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Dirk van Zyl Smit
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International Prison Standards and Transnational Criminal Justice

Dirk van Zyl Smit*

Prison standards are an important element of transnational criminal justice. This Article shows how legal standards governing prison conditions emerged at the international and regional levels and considers how, increasingly, they have gained legitimacy. It then describes how these standards are applied in a way that contributes to a recognizable transnational legal order in respect of prison conditions, which has real impact at the national level. The Article pays close attention to the transfer of prisoners between states, as a mechanism that operates transnationally and, in the process, enhances the importance of international prison standards. It concludes that the benefits of common prison standards are mixed. On the positive side, they have the potential to give states that are asked to extradite suspects, or transfer sentenced prisoners, leverage to demand the improvement of prison conditions in the receiving states. There is, however, a risk that states will accept and implicitly endorse sub-standard prison conditions in order to rid themselves of troublesome offenders.

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INTRODUCTION

Are prison conditions a subject of relevance to the transnational legal ordering of criminal justice? The concept of transnational legal ordering is a fresh way of understanding the complex interactions between international law and the international and regional institutions that have a real impact on not only legal rules but also social reality at the national level.¹

The question of whether prison conditions are influenced by transnational legal ordering presents a particular challenge. While it is clear that in some specific criminal justice areas, such as money laundering, human trafficking, or drug trade across borders, national legal frameworks are shaped directly by international instruments, it is not obvious that prison conditions are influenced by forces beyond national borders. If it can be demonstrated that prison conditions are subject to transnational legal ordering, this will be an important contribution to understanding transnational legal orders in general, as the practical implementation of prison sentences has not previously been studied from this perspective.

The elements of “legal,” “ordering,” and “transnational” all have to be present for a topic to be relevant to this form of analysis. The answer to the primary question begins by first considering briefly whether prison conditions are subject to law and are therefore “legal.” Secondly, one must decide whether prison conditions are subject to a process of “ordering,” which results in their developing a particular way. Thirdly, one must evaluate any process of legal ordering to which prison conditions may be subject in order to determine whether it is really “transnational.”

Studying transnational legal orders closely is not only a matter of deciding whether a particular area of study, in this case prison conditions, constitutes such an order. It is also a matter of observing what impact transnational legal ordering of the particular area of study has. Ultimately, the value of this approach depends on insights into how transnational ordering impacts on national penal systems, and whether it explains developments that can only be understood if their transnational dimensions are made explicit.

Before considering these issues directly, one should observe that virtually every nation state in the modern world has at least one prison. The universal relevance of prisons to modern criminal justice is obvious. At their core, prisons are institutions where individuals are held against their will, either because they are alleged to have committed a criminal offense, or because they have been sentenced to a term of imprisonment as a punishment resulting from there having been found

1. The terms “transnational,” “legal” and “order” are used here as defined by Halliday and Shaffer in *TRANSNATIONAL LEGAL ORDERS* 11–15 (Terence C. Halliday & Gregory Shaffer eds., Cambridge Univ. Press 2015).

to have committed a criminal offense.² The principle of the use of imprisonment for purposes of crime prevention and punishment is not seriously challenged. In that sense, abolitionist movements notwithstanding, prisons worldwide enjoy a great deal of legitimacy.

In each modern nation state, there is law governing the external and internal aspects of imprisonment. *Legal* rules govern respectively, both who should be admitted to or released from prison (external), and how they should be treated while they are in prison (internal). Internal and external aspects of imprisonment are closely related, for the internal regime determines not only the day-to-day running of the prison but also whether prisoners are offered opportunities for self-improvement, which will influence decisions about their release.³ Prison conditions are therefore dependent on both the internal and external aspects of imprisonment. Both are subjects of a national *legal* order, in that in all modern states they are governed by law, both statutory and as developed in the jurisprudence of the national courts.

In almost all countries, this law is underpinned by a national or, in federal countries, a state-based prison bureaucracy that operates within the wider administrative structures of the nation state to normalize the notion of a state prison system. It seems, therefore, to be beyond dispute that prisons and the conditions that pertain in them are part of a legal *order*. Whether the legal order governing imprisonment extends beyond the national, however, is open to dispute.

Does the ubiquity of imprisonment make the legal rules governing it into elements of a *transnational* legal order? Clearly not automatically or necessarily. It is possible that the law governing each country's national prison system developed quite independently of international standards? Common basic standards could emerge independently in each legal order. National prison systems could operate quite independently of any constraints other than those of the national legal and bureaucratic frameworks.

Notwithstanding the possibility that prison conditions are an entirely national question, this Article argues that there is evidence that modern prison law, including the part of it that governs prison conditions, has a key transnational component. Moreover, it seeks to demonstrate that the way in which transnational prison law impacts on national prison systems is evidence of the emergence of a legal ordering of prison conditions that is specifically transnational.

The substance of this Article divides into three parts. The first part begins by examining the legal standards governing prison conditions that have emerged at the

2. The focus of this Article is on prisons as institutions that primarily perform these two functions. This Article does not investigate directly the transnational legal ordering of other carceral institutions that have as their primary function the detention of migrants, prisoners of war or mentally ill persons.

3. CONSTANTIJN KELK, RECHT VOOR GEDETINEERDEN: EEN ONDERZOEK NAAR DE BEGINSELEN VAN HET DETENTIERECHT [RIGHTS FOR PRISONERS: A STUDY OF THE PRINCIPLES OF DETENTION LAW] 12–13 (1978).

international and regional levels. It is necessary to establish their existence and legal scope before considering how, increasingly, they have gained legitimacy. The second part describes how these standards are applied in a way that contributes to a recognizable international legal order in respect of prison conditions, which has real impact at the national level. In the third part, close attention is paid to the transfer of prisoners between states, as a mechanism that *operates transnationally* and, in the process, enhances the importance of international prison standards. The conclusion returns to the primary questions about the impact of transnational legal ordering and what it reveals about transnational legal order as a conceptual framework for understanding the evolution of prison conditions.

I. EMERGENCE

Rudimentary forms of imprisonment have existed ever since people developed the technical skills to build securely enough to incarcerate others. However, only from the Enlightenment onwards, were movements for improving prison conditions routinely accompanied by legal reforms. In England, for example, exposure of the vile prison conditions common in the late-eighteenth century by the great prison reformer, John Howard, was followed by legislation.⁴ Initially, the legislation did not deal directly with prison conditions. Instead, it concentrated on creating a national institutional order, which would fix the disorder in the prisons of the old system and in the process improve prison conditions. Revisionist historians of punishment, as different as Michel Foucault and Michael Ignatieff, have noted the impact of these changes. The new order, in Ignatieff's words, "substituted the rule of rules for the rule of custom" with profound consequences for the way order was maintained in prisons and for the way in which prisoners interacted with the prison authorities.⁵

The gradual systemization of imprisonment by national law did not bring an end to concerns about prison conditions. On the contrary, these concerns remained, and, from a very early stage, they transcended national boundaries. This is epitomized in the life of John Howard who, from his English base, broadened his work to include the rest of the United Kingdom (UK) and, subsequently, large areas of the European continent.⁶ Indeed, on his last prison visit, which took him as far as modern-day Ukraine, Howard died of an illness contracted while visiting a prison.⁷

4. GAOLS ACT, 1791: 31 Geo.III, c.46. For details of this and subsequent English legislation, see LIVINGSTONE, OWEN AND MACDONALD ON PRISON LAW 13 (Tim Owen & Alison MacDonald eds., 5th ed. 2015).

5. Michael Ignatieff, *State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment*, 3 CRIME & JUSTICE 153, 161 (1981).

6. JOHN HOWARD, THE STATE OF THE PRISONS IN ENGLAND AND WALES, WITH PRELIMINARY OBSERVATIONS, AND AN ACCOUNT OF SOME FOREIGN PRISONS 78 (W.J. Forsythe ed., 2000) (1792).

