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INTER-AMERICAN PRISON RULES – CREATING A NORMAL LIFE BEHIND BARS

Abstract

This article deals with the penitentiary achievements in the Inter-American system of human rights protection. Despite its being primarily focused on the analyses of particular standards (both of treaty and recommended status), a comparative approach is proposed when it seems necessary. Most of the provisions under consideration possess the non-binding legal nature and can serve only as recommendations. In such context their final implementation in domestic prisons systems strongly relies on the good will and determination of particular states. Certainly, the Inter-American system of human rights operates within a very difficult region. Thus, any new initiative, especially in the very complicated field of regulation is really welcome even if only for the creation of a better understanding of the problem as well as a more affirmative mentality to accepting the prepared legal solutions. The final remarks expose the importance of the analyzed standards for the creation of a modern prison system and penitentiary policy in the Americas region. Similarly, the above-mentioned standards can support the OAS in the further advance of the actual enjoyment of human rights in the region.

Keywords

treatment of prisoners – international penitentiary standards – Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

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INTRODUCTION

Quite intentionally, the title of this article connects with another famous penitentiary normative phenomenon, namely the European Prison Rules (1973, 1987, 2006) created within the Council of Europe[1]. In the present considerations reference will be made to the newest version of the European Prison Rules (2006). It should be indicated that it is not the Author's intention to make a detailed comparison between the two systems. The same can be said about the penitentiary normative workload of the United Nations Organization (UNO). Nonetheless, whenever it is necessary, this kind of reflection will be presented. This is not only because of the time factor but also owing to the scope of the substantive standards elaborated in the field of international penitentiary activity. Moreover, this kind of presentation allows to make a more solid assessment of the Inter-American efforts in the field under research in present article.

It is true that the penitentiary specialists in different regions of the world have already achieved many of solid solutions, that step-by-step created a basis for modern and effective prison system and penitentiary policy goals. Thus, before a more detailed presentation of the attitude of the Organization of American States (OAS) is made, it seems relevant to recall briefly the international documents which created a "starting point" for international battle for humane treatment of prisoners with a view to their better social readaptation. It is beyond the discussion that the first step was done by the UNO, both at the level of treaty standards, as well as the recommended ones (soft law).

The first UN recommended penitentiary standards of 1955[2], addressed to Member States of the UNO (it seems worth reminding that all states of regional organizations are at the same time the Member States of UNO), have undergone a process of solid revision which started in 2010, and

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1 All the documents adopted by the Council of Europe are available in the official base of documents on www.coe.org. Entering the base it is important to choose a particular organ, in this case the Committee of Ministers of the Council of Europe.

2 Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31.07.1957 and 2076 (LXII) of 13.05.1977.

consequently, on 17 December 2015 the UN General Assembly adopted the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules; Mandela Rules)[3]. As a result, all regional organizations dealing with human rights protection received a very practical point of reference as regards the human rights in prisons.

At the universal treaty level, it is Article 10 of the ICCPR which plays a leading role for the international penitentiary law and policy and for their proper understanding. It is worth remembering that the Human Rights Committee in its General Comments on detention, expressed the opinion that, despite the expressive text of the Article, the human treatment of prisoners cannot entirely depend on the State's resources and treatment[4]. Consequently, the right of detainees to humane treatment, in its broad sense, has become an undisputed universal standard[5].

These last efforts (both Universal and European) towards the modernization of the prison system and its treatment of prisoners, had a very good impact on the other regional organizations (the African Union[6] and the OAS). The main purpose of the present article is a brief reconstruction of Inter-American efforts in penitentiary matters complemented with necessary comparative remarks.

I. Brief characteristics of the OAS

As a regional organization created in 1948, the OAS gathering 35 Member States, has a typical general structure[7]. Firstly, there are the statutory organs (OAS General Assembly, the Meetings of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical

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3 Resolution 70/175, A/Res/70/175, Distr. General, 8.01.2016.

4 P.R. Williams, *Treatment of Detainees. Examination of Issues Related to Detention by the United Nations Human Rights Committee*, Geneva 1990, p. 18.

5 W. Kälin, J. Künzli, *The Law of International Human Rights Protection,* Oxford 2010, pp. 464-465.

6 B. Gronowska, *African Prison Rules – Idea and Reality*, [in:] *Systems of Protection of Human Rights: European and African. Universal Context – Regional's Specific – Implementations' Conditioning* (in printing).

7 It should be born in mind that the original Charter of the Organization of American States was signed in Bogotá in 1948. However, later on it was amended by the Protocols of 1967, 1985, 1992 and 1993 so in result the statute structure of the organization has changed.

Committee, the Inter-American Commission of Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations).

