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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**Council for Penological Co-operation**  
**(PC-CP)**

**MEMBER STATES' COMMENTS ON THE DRAFT  
COMMENTARY TO THE RECOMMENDATION  
CONCERNING FOREIGN PRISONERS**

## 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.<sup>1</sup>

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 specific social and personal 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 No. 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 is to deal with foreign offenders who are, or who may be, held in a prison. (Rule 1.1) 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. (Rule 1.2) Finally, the Recommendation deals with offenders who have been released after a period of incarceration. It is recognised that the situation of foreign offenders may differ in various ways. For example, a foreign offender who is detained briefly before deportation may not have the full range of needs of someone who is likely to spend many years as a prisoner in a foreign country. Nevertheless, this Recommendation should be applied to the first category to the extent practicable.

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 2e, 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 considered to 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 Recommendation (2006) 2, European Prison Rules) 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)

Juveniles are not excluded from this Recommendation. However, the Recommendation applies only to prisons that normally house adults. In practice, therefore, juveniles will only benefit from this Recommendation if they are held in such prisons (see Rule 11, European Prison Rules). 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

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<sup>1</sup> 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).

The term '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. For the purpose of this Recommendation, the term offender includes persons facing criminal proceedings. It should be noted that this definition is not prejudicial to the presumption of innocence (Rule 2a).

Rule 2b defines the term 'foreign offender' in relation to nationality; in other words, those who do not have the nationality of the state in which they are subject to criminal proceedings, sanctions or measures or are deprived of their liberty, will be considered to be foreign offenders. This Recommendation does not purport to define nationality. However, to ensure effective application, states are urged to adopt a flexible approach to nationality for the purposes of implementing this Recommendation. As stated in the preamble, this Recommendation is designed to provide assistance to those who lack linguistic, cultural, religious, residential, family and social links with the state in which they are detained or are subject to proceedings, sanctions or measures. Accordingly, in the case of persons who lack these links, and where it is in the best interests of such persons to do so, States should extend the protections of this Recommendation to those deemed to be nationals in the strict legal sense. Conversely, some of the recommendations may not be necessary for those who technically qualify as 'foreign offenders', but who have considerable linguistic, social or other links to the relevant state. Classification as a 'foreign offender' for the purposes of this Recommendation should be based, not on technical definitions of nationality, but on the objectives of alleviating isolation and enhancing possibilities for social reintegration. Furthermore, the term 'foreign offenders' includes persons with dual nationality, those awaiting the finalisation of decisions on immigration status and stateless persons.

### *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 Council Framework Decision 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 Council Framework Decision 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 in order to foster the application of such sanctions or measures.

The consideration of non-custodial sanctions and measures will often require information about offenders' personal and social circumstances and the resources available to support their resettlement in their home state. Arrangements should be made to ensure that this information can be obtained from the relevant probation and social services in the offender's country of residence or nationality.

#### 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. See for example 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 in 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. In this regard, the CPT has recommended that States review their legal and administrative provisions to ensure that foreign prisoners are not discriminated against by being excluded from eligibility for a range of measures, such as more open conditions, home leave and conditional release.<sup>2</sup>

#### 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 (see Rule 41.2).

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

This basic principle alerts authorities to the difficulties that foreign prisoners may face due to linguistic, cultural and religious differences and their lack of social support. Special welfare measures should be put in place to assist foreign prisoners to overcome the problems that these differences may cause and in so doing, to alleviate the potentially resulting isolation. Such measures may include financial and other material assistance, vocational and language training and a flexible approach to contact with the outside world (see, for example, Rules 21-24, 27.1, 28.1-2, 30.1-2, 34.1-2, 35.3 and 36.2*b-d*).

While the social reintegration of prisoners, both un-sentenced and sentenced is important (Rule 6 European Prison Rules) 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, which is primarily addressed to prison authorities. Consular representatives should also provide assistance in this regard (Rules 26.1*c* and 38.2). Probation agencies and social services also have a valuable role to play in this regard.

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<sup>2</sup> CPT visit to Bulgaria, 2006 (CPT/Inf (2008) 11), para. 105.