7. DAVID WILSON, PAIN AND RETRIBUTION: A SHORT HISTORY OF BRITISH PRISONS, 1066 TO THE PRESENT, at 36 (2014).

A similar reformist tendency, which combined concern with prison conditions with the crystallization of prison law, emerged throughout Europe as ideas on prison policies were widely shared. In the course of the nineteenth century, as the prison historian, Patricia O'Brien, has noted:

Each European nation formed and maintained its own prison system. In spite of distinct, national institutions, however, the prison systems that developed throughout Europe in the nineteenth century were remarkably similar, reflecting a commonly held penal philosophy. Shared ideas about how to create prisons that were secure, sanitary, and rehabilitative produced similar prison populations, architecture, work systems, and inmate subcultures.⁸

Shared ideas about what prison conditions should ideally be like were internationalized at a surprisingly early stage. Americans visited European prisons to see the newest prisons that had been praised by John Howard. Traffic in the opposite direction was even more pronounced. The most famous transatlantic visitor to the US of this period was Alexandre de Tocqueville who was sent by the French government to study US prisons in 1831 and who came back with sharp insights about the latest prison regimes. Delegations from the British and Prussian governments followed in his footsteps.⁹

The early International Penitentiary Congresses, first held in Frankfurt in 1846 and Brussels in 1847, attracted expert delegates—scholars and practitioners—from throughout what was then known as the civilized world. These congresses played an influential role well into the early twentieth century. They adopted solemn resolutions, describing the emerging international consensus on the conditions under which prisoners should be held and the “rehabilitative” regimes with which they should best be treated.¹⁰ The idea that there should be international prison standards had its roots in these transnational scientific conferences, as their resolutions were to be reflected in future international standards on prison conditions

A. The emergence of international legal standards on prison conditions

After the First World War the focus gradually shifted to the development of standards that would have the imprimatur of an international organization. In 1926, the International Penological and Penitentiary Council (IPPC), in some ways the successor body to the earlier international penitentiary congresses, and consisting of a mixture of governmental and independent expert members, began drafting a

8. Patricia O'Brien, *The Prison on the Continent Europe 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON*, at 178–201 (Norval Morris & David Rothman eds., 1995).

9. DIRK VAN ZYL SMIT & SONJA SNACKEN, *PRINCIPLES OF EUROPEAN PRISON LAW AND POLICY: PENOLOGY AND HUMAN RIGHTS 2* (Oxford Univ. Press 2009).

10. Chris Leonards & Nico Randerad, *Transnational Experts in Social Reform, 1840–80*, 55 *INT'L REV. OF SOCIAL HISTORY* 215, 238–39 (2010); Chris Leonards, *Visitors to the International Penitentiary Congress: A Transnational Platform Dealing with Penitentiary Care*, 26 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR GESCHICHTSWISSENSCHAFTEN*, 2015, at 80, 83 (Austria).

set of standard minimum rules for the treatment of prisoners.¹¹ In 1934, the IPPC draft received the endorsement of the League of Nations.¹² However, the League of Nations was a relatively weak international organization. Moreover, the rise of fascism not only disrupted the system of international conferences but also contributed strongly to the demise of the League of Nations as a body that could lend much legitimacy to international standards on prison conditions.

The growing worldwide recognition of human rights in the post-second world war period, as reflected initially in the establishment of the United Nations and its adoption of the Universal Declaration of Human Rights (UDHR), provided a more secure anchor for international standard-setting on prison conditions.¹³ The recognition of a general right to human dignity, together with the prohibition not only of torture but also of cruel, inhuman or degrading treatment or punishment in Article 5 of the UDHR, was of obvious relevance to prison conditions, for it provided a basis for specifying which conditions were unacceptable and therefore potentially in conflict with this prohibition.

Prison conditions were also the first criminal justice issue that the United Nations addressed when it came to setting international standards. Earlier developments had provided it with a useful head start in this regard: there was already an established body of knowledge, legitimated by international experts, on what prison conditions such standards should support. Equally important was that a dialogue had begun between the purveyors of penological expertise and the makers of international law. The initial link between the IPPC and the League of Nations provided a foundation for this dialogue on which the United Nations could build by providing a forum for its continuation. This forum was provided by the First United Nations Congress on Crime Prevention and Criminal Justice in Geneva in 1955 which allowed for a further mixture of official and “expert” knowledge,¹⁴ and at which UN member states could assent to the first international set of standards that governed prison conditions in any detail, the United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR). After the Congress, the UNSMR were given the further imprimatur of the UN Economic and Social Council in 1957.¹⁵

A notable feature of the UNSMR was that its legal status was initially very limited. The Rules themselves have an almost apologetic tone. The preliminary comments to the 1955 UNSMR indicated that they were:

not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary

11. LEON RADZINOWICZ, *ADVENTURES IN CRIMINOLOGY* 364 (1999).

12. William Clifford, *The Standard Minimum Rules for the Treatment of Prisoners*, 66 AM. SOC. INT'L L. PROCEEDINGS 232, 233 (1972).

13. Dirk van Zyl Smit, *Punishment & Human Rights*, in *THE SAGE HANDBOOK OF PUNISHMENT & SOCIETY* 395, 414 (Jonathan Simonds & Richard Sparks eds., 2013).

14. RADZINOWICZ *supra* note 11, at 390.

15. ROGER S. CLARK, *THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM* 134, 135 (1994).

thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.

This is not the wording of a binding treaty. International lawyers of the time would have had no difficulty in describing the UNSMR as an instrument stating the softest of soft law, a self-limiting reassurance that undoubtedly initially made it easier for diverse states to accede to it. Gradually, however, the legal standing of the UNSMR increased. In 1970, the quinquennial UN Crime Congress commented on the “moral authority and hence the relatively mandatory nature” of the UNSMR and asked for the Rules to be reinforced in a resolution of the UN General Assembly, which duly obliged in 1971.¹⁶

Another reason for the increasing status of the UNSMR was that, at both the international and regional levels, provisions relating to the human dignity of prisoners and the primary prohibitions on torture and on inhuman and degrading punishment or treatment were increasingly incorporated into binding treaties. At the international level, the most important provisions were the requirements of the 1966 International Covenant on Civil and Political Rights (ICCPR) that all persons deprived of their liberty should be treated with humanity and respect for their human dignity, and that cruel, inhuman or degrading punishment or treatment were prohibited.¹⁷ The Human Rights Committee (HRC), which was charged with interpreting the provisions of the ICCPR, began regularly to make use of the UNSMR when applying the ICCPR to prison conditions. In the process, specific rules of the UNSMR were given increased legal status. By 1987 Nigel Rodley was able to quote several references by the HRC to rules in the UNSMR pertaining to diverse prison conditions ranging from cell size to use of dark cells and handcuffs as punishment, which the HRC now regard as embodying direct legal obligations of states.¹⁸

The increase in the legal status of the UNSMR, however, was uneven. In the first sixty years after their initial adoption the 1955 UNSMR were subject to only one relatively minor amendment—in 1979—and for a long time there was considerable resistance to updating these rules, lest they be given even more weight. However, the United Nations reinforced the UNSMR by adopting additional instruments that collectively supported the process of hardening what had initially been regarded as a soft law instrument. These included the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules),¹⁹ the 1988 UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment,²⁰ the 1990 UN Rules for the Protection of Juveniles

16. *Id.*

17. International Covenant on Civil and Political Rights, arts. 10 and 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

18. NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 222–32 (1987).

19. Adopted by G.A. Res. 40/33, (Nov. 29, 1985).

20. Adopted by G.A. Res. 43/173, (Dec. 9, 1988).

deprived of their Liberty (the Havana Rules),²¹ the 1990 UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),²² the 2007 Istanbul statement on the use and effects of solitary confinement,²³ and the 2010 UN Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders (the Bangkok Rules).²⁴

Of these, the Bangkok Rules have been particularly important in the process of upgrading the international requirements for prisons. The individual provisions of the Bangkok Rules systematically referred back to the UNSMR and in the process indicated the detailed developments that would create prison conditions suitable for women prisoners in the twenty-first century. The Bangkok Rules may have been relatively easy to accept, for they drew on the legitimacy that the development of women's rights has accumulated in modern international human rights law: no state would want to be seen to oppose them and thus appear to be against women's rights.²⁵ However, the Bangkok Rules were undoubtedly also significant as a practical indication that development of the UNSMR was possible within the UN framework. International non-governmental organizations, such as Penal Reform International, used this momentum to press for reform of the UNSMR.²⁶

Eventually in 2015, with significant support from the US, the UN General Assembly adopted a revised and updated version of the UNSMR, officially also to be known as the Nelson Mandela Rules. When adopting the Nelson Mandela Rules, the General Assembly observed that the Rules sought, "on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of inmates and prison management."²⁷

At the international level, a firm seal of approval was quickly placed on the revised UNSMR. Since 2015, the HRC has quoted them with strong approval in at least six instances.²⁸ The recent language of the HRC has often been peremptory.

21. Adopted by G.A. Res. 45/113, (Dec. 14, 1990).

22. Adopted by G.A. Res. 45/112, (Dec. 14, 1990).

23. Adopted by a working group of 24 international experts on Dec. 9, 2007, it was annexed to the interim report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, of July 28, 2008. The Special Rapporteur considered it "a useful tool to promote the respect and protection of the rights of detainees."

24. Adopted by G.A. Res. 65/229, (Dec. 21, 2010).

25. SUSAN TIEFENBRUN, *WOMEN'S INTERNATIONAL AND COMPARATIVE HUMAN RIGHTS* (2012).

26. Dirk van Zyl Smit, *Legitimacy & the Development of International Standards for Punishment, in LEGITIMACY AND CRIMINAL JUSTICE* 267, 292 (Justice Tankebe & Alison Liebling eds., 2013).