Among the statutory organs, it is the Inter-American Commission of Human Rights whose mission is to promote and protect human rights in the Americas region. To fulfill this task the Commission works through the: 1) system of individual petition (in 1965 it was expressly given competence in this regard); 2) monitoring of the human rights situation in the Member States and 3) attention devoted to priority thematic areas[8]. It was the Statute which obliged the Commission to develop the awareness of human rights in the Americas. It should be added that the Inter-American system on human rights serves 500 million people who still represent different understandings and degrees of sensitivity as far as the humane treatment of prisoners is concerned. This is certainly a huge task mainly for the Inter-American Commission on Human Rights[9].

The second part of the system was built in 1969 against the background of the American Convention on Human Rights (with 2 monitoring organs, i.e. the above mentioned Inter-American Commission of Human Rights and the Inter-American Court of Human Rights)[10]. As the first part of the system predates the second, it has automatically produced some problems connected with the demarcation of competence between the two main human rights organs. Fortunately, practice solves such dilemmas, and in the present literature it is underlined that both parts of the OAS system communicate properly and "live together"[11].

While analyzing the efforts towards a better American "prison world", one should remember that prison realities in the OAS Member States are

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8 *Inter-American Commission on Human Rights*, Washington D.C., USA 2006, p. 2, available at: http://www.oas.org/en/iach/mandate/what.asp [last accessed: 27.07.2016].

9 M. Pinto, *The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievement and Contemporary Challenges*, Human Rights Brief 2013, vol. 20, no. 2, p. 34 and p. 36.

10 Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22.11.1969, text available at: http://www.cidh.org/basicos/english/Basic3. American%20Convention.htm [last accessed: 27.07.2016].

11 L. Guilherme, A. Conci, *The Inter-American System of Human Rights Protection: Birth and Evolution*, [in:] J. Jaskiernia (ed.), *Amerykański system ochrony praw człowieka. Aksjologia – instytucje – efektywność* [*American System of Human Rights Protection. Axiology – Institutions – Effectiveness*], Toruń 2015, p. 13. See also D. Rodrigez-Pinzón, *Inter-American System,* Netherlands Quarterly of Human Rights 2010, vol. 28, no. 1, pp. 91-96.

extremely diverse. Notwithstanding these efforts, it is symptomatic that in the international rankings of the "worst prisons in the world", many prisons from the Americas are placed regularly at the very top of the list. According to the Human Rights Watch World Report of 2002 in some Latin American countries (Brazil, Venezuela, Panama) "prison homicides were so frequent as to seem routine. Inmates were usually killed by other inmates rather than by guards, but inmate-on-inmate violence was often the predictable result of official negligence"[12]. A great deal of other information covered by the above-mentioned report create the impression that most of the prisons are under control of the prisoners' gangs, rather than the prison administration[13].

Undoubtedly, the reasons for the situation are complex, i.e. starting from purely material conditions, political pressures and conflicts, to more complicated factors concerning social mentality and understanding of penal and criminal policy measures. In this context, it seems reasonable to make a short analysis of the present official attitude of the OAS in the fields of penitentiary policy and of the quality of protection of the rights of prisoners.

II. OAS – RIGHTS OF PRISONERS IN THE LIGHT OF GENERAL STANDARDS

In analogy to other international organizations dealing with the protection of human rights, OAS adopted several human rights treaties, of both a general and a specific nature. The leading role in this regard is taken by the American Convention on Human Rights of 1969 (ACHR; San José Convention) which – following the American Declaration of the Rights and Duties of Man of 1948 (Bogotá Declaration)[14] – created the treaty rank basis for the Inter-American system of the protection of human rights.

Even a brief look at the content of the above-mentioned documents leads to interesting conclusions. The first remark – in chronological order –

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12 *Prisons*, Human Rights Watch World Report 2002, p. 1, available at: http://www.hrw.org/legacy/wr2k2/prisons.html [last accessed: 27.07.2016].

13 Ibidem, pp. 2-7.

14 O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, available at: http://www.1umn.edu/humanrts/oasinst/zoas2dec.htm. [last accessed: 27.07.2016].

is mainly connected with the Bogotá Declaration. As it predated the UN Universal Declaration of Human Rights of 1948 by less than a year, it received the status of the first international human rights document of a general nature. Actually in this document, in two articles there are references to situations important from the perspective of prison realities. Accordingly in Article XXV (Right to protection from arbitrary arrest) one can read as follows: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. (…) Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. **He also has the right to humane treatment during the time he is in custody**" [emphasis added BG]. With respect to Article XXVI (Right to due process of law) a special attention should be paid to the second sentence, according to which "Every person accused of an offence has the rights to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing law, and **not to receive cruel, infamous or unusual punishment**" [emphasis added BG][15].

It is interesting, that expressive regulations cannot be found in the Universal Declaration of Human Rights, as the Drafters concentrated mainly on the right to life, freedom and personal security (Article 3) and the prohibition of torture, inhuman or degrading treatment or punishment (Article 5). Likewise, in Articles 8-11 typical procedural guaranties of due process of law were elaborated.

Nonetheless, it would be justified to conclude that the Drafters of the Bogotá Declaration of 1948 seem to have been more sensitive about penitentiary problems than were the early UN documents on the protection of human rights.