## Rule 10

This rule emphasises the positive grounds on which a decision to transfer foreign offenders may be taken. There are several justice and law enforcement related reasons for transferring persons to serve their sentences in a state with which they have links. It may 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.

In addition to the pursuit of justice goals, international transfers should be undertaken with a view to improving 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 Council Framework Decision 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.

This principle refers to all forms of transfer that enable foreign offenders to serve their sentences in another state. It thus includes not only those whose sentences will be continued in prison in the state to which they are transferred but also those who may serve conditional sentences or who may be conditionally released in such a state in terms of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964, ETS 051) and the EU Council Framework Decisions 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. Although the principle refers only to offenders transferred for the purpose of serving sentences, it may be extended in the future to cover also persons transferred for remand in custody, as is envisaged by the EU Framework Directive 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

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.<sup>3</sup> This principle also applies to decisions to extradite or expel a foreign prisoner. Other human rights issues, such as the right to family life, should also be taken into consideration.

## 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 Rule 41.

## Rule 12

Rule 4 of the European Prison Rules emphasises that 'prison conditions that infringe prisoners' rights are not justified by lack of resources'. 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 place 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 of Rec (2006)13 that remand in custody should only be imposed if four conditions are satisfied:

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<sup>3</sup> See Art. 19(2) EU Charter of Fundamental Rights of the European Union (2000/C 364/01)

- 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.

Thus 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.<sup>4</sup> 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. It is also due to the perception that foreign offenders are more difficult to contain and monitor.<sup>5</sup>

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<sup>6</sup> 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. (Rule 13.2) They should also encourage practitioners to investigate more fully before denying foreign offenders the possibility of awaiting trial in the community. 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).

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<sup>4</sup> 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, Bosnia and Herzegovina, 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.

<sup>5</sup> Van Kalmthout, Knapen and Morgenstern (eds.) *Pre-Trial Detention in the European Union*, 2009 at 95.

<sup>6</sup> 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)).

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 13.2b 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. Information about the personal and social circumstances of the offender, provided by the probation or social services, will be valuable in making an assessment of the risk involved in making use of alternatives to remand in custody.

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). 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 in such cases.

Non-custodial alternatives will usually be preferable where the foreign offender has a dependant. This dependant could be a young child, who may be at a higher risk of being put in a foster care than a child of an offender who is a national of the state. Dependants could also include a disabled or elderly relative or partner.

### **COMMENTS on 13**

**Germany:** Il existe des doutes quant au caractère approprié de la proposition visant à obliger le délinquant ne disposant pas d'adresse fixe de résider à une adresse spécifiée, gérée par l'État, la communauté locale ou une agence non gouvernementale. Il n'est pas possible de soutenir cette proposition, car le texte ne fait pas ressortir quelle adresse doit être désignée par le gouvernement.

### **III. Sentencing**

#### 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 B 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 also 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 paragraph of Recommendation R (92)17 add:

"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 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. (Rule 14.1) 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. States in which courts do not routinely use sentence reports, should thus be encouraged to do so especially in the case of foreign offenders.

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. (See Rules 10 and 39) 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 and other dependants of offenders. This is particularly true of foreign offenders who may be the primary carers for their children. The UN 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.<sup>7</sup> Therefore, their interests should also be borne in mind when their foreign parents are sentenced (Rule 14.3).

#### **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 prisoners should be provided with information in a language which they understand, orally and also, where possible, in writing. A good practice which exists in some countries is for prisoners to receive a foreign prisoners' information pack which can be translated beforehand into the languages used by the majority of foreign prisoners. Such a pack should include, inter alia, the information set out in rule 15.1 a to e. In addition there should be information on the internal regulations and main feature of the prison regime, including the rules governing discipline, legal aid, the prisoners' rights and duties, complaints procedures, prison work and release as well as information on how to access services such as medical treatment, education and visits,<sup>8</sup> the CPT has also recommended that prisons provide foreign prisoners with translations of expressions most commonly used in everyday activities as this can prevent misunderstandings and thereby contribute to a less conflictual prison environment.<sup>9</sup> Prisoners should be allowed to keep this information in their possession and the authorities should update it regularly (Rule 15.2). Prison authorities should also assist foreign prisoners who wish to communicate the fact of their imprisonment to relevant individuals or bodies, immediately after admission. (Rule 15.3)

##### *Allocation*

##### Rule 16

Decisions relating to the allocation of foreign prisoners to particular prisons require 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

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<sup>7</sup> See articles 3.1, 9.3, 18 and 20.

