INTERNATIONAL STANDARDS AND NORMS AS GUIDANCE IN THE CRIMINAL JUSTICE SYSTEM

*Matti Joutsen**

I. WHY INTERNATIONAL STANDARDS AND NORMS?

Criminal justice has traditionally been regarded as a sovereign matter. Each country has decided on its own what conduct it regards as criminal, and on how it should respond to criminal acts. After all, for centuries few people travelled further than the neighbouring village, and few crimes affected anyone but those who were directly involved. Those responsible for public order and the administration of justice had little reason to be concerned with what happened elsewhere. As a result, criminal justice was almost entirely territorial, in the sense that it was concerned only with acts or omissions committed in the country in question.

This way of thinking, when combined with the considerable cultural, economic, legal, political and social differences between countries, helps to explain why the structure and operation of criminal justice systems around the world seem to have evolved in quite different directions, and why there are considerable differences even within such individual legal traditions as common law, Continental law and Islamic law.

At the time the United Nations was established some seventy years ago, the prevailing view was that this new organization may not intervene in the domestic affairs of sovereign countries. This point was regarded as so fundamental that it was enshrined as one of the first provisions of the UN Charter, in article 2(7). When the United Nations then began to follow in the footsteps of the League of Nations, by taking up issues related to crime prevention and criminal justice, several countries (in particular the Soviet Union) objected. In their view, how countries respond to crime is very much a domestic matter.[1]

However, following the Second World War (and thus during the seventy years that the United Nations has been in existence), three factors in particular have largely reversed the direction of the evolution of criminal justice systems around the world, from increasing divergence to closer convergence of criminal justice systems: the growing need for a common approach to crime, the realization of the value of sharing experiences, and the growing respect for human rights.

First, the increasingly transnational nature of some forms of crime (in particular organised crime) has led various groups of countries to seek agreement on common definitions of crime and on procedural measures, in order to facilitate international legal co-operation. For example, new offences have been "invented" (such as money laundering, or terrorism), and wide international agreement has been reached on the minimum elements of several other offences (such as bribery, trafficking in persons and participation in an organized criminal group). Wide international agreement has also been reached on the conditions for and forms of mutual legal assistance, and on the conditions for extradition.

Second, policy-makers and practitioners around the world have recognized the value of studying how crime and criminal justice issues have been dealt with in other countries. This process has resulted in attempts to identify internationally what is known as "good practice" in crime prevention and criminal justice. Examples of areas in which good practice has been identified include ways of dealing with juvenile offenders, the use of restorative justice, modern investigative means in policing, the exercise of prosecutorial discretion, and the use of community service or electronic monitoring as sanctions.

Third, the respect that is now accorded to human rights has resulted in the adoption of certain

*Director, European Institute for Crime Prevention and Control, affiliated with the United Nations.
[1] Clark 1994, p. 15, and Redo 2012, p. 110.

minimum legal safeguards and of certain mechanisms in those criminal justice systems where they had been absent or inconsistently recognized. Respect for human rights has also been recognized as promoting effective crime prevention and control, nationally and internationally.[2] In particular the 1948 Universal Declaration of Human Rights and the 1966 Covenant on Civil and Political Rights have direct implications for the operation of the criminal justice system.

Common definitions and procedures, good practice and human rights: these three factors have mixed in different ways, at different times and in respect of different issues. One key way in which they have been brought together is in the form of "international standards and norms" — a concept that would seem to be at odds with that of national sovereignty. And yet, despite the initial doubts of some, this concept has found a welcoming home in the United Nations crime prevention and criminal justice programme.

II. THE EMERGENCE OF INTERNATIONAL STANDARDS AND NORMS

A. United Nations Standards and Norms

The body of United Nations standards and norms that has emerged over the years is a central feature of the United Nations crime prevention and criminal justice programme. These standards and norms now deal with a wide range of issues in crime prevention and criminal justice, from juvenile justice to the treatment of prisoners, from restorative justice to the enforcement of the death penalty.[3] The most recently adopted standard and norm, finalized in 2010, was the United Nations Rules for the Treatment of Women Prisoners (the "Bangkok Rules"). In addition, the very first UN standard and norm, on the treatment of prisoners in general, has now been revised, with the United Nations Commission on Crime Prevention and Criminal Justice recommending in 2015 that the Economic and Social Council (ECOSOC) approve the "Mandela Rules" for adoption by the General Assembly; this will most likely happen during the autumn of 2015.[4]

The idea of developing international standards and norms has long roots, considerably predating the work of the United Nations. Almost 150 years ago, the First International Congress on Crime Prevention and the Suppression of Crime (London, 1872) brought together practitioners from many countries interested in learning from one another about "what works". It was at this major international meeting on crime prevention and criminal justice that some practitioners submitted a draft for international rules on how to deal with prisoners. The draft went through a lengthy process, with work continuing on the document within the framework of the International Penal and Penitentiary Commission (IPPC), which itself was established following the First International Congress. A formal draft was produced in 1926, and revised in 1933. It was submitted to the League of Nations, which "took note" of the rules in 1934. After the establishment of the United Nations, the IPPC revised it again and submitted it to the UN. The resulting Standard Minimum Rules for the Treatment of Prisoners (SMR) were adopted by the First United Nations Crime Congress in 1955, and approved by the Economic and Social Council in 1957.[5]

