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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

THE UPDATE OF THE COMMENTARY TO RECOMMENDATION REC (2006) 2

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

ON THE EUROPEAN PRISON RULES

Preliminary Comments for revision / Draft – version 1, 26.1.2017

To be discussed in the 14th meeting of the PC-CP Working Group,

(Strasbourg, 30 January - 1 February 2017)

Andrew Coyle, CoE scientific expert, in his contextual report on the revision of the 2006 European Prison Rules, referred to "the growing consensus about the need for the international regulation of punishment and particularly of the form of judicial punishment which we know as imprisonment". This consensus has been expressed in the 1957 UN Standard Minimum Rules for the Treatment of Prisoners, setting standards which should be universally applied wherever human beings were deprived of their liberty. On 17 December 2015 a revised version of the UN Standard Minimum Rules were adopted unanimously by the 70th session of the UN General Assembly in Resolution A/RES/70/175. The adoption followed a revision process initiated in 2010 with a UN General Assembly resolution which requested revision of the SMRs so that they reflect major developments in human rights and criminal justice and recent advances in penitentiary science and practices. Leading human rights experts welcomed the Nelson Mandela Rules as a historic step and one of the most significant human rights achievements in recent years and called for their speedy implementation (https://cdn.penalreform.org/wp-content/uploads/2016/07/Joint-statement-Mandela-Rules-PR-July-18-.pdf).

"The revised Rules represent a universally accepted minimum standard for the treatment of prisoners, conditions of detention and prison management, and offer essential practical guidance to prison administrations," they noted. "The implementation of the Rules in prisons around the world would significantly improve the treatment of millions of detainees. At the same time, it is useful guidance to help prison staff deliver their important and difficult task in a professional and effective way, benefiting society at large."

"The revised Rules are premised on the recognition of prisoners' inherent dignity and value as human beings, and contain essential new procedural standards and safeguards that will go a long way in protecting detainees from torture and other ill-treatment" Special Rapporteur on Torture, Juan E. Méndez noted. "The prohibition of the use of prolonged solitary confinement, defined as that in excess of 15 days, is a particularly important new provision in the Rules. Other key advancements are the recognition of independent healthcare professionals who have a duty to refrain from participating in torture or other ill-treatment and have a vital role in detecting such ill-treatment and reporting it. The recognition of the obligation to promptly, impartially and independently investigate all allegations of torture or other ill-treatment by prisoners is also worth highlighting."

"Inhumane conditions in prisons are one of the main human rights concerns in the world, including in Europe. The revised Rules are a welcome step forward because they are an additional tool available to governments to transform prisons from mere places of punishment into places of rehabilitation" said Nils Muižnieks, Council of Europe Commissioner for Human Rights. "It is crucial that governments abide by these rules, as well as other regional standards, while, at the same time, implementing measures to reduce overcrowding, such as alternatives to imprisonment. This will make it easier to manage prisons in conformity with states' obligations in regard to prisoners in their care. There must be a life after imprisonment: better conditions of detention can mean higher chances of reintegrating into society."

Rapporteur on the Rights of Persons Deprived of Liberty of the IACHR, James Cavallaro, also emphasized the importance of legal alternatives to imprisonment and of rehabilitation and social reintegration programs. With regard to the Nelson Mandela Rules, he stated, “These Rules represent a vital advance in the protection of vulnerable groups, in particular, persons with disabilities deprived of liberty. In this regard, among other provisions, the Rules require prison authorities to make reasonable accommodations to ensure that prisoners with disabilities have full and effective access to detention conditions and resources on an equitable basis”.

The Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Med Kaggwa, also hailed the adoption of the Nelson Mandela Rules and pointed to the recent resolution of the African Commission. It establishes a Follow-up Committee to develop strategies for the promotion and implementation of the Rules. “I am confident that the Nelson Mandela Rules provide an inspiration to prison authorities across the globe to revise and update their systems. The revision is also crucial to monitoring bodies like my Rapporteurship to assess prison conditions against an up-to-date set of standards. The inherent dignity of prisoners and value as human beings has been mainstreamed throughout the revised Rules, which is what Nelson Mandela was all about.”

