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DRAFT COMMENTARY ON THE RECOMMENDATION CONCERNING FOREIGN PRISONERS

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Introduction

The increased movement of people from one country to another has led to a growing number of foreigners being held in prison. This is true also of the Council of Europe member states where more and more people are detained who are not nationals of the country in which they are being held or who have no close ties to it. At the same time, increasing numbers of nationals of the member states are being held in prisons abroad.

As the Preamble to the new Recommendation concerning foreign prisoners recognises, foreign offenders often face a range of difficulties brought about by differences in language, culture, customs and religion, and by their lack of family ties locally and contact with the outside world. They are more likely to be remanded in custody while awaiting trial and are more likely to be sentenced to terms of imprisonment after conviction than other offenders. Evidence of these growing difficulties is provided *inter alia* by studies conducted by both the European Union and the United Nations.[1]

The Recommendation concerning foreign prisoners addresses these difficulties by recommending specific steps that need to be taken to reduce the number of foreign offenders that are incarcerated, to improve the treatment of foreign prisoners and to meet their social needs. The objective of such treatment is not only to deal with the conditions of imprisonment to which such prisoners are subject but also to improve their social integration after release, whether they remain in the countries in which they were imprisoned or return to their home countries. The steps recommended are in addition to those contained in the 2006 European Prison Rules and other recommendations of the Council of Europe concerning the treatment of prisoners.

The new Recommendation concerning foreign prisoners replaces the earlier Recommendation R (84) 12 on the same subject with more detailed provisions aimed at addressing the growing problems in this area. It recommends that Member States draw it to the attention of everybody who deals with foreign offenders in general as well as foreign prisoners in particular.

I. Scope and basic principles

Scope

Rule 1

The primary focus of this recommendation, as is reflected in its title, is to deal with foreign offenders who are, or who may be, held in a prison. This may include people who are facing criminal proceedings but whose status as offender has not yet been established. It also includes those who face proceedings that potentially may lead to incarceration. Finally, the Recommendation deals with offenders who have been released after a period of incarceration.

The Recommendation is not designed to deal with persons who are not offenders or suspected of having offended. However, where such persons are held in a prison as defined in Rule 2*e*, they are included. Thus, for example, a state may detain asylum seekers in a prison designed to house offenders. Although these asylum seekers may not be offenders, they will be covered if they are in a prison. In principle, persons remanded in custody or sentenced to imprisonment should only be detained in prisons. (Rule 10.2 EPR) However, foreign offenders who are held in places other than a prison, for example, in police cells, are also included in the Recommendation. (See Rule 1.2.*b*)

The Recommendation does not deal with persons under the age of 18 years. In this regard the recommendation follows the European Prison Rules, which also exclude juveniles on the ground that they should not be held in prisons. However, as the European Prison Rules recognise, juveniles may sometimes in fact be held in prisons and where this happens they should benefit from additional protection. (Rule 11 EPR) The same applies to juvenile foreign offenders. The detention of juveniles is covered fully by Rec (2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, which provides specific rights and safeguards that are applicable to foreign juvenile offenders as well.

Rule 2

The term 'foreign offender' is used to include, as explained in Rule 1, not only those who are actually incarcerated but also those who may be, or have been detained. The term covers both those who have lived

[1] A M van Kalmthout, F B A M Hofstee-van der Meulen and F Dünkel (eds.), *Foreigners in European Prisons* (2007); United Nations Office on Drugs and Crime, *Handbook on Prisoners with special needs* (2009).

for extended periods in the country in which they are imprisoned, but who have not been naturalised, and those who have arrived recently.

'Foreign offender' is defined in Rule 2*b*, largely in terms of the nationality of the offenders concerned. The term 'national' may be defined differently by member States. The Recommendation does not purport to put forward a legal definition of nationality. A state may define nationality more widely than it defines citizenship. There is also the possibility that someone may be a citizen of more than one country and therefore have dual nationality. In order to ensure that offenders who may technically be 'nationals' but who may in practice may still be 'foreigners' are covered by this Recommendation Rule 2*b* ii, follows para.17 Preamble of the EU FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union and allows also for a wider definition of 'foreign offender'. Rule 2*b* ii provides that for the purpose of this Recommendation persons are also regarded as 'foreign' if they are nationals of the state in which they are subject to criminal proceedings, sanctions or measures but do not have close social ties with that state. In interpreting the words 'close social ties' in the definition of foreign offender, attention should be paid to factors such as residency and family, social or professional relationships and knowledge and competency in the local language. The overall purpose of this inclusive definition is to ensure that persons who may be disadvantaged because they are considered to be foreign are included, as the Recommendation as a whole is designed to give further protection to such persons and not to place additional duties or burdens on them.

Basic principles

Rule 3

Respect for human rights is fundamental to the treatment of all offenders. It is highlighted here as it is important that it is not overlooked where foreign offenders are concerned. This principle emphasises that foreign offenders may have specific needs that differ from those of national offenders. Within the wide category of foreign offenders, such needs may differ amongst particular groups or individuals. These various needs must be met as far as possible in order to ensure substantial equality of treatment of all offenders.

Rule 4

In some jurisdictions, foreign offenders are excluded from consideration for non-custodial sanctions and measures because of their status, either due to the fact that they are not perceived to be entitled to remain in the country after release, or may not have the same social capital or because they may be perceived to pose a greater risk of flight. However, this does not apply to all foreign offenders, many of whom may be entitled to remain in the country and serve a community sentence and who may not pose a flight risk. In addition, non-custodial sanctions and measures imposed on foreign offenders may be executed in another state in terms of international agreements, such as the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964, ETS 051), the EU FD 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and the EU FD 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. These possibilities must be taken into account when such sanctions or measures are imposed.

Rule 5

The principle that custody should be used only when strictly necessary and as a last resort is widely recognised in the Council of Europe legal texts. For example in Recommendation No. R (92) 16 on European rules on community sanctions and measures; Recommendation No. R(92)17 concerning consistency in sentencing; No. R (99) 22 concerning prison overcrowding and prison population inflation; Rec(2003)22 on conditional release (parole); Recommendation Rec(2006) 2 European Prison Rules; Recommendation Rec(2006) 13 on the use of remand custody, the conditions in which it takes place and the provision of safeguards against abuse.

