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PENAL REFORM INTERNATIONAL

Essex paper 3

Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules



Based on deliberations at an expert meeting organised by Penal Reform International and Essex Human Rights Centre at the University of Essex, 7–8 April 2016.

Dedicated to the memory of Sir Nigel Rodley, 1941–2017.

Essex paper 3: Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules

Based on deliberations at an expert meeting organised by Penal Reform International and the Essex Human Rights Centre at the University of Essex, 7-8 April 2016.

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Penal Reform International (PRI) is an independent non-governmental organisation that develops and promotes fair, effective and proportionate responses to criminal justice problems worldwide.

We promote alternatives to prison which support the rehabilitation of offenders, and promote the right of detainees to fair and humane treatment. We campaign for the prevention of torture and the abolition of the death penalty, and we work to ensure just and appropriate responses to children and women who come into contact with the law.

We currently have programmes in the Middle East and North Africa, Sub-Saharan Africa, Eastern Europe, Central Asia and the South Caucasus, and work with partners in South Asia.

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Contents

Introduction **5**

Chapter 1:

Diginity **7**

Overarching Requirement to Respect Human Dignity 7
Minimising the Difference between Life in Prison and at Liberty 9
Safety and Security 10
Prohibition of Torture and Other Ill-Treatment 11
Principle of Non-Discrimination 12
Conduct in Case of Death of a Prisoner 13
Searches of Prisoners, Cells and Visitors 14
Prisoners with Disabilities 18

Chapter 2:

Prison management **21**

Basic Principles 21
Allocation, Classification, Admission 22
Provision of Information 26
Prison File Management 29
Institutional Personnel 34
Inspections and External Monitoring 38

Chapter 3:

Contact with the outside world **43**

Introduction 43
Contact with Family and Friends 43
Access to Legal Representation 50
Transfers 55
Foreign National Prisoners 59

Chapter 4:

Healthcare **61**

General Principles 61
Medical Ethics 66
Health-care Assessment on Admission 70
Medical Assistance in Urgent Cases 72
Isolation and Segregation on Grounds of Public Health 72
Fitness to Work Determinations 73
Daily Access to Prisoners 73
No Role of Medical Staff in Discipline or Punishment 74
Documentation of Signs of Torture 75

Chapter 5:

Restrictions, discipline and sanctions **77**

Introduction 77
General Principles 78
Procedural Rights in Disciplinary Proceedings 81
Types of Sanctions and Restriction 84
Solitary Confinement 86
Reducing the Negative Impact of Sanctions and Restrictions 92
Record-Keeping 93
Instruments of Restraint 93
Role of Medical Personnel 96

Chapter 6:

Incident management **98**

Safety and Security 98
Scope/meaning of Safety and Security 99
Use of Force and Arms 107
Complaints 113
Investigations 119

Annex: List of participants **124**

Note on terms used in this document:

Where the document refers to Rules, it refers to the Nelson Mandela Rules. The term 'revised Standard Minimum Rules for the Treatment of Prisoners' and 'Nelson Mandela Rules' is used interchangeably on purpose, seeking to emphasise that the Rules are no newly created standard, but an updated version of the 1955 Standard Minimum Rules (SMR). The terms 'Essex group' or 'experts' refer to the participants of the expert meeting on 7-8 April 2016 at Essex University in Colchester, UK.

Introduction

> "The full contribution which our prisons can make towards a permanent reduction in the country's crime rate lies also in the way in which they treat prisoners. We cannot emphasise enough the importance of both professionalism and respect for human rights."

Nelson Mandela, Speech to the South African Department of Correctional Services in 1998.

On 17 December 2015, the UN General Assembly adopted the revised UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), bringing to a conclusion a four-year process of review.

The review had been completed by the UN Commission on Crime Prevention and Criminal Justice in May 2015 after consensus was reached at the fourth and last Inter-governmental Expert Group Meeting in South Africa. The revision of the Standard Minimum Rules for the Treatment of Prisoners (SMR) was a historic event in that it was the first time that an international standard had been updated. The international community chose a 'targeted revision' approach, identifying the most outdated areas and rules whilst leaving the structure and the majority of the Rules unchanged.

Eight substantive areas have been subject to revision:

- Respect for prisoners' inherent dignity
- Medical and health services
- Disciplinary measures and sanctions
- Investigations of deaths and torture in custody
- Protection of vulnerable groups
- Access to legal representation
- Complaints and independent inspection
- Training of staff

The Resolution adopting the revised Rules encourages Member States to endeavour to improve conditions in detention, consistent with the Nelson Mandela Rules. It also encourages the application of all other relevant and applicable United Nations standards and norms.

The Essex group

During the process of the review, Penal Reform International and the University of Essex's Human Rights Centre organised two expert meetings and provided recommendations on possible wording for revised Rules, as well as a rationale for the suggested changes, based on a screening of existing human rights and criminal justice standards and norms. The deliberations of the group of experts – which have become known informally as the 'Essex papers' – were submitted to the Inter-governmental Expert Group Meeting (IEGM) established at the UN level to negotiate a review of the Rules in November 2012[1] and in March 2014.[2]

Drawing on the positive experience of these consultations, the 'Essex group' was reconvened for a third meeting of experts on 7-8 April 2016 in order to develop guidance on implementing the revised UN Standard Minimum Rules for the Treatment of Prisoners following their adoption as the Nelson Mandela Rules.

The consultation was, like the first two meetings, financially supported by the UK Government (UKAID).

Purpose of this document

The purpose of the meeting was to reflect on the revised areas of the Standard Minimum Rules, and specifically to:

- identify specific Rules, and language, that require further guidance as to their interpretation;
- offer practical and concrete interpretation of specific Rules, drawing on existing international standards and practice;
- identify challenges in implementation and good practice examples.

The deliberations of the meeting took place in plenary and in six working groups, which inform the structure of this document. They focused on the areas and Rules revised, but took into account unchanged provisions where they were relevant in the context of the revised text.

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1. Summary of an Expert Meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review, 21 November 2012, UNODC/CCPCJ/EG.6/2012/NGO/1, available in Arabic, English, French, Spanish and Russian; www.unodc.org/unodc/en/justice-and-prison-reform/expert-group-meetings5.html#_ftn3
2. Summary of an Expert Meeting at the University of Essex on the Standard Minimum Rules for the Treatment of and Second Report of the Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of Prisoners, 20 March 2014, available at: http://www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/PRI_ESSEX-2nd-paper.pdf

The group emphasised that, while consolidating relevant guidance for prison administrations and staff in one document, the revised SMR will continue to be supplemented by other criminal justice and human standards, such as the UN Bangkok Rules for women prisoners, the UN Beijing Rules with regard to children and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

The 'Third Essex Paper'

The document seeks to provide initial guidance on implementation and to serve as a basis for initiatives to develop more comprehensive guidance, training materials, or projects on implementation.

Using the minutes of deliberations of each Working Group as a starting point, the authors drew on additional comments provided by experts following the dissemination of draft chapters and on a screening of other relevant sources, including other treaties and soft law, reports and recommendations of UN Treaty Bodies and Special Procedures, as well as other relevant regional and international bodies. They took into consideration the rationale of changes to the Rules and the overarching principle expressed in the course of the review process that none of the changes must lower any of the existing standards.[3]

In terms of assessing progress in the implementation of the SMR, the authors would like to recall the Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners, in particular Procedure 5, which calls on states to inform the Secretary-General of the United Nations every five years of the extent of the implementation and the progress made, and of the factors and difficulties, if any, affecting their implementation.[4]

We would also like to recall the resolution of the Human Rights Council on human rights in the administration of justice, adopted in 2015, which 'invites States to assess their national legislation and practice in accordance with those standards, including the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)'.[5]

We hope that this paper will provide a useful starting point for policy-makers, prison administrations and staff in the implementation of the revised Standard Minimum Rules for the Treatment of Prisoners, as well as for health-care professionals, monitoring bodies and inspectors, inter-governmental organisations, NGOs and academia.

We would like to thank the participants for their helpful insights and for sharing their expertise (see list of participants in Annex 1). The present document reflects the broad majority agreement in discussions at the meeting and consultations subsequently. We would also like to thank Sharon Critoph for her contribution to the drafting process, to Harriet Lowe for the thorough editing and proof-reading, and to Oliver Robertson for his support on footnoting this paper.

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3. *Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012*, UNODC/CCPCJ/EG.6/2012/1, 16 February 2012, Recommendation 4. *Economic and Social Council Resolution on Standard Minimum Rules for the Treatment of Prisoners*, 20 September 2013, E/RES/2013/35, OP 10; *UN General Assembly Resolution on Torture and other cruel, inhuman or degrading treatment or punishment*, 22 October 2013, A/C.3/68/L.33, 32 bis; *Human Rights Council Resolution on human rights in the administration of justice*, 23 September 2013, A/HRC/24/L.28, OP 16; *Commission on Crime Prevention and Criminal Justice Resolution on Standard Minimum Rules for the Treatment of Prisoners*, 25 April 2013, E/CN.15/2013/L.22/Rev.1, OP 10 (endorsed by ECOSOC, 20 September 2013, E/RES/2013/35 and subsequently endorsed by UN General Assembly); *Report and recommendations of the Intergovernmental Expert Group Meeting in Buenos Aires*, 13 December 2012, UNODC/CCPCJ/EG.6/2012/4, Para.4; *UN General Assembly Resolution*, 20 December 2012 A/RES/67/188, OP 5; *Economic and Social Council Resolution*, 10 August 2012, E/RES/2012/13, OP 5; *Commission on Crime Prevention and Criminal Justice Resolution*, E/CN.15/2012/L.4/Rev.2, 24 April 2012, OP 5; *UN General Assembly Resolution, 'Standard Minimum Rules for the Treatment of Prisoners'*, UN Doc. A/RES/68/190, 11 February 2013, OP 10; *UN General Assembly Resolution 'Standard Minimum Rules for the Treatment of Prisoners'*, UN Doc. A/C.3/69/L.3, 26 September 2014, OP 6; *UN General Assembly Resolution, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, A/RES/70/175, 16 December 2015, preamble.

4. UNODC, *Compendium of United Nations standards and norms in crime prevention and criminal justice, 2016, Procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners* (Economic and Social Council resolution 1984/47, annex, of 25 May 1984).

5. Human Rights Council, *Resolution on Human rights in the administration of justice, including juvenile justice*, 29 September 2015, A/HRC/30/L.16, OP5

Chapter 1

Dignity

Issues/rules covered:

- Prohibition of torture and other ill-treatment (Rule 1)
- Conduct in case of death of a prisoner (Rule 72)
- Searches of prisoners, cells and visitors (Rules 50-52, 60)
- Non-discrimination (Rule 2)
- Prisoners with Disabilities (Rules 5(2) and 109)

This chapter addresses the meaning and scope of a number of new rules introduced in the Nelson Mandela Rules that require respect for the inherent dignity of prisoners. These include the introduction of an overarching framework on human dignity and the specific rules listed above.

Due to time constraints, the Essex Group was unable to discuss all of the new Rules that address human dignity. These included Rules 29 (children accommodated in prison with their parent), Rules 96 and 97 (on work in prisons and the prohibition of slavery) and the protections and treatment necessary to protect prisoners and groups in positions of vulnerability. The Group noted the importance of developing guidance on the interpretation of these Rules and recalled previous coverage of these issues in the first and second reports produced by the Essex Group as submissions to the UN when developing the revised SMR.[1]

Overarching Requirement to Respect Human Dignity

The Nelson Mandela Rules contain a new section entitled 'Basic Principles'. The Essex Group of Experts underscored that the concepts contained in Rules 1 to 5 of this new section should not be seen as abstract. Rather, together they provide an overarching description of the concrete action states are required to take to ensure respect for prisoners' inherent human dignity.

The Essex Group noted the significance of the fact that the requirement to 'respect human dignity' is the very first standard set out in the new Rules. They pointed to Article 1 of the Universal Declaration of Human Rights which provides that, '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. They noted that 'human dignity' is not a singular rule but a general principle that underpins all of the Rules. This means that each Rule within the Nelson

[1] *Expert Meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review* (20 November 2012) available at: http://www.essex.ac.uk/hrc/documents/practice/summary-expert-meeting-20-nov-2012.pdf , see L. Other areas highlighted by experts (1)Children of incarcerated parents (pp.37-39), L.(3) Labour in Detention (pp.40-41), G. Protection and special needs of vulnerable groups deprived of their liberty (pp.26-27)*(First Report of the Essex Group of Experts)*; *Second Report of the Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of Prisoners* (March 2014) available at: http://www.essex.ac.uk/hrc/documents/practice/second-report-of-essex-expert-group-smr-revision-19-march-2014.pdf , see 'Children of imprisoned parents' (paras. 36-39) (*Second Report of the Essex Group of Experts*)

Mandela Rules can be interpreted as a detailed description of how dignity should be respected within prison.

The UN Special Rapporteur on Torture has noted that,

> *The principle of humane treatment of persons deprived of liberty constitutes the starting point for any consideration of prison conditions and the design of prison regimes. It complements and overlaps the principle on the prohibition of torture and other ill-treatment by requiring States (and consequently the prison authorities) to take positive measures to ensure minimum guarantees of humane treatment for persons in their custodial care (see Human Rights Committee general comment No. 21, para. 3). Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule, the application of which, at a minimum, cannot be dependent on the material resources available in the State party to the International Covenant on Civil and Political Rights (para. 4).*[2]

Rules 1 to 5 of the Nelson Mandela Rules explain that states not only have negative duties to ensure that the treatment of prisoners does not offend human dignity but also positive obligations that require the prison administration to take specific action to protect prisoners' dignity. These positive duties are set out throughout the Rules. For example, Rules 12 to 21 address basic issues fundamental to a prisoner's inherent dignity on accommodation, hygiene, clothing and food, requiring the prison administration to take positive action such as:

- Ensuring that 'all parts of the prison regularly used by prisoners [including cells, bathrooms and eating areas are] properly maintained and kept scrupulously clean at all times'[3];
- Providing prisoners 'with water and toilet articles as are necessary for health and cleanliness'[4];
- Where a prisoner is not 'permitted to where his or her own clothing', providing him or her with adequate and clean clothing suitable for the climate[5];
- Ensuring all prisoners have their own bed and 'separate and sufficient bedding'[6];
- Providing prisoners with drinking water whenever needed and 'food of nutritional value adequate for health and strength, of wholesome quality'.[7]

The Essex Group pointed to the fundamental power imbalance between the prison administration and prisoners as imprisonment is a regime enforced upon prisoners, thereby placing their human dignity at constant risk. Certain acts or omissions by the prison administration inherently violate

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[2] UN General Assembly, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* A/68/295 (9 August 2013) , available at: http://www.unodc.org/documents/justice-and-prison-reform/SPECIAL_RAPPORTEUR_EN.pdf , at para 35 (*Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)*. The requirement to treat persons deprived of their liberty with dignity is set out in Article 10 of the *International Covenant on Civil and Political Rights* 1966 (*ICCPR*), Article 5 of the *African Charter on Human and Peoples' Rights* 1981, the *Kampala Declaration on Prison Conditions in Africa* 1996, Principle 1 of the *Basic Principles for the Treatment of Prisoners* 1990; Principle 1 of the *UN Body of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment 1988*; Principles 12 and 87 *UN Rules for the Protection of Juveniles Deprived of their Liberty* 1990; the Guideline 8 of the *Guidelines for Action on Children in the Criminal Justice System* 1997 and Article 2 of the *Code of Conduct for Law Enforcement Officials* 1979.

[3] Rule 17.

[4] Rule 18(1).

[5] Rules 19 and 20.

[6] Rule 21.

[7] Rule 22.

human dignity, such as torture and other cruel, inhuman or degrading treatment or punishment ('other ill-treatment') or a failure to provide adequate sanitary facilities.

Other types of conduct may violate the principle in certain circumstances depending on how it is carried out, such as searches of cells, prisoners or the use of restraints. However, the need to treat prisoners with human dignity extends further than these specific instances; it applies to all activities and interactions in prisons. It therefore covers issues such as ensuring prisoners have adequate clothing, ensuring that female prisoners do not have to ask for sanitary pads, and the way in which prison staff speak to prisoners (for example by not using terms such as 'inmate', 'felon' or 'convict'[8]).

The Essex Group noted the need for training for prison staff to understand how the requirement to treat prisoners with human dignity cuts across all aspects of their work and how to incorporate it into their duties and responsibilities on a day-to-day basis.[9]

Minimising the Difference between Life in Prison and at Liberty

Rule 5(1) requires the prison administration to minimise the differences between prison life and 'life at liberty'. The Rule provides two justifications for this requirement. First, to avoid lessening the 'responsibility of prisoners'. This connects to the importance of ensuring released prisoners can reintegrate into society through maintaining their ability to make decisions autonomously and preventing institutionalisation and dependence on prison life and routine. Second, Rule 5(1) connects to Rule 1 in referencing the requirement to respect prisoners' human dignity. The requirement to respect human dignity is the first positive instruction to the prison administration in the Rules.

Imprisonment does not provide the prison administration with free rein to deny all rights. Imprisonment itself is the punishment; prisoners are not imprisoned for further forms of punishment. Therefore, any restrictions or limitations that differ from life in the outside world must be necessary to advance a legitimate aim and be necessary and proportionate. For example, the European Court of Human Rights has found that many fundamental rights cannot be subject to blanket restrictions because of '[t]he mere fact of imprisonment … [such as] the right of a prisoner to correspond … to have effective access to a lawyer or to court … to have access to his family … to practise his religion … to exercise freedom of expression … or to marry'.[10] Similarly, the Basic Principles for the Treatment of Prisoners provide that:

> *Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners/ detainees shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.*[11]

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[8] Washington Times, *Justice Department program to no longer use 'disparaging' terms 'felons' and 'convicts'* (4 May 2016) available at: http://www.washingtontimes.com/news/2016/may/4/justice-dept-no-longer-use-terms-felon-convict/

[9] Council of Europe: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT standards*, 2015 (CPT/Inf/E (2002) 1 - Rev. 2015) Staff – prisoner relations. at para. 26, noting that: '[t]he cornerstone of a humane prison system will always be properly recruited and trained prison staff who know how to adopt the appropriate attitude in their relations with prisoners and see their work more as a vocation than as a mere job'. Available at: http://www.cpt.coe.int/en/documents/eng-standards.pdf (*CPT Standards*)

[10] See *Hirst v. UK (No 2)*, Application No. 74025/01 (ECHR, 6 October 2005) at para 69.

[11] Principle 5.

Rule 5(1) provides a way for prison officials to test whether any form of treatment that differs from 'life at liberty' is legitimate and necessary, and to assess its impact on a prisoner's self-determination and human dignity. It directs prison officials to think positively about ways to minimise the difference between prison life and life at liberty. The Essex Group noted that those in the community/outside world and those in prisons have a fundamental right to human dignity. This fundamental right underpins all other human rights such as the right to an adequate standard of living, adequate healthcare, a right to education, a right to family life and a right to work. They noted that where the standards of living and opportunities in the community are low, this does not remove the prison administration's obligation to ensure that prisoners are able to exercise these rights.[12] Rather, it must ensure that specific opportunities are available for work, family life, education and communication with the outside world.[13] This aligns with the European Prison Rules that provide that 'life in prison shall approximate as far as possible the positive aspects of life in the community'.[14] It also connects to the objective of rehabilitation in preparing prisoners to undertake socially responsible roles on release.

Safety and Security

Rule 1 provides that the 'safety and security of prisoners, staff, service providers and visitors shall be ensured at all times'. Personal safety is the bedrock of dignity. The Essex Group recalled that states have to ensure that prisoners, staff, service providers and visitors are safe and secure. They noted that safety and security should not be interpreted solely as protection from violence but also from threats, exploitation, abuse, theft, humiliation or any other form of victimization (whether by staff or a fellow prisoner).[15] As noted in the second paper of the Essex Group[16], it also requires safety and security of infrastructure from 'the condition of the prison estate (e.g. dilapidated buildings), the risks arising from prisoners' belongings, fire hazards (e.g. smoking or use of unauthorised electrical equipment such as cooking stoves and non-fire resistant/proof mattresses) as well as procedures and evacuation policies in case of fire[17] or natural disaster'[18]. These obligations are addressed in greater detail in Chapter 6.

The Essex Group noted the relationship between the safety and security clause in Rule 1 and the requirement to ensure the human dignity of prisoners. In this respect, they suggested that when prisons are being refurbished or new prisons built, the human dignity, safety and security of prisoners should be taken into account[19] including ensuring that they comply with the requirements of the Nelson Mandela Rules on accommodation.[20] For example, what might have been acceptable at the time older prisons (such as in the 19th Century) were built may not be appropriate today.

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[12] UN Service for Project Services, *Technical Guidance for Prison Planning: Technical and Operational Considerations Based on the Nelson Mandela Rules* (2016) at 153 (making this point in relation to the right to health). (*UNOPS, Technical Guidance for Prison Planning*)

[13] *UNOPS, Technical Guidance for Prison Planning*, chapter two on prison facilities.

[14] Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, 11 January 2006, available at: http://www.refworld.org/docid/43f3134810.html, Rule 5 (*European Prison Rules)*

[15] This is discussed in greater detail in the *Second Report of the Essex Group of Experts*, at paras 5 – 27.

[16] *Second Report of the Essex Group of Experts,* at para. 24.

[17] See the Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of their Liberty in Honduras, OAS (18 March 2013), OEA/Ser.L/V/II.147, available at: http://www.oas.org/en/iachr/pdl/docs/pdf/honduras-ppl-2013eng.pdf

[18] For example, a report published by the American Civil Liberties Union documents the lack of emergency planning at the Orleans Parish Prison which during Hurricane Katrina resulted in thousands of individuals being trapped. See American Civil Liberties Union, *Abandoned and abused* (August 2006) available at: www.aclu.org/prisoners-rights/abandoned-and-abused .

[19] *UNOPS, Technical Guidance for Prison Planning*, at 16, 30, 32, 44 – 45, 73, 86, 229, 230, 235

[20] See, for example, Rules 12 – 17.

Prohibition of Torture and Other Ill-Treatment

The revised Standard Minimum Rules on the Treatment of Prisoners explicitly incorporate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment ('other ill-treatment') into Rule 1. This is an absolute prohibition under international law, permitting no exceptions.[21] It is defined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as:

> *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

The Essex Group noted that the prohibition of other ill-treatment should not be understood as an abstract concept or one that does not carry the gravitas of the label of torture. It is a firmly established principle in international law with many illustrative cases decided by the regional human rights courts and commissions and UN treaty bodies.[22] As the UN Special Rapporteur on Torture has pointed out, the prohibition of other ill-treatment covers:

> *conditions of detention [that] can amount to inhuman and degrading treatment. Overcrowding, lack of ventilation, poor sanitary conditions, prolonged isolation, the holding of suspects incommunicado, frequent transfers from one prison to another, the non-separation of different categories of prisoners, the holding of persons with disabilities in environments that include areas inaccessible to them and the holding of persons without means of communication could constitute or lead to cruel, inhuman or degrading treatment or torture.*[23]

The type of conduct or omission that falls within the prohibition of other ill-treatment continues to develop with society's standards. Therefore, what might have been seen as acceptable treatment or conditions for prisoners 20 years ago will not necessarily be seen as acceptable today.[24]

As made clear by the UN Special Rapporteur on Torture, the prohibition of other ill-treatment does not only cover intentional physical and/or mental ill-treatment that does not reach the level of torture but also covers poor conditions of imprisonment, irrespective of whether these are imposed intentionally, purposefully or for a reason based on discrimination.[25] It provides a framework not just

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[21] Article 7 of the ICCPR; Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; Article 5 of the African Charter on Human and People's Rights 1981; Article 7 of the American Convention on Human Rights 1969; Article 3 of the European Convention on Human Rights 1950 (ECHR).

[22] For examples, see Inter-American Court of Human Rights*, Case of Cantoral Benavides v Peru* (18 August 2000); *Ireland v. the United Kingdom*, Application no. 5310/71 (ECHR, 18 January 1978)*;* UN Human Rights Committee, *Vuolanne v. Finland*, Communication No. 265/1987 (2 May 1989).

[23] *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. at para 45.

[24] *Selmouni v France,* Application No. 25803/94 (ECHR, 28 July 1998) para. 100.

[25] For example, see *V. v. U.K* Application no. 24888/94 (ECHR,16 December 1999), para. 71

for what prison staff must do and refrain from doing but also what prisoners do to themselves and to each other and to the treatment of visitors.[26]

A violation of the prohibition of other ill-treatment cannot be justified on grounds of lack of resources which is critical on issues such as overcrowding and inadequate food, healthcare and accommodation. For example, citing the Inter-American Court on Human Rights, the UN Special Rapporteur on Torture has noted that:

> *Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule, the application of which, at a minimum, cannot be dependent on the material resources available in the State party to the International Covenant on Civil and Political Rights (para. 4). In this regard, the Inter-American Court of Human Rights has consistently affirmed that States cannot invoke economic hardship to justify imprisonment conditions that do not comply with the minimum international standards and respect the inherent dignity of the human being.*[27]
>
> *While recognizing that penitentiary systems are almost universally severely underfunded and suffer from decades of accumulated problems, the Special Rapporteur recalls that a lack of financial resources cannot be an excuse for not refurbishing detention facilities, purchasing basic supplies and providing food and medical treatment, among other things.*[28]

→ See Chapter 4, Healthcare – Rule 34

Principle of Non-Discrimination

The Essex Group noted that the non-discrimination clause in Rule 2 provides specific illustration of forms of discrimination but also includes the clause 'or any other status'. The inclusion of the clause 'any other status' is in line with a number of other international instruments. In common with these instruments, the list provided is illustrative and not exhaustive.

The Essex Group noted that while the list of illustrative grounds for discrimination was not changed from the original text of the SMR during the revision process, the word 'any' was added. This underscores states' intention to clarify that the term 'discrimination' should be understood as reflecting and recognising the current meaning of the term in international law and standards, as it continues to expand.

For example, existing international human rights standards and norms prohibit discrimination on one or more grounds such as race, colour, sex, language, religion or conviction, political or other opinion or belief, membership of a particular social group, status, activities, descent, national, ethnic, indigenous or social origin, nationality, age, economic position, property, disability, marital

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[26] For examples of inter-prisoner violence cases, see *Pantea v Romania* Application No. 33343/96 (ECHR, 3 June 2003) and *DF v Latvia* Application no. 11160/07 (ECHR, 29 October 2013); For examples on self-harm, see *Keenan v. the United Kingdom* Application no. 27229/95(ECHR, 3 March, 2001) and *Renolde v France* Application no. 5608*/05* (ECHR, 16 October 2008); and on treatment of visitors, see *Wainwright V. The United Kingdom* Application no. 12350/04 (ECHR, 26 September 2006)

[27] *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at para. 35.

[28] *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* at para. 46.

status, sexual orientation, gender identity or birth.[29] This list is also not exhaustive but illustrates the ongoing interpretation of the 'any other status' provision within international human rights standards and norms.

The Essex Group noted, therefore, that 'or any other status' must be interpreted as widely as possible in line with current international law and standards. As with human dignity, the Rule on non-discrimination is not a stand-alone provision but one that must be read together with all of the Nelson Mandela Rules.

Conduct in Case of Death of a Prisoner

Rule 72 requires that the prison administration treat 'the body of a deceased prisoner with respect and dignity'. The underlying rationale for this Rule is that the human dignity of the prisoner must be respected following his or her death. Implicit in Rule 72 and the Rules general is also the duty to treat the family of a deceased prisoner with respect.

The Essex Group noted that prison officials should be trained in how to deal with a body in the same way in which a body is dealt with in an investigation outside of the prison context and that these practices should be followed within the prison.[30]

The Rule specifies that the body should be returned 'as soon as reasonably possible, at the latest upon completion of the investigation'. The Essex Group noted that this provides an upper time limit for the return of the body as there is no justification for keeping a body beyond the period of the investigation. However, in many situations, the experts noted that it may be possible to organise the investigation so that the body is dealt with first. This would enable it to be returned much earlier. In all cases, the Essex Group noted that the prison should respect the relevant religious and cultural norms regarding the proper treatment of the body of a deceased person.

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[29] The illustrative but non-exhaustive lists contained in international norms and standards include, Article 1(1) *International Convention on the Elimination of all forms of Racial Discrimination* 1965 '…based on race, colour, descent, or national or ethnic origin…'; Article 2(1) *ICCPR* '…such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'; Article 26 *ICCPR* '…on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'; Article 2(2) *International Convention on Economic, Social, and Cultural Rights* 1966 '…as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'; Article 1(1) *Convention for the Elimination of all forms of Discrimination Against Women* 1979 '…on the basis of sex …'; Article 2(1)-2(2) Convention on the Rights of the Child 1989 '…without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.''…to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'; Article 1(1) *International Convention on the Protection of the Rights of All Migrant Workers and Their Families* 1990 '…without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.'; Article 13(7) *International Convention for the Protection of All Persons from Enforced Disappearance* 2006 [concerning the prohibition against extradition] '…for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.'; *International Convention on the Rights of Persons with Disabilities*, Preambular paragraph (p) '*Concerned* about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'; on sexual orientation and gender identity as a form of discrimination see, United Nations Human Rights Council, *Resolution regarding human rights, sexual orientation and gender identity*, A/HRC/17/L.9/Rev.1, (15 June 2011) and *Declaration on human rights, sexual orientation and gender identity*, United Nations General Assembly A/63/635 (22 December 2008).

[30] *UNOPS, Technical Guidance for Prison Planning*, at 157 (providing that, '[p]risons may require a facility where prisoners who have died can be prepared for burial or cremation, or where they can be stored while awaiting family arrangements').

Searches of Prisoners, Cells and Visitors

Rule 1 on the requirement to respect human dignity frames how the specific rules on searches of prisoners, cells and visitors in Rules 50 – 52 and 60 should be interpreted and applied. These Rules cover whether searches should be carried out in the first place and when they are, how they are conducted.

Types of Searches

Searches cover all personal searches, including pat down and frisk searches, as well as strip and invasive searches. A strip search refers to the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person's private areas. Invasive body searches involve a physical inspection of the detainee's genital or anal regions. Other types of searches include searches of the property and rooms of prisoners. Visitors to prison are also frequently searched.

Searches as a Last Resort and the Use of Alternatives

The Essex Group recalled that international standards and norms set out clear requirements on when searches are legal, proportionate and necessary[31]. The Essex Group recalled the second Essex paper that emphasized the requirement for the prison administration to ensure that alternatives to searches (and other invasive measures) are in place so that searches are a means of last resort.[32]

The Essex Group also emphasised the particular position of vulnerability in which women are placed with regard to body searches, especially of an invasive nature. This vulnerability arises because of the way in which body searches are conducted (for example, requiring women to remove items of clothing and lifting their breasts) as well as reasons such as prior abuse. These risks again underscore the importance of prioritizing alternatives to searches and ensuring that searches are used only as a last resort as well as the importance of complying with Rule 19 of the Bangkok Rules that require searches of women to be conducted by women staff.

A fact-sheet by the Association on the Prevention of Torture and Penal Reform International sets out a list of concrete questions for prison officials to ask themselves when assessing if a search is necessary in the first place and if they are to be carried out, how and by whom in line with the Nelson Mandela Rules and international standards and norms.[33]

General Principles for the Conduct of Searches

Rule 50 of the Nelson Mandela Rules provides that searches must be respectful of the 'inherent dignity and privacy of the individual being'. The Essex Group emphasized that searches must be conducted in line with the prohibition of torture and other ill-treatment and the right to health.

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[31] Rules 19-21, UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (the Bangkok Rules, 6 October 2010), A/C.3/65/L.5, available at: http://www.un.org/en/ecosoc/docs/2010/res%202010-16.pdf; Principle XXI, Inter-American Commission on Human Rights (IACHR), Resolution 1/08, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (13 March 2008) No. 1/08, available at: http://www.cidh.org/basicos/english/basic21.a.principles%20and%20best%20practices%20pdl.htm ; *European Prison Rules,* Part IV para. 54

[32] *Second Report of the Essex Group of Experts*, at paras. 9 and 72.

[33] Association on the Prevention of Torture and Penal Reform International, *Body Searches: Addressing risk factors to prevent torture and ill-treatment* (Second edition, 2015), available at: https://www.penalreform.org/wp-content/uploads/2016/01/factsheet-4-searches-2nd-v5.pdf

The Essex Group noted that searches should be conducted in a designated search room in a prison facility where a prisoner can be searched with dignity away from the sight of other prisoners.[34] They pointed out that international standards and norms require that strip-searches must never be conducted within a group and that prisoners must never be completely naked.[35]

Similarly, the Essex Group noted that cell searches must respect prisoners' property, especially that with legal, sentimental, religious or similar value.

They noted that the laws and regulations on searches should be clearly specified and that a system and procedures for searches should be in place.[36]

Rule 60 of the Nelson Mandela Rules provides that 'search procedures for visitors must not be degrading and be governed by principles at least as protective' as for prisoners.

Where searches are considered absolutely necessary, the Essex Group recalled that the least intrusive means should be used and that searches should be intelligence-led rather than based on profiling or presumptions.[37] They also noted that it is particularly important for prison officials to be clear that the easiest or most convenient way in which to carry out a search does not establish necessity.

Avoidance of Normalisation or Conditioning to Operating in Ways that Offend Human Dignity

The Essex Group raised the importance of maintaining sensitivity and awareness of the concepts of proportionality and necessity in practice. They noted that there is a risk that prison officials become normalised to certain ways of operating. This could mean that they carry out searches more frequently or in circumstances that are not proportionate or necessary but that over time become seen as acceptable or the 'way things are done' internally.

The Essex Group emphasized the importance of regularly re-examining the rationale and justification for searches to ensure that they are not conducted on a routine basis, but rather their necessity and proportionality assessed on a case-to-case basis. For example, repeated body searches during periods when prisoners are not in touch with others outside their cell are not necessary or proportionate. The frequency of cell searches should also be examined to ensure that they are necessary and proportionate rather than simply the way the prison has always worked.

Recording of Searches

The Essex Group pointed to the rationale underlying the recording of the use of searches within Rule 51. They noted that Rule 51 is clear on the dual purpose of recording the use of searches as first, for accountability and second, to prevent the elimination of the use of searches to harass, humiliate or intimidate prisoners as set out in Rule 51.[38]

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[34] *UNOPS, Technical Guidance for Prison Planning,* at 115.

[35] European Committee for the Prevention of Torture (CPT), *Report to the Government of Bosnia and Herzegovina on the Visit to Bosnia and Herzegovina carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 29 September to 9 October 2015,* CPT/Inf (2016) 17 (5 July 2016) at para 79 (*CPT Report to the Government of Bosnia and Herzegovina)*; CPT, *Report to the Czech Government on the Visit to the Czech Republic carried out by the European Committee for the Prevention of Torture from 1 to 10 April 2014*, CPT/Inf (2015) 18 (31 March 2015) at para. 86.

[36] See, Rule 54(1) of the *European Prison Rules*, Rule XXI of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.*

[37] *CPT Report to the Government of Bosnia and Herzegovina,* at para 79.

[38] See also, Rule 54.4 of the *European Prison Rules*.

The Essex Group recommended that prison staff should be trained in methods to identify whether there are grounds for searching in the first place, whether searches are necessary and proportionate and which alternatives can be used.

Rule 51 requires the prison administration to keep records of the search including the identity of the officials who conducted the search and the reasons and results of the search. The experts particularly emphasized the importance of recording why intrusive searches are necessary given the harm they can have on prisoners as set out below. The experts also noted that evidence of the specific alternatives considered should be included in the documentation and records of the use of searches. The experts discussed that in order to ensure accountability, as explicitly captured in Rule 51, records need to include whether and which alternatives to searching had been considered and why they were not deemed suitable in the circumstances.

Intrusive Body Searches

Rule 52(1) specifies that intrusive body searches may only be used if absolutely necessary. This is because intrusive searches can be particularly harmful and have an adverse impact on prisoners' human dignity, particularly for women prisoners, and can amount to a violation of the prohibition of torture and other ill-treatment, depending on how they are carried out. It is for this reason, the Inter-American Commission on Human Rights[39] and some national jurisdictions have prohibited intrusive body searches altogether.[40]

The Essex Group suggested that 'absolutely necessary' should be understood in the same way in which it is applied to the use of instruments of restraint, meaning situations in which there is an immediate risk to the prisoner or other persons[41].

The Essex Group pointed out that intimate, strip and cavity searches may be conducted using force, with an even heightened potential of misuse by prison officials seeking to assert power and control over new prisoners. As noted above, in such cases, it may also violate the prohibition of torture and other ill-treatment.[42]

In line with international standards and norms, Rule 52(1) requires that alternatives should always be pursued instead of intrusive body searches.[43] Where available, technology should be used such as electronic detection scanning methods[44] although certain forms of technology will not pick up an organic package, for example.

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[39] Principle XXI, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*: "Intrusive vaginal or anal searches shall be prohibited by law."

[40] See Article 57 of the 2009 French Prison Law. In Brazil, five states have also prohibited invasive searches: Paraíba, Goiás, Rio Grande do Sul, Rio de Janeiro and Minas Gerais.

[41] See Rule 48 of the Nelson Mandela Rules.

[42] *Iwanczuk v Poland*, Application No. 25196/94 (ECHR,15 November 2001); *EL Shennawy v France* Application no. 51246/08 (ECHR, 20 January 2011) (during two weeks, the applicant was subjected to 4 to 8 searches a day, when going and leaving the tribunal; during the first week, searches were video recorded and carried out by hooded law enforcement personnel; these searches, under these conditions and frequency, were not justified by pressing security need); *Valasina v Lithuania*, Application No. 44558/98 (ECHR, 24 July 2001)(a male prisoner was obliged to strip naked in the presence of a woman prison officer, and then his sexual organs and his food were touched with bare hands; this constituted a degrading treatment); *Frerot v. France*, Application No. 70204/01 (ECHR, 12 June 2007).