<sup>8</sup> CPT visit to Sweden, 2009, CPT/Inf (2009)34 para. 76; CPT visit to Austria 2004, CPT/Inf(2005)13, para. 108; CPT visit to Denmark 1990, CPT/Inf(91)12, para.109; CPT visit to Germany, 2005, CPT/Inf (2007)18, para. 153; CPT visit to the Slovak Republic, 1995, CPT/Inf(97)2, para. 147; CPT visit to Norway, 1993, CPT/Inf(94)11, para. 130; CPT visit to Finland, 1992, CPT/Inf(93) 8, para. 142; CPT visit to Greece, 1993, CPT/Inf(94)20, para. 102; CPT visit to Spain, 2007, CPT/Inf(2011) 11, para. 118; CPT visit to Italy 1992, CPT/Inf(95)1, para. 61.

<sup>9</sup> CPT visit to Greece, 1997, CPT/Inf(2001)18, para. 190; CPT visit to the Slovak Republic, 1995, CPT/Inf(97)2, para. 147.



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. (Rule 16.3) This may reduce their sense of isolation, but may conversely be undesirable from the point of view of safety and security.

### *Accommodation*

#### Rule 17

Decisions relating to the accommodation of foreign prisoners require the balancing 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, while this may reduce their sense of isolation, it may conversely be undesirable from the point of view of safety and security. It may also be detrimental to their interaction with other prisoners. If the foreign prisoners are to be released in the country in which they are imprisoned, such an accommodation policy may hamper their social reintegration. When deciding whether to allocate foreign prisoners to single or communal cells within a prison, the cultural preferences of such prisoners should 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. (Rule 18.1) 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. (Rule 18.2)

### *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 or searches difficult, particularly when prisoners are outside their cells. 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. (Rule 19.1) Where prison uniform is required, concessions should still be made: for example, Sikhs could still be allowed to wear their headdresses. Respect for the cultural and religious sensibilities of foreign prisoners in respect of clothing (Rule 19.2) should be understood in terms of Rule 20.2 European Prison Rules which forbids degrading or humiliating clothing.

### *Nutrition*

#### Rule 20

Rule 22.1 of the European Prison Rules states that authorities must take cultural and religious preferences in relation to diet into account. The right to food that meets the religious traditions of prisoners has also been recognised by the European Court of Human Rights. In *Jakóbski v Poland* (Application No. 18429/06, 7 December 2010) the Court held that a refusal to provide a Buddhist prisoner with vegetarian meals infringed Article 3 of the European Convention on Human Rights. One method of ensuring this right for foreign prisoners is to allow them to access a prison shop which stocks in hygienic conditions food they prefer. (Rule 20.1) Consular representatives may be approached for help in this regard.

In relation to the need to take account of the religious preferences in respect of meal times (Rule 20.2), the CPT has praised the special efforts made at Woodhill Prison UK to keep food warm for prisoners observing

Ramadan, the organisation of the Eid-ul-Fitr celebration and courses for staff on halal food, which have led to a better mutual understanding.<sup>10</sup>

### *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 prison law, their immigration status and family affairs. 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 access to legal aid (Rule 21.2) and the involvement of outside agencies which specialise in the assistance of foreign prisoners (Rule 21.5). It is important in this regard 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. In this regard, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter when participating in proceedings which concern them, including internal disciplinary proceedings.<sup>11</sup>

### *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 the contact of prisoners with the outside world generally. Moreover, probation and community agencies from both the state in which the prisoners are held and the state to which they will go upon release can assist in this regard. Accordingly, prisoners should be informed where organisations providing services to prisoners abroad exist in their country of residence or nationality.

