

**THE IMPOTENCE OF BEING EARNEST:¹
STATUS OF THE UNITED NATIONS STANDARD
MINIMUM RULES FOR THE TREATMENT OF PRISONERS
IN EUROPE AND THE UNITED STATES**

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ABSTRACT

The Standard Minimum Rules for the Treatment of Prisoners were approved with the most earnest of good intentions at the First United Nations Crime Congress in 1955, in an attempt to establish “what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.” In spite of their noble purpose, implementation of these rules has been somewhat of a disappointment. Europe has adopted the Standard Minimum Rules wholesale. The United States, by contrast, has declined to adopt a set of standards patterned after the Standard Minimum Rules, relying instead on pre-existing correctional standards bolstered by reforms resulting from prisoner civil rights litigation. This paper will review the status of the Standard Minimum Rules and, using Europe and the United States as examples, will demonstrate how these guidelines can be an *important*, and not an *impotent*, tool when implemented in connection with a domestic enforcement mechanism.

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¹ With apologies to Oscar Wilde’s *The Importance of Being Earnest: A Trivial Comedy for Serious People* (1895).

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INTRODUCTION

Scandals involving mistreatment of detainees at the Abu Ghraib prison in Iraq and at the Guantanamo Bay detention center have raised questions about what legal protections apply to the persons imprisoned in these facilities. There has been much debate about the extent to which international law protects individuals seized during the “war on terror,” particularly about application of the laws protecting prisoners of war found in the 1949 Geneva Conventions.³ While this discussion has frequently focused on

³ See Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (12 Aug. 1949) (“Geneva Convention I”); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 (12 Aug. 1949) (“Geneva Convention II”); Convention Relative to the Treatment of Prisoners of War (“Geneva Convention III”) 75 U.N.T.S. 135, T.I.A.S. 3364, 6 U.S.T. 3316

whether terror suspects qualify for protection under the laws of war as “lawful” or “unlawful” combatants,⁴ it has also highlighted protections intended to apply to all detainees, such as those found in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Standard Minimum Rules”),⁵ which were approved with high hopes in 1955.

In spite of the longstanding existence of the Standard Minimum Rules, enforcement of prisoners rights on an international level has proven frustrating. Apart from the Geneva Convention governing the treatment of prisoners of war and other multinational agreements such as the International Covenant on Civil and Political Rights,⁶ or the Convention Against Torture and Other Cruel, Inhuman or Degrading

(12 Aug. 1949); and Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (12 Aug. 1949) (“Geneva Convention IV”).

⁴ See generally George C. Harris, *Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant*, 26 LOY. L.A. INT’L & COMP. L. REV. 31 (2003); Anne E. Joynt, Note, *The Semantics of the Guantanamo Bay Inmates: Enemy Combatants or Prisoners of the War on Terror*, 10 BUFF. HUM. RTS. L. REV. 427 (2004); Pierre-Richard Prosper, *United States Policy and Practice for the Detention of Enemy Combatants in the War on Terror*, 68 ALB. L. REV. 1153 (2005); Lt. Col. Paul E. Kantwill and Maj. Sean Watts, *Hostile Protected Persons or “Extra-Conventional Persons:” How Unlawful Combatants in the War on Terrorism Posed Extraordinary Challenges for Military Attorneys and Commanders*, 28 FORDHAM INT’L L. J. 681 (2005).

⁵ Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E.5988 (1977), available at <http://www1.umn.edu/humanrts/instreet/glsmr.htm>.

⁶ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force March 23, 1976, entered into force for the United States June 8, 1992, 999 U.N.T.S. 171 (1966).

Treatment or Punishment,⁷ there is no international treaty devoted solely to the rights of detainees. Unlike these conventional sources,⁸ the model guidelines found in the Standard Minimum Rules are considered a “soft” source of international law.⁹ Soft sources of law assist in identifying trends or matters of concern within the international community, but they do not impose legally binding obligations on their own.¹⁰ Of course, these soft sources can be an important component of customary international law, which depends on objective patterns of state practice and subjective patterns of expectation in order to establish that a given norm may be considered universally binding

⁷ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-200, 1465 U.N.T.S. 85 (1988).

⁸ There are many sources of international law, but some sources have a higher priority. *See* Statute of the Court of International Justice, Art. 38(1), T.S. No. 993, 59 Stat. 1055 (June 26, 1945) (identifying international conventions, international custom, “general principles of law recognized by civilized nations,” as well as ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’ as among the sources). A “hard” source such as a multilateral convention or treaty generally becomes binding on a party once the instrument is signed and ratified in accordance with domestic laws. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 9-40 (4th ed. 2003). In contrast to a legally binding treaty among nations, resolutions of international organizations — such as the United Nations — are sometimes regarded as “soft law.” *Id.* at 52-53. Thus, there is a distinction between sources of international law and so-called “soft” sources that, while not strictly binding, are not completely void of legal significance. *Id.* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-200, 1465 U.N.T.S. 85 (1988).

⁹ *See* RICHARD B. LILICH AND HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 276-339 (3rd ed. 1995) (discussing the creation of new human rights norms created by the United Nations other than by treaty, using the Standard Minimum Rules as an example of the “model law” or “soft law” approach).

¹⁰ *See* ANTONIO CASSESE, INTERNATIONAL LAW 160-61 (2001) (describing sources of “soft” international law).

without the need for a treaty or convention.¹¹ A given source's vitality, its status, and its utility are objective factors in this analysis.

The Standard Minimum Rules were intended to serve as important source of guidelines for good prison administration. Unlike the Geneva Conventions, however, which have been widely accepted, the implementation process for the Standard Minimum Rules has been fairly flaccid, undercutting its potency as a source of protection for prisoners.¹² This has not been for lack of well meaning efforts, however ineffective, undertaken by the United Nations and advocates of the Standard Minimum Rules.

Thirty years ago, proponents of the Standard Minimum Rules encouraged wholesale adoption by means of direct incorporation into domestic legal systems as opposed to indirect piece-meal implementation through judicial interpretation.¹³ Europe

¹¹ See JANIS, *supra* note 8 at 41-48.

¹² Domestic implementation of international legal norms such as those found in the Geneva Conventions or the Standard Minimum Rules generally occurs through the process of incorporation. See JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 12 (2nd ed. 2003). Sometimes incorporation occurs directly, such as where a state incorporates an international law through a legislative act. See *id.* Sometimes incorporation occurs indirectly, such as where an international norm is used as an interpretive aid to clarify or supplement domestic law. See *id.* A third type of incorporation occurs by reference, such as when a domestic statute refers to a particular source of international law. See *id.* at 13-14 (pointing to federal statutes outlawing "piracy as defined by the law of nations" or violations of the "law of war").

¹³ Douglas J. Besharov and Gerhard Mueller, *The Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules for the Treatment of Prisoners: A Comparison*, 21 *BUFF. L. REV.* 839, 853 (1972) (advocating general acceptance through wholesale adoption of the Standard Minimum Rules into domestic law as "preferable to the route of unpredictable and expensive court litigation, point by point, standard by standard").

has followed this direct strategy,¹⁴ adopting the Standard Minimum Rules outright and updating them with their own set of regional guidelines known as the European Prison Rules.¹⁵ The United States, by contrast, has not formally adopted the Standard Minimum Rules, but has relied instead on standards developed by different professional organizations and on enforcement of prisoners rights through litigation that sometimes takes the Standard Minimum Rules into consideration. Thus, it can be said that the United States has taken an indirect approach to incorporating the Standard Minimum Rules.¹⁶

Regardless of the means of incorporation, the Standard Minimum Rules, by themselves, have not achieved the level of respect accorded to formal treaties. This paper will review the status of the Standard Minimum Rules within Europe and the United States to examine their effectiveness — or lack thereof — in each system. To provide some context for the development of the Standard Minimum Rules, part one of this paper will briefly review prison reform movements in Europe and the United States. Part two

¹⁴ See PAUST, *supra* note 12, at 12 (“Direct incorporation of international law involves use of an international agreement or customary international law directly as law forming the basis for a claim, right, duty, power, civil cause of action, criminal prosecution, or other type of sanction.”).

¹⁵ See Council of Europe, European Standard Minimum Rules for the Treatment of Prisoners, Resolution No. 73(5) (Jan. 19, 1973); Council of Europe, European Prison Rules, Recommendation No. R(87)3 of the Committee of Ministers to Member States (Strasbourg, Feb. 12, 1987).

¹⁶ See PAUST, *supra* note 12, at 12 (“In this instance, international law is not used directly as the basis for a civil claim or criminal prosecution, but indirectly to inform the meaning of some other law or legal instrument.”); *see also, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (examining the content of international norms to inform the meaning of the Eighth Amendment to the United States Constitution and whether the execution of juveniles qualified as “cruel and unusual punishment” under evolving standards of decency).

of the paper will examine the history of the Standard Minimum Rules as an important human rights instrument and will comment separately on how the implementation process has sputtered at an international level. This section of the paper will also offer some generalizations about which provisions of the Standard Minimum Rules have become settled international norms. Part three of the paper will address how prisoners' rights are protected in Europe and the United States by prison standards that have been influenced by the Standard Minimum Rules in different ways as well as by the availability of judicial review for abusive practices and conditions. This part of the paper will also make a few observations about why the Standard Minimum Rules have influenced these systems differently and how this has affected their utility. This review will show that, while the Standard Minimum Rules serve an important function of articulating generally accepted levels of prison administration, these guidelines, standing alone, are ineffectual without an enforcement mechanism to vindicate the rights of prisoners who have suffered true mistreatment.

I. HISTORY OF PRISON REFORM

A brief overview of historical prison reform movements will assist with a comparison of legal systems in Europe and the United States and the evolution of prison standards.¹⁷ This historical review will demonstrate why guidelines such as the Standard Minimum Rules were necessary to address important issues that affect all persons in detention and will show that good intentions toward prisoner welfare have been around

¹⁷ LIORA LAZARUS, *CONTRASTING PRISONERS' RIGHTS: A COMPARATIVE EXAMINATION OF GERMANY AND ENGLAND* 5 (2004) (observing that a historical review is frequently relevant to a comparative law analysis because "'it is not sufficient just to look at legal texts and rules to explain why legal systems are different.'") (quoting J. Bell, *Comparing Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 11 (2002) (A. Harding and E. Özücü, eds.)).

just as long as there have been prisons. This review reveals that, historically, good intentions have frequently been thwarted by the complexities of prison administration. It will also help clarify why the legal systems in Europe and the United States have taken different approaches with respect to the Standard Minimum Rules. Before discussing prison reform efforts, it is helpful to consider why imprisonment developed as a popular form of punishment in the first place.

A. Prison as Punishment

Imprisonment has not always been the predominant form of punishment for criminal offenses as it is today. Historically, the most common forms of punishment for serious misdeeds were banishment or exile, enslavement, corporal punishment, capital punishment, and, for lesser offenses, public humiliation or shame-based measures, such as placement in stocks.¹⁸ During early times, punishment-as-public-spectacle was used as a method to control crime.¹⁹ Although prisons, jails, and dungeons existed, they were used primarily to hold debtors or to detain those accused of an offense and were not the primary means for punishing offenders.²⁰ Conditions in European jails during this time

¹⁸ See IRA J. SILVERMAN, CORRECTIONS: A COMPREHENSIVE VIEW 70-71 (2nd ed. 2001).

¹⁹ TODD R. CLEAR & GEORGE F. COLE, AMERICAN CORRECTIONS 24 (6th ed. 2003); Edward M. Peters, *Prison Before the Prison: Ancient and Medieval Worlds*, in OXFORD HISTORY OF THE PRISON at 3, 32 (Norval Morris and David J. Rothman, eds., 1998) (“Punishment in English criminal law was intended to be quick and public to serve as a deterrent to other crime. Thus, forms of punishment ranged from shaming display – the pillory, mutilation, branding, public stocks, and ducking stools – to severe and aggravated capital punishments – hanging, drowning, burning, burial alive, or decapitation – and any of these could be preceded by the infliction of torments before the execution itself.”).

²⁰ See SILVERMAN, CORRECTIONS, *supra* note 18, at 79; CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 27; Randall M. McGowen, *The Well-Ordered*

were extremely poor: “Men, women, and children, healthy and sick, were locked up together; the strong preyed on the weak, sanitation was nonexistent, and disease was epidemic.”²¹ Still, incarceration was not typically imposed as punishment.

An early effort to use imprisonment for the purpose of correction or reformation stemmed from the so-called Protestant work ethic. A forerunner of the modern prison, the workhouse evolved after the Protestant Reformation in the Sixteenth Century as a way to reform those who were “living in sin” or to put beggars and vagabonds to useful purpose.²² The prison workhouse regime “revolved around forced labor,” except on Sunday, which was reserved for religious instruction.²³ The workhouse eventually became known as the “house of correction,” where the “inmates – primarily prostitutes, beggars, minor criminals, and the idle poor such as the orphaned and the sick – were to be disciplined and set to work.”²⁴

Advances in social thinking contributed to the abandonment of humiliating public spectacles and other cruel practices of punishment. The Enlightenment, which occurred

Prison, in OXFORD HISTORY OF THE PRISON 72 (Norval Morris and David J. Rothman, eds., 1998).

²¹ CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 27.

²² SILVERMAN, CORRECTIONS, *supra* note 18, at 79.

²³ See Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in OXFORD HISTORY OF THE PRISON at 64.

²⁴ CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 28; see also STEPHEN LIVINGSTONE, TIM OWEN, AND ALISON McDONALD, PRISON LAW § 1.02 (3rd ed. 2003) (describing the “local prison,” which included facilities called “bridewells” and “houses of correction (which existed to encourage vagabonds, beggars, and the ‘idle poor’ in the ways of work but which also housed minor offenders)” in contrast to the “local gaol,” which housed felons, misdemeanants, convicted or unconvicted, civil debtors, and, until 1867, those awaiting transportation to an Australian penal colony).

in the 1700s, ushered in an era of reform that saw important changes in Western society's thinking about religion, government, and science, as well as criminal laws and correctional practices.²⁵ During this time, there was a shift away from corporal punishment and, in its place, the "penitentiary developed as an institution in which criminals could be isolated from the temptations of society, reflect on their offenses, and thus be reformed."²⁶

The first prison in the United States, the Walnut Street Jail in Philadelphia, was built in 1787, and expanded in 1790 to include a "Penitentiary House."²⁷ It featured a program advocated by the Quakers, who wanted to reform offenders while providing humane treatment.²⁸ The Quakers opposed corporal punishment and believed that reformation was the only real purpose of punishment.²⁹ They favored order and quiet in the prison environment to allow for true penitence.³⁰ Under the Quaker regime, serious offenders were placed into solitary confinement until they could earn the privilege of

²⁵ See CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 32.

²⁶ *Id.*

²⁷ See SILVERMAN, CORRECTIONS, *supra* note 18, at 86-87; see also CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 42.

²⁸ See SILVERMAN, CORRECTIONS, *supra* note 18, at 86; see also CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 42 (Legislation passed in Pennsylvania in 1790, which was heavily influenced by the Quakers, contemplated the establishment of "an institution in which 'solitary confinement to hard labor and a total abstinence from spiritous liquors will prove the most effectual means of reforming these unhappy creatures.'" (quoting BLAKE MCKELVEY, AMERICAN PRISONS 8 (1977))).

²⁹ See McGowen, *The Well-Ordered Prison*, *supra* note 20, at 86.

³⁰ See *id.*

engaging in work, which was enjoyed by less serious offenders who were housed communally.³¹

Crowded conditions at the Walnut Street Jail facility led to the construction of the first free-standing penitentiary. To combat overcrowding, which was seen as detrimental to reform, the Pennsylvania legislature authorized construction of the Eastern Penitentiary in Cherry Hill, just outside of Philadelphia.³² Under the Pennsylvania system, inmates lived separately in a facility designed so that they “ate, slept, read their Bibles, received moral instruction, and worked in their cells” with limited interaction with each other, prison employees, or members of the public.³³ They were allowed one hour of exercise per day.³⁴ This program featured Quaker ideals of solitary confinement, work, and penitence.³⁵

The penitentiary movement in the United States actually stemmed from increased interest in prison conditions in Europe, which were deplorable, and modern thinking about crime and punishment.³⁶ England, which could no longer export convicts to the

³¹ See SILVERMAN, CORRECTIONS, *supra* note 18, at 86; CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 43.

³² SILVERMAN, CORRECTIONS, *supra* note 18, at 87; *see also* CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 39 (“Few Americans realize that their country gave the world its first penitentiary, an institution created to reform offenders within an environment designed to focus their full attention on their moral rehabilitation.”).

³³ SILVERMAN, CORRECTIONS, *supra* note 18, at 87.

³⁴ *See id.*

³⁵ *See id.* at 88.

³⁶ *See* REPORTS OF THE PRISON DISCIPLINE SOCIETY OF BOSTON, vol. 1, at x (1972). The Quakers of Philadelphia were greatly influenced by Italy’s Cesare Beccaria and his *Essay on Crimes and Punishment*, which was published in 1764. *See id.*

American Colonies after the War of Independence in 1776, began to use old de-commissioned ships or “hulks” to house convicts.³⁷ A year later in 1777, prison reformer John Howard penned a scathing report that condemned prison conditions throughout Europe.³⁸ In his book, *The State of the Prisons*, Howard reported that conditions in English and European jails in general were filthy, prisoners were often ill, as well as ill treated, and the system was corrupt.³⁹ Howard’s book, which envisioned a healthy and efficient prison as an ideal, proved influential to the Quakers in America.⁴⁰

In spite of Howard’s revelations, Europe did not immediately embrace the penitentiary idea. England adopted a proposal of penal reform based on the penitentiary principle but ultimately decided that it would be cheaper to transport convicts to a penal colony in Australia.⁴¹ During this time, England had operated a dual system of local jails or “gaols” as well as a small number of “convict prisons.”⁴² At some point, American

³⁷ LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 1.03.