[43] See, for example, Rule 20 of the *Bangkok Rules* and Principle XXI of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.*

[44] UN Committee against Torture, *Observations of the Committee on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR*), (16 December 2013) UN-Doc. CAT/C/51/4, para.31. See also, Principle XXI of the *Inter-American Principles And Best Practices On The Protection Of Persons Deprived Of Liberty.*

The Essex Group underscored the critical importance that alternatives are also in line with the respect for a prisoner's human dignity. For example, the use of laxatives is viewed as bad practice and not respectful of human dignity.[45]

Body Cavity Searches by Healthcare Professionals

Rule 52(2) specifies that body cavity searches 'shall only be conducted by qualified health-care professionals other than those primarily responsible for the care of the prisoner'. This is in line with medical ethics and the Bangkok Rules.[46]

The second clause in Rule 52(2), however, recognises that in certain situations this is not possible. Where it is not possible, the Rule provides that the search should not be conducted by the primary health-care provider for the prisoner but by 'staff appropriately trained by a medical professional in standards of hygiene, health and safety'.[47] For example, the European Committee for the Prevention of Torture has found that, 'such examinations [body cavity searches] should only be carried out by a medical practitioner, who is not the treating doctor of the prisoner concerned, and under conditions which respect physical safety and human dignity'.[48] The World Medical Association has asserted that:

> *These searches are performed for security reasons and not for medical reasons. Nevertheless, they should not be done by anyone other than a person with appropriate medical training. This non-medical act may be performed by a physician to protect the prisoner from the harm that might result from a search by a non-medically trained examiner. In such a case the physician should explain this to the prisoner. The physician should furthermore explain to the prisoner that the usual conditions of medical confidentiality do not apply during this imposed procedure and that the results of the search will be revealed to the authorities.*
>
> *Finally, the World Medical Association urges all governments and responsible public officials to provide body searches that are performed by a qualified physician whenever warranted by the individual's physical condition.*[49]

Searches of Visitors

Rule 60(1) of the Nelson Mandela Rules provides that visitors must consent to being searched in order to be admitted to the prison and where they do not 'the prison administration may refuse access'. The experts recalled that during the negotiations it was recognized that searches of

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[45] See *Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009*, CPT/Inf (2010) 33, available at: http://www.cpt.coe.int/documents/grc/2010-33-inf-eng.pdf, para. 93; *Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 19 to 27 January 2011*, CPT/Inf (2012) 1, available at: http://www.cpt.coe.int/documents/grc/2012-01-inf-eng.pdf, para. 51.

[46] Rule 19 of the *Bangkok Rules*; *World Medical Association Statement on Body Searches of Prisoners*, Adopted by the 45th World Medical Assembly, Budapest, Hungary, October 1993 and editorially revised at the 170th Council Session, Divonne-les-Bains, France (May 2005), available at: http://www.wma.net/en/30publications/10policies/b5/ (*WMA, Statement on Body Searches of Prisoners)*

[47] See Penal Reform International and Thailand Institute of Justice, *Guidance Document on the United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)* (2013) at 62 – 63 (for a detailed discussion of the standards supporting this point).

[48] CPT, Report to the Estonian Government on the Visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 30 May to 6 June 2012, CPT/Inf (2014) 1 (21 January 2014) at para. 83.

[49] *WMA, Statement on Body Searches of Prisoners*, 212

prisoners and searches of visitors are different as visitors are not in prison following a conviction for a criminal offence. Therefore, searches can never be enforced upon visitors. However, during the negotiations, states pointed out that the prison administration also needs to ensure safety and security in prisons including preventing contraband being brought into the prison. Yet, even on this rationale, a search may not be required or be necessary or proportionate if the visit is not open thus removing the risk of any contraband being transferred.

The Essex Group noted that consent must be interpreted as informed consent and the procedures used to conduct searches announced and explained before entering the facility.

They also pointed out that when visitors are aware that they may be searched, it gives them the opportunity to explain to the prisoner that the risk of the search meant that they had to dispose of any contraband which they are sometimes put under pressure to bring in.

The Essex Group emphasised that there should not be a blanket method of carrying out body searches. Rather, it should be intelligence-led, that is, used only when there is evidence that it is required or evidence that a body search is necessary and proportionate to the identified risks. Further, the experts suggested that search procedures for visitors should 'recognise that visitors are not themselves prisoners and that the obligation to protect the security of the prison has to be balanced against the right of visitors to their personal privacy'.[50]

The Essex Group also pointed out that children should not be subject to body searches as it will never be in their best interests. However, if there is a suspicion that a child may have been pressured into bringing contraband to the prison, alternatives may be possible, such as a non-contact visit. This would still mean that the child could visit his or her family member.

Prisoners with Disabilities

Two key rules deal with the rights of prisoners with disabilities. These are Rule 5(2) and Rule 109. Rule 5(2) requires prison administrations to make all 'reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis'. This is because a disability is as much a reflection of the environment, structure and circumstances in which people live that disadvantage them as an individual trait. Therefore, the idea underpinning reasonable accommodation and adjustment is that the environment and structure should accommodate the trait. If the structure inherently imposes a detrimental experience on any disability, the disadvantage for the person amounts to arbitrary deprivation or punishment. For example, if showers are equipped with a sill that prevents access to wheelchair users, the disability is disadvantaged by a structure, which prison officials will be required to correct.

Rule 5(2) should be read together with Rule 4(2) which requires that all programmes, services and assistance are 'delivered in line with the individual treatment needs of prisoners' and Rule 109 on the detention and treatment of prisoners with mental health disabilities and/or health conditions.

The first step in making reasonable accommodation or adjustments is to identify what the individual needs of the prisoner are. The Essex Group underscored that it is vital that the prisoner has input into what his or her needs are.[51] The prison is then required to make the reasonable

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[50] Coyle A, *A Human Rights Approach to Prison Managemen*t (second edition, 2009), available at: http://www.prison-studies.org/sites/default/files/resources/downloads/handbook_2nd_ed_eng_8.pdf, at p.64 ; see Rule 54.9 of the *European Prison Rules*.

[51] Article 3(a) of the UN Convention on the Rights of Persons with Disabilities.

accommodation or adjustments to meet the needs of the prisoner. Article 2 of the UN Convention on the Rights of Persons with Disabilities defines 'reasonable accommodation' as the 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[52]

The Essex Group noted that in addition to specific accommodation and adjustments tailored to individual prisoners, the prison itself and the way in which it is run can be adapted so that it is not disadvantageous to any prisoner with learning needs or a physical, intellectual or mental disability. Prisons have traditionally been designed and run with young, healthy men in mind despite the fact that many statistics show high levels of prisoners with mental or intellectual disabilities or needs.[53] This calls into question both the justifications for and wisdom of incarcerating many of these individuals in the first place. This is addressed by Rule 109 which has three levels. It first recognises that certain individuals should not be held in prisons and if they are found to be, they should be transferred out of the prison. This is an assessment for the courts. The Essex Group noted that this Rule includes the requirement for ongoing and regular assessment as mistakes may have been made during the initial assessment or a prisoner's health may deteriorate while in prison. The Essex Group also pointed out that 'severe mental' attaches to disabilities *and* health conditions. Second, Rule 109 identifies prisoners who may need to be accommodated within 'specialized facilities'. Third, it places an obligation on the prison administration to provide psychiatric treatment to those 'prisoners who are in need of such treatment'. The Essex Group emphasised that any assessment or treatment should only be provided where the prisoner provides his or her informed consent.

Beyond Rule 109, a general shift is needed in the majority of prisons in addition to meeting individual prisoners' needs. For example, written and oral instructions and signs can be produced and communicated in a way that is accessible and understandable to all prisoners.

The Essex Group also noted that the prison administration must recognize that prison staff will not have all of the expertise and knowledge on strategies and approaches to put in place. Community partnerships are therefore needed so that prisons can benefit from expertise within the community and align prisons with best practice in the outside world in order to minimise differences between life in prison and 'at liberty'.

The Essex Group also noted the importance of cross-referencing Rule 5(2) with Rule 39(3) which addresses the impact of 'mental illness or developmental disability' on conduct and the need for the prison administration to take this into account when deciding upon disciplinary sanction. The experts noted that disabilities should also be taken into account in any reward or privilege system based on 'good' behaviour and assessment of risk reduction for release.[54] The experts pointed out that if certain programmes or activities are only accessible to prisoners who progress in a certain way then some prisoners with mental, intellectual or learning disabilities may be excluded, which constitutes discrimination. They also recalled the first paper of the Essex Group in which the

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[52] For direction on the application of reasonable adjustment/accommodation in prison, see The National Offender Management Service (England and Wales) policy on reasonable adjustments, Annexes G and H.

[53] Prison Reform Trust, *Prison, the facts* (2016) available at: *http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/summer%202016%20briefing.pdf,* at 9-10; Christine M. Sarteschi, *Mentally Ill Offenders Involved With the U.S. Criminal Justice System* (16 July 2013, SAGE open), available at: http://sgo.sagepub.com/content/3/3/2158244013497029; US State Department of Justice, *Bureau of Justice Statistics: Special Report* (September, 2006), available at: http://www.bjs.gov/content/pub/pdf/mhppji.pdf. KiDeuk Kim, Miriam Becker-Cohen, Maria Serakos, *The Processing and Treatment of Mentally Ill Persons in the Criminal Justice System* (7 April 2015, Urban Institute), available at: http://www.urban.org/research/publication/processing-and-treatment-mentally-ill-persons-criminal-justice-system/view/full_report

[54] See rules 36-46 on discipline.

experts emphasized the requirement of reasonable accommodation (or reasonable adjustments) that underpin the UN Convention on the Rights of Persons with Disabilities.[55] Article 9 provides:

> *To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities, access on an equal basis with others, to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.*

In the first Essex paper, the experts noted that, '[t]he principle of reasonable accommodation is defined in Article 2 of the CRPD as 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'. This therefore requires that the state ensures that it reasonably accommodates a particular individual's needs. This must be done in consultation with the individual, as in accordance with the principle of established in Article 3(a) of the CRPD'. The experts underscore that the principle of reasonable accommodation must also apply to sanctions and systems of reward and privilege.

[55] *First Report of the Essex Group of Experts,* at 35 – 36.

Chapter 2[56]

Prison management

Issues/rules covered:

- Basic principles (Rules 3, 4, 5(1))
- Allocation, classification, admission (Rules 59, 89, 93, 94, 119(1))
- Information to be provided to prisoners (Rule 54, 55)
- Prisoner file management (Rules 6-10)
- Institutional personnel: prison staff training (Rules 74-80 in general, Rule 49 for use of control techniques, Rule 82(2) for use of force)
- Inspections (Rules 83, 84, 85)

Basic principles

Rule 4 unequivocally asserts that rehabilitation and reintegration are the key to protecting society against crime and reducing recidivism.

It was noted that the development of rehabilitation and reintegration programmes should take into account the many reasons for prisoners' failure to lead a law-abiding and self-supporting life after release. This should include consideration of less obvious or longer-term challenges such as family break-ups, unemployment, social marginalisation and stigmatisation.

The Essex group also reflected on the myriad ways in which imprisonment can hinder successful reintegration and advised that prison administrations should make every effort to minimise these obstacles.

The experts pointed out that the rehabilitation and reintegration programmes available to prisoners should be as broad as possible, taking into account their many different social, economic and cultural backgrounds.

The relevance of Rule 94 was highlighted, which captures the requirement to develop an individualised programme (sentence plan) at the beginning of a prison sentence to ensure the provision of activities and services which are appropriate to the individual and reflective of their criminogenic background. The experts also stressed that prisoners should have the opportunity to input to the development of their rehabilitation and reintegration programmes.

The experts noted that the requirement to 'offer' opportunities to prisoners (Rule 4(2)) precludes forced participation in any programmes. They pointed out, however, that prisoners may need to participate in programmes to meet certain milestones (for example, prisoners may need to complete particular programmes before applying for parole). The experts also noted Rule 95, which calls for the establishment of a system not based on sanctions but on privileges to 'encourage

[56] This chapter was authored by Andrea Huber, Penal Reform International, with the support of Sharon Critoph.

good conduct, develop a sense of responsibility and secure the interest and cooperation of prisoners in their treatment'.

It is important to note that while prisoners may assume responsibility over certain aspects of such programmes, activities or services, their role must never extend to placing one prisoner in a position of power over another. The Essex group referred to Rule 40, which establishes clear boundaries for self-government. (See also Chapter 6, Incident Management).

Whilst Rule 4 can be interpreted as not being applicable to pre-trial detainees, the experts recommended that pre-trial detainees should not be excluded from programmes, activities and services, nor should they be required to participate in them. The denial of opportunities during pre-trial detention would greatly reduce the chances of successful reintegration upon release whether or not the individual is eventually convicted. The experts noted that Rule 4 on non-discrimination implies that pre-trial detainees are not at a disadvantage to sentenced prisoners.

It was discussed that the term 'other competent authorities' in Rule 4(2) means that 'competent' State authorities other than the prison administration should be involved in the provision of programmes, activities and services. Quality programmes provided by government departments in the community could also be offered in prison, thus reducing the burden on prison authorities. Rule 88 also highlights the role community agencies should play in the task of social rehabilitation of prisoners, which was understood to include civil society agencies which often provide services in prison.

The experts noted the relevance of Rules 93-100 (Work), 104-105 (Education and Recreation) and 106-108 (Social Relations and Aftercare) in the context of rehabilitation and reintegration.

→ For Rules 3 and 5, see Chapter 1, Dignity

Allocation, classification, admission

Proximity to home and family

The Essex group noted that the allocation of prisoners should take into account Rule 58 which states that prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals, including by receiving visits. Rule 59 states that prisoners should be allocated, to the extent possible, close to their homes or places of social rehabilitation.

It was stressed that access to the outside world needs to be a key consideration when planning for the building of new prisons, considering the proximity to communities, transport options, access to the wider criminal justice system (e.g. courts), and the availability of guest houses for overnight accommodation. Practical guidance in the design, planning and operation of correctional facilities can be found in the UNOPS *Technical Guidance for Prison Planning* (UNOPS *Technical Guidance*).[57]

Prisoners should never be sent to facilities far from their homes as a form of punishment. The experts noted that deliberately allocating prisoners far from their families or purposeful and

[57] United Nations Office for Project Services (UNOPS), *Technical Guidance for Prison Planning: Technical and operational considerations based on the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 2016 *(Technical Guidance for Prison Planning, based on the Nelson Mandela Rules)*.

continuous transfer of prisoners may constitute a violation of the prohibition of torture and other ill-treatment.[58]

The Bangkok Rules state that the allocation of women prisoners should take into account their caretaking responsibilities, as well as the individual woman's preference and the availability of appropriate programmes and services.[59]

It was also noted as good practice to consult prisoners about their initial allocation and any subsequent transfer from one prison to another, as enshrined in the European Prison Rules.[60]

The experts discussed the potential tension between the obligation to separate categories of prisoners with keeping them close to their homes or places of social rehabilitation. This may be a particular challenge in allocating female prisoners, minors or high security prisoners due to the smaller number of specialist facilities, particularly in geographically large countries.

The Bangkok Rules address this by requiring flexibility in allowing contact and visits with family to compensate for this disadvantage faced by women.[61]

→ See Chapter 3, Contact with the outside world

Prison facilities

Prison architecture can play an important role in the success of prisoner rehabilitation and reintegration.[62]

The Essex group noted there are risks with both large prisons and prisons so small that proper facilities cannot be provided, for example where there are no specialist staff.

The experts referred to relevant sections of the UNOPS *Technical Guidance*, including on planning and designing prisons to deliver sports-based activities and the provision of educational, vocational, spiritual and recreational activities for prisoners.[63]

The experts clarified that Rule 89(3), which states the maximum number of 500 prisoners per facility, refers to closed prisons and that the maximum population of open prisons should be smaller.

Separation

The Essex group recalled that Rule 11 requires the separation of different groups of prisoners, including pre-trial detainees and convicted prisoners. Participants highlighted that the separation

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[58] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991*, 1992, CPT/Inf (92) 3, para. 57 *(CPT 2nd General Report)*.

[59] UN Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules), Rule 4.

[60] European Prison Rules 2006, Rule 17.3

[61] Rule 26 of the Bangkok Rules states that contact should be encouraged and facilitated 'by all reasonable means' and that measures shall be taken to 'counterbalance disadvantages faced by women detained in institutions far from their homes'.

[62] See, for example, Dr. Marayca López, 'How to build for success: prison design and infrastructure as a tool for rehabilitation', *Penal Reform International expert blog series website*, 24th July 2014, accessed 14 September 2016 at http://www.penalreform.org/blog/build-success-prison-design-infrastructure-tool-rehabilitation/.

[63] *Technical Guidance for Prison Planning, based on the Nelson Mandela Rules*, pp. 141-150 and 170-175.

of women from men and of juveniles from adults makes it easier to meet the distinctive groups' needs, and is also a key measure to prevent violence and exploitation, including sexual violence.

Separation, in different facilities or different sections of the same facility, has been recommended by the Inter-American Commission on Human Rights, suggesting separation also for elderly prisoners, and of civil prisoners from those convicted of criminal offences.[64]

In managing the separation of different prisoner categories, authorities must respect the principle of non-discrimination which requires that each category of prisoner receives equal access to all available resources and services (Rule 2).

The Inter-American Commission on Human Rights underscored that:

> *Under no circumstances shall the separation of persons deprived of liberty based on categories be used to justify discrimination, the use of torture, cruel, inhuman, or degrading treatment or punishment, or the imposition of harsher or less adequate conditions on a particular group.*[65]

Classification and risk assessments

Classification and risk assessments of prisoners are key tools of prison management, required to differentiate and apply various levels of security for different prisoners. The concept is captured in Rules 94 and 89, both unchanged by the review, and is based on an individual assessment and treatment of each prisoner.[66] The Essex group underlined that the references to the 'varying degrees of security' and 'individualized treatment' should be understood in the context of: the principle of rehabilitation and reintegration (Rules 4, 87, 88, 91, 92 94); the provision for the specific needs of individual prisoners (Rules 2(2)); and the protection of prisoners and prison staff from violence (Rule 1).

Risk assessments help identify which prisoners present a threat to themselves or others or a flight risk. While the nature of the offence for which the prisoner was convicted and the length of sentence are an indicator, the Essex group noted that risk assessments should not be based solely on the type of offence or sentence. In particular, prisoners under a death sentence or life sentenced prisoners must not be subjected to higher security measures merely on the basis of their sentence.

Concern was raised, in general, about the frequent practice of keeping prisoners locked in their cells for most of the day as a matter of routine rather than based on individual security concerns.

Risk assessments should include the nature, severity and motivation of the current and previous offences, any history of involvement in inter-prisoner violence or escape attempts, personal history including victimisation (e.g. whether the prisoner has experienced domestic abuse or child abuse), attitude towards the victim and towards fellow prisoners, 'emotional maturity' etc.[67] Risk assessments should cover the identification of any risks of abuse or violence from/to prison staff or

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[64] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XIX.

[65] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XIX.

[66] Rule 94 calls for 'a study of the personality of each prisoner' and a programme of treatment 'in light of the knowledge obtained about his or her individual needs, capacities and dispositions'. Rule 89 emphasises the need for 'individualization of treatment' and a 'flexible system of classifying prisoners in groups' for this purpose. Rule 93 also refers to the classification of prisoners under sentence based on individual risk and needs assessments (see also Rule 89).

[67] For guidance on risk assessments see United Nations Office on Drugs and Crime (UNODC), *Handbook on Dynamic Security and Prison Intelligence*, New York, 2015, pp. 14-15 *(Handbook on Dynamic Security)*.

prisoners,[68] discrimination, self-harm or suicide, and also the identification of any specific needs of prisoners.

The experts stressed that mental health issues should not be misinterpreted as a risk factor when determining classification levels. This is supported by Rule 41(d) of the Bangkok Rules which states that the gender-sensitive risk assessment and classification of prisoners must: 'Ensure that those with mental health care needs are housed in accommodation which is not restrictive, and at the lowest possible security level…'

Most countries allocate prisoners in low, medium and high security levels. The security level to which prisoners are subject to should be the 'minimum necessary to achieve their secure custody'.[69]

However, in the absence of effective classification system, prisoners are frequently over-classified (i.e. housed in higher security facilities than necessary). The number of prisoners who present a genuine risk of escape or a risk to themselves, other prisoners or staff is usually quite small.[70] Allocating prisoners to the minimum security level necessary has three primary benefits: the treatment of prisoners will be more humane (and in line with the principle of minimising differences to life at liberty); staff will have greater capacity to mitigate and minimise the risk of those prisoners who do pose an actual risk; and as higher security facilities are more expensive, there will be financial gains by minimising the number of prisoners allocated to high security levels.

The Essex group highlighted the potential damaging consequences of placing low security prisoners in high security facilities/regimes and noted that certain groups are more likely than others to suffer the adverse effects of high security classification. This included women prisoners, for whom the UN Bangkok Rules require classification methods and sentence planning that address the gender-specific needs and circumstances. They specify that a gender-sensitive risk assessment shall:

> *'Take into account the generally lower risk posed by women prisoners to others, as well as the particularly harmful effects that high security measures and increased levels of isolation can have on women prisoners.'*[71]

A proper risk assessment on admission and regular review to reallocate a prisoner to a lower or higher security level forms part of this measure. In particular prisoners nearing the end of their sentence should be placed in low security accommodation to prepare them for their return to society.[72]

While in some countries judges handing down the sentence also specify the security level for imprisonment, the experts noted that prison authorities are better placed to determine the security requirements. This approach also facilitates the review of security levels at regular intervals, which can act as an incentive for prisoners.[73] However, the experts stressed the need for transparent criteria and avenues to challenge classifications, even more so in systems where the category

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[68] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *11th General Report on the CPT's activities covering the period 1 January to 31 December 2000*, 3 September 2001, CPT/Inf (2001) 16, para. 26 *(CPT 11th General Report)*.

[69] Rule 51 of the European Prison Rules also states explicitly that security measures applied to individual prisoners shall be the minimum necessary to achieve their secure custody.

[70] *Handbook on Dynamic Security*, p. 5.

[71] UN Bangkok Rules 40 and 41.

[72] See Rule 87 on the need for steps to be taken to ensure 'a gradual return to life in society'.

[73] Andrew Coyle, *A Human Rights Approach to Prison Management: Handbook for Prison Staff: Second edition*, International Centre for Prison Studies, London, 2009, p. 62 *(A Human Rights Approach to Prison Management)*.

'entails legal consequences based on assessments of the person's future behaviour', such as qualification for conditional release.[74]

The experts noted that classification requirements need to be taken into account already at the prison planning stage, and in the allocation of prisoners (e.g. location, physical state of the prison, number and experience of prison staff).

Furthermore, the experts noted the relevance of Rule 12(2), which requires careful selection regarding the occupation of shared cells, in particular dormitories, in terms of who is 'suitable to associate with one another in those conditions'.

Provision of information

Information about charges

Rule 119(1) requires that 'every untried prisoner has the right to be promptly informed about the reasons for his or her detention and about any charges against him or her'. In doing so, the Rules incorporate an obligation deriving from Articles 9(2) and 14(3) of the International Covenant on Civil and Political Rights (ICCPR).

Information must be provided in a language that the arrested person understands, or through interpretation (free of charge).[75] It has to be noted that the ability to communicate on everyday issues does not mean individuals can cope with criminal procedure law and charges.[76] For some categories of vulnerable persons, directly informing the person arrested of the reasons for detention is not sufficient.[77] It was also recalled that a family member or other person needs to be notified of the fact and place of detention.[78]

The participants highlighted that interpreters need to be independent from the authorities, as required by the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[79]

Obligations on the provision of information may be met orally initially and subsequently be confirmed in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.[80] The UN Human Rights Committee has provided guidance on the type of information required and how it needs to be delivered. The reasons given must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint.[81]

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[74] Such practice was documented, for example, in Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, 27 November 2013, CAT/OP/ARG/1, para. 42.

[75] Principle 14 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment *(Body of Principles)*.

[76] See, for example, NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*, April 2015, p. 67 *(NSW Police Force Code of Practice)*.

[77] *NSW Police Force Code of Practice*, para. 28. When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives. For certain persons with mental health-care needs notice of the arrest and the reasons also need to be provided directly to persons they have designated or appropriate family members.

[78] *Body of Principles*, Principle 16(1).

[79] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Guideline 3, para 43(f).

[80] UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, para. 31.

[81] UN Human Rights Committee, *General Comment No. 35, Article 9: Liberty and security of person*, 10 April 2014, CCPR/C/GC/R.35/Rev.3, paras. 24-5 *(General Comment No. 35)*.

The term 'promptly' in Rule 119(1) requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law or is publicly named as such. Any delay of notification must be exceptional and kept to the absolute minimum necessary.[82]

Given that information needs to be provided 'immediately upon arrest',[83] this obligation will usually have to be met before a person is admitted to a detention facility. For example, if a person is arrested by police and transferred to a pre-trial detention facility, he/she must have been notified about the charges before arriving. Exceptions might arise where an interpreter has to be found or where additional charges are brought against a person who is already detained.

The role of the prison authority should therefore be to verify whether information about charges was provided, and to assist detainees in obtaining relevant information. To do this, they will need to liaise with other relevant authorities. The Essex group held that the prison administration would be informed about the charges at least in a general way by the commitment order, without which prisoners should not be received in a prison (see Rule 7).

Requirement of valid commitment order

The Essex group noted the prison administration's obligation to verify the existence of a valid 'commitment order' upon admission of a prisoner is enshrined in Rule 7.

The experts advised that such an order, at the very minimum, must include the date, time and place of arrest, the name of the person and authority ordering the commitment and any other relevant information (see Rule 7(b)). Commitment orders must be issued and signed by a judicial authority or another competent agency.

The UN Subcommittee on Prevention of Torture (SPT) has noted, for example, that 'the absence of copies of warrants of committal makes it impossible to monitor any extensions of pre-trial detention'.[84] Any commitment order lacking the required information should be automatically considered invalid.

The group noted that, when a commitment order expires, prison authorities bear a responsibility to either release the prisoner without delay, or – where the legal framework does not allow them to do so – to contact the responsible court or authority immediately, ideally ahead of the foreseeable expiration of the commitment order.

Information provided in detention

Rules 54 and 55 address both the content of information provided to prisoners and the manner in which it should be imparted. The Essex group emphasised that it is in the vital interest of prison administrations and staff for prisoners to understand the prison rules and procedures and their rights and obligations.

The participants considered the terminology 'authorized methods of seeking information' in Article 54(b), and cautioned that this should not be interpreted in a way that results in the denial of information about prisoners' rights. They also noted that 'applicable prison regulations' in Rule

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[82] *General Comment No. 35*, CCPR/C/GC/R.35/Rev.3, para 25.

[83] *General Comment No. 35,* CCPR/C/GC/35, para 27.

[84] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mali*, 20 March 2014, CAT/OP/MLI/1, para. 78 *(SPT Report on visit to Mali)*.

54(a) should be interpreted in the broadest sense and should include information on regulations around the use of force and restraints.

While information should be provided at the earliest possible moment, the experts pointed out that admission to prison is a highly stressful time when detainees may not be able to grasp all the information received. Women prisoners, particularly those who have been separated from their children, may be especially distressed at the time of their admission and should be treated with sensitivity.[85]

Moreover, in larger prisons there may be a significant number of prisoners passing through the admissions area each day, making it difficult to ensure information is provided to each prisoner in a language and format he/she understands.

The experts therefore recommended that information be explained to prisoners again at a later stage and that they should have the opportunity to ask questions and seek clarifications.

→ For further details on information provided on requests and complaints, see Chapter 6, Incident management.

Methods of imparting information

The provision of information should involve a conversation rather than simply handing out pamphlets or giving a lecture. Peers should be engaged in the induction process and peer support may also be helpful for follow up questions. As an example of good practice, it was noted that in some countries there are information desks staffed by prisoners with training in prison regulations and policies.

Rule 55(1) clarifies that information should be available at least in the most commonly used languages in accordance with the needs of the prison population and professional interpretation should be made available wherever possible.

The Essex group acknowledged that professional interpretation may be difficult to provide in some countries or for some languages. They suggested that the support of other prisoners with relevant language skills may be helpful, yet stressed that while this may be a solution for day-to-day routines, it does not provide a sufficient safeguard for more complex or private matters (e.g. medical examinations and complaints). An inventory of the languages spoken by prison staff, social workers and NGOs that might be able to help, was suggested as good practice.

Embassies may also be in a position to assist with language needs; however, where a fear of persecution exists, contact to the diplomatic representation is impermissible. The Essex group noted the relevance of Rule 62 in this context (foreign nationals, refugees and stateless persons), as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 16, paragraph 2) and the Vienna Convention on Consular Relations (article 36, paragraph 1(b)).

→ For consular assistance, see Chapter 3, Contact with the outside world

Good practice could include an easy-to-understand guide with information on practicalities (e.g. times of meals, how to sign up for vocational and educational programmes; information about peer support and relevant contact details; visitation rights; relevant timetables etc.).

[85] See UN Bangkok Rules, Rule 2.

Prison file management

The Essex group stressed the importance of prisoner file management for both good prison management and for the protection of the rights of prisoners. The UNODC *Handbook for Prison Leaders* stresses:

> *'Ensuring effective data management systems, including the basic prerequisite of maintaining adequate files for individual prisoners, is essential for the effective management of any prison system. (…) Where prison records are poor, there is a great risk of individual prisoners becoming "lost" in the system and no one knows why they are being detained, for how long and when they should be released. In many countries it has happened that "lost" prisoners thought to have been released were "discovered" still in prison many years later. Good prisoner data management is critical to ensuring that their human rights are respected and it is also important in terms of the management of the prison itself.'*[86]

The SPT has emphasised the role of complete and reliable records as 'one of the fundamental safeguards against torture or ill-treatment' and as 'an essential condition for the effective exercise of due process guarantees'.[87]

Bearing these objectives in mind, the Essex group discussed the considerable changes to the SMR related to prisoner file management, noting that they now exceed the detail provided in regional standards and include:

- Standardised prisoner file management (Rule 6)[88]
- Security of information (numbered and signed pages, secure audit trail, prevention of unauthorised access or modification) (Rule 6 and 9)
- Requirement of a valid commitment order for admission (Rule 7, see above)
- Comprehensive personal data (Rule 7)
- Prisoner to have access to his/her records (Rule 9)
- Data recorded throughout the term of imprisonment (Rule 8)
- General data to be extracted on trends (Rule 10)

Security of information

The Essex group noted that a 'secure audit trail' implies meticulously kept records which should include the identity of the staff member who enters, modifies or deletes information in the system as well as the date and time of any additions/revisions/deletions. The experts referred to guidance provided on the secure storage of prisoner files by the UNODC *Handbook on prisoner file management*[89] and the UNOPS *Technical Guidance*.

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[86] United Nations Office on Crime and Drugs (UNODC), *Handbook for Prison Leaders*, New York, 2010, p. 94 *(Handbook for Prison Leaders)*.

[87] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine*, 16 March 2016, CAT/OP/UKR/1.

[88] See also, for example *SPT Report on visit to Mali,* CAT/OP/MLI/1, para. 75.

[89] UNODC, *Handbook on Prisoner File Management*, New York, 2008, Chapter 6.

The sensitivity of information (right to privacy and confidentiality of personal information) is recognised by Rule 9, which implies that access to information in the prisoner file should be on a strictly need-to-know basis.

The participants noted cases in which prisoners' safety was in jeopardy or prisoners were even killed after information about their offence became known to other prisoners. They therefore stressed that the files need to be kept in a location where they cannot be accessed by prisoners or any unauthorised persons.

The Essex group recognised there may be a tension between implementing a dynamic security approach and upholding confidentiality of prisoners' files. It was suggested that access to the entire file could be limited to certain prison staff (e.g. more senior staff or wing leaders), who could share the necessary information with their peers, including during staff meetings.

The UN Beijing Rules were mentioned as possibly providing additional guidance. Rule 21 states that access to the records of juvenile offenders must be limited to persons 'directly concerned with the disposition of the case at hand or other duly authorized persons'.

Medical confidentiality

The Essex group considered how the principle of medical confidentiality is to be reconciled with the need to disclose information to prison staff pertaining to a prisoner's mental health status, bearing in mind the requirements of Rule 5(2).[90] Especially following a disciplinary offence, it would be counter-productive to withhold such information from prison staff and it might also be inconsistent with Rules 39(3) and 1.[91]

The experts noted that information on a prisoner's mental health is crucial for prison staff to fulfil their duties (including providing safety and security), but not all medical information needs to be shared. Rather, information can be shared by health-care personnel with prison staff on a need-to-know basis, e.g. potential issues should be flagged to staff so they can recognise a connection between a prisoner's behaviour and mental health problems.

Similarly, the experts held that a common-sense approach will greatly help staff to assess behavioural patterns and will indicate behaviour that may be a result of mental health problems. Such cases must be referred to a health-care professional. The Essex group recalled Rule 8(c) which requires that information related to behaviour and discipline be recorded in the prisoner file.

→ See also Chapter 5 for restrictions, discipline and sanctions and Chapter 4 for health-care

Comprehensive personal data

Rule 7 lists the following information to be entered in the prisoner file management system upon admission of every prisoner:

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[90] Rule 5 (2) 'Prison administrations shall make all reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis'.

[91] Rule 39 (3) 'Before imposing disciplinary sanctions, prison administrations shall consider whether and how a prisoner's mental illness or developmental disability may have contributed to his or her conduct and the commission of the offence or act underlying the disciplinary charge. Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability'; Rule 1 'The safety and security of prisoners, staff, service providers and visitors shall be ensured at all times', which inherently includes protection from suicide and self-harm.

a) Precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender;
b) The reasons for his or her commitment and the responsible authority, in addition to the date, time and place of arrest;
c) The day and hour of his or her admission and release as well as of any transfer;
d) Any visible injuries and complaints about prior ill-treatment;
e) An inventory of his or her personal property;
f) The names of his or her family members, including, where applicable, his or her children, the children's ages, location and custody or guardianship status;
g) Emergency contact details and information on the prisoner's next of kin.

The Essex group pointed out that much of this information can be captured during the reception process[92] on entry to a prison, but noted the need to update some of the information listed in the course of the prison term.

Within its country visits, the SPT has repeatedly documented deficiencies in the maintenance of registers, noting for example if and when registers were not completed or signed regularly, and 'useful records, such as records of deaths, transfers to hospital or other prisons, disciplinary punishments, visits by court officials' were not available.[93]

The Essex group discussed Rule 7(a), describing personal data to be recorded by prison administration as 'precise information enabling determination of his or her unique identity, respecting his or her self-perceived gender'.

The experts noted that the provision was included to protect lesbian, gay, bisexual, transsexual and/or intersex (LGBTI) prisoners, in light of Rule 2 which prohibits discrimination, including based on 'other status' (i.e. gender identity and sexual orientation) and which requires that prison administrations take individual needs into account.

The allocation of LGBTI prisoners and subsequently their placement within a facility need to be determined with great caution in light of the documented particular vulnerability and risk of human rights violations and abuses. LGBTI prisoners should be consulted on their allocation.[94]

The SPT, in its eighth Annual Report, has noted concern that 'the absence of appropriate means of identification, registration and detention leads in some cases to transgender women being placed in male-only prisons, where they are exposed to a high risk of rape, often with the complicity of prison personnel'.[95]

The SPT has also noted that 'obtaining precise individual information as to gender identity is vital to determining proper treatment, including hormone and other treatment associated with gender transition. In the absence of mechanisms to obtain such information, grave health consequences ensue'.[96]

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[92] UNOPS' *Technical Guidance for Prison Planning*, based on the Nelson Mandela Rules, offers guidance on how to design a reception area that supports effective registration.

[93] See, for example, *SPT Report on visit to Mali*, CAT/OP/MLI/1, para. 76.

[94] See PRI and APT, *LGBTI persons deprived of their liberty: a framework for preventive monitoring*, 2015, London *(LGBTI persons deprived of their liberty)*; UN General Assembly, 56th Session, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, 3 July 2001, A/56/156, para. 23.

[95] UN Committee Against Torture, 54th Session, *Eighth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 March 2015, CAT/ C/54/2, para. 68.

[96] UN Committee Against Torture, 57th Session, *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 22 March 2016, CAT/OP/C/57/4, para. 65.

The recording of information on the self-perceived gender in Rule 7(a) should therefore be considered as a way to facilitate the placement of transgender detainees in appropriate facilities[97] and to ensure the necessary protection and treatment.

The Essex group stressed that under no condition must Rule 7(a) be misinterpreted to stigmatise LGBTI prisoners, discriminate against them or impose disadvantageous conditions on them.

It has been recommended that prison registers do 'not mention the sexual orientation and/or gender identity of a person in custody unless the person expressly wants this information to appear and that this information is not used against them. Recording information per Rule 7(a) should not mean that prisoners are automatically separated or their rights restricted. For transgender people, information contained in the records concerning gender identity should not be based solely on the biological sex of the persons concerned'.[98]

In relation to Rule 7(c) the SPT has stressed that failure to record times of arrival and departure makes it 'difficult to monitor whether the legal limit on periods of pretrial detention is respected'.[99]

With regard to Rule 7(f) – inclusion of the names of family members, in particular children – the participants stressed that this requirement must be consistent with the Convention on the Rights of the Child, which provides that the best interests of the child be the primary consideration.[100]

The Essex group also referred to Rule 3 of the Bangkok Rules. This rule recommends recording the names, ages and location of children in order to facilitate contact, but is worded to ensure that women are never forced to disclose information about their children.[101] Parents should never be punished for refusing to provide this information. Furthermore, Bangkok Rule 3(2) specifies that all information related to the children's identity should be kept confidential. The experts highlighted that the respective Bangkok Rules are applicable to fathers as noted in preliminary observation no. 12 of the Bangkok Rules.

The UN Rules for the Protection of Juveniles Deprived of their Liberty specify that the records of juveniles in detention must include details of the 'notifications to parents and guardians on every admission, transfer or release of the juvenile'.[102]

Data recorded throughout the term of imprisonment

The Essex group highlighted the significance of Rule 8, which goes beyond existing regional standards in providing for a record in every prisoner's file not only in terms of personal and case information upon admission, but throughout the term of imprisonment.

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[97] See *LGBTI persons deprived of their liberty*, p. 9.

[98] APT, 'Files and records – LGBTI persons', *Detention Focus database*, accessed 14 September 2016 at http://www.apt.ch/detention-focus/en/detention_issues/27/?setvg=6.

[99] *SPT Report on visit to Mali,* CAT/OP/MLI/1, para. 78.

[100] Article 3(1) of the Convention on the Rights of the Child: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

[101] Bangkok Rule 3 states: 'The number and personal details of the children of a woman being admitted to prison shall be recorded at the time of admission. The records shall include, without prejudicing the rights of the mother, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status'.