There was a pleasing symmetry in this evolution of the first United Nations standard and norm on crime prevention and criminal justice, the Standard Minimum Rules for the Treatment of Prisoners. As noted, the First International Congress, where the SMR began the long road to approval, also led to the establishment of the International Penal and Penitentiary Commission (IPPC). The IPPC began a practice of organizing international congresses every five years on correctional treatment. Following the creation of the United Nations, the functions of the IPPC were formally transferred to the United Nations in 1950. One outcome was the establishment of an Ad Hoc Advisory Committee of Experts; this was the forerunner of today's United Nations Commission on Crime Prevention and Criminal Justice. A second outcome was that the UN took over the organization of the "Crime Congresses", and their scope was widened to

[2] E/CN.15/1997/14, para 41. It may be noted that the UN Charter includes an obligation to promote universal respect and observance for human rights.

[3] See the *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice,* United Nations publication, Sales no. 92.IV.1 and corr.1.

[4] United Nations Standard Minimum Rules for the Treatment of Prisoners (the "Mandela Rules"). See Report of the Commission, E/2015/30 and E/CN.15/201, pp. 20-26 and the annex.

ECOSOC is one of the six main organs of the UN, and is the principal UN body for the coordination of work on economic, social and environmental issues.

[5] Clark 1994, pp. 98-99 and Redo 2012, p. 143.

include crime prevention and the treatment of offenders in general — and it was at the first such Crime Congress that the SMR were adopted.[6]

After the Standard Minimum Rules were adopted by the Economic and Social Council in 1957, there was a pause in the drafting of UN standards and norms.[7] The next instrument, a General Assembly resolution briefly titled "Capital punishment", did not emerge until 1971.[8] This was followed five years later by the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in 1976.

The pace began to increase during the 1980s, with the adoption of the Code of Conduct for Law Enforcement Officials in 1980. The next instrument was adopted in 1982, two more in 1984, and (in the aftermath of the Seventh UN Crime Congress) four in 1986. Yet another instrument saw light in 1988, and five in 1989. The record year, however, was in 1991 (in the aftermath of the Eighth UN Crime Congress), when the General Assembly adopted eight separate standards and norms, and "welcomed" *en bloc* other resolutions emerging from the Crime Congress, among them four other instruments which have been added to the United Nations Compendium.[9]

It was in part a reaction to such "mass production" of resolutions — including resolutions incorporating new standards and norms — that the United Nations crime prevention and criminal justice programme was restructured in 1991.[10] This, however, did not stop continued work on UN standards and norms. In fact, following the spurt in the year 1991, the pace became a more or less steady trot, with at least one new UN standard and norm emerging every single year until the beginning of the 2000s. For a variety of reasons[11] there has been a sharp drop in the number of new instruments over the past ten years. With the exception of the Congress Declarations adopted at the Salvador (2010) and the Doha (2015) Congress (which in structure and content are arguably quite different from other UN standards and norms in crime prevention and criminal justice), the only new instruments since 2005 have been the Bangkok Rules in 2010 and now the revision of the SMR (the Mandela Rules) in 2015.

B. Other International Standards and Norms on Crime Prevention and Criminal Justice

The United Nations does not have a monopoly on international standards and norms on crime prevention and criminal justice. Such instruments have also been developed by regional bodies as well as by many international professional bodies.[12]

Perhaps the most prolific regional body in the production of international standards and norms on crime prevention and criminal justice is the Council of Europe, which has issued recommendations, resolutions, guidelines and other standards and norms. The number of Council of Europe "recommendations" alone is over one hundred, dealing with different aspects of the criminal justice system, from partnerships in crime prevention to the treatment of dangerous offenders, from assistance to crime victims to a code of ethics for prison staff.[13]

Examples of international standards and norms developed by international professional bodies include

- the Law Enforcement Code of Ethics prepared by the International Association of Chiefs of Police;

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[6] See Clark 1994, p. 19, Redo 2012, pp. 108-111.

[7] See the annex for a timeline of adoption of the UN standards and norms.

[8] The brief title of the GA resolution was in keeping with the briefness of the resolution itself; one page in length.

[9] See section 4 below regarding the significance of "adoption" and "welcome".

[10] See for example Clark 1994 p. 117 ff and p. 126 ff. Clark notes that a total of 45 separate resolutions were adopted at the Eighth United Nations Crime Congress. Many delegations were small and "a long way from home with less than perfect communications" (Clark, pp. 128-129). For understandable reasons, Clark questions whether so many draft resolutions could be given the rigorous examination that they deserved.

[11] See section 5 below regarding criticism of work on drafting UN standards and norms.

[12] In addition to international standards and norms, many examples exist of national standards and norms on crime prevention and criminal justice.

[13] The Council of Europe has 47 member states, and covers almost all of Europe. (It should not be confused with the European Union, which has 28 member states, primarily from Western and Central Europe.)