³⁸ See John Howard, *The State of the Prisons*, excerpts of which are reprinted in IMPRISONMENT: EUROPEAN PERSPECTIVES at 7-29 (John Muncie and Richard Sparks, eds., 1991). In addition to prisons in the “United Provinces” of England, Scotland, and Ireland, Howard visited prisons in France, Flanders, Holland, Germany, Prussia, Austria, Denmark, Sweden, Russia, and Poland. See also McGowen, *The Well-Ordered Prison*, *supra* note 20, at 78-80 (discussing John Howard’s quest for healthy and efficient penal institutions and his influence as a prison reformer in Great Britain).

³⁹ See *gen.* Howard, *supra* note 38, at 7-29.

⁴⁰ See McGowen, *The Well-Ordered Prison*, *supra* note 20, at 79, 86-88. See also REPORTS OF THE PRISON DISCIPLINE SOCIETY OF BOSTON, *supra* note 36, vol. 1, at viii - xiv (discussing early corrections in America and the Pennsylvania system).

⁴¹ See John Hirst, *The Australian Experience: The Convict Colony*, in OXFORD HISTORY OF THE PRISON at 236 (referencing the Penitentiary Act of 1779, which was influenced by John Howard’s 1777 treatise *State of the Prisons*).

⁴² See LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 1.02.

experiments with the penitentiary began to influence reform efforts abroad.⁴³ After it ceased transporting convicts to Australia and other outposts in 1857, England implemented a program of penal servitude in its place and enacted reforms in an effort to improve prison conditions in response to those described in John Howard's book.⁴⁴ France would continue deporting recidivist convicts to penal colonies such as those found in French Guyana and New Caledonia until 1897.⁴⁵ Eventually, other European countries would adopt the Pennsylvania model for their own penal systems.⁴⁶

Even as the Pennsylvania model grew in popularity in Europe, this system was soon abandoned in the United States for another that was developed in 1816 at the Auburn Prison in New York. Although the "New York" or "Auburn" plan had similarities to the Pennsylvania scheme, there were important differences in correctional philosophy and economy. The Auburn plan established a "congregate system" of confinement that, like the Pennsylvania model, emphasized discipline, obedience, and work.⁴⁷ The Auburn system viewed prolonged isolation of the type found in the

⁴³ See McGowen, *The Well-Ordered Prison*, *supra* note 20, at 88. In comparison to the gallows, the use of imprisonment for punishment was viewed as reform. See *id.*

⁴⁴ See *id.* at §§ 1.04, 1.05.

⁴⁵ See Patricia O'Brien, *The Prison on the Continent: Europe, 1865-1965*, in OXFORD HISTORY OF THE PRISON at 190-91.

⁴⁶ See SILVERMAN, CORRECTIONS, *supra* note 18, at 88; see also CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 44 ("Most European visitors favored the Pennsylvania model, and the First International Prison Congress, held in 1846 in Germany, endorsed it by a large majority. The separate system was soon incorporated in correctional facilities in Germany, France, Belgium, and Holland.").

⁴⁷ CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 44; see also David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in OXFORD HISTORY

Pennsylvania model cruel, however, and featured instead segregated confinement of each inmate at night only, work by prisoners during the day to pay the cost of imprisonment, and a rigidly enforced rule of silence to prevent inmates from “corrupting each other or plotting escapes and riots.”⁴⁸ The Auburn system, which generally continued to regard reformation as the goal of penitentiary-style punishment, quickly became the model for prisons in the United States because it was less expensive to operate than the Pennsylvania model.⁴⁹ At least twenty-nine states built Auburn-style prisons.⁵⁰

B. The Reformatory Movement and the 1870 Declaration of Principles

Prison overcrowding and budget problems essentially doomed whatever noble intentions were found in the Pennsylvania and Auburn models of penitentiary management. In that respect, overcrowding and understaffing made it impossible to

OF THE PRISON at 105 (describing the congregate system of imprisonment implemented at the Auburn State Prison and then at Ossining, better known as Sing Sing, as opposed to the separate system found in Pennsylvania).

⁴⁸ SILVERMAN, CORRECTIONS, *supra* note 18, at 89; *see also* Rothman, *Perfecting the Prison*, *supra* note 47, at 106 (noting that, unlike the Pennsylvania system, which confined prisoners to individual cells for their entire sentence of confinement, prisoners in an Auburn prison slept alone, one to a cell, but congregated during to work in prison shops where they were not allowed to speak to one another).

⁴⁹ SILVERMAN, CORRECTIONS, *supra* note 18, at 90.

⁵⁰ *See id.* at 92; *see also* Rothman, *Perfecting the Prison*, *supra* note 47, at 107 (observing that almost all the states adopted the Auburn plan out of an “eager[ness] to realize the rehabilitative influence of the prison without incurring the greater costs required by the Pennsylvania system”). For example, the “Walls Unit” in Huntsville, originally constructed as the first Texas prison in 1848, is an Auburn model prison. *See* CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 46.

enforce the disciplined structure of either system.⁵¹ In place of these regimented systems appeared brutal regimes that featured leased inmate labor and harsh punishment that often amounted to torture.⁵² Overcrowding became the rule, as did increasing prisoner unrest.⁵³ Further contributing to the demise of early reformation efforts was the changing nature of the United States prison population, which included a rising percentage of immigrants. Beginning in the 1860s, the type of inmate arriving at state penitentiaries also represented a “more hardened group” of murderers, robbers, and rapists.⁵⁴

The failure of the Pennsylvania and Auburn-plan prisons did not signal an end to Quaker-like concern for prisoner welfare in the United States. Rather, it triggered an interest in implementing ideas for reform from abroad. In 1870, penal reformers from the United States, Canada, South America, and Europe attended the first National Congress on Penitentiary and Reformatory Discipline in Cincinnati, Ohio.⁵⁵ The 1870 Congress resulted in the formation of an organization of correctional professionals, the National

⁵¹ See SILVERMAN, CORRECTIONS, *supra* note 18, at 92; see also Rothman, *Perfecting the Prison*, *supra* note 47, at 109 (observing that prison officials were able to maintain the rule of silence prior to 1850 because overcrowding was not a problem before that time).

⁵² See SILVERMAN, CORRECTIONS, *supra* note 18, at 92; see also CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 45 (observing that, by 1840, “hard labor organized under the contract system achieved dominance in northeastern penitentiaries”).

⁵³ See Rothman, *Perfecting the Prison*, *supra* note 47, at 112 (noting that, by 1866, even the Pennsylvania penitentiary at Philadelphia, which had once housed all inmates in solitary confinement, could no longer completely separate all of its inmates).

⁵⁴ See *id.* at 113.

⁵⁵ ANTHONY P. TRAVISONO AND MARY Q. HAWKES, BUILDING A VOICE: 125 YEARS OF HISTORY [THE AMERICAN CORRECTIONAL ASSOCIATION] 5(1995).

Prison Association, which would later become known as the American Correctional Association (the “ACA”).⁵⁶ As a result of this Congress, penal reformers in the United States embraced a new philosophy developed in Ireland, which featured a “mark” system of stages to punish offenders for their past crimes and to prepare offenders to return to society.⁵⁷ Significantly, the Congress also resulted in a “Declaration of Principles of Prison Discipline” (the “1870 Declaration of Principles”), consisting of thirty-seven articles,⁵⁸ which generally advocated “a philosophy of reformation as opposed to the adoption of punishment, progressive classification of prisoners based on the mark system, the indeterminate sentence, and the cultivation of the inmate’s self-respect.”⁵⁹

The 1870 Declaration of Principles have proven to be an influential and enduring model for prison reform.⁶⁰ Based on principles from this model, which emphasized

⁵⁶ See *id.* at 6. In 1941, the National Prison Association was renamed the American Prison Association, which became the American Correctional Association in 1954. See SILVERMAN, CORRECTIONS, *supra* note 18, at 98, n.8.

⁵⁷ SILVERMAN, CORRECTIONS, *supra* note 18, at 92-95; CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 48 (describing the “Irish or *intermediate* system” in which an inmate could earn “marks” to transfer through stages of solitary confinement to a modern precursor of the parole system) (emphasis in original).

⁵⁸ See TRAVISONO AND HAWKES, *supra* note 55, at 205-19 (setting out the Principles in full).

⁵⁹ SILVERMAN, CORRECTIONS, *supra* note 18, at 95 (quoting from the Declaration of Principles adopted by the newly-organized National Prison Association following a conference of the National Congress on Penitentiary and Reformatory Discipline in Cincinnati); see also CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 49 (describing the “Cincinnati Declaration” of 1870).

⁶⁰ See TRAVISONO AND HAWKES, *supra* note 55, at 59, 121-22 (observing that the Declaration of Principles adopted in 1870 as been revised and reaffirmed by the ACA in 1930, in 1960, and again in 1970, with the basic structure still intact).

rehabilitation, the first “reformatory” opened in Elmira, New York, in 1876.⁶¹ Between 1877 and 1913, seventeen states built reformatories,⁶² which were designed to emphasize rehabilitative programs that featured educational and vocational training.⁶³ Although the rehabilitative model resulted in a number of innovative programs, including the first parole system in the United States, the liberal ideals of reform were frustrated as the system eventually regressed to the harsh disciplinary methods of previous years.⁶⁴

C. Failure of Reform and the Crime Control Era

Like the penitentiary system devised by the early Quakers, rehabilitative principles advanced by the reformatory movement had noble intentions. Unfortunately, overcrowded and chaotic conditions of the type that led to the demise of the Pennsylvania and Auburn models also contributed to the failure of the reformatory movement.⁶⁵ By the outbreak of World War I in Europe in 1914, the reformatory movement was in full

⁶¹ See SILVERMAN, CORRECTIONS, *supra* note 18, at 95; see also Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in OXFORD HISTORY OF THE PRISON at 154-55 (reporting that the Elmira Reformatory in New York, which opened in 1876, featured a system based on ideas advanced at the 1870 National Congress of Penitentiary and Reformatory Discipline in Cincinnati).

⁶² See SILVERMAN, CORRECTIONS, *supra* note 18, at 96.

⁶³ See Rotman, *Failure of Reform*, *supra* note 61, at 155-56 (discussing the Elmira model).

⁶⁴ See SILVERMAN, CORRECTIONS, *supra* note 18, at 96-97 (citing one report, which stated that reformatory inmates rejected the authority of their custodians resorted to “violence, revolts, escapes, drugs, arson, homosexuality [and] suicide,” resulting in a system that was “ineffective and brutal” rather than “benevolent”); CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 50 (outlining an 1893 investigation into charges of brutality at the Elmira reformatory, “which revealed that the whip and solitary confinement were used there regularly”).

⁶⁵ See Rotman, *Failure of Reform*, *supra* note 61, at 156.

decline.⁶⁶ Conditions in the United States prison system also continued to deteriorate as corrupt, understaffed institutions struggled to maintain control of overcrowded facilities, often resorting to brutal, arbitrary forms of punishment, such as “lashing.”⁶⁷

The failure of the reformatory movement left a void that would be filled with institutions whose main purpose was to warehouse offenders. The United States government opened its first federal prison in 1895, in Leavenworth, Kansas, for civilians convicted of violating federal law.⁶⁸ The years between 1900 and 1950 saw an increase in this type of “Big House” prison, which resembled a military-style fortress, and the emergence of the United States Bureau of Prisons as federal prisoners grew in number.⁶⁹

With the rise of the Big House also came the proliferation of leased prison labor at state-run facilities, by which private entrepreneurs were allowed to exploit and profit from a cheap workforce that was organized into chain gangs.⁷⁰ Prison farms, which also relied heavily on inmate labor, operated throughout the American south by 1917.⁷¹ These

⁶⁶ See CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 50.

⁶⁷ See Rotman, *Failure of Reform*, *supra* note 61, at 156.

⁶⁸ FRANK SCHMALLEGER, CRIMINAL JUSTICE TODAY 562 (8th ed. 2005); see also Rotman, *Failure of Reform*, *supra* note 61, at 166 (The first site chosen for the construction of a federal prison was Leavenworth, [Kansas].”) and 212 (“The Three Prisons Act of 1890 authorized building federal prisons at Leavenworth Kansas; Atlanta, Georgia; and McNeil Island, Washington. Until 1890, those convicted of federal offenses were farmed out by contract to state institutions.”).

⁶⁹ See SILVERMAN, CORRECTIONS, *supra* note 18, at 116, 118-26; see also Rotman, *Failure of Reform*, *supra* note 61, at 165 (commenting on the new “Big House” type of prison managed by professionals instead of short-term political appointees and designed to hold large populations of inmates, who were controlled with “stultifying routines, monotonous schedules, and isolation”).

⁷⁰ See Rotman, *Failure of Reform*, *supra* note 61, at 157.

⁷¹ See SILVERMAN, CORRECTIONS, *supra* note 18, at 103.

farms depended upon forced labor to grow their own food and harvest other crops, including cotton, in plantation-style fashion.⁷² In Mississippi, practically all inmates were forced to perform agricultural work at the infamous Parchman farm, which relied on surveillance performed by other prisoners — or trustees — who were notoriously cruel.⁷³ The self-sufficient “prison farm complex” flourished during the Great Depression of the 1930s when states lacked funds for prison programs or improvements.⁷⁴ Eventually, civil rights activists would target racist prison policies practiced at the prison farms, particularly in Mississippi.⁷⁵

The failure of the reformatory movement along with the rise of Big House penitentiaries and prison farms did not mean that there was a total loss of interest in prisoner rehabilitation in the United States. In the 1930s, the growing influence of behavioral sciences in the fields of social work, psychiatry, and psychology led to a progressive reform movement in United States prisons.⁷⁶ Under this “medical or therapeutic model,” the assumption was that “criminal offenders suffered from some form of physical, mental, or social pathology.”⁷⁷

⁷² See *id.* at 103-04.

⁷³ See Rotman, *Failure of Reform*, *supra* note 61, at 157.

⁷⁴ See SILVERMAN, *CORRECTIONS*, *supra* note 18, at 105.

⁷⁵ See *id.* at 105-06.

⁷⁶ See CLEAR & COLE, *AMERICAN CORRECTIONS*, *supra* note 19, at 53.

⁷⁷ See Rotman, *Failure of Reform*, *supra* note 61, at 158-59 (outlining the psychotherapeutic model of prison reform underway in the United States at the turn of the 20th Century).

Rapid social and political change in Europe also signaled changes in the treatment of prisoners. European countries experienced fluctuations in the development and use of imprisonment as a model of punishment, as different nations maintained their own distinct prison systems.⁷⁸ Some nations reacted to criticisms lodged against the use of imprisonment toward the end of the nineteenth century by experimenting with non-custodial forms of punishment.⁷⁹ Other nations expanded their prison systems.⁸⁰ The gulag-style prisons in the former Soviet Union that featured forced prison labor,⁸¹ and the concentration camps utilized by Germany and Italy during World War II,⁸² are considered the most extreme examples of imprisonment in Europe during this period.⁸³

⁷⁸ See Patricia O'Brien, *The Prison on the Continent: Europe, 1865-1965*, *supra* note 45, at 178.

⁷⁹ See *id.* at 179, 188-89 (describing the suspended sentence and supervised parole as “nonincarcerative punishments”); see also Norman Bishop, *Aspects of European Penal Systems*, in *PROGRESS IN PENAL REFORM* at 84-90 (Louis Blom-Cooper, ed., 1974) (describing restrictions on, and alternative penalties to, imprisonment; these included suspended sentences, conditional sentences of probation, the imposition of special duties, community service, and administrative fines).

⁸⁰ See O'Brien, *The Prison on the Continent: Europe, 1865-1965*, *supra* note 45, at 179.

⁸¹ See, *gen.* ANNE APPLEBAUM, *GULAG: A HISTORY* (2004); MICHAEL JAKOBSEN, *ORIGINS OF THE GULAG: THE SOVIET PRISON CAMP SYSTEM, 1917-1934* (1993); see also FYODOR DOSTOEVSKY, *HOUSE OF THE DEAD* (David McDuff, trans. 1985) (1860) (depicting an account based on the author's four years in a Siberian convict prison).

⁸² See, *gen.* NIKOLAUS WACHSMAN, *HITLER'S PRISONS: LEGAL TERROR IN NAZI GERMANY* (2004); DARIO MELOSSI AND MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE [ITALIAN] PENITENTIARY SYSTEM* (1980).

⁸³ See *id.*

Treatment of prisoners or, more accurately, the mistreatment of prisoners in Europe during World War I and World War II, elevated the notion of prison reform to a critical human rights issue. Social change that followed after the end of World War II further renewed interest in rehabilitative institutions of the sort envisioned by United States penal reformers in 1870.⁸⁴ In 1946, the American Correctional Association would publish the *Manual of Suggested Standards for a State Correctional System*.⁸⁵ At the international level, these concerns also resulted in the codification of humanitarian principles found in the laws of war with the adoption of four Geneva Conventions in 1949.⁸⁶

At the same time, the early 1950s were marred by a rise in prison violence, riots, and less serious rebellions such as sit down strikes, acts of escape, and self-mutilation by prisoners attempting to avoid harsh work requirements.⁸⁷ The complaints that sparked these uprisings often concerned deficient prison facilities, “lack of hygiene and medical care, poor food quality, lack of treatment, and guard brutality.”⁸⁸ These rebellions demonstrated that reforms promoted during the progressive era were largely rhetorical, frustrating the expectations of prisoners who fought — literally — for improved

⁸⁴ See SILVERMAN, CORRECTIONS, *supra* note 18, at 126.

⁸⁵ See TRAVISONO AND HAWKES, *supra* note 55, at 98 (detailing the evolution of correctional standards from the early 1946 edition to the present).

⁸⁶ See Geneva Conventions, *supra* note 3.

