



**HAL**  
open science

# When prisoners bring their knowledge to the academic and the judicial world

Gaetan Cliquennois

► **To cite this version:**

Gaetan Cliquennois. When prisoners bring their knowledge to the academic and the judicial world. Scripting Defiance, In press. hal-03512586

**HAL Id: hal-03512586**

**<https://hal.science/hal-03512586v1>**

Submitted on 15 Nov 2023

**HAL** is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

## **Chapter 7 [CHAPTER NO.]**

### **When Prisoners Bring Their Knowledge to the Academic World and to the Judicial Power in order to Oversight their Prison Conditions [CHAPTER HEADING]**

**Gaëtan Cliquennois [AUTHOR NAME]**

#### **Introduction [A-LEVEL SUBHEAD]**

Penal inflation, which consists in increasing penal sanctions for major offences (especially sexual offences and those related to terrorism), has characterized the majority of penal policies in most states worldwide and in the United States and European states in particular since at least 2001. In this regard, since the 9/11 attacks in New York, the European Union (EU) has been urging its member states to adopt repressive measures against terrorism, such as the European arrest warrant,<sup>1</sup> whose legality and compliance with the European Convention on Human Rights is clearly open to discussion (Eckes, 2010). The European Council also adopted in 2005 the EU counterterrorism strategy to fight terrorism globally and radicalisation and recruitment to terrorism in particular in 2008. The strategy was revised in June 2014 in light of evolving trends, such as lone-actor terrorism, foreign fighters and the use of social media by terrorists.<sup>2</sup> In December 2014, the council adopted guidelines for the implementation of the revised strategy by member states. Furthermore, the council adopted on 7 March 2017 a directive on combating terrorism that criminalizes acts such as undertaking training or travelling for terrorist purposes, organizing or facilitating such travel and providing or collecting funds related to terrorist groups or activities.<sup>3</sup>

These punitive European laws have been enacted without being always challenged – neither by the European Court of Justice of the EU nor by the European Court of Human Rights.<sup>4</sup> In particular, Article 15 of the European Convention on Human Rights, which enables a state to unilaterally derogate from some of its obligations to the European Convention on Human Rights (whose scope covers the forty-seven member states of the Council of Europe) in certain exceptional circumstances, has been used by certain member states such as France and the UK in the context of terrorism.<sup>5</sup> These penal policies have contributed to more convictions, causing prison overcrowding and inhuman prison conditions. In fact, this penal inflation was the main factor responsible for prison overcrowding in most of the member states of the EU, resulting in inhuman prison conditions, healthcare issues and rise in incidents of suicide and homicides behind bars.

These human rights violations committed by national prison administrations were progressively and increasingly watched and monitored by international bodies, among which are the UN Council on Human Rights, the European Court of Human Rights and the European Committee for the Prevention of Torture (CPT). In this respect, the UN and European judicial and inspectorate bodies that share the general principles and aims of what is now commonly referred to as 'global justice' have gained increasing prominence in the fields of penal and prison policy and practice over time, particularly in recent years. Each of those bodies work in their diverse capacities to ensure that human rights legislation is observed inside the borders of individual nation states.

This process of international monitoring and judicial censure has been extended over time to such an extent that certain prisoners have been progressively in a position to exert some control over their prison conditions by lodging complaints with the European Court of Human Rights and gaining the backing of some NGOs and scholars. Since 2005 at least, this monitoring system has however radically changed and expanded its scope and obligations imposed on states to such an extent that it could be described as an influential and spreading sociolegal trend which is contributing to the development of modern and democratic societies (Schwartz, 2010).

While academic attention has been paid very recently to the impressive rise of the legal framework of human rights in the realm of penal and prison policies in Europe (Van Zyl Smit and Snacken, 2009; Van Zyl Smit, 2010; Cliquennois and de Suremain, 2017; Cliquennois and Snacken, 2017; Daems, 2017; Daems and Robert, 2017), some significant issues have been neglected by the literature. First, human rights conventions, their monitoring and violations need to extend beyond documenting legal and policy issues in the European context. Second, this literature has overlooked non-EU countries, such as the US and Russia, which are characterized by a large number of prison policies, the harshness of these policies and large-scale human rights violations. Third, African countries and Eastern countries such as Bulgaria and Romania have been also under-researched though they are subjected to international monitoring concerning notably their prison overcrowding, inhumane prison conditions and lack of real and effective domestic remedies. Fourthly and lastly, the process by which prisoners and NGOs are able to monitor prison conditions through international and regional organizations is completely under-researched.

In this regard, the tasks of control and supervision achieved by the UN and the Council of Europe are indeed (according to the Consultative Assembly of the Council of Europe and to the UN Convention on Torture) delegated at a national level to NGOs and human rights groups set up to examine bills in the light of the UN and European Conventions. In this regard, These bodies prevent and denounce breaches of these conventions by the member states. In this respect, these national human rights groups, represented since 2003 at the Council of Europe through the International Conference of NGOs and at the UN through the conferences for NGOs and the UN Democracy Fund set up in 2005, may be considered as watchdogs that can inform their respective national human rights structures (such as ombudsmen, human rights commissions and equality bodies) responsible for gathering complaints against violations of human rights and bring their governments before the European Court of Human Rights (ECHR) and the UN for infringements of human rights (Cliquennois and Champetier, 2016). In other words, and also thanks to the role played by these NGOs, human rights groups and legal aid granted to prisoners, is there any evidence in addition to the constant multifaceted supervision of prisoners (as in the hypothesis of Foucault, 1975), that national Ministers of Justice and prison administrations are now also efficiently monitored and supervised by the UN and European bodies, NGOs and human rights groups and beyond by prisoners? What are the limits of this monitoring based on human rights ‘law’ in this context in terms of access to justice for prisoners and persistence of human rights violations in the face of reform?

This phenomenon is such that we assume that it leads to the development of an inverted panopticon by which certain prisoners and NGOs are in a position to challenge the authority of national prison administrations. This process fits more broadly within a defiance script through which prisoners can both challenge national authorities and legitimize incarceration (Cartuyvels, 2002). The defiance script for prisoners consists in watching professional practices, prison conditions and even potential breach of human rights rather than simply being subject to surveillance. While the defiance script to which certain prisoners can adhere might be compliant with national and international human rights and administrative law, defiant prisoners can be stigmatized by the prison staff for such monitoring of their prison conditions. This is precisely this fight between these both trends that constitute the lens of this chapter. More broadly, prison institutions constitute a specific social phenomenon that differs from other kinds of detention such as camps due to its very high level of institutionalization. Prisons are subjected to strain and paradoxical logics from privation of freedom to restrictions

of freedom and constitute an interesting case study for the defiant script in which the inverted panopticon and prison reactions to it take place. The inverted panopticon and its reaction to it by some of its opponents challenges the traditional view on prisons that are only considered to be a privation of freedom and rights.