The principle is emphasised here because the danger exists that remand in custody and custodial sanctions will be used too readily in the case of foreign offenders due to what may be unfounded assumptions about their propensity to abscond or to fail to complete community sentences.

Rule 6

The principle that foreign prisoners should be considered for early release is implicit in Rec (2003) 22 on conditional release (parole) and other European instruments. In reality, foreign prisoners are often not considered for early release, or indeed, measures that would prepare them for and therefore enable them to successfully apply for such release. The steps prison authorities should take to prepare foreign prisoners for release are elaborated in Rule 36. Rule 37 deals with the detailed factors to be taken into account in decisions relating to release.

Rule 7

This principle should be read against the background of Protocol 12 to the European Convention on Human Rights which outlaws discrimination. This principle emphasises the need to take positive steps to avoid discrimination and to find solutions for the problems faced by foreign offenders in this respect. Such interventions are required at all stages of the criminal justice process, to ensure substantial equality of treatment for foreign offenders.

Rule 8

The inability to communicate in the language most commonly spoken in a prison is a severe barrier to foreign offenders' ability to participate in prison life. It is the root cause of many problems, such as isolation, lack of access to services, work and other activities, and an inadequate understanding of prison rules and regulations. Therefore it is vital that prison authorities make every effort to facilitate communication and to enable offenders to overcome language barriers. This principle emphasises the importance of access to interpretation and translation facilities. Interpreters should be competent and impartial. In addition, communication should be encouraged by creating opportunities for the learning of languages by foreign offenders, as well as by other offenders, and persons who work with them.

The importance of communication and language in specific circumstances is emphasised throughout the Recommendation. Even where it is not mentioned explicitly, the facilitation of communication remains a fundamental underlying principle that should inform all interactions.

Rule 9

While the social reintegration of prisoners, both un-sentenced and sentenced is important (Rule 6 EPR) the social reintegration of foreign offenders poses particular challenges. Foreign prisoners who will return to their home countries after release may require different forms of preparation than foreign offenders who will remain in the state after release. To assist their social reintegration in foreign countries the preparation for release should therefore be tailored as far as possible to enable the foreign offenders to reintegrate into society in the particular state they will return to upon release. This is dealt with in Rule 36.1, which is primarily addressed to prison authorities. Consular representatives should also provide assistance in this regard (Rules 26.4 and 38.1).

Rule 10

This rule emphasises the positive grounds on which a decision to transfer foreign offenders may be taken. First amongst these is where a transfer will improve the opportunities for social reintegration of the offender. This ground is emphasised both in the Council of Europe Convention on the Transfer of Sentenced Persons (ETS No.112) and in the EU FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. It follows therefore that offenders who are well integrated in the society in which they have committed their offence should not be transferred. It may also be in the interests of public protection to transfer an offender. For example, where an offender will eventually settle in the country to which he is transferred the transfer of the sentence will allow some control to be exercised after conditional release from prison. If this is not done and the offender is expelled after having served the full sentence in the sentencing state, such control cannot be exercised.

All transfers should be subject to fundamental human right standards. This means that the transferring state should request the view of the offenders concerned before any decision is taken and should in any event ensure that the offenders will not be subject to torture, or to inhuman or degrading treatment in the state to which they are to be sent. This principle also applies to decisions to extradite or expel a foreign prisoner.

Rule 11

This rule recognises that a wide range of officials and other persons, including professionals such as medical doctors and lawyers, who work with foreign offenders require training both in the specific legal and practical rules that relate to foreign offenders and in the underlying cultural and ethical bases for treating them appropriately. The details of what such training should entail are contained in the rule 41.

Rule 12

European Prison Rules emphasise that 'prison conditions that infringe prisoners' rights are not justified by lack of resources' (EPR 4). This applies also to foreign offenders whose management and treatment may require additional funds.

II. Use of remand in custody

Rule 13

Reiterating the basic principle stated in Rule 5, Rule 13.1 highlights that remand in custody should only be used when strictly necessary and as a measure of last resort. This principle is also set out in Rule 3.3 of Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes places and the provision of safeguards against abuse. This Recommendation deals comprehensively with the use of remand custody and seeks to restrict its use as far as possible.

In particular, it states in Rule 7 that remand in custody should only be imposed if four conditions are satisfied:

a. there is responsible suspicion that he or she committed an offence; and
b. there are substantial reasons for believing that, if release, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order; and
c. there is no possibility of using alternative measures to address the concerns referred to in b.; and
d. this is a step taken as part of the criminal justice process.

Problems arise if states apply these criteria to both national and foreign offenders in a way that appears to be formally equal but which ignores underlying substantive inequalities in the ability of foreigners to bring their circumstances to the attention of the courts. Although the burden of proving the risk that an offender will abscond lies with the prosecutor or judge (Rule 8 [2] Recommendation (2006) 13), many foreign offenders find they are unable to rebut the implicit presumption that they are more likely to do so. This reduces the likelihood that alternatives to remand in custody will be considered suitable for foreign offenders. In practice, the formally equal application of these criteria may lead to discrimination.

Remand in custody is being ordered too readily for foreign offenders. With remand in custody being the norm rather than the exception, foreign offenders have become overrepresented in the pre-trial prison populations of Europe. On average, they represent 40% of the pre-trial detention population in Europe.[2] Steps should be taken to investigate more fully before denying foreign offenders the possibility of awaiting trial in the community

Both Recommendation (2006) 13 (Rule 4) and Recommendation No. R (99) 22 concerning Prison Overcrowding and Prison Population Inflation (Section 12) encourage states to adopt and use the widest possible range of alternatives to remand in custody. Even though alternatives are often available in national legal systems, practice seems to indicate that prosecutors and judges are reluctant to request and impose such alternatives in general and for foreign offenders in particular. This reluctance has been attributed to the need to protect society, but also due to the perception that they are more difficult to organise and monitor.[3]

[2] [The most recent statistics on foreign prisoners in Council of Europe prisons are based on figures collected in 2009. The percentage of foreign prisoners in the prisons of Member States ranged from 0.7% (Poland) to 91.2% (Monaco). The average percentage of foreign prisoners per prison population was 23.1%. The range of percentages of foreign prisoners in pre-trial detention is similar, ranging from 7.2% (Ukraine) to 100% (San Marino). However, the average percentage of foreign prisoners in pre-trial detention nearly doubles, with the average being at 40.4%. The percentage of foreigners on the pre-trial populations is above 40% in Albania, Andorra, BiH, Croatia, Denmark, Hungary, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Serbia, Slovak Republic, Slovenia, Turkey and Scotland.]
See Council of Europe Annual Penal Statistics, SPACE I, 2009 [PC-CP (2011) 3] at 55.

