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REPORT ON THE UPDATE AND REVISION OF THE COMMENTARY TO RECOMMENDATION REC (2006) 2 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE EUROPEAN PRISON RULES

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1. Introduction

Andrew Coyle, CoE scientific expert, in his contextual report on the revision of the 2006 European Prison Rules mentioned that the Council of Europe, as a regional human rights institution, decided that the 1957 UN Standard Minimum Rules (SMR) 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. As it was noted eleven 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". Time passes by and this trend is gradually spread and institutionalised in CoE member states' jurisdictions, despite their above mentioned different traditions, expressed officially in rule 2 of the European Prison Rules (EPR): "Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody".

As it is mentioned in the introduction of the EPR commentary "[P]rison standards reflect the commitment to treat prisoners justly and fairly [emphasis added]. 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 so called 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 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 – for this see further below, paragraph 3 of the present report). In the EPR Commentary it is explained that rehabilitation carries the connotation of forced treatment, while the EPR are looking 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" (EPR 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 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 utilitarian crime policy expectations serving public safety, by the prevention and reduction of further offences occurrence 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 (revised, see below paragraph 3) 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.

2. The European Prison Rules, the Commentary to them and the contribution of the Council of Europe CM Recommendations and other documents to post EPR developments in penal policy and prison management

The European "reflection" of the 1957 UN SMR, Resolution (73) 5 on the standard minimum rules for the treatment of prisoners, have been revised twice since their inception, in 1987 and 2006. 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 "bringing the rules into line with best current practice" 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 reintroduce it, 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 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", "desirable"), 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. Their "soft law" status is strengthened, as they are regularly referred to by the European Court of Human Rights (ECtHR) and the European Committee for the Prevention of Torture (CPT), and they inform judicial control and inspecting bodies work. 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 Coyle's words. Their interpretation will continuously be influenced by the case law of the ECtHR, the recommendations of bodies such as the CPT, the UN SMR and other instruments, 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 EPR 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.

It seems, then, that there is consensus that the 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 institution where the treatment given a prisoner should be at best the same to that provided a member of the lowest significant social class in the free society, and an organization open to the outside world, where "life shall approximate as closely as possible the positive aspects of life in the community" (EPR rule 5), makes 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.

a. Recent relevant Council of Europe CM Recommendations

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 persons deprived of their liberty and, 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, has been finalized for imminent adoption by the Committee of Ministers.

All the above mentioned documents take into account the EPR or, at least, endorse the principles and standards contained therein, which are found in all documents related to penal and prison policy and practice. The question is if the included in the EPR issues these documents provide for should be kept separated and preserve their autonomy or if their codification is preferable. In some aspects, the unification of all the related issues in a single and coherent set of rules seems a reasonable and useful choice. On the other hand, such an option will possibly result in the production of a long and not easily manageable corpus of detailed provisions or, alternatively, a shorter but (then) insufficient set of principles, lacking the thoroughness needed for its purposes.

Starting with remand prisoners, namely “persons who have been remanded in custody and who are not already serving a prison sentence or are detained under any other instrument”, in Recommendation Rec (2006) 13 it is clarified that they should be “held in conditions and subject to a regime appropriate to their legal status, which is based on the presumption of innocence”. As to conditions of remand in custody it is declared (in rule 35 of the afore-mentioned Recommendation) that they shall be governed by the EPR. Rules 94-101 of the EPR (Part VII: Untried prisoners) define as untried prisoners those who have been remanded in custody by a judicial authority prior to trial, conviction or sentence. It is left to individual states to regard prisoners who have been convicted and sentenced as untried prisoners if their appeals are pending. Rec (2006) 13 is evidently more detailed than part VII of the EPR, and may inform their Commentary with some of its general principles and specific issues dealt with in its Part III (rules 36-44). The use of different terminology for non-convicted prisoners (remanded prisoners / untried prisoners) should also be explained, to avoid any potential confusion.