It seems important to underline that the inverted panopticon refers to the panopticon that is a technology of power as described by Jeremy Bentham and constitutes one of the most well-known theses asserted by Foucault concerning prison (Foucault, 1975). Foucault indeed stresses in *Discipline and Punish* that the panopticon is a very efficient prison architecture based on the all-seeing eye that does not allow prisoners to check whether wardens are either present or absent (ibid.). Thanks to its conception, the panopticon is turned towards the discipline of the soul and body of prisoners (ibid.). While this theory has been massively endorsed by academic literature to analyse prison architecture and surveillance devices, scant attention has been paid to the opposite process which implies that prison institutions are scrutinized and even overseen by NGOs, human rights groups and prisoners and through (and thanks to) prisoners by a public audience (Cliquennois and de Suremain, 2018). Even though this opposite process is not architectural, it also involves the all-seeing eye in the sense that prison institutions and their staff are subject to public and judicial exposition without the possibility to know exactly when they are exposed or not. In other words, is there any evidence in addition to the constant multifaceted supervision of prisoners (as in the hypothesis of Foucault, 1975), that national prison administrations and prison institutions are now also watched by prisoners, NGOs and human rights groups, academic scholars, judges and by a more general public audience?

The lack of study of this trend dubbed ‘the inverted panopticon’ is quite surprising as it seems to have grown since the seventies due to the rise of a convict criminology (thanks to which prisoners contribute to produce knowledge), prisoners’ rights organizations and prison activists such as the Prisons Information Group (GIP) to which Foucault himself has contributed. More precisely, we argue that the inverted panopticon is fed and nurtured by prisoners, intellectuals, – the first of them being Foucault, and by NGOs and human rights groups representing prisoners and backed by international organizations. Rather than considering Foucault’s theory and its effects on prisons as prison literature generally does, we would rather take into account the militant Foucault and his influence and effects on the inverted panopticon that contradicts his own theory on prison. Furthermore, we show that Foucault contributed to a defiant script influenced by NGOs that are backed by international

organizations and international human rights law which have been totally overlooked by Foucault.

This is why we study in the first part of this article the role played by prisoners and their representatives – NGOs, human rights groups prisoners as intellectuals through the new school of convict criminology – in the rise of the inverted panopticon and the defiant script. The development of human rights and judicial complaints lodged by prisoners and prisoners' rights groups, which constitutes the second part of this article, has also significantly contributed to foster the defiant script and the inverted panopticon.

### **Prisoners' Voices and Their Insights into the Prison Reality through NGOs and the New School of Convict Criminology: the Defiant Script [A-LEVEL SUBHEAD]**

#### **Prisoners and Prisoners' Rights Organizations: The Role Played by the Prisons Information Groups and Human Rights Activists [B-LEVEL SUBHEAD]**

The role played by NGOs is essential and can be notably seen through the creation of the Prisons Information Group (GIP). In this regard, the position held by the GIP, notably on behalf of Jean-Marie Domenach, Michel Foucault and Pierre Vidal-Naquet, was to produce critical knowledge and thinking on prison, which was considered to be a black hole. They were joined in these efforts by other famous intellectuals and artists such as Jean Genet and Jean-Paul Sartre. Similar to other organizations allowing poor social classes to speak (Sitas et al., 2014), the main goal of the GIP was to give prisoners the opportunity to express their complaints in their own voice for the first time and to speak about their main concerns about detention conditions, poor hygiene and food, abuse, torture, punishment, etc. Prisoners' voices made them actors and their stories constituted critical knowledge from grassroots actors (Artieres et al., 2003) which shed new light on prisons and their daily realities. While prisoners were given access to newspapers and TV thanks to the GIP, a more general audience was given a window into the lives and experiences of prisoners through a journal that frequently published letters written by prisoners. In this regard, this process constituted the premise of the inverted panopticon phenomenon as prisoners' voices were also new insights into prison staff practices and prison officer discretion.

Following the end of the GIP, prisoners' voices were relayed by prisoners' rights organizations and human rights activists in several European countries. For instance, in France, campaigns from prisoners' rights groups were mainly the work of the Multi-professional Prison Group,<sup>6</sup> established and led by Antoine Lazarus (who was very close to Foucault) in 1974; the French section of the International Observatory of Prisons<sup>7</sup> (Observatoire international des Prisons, or the OIP, also very close to Foucault), founded in 1996; Ban Public,<sup>8</sup> founded in 1999 by a former prisoner; the Association of Families Fighting against Insecurity and Death in Prisons<sup>9</sup> (Association des Familles en Lutte contre l'Insécurité et les Décès en Détention – the AFLIDD), created in 1997 by the widow and son of a prisoner having committed suicide; the Group for the Defence of Prisoners' Family Members<sup>10</sup> (Le Collectif de Défense des Familles et Proches de Personnes Incarcérées) created in 2001 and Shed Light on Prisons (Faites la Lumière en Detention, or the FLD) founded in 2008. These campaigns consisted for the most part of posting information on websites, publishing reports (*OIP* 2000, 2003 and 2005), issuing press releases (recalling, for instance, harsh regime and poor detention conditions), participating in television programmes (by the FLD); organizing protest days against suicide and violent deaths in prison, staging events such as Ban Public's 'The Outdoor Prison Visitors' Room' or the FLD's 'Inmate Death in Prison Day' (Lyon, 8 December 2008). French prisoners' rights organizations also refer cases to the CPT, the former French National Commission for Ethics and Safety (Commission Nationale de Déontologie et de Sécurité – CNDS) and the French National Consultative Committee of Human Rights (Commission Nationale Consultative des Droits de l'Homme – CNCDH), whose objectives are to expose administration failures, even those leading to the suicide or murder of prisoners, as well as to request parliamentary investigations. One such investigation, that of 28 October 2002, led to prison visits and public reports on the day-to-day reality of imprisonment.

On a regular basis and on behalf of certain prisoners, some NGOs and members of the French Parliament and independent administrative agencies seize the French Inspector-General of places of deprivation of liberty<sup>11</sup> (Contrôleur general des lieux privés de liberté, the French oversight body of detention<sup>12</sup>) to denounce breach of fundamental rights in certain prisons<sup>13</sup>. In reaction, the French Inspector-General of places of deprivation of liberty can investigate and organise visits in all places of detention to check such fact-finding (notably brought by NGOs

and prisoners) and make public reports and statements, recommendations about their visits by pointing out the breaches of human rights they have noticed<sup>14</sup>.

In addition, the development of new information technology such as the internet and smartphone also made it easier to disseminate prisoners' voices. For instance, prisoners' family members and former prisoners have created websites, Facebook accounts<sup>15</sup> and forums and disseminated pictures of their incarceration to give to society direct access to prisoners' experience in jails and to denounce prison conditions, abuse, punishment and human rights violations. We can find on these websites pictures and even videos taken by prisoners with their mobile phones.