A list of Council of Europe recommendations on crime prevention and criminal justice is available at <http://www.coe.int/t/dghl/standardsetting/cdpc/2Recommendations.asp>.

- the Code of Ethical Conduct prepared by the International Corrections and Prisons Association; and
- the Bangalore Draft Code of Judicial Conduct 2001 (the Bangalore Principles) adopted by the Judicial Group on Strengthening Judicial Integrity.

In addition, various international courts have adopted codes of ethics:

- the Code of Judicial Conduct of the Caribbean Court of Justice;
- the Code of Conduct of the Court of Justice of the European Communities;
- the Resolution on Judicial Ethics of the European Court of Human Rights; and
- the Code of Judicial Ethics of the International Criminal Court.

III. WHAT IS AN INTERNATIONAL STANDARD AND NORM, AND WHAT IS ITS LEGAL STATUS?

A "standard and norm" is a document that contains normative elements. It defines how members of the target audience — individuals, members of a certain profession, public officials and so on — should conduct themselves. An "international standard and norm", accordingly, is a document that is intended to apply to more than one country, for example to all members of a global or regional body (such as the United Nations, the Association of South-East Asian Countries, or the Council of Europe), or to all members of an international professional body (such as the International Corrections and Prisons Association).

International standards and norms come in a huge variety of packages. They may appear as resolutions, recommendations, declarations, standard minimum rules, basic principles, proclamations, statements, guidelines, codes of conduct, codes of ethics and so on.

Are international standards and norms legally binding? The simplest, and perhaps least helpful, answer is based on circular reasoning: all instruments (both national and international) can be divided into two categories, "hard law," which is legally binding, and "soft law", which is not. "Standards and norms" are part of soft law, and therefore are not legally binding. States are free to ignore or apply soft law, just as they wish.

A somewhat more complex version of this answer focuses on the distinction between sovereign states and all other bodies, whether intergovernmental or nongovernmental. Only a state can adopt legally binding instruments — Acts of Parliament, laws, decrees and so on. A state may also decide to ratify or accede to an international agreement, as a result of which the provisions of that agreement may become legally binding (depending on how they are formulated, and on the constitutional law of the country in question). Thus, this version of the answer defines "hard law" broadly to encompass legislation enacted by sovereign states, and international agreements which have been ratified or acceded to by states.[14] No one else (so the answer runs) can decide on instruments that would be binding on the state — not an intergovernmental body, such as the United Nations, and much less a professional or other non-governmental organization, such as the International Corrections and Prisons Association. And also this answer concludes that standards and norms are not legally binding.

Even this somewhat more nuanced answer, however, has been questioned. Some have argued that member states have approved the goals of intergovernmental organizations when they applied for membership, and are thus bound to observe the resolutions and recommendations adopted. Others, however, have responded to this by pointing out that although the goals of such intergovernmental organizations may meet with the general approval of the member states, there may well be disagreement over the proper method of achieving these goals.

It would indeed be difficult to conceive of the willingness of political decision-makers of most (if not all) states to surrender their sovereignty in such internal matters as criminal justice to the extent that they

[14] This distinction can be made somewhat more confusing by noting that an instrument — whether a law, an international agreement or a standard and norm — may contain both normative and non-normative elements. A normative element expresses an obligation to act or refrain from acting ("we will criminalize money-laundering"), while a non-normative element for example expresses an aspiration ("we will promote cooperation").

would bind themselves in advance to following any and all resolutions that may even be passed by majority vote.

Even assuming the willingness of member states to be bound by resolutions and recommendations relating to crime and criminal policy, there would be considerable difficulties in drafting a recommendation that would take sufficient account of the different legal systems, ideologies in criminal policy, and criminal justice practice, so that it could be accepted as legally binding by a large number of member states.

The dominant view is thus that international standards and norms, as part of "soft law", are not legally binding. They only embody an earnest request to their addressees (member states, members of a criminal justice profession) to apply the contents, and not an absolute oblligation to undertake a certain course of action.[15] One practical implication of this is that if a public official (or an entire state) acts contrary to an international standard and norm (but not contrary to "hard law"), then the person subjected to such action has no legal recourse. He or she cannot complain to a superior, or turn to court in order to have the decision overturned.

This does not mean that standards and norms, as "soft law", are meaningless, and have no practical effect. The significance of soft law, including standards and norms, does not lie in any assumed legal binding effect. The significance lies elsewhere, on both the international and the national level. On the international level, "soft law" may be seen as an intermediate stage in the formulation of ideas and concepts that may in time emerge as "hard law", in the form of international agreements. A clear example is provided by the various resolutions, declarations and statements regarding international organized crime which contributed to the drafting of the United Nations Convention against Transnational Organized Crime.[16]

When ideas are embodied in standards and norms, the recognition and declaration of certain principles and even detailed rules may be intended to have a direct influence on the practice of states. If this happens, they contribute to the creation of customary international law, which is widely recognized as binding on states.[17] Standards and norms, even if they are not in themselves binding, may thus become a source of international law, in particular if they are drafted in the form of an obligation (e.g. "States *shall*" do something, as opposed to "States *may consider*" doing something, or "States *are invited*" to do something).[18]

Two examples can be provided of this process, both taken from the work of international tribunals. First, the Preparatory Committee on the Establishment of an International Criminal Court (ICC) made specific reference to the need for the rules of procedure to include provisions that give effect to the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[19] As a result, victims have standing before the ICC, and considerable attention has been paid to providing victim services. A second example is that the Standard Minimum Rules for the Treatment of Prisoners have provided the basis for the development of the European Prison Rules, which have been used by the European Court of Human Rights in its jurisprudence, which in turn has had a direct impact on prison conditions throughout the member countries of the Council of Europe.[20] Soft law gradually becomes hard law.