⁸⁷ See Rotman, *Failure of Reform*, *supra* note 61, at 168; see also Robert Adams, PRISON RIOTS IN BRITAIN AND THE USA 66-67 (1994) (noting that there were an unprecedented number of riots in American prisons occurring between 1951 and 1953, as well as hunger strikes, and incidents in which prisoners slashed their own heel tendons in protest of brutal treatment).

⁸⁸ Rotman, *Failure of Reform*, *supra* note 61, at 168.

conditions of confinement.⁸⁹ Europe experienced a similar wave of prison riots and revolts that were also accompanied by demands from inmates for improved conditions to lessen the “pains of imprisonment.”⁹⁰

Prisoner unrest led to a renewed emphasis on rehabilitative treatment in the United States. In 1954, the American Correctional Association issued a revised *Manual of Correctional Standards*.⁹¹ Consistent with the 1870 Declaration of Principles, the ACA continued to emphasize rehabilitation as the basic aim of prison institutions.⁹² The rehabilitative philosophy featured indeterminate sentences, the length of which depended on whether an offender’s behavior indicated that he had been “cured” or reformed.⁹³ The rehabilitative model introduced the concept of inmate classification in an attempt to diagnose and treat criminals according to their needs.⁹⁴ Likewise, treatment, therapy, and

⁸⁹ *Id.*

⁹⁰ Bishop, *Aspects of European Penal Systems*, *supra* note 79, at 91 (noting by way of example a number of riots in the Swedish and English prisons, in the Toul prison in France, and the Regina Coeli prison in Rome); *see also* Adams, PRISON RIOTS IN BRITAIN AND THE USA, *supra* note 87, at 117-29 (discussing prison riots in Britain in the 1950s, 1960s, and 1970s, over prison conditions).

⁹¹ *See* TRAVISONO AND HAWKES, *supra* note 55, at 89. As noted above, it was first published in 1946 as the MANUAL OF SUGGESTED STANDARDS FOR A STATE CORRECTIONAL SYSTEM. It was revised again in 1959 and in 1966. *See id.* at 99.

⁹² *See* SILVERMAN, CORRECTIONS, *supra* note 18, at 128.

⁹³ *See id.* at 128-29.

⁹⁴ *See id.* at 129. The “medical model” of corrections emphasized rehabilitation of offenders, which in turn increased the importance of inmate classification as the first step in prescribing any needed treatment regimen. *See* CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 53-54; *see also* Rotman, *Failure of Reform*, *supra* note 61, at 159 (“[T]he new emphasis on diagnosis made classification a critical concern for the Progressive penal system.”).

counseling programs began to find a place in prisons.⁹⁵ It was during this time that the United Nations Economic and Social Council would approve the Standard Minimum Rules for the Treatment of Prisoners,⁹⁶ which are discussed in more detail below.

Notwithstanding the interest in rehabilitative treatment, another wave of prison violence erupted in the United States and in Europe in the early 1970s. The infamous 1971 riot at the Attica State Prison in New York, which resulted in thirty-two inmate deaths,⁹⁷ coincided with disturbances in British prisons.⁹⁸ Prisoners in France also rioted in early 1972, demanding better living conditions.⁹⁹ After the Attica prison rebellion, violence began to escalate in prisons everywhere.¹⁰⁰ Reformers began to advocate a model of corrections based on community reintegration, favoring shorter terms in prison or avoiding prison altogether in favor of probation.¹⁰¹

At the same time that the humane treatment of prisoners became viewed as a human rights issue, control of crime increasingly was recognized as an important social issue. Political climates changed in the late 1970s and 1980s, when advocates of crime

⁹⁵ See SILVERMAN, CORRECTIONS, *supra* note 18, at 129-33.

⁹⁶ Standard Minimum Rules, *supra* note 5.

⁹⁷ See NEW YORK STATE COMM'N ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972).

⁹⁸ Besharov and Mueller, *The Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules for the Treatment of Prisoners: A Comparison*, *supra* note 13, at 839, 839 & n.1.

⁹⁹ See *id.*

¹⁰⁰ See SILVERMAN, CORRECTIONS, *supra* note 18, at 141.

¹⁰¹ See CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 56.

control called for an end to the rehabilitative era in imprisonment.¹⁰² Citing its lack of effect on rates of recidivism, the crime control model ushered in a host of measures designed to get tough on crime, such as the increased use of determinate sentences designed to incarcerate offenders for longer periods.¹⁰³ In the United States federal system, parole was abolished.¹⁰⁴ The increased emphasis on imprisonment as punishment caused an explosion of incarceration rates in the United States, which remains under the crime-control model today.¹⁰⁵ As crime rates have also increased in Europe, so too have prison populations there, although few European countries apart from the United Kingdom have emulated United States crime-control policies.¹⁰⁶

A modern extension of the crime-control movement has been the development of international tribunals and the corresponding need to punish violators of international criminal law, including those who have committed war crimes and other atrocities. The need for an international prison is one of recent vintage. There are two detention facilities presently operating in connection with proceedings pending before international

¹⁰² *See id.* at 56.

¹⁰³ *See id.* at 57.

¹⁰⁴ The parole statutes were repealed by the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, Title II, § 218(a)(5), 98 Stat. 2027. Chapter II of this legislation, entitled the Sentencing Reform Act of 1984, took effect on November 1, 1987. *See* Sentencing Reform Amendments of 1985, Pub. L. 99-217, § 4, 99 Stat. 1728 (1985). Since that time, the United States Parole Commission has retained only limited jurisdiction over those defendants who committed their offenses prior to November 1, 1987, among others, and those prisoners transferred to the United States pursuant to a treaty for the purpose of serving a foreign sentence.

¹⁰⁵ *See* CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 56-59.

¹⁰⁶ *See* PENAL REFORM IN OVERCROWDED TIMES 99 (Michael Tonry, ed., 2001).

criminal tribunals for crimes committed in the former Yugoslavia and in Rwanda.¹⁰⁷ Prisoners sentenced by these tribunals are transferred to countries that agree to take them and so they are eventually incarcerated in national prisons.¹⁰⁸ These national prison facilities, nevertheless, are bound to comply with international standards for the detention of these prisoners.¹⁰⁹

II. HISTORY OF THE STANDARD MINIMUM RULES

As indicated in the preceding historical overview of prison reform, the Standard Minimum Rules are linked to an era of increased concern for human rights and a time of growing interest in the promise of rehabilitation. The Geneva Conventions of 1949, which codified the laws of war in light of the strife occasioned by international conflict, included specific protections for prisoners of war.¹¹⁰ Outside the prisoner-of-war context,

¹⁰⁷ See Dirk van Zyl Smit, *International Imprisonment*, 54 INT'L & COMP. L.Q. 357, 357-58 (2005) (referencing war crime tribunals for the former Yugoslavia and Rwanda and detention facilities located in Scheveningen near the Hague and in Arusha, Tanzania).

¹⁰⁸ See *id.* at 358.

¹⁰⁹ See *id.*

¹¹⁰ See, e.g., Geneva Convention III, *supra* note 3 (Relative to the Treatment of Prisoners of War). Article 3, which is common to all four of the Geneva Conventions, hence its designation as “Common Article 3,” provides that “[p]ersons taking no active part in the hostilities . . . shall in all circumstances be treated humanely” and prohibits “cruel treatment and torture” as well as “[o]utrages upon personal dignity, in particular humiliating and degrading treatment[.]” Article 27 requires that all prisoners of war must be treated with “respect for their persons” and “their honour,” and further that “[t]hey shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity[.]” Article 32 prohibits “any measure of such a character as to cause the physical suffering . . . of protected persons,” which extends “not only to murder, torture, corporal punishment, [and] mutilation . . . , but also to any other measures of brutality whether applied by civilian or military agents.” According to Article 147, “torture or inhuman treatment,” and acts “wilfully causing great suffering or serious injury

however, international interest in the treatment of offenders became linked to efforts associated with the administration of justice and the prevention of crime as a social issue. As the following discussion shows, the drafting and approval of the Standard Minimum Rules represents an equally earnest attempt to address human rights goals while in pursuit of a social agenda to eradicate crime at an international level.

A. Drafting and Approval of the Standard Minimum Rules

As noted above, there was an early effort to articulate guidelines for the treatment of prisoners in 1870, with the Declaration of Principles outlined at the inaugural National Congress on Penitentiary and Reformatory Discipline in Cincinnati.¹¹¹ The first effort to adopt international prison standards was made by an entity affiliated with the League of Nations. The Standard Minimum Rules were first developed in 1926 by the International Penitentiary Commission and revised in 1933 by the successor of that entity, the International Penal and Penitentiary Commission or IPPC.¹¹² The League of Nations approved these rules in 1934 before dissolving.¹¹³ The IPPC would prepare a final draft

to body or health” are included among the type of conduct considered to be “[g]rave breaches” of the Convention.

¹¹¹ See SILVERMAN: CORRECTIONS, *supra* note 18, at 95; CLEAR & COLE, AMERICAN CORRECTIONS, *supra* note 19, at 49.

¹¹² ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM: FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION 11-12, 98 (1994). The United States participated in the first International Prison Congress held in London in 1872, and in future international prison congresses held by the International Penal and Penitentiary Commission, but it never became a member nation. See TRAVISONO AND HAWKES, *supra* note 55, at 76.

¹¹³ See LILICH & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9 at 284. See also CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 12 & n.26 (citing League of Nations Docs. C. 620.M.2411930.IV; A.44.1933.IV; A.45.1934.IV. Annex). The League of

in 1951 on behalf of the successor to the League of Nations, the United Nations, which counted human rights as among its primary goals.¹¹⁴

After World War II, nations again attempted to maintain international peace and security by joining together. The “trauma of the war” that lasted from 1939 through 1945 would usher in fundamental social changes and an “urgent interest at the international level in human rights and the treatment of prisoners.”¹¹⁵ To further these goals, the United Nations was formed in 1945.¹¹⁶ Article 55 of the United Nations Charter specifically requires that all signatories “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”¹¹⁷ Presumably, this mandate extends to all persons, including those imprisoned following a criminal conviction or for any other reason.

In 1948, the United Nations General Assembly unanimously passed a resolution called the Universal Declaration of Human Rights (“UDHR”).¹¹⁸ The UDHR primarily

Nations recommended that states adopt the Standard Minimum Rules and proposed a regular reporting process regarding their application and on prison reforms achieved. *See id.* at 12, n. 26.

¹¹⁴ *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 98-99.

¹¹⁵ Kenneth Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, in IMPRISONMENT: EUROPEAN PERSPECTIVES 205 (John Muncie and Richard Sparks, eds., 1991).

¹¹⁶ Charter of the United Nations, T.S. 993, 59 Stat. 1031, 1976 Y.B.U.N. 1043 (June 26, 1945). The United States is a party to the UN Charter and a permanent member of its most powerful organ, the Security Council. *See id.* at Art. 23.

¹¹⁷ *Id.*

¹¹⁸ UDHR, G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948), available at <http://www.un.org/overview/rights.html>.

promotes the general right to human dignity and security,¹¹⁹ as well as several specific rights associated with the administration of justice, including the prohibition against torture and cruel, inhuman, or degrading treatment or punishment, the prohibition against arbitrary arrest and detention, the right to a fair trial, the presumption of innocence, and the prohibition against *ex post facto* laws.¹²⁰ These rights would be solidified in the International Covenant on Civil and Political Rights (the “ICCPR”),¹²¹ which is another important multinational convention adopted following World War II that is designed to advance principles found in the Universal Declaration of Human Rights, and which also contains specific guarantees applicable to prisoners and the administration of justice.¹²²

To further advance the human rights and social goals outlined in the UN Charter and the UDHR, the United Nations initiated a program aimed at crime prevention and criminal justice administration.¹²³ The United Nations Crime Prevention and Criminal Justice Program is operated by one of the principal organs of the United Nations, the

¹¹⁹ See *id.* at Article 3, 12, 17, 28.

¹²⁰ See *id.* Articles 5, 9, 10, and 11.

¹²¹ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force March 23, 1976, entered into force for the United States June 8, 1992, 999 U.N.T.S. 171 (1966). See S. Rep. No. 102-23, 102d Cong., 2d Sess., reprinted at 31 I.L.M. 645, 660 (setting out the Senate’s advice and consent to ratification).

¹²² ICCPR, Art. 6 (restricting the use of capital punishment); Art. 7 (prohibiting torture or cruel, inhuman or degrading treatment or punishment); Art. 8 (prohibiting arbitrary arrest or detention); Art. 10 (requiring humane treatment and “respect for the inherent dignity” of the human person and a penitentiary system whose essential aim shall be reformation and social rehabilitation); Art. 14 (guaranteeing the presumption of innocence and minimum levels of due-process-type trial rights).

¹²³ CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 10.

Economic and Social Council, or ECOSOC,¹²⁴ with the recognition that crime is regarded as a core social issue.¹²⁵ At its formation, the United Nations articulated two kinds of obligations on states in the area of crime and criminal justice: (1) safeguarding “the right of the people of the world to enjoy domestic tranquillity and security of person and property without the encroachment of criminal activity[;]” and (2) operating “efficient criminal justice systems that do not deprive citizens of their rights.”¹²⁶

One of the first steps taken to foster the program’s goal of encouraging humane criminal justice systems was the adoption of the Standard Minimum Rules at the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955.¹²⁷ The Standard Minimum Rules were approved by the United Nations Economic and Social Council in 1957.¹²⁸ The approval language demonstrates that the Standard Minimum Rules were not intended to be legally binding,¹²⁹ and the express terms of the

¹²⁴ U.N. Charter Art. 7(1) (describing the principal organs of the United Nations).

¹²⁵ CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 12.

¹²⁶ *Id.* at 11 (quotation omitted).

¹²⁷ *See* LILlich & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9 at 284. The First Congress adopted a revision of the draft prepared by the IPPC before its dissolution in 1951. *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 99. The IPPC had been holding regular congresses in the correctional field since 1885. *See id.* at 19.

¹²⁸ *See* LILlich & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9 at 284.

¹²⁹ *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 134 (setting out the United Nations Economic and Social Council resolution approving the Standard Minimum Rules and “recommend[ing]” that “favourable consideration be given to their adoption and application in the administration of penal and correctional institutions”) (quoting E.S.C. Res. 663 C (XXIV), U.N. ESCOR, 24th Sess. Supp. No. 1, at 11, U.N. Doc. E/3048 (1957)). There have been suggestions of elevating the Standard Minimum

Rules seek only to establish “what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.”¹³⁰ The overall purpose of the Standard Minimum Rules was to “inject the humanitarian spirit of the Universal Declaration of Human Rights into the correctional system without compromising public safety or prison security.”¹³¹ To accomplish this humanitarian goal, the Standard Minimum Rules emphasize humane treatment and rehabilitation, stating that the only justification for imprisonment is “to ensure, so far as possible, that upon his return to society, the offender is not only willing but able to lead a law-abiding and self-supporting life.”¹³²

The Standard Minimum Rules contain numerous substantive provisions regarding prison conditions and the treatment of prisoners that reflect the concerns of penal reformers such as the ones outlined above in the historical overview in part one of this paper.¹³³ In all, the Standard Minimum Rules consist of ninety-five provisions.¹³⁴ A

Rules to a legally-binding convention, but the idea has failed to catch on. *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 134-35.

¹³⁰ Standard Minimum Rules, *supra* note 5, Rule 1.

¹³¹ Besharov and Mueller, *Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules*, *supra* note 13, at 840 (quoting the *Implementation of the Standard Minimum Rules for the Treatment of Prisoners*, Working Paper, U.N. Doc. ST/SOA/SD/CG2/WP.3 at 8 (1968)).

¹³² Rotman, *Failure of Reform*, *supra* note 61, at 169 (quoting Article 58 of the Standard Minimum Rules).

¹³³ *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 148. Indeed, the word “Treatment” was selected for the Standard Minimum Rules for the Treatment of Prisoners for its ambiguity to capture the dual concern of reformers for human rights and to reflect the endeavor to “‘cure’ the offender from re-offending.” *Id.*

review of the provisions shows that the range of the Standard Minimum Rules is broad, regulating everything from the use of corporal punishment to the provision of clean sheets. As the name implies the Standard Minimum Rules establish minimum standards for a wide variety of functions performed by prison and jail administrators, including prisoner registration or intake and classification, accommodations, personal hygiene, clothing and bedding, food, exercise and sport, medical services, as well as communication with the outside world, the availability of books, religious services and instruction, and the use of force.¹³⁵

The Standard Minimum Rules and their broad provisions were ambitious for their time. They clearly respond to problems highlighted by the historical review of prison reform, particularly with regard to issues affecting prisoners' health, dignity, and prospect for rehabilitation. Because of the noble nature of the themes found in the Standard Minimum Rules, the United Nations Economic and Social Council encouraged states to implement them to further the human rights and social interests of crime prevention and fair administration of justice. In spite of their noble goals, the implementation process has met with a surprising level of ambivalence by domestic nation states.

B. Implementation Process

¹³⁴ See Standard Minimum Rules, *supra* note 5. The Standard Minimum Rules are organized into three parts: Rules 1 through 5 are "Preliminary Observations"; Rules 6 through 55 ("Part I") are "Rules of General Application"; Rules 55 through 95 ("Part II") are "Rules Applicable to Special Categories." See CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 149 (making this distinction). In light of their non-binding intent, it is a misnomer to call these provisions "rules," when they are perhaps more appropriately termed guidelines.

¹³⁵ See Standard Minimum Rules, *supra*, note 5, at ¶¶ 7-26, 37-43.

From its inception, the implementation process for the Standard Minimum Rules has been hampered by their advisory, non-binding character, among other things. As one commentator has observed, “implementation” has not been defined in a United Nations instrument, but it typically consists of two elements: (1) a call for domestic incorporation (“it connotes an effort to encourage states to apply international norms in their domestic laws and practices”); and (2) a mechanism to enforce or to monitor compliance (“it suggests some kind of international machinery to supervise or follow-up on the exhortations to do so”).¹³⁶ The United Nations has encouraged member states to adopt the Standard Minimum Rules, but its mechanism for enforcing them is nonexistent and the means of evaluating state compliance has left much to be desired.

