

CONCEPT NOTE

PARALLEL EVENT ON HUMAN DIGNITY DURING DETENTION Human Rights Council, 21st Regular Session, 10 – 28 September 2012

Event and sponsors

Title

- High level discussion on ensuring human dignity during detention

Format

- Short (10 minute) interventions by panellists will be followed by an open interaction with the audience

Sponsors

- Geneva Academy of International Humanitarian Law and Human Rights
- International Commission of Jurists

Date and venue

Date

- Tuesday 25 September 2012
- 14h – 16h

Venue

- *Palais des Nations*, Room XXI

Focus and panellists

Objectives / issues for discussion

- To provide delegations and civil society with a forum to explore options to ensure the human dignity of persons in detention
- To generate vigorous discussion about the need and options for an international instrument clarifying/enhancing the human rights legal framework applicable to persons in detention

Chair/moderator

- Hina Jilani, Member of the Panel on Human Dignity, Advocate of the Supreme Court of Pakistan

Speakers

1. Professor Manfred Nowak, Member of the Panel on Human Dignity, former UN Special Rapporteur on torture, and former member of the Working Group on Enforced Disappearances
 - *Speaking on experiences as a Special Procedure mandate-holder and the need to take action on ensuring human dignity in detention, including through the possibility of an international legal instrument*
2. Judge Theodor Meron, Member of the Panel on Human Dignity, Judge on the Appeals Chambers of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia (ICTY), former President of the ICTY, and Honorary President of the American Society of International Law
 - *Speaking on administrative versus criminal detention and the distinct human dignity challenges under each framework*

3. Professor Shaheen Sardar Ali, Vice-Chair of the UN Working Group on Arbitrary Detention. Professor of Law University of Warwick
 - *Speaking on the need to ensure human dignity in detention supplementary to the work of the UN Working Group on Arbitrary Detention*
4. Mr Ian Seiderman, Director of Law and Policy, International Commission of Jurists
 - *Speaking on alternative mechanisms for ensuring human dignity, falling short of an international legal instrument*

Participants

- The parallel event aims to attract as wide participation as possible, from senior levels at all Permanent Missions to the United Nations at Geneva
- The parallel event is otherwise open to all persons with access to the *Palais des Nations*

Background

- Summary:
 - To mark the 60th Anniversary of the Universal Declaration of Human Rights, the Swiss Government launched an Agenda for Human Rights, alongside a research agenda to be conducted on eight priority themes, including detention.
 - This event will be held during the 21st session of the Human Rights Council in September 2012, marking the first Council session at which the Working Group on the issue of human rights and transnational corporations and other business enterprises will present a report, and be engaged in an interactive dialogue during the plenary
- Background documents:
 - Geneva, Academy of International Humanitarian Law and Human Rights, *Background Paper on Ensuring Human Dignity During Detention* (enclosed)
 - Mandate of the UN Working Group on arbitrary detention, HRC Resolution 15/18 (2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/166/84/PDF/G1016684.pdf?OpenElement>

Ensuring Human Dignity during Detention Background Paper^{*}

'One of the major human rights challenges we face is to improve prison conditions, through national action and with international cooperation such that detainees can live in dignity'

Panel on Human Dignity, 2008 Report, Protecting Dignity: An Agenda for Human Rights

'Deprivation of liberty does not mean deprivation of liberties'

Professor Manfred Nowak, 2012

Introduction

There are over ten million people currently in detention worldwide, three million of who are in pre-trial detention.¹ Although detention means the intrinsic consequence of a restriction on the right to liberty, it is sometimes forgotten that detainees should nevertheless continue to enjoy other human rights.² A large number of those in detention do not enjoy minimum standards of human rights and represent some of the most vulnerable and forgotten members of society. Detainees are subject to the control of their detainers and are deprived of their full autonomy, thus making them particularly vulnerable to human rights abuses and in turn requiring strong and effective legal protection.³ Furthermore, although *all* detainees are vulnerable to abuse, the vulnerability of detainees who are also members of vulnerable groups, such as persons with disabilities or members of ethnic or religious minorities, is particularly acute.

The number of persons in detention has dramatically increased in recent times. This increase is due to the growth of the world's population; the increased adoption of criminal law sanctions that favour custodial sentences and/or an increase in the length of custodial sentences; as well as an increase in the detention of asylum seekers. In most states, the increase in detainee numbers has not been met with an increase in budgetary resources for detention facilities and staffing. Many prisons are over-crowded and most are critically under-resourced. As a result, many places of detention lack the basic facilities to allow detainees to live in dignity during their incarceration. Today there is a global prison crisis in which human dignity is the primary casualty.

Detainees are often fed an inadequate diet and do not have access to adequate health care or education.⁴ In some states detainees are expected to rely on family and friends to provide or pay for their food, medical needs and toiletries, which has a disproportionate effect on the

^{*} Alice Priddy, Researcher at the Geneva Academy of International Humanitarian Law and Human Rights.

¹ [Report of the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012](#), 16 February 2012, p. 5; International Centre for Prison Studies, [World Prison Population List](#), (8th edn, 2009).

² As confirmed in: Principle 5 of the 1990 UN Basic Principles for the Treatment of Prisoners; Recommendation 2 of the 1996 Kampala Declaration on Prison Conditions in Africa; Principle VIII, of the 2008 Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; and Rule 2 of the 2006 European Prison Rules, amongst others. See also: Human Rights Committee, [General Comment No.21 'Human Treatment of persons deprived of liberty \(Art.10\)'](#), 10 April 1992, § 3; [Interim report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment](#), Manfred Nowak, A/64/215, 3 August 2009; and N. Rodley, *The Treatment of Prisoners under International Law*, (3rd edn, Oxford: Oxford University Press, 2009)

³ The term 'detainees' include those in criminal detention and other forms of detention such as psychiatric units and asylum detention centres.