[102] UN Rules for the Protection of Juveniles Deprived of their Liberty, adopted by UN General Assembly Resolution 45/113, 14 December 1990, Rule 21 (d).

The experts agreed that the list provided in Rule 8 should be read as an indicative rather than an exhaustive list:

a) Information related to the judicial process, including dates of court hearings and legal representation;
b) Initial assessment and classification reports;
c) Information related to behaviour and discipline;
d) Requests and complaints, including allegations of torture or other cruel, inhuman or degrading treatment or punishment, unless they are of a confidential nature;
e) Information on the imposition of disciplinary sanctions;
f) Information on the circumstances and causes of any injuries or death and, in the case of the latter, the destination of the remains.

The requirement to keep records on searches, 'in particular strip and body cavity searches and searches of cells, as well as the reasons for the searches, the identities of those who conducted them and any results of the searches', is enshrined in Rule 51.

The experts clarified that records should also include participation in work or educational activities and the use of force, arms and/or restraints. Information related to behaviour and discipline could include comments on prisoners' rapport with others, sudden behavioural changes etc. which could be useful in later assessments of whether behavioural difficulties may be related to mental health issues.[103]

The prisoner file should include information about good behaviour and positive achievements in line with the rehabilitative purpose of imprisonment and need for ongoing individual assessments with regard classification, rehabilitation programmes and information relevant for conditional release (Rule 93).

While keeping comprehensive records was perceived as an important tool of good prison management, the experts noted the risk of creating an over-bureaucratic system in which staff spend more time doing paperwork than interacting with prisoners, providing security or facilitating rehabilitation programmes.

The Essex group also stressed that in order to maintain a comprehensive prisoner file, personnel needs to be equipped with the skills to operate such a system.[104]

Extraction of general data on trends

The Essex group discussed Rule 10, which states that prisoners' files should be used to generate data about trends in the prison population and occupancy rates.

The importance of extracting general data has been captured, for example, in the 2010 *Survey of the United Nations and other Best Practices in the Treatment of Prisoners in the Criminal Justice System*. It states that 'Collecting data about prisoners and prisons and developing information management systems can (…) better inform criminal policies and help to monitor compliance

[103] The UK's Assessment, Care in Custody, and Teamwork (ACCT) care planning system was given as a good practice example. Under the ACCT any member of staff who receives information, including that from family members or external agencies, or observes behaviour which may indicate a risk of suicide/self-harm, must open an ACCT plan.

[104] See, for example, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*, 28 July 2014, CAT/OP/NZL/1, para. 46, documenting that the 'lack of skills by personnel to effectively operate the system [Integrated Offender Management System] might affect data entry and record keeping of prisoners' information'.

with international standards. Maintenance of accurate prisoner records is also crucial to prevent overcrowding and rights violations'.[105]

The experts agreed that Rule 10 should be interpreted to include reliable data on a broad range of trends such as the numbers of deaths and serious injuries,[106] and data on the profile of prison populations,[107] including, for example, on the changing age profile of a prison population so appropriate facilities and programmes can be provided.

The experts stressed the importance of generating information on occupancy rates to address and/or prevent overcrowding. The Inter-American Commission on Human Rights, for example, has emphasised the need for a reliable system of registration to control prison overcrowding.[108]

The data generated should be publicly available and easily accessible, to better inform public policy and provide the public and media with regular factual information about matters affecting prisoners.

Institutional personnel

Working conditions of prison staff

The Essex group recognised that working in a prison requires specific skills, but that prison staff are often poorly paid, under-trained and experience high levels of work-related stress and violence.[109] It was also noted that those working in isolated, rural prisons may experience particular difficulties.

The group discussed the need for decent working conditions and terms of service for prison staff. This is also a prerequisite to attract and retain suitable people and to enable them to deliver their duties effectively. Favourable conditions of service should include consideration of prisoner to staff ratios. (See also Chapter 6, Incident management - Safety and security.)

The experts also discussed the need to inform the public about prisons, prison staff and the significance of their role in safeguarding society (Rule 74(2)), noting that prison staff are often held in lower regard than other actors who work in the criminal justice field.

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[105] Twelfth United Nations Congress on Crime Prevention and Criminal Justice, *Workshop 2: Survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system: Background Paper*, 28 January 2010, 6A/CONF.213/13, para. 18. See also UNODC, *Handbook on Prisoner File Management*, New York, 2008, which contains practical guidance on setting up effective registration systems.

[106] The UN Committee against Torture, for example, has stated that 'States should monitor and document incidents of violence in prisons with a view to revealing the root causes and designing appropriate prevention strategies'. (UN Committee against Torture, *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)*, 16 December 2013, CAT/C/51/4, para. 15 *(CAT SMR revision observations)*). See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *3rd General Report on the CPT's activities covering the period 1 January to 31 December 1992*, 1993, CPT/Inf (93) 12, para. 62: 'The health care service could compile periodic statistics concerning injuries observed, for the attention of prison management, the Ministry of Justice, etc.'

[107] In this context the experts recalled the value of research, and in particular Rules 67 and 68 of the UN Bangkok Rules which call for research into the reasons why women are in prison and the impact of prison on them as well as research on the number of children affected by imprisonment and the impact on them.

[108] Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II Doc 64, para. 157.

[109] See, for example, Penal Reform International, 'Prison Staff: Overworked and Underpaid?', *Global Prison Trends 2015*, 2016; and PRI and APT, 'Staff working conditions: Addressing risk factors to prevent torture and ill-treatment', *Detention Monitoring Tool*, *second edition*, 2015.

It was noted that in some countries, prison officers are transferred regularly from one prison to another, which constitutes a hardship for them and their families. At the same time, it has to be acknowledged that transfers of prison officers have proven to be an effective measure to prevent corruption.

Guidance about the planning, design and provision of facilities for prison staff can be found in the UNOPS *Technical Guidance*.[110]

Adequate prisoner-staff ratio

The Essex group highlighted the importance of an adequate prisoner-staff ratio for good prison management, which has been widely recognised. The Inter-American Principles and Best Practices provide that '[s]efficient and qualified personnel shall be available to ensure security, surveillance, and custody'.[111] They require that staff 'shall be provided with the necessary resources and equipment so as to allow them to perform their duties in suitable conditions, including fair and equitable remuneration, decent living conditions, and appropriate basic services'. The Kampala Declaration on Prison Conditions in Africa also states that 'the State should provide sufficient material and financial resources for staff to carry out their work properly'.[112]

As has been noted by human rights bodies, 'where staff complements are inadequate (it) can easily result in high levels of stress in staff and their premature burnout, a situation which is likely to exacerbate the tension inherent in any prison environment'.[113]

The experts noted that adequate numbers of staff need to be present at all times to ensure safety and security, including overnight.

Dynamic security and conflict prevention

Lessons learned over the last 60 years include the acknowledgment that techniques of conflict resolution and mediation not only ensure human rights compliance, but also are more effective and efficient in providing for the safety and security of prisoners and prison staff.

In particular, it is now 'generally acknowledged that safety and security in prisons depend on creating a positive climate which encourages the cooperation of prisoners' and that 'engaging with prisoners and getting to know them can enable staff to anticipate and better prepare themselves to respond effectively to any incident that may threaten the security of the prison and the safety of staff and inmates'. This notion is usually referred to as 'dynamic security', describing an 'emphasis on the need for prison staff to establishing good relationships with prisoners'.[114] It implies proactive and frequent interaction of prison staff with prisoners, which allows them to observe the prisoners and gather information. Such regular interaction provides warning signs of incidents and allows

[110] *Technical Guidance for Prison Planning, based on the Nelson Mandela Rules*, pp. 202-208.

[111] Principle XX of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

[112] See African Commission on Human and Peoples' Rights, *Kampala Declaration on Prison Conditions in Africa*, September 1996, 'Prison Staff', para. 3.

[113] *CPT 11th General Report*, [CPT/Inf (2001) 16], para. 26.

[114] *Handbook for Prison Leaders*, p. 106.

prison staff to anticipate and prevent problems before they even arise. It also means that should an incident occur the prison staff know prisoners well enough to know how to respond.[115]

Furthermore, a dynamic security approach has shown to in itself improve security. Constructive as opposed to confrontational, relations between prisoners and staff 'will serve to lower the tension inherent in any prison environment and by the same token significantly reduce the likelihood of violent incidents and associated ill-treatment'.[116] 'Approachability of staff, instilling confidence, creating a sense of order and safety/security' has been found to prevent conflict.[117]

Dynamic security entails the prison staff being directly involved with prisoners ('basic grade staff') and requires adequate training. Interpersonal skills of staff are an important element in the effective application of dynamic security.[118] Staff should understand the relevance of verbal and non-verbal behaviour, and be familiar with the different groups represented in prison (including religious, ethnic and cultural groups).[119]

The SMR acknowledge the concept of dynamic security in Rule 76(c), and emphasise the role of conflict prevention and alternative dispute resolution in prisons in Rule 38(1).

It has been noted, in the context of post-conflict situations, that to a certain extent the 'introduction of effective dynamic security elements, such as increased staff/prisoner contact and interaction, can offset a prison's limited static security components'.[120]

Recruitment and selection of prison staff

The Essex group recommended that penitentiary systems have a recruitment policy in place which is clear about the skills and qualities required. The policy should have proper criteria and procedures to ensure only suitable applicants are employed. It has been stressed that, '[t]o obtain personnel of the right calibre, the authorities must be prepared to invest adequate resources into the process of recruitment and training and to offer adequate salaries'.[121]

The skills described in Rule 76 should already be taken into account in the course of recruitment, i.e. prison authorities should seek to recruit staff who have already acquired relevant skills.

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials also call on governments and law enforcement agencies to 'ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training'. They also call for a periodic review of the 'continued fitness to perform these functions'.[122]

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[115] *A Human Rights Approach to Prison Management*, pp. 59, 70-71. See also United Nations Department of Peace-keeping Operations, *Prison Incident Management Handbook*, 2013, pp. 15 and 21 onwards *(DPKO Prison Incident Management Handbook)*; *Handbook on Dynamic Security*; and Office of the United Nations High Commissioner for Human Rights, *Human Rights and Prisons: A Manual on Human Rights Training for Prison Officials*, vol. I, Geneva, 2005, p. 98 *(Human Rights and Prisons)*.

[116] *CPT 2nd General Report*, CPT/Inf (92) 3, para 45.

[117] *Handbook on Dynamic Security*, p. 32.

[118] *Handbook on Dynamic Security*, p. 32.

[119] *Handbook on Dynamic Security*, p. 32.

[120] *DPKO Prison Incident Management Handbook*, p. 21.

[121] *CAT SMR revision observations*, CAT/C/51/4, para. 63.

[122] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 18.

It was emphasised that there should be no discrimination in the recruitment of staff and that prisons should make efforts to recruit from diverse communities, to include members of different ethnic groups and minorities. This seems particularly relevant in light of Rule 5 and, bearing in mind possible language differences, would be necessary in prisons where a significant number of prisoners are members of such communities. (See also Chapter 3, Contact with the outside world.).

The experts highlighted the importance of recruiting female staff, with particular reference to women's prisons in light of Rule 81(3). This provision states that women prisoners shall be attended and supervised only by women staff members.

The Essex group referred to the UNODC *Handbook for Prison Leaders* which recommends that hiring staff should be a gradual system of application, interview and testing to ensure the best individual receives the position. It also recommends the implementation of testing for situational judgement and personal ethics.

For countries in a post-conflict situation the *Handbook* notes that a 'vetting process' may be required to ensure a proper screening of new recruits and calls for special attention to the frequent practice of recruiting amongst demobilised soldiers and officers.[123]

It was noted with concern that in some countries police or military officers are assigned to serve as prison officers and that prison staff are sometimes transferred to more difficult or remote prisons as a form of disciplinary sanction, rather than in the course of a positive selection.

Training of prison staff

The Essex group noted that the list of training content in Rule 76 should be regarded as illustrative rather than exhaustive.

The experts stressed the importance of strengthening social skills of prison staff, in particular the aptitude for interpersonal communication skills,[124] and of ethical standards, which should be enshrined in a Code of Ethics for prison staff.[125] They pointed out that training needs to be designed to ensure prison staff have a broad understanding of their actions/roles, going beyond the duty of guarding prisoners, but contributing to rehabilitation and reintegration – in line with the principles of Rules 1 and 4.

The need for specialist training mentioned in Rule 76(2) should include training on working with the groups identified in the UNODC *Handbook on Prisoners with Special Needs*.[126] The experts noted good practice in some jurisdictions where specific officers are assigned with sentence planning and identifying suitable rehabilitation and reintegration programmes for special groups. This 'specialist function' should be facilitated by specialist training in line with Rule 76(2).

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[123] *Handbook for Prison Leaders*, pp.55, 59.

[124] 'The possession of such skills will often enable a police or prison officer to defuse a situation which could otherwise turn into violence, and more generally, will lead to a lowering of tension, and raising of the quality of life, in police and prison establishments, to the benefit of all concerned' (*CPT 2nd General Report*, CPT/Inf (92) 3], para. 60). See also *CAT SMR revision* observations, CAT/C/51/4, para. 63 ('considerable emphasis should be placed on the acquisition of interpersonal communication skills by prison staff'); and *Handbook on Dynamic Security*, p. 32.

[125] See Council of Europe, *Recommendation CM/Rec (2012)5 of the Committee of Ministers to member States on the European Code of Ethics for Prison Staff*, 2012.

[126] UNODC, *Handbook on Prisoners with special needs*, 2009.

Training must incorporate standards that give guidance on how to provide both a gender-sensitive and age-sensitive approach,[127] as well as relating to the specific needs of other groups, including LGBTI prisoners.[128]

The experts stressed that training should not be limited to theoretical presentation of laws and regulations, but should be practical and include scenario-based training.

Rule 75(3) underlines that training must be provided not only before entering duty, but on a continual basis.

The experts acknowledged the benefit of technology, including the availability of e-training, but stressed the need and benefit of face-to-face education, in particular for practical training content such as the use of force and restraints. They further noted the need for dedicated training facilities, where inductions can be provided in-house (staff may be more receptive to in-house training) or by external agencies. The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas recommend the participation and cooperation of social institutions and private enterprises in training programmes and specialised education.[129]

→ See also Chapter 6, Incident management – use of force and arms.

Inspections and external monitoring

Two-fold system of inspections

The Essex group recalled that the updating of the rules on inspections (Rules 83-85) reflects the considerable lessons learned in recent decades from the regular monitoring of places of detention and its preventive function with regard to torture and ill-treatment.

Experience with monitoring and inspection systems revealed that, while internal inspections fulfil an important function, monitoring is ensured much more effectively through an external, independent body that has full access and can undertake unannounced visits.

Accordingly, the revised SMR reflect the concept of a two-fold system consisting of internal inspections on the one hand, and external inspections by a body independent of the prison administration on the other.

The participants discussed that there is no clear differentiation between the terms ‘inspection’ and ‘monitoring’. ‘Inspection’ may be used more often amongst criminal justice actors describing internal prison inspections, whereas the term ‘monitoring’ may be in use more in the human rights community and referring to enquiries by an external, independent body.

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[127] UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985; UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) 1990; UN Rules for the Protection of Juveniles Deprived of their Liberty 1990; OHCHR Guidelines for Action on Children in the Criminal Justice System, Guideline 21. See also *CAT SMR revision* observations, CAT/C/51/4, para. 62.

[128] *CAT SMR revision* observations, CAT/C/51/4, para. 62; UN General Assembly, 68th Session, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General,* 9 August 2013, A/68/295, para. 83 *(Special Rapporteur on Torture report 2013)*; UN Human Rights Council, 29th Session, *Discrimination and violence against individuals based on their sexual orientation and gender identity: Report of the Office of the United Nations High Commissioner for Human Rights*, 4 May 2015, A/HRC/29/23, para. 75.

[129] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XX.

The experts did not discuss at length aspects and good practice on external monitoring bodies, given the wealth of information and guidance already available.

They recommended drawing on the wide array of standards and sources relating to monitoring, including the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),[130] the European Committee for the Prevention of Torture (CPT) Standards,[131] as well as manuals such as the OHCHR *Manual on Human Rights Training for Prison Officials*.[132]

The UNOPS *Technical Guidance* suggests that an office should be provided within a prison that can be used by inspectors when conducting their work.[133]

Objectives for internal and external inspection

The Essex group highlighted that Rule 83(2) clarifies the objectives for both internal and external inspections/monitoring, as follows:

- Ensuring management in line with existing laws, regulations, policies and procedures;
- Protecting the rights of prisoners; and
- Bringing about the objectives of penal and corrections services.

The participants emphasised that compliance with laws and regulations includes regional and international standards, and in particular the revised SMR; and that the 'objectives of penal services' need to be interpreted in line with Rule 4, i.e. delivering a rehabilitative function.

The experts highlighted the requirement of 'regularity' of both internal inspections and external monitoring visits in Rule 83(1). They noted that inspections must be frequent enough to enable effective monitoring of conditions, changes and developments whilst allowing for flexibility in terms of prioritising inspections in more problematic prisons.

The Essex group underlined that the existence of inspections or the establishment of a monitoring body should not result in the reduction of access to prison facilities for other actors, such as non-governmental organisations who frequently deliver an important distinct function when visiting prisons. The Inter-American Court on Human Rights has underscored that the work undertaken by NGOs and other groups constitutes a positive and complementary input to the duty of the State as a guarantor of the rights of persons under its custody.[134]

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[130] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[131] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT Standards: "Substantive" sections of the CPT's General Reports*, 2015, CPT/Inf/E (2002) 1 – Rev. 2015, para. 54.

[132] *Human Rights and Prisons*, p. 137: 'Internal inspection is not in itself sufficient. It is therefore essential that there should also be a form of inspection which is independent of the prison system'.

[133] *Technical Guidance for Prison Planning, based on the Nelson Mandela Rules*, p. 225.

[134] I/A Court H.R., Matter of Mery Naranjo et al. regarding Colombia. Provisional Measures. Order of the Inter-American Court of Human Rights of July 05, 2006, Considering 6. I/A Court H.R., Matter of Monagas Judicial Confinement Center ("La Pica") regarding Venezuela. Provisional Measures. Order of the Inter-American Court of Human Rights. February 09, 2006, Considering 14. I/A Court H.R., Matter of Carlos Nieto et al. regarding Venezuela, Provisional Measures. Order of the Inter-American Court of Human Rights of July 09, 2004, Considering 8. I/A Court H.R., Matter of Lysias Fleury regarding Haiti, Provisional Measures. Order of the Inter-American Court of Human Rights of December 02, 2003, Considering 10.

Authority of inspectors/monitors

The Essex group discussed the new provision on the authority of inspectors in Rule 84(1), which is applicable to both internal inspectors as well as external monitors:

- Access all information, including on the number of prisoners, places and locations of detention;
- Access all information on the treatment of prisoners, their records and conditions of detention;[135]
- Freely choose which prisons to visit, including unannounced visits at their own initiative;[136]
- Freely choose which prisoners to interview;
- Conduct private and fully confidential interviews with prisoners;
- Conduct private and fully confidential interviews with prison staff; and
- Make recommendations to the prison administration and other competent authorities.

The Essex group stressed the requirement for inspectors to access 'all places and locations of detention', which includes all areas of prison facilities, including maximum security wings.[137]

Note was made of the prison administration's obligation to enable and facilitate the work of inspectors and monitors.

At the same time, the experts noted frequent problems of members of monitoring bodies when seeking confidential interviews with prisoners. While the protection of monitors from dangerous prisoners is legitimate and required, it must not become an obstacle to the very function of inspection and external monitoring. In particular, it must not prevent confidential interviews of monitors with prisoners in a trustful atmosphere. Such an environment is lacking, for example, if the prisoner being interviewed is handcuffed to bars or windows during the conversation.

The participants clarified that interviews referred to in Rule 84(c) require the consent of the interviewee and that both prisoners and prison staff who speak to inspectors and monitors need to be protected from any risk of intimidation, retaliation or other negative consequence as a result of having been interviewed. The Essex group recommended to expand safeguards against such risks developed under Rule 57(2) on inspectors and monitors, where applicable.[138]

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[135] The SPT has been critical of detention authorities limiting the access of monitoring bodies for reasons of confidentiality (e.g. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment for the purpose of providing advisory assistance to the national preventive mechanism of the Republic of Malta: Report to the State Party*, 1 February 2016, CAT/OP/MLT/1, para. 33 *(SPT Report on visit to Malta)*.

[136] The Special Rapporteur on Torture, for example, has stressed the criterion of unimpeded access (on a regular and an ad hoc basis) without prior notice (*Special Rapporteur on Torture report 2013,* A/68/295, para. 82). See also *CAT SMR revision* observations, CAT/C/51/4, para. 58.

[137] Unimpeded access to all places of detention, all areas and facilities within them and all prisoners is established good practice and proven precondition for the effectiveness of an inspection/ monitoring mechanism. See in particular Article 14 (1) of OPCAT and Principle XXIV of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

[138] The Essex group noted as good practice Articles 15 and 21 of the Optional Protocol to the Convention against Torture, according to which 'No authority or official shall order, apply, permit or tolerate any sanction against any person' for having communicated information to the monitoring body.

It was stressed that inspectors should 'not limit their activities to seeing prisoners who have expressly requested to meet them, but should take the initiative of visiting the establishments' detention areas and entering into contact with inmates'. [139]

External monitoring body

The Essex group recommended that, when establishing such institutions, states should ensure a clear distinction between internal and external inspections.

The participants emphasised that 'independence' requires that the body is not under the same institutional, hierarchical or organisational structure as the prison management. They noted that guidance can be drawn from Article 18 of the OPCAT, which specifies the term as implying functional independence as well as the independence of the monitoring body's personnel. Principle 29(1) of UN Body of Principles, regarding supervision of places of detention, refers to 'a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment'.

The Essex group noted that adequate resources and the monitoring body's ability to decide upon their use constitutes a vital factor in the independence of external monitoring.

The experts discussed the requirement expressed in Rule 84(2) for external inspection teams to be composed of 'qualified and experienced inspectors' and reiterated that guidance can be drawn from the OPCAT. The Protocol requires members to have 'proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration', and calls on states to 'strive for a gender balance and the adequate representation of ethnic and minority groups in the country'.[140] They pointed to the explicit mention of health-care professionals (including forensic doctors) as members of inspection teams, which constitutes established good practice.[141]

The Essex group recommended that experience in monitoring methodology and knowledge of international standards is considered a requirement when appointing members of an inspection team.

The participants noted the appointment by 'a competent authority' in Rule 84(d) and emphasised that in order to ensure independence such a body must not be appointed or approved by the government. The wording of Rule 84(d) illustrates that there may be distinct competent authorities appointing different inspectors.

The participants highlighted that the term 'competent authority' is used in different contexts throughout the SMR and that any explanatory note needs to ensure consistency with other references (see rules 34, 37, 41(1), 45 (1), 56(3), 71(1) and 85(2)).[142]

Internal inspections

The Essex group considered that internal inspections should also, to the extent possible, have an element of independence. Under no circumstances should internal inspection mechanisms replace or be presented as external.

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[139] *CAT SMR revision* observations, CAT/C/51/4, para. 57.

[140] Articles 5 and 18 (2) of the Optional Protocol to the Convention against Torture.

[141] The UN Committee against Torture stressed that inspectors should be 'trained to detect signs of torture or other ill-treatment, including sexual violence' (*CAT SMR revision* observations, CAT/C/51/4, para. 58).

[142] Further guidance on inspections can be found in APT's publications *Optional Protocol to the UN Convention against Torture: Implementation Manual* and *Establishment and Designation of National Preventative Mechanisms*.

The experts noted that internal or administrative inspections under Rule 83(1) should take place according to agreed-upon standards and criteria. Prison managers must be made aware of these, to be aware of what criteria they will be assessed against. Unannounced inspections are to be encouraged.

The experts recommended the scope for internal inspections be clarified, which may vary from external monitoring mechanisms. For example, it was noted that monitoring bodies established under the OPCAT are focused on a mandate to 'prevent torture and other ill-treatment', whereas internal inspections may also want to include broader aspects of prison management, criminal justice, or the prevention of corruption etc.

The participants noted that the ability to speak openly (internally) is imperative for an internal inspection body. They discussed that to achieve the necessary authority, weight, and effectiveness it is beneficial to have a high-level public authority figure as the head of any inspection body.

Reporting and follow up

The Essex group referred to the wealth of information and guidance developed in recent years on monitoring methodology and the follow-up of recommendations in particular by the SPT, National Preventive Mechanisms established under OPCAT, by the Inter-American system, as well as the European Committee for the Prevention of Torture (CPT).

Examining Rule 85(1), the Essex group emphasised that transparency of inspection and monitoring bodies is important to ensure their credibility.

The participants highlighted the requirement of a written report for 'every inspection', which is clearly stipulated in Rule 85(1) for internal and external inspections.

The Essex group considered that Rule 85(1) – 'due consideration to making the reports of external inspections publicly available' – must not be understood as implying that internal inspections are not made public. Rather, they noted clear guidance by international human rights mechanisms that the findings of monitoring should always be 'made public, excluding any personal data of a prisoner without his or her express consent'.[143]

The participants discussed the common approach of monitoring bodies where a bilateral dialogue with the inspected detention facility is held to discuss findings and recommendations, and subsequently reports are made public.

The experts stressed the importance of following up on the implementation of recommendations, including through subsequent inspections to enquire whether recommendations were implemented and whether any questions or challenges have arisen (Rule 85 (2)).

[143] *CAT SMR revision observations*, CAT/C/51/4, para. 57. *Special Rapporteur on Torture report 2013*, A/68/295, para. 82, with reference to Rule 74 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. See the concern raised by the SPT, noting with concern that 'whilst all reports prepared by the NPMs, including annual reports and visit reports, are submitted to the relevant Minister, they have never been made public'. (*SPT Report on visit to* Malta, CAT/OP/MLT/1, para. 35.)

Chapter 3[144]

Contact with the outside world

Issues/rules covered:

- Visits (Rule 58)
- Legal representation (Rule 61 – general, Rules 119(2) and 120 – pre-trial)
- Access to legal documents (Rule 53)
- Diplomatic and consular assistance (Rule 62[145])
- ransfers (Rule 7(c), 47(2a) and Rule 68, transfer of files Rule 26(2))

Introduction

The Essex group acknowledged that by definition imprisonment implies severe restrictions for contact with the outside world which would not apply to other forms of deprivation of liberty, such as in psychiatric facilities. Yet, human contact, especially with family and friends, is a very basic human need. In prison, contact with the outside world is a right in itself and, in addition, acts as a safeguard, especially against torture and other ill-treatment. It enables prisoners to pursue legal procedures and manage other affairs including, for example, child custody.

When managing contact of prisoners with the outside world, prison administrations need to keep in mind that certain communication is privileged and confidential (legal representation) and that visits have to be assessed as a right not only of the prisoner, but also his/her family members, especially children.

More guidance will have to be provided regarding the permissible level of supervision of communications in the context of pre-trial detention, as compared to convicted prisoners and other forms of detention.[146] Furthermore, good practice should be identified on how to manage the necessary supervision of communications without isolating prisoners who speak different languages.

Contact with family and friends

Contact with family and friends has proven crucial for social reintegration of prisoners once released, but is vital also to their well-being overall, as a source of emotional comfort and often

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[144] This chapter was authored by Andrea Huber, Penal Reform International.

[145] Note that Rule 62 has not been changed in the course of the review.

[146] The Essex group recalled that Rule 122 (formerly Rule 95) was adopted in 1977 to clarify that the Rules as a whole as extending to all forms of deprivation of liberty (ECOSOC, *Resolution 2076 (LXII): Extension of the Standard Minimum Rules for the Treatment of Prisoners to persons arrested or imprisoned without charge*, 13 May 1977).

also for material support. The European Committee to Prevent Torture (CPT) has stressed the importance of good contact with the outside world, as a means to safeguard relationships with family and close friends,[147] alluding to the right to private and family life.

Prison administration, therefore, has a duty to encourage communication with the outside world. The UNODC Handbook on Dynamic Security clarifies that 'Prisoners' contacts must be seen as entitlements rather than privileges', and that they should, therefore, not be used as either rewards or punishments.[148]

The importance of maintaining social relations between prisoners and their family members is emphasised in Rule 106. Rule 59 underlines the importance of allocation 'to prisons close to their homes or their places of rehabilitation'.

A number of Rules capture the different facets of contact with family and friends, particularly in relation to notification and information about certain events:

- Rule 7 calls on prison administration to document the names of family members (including children), emergency contact details and prisoners' next of kin.
- Rule 68 concerns the right of prisoners to immediately inform their family (or another dedicated contact person) of their imprisonment and of any transfer, as well as of any serious illness or injury.
- The prison administration is obliged to notify the next of kin or emergency contact in the event of a prisoner's serious illness, injury or transfer to a health institution,[149] and in the event of death of a prisoner (Rule 69).
- Should a 'near relative or any significant other' die or get seriously ill, the prison administration is required to inform the prisoner. In such cases, prison administrations should also consider whether circumstances allow for the prisoner to visit the sick relative or attend the funeral, either under escort or alone (Rule 70).
- The right to issue requests and complaints, to the inspector of prisons, to the central prison administration and to judicial or other competent authorities with reviewing or remedial power, extends to family members,[150] pursuant to Rule 56(4). See Chapter 2, Prison management – complaints.
- The body of a deceased prisoner should be returned to the next of kin (Rule 72).
- Communication with family and friends 'at regular intervals' is enshrined in Rule 58, listing correspondence (in writing, telecommunication, electronic, digital and other means) and visits as the means of communication.

The Essex group noted the various ways in which prisoners can maintain contact with the outside: letters; visits; telephone calls; prison leave; books; newspapers; and the internet; but focused their discussion on visits of family and friends.

They pointed out that means of communication, including electronic ones, need to be facilitated with due regard to the principle of non-discrimination (see Rule 2(1)). This implies that means

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[147] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991*, 1992, CPT/Inf (92) 3, para. 51 *(CPT 2nd General Report)*.

[148] United Nations Office on Drugs and Crime (UNODC), *Handbook on Dynamic Security and Prison Intelligence*, New York, 2015, p. 22 *(Handbook on Dynamic Security)*.

[149] Note the formulation 'individuals designated by a prisoner to receive his/ her health information' in Rule 69.

[150] As well as legal advisers and 'any other person who has knowledge of the case' – see Rule 56(4).

of communication are not only available to those prisoners who can afford to pay for them. The Essex Group noted other examples of discrimination, such as the practice documented by the UN Subcommittee on Prevention of Torture (SPT), where 'in the case of female prisoners, long visits by a civil partner were prohibited and prices for use of facilities for intimate visits were prohibitive and higher than in the male colonies'.[151]

Indigent prisoners should be provided with appropriate support (including writing material, envelopes, postage stamps, telephone cards) so that they are not *de facto* deprived of communication with family and friends.

Visits by family and friends

The Essex group emphasised that for visits at regular intervals it is essential that prisoners are not allocated or transferred to prisons far from their homes.

If families can only visit infrequently due to the location of the prison, prisoners could be permitted to accumulate visiting entitlements and have longer visits or several over a couple of days. The European Committee to Prevent Torture has emphasised the 'need for some flexibility as regards the application of rules on visits and telephone contacts' for families who live far away.[152]

For instance, the SPT has documented good practice of a 3-day visit with overnight stays, but has cautioned against a discriminatory effect due to high costs of overnight visits in the given context.[153]

The Essex group noted that virtual visits via video conferencing may be arranged in case of prisoners whose families live far away, and that this is particularly important for foreign national prisoners. However, the participants also stressed that video-conferencing and other forms of remote communication are not an adequate substitute for in-person visits.

The experts held that in light of the rationale of visits the term 'family' should not be interpreted too narrowly and that in many countries the concept of family is broader than the next of kin or immediate family members.

The UN Committee on the Rights of the Child recognises that the term 'family' refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern arrangements, provided these are consistent with children's rights and best interests.[154] Similarly, regional bodies have adopted broad definitions. The European Court of Human Rights has interpreted the right to private and family life as not confined to legally acknowledged relationships.[155] The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also include 'other

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[151] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine*, 16 March 2016, CAT/OP/UKR/1, para. 140 *(SPT Report on visit to Ukraine)*.

[152] *CPT 2nd General Report,* [CPT/Inf (92) 3], para. 51.

[153] *SPT Report on visit to Ukraine,* CAT/OP/UKR/1, para. 121.

[154] UN Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing child rights in early childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, para. 15.

[155] 'The notion of the "family" in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto "family" ties, where the parties are living together outside marriage'. (*Keegan v. Ireland*, Judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44); see also *Kroon and others v. The Netherlands* (Application no. 18535/91), Judgment of 27 October 1994, para. 30; M*ikulić v. Croatia* (Application no. 53176/99), Judgment of 7 February 2002, para. 51.

persons' in the right to contact with persons outside, even though the English version does not reflect the original Spanish version in this regard ('otras personas' in the original version).[156]

→ See Chapter 5, Restrictions, discipline and sanctions – searches of visitors

Specific groups of prisoners

In a report on children of incarcerated parents, the Committee on the Rights of the Child expressed concern 'with regards to security matters and policies that often undermine the rights of the child'. It reiterated the 'right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests'.[157] The Committee recommended that '[t]he rights of affected children should be regarded as a relevant factor in determining the security policy concerning incarcerated parents, including with regard to the proportionality of the measures in relation to areas that would affect the interaction with affected children'.[158]

The Essex group recalled the UN Bangkok Rules (Rules 26 and 43) which require prisons to encourage and facilitate visits for women prisoners. This is in recognition of their particular situation, including the usually lower number of visits women receive because of their particular stigmatisation and the higher physical distance from their homes. The Bangkok Rules stipulate that measures need to be taken to counterbalance disadvantages faced by women, including as a result of the smaller number of facilities for women. In view of the high rates of violence suffered by female prisoners prior to imprisonment and to prevent victimisation during visits, Bangkok Rule 44 calls on prison staff to consult women prisoners on who is allowed to visit them. Rule 23 of the Bangkok Rules states that disciplinary sanctions for female detainees shall not include a prohibition of family contact, especially with children.

Family visits are also particularly important for juvenile prisoners, and arrangements should therefore be favourable. Mindful of the importance of supportive family relationships of children and adolescents, the CPT has recommended for juveniles to 'benefit from a visiting entitlement of more than one hour every week', and promoted that they should also be able to receive visits at weekends. The Committee has also welcomed juveniles being 'authorised to benefit from long-term unsupervised visits'.[159]

Prison administrations should also consider visits of prisoners to their families, especially in the period leading up to their release.

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[156] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XVIII. Note the original version in Spanish: '(…) a mantener contacto personal y directo, mediante visitas periódicas, con sus familiares, representantes legales, y con otras personas, especialmente con sus padres, hijos e hijas, y con sus respectivas parejas'.

[157] Article 9(3) of the Convention on the Rights of the Child. See also UN Committee on the Rights of the Child, *Report and Recommendations of the Day of General Discussion on 'Children of incarcerated parents' 30 September 2011*, undated, para. 35 *(CRC DGD 2011 Report)*.

[158] *CRC DGD 2011 Report*, para. 14.

[159] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT Standards: "Substantive" sections of the CPT's General Reports*, 2015, CPT/Inf/E (2002) 1 – Rev. 2015, para. 123. The Committee has observed juveniles being allowed to communicate with family members on a regular basis by using free-of-charge Voice over Internet Protocol (VoIP) services, and has highly welcomed such practices while stressing that they should not be considered as a substitute for visits.

The Essex group stressed that prisoners in pre-trial detention should be allowed to receive visits and communicate with family and other persons at least in the same way as convicted prisoners, and may receive additional visits and have additional access to other forms of communication.[160]

Restrictions

The group looked at Rule 43(3) in detail and deduced the following with regard to the prohibition/ restriction of family contact:

- The Rule differentiates between 'disciplinary sanctions' as compared to 'restrictive measures' referring to restrictions based on security grounds.
- The first sentence of Rule 43(3) refers to 'prohibition', whereas the second part governs 'restrictions'.
- Accordingly, neither disciplinary sanctions nor measures based on security grounds may include the prohibition of family contact.
- Restrictions on the other hand are possible, but only 'for a limited time period and as strictly required for the maintenance of security and order'. Moreover, it is the 'means of family contact' that may be restricted, not the contact itself. For example, a visit might be limited to a closed visit (behind a glass partition), but must not be denied entirely.
- The term 'strictly required' introduces a high bar for allowing the imposition of restrictions on family contact as well as the requirement of necessity and proportionality in such imposition.
- Should security concerns have arisen in connection with a particular visitor, this should not result in an automatic or complete ban of visits, but each case should be considered on its merits. For example, if a visitor has delivered contraband to a prisoner, it may be justified to order a closed visit next time, but it would not warrant a complete ban of all visits for the respective prisoner.

In discussing Rule 58, the experts stressed that the term 'under necessary supervision' implies an assessment, evaluating the risk for the specific visit and the specific type of communication (e.g. electronic, contact visits, letter). In the context of most visits, supervision will in particular imply visual control.

The group recalled Principle 19 of the Body of Principles, which requires that conditions and restrictions of visits have to be 'specified by law or lawful regulations'.

→ See Chapter 5, Restrictions, discipline and sanctions

The Essex group recalled the European Prison Rules, which clearly outline that restrictions and monitoring of visits can only be implemented if and as far as they are 'necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime'. The Rules also specify that 'such restrictions shall nevertheless allow an acceptable minimum level of contact'.[161]

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[160] See Rule 99 of the European Prison Rules 2006, which makes it clear that untried prisoners should also be allowed to keep in contact with the outside world and that restrictions, if any, on such contact should be particularly carefully limited.

[161] Rule 24 (2) of the European Prison Rules 2006. Furthermore, Rule 24 (3) requires national law to specifv 'national and international bodies and officials with whom communication by prisoners shall not be restricted'.

The CPT has also emphasised that 'The guiding principle should be the promotion of contact with the outside world', whereas 'any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations'.[162]

The experts also referred to UNODC's *Handbook on Dynamic Security*, according to which 'Monitoring should be proportionate to the threat posed by a particular form of communication and should not be used as an indirect way of restricting communication'.[163]

Good practice was mentioned where the behaviour of prisoners is influenced through privileges and incentives rather than sanctions.