In this manner, prisoners' voices and insights into the daily reality of imprisonment have been relayed by prisoners' rights organizations and exposed through new information technology to the public. This process, along with the rise of convict criminology, clearly contributes to the development of the inverted panopticon.

### **The Development of Convict Criminology [B-LEVEL SUBHEAD]**

Convict criminology is the study of prison by prisoners and ex-prisoners who have become professors or graduate students. While this phenomenon emerged in the American context of mass incarceration with the published works of John Irwin, notably his book *The Felon* (1970), it has expanded its influence beyond the US to Canada, Australia and Europe (Earle, 2016). The main aim of convict criminology is to conduct inside research and studies that incorporate the experiences of prisoners and prison workers, with a view to balance the conventional representations of media and governments on prison. In this the way, prisoners and ex-prisoners have progressively contributed the prisoners' perspective to prison research and criminological knowledge.

The emerging field of convict criminology consists primarily of books and articles written by convicts or ex-convict graduate students and professors and are based on primary data sources such as interviews and observations of prison reality. The Convict Criminology group nowadays is organized as a voluntary writing and activist collective. Different members inspire or take responsibility for speaking to the media and helping authors with academic articles, research proposals, programme assessments or mentoring students and junior faculty. Some of these activities are directly funded by private foundations, including the Soros Foundation Open Society Institute (Ross et al., 2014). Thanks to this support, some prisoners



have brought their first-hand experience of imprisonment to the academic world and beyond and contributed to the inverted panopticon process as media stories about convict criminology have appeared in print in the US, Canada, Australia and Europe.

### **Litigation Undertaken by Prisoners, Their Families and Prisoners' Rights Organizations [B-LEVEL SUBHEAD]**

Prisoners' rights organizations have progressively used legal action against the prison administration and taken prison cases to courts. At the request of their families or of the prisoners themselves, in particular men condemned to very long prison sentences and detained in secure closed regimes characterised by closed doors, permanent surveillance and poor visits (as these prisoners have in general nothing to lose except their reputation among prison officers), several NGOs and prisoners' rights organizations have instructed lawyers to instigate legal proceedings before administrative courts claiming compensation from the prison administration. Generally, certain prisoners condemned to very long sentences play the role of 'jail house lawyers and main litigators' who help other prisoners with practical information, translation, education, writing documents, pre-litigation reports or making contacts with lawyers and NGOs. Sometimes, the process of defiance is even more centralized as one or several prisoners are the key litigants and they centralize complaints by serving as go-betweens for prisoners, barristers and NGOs.

For instance, in France, a pioneer and leader of litigation activities as an NGO, the OIP has obtained a hundred rulings returned by domestic courts and several rulings condemning France before the European Court of Human Rights (OIP, litigation report, 2012). Litigation activities have also been undertaken by other associations, which include former prisoners, such as Robin des lois<sup>16</sup> or Ban Public which is called association for communication on prisons and incarceration in Europe.<sup>17</sup> In their action for inmates' rights, the OIP and Ban Public, which have their own legal teams, have developed a network of lawyers, some of whom are members of the board of directors of these organizations, ready to litigate prison cases and lodge complaints with administrative courts in particular. In this way, a network of lawyers (barristers) dubbed Association A3D (Association of Lawyers for the Defence of Prisoners' Rights) was created in May 2015 on behalf of the OIP, and one year later had brought together nearly 70 members, primarily young professionals ready to undertake prison litigation.<sup>18</sup> The network allows, in particular, through digital tools, to create a collective

knowledge source and to share good litigation practices and complaints forms at the national level in the field of prison law in order to be more efficient in terms of litigation and to reinforce the impact of prison litigation. One of the best judicial results obtained by the A3D was the judgment ruled in 2020 by the French Council of State that condemned the French State for inhumane conditions of detention and retaliation (such as full strip-searches, forced and inhuman hearing, transfer to a cell located in a specific prison wing, pressures and threats which infringe human dignity) by the prison staff against the litigation efforts undertaken by a prisoner<sup>19</sup>.

In the same manner than the A3D the OIP's thinking is that the prison administration is obliged to respect court judgements. According to this optimistic vision of law and human rights, legal challenges can be used to achieve social progress (Scheingold, 2004) and to denounce prison conditions and human rights violations committed by the prison administration. Trials also serve as showcases for the OIP and A3D lawyers and barristers: 'It is interesting to see how the prison administration replies publicly to our litigation: it is a way to expose their practice and even their so-called legal arguments to public scrutiny' (interview with the OIP lawyer); "The prison administration lacks transparency and our legal action allow us to get more transparency on prisons and conditions of detention (interview with an A3D lawyer) Litigation indeed fosters public scrutiny and the inverted panopticon as judgements are often well publicized by the NGOs and the media.

Nevertheless, it could be misleading to consider the rise of prisoners' rights organizations to be purely a national phenomenon as they are encouraged and promoted by international and European human rights organizations. The tasks of control and monitoring of human rights are delegated by the UN and the Council of Europe to NGOs at the national level. NGOs are in charge of monitoring domestic legal instruments in the light of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 1950 European Convention on Human Rights and preventing and denouncing human rights violations in their countries.<sup>20</sup> The role played by NGOs is also recognized by the Vienna Convention and the Action Programme adopted at the World Conference on Human Rights of 25 June 1993 according to which NGOs are authorized to inform their national human rights institutions, such as ombudsmen, responsible for gathering complaints related to human rights violations.

## **The Defiant Script through the United Nations, the European and the African Human Rights Regime [A-LEVEL SUBHEAD]**

The process of judicial control over many institutions and sectors based on human rights is often described as an influential and growing socio-legal trend which is contributing to the development and reform of modern societies. This seems to be particularly the case for prisons and other penal institutions, as international bodies and the courts have tried to influence prison policies since the 1960s at least. The UN and European judicial and inspectorate bodies that share the same general principles and aims of what is now commonly referred to as ‘global justice’ have gained increasing prominence in the fields of penal and prison policy and practice in recent years, each of those bodies working in their diverse capacities to ensure that European human rights legislation is observed inside the borders of individual nation states. In fact, national penal and prison policies in Europe are increasingly controlled and monitored by the Council of Europe. This increasing monitoring has progressively allowed prisoners to contribute to and foster the defiance script.

## **United Nations Monitoring: the Development of Independent Ombudsmen [B-LEVEL SUBHEAD]**

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984 by many nations including the USA and most European states, that came into force on 26 June 1987, established the UN Committee Against Torture (CAT) responsible for monitoring state parties in the implementation of the convention. In particular, this convention against torture set up a monitoring procedure that obliges all state parties to submit regular reports to the CAT on how they are going to implement the rights enshrined by the convention.