Recommendation Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures is an adaptation of the EPR (and the European Rules on community sanctions and measures) to the needs of juveniles (and young adults when they are “regarded as juveniles and dealt with accordingly” (rule 17 of Rec (2008) 11). In the appendix of this Recommendation it is stated that the provisions of the EPR are applicable “to the benefit of juvenile offenders in as far as they are not in conflict with these rules” while the Commentary to the EPR clarifies that they “are designed to deal primarily with the manner of detention of adults in prison. Nevertheless, the rules incorporate within their scope children who are detained on remand or following a sentence in any institution. The rules therefore apply to protect such children in prison”. The importance of this is twofold: on the one hand because, undesirably, children continue to be detained in prisons for adults; on the other hand because standards applicable to adults may indicate in some aspects and despite age based particularities, how children in custody should be dealt with as well. Undoubtedly, keeping children out of prisons is the legacy, the point of departure and the goal of 21st century juvenile justice, but a stronger declaration on the commitment of our societies to the best protection of the well-being of juveniles who enter in conflict with law and end up

in custody as well as the development of child-friendly institutional regimes is important, worthy and consistent with the balanced coexistence of proportionality and welfare elements in juvenile justice.

Adopted some years later, Recommendation CM/Rec (2012) 5 of the Committee of Ministers to member States on the European Code of Ethics for Prison Staff aims to introduce a model European Code for professionals able and aware to protect and respect the fundamental rights and freedoms of all prisoners and facilitate their social reintegration on release, with the positive use of time in custody. The Code emphasises prison staff conduct issues (accountability, integrity, respect for and protection of human dignity, care, assistance, fairness, impartiality, non-discrimination, co-operation, confidentiality, data protection). Part V of the EPR (rules 71-91) describes the ethical context of prison staff work: to treat all prisoners with humanity and with respect for the inherent dignity of the human person. Rule 75 EPR is a condense form of the 2012 Recommendation. Part V EPR focuses on the nature of prison staff work, recruitment, selection and training of prison officers, human rights based management of prisons, raising public awareness and conducting research and evaluation of prison systems function.

The following document, Recommendation CM/Rec (2012) 12 of the Committee of Ministers to member States concerning foreign prisoners, recognises that a large proportion of the prison population is consisted of non-nationals and non-residents who may face social isolation and many difficulties in communication and adjustment due to differences in language, culture, customs and religions, and lack of contact with and support from the outside world. The reference made in the EPR Commentary to Recommendation No. R (84) 12 concerning foreign prisoners, should be replaced by the new Recommendation. Rule 37 EPR reflects the growing importance of issues surrounding foreigners in European prisons. One single rule dedicated to this issue, and the respective comment though, do not suffice to cover all related problems given the cultural- and ethnic-sensitive issues (allocation and accommodation, all kinds of contacts, release particularities, special staff qualifications). Reference should be made also to EU Council Framework Decision 2008/909/JHA of 27 November 2008 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.

The EPR do not refer to “dangerous prisoners”, although the notion of dangerousness or/and the term itself is present in the Commentary: prisoners tempted to escape (rule 49), prisoners subject to special high security or safety measures individually prisoners or in groups (rule 53). The controversial issue of dangerous offenders is dealt with in Recommendation CM/Rec (2014) 3 of the Committee of Ministers. Adopted more than three decades before, Recommendation Rec (82) 17 of the Committee of Ministers concerning custody and treatment of dangerous prisoners, is also relevant. It is important to clarify that, according to the 2014 Recommendation, dangerousness is meant as the high likelihood presented by a person who has been convicted of a very serious sexual or very serious violent crime against persons to re-offend with further very serious sexual or very serious violent crimes against persons and who presents. Dangerousness, then, is understood in different terms, depending on its “target group”, prisoners in particular and offenders in general, respectively. In the first case the priority is prison good order, security and safety; in the second case the concern is recidivism reduction. The EPR Commentary should clarify the different uses of “dangerousness” and the “position” each one of them deserves in the EPR.

Other relevant post-EPR Committee of Ministers Recommendations mentioned above, namely probation, electronic monitoring and community sanctions and measures rules, cover the field of non-custodial (pre-trial, sentencing and post sentencing) options, interacting with the custodial sector of penal sanctioning and shaping the field of penal reactions to crime. Recognising the complex (competing, complementary, supplementary etc) relationships and influences among imprisonment, community sanctions and measures and crime, these recommendations should also inform and enrich the EPR Commentary. A particular issue strongly connecting custodial and community dispositions is the use of imprisonment as a back-up in cases of offenders’ failure to abide by their obligations, namely various ways of non-compliance, fine default etc.

b. Further CoE work on prison overcrowding

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. Consequently, the clear manifestation of the principle that imprisonment should only be used as a last resort, the so-called ultima ratio principle, namely the use of deprivation of liberty only for the most serious offences, inspiring the above mentioned Recommendation, also adopted by the 2006 EPR, is reaffirmed. Perhaps a connection between the principle of last resort and the exceptionality of cases where it should be implemented could make the voices supporting minimal prison use sound louder (paragraph 86 of the White Paper is a good example for this). Nevertheless, the White Paper is valuable in updating the EPR commentary, as it "codifies" recent information on the CoE position on prison overcrowding and prison population growth, including the work of the CPT and the ECtHR. In the White Paper it is recognized that Recommendation Rec (2006) 2 on the EPR is the most known and important text expressing the position of the Council of Europe regarding the execution of penal sanctions and measures (paragraph 50).