Rule 22.2 highlights the need for flexibility in relation to the use of language during contacts. 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. Other concerns are the time difference and costs of phone calls made abroad. Flexibility in respect of the time and length of telephone calls (Rule 22.3) – along with the length of visits (Rule 22.5) can also improve contact with the outside world. In addition to providing support and information, authorities should also adopt a flexible approach to granting visas to family members who live abroad to promote the maintenance of familial relationships (Rule 22.6).<sup>12</sup> This is an area for potential cooperation between prison authorities and consular representatives, other agencies and NGOs from the country to which the prisoner will eventually be sent.

In addition, the authorities are enjoined to assist prisoners with the cost of communication (Rule 22.4). As foreign prisoners often do not have work, and therefore may not have money to buy stamps or phone cards, the CPT has recommended that states ensure access to communications, and if they are externally provided, that they are reasonably-priced.<sup>13</sup> In situations where high travel costs prevent regular, if any, visits, it may be possible to facilitate or improve contact using technology, such as videoconferences.

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 22.7 – see also Rule 35.3). Where children visit their imprisoned parent, there should be open contact with that parent wherever possible (Rules 26 to 28, UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Resolution2010/16)).

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<sup>10</sup> CPT visit to UK, 2008, CPT/Inf(2009)30, para. 80.

<sup>11</sup> CPT visit to Finland 1992, CPT/Inf(93)8, para. 142.

<sup>12</sup> See 2nd General Report [CPT/Inf (92) 3] para. 5.1, CPT visit to Bulgaria 2006, CPT/Inf(2008)11, para. 105; CPT visit to Netherlands (Antilles) 1994, CPT/Inf(96)1, para. 110.

<sup>13</sup> CPT visit to Bulgaria 2008, CPT/Inf(2010)29, paras. 79-80; CPT visit to Hungary 2003, CPT/Inf(2004)18, para. 52.

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 (Rule 24.6 European Prison Rules).

### **COMMENTS on 22 (earlier version)**

**Norway:** Section 22.7: "Family members visiting from abroad shall be provided, in a language they understand, with the support and information to arrange visits and, as far as possible, a flexible approach shall be adopted to granting visas to family members of foreign prisoners." should be replaced by a provision without obligations, such as: "To the extent possible, prison authorities shall endeavour to ensure that family members visiting from abroad are provided, in a language they understand, with the support and information to arrange visits." The latter part of the provision; regarding grants of visas to foreign prisoners' family members, does not belong in this context and should, therefore, be deleted.

### **Rule 23**

Isolation can be prevented and combated by allowing foreign prisoners to remain informed about public affairs 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 (Rules 63-65 CoE Probation Rules, Recommendation CM/Rec (2010) 1).

### *Contacts with consular representatives*

### **Rule 24**

Rule 24 deals with contacts with consular representatives from the perspectives of foreign prisoners. They have the right to such contacts (Rule 24.1) and to reasonable facilities to communicate with their consular representatives. (Rule 24.2) 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 24.3-4)

### **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. (Rule 25.1) 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. (Rule 25.2)

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. (Rule 25.3a) 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 25.3b)

## *Role of consular representatives*

### Rule 26

Rule 26 deals with the duties of consular representatives towards foreign prisoners. Rule 26.1 makes it clear that this rule does not seek to modify the Vienna Convention on Consular Relations in any way but to foster its application in the case of foreign prisoners. In order to assist consular representatives to fulfil their duty to safeguard the interests of persons for whom they are responsible and that are detained in the country in which they are stationed, this rule sets out some specific measures. It should be emphasised that any assistance provided by consular representatives can make a major positive contribution to the lives of foreign prisoners. These measures should only, however, be put in place where the individual concerned consents.

Consular representatives may be an important source of information on legal and financial matters and the possibilities for international transfer. (Rule 26.1a). In addition to providing information and visiting, consular representatives can make an important contribution to the social reintegration of foreign prisoners (Rule 26.1c). Assistance in this regard could include social, legal and financial support for foreign prisoners and their families, the facilitation of visits from and contacts with family members through, inter alia, assistance with obtaining visas, and the return and transfer of property or money due to be received by such prisoners at release. Consular representatives may also be able to support prisoners in practical ways, for instance by providing them with literature and other reading materials (Rule 26.1d) and providing indigent prisoners with financial support.

