheld by Belgium. While Belgium has State-published statistics on recidivism, the conditions of detention will stand as evidence against the standard and effectiveness thereof.

Based on a report by Amnesty International, it is evident that prison conditions are poor, with the threat of overcrowding listed as a major concern.[177] As explained earlier in this article, overcrowding is an exacerbating factor when it comes to conditions of detention, and from it stems a host of issues that threaten other human rights. A number of issues faced by Belgian prisons include poor facilities and insufficient access to basic services. Another factor, which is said to contribute to these poor conditions, is the frequency of strikes by prison officials, with the case of *Clasens v Belgium* clearly showcasing the effects that frequent strikes have had on Belgian prison conditions.[178] The disparity between the prison conditions of Germany and Belgium is significant, especially when considering that the difference in GDP is only roughly $4000.00 per capita.[179] The ECtHR found in *Vasilescu v Belgium* that the physical conditions of detention were in violation with the ECHR, concluding that the widespread problems of unsanitary and rundown prisons were systemic problems in Belgium, and were thus not isolated to the applicant's situation in Antwerp.[180]

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177 Amnesty International, Amnesty International report 2017/18 – Belgium, 22 February 2018.

178 *Clasens v Belgium*, application no: 26564/16 (2017) (ECtHR).

179 Central Intelligence Agency, 'The World Factbook: Country comparison: GDP – Per Capita (PPP)' (2018) <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> accessed 30 April 2018.

180 *Vasilescu v Belgium*, application no: 64682/12 (2014) (ECtHR); See also *Sylla and Nollomont v Belgium*, application no: 37768/13 and 36467/14 (2017) (ECtHR): where the personal space available to Sylla and the conditions of detention of Nollomont were found to be in contravention with Article 3 of the ECHR (n 125).

A recent report was delivered to the Government of Cyprus following a study conducted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,[181] where that committee visited Nicosia Central Prisons.[182] While it was acknowledged that some improvement to facilities had been made since 2013, the issue of overcrowding was pervasive, with occupancy calculated at 142 per cent.[183] It was discovered that one inmate was living in a room generally used for interviews, which had no toilet, running water, or windows, which essentially equated it to solitary confinement.[184] These conditions are deplorable under any circumstances, but especially when viewed in terms of prisoners' rights and human rights collectively. Following the decision by the ECtHR in *Onoufriou v Cyprus*, there was a notable improvement in solitary confinement and isolation standards, although it appears that there could still be abuse in the utilisation of solitary confinement.[185]

It should be noted that similar conditions are evident in Greece.[186] The recent case of *Koureas and Others v Greece* highlighted the requirements for what constituted inadequate physical conditions, although it was not proved by the plaintiffs therein, nor was overcrowding. However, the right to an effective remedy was held to be violated.[187] *In casu*, it is worth noting that the decision is evidence of a need for a mandatory standard and the enforcement thereof. Although the individual circumstance of *Koureas and Others v Greece* could not prove a violation of overcrowding and poor conditions, especially in comparison to the higher standards of Norway or Germany (as a global benchmark of sorts), the standard upheld by Greece should still be questioned.

Previous Eastern Bloc countries are notably rife with violations, and are notorious for poor prison standards, including countries which now form a part of the EU. In Hungary, as an example of the latter, overcrowding is one of the most prevalent issues, with prisons boasting consistent occupation levels over 100 per cent for the last decade.[188] In some prisons it is alleged that, despite being irregular, cells with two bunks routinely have extra bunks

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181 See n 41 for the establishing legislation.

182 Council of Europe: Committee for the Prevention of Torture, Report to the government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2018) CPT/Inf 16, 39.

183 Report to the government of Cyprus (n 182) 40, para 75.

184 ibid 43, para 79.

185 ibid 50–51.

186 Elena Becatoros, 'Council of Europe Slams Greek Prison Conditions' *Business Insider* (29 February 2016) <http://www.businessinsider.com/ap-council-of-europe-slams-greek-prison-conditions-2016-2?IR=T> accessed 6 May 2018.

187 *Koureas and Others v Greece*, application no: 30030/15 (2018) (ECtHR).