The substantive areas of the revised United Nations Standard Minimum Rules for the Treatment of Prisoners rules (UN NMR) (https://www.penalreform.org/priorities/prison-conditions/standard-minimum-rules/) are:

1. Respect for prisoners’ inherent dignity: The principle of treatment with respect for the dignity and value as human beings and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment have been incorporated throughout the Rules. In Rule 1 it is stated as a basic principle.

2. Medical and health services: The Rules clarify that healthcare of prisoners is a free of charge state responsibility, and should be of an equal standard to that available in the community, organised in close relationship to the general public health administration (Rule 24). There is detailed guidance on healthcare in prison and on the role of healthcare staff.

3. Disciplinary measures and sanctions: Detailed guidance is given on the use of instruments of restraint. Fairness and due process in disciplinary procedures are stressed and prohibited disciplinary sanctions (eg reduction of diet or restriction of drinking water) are clarified. Prison staff are encouraged to use conflict prevention mechanisms to prevent disciplinary offences and resolve conflicts. Limitations on the use of solitary confinement (which is also defined) are included for the first time in an international standard.

4. Investigations of deaths and torture in custody: The obligations of the prison in cases of any death, disappearance or serious injury are introduced. These obligations include on reporting,

investigations and notifying family or friends. Prisoner file management requirements were also amended in recognition of their role in recording incidents and complaints.

5. Protection of vulnerable groups: The Rules clarify that prisons need to identify the individual needs of prisoners and that measures taking account of such needs must not be regarded as discriminatory. Some provisions were incorporated on children imprisoned with their parent and outdated terminology regarding prisoners with disabilities was changed.

6. Access to legal representation: Provisions were updated and expanded to cover not only pre-trial detention and criminal proceedings, but requirements of legal counsel more comprehensively based on the 2012 UN Legal Aid Principles and Guidelines. The Rules also clarify that prisoners are allowed to keep in their possession documents relating to their legal proceedings.

7. Complaints and independent inspection: Provisions dealing with information for prisoners and access to complaints mechanisms has been updated, as well as protection against retaliation, intimidation or other negative consequences as a result of a complaint. The impact of external monitoring was acknowledged by introducing the requirement of a twofold system of regular inspections, internal as well as external by an independent body. The revised Rules specify the powers of inspectors and require written inspection reports and encourage their publication.

8. Training of staff: The necessity of training for staff prior to entry into service as well as ongoing in-service training are highlighted. These should reflect contemporary evidence-based best practice. A list of training requirements includes security and safety, the concept of dynamic security, and the use of force and instruments of restraint, as well as management of violent offenders, with due consideration to preventive and defusing techniques.

Before the revision of the Standard Minimum Rules for the Treatment of Prisoners, in December 2010, the United Nations General Assembly adopted the Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (known as “the Bangkok Rules”). These rules fill the lack of standards providing for the specific characteristics and needs of women prisoners, covering issues such humane treatment, admission procedures, healthcare, search procedures, children who accompany their mothers into prison and offering guidance for the reduction of imprisonment of women and the specific needs of imprisoned women.

The United Nations Office for Drugs and Crime recently published a “Handbook on Dynamic Security and Prison Intelligence” (https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_on_Dynamic_Security_and_Prison_Intelligence.pdf). The handbook covers the means by which escapes and other illegal acts are prevented and focuses on dynamic security and one of its particular elements, prison intelligence, which is used within the prison to maintain order and control. Another UNODC initiative is the Handbook on the

Management of Violent Extremist Prisoners and the Prevention of Radicalization to Violence in Prisons (http://www.unodc.org/pdf/criminal_justice/Handbook_on_VEPs.pdf). The handbook provides practical guidance on the management of violent extremist prisoners, on preventing the progression to violent extremism in prisons and on interventions aimed at disengaging violent extremist prisoners from violence and at facilitating their social reintegration upon release. This initiative is in line with the Council of Europe interest in the problem of radicalisation and violent extremism which is expressed with the Guidelines for prison and probation services regarding radicalisation and violent extremism Adopted by the Committee of Ministers on 2 March 2016, at the 1249th meeting of the Ministers' Deputies https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1a69) and the drafting of a handbook for front line staff of prison and probation services.

As Coyle reported in 2006, the Council of Europe, as a regional human rights institution, decided that the UN Standard Minimum Rules should be given a European perspective. The states which constitute the Council of Europe, he wrote, have a variety of different traditions of imprisonment and different understandings of what constitute the essential elements of imprisonment. Ten years ago, in many states it was well understood that "deprivation of liberty constituted the main punishment in a prison sentence and that the experience of imprisonment should not include any additional punitive element". As time passes by, this trend is gradually spread, consolidated and institutionalised in all CoE member states jurisdictions, despite the above mentioned different traditions.

