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A COMPARATIVE APPROACH TO PRISONERS' RIGHTS IN THE EUROPEAN COURT OF HUMAN RIGHTS AND INTER-AMERICAN COURT OF HUMAN RIGHTS JURISPRUDENCE

FRANCESCO SEATZU AND SIMONA FANNI*

I. INTRODUCTION

In its landmark decision of 1984 on the *Campbell and Fell* case[1], the European Court of Human Rights ("ECtHR") correctly observed that: "justice cannot stop at the prison gate."[2]

This statement perfectly captured the rationale for a human rights approach to prison management. It also vividly expresses the auspices of all the actors involved in ensuring respect for human rights in prisons and similar institutions: public authorities, civil society organizations, and prominently, judicial and quasi-judicial human rights bodies. The ECtHR's remark also helps to understand why legal scholars from all countries have produced detailed commentaries and critical examinations of the rules of international law, including the numerous non-binding international standards, guidelines, and provisions applying directly to the prison sector or intended to provide protection in cases where the detainees' rights are at risk.[3] The international community clearly feels the need to identify international standards on the protection of the fundamental rights of detainees.[4]

This need stems firstly from the fact that a number of monitoring bodies—including the ECtHR and the Inter-American Court of Human Rights ("ACtHR"),[5] but not the United Nations human rights bodies[6]—have usually been partially or sometimes even totally unaware of their practical significance for the detainee population and have therefore not exercised their functions with full effectiveness.

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1. *Campbell v. United Kingdom*, Eur. Ct. H.R. 29 (1984).
2. *Id.* at 30.
3. *Id.*
4. *Id.*
5. EUROPEAN COURT OF HUMAN RIGHTS, http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]} (last visited Sept. 20, 2015); INTER-AMERICAN COURT OF HUMAN RIGHTS, http://www.corteidh.or.cr/index.php/en (last visited Sept. 20, 2015).
6. Office of the U.N. High Comm'r for Human Rights (OHCHR), *Human Rights And Prisons Manual on Human Rights Training for Prison Officials*, U.N. Doc. HR/P/PT/11 (2005), http://www.ohchr.org/Documents/Publications/training11en.pdf.

Secondly, and more significantly, the identification and subsequent application of those standards, including the results of the Council of Europe's standard-setting work in the area of the protection of detainees' fundamental rights,[7] have significant consequences for the treatment of detainees inside prisons. Such standards (as a whole) can help courts and quasi-jurisdictional bodies operating at both national and supranational levels to ensure effective respect of human rights and fundamental freedoms for detainees. Although the United Nations Standard Minimum Rules for the Treatment of Prisoners ("SMR"),[8] the European Prison Rules ("EPR"),[9] the Principles and Best Practices on the Protection of Persons Deprived of Their Liberty in the Americas,[10] the United Nations Draft Charter on the Fundamental Rights of Prisoners adopted by the United Nations Commission on Crime Prevention and Criminal Justice in 2003,[11] and other similar documents only have the force of policy guidelines;[12] they are largely incorporated in the relevant detention provisions of various international human rights treaties, including the International Covenant on Civil and Political Rights ("ICCPR"),[13] the

7. Incidentally, since the early 1960s the Council of Europe has issued a number of soft law rules addressing particular aspects of prison life and specific rights of detainees, including Resolution (62)2 on electoral, civil and social rights of prisoners, Resolution (82)16 on prison leave, Resolution (82)17 on the custody and treatment of dangerous prisoners, the Resolution (84)11 concerning information about the Convention on the Transfer of Sentenced Persons, Resolution (89)12 on education in prison and-Recommendation(92)18 concerning the practical application of the Convention on the Transfer of Sentenced Persons. COUNCIL OF EUROPE, *Minimum Corpus of the Council of Europe standards*, Doc. RL-BU(2008)2, 16, 19-20 (2008), http://www.coe.int/t/dghl/cooperation/lisbonnetwork/rapports/RL-BU_2008_2MinimumCorpus_en.pdf; BÉATRICE BELDA, LES DROITS DE L'HOMMES DES PERSONNES PRIVÉES DE LIBERTÉ: CONTRIBUTION À L'ÉTUDE DU POUVOIR NORMATIF DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME (Bruylant 2010); Isabelle Berro-Lefèvre, *Les conditions de vie en détention et la CEDH, in* IN HONOREM CORNELIU BIRSAN 715-724 (Adriana Almăşan ed., 2013).

8. U.N. Economic and Social Council, *Standard Minimum Rules for the Treatment of Prisoners* (Aug. 30, 1955), http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b36e8 [hereinafter *Standard Minimum Rules*].

9. Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules* (Jan. 11, 2006), http://www.refworld.org/docid/43f3134810.html [hereinafter *European Prison Rules*].

10. Inter-Am. Comm'n H.R., *Resolution 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, (ser. A) No. 26 (Mar. 13, 2008), http://www.refworld.org/docid/48732afa2.html [hereinafter *Principles and Best Practices*].

11. U.N. Comm'n on Crime Prevention and Criminal Justice, *For Human Dignity–Towards the Charter of Fundamental Rights of Prisoners*, U.N. Doc. E/CN.15/2003/CRP.9 (May 16-18, 2003).

12. *See also* Christine Chinkin, *Normative Development in the International Legal System, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 23 (Dinah Shelton ed., 2000) (stressing that, "drawing a formal distinction between hard and soft obligations is less important than understanding the processes at work within the law-making environment and the products that flow from it."); *see also*, Humberto Cantú-Rivera, *The Expansion of International Law Beyond Treaties*, AMERICAN SOCIETY OF INTERNATIONAL LAW (last visited Aug. 21, 2015), http://www.asil.org/blogs/expansion-international-law-beyond-treaties-agora-end-treaties (stressing that, "[s]oft law has established itself as a form of international law that serves as a driving vehicle to adopt standards, resolutions, and principles that might not be ripe enough for adoption as a conventional text, that is, of a formally binding nature for the ratifying States.").

13. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. No. E, 95-

United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"),[14] the European Convention on Human Rights ("ECHR"),[15] and the American Convention on Human Rights ("ACHR").[16] Finally, if consistently applied by national and supra-national courts, these standards, guidelines, and principles may greatly contribute to building a body of consistent case law on detainees' rights under the international human rights conventions including the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[17] though there is no specific reference to detention made in the ICESCR. The main reason for their potential contribution is the fact that these soft law instruments (unlike international human rights treaties which lack specific rules addressed to detainees and prisoners as a vulnerable group)[18] embrace a considerable set of issues related to detention conditions—accommodation (for instance, overcrowding, hygiene, sanitary facilities, food, and clothing), discipline and punishment, legal counsel, and free communication in general, health and medical services, work, and recreation.[19] While perhaps not essential, building such a body of '*jurisprudence constante*' would certainly be useful, since several states are parties simultaneously to the ICCPR, the CAT, the ECHR, and the ACHR.[20]

Although the international law standards on the protection of detainees' fundamental rights have been the subject of numerous peer-reviewed articles and at least one monograph in French,[21] to date, very few contributions have investigated in depth the reasons behind the different approaches taken by the international monitoring bodies currently operating within the main international legal instruments for the protection of human rights.