On the national level, international standards and norms may have an instrumental value in guiding national development.[21] They may be used as clinching arguments by decision-makers in individual jurisdictions when these decision-makers seek to justify certain courses of action that they would have

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[15] Castaneda 1969, pp. 7-8 and 193-195.
It may be noted that some authorities in international law deny the entire existence of "soft law". See in particular Klabbers 1996. Essentially, he argues that either something is law, or it is not; there is no intervening category of "soft law", nor is there a need for such a concept.
[16] Among these are the 1994 Naples Political Declaration and Global Action Plan against Organized Transnational Crime, but also a large number of UN Commission and General Assembly resolutions during the 1990s.
[17] Castaneda 1969, pp. 19 and 168-169.
[18] Charlesworth 1994, p. 2.
[19] For examples of how the Victim Declaration actually impacted on the ICC, see Ingadottir.
[20] See in particular Sillaste.

preferred even if the standard or norm did not exist. When selecting from among various alternative approaches to achieving a certain end, the decision-makers may thus defend their choice by referring to the United Nations Victim Declaration or to the Tokyo Rules.

Similarly, international standards and norms can also be used by citizens, non-governmental organizations and other stakeholders in trying to influence their government to change laws and policy in a certain direction.

Analysis of the actual impact of international standards and norms on the domestic level is difficult, due to a number of factors: the absence of an obligation to report, the heterogeneity of the criminal justice systems of different States, the possibility of different interpretations of the same text, and the difficulty in determining if a specific change in national law, policy or practice was due to the influence of a United Nations standard and norm, or to other factors.

Nonetheless, many reports from States to the United Nations cite examples of the impact, and the literature shows several further examples of impact. In many States, the standards and norms are becoming part of the national discourse on crime prevention and criminal justice.

IV. HOW UNITED NATIONS STANDARDS AND NORMS ARE DRAFTED AND APPROVED

The process that eventually led to the adoption of the Standard Minimum Rules on the Treatment of Prisoners was unusually complex and long, involving as it did various experts, drafts, international conferences and governmental input over a period of almost 80 years. Nonetheless, in broad terms it set the pattern for the adoption of most subsequent standards and norms:

- the initiative generally comes from individual experts or organizations;
- a draft is prepared;
- the draft is discussed at several international meetings;
- the draft is discussed at the United Nations Commission (or earlier, the United Nations Committee), which may decide to recommend it for adoption by the Economic and Social Council and/or the General Assembly.

The restructuring of the United Nations Crime Programme in 1992 served in several respects as a watershed in how UN standards and norms were drafted and adopted. The main differences have been in how the initiative was made, and in what format the subsequent draft was discussed.

During the existence of the United Nations Committee (up to 1992), the initiatives for standards and norms came from a variety of sources. One or more of the experts on the Committee would take it up in the Committee which, if it decided that further action was merited, would decide on the organization of one or more expert meeting(s) to examine the draft in greater detail. These expert meetings (almost always held in English only, and on the basis of extra-budgetary funding) usually brought together a mix of representatives of interested governments, intergovernmental organizations and non-governmental organizations, as well as individual experts and UN Secretariat members. The result would then go to the Committee for further action. Often, but not always, the draft would be circulated through one of the United Nations Crime Congresses, allowing for comments from a larger audience.

Following the establishment of the United Nations Commission in 1992, the member states have assumed a far more active role in the drafting of standards and norms, and the process has become more formalized. The initiative has to go through one (or more) of the forty member states of the Commission. If the Commission decides that further action is merited, this generally takes the form of an open-ended in-

[21] The most noted example of a standard and norm guiding national development is the Standard Minimum Rules for the Treatment of Prisoners. It has clearly guided national practice in corrections and, in several cases, helped bring about legal reform.

Various reports of the Secretary-General cite examples provided by Member States of how the standards and norms have influenced domestic law, policy and practice. See, for example, E/CN.15/1996/16, E/CN.15/1997/14, E/CN.15/1997/13, E/CN.15/1998/8, E/CN.15/1999/7, E/CN.15/2001/9 and E/CN.15/2002/3.

tergovernmental expert group. This, in turn, has several implications. There is in effect a higher bar for taking an initiative further. The states seek to ensure that their representatives have tighter control over the drafting process, and correspondingly the input in particular from non-governmental organizations and individual experts has decreased. There is more insistence on multilingualism, which places greater strains on the budget; it has become more difficult to identify host governments who are prepared to pay for such meetings.