Prison administrations should exercise restraint when applying restrictions to visiting children, as their best interests must be an overriding consideration, based on the Convention on the Rights of the Child.[164]

There need to be safeguards in place for ensuring that any restrictions to contact with the outside world for pre-trial detainees, on the grounds of protecting the interests of an ongoing investigation for example, are not excessive. Restrictions need to be proportionate, allow some level of contact to the outside world and their necessity needs to be reviewed at regular intervals. The European Prison Rules (Rules 24 and 99) stipulate that any such restrictions must be only for a specified period, on an individual case-to-case basis and need to be imposed by a judicial authority.

Visiting environment

The visiting environment needs to balance security considerations with the provision of a positive space for the interaction of prisoners with their families. Closed visits should not be the default design, given the importance of direct contact for the well-being of both the prisoner and the visitor, and of physical contact in particular for children with their parent.[165]

As for the setting of family visits, the Essex group noted the importance of an environment conducive to a positive visiting experience in particular for children, as emphasised in Rule 28 of the UN Bangkok Rules. This Rule underlines that open contact between mother and child should be allowed and that visits involving extended contact with children should be encouraged.[166] The commentary on the Bangkok Rules notes that a pleasant visiting experience will not only have a positive impact on the mental and emotional well-being of the mother and the children, but also affect social reintegration prospects.[167] The need for a child-friendly visiting environment conducive to building or maintaining strong relationships was also emphasised by the Committee on the Rights of the Child.[168]

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[162] *CPT 2nd General Report,* [CPT/Inf (92) 3], para. 51.

[163] *Handbook on Dynamic Security*, p. 50.

[164] Article 3(1) of the Convention requires that all decisions should be based on the need to protect the best interests of the child.

[165] For further guidance see United Nations Office for Project Services (UNOPS), *Technical Guidance for Prison Planning: Technical and operational considerations based on the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 2016 *(Technical Guidance for Prison Planning)*., pp. 125-133.

[166] PRI/TIJ, *Guidance Document* on the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules), 2013, p. 75.

[167] UN Bangkok Rules, Commentary on Rule 28.

[168] *CRC DGD 2011 Report*, para. 39.

Such conditions should equally be applied to fathers, as expressed in paragraph 12 of the preliminary observations to the UN Bangkok Rules, recognising 'the central role of both parents in the lives of children'.[169]

Conjugal visits

The Essex group noted that conjugal visits[170] help maintain emotional bonds between partners and spouses and allow for some normalisation of relationships despite the limits placed on family life by the imprisonment of one partner. The maintenance of intimate bonds has a positive impact on the well-being and on rehabilitation and reintegration of prisoners. In the light of this rationale, the experts recommended to facilitate conjugal visits and not to interpret the beneficiaries of conjugal visits too narrowly.

The participants highlighted the contradiction between the denial of conjugal visits and the right to found a family, as enshrined in Article 23 of the International Covenant on Civil and Political Rights.

Furthermore, the group held that the denial of conjugal visits would contradict the principle that limitations should only be those 'demonstrably necessitated by the fact of incarceration', while otherwise prisoners retain all human rights and fundamental freedoms.[171] The European Court of Human Rights has also held that the 'inability to beget children is not an *inevitable* consequence of imprisonment'.[172]

At a minimum, Rule 58(2) requires that 'women prisoners shall be able to exercise this right on an equal basis with men', reiterating the UN Bangkok Rules. Where conjugal visits are allowed, they need to be applied without discrimination.[173]

The experts reflected on the argument used in some countries for denying women conjugal visits, namely to prevent pregnancy while in prison. The experts highlighted their concern that the consequences of limiting conjugal visits for women prisoners on these grounds may be permanent in that it may *de facto* deprive women of having children altogether. Moreover, such limitation denies the right to family and private life not only to the woman prisoner, but also to her partner.

Another argument often invoked for denying conjugal visits for women prisoners is the risk of violence from male partners. The experts noted that this concern would equally apply to women visiting their husbands in prison on a conjugal visit, yet is not brought up as an argument against conjugal visits for male prisoners. Moreover, the concern has been addressed by new Rule 58(2). It stipulates that procedures need to be in place and premises made available 'to ensure fair and equal access with due regard to safety and dignity'.

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[169] Preliminary observations, para. 12, states that 'Some of these rules address issues applicable to both men and women prisoners, including those relating to parental responsibilities (...). However, as the focus includes the children of imprisoned mothers, there is a need to recognize the central role of both parents in the lives of children. Accordingly, some of these rules would apply equally to male prisoners and offenders who are fathers.'

[170] Conjugal visit is a term used to describe a visit of a prisoner by their spouse or partner in order to be able to exercise an intimate relationship. This institution recognises the fact that intimacy between partners is an important prerequisite to preserve the bonds in a relationship, and acknowledges the positive impact of continued relationships for reintegration after release.

[171] OHCHR, Basic Principles for the Treatment of Prisoners,1990, Principle 5, referring to the rights set out in (among others) the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol.

[172] *Dickson v United Kingdom* [2007] ECHR 44362/04 (Grand Chamber, 4 December 2007), para. 74. The case concerned a prisoners' access to artificial insemination facilities whilst in prison and the right to family life under article 8 of the European Convention on Human Rights.

[173] Rule 27 of the UN Bangkok Rules; Rule 58(2) of the Nelson Mandela Rules.

The Essex group reiterated that the non-discrimination requirement in Rule 58(2) means that the right to conjugal visits equally applies to prisoners in a same-sex relationship and/or for partners who are not legally married. The European Court of Human Rights has interpreted the right to private and family life as not confined to legally acknowledged relationships.[174]

In regards to the conditions of conjugal visits, the location and design of the visiting rooms must be private, in line with the right to privacy and family life, equipped with sanitary facilities and a bed.[175]

Access to legal representation

The Essex group welcomed the fact that the revised SMR acknowledge the right of both untried and convicted prisoners to have access to legal representation and not only in the context of their criminal procedure.

The experts acknowledged that the revised Rules introduce general provisions for 'any legal matter' (Rule 61), and attach additional safeguards in the context of pre-trial detention (Rules 119, 120), while the entitlements and modalities of access to legal advisers and legal aid providers 'continue to be governed by Rule 61'.

The CPT has clarified that the 'right of access to a lawyer should be enjoyed by everyone who is deprived of their liberty, no matter how 'minor' the offence of which they are suspected'.[176]

Proceedings for which prisoners may require legal assistance beyond and outside the pre-trial and trial stages include appeals and other motions in the criminal procedure, but also civil proceedings (e.g. marital and parental affairs, inheritance law etc.), potential complaints on detention conditions and/or torture or other ill-treatment and any disciplinary sanctions or processes.[177] The experts stressed that prisoners must not be required to disclose the nature of their wish to see a legal representative as it would render the safeguard void.

Detention pre-trial and during trial

Rule 119 incorporates state obligations relating to arrest and pre-trial detention which will predominantly be addressed to police and judicial authorities. Rule 119(1) reiterates the obligation to promptly inform every untried prisoner about the reasons for their detention and the charges against them.[178] (See Chapter 2, Prison management)

Yet, the reiteration of this principle in the revised SMR indicates a responsibility of prison administration to ensure that the detainee in fact has received this information.

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[174] See for instance *Keegan v. Ireland*, Judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44; *Kroon and others v. The Netherlands* (Application no. 18535/91), Judgment of 27 October 1994, para. 30; M*ikulić v. Croatia* (Application no. 53176/99), Judgment of 7 February 2002, para. 51.

[175] *Technical Guidance for Prison Planning*, p. 126.

[176] CPT, *21st General Report of the CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: 1 August 2010-31 July 2011*, Strasbourg, CPT/Inf (2011) 28, 10 November 2011, para. 20 *(CPT 21st General Report)*.

[177] The Inter-American Commission on Human Rights has also maintained that legal aid is a prerequisite to exercise the right to petition (Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II.Doc 64, para. 254 *(IACHR Report on Persons Deprived of Liberty)*).

[178] See also Article 9(2) of the International Covenant on Civil and Political Rights and Principle 10 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

Rule 119(2) emphasises the need for pre-trial detainees to receive some form of legal advice, either through a legal adviser of their own choice or - failing this - one assigned to the detainee. The requirement to establish a legal aid system ('without payment where the interests of justice so require', see below) is addressed primarily to the legislator/ policy-maker.

Should legal aid be denied, Rule 119(2) requires an independent review without delay. 'Without delay' recognises that the object and purpose of legal representation would be undermined if no speedy control mechanism were available.

The safeguards and rights in Rules 119 and 120 apply during the pre-trial and trial periods, as well as during the appeal procedure (i.e. until the sentence becomes final).

Access to legal advice overall

While the obligation to establish legal aid schemes and review mechanisms must be fulfilled by legislators and policy-makers, the prison administration has a role to play in various regards. Specifically, it is required to:

- Provide information in an accessible, understandable way to the prisoners about their rights (Rule 54(b))
- Facilitate access of prisoners to legal aid schemes (see requirement of 'access' to legal aid in Rule 61(3))
- Ensure physical access, 'without delay', to the legal adviser of choice and/or legal aid provider and provide the 'opportunity, time and facilities' for prisoners to be visited by and communicate with their legal representatives (Rule 61(1))[179]
- Refrain from interception or censorship and allow confidential communication (Rule 61(1)
- Provide the prisoner with writing material for their defence (Rule 120(2))
- Allow the prisoner possession of legal documents (Rule 53)
- Facilitate access to the services of an independent competent interpreter (Rule 61(2))
- Ensure prison facilities have the necessary visiting rooms which provide the confidentiality required.[180]

The Essex group emphasised the importance for the lawyer to be in the direct physical presence of the prisoner, as pointed out by the CPT, for example. Participants also pointed to the requirement of privacy of such consultation, as otherwise the 'detained person may well not feel free to disclose the manner in which he is being treated'.[181]

The supportive role of prison administration in prisoners' access to legal advice is outlined in the Commentary to the European Prison Rules as encompassing assistance 'with writing materials to

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[179] See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17; Basic Principles on the Role of Lawyers, Principle 8; UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, para. 34. See also Vivienne O'Connor and Colette Rausch (eds.), *Model Codes for Post-Conflict Criminal Justice: Volume II: Model Code of Criminal Procedure*, United States Institute for Peace, 1 October 2008, Chapter 4: 'Rights of the Suspect and the Accused', Article 70.

[180] On the role of prison staff in ensuring confidentiality see also Council of Europe, *Commentary to Recommendation Rec(2006) 2 of the Committee of Ministers to Member States on the European Prison Rules*, pp. 910 (Commentary on Rule 23, with reference to jurisprudence of the European Court of Human Rights) *(Commentary to EPR)*.

[181] *CPT 21st General Report*, CPT/Inf (2011) 28, para. 23.

make notes and with postage for letters to lawyers when they are unable to afford it themselves'.[182] This should be read as including the facilitation of more modern forms of communication.

Effective access to legal advice requires, as mentioned, measures to be taken by the central prison administration or policy-makers respectively. These include the following:

- Provide prison administrations with accessible information sheets for prisoners in the languages spoken within the prison population.
- Provide a contact where prison administrations can access a translator, including Braille.
- Provide legal aid schemes which are accessible to persons in prisons, in the context of criminal procedures and for other (e.g. personal) matters.
- Enshrine access to legal representation in the national prison laws and rules.
- Ensure prison facilities have the necessary visiting rooms which provide the confidentiality required for meetings with legal advisers.

While prison administrations may want to see some confirmation of an individual's function/qualification as legal adviser, the experts stressed that the term should not be interpreted narrowly in light of the rationale of this provision. Persons from poor and marginalised backgrounds, with limited financial means and little access to education are usually overrepresented in prison populations, making support even more relevant.

Imprisonment by definition implies reduced means to take care of one's affairs, especially those requiring 'legal literacy'. At the same time many countries lack the resources and capacity to provide comprehensive legal aid by lawyers. Access to legal advice in the context of prison should therefore encompass all possible ways for prisoners to avail themselves of support.

Conditions of visits from legal advisers and permissible restrictions are defined in Rule 61(1), which are generally applicable, including in the pre-trial context (pursuant to Rule 120(1)).

Legal aid

Incorporation of provisions relating to legal aid in the Nelson Mandela Rules follows the adoption, in 2012, of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.[183]

The Principles and Guidelines define legal aid as including 'legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require'.[184]

The Principles and Guidelines recognise that 'legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process' (Principle 1, paragraph 14). Guideline 6

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[182] *Commentary to EPR*, commentary on Rule 23, with reference to ECtHR, *Cotlet v Romania*, 3 June 2003, appl. Nr. 38565/97.

[183] UN General Assembly, 67th Session, *Resolution adopted by the General Assembly on 20 December 2012: 67/187. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 28 March 2013, A/RES/67/187 *(Legal Aid Principles and Guidelines)*.

[184] The *Legal Aid Principles and Guidelines* acknowledge that states employ different models for the provision of legal aid, and list as examples 'public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations, paralegals and others' (para. 8, 10).

makes it clear that prisoners must have access to legal aid and outlines measures to be introduced to ensure this. It was stressed that the right to legal aid applies in all criminal cases, including those involving terrorism and other serious offences.[185]

The Inter-American Court of Human Rights has consistently maintained that the right to defence is a central component of due process, and that the right to access legal aid is a crucial part of it.[186]

The term 'legal aid service provider' (used in Rule 61(1)) is defined in paragraph 9 of the Principles and Guidelines, referring to 'a wide range of stakeholders as legal aid service providers in the form of non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations and academia'.

Rule 61 of the revised SMR incorporated this understanding by requesting 'access to effective legal aid' and the 'services of an independent competent interpreter' where prisoners do not speak the local language.

While legal aid mechanisms and interpretation services need to be established at the level of policy-makers/central prison administration, local prison administrations and staff have a role to play in terms of practical measures to make legal aid effective within their role (see above).

The Essex group stressed that it is not for prison administrations to determine whether the interests of justice would be served by the assignment of legal aid. Decisions on eligibility criteria for legal aid are outside of the mandate of the prison administration.

→ See also Chapter 5, Restrictions, discipline and sanctions – legal assistance

Restrictions of access

The experts stressed that restrictions on access to a legal representative constitute a significant infringement of safeguards. As a consequence, any restrictions need to be limited to exceptional situations and require clear prescription in law of the circumstances, decision-making body and remedies. This is supported by Rule 61(1) (see reference to 'applicable domestic law').

The experts discussed that in practice restrictions refer to security concerns such as charges of organised crime or terrorist offences, and may imply a delay in access to a lawyer, denial of access, or restrictions regarding the conditions of consultation (for the latter see 'Conditions of consultation' below).

While international standards do allow for restrictions in principle, the Essex group recalled Principle 18 of the Body of Principles, which clarifies that the right of a detained person to be visited by and to consult and communicate with his/ her legal counsel 'may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order'.

Jurisprudence has also clarified that restrictions on the principle of confidentiality are only justified if there are 'compelling reasons' for it, and that they must be subject to review.[187]

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[185] UNODC, *Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners*, 2014, p. 46.

[186] I/A Court, *Ruano Torres et al. vs El Salvador*. Merits, Reparations and Costs. Judgment of October 5 of 2015. Serie C No. 303, para. 153.

[187] See *Commentary to EPR*, commentary on Rule 23, with reference to jurisprudence of the European Court of Human Rights.

The European Committee for the Prevention of Torture (CPT) considers that it might exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice, but stressed, that this must not result in the denial of a lawyer. The Committee recommended, in such cases, 'access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation'. The Committee noted that it is 'perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society'.[188]

The CPT has stressed that once such a 'replacement lawyer' has been chosen it 'fails to see any need for derogations to the confidentiality of meetings between the lawyer and the person concerned'.[189]

Conditions of consultation

Rule 61(1) states that 'Consultations may be in sight but not hearing' of prison staff, and requires access to legal representation 'without interception'.[190]

The experts emphasised that consultations with legal advisers in full privacy, in a separate room, should be the norm. In most cases the presence of a prison officer will neither be required nor an efficient use of staff resources. Even if not listening, the presence of a prison officer may still be intimidating and impact negatively on the conversation between legal adviser and prisoner. The Rule clarifies that, if ever the presence of a prison officer is deemed necessary for security reasons, it must not be within hearing (e.g. rooms should be designed so prison staff can observe the consultation, but unable to hear the conversations inside). It should be noted that the safety of the legal adviser is the only conceivable rationale behind the presence of staff, except for when restrictions are required by a judicial authority (see above).

Where prison administrations seek to keep oversight for security considerations it could apply the practice of multiple meetings in parallel in a large room with staff present in the distance (out of hearing).

Decisions on limiting confidentiality is outside of the prison administrations' mandate, but would have to be taken by a judicial authority. Guidance can be drawn, for example, from the European Prison Rules, which state that 'A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security'.

Confidentiality of legal correspondence needs to be ensured as well.

Access to legal documents

The experts discussed the relevance of Rule 53 which enshrines the right of prisoners to have access to their legal documents 'without access by the prison administration'.

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[188] *CPT 21st General* Report, CPT/Inf (2011) 28, para. 22, and CPT, *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 17 January 2013*, Strasbourg, 13 March 2014, CPT/Inf (2014) 7, para. 19.

[189] *CPT 21st General Report,* CPT/Inf (2011) 28, para. 23.

[190] European Court of Human Rights jurisprudence held that authorities cannot prevent prisoners contacting a lawyer, or delay it. See *Golder v The United Kingdom,* Application no. 4451/70, 21 February 1975.

The Rule acknowledges that physical access to legal documents is a prerequisite to exercising one's rights. It also seeks to protect the privacy of a prisoner's legal matters, which is particularly important should a prisoner issue a complaint against a staff member of the prison.

The Essex group recognised that lockable cabinets may not be possible in a prison context, but maintained that efforts can be made to maintain some privacy nevertheless. This implies that staff are prevented from reading prisoners' legal documents. In order to ascertain this, prisoners should be allowed to be present while their cell is being searched. The latter policy has been established as good practice, including in jurisprudence.[191]

It was further noted that legal files are increasingly stored digitally and this may require prisoners being enabled to access them at a computer.

Legal documents were highlighted as one of the possessions that need to accompany a prisoner if and when he/she is transferred.

Transfers

The Essex group noted the importance of guidance for prison administrations on the transfer and transportation of prisoners. While this area has not been revised as such within the SMR review, several provisions of other areas affect transfers directly.

The experts stressed that the obligations invoked when a prisoner is transferred apply regardless of the agency or authority in charge of the transport means. This stems from the responsibility of the state for anyone it deprives of their liberty.[192] In this context, the participants also noted that transport of prisoners must be carried out at the expense and under the direction of the public authorities.[193]

The Essex group recalled that transfers must not be exercised with the intention of punishing, repressing or discriminating the persons deprived of their liberty, their family or their representative.[194]

Documentation/ notification

Rule 7(c) requires documentation of the day and hour of a prisoner's transfer in the prisoner file system. In addition, prisoners are to be afforded the right and means to immediately notify their family or any other person designated. The experts stressed the importance of notification of the prisoner's legal representative of a transfer, invoking the term 'any other person designated' in Rule 68.

This is supported by the Inter-American Commission on Human Rights who have maintained that prisoners have the right to immediately communicate with their family or third parties when he/she is going to be transferred to another prison.[195]

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[191] House of Lords, *R. v Secretary of State for the Home Department Ex p. Daly*, 23 May 2001.

[192] UN General Assembly, 68th Session, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General,* 9 August 2013, A/68/295, para. 31.

[193] This is made explicit in the European Prison Rules 2006 (Rule 32.3). Paragraph 1 of this Rule refers to prisoners being moved 'to or from a prison, or to other places such as court or hospital'.

[194] Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle IX, 4. See also SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, 27 November 2013, CAT/OP/ARG/1, para. 37.

[195] *IACHR Report on Persons Deprived of Liberty*, para. 498 and 499.

Safety during transfer

The experts noted the relevance of the last sentence of Rule 1 also in the context of transfer, namely that safety and security need to be ensured 'at all times'.

The Essex group noted that safety during transfers of prisoners from one facility to another include prevention of escape, but also safety from violence by other prisoners or escorting staff. It further implies measures to prevent injuries through accidents (e.g. in case of use of restraints, with regard to the vehicles used etc.), which comprises regular checks of vehicles.

It was emphasised that provisions regarding separation of prisoners and supervision by staff continue to apply during transfer. Female and male prisoners should not be transported together (Rules 11(a) and 81(2)), and young prisoners must be kept separate from adults (Rule 11(d), Rule 26.3 Beijing Rules[196]). Rule 81(3) requires that women prisoners are supervised by female officers.

The participants noted specific risks in some countries, such as attempts to free prisoners or attack prisoner transports. To address such risks countries may consider measures that reduce the necessity of transports, such as by courts coming to prison rather than prisoners being transported to court; hearings by video etc. However, such solutions should be implemented weighing the risk against infringements of the right to fair trial and the presumption of innocence.

Conditions of transfer

Conditions of transfer need to comply with Rule 42, which specifies minimum material conditions that 'apply to all prisoners without exception'. These include light, ventilation, temperature, sanitation, nutrition (see also Rule 22), drinking water (see also Rule 22, 'whenever he/she needs it'), access to open air and physical exercise (breaks depending on duration of travel), personal hygiene (toilet breaks etc.), health-care and adequate space.[197] This implies that individuals must not be transported in extreme heat or cold.

Specific provisions may need to be made for pregnant women, especially when advanced in pregnancy. Pregnancy or an illness of a prisoner may impact on the composition of the team of escorting officers, for example medical staff may need to be present. A medical practitioner should advise on a prisoner's fitness to travel or any adjustments that need to be made.

Adjustments may be prompted by physical as well as psychological health considerations. Vehicles used for transports of sick prisoners to external health-care facilities need to be adequate to their medical condition.[198] Also, cellular (or custodial) vehicles, which often have small or no windows and are dark, would not be suitable for detainees who are suffering from Post-Traumatic Stress Disorder (PTSD) or claustrophobia. The experts noted that in the UK, therefore, the Inspectorate

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[196] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted 29 November 1985 by UN General Assembly resolution 40/33.

[197] This is supported in the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, stating that transfers cannot be carried out in conditions that can cause physical or mental suffering, humiliate or facilitate public exhibition. See also UN Subcommittee against Torture (SPT), for example in *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Kyrgyzstan*, 28 February 2014, CAT/OP/KGZ/1, para. 95, expressing concern about the means of transportation, dark, without any ventilation and excessively cramped, transporting detainees with tuberculosis at the same time as other detainees without the use of preventive measures. See also Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle IX, 4.

[198] See, for example, concern expressed in *SPT Report on visit to Ukraine*CAT/OP/UKR/1, para. 77.

of Prisons recommends that authorities use alternative vehicles for women affected by previous trauma because of the inappropriateness of cellular vehicles.[199]

The Essex group highlighted the relevance of Rule 5(2), i.e. the obligation to make reasonable accommodation and adjustments for persons with disabilities. The Convention on the Rights of Persons with Disabilities (CRPD) defines 'reasonable accommodation' as: 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[200]

This applies not only for logistical requirements such as wheelchair ramps, but may include a range of other measures, e. g. breaks. The CRPD requires consultation with and active involvement of persons with disabilities including through their representative organisations in the development of policies and other decision-making processes concerning issues relating to persons with disabilities.[201]

Use of restraints

Transfers are one of the situations in which the use of restraints is common to prevent prisoner escapes. Rule 47(2) acknowledges this and provides a basis for national laws to authorise the use of restraints 'as a precaution against escape during a transfer'.

However, the Essex group recalled that such authorisation is subject to Rule 43(1), which prohibits the use of any restrictions that 'amount to torture or other cruel, inhuman or degrading treatment or punishment'. Nor does such authorisation render void the principles of necessity and proportionality. This means that restraints may only be used when such use is deemed necessary, rather than automatically during every transfer. Precautions need to be taken to prevent physical harm of passengers who are restrained in vehicles in case of break action or accident, in particular as restraints compromise the ability of prisoners to protect themselves from falling forward.

Concern has been expressed, for example, by the SPT, regarding the use of extreme security measures irrespective of the detainee's category (remand or convicted) or their security assessment, and with regard to the practice of routinely using handcuffs or waist restraints during transfers of detainees by air.[202]

Furthermore, Rule 47(2) is explicit regarding the obligation to remove restraints when the detainee or prisoner appears before a judicial or administrative authority. This is in recognition of the subliminal message restraints may send to judges or juries; as regards untried prisoners, this is a precondition for the presumption of innocence.

It should also be noted that when prisoners are transported to medical care facilities outside the prison, e.g. for specialised treatment in hospitals, restraints need to be removed unless strictly necessary, as they may hinder medical treatment and compromise the doctor-patient relationship.

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[199] Her Majesty's Inspectorate of Prisons, *Expectations: Criteria for assessing the treatment of and conditions for women in prison, Version 1*, 2014, p. 17.

[200] Article 2, Convention on the Rights of Persons with Disabilities, A/61/611.

[201] Article 4(3), Convention on the Rights of Persons with Disabilities.

[202] SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*, 28 July 2014, CAT/OP/NZL/1, para. 111 *(SPT Report on visit to New Zealand)*.

Also, if restraints are used routinely rather than when strictly necessary, medical personnel may wrongly presume that the prisoner (their patient) is dangerous.[203]

Restraints should not be used if they are contraindicated in light of the medical condition of the prisoner. For example, there should be a presumption against the use of restraints on women in the later stages of pregnancy. Rule 48(2) of the Bangkok Rules enshrine a prohibition against the use of restraints on women during labour or birth or immediately after birth.[204]

→ See Chapter 5, Restrictions, discipline and sanctions – instruments of restraint

Respect for human dignity

The experts also discussed implications of the obligation to respect the human dignity of prisoners (Rule 1) in the context of transfers.

They stressed that the application of this principle means that prisoners should not be exposed to public view especially while dressed in prison uniform or with instruments of restraint such as handcuffs. It was highlighted that Rule 19(3) caters for this situation explicitly, requiring that a prisoner be 'allowed to wear his or her own clothing or other inconspicuous clothing' whenever removed outside the prison. Where prisoners do not possess non-uniform clothing, good practice is for prison administrations to provide such clothing, especially for prisoners who appear at court.

It should be noted that Rule 73(1) states that while prisoners are being transferred the vehicle must ensure they are 'exposed to public view as little as possible' and 'safeguards should be in place to avoid publicity or curiosity from the public'.

Transfer of possessions and files

Where prisoners are transferred to another prison facility, their possessions and files need to be transferred with them.[205] The experts noted that Rules 67(1) and (2) need to be read as an instruction to transfer the prisoners' belongings to any new facility. This also applies to legal documents, which the prisoner is entitled to keep in his/her possession pursuant to Rule 53. Transferring such documents with the prisoner is key to preventing loss of documents, which might infringe procedural rights, result in a delay of procedures, impede fair trial or lead to a failure to attend court hearings.

In order to ensure professional prison administration, the entire prisoner file should be transferred to any new facility since it provides the prison authority with crucial information about risks and needs associated with the individual prisoner.

Medical records also need to be transferred, along with the prisoner (Rule 26(2)), to the health-care service of the receiving institution, while retaining medical confidentiality. The UN Committee

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[203] See, for example, *SPT Report on visit to Ukraine*, CAT/OP/UKR/1, para. 77, and *SPT Report on visit to New* Zealand, CAT/OP/NZL/1, para. 110, expressing concern about transportation in vehicles with single 'cages', prisoners routinely handcuffed and often waist-restrained, regardless of their security classification; as well as about transfers in small cages with metal benches and without proper windows for long journeys (up to twelve hours).

[204] UN Bangkok Rules, Rule 24.

[205] See, for example, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *3rd General Report on the CPT's activities covering the period 1 January to 31 December 1992*, 1993, CPT/Inf (93) 12, para. 59: 'Steps should also be taken to ensure a proper flow of information – both within a given establishment and, as appropriate, between establishments (and more specifically between their respective health-care services) – about persons who have been identified as potentially at risk'.

against Torture, for instance, has emphasised the fact that the confidentiality of medical data persists beyond the transfer and/or release of an inmate.[206]

It was highlighted that measures must be taken to ensure that a prisoner taking any form of medication is provided the respective medicine during transfer and upon arrival at the new facility.

Foreign national prisoners

The experts analysed Rule 62 in the light of the importance of contact with the outside world for foreign national prisoners, although the Rule was not itself revised in the course of the review.[207] Alongside Rule 62, the experts flagged the relevance of Rules 2(2), 54, 55 and 80(1) for foreign national prisoners.

Given the high number of foreign national prisoners in many countries, practical guidance on how to effectuate the revised standards for this group is of particular interest.[208]

As a starting point, the experts noted the relevance of Rule 2(2) in the context of foreign national prisoners, stipulating that 'taking account of individual needs of prisoners, in particular vulnerable categories' does not constitute discrimination.

The participants emphasised that access to rights such as legal aid, complaints procedures and procedural safeguards depend on prisoners being provided with the means to exercise them, including the ability to understand them and to communicate. The written information prisoners ought to receive upon admission according to Rules 54 and 55 (prison law and regulations; rights including legal advice and legal aid, requests and complaints; obligations and disciplinary sanctions) therefore needs to be available 'in the most commonly used languages in accordance with the needs of the prison population'.

Should a prisoner not understand any of these languages, interpretation assistance should be provided (Rule 55(1)). Creative solutions may be required, such as the availability of telephone interpreters. The experts also highlighted that solutions imply the recruitment of prison staff taking into account fluency in the languages common in a country's prison population, as captured in Rule 80(1).[209]

Good practice in reducing the common isolation of foreign national prisoners has been enshrined in the Council of Europe recommendations, suggesting that they be 'allocated to prisons where there are others of their nationality, culture, religion or who speak their language'. It is also recommended that special attention is paid 'to the maintenance and development of their relationships with the outside world, including contacts with family and friends, consular representatives, probation and community agencies and volunteers'.[210] Recommendation 22.2. explicitly states that foreign prisoners 'shall be allowed to use a language of their choice during such contacts' unless there is 'a specific concern in individual cases related to safety and security'. (See detailed provisions

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[206] UN Committee against Torture, *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)*, 16 December 2013, CAT/C/51/4, para.21

[207] See also UN Bangkok Rules, Rule 2(1) last sentence, which captures information about and the opportunity to access consular representatives upon admission.

[208] The Council of Europe, for example, has adopted specific recommendations concerning foreign prisoners (Council of Europe, *Recommendation CM/Rec (2012)12 of the Committee of Ministers to member States concerning foreign prisoners*, 10 October 2012 (*CoE Recommendation on foreign prisoners*)).

[209] Rule 80(1): The prison director, his or her deputy, and the majority of other prison staff shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.

[210] *CoE Recommendation on foreign prisoners,* CM/Rec (2012)12, 16.3. and 22.1.

on the facilitation of contact to the outside world and contact with consular representatives in Recommendations 22.1. to 25.4.)

Consideration should be given, where possible, to providing teleconferencing facilities so foreign national prisoners can maintain contact with their families.[211]

Diplomatic and consular representation

Foreign individuals deprived of their liberty are entitled to have consular authorities of their State or origin notified 'without delay' of the fact and place of their detention and/or that of questioning if they so request.[212]

The International Court of Justice has clarified that 'without delay' does not necessarily mean 'immediately' upon arrest, but that 'there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national'.[213]

It was noted that prisoners need to be consulted prior to making contact with the diplomatic or consular representation of the prisoners' country of citizenship, as they are entitled to waive this right and may in fact fear persecution from this state in some cases. In this instance, Rule 62(2) points to national and international agencies established to protect or assist refugees or stateless persons, such as the United Nations High Commissioner for Refugees (UNHCR).

[211] *Technical Guidance for Prison Planning*, p. 126.

[212] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16(2); Vienna Convention on Consular Relations, Article 36(1)(b); Asia Pacific Forum of National Human Rights Institutions, *Minimum Interrogation Standards*, 2005, para. 2.

[213] International Court of Justice, *Case concerning Avena and other Mexican nationals (Mexico v. United States of America),* para. 87-88.

Chapter 4

Healthcare

Issues/rules covered:

- Provision of health-care (Rules 24-27, 30 and 31)
- Medical ethics (Rules 32 and 46)
- Role of doctors in case of signs of torture or other ill-treatment (Rule 34)

General Principles

States are under an international obligation to ensure the right to the highest attainable standard of health[214]. The fulfilment of this obligation is particularly acute in prisons as a combination of factors can make prison environments detrimental to health and wellbeing and place prisoners in a position of vulnerability as a result. Compared to the general population, the health needs within the prison population are typically higher in relation to physical and mental health and drug dependencies.[215]

Prisoners fully depend on the authorities to access health-care. Any act or omission by the authorities can have a serious impact on a prisoner's health and well-being. It is therefore critical that there are:

- qualified staff;
- continuity of care between prisons and the community;
- robust health-care services and infrastructure are provided within prison;[216]

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[214] UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*. Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4) at para 43(a) available at: http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC14.pdf (*General Comment No. 14)*

[215] World Health Organization Europe, *Good governance of prison health in the 21st century. A policy brief on the organization of prison health* (2013) available at: http://www.euro.who.int/__data/assets/pdf_file/0017/231506/Good-governance-for-prison-health-in-the-21st-century.pdf?ua=1 (*WHO, Good governance of prison health in the 21st century)*

[216] United Nations Office for Project Services, *Technical Guidance for Prison Planning: Technical and Operational Considerations Based on the Nelson Mandela Rules* (2016) at 151 – 157 (setting out the minimum elements that must be provided in prisons including that: '[Prison facilities must include a dedicated space for the provision of physical and mental health services, as well as dental services. Prisons that house women must include provisions for pre- and post-natal care, and other gender-specific health care services') available at: https://www.unops.org/SiteCollectionDocuments/Publications/TechnicalGuidance_PrisonPlanning.pdf (*UNOPS, Technical Guidance for Prison Planning*); Sub-Committee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Sub-Committee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Kyrgyzstan* CAT/OP/KGZ/1 (2014) at paras. 90 - 94 (identifying the needs of a healthcare system to include adequate equipment, qualified and adequately paid staff including mental health experts, adequate and free medical supplies, a high standard of diagnostic and therapeutic services, adequate sanitary conditions, adequate central heating and adequate training including in the assessment and response to human rights violations) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fOP%2fKGZ%2f1&Lang=en (*Kyrgyzstan CAT/OP/KGZ/1)*

- prisoners' health does not deteriorate but rather treatment is aimed at recovery and rehabilitation;
- the prison administration always follows the medical advice and recommendations of health-care staff;[217]
- wherever possible women physicians and nurses attend to women prisoners to conduct examinations or treatment.[218]

Caregiving Mission of Health-Care Staff

The Essex Group noted that Rule 25 of the Nelson Mandela Rules pinpoints caregiving as the fundamental mission of health-care staff in prisons. The experts advised that the rest of the Rules on health-care should be read from this starting point as it provides the framework for health-care in prisons in line with international human rights standards and norms.[219] They also pointed out that the implementation of this fundamental mission requires states to ensure the adequate allocation of resources to health-care in prisons.

Interdisciplinary Team

Rule 25(2) requires the health-care service within prison to comprise an interdisciplinary team, including with expertise in psychology, psychiatry, dental care and pre- and post-natal care.[220] This is reiterated in Rule 78 of the Nelson Mandela Rules that provide that '[s]o far as possible, prison staff shall include a sufficient number of specialists such as psychiatrics, psychologists, social workers, teachers and trade instructors'.

Read together with Rule 29(1)(b) which requires provision for child-specific health-care, the interdisciplinary team must include a child-health specialist where children are in prison with a parent. This aligns with the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) which require that a child health specialist is available 'to determine any treatment and medical needs'[221] of a child accompanying a parent.[222]

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[217] European Court of Human Rights, Thematic *Report Health-related issues in the case-law of the European Court of Human Rights* (2015) Chapter IV. Health of Detainees. A. Introduction (p. 13) available at: http://www.echr.coe.int/Documents/Research_report_health.pdf

[218] Due to common histories of violence, including sexual violence, the need for sexual and reproductive healthcare and due to cultural reasons it is generally acknowledged that female health-care staff should attend to women prisoners wherever possible. Rule 10(2), *United Nations Rules for Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (*the Bangkok Rules*) A/C.3/65/L.5 (6 October 2010) requires that an examination is undertaken by a woman physician or nurse if a woman prisoner requests so, unless this is not possible and the situation requires urgent medical attention.

[219] See *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.* United Nations General Assembly Resolution 37/194. New York, United Nations, 1982 available at: http://www.un.org/documents/ga/res/37/a37r194.htm (*UN Principles of Medical Ethics)*

[220] UN Committee against Torture, *Observations of the Committee on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners* (SMR), 16 December 2013, UN-Doc. CAT/C/51/4, para. 24 available at: http://www.refworld.org/docid/53429c014.html

[221] Rule 9.

[222] The *Bangkok Rules* recognise the central role of both parents and clarify that in para. 12 of the preliminary observations that some of the rules apply equally to male prisoners and to offenders who are fathers.