[3] Van Kalmthout, Knapen and Morgenstern (eds.) Pre-Trial Detention in the European Union, 2009 at 95.

To overcome the difficulties surrounding the use of alternatives for non-resident foreign offenders, Rule 2.2 of Recommendation (2006) 13 states that such measures should be applied in the state where the suspect is usually resident. The EU has adopted a Framework Decision[4] which enables the implementation of supervision measures, adopted as alternatives to provisional detention in the state in which offenders are subject to criminal proceedings, in the state in which they are lawfully and ordinarily resident. This mechanism is designed to reverse the current practice whereby non-residents are much more likely to be remanded in custody pending trial than resident offenders (Para. 5 Preamble). Moreover, it aims to enhance the protection of victims and the general public while also enhancing the right to liberty and presumption of innocence for non-resident accused persons. (Paras. 3 and 4 Preamble and Article 2)

To avoid discrimination in practice, states should encourage the use of available alternatives to remand in custody and develop options that are suitable for foreign offenders. By ensuring that foreign offenders are considered for all available alternatives to remand in custody, states can effectively enforce criminal law while respecting the rights of non-nationals.

One of the major obstacles to the use of alternatives to remand in custody for foreign offenders is the presumption that such offenders are more likely to abscond. (See Rule 7(b)(i) Recommendation (2006)13). This presumption has been attributed to the fact that many foreign offenders do not have a fixed address, or a residency permit. The lack of a residential link often leads to an exclusion from consideration for alternatives. In turn, therefore, it leads to the over-representation of foreign offenders in the pre-trial prison population.

Rule 9[2] of Recommendation (2006) 13, as well as Rule 13.2*b* of this Recommendation, make it clear that it should not be assumed automatically that foreign offenders pose a greater flight risk. All risk determinations must be taken on the basis of the individual circumstances of the offender, examined in light of objective criteria (Rules 8[1] and 9[1] Recommendation (2006) 13). Generalisations are not appropriate.

Moreover, alternatives to pre-trial detention should be tailored to deal with the specific problems faced by foreign offenders. For example, where foreign offenders do not have a fixed address, they could be required to reside at a specific approved address that may be operated by a state, local community or non-governmental agency. If there is a risk of flight, such an order may be coupled with other requirements, such as the surrender of passports, a ban on leaving the country, an obligation to report to police or judicial authorities at specific times or the use of electronic monitoring (See Section 12 Recommendation No. R (99) 22 and Rule 2(1) Recommendation (2006)13). Non-custodial alternatives will usually be preferable where the foreign offender is the primary carer of a child. The availability of more suitable alternatives for foreign offenders should reverse the perceived flight risk such offenders pose, thereby reducing the present over-reliance on remand in custody.

III. Sentencing of foreign offenders

Rule 14

As explained in the Commentary to Rule 5, Recommendation No, R (99) 22 concerning prison overcrowding and prison population inflation and other Council of Europe Recommendations have strongly emphasised that sentences of imprisonment should only be used when absolutely necessary and as a measure of last resort. The challenge is to ensure that this principle is also applied to foreign offenders, particularly in an era where outsiders tend to be punished harsher than local people. If applied fully and in a non-discriminatory manner, the provisions of Recommendation R(92)17 concerning consistency in sentencing can assist states to meet this challenge. Its guidance on how to avoid custodial sentences should be applied in all cases. In this regard Para A 5 of Recommendation R(92)17 should be noted, as not only does it emphasise that imprisonment should be regarded as a sanction of last resort, but it goes on to explain that and it “should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offence would make any other sentence clearly inadequate”.
The same para. of Recommendation R(92)17 adds:

> “Where a custodial sentence on this ground is held to be justified, that sentence should be no longer than is appropriate for the offence(s) of which the person is convicted. Criteria should be developed

[4] EU Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. This Framework Decision will be implemented by all Member States from 1 December 2012 (Art. 27(1)).

for identifying the circumstances which render offences particularly serious. Wherever possible, negative criteria to exclude the use of imprisonment, in particular in cases involving a small financial loss, may be developed."

This approach should be applied to foreign offenders too. Its adoption requires the rejection of the assumption that imprisonment, often coupled with expulsion, is the only appropriate sentence for foreign offenders convicted of all but the most minor offences. If foreign offenders are routinely considered for the full range of sentences, this danger can be minimised.

Although foreign offenders should be considered for the same range of sentences as national offenders, it should also be borne in mind, that sentences may have a harsher impact on foreign offenders, both in terms of their experience in prison and as regards their possibilities for social reintegration. This should be taken into consideration when the type or quantum of the sentence is being determined. Pre-sentence information required by Rule 14.2 will enable the judicial authorities to make informed judgement on these factors.

Sentencing authorities should also bear in mind that member states have ratified bilateral and multilateral treaties to facilitate the transfer of sentenced persons to states with which they have legal and social links. As these transfer mechanisms enable sentenced persons to serve both custodial and non-custodial sentences in their own community, this should further encourage judicial authorities to consider the fullest range of sanctioning options.

In reality, sentences may have a devastating impact on the children of offenders. This is particularly true of foreign offenders who may be the primary carers for their children. The Convention on the rights of the child requires that the best interests of the child be considered in all official decisions that may affect them. Therefore their interests should also be borne in mind when their foreign parents are sentenced (Rule 14.4).