2, 999 U.N.T.S. 171.

14. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. no. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987).

15. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221 (European Convention on Human Rights, ECHR signed on 4 November 1950 in Rome and entered into force in 1953; all Council of Europe Member States party to it, i.e. forty-seven states) [hereinafter ECHR].

16. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

17. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

18. *See* Alphonse Spielmann, *Les Déteneus et Leurs Droits (de l'Homme)*, *in* LES DROITS DE L'HOMME AU SEUIL DU TROISIÈME MILLÉNAIRE: MÉLANGES EN HOMMAGE À PIERRE LAMBERT 777-88 (Bruylant, 2000).

19. *See* Jiri Toman, *The Treatment of Prisoners: Development of Legal Instruments and Quasi-Legal Standards, in* LIVING LAW OF NATIONS: ESSAYS ON REFUGEES, MINORITIES, INDIGENOUS PEOPLES AND THE HUMAN RIGHTS OF OTHER VULNERABLE GROUPS: IN MEMORY OF ATLE GRAHL-MADSEN 421-439 (Gudmundur Alfredsson, Peter Macalister-Smith, Kehl-am-Rhein eds. N.P. Engel, 1996).

20. *Id.*

21. *See* JIM MURDOCH, LE TRAITEMENT DES DÉTENUS: CRITÈRES EUROPÉENS (Editions du Conseil de l'Europe ed., 2007).

This paper aims firstly at assessing, and subsequently comparing and contrasting, the respective contribution of the ECtHR, the IACtHR, and the Inter-American Commission of Human Rights ("IACommHR") to the widespread success of the values embodied in international legal instruments on the protection of detainees' rights. As Professor Thomas Buergenthal indirectly suggests, this type of comparative approach to the topic is strongly advisable because "although the American Convention is modelled on the European Convention, it departs from or improves upon the latter in a number of important respects."[22] In this paper, an empirical analysis is conducted on the compliance of the judicial decisions and advisory opinions of the two regional human rights courts in Europe and the Americas with the international standards on the protection of detainees' rights. This requires comparative study of the influence of those legal instruments on the case law of the ECtHR and the IACtHR. To do so, this paper starts with a brief discussion of the SMR, followed by examination of the EPR, the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, and the Kampala Declaration on Prison Conditions in Africa.

II. A SURVEY OF THE INTERNATIONAL STANDARDS ON THE PROTECTION OF THE HUMAN RIGHTS OF DETAINEES

To ascertain and assess critically the relationship between detention provisions in the regional human rights conventions and international standards and guidelines on the protection of the fundamental rights of detainees, it is useful to consider those standards and guidelines that have succeeded in clarifying the most difficult issues that arise from a human rights approach to prison management.

A broad array of international standards on the protection of the fundamental rights of detainees have existed for the international community since the early 1950s.[23] The historical origins and main features of the standards that are, objectively speaking, the most useful for interpreting and applying the articles on detention in the ECHR and ACHR are briefly outlined below.

The first modern (non-legally binding) international standards for the protection of the rights of detainees were adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and were approved by the Economic and Social Council in its resolutions of 31 July 1957

22. *See* Thomas Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U. L. REV. 155 (1981).

23. *See, e.g.*, G.A. Res. 3452(XXX), ¶ 1, U.N. Doc. A/RES/30/3452, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 9, 1975); G.A. Res. 40/33, Annex, U.N. Doc. A/RES/40/33, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (Nov. 29, 1985); G.A. Res. 43/173, Annex, U.N. Doc. A/RES/43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Dec. 9, 1988); G.A. Res. 45/111, ¶¶ 1-11, U.N. Doc. A/RES/45/111, Basic Principles for the Treatment of Prisoners (Dec. 14, 1990).

and 13 May 1977.[24] The most noteworthy aspects of these standards—the SMR—are their expansion on and detailed elaboration of a wide range of fundamental rights, including certain social and economic rights, and their reference to human dignity as an interpretative tool for all of the provisions.[25] Clearly, the latter aspect was developed on the ground that detention conditions could easily debase or even annihilate human dignity.[26] Another aspect worthy of note is that the SMR also addressed and applied to juvenile detainees and prisoners.[27] This feature of the SMR is in common with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the so-called "Beijing Rules"), which boosts the application of several standards, values, and requirements set by the SMR, such as proportionality of the sanction, and the requirements for rehabilitation and resocialization inside prisons and similar institutions.[28] This feature is also in line with the Basic Principles for the Treatment of Prisoners, which was adopted in 1990 to facilitate the enforcement of the SMR values at a national level.[29]

The EPR were originally adopted in 1973 and were subsequently updated in 1987 and 2006.[30] The EPR were drafted to address the specific needs of detainees in Council of Europe Member States.[31] More precisely, the rules were formulated with the purpose of boosting the application of the globally acknowledged soft law

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24. Standard Minimum Rules for the Treatment of Prisoners, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex 1 (Aug. 30, 1955).

25. *See id.*, ¶¶ 22-6, 60, 77-8.

26. *See* Phillippa Kaufmann, *The price of dignity and liberty: legal aid for prisoners*, 5 EUR. HUM. RTS. L. REV., 482-493 (2013) (stressing that the status of persons deprived of their liberty makes prisoners more vulnerable and exposes to easy threats their dignity, since they are under the control of state's authority); Piet Hein van Kempen, *Positive obligations to ensure the human rights of prisoners*, INTERNATIONAL PENAL AND PENITENTIARY FOUNDATION WEBSITE, http://www.internationalpenalandpenitentiaryfoundation.org/Site/documents/Stavern/05_Stavern_Contribution%20Van%20Kempen.pdf (last visited July 18, 2015). For analysis of the IACtHR and the ECtHR's views, *see Juvenile Re-education Institute v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 153-155 (Sept. 2, 2004) (also known as Panchito Lopez v. Peru case); *Kudla v. Poland*, 2000-XI Eur. Ct. H. R. 197, ¶ 94 (2000); *Kalashnikov v. Russia*, 2002-VI Eur. Ct. H. R. 93, ¶ 95 (2002). The centrality of human dignity is also stressed in the U.N. Draft Charter on the Fundamental Rights of Prisoners, *see* G.A. Res. 45/111, *supra* note 23.

27. G.A. Res. 40/33, *supra* note 23. The SMR addresses and applies to juvenile detainees and prisoners too, in line with the express reference made by Rule 27 of the "Beijing Rules" and pursuant to the saving clause provided by Rule 9, which confirms the applicability of international standards concerning juvenile justice issues, in particular the SMR. *Id.*

28. *Id.*

29. G.A. Res. 45/111, *supra* note 23.

30. Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, 11 January 2006, Rec(2006)2, http://www.refworld.org/docid/43f3134810.html, http://www.coe.int/t/dghl/standardsetting/prisons/E%20commentary%20to%20the%20EPR.pdf (last visited Sept. 22, 2015).