In paragraph 10 of the White Paper rule 18.3 of the EPR is invoked, where the lack of internationally agreed precise definitions of what constitutes overcrowding is discussed. It is added that, contrary to this rule, a number of member states have not a definition of prisoners' minimum personal space, and this makes it "difficult to secure an agreement about the capacity of the prison systems".

In paragraph 26 of the White Paper it is noted that "at the Council of Europe level prison overcrowding has been addressed both in standard setting texts [i.e. the CPT standards] and in relation to more specific assessments of individual situations" [i.e. ECtHR judgments] (see also paragraph 28).

In paragraph 33 of the White Paper the Commentary to rule 18 of the EPR is mentioned, explaining that, as regards adequate personal space in detention "the more time a prisoner spends in the cell the more acutely the impact of overcrowded and unsanitary conditions of detention is felt", to confirm the adoption of the position that "material conditions related to accommodation include, apart from the size of the cell and its overall state, access to natural light and fresh air".

In paragraph 42, the White Paper, referring to the EPR Commentary, endorses the view expressed there that "prison population is the product of the functioning of the criminal justice systems and it is not always directly correlated to the crime rates in a given country. Therefore when designing general criminal justice policies and strategies and when adopting specific sanctions and measures due regard needs to be had to their effect on the rates of imprisonment. In paragraph 46, it is also mentioned that Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation is in line with the EPR by "recommending setting and strictly respecting maximum capacity for each penal institution". Additionally, it is noted that, more than this, other ideas of coping with the problem should be considered, such as more out-of-cell activities, more family visits, improved food and hygiene, application of humane and positive treatment by staff, more home leaves and placements in semi-open or open institutions.

EPR rule 12.1, where reference is made to the special needs of offenders with mental health disorders, is positively mentioned in paragraph 111. Prevalence to healthcare, though, is ignored by some countries, where the practice of keeping these offenders in common prisons instead of caring for them in special institutions is observed.

The necessity of the coexistence of governmental inspection and independent monitoring in pursuing transparency in prisons, as explained in the Commentary to rules 92 and 93 of the EPR, is also invoked in paragraph 128 of the White Paper.

Rule 71 of the EPR is quoted in paragraph 135, footnote 46, to support the crucial point that the execution of penal sanctions and measures is a state responsibility, regardless of the public or private character of the implementing agencies.

c. The CPT work

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 354 reports as at 3 March 2017 after 239 periodic and 167 ad hoc visits). An example indicating the wide range and diversity of issues raised by the CPT in their reports is the area of health care in prisons (http://hudoc.cpt.coe.int/eng#{"CPTPlaces":["pri","prir","pris","prid","prip","prih"],"CPTKeywords":["fmpm"]}) The CPT is also making recommendations on a series of broader issues in its general annual reports.[1]

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

[1] A detailed account of the work of the CPT and its influence on the EPR Commentary is currently drafted by Hugh Chetwynd, Head of Division, Committee for the Prevention of Torture at the Council of Europe.

revised in 2006, 2011 and 2015. Post EPR issues included in the CPT Standards last published version (CPT/Inf/E (2002) 1 - Rev. 2015 and enriched in 2016) 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, revised on 21 March 2017 [CPT/Inf (2017) 6]);
- 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).
- Situation of life-sentenced prisoners (Extract from the 25th General Report [CPT/Inf(2016)10-part], published in 2016;

Not surprisingly, the CPT focuses on ill-treatment prevention and reporting, restrictive measures and excessive use of force. So the interest seems to turn sometimes in exceptional situations as other times on the daily routines (i.e. living conditions) of deprivation of liberty. Some of the new topics (the role medical staff have to play, juveniles deprived of their liberty, the use of electrical discharge weapons) can be used to update the EPR Commentary. Some other extracts cover different issues (mental health patient means of restraint, immigration and administrative custody).