The second general human rights document of the OAS is the San José Convention of 1969. There is no doubt that the Drafters of this treaty had in mind the famous UN ICCPR of 1966. For the persons dealing with

[15] Despite the quoted articles the text of the Bogotá Declarations covers additionally such traditional standards as the right to life, liberty and personal security as well as the right to a fair trial.

penitentiary law and policy, the former document was more than welcome. Its Article 10 started to be a kind of "model", as far as the main principles concerning the treatment of prisoners were concerned. Its Paragraph 1 stated, without any exceptions, that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Paragraph 2 formulated the segregation principle, depending on the legal status of prisoner (accused person and convicted prisoner; accused juveniles and adults). But for sure the most important – from the view-point of penitentiary policy – was Paragraph 3, according to which "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation (…)". It was the first time that such a strict rule concerning the purpose of prisoners' treatment was formulated in a treaty rank standard[16]. Bearing in mind the principle of the subsidiarity of the international protection of human rights (especially in the field of the criminal justice system model) this kind of attitude was very modern and far-reaching, as for the time being.

Returning to the OAS attitude, presented in its San José Convention, it is once again a similar situation, i.e. a broad understanding of the "Right to Humane Treatment" (Article 5). Despite the traditional rule of the right to respect the physical, mental and moral integrity of every person (Paragraph 1); the prohibition of torture and other ill-treatment, the second sentence of Paragraph 2 states in expressive terms that "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person". And further: "Punishment shall not be extended to any person other than the criminal" (Paragraph 3); the principle of the segregation of prisoners depending on their legal status (Paragraphs 4 and 5), and finally reference to the aim of the punishment of deprivation of liberty which "shall have as an essential aim the reform and social readaptation of the prisoners" (Paragraph 6) were articulated. To conclude this part of the presentation it should be added that in the San José Convention there are also traditional

16 No similar regulation can be found in the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 which restricted itself to traditional standards of prohibition of torture (Article 3), freedom and personal liberty (Article 5) or right to a fair trial (Article 6).

standards such as "Right to Personal Liberty" (Article 7) and "Right to a Fair Trial" (Article 8).

Similarly, as a partial conclusion the following remarks could be formulated. The San José Convention seems to be under the visible influence of Article 10 of the ICCPR which was adopted three years earlier. Besides, both documents have the same legal status and – with some differences – similar monitoring procedures (especially the individual complaint procedure). This means that the standards at stake are under solid control[17].

Despite all the positive statements concerning the San José Convention, one rather controversial piece of information should be added. Until now, the Convention has been ratified by only 26 OAS Member States. The great absentees are the USA and Canada. It is particularly surprising that the USA – a country that has actively participated in the negotiations of the San José treaty – is not bound by it. According to specialists, the central problem concerning this lack of ratification is a political one. Thus, the reason for the USA's reluctance is "fear that international obligations created by the Convention will interfere with the domestic affairs of the United States"[18]. The second objection is the sovereignty argument, and finally, objections to the "right to life" (Article 4) as it raises the problem of the legality of abortion and the death penalty[19].

The second type of international documents relevant for the prison reality is certainly the standard concerning the prohibition of torture and other ill-treatment. In this regard, traditional reference is made to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[20], and its Optional Protocol[21].

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17 For detention issues addressed by the Committee of Human Rights see: P.R. William, *Treatment of Detainees. Examination of Issues Relevant to Detention by the United Nations Human Rights Committee*, Geneva 1990, pp. 27-78.

18 *Note. United Nations Ratification of the American Convention on Human Rights*, Duke Journal of Comparative & International Law 2002, vol. 2, no. 2, p. 328.

19 Ibidem, pp. 324-340.

20 Adopted by the General Assembly of the United Nations on 10.12.1984 (resolution 39/46); entered into force on 26.06.1987; available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx [last accessed: 27.07.2016].

21 *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18.12.2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199; entered into

To be more specific, it should be added that new realities and the fear of growing terrorist activity has provoked a new initiative, namely the Istanbul Protocol, which is the first international guideline on effective psychological, physical and legal investigation and documentation. It was drafted by 75 experts and finally was submitted to the UN High Commissioner for Human Rights in 1999. Officially, the Protocol was adopted on 4 December 2000 as an annex to the resolution of the General Assembly and the Commission on Human Rights[22].

As for the Americas region and the problem of prevention and punishing torture, it should be mentioned that in the San José Convention there is a general prohibition of any kind of ill-treatment (Article 5.1-2.)[23]. Thus, both the Inter-American Commission and the Inter-American Court[24] have already developed an impressive case-law on this issue. It is obvious that many these cases concerned the treatment of detainees[25]. Similarly to other regional systems of human rights protection, OAS adopted its own the Inter-American Convention to Prevent and Punish Torture of 1987[26]. The treaty covers most traditional provisions on the topic. However, it lacked any own monitoring system, just as in the case of the UN Convention of 1984. According to Article 17 it is the Inter-American Commission on Human Rights which primarily should be informed by the States Parties of any legislative, judicial, administrative, or other measures they adopt in the application of this Convention. Additionally, in keeping with its duties and responsibilities, the Inter-American Commission on Human Rights will endeavour, in its annual report,

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force on 22.06.2006; available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx [last accessed: 27.07.2016].