31. *See* MURDOCH, *supra* note 21, at 15. (Council of Europe Publishing, 2006); DENIS ABELS, PRISONERS OF THE INTERNATIONAL COMMUNITY 49 (Springer, 2012).

rules on detention, in particular those of the SMR.[32] The EPR are mirrored, in the Inter-American system of human rights protection, by the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas.[33] The Inter-American Commission on Human Rights ("IACHR") adopted these Principles in 2008 with the aim being to set specific and more effective rules concerning detention conditions and issues related to torture and other inhuman or degrading treatment within the framework of the Organization of the American States ("OAS").[34] The EPR and the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas have many points in common. Firstly, they share the same goal: namely to increase the effectiveness of the protection of detainees in their contexts of application.[35] Secondly, they were both inspired by the SMR, which constitute their archetype.[36] The Kampala Declaration on Prison Conditions in Africa ("the Kampala Declaration")[37] serves the same purpose and restates that prisoners do not forfeit their rights.[38] This soft law instrument on prison management was adopted by a pan-African conference in 1996[39] and, similar to the EPR and the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, it is patterned on the SMR (albeit its statements are more concise). Both the United Nations General Assembly and the United Nations Economic and Social Council ("ECOSOC"), in Resolution 1997/36, recognized the Kampala Declaration's importance as a tool to enforce the most fundamental rights of detainees.[40]

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32. *Id.* at 34-7; from this standpoint, also the ECtHR's "regionalism" is relevant: *see* Lech Garlicki, *Conferencia introductoria: Universalism v. Regionalism?: the Role of the Supranational Judicial Dialog, in* EL DIALOGO ENTRE LOS SISTEMAS EUROPEO Y AMERICANO DE DERECHOS HUMANOS 27, 36 (Civitas, 2012).https://translate.google.com/translate?hl=en&sl=pl&u=http://bibliografia.icm.edu.pl/g2/english.pl%3Fmod%3Ds%26p%3D2%26a%3D1%26s%3D4577%26imie%3DLech%26nazwisko%3DGarlicki%26lim%3D25%26ord%3D1&prev=search.

33. *Principles and Best Practices*, *supra* note 10.

34. University of Bristol OPCAT Research Team, *The Inter-American Commission on Human Rights' Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and the Optional Protocol to the Convention Against Torture*, (last visited Sept. 22, 2015), http://www.bris.ac.uk/media-library/sites/law/migrated/documents/iacmhrprinciples.pdf.

35. *European Prison Rules*, *supra* note 9; *Principles and Best Practices*, *supra* note 10.

36. *Standard Minimum Rules*, *supra* note 8.

37. Afr. Union, Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1, *Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa*, (Oct. 23, 2009), http://www.refworld.org/docid/4af0623d2.html.

38. More precisely, the second Recommendation on Prison Conditions of the Kampala Declaration refers to prisoners' human rights. *See* Amanda Dissel, *Comments on the Kampala Declaration, in* PRISON CONDITIONS IN AFRICA 99-118 (1996), http://www.csvr.org.za/index.php/publications/1360-comments-on-the-kampala-declaration.html (last visited Sept. 22, 2015).

39. The 4th Pan African Conference was convened in Kampala, Uganda, from 23 to 27 September 1996 with delegates from forty-six African National Red Cross and Red Crescent Societies in attendance. ICRC Resource Centre, *Kampala Declaration*, INTERNATIONAL REVIEW OF THE RED CROSS 318 (1997), https://www.icrc.org/eng/resources/documents/misc/57jnpl.htm.

40. S.C. Res. 1997/36 at 2 (Jul. 21, 1997),

III. THE APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS TO THE INTERNATIONAL GUIDELINES AND PRINCIPLES ON THE PROTECTION OF THE FUNDAMENTAL RIGHTS OF DETAINEES

The violation of human rights in detention is a serious concern for all human rights supervisors. It is therefore not surprising that, similar to the ICCPR and ACHR, the ECHR also contains a key provision, Article 3, which grants protection to people under custody and detention, albeit indirectly.[41]

Article 3 ECHR forbids inhuman or degrading treatment.[42] It is a common understanding that this Article does not allow limitations or derogations under any conditions.[43] However, as Michael K. Addo and Nicholas Grief lucidly observed, Article 3 "does not expressly provide that its terms are absolute."[44] Moreover, settled case law of the ECtHR has established that Article 3 also "imposes [a *positive*] obligation on the State to protect the physical well-being of persons deprived of their liberty."[45] More specifically, in *Orchowski v. Poland*, the Strasbourg judges maintained that the state must ensure that the accommodations provided for detainees, especially sleeping accommodations, respect human dignity, privacy (to the extent possible), and meet the requirements of hygiene and health, with due regard being paid to climatic conditions, especially to cubic content of air, floor space, lighting, heating, and ventilation.[46]

Furthermore, and even more significantly, in the same line of cases, the ECtHR held that, pursuant to Article 3 of the ECHR:

> the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and

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http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm.

41. ECHR, *supra* note 15, at 6.

42. *Id.* at art. 3 (stating "No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

43. *See* Nigel S. Rodley, *The Prohibition of Torture: Absolute Means Absolute*, 34 DENV. J. INT'L. L. & POL'Y 145, 159 (2006); Gianluca Gentili, *European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-treatment is a Genuine Risk*, 8 . INT'L. J. CONST. L. 311, 314 (2010). The absolute nature of the prohibition foreseen by Art. 3 of the ECHR was stated in many ECtHR's decisions. *See, e.g.* Soering v. United Kingdom, 11 Eur. Ct. H. R. 439 (1989), ¶ 88; Selmouni v. France, 1999-V Eur. Ct. H. R. 149, ¶ 95; Saadi v. Italy, 2008-II Eur. Ct. H. R. 145, ¶¶ 120, 127.

44. *See* Michael K. Addo, Nicholas Grief, *Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?*, 9 EUR. J. INT'L L. 510 (1998).

45. Mouisel v. France, 2002-IX Eur. Ct. H. R. 191, ¶ 40; *see also* Kudla v. Poland, 2000-XI Eur. Ct. H. R. 197, ¶ 94; Musial v. Poland, Appl. (No. 28300/06) Eur. Ct. H. R. ¶ 86 (2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90783 (last visited Sept. 22, 2015); Gulay Cetin v. Turkey, App. no. 44084/10 (Eur. Ct. H. R., Mar. 5, 2013) ¶ 84, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116946 (last visited Sept. 22, 2015) (providing a peculiar reference to physical integrity and third parties' attitudes–in particular medical negligence).

46. Orchowski v. Poland, Appl. no. 17885/04 (Eur. Ct. H. R., Oct. 22, 2009), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-95314 (last visited Sept. 22, 2015), ¶¶ 119-122.