Consular representatives may also provide an important link between national authorities, probation agencies and foreign prisoners (See Rule 65, Probation Rules). It is also important that there are good working relationships between consular representative and organisations that help prisoners abroad. Consular representatives may assist with organising volunteer visits to such prisoners.

In the event of the death of a foreign prisoner, consular representatives may assist with the repatriation of the body and help relatives deal with property or inheritance issues.

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. (Rule 26.2. See also Rule 42.2)

### *Prison regime*

### Rule 27

Rule 27 deals with the prison regime as a whole. Rule 27.1 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. In this regard, the CPT has recommended that authorities aim to prevent the exclusion of foreign prisoners from prison regime activities whether due to language or more systemic barriers.<sup>14</sup>

There is a danger that foreign prisoners will be regarded as less worthy of treatment and training because they may be transferred, extradited or expelled. Rule 27.2 states that this should not be the case.

### *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 their lack of social links in the country of their detention. The authorities should take steps in order to ensure that foreign prisoners are not discriminated against in respect of work allocation and training. (Rule 28.1-2) In organising work, account should be taken of religious and cultural practices, for example, differing days of rest. Foreign prisoners should also be considered for work programmes that occur outside the prison.

Rule 26.11 of the European Prison Rules already provides for prisoners to transfer some of their earnings out of prison. In the case of foreign prisoners, Rule 28.3 provides explicitly that they may transfer part of their

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<sup>14</sup> CPT visit to Portugal 2008, CPT/Inf(2009)13, para. 65; CPT visit to Austria 1994, CPT/Inf(96)28, para. 140.

earnings to family members abroad.

Building on Rule 26.17 of the European Prison Rules, which states that, as far as possible, prisoners who work should be included in national social security systems, Rule 28.4 provides that foreign prisoners who contribute to the social security system of the country in which they are detained shall be allowed, where possible, to transfer such contributions to another state. This Rule enables foreign prisoners to contribute to the system in the country in which they are most likely to live after release, thus facilitating their social reintegration. 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. It may be necessary to apply internal regulations flexibly to ensure that foreign prisoners are not, in practice, excluded from such activities. Such flexibility may also be required to ensure that activities do not conflict with the cultural practices of these prisoners. (Rule 29.1) 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 improve relationships amongst prisoners. (Rule 29.2)

#### *Education and training*

##### Rule 30

The CPT has noted that an inability to communicate due to linguistic barriers may cause foreign prisoners deep moral distress.<sup>15</sup> The CPT has therefore recommended that prison authorities introduce programmes of language education for foreign prisoners.<sup>16</sup> Rule 30.1 encourages the learning of the daily working languages of the prison. In addition, opportunities should be made available for prisoners who wish to learn or improve their knowledge of the language of the country of origin.

The educational and vocational training provided for foreign prisoners should be tailored as far as possible to their specific needs, as this is important for their eventual social reintegration. Rule 30.2 sets out how this should be done.

To assist with this training, prisons should be stocked with reading materials and resources that reflect the linguistic and cultural backgrounds of the prison population. Whether these materials are held in the prison library or education and training centre, these resources should be accessible. (Rule 30.3) Educational resources can be derived from audio, video and electronic material and means. Consular representatives and non-governmental organisations should be encouraged to contribute to the educational and training resources available and suited to the needs of foreign prisoners.

#### *Freedom of thought, conscience and religion*

##### Rule 31

Rule 31.1 is designed to give practical effect to the right to freedom of thought, conscience and religion that is recognised by Article 9 of the European Convention on Human Rights and Rule 29 of the European Prison Rules. This right is strengthened by the requirement that foreign prisoners must not be compelled to practice any particular religion or belief. Indeed, prisoners should be protected against the risk of proselytisation both by representatives of any faith or religion and by staff or fellow prisoners.

Prison authorities have a general duty to facilitate the exercise of this right by foreign prisoners. They may do so in various ways. Rule 31.2 encourages prison authorities 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.