⁴ [The right to education of persons in detention, Report of the Special Rapporteur on the right to education](#), A/HRC/11/8, 2 April 2009.

poor. In many states conditions in detention facilities amount to inhuman or degrading treatment.⁵ As a result of overcrowding, diseases such as tuberculosis are rife in prisons and detention centres. HIV amongst detainees can be alarmingly high. In Zambia, for example, 27 per cent of prisoners have HIV – nearly double that of the general population.⁶

As well as increasing in number, the composition of detainees has also changed from being predominately adult male nationals of the state of detention. There has been a disproportionate increase in juvenile and women prisoners in recent years, who have different needs to those of adult male detainees.⁷ Corresponding with the increase in the duration of custodial sentences, the age profile of detainees in criminal detention has increased, placing a further burden on prison systems, including on their ability to provide medical, nursing and hospice care. Foreign nationals now make up a high number of detainee numbers in many states, which poses unique challenges in meeting their specific needs, including language and cultural requirements. Pre-trial detention has also dramatically increased: worryingly, in some states the number of detainees who are awaiting trial is as high as 80 per cent of the prison population.⁸

Violations of detainees' human rights is not only as a result of overcrowding and under-resourcing. Detainees are also vulnerable to torture and other forms of cruel, inhuman or degrading treatment, particularly during police detention where such treatment may be used to compel 'confessions'. Detainees are also often exposed to sexual abuse, including rape. Detention practices such as solitary confinement have increased in use and can have devastating effects on a detainees' health. In his 2011 report to the Human Rights Council, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, found that where the physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering, it can amount to cruel, inhuman or degrading treatment or punishment (or even torture) when used as a punishment, during pre-trial detention, indefinitely, on a prolonged basis, or in respect of juveniles or persons with mental disabilities. In addition, the use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.⁹

Too often protecting the rights of detainees is characterised by governments as an optional measure. Detainees are sometimes portrayed as less worthy of their rights or as having somehow forfeited their rights, ignoring the universal nature of human rights. In fact the position of prisoners entails not only negative duties on the state but also special positive obligations. For example, to ensure a detainee can manifest their religious beliefs, a human right protected in multiple treaties,¹⁰ the state will have to provide places and materials to allow worship within the detention facility as well as cater for religious dietary requirements.

⁵ See [Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment](#), Manfred Nowak, A/HRC/13/39, 9 February 2010 and S. Slama, H. Wolff and L. Loutan, [Realizing the Right to Health in Prisons: Implications in a Borderless World](#), in (eds A. Clapham, M. Robinson, C. Mahon, S. Jerbi), *Realizing the Right to Health*, (rüffer & rubb, 2009).

⁶ [Unjust and Unhealthy: HIV, TB and Abuse in Zambia Prisons](#), Human Rights Watch, April 2010, p.4.

⁷ See [Background note, Open-ended intergovernmental Expert Group Meeting on the UN Standard Minimum Rules for the Treatment of Prisoners](#), Vienna, 31 January-2 February 2012; and International Centre for Prison Studies, [World Prison Population List](#) (9th edn, 2011).

⁸ [Background note, Open-ended intergovernmental Expert Group Meeting on the UN Standard Minimum Rules for the Treatment of Prisoners](#), Vienna, 31 January-2 February 2012, p.3.

⁹ [Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment](#), A/66/268, August 2011. See also Human Rights Committee, General Comment 20, Article 7, 1992 § 6.

¹⁰ Article 18, 1966 International Covenant on Civil and Political Rights (ICCPR); Article 9, 1950 European Convention on Human Rights (ECHR); Article 12, 1969 American Convention on Human Rights (ACHR); Article 8, 1981 African Charter on Human and Peoples Rights (AfChHPR); Article 30, 2004 Arab Charter on Human Rights (AbCHR). See also Human Rights Committee, General Comment No. 22 'The Right to Freedom of Thought, Conscience and Religion (art.18)', 30 July 1993.

Societies are more often than not uninterested in the treatment of detainees. Political will for change is often lacking because detainees' welfare is not a vote winner, whereas being seen to come down hard on criminal activity and immigration is. Societies' lack of interest combined with a lack of will on the part of governments leaves the ten million detainees isolated and particularly vulnerable. That is why the Panel on Human Dignity has identified that ensuring the human rights and human dignity of detainees is one of the main contemporary human rights challenges of today. The Panel on Human Dignity has therefore decided to hold an expert meeting to discuss the situation of detainees on the ground, to assess the current legal protection framework and protection mechanisms, and to consider what is needed to improve the lives of the millions of detainees currently existing in such conditions where their human dignity is undermined.

Existing Legal framework for the protection of those in detention

General human rights instruments such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1984 Convention against Torture (CAT) provide important protection to those in detention. Article 10 of the ICCPR, for example, requires that state parties ensure that '[a]ll persons deprived of their liberty' are 'treated with humanity and with respect for the inherent dignity of the human person.' Specifically article 10 requires that 'accused persons shall, save in exceptional circumstances, be segregated from convicted persons'¹¹ and the 'penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.'¹² Furthermore, both the ICCPR and CAT are amongst a number of instruments that articulate the absolute prohibition on the use of torture, a peremptory norm of international law.¹³

Aside from general human rights instruments, a wide array of legal frameworks exist that are dedicated to the treatment of detainees. These instruments include:

- 1957 Standard Minimum Rules for the Treatment of Prisoners;
- 1982 Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- 1984 Procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Offenders;
- 1984 Safeguards guaranteeing protection of the rights of those facing the death penalty;
- 1985 Model Agreement on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners;
- 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
- 1990 Basic Principles for the Treatment of Prisoners;
- 1990 Rules for the Protection of Juveniles Deprived of their Liberty;
- 1990 Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released;
- 1996 Kampala Declaration on Prison Conditions in Africa;
- 1999 Arusha Declaration on Good Prison Practice;

¹¹ ICCPR, article 10 (2) (a).

¹² ICCPR, article 10 (3).

¹³ Instruments that contain the prohibition include: ICCPR, articles 7; the 1950 European Convention on Human Rights, article 3; the 1969 American Convention on Human Rights, article 5; the 1981 African Charter in Human Rights, article 5; and the 2004 Revised Arab Charter on Human Rights Article 8.

- 2002 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island);
- 2010 Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders.