Solitary confinement issues dealt with in 2011 and incorporated in the substantive, selected sections of the reports due to the extremely damaging effect it may have on the somatic, mental and social health of prisoners, are:

- principles,
- different uses of solitary confinement (result of a court decision, a disciplinary sanction, a preventative administrative measure or a measure for the protection of the prisoner concerned) and their legitimacy,
- procedures and safeguards governing the decision of placement in solitary confinement and its material conditions and regimes,
- the role of health-care staff in cases of solitary confinement.

The CPT approach is that solitary confinement imposes extra restrictions not inherent in the fact of imprisonment. For this reason, it should be proportionate, lawful, accountable, necessary and non-discriminatory (PLANN). Particular attention should be paid to the role of medical practitioners; they are expected to act as the personal doctors of prisoners and build a positive doctor-patient relationship between them, not to certify whether a prisoner is fit to undergo solitary confinement. In this point positive reference is made to the 2006 EPR [rule 43.2] underlining the removal of such an approach which was expressed in the previous (1987) version of the Rules, which distorted the relationship of medical doctors with their patients (the approach adopted in the EPR Commentary is similar, see, though, the reservation of the representative of Denmark, note 1 to the Recommendation on the EPR).

In the extract from the 24th General Report of the CPT safeguards which should be offered to juveniles deprived of their liberty under criminal legislation, originally drafted in 1998, are reviewed. As it is pointed out by the CPT juvenile-only units, where they exist, “offer not only poor material conditions but, due to a lack of trained staff, juvenile inmates are also provided with an impoverished regime, and support and supervision remain inadequate”. In some countries, though, the CPT has identified some establishments which can be considered a model for holding detained children, and defined the particular characteristics

of these establishments (composed of small well-staffed units, each comprising a limited number of single rooms, as well as a communal area, providing juveniles with a range of purposeful activities throughout the day, and promote a sense of community within the unit). The EPR Commentary to rule 35 could be enriched by such "guiding" information.

The methodical recording of injuries and the provision of information to the relevant authorities is considered in details in the relevant extract from the CPT 23rd General Report. However, health-care services in establishments which constitute points of entry into the prison system also have a crucial contribution to make as regards the prevention of ill-treatment during the period immediately prior to imprisonment, namely when persons are in the custody of law enforcement agencies (e.g. the police or gendarmerie).

As regards electrical discharge weapons (EDW) in 2010 the Committee has expressed strong reservations about their use in prison establishments. In their view "only very exceptional circumstances (e.g. a hostage-taking situation) might justify the resort to EDW in such a secure setting, and this subject to the strict condition that the weapons concerned are used only by specially trained staff". The use of this highly coercive and very painful method of control "should be subject to the principles of necessity, subsidiarity, proportionality, advance warning (where feasible) and precaution", as well as to strict procedural rules.

The CPT long standing concern, expressed in 2000 that life sentenced prisoners are many times "not provided with appropriate material conditions, activities and human contact", and that "they [are] frequently subjected to special restrictions likely to exacerbate the deleterious effects of their long-term imprisonment", is reaffirmed in the 25th General Report. The EPR are generally mentioned in footnote 1 of the extract. The CPT strongly opposes "actual or whole life sentence", namely life imprisonment without any prospect of conditional release. They set six basic principles for the treatment of life-sentenced prisoners (individualisation, normalisation, responsibility, security and safety, non-segregation, progression) and call upon member states "to review their treatment of life-sentenced prisoners to ensure that this is in accordance with their individual risk they present, both in custody and to the outside community, and not simply in response to the sentence which has been imposed on them". EPR rule 103.8 is dealing with this issue and relevant reference in made in the commentary to rules 17, 18.5, 24, 34, 35, 37, 43, 51, 53, and 103.8. In all cases Recommendation Rec (2003) 23 of the Committee of Ministers on the management by prison administrations of life sentence and other long-term prisoners is of major importance, as more specific on the matter than the EPR.

In addition to the above mentioned, selected as major importance issues, the CPT also drafted standards on "Living space per prisoner in prison establishments" and published on 15 December 2015. In these standards single occupancy and multiple occupancy cells are distinguished. According to the standards, 6m² is the minimum amount of living space to be afforded to a prisoner accommodated in a single occupancy cell, adding in multiple occupancy cells (ideally of up to four inmates) 4m² per additional inmate, plus sanitary annexe in all cases which should be fully separated in multiple occupancy cells.

d. ECtHR case-law

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. Especially in the area protected by art. 3 (Prohibition of torture) there are 8,264 judgements regarding degrading punishment, inhuman treatment, torture etc.