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<sup>15</sup> CPT visit to Denmark 1990, CPT/Inf(91)12, para.107.

<sup>16</sup> CPT visit to Austria 2004, CPT/Inf(2005)13, para. 108; CPT visit to Denmark 1990, CPT/Inf(91)12, para.109.

## *Health*

### Rule 32

Rule 32.1 highlights the need to ensure the implementation of the principle of equivalence of care. This principle 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.<sup>17</sup> (Rule 32.2) The CPT has urged authorities to ensure that foreign prisoners have equal access to drug rehabilitation programmes.<sup>18</sup> 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 to 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. (Rule 32.3) Given the difficulties foreign prisoners may encounter when trying to communicate with healthcare staff (and the risk that such difficulties may jeopardise the health of such prisoners), the CPT has recommended that steps be taken to ensure such prisoners benefit from the services of a professional interpreter as this helps best respect the prisoner's right to privacy and allows good quality of communication which is primordial for healthcare purposes.<sup>19</sup> However, for financial reasons and also in cases of emergency, more informal methods of interpretation may have to be relied on, like interpretation offered by a fellow-prisoner or by staff member. 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 to this form of communication. (Rule 32.4)

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. (Rule 32.5)

An ability to communicate in a culturally sensitive manner 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. (Rule 32.7)

In recognition of the humanitarian principle that prisoners with a short-term fatal prognosis should be transferred to external medical facilities to ensure their best possible care, (Rule 51, Recommendation (98)7 concerning the ethical and organisational aspects of health care in prison) consideration should also be given to the possibility of transferring terminally ill foreign prisoners, who so request, to a state with which they have strong social links. (Rule 32.8)

In any case of transfer, extradition or expulsion, steps should be taken to ensure the continuation of medical treatment. This should involve the provision of medication for use during transit to the other state and, where the prisoner consents, the transfer of medical records. The CPT has stressed that any such provision of medication must only be done on the basis of a medical decision and in accordance with medical ethics.<sup>20</sup>

### *Good order, safety and security*

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<sup>17</sup> CPT visit to the Netherlands (Aruba) 2007, CPT/Inf(2008)2, para. 70.

<sup>18</sup> CPT visit to Malta, 2001, CPT/Inf(2001)16, para. 61.

<sup>19</sup> CPT visit to Austria 2009, CPT/Inf(2010)5, paras. 52 and 111; CPT visit to Norway 2005, CPT/Inf(2006)14, para. 77; CPT visit to Serbia and Montenegro 2004, CPT/Inf(2006)18, para. 285.

<sup>20</sup> 7<sup>th</sup> General Report, CPT/Inf (97)10, para. 36.

### 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. (Rule 33.1) 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. (Rule 33.2) 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 33.3. See also Rule 29.2) For example, the CPT has highlighted the good practice at Woodhill Prison, UK, where the Imam has initiated programmes to provide prisoners and staff with a better understanding of Islam.<sup>21</sup> Staff should also be aware that tensions may arise due to linguistic barriers and therefore, be trained to deal with such situations.<sup>22</sup> (See Rule 41.2) This may involve reliance on informal means of interpretation and translation, which can be offered by other prisoners. In addition, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter in order to enable them to participate in disciplinary proceedings.<sup>23</sup>

Prison authorities should keep up-to-date records about the composition of their prison populations. (Rule 33.5) 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. (Rule 33.4) 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 Council of Europe 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.<sup>24</sup> 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. (Rule 34.2) 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. (See Rule 34.1 European Prison Rules)

This Rule also elaborates on 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

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<sup>21</sup> CPT visit to UK, 2008, CPT/Inf(2009)30, para. 80.

<sup>22</sup> 11th General Report [CPT/Inf (2001) 16, para. 27.

<sup>23</sup> CPT visit to Finland, 1992, CPT/Inf(93) 8, para. 142.