The implementation machinery employed for the Standard Minimum Rules initially featured data collation and dissemination of information.¹³⁷ This process was evidently selected in an effort to encourage states to make a self-assessment of their prison systems.¹³⁸ After approving the Standard Minimum Rules in 1957, the United Nations Economic and Social Council requested progress reports on implementation and began sending out questionnaires or surveys.¹³⁹ Surveys were sent out in 1967, 1974, 1979, 1984, and 1989, so that the results would coincide with the regularly held United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which has

¹³⁶ CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 232.

¹³⁷ *Id.* at 233.

¹³⁸ *See id.* (outlining implementation measures taken in the late 1950s, which were deemed “cathartic” for participating states and useful, perhaps, to assess states’ efforts in light of community practice).

¹³⁹ *Id.* at 234.

convened every five years since its initial meeting in 1955 to address international issues related to criminal justice.¹⁴⁰

The response to the surveys was less than enthusiastic. Of the 123 states that had joined the United Nations by 1967,¹⁴¹ only 44 replied to the initial survey distributed that same year.¹⁴² As a result of this lukewarm response, the United Nations General Assembly issued two resolutions in the 1970s, asking member nations to incorporate the Standard Minimum Rules into their respective domestic penal laws.¹⁴³ There were discussions at the Fourth United Nations Congress in 1970 about redrafting and updating the Standard Minimum Rules.¹⁴⁴ The only significant update that resulted, however, was

¹⁴⁰ See LILlich & HANNUM, *INTERNATIONAL HUMAN RIGHTS*, *supra* note 9, at 306; see also Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453 (1975) (reviewing the initial surveys). Delegates of the American Correctional Association attended the first United Nations Crime Conference and they continue to participate in these regularly held conferences. See TRAVISONO AND HAWKES, *supra* note 55, at 89-90.

¹⁴¹ See <http://www.un.org/overview/growth.htm> (providing an overview of the growth of UN member states from 1945 to present).

¹⁴² CLARK, *UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM*, *supra* note 112, at 234.

¹⁴³ See G.A. Res. 3144, Dec. 14, 1973, U.N. GAOR, 28th Sess., Supp. No. 30, at 85; G.A. Res. 2858, Dec. 20, 1971, U.N. GAOR, 26th Sess. Supp. No. 29, at 94.

¹⁴⁴ See Besharov & Mueller, *Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules*, *supra* note 13, at 847 (citing *The Standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field* iv, 2-5, Report of Section III, Severin-Carlos Versele, Rapporteur, Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Kyoto, Japan, 17-26 August 1970)).

the addition of one rule designed to extend protections to pretrial detainees and persons detained without charges.¹⁴⁵

The 1974 survey yielded an improved return with 62 responses from United Nations member states.¹⁴⁶ In 1979, however, there was a low number of 38 responses from United Nations members, which had grown by then to 152 states.¹⁴⁷ No further effort was made to encourage implementation of the Standard Minimum Rules until the 1980s. In 1984, the Economic and Social Council of the UN approved a set of Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners.¹⁴⁸ Beginning in 1984, members of the United Nations were required to report to the Secretary General every five years on the extent of implementation of the Standard Minimum Rules, the application of these rules, and the “factors and difficulties, if any, affecting their implementation.”¹⁴⁹ In 1984 there was an increase in the number of survey responses to 62 member states, which was up from the

¹⁴⁵ N.S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 279 (2nd ed. 1999) (citing ECOSOC Res. 2076 (LXII) (13 May 1977) (adding article 95 to ensure that persons arrested or imprisoned without charge should benefit from most provisions of the Standard Minimum Rules)).

¹⁴⁶ CLARK, *UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM*, *supra* note 112, at 234, n.8.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 238 (citing Committee on Crime Prevention and Control, Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, May 25, 1984, E.S.C. Res. 1984/47, U.N. ESCOR, 76th Sess., Supp. No. 1, at 29, U.N. Doc. E/1984/84).

¹⁴⁹ *Id.* at 238-39.

38 replies received in 1979,¹⁵⁰ but still failed to demonstrate wide acceptance by a UN membership that had grown to over 150 nations.

The year 1984 also saw the fruition of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”).¹⁵¹ Of great relevance to prisoners, the CAT recognizes the “inherent dignity of the human person” and the international prohibition against torture and otherwise cruel, inhuman or degrading treatment or punishment.¹⁵² Parties were required to submit an initial report within one year, outlining steps taken to implement the treaty’s specific articles,¹⁵³ and to make subsequent reports every four years.¹⁵⁴ The CAT has something

¹⁵⁰ See *id.* at 234, n.8.

¹⁵¹ The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the “CAT”), Dec. 10, 1984, S. Treaty Doc. No. 100-200 (1988), 1465 U.N.T.S. 85.

¹⁵² Article 1 of the CAT prohibits “torture,” defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Article 16 of the CAT prohibits “cruel, inhuman, or degrading treatment or punishment” that does not rise to the level of torture, but offers no definition as to what kind of treatment fits within this prohibition. The United States ratified the CAT on April 18, 1988, and it has been in effect since November 20, 1994.

¹⁵³ Reports are required by Article 19 of the CAT. The initial report by the United States includes an overview of its criminal justice system, the legal mechanisms protecting prisoners, and a discussion concerning conditions of confinement. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Committee Against Torture, Initial Reports of States Parties Due

that the Standard Minimum Rules do not — a means for investigation and the possibility of some kind of sanction, even if it is only a denunciation of practices. In that regard, if the United Nations Human Rights Committee receives “reliable information” that torture is being “systematically practised in the territory of a state party,” it may undertake a confidential inquiry.¹⁵⁵ Parties that accede to a proposed Optional Protocol to the CAT may be subject to a system of regular inspections for places of detention by a subcommittee.¹⁵⁶

The United Nations has expended additional efforts to extend protection tailored to the interests of pretrial detainees or “remand” prisoners. On December 9, 1988, the United Nations General Assembly approved the “Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.”¹⁵⁷ The Body of Principles expressly applies to imprisoned persons, defined as those who have been “deprived of personal liberty as a result of conviction for an offense.”¹⁵⁸ Chiefly concerned with the plight of political prisoners and those arbitrarily deprived of their liberty and held

in 1995 Addendum: United States of America, at ¶¶ 22-53, 138-155, CAT/C/28/Add. 5 (9 Feb. 2000), available at: <http://www.unhchr.ch>.

¹⁵⁴ See LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at §§ 3.53 – 3.54 (outlining the CAT reporting system).

¹⁵⁵ CAT, Art. 20. To date, only two such inquiries have been undertaken, in regard to Egypt and Turkey. See LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.53.

¹⁵⁶ GA Res. A/Res/57/199, 18 Dec. 2002.

¹⁵⁷ Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, 43 U.N. GAOR Supp. (No. 49) at 297, U.N. Doc. A/43/49, 1988).

¹⁵⁸ *Id.*

incommunicado, the Body of Principles contains procedural safeguards not found in the Standard Minimum Rules.¹⁵⁹

In spite of these positive developments on behalf of prisoners in the mid-1980s, interest in the Standard Minimum Rules continued to wane. In response to the 1989 survey, only 49 states replied to the United Nations Economic and Social Council's questionnaire on implementation of the Standard Minimum Rules, which represented less than one-third of the then-existing United Nations membership.¹⁶⁰ The low level of responses to surveys distributed by the United Nations Economic and Social Council has made it difficult to reach general conclusions about world-wide implementation, other than the determination that there is a definite lack of fervor for the Standard Minimum Rules.¹⁶¹

In a further effort to advance the "long-standing concern of the United Nations for the humanization of the criminal justice and the protection of human rights," the General Assembly passed a resolution in 1990, containing a list of Basic Principles for the

¹⁵⁹ See Tulio Treves, *The UN Body of Principles for the Protection of Detained or Imprisoned Persons*, 84 AM. J. INT'L L. 578, 581-86 (1990) (outlining procedural applicable during interrogations, after arrest, and detention on a criminal charge).

¹⁶⁰ See CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 234, n.8. In 1989, the UN had grown to include 159 member states. A helpful chart depicting an annual overview of the UN's growth from 1945 to present is found at www.un.org/overview/growth.htm (last visited April 29, 2006).

¹⁶¹ CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 165 ("Neither the volume of responses to the surveys nor the picture that emerges from them gives any impression of vast enthusiasm among the Foreign Offices and Justice Departments of the World.").

Treatment of Prisoners.¹⁶² It is intended to serve as a “declaration on the human rights of prisoners,” and to encourage members of the United Nations to fully implement the Standard Minimum Rules.¹⁶³ Also in 1990, the Eighth United Nations Crime Congress attempted to require additional reports regarding the adoption of some other criminal justice model rules.¹⁶⁴ Reporting had ceased altogether by 1993, however, as the result of apathy and limited resources.¹⁶⁵

One factor that apparently has complicated the reporting process is the proliferation of standards and human rights treaties. Many of the provisions found in the

¹⁶² Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, 45 U.N. GAOR Supp. (No. 49) at 199, U.N. Doc. A/45/49 (1990), *reprinted in* THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS 108-111 (M. Cherif Bassiouni, ed., 1994).

¹⁶³ *Id.*

¹⁶⁴ *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 255. In addition to reporting requirements for the Standard Minimum Rules for the Treatment of Prisoners, states were asked to report on implementation of the Standard Minimum Rules for Non-Custodial Measures (the “Tokyo Rules”), the Guidelines for Prevention of Juvenile Delinquency (the “Riyadh Guidelines”), the Standard Minimum Rules for the protection of Juveniles Deprived of their Liberty, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors. *See id.*

¹⁶⁵ *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 259. The next survey was reportedly planned for 1993. *See* Report of the Secretary General, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Implementation of the Standard Minimum Rules for the Treatment of Prisoners, ¶ 110(e) A/CONF.144/11 (19 July 1990). The proceedings of the Ninth United Nations Crime Congress contain no report from the Secretary General and no explanation for why a survey was not done. Since the Eighth Crime Congress in 1990, there has been no further report from the UN Secretary General on implementation of the Standard Minimum Rules. For a link to reports presented at all of the United Nations Crime Congresses since 1955, see the website for the American Society of Criminology, www.asc41.com.

Standard Minimum Rules overlap with those found in other instruments, such as the above-referenced CAT, and the International Covenant on Civil and Political Rights or ICCPR.¹⁶⁶ Reports by state parties to these other international conventions include an enquiry into the implementation of the Standard Minimum Rules.¹⁶⁷ In answer to concerns about the utility of the reporting regime, the United Nations Commission on Crime Prevention and Criminal Justice recommended revising its information-gathering process in 1993.¹⁶⁸ The first reporting cycle for this new process extended from 1996 to 2002, to enable member states sufficient time to provide replies for consideration by the Commission.¹⁶⁹ As of the Eleventh Annual Crime Congress in 2005, however, the reports received “could not provide a precise account of the impact produced” by United Nations standards, norms, and guidelines.¹⁷⁰ Accordingly, it appears that the United

¹⁶⁶ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force March 23, 1976, entered into force for the United States June 8, 1992, 999 U.N.T.S. 171 (1966). *See* S. Rep. No. 102-23, 102d Cong., 2d Sess., reprinted at 31 I.L.M. 645, 660 (setting out the Senate’s advice and consent to ratification).

¹⁶⁷ *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 273 (observing that regular reports required by the ICCPR include an inquiry into the implementation of the Standard Minimum Rules); *see also* LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at §§ 3.49 – 3.50, 3.53 – 3.54 (discussing the state reporting requirement under the ICCPR and the CAT in relation to prison conditions).

¹⁶⁸ *See* United Nations, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *Making Standards Work: Fifty Years of Standard-Setting in Crime Prevention and Criminal Justice*, at ¶¶ 25-26, A/CONF.203/8, Bangkok, 18-25 April 2005, available at www.asc41.com (citing E/CN.15/1992/4/Add.4).

¹⁶⁹ *Id.* at ¶ 26.

¹⁷⁰ *Id.* No information is given in the working paper about how many replies the Commission received from member states.

Nations has gone back to the drawing board to develop a workable information-gathering system.¹⁷¹

C. Generalizations About the Status of the Standard Minimum Rules

Some generalizations about the Standard Minimum Rules are possible even in light of lackluster compliance with the survey process. Interpreting the “sparse” results of the 1989 survey, to which there were only 49 replies, one commentator has observed that provisions 6 and 7 of the Standard Minimum Rules (emphasizing the principle of non-discrimination and establishing a registration requirement for recording prisoners’ names) are the most widely accepted.¹⁷² There is reportedly “widespread” support for provision 34, which places limits on the use of restraints, and “solid” support for provision 31, which prohibits corporal punishment.¹⁷³ The picture of implementation for the remaining provisions of the Standard Minimum Rules, however, appears sketchy.¹⁷⁴ It is fair to conclude from the underwhelming nature of the 1989 survey response that the overall value of the information disclosed is, at best, “debatable.”¹⁷⁵

In spite of the dispirited implementation efforts for the Standard Minimum Rules as a whole, these guidelines have found utility in conjunction with other international efforts to promote better treatment for prisoners. In making a comparison with other

¹⁷¹ *Id.* at ¶¶ 27-33, 47 (outlining various efforts to reform and streamline the reporting process).

¹⁷² *See* CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 168.

¹⁷³ *Id.* at 169.

¹⁷⁴ *Id.* at 170-74 (containing a table that illustrates the extent of implementation based on the uneven responses by 49 states to the 1989 survey).

¹⁷⁵ *Id.* at 177-78.

international instruments, a commentator has observed that the prohibitions of corporal punishment found in provision 31 of the Standard Minimum Rules, as with the prohibition against all cruel, inhuman, or degrading forms of punishment, are more than merely advisory; rather, such prohibitions “reflect legal obligations” as a matter of customary international law.¹⁷⁶ Other provisions of the Standard Minimum Rules, by contrast, are more easily seen as non-binding guidelines, such as provision 40, which “requires a library ‘adequately stocked with both recreational and instructional books.’”¹⁷⁷ Acknowledging that not every provision may constitute a legal obligation, the Standard Minimum Rules have served an important interpretive purpose:

Although not every rule may constitute a legal obligation, it is reasonably clear that the Standard Minimum Rules can provide guidance in interpreting the general rule against cruel, inhuman, or degrading treatment or punishment. Thus, serious non-compliance with some rules or widespread non-compliance with some others may well result in a level of ill-treatment sufficient to constitute violations of the general rule [prohibiting cruel treatment].¹⁷⁸

The Standard Minimum Rules can also provide guidance in interpreting the duty of humane treatment and the respect for human dignity and the specific requirement found

¹⁷⁶ RODLEY, TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, *supra* note 145, at 280-81.

¹⁷⁷ *Id.* (quoting Standard Minimum Rule 40).

¹⁷⁸ *Id.*

in Article 10 of the ICCPR,¹⁷⁹ which states that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”¹⁸⁰ Using the Standard Minimum Rules as an interpretive guideline for norms found in other instruments may ameliorate the poor record of domestic implementation.

In view of the uneven implementation process, it has been suggested that converting the Standard Minimum Rules to a convention or a series of conventions would enhance their status.¹⁸¹ This is unlikely to happen in view of the difficulty of achieving international consensus, especially on issues closely related to internal, domestic matters. It has been implied that the Standard Minimum Rules are so well-recognized as international standards that a convention is not needed to achieve informal but “effective local judicial recognition.”¹⁸² In the absence of a binding convention, however, states remain free to implement their own standards regarding the treatment of prisoners or simply to elect to do nothing. So far, efforts to evaluate domestic implementation of the

¹⁷⁹ International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force March 23, 1976, entered into force for the United States June 8, 1992, 999 U.N.T.S. 171 (1966). See S. Rep. No. 102-23, 102d Cong., 2d Sess., reprinted at 31 I.L.M. 645, 660 (setting out the Senate’s advice and consent to ratification).

¹⁸⁰ RODLEY, TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, *supra* note 145, at 281 (citing 12 *Yearbook of the European Convention on Human Rights — The Greek Case* 468 (1969)).

¹⁸¹ See *The Standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field*, ¶ 50, Working Paper by the Secretariat, 4 U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 1, 13-18, U.N. Doc. A/CONF. 43/3 (1970), reprinted in LILLICH & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9, at 296-300.

¹⁸² *Id.* at ¶ 52.

Standard Minimum Rules, as outlined above, have failed to provide a clear picture of whether states have opted for the former or the latter.

Undeterred by the lack of fervor for the Standard Minimum Rules shown in the survey replies, the United Nations continues to push in earnest for humane treatment of prisoners. In recognition of the “pioneering role” of the Standard Minimum Rules and the need for a binding instrument, the United Nations Commission on Crime Prevention and Criminal Justice adopted a draft “Charter of Fundamental Rights of Prisoners” in 2003.¹⁸³ The proposed Charter outlines the following fundamental rights: (1) the right to inherent dignity; (2) the right to separation, classification, and different legal treatment; (3) the right to humane accommodation; (4) the right to decent food; (5) the right to health and medical care; (6) the right to legal consultation, prompt and fair trial, equitable sentencing, including non-custodial sanctions; (7) the right to independent inspections; and (8) the right to reintegration.¹⁸⁴ The proposed Charter does not announce anything new. The rights outlined therein simply regurgitate provisions found in existing instruments such as the Standard Minimum Rules, the Basic Principles for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the UDHR, and the ICCPR.¹⁸⁵ The resolution accompanying the proposed draft Charter of Fundamental Rights invites consideration by member states of the United Nations and other organizations in preparation for the Eleventh United

¹⁸³ United Nations Commission on Crime Prevention and Criminal Justice, *For Human Dignity - Towards the Charter of Fundamental Rights of Prisoners*, 12th Sess., Vienna, 13-22 May 2003, E/CN.15/2003, available at www.asc.41.com/un3.htm.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.*

Nations Congress on Crime Prevention and Criminal Justice, which was held in Bangkok, Thailand, in 2005.¹⁸⁶ At that Conference, the United Nations celebrated the fiftieth anniversary of the Standard Minimum Rules and their important role in improving the administration of criminal justice by influencing the formulation of national or domestic policies.¹⁸⁷ No mention was made in that report, however, about the adoption of the proposed Charter of Fundamental Rights of Prisoners.