Some of these international instruments are further elaborated upon below.¹⁴

1955 UN Standard Minimum Rules for the Treatment of Prisoners (SMR)¹⁵

The UN Standard Minimum Rules for the Treatment of Prisoners (SMR) are a soft law (non-binding) instrument drafted to articulate accepted principles and good practice regarding the treatment of prisoners. They apply to all those in criminal detention as well as persons arrested or detained without charge.¹⁶ However: ‘In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times.’¹⁷

Despite their age, the SMR have been credited with standing the test of time relatively well and are today generally accepted to represent minimum standards for the treatment of prisoners. The principles they articulate remain as relevant today as when they were first drafted.¹⁸ In a number of states the SMR is the only document made available to prisoners to inform them of the treatment that they should expect while in detention. International and regional courts, committees and commissions have referred to the SMR in their jurisprudence reaffirming the guiding role of the SMR.¹⁹ Furthermore, the SMR remain the main reference point used by a number of international and national monitoring bodies when inspecting prisons and making recommendations for reform.²⁰

It should be recognised, however, that the drafters of the SMR only sought ‘on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today [1957], to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.’²¹ The 60 years

¹⁴ An overview of some of these instruments can be found in Annex I. For a commentary on each of the rules contained in the SMR see [‘Notes and comments on the Standard Minimum Rules for the Treatment of Prisoners’](#), Prof Andrew Coyle, February 2012.

¹⁵ The full text of the SMR can be found in Annex II. The SMR were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and approved by the Economic and Social Council in Resolution 663 C (XXIV) of 31 July 1957.

¹⁶ ECOSOC Res 2076 (LXII) extended the scope of the SMR to apply to those arrested or detained without charge by adding rule 95 to the SMR.

¹⁷ SMR, Preliminary observations, para.2.

¹⁸ APT, [Revision of the Standard Minimum Rules?; Background note, Open-ended intergovernmental Expert Group Meeting on the UN Standard Minimum Rules for the Treatment of Prisoners](#), Vienna 31 January-2 February 2012, [Report of the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012](#), 16 February 2012.

¹⁹ For examples and discussion of the SMR’s influence on the jurisprudence of the HRC, The European Commission of Human Rights, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples Rights see N. Rodley, *The Treatment of Prisoners under International Law*, (3rd edn, Oxford: Oxford University Press, 2009) pp 385-400.

²⁰ For example, the SMR are often referred to in reports of UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (SRT), for examples see: Report of the SRT Mission to the Republic of Equatorial Guinea, UN Doc A/HRC/13/39/Add.4, (7 January 2010), §§26-27; and SRT Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Brazil, Cameroon, China (People’s Republic of), Denmark, Georgia, Indonesia, Jordan, Kenya, Mongolia, Nepal, Nigeria, Paraguay, the Republic of Moldova, Romania, Spain, Sri Lanka, Uzbekistan and Togo, UN Doc A/HRC/13/39/Add.6, (26 February 2010) p.111. The Human Rights Committee (HRC), in its General Comment No 21, invited state to include in their reports to what extent they were complying with ‘relevant UN standards applicable to the treatment of prisoners’ including the SMR. Human Rights Committee, [General Comment No.21 ‘Human Treatment of persons deprived of liberty \(art.10\)’](#), 10 April 1992, § 5.

²¹ SMR, Preliminary observations, para.1.

since the SMR were adopted have seen dramatic changes in the nature of detention and prisons, as well as in international human rights law standards. Unfortunately some states have used the SMR as a blueprint for national laws,²² meaning that the gaps in the SMR – as they existed when they were adopted, or as they have emerged since then – are implanted into domestic law.

As to their content, the SMR apply to all categories of prisoners,²³ without discrimination.²⁴ The rules call for untried prisoners to be segregated from convicted persons;²⁵ as far as possible, men and women should be segregated;²⁶ and young prisoners should be detained separately from adults.²⁷ The SMR articulate the right of prisoners to inform someone of their imprisonment.²⁸ The SMR include basic rules on accommodation such as that inside prisons windows should be large enough to allow detainees to read or work by natural light and allow ventilation of fresh air.²⁹ Sanitary installations should be adequate to allow every prisoner ‘to comply with the needs of nature when necessary in a clean and decent manner’.³⁰ Adequate bathing and shower installations must be provided, and prisoners’ living areas should be properly maintained and kept ‘scrupulously clean at all times’.³¹ At every institution the services of at least one qualified medical officer should be available.³² As well as corporal punishment, punishment by placing a detainee in a dark cell is completely prohibited as punishments for disciplinary offences, as are all other forms of cruel, inhuman or degrading punishment.³³ The SMR also contain rules on vulnerable prisoners such as those with mental health issues.³⁴ The SMR also provide for regular inspection of penal institutions and services by qualified and experienced inspectors appointed by a competent authority.³⁵

The rules themselves are brief and lack practical guidance. As a result, the 1984 UN Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners were adopted to provide general guidance on the implantation of the SMR as a whole.³⁶ Regrettably, however, this instrument does not provide guidance on the implementation of each specific rule in the SMR.

Despite the SMR being the core document in relation to the treatment of prisoners, there are significant gaps in their implementation. To consider these gaps the UN General Assembly requested the UN Commission on Crime Prevention and Criminal Justice to establish an open-ended intergovernmental working group ‘to exchange information on best practices, as well as national legislation and existing international law, and the revision of the UN Standard Minimum Rules for the Treatment of Prisoners, so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on possible next steps’.³⁷ The first meeting of the Expert Group was held in February 2012. The Expert Group agreed that the SMR had stood the test of time. However,

²² Countries including Austria, China, Finland, Japan Mauritius, Mexico, New Zealand, South Africa and the United Kingdom all based their national legislation on the SMR. [Background note, Open-ended intergovernmental Expert Group Meeting on the UN Standard Minimum Rules for the Treatment of Prisoners](#), Vienna, 31 January-2 February 2012, p. 5.

²³ SMR, Preliminary observations, § 4.

²⁴ SMR, rule 6.

²⁵ *Ibid.* rule 8(b).

²⁶ *Ibid.* rule 8(a).

²⁷ *Ibid.* rule 8(d).

²⁸ *Ibid.* rule 44.

²⁹ *Ibid.* rule 11.

³⁰ *Ibid.* rule 12.

³¹ *Ibid.* rule 13.

³² *Ibid.* rule 22.

³³ *Ibid.* rule 31.

³⁴ *Ibid.* rules-82-83.

³⁵ *Ibid.* rule 55.