(http://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"][2]. In all cases it should be taken into consideration that the "mission" of the EPR, the institutional role and the mandate of the CPT and the competency of the ECtHR are different. So are the ways their work should be read and comprehended; the European Prison Rules set general standards guiding national legislation, policies and practices. The CPT develops general standards concerning the treatment of prisoners and other person deprived of their liberty and act in a preventive manner. On the other hand the ECtHR is responsible for the judicial application in individual cases of the ECHR and, its duty is to take into account all the relevant circumstances of a particular case (Muršić v. Croatia [GC], no. 7334/13, § 112, 20 October 2016).

In technical terms, it is noted that the abbreviations used in the current text of the EPR Commentary to refer to the European Court of Human Rights (at places as ECHR, at other places as ECtHR, while sometimes the full name is used) need to be consolidated. It is proposed to use the abbreviation "ECtHR" for the European Court of Human Rights and the abbreviation "ECHR" for the European Convention on Human Rights and Fundamental Freedoms throughout the text. The same observation is made as regards the ECtHR case-law references and it is suggested "to reflect as close as possible the manner in which the ECtHR cites its cases, and to provide all relevant identification elements of a case, [...] to use the following formula: name in italics; if Grand Chamber, abbreviation [GC]; number; if applicable and relevant, the specific paragraph; date of the judgment.

As Krešimir Kamber notes "the 2006 revised version of the European Prison Rules has attracted significant attention and judicial recognition in the case-law of the ECtHR. They have been referred to by the ECtHR Grand Chamber in cases concerning solitary confinement (*Ramirez Sanchez v. France* [GC], no. 59450/00, § 85, 04 July 2006), life imprisonment (*Kafkaris v. Cyprus* [GC], no. 21906/04, § 73, 12 February 2008; *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 et al., § 77, 9 July 2013; *Murray v. the Netherlands* [GC], no. 10511/10, §§ 68-69, 26 April 2016, and *Hutchinson v. the United Kingdom* [GC], no. 57592/08, § 21, 17 January 2017), conjugal and family visits (*Dickson v. the United Kingdom* [GC], no. 44362/04, §§ 31-35, 4 December 2007, and *Khoroshenko v. Russia* [GC], no. 41418/04, §§ 58-62, 30 June 2015), special prison regime (*Enea v. Italy* [GC], no. 74912/01, § 48, 17 September 2009), prison work (*Stummer v. Austria* [GC], no. 37452/02, §§ 54-58, 7 July 2011), prison leave (*Boulois v. Luxembourg* [GC], no. 37575/04, § 61, 3 April 2012), prison overcrowding and conditions of imprisonment (*Muršić v. Croatia* [GC], no. 7334/13, §§ 55 and 58, 20 October 2016) and discrimination in penal policy (*Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 30, 24 January 2017). Moreover, the ECtHR has been guided by the European Prison Rules in its pilot judgments addressing the structural problems of inadequate conditions of imprisonment in various Council of Europe States (*Orchowski v. Poland*, no. 17885/04, § 88, 22 October 2009; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 58, 10 January 2012; *Torreggiani and Others v. Italy*, nos. 43517/09 et al., § 32, 8 January 2013; *Neshkov and Others v. Bulgaria*, nos. 36925/10 et al., § 144, 27 January 2015, and *Varga and Others v. Hungary*, nos. 14097/12 et al., § 37, 10 March 2015).

As regards the EPR basic principles (Part I, rules 1-13), it is emphasised that respect for human dignity underpins the very essence of the European human rights system (*Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 et al., § 113, 9 July 2013) (Commentary to rule 1). Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the ECHR save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 ECHR. There is no question that a prisoner forfeits his or her ECHR rights because of his or her status as a person detained following conviction (*Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, §§ 69-70, 6 October 2005) (Commentary to rule 2). It is also held that under Article 3 ECHR the suffering and humiliation involved must in any event go beyond that inevitable element of suffering and humiliation connected with detention. The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject

[2] This part of the present document is based on the valuable comments, additions and suggestions made by Dr Krešimir Kamber, Lawyer, Registry of the European Court of Human Rights. The presentation is selective, as only some specific parts, those related to general principles and central topics are copied and included here. The exhaustive account of the ECtHR case law can be found in Dr Kamber's contribution.