IV. Conditions of imprisonment

The conditions of imprisonment for foreign offenders are, subject to the rules below, governed by the European Prison Rules as they apply to all prisoners including foreigners.

Admission

Rule 15

Admission to prison is always intimidating. It may be particularly so for foreign prisoners. Therefore, extra care needs to be taken to communicate effectively with them from the outset. Staff who are trained in accordance with Rule 41.1 should be involved in the admission process to facilitate such communication (Rule 15.4). The importance of effective communication is apparent from rule 15.1 which notes that information should be provided orally and in writing and that such information should be in a language that prisoners understand. A good practice is for prisoners to receive a foreign prisoners' information pack which can be translated beforehand into the languages of most foreign prisoners. Such a pack should include the information set out in rule 15.1 *a* to *d*. Prisoners should be allowed to keep it in their possession and the authorities should update it regularly (Rule 15.2). In the information provided to prisoners, it is important to mention matters such as rules governing discipline, legal aid, prison work and release. The provision of such information prevents misunderstandings and contributes thus to a less conflictual prison environment. Particular emphasis should be put on allowing foreign prisoners to communicate on admission to persons of their choice the fact of their imprisonment. (Rule 15.3).

Allocation

Rule 16

The allocation of foreign prisoners to particular prisons requires balancing a wide range of factors. Some of these are applicable to all prisoners, such as the desirability of housing them close to their family and community ties. Where foreign prisoners are resident in the country in which they committed an offence or have close family ties, these may be the key considerations, balanced always with the requirements of safety and security. On the other hand, where foreign prisoners' primary contacts are abroad it may make more sense to house them close to transport facilities that would allow their families to travel from abroad to visit them and that will enable them to keep in touch with their consular representatives (see Rule 16.2). Another factor to be considered is whether it is better to house foreign prisoners in prisons where there are others of their nationality, culture or religion. This may reduce their sense of isolation, but may conversely be undesirable from the point of view of safety and security.

Accommodation

Rule 17

Accommodation of foreign prisoners requires the balance of various factors. One factor to be considered is whether it is better to house foreign prisoners in a given prison together with their compatriots or others who share their culture or religion. As is the case with allocation this may reduce their sense of isolation, but may conversely be undesirable from the point of view of safety and security. It may also be detrimental to their interaction with the other prisoners. Particularly if they are released in the country in which they are imprisoned, this may hamper their eventual social reintegration. When deciding whether to allocate foreign prisoners to single or communal cells within a prison their cultural preferences shall be borne in mind.

Hygiene

Rule 18

The general requirements of hygiene need to be applied to all prisoners. In the case of foreigners however, a certain degree of flexibility may be necessary to make provision for their cultural and religious preferences and traditions, while not compromising on standards of cleanliness. For example, where these preferences require men to grow beards, they should not be prohibited from doing so but there should be facilities for them to keep their beards clean and trimmed. The facilities provided should enable prisoners to shower in a way which is sensitive to their understandings of public decency.

Clothing

Rule 19

In the case of clothing for foreign prisoners, a balance of various concerns is required. Prisoners may legitimately wish to wear clothing that reflects their cultural and religious traditions. However, requirements of safety and security may not allow certain forms of dress which for example could enable them to hide things, or make identification difficult. Safety and security concerns should not be used as an excuse to forbid a particular form of dress where it does not pose a substantial risk. Where prison uniform is required concessions should still be made: for example, Sikhs could still be allowed to wear their headdresses.

Nutrition

Rule 20

The rule in EPR 22.1 already provides for taking into account cultural and religious preferences in diet. For foreign prisoners this may be achieved in practice by allowing them access to a prison shop which stocks the food they prefer. Consular representatives may be approached for help in this regard. In order to take account of religious preferences in respect of meal times, such as the Muslim practice of not eating during the day in the month of Ramadan, adjustments may need to be made in the overall pattern of the prison day.

Legal advice and assistance

Rule 21

It is important to recognise that foreign prisoners may need legal advice not only on matters relating to their criminal trial or conviction, but also on a wide range of other matters including their immigration status and their family affairs as well as matters of prison law. Various steps should be taken to ensure that they benefit from the legal advice and assistance that is available to all prisoners in the country in which they are held. This may include the involvement of outside agencies which specialise in the assistance of foreign prisoners (Rule 21.5). Important in this regard is that they have information about the services they can access and that such access is facilitated by the prison authorities. They may also need specific help in respect of translation (Rule 21.1, 21.3 and 21.4). It is important that such translation is accurate, impartial and recognises the requirements of legal confidentiality. It should be provided where a prisoner does not have a full understanding of the language used.

Contact with the outside world

Rule 22

Contact with the outside world is particularly important for foreign prisoners who may easily become isolated. Research has also shown that family connections are important for offenders' social reintegration. It is therefore essential to minimise the damage that imprisonment causes to family ties. Rule 22.1 lists a wide range of forms that contacts with the outside world could take. The prison authorities should do what they can to facilitate contacts with family and friends, consular representatives, probation and community agencies and volunteers. This can best be achieved by flexibility in relation to the rules that govern contact of prisoners with the outside world generally. Rule 22.2 deals with the flexibility with the use of language. Whilst security concerns may arise when prisoners speak a language which the authorities do not understand, practical measures relating to interpretation can minimise this concern. Flexibility in respect with the time and length of telephone calls (Rule 22.3) and the length of visits (Rule 22.5) can also improve contact with the outside world as can a flexible approach to the granting of visas to family members (Rule 22.7). In addition, the authorities are enjoined to assist prisoners with the cost of communication (Rule 22.4): for example they may need more expensive phone calls or stamps for their letters. Good practices in this respect involve the use of videocalls and videoconferences, especially in cases when families live in faraway countries and travel expenses are prohibitative to allow regular visits.

Special measures to enable foreign prisoners to keep in contact with their children are particularly important as they are valuable both to the prisoner concerned and are in the interest of the child (Rule 22.6 – see also Rule 35). Where children visit their imprisoned foreign parent, there should be open contact with the parent wherever possible (Bangkok Rules 26 to 28).