³⁶ Adopted pursuant to ECOSOC Res.1984/47.

³⁷ GA Res. 65/230 of 21 December 2010, §10.

the Group recognised the need to improve the monitoring and implementation of the SMR and recognised that some fundamental aspects of the SMR needed review, including: respect for prisoners' inherent dignity and value as human beings; medical and health services; disciplinary action and punishment, including the role of medical staff, solitary confinement and reduction of diet; investigation of all deaths in custody, as well as any signs or allegations of torture or inhuman or degrading treatment of prisoners; protection and special needs of vulnerable groups deprived of their liberty, taking into consideration countries in difficult circumstances; the right of access to legal representation; complaints and independent inspection; the replacement of outdated terminology; and the training of relevant staff to implement the SMR.

The Expert Group discussed the possibility of a new internationally binding instrument whereby states parties would be under an obligation to ensure certain standards in places of detention. However, the Group concluded that at this point in time there is insufficient consensus to move forward with this option. Redrafting the SMR was also considered, but it was concluded that as the SMR are so influential in the drafting of national standards, as well as the work of various human rights treaty bodies, complete redrafting would be a extremely precarious exercise and therefore not an option.³⁸

Based on the recommendations of the Expert Group the UN Commission on Crime Prevention and Criminal Justice recommended to the Economic and Social Council a draft resolution that recognises some aspects of the SMR 'could be reviewed so that the Rules reflect the latest advances in correctional science and good practices, provided that any changes to the Rules would not lower any existing standards.'³⁹ The resolution also extends the mandate of the Expert Group to continue its work and report its progress at the 22nd session of the Commission on Crime Prevention and Criminal Justice in 2013.⁴⁰

1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

After nearly 20 years of preparation, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the Body of Principles) were adopted by the General Assembly by consensus on 9 December 1988.⁴¹ Like the SMR, the Body of Principles are a soft law instrument. In adopting the Body of Principles, the General Assembly urged 'every effort be made so that the Body of Principles becomes generally known and respected',⁴² yet today they are not widely known.

The Principles are wider in scope than the SMR and apply for the 'protection of all persons under any form of detention or imprisonment'.⁴³ The Body of Principles contain 39 principles that range from general statements regarding the human rights of detainees, to specific procedural guarantees, to principles on particular rights to be guaranteed in places of detention.

Principle 1 states that all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. Principle 6 contains a strong articulation on the prohibition against the use of torture and cruel, inhuman or degrading treatment or punishment. A footnote explains that '[t]he term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend

³⁸ [Report of the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012](#), 16 February 2012, p.7.

³⁹ E/CN.15/2012/L.4/Rev.2, § 5.

⁴⁰ E/CN.15/2012/L.4/Rev.2, § 5.

⁴¹ For background on the adoption of the Body of Principles see T Treves, The UN Body of Principles for the Protection of Detained or Imprisoned Persons, *AJIL*, Vol. 84, No. 2, April 1990.

⁴² GA Res 43/173 of 9 December 1988.

⁴³ The Body of Principles, opening paragraph.

the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.’

Principles 9-13 concern the rights of a person after arrest including the right to be heard by a judicial body or other authority promptly. Principles 36-39 contain safeguards for those detained on a criminal charge with regard to criminal proceedings, such as the presumption of innocence.⁴⁴ Principle 32 contains the rule on *habeas corpus*, whereby a detainee has the right to challenge the lawfulness of her or his detention.

Principle 29 states that places of detention ‘shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.’ It adds that a ‘detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment... subject to reasonable conditions to ensure security and good order in such places.’

The Body of Principles do contain some standards that appear to contrast with the SMR. For example, according to the Body of Principles, medical examination must be ‘offered’ to detainees promptly after their incarceration, rather than automatically as articulated in Rule 24 of the SMR. However, the adoption of the Body of Principles did not in any way lower the rules contained in the SMR, including Rule 24. The Principles do contain a savings clause reading that ‘nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.’⁴⁵

1990 Basic Principles for the Treatment of Prisoners

The Basic Principles for the Treatment of Prisoners articulate, in 11 concise statements, the principles underlying the Standard Minimum Rules. Those statements include; ‘all prisoners shall be treated with the respect due to their inherent dignity and value as human being’⁴⁶ and ‘[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.’⁴⁷

1990 Rules for the Protection of Juveniles Deprived of their Liberty

Children in detention are particularly at risk of harm and ill-treatment. The detention of children should always be avoided due to the extremely negative impact it has on their development, especially where children are held in adult prisons – which is the norm in many states. Female children can be particularly susceptible to abuse during detention.⁴⁸

The Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) were adopted to address the specific needs of children in the criminal justice system. The Havana Rules is a soft law instrument containing 87 rules and that are meant to supplement the SMR.

⁴⁴ The Body of Principles, Principle 36.

⁴⁵ The Body of Principles, General clause.

⁴⁶ [Basic Principles for the Treatment of Prisoners](#), principle 1.

⁴⁷ *Ibid.* principle 5.

⁴⁸ See [Safeguarding Children in Detention: Independent Monitoring Mechanisms for Children in Detention in Mema](#), Penal Reform International, 2011; and [Paulo Sérgio Pinheiro, World Report on Violence against Children, UN Secretary-General's Study on Violence against Children](#), 2006.

The Havana Rules are based on the principle that the detention of children should only ever be used as a last resort and be for the shortest time possible.⁴⁹ The rules provide detailed recommendations concerning the treatment of children in detention, including: the presumption of innocence;⁵⁰ a complete record should be taken when a child is taken into a place of detention and a medical report should be made as soon as possible;⁵¹ accommodation standards including that children and adults should be segregated; the right of the child to education during detention;⁵² the provision of adequate diet and medical care;⁵³ and that ‘every means should be provided to ensure that juveniles have adequate communication with the outside world, which is essential to the preparation of juveniles for their return to society’.⁵⁴ One of the most limiting aspects for the universal application of the Havana Rules is their provision that they are to be implemented in the context of the economic, social and cultural conditions prevailing in each state.⁵⁵

The Havana Rules include the requirement that qualified inspectors (or an equivalent), not belonging to the administration of the facility, ‘should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities’.⁵⁶

2010 Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)