> method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. . .[47]

A similar approach is found in the ECtHR's decision in the *Mouisel* case.[48] In this case the Court of Strasbourg considered that

> [a]lthough Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[49]

This approach was strengthened three years later in the *McGlinchey and Others v. the United Kingdom* case, where the ECtHR held that the United Kingdom was responsible under Article 3 of the ECHR for the unlawful conduct of its prison authorities who had failed to comply with their obligation to provide the victim, a woman with a long history of heroin addiction, with the requisite medical care.[50] More recently, in the case of *Salakhov and Islyamova v. Ukraine*, the ECtHR clarified that: "[i]n order to establish whether an applicant received the requisite medical assistance while in detention, it is crucial to determine whether the State authorities provided him with the minimum scope of medical supervision for the timely diagnosis and treatment of his illness."[51] In the same line of cases, the ECtHR stated in the *Slawomir Musial* case that Article 3 of the ECHR cannot be interpreted as imposing on states a duty to release prisoners if detention conditions do not suit their health needs appropriately or to place them in civil facilities, regardless of the fact that the disease affecting them is hard to treat.[52]

Article 3 of the ECHR was drafted primarily during the early 1950s.[53] Having the longest case law concerning detentions and prisons, Article 3 has significantly influenced the content of detention provisions in other more recent international human rights conventions, such as Article 5 of the ACHR.[54] Curiously enough, Article 3 of the ECHR does not contain a fully operative rule that gives effect to or properly describes the conditions the ECHR's contracting

47. Kudla, *supra* note 45, ¶ 94; Kalashnikov, *supra* note 26, ¶ 95.

48. Mouisel, *supra* note 45.

49. *Id.* ¶ 40.

50. McGlinchey v. United Kingdom, 2003-V Eur. Ct. H. R. 183, ¶ 67.

51. Salakhov v. Ukraine, Appl. no. 28005/08 ¶ 127 (Eur. Ct. H. R., Mar. 14, 2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117134 (last visited Sept. 22, 2015).

52. Musial, *supra* note 45.

53. *See* Thomas Buergenthal, *Centennial Essay: The Evolving International Human Rights System*, 100 Am. J. Int'l. L. 783, 787, 792 (2006); Tania Groppi, Anna Maria Lecis Cocco-Ortu, *Le citazioni reciproche tra la Corte europea e la Corte interamericana dei diritti dell'uomo: dall'influenza al dialogo?*, 19 FEDERALISMI.IT 1, 8 (2013), http://www.academia.edu/4603003/ (last visited Sept. 22, 2015).

54. *See* Tania Groppi, Anna Maria Lecis Cocco-Ortu, *supra* note 41, at 7; Buergenthal, *supra* note 22. OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW 29 ff. (Cambridge, 2nd ed. 2014).
https://books.google.com/books/about/International_Human_Rights_Law.html?id=Uv8OBAAAQBAJ.

states must comply with.[55] On the contrary, its wording gives rise to several uncertainties on the meaning and operational character of numerous expressions used therein. Clearly this also has consequences on the application of Article 3 in the prison field. For instance, there are uncertainties in relation to the expressions "torture," "degrading treatment," and "inhuman treatment," as has been repeatedly pointed out by various commentators.[56] Further uncertainties concern the question of whether "[i]ll-treatment must attain a minimum level of severity in order to trigger the provision's application."[57] Moreover, uncertainty is inherent in the distinction between the three types of infringement recognized in Article 3.

As Article 3 of the ECHR is so ambiguous in these and several other respects, the ECtHR would benefit from referring to the above-mentioned and far more detailed international standards as the major (or even crucial) tools for its interpretation. This is in addition to the understanding and application of this Article provided by the case law of the Strasbourg Court.[58] A landmark example of this case law is the ruling in the *Güveç* case, where the ECtHR found for the first time that the imprisonment of a minor in an adult prison amounted to degrading and inhuman treatment.[59] Nevertheless, as the above-named international instruments of soft law on detention contain various elucidations on issues, such as the meaning of the term "treatment," the basic criteria for interpreting the content of the right of those deprived of liberty to decent and humane treatment, the threshold of severity indispensable to meet the definition of torture, and the forms of ill-treatment which can be considered inhuman treatment, can provide valuable guidance to the Strasbourg Court for the application of Article 3 of the ECHR. Moreover, such guidelines, standards, and general principles may also help the Court to assess the proportionality of a punitive measure imposed upon a prisoner. Furthermore, guidelines, standards, and general principles can help the Strasbourg Court to establish the procedural guarantees afforded to prisoners. Additional useful guidance, *mutatis mutandis*, can be found in the annual reports of the Working Group on Arbitrary Detention established by Resolution 1991/42 of the former Commission on Human Rights and in the reports of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[60]

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55. ECHR, *supra* note 15.

56. *See, e.g.*, Pietro Pustorino, *'Articolo 3', in* Commentario Breve alla Convenzione Europea per la Salvaguardia dei Diritti dell'Uomo e della Libertà fondamentali 63 (Sergio Bartole, Pasquale De Sena, Vladimiro Zagrebelsky eds., CEDAM 2012).

57. Addo, *supra* note 44, at 511.

58. *See* Pustorino, *supra* note 56, at 63; Addo, *supra* note 44, at 510.

59. Güveç v. Turkey, 2009-I Eur. Ct. H. R. 17, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22G%C3%BCve%C3%A7%20v.%20Turkey%22], %22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22: [%22001-90700%22]}.

60. *See, e.g.*, Human Rights Council, *Report of the Working Group on Arbitrary Detention: A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court*, 27th Sess., June 30, 2014, U.N. Doc. A/HRC/27/47, http://www.refworld.org/docid/53ff197d4.html; Human Rights Council , *Report of the Working Group*

The next question is therefore whether the ECtHR in its case-law under Article 3 has already referred to the European Prison Rules, the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, the United Nations' Draft Charter on the Fundamental Rights of Prisoners, or other international standards and guidelines on the treatment of detainees as interpretative aids to this provision. In other words, in light of these rules and instruments, the question is now whether the ECtHR has ever scrutinized measures taken by the state parties to the Convention in the field of prison management. To answer this question it is necessary to investigate the most significant judicial decisions by the ECtHR on prisoner rights.

In the case of *G. v. France,*[61] which concerned the continued detention over a four-year period of the applicant who suffered from a chronic schizophrenic-type psychiatric disorder, the ECtHR confirmed the determination by the European Commission of Human Rights ("ECommHR") that Article 3 of the ECHR must be interpreted in the light of "its natural and customary" meaning. With the only exception of a brief reference to the Council of Europe's Recommendation Rec(2006)2, the Court however did not refer to sources of law outside the ECHR framework, namely the European Prison Rules or SMR, to support its decision.[62] The ECtHR's contention was that this was unnecessary since ". . .treating the applicant—in prison and in a psychiatric institution—and detaining him in prison had clearly impeded the stabilisation of his condition, demonstrating that he was unfit to be detained from the standpoint of Article 3."[63] A similar pattern emerges from the *Slawomir Musial* case, where the ECtHR referred to the EPR but only for the purpose of stressing its existence.[64] This is why the reference to the "the most important regional guidelines on detention," as the EPR were called in the judgment, did not help the ECtHR in identifying the content and scope of the protection granted to detainees under Article 3 of the ECHR.[65] Furthermore, and more recently, in the *Velyo Velev* case,[66] the Court relied neither on the EPR nor on the SMR when it illustrated its understanding of the detainees' right to education under Article 2 of Protocol No. 1 of the ECHR.[67] This is clear from the judgment,

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on Arbitrary Detention, 27th Sess., June 30, 2014, U.N. Doc. A/HRC/27/48, http://www.refworld.org/docid/53eb29a04.html; *see also* Juan Ernesto Mendez, (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment*, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015), http://www.refworld.org/docid/550824454.html.