The prison authorities can assist directly in the preservation of family relationships by informing family members of major events in the life of the prisoner including their transfer, major health issues and their death. To achieve this, the authorities need to keep in contact with known family members and have a record of their most recent contact details. Such contacts should of course always be subject to the approval of the prisoner (Rules 22.8 and 22.9). The reverse situation should also be considered. Where the prison authorities are given news of major events in the life of a member of the prisoner's family they should convey this information to the prisoner (EPR 24.6).

Rule 23

Isolation of foreign prisoners can also be combated by allowing them to remain well informed of public affairs, including news of what is happening in their countries of origin. To this end, they should be allowed to subscribe to publications (Rule 23.1) and be given access to radio and television broadcasts (Rule 23.2). Both of these should be available in a language they understand. Access of this kind will also facilitate their reintegration, particularly if they return to their home country.

A wide range of agencies can contribute to better contacts for foreign prisoners with the outside world. Volunteers have a particularly important role to play in this regard. Compatriots, who may be members of associations or individual volunteers, may play an important part in preserving foreign prisoners' links with their home countries. A degree of flexibility on the part of the prison authorities is required when recognising such associations or individuals and ensuring that they have appropriate access to foreign prisoners (Rule 23.3). Probation agencies can assist in this process, inter alia by liaising with their counterparts in the country of origin of foreign prisoners (Probation Rules 63 and 64).

Contacts with consular representatives

In the case of foreign prisoners contacts with consular representatives assume particular importance. In this regard, the Vienna Convention on the Consular Relations should be borne constantly in mind (See also Rule 38 of the U.N. Standard Minimum Rules on the Treatment of Prisoners).

Rule 24

Rule 24 deals with contacts with consular representatives from the perspectives of foreign prisoners. They have the right to such contacts and to reasonable facilities to communicate with their consular representatives. Equally, foreign prisoners may refuse to make contact with consular representatives. There may be problems where prisoners are without consular representation in the country in which they are detained or indeed are stateless. In such cases prisoners may communicate with consular representatives of another state which takes charge of their interests or with an international body whose task it is to do so.

Rule 25

Prison authorities have duties to both foreign prisoners and consular representatives. In the case of the former they must keep them informed of the role of consular representatives and the actions that such representatives may take on their behalf. However, prison authorities should not place pressure on prisoners to take up contacts with consular representatives if they do not wish to do so. As regards the consular representatives themselves the duty of the prison authorities is to cooperate with them and to facilitate their provision of services.

The prison authorities also have a duty to record information about the consular contacts with prisoners. The purpose is simply to have a record that such visits took place and not to record their content, which should normally be confidential. To ensure that pressure is not put on foreign prisoners a record should also be kept of where they waive their right to such contact.

Rule 26

Rule 26 deals with the duties of consular representatives towards foreign prisoners. It should be emphasised that consular representatives can assist their nationals and other prisoners for whom they may be responsible in various ways and that this assistance can make a major positive contribution to the lives of foreign prisoners. Assistance includes contact through consular representatives with the outside world, and provision of information. As far as contact is concerned, they should assist with family visits, including with the delivery of visas, if required, and generally in providing information about what is going on in the home countries of the prisoners. Consular representatives are also assisting in repatriation of corpses of deceased nationals, including prisoners, as well as of assisting their family in dealing with their property or heritage. They may also be able to support prisoners in practical ways, for instance by providing them with literature and other reading materials (Rule 26.5) and even providing indigent prisoners with financial support. Consular representatives may also be an important source of information on legal and financial matters and the possibilities for international transfer. Consular representatives need to play an active role in terms of the international instruments governing such transfers.

Consular representatives may also provide an important link between national and probation agencies and foreign prisoners abroad (Probation Rules 65). In addition, they may assist with organising volunteers to visit such prisoners. Given the complexity of their role, it is important that consular representatives keep themselves fully informed about the law and regulations governing all aspects of imprisonment of foreign prisoners and in particular of their duties in this regard. (See also Rule 42.2)

Prison regime

Rule 27

Rule 27 deals with the prison regime as a whole. It emphasises that in order to achieve a balanced programme of activities it may be necessary to take additional positive measures to ensure that foreign prisoners can fully participate in such activities. These may include interpretation and language classes as otherwise they may be excluded. There is a danger that foreign prisoners will be regarded as less worthy of treatments and training because they may be transferred, extradited or expelled. Rule 27.2. states that this should not be the case. On the positive side, foreigners may have special welfare needs that should be accommodated within the overall programme of activities.

Work

Rule 28

It is particularly important for foreign prisoners to be engaged in useful and productive work as they often do not receive financial support from outside the prison because of the lack of social ties with the country of detention. The authorities should take steps in order to ensure that foreign prisoners are not discriminated against in respect of work allocation and training. Account should be taken of their cultural practices: for example foreign prisoners may have a different day of rest than what is customary for other prisoners. Where programmes take place outside prison, foreign prisoners should be considered for them too (Rule 28.2 and 28.3).

The European Prison Rules already provide for prisoners to transfer some of their earnings out of prison (Rule 26.11). In the case of foreign prisoners, Rule 28.3 provides explicitly that they may transfer part of their earnings to family members abroad. However steps may be needed to ensure that this is not abused, for

example by prisoners being extorted.

Rule 28.2 allows foreign prisoners to participate in the social security system most appropriate for them by providing that they can contribute to the system in the country in which they are most likely to live after release. As social security systems differ in the coverage that they provide – unemployment benefits, pensions and health care are funded differently in various countries – careful attention needs to be paid to where and how such contributions should best be made.

Exercise and recreation

Rule 29

It is important that foreign prisoners have adequate exercise and recreational activities. Internal regulations may need to be applied flexibly so that foreign prisoners are not excluded from such activities. Such flexibility may also be required to ensure that activities do not conflict with the cultural practices of these prisoners. Cultural differences can be used to positive effects. For example, prisoners may share different cooking techniques, games and entertainment. This may promote intercultural understanding and may well improve relationships amongst prisoners.