188 World Prison Brief, 'Hungary' (2018) <http://www.prisonstudies.org/country/hungary> accessed 6 May 2018; Blanka Zsuzsanna Horvath, 'Conditions in Hungarian Prisons: Challenges in Addressing Overcrowding and other Inhuman Circumstances' (MA Dissertation, University of Oslo 2017)

added (and then removed prior to inspection).[189] Other than overcrowding in Hungarian prisons, which is an apparent globally pervasive issue, repair and hygiene are major on-going concerns, and it is reported that, aside from poor maintenance conditions,[190] prisoners are forced to suffer infestations of rodents and insects.[191] It should be noted that while hygiene and overcrowding can be mutually exclusive, they are often mutually inclusive and overcrowding can intrinsically be linked to poor hygiene.

Another two Eastern Bloc countries worth noting are Ukraine and Russia, which, despite being separate from the EU, are members of the Council of Europe and have both signed the ECHR.[192] Some Ukrainian prisons were reported to have unsanitary conditions of detention, including poor ventilation and unsanitary healthcare facilities.[193] It is also reported the conditions of Ukrainian prisons remained poor, and lack of nutrition and adequate lighting were persistent problems.[194] In a letter by the Foreign and Commonwealth Office, it was stated that 'overall, conditions in Ukrainian prisons do not meet EU standards. Conditions in certain prisons can be considered to violate human rights'.[195]

Regarding the low standard in Russia, a report by the US Department of State revealed overcrowding, unsanitary conditions,[196] and poor access to healthcare as persisting problems in Russian prisons.[197] In terms of overcrowding, where the federal minimum accommodation area per individual was prescribed as 26 square feet, prisoners were confined to

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189 Horvath (n 188) 17.

190 Council of Europe: Committee for the Prevention of Torture, Report to the Hungarian Government on the Visit to Hungary Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 27 October 2015 (2016) CPT/Inf 27.

191 Horvath (n 188) 18–20.

192 COE (n 20).

193 'Deplorable Prison Conditions in Ukraine' *Prison Insider* (7 March 2018) <https://www.prison-insider.com/en/ressources/analyses/rapports/deplorable-prison-conditions-in-ukraine> accessed 2 May 2018. See an application brought by two detained asylum seekers, *Ilias and Ahmed v Hungary*, application no. 47287/15 (2017) (ECtHR).

194 US Department of State, '2016 Country Reports on Human Rights Practices – Ukraine' (2017) <https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/> accessed on 07 July 2019.

195 Independent Advisory Group on Country Information, 'Country Policy and Information Note – Ukraine: Prison Conditions' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/608566/Ukraine_-_Prison_Conditions_-_CPIN_-_v2.pdf> accessed 7 July 2019 – see therein, Annex A: British Embassy, Kyiv, *Letter to the Home Office*, 20 September 2016.

196 *Kalashnikov v Russia*, application no: 47095/99 (2002) (ECtHR) – where the cells were incredibly overcrowded, and the plaintiff was surrounded by heavy smokers. See also the pilot judgment of *Ananyev and Others v Russia*, application no: 42525/07 and 60800/08 (2012) (ECtHR).

197 US Department of State, '2016 Country Reports on Human Rights Practices – Russia' (2017) <https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/russia/> accessed 7 July 2019.

spaces far below the minimum prescribed area, an issue exacerbated by an occupancy level of 95 per cent.[198] Torture is also noted as being systemic in Russian prisons, with the main contributing factors to this element being 'poor training and [a] culture of impunity'.[199]

Looking across the ocean to the West, many prisoners in the USA, in both federal and state prisons, are kept in conditions which are in contravention of international guidelines. Recidivism in the US is disturbingly high, ranging from 68 per cent to 83 per cent (depending on the range of analysis, which usually falls within 3 to 9 years of release).[200] A prison in Sacramento was reported to have a lack of hot water as well as poor food storage and sewage management.[201] Unlawful conditions and overcrowding are common issues within the American prison and jail system.[202] One of the more prevalent issues contributing to the USA being classified as a low standard system – when it comes to complying with the international standard for prisoners' rights and their conditions of detention – is the frequency and nature of their implementation of solitary confinement and segregation.[203]

South Africa, other than the conditions earlier noted, is no exception to the inherently low global standard. In the latest report by the US Department of State, it was shown that many of South Africa's prisons fail to meet international standards, and the majority actually fail to meet even domestic standards.[204] Poor healthcare, unsanitary conditions, overcrowding, and poor ventilation and lighting were among the listed concerns. It was also confirmed, in a fact sheet compiled by Africa Check, that overcrowding,

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198 ibid.