22 H. Ucpinar, T. Baykal, *An Important Step for Prevention of Torture. The Istanbul Protocol and Challenges*, Torture 2006, vol. 16, no. 3, pp. 252-267.

23 However, the Bogotá Declaration of 1948 did not cover a similar standard. Some "traces" can only be found in Article 1 (Right to life, liberty and personal security).

24 The Inter-American Court of Human Rights was officially installed in 1979.

25 *Inter-American Human Rights System. Association for the Prevention of Torture*, p. 1, available at: http://www.apt.ch/inter-american-human-rights-system [last accessed: 27.07.2016].

26 Adopted at Cartagena de Indias on 9.12.1985 at the fifteenth regular session of the General Assembly; entered into force 28.02.1987; OAS, Treaty Series, No. 67, available at: http://www.oas.org/juridico/english/treaties/a-51.html [last accessed: 27.07.2016].

to analyze the existing situation in OAS Member States concerning the prevention and elimination of torture.

Both legal instruments are directly connected with prisons and the quality of protection of human rights "behind bars". Moreover, if the monitoring procedures become more precisely elaborated, it could be expected that these instruments would provide identification of problems and help to find necessary solutions. The only problem is that not all States have ratified the relevant treaties yet[27]. As a result, their practical influence seems to be too narrow and limited. Nevertheless, their mere existence cannot be underestimated as far as the creation of a positive attitude of international society to the condemnation of ill-treatment in prison is concerned.

III. OAS – SPECIFIC PENITENTIARY RULES (SOFT LAW)

The first attempts towards the preparation of Inter-American prison rules started in 2001 on the initiative of the OAS General Assembly. The first stage was connected with a detailed report on the situation of persons under any form of detention or imprisonment in the Americas[28]. According to the original idea, the whole work should have ended with the preparation of a Declaration on the rights and the care of persons under any form of detention or imprisonment. Owing to the idea of strengthening the reporting system and giving it additional impetus, the Inter-American Commission of Human Rights appointed in 2004 a Special Rapporteur on the Rights of Persons Deprived of Freedom[29]. The main intention of this initiative was "to help to inspire Member States to elaborate public policies and internal legislation as well as to offer civil society organizations a control tool, and provide normative support to the Inter-

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27 Actually 16 Member States were not ready to do so. Among them – which may be more than surprising – are once again Canada and the USA.

28 Resolution of the General Assembly of the OAS, OAS Doc.AG/RES. 1816 (XXXI-0/01) of 5.06.2001 on study of the Rights and Care of Persons Under any Form of Detention or Imprisonment. Actually similar studies were conducted in 2002, 2003, and 2004.

29 For the background and general idea see: *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*, Research Team, University of Bristol, August 2009, pp. 1-2.

American Commission when it deals with cases concerning conditions of detention"[30].

The whole process of consultations was divided into two phases. The first one started in November 2005 and the second in July 2006. It is important to stress that a wide range of experts, civil society organizations and Member States of the OAS were involved in the drafting process. After the second phase of consultation the participants were asked to send the final observations by 31 November 2007[31]. Finally, the document "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas" (the Principles) was approved by the Commission (under the auspices of its Rapporteurship on the Rights of Persons Deprived of Liberty) during its 131st regular period of sessions, held from March 3-14 in 2008[32].

From the legal view-point, the Principles are not legally binding (just like their UN or European counterparts). However, their true sense and potential stem from the fact that they reflect the dominant legal concepts of international human rights provisions relating to detention. As for the content of the Principles, they brought about several specific features (sometimes really interesting). However, let us start with the whole structure of the document which is divided into:

1. Preamble;
2. General Provisions (explaining the scope of regulation, especially the meaning of deprivation of liberty);
3. General Principles (seven principles regarding the following issues: humane treatment, equality and non-discrimination, personal liberty, principle of legality, due process of law, judicial control, and supervision of punishment, petition, and response);
4. Principles Related to the Conditions of Deprivation of Liberty (this part covers thirteen principles dealing with: rights and restriction; admission, registration, medical examination and transfers; health;

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30 Ibidem, pp. 2-3.

31 See: *Consultation Regarding the Draft Principles and Best Practices on the Protection of Persons Deprived of Liberty in Americas*, available at: http://www.cidh.org/proyectodeprincipiosybuenapracticas.eng.htm [last accessed: 27.02.2016].