A major change has been the replacement of the UN Commission on Human Rights by the UN Council on Human Rights in 2006, which resulted in the addition of Universal Periodic Reviews (UPR) to the monitoring apparatus of the commission. While with the commission only certain countries were targeted by UN’s human rights monitoring, the UPR led to regular monitoring of all forty-seven states of the Council of Human Rights. All in all, the reform of the Committee on Human Rights has been accompanied by a significant increase in the monitoring of human rights exercised over the United States and African and European states.

This UN monitoring has been also massively reinforced since the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>21</sup> of 18 December 2002 created the Subcommittee on Prevention of Torture (SPT), which has a mandate to visit places within the state parties where persons are deprived of their liberty.

A major shift has also been observed in UN monitoring since the introduction of OPCAT to the convention, in which the US has not taken part, as it fosters independent national monitoring of prisons. This protocol obliges member states to establish independent National Preventive Mechanisms (NPMs) for the prevention of torture at the domestic level. These national preventative mechanisms, which act under the authority of the UN Committee on Human Rights, are charged with performing regular inspections – without informing the prison administration about such inspections to avoid any elaborate preparations – visiting places of detention, hearing appeals by prisoners, making recommendations to their national authorities, submitting proposals and observations concerning existing or draft legislation and drawing up a public annual report for the relevant parliaments. In response to these international obligations, some African countries, such as Congo, Mali, Niger and Nigeria, South American countries such as Argentina, Brazil and Mexico, have established their national ombudsman in charge of oversighting prison conditions. In the same way, European countries<sup>22</sup> such as France,<sup>23</sup> Germany<sup>24</sup> and the UK<sup>25</sup> have respectively set up the French Inspector-General (Contrôleur général) of Places of Deprivation of Liberty,<sup>26</sup> the German Joint Commission of the Länder<sup>27</sup> and the British Independent Inspectorate for Prisons and Youth Detention<sup>28</sup> which inspect prisons and issue and transmit annual reports on prison conditions to the Subcommittee on Prevention of Torture.

### **The European Human Rights Regime [B-LEVEL SUBHEAD]**

The influence of this European monitoring seems to be deep and broad, resulting from the interaction between, and the mutual reinforcement of, three distinct organs: the European Court of Human Rights (ECHR), the Committee for the Prevention of Torture (CPT) and the Committee of Ministers (CM). In particular, the ECHR has gained power and developed over time a jurisprudence more and more in favour of prisoners and the inverted panopticon.

## **The European Court of Human Rights [C-LEVEL SUBHEAD]**

The ECHR was established in 1953. It allows NGOs and citizens of the forty-seven Council of Europe member states to directly lodge complaints with it. The ECHR increased significantly its power and influence over time. This increase is due to five factors in particular: the evolution of the ECHR's architecture into a quasi-constitutional court;<sup>29</sup> the power of the ECHR since 2004 to issue pilot and quasi-pilot judgements that bring together groups of similar cases of human rights violations linked to structural and systemic problems and its power to order member-state governments to implement corrective legislative and/or administrative measures, which must be reported in action plans submitted to the Committee of Ministers of the Council of Europe;<sup>30</sup> the ECHR's increased use of a wide range of bold interpretation techniques to protect the rights of citizens, in particular detainees;<sup>31</sup> the increased interaction of the ECHR with other Council of Europe bodies such as the CPT during its visits to member states and the Commissioner for Human Rights;<sup>32</sup> and the increased interaction of the ECHR with the European Union, which, for instance, funds programmes to improve the implementation of ECHR case law and European penitentiary standards for the prevention of suicide.<sup>33</sup>

This is why the protection of human rights of citizens and, more specifically, detainees, has been gradually imposed on its member states by the Council of Europe<sup>34</sup> as a 'common European law on detention'.

In this respect, the court has increased over time the content of substantial and procedural obligations imposed on states having committed human rights violations. Procedural obligations are defined as the obligations on the burden of states and are supposed to reinforce internal protection of a substantial number of human rights guaranteed by the European Convention on Human Rights. Procedural obligations therefore involve a proactive behaviour from national authorities to insure the useful effect of the protected right.<sup>35</sup> We take here some examples of several rights enshrined by the European Convention, which are subject to a special protection and attention from the Strasbourg Court and clearly reinforce the inverted panopticon and oversight of prisons.

## **The Right to Life and Suicide and Homicide Prevention in Jail (Article 2 of the European Convention) [D-LEVEL SUBHEAD]**

The ECHR considers the right to life to be a priority and stipulates that the right to life should not only be passively respected but that the prison administration has an obligation to take practical, suitably adapted steps to protect this right when the risk of suicide and homicide is known or foreseeable on the basis of Article 2. However, this obligation is ambivalent as it both involves an increase of disciplinary and surveillance measures for prisoners and a growing control over prison administrations and institutions.

On the one hand, the Strasbourg Court imposes on national authorities preventive and surveillance measures – such as permanent CCTV for prisoners facing with suicide crisis, special cells with no anchor points, fireproof mattresses and tear-proof sheets, reinforcement of physical surveillance, removal of all objects or substances that could be used to commit suicide or murder including scarves and bed sheets, particularly intense surveillance, etc. – to respect the right to life and prevent any death (Cliquennois and Champetier, 2013; Cliquennois, 2010). Consequently, these prevention systems reinforce the punitive approach to prison since prisoners registered on the ‘suicide watch list’ and designated as ‘high risk’ are transferred for at least twenty-four hours to special cells with no anchor points and equipped with video surveillance, fireproof mattresses and tear-proof sheets. The prisoners at high risk are also dressed in special tear-proof clothes and are observed by prison staff round the clock.<sup>37</sup> Even prisoners assessed at medium risk of suicide are placed under enhanced surveillance by prison staff and offered psychiatric counselling.<sup>38</sup> Prison officers are also required to complete observation forms about each medium-risk prisoner.<sup>39</sup>

On the other hand, national states are requested by the ECHR under Article 2 to investigate the death of prisoners in order to give a coherent and true explanation of the death, which allows the court to determine responsibility and liability.<sup>40</sup> According to the ECHR, Article 2 obliges national authorities to conduct investigations into all deaths in custody that are formal, independent (in the sense that the investigators are not connected in any way to the officials involved in the death), impartial, prompt and effective.<sup>41</sup> These investigations must determine the cause of death (suicide, homicide or accident), the exact circumstances and the liability of individuals or institutions, with appropriate sanctions in the event of suicide.<sup>42</sup> This positive obligation imposed on national governments by the ECHR is derived from the UN’s Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances.<sup>43</sup> In addition, the investigation must be

based on eyewitness accounts, expert opinions, medical and forensic evidence, an autopsy to accurately and fully report injuries where appropriate and an objective clinical analysis, including the cause of death.<sup>44</sup> Regarding the autopsy, the ECHR also applies the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions that includes a model autopsy protocol which provides authoritative guidelines for the conduct of autopsies by public prosecutors and medical staff.<sup>45</sup>