199 United Kingdom: Foreign and Commonwealth Office, *Human Rights and Democracy Report – Russia* (2015). See *Boris Ivanov v Russia*, application no: 12311/06 (2016) (ECtHR) – dealing with torture and poor treatment of prisoners specifically regarding Article 3 of ECHR (n 125).

200 Alper (n 19) Table 2 and Table 3, 4–6.

201 Sharon Bernstein 'California prison inspection uncovers unsanitary conditions' (*Reuters*, 14 May 2015) <https://www.reuters.com/article/us-usa-california-prisons/california-prison-inspection-uncovers-unsanitary-conditions-idUSKBN0NZ07D20150514> accessed 6 May 2018.

202 *Kelley v Hodgson*, Case no: 1998-03083 (Suffolk Superior Court – Massachusetts): Although instituted in 1998, this class-action only received judgement in 2009, while it is understandable the judicial process of such a class-action can be lengthy, it should be noted the detrimental effect that a decision which takes this length of time has on the justice for prisoners.

203 See *Cantell, et al. v. Commissioner of Correction, et al.*, 475 Massachusetts 745 (2016) (Massachusetts Court of Appeals); *Ruiz v. Texas* 580 U.S. (2017) (US District Court: Southern District of Texas).

204 US Department of State, '2017 Country Reports on Human Rights Practices: South Africa' (2018) <https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/south-africa/> accessed 7 July 2019.

segregation, and infectious diseases, coupled with generally unsanitary conditions, were pervasive in South African prisons.[205]

Although the above does not constitute a comprehensive list of standards – with details surrounding each condition's maintenance at either a high or low standard – it is clear that, when it comes to the low standards of enforcement regarding the conditions of prisoners' detention, the number of globally reported violations suggest that the number of transgressing countries significantly outnumber those countries who demonstrate an adequate or excellent compliance with international standards. While the list of States with a low standard is far more extensive than the one discussed above, the list demonstrating a high standard is sparse. If nothing else validates the call for international enforcement, this alone should demonstrate the dire need to reform the sphere in which prisoners' rights and their conditions of detention exist.

## Other Mechanisms Created for Enforcement

While it has been detailed above that the SMR exists as an international guideline, and many States (or unions of a number thereof), have created and ratified legislation to comply with the guidelines, it is evident that enforcement of these rules, and compliance globally is poor. Possible solutions to this can perhaps be guided by the existing mechanisms and structures which attempt to enforce human rights. Although, the overall structure of the international human rights system is complicated and has numerous bodies with varying amounts of 'decision-making authority, enforcement capacities, and mechanisms', with the effects of these bodies also varying in their individual success rates.[206]

Although the discussion in this section of the article focuses on international mechanisms, this does not imply that domestic responsibility is non-existent. To the contrary, it is the first and simplest step for enforcing human rights – that States ratify their international responsibilities, through domestic policy and voluntary compliance.[207] Other than NHRIs, and the systems provided for in terms of IACHR, ACHPR, and the ECHR (which were discussed above), the following section of this article will discuss some of the current international mechanisms for human rights

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[205] Africa Check, 'Overcrowding, Disease and Torture – [Fact Sheet] The State of South Africa's Prisons' (2017) <https://www.wits.ac.za/news/latest-news/research-news/2017/2017-07/overcrowding-disease-and-torture.html> accessed 7 July 2019.

[206] Douglas Donoho, 'Human Rights Enforcement in the Twenty-first Century' (2006) 35 Georgia Journal of International and Comparative Law 1, 1–52. Donoho does make note of the ambiguity between the various terms, including 'enforcement' and 'monitoring', which complicates the issue about the various bodies' appropriate authority and role. He states that contextually the term enforcement rarely is used to imply 'mandatory sanctions' although while not necessarily changing behaviour it can impact international relations.

[207] Donoho (n 206) 12–14.

enforcement,[208] thereby providing insight into mechanisms which could inform how prisoners' rights should also be enforced.