27. G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (Dec. 17, 2015).

28. Mukhtar v. Kazakhstan, CCPR/C/115/D/2304/2013, Communication No. 2304/2013 (Dec. 9, 2015); Askarov v. Kyrgyzstan, CCPR/C/116/D/2231/2012, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2231/2012 (May. 11, 2016); Matyakubov v. Turkmenistan CCPR/C/117/D/2224/2012, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2224/2012 (Sep. 26, 2016); Uchetov v. Turkmenistan, CCPR/C/117/D/2226/2012, Views adopted by the Committee under

Thus, for example, in two of these cases, one in 2016 and one 2017, which turned on the adequacy of medical treatment for prisoners, the HRC commented pointedly and in identical words that the state party to the ICCPR was “under an obligation to observe certain minimum standards of detention, which include the provision of medical care and treatment for sick prisoners, in accordance with Rule 24 of the Nelson Mandela Rules but that it had failed to do so.”²⁹

Other international developments have also contributed to the emergence of international legal standards on prison conditions. Prominent amongst these is the increasing role played by the International Committee of the Red Cross (ICRC) with regard to prisons generally. The initial focus of the ICRC was on prisoners of war, who are not normally held in civilian prisons, which are primarily for untried or sentenced persons, but in special PoW camps. However, the ICRC explained in 2016: “The ICRC’s detention-related activities have progressively evolved from a monitoring role during armed conflicts to a broader range of activities that seek to help individuals deprived of their liberty in a variety of situations and places of detention.”³⁰ The situations include not only instances, such as Guantanamo Bay, where the PoW status of the detainees is in dispute, but also instances where detainees held in relation to a non-international armed conflict or another situation of violence are often mixed with prisoners held for other reasons.³¹ In recent years the ICRC has begun to publish guidelines that can be applied in prisons of all kinds. These include specific guidance on water, sanitation, hygiene and habitat in 2012 and health care in 2017.³² This guidance is highly detailed and practical, going beyond that offered in the international standards, by dealing, for example, with architectural best practice in prison design.

Finally, it is now generally recognized that persons imprisoned by international tribunals and courts, such as the International Criminal Court (ICC), have to be held in conditions that meet the requirements of international law. This was not always the case: the regime governing the prison at Spandau holding prisoners sentenced by the International Military Tribunal that sat in Nuremburg was not clearly specified in law and varied according to which allied power was managing the prison

article 5 (4) of the Optional Protocol, concerning communication No. 2226/2012 (Sep. 26, 2016); Samathanam v. Sri Lanka, CCPR/C/118/D/2412/2014, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2412/2014 (Dec. 7, 2016); Suleimenov v. Kazakhstan, CCPR/C/119/D/2146/2012, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2146/2012 (May. 12, 2017).

29. No. 11: CV2694 (SAS), 2016 U.S. Dist., (S.D.N.Y. Mar. 31, 2016). CCPR/C/116/D/2231/2012 ¶ 8.5; Suleimenov, CCPR/C/119/D/2146/2012 ¶ 8.7.

30. INT’L COMM’N OF THE RED CROSS, PROTECTING PEOPLE DEPRIVED OF THEIR LIBERTY 5 (2016).

31. *Id.*; see also Dirk van Zyl Smit, *International Imprisonment*, 54 INT’L & COMP. L.Q. 357, 386 (2005).

32. INT’L COMM. OF THE RED CROSS, WATER, SANITATION, HYGIENE AND HABITAT IN PRISONS (2012); INT’L COMM. OF THE RED CROSS, HEALTH CARE IN DETENTION PRISONS (2017); see also INT’L COMM’N OF THE RED CROSS, TOWARDS HUMANE PRISONS, A PRINCIPLED AND PARTICIPATORY APPROACH TO PRISON PLANNING AND DESIGN (2018).

in a particular month.³³ However, when the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in the 1990s, one of its first judgments stipulated that all prisoners sentenced by it had to be treated in a way that met “principles of humanity and dignity which constitute the inspiration for the international standards governing the protection of the rights of convicted persons.”³⁴ In this regard, it listed a range of international treaties and other instruments, which included both the ICCPR and the UNSMR.³⁵ The ICC has adopted the same approach. The Statute governing the ICC provides directly that conditions in prisons where its sentences are enforced “shall be consistent with widely accepted international treaty standards governing treatment of prisoners.”³⁶ In practice, this also includes taking into account standards such as the UNSMR.³⁷ Only a very small percentage of the world’s prisoners are detained as a result of the activities of international courts and tribunals, either in the detention centers attached to these bodies or in national prisons to which they send their convicts to serve their sentences. However, their impact on the emergence of a transnational prison ordering is significant. Such impact is not only symbolic. Where prisoners sentenced by an international court or tribunal are held in a national prison, the requirement that their treatment must meet international standards puts considerable pressure on the national prison system to conform to the same standards.³⁸

B. The emergence of regional legal standards on prison conditions

Regional standards on prison conditions emerged in much the same way as they did on the international level. Typically, a regional human rights treaty would recognize human dignity and prohibit, with minor variations of language, inhuman or degrading punishment or treatment. This would then be followed by specific instruments that spelled out for the region what prison conditions should be like and how prisoners should be treated. In the Americas, the key treaty is the 1969 American Convention on Human Rights, applied to prisoners by the 2008 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.³⁹ In Africa, the 1981 African Charter on Human and Peoples Rights has been underpinned for prisoners by the 1996 Kampala Declaration on Prison

33. See NORMAN GODA, *TALES FROM SPANDAU: NAZI CRIMINALS AND THE COLD WAR* (2007).

34. Prosecutor v. Erdomović, Case No. IT-96-22-T, Sentencing Judgement, ¶ 74 (Nov. 29, 1996).

35. *Id.*

36. Rome Statute of the International Criminal Court, art. 106, July. 17, 1998, 2187 U.N.T.S. 90.

37. van Zyl Smit, *supra* note 31, at 376.

38. *Id.* For further analysis of these questions, see DENIS ABELS, *PRISONERS OF THE INTERNATIONAL COMMUNITY* (2012); RÓISÍN MULGREW, *TOWARDS THE DEVELOPMENT OF THE INTERNATIONAL PENAL SYSTEM* (2013).

39. Inter-American Commission on Human Rights Res. 1/08, OEA/Ser/L/V/II.131, doc. 26 (Mar. 13, 2008).

Conditions in Africa,⁴⁰ the 1999 Arusha Declaration on Good Prison Practice,⁴¹ and the 2002 Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa.⁴²

In Europe, this regional pattern emerged the earliest and has developed the furthest. It will therefore be treated as an example of the transnational legal order that can emerge from such regional standards. The initial treaty was the 1953 European Convention on Human Rights (ECHR). In 1973 the Committee of Ministers of the Council of Europe adopted the European Standard Minimum Rules on the Treatment of Prisoners (ESMR). These Rules were modeled on the 1955 UNSMR, but were designed also to emphasize a specifically European approach to prison conditions. In 1987 the ESMR were replaced by a more comprehensive set of rules, known simply as the European Prison Rules (EPR).

In 2006 the 1987 EPR were restructured comprehensively. The 2006 EPR reflected in considerable details an “expert” view of what minimum standards prison conditions should meet throughout Europe, one that has been endorsed by all member states of the Council of Europe, that is, all countries in geographic Europe except Belarus. In his powerful, analytical dissenting opinion in the 2016 decision of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Muršić v. Croatia*, Judge Pinto de Albuquerque made much of these factors in arguing that the 2006 EPR had developed from soft law into the type of hard law that requires formal recognition by the ECtHR as a binding part of the overall European human rights framework.⁴³ Such recognition, granted, for example, to the minimum space requirements for prison cells spelled out in the EPRs, would mean that these requirements could be applied transnationally by the ECtHR, when deciding whether the accommodation for prisoners in a particular national prison was sufficiently spacious for it not to be inhuman or degrading.

II. APPLICATION

International and regional interventions may have developed legal rules on prison conditions that have the status of transnational law, but for them to be part of a transnational legal order they must be applied across national boundaries. In practice, such cross-border application can operate in several interrelated ways,

40. Adopted by consensus in Sept. 1996 by 133 delegates from 47 countries, including 40 African countries, which met in Kampala, Uganda. The President of the African Commission on Human and Peoples' Rights, Ministers of State, Prison Commissioners, Judges and international, regional and national non-governmental organizations concerned with prison conditions took part in the meeting. *Id.* For further analysis see ABELS, *supra* note 39; MULGREW, *supra* note 39.

41. Approved by the Prison Services in Central, Eastern and Southern Africa (CESCA), held in Arusha, Tanzania from February 23, 1999 to February 27, 1999.