Full Clinical Independence

Rule 25(2) underscores the full clinical independence of the health-care service. This reflects the range of international standards and norms providing for the clinical independence of health professionals working in prisons.[223]

Rule 24(2) provides that health-care services should be 'organised in close relationship to the general public health administration'. When read together with Rule 25(2), the Essex Group recalled international standards and norms that require the general public health administration to be the entity to employ the prison health-care staff rather than the prison director in order to safeguard clinical independence.[224]

The Essex Group also noted that as provided in Rule 27(2), the prison administration must have no influence or go against the decisions of the health-care team. The Rule underscores that decisions 'may only be taken by the responsible healthcare professionals and may not be overruled or ignored by non-medical prison staff'. This is in line with medical ethics including the World Medical Association's Declaration of Tokyo[225] which states that:

> *A physician must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible. The physician's fundamental role is to alleviate the distress of his or her fellow human beings, and no motive, whether personal, collective or political, shall prevail against this higher purpose'.*[226]

Equivalence of Care

Rule 24 of the Nelson Mandela Rules emphasises that health-care in prison should be equivalent to that in the community as the right to the highest attainable standard of health under the International Covenant on Economic, Social and Cultural Rights applies throughout the state without distinction. Those in the community and in prisons have a right to the highest attainable standard of health-care based on assessed individual needs and the state is required to meet the obligation to the outside community and in prisons. Rule 24 requires the organization of health-

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[223] *UN Principles of Medical Ethics*, the *Bangkok Rules*, the *UN Rules for the Protection of Juveniles Deprived of their Liberty* adopted by General Assembly resolution 45/113 on 2 April 1991, the Background Paper for the *Trencin Statement on Prisons and Mental Health* 2007 (*the Trencin Statement*), the Council of Europe Committee of Ministers' *Recommendation No. R (98) 7 Concerning the Ethical and Organisational Aspects of Health Care in Prison* 8 April 1998, and Principle X of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (2008) indicate international acceptance of such obligations. The provision of health-care services operated with full clinical independence has also been established in the Proposed *Guidelines & Institutional Mechanisms A Project of the International Dual Loyalty Working Group Guidelines for Prison, Detention and Other Custodial Settings* (*Dual Loyalty Guidelines*) and in the World Medical Association Declaration of Tokyo-*Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment* 1975, Rev. October 2016, available at: http://www.wma.net/en/30publications/10policies/c18/ (*WMA Declaration of Tokyo*)

[224] *WHO, Good governance of prison health in the 21st century*. In this document WHO suggests that in order for prisons to meet international human rights standards and to contribute to better public health the best organisational solution is that "health ministries should provide and be accountable for health care services in prisons and advocate healthy prison conditions." See also *Commentary to Recommendation REC(2006)2 of the Committee of Ministers to member states on the European Prison Rules*. Strasbourg, Council of Europe (2005) available at: http://www.coe.int/t/dghl/standardsetting/prisons/E%20commentary%20to%20the%20EPR.pdf. It reads (at p.17): "Organisation of prison health care. Rule 40. The most effective way of implementing Rule 40 is that the national health authority should also be responsible for providing health care in prison, as is the case in a number of European countries. (…). This will not only allow for a continuity of treatment but will also enable prisoners and staff to benefit from wider developments in treatments, in professional standards and in training." *(Commentary to Recommendation REC(2006)2)*

[225] *WMA Declaration of Tokyo*

[226] Principle 5

care in 'close relationship to the general public health administration' as a means of ensuring equivalence and continuity of care.

The Essex Group noted that in some states health-care in the community may be very poor. In such circumstances, as outlined by the UN Office for Project Services in its interpretation of the Nelson Mandela Rules, '[w]hile it is a typical expectation that health facilities should be equivalent to the standard of facilities serving the broader community, it must be recognized that the absence of local health facilities does not imply a lack of responsibility toward the healthcare of prisoners'.[227]

Continuity of Care

Rule 24(2) of the Nelson Mandela Rules addresses continuity of care, a key aspect of which is the organisation of health-care services in close relationship to the public health administration.[228] The Essex Group noted that continuity of care has two dimensions: first, continuity with care prior to and upon entering prison; and second, continuity with care in prison on release or transfer. (See Rule 26(2) concerning transfer of medical files upon transfer of prisoners). For example, on entering prison, Rule 24(2) would require prisoners to be able to bring drugs like an inhaler into prison in order to ensure continuity of care.[229]

Health-care staff have the duty to cooperate in the coordination of continuous care (see also Rule 30(a)).[230] The Essex Group noted that continuity of care extends to drug dependence, noting the importance of ensuring that treatment allowed in the community, like methadone, is also allowed in prisons in line with harm reduction and to avoid prisoners having to go 'cold-turkey'.[231] The UN High Commissioner for Human Rights, in his study on the impact of the world drug problem on the enjoyment of human rights, emphasised the entitlement of persons in custodial settings, to the same standard of health-care found on the outside, including with regard to prevention, harm reduction and antiretroviral therapy.[232] The importance of continuity of care with regard to treatment

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[227] *UNOPS Technical Guidance for Prison Planning* at 153.

[228] *Commentary to Recommendation REC(2006)2*. It reads: Organisation of prison health care. Rule 40. The most effective way of implementing Rule 40 is that the national health authority should also be responsible for providing health care in prison (..). (…). This will (..) allow for a continuity of treatment (..).".

[229] *Gladkiy v. Russia*, Application No. 3242/03 (ECHR, 21 December 2010) at para. 47

[230] *WMA Declaration of Lisbon on the Rights of the Patient* (1981/Rev. 2015), available at: (http://www.wma.net/en/30publications/10policies/l4/) Principle 1. Right to medical care of good quality (f). "The patient has the right to continuity of health care. The physician has an obligation to cooperate in the coordination of medically indicated care with other health care providers treating the patient. The physician may not discontinue treatment of a patient as long as further treatment is medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care." See also *Commentary to Recommendation REC(2006)2.* It reads (at p. 17): Organisation of prison health care. Rule 40. The most effective way of implementing Rule 40 is that the national health authority should also be responsible for providing health care in prison, as is the case in a number of European countries. (…). This will (..) allow for a continuity of treatment (..)." It also reads (at p. 19) "Rule 42.2 provides that if a prisoner is released before the completion of his treatment, it is important that the medical practitioner establishes links with medical services in the community so as to enable the prisoner to continue his treatment following release."

[231] Principle 6, UNODC/WHO, *Principles of Drug Dependence Treatment Discussion Paper* (March 2008), available at: https://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf; The UN Committee on Economic, Social and Cultural Rights, the Special Rapporteur on the Right to Health and the UN High Commissioner for Human Rights have all mentioned harm reduction as part of the right to health: UN Committee on Economic, Social and Cultural Rights, *Concluding Observations: Tajikistan* (24 November 2006) UN Doc No E/C.12/TJK/CO/1, at para. 70; UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, *Paul Hunt, Mission to Sweden* (28 February 2007) UN Doc No A/HRC/4/28/Add.2, at para. 60 and UN General Assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* (6 August 2010) A/65/255, at para. 60; United Nations High Commissioner for Human Rights, *Study on the impact of the world drug problem on the enjoyment of human rights* (4 September 2015) UN Doc A/HRC/30/65, at paras. 21-23 (*OHCHR Study on the impact of the world drug problem)*.

[232] *OHCHR Study on the impact of the world drug problem*, para. 21

such as opioid substitution and antiretroviral therapy, has been underscored by the World Health Organization and UNAIDS, stressing that interrupting such treatment has serious health consequences.[233]

Continuity of care is also critical as a means of preventing overdoses in opioid-dependent prisoners in the immediate post-release period. Pre-release drug services should be coordinated with and linked to appropriate after-care.[234]

The Essex Group noted the importance of training and education of the prison administration on drug dependency.

The Essex Group also noted the importance of reading the requirement to provide continuity of care together with Rule 2(2) of the Nelson Mandela Rules which provides that prison administrations need to 'take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings' and adopt '[m]easures to protect and promote the rights of prisoners with special needs'.

When non-national prisoners are released, they may be transferred to their country of origin which may complicate the requirement to provide continuity of care. International standards and norms require states 'to facilitate the continuation of medical treatment of foreign prisoners who are to be transferred, extradited or expelled, which may include the provision of medication for use during transportation to that State and, with the prisoners' consent, the transfer of medical records to the medical services of another state'.[235]

Provision of Healthcare Free of Charge

Rule 24 provides that health-care should be free of charge.[236] The World Health Organization has clarified that 'free of charge' should be interpreted literally without any qualifications or ceilings. For example, 'free of charge' does not mean that prisoners should only be provided with free access to health-care facilities (such as being transported to a hospital but then being charged for the treatment needed) or that medications should be bought by the family.[237] Rather, it means that access to health-care and all necessary treatment, care and medication must be free of charge.

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[233] WHO, UNODC and UNAIDS, *Technical Guide for countries to set targets for universal access to HIV prevention, treatment and care for injecting drug users* (2009) available at: http://www.who.int/hiv/pub/idu/idu_target_setting_guide.pdf, p. 26, and WHO, *Consolidated Guidelines on HIV Prevention, Treatment And Care For Key Populations* (July 2014), available at: http://apps.who.int/iris/bitstream/10665/128048/1/9789241507431_eng.pdf?ua=1&ua=1 ,p. 5.

[234] WHO, *Preventing overdose deaths in the criminal-justice system,* 2010 (updated 2014) available at: http://www.euro.who.int/__data/assets/pdf_file/0020/114914/Preventing-overdose-deaths-in-the-criminal-justice-system.pdf?ua=1

[235] Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners*, 2012 available at: https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2012)12&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true) Rule 31.9. Further, reference could also be made to Rule 35.5 CM/Rec(2012)12 and Council of Europe: Committee of Ministers, *Commentary to Recommendation CM/Rec(2012) 12 of the Committee of Ministers to member States concerning foreign prisoners,* 2012 available at: http://www.coe.int/t/dghl/standardsetting/prisons/Rec(2012)12Commentary_E.pdf

[236] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988), A/RES/43/173. Principle 24. A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge. (http://www.un.org/documents/ga/res/43/a43r173.htm).

[237] Møller L, Stöver H, Jürgens R, Gatherer A and Nikogasian H, (eds.), *Health in prisons, A WHO guide to the essentials in prison health*, WHO Europe (2007), available at: http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf, at 10 (*A WHO guide to the essentials in prison health*)

When read together with Rule 25, the Essex Group suggested that a clear way to understand the requirement to provide health-care free of charge is to understand it as all treatment and medicine that a qualified clinician deems necessary. Medical necessity can only be determined by medical staff and on a case-by-case basis (see Rule 27(2)). Rule 24 should therefore be read together with Rules 30(a) and 25(2) on clinical independence; Rule 27(2) providing that clinical decisions are the sole province of health-care professionals; and Rule 32(1) providing that treatment can only be based on clinical grounds.

The Essex Group noted that 'necessary' does not refer only to life-saving treatment, procedures or basic healthcare. Rather, it refers to the care that is necessary to maintain the established health needs of the prisoner[238] in line with Rule 25 and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment[239].

The Essex Group noted that Rule 24(1) requires that free health-care is provided 'without discrimination on the grounds of their legal status'.[240] The experts pointed to the particular risk to non-national prisoners and pre-trial detainees and underscored that the requirement to provide health-care free of charge applies to all prisoners without distinction on grounds of nationality or otherwise.

The Essex Group pointed out that prisoners' health problems can be aggravated by the prison facilities. Therefore, Rule 24 should be read together with the obligation of the prison administration to ensure that prisons are safe as set out in Rules 12, 13 and 35 by ensuring that the prison is maintained in a way that does not worsen or aggravate prisoners' health.

Medical Ethics

The Essex Group recalled that informed consent, patient autonomy and confidentiality are key components of the right to health and the cornerstones of a trustful patient-doctor relationship which is also a precondition for effective public health.

Rule 32(1) provides that the same ethical and professional standards shall apply to the relationship between the doctor and the prisoner-patient as between the doctor and the patient in the community[241].

Rule 31(1)(d) also sets out, '[a]n absolute prohibition on engaging, actively or passively, in acts that may constitute torture or other cruel, inhuman or degrading treatment or punishment, including medical or scientific experimentation that may be detrimental to a prisoner's health, such as the removal of a prisoner's cells, body tissues or organs'.

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[238] Council of Europe: Committee of Ministers, *Recommendation No. R (98) 7 of the Committee of Ministers to member states concerning the ethical and organisational aspects of health care in prison*, 1998 (available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804fb13c) makes clear that "necessary" refers to established health needs of individual prisoners according to their right to health, see: *Main characteristics of the right to health care in prison. A. Access to a doctor. 2.* "In order to satisfy the health requirements of the inmates, doctors and qualified nurses should be available (..), depending on the number and the turnover of inmates and their average state of health."

[239] Council of Europe: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *CPT standards*, 2015 (CPT/Inf/E (2002) 1 - Rev. 2015) Standard on Health care services in prisons, No. 30 p. 38: "An inadequate level of health care can lead rapidly to situations falling within the scope of the term 'inhuman and degrading treatment'". Available at: http://www.cpt.coe.int/en/documents/eng-standards.pdf (*CPT Standards*)

[240] UN Committee against Torture, *Observations of the Committee on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR),* 16 December 2013, UN-Doc. CAT/C/51/4, para. 24 (*CAT SMR revision observations*).

[241] The World Medical Association (WMA) gives a good collection of useful resources regarding Medical Ethics. See: http://www.wma.net/en/20activities/10ethics/

The Essex Group noted that in order to ensure that this requirement is met in the prison context, training for all staff (particularly medical staff) on human rights and medical ethics will be needed[242].

Informed Consent and Autonomy

Of particular importance to medical ethics and the right to the highest attainable standard of health is a strong understanding of informed consent and prisoner-patient autonomy as set out in Rule 32(1)(b).

The Essex Group noted that prison authorities are under an obligation to make sure that informed consent is documented through a written procedure.

As set out above, prisoner-patient autonomy and confidentiality are cornerstones of a trustful patient-doctor relationship. The absence of a trustful relationship may mean that prisoners may not feel comfortable revealing health conditions that could be of public health relevance. Where treatment is proposed, the principles of informed consent and patient autonomy mean that the prisoner must be able to refuse treatment if he or she does not wish to receive it.[243]

The information on the proposed treatment must be explained in a language that the prisoner understands. In the very narrowest of circumstances, the Essex Group noted that medical staff may act where the prisoner is unable to consent, for example, where the prisoner is unconscious and requires emergency treatment. However, following the Declaration of Lisbon, where clear prior wishes to the contrary have been expressed, even such emergency treatment is not permissible. This Declaration provides that, 'if a legally entitled representative is not available, consent of the patient may be presumed, unless it is obvious and beyond any doubt on the basis of the patient's previous firm expression or conviction that he/she would refuse consent to the intervention in that situation'.[244]

The experts recalled that no vaginal examination of women prisoners must be undertaken without consent and that virginity tests are prohibited explicitly by Rule 8 of the Bangkok Rules.

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[242] *WHO, Good governance of prison health in the 21st century* reflects on State's core obligations under the right to health according to *General Comment No. 14* and concludes with regard to health staff's professional and ethical conduct and their clinical independence (at p. 9) "(..) such an understanding of their role implies the necessity for all people working in prisons to be trained in and respect human rights and medical ethics". The Norwegian Medical Association, in cooperation with the World Medical Association, has developed a web-based course *Doctors Working in Prison: Human Rights and Ethical Dilemma*. Oslo, Norwegian Medical Association, 2001, available at: http://www.wma.net/en/70education/10onlinecourses/20prison/ , or https://nettkurs.legeforeningen.no/enrol/index.php?id=39). See also *UN Principles of Medical Ethics* and the Council of Europe's Manual on *Prison health care and medical ethics* (2015), available at: http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/Publications_HealthCare_manual_Web_A5_E.pdf .

[243] *A WHO guide to the essentials in prison health*, at 37- 38; UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, (28 July 2008) UN doc A/63/175, paras. 47, 74.

[244] *WMA Declaration of Lisbon on the Rights of the Patient* (1981/Rev.2015), available at: http://www.wma.net/en/30publications/10policies/l4/, Principle 4 b.

Rule 32(2) addresses informed consent in the context of participation in 'clinical trials and other health research accessible in the community'. Informed consent is always critical for participation in clinical trials or research.[245] It is magnified in the context of deprivation of liberty.[246]

As in the community, informed consent must be obtained through the provision of information to the prisoner-patient by those conducting the trials or research (such as a company or research institute). An ethics committee must also be involved in order to provide an independent view on whether the treatment would produce a 'direct and significant' benefit to health. The Essex Group noted that the prison authorities are under an obligation to ensure that the trial has been officially approved by an appropriate body and that this information and the means of conveying it to the prisoner must be the same as in the outside world.

Confidentiality

The Essex Group reiterated the overall principle of confidentiality as set out in the first Essex paper. In that paper, the experts stated that, the principle of medical confidentiality is a fundamental tenet of medical practice and derives from the right to privacy as recognized in the International Covenant on Civil and Political Rights. It has also been set out in Rule 8 of the Bangkok Rules, the World Medical Associations International Code of Medical Ethics 1949 (revised 2006), the World Medical Association Declaration of Lisbon on the Rights of the Patient, the Dual Loyalty Guidelines, Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, and the European Committee for the Prevention of Torture (CPT) Standards.

The Essex Group recalled that confidentiality in prisons should be understood in the same way as in the community at large.[247] Rule 32(1)(c) requires the confidentiality of medical information 'unless maintaining confidentiality would result in a real or imminent threat to the patient or others'. The Essex Group noted that the exception to confidentiality in Rule 32(1)(c) should be understood narrowly and not as applying to the whole medical file. Rather, it requires an assessment of which specific pieces of information need to be communicated and at what level on a 'need to know basis'.[248] The exception does not imply that the whole medical file should be shared but depending on the situation, a summary of the pertinent issues (such as whether illness may have contributed to a particular behaviour) may be necessary. Similarly, the medical staff may communicate that certain action is needed without communicating that the prisoner has a particular disease or illness. An assessment of who receives the information will also be needed bearing in mind the sensitivity and confidentiality of medical information.

Part of the obligation of confidentiality covers the storage of confidential records as set out in Rule 26. The Essex Group noted that these records should encompass a full medical file, not simply a summary. Standard 39 of the CPT Standards provides that,

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[245] World Medical Association, D*eclaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects* adopted at 18th WMA General Assembly, rev. at 64th WMA General Assembly, Fortaleza, Brazil October 2013, available at: (http://www.wma.net/en/30publications/10policies/b3) paras 25 – 32 on informed consent in research (*WMA Declaration of Helsinki)*

[246] See *WMA Declaration of Helsinki*; *CPT Standards*; Council of Europe: Committee of Ministers, *Recommendation No. R (93) 6 concerning prison and criminological aspects of the control of transmissible diseases including Aids and related health problems in prisons* (1993) available at: https://bip.ms.gov.pl/Data/Files/_public/bip/prawa_czlowieka/zalecenia/936.pdf; Council of Europe, *Additional protocol Human rights to the Convention on Human Rights and Biomedicine, concerning Biomedical Research*, Strasbourg 2005 (art 20), available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371a

[247] *CAT SMR revision observations*, para.21

[248] World Medical Association, *Medical Ethics Manual* (3rd edition 2015), available at: http://www.wma.net/en/30publications/30ethicsmanual/pdf/ethics_manual_en.pdf, at 53-56

> *A medical file should be compiled for each patient, containing diagnostic information as well as an ongoing record of the patient's evolution and of any special examinations he has undergone.*[249]

Standard 40 also provides that,

> *A personal and confidential medical file should be opened for each patient. The file should contain diagnostic information (including the results of any special examinations which the patient has undergone) as well as an ongoing record of the patient's mental and somatic state of health and of his treatment.*[250]

Standard 74 provides that,

> *Recording of the medical examination in cases of traumatic injuries should be made on a special form provided for this purpose, with body charts for marking traumatic injuries that will be kept in the medical file of the prisoner. Further, it would be desirable for photographs to be taken of the injuries, and the photographs should also be placed in the medical file.*[251]

The medical file should be kept separate from other files and in a lockable room that is only accessible by the health-care staff[252]. The Essex Group also pointed out that the right of the prisoner to access to files provided in Rule 26(1) includes the right to copy the files, not only look at them. The files should be understood as the property of the prisoner not the prison. The experts also noted that systems should be put in place to ensure continuity of access to medical files and care when a prisoner is transferred to another prison or another facility so that records follow the prisoner.

The experts recalled that for women prisoners confidentiality of medical information includes information about their sexual and reproductive health history. They noted that women prisoners may have reasons not to want to share such information, 'especially in countries or societies where out of marriage pregnancies and childbirth may be a cause for stigmatisation, and in some societies may be considered criminal acts. Information about any abortions is particularly sensitive, due to its criminalisation in many countries'.[253] They referred to the Bangkok Rules which acknowledge that women prisoners should only be requested to provide information about their reproductive health history on a voluntary basis, and that no woman should be forced to provide such information.[254]

The experts referred to specific guidance on confidentiality in the case of HIV and AIDS in Principles 32 and 33 of the World Health Organization (WHO) Guidelines on HIV Infection and AIDS in Prisons (1999):

> *32.Information regarding HIV status may only be disclosed to prison managers if the health personnel consider, with due regard to medical ethics, that this is warranted to ensure the safety and well-being of prisoners and staff, applying to disclosure the same*

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[249] At 40.

[250] At 52.

[251] At 98.

[252] *UNOPS Technical Guidance for Prison Planning* at 156.

[253] Pew Research Center, *Worldwide Abortion Policies* (October 2015), available at: http://www.pewresearch.org/interactives/global-abortion/

[254] Penal Reform International and Thailand Institute of Justice *Guidance Document on the Bangkok Rules* (2013), available at: https://www.penalreform.org/wp-content/uploads/2013/10/PRI-TIJ-Guidance-Document-on-Bangkok-Rules-October-2013.pdf, pp. 40 and 46.

principles as those generally applied in the community. Principles and procedures relating to voluntary partner notification in the community should he followed for prisoners.

33.Routine communication of the HIV status of prisoners to the prison administration should never take place. No mark, label, stamp or other visible sign should be placed on prisoners' files, cells or papers to indicate their HIV status.

The Essex Group also noted that in Rule 26(2), confidentiality should also be ensured during transit.

Health-care Assessment on Admission

In Rule 30, a 'physician or other qualified health-care professional' is required to see the prisoner as soon as possible after admission. The rationale for this requirement is provided in Rule 24 which establishes that the state's responsibility for the health of prisoners begins upon admission to the prison. Assessment on admission is critical for the health of the individual. It should therefore be offered to prisoners on admission with health-care staff explaining the benefits to them of the assessment. Without knowing the state of an individual's health, it is not possible to take appropriate and medically necessary measures to protect, promote or improve his or her health.

An assessment on admission necessarily requires that the physician or other qualified health-care staff assess the prisoner's individual health needs and any specific risks to physical or mental health, including signs of psychological or other stress brought about by imprisonment and suicide risks. The health-care staff must also ensure that an appropriate treatment plan is established where needed and that the prisoner has access to the required medicines, including in continuity of care from before entering the prison as set out in Rule 30(c). It is also necessary to minimize withdrawal symptoms in prisoners who depend on substances and in order to identify any signs of torture or other ill-treatment.

Assessment on admission is also important from a public health perspective in order to assess whether newly entering prisoners carry any potential contagious diseases. Otherwise, it is not possible to effectively protect other prisoners and staff from possible transmission and prevent possible outbreaks (however, see the restrictions on isolation below).

The World Health Organization and the European Committee on the Prevention of Torture have both stated that 'as soon as possible' should be understood as within 24 hours.[255] This timeframe is not only important with regard to the prisoner's health[256] and public health[257] but also in order to identify possible signs of ill-treatment[258], signs of stress and the risk of suicide or self-harm[259].

The fulfilment of the requirements of this Rule requires record-keeping as set out in Rule 26(1). The Essex Group also noted that this Rule should be read together with Rule 25(2) to mean that in order to fulfil the requirements of this Rule prisons must have 'sufficient qualified personnel'. 'Qualified personnel' requires that the health-care staff are trained in applying the Manual on

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[255] *CPT Standards* para. 73 p. 98: "It is axiomatic that persons committed to prison should be properly interviewed and physically examined by a health-care professional as soon as possible after their admission. The CPT considers that the interview/examination should be carried out within 24 hours of admission. (…). The same procedure should be followed when a prisoner who has been transferred back to police custody for investigative reasons is returned to the prison."

[256] Rule 30(a).

[257] Rule 30(d).

[258] Rules 7(d), 30(b) and 34.

[259] Rule 30(c).

effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment ("the Istanbul Protocol).[260] Their qualifications should be commensurate with the nature of the decisions they are required to take and with their reporting responsibilities. For example, the head of a team should be a qualified medical doctor.

Rule 30(b) should be read together with Rule 34 on documentation. The Essex Group noted that ill-treatment is not only physical but can also be mental. In order to identify any ill-treatment, they pointed out that it is necessary to talk to the prisoner as not all signs of ill-treatment will be obvious or visible.

In Rule 30(c), the Essex Group noted that the requirement to identify 'any signs of psychological or other stress' is particularly important in relation to prisoners in the first 24 hours of detention, pre-trial and remand and high risk prisoners.[261]

The Essex Group underscored that Rule 30 must be read together with Rules 6 – 8 of the Bangkok Rules that set out the women-specific dimensions to the health screening (although some also apply to men) on entry. Rule 6 provides that this 'shall include comprehensive screening to determine primary health-care needs, and also shall determine:

> *(a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling;*
> *(b) Mental health-care needs, including post-traumatic stress disorder and risk of suicide and self-harm;*
> *(c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues;*
> *(d) The existence of drug dependency;*
> *(e) Sexual abuse and other forms of violence that may have been suffered prior to admission.*

The Bangkok Rules also provide that 'if the existence of sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities'[262]. The Rules also reiterate the right to medical confidentiality 'including specifically the right not to share information and not to undergo screening in relation to their reproductive health history'.[263]

The Essex Group noted that HIV testing may be offered to prisoners with 'pre- and post-test counselling', however, such testing cannot be mandatory or required.[264]

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[260] *CAT SMR revision observations*, para.17; CAT, *Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture* CAT/C/DEU/CO/5 12 December 2011, para 29; CAT, *Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture* CAT/C/ETH/CO/1 20 January 2011, para 21; CAT, *Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture* CAT/C/SVK/CO/2 17 December 2009, para 11; UN General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* A/69/387 23 September 2014, paras 32-37

[261] *Bangkok Rules*, 6(a) - Medical Screening on entry -,7 - Procedures in case of sexual abuse or violence detected upon screening on entry, 8 - right to refuse screening related to reproductive health history, and 9 - right of accompanying children to undergo entry screening. Bangkok rule 9 should be linked to Nelson Mandela Rule 29.1 (b).

[262] Rule 7.

[263] Rule 8.

[264] *Bangkok Rules* 6(a).

Medical Assistance in Urgent Cases

The first sentence of Rule 27(1) requires prisons to 'ensure prompt access to medical assistance in urgent cases'. The Essex Group emphasised that the determination of urgency should be made by a clinician, not the prison administration.

The Essex Group acknowledged that in situations in which health-care staff are not present, a non-medical person may have to take a decision on what to do. However, they noted that even in such situations it should still be possible to telephone a health-care specialist so that the decision and any subsequent action is informed by the advice of a health-care specialist.

The experts noted that 'urgency' does not only imply a life-threatening situation. Rather, it refers to the situation in which if the prisoner was in the community, he or she would need to go to the accident and emergency/emergency room of a hospital. The experts noted that this rule applies to both physical and mental health.

The second sentence of Rule 27(1) provides that '[p]risoners who require specialized treatment or surgery shall be transferred to specialized institutions or to civil hospitals'. The Essex Group pointed out that this sentence is broader than the first which only focuses on 'urgent' cases. This sentence addresses situations in which prisoners may need to be taken out of the prison if necessary in order to access specialist care. This may relate to the nature of the health complaint or the identity of the patient (for example, access to a paediatrician for a child or young person). Specialist care also includes mental health facilities.

Rule 27(2) provides that '[c]linical decisions may only be taken by the responsible health-care professionals and may not be overruled or ignored by non-medical prison staff'. This Rule makes clear that if the clinician determines that the prisoner needs to go to hospital, the prison administration cannot overrule or ignore this decision in any situation, including non-urgent cases.

The Essex Group also noted that this provision should be read together with Rule 26(1) as requiring a record to be made and maintained of the chain of decision-making as a means of protection against abuse and to ensure accountability.

Isolation and Segregation on Grounds of Public Health

The Essex Group noted that tuberculosis (TB) or other highly contagious diseases and threats of epidemics may require quarantine for medical reasons, as captured in Rule 30(d). It states that 'in cases where prisoners are suspected of having contagious diseases, providing for the clinical isolation and adequate treatment of those prisoners during the infectious period'.

The Essex Group recalled that Rule 30(d) should not be read to require the isolation or segregation of prisoners infected by HIV.[265]

Where isolation is deemed necessary this must only be for public health reasons and based on national health protocols. The World Health Organization has set out that,

> *Only a medical doctor can decide on the need for isolation. The beginning and end of quarantine measures are strictly medical decisions. The duration of isolation should be*

[265] The European Court of Human Rights has ruled that the segregation of prisoners with HIV, in the absence of a reasonable and objective justification, may amount to a violation of Article 3 in conjunction with Article 14 of the ECHR, see: *Martzaklis and Others v. Greece,* Application No. 20378/13 (ECHR, 9 July 2015)

> *limited to the strictly necessary minimum. Medical and custodial staff will see to it that the rights of prisoners are guaranteed as far as possible (daily walk, legal assistance, contact with family). The quarantined sections of the prison (a cell, a section or the entire prison) must be marked by biohazard signs (..) (such as posters and stickers) (..)*[266].

The Essex Group noted that the justification for isolation would have to be the same as it would be outside of prison in order to prevent stigmatisation or discrimination.

Where there is separation, the input of additional health-care specialists will be required in order to guarantee adequate treatment; it should be for the shortest period of time; and accompanied by provision of information to prisoners including on the health implications of any decision to refuse treatment. While separated, the Nelson Mandela Rules still apply fully to the prisoner. Rule 46 provides direction on the role of health-care staff during a period of separation. Rule 42 also emphasises that '(g)eneral living conditions … including those related to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space, shall apply to all prisoners without exception' including during any person of separation.

The Essex Group also noted that public health information should be given to staff on the particular disease or illness that is being treated as otherwise they may be fearful or influenced by inaccurate rumours about the disease or illness that could negatively impact on the treatment (including segregation) of prisoners.

Fitness to Work Determinations

When determining fitness to work in Rule 30(e), the Essex Group emphasised the duty of medical staff to make individual assessments of the prisoner's ability to work against the nature of the work he or she is offered in order to prevent prisoners from being assigned work that could result in further physical or mental harm to them or others due to the nature of a particular illness. Medical staff should read this Rule together with Rules 4(2), 5 and 96(1) which address activities such as work, education and sport as activities in which prisoners are entitled to engage – should they so wish on a voluntary basis - as a means of contributing to their well-being and rehabilitation as well as Rules 97 – 103 on the terms and conditions of prison labour.

Daily Access to Prisoners

Rule 31 of the Nelson Mandela Rules requires that physicians and 'where applicable, other qualified health-care professionals shall have daily access to all sick prisoners, all prisoners who complain of physical or mental health issues or injury and any prisoner to whom their attention is specially directed'. The Essex Group noted that the access referred to in Rule 31 implies that health-care professionals are informed of where all prisoners are. This Rule is also relevant to Rule 46 where prisoners are undergoing disciplinary sanctions as the medical staff need to know where the prisoners are.

[266] World Health Organization Europe, *Prisons and Health* (2014) chapter 8 available at: http://www.euro.who.int/__data/assets/pdf_file/0005/249188/Prisons-and-Health.pdf

No Role of Medical Staff in Discipline or Punishment

Rule 46 underscores that medical staff should have no 'role in the imposition of disciplinary sanctions or other restrictive measures'. This is in line with the UN 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.[267] Similar provisions are included in the World Medical Association Statement on Body Searches of Prisoners,[268] the International Council of Nurses Position Statement,[269] and the Dual Loyalty Guidelines.[270]

This means that doctors must not play a role in the disciplinary basis for the imposition of sanctions. It also means that they must not assess whether a prisoner is medically 'fit' for the imposition of a sanction such as isolation. This is because the role of medical staff is to provide health-care, and it is 'in the interests of safeguarding the doctor/patient relationship, that health-care staff should not be asked to certify that a prisoner is fit to undergo punishment'.[271] They must therefore not be involved in any decision-making which is not related to their patients' health needs.

Furthermore, sanctions such as solitary confinement are inherently harmful to a person's health. It would therefore violate medical ethics, Rule 43 of the Nelson Mandela Rules which prohibits restrictions or disciplinary sanctions that amount to torture or other cruel, inhuman or degrading treatment or punishment as well as the fundamental mission of medical staff in prisons to provide care as set out in Rule 25, to make an assessment of medical 'fitness'[272] for a sanction.

However, once a prisoner is undergoing disciplinary measures, the Essex Group noted that health-care staff should pay particularly close attention to the health of prisoners held under any form of involuntary separation, including by visiting such prisoners on a daily basis and providing prompt medical assistance at the request of such prisoners or prison staff.

In the same vein, Rule 46(3) provides health-care staff with 'the authority to review and recommend changes to the involuntary separation of a prisoner in order to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner'. The Essex Group noted that this access is protective and provides a route for the health-

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[267] Principle 3 of *UN Principles of Medical Ethics*: 'It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health', and Principle 2: 'It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity or, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment'.

[268] *WMA Statement on Body Searches of Prisoners*, adopted by the 45th World Medical Assembly, Budapest, Hungary, October 1993 and editorially revised in May 2005 and October 2016, available at: http://www.wma.net/en/30publications/10policies/b5

[269] The International Council of Nurses, Position statement on *Nurses' role in the care of detainees and prisoners* (adopted in 1998, reviewed and revised in 2006 and 2011) available at: http://www.icn.ch/images/stories/documents/publications/position_statements/A13_Nurses_Role_Detainees_Prisoners.pdf

[270] *Dual Loyalty Guidelines*, Guideline 14: '15. The health professional should not participate in police acts like body searches or the imposition of physical restraints unless there is a specific medical indication for doing so or, in the case of body searches, unless the individual in custody specifically requests that the health professional participate. In such cases, the health professional will ascertain that informed consent has been freely given, and will ensure that the prisoner understands that the health professional's role becomes one of medical examiner rather than that of clinical health professional'. See also the *Trencin Statement*, 13-14.

[271] *CPT Standards*, para. 73, p. 47.

[272] Principle 3 and 4(b), *UN Principles of Medical Ethics*; *Commentary to Recommendation REC(2006)2*, Rule 43, p.21; *CPT Standards*, para. 73, p.47.

care staff to advise the prison administration on a harmful practice for so long as it persists and until it is phased out.

→ On the tension between medical ethics and the specific duty of care towards prisoners see also Chapter 5, Restrictions, discipline and sanctions – Role of medical personnel

Documentation of Signs of Torture

Rule 34 requires medical staff to 'document and report (…) any signs of torture or other cruel, inhuman or degrading treatment or punishment' that they become aware of and to report these signs 'to the competent medical, administrative or judicial authority'. The Rule requires that 'proper procedural safeguards are followed in order not to expose the prisoner or associated persons to foreseeable risks of harm'.

The Essex Group noted that health-care staff must record all signs and traces of torture and other ill-treatment in a prisoner's medical file. The Committee against Torture has stated that medical 'examinations should be carried out in private by a health professional trained in the description and reporting of injuries, include an independent and thorough medical and psychological examination, and the results be kept confidential from police or prison staff, and shared only with the detainee and/or the detainee's lawyer, in accordance with the Istanbul Protocol'.[273]

The Essex Group suggested that it would also be desirable for the health-care team to compile periodic statistics on the types of injuries observed in prison and to submit this to the prison administration and ministry of justice.[274] However, such statistics should anonymise the data and ensure that re-identification is not possible to prevent further harm to prisoners.

The Essex Group noted that health-care professionals should systematically ask prisoners for their consent to report signs of torture or other ill-treatment. On its face, the obligation to report any signs of torture or other ill-treatment conflicts with the principles of informed consent and confidentiality in situations in which documentation and reporting is contrary to the prisoner's wishes, for example, for fear of reprisals. For this reason, the Essex Group recommended that the Rule should be interpreted as prohibiting automatic or systematic reporting of torture or other cruel, inhuman or degrading treatment or punishment without the informed consent of the prisoner.[275] The absence of informed consent would violate basic principles of medical ethics and the confidentiality and trust of the doctor-patient relationship.

This approach has also been taken in Rule 7 of the Bangkok Rules, which underscores the requirement of informed consent to report signs of torture and other ill-treatment. It states that if sexual abuse or other forms of violence before or during detention is diagnosed, the woman prisoner shall be informed of her right to seek recourse from judicial authorities and of the procedures and steps involved. However, it clarifies that the case can only be referred to the competent authority for investigation 'if the woman prisoner agrees to take legal action'.

The Istanbul Protocol provides that where the prisoner has not consented to reporting, the health-care professional is in a position of dual loyalty between the individual prisoner concerned and society at large 'which has an interest in ensuring that justice is done and perpetrators of abuse are brought to justice'[276]. In such a situation, the Istanbul Protocol suggests that, '[t]he fundamental

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[273] *Kyrgyzstan CAT/OP/KGZ* para. 57

[274] *CPT Standards* para. 62 p. 44

[275] Bangkok Rule 7

[276] paras. 69 and 72

principle of avoiding harm must feature prominently in consideration of such dilemmas. Health professionals should seek solutions that promote justice without breaching the individual's right to confidentiality. Advice should be sought from reliable agencies; in some cases this may be the national medical association or non-governmental agencies. Alternatively, with supportive encouragement, some reluctant patients may agree to disclosure within agreed parameters'.

The health-care professional may, therefore, assist the prisoner with identifying other routes to report the allegations of torture or other ill-treatment such as detention staff, forensic medical specialists, inspectors and monitors. Rule 7(2) of the Bangkok Rules also provides that '[w]hether or not the woman chooses to take legal action, prison authorities shall endeavor to ensure that she has immediate access to specialized psychological support and counselling'.

The experts considered that more detailed discussion and guidance is needed on how to deal with the situation of dual loyalty identified in the Istanbul Protocol and how to maintain confidentiality and informed consent while bearing in mind the do no harm principle.

→ See Chapter 2, Prison management – Inspections and external monitoring/ objectives for internal and external inspection

→ See Chapter 6, Incident management – investigations

Chapter 5 [277]

Restrictions, discipline and sanctions

Issues/rules covered:

- Disciplinary sanctions (Rules 36, 37, 39, 41, 42 and 43)
- Solitary confinement/isolation (Rules 38, 44, 45 and 46)
- Instruments of restraint (Rules 47, 48 and 49)

Introduction

At the outset, the Essex group stressed that the Rules apply comprehensively to restrictions and sanctions, regardless of the term used to describe them.

The experts pointed to the structure of provisions in this section, with a number of Rules covering disciplinary sanctions (Rules 39-41) specifically, and others applying more broadly to 'other restrictive measures'/'restrictions'. The participants noted that these Rules apply regardless of whether the restriction is imposed as a disciplinary sanction (intended to be punitive in nature) or for other reasons, unless the text of a specific rule states otherwise.

The Essex group noted that the revised SMR use the term 'other restrictive measures' without defining it.[278] From the context of its use it can be deducted that the term:

- describes limitations in the context of contact to the outside world (visits)
- refers to measures imposed not as a disciplinary sanction, but in the context of 'safety and security', presumably including measures to prevent inter-prisoner violence and risks of self-harm and suicide
- is used in the context of the use of instruments of restraint.