61. G. v. France, 2012-II Eur. Ct. H. R., http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22G.%20v.%20France%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57968%22]}.

62. *Id.* at 15.

63. *Id.*

64. Musial, *supra* note 45.

65. *Id.* at 96.

66. Velev v. Bulgaria, 2014-V, Eur. Ct. H. R., http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22VELYO%20VELEV%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-144131%22]}.

67. *See* Protocol to the European Convention for the Protection of Human Rights and

although the ECtHR formally acknowledged the existence of both the EPR and Recommendation of the Committee of Ministers No. R. (89) 12 on education in prison.[68]

Nevertheless, in the *Guvec v. Turkey* case the Court felt it necessary to mention the EPR and the United Nations Convention on the Rights of the Child ("CRC") as support for affirming the states' duty to separate children from adult prisoners.[69] In particular, the Court held that different standards on detention on the basis of the age are justified in the context of Article 3 of the ECHR.[70] It also maintained that

> . . .although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[71]

Moreover, the idea that the above-mentioned international standards on detention are not indispensable tools for interpretation of Article 3 can be derived, implicitly, from the case of *Mathew v. the Netherlands*, where the ECtHR states that the principles applicable to the treatment of detainees are those developed in its own case law on Article 3 of the ECHR.[72] A similar line of reasoning is found in the *Slawomir Musial v. Poland* case, which concerned the transfer of the applicant, who had suffered from epilepsy since early childhood and had also been diagnosed with schizophrenia and other serious mental disorders, to a specialized institution.[73] Confirming its interpretative approach in the *Mathew* case, the ECtHR held that to determine whether the inadequate medical care and inappropriate conditions in which the applicant was held during his detention should be qualified as degrading and inhuman, each contracting state must consider the general principles on prison management developed by the Strasbourg Court.[74] In particular, each contracting state must look at the manner and method used for execution of the measure as well as the duration of the treatment; its physical and mental effects; and in some circumstances, the age, sex, and state of

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Fundamental Freedoms, art. 2, Mar. 20, 1952, C.E.T.S. No. 009, http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm.

68. Velev, supra note 66, ¶¶ 21-4.

69. Güveç, *supra* note 59, ¶¶ 58, 83.

70. *Id.* ¶¶ 88, 91.

71. *Id.* ¶ 96; *see also* Ilaşcu v. Moldova, 2004-VII Eur. Ct. H. R. 100, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Ila%C5%9Fcu%20and%20Others%20v.%20Moldova%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61886%22]}; on the subject, *see* Clara Burbano Herrera, *How does the European system of human rights protect detainees in bad health?*, 6 INTER-AM. & EUR. HUM. RTS. J. 157-172 (2013).

72. Mathew v. Netherlands, 2005-IX Eur. Ct. H.R. 34, (ECtHR expressly recalled principles developed in its case-law).

73. *See* Musial, *supra* note 45, ¶ 97.

74. *Id.* ¶¶ 85, 88.

health of the detainee.[75] Moreover, and more recently, a similar approach was also endorsed in the *Torreggiani* line of cases,[76] where the ECtHR referred to the standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT")[77] as relevant criteria for assessment of the contracting states' responsibility under Article 3 of the ECHR and as yardsticks in the allocation of the burden of proof.[78]

Why are the international standards on detention not routinely used as tools for interpreting the most relevant ECHR Articles for the protection of detainees? In other words, why are these standards not routinely incorporated in the ECtHR's legal reasoning? This paper takes the view that these reasons are unclear and difficult to identify. Especially, if one considers that, at least since the 1990s, the ECtHR has acknowledged that public international law rules can be used as supportive evidence in order to extend the applicability of the ECHR's provisions.[79] Furthermore, the doctrine of margin of appreciation,[80] which is the main reason for the quasi-systematic rejection of the international standards on the protection of fundamental rights in states of emergency as tools for interpreting Article 15 of the ECHR,[81] has never been invoked in respect of Article 3, which is the key provision in relation to prison management and the treatment of detainees.[82] Moreover, international soft law instruments, such as the SMR and

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75. *Mathew*, *supra* note 72, ¶ 175.

76. Torreggiani v. Italy, App. Nos. 43517/09, 35315/10, 37818/10, 46882/09, 55400/09, 57875/09, 61535/09 Eur. Ct. H. R., 25 (2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115860.; for a commentary, *see* Gabriele Della Morte, *La situazione carceraria italiana viola strutturalmente gli standard sui diritti umani (a margine della sentenza Torreggiani c. Italia)*, 7 (1) DIR. UM. DIR. INT. 147-158 (2013).

77. Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The CPT Standards,* CPT/Inf/E (2002) 1-Rev 2010, http://www.refworld.org/docid/4d7882092.html (last visited May 9, 2015).

78. For some interesting considerations on the ECtHR's jurisprudence on detention after the *Torreggiani* case, *see* Francesca Cancellaro, *Da Roma a Bruxelles: la Corte EDU applica i principi della sentenza Torreggiani anche alle condizioni di detenzione in Belgio*, DIRITTO PENALE CONTEMPORANEO (Dec. 9, 2014), http://www.penalecontemporaneo.it/tipologia/0-/-/-/3523-da_roma_a_bruxelles__la_corte_edu_applica_i_principi_della_sentenza_torreggiani_anche_alle_condizioni_di_detenzione_in_belgio/ (last visited May 9, 2015).

79. *See* Gustafsson v. Sweden, 1996-II Eur. Ct. H. R. 2, http://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Gustafsson%20v.%20Sweden%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58213%22]}.

80. *See* Joseph Jean-Louis Correa, *Le voile islamique devant la Cour européenne des droits de l'Homme : entre marge nationale d'appréciation et nécessité d'un droit commun des droits fondamentaux : les cas de la France et de la Suisse*, 14 AFR. J. INT'L & COMP. L. 234, 237 (2006); Françoise Tulken, *L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme, Paravent juridique superflu ou mécanisme indispensable par nature?*, 1 REV. SC. CRIM. 3,14 (2006).

81. *See* Francesco Seatzu, *The Experiences of the European and Inter-American Courts of Human Rights with the International Standards on the Protection of Fundamental Rights in Times of Emergency, in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 573-585 (Nerina Boschiero, Tullio Scovazzi, Cesare Pitea and Chiara Ragni eds., T.M.C. Asser, 2013).

82. Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European*

EPR, can indeed help both supranational and national courts to ensure the respect of human rights and fundamental freedoms for prisoners.[83] Last, an increasing number of ECtHR's rulings attach importance to the EPR and other recommendations of the Council of Europe's Committee of Ministers dealing with specific aspects of penitentiary policy, despite their non-binding character.[84] One example of this approach is the *Güveç* case, where the Strasbourg Court referred to international binding and non-binding instruments relevant to the field of prison management and used them in its legal reasoning.[85] Likewise, in the *Al Nashiri* case the ECtHR found that Poland failed to comply with its international duties by allowing the torture, secret detention, and extraordinary rendition of a Saudi Arabian national and a stateless Palestinian, both allegedly guilty of terrorist acts.[86] Finally, the ECtHR's position is strikingly different from the IACtHR's case law on detention and fundamental prisoner rights. This said, it might nevertheless be useful to briefly speculate on some possible explanations for the ECtHR's conduct.

A first possible explanation for the non-generalized use of the above-mentioned soft law standards in the ECtHR's case law on prison management and detainee rights is that these standards were drafted to facilitate the application of detention provisions in other international human rights instruments such as the ICCPR and the CAT.[87] Another possible explanation is the difficulty of selecting, from among the various international standards currently existing on the treatment of detainees, those most appropriate for the interpretation of the relevant ECHR Articles for the protection of this category of vulnerable individuals. Mainly, this is because of the diversity of the content of the existing soft law instruments on detention. Finally, the non-generalized use of the standards by the Strasbourg Judges might be influenced, albeit indirectly, by the fact that the ECtHR has traditionally resisted extending its constructive interpretation method to the use of non-legally binding international instruments, and often avoids incorporating them into its purposive interpretation technique.[88]

Convention of Human Rights, 17 HUM. RTS. FILES 1, 7-13 (Jul. 2000), http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-17%282000%29.pdf.

83. *See* G. v. France, *supra* note 61; Musial, *supra* note 45; Neptune v. Haiti, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 180, ¶ 131 (May 6, 2008); Loor v. Panama, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 218, ¶ 215 (Nov. 23, 2010); Vera v. Ecuador, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 226, ¶ 50 (May 19, 2011).

84. *See* Council of Europe Committee of Ministers, *Recommendation Rec(2006) 2 on the European Prison Rules* (2006), http://www.refworld.org/docid/43f3134810.html.

85. Güveç, *supra* note 59, ¶¶ 58-9, 60-4, 83.

86. Nashiri v. Poland, App. No. 28761/11 Eur. Ct. H. R. (2014), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044.

87. U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1465 U.N.T.S. 85 (entered into force Jun. 26, 1987); *see also* International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966).

88. *See e.g.*, Isayeva v. Russia, App. No. 57950/00, Eur. Ct. H. R.(2005), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68381; *see also* Cesare Pitea, *Interpretation and Application of the European Convention on Human Rights in the Broader Context of International*

However, these reasons do not justify the non-use of these and other correspondent non-binding instruments to assist interpretation of Article 3 of the ECHR and of the other ECHR provisions relevant to the treatment of detainees. On the contrary, the strong analogies between Article 3 of the ECHR and Article 5 of the ACHR,[89] and above all the need for a "jurisprudence constante" on prisoners' rights and prison management, show that such instruments may indeed be regularly used as tools for the interpretation, at least of Article 3 of the ECHR. In other words, the EPR and SMR are very helpful in clarifying the meaning and operational character of detention provisions in human rights treaties. Therefore, the ECtHR's approach to Article 3, as well as with Articles 2, 6, and 8 of the ECHR and to Article 2 of Protocol No. 1 to the ECHR, when they are applied to prisoners' cases should be based on a systematic use of the non-binding international standards on prison management. For example, the EPR, the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas, the SMR, and the United Nations Working Group on Arbitrary Detention's Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Court ("Basic Principles and Guidelines") may be useful to this end.[90] Furthermore, by complying with such rules—notably with the EPR and SMR, which aim to lay down universal standards having binding force outside any treaty process and hence applicable irrespective of their specific acceptance by states, and available to any fundamental rights supervisory mechanism[91]—the ECtHR may clarify the meaning and operational character of various expressions used in Article 3 of the ECHR.

To summarize, perusal of the ECtHR' s case law on prisoner rights reveals that the negative approach of the ECtHR towards the standards and principles has significant consequences, whose impact has not been yet universally recognised.[92] A notable, though implicit, recognition has been made by Clare Ovey, who rightly observed that the main focus of the case law of the ECtHR on prisoners has been:

Law: Myth or Reality?, in HUMAN RIGHTS AND CIVIL LIBERTIES IN THE 21ST CENTURY 1-14 (Yves Haeck, Eva Brems eds., Springer, 2014); Jean-François Flauss and Gérard Cohen-Jonathan, *Cour européenne des droits de l'Homme et droit international general*, 51 A.F.D.I. 675–677 (2005).

89. ECHR, *supra* note 15, at art. 3; ACHR, *supra* note 16, at art. 5.

90. European Prison Rules, *supra* note 30; *Principles and Best Practices*, *supra* note 33; *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 24; Human Rights Council Res. 20/16, *Arbitrary Detention*, U.N. GAOR, 20th Sess., A/HRC/RES/20/16 (July 17, 2012), http://www.ohchr.org/EN/Issues/Detention/Pages/DraftBasicPrinciples.aspx%20.

91. PENAL REFORM INTERNATIONAL, *A Compendium of Comparative Prison Legislation* 6 (2008), http://www.penalreform.org/wp-content/uploads/2013/06/man-2008-compendium-prison-legislation-en.pdf (last visited Sept. 19, 2015).

92. This point emerges *a contrario* from some recent works on the ECtHR's jurisprudence on detainees' rights. *See e.g.*, Daniela Ranalli, *Nuovi interventi della Corte europea dei diritti dell'uomo in tema di trattamento carcerario* 2 RASS. PEN. CRIM. (2013) 157-172; Fabiana Fucci, *La tutela del diritto alla corrispondenza dei detenuti nella giurisprudenza della Corte europea dei diritti dell'uomo*, 16 1 DIRITTI DELL'UOMO, CRONACHE E BATTAGLIE (2005) 37-44; Andreana Esposito, *Condizioni della detenzione e trattamento dei detenuti: la cultura della detenzione*, 1-2 DOCUMENTI GIUSTIZIA: L'ITALIA E LA CONVENZIONE EUROPEA DEI DIRITTI DELL'UOMO (2000) 99-116.

"to ensure that prisoners are not placed in health-threateningly bad conditions, enjoy access to medical care and are protected from other forms of serious ill-treatment," which is the same focus as the EPR and SMR.[93] This position has also been indirectly endorsed by Professor Laurence Burgorgue-Larsen, who recalls the main solution of the Strasbourg Judges to guarantee protection of detainees under Article 3 of the ECHR, namely the 'creation' of an Article 3a.[94]

IV. THE APPROACH OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS TO THE INTERNATIONAL GUIDELINES AND PRINCIPLES ON THE PROTECTION OF DETAINEES' FUNDAMENTAL RIGHTS

The ACHR expressly indicates that there may be situations in which the deprivation of liberty may be justified. Deprivation of liberty issues are addressed in Article 5 of the ACHR.[95] Article 5 provides that:

> 1. Every person has the right to have his physical, mental, and moral integrity respected.
>
> 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
>
> 3. Punishment shall not be extended to any person other than the criminal.
>
> 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
>
> 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
>
> 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.[96]

Article 5 is of paramount importance for the system of protection of human rights under the ACHR's aim to establish precise restrictions on the states' actions and allow the international community to identify violations of the right to humane

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93. *See* Clare Ovey, *Ensuring respect of the rights of prisoners under the European Convention on Human Rights as part of their reintegration process*, REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS (last visited May 10, 2015), http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/Conference_19_files/COURT-%20Clare%20Ovey%20Helsinki.pdf.