The primary purpose of the investigation should be to ensure the effective implementation of domestic laws protecting the right to life and, in cases where national government agents or bodies are involved, to ensure that they are held accountable for the deaths of people under their responsibility<sup>46</sup>. As the ECHR puts it, another aim of such investigation and its promptness is for national authorities to ‘maintain public confidence in their adherence to the rule of law and to prevent any appearance of collusion in, or tolerance of, unlawful acts’.<sup>47</sup>

As this procedural obligation of investigation must meet several requirements imposed by the ECHR such as independence, effectiveness, public scrutiny and celerity,<sup>48</sup> these requirements increase, by definition and in practice, policing, medical, psychiatric, judicial and prisoners’ insights into the prison reality through interviews of witnesses, prisoners, prisoners’ family members and prison staff for investigative purposes; production of autopsies, medical and psychiatric reports; taking videos and pictures of the prison facility, the cells, the body of the prisoner and so forth. In addition, investigations into death of prisoners which are often mediatized (Cliquennois and Champetier, 2013) oblige the prison administration to carry out internal inspections to foster its defence against prisoners and prisoners’ family members and avoid a condemnation pronounced by national jurisdictions and the ECHR. A professional control over prison is added thanks to this procedural obligation imposed by the Strasbourg Court. The investigation requested by the ECHR therefore leads to an increase of insights into the day-to-day prison reality.

### **Prohibition of Torture or Inhuman or Degrading Treatment (Article 3 of the European Convention) [D-LEVEL SUBHEAD]**

Another priority pursued by the court is related to the prohibition of torture or inhuman or degrading treatment, which raises obligations of prevention incumbent on the member states

(Prison Litigation Network, 2016). These obligations, which also foster the inverted panopticon process, are twofold.

First, these obligations also cover investigations and techniques that are necessary to prove human rights violations under Article 3 (ibid.). For instance, evidence of bad and inhuman treatment generated by poor prison conditions involve investigations conducted by surveyors, ergonomists, hygienists and doctors in prison facilities with a view to determining the physical and topological features of prison cells and wings. This new kind of expertise also implies videos and pictures that increase insights into prison facilities can even lead to the renovation and closure of prisons that contravene to Article 3; in Italy and France, some prison facilities have been destroyed due to ECHR orders. In some cases, rulings delivered by the European Court has condemned prison architecture deemed to have too much surveillance. In this way, the traditional panopticon is reprehended (ibid.).

Second, the European Court has ordered the implementation of effective domestic remedies, which have to meet qualitative criteria such as effectiveness, independence, contradictory (by allowing the accused person to defend him/herself through hearings), adequate motivation of facts and decisions, etc., to give access to justice and the opportunity to complain about conditions of detention for prisoners. According to the ECHR, this last objective can be achieved by equipping the courts with appropriate legal tools, allowing them to consider the problem underlying an individual complaint and thus effectively deal with situations of massive and concurrent violations of prisoners' rights resulting from inadequate detention conditions in a given facility.<sup>52</sup>

### **The Committee for the Prevention of Torture [C-LEVEL SUBHEAD]**

The CPT was established in November 1989 as a consequence of the European Convention on the Prevention of Torture drafted by the International Conferences of NGOs and signed by fifteen states in 1987. Since then, all forty-seven member states have ratified the convention. Members of the committee, who are independent and impartial experts from a variety of backgrounds – including lawyers, judges, medical doctors, prison governors and specialists in criminology, prison or police matters – are elected by the Council of Ministers of the Council of Europe from a short list drawn up by the Parliamentary Assembly of the Council of Europe.



The CPT constitutes the inspectorate organ of the Council of Europe, a non-judicial preventive mechanism to protect persons deprived of their liberty against torture and other forms of ill-treatment, and it is a complement to the judicial work of the ECHR.

In this respect, the committee organizes visits to places of detention including prisons, juvenile detention centres, police stations, holding centres for immigration detainees, psychiatric hospitals and centres for the mentally disabled and the elderly in order to assess how persons deprived of their liberty are treated. To this end, the CPT regularly hears and interviews prisoners to get a more precise insight into the prison institution. It has developed its own standards and methods in order to protect civilians from torture and inhuman and degrading treatment. After each visit, the CPT sends to the concerned state a detailed public report and requests a detailed response to the issues raised in its report.

The standards and public reports released by the CPT and the recommendations issued by the Committee of Ministers, such as the European Prison Rules, have served as evidence and standards for the ECHR. Conversely, the rulings made by the ECHR have inspired and enforced the recommendations and standards issued by the European Committee of Ministers as well as the reports released by the CPT (van Zyl Smit & Snacken 2009; Snacken, 2011; Snacken and Dumortier, 2012; Cliquennois and Champetier, 2013).

## **The African Human Rights Regime [B-LEVEL SUBHEAD]**

### **The African Charter on Human and Peoples' Rights [C-LEVEL SUBHEAD]**

The African Charter on Human and Peoples' Rights, also known as the Banjul Charter, constitutes an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.

It was set up by the Organization of African Unity (OAU, since replaced by the African Union) which, at its 1979 Assembly of Heads of State and Government, adopted a resolution calling for the creation of a committee of experts to draft a continent-wide human rights instrument, like those that already existed in Europe and similar to the European Convention on Human Rights and the American Convention on Human Rights. This committee produced a draft that was unanimously approved at the OAU's eighteenth assembly held in June 1981, in Nairobi, Kenya. The African Charter on Human and Peoples' Rights came into force on 21 October 1986, in honour of which 21 October was declared African Human Rights Day.

The charter recognizes most universally accepted civil and political rights. The civil and political rights enshrined in the charter cover the right to freedom from discrimination (Article 2 and 18(3)), equality (Article 3), life and personal integrity (Article 4), dignity (Article 5), freedom from slavery (Article 5), freedom from cruel, inhuman or degrading treatment or punishment (Article 5), rights to due process concerning arrest and detention (Article 6), the right to a fair trial (Article 7 and 25), freedom of religion (Article 8), freedom of information and expression (Article 9), freedom of association (Article 10), freedom to assembly (Article 11), freedom of movement (Article 12), freedom of political participation (Article 13) and the right to property (Article 14).

The charter also enshrines certain economic, social and cultural rights. Overall, the charter is considered to put emphasis on these rights. It also recognizes the right to work (Article 15), the right to health (Article 16), and the right to education (Article 17).

Oversight and interpretation of the charter is the remit of the African Commission on Human and Peoples' Rights, which was created in 1987. A protocol to the charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights was to be created.

### **The African Commission on Human and Peoples' Rights [C-LEVEL SUBHEAD]**

The African Charter created the African Commission on Human and Peoples' Rights which was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The commission consists of eleven members elected by the African Assembly from experts nominated by the state parties to the charter.

The African Commission is mainly in charge of the promotion of human rights, the protection of human and peoples' rights and the interpretation of the African Charter on Human and Peoples' Rights.