The European Prison Rules have been revised twice since 1973, in 1987 and 2006. These revisions show "significant social trends and changes in regard to prison treatment and management" in terms used by the Committee of Ministers in 1987. The need to reflect the developments in penal policy, sentencing practice and the overall management of prisons in Europe justified the 2006 revision. As Jim Murdoch has noted, while the 1987 rules appear to have abandoned rehabilitation in favour of humane containment or "positive custody", the 2006 rules put rehabilitation, in the sense of helping prisoners to put on again the mask of citizenship, as a central goal.

In 2016 the EPR entered the second decade of their life. Designed to be "a stimulus for domestic action" as a main normative, though not binding, instrument in the penitentiary field, they fulfil an important reference function in the continuous development and reform of prison systems in Europe. Although, as J. Murdoch has pinpointed, gaps of coverage do exist (treatment of particular categories of inmates) and vague or open formulations are used ("as far as possible", "desireable"), the rules stress the importance of promoting the requirements of human rights and dignity of prisoners and lay down standards for humane and effective prison management. While these rules are founded on long-standing human rights principles which are unlikely to change, the detail contained in individual rules is subject to continuous development. From this point of view, "the rules should not be regarded as tablets of stone but rather as dynamic and living" to use Andrew Coyle's words. Their interpretation will continuously be influenced by the case law

of the European Court of Human Rights, the recommendations of bodies such as the Committee for the Prevention of Torture, the UN standard minimum rules, the reports of NPMs etc. For these reasons, the rules need to be kept under continuous scrutiny.

In the commentary to Rule 108 of the 2006 EPR it is acknowledged that best prison practice is constantly evolving. It is essential, then, that the European Prison Rules reflect this evolution and that updates are undertaken regularly. Such updates should be based on scientific research and consider carefully the relationship between the rules and other instruments, standards and recommendations in the penal sphere.

In conclusion, there is consensus that the European Prison Rules (EPR) provide progressive standards to improve the treatment of prisoners and the management of penal establishments, favouring the "counter-less-eligibility" principle of normalisation. The continuous interaction between the conflicting faces of prison, namely the sufficiently (as crime deterrent) punitive and restrictive prison and the prison where "life shall approximate as closely as possible the positive aspects of life in the community" (EPR Rule 5), obliges us not just to be content with the rules, but also to be aware with the recognition of the important role they play in dispensing justice and not "executing" people's rights.

Since 11 January 2006, when Recommendation Rec (2006) 2 on the European Prison Rules was adopted by the Committee of Ministers of the Council of Europe, a number of other recommendations concerning directly or indirectly prisoners and imprisonment have been approved. These are;

- Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse

- Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures

- CM/Rec (2010) 1 on the Council of Europe Probation Rules

- CM/Rec (2012) 5 on the European Code of Ethics for Prison Staff

- CM/Rec (2012) 12 concerning foreign prisoners

- CM/Rec (2014) 3 concerning dangerous offenders

- CM/Rec (2014) 4 on electronic monitoring.

- The revision of 1992 and 2000 rules on community sanctions and measures, replacing two relevant recommendations, R (92) 16 and Rec (2000) 22, is also finalized for imminent adoption by the Committee of Ministers.

All the above mentioned documents take into account the EPR, endorsing the principles and standards contained therein, which are found in all relevant documents which relate to penitentiary policy and practice.

The 2016 White Paper on Prison Overcrowding confirms that Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation is still relevant and valid. Nevertheless, the White Paper is valuable in updating the EPR commentary, as it “codifies” recent information on the Council of Europe´s position on prison overcrowding and prison population growth, including the work of the CPT and the ECtHR.