32 Resolution 1/08 adopted on 13.03.2008 in Washington D.C., OEA/Ser/L/V/II/131, doc. 26.

food, and drinking; accommodation, hygiene and clothing; work; freedom of conscience and religion; freedom of expression, association and reunion; measures against overcrowding; contacts with the outside world; separation of categories), and the last section;

5. Principles Related to the Systems of Deprivation of Liberty (covering the five following sections: personnel of places of deprivation of liberty; bodily searches, inspection of installations and other measures; disciplinary regime; measures to combat violence and emergency situations; institutional inspections, and interpretation of the principles).

As mentioned before, this article does not intend to provide a detailed analysis of particular principles, but rather an overview as far as the "philosophy" or penitentiary ideology of the document is concerned. Bearing this in mind, a brief description of the Principles should begin with the Preamble, where the Drafters underlined the value of human dignity and of fundamental rights and freedoms. As these undisputable values are endangered in the prison environment, mainly because of the particular situation of vulnerability of the detainees, it is a duty of the State to respect and ensure the fundamental right of all persons deprived of their liberty to humane treatment, dignity, their right to life as well as their physical, mental, and moral integrity. Likewise, in the Preamble there is a reference to such basic aims of imprisonment as reform, social readaptation and personal rehabilitation. Actually, this aim was earlier recognized by the San José Convention and is strictly underlined in other international prison "codes"[33].

Interestingly enough, these aims were connected with reintegration into society and family life; as well as the protection of both the victims and society. This victimological aspect is really symptomatic and quite compatible with the current attitude towards the restorative justice concept[34]. Moreover, the critical situation of violence, overcrowding and

33 See: Rule 6 of the European Prison Rules (2006) and Rule 4 of the Mandela Rules (2015).

34 M. Płatek, *Europejskie reguły penitencjarne z 2006 r.* [*The European Prison Rules of 2006*], Państwo i Prawo [State and Law] 2008, no. 2, pp. 5-7.

inhuman living conditions in several detention places in the Americas has been confirmed by reliable sources.

The final part of the Preamble covers a very long list of documents, both of treaty rank and of soft-law nature, adopted at universal and regional levels, which are to be duly taken into account. All of them were the "normative inspiration". What seems important is the content of references, as it includes – besides the OAS standards – many of the UNO documents (even those of humanitarian law) concerning the criminal justice system in its broad sense. When reading this list, one can easily conclude that "persons deprived of liberty" belong to the vulnerable population of potential victims of human rights violations and are in need of proper protection.

In the Principles, the notion of deprivation of liberty is very broad, as it covers not only typical detention in criminal matters (detention pending trial, custodial sentence), but also detention imposed for reasons of humanitarian assistance, treatment, guardianship, and protection. Actually, the same attitude can be found both in the European Prison Rules (Rule 10.3) and maybe not so directly in the Mandela Rules (Preliminary observation 3 and Part II. Rules applicable to special categories). Nevertheless, in this regard the Mandela Rules posses a more penal nature.

Despite their very detailed structure, it is rather easy to identify the basic values of the Principles. Undoubtedly, these values are grounded on the following assumptions: respect for the inherent human dignity of every person deprived of liberty (understood broadly, i.e. as a form of treatment and the offered living conditions), then the normalization rule and lastly, strict and objective legality as regards the prison administration decisions concerning a particular detainee, connected with the full concept of the due process of law.

Special attention should be paid to the idea of humane treatment (Principle I). Despite the traditional prohibition of any kind of ill treatment, there is an expressive reference to the positive duties of state authorities responsible for the places of detention. The States having a special position as guarantors regarding prisoners shall respect and ensure their life and personal integrity and, as well, detainees shall be afforded the minimum conditions compatible with their dignity. Moreover, in the final part of this principle the duties of the above-mentioned state authorities are

of an absolute nature, i.e. no kind of emergency situation can allow the evasion of the obligations imposed by international law to respect and ensure the right to humane treatment of all detainees.

The idea of normalization is strictly connected with the aforementioned principle and also with the modern perception of the aim of deprivation of liberty. To put it briefly, normalization means that "life in prison shall approximate as closely as possible to the positive aspects of life in the community"[35]. The same statement cannot be found in the Principles, nonetheless the idea of normalization can be reconstructed upon the whole set of principles dealing with the rights of detainees. Moreover, the essential aim of deprivation of liberty is that of "reform, social readaptation and personal rehabilitation; reintegration into society and family life (…)"[36] it is quite easy to connect this standpoint with the idea of normalization. It is quite obvious that the total or very strict isolation of person concerned will produce many negative effects in different aspects (health condition, social abilities, hopes for normal life after release, etc.).

According to contemporary international penitentiary rules, a prisoner is not an "object" of penitentiary policy and practice. To the contrary, he or she is a partner in the whole process of social readaptation. Prisoners should enjoy a wide range of rights concerning their living conditions, health care, the possibility of access to work or to education, the right to react by way of petitions and response to judicial, administrative, or other authorities. However, the most important in this regard is the fact that the prisoners still "retain all other rights that are not lawfully taken away by the decision upon which they were deprived of their liberty"[37].