him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-being are adequately secured (*Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, 26 October 2000) (Commentary to Rule 3). States are obliged to organise their penitentiary systems in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties (*Muršić v. Croatia* [GC], no. 7334/13, § 100, 20 October 2016) (Commentary to Rule 4). The reintegration into society of a convicted person has been recognised and over time gained increasing importance in the ECtHR case-law under various provisions of the ECHR (*Murray v. the Netherlands* [GC], no. 10511/10, § 102, 26 April 2016) (Commentary to Rule 6). When the case of children in prisons is considered, the governing principle in all cases must be a child's best interests. While observing the World Health Organisation ("the WHO") recommendations, which were adopted following its Joint Interregional Conference on Appropriate Technology for Birth (Fortaleza, Brazil, 22-26 April 1985), according to which a healthy new-born must remain with the mother, the ECtHR stressed that the authorities have an obligation to create adequate conditions for those requirements to be implemented in practice, including also in detention facilities (*Korneykova and Korneykov v. Ukraine*, no. 56660/12, §§ 129-132, 24 March 2016) (Commentary to Rule 11). A lack of appropriate medical care for persons in custody is capable of engaging a State's responsibility under Article 3 ECHR, which in certain circumstances may impose an obligation on the State to transfer a prisoner to special facilities in order to receive adequate treatment. In the particular cases of mentally ill prisoners, their vulnerability and, in some cases, their inability to complain coherently or at all about how they are being affected by any particular treatment has to be taken into account. Moreover, such prisoners must be examined, a proper diagnosis must be made and proper treatment for the problem diagnosed, including a suitable medical supervision, must be provided (*Murray v. the Netherlands* [GC], no. 10511/10, §§ 105-106, 26 April 2016) (Commentary to Rule 12). While discrimination is not acceptable in all cases, protection for vulnerable groups justifies treatment tailored to their special needs. Consequently, the ECtHR did not consider that a sentencing policy which exempted female offenders, juvenile offenders and offenders aged 65 or over from life imprisonment amounted to a prohibited discrimination against the male adult offenders, who were susceptible to life imprisonment (*Khamtokhu and Aksenchik v. Russia* ([GC], nos. 60367/08 and 961/11, 24 January 2017) (Commentary to Rule 13).

The ECtHR case law is a very important input in updating all the parts of the Commentary to the EPR. The Court's potential and actual influence is also obvious in issues regulated by rules regarding conditions of imprisonment (Part II, rules 14-38). Particular attention should be paid to rule 18, where it should be clarified that, a specific number of square metres that should be allocated to a detainee in order to comply with the ECHR cannot be determined "once and for all", as other relevant factors (the duration of detention, the possibilities for outdoor exercise and the physical and mental condition of the detainee) play an important part in deciding whether the detention conditions satisfied the guarantees of Article 3 ECHR. Nevertheless, extreme lack of space in prison cells weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" within the meaning of Article 3 ECHR (*Muršić v. Croatia* [GC], no. 7334/13, §§ 103-104, 20 October 2016). The ECtHR has therefore set some principles for its assessment of the conditions of accommodation under Article 3 ECHR: (1) the standard of 3 sq. m of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 ECHR; (2) the place factor in cases of 3 to 4 sq. m of personal space per inmate remains a weighty factor in the ECtHR's assessment of the adequacy of conditions of detention but it is needed to be coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements; (3) when more than 4 sq. m of personal space are available in multi-occupancy accommodation in prison, other aspects of physical conditions of detention, set out, inter alia, in the European Prison Rules, remain relevant for the ECtHR's assessment of adequacy of a prisoner's conditions of detention under Article 3 ECHR. In a crucial rule regarding prisoners' contacts with the outside world (rule 24) the existence of close personal ties is the key to approach protected and promoted "family life". The notion of "family" in Article 8 ECHR concerns not only marriage-based relationships, but also other de facto "family ties" where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy. Moreover, whereas Article 8 does not safeguard the mere desire to found a family, it

presupposes the existence of a family or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father, or the relationship that arises from a genuine marriage, even if family life has not yet been fully established, or the relationship between a father and his legitimate child even if it proves, years later, to have had no biological basis, or the relationship that arises from a lawful and genuine adoption (*Paradiso and Campanelli v. Italy* [GC], no. 25358/12, §§ 140-141, 24 January 2017). It is an essential part of a prisoner's right to respect for family life then, that the authorities enable or assist him or her in maintaining contact with his or her close family (*Khoroshenko v. Russia* [GC], no. 41418/04, § 106, 30 June 2015). Any restriction in this respect must be in accordance with the law, must pursue legitimate aim and be proportionate as required under Article 8 § 2 ECHR (Commentary to rule 24).