The experts noted CPT-standards which also highlight that 'Other procedures often exist, alongside the formal disciplinary procedure', describing measures like involuntary separation from other detainees 'for discipline-related/security reasons (e.g. in the interests of "good order" within

[277] This chapter was authored by Andrea Huber, Penal Reform International, with the support of Sharon Critoph.

[278] In Rule 36 ('no more restriction than necessary'), Rule 43(3), Rule 46 (1, 2). Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment uses the term in the context of access to the outside world ('can only be denied subject to reasonable conditions and restrictions as specified by law').

an establishment)' and pointing out that these procedures should also be accompanied by effective safeguards.[279]

The Essex group noted that Rule 36 is laying down the only possible purposes for restrictions, i.e. safe custody, secure operation of the prison and a well-ordered community life.

The experts considered that more detailed discussion and guidance will be needed with regard to the differentiation between disciplinary sanctions and 'other restrictions'. Other issues identified as requiring more discussion and practical guidance were the application of Rule 39(3); compensatory measures as described in Rule 38(2); and criteria to assess whether solitary confinement would exacerbate the situation of prisoners with mental or physical disabilities.

General principles

The Essex group emphasised the means and tools at the disposal of prison administrations in order to avoid and prevent disciplinary infractions in the first place, and pointed out five overarching principles:

1. Restrictions and disciplinary sanctions should not be a first response to problems within prisons – they may only be imposed once steps aimed at preventing conflicts or resolving them through other means have failed (Rule 38(1)).
2. Only such restrictions and disciplinary sanctions as are provided in laws and regulations may be imposed (Rules 37).
3. No restrictions or disciplinary sanctions may involve lowering the general living conditions (Rule 42).
4. Measures need to be necessary and proportionate, and need to be imposed through fair proceedings (Rule 39(1) and (2)).
5. Restrictions or disciplinary sanctions must never amount to torture or other cruel, inhuman or degrading treatment or punishment (Rule 43(1)).[280]

Principle of legality

The Essex group pointed to Rule 37, which enshrines the principle of legality and clarifies that authorisation by law or by regulation is always required to determine:[281]

- what conduct constitutes a disciplinary offence and what conduct/situation may prompt 'other restrictions'
- types and duration of sanctions/restrictions that may be imposed
- the authority competent to impose such sanctions/restrictions
- any form of involuntary separation from the general prison population (whichever term is used e.g. isolation, segregation, restricted housing or special care units and regardless of whether or not it is applied as a disciplinary sanction or citing order and security reasons).

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[279] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991*, 1992, CPT/Inf (92) 3, para. 55 *(CPT 2nd General Report)*.

[280] Rule 47(1) applies this principle specifically to instruments of restraint.

[281] Rule 37 reflects Principle 30(1) of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

Information about prison rules

The Essex group noted that provision of clear and comprehensive information about prison rules and procedures is an important tool in order to prevent disciplinary infractions in the first place.

The experts therefore stressed that Rule 37 should be made known to the prisoners, and should be part of the information provided under Rule 54 (a, c) in writing and in a language and format they understand (Rule 55). Such information should include what types of conduct constitute a disciplinary offence, and the possible sanctions associated with each.

The importance of making the rules and regulations for disciplinary procedures known amongst both prisoners and prison officials, including through the distribution of printed copies, has been emphasised by the Inter-American Commission on Human Rights.[282]

Conflict prevention and mediation

The Essex group stressed the importance of conflict prevention, mediation and alternative dispute resolution as means to avoid disputes and disciplinary infractions. They pointed to the encouragement to this end in Rule 38(1) and also in Rule 76(1c) on dynamic security training for prison staff.

The experts referred to the first 'Essex paper', in which they had pointed to the 'many effective and well-proven ways in which to deal with security and order in places of detention such as the configuration and infrastructure of the place of detention; adequate numbers of well-trained staff; an effective system of classification and separation of detainees; positive staff-prisoner relationships, which enable prison staff to anticipate and proactively deal with problems; dynamic security and conflict resolution tools such as mediation'.[283]

The 'preventive principle' has also been stressed by the Special Rapporteur on Torture, who stated that 'it is essential that the Rules provide for an obligation for prison authorities to use disciplinary measures on an exceptional basis and only when the use of mediation and other dissuasive methods to resolve disputes proves to be inadequate to maintain proper order'.[284]

→ See Chapter 2, Prison management – dynamic security and conflict prevention

Proportionality

The Essex group stressed the principle of proportionality for disciplinary sanctions and restrictive measures, enshrined in Rule 39 (2). They noted that Rule 36 provides guidance for applying this principle in that it requires discipline and order to be 'maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life'.

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[282] Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II.Doc 64, para. 380.

[283] University of Essex/Penal Reform International, *Second Report of Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of Prisoners, prepared by Penal Reform International/Essex University*, 20 March 2014, UNODC/CCPCJ/EG.6/2014/NGO.7, para. 43 *(Essex 2)*, with reference to Penal Reform International/Association for the Prevention of Torture, *Balancing security and dignity in prisons: a framework for preventive monitoring*, 2013, p. 18.

[284] UN General Assembly, 68th Session, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General,* 9 August 2013, A/68/295, para. 57 *(Special Rapporteur on Torture report 2013)*.

The experts reviewed the report of the UN Special Rapporteur on Torture who has stressed that a punishment disproportionate to the offence 'would be tantamount to improperly making the nature of the deprivation of liberty harsher'.[285]

The experts recalled that proportionality must be ensured on a case by case basis and any sanction must be commensurate with the harm caused by the infraction as well as the individual circumstances of the prisoner involved. The participants pointed to guidance provided by the European Committee for the Prevention of Torture (CPT), which held that in order to be proportionate, any restriction of a prisoner's rights 'must be linked to the actual or potential harm the prisoner has caused or will cause by his or her actions (or the potential harm to which he/she is exposed) in the prison setting'.[286]

The experts reasoned that the interpretation of 'harshness' is subjective to some extent, and sanctions perceived as minor by one prisoner may have severe repercussions for another, depending on their personal circumstances.

This is supported by the commentary to Rule 5 of the UN Standard Minimum Rules for the Administration of Justice (Beijing Rules),[287] although it refers to criminal sanctions. It states that consideration should not only be based on the gravity of the offence but also on personal circumstances, and lists as examples 'social status, family situation, the harm caused by the offence or other factors affecting personal circumstances'.

In this context the Essex group reiterated that restrictive measures must not be applied to prisoners by virtue of their sentence and endorsed the assessment of the Committee Against Torture (CAT) which rejected 'the application of additional and severe punishments on prisoners serving life sentences, such as handcuffing when outside cells, and segregation'.[288]

Furthermore, the experts stressed that rules and regulations governing sanctions and restrictive measures need to be reviewed over time in the light of the proportionality principle.

The Essex group highlighted the considerable impact of the regime of disciplinary sanctions, discipline and restrictive measures on the institutional culture of a prison facility and on the rehabilitation and reintegration prospects of prisoners.[289] They noted an example documented by the UN Sub-committee for Prevention of Torture (SPT), where due to the modalities regarding disciplinary measures the 'overall attitude was one of resignation and fear of reprisals'.[290]

Consideration of disabilities

The Essex group pointed to Rule 39(3) which requires that prison administrations consider 'whether and how a prisoner's mental illness or developmental disability may have contributed to his/her conduct' before imposing disciplinary sanctions.

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[285] *Special Rapporteur on Torture report 2013*, A/68/295, para. 57.

[286] CPT, *21st General Report: 1 August 2010-31 July 2011*, Strasbourg, 10 November 2011, [CPT/Inf (2011)28] para. 53 onwards *(CPT 21st General Report)*, para. 55(a).

[287] Adopted by UN General Assembly resolution 40/33 on 29 November 1985.

[288] UN Committee against Torture, *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)*, 16 December 2013, CAT/C/51/4, para. 39 *(CAT SMR revision observations)*.

[289] See PRI/APT, 'Institutional culture in detention: a framework for preventive monitoring', *Detention Monitoring Tool, 2nd edition*, 2016.

[290] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine*, 16 March 2016, CAT/OP/UKR/1, para. 124 *(SPT Report on visit to Ukraine)*.

Should a direct link be found between the conduct and the prisoner's 'mental illness or psychosocial disability',[291] then no sanction may be imposed, in line with Rule 39(3).

The Rule seeks to account for limitations persons with disabilities might have in regulating independently their behaviour in relation to obeying a norm.

The participants recommended that any suspicion that mental health problems may have contributed to an infraction should trigger a process which involves consultation with relevant staff, such as psychologists and medical staff.

When external medical practitioners are consulted on a prisoner's mental health status or intellectual or psychosocial disability in relation to a disciplinary infraction, the reasons for the consultation and their role within that process must be made clear to them. The participants stressed that such assessments should be inter-disciplinary and should take into account the psycho-social condition of the prisoner.

In this context, the experts recalled Rule 46, according to which '[h]ealth-care personnel shall not have any role in the imposition of disciplinary sanctions or other restrictive measures'. (See Chapter 4, Health-care – medical ethics)

It was noted that in a well-functioning prison system, prison officials are aware of physical, mental, intellectual or sensory illnesses or disabilities of prisoners, as they are required to ensure their full and effective participation, inclusion and access to prison life in line with Article 3(c) of the CRPD and Rules 5(2) of the Nelson Mandela Rules.

The Essex group recalled the confidentiality of medical records (Rule 26), but noted the recognised practice of information being provided to prison staff on a need-to-know basis, which protects privacy and confidentiality of sensitive information while enabling prison staff to fulfil their task, including provision for individual needs of prisoners in line with Rule 2(2).

The participants suggested that it may be useful to consult prison staff who are familiar with the prisoner alleged to have committed an infraction, especially in a dynamic security setting, which is based on frequent interaction and constructive relationships with prisoners. (See Chapter 2, Prison management)

Procedural rights in disciplinary proceedings

The experts clarified that the 'principles of fairness and due process' (Rule 39(1)) must be interpreted in line with the principles reflected in Article 14 of the International Convention on Civil and Political Rights (ICCPR).

They drew on guidance provided by international human rights instruments, bodies and jurisprudence to list the following, non-exclusive elements of due process in disciplinary proceedings:

- information about the charges
- right to defence
- legal representation

[291] The experts expressed their preference for the terminology used in the UN Convention on the Rights of Persons with Disabilities (CRPD) ('person with disability') as the internationally agreed and less ambiguous term.

- adequate time and facilities to prepare
- opportunity to cross-examine witnesses
- opportunity to examine evidence
- hearing in person
- receipt of a copy of any disciplinary decision
- possibility of review by independent authority against a sanction imposed (appeal).

Guidance on this issue has been provided by the UN Committee against Torture (CAT), for example, listing fair trial guarantees for disciplinary proceedings in prison, including 'to be heard in person; to call witnesses and examine evidence given against them; to be provided with a copy of any disciplinary decision concerning them and an oral explanation of the reasons for the decision and the modalities for lodging an appeal, and to appeal to an independent authority against any sanctions imposed'.[292]

The CAT has emphasised that detainees need 'to be informed in writing of the charges against them'.[293] For juveniles this is supported also by Rule 70 of the Beijing Rules,[294] which states that 'No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile'.

The CPT has also detailed procedural safeguards that should apply in the case of disciplinary proceedings, including that the 'prisoner should be informed in writing of the reasons for the measure taken against him (it being understood that the reasons given might not include details which security requirements justify withholding from the prisoner)' and 'be given an opportunity to present his views on the matter'.[295]

The requirement for the prisoner to be provided 'with a copy of any disciplinary decision concerning them and an oral explanation of the reasons for the decision and the modalities for lodging an appeal' has been enunciated by the CAT, for example.[296]

The Essex group discussed what would constitute 'adequate time and facilities' for the preparation of a defence (Rule 41(2)), and suggested that such facilities include, at a minimum, copies of or electronic access to the prison rules and regulations,[297] access to assistance from designated prison staff/other prisoners/civil society representatives and basic materials such as pen and paper or access to a computer.

Participants flagged that family members may be accused of prison rule violations, resulting in restrictions against the prisoner. They stressed that such allegations need to be documented and that there needs to be a possibility to dispute not only violations by the prisoner him/herself, but also those allegedly committed by family members if they impact on the prisoner's rights. It was also pointed out that denial of visits infringes on the right to a private and family life not only of the prisoner, but also their relative(s).

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[292] *CAT SMR revision observations,* CAT/C/51/4, para. 41.

[293] *CAT SMR revision observations*, CAT/C/51/4, para. 41.

[294] UN Rules for the Protection of Juveniles Deprived of their Liberty.

[295] *CPT 2nd General Report,* [CPT/Inf (92) 3], para. 55 including footnote 1.

[296] *CAT SMR revision observations*, CAT/C/51/4, para. 41.

[297] Rule 54 required the provision of written information 'promptly' upon admission, including information about prison law and regulations.

Right to defence

The Essex group discussed Rule 41(3), requiring an opportunity for prisoners to defend themselves in the case of an allegation of a disciplinary nature. They may do so themselves or through legal assistance (see below).

The experts considered that the right of prisoners to defend themselves 'in person' should be interpreted as that person having the opportunity to appear in front of, and be heard by, the decision-making body.

Should the prisoner not understand the language used in such hearing, an interpreter needs to be made available free of charge (Rule 41(3)).

Legal assistance

Rule 41(3) provides that detainees may want to defend themselves through legal assistance and specifies that such should be possible 'when the interests of justice so require'. This applies 'particularly in cases involving serious disciplinary charges'. The Essex group considered that every allegation which can be prosecuted by judicial authorities *ipso jure* constitutes a 'serious disciplinary charge', but that the term is not limited to such offences. Other factors have to be taken into account when determining whether disciplinary charges are 'serious'. The Essex group considered that the following are examples of such situations:

- in particularly complex cases
- if the applicable law or prison regulation is not clearly worded
- if the prisoner lacks the capacity to understand the process or the accusation against him/her or the ability to defend him/herself
- where infractions could lead to serious collateral consequences for the prisoner (e.g. removal of eligibility for parole or early release)
- where the disciplinary sanction would result in a material change in the conditions of imprisonment (e.g. transfer to solitary confinement; transfer to a high security prison).

Judicial review

Rules 41(4) set out the right of prisoners to seek judicial review of disciplinary sanctions imposed on them. The Essex group pointed to the particular relevance of this right for serious forms of punishment (see above).

Rule 41(5) clarifies that criminal procedural standards and due process rights apply should an act in prison be prosecuted as a crime within the regular justice system. This provision intended to ensure that the fair trial rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) and other respective treaties are not undermined by the formulation of disciplinary offences. The Nelson Mandela Rules call for 'unimpeded access to a legal adviser' in such cases.

The right to appeal to a competent impartial authority has also been enshrined explicitly in Rule 70 of the Beijing Rules. The CPT has incorporated a similar recommendation in their standards, calling for the right of appeal at a 'higher authority' and the ability to 'contest the measure before an appropriate authority'.[298]

[298] *CPT 2nd General Report,* [CPT/Inf (92) 3], para. 55.

Types of sanctions and restrictions

Prohibited sanctions and restrictions

While focusing their deliberations on specific provisions, the Essex group recalled a number of sanctions and restrictive measures explicitly prohibited by the Nelson Mandela Rules:

1) collective punishment (Rule 43(1e)
2) restrictions of general living conditions (Rule 42)[299]
3) indefinite or prolonged solitary confinement (Rule 43(1a, 1b), see below)
4) placement in a dark cell (Rule 43(1c))
5) placement in a constantly lit cell (Rule 43(1c))
6) corporal punishment (Rule 43(1d))
7) reduction of a prisoner's diet or drinking water (Rule 43(1d))
8) collective punishment (Rule 43(1e))
9) use of restraints as a punishment (Rule 43(2)
10) torture and any other cruel, inhuman or degrading treatment or punishment (Rule 1)
11) being sanctioned twice for the same act or offence (Rule 39(1)).

The Essex group pointed to the distinction between acts that can be pursued at the level of prison administrations as disciplinary offences, and those that need to be investigated and prosecuted by judicial authorities.[300] They shared the assessment of the Special Rapporteur on Torture who asserted that 'Any act that may amount to a crime should be dealt with by the authorities of justice administration and not by penitentiary or prison staff'.[301] The CAT has held that '[a]ny offences committed by a prisoner which might call for more severe sanctions should be dealt with through the criminal justice system'.[302]

The experts pointed out that any other form of punishment that constitutes torture or other cruel, inhuman or degrading treatment or punishment is prohibited.

They recalled jurisprudence of the Inter-American Court of Human Rights which has held that certain disciplinary punishments, including bodily punishments, placement in dark cells and prolonged confinement, as well as any other measure that could cause harm to the physical

[299] The Essex group recalled that a provision on the reduction or suspension of food has been deleted in the course of the review as it is incompatible with international law (*Special Rapporteur on Torture report 2013*, para. 58; Principle XI Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of the Inter-American Commission on Human Rights).

[300] See deliberations on this question in ECtHR, *Campbell and Fell v The United Kingdom* (ECHR 28 JUN 1984).

[301] *Special Rapporteur on Torture report 2013,* A/68/295, para. 57.

[302] *CAT SMR revision observations,* CAT/C/51/4, para. 33.

or mental state of the person, constitute cruel, inhuman or degrading treatment.[303] Where such punishments cause severe pain or suffering, they constitute torture.[304]

The experts noted further examples such as the 'deliberate non-separation of inmates from persons with active tuberculosis, and the denial of medical assistance'.[305]

The practice of frequent transfers to remote locations and different places in the country has been documented as a problematic form of punishment or reprisal, often taking place without the families being informed and in degrading conditions (poor state of vehicles, long periods of travel, sometimes without food).[306] (See Chapter 3, Contact with the outside world – transfers)

The experts noted reports about 'combinations' of prohibited practices, such as disciplinary and solitary confinement cells with poor material conditions and hygiene, without drinking water or inadequate lighting or ventilation, freezing or hot temperatures.[307]

Collective punishment

The Essex group highlighted that the prohibition of collective punishment in Rule 43(e) reflects a well-established principle in human rights law. The experts referred to comparable prohibitions enshrined in the African Charter on Human and Peoples' Rights and the American Convention on Human Rights, the former stating that '[p]unishment is personal and can only be imposed on the offender'.[308] The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas emphasise that '[t]he imposition of collective punishments shall be prohibited by law'.[309]

The experts underlined that the term 'collective punishment' describes sanctions intentionally directed at the whole prison population, a group of prisoners or specific ones (for example prisoners in a specific cell) for infractions for which they bear no responsibility.

An example was mentioned, documented by the SPT, where 'extended lock-downs were used as a form of collective punishment for all those in a block or unit where there has been an incident, regardless of their involvement in an alleged offence'.[310]

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[303] I/A Court H.R., *Case of Pacheco Teruel et al v. Honduras*. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 241, para. 67.k.

[304] See, for instance, Commission on Human Rights, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 B, E/CN.4/1997/7*, 10 January 1997, paras. 7-8; *Curtis Francis Doebbler v Sudan* (236/2000), African Commission on Human and Peoples' Rights (2003), para. 42; *Caesar v Trinidad and Tobago* (Ser. C No. 123), Inter-American Court of Human Rights (2005), para. 73.

[305] *SPT Report on visit to Ukraine*, CAT/OP/UKR/1, para. 133.

[306] See for example *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, 27 November 2013, CAT/OP/ARG/1, para. 37; see also *CPT 2nd General Report*, para. 57.

[307] A report by the SPT on its visit to Ukraine is referred to in this context merely as an illustrative example, *SPT Report on visit to* Ukraine, CAT/OP/UKR/1, para. 116. See also SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Kyrgyzstan*, 28 February 2014, CAT/OP/KGZ/1, para. 84. Flooding of punishment cells with rainwater have been documented in Brazil, for example (see SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, 5 July 2012, CAT/OP/BRA/1, para. 124.)

[308] Article 7(2) of the African Charter on Human and People's Rights; Article 5(3) of the American Convention on Human Rights.

[309] Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Principle XXII.4.

[310] SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*, 28 July 2014, CAT/OP/NZL/1, para. 37.

The participants mentioned the problem that security breaches of individuals often result in sweeping changes affecting the whole prison population. For example, misuse of the ability to deliver items to prisoners (e.g. hiding prohibited items in goods) may lead to the prohibition of the respective good or goods brought by relatives overall. However, the experts reasoned that such measures have the effect of collective punishment and are particularly problematic in countries/locations where prisoners depend on family members to bring food, medication and hygiene products.

Restrictions on family visits

The experts noted that solitary confinement must not be compounded by restrictions on family contact unless strictly required for the maintenance of security and order (Rule 43(3)). Family contact in 43(3) must be understood to include visits and other means of contact as defined in Rule 58(1b).

The experts clarified that restrictions on family contact may be imposed if visiting rights were abused to break prison rules and regulations (e.g. a family member smuggling illegal items into the prison during the visit), but that restrictions should only be imposed on the particular family member involved, and not on the family as a whole.

The Essex group highlighted Principle 19 of the UN Body of Principles, which stipulates that access to the outside world can only be denied subject to reasonable conditions and restrictions as specified by law or lawful regulations.

For juveniles, the CPT has stressed that their 'contact with the outside world should never be denied as a disciplinary measure; nor should it be limited unless the disciplinary offence relates to such contact'.[311] The experts recalled Rule 23 of the Bangkok Rules which states that disciplinary sanctions for women prisoners shall not include a prohibition on family contact, especially with children.

→ See Chapter 3, Contact with the outside world – contact with family and friends/restrictions

Solitary confinement

The Essex group recalled the rationale for introducing provisions on solitary confinement in the course of the review of the SMR, in particular the severe and long-lasting damage isolation can cause to human beings. Medical research confirms that the denial of meaningful human contact can cause 'isolation syndrome', the symptoms of which include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia, psychosis, self-harm and suicide, and can destroy a person's personality.[312]

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[311] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *24th General Report of the CPT: 1 August 2013-31 July 2014*, Strasbourg, 2014.

[312] Grassian S, 'Psychiatric effects of solitary confinement', *Journal of Law and Policy*, Vol. 22, 2006, pp. 325-383 *(Psychiatric effects of solitary confinement)*; Craig Haney, 'Mental health issues in long-term solitary and "supermax" confinement', *Crime & Delinquency*, Vol. 49, No. 1, 2003, pp. 124-156; Sharon Shalev, *A sourcebook on solitary confinement*, Mannheim Centre for Criminology, London School of Economics, 2008 *(A sourcebook on solitary confinement)*; UN General Assembly, 66th Session, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, 5 August 2011, A/66/268 *(Special Rapporteur on Torture report 2011)*.

The experts recalled that isolation and solitary confinement constitute a high-risk situation for human rights abuse.[313] It has also been found that placement in segregation or solitary confinement can increase the risk of suicide.[314] Furthermore, it was emphasised that solitary confinement/isolation is typically linked with limitations in access to family visits, work, educational, recreational, sports and other activities, which exacerbate its negative impact.

Therefore, a significant body of international law and standards has developed requiring restrictions of the use of solitary confinement, which the review of the Standard Minimum Rules incorporated into the Nelson Mandela Rules.[315]

In introducing this topic, the Essex group noted that the new provisions encapsulate absolute prohibitions of the practice of solitary confinement, but also further limitations. First and foremost, it should be imposed only 'in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority'.[316]

The experts stressed that prohibitions and limitations apply regardless of the purpose of the practice, i.e. whether applied as a disciplinary sanction, or citing safety and security reasons or the risk of interference with the course of justice pre-charge and/or pre-trial.

It was emphasised that the Rules apply irrespective of whether solitary confinement is imposed by the prison administration or as part of a judicially imposed sentence or disciplinary measure.[317] This means, among other things, that neither a prison administration nor a court may impose solitary confinement for more than 15 days.

The Essex group noted guidance on solitary confinement provided by the CPT in its 21st General Report (2011),[318] the Special Rapporteur on Torture's report on solitary confinement (2013),[319] and the *Sourcebook on Solitary Confinement*.[320]

The participants also took note of a chapter in the UNOPS *Technical Guidance for Prison Planning*, which compiles minimum requirements with regard to 'isolation cells', referencing the Nelson Mandela Rules and other international standards. The *Manual* points out that isolation cells must not be considered part of the overall prison capacity. Using an example, the Manual notes that a prison 'with regular housing units for 490 prisoners and 10 isolation cells can accommodate 490

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313 Penal Reform International/Association for the Prevention of Torture, *Balancing security and dignity in prisons: a framework for preventive monitoring: 2nd edition*, 2016, p. 14 *(Balancing security and dignity 2nd edition)*.

314 WHO/International Association for Suicide Prevention, *Preventing Suicide in Jails and Prisons,* Geneva, 2007, p.16.

315 See, for example, Principle 7 of the Basic Principles for the Treatment of Prisoners 1990; the Human Rights Committee, 44th Session, *General Comment No. 20: Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 30 September 1992; International Psychological Trauma Symposium, *Istanbul Statement on the use and effects of solitary confinement*, Istanbul, 9 December 2007 *(Istanbul Statement on solitary confinement)*; Rule 22 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders; Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty; European Prison Rules, Rule 60(5); Principle XXII(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. The European Court of Human Rights has also recognised that 'complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason' (*Ilaşcu and others v. Moldova and Russia*, Application No. 48787/99, European Court of Human Rights (2004), para. 432).

316 Rule 45 of the Nelson Mandela Rules.

317 *Special Rapporteur on Torture report 2013*, A/68/295, para. 61.

318 *CPT 21st General Report*, [CPT/Inf (2011], para. 53 onwards.

319 *Special Rapporteur on Torture report* 2011, A/66/268.

320 *A sourcebook on solitary confinement*.

and not 500 prisoners'. The participants noted guidance on operational and security considerations in the *Manual*.[321]

Absolute prohibitions

The Essex group recalled absolute prohibitions of the use of solitary confinement, namely if it is:

- indefinite
- prolonged
- imposed on juveniles[322]
- imposed on pregnant women, women with infants and breastfeeding mothers in prison[323]
- imposed on 'prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures'
- applied by virtue of a prisoner's sentence, as is the case in some countries, for example for prisoners on death row or persons serving a life sentence[324]
- used as coercion intended to intimidate, to elicit cooperation or extract a confession within the justice system.[325]

The participants recalled the UN Special Rapporteur on Torture's report on solitary confinement, calling for a ban on prolonged and indefinite solitary confinement as incompatible with the prohibition of torture and other ill-treatment[326] and as a harsh measure that is contrary to rehabilitation, the aim of the penitentiary system.[327]

The experts clarified that the term 'indefinite solitary confinement' (Rule 43(a)) means that the person concerned does not know when this confinement will end.

They looked at the definition of 'solitary confinement' in Rule 44 as 'the confinement of prisoners for 22 hours or more a day without meaningful human contact'.

The Essex group discussed elements that help determine what constitutes 'meaningful human contact' referred to in Rule 44, using the rationale of the provision and relevant documents from international human rights bodies.[328]

The term has been used to describe the amount and quality of social interaction and psychological stimulation which human beings require for their mental health and well-being. Such interaction

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[321] United Nations Office for Project Services (UNOPS), *Technical Guidance for Prison Planning: Technical and operational considerations based on the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 2016, p. 111 onwards.

[322] Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

[323] Rule 22 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

[324] Rule 45 of the Nelson Mandela Rules. This has been emphasised also by the Special Rapporteur on Torture, in e.g. *Special Rapporteur on Torture report* 2013, A/68/295, para. 61.

[325] Article 14(3)(g) of the International Convention on Civil and Political Rights.

[326] *Special Rapporteur on Torture report* 2011, A/66/268. The European Committee for the Prevention of Torture (CPT) has made comparable recommendations: *CPT 21st General report*, 1 August 2010–July 2011, November 2011.

[327] *Special Rapporteur on Torture report* 2011, A/RES/65/205, para. 79.

[328] The concept of 'meaningful human contact' has been borrowed from the *Istanbul Statement on solitary confinement* and from the UN Committee against Torture. See *CAT SMR revision observations*, para. 34. The *Istanbul Statement on solitary confinement* states 'The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic'. See also *CAT SMR revision observations*, para. 34.

requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity.

Rule 5 provides another indicator for interpretation, stipulating as a general principle that '[t]he prison regime should seek to minimize any differences between prison life and life at liberty'.

The experts stressed that the provision needs to be interpreted in good faith and conscious of its intent and purpose. They emphasised that, therefore, it does not constitute 'meaningful human contact' if prison staff deliver a food tray, mail or medication to the cell door or if prisoners are able to shout at each other through cell walls or vents. In order for the rationale of the Rule to be met, the contact needs to provide the stimuli necessary for human well-being, which implies an empathetic exchange and sustained, social interaction. Meaningful human contact is direct rather than mediated, continuous rather than abrupt, and must involve genuine dialogue. It could be provided by prison or external staff, individual prisoners, family, friends or others – or by a combination of these.

The Essex group recalled that the absolute prohibition of solitary confinement had already been incorporated into standards for juveniles,[329] and for pregnant women, women with infants and breastfeeding mothers in prison.[330] Rule 45(2) reiterates the prohibition of solitary confinement in other UN standards, referring to the Bangkok Rules and the Beijing Rules.

For children, segregation has been found to be particularly traumatic,[331] and the imposition of solitary confinement on children, of any duration, has been considered to constitute cruel, inhuman or degrading treatment or punishment or even torture.[332] The Essex group noted a Council of Europe Recommendation, whereby young adults under the age of 21 would be treated in a way comparable to the treatment of juveniles considering their level of maturity and responsibility for their actions.[333]

The prohibition of solitary confinement enshrined in the Bangkok Rules is based on evidence that the practice has a particularly harmful impact on the mental well-being of women prisoners, due to women's strong need for close contact with their children, as well as the health of pregnant women and women who have recently given birth, who need to receive appropriate pre- and post-natal care in suitable surroundings.[334]

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[329] Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

[330] Rule 22 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). This is reflected also in Principle 22(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas which states that 'It shall be strictly forbidden to impose solitary confinement to pregnant women; mothers who are living with their children in the place of deprivation of liberty; and children deprived of liberty'.

[331] Council of Europe, *Commentary to the European Rules for juvenile offenders subject to sanctions or measures*, CM(2008)128 addendum 1, p. 34.

[332] UN Human Rights Council, 28th Session, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez*, 5 March 2015, A/HRC/28/68, paras. 44, 86(d). Furthermore, research has indicated that solitary confinement, as a disciplinary measure, does not reduce violence among juvenile offenders detained in the youth prison. *Special Rapporteur on Torture report* 2011, A/66/268, with reference to Robert Wildeboer, 'The Impact of Solitary Confinement in a Youth Prison', *Inside and Out*, Chicago, 2010.

[333] Council of Europe, Council of Europe Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rule 11.

[334] Penal Reform International and Thailand Institute of Justice, *Guidance Document: United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)*, London and Bangkok, October 2013, p. 66.

The Essex group noted that there are also prohibited purposes of solitary confinement, namely if the measure were used 'intentionally for purposes such as punishment, intimidation, coercion or obtaining information or a confession, or for any reason based on discrimination'.[335]

Prolonged solitary confinement

The Essex group discussed the absolute prohibition in Rule 43(1b) of prolonged solitary confinement, reiterating that the practice in itself amounts to torture or other cruel, inhuman or degrading treatment, as established by the UN Special Rapporteur on Torture.[336]

Prolonged solitary confinement is defined as solitary confinement in excess of 15 consecutive days (Rule 44).

The Essex group stressed that the prohibition applies to periods of isolation imposed in close succession, and pointed to the recommendation of the CAT that there should be a prohibition on sequential disciplinary sentences resulting in an uninterrupted period of solitary confinement in excess of the maximum period.[337]

The Special Rapporteur on Torture has also stressed that the prohibition should include 'frequently renewed measures that amount to prolonged solitary confinement'.[338]

The Essex group pointed out that in the case of a transfer from one prison to another the maximum time limit still applies.

Furthermore, the participants pointed to the effect of 'prolonged solitary confinement' based on '[a] dvancements in new technologies', which 'have made it possible to achieve indirect supervision and keep individuals under close surveillance with almost no human interaction'.[339]

Mental and physical disabilities

The Essex group discussed Rule 45 (2) which prohibits the use of solitary confinement of 'prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures'.

With regard to prisoners with mental disabilities the experts referred to the Special Rapporteur on Torture who has drawn attention to the fact that solitary confinement often severely exacerbates mental disabilities, and that '[p]risoners with mental health issues deteriorate dramatically in isolation'.[340]

The Rapporteur has therefore held that the imposition of solitary confinement, 'of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment and violates Article 7 of the Covenant and Article 16 of the Convention [against Torture]'. He has therefore called for the abolition of the use of solitary confinement for persons with mental disabilities.[341]

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[335] *Special Rapporteur on Torture report* 2013, A/68/295, para. 60.

[336] *Special Rapporteur on Torture report 2011*, A/66/268, e. g. paras. 21, 58 and 81.

[337] *CAT SMR revision* observations, para. 33.

[338] *Special Rapporteur on Torture report* 2013, A/68/295, para.61.

[339] *Special Rapporteur on Torture report 2011,* A/66/268, para. 55.

[340] *Special Rapporteur on Torture report* 2011, A/66/268, para. 68, quoting *A Sourcebook on Solitary Confinement*, pp. 10, 26; and *Psychiatric effects of solitary confinement*.

[341] *Special Rapporteur on Torture report 2011*A/66/268, paras. 78, 81 and 86.

Calls for a prohibition of solitary confinement 'in the case of prisoners with mental illness' and of 'persons with mental disabilities' have been made by the SPT,[342] and also in the Istanbul Statement on the Use and Effects of Solitary Confinement 2007.[343]

Further limitations on use of solitary confinement

Where no absolute prohibition applies, solitary confinement should still only be imposed 'in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority' (Rule 45).[344]

This has been emphasised also by the Special Rapporteur on Torture and the CAT.[345]

The experts recalled the commitment of the Basic Principles for the Treatment of Prisoners 'towards the abolition of solitary confinement or the reduction of its use'.[346] The Istanbul Statement on the Use and Effects of Solitary Confinement, the European Prison Rules[347] and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas all reiterate that solitary confinement should be used only in very exceptional cases, as a last resort and for as short a time as possible, 'when it is evident that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel'.[348]

The CPT added guidance by stating that, '[g]iven that solitary confinement is a serious restriction of a prisoner's rights which involves inherent risks to the prisoner, the level of actual or potential harm must be at least equally serious and uniquely capable of being addressed by this means.'[349]

Procedural safeguards

The CPT has pointed out that clear disciplinary procedures need to be both formally established and applied in practice, and that any grey zones in this area involve the risk of seeing unofficial (and uncontrolled) systems developing.[350]

The Essex group noted that under the Rules, solitary confinement must be 'subject to independent review, and only pursuant to the authorization by a competent authority'. The participants recalled that this principle has been enshrined in Rule 41(4) for disciplinary sanctions in general, but is reiterated in Rule 45(1), clarifying that it applies to solitary confinement regardless of the reason for which this measure is imposed.[351]

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[342] SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay*, 7 June 2010, CAT/OP/PRY/1, para. 185.

[343] *Istanbul Statement on the use and effects of solitary confinement*, adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.

[344] Rule 45 Nelson Mandela Rules.

[345] *Special Rapporteur on Torture report* 2013, A/68/295, para. 60; *CAT SMR revision* observations, CAT/C/51/4, para. 32.

[346] Principle 7 of the UN Basic Principles for the Treatment of Prisoners 1990.

[347] European Prison Rules 2006, Rule 60(5): 'Solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible'.

[348] Principle XXII (3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

[349] *CPT 21st General Report*.

[350] *CPT 2nd General Report*, [CPT/Inf (92) 3], para. 55.

[351] Principle 22(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also states that 'In all cases, the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control'.

Referring to their discussions at the first expert meeting, the Essex group stressed that such reviews need to be substantive and comprehensive assessments, rather than a brief schematic review.[352]

Reducing the negative impact of sanctions and restrictions

Compensatory measures

The Essex group drew attention to Rule 38(2) which calls on prison administrations to establish 'compensatory measures' for prisoners separated from the general prison population in order to 'alleviate the potential detrimental effects of their confinement on them and on their community following their release from prison.'[353]

With regard to solitary confinement, the European Court of Human Rights has also called on states to 'take steps to reduce the negative impact'.[354]

This means that prison administrations should put effort into raising the level of meaningful social contacts with others,[355] for example by facilitating more visits and access to social activities with other prisoners, by arranging talks with social workers, psychologists, psychiatrists, volunteers from NGOs, from the local community, or religious prison personnel, if so wished by the prisoner. Regular contact with family members through visits, letters, phone calls or emails are crucial for detainees. The provision of meaningful in-cell and out-of-cell activities, such as educational, recreational and/or vocational programmes, are equally important to prevent infringements of prisoners' dignity and health, and will have a positive effect on levels of violence.[356]

Monitoring/inspections

Given the particular risk of torture and other ill-treatment in solitary confinement, the Essex group pointed to the particular attention that monitoring bodies should pay to prisoners in isolation.

The participants referred to guidance in a thematic paper published by PRI and APT, recommending that:

> *'Monitors should ensure that their visits include a thorough examination of the use of isolation, segregation and solitary confinement, including its frequency and length. They should closely review the classification systems, and decisions to isolate prisoners, including whether these are based on an individual risk assessment. The use of isolation for 'protection' of vulnerable groups should be examined carefully.*
>
> *Monitoring bodies should also pay particular attention to the conditions in segregation units and their impact on the mental well-being of the prisoners, examining in particular the possibility for detainees to maintain meaningful human contact. Furthermore, monitoring bodies should inquire whether segregation is applied in a discriminatory way towards certain groups or individuals.'*[357]

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[352] University of Essex/ Penal Reform International, *Summary of Expert meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review*, 21 November 2012, UN-Doc. UNODC/CCPCJ/EG.6/2012/NGO/1, pp. 20-21 *(Essex 1)*.

[353] Rule 38(2) of the Nelson Mandela Rules.

[354] *Mathew v. Netherlands*, Application No. 24919/03, para. 202.

[355] *Istanbul Statement on solitary confinement*, p. 4.

[356] *Balancing security and dignity 2nd edition*, p. 15.

[357] *Balancing security and dignity 2nd edition*, p. 15.