The well-intentioned efforts of the United Nations have not been ignored completely and there are undoubtedly some good explanations for any particular country's seeming ambivalence towards implementing the Standard Minimum Rules for domestic use. As explored further below, the United States and Europe make use of the Standard Minimum Rules in different ways. In that respect, the United States has been characterized as an example of the "limited success" enjoyed by the Standard Minimum Rules, as only few references are found among the reported cases and the "enormous" body of literature that has addressed the "outpouring of prisoner litigation" in this country.¹⁸⁸ Europe, by contrast, which has formally adopted the Standard Minimum Rules by creating its own set of European Prison Rules, is depicted as an optimistic example of the inspirational role that the Standard Minimum Rules have played.¹⁸⁹ The

¹⁸⁶ *See id.*

¹⁸⁷ Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *Making Standards Work: Fifty Years of Standard-Setting in Crime Prevention and Criminal Justice*, A/CONF.203/8, Bangkok, 18-25 April 2005, available at www.asc41.com.

¹⁸⁸ CLARK, UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM, *supra* note 112, at 177-78.

¹⁸⁹ *See id.* at 179.

following section of the paper compares legal regimes for prisoners' rights in Europe, which has implemented the Standard Minimum Rules wholesale by adopting its own European Prison Rules, with the system in the United States, which has developed standards of its own.

III. LEGAL REGIMES FOR PROTECTING PRISONERS' RIGHTS

Just as with the historical overview of penal reform, the legal systems for protecting prisoners rights in the United States and Europe are fundamentally different and involve distinctive concerns. Europe represents an "Old World" where states have long histories and some have equally ancient prison facilities.¹⁹⁰ The democracy in place in the United States is only just over 225 years old and has seen nowhere near the political upheaval as the so-called European Union, which continues to add members as it

¹⁹⁰ For example, the United Nations Human Rights Committee has found that the following conditions at Spain's ancient Metilla prison violated the right to human dignity protected by Article 10(1) of the ICCPR, where the complainant had been held in —

a 500-year old prison, virtually unchanged, infested with rats, lice, cockroaches and diseases; 30 persons per cell, among them old men, women, adolescents and an eight-month-old baby; no windows, but only steel bars open to the cold and the wind; high incidence of suicide, self-mutilation, violent fights and beatings; human [feces] all over the floor as the toilet, a hole in the ground, was flowing over; sea water for showers and often for drink as well; urine-soaked blankets and mattresses to sleep on in spite of the fact that the supply rooms were full of new bed linen, clothes, etc.

RODLEY, TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, *supra* note 145, at 291 (quoting Griffin v. Spain, 493/1992, UN doc. CCPR/C/57 (1996), para. 3.1). The Human Rights Committee further found that, because the complainant was subjected to these conditions for over seven months, the conditions amounted to cruel, inhuman, and degrading treatment and punishment. *Id.*

struggles to adopt uniform standards.¹⁹¹ This section of the paper will review the prisoners' rights regime in Europe and the United States in an effort to determine how differences in the legal systems have resulted in objectively different levels of esteem for the Standard Minimum Rules.

A. Prison Standards and Prisoners' Rights in Europe

As the epicenter of both world wars, Europe has had an acute interest in improving human rights. The Council of Europe, which was formed immediately after World War II in 1949, has grown from ten to forty-six member states.¹⁹² In addition to the domestic legal systems of these members, Europe has developed regional mechanisms for vindicating human rights, including the rights of prisoners. Europe, in particular, responded to the United Nations' encouragement by adopting the Standard Minimum Rules outright in 1973.¹⁹³ The European Standard Minimum Rules for the Treatment of Prisoners, which were eventually revised in 1987 and renamed the European Prison Rules,¹⁹⁴ work in tandem with two other important regional instruments

¹⁹¹ See Floyd Norris, *It is European, But It Is Not A Union*, N.Y. TIMES, March 3, 2006, at C1.

¹⁹² PHILIP LEACH, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 1, 7 (2nd ed. 2005). Membership has grown in the 1990s, with the addition of several central and eastern European states, including Bulgaria (1992), the Czech Republic (1992), Slovakia (1992), Poland (1993), Romania (1994), Slovenia (1994), Lithuania (1995), Albania (1996), Andorra (1996), Estonia (1996), Ukraine (1997), Croatia (1997), Moldova (1997), the former Yugoslav Republic of Macedonia (1997), Latvia (1997), Russia (1998), Georgia (1999), Armenia (2002), Azerbaijan (2002), Bosnia and Herzegovina (2002), Serbia and Montenegro (2004). *See id.* at 7.

¹⁹³ Council of Europe, European Standard Minimum Rules for the Treatment of Prisoners, Resolution No. 73(5) (Jan. 19, 1973).

¹⁹⁴ Council of Europe, European Prison Rules, Recommendation No. R(87)3 of the Committee of Ministers to Member States (Strasbourg, Feb. 12, 1987).

that affect the rights of prisoners in Europe: the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”);¹⁹⁵ and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the “European Torture Convention”).¹⁹⁶ Each facet of the European system is discussed briefly below to describe how it protects prisoners’ rights.

1. *The European Prison Rules*

The instrument that most directly affects the management of Europe’s prisons is the European Prison Rules. The history and evolution of the European Prison Rules reflects that Europe, as a region, accepted seriously the challenge posed by the United Nations to improving human rights and the treatment of prisoners. In 1973, the regional European Committee on Crime Problems of the Council of Europe adopted its own Standard Minimum Rules for the Treatment of Prisoners.¹⁹⁷ As originally adopted, the European Standard Minimum Rules closely paralleled the United Nations Standard Minimum Rules, but featured a “narrower framework” designed to reflect a “more liberal common denominator than the one established at world level.”¹⁹⁸ Thus, the European version adopted “was envisaged as giving [the Standard Minimum Rules] a European emphasis and reflecting the particular need and circumstances of the prison systems of

¹⁹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950).

¹⁹⁶ Council of Europe Treaty Series, No. 126 (26 Nov. 1987).

¹⁹⁷ Council of Europe, European Standard Minimum Rules for the Treatment of Prisoners, Resolution No. 73(5) (Jan. 19, 1973).

¹⁹⁸ LILICH & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9, at 314 (quoting Council of Europe Activities in the Field of Crime Problems 1956-1976, at 45 (1977)).

the member states of the Council of Europe.”¹⁹⁹ Like the United Nations Standard Minimum Rules, the European version included a reporting requirement every five years on member states’ progress with implementation.²⁰⁰

Unlike the Standard Minimum Rules, which have not been revised significantly since 1955, the European rules have evolved and changed with time. From the inception of the European rules, the drafters aspired to establish “a new, more creative and distinctively European model.”²⁰¹ Noting “significant social trends and changes in regard to prison treatment and management,” the Council of Europe adopted a revision to its version of the Standard Minimum Rules in 1987.²⁰² In doing so, the Council of Europe consciously decided to advance emerging philosophical ideas that were a distinct product of the “major post-war phenomena of a social and political nature, as well as the impact of the developing thought and practice that had occurred in the penal field.”²⁰³

To summarize the unique European penal philosophy on which its rules are based, the European Standard Minimum Rules set forth the following ideals: (a) that conditions of confinement should not be punitive because deprivation of liberty was punishment enough; (b) that treatment must be the principle aim of punishment; and (c) and that the

¹⁹⁹ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 205.

²⁰⁰ *See id.*

²⁰¹ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 205.

²⁰² Council of Europe, European Prison Rules, Recommendation No. R(87)3 of the Committee of Ministers to Member States (Strasbourg, Feb. 12, 1987).

²⁰³ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 206.

“administration of prisons must show respect for the fundamental rights of individuals, and at all times uphold the values that nourish human dignity.”²⁰⁴ To emphasize the regional quality of the rules, the Council of Europe elected to rename the 1987 revision the “European Prison Rules.”²⁰⁵

The content of the European Prison Rules remains very similar to the Standard Minimum Rules.²⁰⁶ A significant effort was made in the revision process, however, to take into account the experience in the implementation of the existing rules, the views and proposals of member states, and the results of studies into specific aspects of penal treatment and administration by the Council of Europe, as well as relevant ideas from academia and professional experts, political, and public opinion.²⁰⁷ The most significant aspect of the revised European Prison Rules is its enhanced preamble and explanatory memorandum, which emphasizes the above-referenced European penal philosophy in order to provide a greater “moral imperative,” to give the rules a “stronger philosophical base,” and a “more credible operational validity.”²⁰⁸ To increase effectiveness, the European Prison Rules set forth a more explicit regime of “regular inspections” and monitoring by a “competent authority” to ensure compliance with the objectives and requirements of the rules.²⁰⁹ Compliance is also aided by the increased availability of

²⁰⁴ *Id.* at 206-07.

²⁰⁵ *Id.* at 210.

²⁰⁶ See LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.57.

²⁰⁷ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 208.

²⁰⁸ *Id.* at 208-10.

²⁰⁹ European Prison Rules, Rule 4 of the Basic Principles.

judicial review by a regional court set up to review potential human rights violations under the European Convention.

2. *European Convention*

The European Convention was implemented in 1950 to secure the universal recognition and observance of the rights declared in the Universal Declaration of Human Rights, including the right most relevant to prisoners to be free from torture and other forms of inhuman or degrading treatment or punishment.²¹⁰ The European Convention created a right of individual petition to the European Commission of Human Rights, which was established in 1954, and the European Court of Human Rights, which was established in 1959.²¹¹ Since 1999, a new version of the European Court of Human Rights has jurisdiction over both admissibility and the merits of complaints alleging violations of the Convention.²¹² The exclusive responsibility of the European Court of Human Rights is to supervise the application of the European Convention through hearing complaints by individuals or contracting states.²¹³ Located in Strasbourg, individuals have the option of seeking redress for violations of the European Convention

²¹⁰ See European Convention, Article 3.

²¹¹ LEACH, EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 192, at 5.

²¹² LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.09. Previously, applications were first submitted to the European Commission on Human Rights and, if admissible and if not subject to resolution by way of “friendly settlement,” then later by the European Court of Human Rights. *Id.* at 3.10.

²¹³ See Kieran St. Clair Bradley, *The European Court of Justice*, in INSTITUTIONS OF THE EUROPEAN UNION at 119 (John Peterson and Michael Shackleton, eds., 2002). It is not to be confused with the European Court of Justice, which sits in Luxembourg as the ultimate authority for the interpretation of legal acts affecting the rules and practices of the European Community. *See id.*

by filing a simple letter complaint or application with the European Court of Human Rights, provided that they have first exhausted domestic remedies.²¹⁴

Over time, the European Convention and the European Court of Human Rights have had increased importance in protecting the rights of prisoners at the regional level. Applications from persons in detention make up the majority of cases considered by the European Court of Human Rights, which has defined a wide range of rights in the prison context.²¹⁵ The provision of the European Convention most applicable to the prisoner is found in Article 3, which simply mandates as follows: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 3 provides no definition for the type of treatment or punishment that is deemed torture as opposed to that which constitutes inhuman or degrading, but cases interpreting Article 3 have attempted to distinguish these concepts.

An overview of prisoner cases decided under the European Convention exceeds the scope of this paper. Nevertheless, it is worth noting several decisions from the European Court of Human Rights and its predecessor, the European Commission on Human Rights, that have clarified what type of conditions constitute “inhuman or degrading treatment” in violation of Article 3. Overcrowded, unsanitary, inadequately

²¹⁴ LIVINGSTONE, OWEN, & McDONALD, *PRISON LAW*, *supra* note 24, at §§ 3.09, 3.12, 3.25. The responsibility for ensuring that the rights guaranteed by the European Convention are protected lies first with the member states. *See id.* at § 3.09.

²¹⁵ *See id.* at § 3.03. For example, decisions that have had a “significant impact” in the United Kingdom include areas of disciplinary procedures, access to the courts and the outside world, release procedures for “life sentence prisoner and prisoners detained during Her Majesty’s Pleasure,” the treatment of detainees, prisoners’ rights to marry, and secrecy regarding prisons. *Id.*

ventilated, and pest-infested conditions have been found to violate Article 3.²¹⁶ Lack of adequate accommodations for a severely handicapped detainee has been found to violate Article 3.²¹⁷ Lack of access to prompt medical treatment or adequate psychiatric care may also pose a violation of Article 3.²¹⁸ Whether conditions rise to the level of torture is a separate matter.²¹⁹

An early case decided by the European Commission of Human Rights (the *Greek Case*) made a distinction between torture and treatment that is considered inhuman or

²¹⁶ The Greek Case, *Yearbook of the European Convention on Human Rights No. 12*, 1969; *Dougoz v. Greece*, Judgment of 6 March 2001; *Peers v. Greece*, Judgment of 19 April 21. *Kalashnikov v. Russia*, Judgment of 15 July 2002.

²¹⁷ *Price v. United Kingdom*, Judgment of 10 July 2001.

²¹⁸ *See, e.g.*, *Hurtado v. Switzerland*, Judgment of 26 January 1994 (finding that states have a positive duty to protect the physical well-being of persons deprived of their liberty, which duty requires adequate medical treatment); *Ilhan v. Turkey*, Judgment of 27 June 2000 (finding that a 36-hour delay in providing medical care to a visibly injured detainee was so cruel as to possibly amount to torture); *Keenan v. United Kingdom*, Judgment of 3 April 2001 (finding that a mentally ill prisoner who committed suicide was provided with inadequate psychiatric care); *compare with Tas v. Turkey*, Judgment of 14 November 2000 (finding that medical care was promptly provided for a detainee); *Rehbock v. Slovenia*, Judgment of 28 November 2000 (finding that failure to provide pain-killing medication on occasions where the prisoner had suffered a double fracture of his jaw did not violate Article 3).

²¹⁹ Torture is more frequently associated with custodial interrogation by police. Conditions of custodial confinement, by contrast, are typically examined under the norm that prohibits cruel, inhuman, or degrading treatment. It is recognized, nevertheless, that conditions of punishment can be so severe as to constitute torture. *See, e.g.*, Rod Morgan, *The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, reprinted in *IMPRISONMENT TODAY AND TOMORROW* at 727 (discussing torture as reserved for “specialized, or exotic, forms of violence purposefully employed . . . to gain a confession or information or to intimidate or humiliate, and involving severe pain” as opposed to ill-treatment while in “non-police” settings).

degrading based on the nature and severity of the treatment.²²⁰ In that case, the Commission found that “inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation is unjustifiable.”²²¹ Torture, by contrast, was considered an “aggravated form of inhuman treatment.”²²² Since the *Greek Case*, the European Court of Human Rights made a similar analytical distinction between torture and ill-treatment in a case that addressed the use of five specific interrogation techniques designed to cause disorientation and sensory deprivation.²²³ The European Court decided that these techniques were not torture because the suffering inflicted was not sufficiently severe, but that the techniques were nonetheless degrading and cruel in violation of Article 3 of the European Convention.²²⁴

²²⁰ The Greek Case, *Yearbook of the European Convention on Human Rights No. 12*, 1969. See LILLICH & HANNUM, *INTERNATIONAL HUMAN RIGHTS*, *supra* note 9, at 341-407 (dedicating an entire chapter – Problem V – to the situation in Greece and the different responses by the international community, including the United Nations Human Rights committee and the European Commission of Human Rights, culminating in the *Greek Case*).

²²¹ Anthony Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights*, 34 CAL. W. INT’L L. J. 29, 35 (2003) (quoting The Greek Case, 1969 Y.B. Eur. Conv. on H.R. 186 (Eur. Comm’n on H.R.)).

²²² *Id.* The *Greek Case* further defines degrading treatment as that which “grossly humiliates” a person “before others or drives him to act against his will or conscience.” *Forti II* rejects this definition as “too abstract” to define a violation of customary international law. 694 F. Supp. at 712.

²²³ *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25 (1980) (involving members of a terrorist group – the Irish Republican Army – who were detained in police custody). The case concerned the following techniques employed by British Security Forces for the purpose of extracting information: (a) wall standing for extended periods in a “stress position”; (2) hooding of detainees heads while not in interrogation; (3) subjection to continuous loud noise; (4) deprivation of sleep; and (5) deprivation of food and drink. *Id.* at ¶ 96.

²²⁴ *Id.* at ¶ 174.

Thus, whether treatment constitutes “torture” or “inhuman and degrading treatment” in violation of Article 3 is a matter of degree in severity, depending entirely on the circumstances.²²⁵

Applying this standard to a case involving prison conditions, the European Court of Human Rights appears to have clarified that conditions of confinement, standing alone, concern primarily the prohibition against inhuman or degrading treatment or punishment.²²⁶ The Court explained that “ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3.”²²⁷ The Court elaborated that treatment is inhuman in violation of Article 3 “if it is applied for hours at a stretch and caused, if not actual bodily injury, at least intense physical and mental suffering[.]”²²⁸ Treatment is considered “degrading” in violation of Article 3 if it is “such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral

²²⁵ *Id.* at ¶ 162; *see also* LILICH & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9, at 765 (discussing the *Irish* case and the distinction between “torture” as opposed to “inhuman and degrading treatment”).

²²⁶ *In re Soering*, 11 Eur. H.R. Rep. 439 (1989). The *Soering* case, however, is not without political overtones. The *Soering* case involved a proceeding in which the United States sought extradition of a German national who was in custody of the United Kingdom to face charges in the State of Virginia for a gruesome capital murder that he confessed to committing. *Id.* at ¶¶ 11-26. Because the offense carried a possible death sentence, the court in *Soering* examined conditions at the Mecklenburg Correctional Center in Virginia and considered whether the risk of exposing a prisoner to “death row phenomenon” would violate the prohibition found in Article 3 of the European Convention against extraditing someone where the subject might be subjected to inhuman and degrading treatment or punishment. *Id.* at ¶ 93.