Going to Part II (rules 39-48, health care issues) in the comment to rule 40, the ECtHR approach is that, to determine the adequacy of medical assistance, the mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate. The authorities must also ensure that; (1) a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention; (2) diagnosis and care are prompt and accurate, and (3) if necessitated by the nature of a medical condition supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing their aggravation, rather than addressing them on a symptomatic basis. The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through (*Blokhin v. Russia* [GC], no. 47152/06, § 137, 23 March 2016). Moreover, medical treatment provided within prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole, but not necessarily that provided in the best health establishments outside prison facilities (Loc. cit.). In the comment to rule 46 an addition is suggested to the ECtHR judgment that the conditions of detention of a person who is ill must ensure that his or her health is protected, regard being had to the ordinary and reasonable demands of imprisonment. Although Article 3 ECHR cannot be construed as laying down a general obligation to release sick detainees or place them in a civil hospital, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. Accordingly, in particularly serious cases situations may arise where the proper administration of criminal justice requires remedies to be taken in the form of humanitarian measures. The relevant factors in this context which the ECtHR takes into account are: (1) the prisoner's condition; (2) the quality of care provided, and (3) whether or not the prisoner should continue to be detained in view of his or her state of health (*Enea v. Italy* [GC], no. 74912/01, §§ 58-59, 17 September 2009).

In part IV (rules 49-70 on good order) relevant to rule 51.3 and the respective part of the Commentary is the requirement of an appropriate risk assessment related to the potential threat posed by a prisoner should be applied to prison leave (*Mastromatteo v. Italy* [GC], no. 37703/97, 24 October 2002).

In the EPR Commentary to rule 55 it is suggested that a procedural obligation to investigate any suspicious death or an arguable claim of ill treatment in prison arises under Articles 2 and 3 ECHR. The investigation should be capable of leading to the identification and punishment of those responsible. The minimum standards as to effectiveness include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness. The investigation must also be thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard (*Gladović v. Croatia*, no. 28847/08, §§ 39-40, 10 May 2011, and *Volk v. Slovenia*, no. 62120/09, §§ 97-98, 13 December 2012). See further Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations of 30 March 2011.

The applicability of Article 6 ECHR in the disciplinary proceedings in prison, related to rule 59 EPR, will depend on the classification of the offence under domestic law, the nature of the offence and the nature

and degree of severity of the penalty. The ECtHR has considered that a forfeiture of remission is a sufficiently serious penalty amounting to a "criminal charge" within the meaning of Article 6 ECHR (*Campbell and Fell v. the United Kingdom*, nos. 7819/77 and 7878/77, § 73 28 June 1984), as well as a possible award of maximum number of additional days to the prison sentence of 42 days (*Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, §§ 128-129, 9 October 2003). On the other hand, a sanction restricting the prisoner's free movement inside the prison and his contact with the outside world for a period of three months, without extending the prison term or seriously aggravating the terms of prison conditions, was considered to be entirely within the disciplinary sphere and thus out of the scope of Article 6 ECHR (*Štitić v. Croatia*, no. 29660/03, § 61, 8 November 2007). The applicability of Article 6 ECHR requires the disciplinary authorities to comply with the particular institutional and procedural requirements under Article 6 ECHR as defined in the ECtHR case-law.

As mentioned in the Commentary, EPR rule 63 is the expression of the *ne bis idem* principle, also guaranteed under Article 4 of Protocol No. 7 to the ECHR. The *ne bis in idem* principle consists of three elements: (1) the impugned acts or conduct form offences qualifying as "criminal", within the autonomous ECHR meaning; (2) the acts or conducts are the same in that they concern the same facts which constitute a set of concrete factual circumstances involving the same defendant and are inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute the proceedings, and (3) there was a duplication of finally concluded proceedings (*Sergey Zolotukhin v. Russia* [GC], no. 14939/03, 10 February 2009, and *A and B v. Norway*, nos. 24130/11 and 29758/11, 15 November 2016).

Use of force (rule 64) and the use of instruments of restraint (rule 68) reasonably raise major human rights concerns. The ECtHR has accepted that the use of force may be necessary on occasion to ensure prison security, and to maintain order or prevent crime in detention facilities. Nevertheless, such force may be used only if indispensable and must not be excessive (*Ivan Vasilev v. Bulgaria*, no. 48130/99, § 63, 12 April 2007). Any recourse to physical force in respect of a person deprived of his or her liberty which has not been made strictly necessary by his or her own conduct diminishes human dignity and is an infringement of the right set forth in Article 3 ECHR (*Bouyid v. Belgium* [GC], no. 23380/09, § 100, 28 September 2015). In addition, any arguable complaint of the use of force must be effectively investigated.