In the post EPR 2006 period, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) continued to visit states which have ratified the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and has published detailed reports on prison conditions in individual states (totally 334 reports in 26 years). The CPT is also making recommendations on a series of broader issues in its general annual reports. After the introduction of the EPR ten general reports on the CPT’s activities have been published. The first of them is the 16th report (2005-2006). It includes a section on means of restraint in psychiatric establishments for adults. In the 17th report (2006-2007) a public statement is included, concerning the Chechen Republic of the Russian Federation failure to cooperate on core issues such as unlawful detentions and ineffective investigations into cases involving allegations of ill-treatment. No particular issues are raised in the 18th report (2007-2008). The next, 19th report (2008-2009) includes a section on safeguards for irregular migrants deprived of their liberty) and the 20th report (2009-2010) includes a section on the use of electrical discharge weapons (EDW) by law enforcement and other public officials. Selected parts of reports on periodic and ad hoc visits to Belgium, Bosnia and Herzegovina, Italy, Moldova, Montenegro, Sweden and Northern Ireland (United Kingdom) and the responses of these countries authorities are also included in this report. The 21st CPT’s annual report (2010-2011) includes sections on access to a lawyer and on solitary confinement of prisoners as well as selected issues from report on the periodic and ad hoc visits to Georgia, Ireland, Lithuania, Malta, Poland, Romania and Turkey with the responses of these countries’ authorities. A public statement concerning Greece is also included, initiated by the Greek authorities inaction in addressing the very serious concerns raised by the CPT and the lack of appreciation on their part of the deteriorating situation in the country’s detention establishments. The 22nd report (2011-2012) includes a section on "National Preventive Mechanisms" and particular attention is paid to some of the visit reports, government responses and other documents published during the covered period (Armenia, Bulgaria, France, Germany, Serbia, Ukraine, Kosovo. The 23rd report (2012-2013) includes a section on documenting and reporting medical evidence of ill-treatment. Selected publications in this document are reports on periodic and ad hoc visits to Belgium, Bulgaria, Georgia, Malta, the North Caucasian region of the Russian Federation, Spain and the United Kingdom as well as responses of these states’ authorities. The 24th report (2013-2014), with the CPT reaching its 25-year milestone, includes

sections on the phenomena of intimidation and retaliatory action against detained persons and on juveniles in police custody and in detention centres under criminal legislation. In the same report a closer look is taken at the visit reports on Cyprus, Denmark, Greece, Hungary, Italy, Latvia, Montenegro, Poland, Portugal, the Russian Federation, the Slovak Republic, Ukraine, and respective government responses. The last published, 25th General Report on the CPT's activities (2015) includes a section on the situation of life-sentenced prisoners in Europe, standards on living space per prisoner in prison establishments, a public statement concerning Bulgaria for lack of decisive action by this country's authorities leading to a steady deterioration of the situation of persons in police custody and prison establishments. Highlighted parts of visit reports and government responses refer to Bulgaria, the Czech Republic, Finland, Spain, Turkey, Ukraine and the organisation of a removal operation of foreign nationals by the Dutch authorities.

The "substantive" sections of the CPT's reports are brought together in a document - which deals with police custody, imprisonment, training of law enforcement personnel, health care services in prisons, foreign nationals detained under aliens' legislation, involuntary placement in psychiatric establishments and juveniles and women deprived of their liberty. The document appeared in 2002 and it has been revised in 2006, 2011 and 2015. Post EPR issues included in the CPT Standards last published version (CPT/Inf/E (2002) 1 - Rev. 2015) are:

- Access to a lawyer as a means of preventing ill-treatment (Extract from the 21st General Report [CPT/Inf (2011) 28], published in 2015,
- Solitary confinement of prisoners (Extract from the 21st General Report [CPT/Inf (2011) 28], published in 2011),
- Means of restraint in psychiatric establishments for adults (Extract from the 16th General Report [CPT/Inf (2006) 35], published in 2006),
- Safeguards for irregular migrants deprived of their liberty (Extract from the 19th General Report [CPT/Inf (2009) 27], published in 2007,
- Juveniles deprived of their liberty under criminal legislation (Extract from the 24th General Report [CPT/Inf (2015) 1], published in 2015),
- Documenting and reporting medical evidence of ill-treatment (Extract from the 23rd General Report [CPT/Inf (2013) 29], published in 2013) and
- Electrical discharge weapons (Extract from the 20th General Report [CPT/Inf (2010) 28], published in 2010).