42. Approved by the second Pan-African Conference on Prison and Penal Reform in Africa, held in Ouagadougou, Burkina Faso from September 18, 2002 to September 20, 2002.

43. *Muršić v. Croatia*, App. No. 7334/13, Eur. Ct. H.R. at 96–97 (2016) (Pinto de Albuquerque, J. dissenting); see also van Zyl Smit, *supra* note 27, at 279–80, for further reflections on the legitimacy of the EPR, including evidence of the specific application of the 2006 EPR by European states.

which are disaggregated in this part of the Article. Key amongst these are (A) international and regional courts and tribunals, as well as (B) inspecting bodies of various kinds, whose legal writ runs across national boundaries. The significance of these key bodies is supplemented by (C) international professional associations and (D) international non-governmental organizations. Finally, this part considers (E) national application of the international and regional standards on prison conditions, as this is the decisive test of whether the ordering that these standards purport to do is in fact operative transnationally.

A. Direct application by international and regional courts and tribunals

In discussion of the development of international and regional prison rules, we have already given some examples where international and regional courts and tribunals have upheld rules on prison conditions and found against nation states that did not conform to these rules. The contribution that these findings make towards establishing a transnational legal order is uneven.

At the European level, the ECtHR plays a significant role in applying standards that govern prison conditions. State parties to the ECHR undertake to enforce the judgments of the ECtHR and generally do so by improving the prison conditions of individual prisoners who can demonstrate that their treatment infringes the ECHR. The ECtHR can also award costs and damages to individual complainants, and these too are generally paid by the state parties against whom they are awarded. In addition, so-called pilot judgments are a further useful remedy, for they allow the Court to order a government to make systemic changes rather than merely to provide relief to an individual applicant. For example, where lack of space in a cell or poor medical services led to findings that prisoners in a particular state were persistently being treated in an inhuman or degrading way, the Court ordered the government of the state concerned to reduce prison overcrowding, so that all prisoners in the system had adequate space. Similarly, the Court has intervened to remedy shortcomings of the prison medical system as a whole, so that all prisoners had better health care.⁴⁴

At the international level, the HRC has less power to issue binding judgments, even where states have acceded to the Optional Protocol to the ICCPR that allows individuals to bring complaints, (called “communications”) against them.⁴⁵ States that accede to the Optional Protocol undertake to provide the complainants with an effective remedy, including compensation, if required. They are also under an obligation to take steps to prevent similar violations in the future.⁴⁶ In practice, however, these obligations are not always met. Thus, for example, in 2006 the HRC found that Australia had sentenced two juveniles to what was effectively a term of

44. *Orchowski v. Poland*, App. No. 17885/04, Eur. Ct. H.R. (2009); *Affaire Torreggiani et Autres c. Italie*, Apps. Nos. 43517/09 et al., Eur. Ct. H.R. (2013) (Fr.).

45. Optional Protocol to the International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, 999 U.N.T.S 171, 173.

46. *Id.* art. 2.

life imprisonment without parole (LWOP), which, the HRC concluded, created prison conditions that infringed the ICCPR.⁴⁷ The Australian government, however, in what has been described as a “contemptuous response,” simply reiterated its view that the sentence allowed the complainants a reasonable possibility of being released and did not take any remedial action, either in respect of the complainants or by amending the law.⁴⁸

B. Application by regional and international inspectorates

A second indication that international rules on prison conditions are applied in a way that indicates that they are part of a transnational legal order is to be found in the activities of regional and international bodies, other than courts and tribunals, which attempt to enforce the application of standards governing prison conditions.

The European Committee on the Prevention of Torture (the CPT) is a regional example of such a body. It was established by a treaty, the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Article 1 of which provides that the CPT “shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.” Although the brief of the CPT extends beyond prisons, prison conditions are a key focus of its work. Today, all European states except Belarus are parties to the Convention and have a treaty-based duty to co-operate with the CPT.⁴⁹ States parties must help the CPT to perform its tasks, by granting access to all places of detention and providing all relevant information. In addition, they must respond to the CPT country visit reports within six months, and in a final response after one year must set out how they will take into account its recommendations.⁵⁰

The reports on the visits are confidential but can be published at the request or with the consent of the country concerned. If a state does not co-operate with the CPT or systematically does not follow its recommendations, the CPT may publish a statement about its key findings and recommendations without the consent of the state concerned. As a result, most countries consent to publication of the full CPT reports, which are published together with the responses of the

47. *Blessington and Elliot v. Australia*, HRC Communication No. 1968/2010, U.N. Doc. CCPR/C/112/D/1968/2010, Nov. 17, 2014.

48. Andrew Dyer, *Irreducible Life Sentences: What Difference Have the European Convention on Human Rights & the United Kingdom Human Rights Act Made?* 16 HUM. RTS. L. REV. 541, 584 (2016); *Response of Australia to the Views of the Human Rights Committee in Communication No. 1968/2010 (Blessington and Elliot v. Australia)*, <https://www.ag.gov.au/RightsandProtections/HumanRights/Documents/Blessington&ElliotVAustralia-AustralianGovernmentResponse.pdf> (last accessed Oct. 1, 2018).

49. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment art. 3, Nov. 26, 1987, CETS 126.

50. *Id.* art 8.

member states.⁵¹ This publicity is a powerful incentive for them to change their practices. Evidence of the practical effect of CPT interventions on prison conditions at the national level has increased in recent years, and scholarly research shows that several states do make some efforts to conform with recommendations of the CPT.⁵² At the regional level the CPT has played a further role by inspecting the detention facility in the Netherlands where prisoners on trial before the ICTY are housed as well as prisons in other European countries that hold prisoners sentenced by the Tribunal.⁵³

At the international level there is an interesting variation on the CPT's methods of work. The explicit objective of the 2006 Optional Protocol to the United Nations Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (OPCAT) is to "establish a system of regular visits undertaken by independent *international and national* bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."⁵⁴

For this purpose, OPCAT requires the creation of two types of bodies. First, there is the Subcommittee on Prevention of Torture (SPT), an international body that undertakes visits.⁵⁵ The SPT conducts its visits in much the same way the CPT does,⁵⁶ and since 2007 has undertaken a number of visits worldwide.

Secondly, national states that accede to OPCAT have to set up National Preventive Mechanisms (NPMs), which must have "functional independence",⁵⁷ access to information, and wide powers of investigation⁵⁸ in respect of all persons deprived of their liberty. OPCAT also provides that NPMs may publish their

51. ANTONIO CASSESE, *INHUMAN STATES: IMPRISONMENT, DETENTION AND TORTURE IN EUROPE TODAY* (1996).

52. For example, the Netherlands. Jan de Lange, *Detentie genormeerd: Een onderzoek naar de betekenis van het CPT voor de inrichting van vrijheidsbeneming*, in *NEDERLANDSE PENITENTIAIRE INRICHTINGEN* (2008) (Neth.); Germany: DANIELA CERNKO, *DIE IMPLEMENTIERUNG DER CPT-EMPFEHLUNGEN IM DEUTSCHEN STRAFVOLLZUG*, (2014) (Ger.); Also, the Nordic countries. Tapio Lappi-Seppälä & Lauri Koskeniemi, *National & Regional Instruments in Securing the Rule of Law & Human Rights in the Nordic Prisons*, 70 *CRIME L. & SOC. CHANGE* 135, 159 (2018).

Greece is an exception. Sappho Xenakis & Leonidas Chelioliotis, *International pressure and carceral moderation: Greece and the European Convention on Human Rights*, in *MONITORING PENAL POLICY IN EUROPE* 92 (Cliquennois & de Suremain eds., 1st ed. 2017) (commenting that "Greek governments have long responded to critical CPT reports with a combination of denial and defiance". The same may be said of Russia, which has been the subject of number of highly critical public statements by the CPT).

53. Sonja Snacken & Nik Kiefer, *Oversight of International Imprisonment: The Committee for the Prevention of Torture*, in *RESEARCH HANDBOOK ON THE INTERNATIONAL PENAL SYSTEM* 322, 344 (Róisín Mulgrew & Denis Abels eds., 2016).

54. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 18, 2002, at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199 [hereinafter OPCAT].

55. *Id.* arts. 5–8.

56. *Id.* art. 11(a).

57. *Id.* art. 18.

58. *Id.* art. 19.

findings.⁵⁹ In terms of OPCAT, national authorities undertake to enter into a dialogue with the NPMs about the implementation of any recommendations they may make.⁶⁰ Working with NPMs is a major function of the SPT.⁶¹ Much of the SPT's energy is focused on strengthening NPMs rather than on only undertaking investigations itself. States parties have considerable flexibility on how they constitute their NPMs and many of them seek to rely on their existing prison monitoring systems as key elements of their NPMs.⁶² Nevertheless, OPCAT, through the SPT, has had an impact on the development of national monitoring bodies to ensure that they meet the commitments that states parties have entered into. The substance of these commitments includes the implementation of the UNSMR and other international instruments that refer to prison conditions.