²²⁷ *Id.* at ¶ 100.

²²⁸ *Id.*

resistance.”²²⁹ The Court declined to find, however, that these conditions constituted torture.²³⁰

Prisoners have a wide variety of rights under the European Convention. What this review shows, however, is that a judicial inquiry in a prisoner case before the European high court for human rights is more likely to focus on whether the complained of condition constitutes inhuman or degrading treatment unless the its consequences are so severe as to qualify as torture. European courts are aided in this enquiry by the existence of the European Torture Convention and a committee that undertakes to prevent torture by regularly inspecting places of detention in Europe.

3. *The European Torture Convention*

Europe plainly recognizes that torture is one of the most serious human rights violations, that it is considered a peremptory norm, and that this norm cannot be

²²⁹ *Id.*

²³⁰ The *Soering* Court noted that prisoners on death row experience delay before their executions while they exhaust their appellate and collateral remedies and opined that the delay is accompanied by “increasing tension and psychological trauma.” *Id.* at ¶ 105. In addition, the petitioner in *Soering* expressed fear that he might face homosexual abuse and physical attack from other prisoners on death row. *Id.* at ¶ 107. Adopting the so-called “death row phenomenon,” the *Soering* court ultimately concluded that the “very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty,” in light of the personal circumstances of the youthful and purportedly vulnerable offender, “exposed him to a real risk of treatment going beyond the threshold set by Article 3.” *Id.* at ¶ 111. Today there is a split of authority about whether lengthy detention on death row, without the existence of compelling circumstances, violates important civil rights. See *Bickaroo v. Trinidad and Tobago*, Comm. No. 555/1993, CCPR/C/61/D/555/1993 (15 January 1998) (discussing detailed views set forth in *Errol Johnson v. Jamaica*, Comm. No. 588/1994 (22 March 1996)); see also LILICH & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9, at 760 (citing cases on both sides).

derogated from even in time of war or emergency.²³¹ The European Torture Convention, which came into force in 1989, recites the prohibition found in Article 3 of the European Convention, emphasizing that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”²³² Unlike the United Nations Convention Against Torture, however, the European Torture Convention has no definition of what constitutes torture or what constitutes inhuman or degrading treatment or punishment, which is sometimes referred to generally as “ill treatment.”²³³ The definition of what type of treatment constitutes torture or ill treatment has been formed in practice by the committee designed to monitor compliance.²³⁴

²³¹ Torture is prohibited by Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, as well as by the United Nations Convention Against Torture. *See* *Filartiga v. Pena-Irala*, 630 F.2d 867, 890 (2d Cir. 1980) (The prohibition against torture is so universally recognized that “the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind.”); LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.41.

²³² Council of Europe Treaty Series, No. 126 (26 Nov. 1987). To date, the European Torture Convention has been ratified by forty-five of the European Council’s forty-six member states. *See* LEACH, EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 192, at 3. Monaco signed the Convention on October 5, 2004, but had not ratified it by 2005. *See id.* at 7, n.29. Protocol No. 1 of the European Torture Convention, which came into force on March 1, 2002, allows the Committee of Ministers for the Council of Europe to invite non-member states to accede to the Convention. *See id.* at 3.

²³³ *See* MALCOLM D. EVANS AND ROD MORGAN, PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 98 (1998).

²³⁴ *See* LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.41 (noting that jurisprudence on Article 3 of the European Convention has played a part in forming a working definition, but that the European Committee for the Prevention of Torture views its mandate as more extensive, extending to “general conditions of imprisonment in so far as they may give rise to at least a risk of degrading treatment”).

Compliance with the European Torture Convention is monitored by the European Committee for the Prevention of Torture or Inhuman and Degrading Treatment or Punishment (the “CPT”).²³⁵ To encourage compliance, the CPT conducts periodic and *ad hoc* follow-up inspection visits to places of detention, including prisons, police stations, and psychiatric hospitals.²³⁶ From these visits the CPT has developed a body of jurisprudence consisting of its reports.²³⁷ The reports are confidential unless the state requests that it be published, which a large majority have been.²³⁸ The reports typically include a request for the state to report back to the CPT within a year on the steps it has taken to comply with any recommendations made.²³⁹ If a state fails to comply, or otherwise proves un-cooperative, the CPT may issue a public statement.²⁴⁰ Public statements have been issued, for example, with respect to conditions of detention in

²³⁵ LEACH, EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 192, at 3.

²³⁶ *See id.* at 3. Interestingly, under Article 17(3), the CPT does not visit places that “representatives of the International Committee of the Red Cross (the “ICRC”) ‘effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols of 18 June 1977 thereto’.” LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24 at § 3.43.

²³⁷ LEACH, EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 192, at 3. These reports are confidential, but may be published with the agreement of the contracting state. *See id.*

²³⁸ LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.44 (noting that, as of the CPT’s Twelfth Annual Report, 89 of 129 submitted reports have been made public).

²³⁹ *Id.*

²⁴⁰ *Id.*

Turkey, and the failure of Russian authorities to co-operate with some aspects of an inquiry into conditions of detention in the Chechen Republic.²⁴¹

Since its inception, lack of definition has posed both a problem and an opportunity for the CPT and its ability to carve out distinctions between torture and lesser forms of ill treatment.²⁴² Absent immutable propositions that restrict its range of activities, CPT remains free to test the limits of the prohibition found in Article 3 “by exploring – and revealing – the range of circumstances which potentially might be considered as within its ambit.”²⁴³ This means that CPT has a virtually unfettered mandate to investigate. To assist in its mission, the CPT has developed its own set of prison standards.²⁴⁴ The *CPT Standards*, which consist of extracts from substantive sections of the CPT’s general reports, are disjointed and contain no precise definition of torture or ill treatment.²⁴⁵ The *CPT Standards* do attempt, however, to identify conditions and practices that represent cause for concern, such as overcrowding.²⁴⁶

²⁴¹ *Id.*

²⁴² See EVANS AND MORGAN, PREVENTING TORTURE, *supra* note 233, at 73 (observing that, because there is no clear understanding in the drafting history of what was meant in Article 3 by “torture, inhuman or degrading treatment or punishment,” the preventative mechanism established by the CPT “is built on sand”).

²⁴³ *Id.*

²⁴⁴ See Council of Europe, The CPT Standards, CPT/Inf/E (2002), Rev. 2003, available at: www.cpt.coe.int/en/documents/eng-standards.doc.

²⁴⁵ For example, without attempting to define ill-treatment, the CPT Standards simply recognize that “[i]ll-treatment can take numerous forms, many of which may not be deliberate but rather the result of [organizational] failings or inadequate resources.” *Id.* at 17.

²⁴⁶ *See id.*

Thus, the *CPT Standards* supply a much needed level of detail about what kinds of conditions and treatment are preferable and what kinds are unacceptable.²⁴⁷

4. *Continued Progress of the European Prison Rules*

The Council of Europe continues to revise its European Prison Rules to keep up with changes in its ever-growing region, evolution of penal practices, and information obtained in the implementation process. On January 11, 2006, the Council of Europe reportedly adopted a new recommendation to update the European Prison Rules to take into account recent case law by the European Court of Human Rights as well as standards developed by the CPT.²⁴⁸ The newly revised version of the European Prison Rules, which reportedly features a separate section on inspection and monitoring by government and independent bodies at a national and local level,²⁴⁹ has the potential to be an even more powerful instrument for prison reform than the 1987 version, in part, because of the CPT and its inspection activities.²⁵⁰

The Council of Europe has also proposed a European Prison Charter, which is reportedly less comprehensive than the European Prison Rules, but binding like a

²⁴⁷ For example, the *CPT Standards* broadly state that “[r]eady access to proper toilet facilities and the maintenance of good standards of hygiene are essential components of a humane environment.” *Id.* at 18. The CPT specifically expresses its dislike for the practice of “slopping out,” which is employed in many European countries that do not provide prisoners with access to toilets, forcing those prisoners to use a bucket in their cells to discharge human waste. *See id.*

²⁴⁸ Professor Dirk van Zyl Smit has acted as an expert to assist the Council of Europe in revising the rules, the first draft of which was proposed in 2004.

²⁴⁹ Dirk van Zyl Smit, *International Human Rights and Best Practice as Factors in Prison Reform* at 11 (Paper presented at the 14th World Congress on Criminology, Philadelphia, U.S.A., August 2005), available at: www.worldcriminology2005.org/vanZylSmit.doc.

²⁵⁰ *See id.* at 4.

treaty.²⁵¹ The need for a binding prison charter highlights a lingering problem with all systems based on soft model guidelines or standards: lack of enforceability. Unless the European Prison Rules are adopted and implemented in domestic law they are not enforceable. If the process of adopting a convention on prisoners' rights is as fraught with problems as the proposed European Constitution, which remains unratified by all of the member states, it remains to be seen whether consensus on a regional prison charter can be obtained.

B. Prison Standards and Prisoners' Rights in the United States

Turning to the United States, which for the most part has not adopted the Standard Minimum Rules wholesale, a review of the regime of standards and rights applicable to prisoners appears similar in many respects to the system in place in Europe. The United States has a long history of prison standards, many of which pre-date the Standard Minimum Rules. Prisoners in the United States also have a variety of protections found in the Bill of Rights attached to the United States Constitution, which had even greater effect following the passage of important civil rights legislation in 1964. Similar to detention facilities in Europe, prisons and jails in the United States may be subjected to intermittent inspections for the purpose of accreditation, which monitors compliance with standards and constitutional guidelines. These features are discussed below before commenting on the status of the Standard Minimum Rules in the United States.

1. *Early Standards*

In contrast to Europe, the Standard Minimum Rules have not been formally adopted in most United States jurisdictions. This does not mean, however, that United

²⁵¹ See *id.* at 7, 11.

States prison systems are lacking in standards to govern conditions of confinement. Many of the prison standards that are still in use in the United States today pre-date the ones found in the Standard Minimum Rules adopted in 1955, and those which were adopted in Europe in 1973. The 1870 Declaration of Principles published at the first National Congress on Penitentiary and Reformatory Discipline in Cincinnati are credited as “the basis for the development of standards in corrections.”²⁵² As noted above, the ACA published its *Manual of Suggested Standards for a State Correctional System* in 1946.²⁵³ Subsequently, the ACA issued revised versions of its *Manual of Correctional Standards* in 1954, 1959, and 1966, as well as many other publications related to correctional administration, rehabilitative treatment, and professional issues.²⁵⁴

The Standard Minimum Rules have not been without influence on the ACA standards. In the last revised version of its *Manual*, the ACA expressly adopted a “statement of ‘minimum standards to govern correctional officials in dealing with the rights of prisoners’” that was “drawn in the main from the Standard Minimum Rules.”²⁵⁵ Thus, the ACA *Manual of Correctional Standards* has been hailed as containing guidelines that are “identical or parallel” to the Standard Minimum Rules.²⁵⁶

²⁵² TRAVISONO AND HAWKES, *supra* note 55, at 97.

²⁵³ *Id.* at 98.

²⁵⁴ *Id.* at 84-85, 88, 97-99. For example, the ACA published a *Handbook on Classification in Correctional Institutions* in 1947, which was later updated.

²⁵⁵ AMERICAN CORRECTIONAL ASSOCIATION, *MANUAL OF CORRECTIONAL STANDARDS* 266-67(3rd ed. 1966).

²⁵⁶ See Besharov & Mueller, *Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules*, *supra* note 13, at 852 (observing that “[t]he *Manual of Correctional Standards*, issued by the American Correction Association which represents American professional opinion on the subject has

The ACA standards reportedly worked well until the mid 1960s, when something changed that would alter the course of corrections in the United States.²⁵⁷ That event was the enactment of the Civil Rights Act of 1964, Section 1983 of which established a remedy for constitutional violations by state actors such as correctional officials.²⁵⁸ Thus began the end of the so-called “hands-off” era of prisoners’ rights in the United States as prison administrators became obliged to go beyond standards to follow practices and policies that complied with constitutional requirements.

2. *Prisoner Civil Rights Litigation*

As with the rights outlined in the European Convention on Human Rights, the United States Constitution has many provisions in its Bill of Rights that are of great benefit to persons deprived of their liberty. Notably, the Eighth Amendment to the United States Constitution succinctly prohibits “cruel and unusual” punishment.²⁵⁹ According precedent from the United States Supreme Court, the original intent of the drafters “was to proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.”²⁶⁰

identical or parallel standards to . . . the [Standard Minimum Rules”] (citing the AMERICAN CORRECTION ASS’N, MANUAL OF CORRECTIONAL STANDARDS (3d ed. 1966)).

²⁵⁷ TRAVISONO AND HAWKES, *supra* note 55, at 99 (commenting on the evolution of standards through the 1960s and the effect of the Civil Rights Act of 1964).

²⁵⁸ 78 Stat. 243, 42 U.S.C. § 1983.

²⁵⁹ U.S. CONST. amend. VIII.

²⁶⁰ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969)). Initially, the Eighth Amendment was used to challenge methods of execution and “concededly inhuman techniques of punishment.” *Estelle*, 429 U.S. at 102 (citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of

The Eighth Amendment prohibits punishment that is excessive under the theory that a disproportionate penalty is cruel and unusual.²⁶¹ The prohibition on cruel and unusual *punishment* also has been extended to cover prison conditions and the treatment accorded to prisoners after sentence has been imposed.²⁶²

Nevertheless, prisoners in the United States did not always have standing to challenge cruel conditions of confinement in a court of law. Prisoners in the United States were once considered “slaves of the state” with few rights, if any.²⁶³ For a long time the courts accorded virtually unfettered deference to prison administrators over day-to-day management decisions. This “[hands-off] attitude toward problems of prison administration” was justified, in part, because of the recognition that increased interference by the courts would result an unwieldy system of judicial micro-management:

unnecessary cruelty, are forbidden by [the Eighth Amendment] . . .”); *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death . . .”).

²⁶¹ For example, the Supreme Court has recently excluded the use of capital punishment for offenders who committed heinous capital crimes before the age of eighteen. *See Roper v. Simmons*, 543 U.S. 551 (2005). Likewise, offenders whose sub-average intelligence meets the criteria for mental retardation are exempt from the death penalty under the theory that executing persons who lack the mental capacity to appreciate the heinous nature of their actions as cruel. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁶² *Estelle*, 429 U.S. at 290-91 (“The infliction of . . . unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common-law view that ‘[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.’”) (footnote and citations omitted).

²⁶³ *Ruffin v. Commonwealth*, 62 Va. (21 Gratt) 790, 796 (1871); *see also United States ex rel. Miller v. Twomey*, 479 F.2d 701, 711-713 (7th Cir. 1973) (rejecting the view once held by some state courts that a prison inmate is a mere slave).

[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.²⁶⁴

During the 1960s, however, prisoner litigation increased with the passage of the Civil Rights Act of 1964, and the recognition that Section 1983 of that Act, codified at 42 U.S.C. § 1983, could afford a remedy in federal court for constitutional violations committed by officials acting under “color of law.”²⁶⁵

As increased attention to civil rights extended to the prison environment, the United States Supreme Court signaled an end to the hands-off era, confirming that “[a] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this

²⁶⁴ Procunier v. Martinez, 416 U.S. 396, 404-405 (1974) (footnote omitted).

²⁶⁵ Section 1983 of United States Code Title 42 provides that “Every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” Section 1983 applies to state officers who act under colour of state law. See *Monell v. Department of Social Svcs.*, 436 U.S. 651 (1978); *Monroe v. Pape*, 365 U.S. 167 (1961). Civil rights suits against federal officials for constitutional violations are available under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

country.”²⁶⁶ The demise of the hands-off era and the rise of prisoners’ rights triggered a revolution that would transform prison systems within the United States.²⁶⁷ Several state prison systems were declared unconstitutional and placed under court-supervised monitoring.²⁶⁸ Indeed, by 1993 nearly forty states plus the District of Columbia, Puerto Rico, and the Virgin Islands were under some form of court supervision or consent decree as the result of prisoner civil rights lawsuits.²⁶⁹ Twelve jurisdictions were under court orders covering their entire systems.²⁷⁰

With increased funds from state legislatures that were required to bring state penal systems in line with constitutional requirements, the civil rights revolution unquestionably has improved prison conditions throughout the United States.²⁷¹ These

²⁶⁶ Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

²⁶⁷ See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS (1998); BRADLEY STEWART CHILTON, PRISONS UNDER THE GAVEL: THE FEDERAL COURT TAKEOVER OF GEORGIA PRISONS (1991); COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS (John J. DiIulio, Jr., ed., 1990); STEVE J. MARTIN & SHELDON EKLAND-OLSON, TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN (1987).

²⁶⁸ See, e.g., Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (Arkansas); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (Mississippi); Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (Alabama); Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980) (Texas).

²⁶⁹ MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 2.15 at 328 (3rd ed. 2002) (citing Edward I. Koren, Status Report: State Prisons and the Courts - January 1993, 8 J. Nat’l Prison Project 3 (1993)).

²⁷⁰ *Id.* Those jurisdictions included Alabama, Alaska, Arkansas, Delaware, Florida, Mississippi, New Mexico, Rhode Island, South Carolina, Tennessee, Texas, and the District of Columbia. See *id.*

²⁷¹ By 1995, the number of states subject to a court order or consent decree dropped to 33 and only nine states remained under court supervision that extended to their

improvements are monitored extensively by a variety of professional and governmental organizations, which have been charged with updating standards and inspecting prison and jail facilities for compliance. Non-governmental prisoners' rights organizations also continue to monitor compliance with court-imposed mandates with the goal of initiating litigation to obtain redress for conditions that fall below constitutionally acceptable standards.²⁷²

3. *Continued Development of Standards and the Accreditation Process*

Since the prisoner civil rights revolution, there has been a plethora of standards published for use in United States prison and detention facilities. The American Correctional Association has continued to publish standards for a variety of different settings, including correctional institutions, jails, and adult local detention facilities.²⁷³ The United States Bureau of Prisons issued a set of standards that generally approximate

entire prison system. *See id.* The advent of the Prison Litigation Reform Act (the "PLRA") in 1996, has made it easier for states to terminate consent decrees involving prison conditions.