Women prisoners have specific needs and are particularly vulnerable to gender based discrimination leading to multiple violations of their human rights. Neither the SMR, nor any of the instruments that followed, addressed the specific needs of women detainees. Recognising the protection gap left by the SMR and ‘that most existing prison facilities worldwide were designed primarily for male prisoners, whereas the number of female prisoners has significantly increased over the years’ the Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders Bangkok (the Bangkok Rules) were adopted in December 2010 ‘to complement and supplement’ the SMR.⁵⁷

The Bangkok Rules are a set of non-binding rules that represent ‘global aspirations amenable to the common goal of improving outcomes for women prisoners’.⁵⁸ It is stated within the Resolution under which the Bangkok rules were adopted that ‘in view of the great variety of legal, social, economic and geographical conditions in the world, not all of the rules can be applied equally in all places and at all times... [the Bangkok Rules] should serve to stimulate a constant endeavour to overcome practical difficulties in their application.’⁵⁹ Restricting the Bangkok rules apply to women offenders only and not women in administrative detention.

The Bangkok Rules set out standards covering the treatment of women prisoners and the general management of prisons detaining women, and additional guidance for the treatment of juvenile female prisoners, children detained with their mother, and pregnant or breastfeeding women. The Bangkok rules recall the United Nations Standard Minimum Rules for Non-

⁴⁹ Havana Rules, rules 1 and 2.

⁵⁰ *Ibid.* Rule 16.

⁵¹ *Ibid.* Rules 21-27.

⁵² *Ibid.* Rules 38-46.

⁵³ *Ibid.* Rules 37 and 49- 55

⁵⁴ *Ibid.* Rule 59.

⁵⁵ *Ibid.* Rule 16, which contains language similar to the SMR, Preliminary observations, para.2.

⁵⁶ *Ibid.* Rule 72.

⁵⁷ [Bangkok Rules](#), § 2.

⁵⁸ [GA Res 2010/16](#) § 4.

⁵⁹ [GA Res 2010/16](#) § 4.

Custodial Measures (the Tokyo Rules) and their particular relevance for women. The rules stress the paramount importance of research, planning, evaluation, public awareness-raising and sharing of information as ways to implement the standards contained within them. The Rules recommend the inclusion of women within monitoring boards or supervisory bodies, as well as a capacity-building and training for all staff employed in women's prisons.⁶⁰

The Bangkok rules fill the protection gap left by the SMR and are an important tool for monitoring bodies to support recommendations. They are not widely known, however, and thus lack general implementation. Greater dissemination and education of the Rules to monitoring bodies, prison authorities, policymakers, legislators, the prosecution service, the judiciary, the probation service, the civil society and the media would undoubtedly be desirable.

Summary of the international framework and questions posed

The above provides a brief summary of some of the international instruments relevant to the treatment of detainees. Although some of the principles contained in these instruments may have crystallised into international customary law none of the instruments are in the form of binding treaties. The SMR, the most prominent and commonly referred to instrument in relation to the treatment of detainees, is considered by some to be outdated and contain unacceptable gaps. As the SMR is being used by states as a blue print for domestic laws on detention these gaps are being adopted and integrated into state practice. Subsequent instruments such as the Bangkok rules have tried to plug these gaps resulting in a patchwork framework. This begs the following questions:

- Does the current patchwork framework of soft law provide sufficient protection for *all* detainees- including those in non-penal detention? If not, what is needed to correct this? Commentaries to provide practical guidance on how to implement these soft law standards? An update to the SMR?
- Is it helpful to have separate instruments dealing with those groups, such as women, that weren't considered when the SMR were adopted or is segregating such groups harmful to mainstreaming such groups' rights?
- The SMR could clearly be improved to enhance the protection of detainees from human rights abuses, however, would such improvements risk detracting from the fact that the SMR are designed to act as a minimum level of acceptable standards? There are fears that amending the SMR may result in lowering the standards that it contains- are these fears warranted enough to justify not amending the SMR given that states continue to use the SMR and the gaps they contain as a blueprint and the SMR are the core document used to monitor detention institutions?
- Rather than concentrating efforts on amending existing instruments would it be valuable to increase efforts into implementing the standards contained in these rules?
- Or would the best option, to ensure protection of all detainees, be the adoption of a new protocol or international covenant on the rights of detainees, which would reflect developments in detention as well as human rights law?

Human Rights Mechanisms

Mechanisms that can provide oversight of the treatment of detainees include: UN Treaty Bodies, Special Procedures of the UN Human Rights Council, regional courts and commissions, and national human rights institutions (NHRIs) and courts.

⁶⁰ Bangkok Rules, rules 25(3) and 70.

Treaty Bodies

Human Rights Committee

The Human Rights Committee (HRC), the treaty-monitoring body established under the ICCPR, has addressed the situation of persons in detention through various means, namely: examination of states parties' periodic reports under the ICCPR and the issuing of Concluding Observations in that regard; consideration of individual communications under the first Optional Protocol to the ICCPR; and General Comments based in part upon jurisprudence arising from individual communications and state report concluding observations. HRC General Comment 21 (GC 21) is dedicated to the humane treatment of all persons deprived of their liberty, including those held in prison, hospitals and detention camps. In General Comment 21 the HRC reiterates that detainees 'enjoy all rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment'.⁶¹ It affirms that: 'treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'⁶²

With regard to the conditions of detention in general the HRC has affirmed:

[T]hat certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with rules 10,12,17,19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of fresh air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.⁶³

When submitting periodic reports to the HRC – in which states parties are called on to report on the implementation of the provisions of the ICCPR (including those applicable to the situation faced by persons in detention) – state parties are 'invited' to indicate to what extent they are applying the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).⁶⁴

The HRC has affirmed that states are obliged to protect detainees from themselves as well as each other and that states parties are responsible for the life and well-being of detainees.⁶⁵ The HRC has affirmed that 'it is incumbent on States to ensure the right of life of detainees, and not incumbent on the latter to request protection' and that 'the State party by arresting and detaining individuals takes the responsibility to care for their life. It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as

⁶¹ Human Rights Committee, [General Comment No.21 'Human Treatment of persons deprived of liberty \(art.10\)](#), 10 April 1992, § 3.