The ratification of OPCAT and the establishment of NPMs has been a slow process. Currently there are eighty-eight states parties of whom sixty-seven have designated their NPMs.⁶³ A 2016 report by the Association of the Prevention of Torture, an international NGO that has sought to propagate OPCAT, points to a direct impact of NPMs on prison conditions in several countries.⁶⁴ These range widely, with reports of positive changes in Costa Rica, Indonesia, Georgia, Mali and Morocco.

A more critical literature, which points out that NPMs are not a panacea to all problems of imprisonment, is gradually emerging.⁶⁵ The powers and influence of NPMs vary from country to country. Moreover, some key countries, including the US, have not ratified OPCAT at all.⁶⁶ However, OPCAT remains important as a potentially worldwide mechanism that is concerned with improving the detail of prison conditions.

Finally, there are various other international processes that also contribute to monitoring prisons and thus have some impact on the recognition of prison conditions as something of more than local significance. A whole range of UN committees, including the Human Rights Committee,⁶⁷ the Committee against

59. *Id.* art. 23.

60. *Id.* art. 20.

61. *Id.* art. 11(b).

62. Slovenia spelt this out in its reservation to its ratification of OPCAT.

63. *OPCAT Database*, Association for the Prevention of Torture, <https://apt.ch/en/opcat-database/> (last visited Aug. 29, 2018).

64. Association for the Prevention of Torture, *Putting prevention into practice 10 years on: the Optional Protocol to the UN Convention against Torture* (2016).

65. Judy McGregor, *The challenges & limitations of OPCAT national preventive mechanisms: lessons from New Zealand* 23 AUSTL. J. HUM. RTS. 351, 367 (2017); Elina Steinerte, *The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms under the Optional Protocol to the UN Torture Convention*, 14 HUM. RTS. L. REV. 1, 29 (2014).

66. For an argument supporting the ratification of OPCAT by the U.S.A., see Jonathan Simon, *Penal monitoring in the United States: lessons from the American experience and prospects for change*, 70 CRIME L. & SOC. CHANGE 161, 173 (2018).

67. Established by [the] International Covenant on Civil and Political Rights, art. 28, Dec. 16, 1996, 999 U.N.T.S. 171.

Torture,⁶⁸ the Committee on the Rights of the Child,⁶⁹ Committee on the Rights of Persons with Disabilities,⁷⁰ and the Committee on the Elimination of Discrimination against Women,⁷¹ all receive reports from States Parties on whether they are meeting the standards set by the underlying treaties. In as far as these treaties are relevant to the treatment of prisoners, these reports regularly include accounts of prison conditions. The evaluations of these reports by the relevant committees produce further international understandings of what prison conditions should be like. Similarly, the reports of UN special rapporteurs, particularly the Special Rapporteur on Torture, often contain both information on abusive prison conditions and recommendations on what should be done to combat them.⁷² Inspections by the ICRC play largely the same role, although ICRC reports are usually confidential to the government concerned.⁷³

C. Application by international professional associations

Professional associations play an important part in encouraging the implementation of regional and international prison standards. In Europe, the Penological Council of the Council of Europe organizes Annual Conferences for Directors of Prison and Probation Services at which European prison standards are given considerable prominence.⁷⁴ The secretariat of the Penological Council has backed this up with a survey of what European states have done to implement the

68. Established by [the] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, art. 17, Dec. 10, 1984, 1465 U.N.T.S. 85.

69. Established by [the] Convention on the Rights of the Child, art. 43, Nov 20, 1989, 1577 U.N.T.S. 3.

70. Established by [the] Convention on the Rights of Persons with Disabilities, art. 34, Jan. 24, 2007, 2515 U.N.T.S. 3.

71. Established by the Convention on the Elimination of All Forms of Discrimination Against Women, art. 17, Dec. 18, 1979, 1249 U.N.T.S. 13.

72. For the introduction of prison conditions to the remit of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see NIGEL S. RODLEY WITH MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 400–01 (3rd ed. 2009); for the nature & function of the Special Rapporteur on Torture more broadly, see *id.* at 204.

73. *Id.* at 198.

74. *E.g.*, Jan Kleijssen, opening speech at the 23rd Council of Europe Conference of Directors of Prison and Probation Services, Working Together Effectively: Management and Co-operation Models between Prison and Probation Services (June 19, 2018), Jõhvi, Estonia discussing ECtHR judgments and CPT reports relating to prison overcrowding, <https://rm.coe.int/jan-kleijssen-opening-speech-23rd-cdpps-estonia-2018-doc/16808b7dfe> (last visited Oct. 9, 2018); Tørbjørn Frøysnes, Ambassador, Head of the Council of Europe Office to the EU, Opening speech at the 18th Conference of Directors of Prison Administration Brussels (Nov. 22, 2013) (outlining importance of ECtHR case law and pilot judgments ¶¶ 5) and emphasising the aim of improving implementation of CoE standards and ECtHR judgments ¶¶ 6), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f5088> (last visited Oct. 9, 2018); Pedro das Neves, Policy and Program Advisor, Prison Administration, Portugal, Presenter to the 18th Conference of Directors of Prison Administration Brussels: The “Low Cost” prison: minimum design for minimum results (Nov. 27, 2018) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f4fc2> (last visited Oct. 9, 2018) (discussing overcrowding and the importance of CPT and EPR standards).

EPR, which it has shared with heads of prison services.⁷⁵ In addition, the European Union (EU) has supported the establishment of EuroPris, the umbrella organization of prison services throughout Europe, which represents the interests of prison administrations and prison officers before the various European bodies in the EU and the Council of Europe. EuroPris describes its primary function as “bringing together practitioners in the prisons’ arena with the specific intention of promoting ethical and rights-based imprisonment, exchanging information and providing expert assistance to support this agenda.”⁷⁶

In other regions, there are similar organizations. In Africa for example, the African Correctional Services Association represents the interests of correctional professionals and at the same time places emphasis on the recognition of the rights that prisoners have to humane prison conditions.⁷⁷

At the international level, the International Corrections and Prisons Association (ICPA) has developed into the leading professional organization for prison officers worldwide. The stated mission of the ICPA is “to promote and share ethical and effective correctional practices to enhance public safety and healthier communities world-wide.”⁷⁸ Much of its work aims to improve technical aspects of prison administration. However, it has involved itself in developing regional and national prison standards⁷⁹ and in propagating the Nelson Mandela Rules.⁸⁰

D. Application by international non-governmental organizations

Specialist international non-governmental organizations (INGOs) rely heavily on international prison standards to justify and legitimize their initiatives to improve prison conditions. Prominent amongst these is Penal Reform

75. Council of Europe, *Report presented to the 16th Conference of Directors of Prison Administration: Summary of the replies given to the questionnaire regarding the implementation of the most recent Council of Europe standards related to the treatment of offenders while in custody as well as in the community* (Council of Europe 2011).

76. European Organisation of Prison and Correctional Services, <https://www.europris.org/about/> (last visited Oct. 9, 2018).

77. African Correctional Services Association, <http://acsa-ps.org/index.php> (last visited Oct. 9, 2018) (“The Association aims to become the front runner and nucleus of Correctional professional development on the African continent and one of the leading Correctional development [organizations] in the world.”) The 4th ACSA Biennial Conference held in Kigali, Rwanda included a presentation from Penal Reform titled *Implementation of the Nelson Mandela Rules in Africa: Challenges and Opportunities* May 16, 2017; conference program available at <http://acsa-ps.org/4th%20conference%20program%20Day2.php> (last visited Oct. 9, 2018).

78. International Corrections & Prisons Association, *Mission, Vision and Values*, <https://icpa.ca/about-us/mission-vision-and-values/> (last visited Oct. 9, 2018).

79. The introductory text of the ICPA states: “The ICPA has collaborated and formed agreements with partner [organizations] for standards-setting in both Africa (the Abuja Declaration) and in Latin America (the Barbados Declaration), and has pledged to work together with the United Nations Department of Peacekeeping in a concerted manner to address the many challenges facing prison systems, particularly in developing and post-conflict environments (the UNDPKO Declaration).” Int’l Corrections & Prisons Ass’n, *About Us*, <https://icpa.ca/about-us/> (last visited Oct. 9, 2018).

80. See e.g., <https://www.irishprisons.ie/director-general-michael-donnellan-awarded-head-service-award-icpa-conference-london-25th-october-2017/> (last visited Oct. 9, 2018).