Education

Rule 30

It is important to provide education and training for foreign prisoners which meet their particular needs. Learning of languages plays an important part in this and Rule 30.1 and 30.2 encourage learning the daily working languages of the prison and the languages in the country to which the foreign prisoners may be returned, respectively. The educational and vocational training for foreign prisoners shall be tailored as far as possible to their specific needs as this is important for their eventual social reintegration. Rule 30.3 sets out how this should be done.

The offerings of the prison library too should be shaped to meet the particular needs of foreign prisoners (Rule 30.4). Consular representatives and non governmental organisations should be encouraged to add to the materials available in prison libraries for the nationals of their countries.

Freedom of thought, conscience and religion

Rule 31

This rule is designed to give practical effect to the right to freedom of thought, conscience and religion that is recognised by Article 9 of the ECHR and Rule 29 of the EPR. Prison authorities have a general duty to facilitate the exercise of these rights by foreign prisoners. They may do so in various ways. Rule 31.2 encourages them to keep a list of approved representatives of all the religions and beliefs of foreign prisoners. There may be many of these and it may be difficult to deal with all of them. However, the authorities should be as flexible as possible in this regard. Religious observance may raise security concerns but these should not trump this fundamental right except where it is essential to impose limitations. Such limitations should be the minimum necessary to guarantee safety and security. The right to freedom of thought, conscience and religion must be balanced by the requirement that foreign prisoners may not be compelled to practice any particular religion or belief. Indeed prisoners should be protected against the risk of proselytisation both by representative of any faith or religion, staff or fellow prisoners.

Health

Rule 32

The principle of equivalence of care recognised in Council of Europe texts relates not only to the provision of health care within prison which is of the same standard as is available in the general community, but also to ensuring that all prisoners can access this health care. In reality, however, foreign prisoners may not be covered by the national health care insurance system of the state in which they are detained. Prison authorities must therefore ensure that foreign prisoners have access to the necessary general medical and dental treatment and care, as well as to more specialised medical services that may be required. Given that foreign prisoners may also have specific health problems or suffer from diseases that are not common in the state in which they are detained, prison authorities should ensure that sufficient resources and funds are allocated to deal with these problems effectively. In the case of transmissible and infectious diseases, it may

also be necessary to ensure the health of other prisoners and staff who are in contact with foreign offenders (see Recommendation No. R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison).

In addition from being trained to diagnose and treat diseases and conditions that may be more typical for foreign prisoners, medical and health care staff should also be trained in cultural diversity and methods for interacting with prisoners coming from different backgrounds. This expertise is especially important for the provision of psychiatric and mental health care. In particular it may be more difficult for prisoners coming from different religious, cultural and linguistic backgrounds to adjust to the culture of the country in which they are detained and more specifically to prison life. This may lead to excessive feelings of abandonment and anxiety. Accordingly, both prison authorities and medical and health care staff should pay particular attention to the prevention of self-harm and suicide among such prisoners.

As linguistic barriers may hinder the provision of proper health care, and the need to respect the patient's right to privacy, more informal methods of interpretation may have to be relied on. Extreme caution should be exercised in such cases, and informal interpretation used only if it respects the medical confidentiality of the patients concerned and they consent.

Some cultural traditions do not allow a prisoner to be examined by a medical practitioner of a different gender. Save in the case of a medical emergency, such requests should be met where possible.

In recognition of the principle that prisoners with a short term fatal prognosis should be transferred to external medical facilities to ensure their best possible care, (Recommendation (98) 6 Rule 51), for humanitarian reasons, the possible transfers of foreign prisoners who are terminally ill and who have strong social ties abroad should be considered.

In any case of transfer, extradition or expulsion, steps should be taken to ensure the continuation of medical treatment. This may involve the transfer of medical records and the provision of necessary medical aids and medication. In any case, medication should be provided for use during transit to the other state.

Good order, safety and security

Rule 33

The maintenance of good order, safety and security in a prison housing prisoners of various backgrounds requires awareness of the potential conflicts that may arise between prisoners, and between prisoners and staff or other persons working in or visiting the prison. While such issues should be considered during the selection and training of staff (Rules 40 and 41), it is also important that prison authorities adopt the principles of dynamic security in their management of prisons. By doing so, and ensuring staff prioritise the creation and maintenance of everyday communications and interaction with all prisoners, any potential or current tensions or problems can be detected and dealt with as early as possible. Effective communication in this respect requires awareness and understanding of cultural and religious differences and possible inter-ethnic tensions. Understanding and tolerance among prisoners, and between prisoners and staff, can be enhanced by participation in activities that raise awareness of cultural, religious and ethnic diversity. (Rule 29.2) Staff should also be aware that tensions may arise due to linguistic barriers and therefore, be trained to deal with such situations. This may involve reliance on informal means of interpretation and translation, which can be offered by other prisoners.

Prison authorities should keep up-to-date records about the composition of their prison populations. While information on their cultural, religious and ethnic backgrounds can be a useful tool in creating policies to prevent and manage potential and actual conflict, such information should not decisively affect decisions on the risk posed by an individual or a group of foreign prisoners to good order, safety and security. However, where information is available that there is a risk to the safety of a particular individual or group, all possible measures must be taken to ensure their safety (*Rodic and Others v. Bosnia and Herzegovina*, application no 22893/05).

Women

Rule 34

The COE recognises the need to respect principles of non-discrimination and individualisation in relation to prisoners. (See Rules 3 and 7) These principles apply also to women prisoners.

Given that women represent only a small proportion of the prison population, there are fewer accommodation possibilities for them. This often results in women prisoners being housed far away from their families and children. Research has shown that separation from family members, children and the community in general may have an extremely adverse impact on women prisoners. While this problem also affects foreign female prisoners whose families are resident in the state in which they are imprisoned, it is much more acute in the case of foreign female prisoners whose families are abroad. These women may become further isolated due to linguistic barriers that prevent or reduce access to social support and other services and activities in prison. (Rule 34.1)

It is recognised that imprisonment may affect and impact on women differently from men. In particular, women with children may suffer from feelings of guilt and helplessness due to enforced separation, especially if the children are resident in a different country. Research has also shown that women are more likely to commit acts of self-harm and suicide, particularly during the very early stages of detention. A history of abusive and violent relationships and experiences may also lead to heightened anxiety and post-traumatic stress disorders during detention. The situation may be more complicated for foreign female prisoners coming from different cultural backgrounds. Accordingly, medical and healthcare staff should be particularly attentive and trained to deal with these psychological needs. (See Rule 34.1 EPR) To ensure medication is not the primary means of dealing with the psychological problems women may face while in detention, support, counselling and treatment programmes should be provided when appropriate.

