Traditionally, discussions, research and court judgements within the field of prisons and human rights have almost exclusively been a matter of balancing the state’s legitimate use of power and security concerns against the individual prisoners’ rights. The question of whether, how and to what degree the use of imprisonment has also affected the rights of people living outside of prison has for many years been left out of consideration. This has certainly been the case with prisoners’ children – a group of people whose rights are clearly affected through the use of imprisonment.

Part of the explanation for this is that despite the long history of the prison, it took many years for even prisoners’ rights to become an area of serious legal and penal concern. From a historical perspective, prisoners’ rights are in fact a relatively new phenomenon. Eighteenth-century Enlightenment brought with it a critique of the corporal system of punishment – including torture, public executions and the death sentence – a process that eventually paved the way for an expanding role for imprisonment. Sparked by the Enlightenment spirit and the accompanying legal reforms, new types of prisons were (as previously explained) constructed in Europe and the United States from the late 18th century and during the 19th century. This did not mean that prisoners were given actual legal rights, however. On the contrary, their well-being was often left at the discretion of prison staff and especially the prison management who – with the help of the isolation regimes of the modern penitentiary – actually gained much tighter control of prisoners than had previously been the case.

The American history of prisoner rights provides an illustrative example. Here, the so-called hands-off doctrine dominated in the courts of law from the late 19th century all the way up to the 1970s. American
judges essentially refrained from interfering in prison matters.¹ A judgement from Virginia in 1871 ruled that a sentenced and imprisoned criminal was simply a “slave of the state”, and his estate was to be administered like that of a dead man.² A prisoner, in other words, had no rights. The hands-off doctrine was enforced for almost a century. In the 1960s and 1970s, a reform process began and prisoners’ rights were gradually secured in a number of rulings. This was an international trend, and in many countries it was recognised that ordinary citizens’ rights were not automatically suspended when a person passed the prison gate and became a prisoner.³ As stated by the US Supreme Court in 1974, there “is no iron curtain drawn between the Constitution and the prisons of this country”.⁴

Parallel to this development, the human rights conventions, rules and guidelines were created and went into force after World War II and slowly began to influence prison standards. Thus, a principle gradually developed according to which a prisoner upheld his or her basic rights except for those rights that were taken away by necessary implication. This principle was spelled out in a 1969 Canadian judgement according to which “an inmate of an institution continues to enjoy all the civil rights of a person save those that are taken away or interfered with by having been lawfully sentenced to imprisonment”.⁵

When looking at the relevant human rights conventions, rules and recommendations, it is clear that this principle was based on the philosophy that all human beings – including the imprisoned – must be treated with respect for their human dignity. Particularly important was the adoption of the International Covenant on Civil and Political Rights (ICCPR) by the United Nations (UN) in 1966 (came into force in 1976) as well as the UN’s Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment from 1984 (came into force in 1987). As explained in article 10 of the ICCPR: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” (10.1). This principle, the very basic starting point for all discussions on prisons and human rights, is related to an understanding of prisons according to which the deprivation of liberty is punishment enough in itself. As famously argued by Alexander Paterson in the 1920s, “men come to prison as a punishment, nor for punishment”.⁶

In 1955, the UN’s prison rules (the “Standard Minimum Rules for the Treatment of Prisoners”) were also adopted. The document is not legally binding but nonetheless gathered and internationalised a number of fundamental standards on how prisoners should be treated. Numerous