<sup>24</sup> 10th General Report [CPT/Inf (2000) 13], para. 21.

particular, attention should be paid to sexual and reproductive health issues and the provision of female hygienic and sanitary facilities and items.<sup>25</sup> (Rule 34.2)

In general, imprisonment should not be used as a sanction for pregnant women.<sup>26</sup> However, in situations where such women are imprisoned, the prison authorities must provide the facilities necessary to meet their needs. (Rule 34.3) In the case of foreign women prisoners, this may require cultural and religious sensitivity.

As it was established in Rule 34.3 of the European Prison Rules, prisoners should be allowed to give birth outside prison.<sup>27</sup> Women shall be transported to give birth in an outside hospital when labour begins.<sup>28</sup> There may still be occasions in which the child may be born within the prison. In such cases, prison authorities should call emergency services immediately and the child's birth certificate should not mention that he was born in a prison setting. 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. (Rule 35.2) Although there may be 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) the vast majority of cases will involve the child remaining with the mother in prison.

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 confinement to a closed environment like a prison, this negative effect outweighs the benefits of remaining with their mother. Any decision to remove a child from prison should, therefore, only be taken after special consideration of all circumstances and only if this is in the best interests of the child. (See Rule 36.1 European Prison Rules and Articles 3, 9(1) and 20(1) UN Convention on the Rights 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 of both parents, if possible, shall be taken into account and all appropriate care arrangements shall be examined before a final decision is reached.

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 European Prison Rules) In addition to ensuring that children receive appropriate care<sup>29</sup> (see Rule 36.3 European Prison Rules), the arrangements should respect different religious traditions and cultural approaches to parenthood. (Rule 35.1)

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

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<sup>25</sup> 10th General Report [CPT/Inf (2000) 13], para. 31.

<sup>26</sup> COE Parliamentary Assembly Recommendation 1469 (2000) and Rule 10 Rec 2006 (13) on the Remand Custody.

<sup>27</sup> See also 3rd General Report [CPT/Inf (93) 12] para.65.

<sup>28</sup> 10th General Report [CPT/Inf (2000) 13], para. 7.[CHECK]

<sup>29</sup> 10th General Report [CPT/Inf (2000) 13], para. 29.



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. (Rule 36.1) 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. (Rule 36.2a)

Progressive preparation for release and social reintegration requires that prisoners benefit from prison leave and other temporary release schemes. In practice, foreign prisoners are often 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. (Rule 36.2c) 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. (Rule 36.2b and 36.3) If foreign prisoners will be transferred or expelled to another country, and if they consent, contacts should be established with the relevant authorities and support services in that country as soon as possible. (Rule 36.2b and 36.4-5) 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. (Rule 36.5c) Other information and records that will facilitate the prisoners' reintegration should also be transferred. To reduce anxiety and prevent misunderstandings, the authorities of the proposed receiving state should provide returning prisoners with information about prison life and possibilities for release. (Rule 35.6. See also Rule 39.2a)

## *Consideration for release*

### Rule 37

This rule applies to both remand and sentenced prisoners. In order to establish substantial equality of treatment, positive steps should be taken to ensure that foreign prisoners are considered for release when they become eligible for such release. (Rule 37.1) Given that foreign prisoners may be embroiled in immigration or other proceedings, care should be taken to avoid unnecessary bureaucratic delays to release decisions. (Rule 37.2)

Foreign prisoners should not be excluded from consideration for release on the basis of their nationality or legal status. (Rule 37.3) The criteria set by Recommendation (2003)22 on conditional release (parole) should be applied in all cases. Particular attention should be paid to Rule 19 of this Recommendation which says that the lack of the possibility of work on release should not constitute a ground for refusing or postponing conditional release, and to Rule 20, which emphasises that conditional release should be granted to all prisoners who are considered as meeting the minimum level of safeguards for becoming law-abiding members of society.

Release decisions should, therefore, be taken on merits of individual cases. In the case of non-resident foreign prisoners, a lack of property or familial links should not alone be sufficient grounds to deny release. Other factors should be present; such as the possession of a false passport, previous attempts to evade being taken into custody, or the fact that the individual has been extradited for trial that cannot occur in absentia.<sup>30</sup> When considering cases involving settled foreigners, the authorities should take residential and familial links into account when deciding if detention is justified.<sup>31</sup> In either case, decisions on the risk of absconding should be made 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).