This Rule also develops further Rule 32.6, which emphasises the need to provide health care in a culturally appropriate manner. Health care should be provided in a manner that recognises gender-specific needs. In particular, attention should be paid to sexual and reproductive health issues and the provision of female hygienic and sanitary facilities and items. (Rule 34.2)

In general, imprisonment should not be used as a sanction for pregnant women.[5] However, in situations where such women are imprisoned, the prison authorities must provide the facilities necessary to meet their needs. In the case of foreign women prisoners, this may require cultural and religious sensitivity.

As it was established in Rule 34.3 EPR, prisoners should be allowed to give birth outside prison. There may still be occasions in which the child may be born within the prison. Independent of whether the child is born in or outside of the prison, the authorities should respect the cultural and religious preferences of the mother in relation to the birth and post-natal care. (Rule 34.3)

Children

Rule 35

Independent of whether children are born inside or outside the prison, they may be allowed to remain with their parent in prison if this is in their best interests (Rule 36.1 EPR and Art. 18 UN Convention on the Rights of the Child). In the vast majority of cases, this parent will be the mother. There may however be some circumstances in which children may be allowed to remain with their father, for example in asylum and immigration cases where the father is the primary carer and is detained in prison.

Practices may vary from country to country in relation to the upper age limit until which children may be kept in prison with their detained parent. In some cases, they can remain in prison up to the age of 6 years. In other countries, they may be put into state or foster care after their birth. Whatever the national practice are, prisons should have special facilities and arrangements for keeping such children with their parent. The facilities should be staffed with trained personnel. (See Rule 36.2 EPR) In addition to ensuring that children receive appropriate care (See Rule 36.3 EPR), the arrangements should respect different religious traditions and cultural approaches to parenthood. (Rule 35.1)

Research has shown that maternal separation in the first months, and even years of childhood, can be very detrimental as it can cause long-term difficulties for children, including impairment of attachment to others, emotional adjustment and personality disorders.

Even though the development of young children can be impaired as a result of their confinement in a closed environment like a prison, this negative effect outweighs the benefits of remaining with their mother. Therefore, any decision to remove a child from prison should only be taken after special consideration of all circumstances and only if this is in the best interests of the child. The same criteria apply to the decision on whether to keep the child in the state where the parent is imprisoned or to send the child abroad. The views

[5] COE Parliamentary Assembly Recommendation 1469 (2000) and Rule 10 Rec 2006 (13) on the Remand Custody.

of both parents, if possible, shall be taken into account and all appropriate care arrangements shall be examined before a final decision is reached.

Where it is in the best interests of the child, preference should be given to options which enable the maintenance of regular contact between the children and their imprisoned parent. Such decisions should be taken by an impartial body with experience and knowledge of children's welfare rights and needs and should be subject to appeal. (Rule 35.2)

In recognition that prison visits can be a difficult experience for children, and even more difficult for children living abroad, prison authorities should take particular care to ensure that the measures put in place as required by Rule 22 to maintain familial relations are implemented in a child-friendly and sensitive manner. This should include consideration of the children's availability for such visits, bearing in mind they may be attending school. (Rule 35.3)

The rules relating to flexibility (Rule 22.3 and 22.5) in relation to the times and types of communications should be implemented in a way that takes into consideration the children's schedules and ability to communicate.

Some countries apply *jus soli* so that children born to a foreign prisoner may obtain the nationality of the state in which they are born. In other countries, such children may remain stateless until the time their legal status is decided. In all cases, children should be provided with a birth certificate and any other identification papers needed to determine their legal status. (Rule 35.4)

V. Release

The release of foreign prisoners and the conditions to which they are subject should be governed by Recommendation 2003(22) concerning conditional release (parole) and Recommendation 2010(1) on the Council of Europe probation rules.

Preparation for release

Rule 36

Rule 36 is a continuation of the principle contained in Rule 9. Preparation for release for foreign prisoners should start, as for all other prisoners, as soon as possible after admission. This should occur notwithstanding the fact that decisions in relation to release are generally taken at a later point in the sentence. Careful consideration should be given to whether the prisoners will remain in the state in which they are detained. Irrespective of which country the prisoner will live in upon release, the sentence of a foreign prisoner should be planned with a view to their successful social reintegration. Foreign prisoners should not be excluded on the basis of any possible removal, from any treatment, work, education or activity programmes.

There is a range of steps which authorities should take to facilitate this. For foreign prisoners, one of the most important issues is often the determination of their legal status and situation. There may be cases of prisoners who may be legally residing in the country in which they are detained but whose residence permits may have expired during their detention. There may be other cases where the right to reside has been revoked due to the commission of an offence. There are also foreign prisoners who were illegally residing in the country. Prison authorities should ensure that foreign prisoners have access to all the relevant information and assist them to comply with the procedures necessary for the determination of their legal status.

The legal status of foreign prisoners should be determined as soon as possible after they are admitted to prison. The early determination of legal status will assist prison authorities to plan the foreign prisoners' sentences with a view to their successful reintegration.

Progressive preparation for release and social reintegration requires that prisoners benefit from prison leave and other temporary release schemes. In practice, foreign prisoners often are denied such possibilities due to a lack of a permanent address in the country and the flight risk they are considered to pose. To avoid this discrimination, leave requests should be dealt with on a case-by-case basis. Good practice would entail also taking into consideration the address of family members resident in the state or associations that provide accommodation for such prisoners on prison leave and also for their families who may be visiting from abroad. Prison leave is therefore also important to facilitate the maintenance and re-establishment of contacts with family members, a crucial factor in successful reintegration. If foreign prisoners are denied

requests for prison leave, steps should be taken to ensure that such prisoners have alternative supplementary means of maintaining or re-establishing contracts with their family members.