International, which specifically refers to the Bangkok Rules when seeking the reform of prison conditions for women in the Middle East and North Africa region.⁸¹ Penal Reform International also mentions the Nelson Mandela Rules more generally when campaigning for reforms ranging from a worldwide limit on the use of solitary confinement to the treatment of life-sentenced prisoners.⁸² The Association for the Prevention of Torture campaigns for the ratification of OPCAT and trains bodies acting as National Preventive Mechanisms in international human rights standards.⁸³ Human Rights Watch, which regularly produces reports on prison conditions in various countries, refers to UN standards when justifying its recommendations for improving these conditions.⁸⁴ Amnesty International, too, makes use of these instruments. For example, a recent report by Amnesty International, *Punished for Being Poor: Unjustified, Excessive and Prolonged Pre-Trial Detention in Madagascar*, relied heavily on the Bangkok Rules and the Nelson Mandela Rules in its call for action to set right prison conditions that amount to serious human rights abuses.⁸⁵

E. National applications

In Europe, there is evidence that initiatives taken at the European level to improve prison conditions have been reflected in changed national practices. Recent research findings have shown that, while some European states resist supervision of their prison systems by the ECtHR or claim that for economic reasons they are unable to implement them, the Court's judgments have had a systematic impact on how prisoners are treated throughout Europe.⁸⁶ In 2011 the Penological Council of the Council of Europe conducted a survey of what European states have done to implement the 2006 EPR.⁸⁷ Of the thirty-four states that replied, only the UK answered that the EPR had had no impact on its prison legislation or practices.

81. PENAL REFORM INT'L, *IMPACT EVALUATION: PROMOTING A HUMAN RIGHTS BASED APPROACH TOWARDS DETENTION IN MENA (2011-2013)* (2015).

82. OLIVIA ROPE & FRANCES SHEAHAN, *PENAL REFORM INT'L & THAILAND INST. OF JUSTICE, GLOBAL PRISON TRENDS 2018 (2018)* (life sentence conditions at 13, solitary confinement at 27).

83. Association for the Prevention of Torture Annual Report 2017: 40 years of torture prevention (APT 2017).

84. Human Rights Watch Reports: *We Are In Tombs: Abuses in Egypt's Scorpion Prison* (HRW Sept. 2016); *We Are Like The Dead: Torture and other Human Rights Abuses in Jail Ogaden, Somali Regional State, Ethiopia* (HRW July 2018); *I Needed Help, Instead I Was Punished: Abuse and Neglect of Prisoners with Disabilities in Australia* (HRW Feb. 2018); *Double Punishment: Inadequate Conditions for Prisoners with Psychosocial Disabilities in France* (HRW Apr. 2016).

85. AMNESTY INTERNATIONAL, *PUNISHED FOR BEING POOR: UNJUSTIFIED, EXCESSIVE AND PROLONGED PRE-TRIAL DETENTION IN MADAGASCAR (2018)*.

86. See MONITORING PENAL POLICY IN EUROPE (Gaëtan Cliquenois & Hugues de Suremain eds., 2018) (introducing the accounts of the role of the ECtHR in Germany, France, the Netherlands, Italy, Greece, the Nordic countries, England and Wales, and Spain).

87. Council of Europe *Report presented to the 16th Conference of Directors of Prison Administration: Summary of the replies given to the questionnaire regarding the implementation of the most recent Council of Europe standards related to the treatment of offenders while in custody as well as in the community* (Council of Europe 2011).

Evidence of the practical effect of CPT interventions on prison conditions at the national level has also increased in recent years. Scholarly research shows that several states do make concerted efforts to conform to the recommendations of the CPT.⁸⁸

A good example of how these various European developments could combine to have practical impact on prison conditions occurred in 2004 when a Scottish prisoner sued the authorities on the grounds that his human rights had been breached by his suffering from severe eczema because of the conditions in which he had been forced to live. A Scottish court found that the conditions under which the prisoner had been held, including the practice of “slopping out”, that is using a bucket that had to be emptied in the morning as a lavatory during the night, constituted a breach of his right not to be subject to inhuman or degrading treatment.⁸⁹ In coming to this conclusion, the Scottish court referred to both to judgments of the ECtHR and the EPR. In addition, it placed considerable weight on the reports of the CPT that had condemned the practice of slopping out and noted the failure of the Scottish executive to abide by earlier government undertakings to rectify the problem. The practical effect on prison conditions was that the Scottish authorities abolished the practice of slopping out throughout the Scottish prison system, by building extra facilities that give all prisoners direct access to lavatories.⁹⁰

International prison standards were initially paid relatively little attention by national courts.⁹¹ However, the revised Nelson Mandela Rules were relied on shortly after their adoption in some path breaking national decisions on the controversial subject of solitary confinement. For example, in 2016, this happened in the Federal District Court in New York where Judge Shira Schneidlin justified a consent decree drastically reducing the use of solitary confinement with reference to Rule 45 of the Nelson Mandela Rules, which provides that “solitary confinement

88. For example, the Netherlands. JAN DE LANGE, *DETENTIE GENORMEERD: EEN ONDERZOEK NAAR DE BETEKENIS VAN HET CPT VOOR DE INRICHTING VAN VRIJHEIDSBENEMING IN NEDERLANDSE PENITENTIAIRE INRICHTINGEN* (Wolf 2008) (Neth.); Germany: DANIELA CERNKO, *DIE IMPLEMENTIERUNG DER CPT-EMPFEHLUNGEN IM DEUTSCHEN STRAFVOLLZUG*, (2014) (Ger.); and the Nordic countries: Tapio Lappi-Seppälä & Lauri Koskenniemi, *National & Regional Instruments in Securing the Rule of Law & Human Rights in the Nordic Prisons*, 70 *CRIME L. & SOC. CHANGE* 135, 159 (2018).

Greece is an exception. Sappho Xenakis & Leonidas Chelioliotis, *International Pressure and Carceral Moderation: Greece and the European Convention on Human Rights*, in *MONITORING PENAL POLICY IN EUROPE* 92 (Cliquennois & de Suremain eds., 1st ed. 2017) (“Greek governments have long responded to critical CPT reports with a combination of denial and defiance.”). The same may be said of Russia, which has been the subject of number of highly critical public statements by the CPT.

89. *Napier v. Scottish Ministers*, [2004] SLT 555, [2004] UKHRR 881.

90. Sarah Armstrong, *Securing Prison through Human Rights: Unanticipated Implications of Rights-Based Penal Governance*, 57 *HOWARD J. CRIME & JUSTICE* 401, 421 (2018).

91. Dirk van Zyl Smit, *The Impact of United Nations Crime Prevention and Criminal Justice Standards on Domestic Legislation and Criminal Justice Operation*, in *THE APPLICATION OF UNITED NATIONS STANDARDS AND NORMS IN CRIME PREVENTION AND CRIMINAL JUSTICE* 133, 140 (U.N. Off. in Drugs and Crime ed., 2003).

shall be used only in exceptional cases, for a last resort, and subject to independent review.”⁹² An even more specific example arose in Canada in early 2018, where a judge of the Supreme Court of British Columbia relied heavily on the Nelson Mandela Rules to define administrative segregation as solitary confinement and to prohibit it when used continually for longer than fifteen days—the maximum period that the Rules allow for solitary confinement.⁹³ These decisions are an indication that international standards on prison conditions may play an increasing role in the future.

In sum, when application of standards to prison conditions is considered in the round, there is overwhelming evidence of the development and reinforcement of these standards at the international, regional and national levels. It is at the national level, however, that their actual application takes place.

III. MUTUAL ASSISTANCE

Mutual assistance in criminal matters is widely recognized as an element of transnational criminal law.⁹⁴ The extradition of suspects from one state to stand trial in another state has long been accepted as a key element of mutual assistance. Similarly important is the transfer of sentenced prisoners from the state where they committed their offenses to the states of which they are nationals so that they can serve their sentences in their “home” countries.

Making such assistance dependent on the prison conditions to which the person to be extradited or transferred will be subject in the receiving state, is a much more recent development. This issue first came to international attention in 1989 in the case of Jens Soering, whose extradition from the UK to the US was challenged before the ECtHR on the basis that it would infringe his human rights as he would face the death penalty in the US. The ECtHR agreed, not because it regarded the death penalty as inherently contrary to the ECHR, but because the long period of detention on death row to which Soering might be subject would be inhuman and degrading. Such treatment would infringe the prohibition of such treatment in Article 3 of the ECHR.⁹⁵ Therefore, Soering could not be extradited to the US if there was a possibility that he would be sentenced to death. The US responded to this decision by giving a guarantee that Soering would not face the death sentence and, on this basis, the British government allowed his extradition. Subsequently, such guarantees have routinely been given in all cases where extradition is sought from abolitionist countries. The *Soering* judgment, however, was of international significance beyond the question of the death penalty. It raised the wider question of whether the possibility that persons sent abroad against their will would potentially face human rights violations in prison, could also be a ground for refusing extradition.