As for adoption, most of the United Nations standards and norms included in the Compendium have been adopted by consensus by the General Assembly or the Economic and Social Council.[22]

There is, however, no hard and fast rule on adoption. The standards and norms contained in the "Compendium" have almost all been adopted by ECOSOC or the General Assembly.[23] However, a resolution that contains "standards and norms language" can also be "endorsed" by the General Assembly (as had often been done regarding various resolutions adopted at UN Crime Congresses up to the year 2000). It is in this way, for example, that the Model Agreement on the Transfer of Foreign Prisoners came into being. The status of the Basic Principles on the Independence of the Judiciary is even stranger: it was first "endorsed" by the General Assembly, but a few weeks later it was "welcomed" by the same General Assembly.[24]

V. CRITICISM OF STANDARDS AND NORMS AND OF THE COLLECTION OF INFORMATION ON THEIR USE AND APPLICATION

The United Nations standards and norms have been developed in the conviction that not only is there a shared understanding about the minimum standards of human rights that should be upheld when preventing and controlling crime, but also that such standards contribute to improved professionalism and to the strengthening of the criminal justice system.

Over fifty standards and norms relating to crime prevention and criminal justice have been adopted and included in the Compendium published by the United Nations Office on Drugs and Crime. As was noted in section 2 above, the pace of adoption began slowly, but then increased quite rapidly at the end of the 1980s, with twelve new standards and norms adopted in just one year, 1991.

At that time, work had already begun on the restructuring of the United Nations crime prevention and criminal justice programme.[25] One of the main concerns underlying the work that was being carried out within the framework of the United Nations "crime programme" at that time was that it was inefficient, and was not responding to the needs and priorities of member states.

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[22] A separate question is, what constitutes a United Nations standard and norm, which should therefore merit publication in the Compendium? The Compendium contains a mixture of different documents. Some are clearly drafted as norms to guide the conduct of criminal justice agencies or the members of a criminal justice profession; examples include the SMR, the Tokyo Rules and the Code of Conduct for Law Enforcement Officials. A second set consists of instruments that are intended to guide the general policy of Governments and other stakeholders; examples include the Crime Congress Declarations from 2000, 2005, 2010 and 2015. A third set consists of the various "Model Treaties"; one could perhaps argue that these are "standards and norms" designed to guide the work of officials who are negotiating treaties.

A large number of resolutions adopted within the framework of the UN Crime Programme contain extensive elements very similar to those mentioned above, but for a variety of reasons, have not been included in the Compendium. The Economic and Social Council and the General Assembly have at times specified in a resolution that the Secretariat should ensure broad dissemination of the new instrument. This could be understood as a suggestion that it should be published in the Compendium. This, however, has not been a consistent practice. It would therefore appear that the Secretariat has almost always decided on publication on a case-by-case basis.

[23] Of the 56 standards and norms contained in the Compendium, 23 were adopted by ECOSOC and the rest adopted (or "endorsed" or "welcomed") by the General Assembly. Of the standards and norms adopted before the 1992 restructuring of the UN Crime Programme, eight were adopted by ECOSOC and 21 by the GA; after the restructuring, the corresponding figures were 15 by ECOSOC and 12 by the GA. It would thus seem that, after the restructuring, proportionately fewer have been going all the way up to the General Assembly.

[24] GA 40/32 and GA 40/146, respectively. See Clark 1994, pp. 147-148.

[25] The best presentation of the background, process and results of the restructuring of the UN "crime programme" is to be found in Clark 1994, pp. 24-57.

Also the work on standards and norms was subjected to criticism on a variety of grounds:

- *"No more standards and norms are needed."* Perhaps the most benign criticism of the standards and norms was that the existing set of United Nations standards and norms already covered the key issues, and much more attention should be paid to assisting member States on request in promoting their implementation in practice, in particular by providing technical assistance. This criticism could be encapsulated in the statement, "We already know what we should do; just give us the resources to get it done."

- *"The standards and norms are too vague."* According to other criticism, the standards and norms are unhelpful, because they tend to be phrased in very general terms. The standards and norms must take into account different criminal justice systems and traditions. Since there has also been a consistent effort within the United Nations Programme to reach consensus on the different issues, the extensive negotiations on the drafts tend to raise the language to such a level of generality that they cannot provide specific guidance to the individual practitioner or legal draftsperson.[26]

- *Disagreement over priorities.* The time spent on formulating standards and norms and assessing their implementation was seen by some critics to be at the expense of more urgent measures, such as dealing with transnational organized crime. The argument here has been that the United Nations has very limited resources at its disposal, and these should be focused on priority issues — and not on drafting new standards and norms (or on implementing existing standards and norms, for that matter).