The experts added that prison inspectors (Rules 83-85) need to have access to the prisoner's file, including to information about the use of disciplinary procedures, the records of sanctions and restrictive measures imposed. Their assessment should include recommendations on the proportionality of disciplinary sanctions.[358]

The CAT has stressed that '[q]ualified medical personnel should regularly monitor every detainee's physical and mental condition after solitary confinement has been imposed and should also provide such medical records to the detainees and their legal counsel upon request'.[359]

Record-keeping

The Essex group emphasised the importance of record-keeping for disciplinary procedures and sanctions as a part of due process. This is supported by the Rules on prisoner files (Rules 8 (c, e) and 39 (2)), which call for the recording of information 'related to behaviour and discipline' and 'the imposition of disciplinary sanctions'.[360]

Rule 19 of Beijing Rules details that '[a]ll reports, including (…) records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential individual file, which should be kept up to date.'

More detailed guidance with regard to the documentation of solitary confinement has been provided by the Special Rapporteur on Torture, who stated, that:

> *'All assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the source of his or her legal attributes to impose it, a statement of underlying justification for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person's mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular review of the justification for solitary confinement, and medical assessments of the detained person's mental and physical health.'*[361]

Instruments of restraint

Drawing on the second 'Essex paper' and referring to discussions on the use of force (See Chapter 6, Incident management) the experts noted that international law recognises certain legitimate reasons for using force or restraints such as to protect prisoners or staff, to prevent escape, to prevent self-harm and suicide and in self-defence.

However, the experts emphasised that international law only permits the use of force and restraints in very narrow and exceptional circumstances, in line with the principles of legality, necessity and proportionality and when all other methods have been exhausted and no alternatives remain. The

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[358] Rule 84 (1a) of the Nelson Mandela Rules according to which inspectors shall have the authority: 'To access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention'.

[359] *CAT SMR revision* observations, CAT/C/51/4, para. 34.

[360] See also Rule 70 of the Beijing Rules which states that 'Complete records should be kept of all disciplinary proceedings'.

[361] *Special Rapporteur on Torture report 2011*A/66/268, para. 93.

use of force and of restraints are 'clearly high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards'[362] – as the CPT has diagnosed.

The Essex group discussed the update to provisions on the use of instruments of restraint, and noted overarching principles[363] which apply to the use of force, of arms and of instruments of restraints, measures that are often used in combination by staff responding to incidents. (See Chapter 6, Incident Management – Use of force and arms):

- prohibition of certain methods/instruments
- legality
- necessity
- proportionality
- use in the least painful way, not causing humiliation or degradation.

The Essex group recalled the prohibition of the use of restraints that are 'inherently degrading or painful' (Rule 47(1)), which derives from the general prohibition of torture and other cruel, inhuman or degrading treatment or punishment. They emphasised that such cases foreclose the invocation of considerations of necessity or proportionality to ever justify their use.

The experts noted the explicit prohibition of chains and irons as illustrative examples of instruments of restraint which have been considered inherently degrading and painful. They emphasised that the absence of a longer list of prohibited items merely reflects reasons of practicality. They referred to their second expert meeting, where they had noted the 'challenges involved in updating the lists of prohibited instruments and methods of restraint' as terminology varies between states and technology is always evolving with the risk that the list becomes quickly outdated and under-inclusive.[364]

The Essex group stressed that the term 'instruments of restraint' should be interpreted to include all forms of restraint, including chemical restraints, and noted the prohibition in the Beijing Rules of administering medicines as a means of restraint.[365]

The experts recalled the prohibition of instruments of restraint being used on women during labour, during childbirth and immediately after childbirth, enshrined in Rule 48(2) as well as in Rule 24 of the Bangkok Rules. They recommended this principle to be expanded to late pregnancy and noted that the prohibition has been introduced to account for the fact that the use of restraints on women in such situations raises concerns about degrading treatment as well as medical complications. They noted that women in labour need to be mobile to assume various positions and so they can be moved to an operating room quickly if necessary.[366]

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[362] *CPT 2nd General* Report, CPT/Inf (92) 3, para. 53.

[363] *Balancing security and dignity 2nd edition*.

[364] *Essex 2*, para. 48.

[365] Rule 55 of the UN Rules for the Protection of Juveniles Deprived of their Liberty states that medicines 'must not be administered with a view to eliciting information or a confession, as a punishment or as a means of restraint'.

[366] See concerns detailed by Dr Garcia, obstetrician and gynaecologist at Northwestern University's Prentice Women's Hospital: 'Having the woman in shackles compromises the ability to manipulate her legs into the proper position for necessary treatment. The mother and baby's health could be compromised if there were complications during delivery, such as haemorrhage or decrease in fetal heart tones. If there were a need for a C-section (caesarean delivery), the mother needs to be moved to an operating room immediately, and a delay of even five minutes could result in permanent brain damage for the baby'. (Statement provided to Amnesty International by Chicago Legal Aid to Incarcerated Mothers, December 1998, in Amnesty International, *Not part of my sentence: Violations of the Human Rights of Women in Custody*, March 1999, AI Index: AMR 51/01/99); see also American College of Obstetricians and Gynaecologists, *Committee Opinion Number 511, Reaffirmed 2016*, November 2011.

Drawing on the first 'Essex paper' the experts recalled that body-worn electro-shock belts,[367] which by their nature inflict severe physical pain and mental suffering and due to their humiliating and degrading effect, have been increasingly condemned and their use nowadays has been abandoned in most states.[368] The CAT has recommended the abolition of electro-shock stun belts and restraint chairs as methods of restraining those in custody, noting that their use often violates Article 16 of the Convention.[369] The CPT opposes the 'use of electric stun belts for controlling the movement of detained persons, whether inside or outside places of deprivation of liberty.'[370] The European Union has gone as far as prohibiting the export of electric-shock devices which are intended to be worn on the body by a restrained individual as goods 'which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment'.[371]

The Essex group stressed the requirements of legality (prescription by law), necessity and proportionality: these are invoked in Rules 47(2) and 48, and provided for in the Code of Conduct for Law Enforcement Officials[372] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,[373] which continue to supplement the revised SMR. These principles have also been enshrined in the Beijing Rules.[374]

The Essex group noted that Rule 47(2) limits the cases of lawful use of restraints to:

a) precaution against escape during a transfer (note restrictions before courts etc)
b) instances where other methods of control fail to prevent self-injury, injury to others or damage to property (note restrictions).

The experts recalled that health-care personnel must not play any role in the application of sanctions or restrictive measures, including instruments of restraint, and that therefore, in the course of the SMR review, their use on 'medical grounds' has been deleted.

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[367] Body-worn electro-shock devices (for example belts, sleeves, cuffs) encircle various parts of the subject's body (usually the waist, but variants have been developed to fit on legs or arms) and deliver an electric shock when a remote control device is activated.

[368] *Essex 1*, pp. 25, 26.

[369] UN Committee against Torture, for example, 23rd and 24th Sessions, *Report of the Committee against Torture: Consideration of reports submitted by States Parties under article 19 of the Convention: M. United States of America, May 2000, A/55/44*, para. 180(c).

[370] CPT, *20th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* [CPT/Inf(2010)28], para. 74; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT Standards: "Substantive" sections of the CPT's General Reports*, 2015, CPT/Inf/E (2002) 1 – Rev. 2015.

[371] European Union, *Council Regulation (EC) No. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*, Article 3 referring to Annex II, which lists in para. 2.1 'Electric-shock devices which are intended to be worn on the body by a restrained individual, such as belts, sleeves and cuffs, designed for restraining human beings by the administration of electric shocks having a no-load voltage exceeding 10 000 V'.

[372] Article 3 of the Code states that 'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty'. The Commentary elaborates on the exceptionality and proportionality, stating that 'In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved'.

[373] In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term 'law enforcement officials' includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

[374] Rule 64 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

The Essex group reiterated the recommendation of their second meeting, that the principle of legality requires detailed procedures in national law under regular review, laying out the types of restraints that may be used, the circumstances in which each type may be applied, the members of staff who are authorised to take respective decisions and which clarify the recording requirements (see also Rule 8(c, e)).[375]

Recalling the negotiations on this provision, the Essex group noted that Rule 48(1a) encapsulates the principle of necessity in that it limits the use of instruments of restraint to situations where 'no lesser form of control would be effective to address the risks posed by unrestricted movement'.

The experts recalled guidance provided by the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which uses the formulation 'if other means remain ineffective or without promise of achieving the intended result', and only where use of force is 'unavoidable'.

They also highlighted the relevance, in this regard, of Rule 49, which requires the provision of 'training in the use of control techniques that would obviate the need for the imposition of instruments of restraint or reduce their intrusiveness'.

The Essex group referred to Rule 48(1b) which captures the principle of proportionality in more practical terms, i.e. the method of restraint used must be the 'least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed'.

It was further noted that the principles of necessity and proportionality imply an assessment on an individual, case-to-case basis and a regular review. This is captured in Rule 48(1c), which determines that instruments of restraint shall be 'imposed only for the time period required', i.e. they have to be 'removed as soon as possible after the risks posed by unrestricted movement are no longer present'.

Furthermore, it was emphasised that even if the use of instruments of restraint is legal, necessary and proportionate it must be applied in the least painful way. The Beijing Rules, for example, reflect this by stating that their use 'should not cause humiliation and degradation'. They also add the requirement that 'the director should at once consult medical and other relevant personnel and report to the higher administrative authority'.[376]

Rule 47 (2b) requires not only that the physician or another qualified health-care professional be alerted to the situation, but also that they personally check on the individual concerned.

It was emphasised that in order to be in a position to apply these principles prison staff need to be provided with appropriate practical training, as is enshrined in Rule 49 and Rule 76(1c). (See Chapter 2, Prison Management)

Role of medical personnel

The Essex group highlighted Rule 46, which is dedicated to the role of health-care personnel in the context of disciplinary sanctions and other restrictive measures. The experts stressed that these provisions apply to both (disciplinary) sanctions and 'other restrictive measures' and irrespective of the type of sanction or restriction, including instruments of restraint.

[375] *Essex 2*, p. 13.

[376] Rule 64 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

The experts noted that the provision has been informed by the UN 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, and in particular Principle 5 which states that:

> *'[i]t is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.'*[377]

The Essex group pointed out that the Nelson Mandela Rules have sought to reconcile the tension between this principle and the specific duty of care towards prisoners under such measures. While required to pay 'particular attention to the health of prisoners held under any form of involuntary separation, including by visiting such prisoners on a daily basis' they 'shall not have any role in the imposition of disciplinary sanctions or other restrictive measures'.

At the same time, health-care personnel should report adverse effects of such measures to the director of the facility, without delay, and have the authority to review and recommend changes 'to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner'.[378]

→ See Chapter 4, Health-care – medical ethics

[377] UN 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, adopted by UN General Assembly resolution 37/194 of 18 December 1982.

[378] *Balancing security and dignity*, 2nd edition, p. 15, with reference to Rule 46 of the Mandela Rules.

Chapter 6 [379]

Incident management

Issues/rules covered:

- Safety and security (Rule 1 last sentence)
- Complaints (Rule 56 and 57(1))
- Protection against reprisals (Rule 57(2) and (3))
- Cases of death or serious injury (Rules 68, 69, 70, 72)
- Investigations (Rule 71)
- Use of force (Rule 82, Basic Principles on Use of Force and Firearms)

Safety and security

The last sentence of Rule 1 establishes the general principle that safety and security must be ensured at all times, as well as respect for prisoners' inherent dignity and value as human beings. It calls for a balance between the two principles.

The Essex group affirmed that personal safety in prisons underpins the SMR as a whole and is essential to upholding human dignity. The duty to maintain safety is inextricably linked to other provisions such as: the use of force and restraints, searches, the prevention of torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment), and the protection of prisoners at risk of discrimination or abuse. It is well documented that a lack of safety and security in prisons can lead to grave threats to the life and dignity of prisoners.[380] A loss of safety undermines dignity, but measures intended to maintain safety must also uphold the right to dignity.

Both the UN Special Rapporteur on Torture and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have pointed out that 'the State assumes a heightened duty of protection by severely limiting an inmate's freedom of movement and capacity for self-defence'.[381] The Inter-American Commission on Human Rights has also maintained that the state has particular obligations to protect the dignity of prisoners, their life, health, personal integrity and other rights.[382]

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[379] This chapter was authored by Andrea Huber, Penal Reform International, with the support of Sharon Critoph.

[380] Open-Ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, *Second Report of Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of Prisoners, prepared by Penal Reform International/Essex University*, 20 March 2014, UNODC/CCPCJ/EG.6/2014/NGO.7, para. 5 *(Essex 2)*.

[381] UN General Assembly, 61st Session, *Extrajudicial, summary or arbitrary executions: Note by the Secretary-General*, 5 September 2006, A/61/311, para.51.

[382] Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II.Doc 64, para 293 *(IACHR Report on Persons Deprived of Liberty)* (citing Report No. 118/10, Case 12.680, Merits, *Rafael Arturo Pacheco Teruel et al.*, Honduras, October 22, 2010, para. 63).

Prison authorities therefore need to act with due diligence in both the prevention of, and response to risks. The due diligence principle implies periodic assessments of risks and safeguards. Safety and security should inherently be key performance targets in a prison system.

The SMR acknowledge the importance of the safety of prison staff, and recognise it also as a right. If prison staff are not safe, it is difficult for them to provide for the safety of prisoners.

Scope/meaning of safety and security

There may not be a clear differentiation between the terms 'safety' and 'security' (used in Rule 1). Prison security may be used more often to describe infrastructural aspects such as the means by which escapes are prevented, while safety refers more frequently to the physical safety of individuals in prison.

The Essex group emphasised that the concept of safety and security is not limited to the external perimeters of the prison, but encompasses a number of components. It requires prison administrations to take proactive measures to prevent and protect prisoners and staff from risks to their safety and security such as inter-prisoner violence, self-harm and suicide and risks arising from the prison estate and its management, such as fires and floods.[383]

The principle applies to prisoners as well as prison staff, visitors and any other persons within the prison walls. It entails:

the protection of:

- prisoners
- staff
- visitors
- service providers in prisons such as healthcare personnel, social workers, etc
- children staying in prison with their parent;

and protection from:

- abuse of prisoners by staff and vice versa
- inter-prisoner violence
- self-harm and suicide
- escape (security of external perimeters)
- illegal items such as harmful drugs, weapons, etc.
- infrastructural risks including fire safety
- natural disasters such as floods, hurricanes, mudslides, etc.

[383] *IACHR Report on Persons Deprived of Liberty,* OEA/Ser.L/V/II.Doc 64, para. 51 (citing the decision of the Inter-American Court of Human Rights in *Case of Neira Alegria et al v Peru*, judgment of 19 January 1995, Series C No. 20, para. 60, which found that 'since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners').

The experts discussed the significance of the wording 'at all times' in Rule 1 and noted that it means 24 hours (day and night), from admission to prison through to release, including during any transfer of prisoners. For prison staff, the principle applies during the entire time of their duties.

The experts emphasised that the protection of prisoners from inter-prisoner violence is a key component of ensuring safety in prison and a human rights obligation. As a report of the Secretary-General has noted, acquiescence in inter-prisoner violence is not simply a breach of professional responsibilities but amounts to consent or acquiescence in torture or other ill-treatment'.[384] The duty to prevent inter-prisoner violence has also been recognised as a component inherent in the safety of prisoners in the Bangkok Rules[385] and the European Prison Rules.[386]

Inter-prisoner violence involves a wide range of phenomena from subtle forms of harassment to unconcealed intimidation and serious physical attacks.[387] In a prison environment where verbal abuse, harassment on racist or tribal grounds, theft, or exploitation are widespread, prisoners will be tempted to use force to defend their interests. The protection of prisoners from all forms of victimisation is therefore in the vital interest of prison staff.

It was stressed that safety and security is jeopardised in overcrowded prisons, alongside its negative impact on the conditions of detention overall. The Inter-American Commission on Human Rights has described the correlation, stating that 'the general context and the causes that give rise to the acts of violence are fundamentally the same: a general situation of inhumane conditions of detention characterized mainly by considerable overcrowding'.[388] A report of the UN Secretary General concluded that 'overcrowded cells in prisons foster the development of an offender subculture, which is difficult for prison staff to control'.[389]

→ See Chapter 4, Healthcare – suicide prevention and prevention of self-harm

→ See Chapter 3, Contact with the outside world – transfers/transport

Measures to ensure safety and security

The Essex group noted that prison security is usually associated with physical means, particularly walls, bars, watch towers and alarm systems, but in fact encompasses a whole range of measures, including:

- architectural aspects

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[384] UN General Assembly, 68th Session, *Human rights in the administration of justice: analysis of the international legal and institutional framework for the protection of all persons deprived of their liberty: Report of the Secretary-General*, 5 August 2013, A/68/261, para 49 *(Human rights in the administration of justice)*. Separately, the UN Special Rapporteur on Torture recalls that inter-prisoner violence may amount to torture or other ill-treatment if the State fails to act with due diligence to prevent it (in UN Human Rights Council, 13th Session, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Mission to Kazakhstan*, 16 December 2009, A/HRC/13/39/Add.3, para. 28). See also UN General Assembly, 68th Session, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General,* 9 August 2013, A/68/295, para. 48 *(Special Rapporteur on Torture report 2013)*.

[385] *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, 2011, Preliminary observations para.9.

[386] *European Prison Rules*, 2006, Rule 52(2): 'Procedures shall be in place to ensure the safety of prisoners, prison staff and all visitors and to reduce to a minimum the risk of violence and other events that might threaten safety'.

[387] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *11th General Report on the CPT's activities covering the period 1 January to 31 December 2000*, 3 September 2001, CPT/Inf (2001) 16, para. 27 *(CPT 11th General Report)*.

[388] Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II.Doc 64, paras.103-106.

[389] *Human rights in the administration of justice*, para.49.

- infrastructural safety, alarm systems and evacuation plans in case of fires and other emergencies
- exercise of control
- separation of prisoners
- classification, risk and needs assessments
- dynamic security, early warning systems and conflict resolution tools, such as mediation
- periodic safety assessments and security audits.

Architecture and technology

The Essex group did not discuss issues around architecture but referred to specialised literature such as the *Technical Guidance for Prison Planning*, published by UNOPS in 2016.[390] Architectural measures to protect prisons from external attacks have also been provided in a handbook published by UNODC.[391]

Security equipment includes bars, doors and watchtowers, but also technology such as x-rays, metal detectors, radios, alarm systems, etc. Basic Principle 2 of the Basic Principles on the Use of Force and Firearms requires that law enforcement, a term that includes prison officers, should be 'equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind'.

The experts noted that new technologies have provided new tools, but also prompted new challenges for prison administrations in terms of safety. For example, drones are being used to smuggle drugs or phones into prison. New solutions will have to be developed to address such threats, including edificial measures without jeopardising natural light etc. (See also below on body cameras.).

Comparative research was noted, according to which 'unit management'[392] has a positive impact on security and provides a good setting for rehabilitation and counselling programmes, without greater spending on buildings or staffing. The concept implies that multi-disciplinary teams deliver services in each unit, with individual team members being responsible for both security and prisoner development outcomes.[393]

Infrastructural safety

The safety and security principle also includes infrastructural safety, for example, with regard to the condition of the prison estate (e.g. dilapidated buildings), the risks arising from prisoners' belongings, fire hazards (e.g. smoking or use of unauthorised electrical equipment such as cooking stoves and non-fire resistant/proof mattresses) as well as procedures and evacuation

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[390] United Nations Office for Project Services (UNOPS), *Technical Guidance for Prison Planning: Technical and operational considerations based on the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 2016 *(Technical Guidance for Prison Planning)*.

[391] United Nations Office on Drugs and Crime (UNODC), *Handbook on Dynamic Security and Prison Intelligence*, New York, 2015, pp. 11-12 *(Handbook on Dynamic Security)*; UNODC, *Handbook on the Management of High-Risk Prisoners*, New York, 2016, pp. 64-65.

[392] The term refers to a prison that is broken down into units, each of which may contain a number of prisoner accommodation sections and static posts. Multi-disciplinary teams of staff consist of disciplinary officials, educationalists, social workers, psychologists, religious care workers and nurses.

[393] *Handbook on Dynamic Security*, p. 35.

policies in case of fire[394] or natural disaster (e.g. floods, storms, mudslides, etc.).[395] The Inter-American Commission has emphasised the obligation to maintain safe electrical installations.[396] The Essex group noted that risks from poor infrastructure and an absence of procedures in cases of emergency tend to be overlooked and expressed their concern over situations where prisoners have been left in prison in life-threatening situations.

The relevance of prison design was noted as a factor to improve safety in this regard, with the floor plan of any facility aiding or hindering speedy evacuation, edificial layouts that help prevent fire spreading, the location of fire alarms and extinguishing equipment, as well as escape routes, exits and evacuation areas. The UNOPS *Technical Guidance for Prison Planning* notes that '[w]hen considering fire safety and evacuation for the prison, outdoor yards can provide a contained space close to accommodation areas where prisoners can be evacuated until the emergency is resolved'.[397]

It was stressed that proper equipment needs to be available to react to emergencies and that prison personnel must be trained in evacuation procedures and first aid.[398] This implies evacuation plans, which need to be included in prison safety audits. Analysing a number of mass casualties due to fires in Latin America, the Inter-American Commission on Human Rights concluded the main causes were 'overpopulated prisons in a state of physical disrepair' and the lack of protocols to dealing with these situations even though the risks were known to the authorities.[399]

The experts discussed that prison administrations may be reluctant to share evacuation plans with prisoners. However, good practice from the UK was referred to where posters give detailed information on fire drills and evacuation procedures to prisoners.

The experts highlighted that alarm systems must take into account the local context. For example, they must not rely on electric power if power supply is a problem in the respective country or region, and alternative systems or a back-up generator must be available in such cases. Examples of fire alarm systems are provided in the UNOPS *Technical Guidance*.[400]

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394 Inter-American Commission on Human Rights, *Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of their Liberty in Honduras*, 18 March 2013, OEA/Ser.L/V/II.147 *(IACHR Report on Honduras)*. The Commission reported on a number of fires resulting in alarming numbers of fatalities amongst prisoners, e.g. in Argentina, Chile, the Dominican Republic, Uruguay, El Salvador and Panama: see IACHR press releases 33/05, 55/07, 120/10, 8/05, 68/10, 112/10 and 2/11.

395 For example, a report published by the American Civil Liberties Union documents the lack of emergency planning at the Orleans Parish Prison which during Hurricane Katrina resulted in thousands of individuals being trapped. See American Civil Liberties Union, *Abandoned & abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina*, Washington DC, August 2006.

396 *IACHR Report on Persons Deprived of Liberty*, para 293 (citing the Report No. 118/10, Case 12.680, Merits, *Rafael Arturo Pacheco Teruel et al.*, Honduras, October 22, 2010, para. 63).

397 *Technical Guidance for Prison Planning*, p. 99.

398 *IACHR Report on Persons Deprived of Liberty*, para 293 (citing the Report No. 118/10, Case 12.680, Merits, *Rafael Arturo Pacheco Teruel et al.*, Honduras, October 22, 2010, para. 63).

399 *IACHR Report on Persons Deprived of Liberty*, para. 292.

400 *Technical Guidance for Prison Planning*, p. 36.

Effective control over the prison population

The Essex group emphasised that in order to ensure safety and security in prisons, prison authorities must exercise effective control over the prison population.[401] Prisons monitored only at the perimeters give rise to grave threats to the safety of prisoners, as highlighted by the Inter-American Commission on Human Rights, for example:

> *'[T]he fact that the State exercises effective control of the prisons implies that it must be capable of maintaining internal order and security within prisons, not limiting itself to the external perimeters of the prisons. (…) It is not admissible under any circumstance for the prison authorities to limit themselves to external or perimeter surveillance, leaving the inside of the facilities in the prisoners' hands. When this happens, the State puts the prisoners at permanent risk, exposing them to violence in the prison and to the abuses of other more powerful prisoners or the criminal groups that run such prisons.'*[402]

The experts noted problems in many countries due to self-governance or 'shared governance' where prison management is left too much, often even entirely, to prisoners. Human rights bodies have documented, for example, hierarchies of cell and yard bosses left in charge of day-to-day management, including entry to the prison compound and cells, enjoying considerable privileges in their detention conditions.[403] Other reports document prisoners deciding on who would receive or be denied medical care;[404] or discipline and protection of detainees delegated to privileged detainees who, in turn, 'use this power to their own benefit'.[405]

Rule 40, which remained unchanged by the review, does not rule out systems based on self-governance, but specifies its limitation to 'social, educational or sports activities'. It also clarifies that this ought to take place 'under supervision' and that disciplinary functions must never be entrusted to prisoners.

The UN Subcommittee on Torture, the UN Special Rapporteur on Torture, as well as the Inter-American Commission on Human Rights, have all emphasised concerns about self-governance

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[401] UN Committee against Torture, 46th session, *Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 3 February 2011, CAT/C/46/2, para. 57: 'It is axiomatic that the State party remains responsible at all times for the safety and well-being of all detainees and it is unacceptable for there to be sections of institutions which are not under the actual and effective control of the official staff'. *Special Rapporteur on Torture report 2013,* A/68/261, para. 49: 'The fundamental role of authorities to exercise effective control over places of deprivation of liberty and ensure the personal safety of prisoners from physical, sexual or emotional abuse should be further strengthened as one of the most important obligations (see the United Nations Standard Minimum Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, para. 9, and the European Prison Rules, rule 52.2). In this respect, preventive measures include increasing the number of personnel sufficiently trained in using non-violent means of resolving conflicts'.
Also see UN Committee Against Torture, 47th Session, *Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture: Bulgaria*, 14 December 2011, CAT/C/BGR/CO/4-5, para.23 (c), and UN Human Rights Council, 7th Session, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak: Addendum: Mission to Paraguay*, 1 October 2007, A/HRC/7/3/Add.3, para.90 (t). These cover the prompt and efficient investigation of all reports of inter-prisoner violence and prosecuting and punishing those responsible; and offering protective custody to vulnerable individuals without marginalizing them from the prison population more than is required for their protection.

[402] *IACHR Report on Persons Deprived of Liberty*, para. 53.

[403] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mali*, 20 March 2014, CAT/OP/MLI/1, para. 59 *(SPT Report on visit to Mali)*.

[404] *IACHR Report on Persons Deprived of Liberty*, para. 540. See also para. 583, stressing that relatives and others visits in correctional facilities run by systems of 'self-governance' or 'shared governance' were directly exposed to kidnapping, extortion, acts of forced prostitution, and all types of abuse and assault perpetrated by those who *de facto* exercise control in these prisons.

[405] *Special Rapporteur on Torture report 2013,* A/68/295, para. 47.

of prisoners in cases where it exceeded these boundaries. All bodies emphasised the prohibition of self-governance in prisons as enshrined in the SMR.[406] Some have also highlighted the link to corruption, stating that corruption was 'evidenced by the almost complete control of certain places of detention by organised criminal groups'.[407] The experts noted that in an atmosphere of corruption it is likely that dangerous goods will to be brought into prison in exchange for bribes, undermining safety and security.

Adequate prisoner-staff ratio

The Essex group highlighted that the ability to exercise effective control is intrinsically linked to the availability of sufficient resources, in particular an adequate staff-prisoner ratio (day and night). It requires qualified and well-trained staff (see Rules 74-80).[408] (See Chapter 2, Prison management.)

The experts noted that adequate numbers of staff need to be present at all times, including overnight. Incidents often occur during the night, a time when usually there are fewer staff on duty and often also more junior staff members.

Separation and classification

The Essex group recalled that the separation of prisoners (Rule 11) is one means of providing safety. The separation of women from men, and of juveniles from adults makes it easier to care for their specific needs, but it is also a key measure to protect them from violence and exploitation, including sexual violence.

Classification and risk assessments of prisoners are another key tool, seeking to differentiate levels of security applied for different prisons and prisoners.

→ For more detail on classification and risk assessments, see Chapter 2, Prison management

Diligent file management

The Essex group stressed the importance of proper prison file management as a tool for ensuring safety and security. Documentation of classification and risk assessments, behaviour and discipline and the imposition of any disciplinary sanctions (Rule 8(b), (c) and (e)) ensures that where there are staff changes or the transfers of prisoners to other facilities, relevant information is available about risks associated with each individual prisoner.

Dynamic security and conflict prevention

Lessons learned over the last 60 years include the acknowledgement that techniques of conflict resolution and mediation not only ensure human rights compliance, but also are more effective and efficient in providing for the safety and security of prisoners and prison staff.

→ For further detail, see Chapter 2, Prison Management.

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[406] *Special Rapporteur on Torture report 2013,* A/68/295, para. 47. *SPT Report on visit to Mali,* CAT/OP/MLI/1, para. 61.

[407] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, 5 July 2012, CAT/OP/BRA/1, para. 57 *(SPT Report on visit to Brazil)*.

[408] See also UN Committee against Torture, *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)*, 16 December 2013, CAT/C/51/4, para. 15 *(CAT SMR revision observations)*.

Restrictions, discipline, sanctions and searches

→ On searches, see also Chapter 1

→ On disciplinary measures and procedures, see also Chapter 5.

The Essex group noted the role of fair and transparent disciplinary rules for the safety and security inside prison. However, they emphasised the effectiveness of a system of incentives and recommended that prison managers make more use of positive motivation as compared to disciplinary sanctions.

Searches of prisoners, visitors and staff were discussed in relation to the prevention of dangerous items being brought into prison (Rules 50-52 and 60), but it was noted the risk searches may have on the right to human dignity. The Inter-American Principles and Best Practices provided examples of measures to prevent violence against – or between – persons deprived of liberty, and call on prison staff to:

> '*Effectively prevent the presence of weapons, drugs, alcohol, and other substances and objects forbidden by law, by means of regular searches and inspections, and by using technological and other appropriate methods, including searches to personnel*.'[409]

The experts highlighted that safety and security require clear and transparent prison rules, with rights and obligations that are made known to the prisoners upon admission and which they have access to and understand (see Rules 54, 55).

While staff must enforce discipline as a means of maintaining order, Rule 36 also makes clear that discipline must operate 'with no more restriction than is necessary'. Methods of delivering safety based on incapacitation alone – for example, through universal lockdowns, or excessive use of force – are ineffective and unlikely to deliver a safer environment.

> *'Member States have to ensure that prisons are secure, safe and well-ordered but are not run in an oppressive or brutal manner. It is the duty of the prison authorities to implement the sentence of the court, not to impose additional punishment. The term 'firmness' in Rule 27 of the SMRs is not to be confused with harshness, but should be understood to mean consistency and fairness in all measures that aim to establish good order and in all disciplinary procedures. On the same basis, firmness should never be understood to imply the use of unnecessary force, the strict limitations of which are explained in Rule 54 of the SMRs.*'[410]

The UN Subcommittee on Prevention of Torture, for example, observed that 'the increasingly strict prison regime, lack of employment opportunities, lost parole, long hours of lock down, etc., may have a bearing on increased levels of violence'.[411]

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[409] Principle XXIII (1d) of the Principles and Best Practices on the Protection of People Deprived of Liberty in the Americas.

[410] Open-Ended Intergovernmental Expert Group on The Standard Minimum Rules for the Treatment of Prisoners, *Working paper prepared by the Secretariat*, Buenos Aires, Argentina, 6 November 2012, UNODC/CCPCJ/EG.6/2012/2.

[411] Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*, 28 July 2014, CAT/OP/NZL/1, para. 35 *(SPT Report on visit to New Zealand)*.

Training of prison staff

Training specifically on issues relating to safety and security are captured in Rule 76(1c), and it is noted that, 'at a minimum', training shall include the concept of dynamic security as well as 'the use of force and instruments of restraint, and the management of violent offenders', with due consideration given to 'preventive and defusing techniques, such as negotiation and mediation'. Rule 75(3) clarifies that training courses need to be provided not only prior to entering service, but continuously 'with a view to maintaining and improving the knowledge and professional capacity' of personnel. Rule 82(2) further notes that 'prison staff shall be given special physical training to enable them to restrain aggressive prisoners'.

In order to implement the SMR, in particular on proportionate use of force, arms and restraints, it is vital that prison staff are trained on non-violent means of resolving conflicts, and receive practical training on a range of use of force techniques, from empty hand techniques[412] to the use of weaponry, to ensure that they are able to use no more force than is strictly necessary. Training should include explicit emphasis on human rights, and how to operationalise human rights. It should also include material on the risks and human rights concerns associated with the use of particular weapons/force options. As some use of force options and techniques pose a greater risk than others, training should ensure that officers are given a level of training commensurate with the complexity of the technique in question, and the risks it may pose.

Training should incorporate real life scenarios, practical exercises and scenario-based assessments, ensuring that officers can practically use the skills they have been taught and respond to a range of different circumstances.

Delivering detailed modules on the following aspects was mentioned as a good practice: avoiding danger, conflict prevention, defusing the situation, controlling the situation, necessity, guidance on decision whether use of force is necessary, reasonability in the circumstances, and using the least amount of force possible.[413]

Regular system assessments

Implementation of safety and security also implies that prison administrations take a step back from the daily management of the prison to reflect, identify and resolve challenges and recurring issues in relation to safety and security. Periodic assessments enable the prison administration to identify questions of a systemic nature that require regulation or intervention by central authorities and that should be dealt with by those responsible for the prison system as a whole.[414]

The importance of periodic reassessments of fire safety specifically has been highlighted by the Inter-American Commission on Human Rights which recommended that the fire department should be requested to 'periodically inspect and deliver assessments on the appropriateness of the fire safety and prevention measures' to prisons 'nationwide'.[415]

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[412] 'Empty hand techniques' is an umbrella term used to refer to force that is inflicted without any kind of weapon or equipment. This can include, for example, punches, kicks, ground pins, strikes and pressure point techniques.

[413] HM Prison Service, *Prison Service Order 1600: Use of Force*, London, 2005 (amended 2015).

[414] See also UNODC, *Handbook on prisoner file management*, New York, 2008, p. 44, on the importance of processes and procedures to 'monitor the performance of various components of the organization in helping achieve the strategic objectives of the institution'.

[415] *IACHR Report on Honduras*, para. 162 (10), page 62.

Meaningful activities and mental health

Occupying prisoners' time with purposeful activity serves not only the rehabilitative purpose of imprisonment, but also reduces risks of violence. It has been established that meaningful activities keep prisoners engaged and channel their energy into constructive activities, 'reducing their motivation to engage in disorder'. At the same time such programmes allow prison staff to establish positive relationships with prisoners and contributes to dynamic security.[416]

Rule 4(2) recalls the rehabilitative purpose of imprisonment and calls on prison administrators to offer education, vocational training and work.

The European Committee to Prevent Torture (CPT), for example, has stressed the importance of a 'satisfactory programme of activities (…) as diverse as possible (education, sport, work of vocational value, etc.)', including and in particular in high security units, stating that '[i]t can do much to counter the deleterious effects upon a prisoner's personality of living in the bubble-like atmosphere of such a unit'.[417]

Use of force and arms

The Essex group noted that guidance in the revised SMR on the use of force and arms remains limited as this area was not updated in the course of the review. It is noteworthy that the only provision relating to the use of force and to arms is contained in the section on 'institutional personnel' rather than in any of the substantive sections.

However, the SMR are supplemented by the Code of Conduct for Law Enforcement Officials,[418] and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF).[419] Both of these instruments enshrine the requirements of prescription by law, necessity and proportionality and call on law enforcement[420] to, 'as far as possible, apply non-violent means'.

The use of force and restraints is documented as a high risk situation for ill-treatment of prisoners, and 'as such call[s] for specific safeguards'.[421]

The experts noted that often the use of force, restraints and arms (including firearms) are linked, and recommended that more guidance is compiled on their use in a prison context, which should describe examples of legitimate and illegitimate use. They also recommended more guidance to clarify ambiguous terms such as 'arms' and 'passive physical resistance'.

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[416] *Handbook on Dynamic Security*, pp. 38-39.

[417] *CPT 11th General Report,* CPT/Inf (2001) 16, para. 47.

[418] Article 3 of the Code states that 'Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty'. The Commentary elaborates on the exceptionality and proportionality, stating that '[i]n no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved'.

[419] In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term 'law enforcement officials' includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

[420] The term 'law enforcement officials' includes 'all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention' (See note 1 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which refers to the same definition in the commentary to article 1 of the Code of Conduct for Law Enforcement Officials).

[421] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991*, 1992, CPT/Inf (92) 3, para. 53 *(CPT 2nd General Report).*

While a distinction is often made between the use of force, arms, firearms and restraints, and specific standards are applicable to them, a number of principles apply to all uses of force and other coercive measures. These are:

- principle of legality
- principle of necessity
- principle of proportionality
- relevance of classification, prisoner file management, conflict prevention and dynamic security
- documentation of use
- training
- accountability.

In order to be permissible the use of force or arms must be 'used only in exceptional circumstances, when strictly necessary as specified by law'.[422] The experts recommended policy-makers provide written regulations setting out which different force options can (and cannot) be used, the criteria for their deployment and the risks that accompany their use. Providing clear guidance on different use of force options has been shown to influence significantly their use in practice.[423]

The principle of necessity means that force or arms should be used 'only when less extreme means are insufficient' to achieve the objective. Basic Principle 4 of the BPUFF states that law enforcement officials shall 'as far as possible, apply non-violent means before resorting to the use of force and firearms' and may use them 'only if other means remain ineffective or without any promise of achieving the intended result'. Basic Principle 5 uses the term 'unavoidable',[424] and the Special Rapporteur on Torture refers to the concept of 'last resort'.[425]

The experts stressed that factors such as a sufficient prisoner-staff ratio and adequate training of officers play a role when determining the necessity of such an intervention. They further recalled the relevance of conflict prevention and mediation as alternatives to physical intervention.[426]

The experts noted that the use of force, arms and/or restraints may increase rather than decrease the number and severity of incidents. As captured in the 2010 *Survey of the UN and other best practices in the treatment of prisoners in the criminal justice system*:

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[422] *Special Rapporteur on Torture report* 2013, A/68/295, para. 58.

[423] For example, when the Dallas Police implemented a more 'restrictive' policy on conducted energy weapons, the use of these weapons 'dropped significantly' (Stephen Bishopp, David Klinger and Robert Morris, 'An Examination of the Effect of a Policy Change on Police Use of TASERs', *Criminal Justice Policy Review*, Vol. 26 No. 7, October 2015, p. 737*)*

[424] Basic Principle 5 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

[425] *Special Rapporteur on Torture report 2013,* A/68/295. para. 58.