92. *Peoples v. Annucci*, 180 F. Supp. 3d 294, 299 (S.D.N.Y. 2016).

93. *B.C. Civil Liberties Ass'n v. Canada* (Att’y Gen.), (2018) CanLII 62 (Can. B.C. S.C.).

94. NEIL BOISTER, *AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW* (2nd ed. 2018).

95. *Soering v. The United Kingdom*, App.14038/88, Eur. Comm’n H.R. (1989).

National courts were initially hostile to considering these wider implications and sought to relativize the human rights standards relating to prison conditions by arguing that strict national and regional standards should not be applied when someone was to be sent outside the region. In 2008 the House of Lords (then still the apex court in the United Kingdom) specifically declined to apply an absolute standard in cases where someone would face life imprisonment outside Europe.⁹⁶ An absolute standard would mean, Lord Hoffmann suggested sarcastically, that a suspect could not be extradited to a country where prisons did not have flush lavatories, since it had been held in the UK that a failure to provide such facilities for domestic prisoners was inhuman and degrading.⁹⁷

Even the German Federal Constitutional Court equivocated on whether prisoners should have the same human rights following extradition as they would in the country in which they had initially been arrested. In 2005, it allowed the extradition from Germany to California of two murder suspects where they would face LWOP sentences. In Germany, such a sentence would be regarded as contrary to the constitutional right to human dignity, because imprisonment without a clear procedure for considering release after a fixed period is regarded as denying the fundamental humanity of the prisoner concerned. However, in an extradition case that was important for purposes of mutual assistance, the German Court explained, a less strict standard could be applied.⁹⁸

Nevertheless, in 2010, in a case involving a request from Turkey for the extradition of someone who, on conviction, would also face an LWOP sentence, the Federal Constitutional Court changed its position. It found that, notwithstanding the requirement of international law that foreign legal orders were to be respected, if someone had no practical prospect of release such punishment would be cruel and degrading (*grausam und erniedrigend*).⁹⁹

European human rights law has developed in the same way as that in Germany. Since the beginning of the current decade the ECtHR has repeatedly recognized in principle that suspects facing extradition should have their human rights as prisoners - both to the internal conditions of imprisonment that meet human rights standards and, in the case of persons facing a life sentence, to appropriate consideration for release - recognized before extradition would be allowed. In principle therefore, the ECHR standards are absolute, to be applied whenever a European state wishes to send someone abroad to be incarcerated there.

The difficulty for persons facing extradition has been to prove that in practice their imprisonment abroad would not meet these human rights criteria. There are a few examples where extradition has been resisted successfully on the grounds of the

96. *Regina (Wellington) v. Secretary of State for the Home Department*, [2008] UKHL 72, [2009] 1 AC 335 (HL) (Eng.).

97. *Id.* ¶ 27.

98. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 6, 2005, 113 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 154 (Ger.).

99. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 16, 2010. (Ger.).

treatment that they may face if they were to be imprisoned in the country seeking their extradition. In the important 2015 case of *Trabelsi v Belgium* the ECtHR did find that the highly restrictive prospects of release that Trabelsi, who was wanted for terrorism in the US, would face if he were convicted and sentenced to life imprisonment, would be inhuman and degrading, and that his extradition should be prohibited.¹⁰⁰ (Even this was something of a Pyrrhic victory as Belgium sent Trabelsi back to the US before the ECtHR could give its judgment.)¹⁰¹

In most extradition cases, however, allegations that prison conditions would be so bad that prisoners would inevitably be subject to inhuman or degrading treatment have rarely succeeded. For example, in 2012 in *Babar Ahmed and others v the United Kingdom*, the applicants argued that their detention in the supermax prison, ADX Florence, where they might well be held in solitary confinement following their extradition to the US, would be a form of inhuman and degrading treatment that would contravene Article 3 of the ECHR. In spite of being able to present considerable evidence of the shortcomings of the regime at ADX Florence, Babar Ahmed and his fellow applicants were unable to convince the ECtHR that the ill-treatment that they could suffer there was likely to reach the requisite level of severity that would justify a finding that Article 3 of the ECHR would be contravened.¹⁰²

Within the European Union (EU), mutual assistance has developed a more streamlined alternative to the cumbersome procedures of worldwide extradition. Member states of the EU have made provision for a European Arrest Warrant, which entitles an EU member state to issue a warrant requesting that a person be sent to them from another member state to attend trial or serve a sentence of imprisonment.¹⁰³ If certain formal requirements relating primarily to the seriousness of the offense and the nationality of the person whose arrest is sought are met, such warrant must be implemented more or less automatically by the executing state, without an enquiry into the substantive grounds for the request that is necessary before traditional extradition could be allowed. A further EU instrument makes provision for executing member states to send sentenced prisoners without their consent to serve their sentences in the countries of which they are nationals.¹⁰⁴ Again, if certain formal requirements are met, this may happen also without the consent of the state to which the prisoners are to be returned.

100. *Trabelsi v. Belgium*, App. No. 140/10, Eur. Ct. H.R. at 20, 41 (2014).

101. Mark Eeckhaut & Jan Temmerman, *Nizar Trabelsi uitgeleverd aan de VS*, DE STANDAARD (Belg.) (Oct. 3, 2013), http://www.standaard.be/cnt/dmf20131003_00772741. The Belgian government relied on a decision of the Belgian Conseil d'Etat (L'arrêt n° 224.770 du 23 Septembre 2013) and ignored its obligations under the European Convention on Human Rights. For this reason perhaps, Belgium did not seek to take the case of Trabelsi to the Grand Chamber of the ECtHR.

102. *Babar Ahmad and Others v. United Kingdom*, Apps. Nos. 24027/07 et al., Eur. Ct. H.R. (2012).

103. Council Framework Decision 2002/584/JHA of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, 2002 O.J. (L190) 1.

104. Case C-216/18, *Minister for Justice and Equality v. LM*, 2018, E.C.R.

The (unintended?) result of these tighter regulations has been that one of the few grounds on which a cross-border transfer of prisoners can be challenged is that prison conditions in the issuing state, where they will be held, as either awaiting trial or sentenced prisoners, do not meet human rights standards. This is paradoxical, for the assumption of these EU instruments, as the Luxembourg-based Court of Justice of the European Union (CJEU) has recently again emphasized, is that there is a strong presumption that all member states comply with the fundamental rights recognized by the EU as a whole.¹⁰⁵ However, in exceptional circumstances, the CJEU has held there may be a departure from the principle of mutual assistance based on mutual trust. As the CJEU has explained:

where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.¹⁰⁶

This principle is a vivid example of how the transnational recognition of standards for prison conditions can influence decisively how a key “moving part” of the transnational legal order operates, or even whether it operates at all. If prison conditions in the executing state are found not to meet human rights standards, the issuing state is not able to have its warrants enforced.

A further interesting question is, how should an executing state decide whether there is a risk that a particular prisoner who is to be transferred might suffer inhuman or degrading treatment? In two important cases, both involving a request following from a European arrest warrant to transfer a prisoner from Germany to Hungary, the CJEU has given some important guidance in this regard. The process has two steps. First, the court in the executing state must, in the words of the CJEU,

initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, *inter alia*, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also

105. Valsamis Mitsilegas, *The Symbiotic Relationship between Mutual Trust & Fundamental Rights in Europe's Area of Criminal Justice* 6 NEW J. EUROPEAN CRIM. L. 457, 480 (2015). For a recent statement of this principle by the Grand Chamber of CJEU, see Case C-216/18, Minister for Justice & Equality (Deficiencies in the System of Justice), 2018, ¶ 40. E.C.R.

106. Joined Cases C-404 & 659/15, Aranyosi and Căldăraru, 2016 E.C.R. 1 ¶ 88.

decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.¹⁰⁷

This technique itself is of significance for the recognition of the transnational aspect of the law governing prison conditions, as the sources mentioned here are also the sources of information on which, as we have seen, transnational insights into prison conditions rely. In this particular case, much was made by the CJEU of a decision of the ECtHR that had held that prisons in the Hungarian system as a whole were overcrowded.¹⁰⁸ This was coupled to other key decisions of the ECtHR that overcrowding resulted in conditions that infringed the prohibition on inhuman and degrading treatment.¹⁰⁹ The fact that the CJEU also allows consideration of other documents produced by the Council of Europe opens the way for courts to consider CPT reports on conditions in the requesting state, while the reference to UN reports would allow reports by, for example, a special rapporteur to be considered in appropriate cases.

If the court in the executing state considers that it is in possession of information that shows that there are systemic or generalized deficiencies in detention conditions in the receiving state, the second step commences. The court in the executing state must determine whether the particular individual who is the subject of an EAW is likely to be detained in a prison where he or she is likely to be subjected to inhuman or degrading treatment. Guidance issued by the CJEU in a recent judgment suggests that in such a case the court in the executing state must also rely on official material from international and regional sources, and cannot rely only on the undertakings given by the issuing state.¹¹⁰ The executing judicial authorities are still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy themselves that their decision on the surrender of that person will not expose him or her, on account of those conditions, to a real risk of inhuman or degrading treatment.