- *Lack of Government control over the formulation of standards and norms.* About half of the standards and norms contained in the Compendium had been adopted before 1992, during the period when the Programme was overseen by a Committee of experts elected in their individual capacity, and not by the present Commission, which consists of Member States. The criticism has been, essentially, that the formulation of the standards had been the handiwork largely of non-governmental organizations and individual experts, and that the final result had been given to the Economic and Social Council or the General Assembly very much as a *fait accompli*, at a stage where no fundamental amendments could in practice be made by the delegations representing the member states.[27]

- *Potential violation of national sovereignty?* According to one view, the standards and norms, and in particular assessment of their implementation,[28] infringe on national sovereignty. This argument has seldom been raised directly, since few are prepared to have themselves seen as opposing, for example, the protection of the rights of suspects. The argument has been raised, however, most notably in connection with the issue of capital punishment, where States supporting capital punishment have objected to attempts by other States to abolish capital punishment in all countries around the world.

- *"Questionnaire fatigue."* Even if the assessment of the use and application of standards and norms was not seen to infringe on national sovereignty, some states began to be concerned that they were receiving repeated requests from the Secretariat for information on the use and appli-

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[26] In the hallways of the Vienna International Centre and elsewhere where international texts are negotiated. this is amusingly described as "constructive ambiguity". There is enough vagueness to satisfy almost everyone's opinion about what should be in the text.

[27] The sheer large number of standards and norms (and indeed resolutions in general — a total of 45!) adopted by the Eighth United Nations Crime Congress in 1990, and sent up to the General Assembly, was a particular sticking point for some. See, for example, footnote 11 above, and Clark 1995, pp. 126-132.

[28] Earlier in the UN Programme, there had been discussions on the "monitoring" of the implementation of standards and norms. During the 1990s, there were at times heated debates in the Commission on what exactly "monitoring" involves, and whether the UN had the mandate to ask sovereign member states what they have done for implementation. The term has subsequently in practice disappeared from the UN Crime Programme. According to the wording currently preferred, the Secretary-General of the United Nations does not "monitor" implementation of standards and norms, but "reviews" implementation, and more generally "promotes their use and application". See, for example, Clark 1994, pp. 229 ff.

cation of over 50 standards and norms. Responding to such requests often requires the collection of statistics or other information from a number of different national agencies. One result was a clear drop in the number of states responding to the various *notes verbale* sent out by the Secretariat for information. (Some critics even interpreted this drop as a sign that the majority of states assigned the standards and norms a very low priority.)

It should be emphasized that the criticism referred to above has been voiced by only a few member States, and even then not all critics have agreed on all points. Even so, since the Commission operates on the basis of consensus, those supporting further action on the standards and norms have had to respond to the criticism.

Following the restructuring of the United Nations Crime Programme in 1992, there was indeed the risk that not only would further standard-setting be halted, but that the work that had been conducted up to that point would be negated: if there could be no agreement on the viability of the existing standards and norms, nor on work on implementation of the standards and norms, they could essentially be ignored by the United Nations Commission. It was thus significant that, in 1994, soon after the restructuring took place, the Economic and Social Council specifically noted that United Nations standards and norms in crime prevention and criminal justice constitute internationally accepted principles outlining desirable practices in that field.[29] It is also significant that new standards and norms have been developed and agreed upon, for example on violence against women, children in the criminal justice system, restorative justice and women prisoners.[30]

Mindful in particular of the criticism regarding "questionnaire fatigue" but also of the need to strengthen technical assistance, ECOSOC decided to request the Secretary-General to convene a meeting of experts to plan the way forward. This expert group meeting was held in 2003, and made several recommendations, including the use of a "cluster approach" in the review of use and application, and the simplification of the forms used in this review.[31] Following a further intergovernmental expert group meeting, the recommendations were formulated into a resolution, which was adopted by ECOSOC.[32] The basic idea was to streamline the collection of information on the use and application of standards and norms, in order to make it more efficient and cost-effective, and to proceed in stages ("clusters"). The first stage was to deal with standards and norms related to persons in custody, non-custodial sanctions, juvenile justice and reformative justice. The second stage was to deal with legal, institutional and practical arrangements for international cooperation, the third stage with crime prevention and victim issues, and the fourth with the independence of the judiciary and the integrity of criminal justice personnel.

In the years that followed, some adjustments were made to this approach. The first stage was carried out as planned, and in 2006, the Commission had before it the Secretariat report on the situation with persons in custody, non-custodial sanctions, juvenile justice and reformative justice.[33] The following year, the Commission discussed standards and norms that dealt with crime prevention, and in 2009, standards and norms that dealt with victim issues.[34] However, amid further expressions of concern regarding "questionnaire fatigue" and a relatively low response rate, subsequent reports of the Secretariat focused primarily on the use of standards and norms in technical assistance.[35]

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[29] ECOSOC resolution 1994/18 of 25 July 1994. See Redo 2012, pp. 111-113.

[30] On the other hand, fewer new United Nations standards and norms have emerged since 2000, and many of these have been UN Crime Congress declarations, which are more aspirational than normative. In the assessment of the author, it has become considerably more difficult to reach consensus in the Commission on the need for new standards and norms, very much in the same way as it has become more difficult to reach consensus on the need for new UN conventions.