### **COMMENTS on 37 (earlier version)**

**Norway:** Norway cannot accept Section 37.2, which states that: "Particular consideration shall be given to the early release of foreign prisoners who have young children in their primary care." as this would create double standards in our legal system and eventually cause discrimination of Norwegian prisoners (and their children).

## *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. (Rule 39.1. See also Rule 33.7 European Prison Rules) 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. (Rule 38.2. See also Rule 33.8 European Prison Rules)

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. (Rule 38.2) Where foreign prisoners are to return to another country, prison authorities shall ensure the return of any property or monies that may be owing to them at their release.

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<sup>30</sup> *Sardinas Albo v Italy* (Application No. 56271/00) 17 February 2005, para.93 and *Chraidí v Germany* (Application No. 65655/01) 26 October 2006, para. 40.

<sup>31</sup> *Al Akidi v Bulgaria* (Application No. 35825/87) 31 July 2003, para.85.

## *International transfers*

### Rule 39

The CPT advocates the transfer of foreign prisoners to their home countries, regions of origin or places where they have family and social links, as a means to obtain both humanitarian goals and the penological objective of the social reintegration.<sup>32</sup> 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.

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. (Rule 39.1. See also Rule 15.1e) It is important that prisoners understand the potential consequences of transfers, particularly in relation to eligibility for release. (Rule 39.2) While prison authorities and consular representatives can play a crucial role in this regard, (See Rule 36.6) it is imperative that prisoners have access to independent legal advice and assistance in this connection.

In all decisions in relation to transfer, the prisoners' views must be taken into account. (Rule 39.3) 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 or treatment, 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. (Rule 39.4)

## **VI. Persons who work with foreign offenders**

### *Selection*

#### Rule 40

Staff selected to work with foreign offenders should possess well-developed interpersonal communication skills,<sup>33</sup> be familiar with different cultures and at least some staff should have the language skills required to communicate with these offenders.<sup>34</sup> Where possible, such staff should also be selected to represent the various cultural and linguistic backgrounds of the offenders detained with whom they work.<sup>35</sup> In addition, staff should have the qualities necessary to form good human relationships and a willingness to learn (See paragraphs 7 and 10, Recommendation (97)12 on staff concerned with the implementation of sanctions and measures).

### *Training*

#### Rule 41

Staff who work with foreign offenders should be provided with specialised training on the specific issues that affect foreign prisoners. (Rule 41.1) This should include training on the importance of respect for cultural diversity.<sup>36</sup> 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.<sup>37</sup> The CPT has commented that language barriers can prevent effective communication.<sup>38</sup> Accordingly, staff should

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<sup>32</sup> CPT visit to Luxembourg, 1993, CPT/Inf(93)19, para. 102.

<sup>33</sup> See 2nd General Report, CPT/Inf (92) 3, para. 60.

<sup>34</sup> See 7<sup>th</sup> General Report, CPT/Inf (97)10, para. 29.

<sup>35</sup> See 11<sup>th</sup> General Report, CPT/Inf (2001) 16, para. 26.

<sup>36</sup> CPT visit to Austria 2009, CPT/Inf(2010)5, para. 110; CPT visit to Austria 2004, CPT/Inf(2005)13, para. 108; CPT visit to Malta 2001, CPT/Inf(2002)16, para. 61; CPT visit to Denmark 1990, CPT/Inf(91)12, para.109; CPT visit to Switzerland, 1991, CPT/Inf(93)3, para. 65; CPT visit to Greece, 1993, CPT/Inf(94)20, para. 102.

<sup>37</sup> See 7<sup>th</sup> General Report, CPT/Inf (97)10, para. 29.

<sup>38</sup> See CPT visit to Spain, 2007, CPT/Inf(2011) 11, paras. 87 and 118.

be provided with information about the different languages spoken by the offenders with whom they work and opportunities to learn such languages. (Rule 41.2)

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. (Rule 41.3) 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. (Rule 42.1) 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. (Rule 42.2) 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). Rule 43.1 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. (Rule 43.2-3)