²⁷² A good example of a private prisoners' rights advocacy group is the American Civil Liberties Union and its National Prison Project, which operates a national litigation program on behalf of prisoners in the United States. *See* www.aclu.org/prison. Amnesty International (www.amnesty.org) and Human Rights Watch (www.hrw.org) are two other non-governmental organizations that concern themselves with prison conditions and the rights of the incarcerated.

²⁷³ *See, e.g.*, ACA, Standards Supplement (2006); ACA, Standards for Adult Correctional Institutions (3rd ed. 1990); ACA, Standards for Adult Local Detention Facilities (1991); ACA, Standards for Adult Correctional Boot Camp Programs (1995); ACA, Standards for Small Jail Facilities (1989). Additional publications by the ACA can be found at their website, www.aca.org.

the Standard Minimum Rules.²⁷⁴ Model rules for jail administration have also been issued by the National Sheriffs' Association.²⁷⁵ The United States Department of Homeland Security Immigration and Customs Enforcement Bureau has a set of guidelines and standards for its immigration detention centers.²⁷⁶ Private prison facilities in the United States, such as those run by the Corrections Corporation of America, are also subject to stringent standards.²⁷⁷ State, local, and municipal authorities also frequently compose their own standards for jail facilities.²⁷⁸

Prison standards also have been developed by professionals other than those charged with penal administration. The American Bar Association (the "ABA") has issued a detailed set of standards concerning the legal status of prisoners and the conditions of their confinement, which includes commentary, cites to related standards developed by the American Correctional Association, and case citations.²⁷⁹ The useful

²⁷⁴ UNITED STATES, DEP'T OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS (1980).

²⁷⁵ See National Sheriffs' Administration, Jail Administration (1974), Jail Programs (1974), Jail Security, Classification, and Discipline (1974).

²⁷⁶ See United States, Department of Homeland Security, Immigration and Customs Enforcement, Detention Operations Manual, available at www.ice.gov/partners/dro/opsmanual/index.htm.

²⁷⁷ See Myths v. Reality in Private Corrections: The Truth Behind the Criticism www.correctionscorp.com/myths.html (stating that "CCA training of correctional staff meets or exceeds all established standards by the American Correctional Association, as well as the stringent requirements of the jurisdiction with whom the company contracts").

²⁷⁸ See, e.g., 37 TEX. ADMIN. CODE Part IX, Chapters 251-301 (Texas Commission on Jail Standards).

²⁷⁹ See American Bar Association, *Legal Status of Prisoners* in IV STANDARDS FOR CRIMINAL JUSTICE (2nd ed.). The ABA embarked on a project to develop standards covering the legal status of prisoners in 1972. See *id.* at 4. After a

and informative standards established after years of study by the ABA are frequently referenced by the courts in connection with cases filed by prisoners.²⁸⁰

In addition to issuing its correctional standards, the American Correctional Association also sponsors an inspection and accreditation program. Through its Commission on Accreditation for Corrections, the ACA offers a private, voluntary certification program to which corrections facilities may apply for ACA accreditation.²⁸¹ Accreditation is based on demonstrated compliance with standards adopted by the ACA.²⁸² Facilities are accredited for a period of three years following an audit or inspection of the facility by representatives of the ACA, which will assess the strengths and weaknesses of a correctional facility in a wide variety of categories, and requires accredited facilities to make an annual certification thereafter to confirm continued compliance.²⁸³ Like the European Committee for the Prevention of Torture, the ACA is

series of tentative drafts, they were approved by the ABA House of Delegates on February 9, 1981. *See id.* at 5; *see also* American Bar Association, *Standards Relating to the Legal Status of Prisoners*, 14 AM. CRIM. L. REV. 377 (1977) (setting out the contents of Tentative Draft No. 4).

²⁸⁰ *See* O’Lone v. Estate of Shabazz, 482 U.S. 342, 363 n.5 (1987); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 34 n.16 (1979); Jones v. North Carolina Prisoners’ Labor Union, Inc., 433 U.S. 119, 142 & n.4 (1977); Bounds v. Smith, 430 U.S. 817, 830 n.19 (1977); Norris v. District of Columbia, 737 F.2d 1148, 1158 n.6 (D.C. Cir. 1984); Wright v. Rushen, 642 F.2d 1129, 1135 n.4 (9th Cir. 1981); Campbell v. McGruder, 580 F.2d 521, 553 n.64 (D.C. Cir. 1978); United States v. Davis, 763 F. Supp. 638, 641 (D.D.C. 1991); McMurry v. Phelps, 533 F. Supp. 742, 750 n.17 (W.D. La. 1982); United States v. Hinkley, 525 F. Supp. 1342, 1358 n.36 (D.D.C. 1981).

²⁸¹ *See* American Correctional Association, <http://www.aca.org> (including information about “Standards and Accreditation”).

²⁸² *See id.*

²⁸³ *See id.*

not a judicial body with power to sanction institutions who fail to comport with its standards. The ACA has no authority to require a correctional facility to adopt any procedure or to change any existing procedure.²⁸⁴ The ACA's sole authority is to deny accreditation, or to withdraw accreditation from any facility found not to be in compliance with ACA standards.²⁸⁵

Although the ACA lacks enforcement capabilities, obtaining ACA accreditation is viewed as a significant accomplishment.²⁸⁶ ACA accreditation has been hailed by courts as useful to show a "good faith" effort by prison officials to improve prison conditions.²⁸⁷ Failure to achieve ACA accreditation is also a relevant consideration during litigation.²⁸⁸ Maintaining ACA accreditation has been a condition of court ordered injunctive relief for deficient prison conditions.²⁸⁹ Compliance with ACA standards is not, however, *per se*

²⁸⁴ *See id.*

²⁸⁵ *See id.*

²⁸⁶ *See* Robin Fitzgerald, *From Early Scandals to the Distinction of Accreditation, Time Tells the Tale of the County Jail*, SUN HERALD (Biloxi, Miss.), April 13, 2006, at A1 (detailing the tumultuous history of the Biloxi County Jail system from 1982, when 29 inmates died in a fire, to its recent accreditation by the ACA following numerous improvements).

²⁸⁷ *See* Ruiz v. Johnson, 37 F. Supp. 2d 855, 924 (S.D. Tex. 1999), *rev'd on other grounds sub nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001).

²⁸⁸ *See* Little v. Shelby County, Tenn., 384 F. Supp. 2d 1169, 1187 (W.D. Tenn. 2005) (noting that the jail has never received accreditation by the ACA although it was moving in that direction); Brian B. v. Stadler, Civ. A. 98-886-D, 2005 WL 1847000, *4 (M.D. La. Aug. 2, 2005) (unpublished) (noting the failure of a privately run prison to gain accreditation by the ACA).

²⁸⁹ *See, e.g.,* Hamilton Plaintiffs v. Williams Plaintiffs, 147 F.3d 367, 372 (5th Cir. 1998) (setting out the Order Approving Settlement in Williams v. McKeithen, Civil Action No. 71-98-B).

evidence that conditions meet constitutional requirements.²⁹⁰ As the Supreme Court has stated regarding the ACA and other jail standards, “while the recommendations of these various groups may be instructive . . . , they simply do not establish the constitutional minima; rather they establish goals recommended by the organization in question.”²⁹¹

4. *Status of the Standard Minimum Rules in the United States*

Even without wholesale implementation, the Standard Minimum Rules clearly have not played an unimportant part of the increased application of rights to prisoners and the improvement of prison conditions. For example, a hallmark of the modern prison reform movement can be traced to the 1971 rebellion at the Attica State Prison in New York.²⁹² Having seized hostages, the prisoners made a set of demands for amnesty and safe transportation from confinement.²⁹³ A committee of outside observers met with the inmates in an effort to negotiate a peaceful end to the uprising.²⁹⁴ Prison officials agreed to a set of proposals for improved prison conditions.²⁹⁵ When the inmates rejected the

²⁹⁰ See *Ruiz*, 37 F. Supp. 2d at 924-25 (S.D. Tex. 1999) (commending participation by the Texas Department of Criminal Justice in the ACA accreditation process, but recognizing its limitations as a “tool” that does not necessarily equal constitutional standards).

²⁹¹ *Bell v. Wolfish*, 441 U.S. 520, 543 n. 27 (1979).

²⁹² Alvin J. Bronstein and Jenni Gainsborough, *Using International Human Rights Laws and Standards for U.S. Prison Reform*, 24 PACE L. REV. 811, 812 (2004) (“The prisoner rebellion and its aftermath at Attica in 1971 . . . served as an opening into the dark world of America’s prisons and became the catalyst for the development of the modern prisoners’ rights movement.”).

²⁹³ NEW YORK STATE COMM’N ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 204-05 (1972).

²⁹⁴ *Id.* at 205, 235-38.

²⁹⁵ *Id.* at 251-57.

proposed settlement of penal reform measures, an assault ensued to retake the prison.²⁹⁶ Thirty-two inmates and eleven prison employees who had been taken hostage were killed in the siege.²⁹⁷ As commentators have observed, the reforms proposed during the Attica uprising mirrored many of the guidelines offered by the Standard Minimum Rules.²⁹⁸

Yet, the Standard Minimum Rules have not been fully implemented in the United States, which is to say that the United States has not formally adopted them as part of its domestic law. After the Attica rebellion, a few individual states within the United States expressly adopted the Standard Minimum Rules.²⁹⁹ Most states, however, have not done so. In 1971, there was a bill introduced in the United States Congress to enact the principles of the Standard Minimum Rules into domestic legislation.³⁰⁰ It was not successful. To date, the federal government has not formally adopted the Standard Minimum Rules, although federal standards supposedly approximate the Rules.³⁰¹

²⁹⁶ *Id.* at 333.

²⁹⁷ *Id.* at Appendix D & E.

²⁹⁸ See Besharov & Mueller, *The Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules for the Treatment of Prisoners: A Comparison*, *supra* note 13, at 839.

²⁹⁹ ABA, Corrections Comm'n, *The United Nations Standard Minimum Rules for the Treatment of Prisoners*, 11 CRIM. L. BULL. 637 (1975) (identifying Pennsylvania (1971), Connecticut (1974), South Carolina (1974), and Illinois (1974) as states that have adopted the Standard Minimum Rules directly or by reference, as well as Ohio (1974) and Minnesota (1974) as among the states adopting the Standard Minimum Rules in some fashion).

³⁰⁰ See Besharov & Mueller, *Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules*, *supra* note 13, at 854 (citing H.R. 11605, 92d Cong., 1st Sess. (1971) (introduced by Congressman Charles Rangel)).

³⁰¹ See LILlich & HANNUM, INTERNATIONAL HUMAN RIGHTS, *supra* note 9, at 315 (citing United States Dep't of Justice, *Federal Standards for Prisons and Jails* (1980)).

Likewise, principles of the Standard Minimum Rules are reportedly comparable to those incorporated into the 1962 Model Penal Code and the correctional standards developed in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, suggesting an influence.³⁰²

Apart from their influence on existing prison standards, the Standard Minimum Rules have been invoked by courts looking for guidance within the United States. Actual discussion of the Standard Minimum Rules, however, is scarce. For the most part domestic courts have pointed to the Standard Minimum Rules as evidence of customary international law.³⁰³ In that respect, courts in the United States have limited the role of the Standard Minimum Rules to informational or advisory of what constitutes accepted state practice. The United States Supreme Court has characterized the Standard Minimum Rules as evidence of “contemporary standards of decency” of the sort that informs an Eighth Amendment analysis.³⁰⁴ The Court has stopped short, however, of equating guidelines found in the Standard Minimum Rules with constitutional requirements. In another case, the Supreme Court has viewed the Standard Minimum Rules in a more limited manner as instructive recommendations, but not as establishing a

³⁰² See Skoler, *World Implementation of the United Nations Standard Minimum Rules*, *supra* note 140, at 453, 461 & n.22.

³⁰³ *Lareau v. Manson*, 507 F.Supp. 1177, 1189 (D. Conn. 1980) (observing that the Standard Minimum Rules “may be significant as expressions of the obligations to the international community of the member states of the United Nations.”); *Sterling v. Cupp*, 625 P.2d 123, 132 n. 21 (citing the Standard Minimum Rules as among those “contemporary expressions” of the concern with minimizing “dehumanizing treatment of prisoners”).

³⁰⁴ *Estelle v. Gamble*, 429 U.S. 97 103-04 & n.8 (1976).

constitutional minimum.³⁰⁵ Standards such as those issued by the American Correctional Association are viewed similarly as guidelines for what is considered appropriate prison administration,³⁰⁶ but not equal to what is constitutionally required.³⁰⁷

Although courts in the United States appear to have given the Standard Minimum Rules short shrift, this does not necessarily mean that the United States fails to comport with the guidelines provided therein. It is possible to discern through a brief review of the standards published by the ACA and the ABA, as well as major court decisions enlarging the constitutional rights of prisoners, that the major substantive provisions found in the Standard Minimum Rules have achieved implementation in the United States, even if at a piecemeal pace. As this review attempts to show, the principles advanced by the Standard Minimum Rules are recognized and adequately protected in the United States by comprehensive professional standards and court rulings on prison conditions without the need for actual implementation as that term is understood by the United Nations.

C. Observations

³⁰⁵ Bell v. Wolfish, 441 U.S. 520, 542 (1979) (upholding the practice of double-bunking).

³⁰⁶ See, e.g., Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 375 n.3 (1992) (examining architectural standards for cell size); Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 469 & n.5 (1989) (Marshall, J., dissent) (pointing to standards issued by governmental and private organizations on inmate visitation); Turner v. Safley, 482 U.S. 78, 112 (1987) (Stevens, J., concurring and dissenting) (citing standards on inmate correspondence rules); Hudson v. Palmer, 468 U.S. 517, 552 & n.24 (1984) (O'Connor, J., concurring) (citing standards that require prison officials to respect prisoners' possessory rights in noncontraband personal property).

³⁰⁷ See *Bell*, 441 U.S. at 543, n.27.

A comparison of Europe and the United States shows that both employ standards in an effort to improve conditions within their prison systems. There are a couple of explanations for the differing levels of esteem that the Standard Minimum Rules appear to have enjoyed in these regimes. One factor is the existence of comprehensive correctional standards that pre-date the Standard Minimum Rules, which explains why the United States has declined to adopt the spartan guidelines approved by the United Nations whereas Europe has embraced them wholesale. Another factor is the differing level of judicial control over prison issues within these jurisdictions, which may explain why standards occupy a predominant place of importance in Europe. These observations are discussed briefly below.

1. *Pre-Existing Comprehensive Standards*

The differing degree of influence that the Standard Minimum Rules have had within the legal systems in Europe and the United States is, in part, an issue of timing. When the Standard Minimum Rules were formally adopted at the First United Nations Crime Congress in 1955, the 1870 Declaration of Principles were already firmly established and ensconced within professional organizations operating in the United States. Based on the 1870 Declaration of Principles, the American Correctional Association had already published at least two comprehensive manuals of correctional standards in 1946 and 1954, before the Standard Minimum Rules were formally adopted. During the time that professional organizations such as the ACA were issuing correctional standards, Europe was being torn asunder by decades of war. Adopting the Standard Minimum Rules wholesale made sense to Europe, but not necessarily for the United States, which already had standards that approximated the Standard Minimum

Rules in principle and exceeded them in terms of detail even before the civil rights revolution of the 1960s and 1970s.

Europe's decision to adopt the Standard Minimum Rules wholesale, while undoubtedly beneficial, has not been without difficulty. The level of detail found in the Standard Minimum Rules, or the lack thereof, has forged a critical difference between the prison standards found in Europe and the United States that has proven detrimental. Like the Standard Minimum Rules, the European Prison Rules are vague in character, which has made the European Prison Rules less useful. Comprehensive standards such as those formulated by the ACA and the ABA, which take into consideration judicial rulings about constitutionally required standards for the treatment of prisoners, are seen as more useful in their application by prison officials and as guidelines for courts to follow concerning what is generally accepted as good practice.

One commentator has noted this contrast between prison standards in the United States and Europe and has made a connection between lack of detail and the problem of enforceability. "The specificity of some of these American codes of standards has a direct bearing on the question of compliance."³⁰⁸ Where comprehensive standards exist, "[t]here is less room for varying interpretations, a problem besetting the European Prison Rules, whose vague wording and qualified statements of principle create loopholes and allow circumvention."³⁰⁹ This commentator has also noted that standards and systems of accreditation have a place in developing "good practice" in the correctional context, but that standards are "no substitute for a system which obliges compliance" such as the one

³⁰⁸ Silvia Casale, *Conditions and Standards*, in *PRISONS AFTER WOOLF: REFORM THROUGH RIOT* at 74 (Elaine Player and Michael Jenkins, eds., 1994).

³⁰⁹ *Id.*

in place in the United States, for which the system of accreditation operates against a background of minimum standards at the federal, state, and local level, and which also features active judicial intervention to enforce those standards.³¹⁰

The growing body of jurisprudence by the European Committee for the Prevention of Torture (the CPT) further illustrates how the vague character of the European Prison Rules detracts from their effectiveness. It has been observed that, whereas the European Prison Rules are seen as vague and unhelpful, the impact of the specific comments and general reports made annually by the CPT have provided a guide to “European ‘good practice’ in relation to prison conditions and regimes and appear to have greater influence on the decisions of [the European Court of Human Rights] than the European Prison Rules”³¹¹ Thus, judicial enforcement is also aided by the availability of comprehensive standards.