One mechanism of the UN designed to enforce human rights, – specifically when it comes to enforcing and protecting economic, social, and cultural rights in terms of the International Covenant on Economic, Social, and Cultural Rights[209] – is the Committee on Economic, Social, and Cultural Rights (hereafter CESCR).[210] The CESCR, who monitors party States' compliance and fulfilment of obligations under the ICESCR, requires the parties to prepare reports every five years for review.[211] These reports reveal the extent of compliance and assists in new policy formulation, but most importantly, the reporting process affords the public with access to information regarding their respective governments' progress in terms of fulfilling and promoting the ICESCR.[212] The CESCR then makes recommendations, and highlights areas of concern; further the CESCR can accept reports from members of the civil society regarding the situation in their countries as part of the CESCR's review process.[213]

The UN uses the Human Rights Council, which is comprised of 47 Member States of the UN, as its major human rights enforcement mechanism.[214] The council allows for governments and civil societies, with concerns about abuses or other specific areas of concern, to meet in round-table discussions and raise these concerns.[215] The council reviews the reports and discussions submitted to it, and then advises and publicly reports on human rights or thematic issues brought to its attention, providing the relevant countries with recommendations, allegations, and requests. Other mechanisms, which have developed over the last few decades, include the use of domestic criminal and civil processes,[216] and the creation of ad-hoc tribunals such as those created in Rwanda and Yugoslavia.[217]

Although the UN has a number of other mechanisms in place, and it can be argued that while these mechanisms may provide some relief if adopted

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208 A discussion on the success of these is relevant to effectiveness, however this section specifically deals with possible mechanisms to be introduced in the sphere of prisoners' rights.

209 International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA A/RES/2200(XXI) (hereafter ICESCR).

210 The CESCR, comprised of 18 independent experts, was established by *Economic and Social Council (ECOSOC) Resolution 1985/17*.

211 ICESCR (n 209) Article 16 and 17.

212 ESCR-Net, 'Human Rights Enforcement Mechanisms of the United Nations' (2018) <https://www.escr-net.org/resources/human-rights-enforcement-mechanisms-united-nations> accessed 20 May 2018.

213 ibid.

214 The Human Rights Council was established by: Human Rights Council: Resolution (adopted 3 April 2006) UNGA A/RES/60/251.

215 ESCR-Net (n 212).

216 Donoho (n 206) 32.

217 ibid (n 93).

in the sphere of enforcing prisoners' rights, their varying success rates (as mentioned above) demand that possible alternatives to imprisonment be assessed as a more suitable option,[218] at least for short-term relief. The mechanisms listed above, although not a comprehensive list, provide some insight into viable solutions. Yet, it should still be noted with concern that, if implemented, these steps need to be consistently proactive in their enforcement and review procedures.

## Alternatives to Imprisonment

In a report published in 2012 by Prison Reform International,[219] attention is drawn to both the Kadoma Declaration and the Ouagadougou Declaration.[220] In the Kadoma Declaration, a recommendation for an alternative to imprisonment, as a method of alleviating overcrowding, was made. The recommendation was that a more 'widespread introduction of community service… as a [more] positive and cost-effective measure [should] be preferred whenever possible'.[221] The Ouagadougou Declaration, and its associated action plan, also recommended (as a strategy to address overcrowding) that State parties 'set targets for reducing the prison population… [and] consider prison capacity when sentencing'.[222] The proposed strategy also included the use of proven effective alternatives, such as community service, suspended sentences, probation, and calling for imprisonment to be a last resort reserved for more serious offences.[223]

The Tokyo Rules were specifically created by the UN to provide non-custodial measures as an alternative to imprisonment.[224] The primary purpose of these measures, which target the individual offender, is said to be more effective at rehabilitation and also reduces the strain on an already inundated system.[225] Some of the measures mentioned therein include: verbal sanctions, fines, confiscation orders, parole or judicial supervision, restitution to the victim, house arrest, as well as referral to an attendance centre.[226] Rule 10.1 of the Tokyo Rules emphasises that non-custodial

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218 See Donoho (n 206) for elaboration on these varying success rates.