### **Promotional Function [D-LEVEL SUBHEAD]**

The promotional function of the African Commission consists in sensitizing the population and disseminating information on human and peoples' rights in Africa. To achieve this, the commission is entrusted under article 45(1) of the African Charter on Human and Peoples' Rights to 'collect document, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate

information, encourage national and local institutions concerned with human and peoples' rights and, should the case arise, give its views or make recommendations to governments'<sup>53</sup>.

The commission has intensively cooperated with NGOs and intergovernmental organizations to set up a documentation centre used for human rights studies and research, and to organize several seminars, symposia and conferences aimed at promoting human and peoples' rights within the African continent. The commission has also been collaborating with other human rights institutions (both intergovernmental and non-governmental) in many areas relating to the promotion and protection of human rights. In this regard, in a bid to strengthen cooperation, the commission has been granting observer status to NGOs since 1988. As at its twenty-second ordinary session held in 1997, over 200 NGOs, among which were those aiming at protecting prisoners' rights, received such status. A special status to national human rights institutions has also been granted to the African Commission in order to reinforce their partnership considered by the Commission to be invaluable partners in the promotion of human and peoples' rights in the continent.

In the same way, the commission has also drafted and released several human rights documents, including the Review of the African Commission, its annual activity reports, the African Charter and the Commission's Rules of Procedure.

Members of the commission have also been allocated states on the continent for promotional activities. The members are entrusted to visit these states and organize lectures with various institutions to discuss the African Charter and the commission. They report on their intersession activities at each session of the commission.

The commission has also recruited special rapporteurs on prisons and other places of detention in Africa on arbitrary, summary and extrajudicial executions, and on the human rights of women in Africa. These rapporteurs play a significant role by researching, gathering and documenting information on human rights violations in places of detention. This information is then used by the commission to formulate advice and recommendations to African states.

The commission is also supposed to 'formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation' (Article 45(1)(b) of the charter). It is also mandated under article 45(1)(c) to cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

Intense collaboration and cooperation have also been sought with other regional and international institutions, among which are the ECHR, the Inter-American Commission and the Inter-American Court of Human Rights.

### **Protection of Human Rights [D-LEVEL SUBHEAD]**

The protection of human rights and the interpretation of the African Charter are notably carried out by the African Commission through its responses to the reports that state parties have to submit to the African Charter every two years on legislative or other measures they have taken to give effect to the rights and freedoms recognized in the charter. The aim of such monitoring is to ensure the protection of the rights and freedoms recognized and guaranteed by the charter (Article 45 (2)). In this perspective, the commission studies these reports and makes recommendations at the session dialogues with representatives from the states. NGOs and ordinary citizens are also allowed to request copies of these reports from the Secretariat of the commission and study them. They can draft counter-reports or recommend to the commission questions that could be asked to the state representatives. In this manner, the commission is required to monitor that citizens effectively enjoy the rights contained in the charter. The commission must check on a regular basis that the states do not violate these rights and, if they do, that the rights of the victims are reinstated.

For that purpose, the charter has established a ‘communication procedure’, which is a complaint system through which an individual, NGO or group of individuals, who allege that their right or those of others have been or are being violated, can petition and take their case to the commission. A communication can also be made by a state party to the charter to claim that another state party has violated any of the provisions in the charter. If the communication meets the criteria set out in Article 56 of the charter, it will be formally accepted for consideration by the commission. The defendant state will then be informed about the allegations and invited to submit its comments on them.

Thus, the commission will rule whether there has been any violation and will make recommendations to the concerned state and to the African Assembly on what the member state should do and remedy the harm caused to the victim. The commission has also the option to initiate friendly settlements, where the complainant and the accused state negotiate to settle the dispute amicably.

The commission has also sent missions to several state parties to investigate allegations of massive and serious human rights violations. At the end of such a mission, the commission is able to make recommendations to the states concerned on how to remedy the human rights situation. Furthermore, in emergency situations that imply that the life of the victim is in imminent danger, the commission might invoke provisional measures and require the state to delay any action pending its final decision on the matter, as per Rule 111 of its Rules of Procedure.

### **Interpretation of the African Charter [D-LEVEL SUBHEAD]**

Article 45(3) of the charter also entrusts the commission with interpreting the provisions of the charter on behalf of a state party, an institution of the Organization of African Unity (OAU) or an African organization recognized by the OAU. To date, neither the OAU nor a state party to the charter has approached the commission for an interpretation of any of the provisions of the charter.

Nevertheless, some NGOs have sought and obtained through draft resolutions the interpretation of some of the provisions in the charter. Through this method, the commission has adopted many resolutions which give clarity and a broader interpretation to some of the ambiguous and ambivalent provisions in the charter.

### **The African Court on Human and Peoples' Rights [C-LEVEL SUBHEAD]**

The African Court on Human and Peoples' Rights is a continental court established by African countries to protect human and peoples' rights in Africa, as enshrined in the African Charter. The court was set up by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which was adopted by member states of the then OAU in Ouagadougou, Burkina Faso, in June 1998. The protocol came into force on 25 January 2004. The court complements and reinforces the functions carried out by the African Commission on Human and Peoples' Rights.

The court may receive cases filed by the African Commission of Human and Peoples' Rights, state parties to the protocol and African intergovernmental organizations. NGOs with observer status before the African Commission and individuals can also bring cases directly

before the court as long as the state against which they are complaining has deposited the Article 34(6) declaration recognizing the jurisdiction of the court to accept cases from individuals and NGOs.

As of July 2021 only nine of the thirty state parties to the protocol have made the declaration recognizing the competence of the court to receive cases from NGOs and individuals. The nine states are Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania, the Gambia and the Republic of Tunisia. The thirty states which have ratified the protocol are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.

The court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples' Rights, the protocol and any other relevant human rights instrument ratified by the states concerned. Specifically, the court has two types of jurisdiction: contentious and advisory.

Regarding its jurisprudence, in the *Alex Thomas v. United Republic of Tanzania* case, the African court had to decide on the lawfulness of the imprisonment of over thirty years of a Tanzanian applicant. The court quashed the sentence pronounced by the Tanzanian court on 20 November 2015 on the grounds that the sentence was unlawful and that the right to liberty was violated.<sup>54</sup> Furthermore, the court found that the applicant was denied the right to be heard, to defend himself<sup>55</sup> and to get free legal aid to which he was entitled.<sup>56</sup>

In *Lohe Issa Konate v. Burkina Faso*,<sup>57</sup> a case where a journalist was condemned to a one-year term of imprisonment for having denounced in a journal the prosecutor of Faso, the court required Burkina Faso to have him released immediately or, alternatively, to provide him with adequate medical care. The applicant was backed up by some influential NGOs that intervene in the case as amici curiae: the Centre for Human Rights, Comité pour la Protection des Journalistes, Media Institute of Southern Africa, Pan African Human Rights Defenders Network, Pan African Lawyers Union, PEN International and Nation PWN Centres, Southern Africa Litigation Centre and World Association of Newspapers and News Publishers.