[31] The report is contained in "Application of United Nations Standards and Norms in Crime Prevention and Criminal Justice" , Report of the Expert Group Meeting held at Stadtschlaining, Austria, 10-12 February 2003, UNODC publication. The recommendations are to be found on pp. 247-250.

[32] ECOSOC resolution 2003/30. See also Redo 2012, p. 113.

[33] E/CN.15/2006/13.

[34] E/CN.15/2007/11 and E/CN.15/2009/6, respectively.

[35] See, for example, E/2006/30, para 137; E/2007/30/Rev.1, para 116. The proposal for a questionnaire on the fourth cluster, on the independence of the judiciary and the integrity of criminal justice personnel, was specifically opposed by one speaker in 2007 on the grounds that this would overlap with ongoing work within the framework of the Organized Crime Convention and the Convention against Corruption. E/2007/30/Rev.1, para 118.

VI. STANDARDS AND NORMS IN THE WORK OF THE UNITED NATIONS TODAY

Today, the earlier criticism of United Nations standards and norms has largely abated, and they have been accepted as a mainstay of the United Nations crime prevention and criminal justice programme. This can be seen in a number of ways:

- "the use and application of United Nations standards and norms in crime prevention and criminal justice" has become a standing item on the agenda of the annual sessions of the United Nations Crime Commission;
- the specific question of United Nations standards and norms has been on the agenda of every United Nations Congress since 2005.[36] The eleventh Congress (Bangkok, 2005) dealt with "Making standards work: fifty years of standard-setting in crime prevention and criminal justice", the twelfth Congress (Bahia de Salvador, 2010) dealt with "Making the United Nations guidelines on crime prevention and criminal justice work", and the most recent, thirteenth Congress (Doha, 2015) dealt in a workshop with the "Role of the United Nations standards and norms in crime prevention and criminal justice in support of effective, fair, humane and accountable criminal justice systems: experiences and lessons learned in meeting the unique needs of women and children, in particular the treatment and social reintegration of offenders";
- the Secretariat makes extensive use of the standards and norms in providing, on request, technical assistance to member states in crime prevention and criminal justice, and encourages the appropriate United Nations bodies to use the crime prevention and criminal justice standards and norms;[37]
- similarly, the United Nations Crime Prevention and Criminal Justice Programme Network of Institutes makes extensive use of the standards and norms in its work; and
- various principles and provisions contained in the standards and norms have been used in cross-fertilizing other work in the United Nations, including work on binding instruments. For example, several principles expressed in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[38] have been incorporated into the United Nations Convention against Transnational Organised Crime, and in even greater detail in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[39]

It is true that the collection of information on the use and application of standards and norms has not been continued as a separate exercise since 2007, and that the discussions on the separate agenda item on standards and norms at annual sessions of the Commission have at times been rather brief. These should not, however, be seen as signs of any lessening of the importance of the standards and norms, but more of the fact that they have become more fully integrated into the general work of the United Nations crime prevention and criminal justice programme. They are not issues which can, or should, be seen apart from the work done on, for example, transnational organized crime, or crimes against children, or terrorism.

Both crime and the manner in which society sees and responds to crime are constantly evolving. For this reason also the criminal justice system is subject to unending change. Implementation of the United Nations standards and norms in crime prevention and criminal justice, as is the case with standards in general, can be seen as a never-ending process. The need for further work on implementation of the different standards and norms may vary from one State to the next, and also within a State, but no State should allow itself the complacency of regarding itself as being in full compliance with all of the standards and norms. While it is true that the work of the United Nations in the rule of law and in increasing the efficacy and efficiency of criminal justice systems has in particular taken into account the needs of develop-

[36] As for earlier Congresses, the implementation of the SMR was dealt with by the first (Geneva, 1955), fourth (Kyoto, 1970) and fifth Congress (Geneva, 1975); the sixth Congress (Caracas, 1980) dealt with "United Nations norms and guidelines: from standard-setting to implementation", the Seventh Congress (Milan, 1985) dealt with "Formulation and application of United Nations standards and norms in criminal justice", and the Eighth Congress (Havana, 1990) with "United Nations norms and guidelines in crime prevention and criminal justice: implementation and priorities for further standard setting".
[37] For example, in the work of the High Commissioner for Human Rights, the Standard Minimum Rules on the Treatment of Prisoners is evolving from soft law into more obligatory rules. Several key standards and norms have been incorporated in the "Blue Book", which is used on United Nations peacekeeping missions.
[38] GA resolution 40/34.
[39] E/CN.15/2002/3, para. 38.

ing countries and countries in transition, also the more developed countries may benefit. The administration of criminal justice should be seen within the context of broader political, economic and social development.

Moreover, many of the provisions in standards and norms that have been adopted in the field of crime prevention and criminal justice require what is known as "progressive realization", as opposed to full application immediately upon adoption.[40] This means that they need to be made operative in successive stages. Clearly, use and application require continuous review by the authorities of all member states of the United Nations.