Finally, with regard to mutual assistance more generally, insistence on international standards may result in states that wish to transfer prisoners out of their territory seeking to intervene in the prison systems of foreign states to ensure that the conditions in their prisons are human rights compliant.¹¹¹ A striking example of this tendency is to be found in interactions between the UK and Nigeria in this respect. In 2014, the British government concluded an agreement with Nigeria, which allows the UK to return Nigerian nationals who are serving prison

107. *Id.* ¶ 89.

108. *Varga and Others v. Hungary*, Apps. Nos. 14097/12 et al., Eur. Ct. H.R. (2015).

109. *Affaire Torreggiani et Autres c. Italie*, Apps. Nos. 43517/09 et al., Eur. Ct. H.R. (2013) (Fr.).

110. Case C-220/18, ML intervener: Generalstaatsanwaltschaft Bremen, 2018 E.C.R.

111. Austria, for example, has sought to do so since 2003, when it announced that it would build a prison in Romania to house the many Romanians currently held in Austrian prisons. Hitherto, however, these efforts have been unsuccessful. Manfred Seeh, *Häftlinge in Heimatländer bringen*, DIE PRESSE (Ger.) (May 26, 2016), <https://diepresse.com/home/panorama/oesterreich/4996744/Haeftlinge-in-Heimatlaender-bringen>.

sentences in the UK to Nigeria to serve the remainder of their sentences.¹¹² Contrary to what had been the general practice in international agreements outside Europe up to this point, the agreement provides that such prisoners may be returned without their consent. The British government, fearing, not without reason, that prisoners, facing being sent to Nigeria against their will, would object on the grounds that Nigerian prison conditions would infringe their human rights, provided the Nigerian government with a significant amount of aid money that would enable the Nigerians to build and run human-rights-compliant prisons where returning prisoners could be housed. In March 2018, the Foreign Secretary informed Parliament that the British Government had agreed to build a “UN compliant” 112-bed wing in Kiri Kiri Prison, in Lagos in Nigeria, at a cost of almost £700,000.¹¹³ The small phrase, “UN compliant,” is a further indicator of the extent to which international standards, such as the Nelson Mandela Rules, which the UN has been propagating vigorously, have become an accepted part of this transnational process.

CONCLUSION

The transnational ordering of prison conditions has a long history. Ideas about how all prisons should be managed have been formulated over more than the last two centuries. That international and regional standards should embody these ideas is largely a product of the emphasis on human rights in the post–World War II period.

As this Article has demonstrated, the mechanisms for articulating and enforcing these standards have continued to develop at the international and regional levels, thus enabling the ordering of this area of law and practice. Since the earliest times the ordering process has been driven by a mixture of theorists and practitioners. In more recent times, these theorists have tended to be academics and judges inspired by rights-driven ideals of human dignity. The human rights discourse has contributed to the legitimacy of the ordering process. However, its success has always depended on engaging with prison officials who have the immediate power to improve prison conditions. This engagement has been deliberately sought, with varying degrees of success, in different parts of the world.

112. British High Comm’n Abuja, *UK – Nigeria Sign Compulsory Prisoner Transfer Agreement*, GOV.UK (Jan. 10, 2014), <https://www.gov.uk/government/news/uk-nigeria-sign-compulsory-prisoner-transfer-agreement>. For the background, see Róisín Mulgrew, *The International Movement of Prisoners*, 22 CRIM. L. FORUM 103, 143 (2011).

113. BORIS JOHNSON, PROVISION OF PRISON ACCOMMODATION TO NIGERIA: WRITTEN STATEMENT - HCWS518, PARLIAMENT.UK (Mar. 7, 2018), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-03-07/HCWS518/>. The British government sought to make a similar arrangement with Jamaica, but it was rejected by the Jamaican government. *Carceral Colonialism: Britain Plans to Build a Prison Wing in Nigeria*, CORPORATE WATCH (Apr. 17, 2018), <https://corporatewatch.org/carceral-colonialism-britains-plan-to-build-a-prison-wing-in-nigeria/>.

More research is required to show the impact the discourse about prisoners' rights on prison conditions in individual countries, particularly in the developing world.¹¹⁴ There can be little doubt, however, that an element of transnational legal ordering of prison conditions is a factor in all modern prison systems.

In many ways, the growing attention paid to the international and regional standards governing prison conditions is a positive aspect of the transnational legal ordering of imprisonment. The 2015 Nelson Mandela Rules and 2006 European Prison Rules exemplify this renewed emphasis. Among the benefits of rules of this kind are the additional rights and legal protections offered to prisoners worldwide.

At the same time, the existence of common standards underpins transnational co-operation in prosecuting crime and enforcing sentences of imprisonment. The mutual recognition of common standards facilitates the extradition of accused persons and sentenced prisoners between states that apply these standards in their prisons. It also has the potential to give states that are responding to requests for extradition, or the transfer of sentenced prisoners, leverage to demand the improvement of prison conditions in the receiving states where the prisons may not be up to standard.

The overall impact of human rights-based standards on actual prison conditions has been subject of much debate. One position is out-and-out skepticism about whether they have any impact at all. This is relatively easy to dismiss, as we have seen, for there is empirical evidence of specific changes for the better in prison conditions flowing directly from such interventions. At very least, there is some impact on national law and practice in respect of prison conditions some of the time.

A variation on out-and-out skepticism would hold that human rights interventions in the form of international standards may be of very limited direct significance in their own right, but that they provide stimulus to NGOs, who can use them to legitimize their own interventionist strategies.¹¹⁵ As we have seen, there is certainly convincing evidence of INGOs in particular being empowered by the legitimacy of regional and international instruments that set standards in relation to prison conditions.

Finally, there is a more sophisticated argument that recognizes that a human rights approach to prisoners' rights may lead to bureaucratic reforms, that is, to

114. See for example, the analyses of imprisonment in Sierra Leone by Andrew Jefferson, who argues that, in societies where there is "exorbitant poverty," the relationship between institutions, such as a prison service, and legal rules and structures is weaker and less legitimate than it might be in the Global North. Andrew Jefferson, *The Situated Production of Legitimacy: Perspectives from the Global South*, LEGITIMACY AND CRIMINAL JUSTICE 248, 266 (Justice Tankebe & Alison Liebling eds., 2013); Andrew Jefferson, *Conceptualizing Confinement: Prisons and Poverty in Sierra Leone*, 14 CRIMINOLOGY & CRIM. JUSTICE 44, 60 (2014). In these societies personal links and patronage may be more important than elsewhere. However, law and legal structures continue to play some role. The manner and extent to which the latter are subject specifically to transnational ordering needs to be investigated more fully.

115. Emilie M., Hafner-Burton, & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. OF SOCIOLOGY 1373, 1411 (2005).

increase legal ordering of prison services. However, the unintended consequence may be not only to increase the legitimacy of human rights-compliant prison services but also to provide them with more resources, for example, to build new (and larger) facilities in order to fulfill a mandate of providing better prison conditions. For example, it has been argued that abolition of “slopping out in Scotland led to resources being made available to expand the prison system as a whole.”¹¹⁶

The risk is that transnational legal ordering of prison conditions will pay lip service to having acceptable conditions worldwide, but will contribute to a growth in imprisonment. For example, it may be argued that prisoners will be rehabilitated more effectively if they are returned to their countries of origin, but the real motivation may be that wealthier states are keen to facilitate such transfers in order to rid themselves of troublesome offenders. Even allowing for the cost of improving prisons abroad, it is often cheaper to have prisoners serving their sentences there than in the countries that seek to send them. The paradoxical effect may be that a focus on improving prison conditions in developing countries may lead to foreign aid being directed to building prisons that will house expelled prisoners rather than to development programs that will benefit those countries more directly.

The recognition of paradoxes of this kind illustrates the utility of seeing human rights-driven reforms through the critical lens of transnational legal ordering, as it considers law and practice at the same time. It also illustrates how carefully analyzing prisons conditions as a product of transnational legal ordering can provide insights that go beyond claims that setting international standards for prison conditions is necessarily desirable, while at the same time not denying the positive impact such standards may have.

Transnational legal orders are inherently complex. Their functions may include both progressive and repressive elements. This conclusion may disappoint human rights idealists, who are determined to improve prison conditions by developing international standards against which these conditions can be judged. As this Article has shown, however, a focus on transnational legal ordering reveals many of these complexities. This is a strength of this form of analysis, which may assist in developing more effective reformist strategies as well.

116. Armstrong, *supra* note 90.