⁶² Human Rights Committee, [General Comment No.21 'Human Treatment of persons deprived of liberty \(art.10\)](#), 10 April 1992, § 4.

⁶³ *Mukong v. Cameroon*, Comm. No. 458/1991, (10 August 1994) §9.3.

⁶⁴ *Ibid.*

⁶⁵ *Fabrikant v. Canada*, Comm.No. 970/2001, (6 November 2003), § 9.3; *Barbato v. Uruguay*, Comm. No. 84/1981, (21 October 1982) §§ 9-10.

far as may be reasonably expected. Lack of financial means cannot reduce this responsibility.⁶⁶

In considering individual communications under the Optional Protocol, the HRC has found a number of detention conditions that violate detainees' right to be treated humanely and with respect for their human dignity,⁶⁷ as well as their right to be free from torture, cruel, inhuman, degrading treatment or punishment.⁶⁸ Views of the HRC have often found multiple violations of rights, including in the following situations:

- Imprisonment in a cell for 23 hours per day, without a mattress or any bedding, integral sanitation, natural light, recreational facilities. This had sometimes been combined with a lack of artificial light, and/or with the provision of bad food and inadequate medical care.⁶⁹
- Failure by the state to provide medical care and treatment for a detainee on death row, whose mental health had severely deteriorated during the period of detention.⁷⁰
- Instances of incommunicado detention, meaning that the detainee is prohibited from communicating with the outside world, including family, friends and others, such as a lawyer, has often been found to constitute 'inhuman treatment'.⁷¹
- Incommunicado detention of a detainee over a two-year period, accompanied by threats of torture and death, intimidation, food deprivation, and being locked in a cell for days without any possibility of recreation.
- Incommunicado detention for a period of ten months, including solitary confinement where the detainee was chained to a bed for three and a half months with minimal clothing and severe food rations, followed by a further month's incommunicado detention in a tiny cell, then followed by detention with another person in a three-by-three metre cell without external access for eighteen months.⁷²
- Deprivation of food and water for several days.⁷³
- Detention for fifty hours without food or water in a cell: "measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held, and where, owing to lack of space, some detainees had to sit on excrement".⁷⁴

Challenges faced by the HRC include: low levels of timely compliance by states parties with the requirement to submit periodic reports; the fact that inter-state complaints under the ICCPR have never been made; the fact that the HRC can only receive individual communications from individuals complaining of violations by states that have ratified the first Optional Protocol to the ICCPR;⁷⁵ and the limited capacity of the HRC to follow-up on the implementation of Concluding Observations and Views.

⁶⁶ *Lantsova v. Russia*, Comm.No. 763/1997, (26 March 2002), § 9.2.

⁶⁷ Article 10, ICCPR.

⁶⁸ Article 7, ICCPR.

⁶⁹ *Deidrick v. Jamaica*, Comm.No. 619/1995 (4 June 1998).

⁷⁰ *Williams v. Jamaica*, Comm.No. 609/1995 (4 November 1997).

⁷¹ See, for example, *Polay Campos v. Peru*, Comm. No 577/1994 (6 November 1997), § 8.6. 8 months incommunicado detention, in damp and overcrowded conditions, was found to be a violation of Article 7, ICCPR in *Shaw v. Jamaica*, Comm. No. 704/1996, (4 June 1998), §7.1.

⁷² *White v. Madagasca*, Comm.No. 115/1982, (1 April 1985).

⁷³ *Miha v. Equatorial Guinea*, Comm. No 414/1990, (10 August 1994).

⁷⁴ *Portorreal v. Dominican Republic*, Comm.No 188/1984, (5 November 1997) § 9.2.

⁷⁵ As of 16 August 2012, 114 states are party to the Optional Protocol

Committee against Torture

The Committee against Torture, the monitoring body established under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), also receives periodic reports from state parties detailing how the obligations under the CAT are implemented in law and in practice. The Committee adopts Concluding Observations following the examination of periodic reports. The Committee can also consider individual communications, provided that the state party against which a complaint originates has made a declaration under article 22 of the CAT agreeing to recognise the competence of the Committee to receive individual communications. Additionally, if the Committee receives 'reliable information containing well-founded indications of serious or systematic violation' of the CAT, it may initiate its own inquiries into the situation. However, state parties upon ratifying CAT are entitled to opt-out of recognising the competence of the Committee by making a declaration under article 28 of the CAT.⁷⁶ The same applies to inter-state complaints.

Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

The UN Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) was established under the 2002 Optional Protocol to the Convention against Torture (OPCAT), the object of which is to 'establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'.⁷⁷ The SPT is specifically tasked with monitoring the implementation of all norms of the UN relevant to the treatment of those deprived of their liberty.⁷⁸

By ratifying OPCAT, states agree to allow the SPT to regularly visit all places of detention within their jurisdiction and allow the SPT access to all information regarding detainees.⁷⁹ Following a state visit, the SPT will produce a confidential report containing recommendations for the state. Although the report is confidential, the state that is the subject of a report may authorise its publication for subsequent transmission to all states parties and, if relevant, for the report to also be sent to the national preventive mechanism. As for other UN mechanisms, the recommendations contained in SPT reports are not binding, although states have an obligation to examine them and enter into dialogue on their implementation. If a state refuses to cooperate with recommendations made, the Subcommittee can propose to the Committee against Torture that it adopt a public statement or publish its report on the state – a measure that has not been resorted to thus far.

Further, states parties to the OPCAT agree to establish a National Preventive Mechanism (NPM) - an inspection mechanism at the national level.⁸⁰ NPMs should be authorised to visit any place within the state's jurisdiction where people are detained, as well as having unrestricted access to all information surrounding the persons deprived of liberty, their treatment and conditions of detention, and to the detainees themselves. Approximately 50 per cent of states parties to the OPCAT have created NPMs.

The SPT and NPMs are powerful tools in monitoring the treatment of detainees, ensuring that all states ratify the OPCAT is of paramount importance to ensuring the human dignity of persons in detention.

⁷⁶ Since its establishment in 1988 the Committee has carried out seven inquiries with regard to: Brasil; Serbia and Montenegro; Mexico; Sri Lanka; Peru; Egypt; and Turkey.

⁷⁷ Article 1, OPCAT

⁷⁸ OPCAT 2.2 and 4.1.