As regards to provisional measures, the applicant claimed that his health had deteriorated since his detention and he needed to be provided with medication and adequate medical care. The African court ruled for the applicant's request for provisional measures on 4 October 2013 by considering that the situation in which the applicant was could cause irreparable harm to him.<sup>58</sup> According to the court, the applicant had the right to access all medical care that his health condition needed.<sup>59</sup> Consequently, the court required Burkina Faso to provide the applicant with medication and healthcare for the entire period of his detention.<sup>60</sup>

On the merits of the application, the African court decided that Burkina Faso had violated the right to freedom of the applicant and that defamation should not be punishable by prison sentences and must be decriminalized.<sup>61</sup> 'The Court notes that, for now, defamation is an offense punishable by imprisonment in the legislation of the Respondent State, and that the latter failed to show how a penalty of imprisonment was a necessary limitation to freedom of expression in order to protect the rights and reputation of members of the judiciary'. In this manner, the African court could significantly orient the penal and prison policy of Burkina Faso through this case and under the pressure exerted by some influential NGOs helping the prisoner. The Court ordered Burkina Faso to amend its legislation on defamation in order to make it compliant with article 9 of the Charter: by repealing custodial sentences for acts of defamation and by adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments'.<sup>62</sup>

In addition to the African Court, the African Special Rapporteur on Prisons and Conditions of Detention was created during the 20th Ordinary Session of the Commission, following the Seminar on Prison Conditions in Africa (Kampala, 19 - 21 September 1996). The Special Rapporteur's remit is to examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights. The various Special Rapporteurs have been active, among others by holding missions (among which visits) to the various State Parties – since 1997, over 20 missions have taken place and 16 resolutions on detention adopted<sup>63</sup>.

## **Conclusion [A-LEVEL SUBHEAD]**

The fight undertaken by Foucault through his participation in the Prisons Information Group has probably changed prison reality and therefore invalidated his analysis and study of prison.

In this regard, analyses proposed by sociologists, historians, lawyers, etc. tend to integrate the social reality they propose to study and influence it. Foucault has certainly contributed to the development of the inverted panopticon that implies that prisoners have increased their insights and even oversight of their prison administration and facilities. This phenomenon is such that we assume that it leads to the development of an inverted panopticon by which certain prisoners and NGOs are in a position to challenge the authority of national prison administrations. This trend has also been fostered by the role played by NGOs and the development of an international and European human rights regime.

In this regard, the inverted panopticon to which Foucault has contributed through his commitment as an activist, along with other activists, and his fight against the justice and prison administration could constitute a double paradox. The first paradox is that the inverted panopticon partly relies on human rights while Foucault was very reluctant to address law and human rights in general. The second paradox is that the inverted panopticon entails not only the all-seeing eye but also other dimensions that are concerned with the content of incarceration and penal and prison policies.

This process fits more broadly within a defiance script by why prisoners can on the one hand challenge national prison authorities, who are then obliged to make some concessions, and on the other hand legitimize incarceration through their participation as stakeholders in the betterment of prison conditions. The defiance script consists for certain prisoners in watching professional practices and prison conditions rather than simply being subject to surveillance. It constitutes for these prisoners both a co-optation and cooperation with human rights activists and institutions in which prisoners continue to be embedded through the inverted panopticon.

---

<sup>1</sup> 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>

<sup>2</sup> See also the statement by the members of the European Council on the fight against terrorism, 12 February 2015, available at <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/history-fight-against-terrorism/>

<sup>3</sup> Directive of the European Parliament and of the European Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 23 February 2017 PE-CONS 53/16, available at <https://data.consilium.europa.eu>

<sup>4</sup> ECHR, *Terrorism and the European Convention on Human Rights*, Factsheets, December 2017; ECHR, *A. and Others v. the United Kingdom*, 19 February 2009, n° 3455/05.

<sup>5</sup> ECHR, *Derogation in Time of Emergency*, Factsheets, November 2017.



---

<sup>6</sup> See *Groupe Multiprofessionnel Prison*, available at <https://gmprison.wordpress.com/>, accessed 20 October 2021.

<sup>7</sup> See *Ban Public*, available at [www.prison.eu.org](http://www.prison.eu.org), accessed 20 October 2021; and *Observatoire International Des Prisons: Section Francaise*, available at [www.oip.org](http://www.oip.org), accessed 20 October 2021.

<sup>8</sup> See ‘Qui sommes-nous ?’, *Ban Public*, available at [http://prison.eu.org/spip.php?page=rubrique&id\\_rubrique=5](http://prison.eu.org/spip.php?page=rubrique&id_rubrique=5), accessed 20 October 2021.

<sup>9</sup> See Nathalie Guibert, ‘décision du conseil d’Etat du 17 déc 2008’, *A.F.L.I.D.D.*, available at <http://aflidd.over-blog.com/article-25915713.html>, accessed 20 October 2021.

<sup>10</sup> See ‘Qui sommes nous?’, *CDFPPI*, available at <http://cdfppi.free.fr/assoc.htm>, accessed 20 October 2021.

<sup>11</sup> For instance, the NGO A3D seized the Inspector-General of places of deprivation of liberty in December 2019 to denounce the mandatory removal of barristers’ wonderbra in prison. See <https://www.association-a3d.fr/articles/66572-les-avocates-et-leurs-soutiens-gorge-ne-seront-plus-interdits-de-parloirs>

<sup>12</sup> See <https://www.cglpl.fr/>

<sup>13</sup> <https://www.cglpl.fr/saisir-le-cglpl/qui/>

<sup>14</sup> <https://www.cglpl.fr/rapports-et-recommandations/dernieres-recommandations/>; <https://www.cglpl.fr/rapports-et-recommandations/les-rapports-de-visite/>

<sup>15</sup> See for instance the Facebook page, *femme de détenu*, available at <https://fr-fr.facebook.com/femme-de-d%C3%A9tenu-219014641500198/>, accessed 20 October 2021.

<sup>16</sup> See, for example, CE, 29 March 2010, *OIP-SF and Korber*, No. 319043. The association is directed by François Korber, a former prisoner who was at the origin of several appeals during his time in prison. See, for example, CE, 4 November 1994, No.157435; CE, 30 July. 2003, No. 249563; CE, 15 July 2004, No.265594.

<sup>17</sup> See, for example, CE, 24 September 2014, No. 362472.

<sup>18</sup> See A3D’s Twitter page, available at <https://twitter.com/associationa3d>, accessed 21 October 2021.

<sup>19</sup> Council of State, Decision n°447141, 16 December 2020.

<sup>20</sup> According to the Consultative Assembly of the Council of Europe held from 18 to 22 October 1971 at the Parliamentary Conference on Human Rights.