The European Court of Human Rights (ECtHR) has admitted an increasing number of applications by or on behalf of individuals in a wide range of member states concerning breaches of the Convention on Human Rights in respect of their treatment in prison. Many of them deal with art. 3 ECHR violations alone and sometimes in conjunction with article 14, or violations of art. 2 and 5, which are results of detention conditions, overcrowding, personal available space,

sanitary conditions, ill-treatment by other prisoners or prison staff, repeated transfers, solitary confinement, strip searches, forced feeding of prisoners staging a hunger strike, use of force against prisoners on massive hunger strike, the health care treatment of elderly, sick, disabled, mentally ill and drug addicted prisoners and prisoners with special diet needs, monitoring of medical correspondence, passive smoking, the reducibility of life sentences etc.

Comentado [a1]: Issues raised by the ECtHR judgments will be developed at a later stage.

As it is mentioned in the introduction of the EPR commentary "Prison standards reflect the commitment to treat prisoners justly and fairly. They need to be spelt out clearly, for the reality is that public pressure may easily lead to the violation of the fundamental human rights of this vulnerable group." Justice and fairness are mainly inspired by the legacy of proportional, deserts based models of sentencing and penal control, stemming in their contemporary version from the 1970s-1980s decline of the rehabilitative ideal. The justice model of corrections favours the administration of punishments as appropriate to the severity of the crime committed, with no particular concern for offenders' rehabilitation. It's liberal, rights-based and forced-treatment-free version, it is reflected in the 2006 EPR. The term (social) "rehabilitation" appears only once in the EPR (Rule 17.1 for the allocation of prisoners as far as possible, to prisons close to their homes – the same use of the term is made in the UN NMR, Rule 59). In the commentary it is explained that rehabilitation carries the connotation of forced treatment, while the EPR are look forward to "the importance of providing sentenced prisoners, who often come from socially deprived backgrounds, the opportunity to develop in a way that will enable them to choose to lead law-abiding lives" (Rule 102 Commentary). In rule 88 1 of the UN NMR though, it is stated that "The treatment of [sentenced] prisoners should emphasize not their exclusion from the community but their continuing part in it. Community agencies should therefore be enlisted wherever possible to assist the prison staff in the task of social rehabilitation of the prisoners." Combining this Rule with Rule 96 1 of the UN NMR (: " Sentenced prisoners shall have the opportunity to work and/or to actively participate in their rehabilitation [emphasis added], subject to a determination of physical and mental fitness by a physician or other qualified health-care professionals.", one can see that rehabilitation now is not meant as forced treatment but as a task encouraged and assisted by prison administrations and communities to help prisoners maintain or establish positive relations outside the prison (see also UN NMR, Rule 107). The UN NMR (Rule 4) provide that justifications of imprisonment, namely protection of society against crime and recidivism reduction, "can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life" and that "prison administrations and other competent authorities should offer [emphasis added] education, vocational training and work, as well as other forms of assistance that are appropriate and available, including those of a remedial, moral, spiritual, social and health- and sports-based nature. All such programmes, activities and services should be delivered in line with the individual treatment needs of prisoners." Rehabilitation understood more or less in the same sense is used also in other, post EPR, Council of Europe documents, such as Recommendation CM/Rec (2014) 3 of the

Committee of Ministers to member States concerning dangerous offenders, Recommendation CM/Rec (2010) 1 of the Committee of Ministers to member states on the Council of Europe Probation Rules , Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures, Guidelines for prison and probation services regarding radicalisation and violent extremism Adopted by the Committee of Ministers on 2 March 2016, at the 1249th meeting of the Ministers' Deputies). Offenders' (social) reintegration and desistance from crime are also ways to express crime policy expectations serving public safety by preventing and reducing the occurrence of offences with a law abiding future of ex-prisoners.

On the other hand, the EPR incorporate actuarial, risk assessment influences of the so called "new penology", relying on different categories and levels of risk offenders represent, where management is substituted for personality transformation and incapacitation and regulation of future behaviours replaces understanding and addressing these behaviours past causes. The risk of prisoners' escaping or harming themselves or others dictates their accommodation security and safety arrangements (Rules 16 b and c, 18.10, 51.3, 52.1). The new penology influence is much stronger in the post 2006 period, especially in Recommendation CM/Rec (2014) 3 of the Committee of Ministers to member States concerning dangerous offenders and the 2016 Guidelines for prison and probation services regarding radicalisation and violent extremism. In the UN NMR actuarialism is less visible, nevertheless it is present especially in Rule 8 where it is provided that information entered in the prisoner file management system will include initial assessment and classification reports.