94. *See* Laurence Burgorgue-Larsen, *Les équivalents de l'article 3 de la Convention européenne dans le système interaméricain des droits de l'homme, in* LA PORTÉE DE L'ARTICLE 3 DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME 23-46 (Catherine Amélie Chassin ed., Bruylant, 2006).

95. ACHR *supra* note 16, at art. 5.

96. *Id.*

treatment.[97] Article 5's terms regulate the measures used in the Inter-American States in some of the most critical human rights situations—the imprisonment and punishment of people, including minors.[98]

The Inter-American States Parties must ensure that their rules on detention and punishment are fully in line with all the requirements of the ACHR.[99] While not questioning the right of Inter-American States Parties to restrict and limit the personal liberty of individuals for the legitimate purposes of punishment or investigation, the IACtHR always requires them to withdraw the restrictions on personal liberty as soon as possible.[100] In other words, when restricting or limiting the right to personal liberty under Article 5 of the ACHR, the ultimate aim of a Inter-American State shall be to return to normality as soon as possible. In both theory and practice, the detention of individuals is by definition a temporary measure. Indeed, the temporary nature of detention and of restriction on personal liberty constitutes an essential safeguard for any individual, including and especially accused persons.

As noted, the ACHR had to acknowledge that the limitations and restrictions on personal liberty may be necessary in exceptional circumstances.[101] Instead of approaching the matter exclusively from a prohibition perspective, as the ECHR does, the ACHR wisely sets out the formal requirements and prerequisites under which such limitations and restrictions of personal liberty are allowed.[102] In addition, Article 5 of the ACHR also establishes the aim, degree, and scope of punishment.[103] Professor Laurence Burgorgue-Larsen observes that this feature distinguishes Article 5 of the ACHR from corresponding provisions in other human rights conventions such as the ECHR.[104] While both conventions aim to establish many of the same guarantees, and both forbid degrading treatment within the framework of the ban on torture, the array of content-related elements is more comprehensive in the ACHR than in the ECHR. However, like the ECHR, the

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97. WILLIAM SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 40-1 (Ne. Univ. Press) (1996).

98. ACHR, *supra* note 16, at art.5 ¶¶ 3-6 (focusing on the rehabilitative aim–reform and social readaptation of the prisoners–of the deprivation of liberty).

99. *Id.* at art. 1(1). Under Article 1, titled "Obligation to Respect Rights," provides that:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Id. See also Portugal v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 186, ¶¶ 179, 203 (Aug. 12, 2008).

100. *See, e.g.*, Álvarez v. Ecuador, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 170, ¶ 53 (Nov. 21, 2007); Argüelles v. Argentina, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 288, ¶ 120 (Nov. 20, 2014).

101. Argüelles, *supra* note 100, ¶ 128.

102. ACHR, *supra* note 16, at art. 5 ¶ 6, art. 7 ¶¶ 2-3.

103. ACHR, *supra* note 16, at art. 5.

104. *See* Burgorgue-Larsen, *supra* note 94, at 23.

ACHR fails to provide expressly that the prohibition from torture and degrading treatments admits no exception under any circumstances.[105]

Comparison with the ECtHR shows that for the purpose of interpreting Article 5 of the ACHR, the IACtHR has occasionally referred to international instruments of soft law on the detention and treatment of detainees, such as the SMR and the Body of Principles for the Protection of All Persons under Any Form of Detention or Prison ("the Body of Principles").[106] This approach was justified by the IACtHR on the premise that these international non-binding tools can help to ascertain the precise content and scope of the Inter-American States' obligations regarding the protection of detainees.[107] In this respect, it is worth recalling the *Ver Vera* ruling, where the Inter-American Court referred to Principle 24 of the Body of Principles to identify a breach of Article 5 of the ACHR.[108] Further confirmation of the Court's recourse to different external sources to interpret the rights enshrined in the ACHR is found in the landmark case *Panchito Lopez* concerning Paraguay where the IACtHR developed tailored protection of juvenile prisoners' right to education by combining Articles 4 and 5 of the ACHR with Article 13 of the Protocol of San Salvador and the CRC.[109] Again, a similar line of reasoning is found in the case of *Maritza Urrutia v. Guatemala,*[110] where the IACtHR used the relevant practice of the courts of other Inter-American States and of other human-rights monitoring bodies to conclude that:

> An international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, has been developed and, with regard to the latter, it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered "psychological torture."[111]

In the leading case of *Bayarri v. Argentina*, to show that the duty of judicial authorities to guarantee the rights of the person detained entails the obligation to obtain and ensure the authenticity of any evidence that can demonstrate acts of torture, the IACtHR referred to sources of law outside the Inter-American system, namely the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Manual or Istanbul Protocol").[112] Moreover, in the case of *Valle Jaramillo and others v.*

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105. *See* ACHR, *supra* note 16.

106. Neptune, *supra* note 83, ¶ 131; Loor, *supra* note 83, ¶ 215; Vera, *supra* note 83, ¶ 50; Fleury v. Haití. Merits, Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 236, ¶ 85 (Nov. 23, 2011).

107. De la Cruz-Flores v. Perú. Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 115, ¶ 132 (Nov. 18, 2004); Vera, *supra* note 83, ¶ 69.

108. Vera, *supra* note 83, ¶ 69.

109. Juvenile Re-education Institute, *supra* note 26.

110. Urrutia v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 103 (Nov. 27, 2003).

111. *Id.* ¶ 92.