Another factor that militates against adopting the Standard Minimum Rules at this point is that they are out of date. As one commentator has observed, their dated character leaves the Standard Minimum Rules “vulnerable to criticism” and, perhaps more importantly, they lack a “compelling underlying rationale” which further diminishes their application and influence.³¹² Given the small number of nations that responded to the periodic surveys issued by the United Nations, revisions to the Standard Minimum Rules are not likely. Therefore, future progress with respect to guidelines regulating

³¹⁰ *Id.*

³¹¹ LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.45.

³¹² Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 207.

prison conditions almost certainly will be at the regional level.³¹³ To its credit, Europe has at least attempted to remedy this deficiency with updated revisions that are tailored to regional needs while advancing a distinct philosophy that is relevant to the area of geographic application. Because the United States finds itself with a plethora of well-developed standards by professional organizations, as well as federal, state, and local authorities, there is little incentive at this point to adopt the antiquated Standard Minimum Rules.

2. Differing Levels of Judicial Control

Another reason that the Standard Minimum Rules have thrived in Europe is that the role of the judiciary appears less prominent than in the United States, where prison reform has been driven by court intervention or, as some would say, judicial activism. Although the European Court of Human Rights has issued many important decisions concerning prisoners' issues, there are some significant limitations to review by the Strasbourg court. Less than 25 percent of the applications submitted ultimately have been found admissible.³¹⁴ In that respect, limits on admissibility require a party to exhaust all available domestic remedies and to file his or her application with the European Court of Human Rights within six months of the domestic tribunal's final decision.³¹⁵ An application may be deemed inadmissible if it appears "manifestly ill-founded," such as if the allegations do not disclose an arguable breach of the

³¹³ See *id.* at 207-08 (predicting future progress on a regional level, but no revisions to the Standard Minimum Rules due to lack of support at the international level).

³¹⁴ LIVINGSTONE, OWEN, & McDONALD, *PRISON LAW*, *supra* note 24, at § 3.22.

³¹⁵ See *id.* at §§ 3.25 – 3.31 (referencing Article 35 of the European Convention).

Convention.³¹⁶ There are other limits on admissibility found in Article 35 of the European Convention, which has been amended recently in an effort to further restrict the European Court's burgeoning workload.³¹⁷

Apart from the European Court of Human Rights it is less clear what role, if any, that domestic courts in European member states have had in extending the rule of law to prisoner complaints about conditions of confinement. Europe, as in the United States, had adopted a "hands-off" attitude toward prisoner litigation in the past.³¹⁸ The United Kingdom, for example, did not extend court jurisdiction over a complaint against the government agency responsible for supervising prisoners until 1979.³¹⁹ Domestic courts in the United Kingdom did not become active in extending rights to prisoners until the 1980s.³²⁰

³¹⁶ *Id.* at § 3.32 (citing Article 35(3) of the European Convention).

³¹⁷ LEACH, EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 192, at 9 (citing Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series, No. 194, May 13, 2004). The new criteria establishes a three-part test that will result in a declaration of inadmissibility if the following are met: (1) the applicant has not suffered a significant disadvantage; (2) unless respect for human rights requires an examination of the application on the merits; and (3) provided that no case that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. *See* LEACH, EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 192, at 9 (citing Article 12 of Protocol 14, amending Article 35(3) of the European Convention).

³¹⁸ *See* LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at §§ 16.01, 16.17 (referencing the demise of the "judicial 'hands off' approach" by domestic and regional courts in the 1970s).

³¹⁹ *See id.* at § 2.77 (citing *Regina v. Board of Visitors of Hull Prison, ex parte St. Germaine*, [1979] QB 425).

³²⁰ *See id.* at § 16.17 (commenting on the "unexpected willingness" of the judiciary to involve themselves in the control of prison administration by the late 1980s).

The legal status of prisoners differs among the European states depending on whether a country's prison system is part of a political system in which oversight is conducted by administrative, legislative, or executive departments, as opposed to prison systems that also operate under a system of judicial oversight.³²¹ Some countries have no judicial control over prison conditions, others have limited amounts of judicial control, while still others have significant judicial control.³²²

France is one example of a country with significant judicial control over prisons.³²³ Since 1958, each French prison has been assigned a judge who has both administrative and judicial functions in the prison setting.³²⁴ Because the level of judicial control is so strong, the political influence over prisons in France is weak. There is no political control over prisons at the national level, leaving their regulation to local authorities.³²⁵ Spanish prisoners are also subject to significant amounts of judicial control.³²⁶ In Spain, prisoners have the right to complain to prison administration, the

³²¹ See PHILIP L. REICHEL, CORRECTIONS: PHILOSOPHIES, PRACTICES, AND PROCEDURES 541 (2nd ed. 2000).

³²² See *id.* at 542.

³²³ See REICHEL, CORRECTIONS: PHILOSOPHIES, PRACTICES, AND PROCEDURES, *supra* note 321, at 543.

³²⁴ See *id.*

³²⁵ See Philippe Combès, *France*, in IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS at 262.

³²⁶ See REICHEL, CORRECTIONS: PHILOSOPHIES, PRACTICES, AND PROCEDURES, *supra* note 321, at 543.

courts, an ombudsman, the prosecutor, or any other public authority.³²⁷ Similarly, all prison decisions made by German authorities are subject to judicial review.³²⁸

In contrast to the domestic legal systems found in France, Spain, and Germany, judicial control is limited in Sweden, which instead emphasizes political control in the form of an ombudsman.³²⁹ The role of courts is down played in the Swedish system.³³⁰ Individual cases decided by central prison administration can be appealed to an administrative court.³³¹ Prisoners also have the option to appeal to an ombudsman.³³² Austria is another example of a jurisdiction that operates primarily under a system of political control, in which prisoner complaints are handled by the head of the institution and complaints against the head of the institution are addressed by the Federal Ministry of Justice.³³³

³²⁷ Jose Louis de la Cuesta and Isidoro Blanco, *Spain*, in *IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS* at 614-15.

³²⁸ Frieder Dünkel and Dieter Rossner, *Germany*, in *IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS* at 315-16 (Dirk van Zyl Smit and Frieder Dünkel, eds., 2nd ed. 2001).

³²⁹ See REICHEL, *CORRECTIONS: PHILOSOPHIES, PRACTICES, AND PROCEDURES*, *supra* note 321, at 541.

³³⁰ Hanns von Hofer and Ryan Marvin, *Sweden*, in *IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS* at 638.

³³¹ *See id.*

³³² *See id.*

³³³ Wolfgang Gratz, et. al, *Austria*, in *IMPRISONMENT TODAY AND TOMORROW: INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS* at 15-16 (Dirk van Zyl Smit and Frieder Dünkel, eds., 2nd ed. 2001).

As this shows, the presence of a strong judiciary can translate into weak control of prisons at the administrative level. By contrast, countries with strong administrative control often feature a very limited judicial role. The limited availability of judicial review for prisoner complaints within some domestic systems in Europe increases the importance of the European Court of Human Rights as a forum. These limitations also increase the importance of continued efforts by the Council of Europe to promulgate a revised version of the European Prison Rules as well as the European Committee for the Prevention of Torture and its inspection regime, which has produced its own set of guidelines in the *CPT Standards*. Comparatively speaking, it can be concluded from a review of the European system that wherever local judicial control is less prominent, standards are a more important tool for ensuring minimum levels of acceptable treatment for prisoners, while affording less in the way of individual rights. Thus, standards may be more important for protecting prisoners rights where administrative control is more prevalent than judicial control. This may explain why in the United States, where courts are unlikely to fully cede an interest in monitoring prison compliance with constitutional requirements, standards have lesser importance than they do in Europe.

CONCLUSION

What this paper has attempted to show is that Europe and the United States both have prison standards in place, and that these standards have been influenced by the Standard Minimum Rules in different ways for good reasons. These differences reveal the strengths and the weaknesses of using model rules or guidelines as a source of law. The United States has a variety of well-developed, comprehensive prison standards that stem from the 1870 Declaration of Principles and an equally long history of reform

movements that date back to the very first penitentiary built in the late 1700s. Even with this longstanding interest in the evolution of humane standards, however, significant reform arguably has required court involvement in many instances. Thus, while prison standards have been important factors in ensuring humane prison conditions, effective reform of prison conditions sometimes has required other mechanisms such as a regime of regular inspection or accreditation as well as the availability of judicial intervention. In this respect, the European system of prison standards, which has been strengthened by the European Convention and the European Committee for the Prevention of Torture, is no different from the one in the United States.

It is undisputed that the Standard Minimum Rules, in spite of their advisory, non-binding status, have played a significant role in elevating prison conditions in countries which lacked a tradition of reform. Because of their advisory nature, however, standards are inherently different from enforceable rules such as those found in a convention, constitution, or legislative enactment. As a result, violating a standard does not automatically warrant a sanction. The European Court of Human Rights has recognized as much, holding that a mere breach of the European Prison Rules will not amount to a violation of Article 3 of the European Convention, which prohibits torture or other forms of cruelty.³³⁴ In other words, while conditions may fall short of the standards required by the European Prison Rules, this does not necessarily constitute inhuman or degrading treatment in violation of the European Convention and the demands of Article 3.³³⁵ The

³³⁴ See LIVINGSTONE, OWEN, & McDONALD, PRISON LAW, *supra* note 24, at § 3.58 (citing Application 7341/76, discussed in A. Reynaud, *Human Rights in Prisons* 34 (Strasbourg, 1987)).

³³⁵ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 211.

United States Supreme Court has reached the same result with regard to the Standard Minimum Rules, observing that they are not a constitutional floor.³³⁶

Importantly, not all of the provisions in the Standard Minimum Rules are intended or required to be on the level of an actionable constitutional right. Some of the provisions are plainly aspirational, whereas other have achieved legally binding status such as the prohibition of torture and other forms of cruel, inhuman, or degrading treatment. These, however, are also regulated by other multinational conventions, such as the CAT and the ICCPR, as well as domestic provision such as those found in the Eighth Amendment to the United States Constitution and Article 3 of the European Convention on Human Rights.

Even as a “soft” source of law, standards are not necessarily less important than conventional or constitutional rules and judicial decrees. As one commentator has noted it would be a mistake to underestimate the utility of the European Prison Rules and “the moral and practical influence they exert,” particularly in light of the increased authority in the inspection process and the procedural mechanisms created by the Council of Europe to enhance the rules’ enforceability.³³⁷ The European Prison Rules have been

³³⁶ See *Bell*, 441 U.S. at 542.

³³⁷ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 211. Specifically, to strengthen compliance the Council of Europe has increased its “procedural machinery” by requiring reports from member states every five years to be studied by an appointed “Select Committee.” *Id.* at 212. The European Committee for Co-operation in Prison Affairs (the “CCPA”) was formed in 1981, and further serves the purpose of enforcement by collecting and disseminating information and data, such as through publication of the *Prison Information Bulletins*, as well as identifying “specific problems” that may arise in a particular country. *Id.* at 213. Co-operative arrangements to achieve remedies for these problems have further enhanced the status of the European Prison Rules. *See id.*

widely accepted and, although not binding in international law, they are held in high regard in the international community because of the political obligations and moral sanction imposed on the national authorities who have agreed to be bound by them.³³⁸ European countries that have declined to incorporate the European Prison Rules into their domestic law, most notably the United Kingdom,³³⁹ have faced significant problems. In that respect, the United Kingdom has been plagued with bad reports about its prisons and outbursts of prison violence.³⁴⁰ Its failure to adopt the rules has resulted in criticism.³⁴¹ Although many of the standards found in the European Prison Rules exist in the UK system, in regulations, manuals, operational codes, and the like, “[w]hat is lacking is a discrete codification and the means of enforcement.”³⁴²

³³⁸ See Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 210-11.

³³⁹ See LIVINGSTONE, OWEN, & McDONALD, *PRISON LAW*, *supra* note 24, at § 3.58 (“Unlike some European countries the United Kingdom has not incorporated the European Prison Rules into its domestic law . . .”).

³⁴⁰ On April 1, 1990, for examples, prisoners at the Strangeways prison began the “longest and most devastating riot in British penal history.” *PRISONS AFTER WOOLF: REFORM THROUGH RIOT* at 2 (Elaine Player and Michael Jenkins, eds., 1994). It lasted for twenty-five days, and inspired serious riots at five other prisons and various forms of disruption at more than thirty other establishments in England and Wales. *Id.* The riots resulted in an inquiry with public hearings and report by Lord Justice Woolf (the Woolf Report). *See id.* at 3-6.

³⁴¹ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 216.

³⁴² *Id.* See also Silvia Casale, *Conditions and Standards*, *supra* note 308, at 77 (discussing standards proposed in the Woolf Report, issued in the wake of widespread prison violence in the United Kingdom in 1990, and noting that a “network of mechanisms” to improve conditions is missing); accord LAZARUS, *CONTRASTING PRISONERS’ RIGHTS*, *supra* note 17, at 159 (explaining that England’s prison rules govern the day-to-day administration of prisons and do not amount to a code of prisoners’ rights). For a summary of prisoners’ rights cases from the United Kingdom before the European Commission and the Court of

Even with the wide acceptance enjoyed by the European Prison Rules, compliance with these standards has been a problem. In some areas the level of compliance is reportedly “barely above the minimum,” although shortfalls are in application of some of the rules are allegedly technical or peripheral in nature.³⁴³ Thus, although Europe has taken great strides in implementing the Standard Minimum Rules, clearly there is room for improvement. That improvement is the addition of other mechanisms, such as inspections or accreditation programs, and the obligations placed on states and prison administrators by courts with authority to enforce prisoners’ rights.

The prospect for a renewed version of the European Prison Rules and for a Prison Charter is important because of ongoing political changes in Europe, which continues to grow as a union. The growing number of new member states from Central and Eastern Europe is another important factor, as many of these new states (such as Russia) have high prison populations.³⁴⁴ Many of these new members have also only recently abolished the death penalty, meaning that these states will have to deal with larger numbers of prisoners serving life sentences.³⁴⁵

Human Rights, beginning in 1969, *see* DONALD W. JACKSON, *THE UNITED KINGDOM CONFRONTS THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 64-81 (1997).

³⁴³ Neale, *European Prison Rules: Contextual, Philosophical and Practical Aspects*, *supra* note 113, at 212.

³⁴⁴ Dirk van Zyl Smit, *International Human Rights and Best Practice as Factors in Prison Reform* at 6 (Paper presented at the 14th World Congress on Criminology, Philadelphia, U.S.A., August 2005), available at: www.worldcriminology2005.org/vanZylSmit.doc.

³⁴⁵ *See id.*

Decisions by the European Court of Human Rights have underscored the importance that positive obligations have by requiring member states to take action.³⁴⁶ For example, Russia has been directed to report on steps taken to prevent further human rights violations following an adverse judgment, which found violations of Article 3 of the European Convention with respect to overcrowded and unsanitary conditions of pre-trial detention.³⁴⁷ As the Court noted, Article 46 of the European Convention obliges every state to abide by the judgments of the Court, which includes the adoption of general measures to prevent new violations of the Convention similar to those found in the Court's judgments.³⁴⁸ This is an example of the potential part that standards can play in improving the prison conditions that exist in former totalitarian states, which in the past may have been resistant to international guidelines like the Standard Minimum Rules as an unwarranted intrusion into domestic affairs.

The world community has an obvious interest in encouraging states without adequate prisons or prison standards to adopt the Standard Minimum Rules. This is why the unenthusiastic record of implementation, as demonstrated by the low level of responses to United Nations survey efforts, is so troubling. As one United States district court has recently observed, the record of compliance with the reporting requirements on implementation of the Standard Minimum Rules by United Nations member states

³⁴⁶ See A.R. MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 2 (2004) (citing *Gul v. Switzerland* 1996-I 16 (J. Martens, dissent)).

³⁴⁷ See *Kalashnikov v. Russia*, ResDH (2003) 123, 4 June 2003, reprinted in LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 192, at Appendix 32.

³⁴⁸ See *id.*

constitutes “both relevant practice and evidence of *opinio juris*” as customary international law.³⁴⁹ While the lackluster record of responses to the surveys issued by the United Nations is disconcerting, it should not detract from the status of the Standard Minimum Rules as evidence of what is considered good practice.³⁵⁰ The proposed draft Charter of Fundamental Rights of Prisoners by the United Nations Commission on Crime Prevention and Criminal Justice in 2003 is further evidence of the influence of the Standard Minimum Rules and of which norms are recognized as basic.

In spite of their aspirational character and the lukewarm response to the United Nations’ surveys, “the Rules are meant to be binding on the conscience of nations.”³⁵¹ For all of the limitations found in the Geneva Convention regime and its application to prisoners taken during an armed conflict,³⁵² the Standard Minimum Rules persist as a “global floor” of minimally acceptable treatment for all persons detained no matter what the context.³⁵³ Therefore, as illustrated by the controversy over the treatment of detainees at Guantanamo Bay, prison standards should continue to be an *important* and not an

³⁴⁹ Kane v. Winn, 319 F. Supp.2d 162, 198 (D. Mass. 2004).

³⁵⁰ See RODLEY, TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, *supra* note 145, at 280-81 (noting that only some of the provisions found in the Standard Minimum Rules are considered binding).

³⁵¹ Besharov & Mueller, *The Demands of the Inmates of Attica State Prison and the United Nations Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 13, 840.

³⁵² See Kantwill and Means, *supra* note 4, at 687-92 (discussing the controversy surrounding memoranda from the Department of Justice about whether non-government actors, such as Taliban fighters and insurgents, qualified for protection under the Geneva Conventions).

³⁵³ William Clifford, *The Standard Minimum Rules for the Treatment of Prisoners*, 66 AM. SOC’Y INT’L L. PROCEEDINGS 232, 232 (1979).

impotent tool in establishing minimum levels of treatment for the protection of those detained under any set of circumstances.