In the Principles this idea was formulated in a slightly different manner, albeit twice. Thus, in Principle II (Equality and non-

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35 See Part I, Rule 5 of the European Prison Rules (2006). A similar attitude can be found in Rule 5 of the Mandela Rules according to which "the prison regime should seek to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings".

36 Preamble to the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, paragraph 4.

37 See Part I, point 2 of the European Prison Rules (2006); in the Mandela Rules this problem was not directly treated. However the recognition of the prisoners' rights to conjugal visits (Rule 58.2) can be used as an argument for the similar position to the fact of retaining all those rights that were not legally taken away.

discrimination) in the second sentence, one can read that "every person deprived of liberty (…) shall also have the right to maintain their guarantees and exercise their fundamental rights, except for those rights which exercise is temporarily limited or restricted by law and for reasons inherent to their condition as persons deprived of liberty". Then according to Principle VIII (Rights and restriction) the Drafters underlined that "Persons deprived of liberty shall enjoy the same rights recognized 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 person deprived of liberty".

In fact, the difference in style of regulation is not substantive but rather apparent. Even the most radical stylistics cannot change the fact that being in prison implies the so-called inherent limitations. It means that the possession of rights can be in individual cases limited. However automatic limitation is prohibited. This fact is well elaborated in the literature as well as in the jurisprudence of international courts of human rights[38]. Likewise it corresponds with the normalization idea.

Returning to the Principles, a very good illustration of the above reasoning can be found in Principle XVI. According to this regulation, "Persons deprived of liberty shall have the rights to freedom of expression in their own language, association, and peaceful assembly, subject to the limitations that are strictly necessary in a democratic society to protect the rights of others or public health or morals, and maintain public order, internal security, and discipline in places of deprivation of liberty, as well as subject to other limitations permitted by law and international human rights law". Against the background of this example it is easy to build a traditional structure of limitation of a right, namely the requirements of legality, justification (protection of legitimate aims), and proportionality (test of necessity). It is worth mentioning that the similar solution cannot

38 P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, Antwerpen-Oxford 2006, pp. 343-350; B. Gronowska, *Europejski Trybunał Praw Człowieka. W poszukiwaniu efektywnej ochrony praw jednostki* [*European Court of Human Rights. In Searching for an Effective Protection of the Rights of Individual*], Toruń 2011, pp. 133-135.

be found in either the European Prison Rules (2006) or the Mandela Rules[39]. Thus, as regards the freedom of expression, association and reunion the Principles are unique.

The same may be true as far as the prisoners' work is concerned. Principle XIV starts with a very decisive style exposing, that "All persons deprived of liberty shall have the right to work, to have effective opportunities of work, and to receive a fair and equitable remuneration (…). Such labour shall never be of an afflictive nature".

Of course, the problem of prisoners' work belongs to a very well elaborated topic. However, if one compares the provisions of the Principles with the European Prison Rules (Rule 26. 1-17), despite the impressively solid regulation of the former, there is no expressive reference to the "right to work"[40]. For better orientation two regulations are worth quoting. According to Rule 26.1, "Prison work shall be approached as a positive element of the prison regime and shall never be used as a punishment". And secondly, according to Rule 26.9, "work for prisoners shall be provided by the prison authorities, either on their own or in co-operation with private contractors, inside or outside prison".

The formulation concerning prisoners' work seems to be an important factor from the viewpoint of modern penitentiary policy. To put it briefly, the difference of language used has its consequences in the field of differentiation of position of persons concerned. Thus, exposition of the "right to work" places prisoners in a more positive and creative situation, especially in context of the compulsory labour of prisoners. The second option simply required prison administration to organize the work places for prisoners.

There is no doubt that one of the biggest enemies of a good and effective prison system is the phenomenon of overcrowding. Unfortunately and without any exaggeration most of the prison systems in the world still face this problem. In the Principles firstly in Principle III point 4 strong approval of introducing alternative or substitute measures for the

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39 In the case of the European Prison Rules and the Mandela Rules only the freedom of thought, conscience and religion was clearly expressed (adequately Rule 29 and Rule 66).

40 The same can be said about the Mandela Rules in which according to Rule 96 "Sentenced prisoners shall have the opportunity to work and/or to actively participate in their rehabilitation".

deprivation of liberty was formulated. Interestingly enough in this principle one can find a recommendation for promotion of the participation of society and the family in such a way as to complement the intervention by the State.

Secondly, Principle XVII directly addresses the matter, however in the direction of possible measures against overcrowding. In my opinion, the content of this principle is rather vague. But during the preparatory works on the Principles, the participants in the consultation proposed an interesting list of alternative or substitute measures for deprivation of liberty. They were as follows: parole; conditional discharge, remission; pardon; verbal admonition; status penalties permitted by national or international law; economic or monetary measures; reparative measures such as restitution, restoration, or compensation; acceptance of responsibility, and apology to the victims, the victims' family, and the community; probation and judicial supervision; community or environmental services; referral to an attendance centre; group therapy and psychosocial treatment; house arrest; monitored liberty using electronic or other means; release on humanitarian grounds, advanced age, or terminal illness; measures applicable in indigenous justice that are compatible with the legislation in force and the opportune implementation and application of open or half-open regimes for custodial sentences[41].