⁷⁹ As of 18 August 2012, 68 states are party to OPCAT.

⁸⁰ Article 3, OPCAT

Special Procedures

The Special Procedure of the UN Human Rights Council that are particularly relevant to the protection of detainees are:

- Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment;
- Working Group on Arbitrary Detention;
- Special Rapporteur on the independence of judges and lawyers;
- Special Rapporteur on extrajudicial, summary or arbitrary executions;
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
- Special Rapporteur on the right to education;
- Special Rapporteur on the right to food;
- Special Rapporteur on the human rights of migrants;
- Special Rapporteur on the human right to safe drinking water and sanitation; and
- Working Group on Enforced Disappearances.

Although there is no mandate dedicated to the rights of detainees, all of the Special Procedures listed above have at least touched upon the situation of detainees in their reports. Unlike treaty monitoring bodies, the Special Procedures are not limited in their mandate to only consider the treatment of detainees by states parties to a particular instrument. They may receive communications, including urgent appeals, from all individuals pertaining to the conduct of all states. The Special Procedures may also address thematic issues in their annual reports to the Human Rights Council and the General Assembly, and country-specific issues in reports on official country missions.

The work of the Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment (SRT) is particularly important for monitoring detainee treatment and detention conditions. As torture and cruel, inhuman or degrading treatment or punishment are arguably most prevalent in places of detention, through necessity, the mandate of the SRT demands he or she focus on conditions of detention in their work. During fact-finding missions SRT's will spend the majority of their time in detention facilitates looking for evidence of torture and assessing conditions of detention. Indeed the fact-finding reports of a SRT normally contain a section on torture and a separate section on conditions of detention.

Working Group on Arbitrary Detention

As well as the functions applicable to all Special Procedures, as outlined above, the Working Group on Arbitrary Detention⁸¹ is also mandated to investigate cases of, and issue opinions on, deprivation of liberty that are allegedly imposed arbitrarily or otherwise inconsistently with relevant standards in the Universal Declaration of Human Rights or in relevant legal instruments accepted by the states concerned.⁸² This may include consideration of the implementation of and compliance with the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the UN Rules for the Protection of Juveniles Deprived of Their Liberty; and the UN Standard Minimum Rules for the Administration of Juvenile Justice.

⁸¹ Established under Resolution 1991/42 of the former Commission on Human Rights.

⁸² See Human Rights Council resolution 15/18 (2010), § 7; and Human Rights Council resolution 6/4 (2007), § 1(a).

Regional Commissions and Courts

Courts and commissions established under regional human rights instruments have reaffirmed the basic principle that deprivation of liberty does not mean deprivation of liberties.⁸³ The European Court of Human Rights (ECtHR), for example, has held that a difference in treatment between free persons and prisoners is discriminatory if it has no objective and reasonable justification.⁸⁴ The Inter-American Court of Human Rights has similarly stressed that ‘impairment of rights arising from the deprivation of liberty or as its collateral effect, must be strictly minimized’ and that deprivation of liberty may not result in suffering exceeding the unavoidable level of suffering inherent in detention.⁸⁵ Furthermore, the regional courts have affirmed that states cannot cite lack of resources in an attempt to justify lack of protection of detainees’ fundamental rights.⁸⁶

Regional Mechanisms

Aside from regional courts and commissions, regional mechanisms may also play a crucial role in monitoring the implementation of standards within places of detention. Such mechanisms include the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (which monitors all places of detention including prisons, holding centres for immigration detainees, psychiatric hospitals, and social care homes) and the African Commission’s Special Rapporteur on Prisons and Conditions of Detention (who is empowered to examine the situation of detainees, in relation to the African Charter on Human and Peoples’ Rights and the Kampala Declaration on Prison Conditions in Africa, within the territories of states parties to the African Charter on Human and Peoples’ Rights and applies).

The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) was established under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.⁸⁷ The CPT is mandated to conduct visits to any place within each state parties jurisdiction where persons are deprived of their liberty by a public authority. 47 states are party to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Through its yearly general reports the CPT has developed standards ‘to give a clear advance indication to national authorities of its views regarding the manner in which persons deprived of their liberty ought to be treated and, more generally, to stimulate discussion on such matters.’⁸⁸ To date the CPT has carried out 323 visits (195 periodic visits and 128 ad hoc visits).

National Courts

An effective, independent judiciary capable of providing judicial oversight to detention is crucial to ensure that the detention is lawful and to protect detainees from abuse.⁸⁹

⁸³ *Hirst v. the United Kingdom (No.2)*, App. No 74025/01, (6 October 2005) § 69 ; [Resolution on Prisons in Africa](#), the African Commission on Human and Peoples’ Rights (AfCionHPR) preambular § 2.

⁸⁴ *Shelley v. the United Kingdom* ECtHR, App. No. 23800/06, (4 January 2008), § 2. The European Court of Human Rights, the most established regional human rights court has produced a high volume of jurisprudence on the treatment of detainees, see amongst others: *Trubnikov v. Russia*, App. no. 49790/99 (5 July 2005); *Salman v. Turkey*, App. No. 21986/93, (27 June 2000); *Keenan v. the United Kingdom*, App. no. 27229/95, (3 April 2001); *Paul & Audrey Edwards v. the United Kingdom*, App. no. 46477/99, (14 March 2002).

⁸⁵ *Montero Aranguren et al (Detention Center of Catia) v. Venezuela*, ACtHR, Judgment of 5 July 2006, § 86.

⁸⁶ *I.I v Bulgaria*, ECtHR, App. No 44082/98, (9 June 2005) § 77. *Montero Aranguren et al (Detention Center of Catia) v. Venezuela*, I-ACtHR, Judgment of 5 July 2006, § 85

⁸⁷ Article 1, 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

⁸⁸ CPT Standards, [Council of Europe Doc: CPT/Inf/E \(2002\) 1 - Rev. 2011](#).

⁸⁹ See, for example, recognition of this position in Human Rights Council resolution 13/19 (2010).