The United Nations standards and norms in crime prevention and criminal justice continue to be relevant in the development of crime prevention and criminal justice locally, nationally and internationally. They embody a useful and exemplary set of instruments in international law that contribute to basic human values. Each and every State, whether developed or developing, should examine its progress in the use and application of standards and norms. The standards and norms are relevant in establishing the basis for good governance and institution-building and thus also for economic development especially in post-conflict situations. They should be promoted, protected and pursued by the Governments, intergovernmental, non-governmental organizations and civil society.

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[40] An example of a provision that should be given immediate application upon adoption is para. 2 of the Safeguards guaranteeing protection of the rights of those facing the death penalty (1984/50, according to which capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission.

[41] The United Nations standards and norms listed here are those that are contained in the *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice,* United Nations publication, Sales no. 92.IV.1 and corr.1, and is updated to reflect that in 2015, the United Nations Crime Commission recommended to ECOSOC adoption of the "Doha Declaration" and the "Mandela Rules" for submission to the General Assembly for approval.

ANNEX
Timeline of adoption of United Nations standards and norms on crime prevention and criminal justice[41]

1957
Standard Minimum Rules for the Treatment of Prisoners (ECOSOC 663/XXIV)

1971
Capital punishment (GA 2857/XXVI)

1976
Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA 3452/XXX)

1980
Code of Conduct for Law Enforcement Officials (GA 34/169)

1982
Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (GA 37/194)

1984
Procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners (ECOSOC 1984/47)
Safeguards guaranteeing protection of the rights of those facing the death penalty (ECOSOC 1984/50)

1986
United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (GA 40/33)
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (GA 40/34)
Basic Principles on the Independence of the Judiciary ("endorsed" in GA 40/32 and "welcomed" in GA 40/146)
Model Treaty on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners ("endorsed" by GA 40/32)

1988
Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (GA 43/173)

1989
Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (ECOSOC 1989/57)
Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (ECOSOC 1989/64)
Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (ECOSOC/65)
Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials (ECOSOC 1989/61)
Procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary (ECOSOC 1989/60)

1991
United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the Tokyo Rules) (GA 45/110)
Basic Principles for the Treatment of Prisoners (GA 45/111)
United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (GA 45/112)

UN Rules for the Protection of Juveniles Deprived of their Liberty (GA 45/113)
Model Treaty on Extradition (GA 45/116)
Model Treaty on Mutual Assistance in Criminal Matters (GA 45/117)
Model Treaty on the Transfer of Proceedings in Criminal Matters (GA 45/118)
Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released (GA 45/119)
Model treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property ("welcomed" by the GA in 45/121)
Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("welcomed" by the GA in 45/121)
Basic Principles on the Role of Lawyers ("welcomed" by the GA in 45/121)
Guidelines on the Role of Prosecutors ("welcomed" by the GA in 45/121)

1992
Statement of principles and programme of action of the United Nations crime prevention and criminal justice programme (GA 46/152)

1993
Declaration on the Elimination of Violence against Women (GA 48/104)

1994
Naples Political Declaration and Global Action Plan against Organized Transnational Crime (World Ministerial Conference; transmitted by the Secretary-General to the General Assembly in A/49/748)

1995
Guidelines for cooperation and technical assistance in the field of urban crime prevention (ECOSOC 1995/9)

1996
International Code of Conduct for Public Officials (GA 51/59)
United Nations Declaration against Corruption and Bribery in International Commercial Transactions (GA 51/191)
Safeguards guaranteeing protection of the rights of those facing the death penalty (ECOSOC 1996/15)

1997
Model Strategies and Practical measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (GA 52/86)
Kampala Declaration on Prison Conditions in Africa (ECOSOC 1997/36)
Guidelines for Action on Children in the Criminal Justice System (ECOSOC 1997/30)
Model Bilateral Treaty for the Return of Stolen or Embezzled Vehicles (ECOSOC 1997/29)
Firearm regulation for the purposes of crime prevention and public health and safety (ECOSOC 1997/28)

1998
Plan of action for the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (ECOSOC 1998/21)
Status of foreign citizens in criminal proceedings (ECOSOC 1998/22)
Kadoma Declaration on Community Service (ECOSOC 1998/23)

1999
Arusha Declaration on Good Prison Practice (ECOSOC 1999/27)

2000
United Nations Declaration on Crime and Public Security (GA 51/60)

2001
Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (GA 55/89)

Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century (GA 55/59)
Plans of action for the implementation of the Vienna Declaration on Crime and Justice: meeting the Challenges of the Twenty-first Century (GA 56/261)

2002
Basic principles on the use of restorative justice programmes in criminal matters (ECOSOC 2002/12)
Guidelines for the Prevention of Crime (ECOSOC 2002/13)

2003
The question of the death penalty (Commission on Human Rights 2003/67)

2005
Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice (GA 60/177)
Model Bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property (ECOSOC 2005/14)
Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC 2005/20)

2010
Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World (GA 65/230)
United Nations Rules for the Treatment of Women Prisoners (the Bangkok Rules) (GA 65/229)

2015
(The Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation; to be adopted by the GA during the autumn of 2015)
(revised Standard Minimum Rules for the Treatment of Prisoners [the Mandela Rules]; to be adopted by the GA during the autumn of 2015)