219 Penal Reform International, *Alternatives to Imprisonment in East Africa* (Penal Reform International 2012).

220 Kadoma Declaration on Community Service Orders in Africa (1997) ('the Kadoma Declaration'); Commission Africaine des Droits de l'Homme, *Ouagadougou Declaration on accelerating prison and penal reform in Africa* (2002), ('the Ouagadougou Declaration').

221 Penal Reform International (n 219) 7.

222 ibid 8.

223 ibid.

224 United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) (adopted 2 April 1991) UNGA A/RES/45/110.

225 United Nations: Office of the High Commissioner for Human Rights (OHCHR), 'The Use of Non-custodial Measures in the Administration of Justice: Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' (2003) 9 Professional Training Series, 371–396.

226 ibid 385–386.

measures, particularly supervision, is aimed at reducing reoffending and assisting with reintegration in a manner which reduces recidivism.[227] The focus of the Tokyo Rules is clearly in line with the principle of rehabilitation, and while measures such as this do not solve some of the structural issues leading to the violation of prisoners' conditions of detention, alleviating the occupancy levels within prisons is a simpler and cheaper mechanism, and would, for the short-term at least, provide some relief to the issue.

The US has offered similar alternatives since the 1980s and 1990s, including electronic monitoring. However, one option which has been suggested (and to an extent has been used through 'moral waivers'), is enlistment in the military as an alternative to imprisonment – subject to psychological and psychometric analysis.[228] South Africa makes provision in the CSA[229] for some of the alternative measures mentioned above.[230] Yet, despite the fact that around 70 000 parolees serve under community corrections on a daily basis,[231] the South African prison system remains overloaded. However, this does not speak to the effectiveness of the use of community corrections, but rather on implementation and funding. As an internationally recognised mechanism, community corrections do pose a viable alternative to imprisonment and incarceration,[232] and it is clear that the use of mechanisms such as these lead to a reduction in overcrowding. The reduction in overcrowding, which has been discussed in this article, can only serve to increase the effectiveness of resocialisation for those imprisoned and limits the economic burden on State and taxpayer resources.

## CONCLUSION

While the violation of human rights becomes an ever more pressing concern, about which States and institutions are constantly being scrutinised, it is apparent that prisoner's rights are rarely afforded the same concern. Although the reason for this could perhaps be related to how society stigmatises prisoners, it is the responsibility of States and the international community collectively, through organisations like the UN, to prevent these violations to prisoners' rights. It has been made clear in this article that while

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227 The Tokyo Rules (n 224) Rule 10.1.

228 John Frana and Ryan Schroeder, 'Alternatives to Incarceration' (2008) 5 Justice Policy Journal 2, 1–32.

229 CSA (n 66) Chapter VI.

230 See here, for a South African discourse into alternative methods: Jan Neser, 'Restorative Justice – A New Dimension of Sentencing in South African Courts' (2001) 14 Acta Criminologica 3, 46–51; Jacqueline Gallinetti, Jean Redpath and Julia Sloth-Nielsen, 'Race, Class and Restorative Justice in South Africa: Achilles Heel, Glass Ceiling or Crowning Glory?' (2004) 17 South African Journal of Criminal Justice 17–40.

231 Department of Correctional Services, Department of Correctional Services – vote no.18 – Annual report 2016/2017 Financial year (2017) 27.

232 Shanta Singh, 'Alternatives to Imprisonment in South Africa: A Historical Perspective, 1980's to Present' (2007) 53 New Contree 6, 147–170.

a comprehensive set of rules governs the protection owed to prisoners, in the form of the SMR, these are poorly enforced due to their nature as non-enforceable guidelines. Granting the SMR the same status as the UDHR in the realm of international law, could perhaps alleviate the issue regarding prisoners' rights violations, not just regarding their conditions of detention but all facets of their rights. Although it has not been the intention of this article to provide a clear and definite solution that would immediately solve the problem, the current methods of enforcement have been evidenced to be ineffective and inconsistent. While the alternative options to imprisonment and various mechanisms for enforcing human rights could assist in alleviating the conditions of detention, we find it necessary to note that the current system is too reactive in nature, and perhaps a more proactive system of reports and spot checks by task teams is required. Regardless of viable solutions, this article demonstrates the poor consideration afforded to prisoners' rights, as such, a resounding call should be made to the UN and domestic governments to reform the current system and afford prisoners the rights which they deserve – those inherent to all humans.