If foreign prisoners are to remain in the country in which they are detained, preparation for release should include assistance with social needs, such as housing and employment in cooperation with probation and social services. If foreign prisoners will be transferred, extradited or expelled to another country, contacts should be established with the relevant authorities and support services in that country as soon as possible. In such cases, all relevant information about the prisoner should be transferred to the relevant authorities of that state. In order to ensure continuity of treatment and care, it is very important to transfer all relevant medical records in a manner that respects medical confidentiality. Other information and records that will facilitate the prisoners' reintegration should also be transferred. Foreign prisoners should also be informed about the details of their extradition or transfer, including information about prison life and possibilities for release.

Consideration for release

Rule 37

Foreign prisoners should not be excluded from consideration for release on the basis of their nationality or legal status. Release decisions should be taken on a case-by-case basis. In some countries it may be possible to grant conditional release even where a foreign prisoner is subject to expulsion but where the possibility exists that such order may be reversed at a later stage in case the prisoner has abided by the conditions set for his release. Moreover, foreign prisoners should be considered for all possible early release schemes, particularly where they are parents with young children. In order to enable them to understand and participate in the decision-making process relating to their release, foreign prisoners should have access to legal advice and assistance. (see Rule 21)

Release from prison

Rule 38

Upon release from prison, some foreign prisoners will remain in the state in which they were detained while others will leave that state. In all cases, the relevant authorities, including the foreign prisoners' consular representatives, should assist such prisoners to have in their possession the necessary identification papers and other documents that would allow them to find housing and employment and to travel to their chosen place of residence. (EPR 33.7) Foreign prisoners should also be provided with a copy of their medical records. The authorities should also assist foreign prisoners with travel arrangements that would enable them to reach their chosen destination. (EPR 33.8)

In many countries, prisoners are paid for the work they undertake in prison. Upon release, salaries for such work may not yet have been paid. In such circumstances, the prison or consular authorities should facilitate the payment or transfer of such sums to the foreign prisoner.

International transfers

Rule 39

The Council of Europe Convention on the Transfer of Sentenced Persons and its Additional Protocol provide detailed procedures for the transfer of prisoners to other states to complete their prison sentences. With a view to the maintenance of family ties, foreign prisoners with children who are resident abroad should be considered for international transfers as soon as possible. It is important that foreign prisoners who are eligible for such transfers are informed about such possibilities, the necessary procedures to follow, and crucially, the consequences of such transfers, as soon as possible after admission, in a language which they understand. The prisoner should have access to legal advice and assistance in this connection. The cooperation between prison authorities and consular representatives is crucial in this respect. In all decisions in relation to transfer, the prisoners' views must be taken into account. The procedure for determining the prisoners' views must provide such prisoners with a real opportunity to present their views. This information enables state authorities to consider the potential impact of the proposed transfer on prisoners and their families. State authorities must also take into account other potential risks of human rights violations such a transfer would pose, ranging from the violation of the right to family life, poor prison conditions and regimes which would not facilitate social reintegration, to the more extreme situation where there is a risk of torture, inhuman or degrading treatment. (See Rule 10). Given the potential risks that may be involved, officials responsible for making such decisions should be provided with appropriate training and have access to

objective and independent information about the human rights situations in other countries. (CPT/Inf (97)10 at para. 29)

VI. Persons who work with foreign offenders

Selection

Rule 40

Staff selected to work with foreign offenders should possess well-developed interpersonal communication skills, be familiar with different cultures and at least some staff should have the language skills required to communicate with these offenders (CPT/Inf (97)10 at paras. 29). Where possible, such staff should also be selected to represent the various cultural and linguistic backgrounds of the offenders detained with whom they work. In addition, staff should have the qualities necessary to form good human relationships and a willingness to learn (Rec (97)12, paras. 7 and 10).

Training

Rule 41

Staff who work with foreign offenders should be provided with specialised training on the specific issues that affect foreign prisoners. This should include training on the importance of respect for cultural diversity. To enable staff to deal with particular problems faced by foreign offenders and in particular by detained foreign offenders, training should be provided on methods to recognise possible symptoms of stress, whether post-traumatic or induced by socio-cultural change, and the appropriate action to take (CPT/Inf (97)10 at para. 29). Staff should be provided with information about the different languages spoken by the offenders with whom they work and opportunities to learn such languages. It is also important for such staff to be aware of and understand relevant legal and human rights standards and to apply such standards in their everyday work. Training on these standards must therefore be provided and regularly revised to ensure it reflects changes in the law but also in the prison and probation population and the wider social situation. This will ensure that staff are equipped with the necessary knowledge to work with and manage foreign prisoners. In addition to in-house training, staff who work with foreign offenders may also benefit from exchange programmes whereby they spend time working in a prison or probation system in another country.

Specialisation

Rule 42

Prison authorities should consider creating specific posts or roles for persons who would be responsible for overseeing and evaluating the implementation of policies and practices relating to foreign offenders. The creation of such posts would facilitate direct contact between the prison and probation services and other bodies, including national and international agencies, professionals and associations, consular representatives, the prisoners' families and volunteers who assist foreign offenders. This form of liaison is crucial for dealing effectively with foreign offenders and their specific needs. As consular representatives are often involved with foreign offenders throughout the criminal justice process, they should receive training. Training on relevant legal measures should be provided before consular representatives are posted to a particular country and this should be supplemented by country specific information on the applicable law and practices when they are stationed there.

VII. General Provisions

Rule 43

In order to design effective policies to deal with foreign offenders, it is necessary to have access to current and accurate information and research about the proportion of foreign offenders involved in the criminal justice process, the range of sanctions or measures that are being imposed on such offenders and decisions on their release, transfer, extradition and expulsion (See §§J1-J5 of Recommendation on R (92) 17 Consistency in Sentencing).This rule, therefore, emphasises the need for authorities to fund and initiate research, which should be based on the collection of empirical information and data. This body of information should be collated and analysed in a manner that enables comparisons and discussions with other states and organisations, and the evaluation and revision of policies to reflect contemporary realities and standards.