In penal sciences, the opinion that the deprivation of liberty should be treated as a measure of last resort has a long history[42]. The idea of deprivation of liberty as the measure of last resort was for the first time articulated in the Preamble to the European Prison Rules of 2006[43]. As for the Principles some connections with the above problem can be found in Principle III, point 1 sec. 2. According to this principle "deprivation of liberty of children shall be applied as a measure of last resort and for

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41 *Consultation Regarding the Draft Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, p. 5, available at: http://www.cidh.org/proyectodeprincipiosybuenaspracticas.eng.htm [last accessed: 27.07.2016].

42 One of the best Polish monographs on the topic was written by J. Śliwowski, *Kara pozbawienia wolności we współczesnym świecie* [*Punishment of Deprivation of Liberty in the Contemporary World*], Warszawa 1981, pp. 11-74, 171-215, 262-294.

43 Due to this part of the Preamble "*no one shall be deprived of liberty save as a measure of last resort and in accordance with a procedure prescribed by law*"; there is no such statement in the Mandela Rules.

the minimum necessary period, and shall be limited to strictly exceptional cases". As for adults, it is recommended that "as a general rule, the deprivation of liberty of persons shall be applied for the minimum necessary period".

Thus, a different attitude is visible in the Principles. However the choice of alternative measures allows us to conclude that the Drafters of the Principles had no doubts that the deprivation of liberty has detrimental effects on the detainees. Consequently, custodial measures should be applied very carefully and with moderation.

Likewise, some other and unique specific recommendations are included in the Principles. A very good example in this regard is Principle XXI that deals with bodily searches, inspections of installations and other measures. Besides the typical considerations concerning bodily searches an expressive and absolute prohibition of the "intrusive vaginal or anal searches" was introduced. Such practices shall be forbidden by law[44]. Similarly, regulation concerning the problem of measures of solitary confinement includes as a rule the legal prohibition of solitary confinement in punishment cells. Moreover, it shall be strictly forbidden to impose such measure on pregnant women; mothers who are living with their children; and children deprived of liberty. Lastly, solitary confinement shall be permitted only as a disposition of last resort and for a strictly limited time (Principle XXII point 3).

Once again, this regulation seems to be a more far-reaching than the solutions covered by other international prison rules. Thus, according to Rule 60.5 of the European Prison Rules (2006) "Solitary confinement shall be imposed as a punishment only in exceptional cases and for specified period of time, which shall be as short as possible". In the case of the Mandela Rules the regulation is closer to that of Principles. Thus, "solitary confinement shall be used only in exceptional cases as a last

[44] No other document in the field includes such a restrictive provision. In the European Prison Rules (2006) one can read that "There shall be no internal physical searches of prisoners' bodies by prison staff" (Rule 54.6) and further: "An intimate examination related to search may be conducted by a medical practitioner only" (Rule 54.7). In the case of Mandela Rules the problem is regulated even in a more flexible way, i.e. strip and body cavity searches should be appropriately recorded (Rule 51), and this kind of searches can be conducted only by qualified health-care professionals and only if it is absolutely necessary (Rule 52).

resort, for as short time as possible (…). It shall not be imposed by virtue of a prisoner's sentence (…). The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities, women, and children" (Rule 45.1-2).

The prison population has its two "faces", i.e. prisoners and prison staff. In the prison world, even those keeping the keys to the cells are in a way "prisoners", as they spend much time in a totalitarian institution. In the Principles there are two especially important recommendation concerning the personnel. The first one focuses on the careful selection of the candidates, taking into account their ethical and moral integrity, sensitivity to cultural diversity and to gender issues, professional capacity for the work, and sense of responsibility. The second recommendation is connected with the equipment of the personnel with the necessary resources for the purpose of allowing them to perform their duties in suitable conditions, including fair and equitable remuneration, decent living conditions, and appropriate basic services.

A very important proposal is included in the Principle concerning the Institutional Inspection (Principle XXIV). Due to its first sentence "in accordance with national and international law, regular visits and inspections of places of deprivation of liberty shall be conducted by national and international institutions and organizations, in order to ascertain, at any time and under any circumstance, the conditions of deprivation of liberty and the respect for human rights". A special role in this regard is for the Inter-American Commission on Human Rights, as well as its Rapporteurships. This visible openness of the Principles for the involvement of national and international organizations in the inspection process should be highly appreciated, as it goes much further than other international penitentiary regulations.

The benefits of this idea of solid and broad co-operation between competent international institutions and organizations will produce many positive effects. Moreover, in this way, a traditional border line between universal and regional human rights standards will not be so "waterproof".