[426] Rule 38(2) in this context as it encourages, 'to the extent possible, conflict prevention, mediation or any other alternative dispute resolution mechanism' (although in the context of disciplinary measures), and of Rule 76(c) which encourages the use of the concept of dynamic security. (See Chapter 2, Prison management – Dynamic security and conflict prevention.)

> *'Excessive security and control can, at its worst, lead to a sense of injustice and increase the risk of a breakdown of control and of violent or abusive behaviour.'*[427]

Thirdly, the use of force or other coercive means need to meet the test of proportionality. Basic Principle 5 describes that where the use of force is 'unavoidable, law enforcement officials shall (a) exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved', and should '(b) minimise damage and injury (…)'.

While the extent of a threat and impact of a counter-measure may be difficult to predict, the experts noted that compared to police who have to make assessments in respect to entirely unknown individuals, prison staff do have information about the individuals in their custody. In fact, proper classification of prisoners, file management and dynamic security all contribute to allowing an assessment of which measure is adequate (proportionate) in resolving the situation with minimal or no use of force.

In this context, the experts recalled Basic Principle 2, which requires law enforcement agencies to 'develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms'. These should include the development of non-lethal incapacitating weapons for use in appropriate situations.

The principle also implies that the use of force or arms must be ceased as soon as it is not necessary or proportionate any longer (i.e. it is used for the shortest possible time).[428]

The importance of documentation was emphasised as another general principle for both the use of force and arms, in order to enable a review of its application and to ensure accountability.[429] Good practice from the UK was mentioned where a report is filed each time any arm, including a baton, is even drawn. It was also highlighted that medical personnel should examine prisoners after every use of force or arms.[430]

The experts mentioned the benefits of closed circuit television (CCTV) and body cameras, especially those recording the use of arms, as they allow for accountability and have been found to reduce their use.

The importance of training was emphasised, as well as the need to review training programmes and operational procedures in light of particular incidents.

→ For more detail on training, see above; see also Chapter 2, Prison management

The experts noted that wherever new methods or devices are deployed, prison staff are keen on using them. They also highlighted that carrying a weapon may enhance security, but it could also threaten it if it undermines the creation of an institutional culture which supports a rehabilitative rather than a punitive approach, and emphasises conflict prevention over repression.

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[427] Twelfth United Nations Congress on Crime Prevention and Criminal Justice, *Workshop 2: Survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system: Background Paper*, 28 January 2010, 6A/CONF.213/13, para. 45. See also studies on prison populations which have found that those inmates who have had force used upon them in the past are 'more likely to engage in assaultive and other rule violating behaviour' once in prison (for example, Charles Klahm, Benjamin Steiner and Benjamin Meade, 'Assessing the Relationship between Police Use of Force and Inmate Offending (Rule Violations)', *Crime and Delinquency*, 17 November 2014).

[428] See, for example, *CPT 2nd General Report*, [CPT/Inf (92) 3], para. 53

[429] See, for example, *CPT 2nd General Report*, para. 53, stating that 'a record should be kept of every instance of the use of force against prisoners'.

[430] See, for example, *CPT 2nd General Report*, para. 53

Lastly, the experts highlighted the need for accountability, as also expressed in Rules 22-26 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, and the link to effective complaints mechanisms as well as external, independent monitoring.

→ For more on complaints, see below; see also Chapter 2, Prison management – inspection and external monitoring

Use of force

The Essex group noted that Rule 82 has not been updated in the course of the review and that its interpretation needs to draw on the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) and the Code of Conduct on Law Enforcement Officials.

Accordingly, situations of 'self-defence or in cases of attempted escape, or active or passive physical resistance to an order based on law or regulations' described in Rule 82(1) only make the use of force permissible if and when it is also necessary and proportionate[431] (for detailed guidance on these principles, see above).

The experts noted a divergence between Rule 82 and Basic Principle 15 of the BPUFF. The latter states that force shall not be used 'except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened'.

Concern was expressed over the ambiguity of the term 'passive physical resistance' in Rule 82(1). The experts discussed possible cases where this might apply and noted that the term could refer to instances where prison staff seek and fail to enforce an order, but emphasised that not every case of resistance to an order would render the use of force permissible. The experts felt that the term must not be interpreted too broadly and recommended the provision be clarified with concrete examples.

Use of arms

Provisions on the use of arms in the revised SMR remain limited to the provision of Rule 82(3), according to which prison staff performing duties in direct contact with prisoners should not be armed. The Essex group noted that officers guarding the external walls of a prison often carry firearms, yet would not be performing duties in direct contact with prisoners at the same time, and therefore should hand in their arms before they do.

The Essex group noted ambiguity of the terms 'arms' and 'armed', which applies not only to conventional firearms, but to the full range of weaponry with which prison officials are equipped.[432] Varying from one correctional setting to another, such arms can include batons, electrical discharge weapons (EDW), irritant sprays (e.g. pepper spray), kinetic impact weapons (e.g. so called 'rubber bullets'), canines, – or even 'ceremonial arms' (e.g. whips).

The experts reiterated that under no circumstances must prison officials be equipped with weaponry deemed to have no other use than for the purpose of torture or ill-treatment. Discussions at previous deliberations of the Essex group[433] were recalled on the prohibition of body-worn

[431] Rule 82 (1) emphasises the proportionality aspect ('no more than is strictly necessary') and requires an immediate report of the incident to the prison director. Article 3 of the Code of Conduct also uses the term 'only when strictly necessary' and the commentary specifies it should be 'exceptional'.

[432] The use of dogs in some countries was also raised as a possible application of an arm. It was mentioned that in some countries officers carry ceremonial arms.

[433] *Essex 2*, paras. 50-51.

electro-shock devices and restraint chairs (see UN Committee Against Torture,[434] European Committee for the Prevention of Torture[435] and the European Commission[436]). For example, the Omega Research Foundation has emphasised:

> *'The electrical current not only causes severe pain, with one survivor describing it as 'very intense shocking pain, so intense I thought that I was actually dying', but can cause short and long term physical side effects. These include; muscular weakness, urination and defecation, and heartbeat irregularities and seizures.'*[437]

The experts also recalled the 'Second Essex paper' with regard to the distinction between body worn electro-shock devices and restraint chairs on the one hand and electrical discharge weapons (EDW) on the other hand. EDWs may provide an alternative to the lethal use of firearms. However, by their nature they 'can cause acute pain and (…) are open to abuse'.[438] They must therefore be subject to strict circumscription in national law.

The European Committee for the Prevention of Torture has expressed 'strong reservations' about their use in prison settings, in which 'only very exceptional circumstances (e.g. hostage-taking situation) might justify the resort to EDW'. It stressed that even then circumstances where an EDW is used must be 'strictly circumscribed' and 'subject to the strict condition that the weapons concerned are used only by specially trained staff'.[439] The UN Committee against Torture has concluded that EDWs should not be part of the general equipment of custodial staff in prisons or any other place of deprivation of liberty.[440]

In light of this guidance, the experts noted good practice, in which legal framework explicitly prohibits specific acts or weapons such as 'striking with truncheons' or 'electric-shocks'.[441]

The experts recalled in this context that particular weapons may be considered to constitute a proportionate response to incidents occurring outside of prisons, however, may not prove a proportionate response to similar incidents in detention due to an enhanced risk of death or serious injury that they pose in such environments (e.g. kinetic impact projectiles when used at

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[434] The Committee recommended the abolition of electro-shock stun belts and restraint chairs as 'methods of restraining those in custody; their use almost invariably leads to breaches of article 16 of the Convention' (UN Committee against Torture, 23rd and 24th Sessions, *Report of the Committee against Torture: Consideration of reports submitted by States Parties under article 19 of the Convention: M. United States of America*, 2000, A/55/44, paras. 175-180).

[435] CPT, *20th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT): 1 August 2009-31 July 2010*, Strasbourg, 26 October 2010, p. 35 *(CPT 20th General Report)*.

[436] European Commission, *Commission Implementing Regulation (EU) No 775/2014 of 16 July 2014 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*, 16 July 2014, Annex 1, provisions 2.1 and 2.5.

[437] Philip Yoon, 'The "Stunning" Truth: Stun Belts Debilitate, They Prejudice, and They May Even Kill', *Capital Defense Journal*, Volume 15, Issue 2, 2003, pp. 383-404.

[438] *CPT 20th General Report*, p.35.

[439] *CPT 20th General Report*, p.36.

[440] *CAT SMR revision observations*, para. 38.

[441] Government of Uganda, *Acts Supplement Noto The Uganda Gazette No. 52 Volume CV dated 18th September, 2012: The Prevention And Prohibition of Torture Act 2012: Second Schedule – Acts constituting torture*, 2012, which describes them as 'acts constituting torture'.

close range).[442]. 'Serious reservations' have also been raised about the 'the use of irritant gases[443] [especially the alleged use of teargas] in confined spaces, as it may entail health risks and cause unnecessary suffering'.[444]

The experts recalled Basic Principle 2 of the BPUFF, which requires law enforcement agencies to 'develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms'. These should include the development of non-lethal incapacitating weapons, while carefully controlling the use of such weapons and evaluating them to 'minimize the risk of endangering uninvolved persons'.[445]

Where prison officials are provided with arms, Rule 82(3) is unambiguous in that officers should be trained in their use (see above). In this context, Basic Principle 20 calls for special attention to 'ethics and human rights, (...), to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, (... and) methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting' their use.

Where arms are used in places of detention, they should be stored safely, with access only to those entitled and clear records (e.g. signing in and out of arms), providing accountability for the use of weapons.

Use of firearms

The commentary to Article 3 of the Code of Conduct emphasises that 'the use of firearms is considered an extreme measure' and that 'Every effort should be made to exclude the use of firearms'.

Situations which may prompt the use of firearms are described in Basic Principle 9 as 'self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, (…) or to prevent his or her escape'. [446] However, the Essex group emphasised that a particular threshold applies for the use of lethal force, which can only ever be applied 'when strictly necessary to protect a life'.[447] The Basic Principles also clarify that 'intentional lethal use of firearms' may only be used 'when strictly unavoidable in order to protect life'.

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[442] Impact projectiles can be fired from a wide variety of weapons, and projectiles can be made of wood, rubber, plastic or other materials (e.g. fabric bags weighted with lead shot). Single and multiple projectiles can be fired including, for example, balls, segments, blocks or cylinders of wood, plastic or rubber (often referred to as 'rubber bullets'). On impact they are designed to cause blunt trauma (i.e. non-penetrating trauma); however, they often cause serious injuries including lacerations, broken bones, concussion, head injuries or internal organ damage (Omega Research Foundation, *Tools of torture and repression in South America: Use, manufacture and trade*, June 2016, p. 16).

[443] Chemical irritants are designed to deter or disable an individual, by producing temporary irritation of the eyes and upper respiratory tract. The most commonly used chemicals include CN or CS (commonly called tear gas) and OC/ Pepper and PAVA (commonly called pepper spray). Chemical irritants are delivered through hand-held aerosol sprays, hand-thrown grenades, weapon- launched projectiles/grenades, as well as via water cannon. (Omega Research Foundation, *Tools of torture and repression in South America: Use, manufacture and trade*, June 2016, p. 18).

[444] For example, the UN Subcommittee on Prevention of Torture, has expressed "serious reservations about the use of irritant gases in confined spaces, as it may entail health risks and cause unnecessary suffering" (*SPT Report on visit to* Brazil, CAT/OP/BRA/1, para. 128.)

[445] Principle 3 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

[446] Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The case of 'arrest' was not included here as not relevant in the detention context.

[447] Principle XXIII (2) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

The Inter-American Commission on Human Rights has clarified that:

> *'In cases of flight or escape of persons deprived of their liberty, the State must employ all non-lethal means at its disposal to recapture the offenders and may only use lethal force in cases of imminent danger in which prisoners attempting to escape react against prison guards or third parties with violent means that threaten their lives. Therefore, there is no ethical or legal justification for a so-called 'escape law' legitimizing or empowering prison guards to automatically fire on prisoners attempting to escape.'*[448]

'In every instance in which a firearm is discharged' a report needs to be made promptly to the competent authorities.[449]

Moreover, Basic Principle 11 specifies that rules and regulations on the use of firearms should include guidelines, which:

> '(a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
> (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
> (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;
> (d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
> (e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;
> (f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.'

These provisions would seem to have a broader applicability, and could usefully be extended to apply to all weapons used by state officials, not just firearms.'[450]

Complaints

Rules 56 and 57 stipulate the right of prisoners to issue requests and complaints. The Essex group discussed the following questions:

- Who can issue a complaint?
- How are prisoners informed about them?
- What are the types and contact points of complaints?
- What is the distinction between request and complaint?
- When is a complaints procedure effective?
- How are prisoners protected against reprisals?

The Essex group highlighted various issues for further deliberation including: the different types of request and complaints, in particular the interlinkages with external and independent complaints

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[448] *IACHR Report on Honduras*, para. 237.

[449] Commentary to Article 3 of the UN Code of Conduct on Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979.

[450] UN Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979.

systems, clarification of the term 'judicial or other competent authorities, including those vested with reviewing and remedial power' (see Rule 56 (3) and Rule 57 (1)) and practical measures to prevent reprisals.

The experts recommended that prison administrations keep track of the number and nature of complaints as they are an important indicator for identifying and addressing grievances with the potential to prevent unrest and violence.[451] The UN Committee against Torture has called for 'a centralized register of complaints that includes information on the corresponding investigations, trials and criminal and/or disciplinary penalties imposed'.[452] The SPT has taken the lack of any trace of complaints by detainees in registers as evidence for the absence of an 'institutionalized complaints system'.[453]

Who can issue a complaint?

The beneficiaries of the right to make requests and complaints are captured in Rule 56 (4). Primarily this is the prisoner, but also his/her legal representative and in case neither is able to exercise the right a 'member of the prisoner's family or any other person who has knowledge of the case'.

The Essex group recalled that the entitlement of family members to make a request or complaint seeks to account for the well acknowledged barriers of persons deprived of their liberty to contact the outside world, and does not require any proof of the detainee's inability to submit a complaint. For example, this is provided for in Principle VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.[454]

How are prisoners informed about complaint mechanisms?

Examining Rules 54(b) and 55, the Essex group shared the observation of the Special Rapporteur on Torture that, because of literacy limitations (including legal literacy) and learning disabilities many detainees have difficulty in completing complaint forms.

Formal requirements should therefore be minimal and if forms are used, they should be simple and accessible, including for 'those who may have limited communication abilities'.[455]

Prison administrations should therefore make information about requests and complaints available 'in both written and oral form, in Braille and easy-to-read formats, and in sign languages for deaf or hard-of-hearing individuals' and 'display it prominently in all places of deprivation of liberty'.[456] It is good practice to display posters illustrating the avenues to issue requests or complaints on prison walls in an easy-to-understand way.

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[451] An effective complaint system and records of complaints lodged are recommended also by the IACHR, stating that 'the reception and examination of complaints and petitions is an effective mechanism for (…) detecting structural deficiencies or abuses committed by prison officials' (*IACHR Report on Persons Deprived of Liberty*, p. 87.

[452] *CAT SMR revision observations*, para. 53.

[453] *SPT Report on visit to* Mali, CAT/OP/MLI/1, para. 91.

[454] Principle VII of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas states: 'Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law. This right comprises, amongst others, the right to lodge petitions, claims, or complaints before the competent authorities, and to receive a prompt response within a reasonable time.'

[455] *CAT SMR revision* observations, CAT/C/51/4, para.54.

[456] *Special Rapporteur on Torture report* 2013, A/68/295, para. 79.

Other good practice examples mentioned were telephone hotlines and confidential complaint boxes.[457]

Types of complaints and contact points

Rule 56 (1) and (2) and Rule 57(1) read together suggest a complaints mechanism escalating through various stages, as described below, although the wording makes clear that there is no limitation or specific order for these different stages.[458]

The different stages envisaged are:

1. to the prison director (or the person appointed by him/her, each day, Rule 56 (1))
2. to the inspector of prisons during his/her inspections (Rule 56 (2))
3. to the central prison administration (Rule 56 (3))
4. to a judicial or other competent authority, including those vested with reviewing or remedial power (Rule 56 (3))
5. to an independent national authority in case of allegations of torture or other cruel, inhuman or degrading treatment or punishment (71 (1) and (2)).459

There are slightly different provisions depending on the type of request and complaint:

1. Complaints to the prison director (or the person appointed by him/her) must be available 'each day' (Rule 56 (1)).
2. Where complaints are raised with the inspector of prisons, the prisoner must have the opportunity to talk to the inspector in private, without the presence of the prison director or staff. (Rule 56 (2) notes that this Rule is equally relevant for external monitors, see Rule 84 (c)).

3 & 4. Rule 56 (3) enshrines the right to make complaints to the central prison administration and to 'the judicial or other competent authority, including those vested with reviewing or remedial power'. The wording clarifies that such complaints can be made 'without censorship as to substance', implying that a) prisoners do not need to issue an internal complaint first, and b) complaints must be passed on as they are made.

5. Specific rules apply in case of allegations of torture or other cruel, inhuman or degrading treatment or punishment, in line with obligations under the Convention against Torture and the Istanbul Protocol.[460] They must be dealt with immediately and shall result in a prompt and impartial investigation conducted by an independent national authority in accordance with Rule 71 (1) and (2).

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[457] *CAT SMR revision* observations, CAT/C/51/4, para.54.

[458] Further guidance can be drawn from Principle 33 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly on 9 December 1988, A/RES/43/173.

[459] The UN Committee against Torture has recommended establishing 'a central and accessible mechanism to receive complaints of torture or ill-treatment' (*CAT SMR revision* observations, CAT/C/51/4, para. 53).

[460] UN High Commissioner for Human Rights, *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (commonly known as the Istanbul Protocol), 1999, 2004. See also Principle V of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

The Essex group suggested that the terms 'independent national authority' and 'judicial or other competent authority' need further clarification and noted that a complaints mechanism is distinct from an external (preventive) monitoring body.[461] They also suggested that Principle 33(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment indicates that a higher authority needs to be involved ('authorities vested with reviewing or remedial powers').

The experts mentioned the practice of employing non-operational members of staff (not wearing uniform) as 'contact officers', and they were seen positively by prisoners as less threatening and more approachable. At the same time, the experts cautioned against assigning 'wing leaders' or 'yard bosses' as recipients of informal complaints[462] as such a system is open to abuse and constitutes self-governance in contradiction to Rule 40(2).

Distinction between requests and complaints

The SPT has documented problems with requests and complaints procedures due to lack of 'distinction between a request and a complaint, both being submitted on the same forms and processed in the same way', stating that 'As a result, simple requests are not dealt with quickly, and serious complaints can be trivialised'.[463]

The Essex group confirmed that the majority of complaints are related to day-to-day issues, conditions of detention and basic services such as food, telephone calls, appointments with doctors, recreational, work-related or educational activities. Many of these can be solved without a lengthy complaints procedure and with modest financial means.[464]

As both the Special Rapporteur on Torture and the SPT have noted these types of requests/day-to-day complaints could be addressed by delegating independent, dedicated persons to receive and handle minor complaints and ensure that steps are taken within a reasonable period of time to set aside funds required to give effect to these rights.[465] Also, many incidents can be resolved by prompt action by the prison staff.

The experts clarified that requests and complaints can be brought against acts as well as omissions of the prison administration/ staff.

Effectiveness of complaints mechanisms

The SPT stressed that 'the mere existence of complaints mechanisms is not enough; they must be, and must be seen to be, independent and impartial, and should offer guarantees of effectiveness, promptness and expeditiousness'.[466]

Rule 57 describes procedural aspects, applicable to '*every* request or complaint', (emphasis added) i.e. all types described under 1) to 5). It stipulates that they must be:

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[461] The emphasis of external monitoring mechanisms is on the prevention of torture, through the identification of systemic risk factors contributing to an environment where torture or other ill-treatment arise, and recommendations in order to address and rectify these risk factors. The function of complaints mechanisms, by comparison, is to investigate individual cases of torture and ill-treatment, to adjudicate on the facts of the case and redress for the individual victim.

[462] Participants mentioned the system of 'ward leaders' in East Africa, and 'Chaveiros' in Latin America, for example. See, for example, concerns expressed in *SPT Report on visit to Mali,* CAT/OP/MLI/1, paras. 31, 91.

[463] *SPT Report on visit to New Zealand,* CAT/OP/NZL/1, para. 44.

[464] *Special Rapporteur on Torture report 2013,* A/68/295, para. 78.

[465] *Special Rapporteur on Torture report 2013,* A/68/295, para. 78.

[466] *SPT Report on visit to* Brazil, CAT/OP/BRA/1, para. 32.

- promptly dealt with
- replied to without delay; and there must be
- availability of a remedy in case of rejection or undue delay ('can be brought before judicial or other authority if rejected or in case of undue delay').[467]

The Essex group listed the following established requirements of effectiveness for complaints mechanisms:[468]

1. sufficient detachment from the authority alleged of wrongdoing (independence)[469]
2. fairness and perceived fairness
3. promptness of enquiry into complaint ('without undue delay'[470])
4. confidentiality – if requested[471]
5. complaint mechanism needs power to enquire
6. facilitates simple, prompt and effective recourse[472]
7. safety from reprisals.[473]

Effective mechanisms should seek to proactively address circumstances that discourage prisoners from issuing complaints.[474] The UN Special Rapporteur on Torture has emphasised that complainants may require access to independent lawyers and timely independent medical

[467] As required by Principle 33(4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: 'If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority'.

[468] The principles draw on the *Special Rapporteur on Torture report* 2013, A/68/295.

[469] *Special Rapporteur on Torture report* 2013, A/68/295, para. 77.

[470] Principle 33(4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[471] With regard to confidentiality, the experts referred to language included in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 33 (3) calls for confidentiality 'if so requested by the complainant'), the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol), the Bangkok Rules (Rule 57 (2), see also Rule 25(1)) and Article 21 of the Optional Protocol to the Convention against Torture (OPCAT). See also *CAT SMR revision* observations, CAT/C/51/4, para. 54.

[472] Principle VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas emphasises the importance of a 'simple, prompt, and effective recourse'.

[473] Principle 33(4) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: '(…) Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint'. Rule 25(1) of the Bangkok Rules also requires protection measures specifically relating to the risk of retaliation (see also Rule 57(2) of the Bangkok Rules). Article 21 (1) of the Optional Protocol to the Convention against Torture states: 'No authority or official shall order, apply, permit or tolerate any sanction against any person or organization for having communicated to the national preventive mechanism any information, whether true or false, and no such person or organization shall be otherwise prejudiced in any way'.

[474] The SPT, for example, documented the lack of awareness of the possibility to submit a complaint, but also the lack of trust that a complaint would lead to any positive or useful outcome, or that it would lead to reprisals against them (Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine*, 16 March 2016, CAT/OP/UKR/1, para. 53 *(SPT Report on visit to Ukraine)*). See also *SPT Report on visit to Brazil*, para. 32; and Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, 27 November 2013, CAT/OP/ARG/1, para. 75 *(SPT Report on visit to Argentina)*.

examination in order to substantiate their complaint.[475] Procedures also need to address the risk of complaints being tampered with or not being transmitted to the complaints mechanism.[476]

The experts noted particular disincentives for women in custody, such as the fear of stigma and shame associated with sexual abuse and rape and of investigations involving humiliating physical examinations. Complaints mechanisms should therefore account for the specific risks of retaliation against women prisoners, and implement Bangkok Rules 7 and 25. Experts cautioned against transfer of a woman to another prison, as a means of protection against reprisals, as given the small number of women's prisons in most countries this would 'almost certainly mean that she would be taken further away from her home'.[477]

In order to investigate any alleged wrong-doing complaint mechanisms need to be equipped with their own investigative capacity, rather than having to rely on the enquiries of other bodies, in particular the one alleged of misconduct.[478]

The experts identified elements of a functioning complaints system: differentiation between requests and complaints (to expedite day-to-day and less serious complaints/requests); provision of a complaints form that is easy to read/understand and freely available to prisoners (without the requirement to request a form); provision of a locked and discrete complaints box at various locations in the prison facility'; a step-by-step response system (e.g. prison officer at the wing, management level, governor, Ombudsperson); and accessible 'easy-to-read' replies.

They emphasised that an effective complaints mechanism is one that provides recourse within reasonable time if the complaint is found to be well founded, and that it must be linked with accountability of officers who are found to have violated laws or regulations. As the UN Special Rapporteur on Torture has noted, it is important to 'integrate a provision obliging the personnel to guarantee the timely enforcement of any decision'.[479]

Protection against reprisals

The Rules place an obligation on prison authorities to take effective measures to protect complainants against 'any risk of retaliation, intimidation or other negative consequence as a result of having submitted a request or complaint' (Rule 57(2)). As the Rule suggests, measures need to be taken to protect the prisoner – as well as persons who are entitled to issue complaints (legal representative, family members, according to Rule 56 (4)).[480]

The UN Special Rapporteur on Torture has emphasised that '[m]easures in this regard include the transfer of the complainant or the implicated personnel to a different detention facility or the suspension from duty of the personnel'.[481] The UN Committee against Torture recommended '[p]rotective measures including relocation, on site security, hotlines, and judicial orders of protection to prevent violence and harassment against complainants, witnesses, or close associates of such parties'.[482]

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[475] *Special Rapporteur on Torture report* 2013, A/68/295.

[476] See, for example, *SPT Report on visit to* Ukraine, CAT/OP/UKR/1, para. 53.

[477] Penal Reform International and Thailand Institute of Justice, *Guidance Document: United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)*, London and Bangkok, October 2013, p. 70.

[478] *SPT Report on visit to Brazil,* CAT/OP/BRA/1, para. 54.

[479] *Special Rapporteur on Torture report 2013,* A/68/295, para. 77

[480] The Inter-American Commission on Human Rights also emphasised that detainees who take recourse in appeals, complaints and petitions must not be punished for filing them (*IACHR Report on Persons Deprived of Liberty*).

[481] *Special Rapporteur on Torture report 2013*. A/68/295, para. 77.

[482] *CAT SMR revision* observations, CAT/C/51/4, para. 55.

Persons who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials, also need to be protected against retaliation.[483]

Investigations

The UN Special Rapporteur on Torture emphasised that it is the State who bears the burden of evidentiary proof to rebut the presumption of its responsibility for violations of the right to life and for inhumane treatment committed against persons in its custody.[484] Accordingly, 'the obligation on the authorities to account for the treatment of an individual in custody is particularly stringent' in the case of death and exists irrespective of whether a complaint is filed or not.[485]

In this context, the Essex group highlighted that Rule 71(1) unequivocally requires an investigation into *any* case of death. They emphasised that this includes what is often termed as cases of death due to 'natural causes', and that a natural cause does not necessarily mean unavoidable. This includes cases of deaths in custody due to lack of medical care.[486] The Inter-American Commission on Human Rights has emphasised that 'the fact that evidence might initially suggest the possibility of a suicide does not exempt the competent authorities from undertaking a serious and impartial investigation in which all logical lines of inquiry are pursued'.[487]

The experts noted that the SMR deliberately omit guidance on the course and modalities of investigations because these have to be conducted by an independent (i.e. external) body. As the SMR are intended as a standard specifically addressing prison administration and prison staff, they focus on the obligations and role of prison authorities when such cases arise.

Initiation of an investigation

The Essex group examined Rule 71 and Rule 57,[488] which incorporate the obligation of the prison director to 'report, without any delay, any custodial death, disappearance or serious injury to a judicial or other competent authority that is independent of the prison administration and mandated to conduct prompt, impartial and effective investigations into the circumstances and causes of such cases'.

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[483] *CAT SMR revision observations,* CAT/C/51/4, para. 45.

[484] The burden of proof on the state in case of death of a person detained, but also when their physical condition worsens, has also been maintained by the Inter-American Court of Human Rights, for example in I/A Court. *Case of Mendoza et al.*, 2013, para. 219; I/A Court. *Case of Vera Vera v. Ecuador*, 2011, para. 88; I/A Court. *Case of Cabrera García and Montiel Flores v. Mexico*, 2010, para. 134; I/A Court. *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela*, 2006, para. 80; I/A Court *Case of Bulacio v. Argentina*, 2003, para. 127; I/A Court. *Case of Juan Humberto Sánchez v. Honduras*, 2003, para. 111.

[485] *Special Rapporteur on Torture report 2013,* A/68/295, para. 62, referring also to *IACHR Report on Persons Deprived of Liberty*, para. 54. The experts referred to Principle 34 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which also requires an inquiry 'into the cause of death or disappearance' whenever a 'death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment', 'by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case'.

[486] See, for example, *SPT Report on visit to* Mali, para. 37 ('the Subcommittee met numerous persons who were dying due to the lack of adequate medical care'), and *SPT Report on visit to* Ukraine, CAT/OP/UKR/1, para. 88 ('a large proportion of deaths in custody were reportedly related to the combination of HIV and hepatitis B').

[487] *IACHR Report on Persons Deprived of Liberty*, para. 324.

[488] Further guidance was drawn from Principle 34 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.

As for allegations of torture or other cruel, inhuman or degrading treatment or punishment, the requirement of an investigation is reiterated in Rule 57(3).

The experts recalled the duty of law enforcement officials (which includes prison staff) to report promptly to their superiors any case 'where injury or death is caused by the use of force and firearms by law enforcement officials', and to send a detailed report 'promptly to the competent authorities responsible for administrative review and judicial control'.[489]

The experts highlighted that detainees may have suffered torture or ill-treatment before being admitted to prison, while in the custody of other law enforcement agencies. It is therefore in the interest of prison administrations to ensure that any signs of such abuse are identified and documented upon admission – in line with Rule 30 (b)).[490]

According to Rule 34, an investigation can be triggered by healthcare staff who have an obligation to 'document and report to the competent medical, administrative or judicial authority' any case in which they become aware of signs of torture and other cruel, inhuman or degrading treatment or punishment.[491]

Accordingly, the experts noted the importance of the independence of healthcare professions[492] and noted a link to the requirement of having confidential, up-to-date medical files (Rule 26).

→ See more in Chapter 4, Healthcare

Independent body of enquiry

The Essex group noted that there is an obligation of the state to ensure the establishment of an independent investigatory body, since an enquiry carried out by prison administrations would be 'marred by a conflict of interest'.[493] The Essex group noted that the independence of the investigatory body is in the interest of prison administrations as it demonstrates fairness and accountability, and is needed to refute malicious allegations.

The body must be an 'external investigative body, independent from those implicated in the allegation and with no institutional or hierarchical connection between the investigators and the alleged perpetrators'.[494]

Modalities of the investigation

Given that the duty to investigate rests with an external body, the role of the prison administration in cases of death, disappearance or serious injury is to:

- ensure the external investigation is initiated, by promptly reporting the incident

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[489] Principle 6 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

[490] The obligation of an examination upon entering prison on whether the detainee had been a victim of torture or ill-treatment is also enshrined in Principle IX of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

[491] *CAT SMR revision observations,* CAT/C/51/4, para. 19; *IACHR Report on Persons Deprived of Liberty*, para. 564.

[492] See, for example, Inter-American Commission on Human Rights, about the importance of health care professionals acting with autonomy and independence, free from any interference, coercion or intimidation. (*IACHR Report on Persons Deprived of Liberty*, para. 561).

[493] *Special Rapporteur on Torture report 2013*. A/68/295, para. 64.

[494] *Special Rapporteur on Torture report* 2013, A/68/295, para. 64, with reference also to *Jordan v. United Kingdom*, application No. 24746/94, para. 106.

- preserve the evidence within the perimeters of the prison
- ensure that officers implicated in the incident do not interfere with the investigation
- protect the alleged victim and witnesses
- cooperate with and support the investigative body, and;
- collect and monitor occurrences of such incidents in order to identify and address any structural causes.

The Essex group noted clarification by the UN Committee against Torture of the meaning of 'prompt' for the initiation of an investigation by the prison director, stating that this 'must be initiated within hours or, at the most, within days' and that relatively short delay can constitute a violation of Article 12 of the Convention against Torture.[495]

The UN Special Rapporteur on Torture has emphasised that: '[t]here should be protocols and guidelines for the prison administration about cooperating with the authorities by not obstructing the investigation and by collecting and preserving evidence'.[496] The experts emphasised that other than those measures required immediately after an incident, the course of enquiry should be determined, as soon as possible, by the external investigatory body, including instructions to the prison administration as to necessary measures and steps.

It was emphasised that the protocols and guidelines for the preservation of evidence and forensics need to be consistent with those in the community.

It should be ensured that the scene of any incident is sealed off immediately, that evidence is secured and that witnesses are protected against influence or intimidation. Preservation of evidence includes the instant securing and safe storage of CCTV footage in order to prevent it from disappearing or being manipulated.

The experts rebutted frequent claims by prison administrations that sealing off the location of an incident was not possible in a prison, e.g. in the case of a suspicious death. They pointed to the fact that on the contrary, while it may be inconvenient for the operation of a prison, it is in fact easier to seal off and prevent persons from entering the scene of an incident in a prison than in the community.[497] The experts noted that good management of the prison can be maintained by ensuring that evidence is secured promptly and professionally by the appropriate authority so that the scene can then be properly disinfected and returned to use as soon as possible.

Another key element of protocols for incidents are measures to prevent interference in the investigation and reprisals against victims or witnesses. Officers implicated in an incident should therefore not have any contact with the relevant prisoner or witnesses. Similarly, the experts considered that any officer allegedly implicated in incidents under Rule 71 should also not have any contact with members of the victim's family. The experts raised that states, and prison administrations, need to ensure accountability for any infringements of Rule 71, and that any alleged infraction should be reported to the independent investigatory body and the prison director.

Rule 34 calls for 'proper procedural safeguards (…) in order not to expose the prisoner or associated persons to foreseeable risk of harm' in the context of healthcare personnel

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[495] *Blanco Abad v. Spain*, Comm. No. 59/1996, para. 8.5. See also: Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary (2nd ed.)*, Kehl am Rhein, Engel Verlag, 2005, p. 434.

[496] *Special Rapporteur on Torture report* 2013, A/68/295, para. 65.

[497] They noted the example of a fatality on the road, requiring the closure of the road.

documenting and reporting signs of torture or other ill-treatment. The experts noted the link to Rule 57(2) which calls for protection from reprisals in the context of complaints.

This may imply the temporary transfer of any relevant officer to a different part of the facility, or even to a different prison. The experts noted that it may be necessary to move the alleged victim and others (if reprisals are feared on a larger scale); however, it was cautioned that this will usually have the effect of punishing the victim and experts noted risks of retaliation during the transfer/transport itself which need to be prevented. The UN Special Rapporteur on Torture recommended to take into account witness protection programmes 'that fully cover persons with a previous criminal record and staff'.[498]

Both the UN Special Rapporteur on Torture and the UN Committee against Torture have recommended that those potentially implicated in deaths, injuries or torture/ill-treatment 'should immediately and for the duration of the investigation be suspended, at a minimum, from any duty involving access to detainees or prisoners because of the risk that they might undermine or obstruct investigations'.[499]

The experts noted that the modalities of the enquiry by the external, independent body go beyond the remit of the SMR, and referred to the Principles on Effective Investigation and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and the UN Istanbul Protocol (1999) Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[500] for guidance. The experts also recommended the Council of Europe document, *Effective investigation of ill-treatment – Guidelines on European standards*, for further guidance.[501]

Impediments documented with regard to the investigation of cases of torture included fear of reprisals which impede the ability to gather evidence, lack of effective legal representation for victims, failure to follow a protocol of investigation, lack of a systematic approach to investigations and lack of enforcement of penalties handed down where violations were established.[502]

Outcome of investigations

Principle 34 of the UN Body of Principles[503] stipulates that: '[t]he findings of such inquiry [into the cause of death or disappearance] or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation'.

The experts pointed to the view of the UN Committee against Torture that the family of the deceased should be informed of the outcome of an investigation.[504] They shared the assessment of the Special Rapporteur on Torture that information related to the circumstances surrounding

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[498] *Special Rapporteur on Torture report* 2013, A/68/295, para. 66, with reference to Commission on Human Rights, 60th Session, *Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur, Theo van Boven*, 23 December 2003, E/CN.4/2004/56, para. 40.

[499] *Special Rapporteur on Torture report 2013,* A/68/295, para. 66, referring to Principle 3(b) of the Principles on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). *CAT SMR revision* observations, CAT/C/51/4, para. 44.

[500] See respective recommendation in *IACHR Report on Persons Deprived of Liberty,* para. 518.

[501] Council of Europe, *Effective investigation of ill-treatment: Guidelines on European standards*, Strasbourg, 2009.

[502] *SPT Report on visit to* Argentina, CAT/OP/ARG/1, para. 104.

[503] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988.

[504] *CAT SMR revision* observations, CAT/C/51/4, para. 42.

the death of a person in custody needs to be 'made publicly accessible, considering that public scrutiny outweighs the right to privacy unless otherwise justified'.[505]

It is also a responsibility of the prison administration to 'systematically identify and collect the patterns of deaths for further examination by independent bodies'.[506]

[505] *Special Rapporteur on Torture report 2013,* A/68/295, para. 65.

[506] *Special Rapporteur on Torture report* 2013, A/68/295, para. 65.

Annex

List of participants[1]

Expert Meeting on the Implementation of the Revised Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), 7-8 April 2016

Abi Dymond	Omega Research Foundation
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Debra Long	University of Bristol
Dirk van Zyl Smit	University of Nottingham
Haitham Shibli	Penal Reform International, MENA Office
Ilvija Pūce	European Committee for the Prevention of Torture
Kimmett Edgar	Quaker Representative
Lorna McGregor	Human Rights Centre, University of Essex
Luciana Pol	Centro de Estudios Legales y Sociales
Mary Murphy	International Committee of the Red Cross (observer status)
Marzena Ksel	European Committee for the Prevention of Torture
Michael Neurauter	European Committee for the Prevention of Torture
Miriam Minder	Switzerland
Nick Hardwick	Former HMI Prisons Chief Inspectorate
Nigel Rodley	Human Rights Centre, University of Essex
Olivia Rope	Penal Reform International
Philipp Meissner	UN Office on Drugs and Crime
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Sharon Critoph	Independent expert
Sharon Shalev	University of Oxford
Stefan Enggist	World Health Organization
Stephanie Selg	Organization for Security and Co-operation in Europe
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Will Thurbin	United Nations Office for Project Service
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1. The attendees participated in their personal capacity and did not necessarily represent their organisations.

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