Furthermore, effective national courts can also set minimum standards with regard to the treatment of detainees. In a 2007 case of the Supreme Court of Israel, for example, it was held that the Israeli State was obliged to provide every prisoner in Israel with a bed. The Court concluded that the right to sleep on a bed is a minimum standard of living and dignity.⁹⁰

Summary of Human Rights Mechanisms and Questions Posed

Within the UN framework a variety of mechanisms exist that, to varying degrees, concern themselves with the treatment of detainees. There is, however, no single mandate broad enough to consider all relevant issues pertaining to the treatment of detainees and conditions of detention, as well as to the issue of the legality or otherwise of restrictions upon the right to liberty.

- Are the variety of UN and regional mechanisms effective in protecting the rights of detainees or is the lack of a dedicated mandate creating a protection gap and/or a lack of focus?
- Monitoring of detention facilities, similarly to the legal protection regime, relies on a patchwork of mechanisms. Can such a patchwork ever provide adequate protection? As an alternative, could the mandate of the mechanisms such as the Working Group on Arbitrary Detention be extended to specifically address the treatment of those in detention? Would this be desirable and/or effective? Or is there a need for a new Working Group or a Special Rapporteur?

⁹⁰ Background note, [Open-ended intergovernmental Expert Group Meeting on the UN Standard Minimum Rules for the Treatment of Prisoners](#), Vienna 31 January-2 February 2012 p4.

International Instruments specifically concerned with the treatment of detainees				
Instrument	Year	Status ⁹¹	Application	Overview
Standard Minimum Rules for the Treatment of Prisoners	1957	Soft-law	Apply to all persons in pre and post-trial detention.	Contains accepted principles and good practice regarding the treatment of prisoners. The SMR are generally accepted to represent absolute minimum standards for the treatment of prisoners.
ECOSOC Res 2076 (LXII)	1977		Added Rule 95 to extend the scope of the SMR to also apply to those arrested or held without charge.	
Procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Offenders	1984			
Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	1982	Soft-law	Apply to health professional who are charged with caring for prisoners and detainees.	Contains six-principles to serve as guidelines for health officials involved in prisoner and detainee treatment. Specifically the principles require physicians to deliver the same standard of treatment to prisoners and detainees as individuals outside custody. The principles prohibit active and passive participation in, as well as conspiracy to commit, torture or cruel, inhuman or degrading treatment.
Body of Principles for the Protection of All Persons under Any Form of Detention or	1988	Soft-law	Apply to all detainees	The Body of Principles contains 39 principles that range from general human rights statements

⁹¹ Although an instrument may be classified as soft-law the principles it contains may have crystallised in to customary international law.

Imprisonment				to specific procedural guarantees, and principles on particular rights to be guaranteed in places of detention.
Basic Principles for the Treatment of Prisoners	1990	Soft-law	Apply to all persons in pre and post-trial detention.	Articulate the basic principles underlying the SMR in 11 concise statements. The majority of the Basic Principles discuss the treatment of prisoners while imprisoned, but the Principles also include abstract post-detention policy recommendations. Principle 5 states: 'Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, andUnited Nations covenants.'
Rules for the Protection of Juveniles Deprived of their Liberty	1990	Soft-law	Apply to those aged under 18 in any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.	The Rules offer guidelines for treatment of juveniles at every stage of custody: detention, arrest, trial and imprisonment.
Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders	2010	Soft-law	Apply to women in pre and post trial detention.	The Rules set out standards covering the treatment of women prisoners and the general management of prisons detaining women, and additional guidance for the treatment of juvenile

				female prisoners, children detained with their mother, and pregnant or breastfeeding women.
Regional Instruments				
Kampala Declaration on Prison Conditions in Africa	1996	Soft-law	Apply to all persons in pre and post-trial detention.	The Declaration outlines the minimum standards of treatment of prisoners. The declaration articulates that a person who is denied freedom has a right to human dignity, and that ‘some groups of prisoners, including juveniles, women, the old, the mentally and physically ill, are especially vulnerable and require particular attention.’ As well as ‘that prisoners should retain all rights which are not expressly taken away by the fact of their detention’.
Arusha Declaration on Good Prison Practice	1999	Soft-law	Declaration by the Prison Services in Central, Eastern and Southern African	The Declaration notes that prison conditions in most African states fall below the minimum standards contained in existing instruments. The Prison Services in Central, Eastern and Southern African declare their agreement to a number of principles including to respect and protect the rights and dignity of prisoners as well as ensure compliance with national and international standards.
Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines)	2002	Soft-law	Apply to all persons in Africa	Part II of the Guidelines detail measures states should take to prevent torture including: ensuring those deprived of their liberty have access to an independent medical examination and a lawyer;

				prohibit the use of incommunicado detention; and take steps to ensure that the treatment of all persons deprived of their liberty are in conformity with international standards guided by the SMR.
<p>Revised European Prison Rules (2006)</p> <p>Note also Recommendation (2006)2 of the Committee of Ministers on the European Prison Rules and Recommendation No. R (99) 22 of the Committee of Ministers concerning prison overcrowding and prison population inflation and the European Rules on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (2006)</p>	2006	Soft-law	Apply to all persons in pre and post-trial detention.	<p>Contains a number of basic principles including Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody. Furthermore the Rules include an extensive list of rules regarding the conditions of imprisonment including in relation to admission, accommodation, nutrition, hygiene, clothing and bedding, education and work. The Rules also contain standards for the treatment of juvenile, foreign national and women prisoners and the duties and responsibilities of health care professionals working in prisons are included within the Rules as well as those of prison staff. Rule 2 states: 'Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remaining them in custody.'</p>

European Rules for juvenile offenders subject to sanctions or measures	2008	Soft-law	All rules apply to those aged under 18 in any form of detention as well as 18-21 year olds 'where appropriate'	The rules contain general principles regarding the treatment of juveniles in detention as well as rules pertaining to implementation, the consequences of non-compliance and inspection and monitoring.
Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas	2008	Soft-law	Applies to all detainees	<p>Contains detailed principles on the minimum treatment of all persons in detention, including general principles regarding non-discrimination, right to judicial oversight as well as detailed principles relating to conditions within detention facilities. As well as special measures for those in vulnerable groups.</p> <p>Principle VIII states: 'Persons deprived of their liberty shall enjoy the same rights recognised to every other person by domestic law and international human rights law, except for those rights which exercise is temporarily limited or restricted by law and for reasons inherent to their condition as persons deprived of their liberty.'</p>