The last reflection connected with the text of the Principles is the preference for the dynamic interpretation of all the Inter-American standards. Thus, according to Principle XXV "in order to fully respect and ensure the fundamental rights and freedoms enshrined in the Inter-

American system, Member States of the Organization of American States shall utilize extensive interpretation to human rights norms, so as to apply the most favorable clause to persons deprived of liberty (…)". This kind of openness to other international penitentiary rules and norms of human rights and freedoms can serve as the best prognosis for the future. Of course, every prognosis is connected with a certain level of probability, nonetheless it is at least a solid gesture of the good will of those involved in the process.

FINAL REMARKS

Certainly, the adoption of the Principles can be seen as an important regional part of the international prison rules. Owing to the fact that their provisions are non-binding and only serve as recommendations, their final implementation in domestic prisons systems strongly relies on the good will and determination of particular states. The Inter-American System of Human Rights operates within a very difficult region (just to recall the reluctance over ratification of basic Inter-American Treaties).

Actually, the problem of taking the prison rules as a point of reference could also be observed at the level of International Courts of Human Rights activity. According to the data provided in the literature, there was a difference of willingness of the European Court on Human Rights and the Inter-American Court on Human rights as far as the proper use of international standards on detention was concerned. To put it briefly, as compared to the Inter-American Court of Human Rights, the European Court of Human Rights (especially at the early stage of its activity) has too often refused to use in its interpretative approach the international non-binding penitentiary rules and failed to integrate these standards into its own elements of purposive interpretation[45]. Fortunately, the situation has started to change since the 1990s. However, a more positive and decisive approach from both the regional Court of Human Rights as routinely used

[45] F. Seatzu, S. Fanni, *A Comparative Approach to Prisoners' Rights in the European Court of Human Rights and Inter-American Court of Human Rights*, Denver Journal of International Law and Policy 2015, vol. 44, no. 1, pp. 27-40.

for interpretation of the international penitentiary standards would strengthen their factual position.

In the Preliminary observation 2 to the Mandela Rules there is a very wise and deeply rational assumption. Accordingly "In view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however serve to stipulate constant endeavour to overcome practical difficulties in the way of their application (…)" (1). And further "the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided they are in harmony with the principles and seek to further the purposes which derived from the rules as a whole. It will always be justifiable for the central prison administration of Member States' legal framework and in that recognized departures from the rules in this spirit" (2).

This long quotation explains many possible doubts that can arise against the background of the problem of the practical implementation of international penitentiary standards. It also seems that the development of regional prison rules can be better understood in specific regions, as usually they should take into account the specific features of the region concerned. On the other hand, it can sometimes produce some controversies. A very good illustration of such situation can be found in Principle V (Due process of law) of the Principles, which in the final part, deals with the problem of death penalty sentences. This category of sentences shall be in accordance with the principles, restrictions, and prohibition established in international human rights law. In all circumstances, the convicts shall have the right to request commutation of punishment.

Actually, such a principle could be seen as a dissonance in Europe, even in the case of the Mandela Principles[46]. On the other hand, if the Principles are supposed to address real penitentiary problems, they cannot eliminate such drastic topics. What also seems important

[46] Actually such reference can be found in: United Nations. Office of the High Commissioner for Human Rights, *Human Rights and Prisons. A Pocketbook of International Human Rights Standards for Prison Officials,* New York-Geneva 2005, p. 16.

is the undertaking of the Drafters of the Mandela Rules "that non-binding nature of the provisions acknowledges the variety of Member States' legal frameworks and in that regard recognizes that Member States may adapt the application of the Mandela Rules in accordance with their domestic legal framework, as appropriate, bearing in mind the spirit and purposes of the Rules" (point 8 of the Resolution 217 A (III) to which the Mandela Rules are annexed).

Maybe it is too early to ask the question whether the penitentiary standards of the OAS can be improved. Nonetheless, some postulates *de lege ferenda* concerning the Principles have been already formulated. The first proposition concerns the strengthening of the concept of the prevention of torture and other forms of ill-treatment. One of the proposals recommends a change of content of the Principle XXIV. It could simply be completed by a reference to the prevention of torture and refer directly to the OPCAT as one of the means of institutional inspections. An alternative proposal concerns the widening of the Inter-American Commission on Human Rights competences of the possibility of issuing an interpretation in the form of a recommendation according to Article 18(b) of the Commission's Statute. Likewise, there could be a proposal that the Inter-American Commission of Human Rights could further expand the role of "other" organizations (NGOs) beyond a visiting role, as they can be active in the implementation of the Principles and the OPCAT[47].

Despite some uncertainty which is always connected with a new initiative, especially in the very complicated field of regulation, there is also great expectation concerning the creation of a better understanding of the problem as well as a more affirmative mentality to accepting the prepared legal solutions. I express the view that the Principles will not disappoint anyone interested in the problem, and consequently they support the OAS in the further advance of the actual enjoyment of human rights in the region.

47 See: supra note 30, p. 8.