<sup>21</sup> The OPCAT was adopted by the General Assembly of the United Nations (57/99) on 18 December 2002 and came into force in June 2006.

<sup>22</sup> In December 2013, among the EU’s twenty-seven member states, three had not yet signed the Optional Protocol: Latvia, Lithuania and Slovakia; three signatory countries had not yet ratified the Optional Protocol: Belgium, Finland and Greece.

<sup>23</sup> UN Committee against Torture, Draft Consideration of Reports submitted by state parties (France) under Article 19 of the Convention, Concluding Observations of the Committee against Torture, forty-fourth session (26 April–14 May 2010), CAT/C/FRA/CO/4-6/CRP.1. The Committee welcomes France’s ratification of the Optional Protocol to the Convention and ‘‘the subsequent establishment, under the Act of 30 October 2007 (Act n°2007- 1545), of the post of Inspector-General (Contrôleur général) of places of deprivation of liberty, which constitutes a national preventive mechanism within the meaning of the Optional Protocol.’’

<sup>24</sup> The UN Committee against Torture, Consideration of Reports submitted by state parties (Germany) under Article 19 of the Convention, Concluding Observations of the Committee against Torture forty-seventh session (31 October–25 November 2011), 12 December 2011 CAT/C/DEU/CO/5. The Committee welcomes Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, on 4 December 2008 and ‘‘the establishment of the National Agency for the Prevention of Torture, composed of the Federal Agency and the Joint Commission of the Länder, which has been mandated to serve as independent national preventive mechanism under the Optional Protocol to the Convention’’.

<sup>25</sup> UN Committee against Torture, Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, adopted by the Committee at its fiftieth session (6–31 May 2013), 24 June 2013 CAT/C/GBR/CO/5.

<sup>26</sup> The Inspector-General of Places of Deprivation of Liberty, who is nominated for six years, has a staff composed of fifteen permanent inspectors and seventeen independent contractors acting as inspectors. See ‘Présentation de l’équipe’, *Contrôleur général des lieux de privation de liberté*, available at <http://www.cglpl.fr/missions-et-actions/presentation-de-lequipe/>, accessed 21 October 2021.

<sup>27</sup> In addition to the Joint Commission of the Länder, the petitions committees are entitled in some of the Länder to make unannounced visits to places of detention.

<sup>28</sup> The UK counts at least three levels of independent inspection for prisons, each one operating independently from the others:

At the local level, monitoring boards made up of volunteers recruited from the general population carry out at least two or three visits of the prisons to which they have been designated per week on a continual basis.

---

At the national level, the National Prison Inspectorates carry out programmes of inspections for prisons. In addition, the national prison ombudsmen and – in Scotland the Independent Prisons Complaints Commissioner – investigate individual complaints lodged by prisoners.

<sup>29</sup> See in particular Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Restructuring of the Control Mechanism established by the Convention, Strasbourg, 11 May 1994. Also see Sadurski, ‘Partnering with Strasbourg’; Christoffersen and Madsen, *The European Court of Human Rights between Law and Politics*; Føllesdal, Peters and Ulfstein, *Constituting Europe*.

<sup>30</sup> Council of Europe, Resolution (2004)3 of the Committee of Ministers on Judgments Revealing an Underlying Systemic Problem. Strasbourg, 12 May 2004.

<sup>31</sup> Author A.

<sup>32</sup> Morgan and Evans, *Combating Torture in Europe*; Smit and Snacken, *Principles of European Prison Law and Policy*.

<sup>33</sup> Criminal justice and human rights programmes funded by the Directorate-General for Justice of the European Commission. For example, JUST / 2013 / JPEN / AG / 4554 funds the implementation of a suicide prevention system in several European countries, in accordance with the case law of the ECHR and as per CPT standards.

<sup>34</sup> Mayerfeld, ‘A Madisonian Argument for Strengthening International Human Rights Institutions’.

<sup>35</sup> Sudre, ‘Les “obligations positives” dans la jurisprudence européenne des droits de l’homme’.

<sup>37</sup> Memorandum, 15 June 2009; Memorandum, 17 December 2009.

<sup>38</sup> Memorandum, 7 July 2009.

<sup>39</sup> *Ibid.*

<sup>40</sup> ECHR, 3 April 2001, *Keenan v United Kingdom*, n° 27229/95: 88, available at <http://hudoc.echr.coe.int/fre?i=001-59365>

<sup>41</sup> ECHR, *Paul and Audrey Edwards v. the United Kingdom*, 14 March 2002, n° 46477/99: 70–73, available at <http://hudoc.echr.coe.int/eng?i=001-60323>

<sup>42</sup> ECHR, *Troubnikov v. Russia*, 5 July 2005, n°49790/99: 86–88, available at <http://hudoc.echr.coe.int/eng?i=001-69616>

<sup>43</sup> UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions, adopted in Resolution 1989/65, 24 May 1989: 9, available at <https://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>

<sup>44</sup> *Ibid.*

<sup>45</sup> UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted in Resolution 1989/65, 24 May 1989: 9.

<sup>46</sup> ECHR, *De Donder and De Clippel v. Belgium*, 6 December 2011, n° 8595/06: 61, available at <http://hudoc.echr.coe.int/eng?i=001-107737>

<sup>47</sup> ECHR, *Paul and Audrey Edwards v. the United Kingdom*, 14 March 2002, n° 46477/99: 72; *Šilih v. Slovenia*, 9 April 2009, n°71463/01: 195.

<sup>48</sup> *Ibid.*

<sup>52</sup> ECHR, *Ananyev and Others v. Russia*, 10 January 2012, No 42525/07 and 60800/08: 219, available at <http://hudoc.echr.coe.int/fre?i=001-206363>

<sup>53</sup> African Charter on Human and People’s Rights, available at <https://www.achpr.org/legalinstruments/detail?id=49>

<sup>54</sup> African Court on Human and Peoples’ Rights, *Alex Thomas v. The United Republic of Tanzania*, 20 November 2015, application n°005/2013, available at <https://www.african-court.org/cpmt/finalised>

<sup>55</sup> *Ibid.*: 99.

<sup>56</sup> *Ibid.*: 123–24.

<sup>57</sup> African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, 5 December 2014, application No 004/2013, available at <https://www.african-court.org/cpmt/finalised>

<sup>58</sup> African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Fasso*, 4 October 2013, application No 004/2013, Order of provisional measures: 22, available at <https://www.african-court.org/cpmt/finalised>

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*: 23.

<sup>61</sup> African Court on Human and Peoples’ Rights, *Lohe Issa Konate v. Burkina Faso*, 5 December 2014, application No 004/2013: 162, available at <https://www.african-court.org/cpmt/finalised>

<sup>62</sup> *Ibid.*: 176.

<sup>63</sup> See <https://www.achpr.org/specialmechanisms/detail?id=3>