112. Bayarri v. Argentina, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 187, ¶ 92 (Oct. 30, 2008).

Colombia, the IACtHR also referred to external sources of law to hold the existence of a duty under Article 5 of the ACHR to take all reasonable measures necessary to guarantee the right to personal liberty and personal integrity of the human rights defenders who denounce human rights breaches and who are in a situation of special vulnerability.[113] Furthermore, in *Yvon Neptune v. Haiti,* the Inter-American Court held that, "detention in conditions of overcrowding, with lack of ventilation and natural light, without a bed to rest on or adequate conditions of hygiene, in isolation or with undue restrictions to the visiting regime, constitutes a violation of personal integrity" by referring, *inter alia,* to the Standard Minimum Rules for the Treatment of Prisoners.[114]

Nevertheless, an even cursory review of the case law of the IACtHR on Article 5 shows there are some exceptions to this approach. For instance, one exception to the use of sources of law outside the Inter-American system for supporting a purposive interpretation of Article 5 of the ACHR is found in the leading case of *Heliodoro Portugal v. Panama* relating to the forced disappearance of Heliodoro Portugal, a "well-known member of the Panamanian Communist Party," from Panama City in 1970.[115] Nearly thirty years after his forced disappearance from Panama, the Panamanian Attorney General's Office discovered human remains in a barracks in Tocumen, which, after undergoing DNA testing, were identified as being those of the victim.[116] For this reason, the IACtHR rightly alleged violation of Article 5(2) of the ACHR relating to personal integrity and human dignity.[117] More precisely and significantly, it held that the violation of certain rights of the primary victim, in cases of enforced disappearances, killings, or extra-judicial killings, for instance, might also lead to a breach of the right to integrity of 'secondary victims' (friends or relatives).[118] The United Nations General Assembly adopted a consensus resolution on principles to protect all persons from enforced disappearance, the Declaration on the Protection of All Persons from Enforced Disappearance,[119] and extensive studies on this topic have been conducted by the International Committee of the Red Cross ("ICRC")[120] and Amnesty International;[121] notwithstanding that, the IACtHR did not refer to

113. Jaramillo v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 192, ¶ 89 (Nov. 27, 2008).

114. Neptune, *supra* note 83, ¶ 131.

115. *See* Portugal, *supra* note 99.

116. Portugal, *supra* note 99, ¶ 2.

117. *Id.* ¶¶ 3, 162-63, 174, 181.

118. *Id.* ¶ 175; *see also* Jaramillo, *supra* note 113, ¶ 119.

119. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res 47/133 U.N. GAOR, 47th Sess., 92nd Plen Mtg, U.N. Doc A/RES/47/133 (Dec. 18, 1992).

120. Statement by the International Committee of the Red Cross to the United Nations Human Rights Council concerning the draft, International Convention for the Protection of all Persons from Enforced Disappearances (Jun. 27, 2006), https://www.icrc.org/eng/resources/documents/statement/human-rights-council-statement-270606.htm (last accessed May 6, 2015).

121. Amnesty Int'l, *Disappearances: A Workbook* (1981).

these documents as aids to the interpretation of Article 5.[122] As a consequence, the IACtHR failed to avoid the "pitfalls of regulating the legal status of disappeared persons through a declaration of death," as remarked by Gabriella Citrioni.[123] Another exception is found in the case of *Cantoral Huamaní and García Santa Cruz v. Peru,* which concerned the alleged kidnapping, torture, and extrajudicial execution of Saúl Isaac Cantoral-Huamaní and Consuelo Trinidad García-Santa Cruz on February 13, 1989 in Lima, and the complete impunity of the perpetrators of these facts.[124] In this case the IACtHR found that the right to mental and moral integrity of the victims' next of kin had been infringed as a result of the particular circumstances of the violations perpetrated against their loved ones, again without referring to external sources of law—the SMR, EPR or the ECHR—to support its interpretation, but referring solely to its previous decisions on the subject.[125]

V. CONCLUSION

Will there ever be a change in the ECtHR's approach inspired by IACtHR case law?

The answer should be yes, at least *prima facie.* Indeed, this change is reasonably expected if one takes into account the strong similarities between Article 3 of the ECHR and Article 5 of the ACHR in general and, in particular, the substantial coincidence of their aims and regulatory principles. A further indication of this change is the increasing number of references to the IACHR in the ECtHR's case law.[126] However, there are equally strong arguments supporting the opposite conclusion. Most of these arguments have already been discussed above, but this paper will now consider them here according to their practical significance.

The first argument is that unlike Article 3 of the ECHR, Article 5 of the ACHR addresses the protection of the right to personal, mental, and moral integrity, not just from a prohibition perspective.[127] Clearly, the different approach of Article 5 may also lead to different results as to the requirements and prerequisites justifying limitations and restrictions of personal liberty.

The second argument is that Article 5 of the ACHR has two significant features that distinguish it from Article 3 of the ECHR. Although both Articles

122. *See* Portugal, *supra* note 99.

123. *See* Gabriella Citroni, *The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death*, 12 J. INT'L CRIM. JUST. 787-803 (2014); *see* also Juan E. Mendez & José Miguel Vivanco, *Disappearances and the Inter-American Court: Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 507 (1990).

124. Cantoral-Huamaní v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 167 (July 10, 2007).

125. *Id.* ¶¶ 11-121.

126. Eur. Ct. H.R., *References to the Inter-American Court of Human Rights in the case-law of the European Court of Human Rights*, Research Report, http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf (last accessed May 9, 2015).

127. *See* ACHR, *supra* note 16, at art. 5 ¶ 1.

forbid torture and cruel, inhuman, or degrading punishment or treatment under any circumstances,[128] only Article 5 of the ACHR deals with the legitimate degree of punishment allowed for violations of the right to personal liberty.[129] In addition, only Article 5 of the ACHR provides that: "[m]inors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible."[130]

The third argument is that the ECtHR has all too frequently refused to extend its constructive-interpretative approach to the use of international non-binding rules on detention and prison management, and expressly failed to integrate these non-binding instruments into its tools of purposive interpretation.[131]

The fourth argument is that the IACtHR's case law on detainees' rights and prison management also includes certain rulings, such as in the ground-breaking cases *Heliodoro Portugal v. Panama* and *Huamaní and García Santa Cruz* which significantly omit to refer to non-binding 'soft law' instruments concerning the protection of the fundamental rights of detainees as tools for interpreting Article 5 of the ACHR.[132]

The fifth argument is that the IACtHR's case law on detainees' rights has grown and developed in a socio-economic environment characterized by strong peculiarities, namely the high level of inmate violence inside Latin American prisons.[133]

The sixth and final argument is that the ECtHR, unlike the IACtHR, has never demanded improvements in general prison conditions.[134]

For all of these reasons this paper does not expect the ECtHR to align itself with the IACtHR's case law on detainee rights. In other words, it seems unlikely that in the near future the ECtHR will assume a more positive attitude with respect to the role of international soft law rules on detention—such as the EPR, the SMR, or the Principles and Best Practices on the Protection of Persons Deprived of their Liberty in the Americas—as possible guides to the interpretation of Article 3 of the ECHR.

128. ACHR, *supra* note 16, ¶ 2; *see also* ECHR, *supra* note 15, at art. 3.

129. *See e.g.*, ACHR, *supra* note 16, at art. 5 ¶ 4.

130. ACHR, *supra* note 16, ¶ 5.

131. *See* ACHR, *supra* note 16, ¶ 3.

132. Portugal, *supra* note 99; Cantoral-Huamaní, *supra* note 124.

133. CECILIE DINESEN ET AL., VIOLENCE AND SOCIAL CAPITAL IN POST-CONFLICT GUATEMALA, 34 REV. PANAM. SALUD PUBLICA 162 (2013), http://www.scielosp.org/scielo.php?script=sci_arttext&pid=S1020-49892013000900003.

134. For a fuller discussion of this issue, *see* Herrera, *supra* note 71, at 165.