It should be also noted that the ECtHR has held that a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. This is particularly relevant for force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. However, the ECtHR stressed that it must satisfy itself that the medical necessity has been convincingly shown to exist. Furthermore, it must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the prisoner is subjected to force-feeding during the hunger strike must not trespass the threshold of a minimum level of severity envisaged by the ECtHR's case-law under Article 3 ECHR (*Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94, 5 April 2005).

Rule 70 (requests and complaints) is another major human rights indicator. The Commentary to this rule is extended, but relevant additions are proposed from the perspective of Article 13 ECHR. In the area of complaints about inadequate conditions of detention two types of relief are possible: an improvement in the material conditions of detention (preventive remedy) and compensation for the damage or loss sustained on account of such conditions (compensatory remedy). If a prisoner has been held in conditions that are in breach of Article 3 ECHR, a domestic remedy capable of putting an end to the on-going violation of his or her right not to be subjected to inhuman or degrading treatment, is of the greatest value. Once, however, the applicant has left the facility in which he or she endured the inadequate conditions, he or she should have an enforceable right to compensation for the violation that has already occurred. Moreover, the preventive and compensatory remedies have to be complementary in order to be considered effective. However, the ECtHR places special emphasis on the duty of the States to establish, over and above a compensatory remedy, an effective preventive remedy, namely a mechanism designed to put an end to an inadequate treatment rapidly (*Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 97-98, 10 January 2012). At this point a connection is made with the comments to rules 92 and 93. The ECtHR has not been inclined to accept that a complaint to the prosecutor, which does not

vest a personal right for the person concerned, or a complaint to the Ombudsman, who cannot issue binding and enforceable decisions, represent effective remedies (*Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 102-106, 10 January 2012, and *Neshkov and Others v. Bulgaria*, nos. 36925/10 et al., § 212, 27 January 2015).

No case-law comments exist on Part V (rules 71-91) addressing management and staff issues. In the next parts (Part VI, rules 92 and 93 on inspection and monitoring, Part VII, rules 94-101, untried prisoners as well as in Part IX, rule 108) also, no comments based on ECtHR judgments are suggested.

Finally, in Part VIII (rules 102-107 on the regime for sentenced prisoners) it is noted that, as regards compulsory prison work, the ECtHR, observing the lack of consensus between the Council of Europe Member States on the issue of work of prisoners who have reached the retirement age, did not consider that Rule 105.2 could be interpreted as providing for an absolute prohibition of work of prisoners who have reached the retirement age, which would be in breach of Article 4 ECHR (*Meier v. Switzerland*, no. 10109/14, §§ 78-79, 9 February 2016).

In all, ECtHR case law is a very useful source in enriching and strengthening the explanatory value of the EPR Commentary. The updating procedure should take advantage of this precious work.

3. The recent standard-setting work of the United Nations in the penitentiary field and its potential implications on the European Prison Rules

a. The Nelson Mandela legacy

Coyle 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 Standard Minimum Rules (SMR) for the Treatment of Prisoners approved by the UN's Economic and Social Council in a July 1957 resolution and extended by the Council in a May 1977 resolution, 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 (named "the Nelson Mandela Rules", to honour the legacy of the late President of South Africa, Nelson Rolihlahla Mandela, "who spent 27 years in prison in the course of his struggle for global human rights, equality, democracy and the promotion of a culture of peace"). The adoption followed a review process initiated in 2010 with a UN General Assembly resolution which requested revision of the SMR. The process was led by the UN Office of Drug Control and Crime Prevention (UNODC) with the active participation of many States and civil society organizations to assure that the revised Rules reflect major developments in human rights and criminal justice and recent advances in penitentiary science and practices.

It is the first time in the UN history that an international standard setting instrument has been updated and this happened with a 'targeted revision' approach, identifying the most out-dated areas of the old standards whilst leaving their structure and the majority of the "old" rules unchanged (Essex paper 3: Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules, http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202017/PRI%20-%20Essex%203%20paper.pdf). The new UN Rules address respect to human dignity as their very first standard. This is particularly stressed in Rules 29 (children accommodated in prison with their parent), Rules 96 and 97 (on work in prisons and the prohibition of slavery) and the treatment of prisoners and groups in positions of vulnerability. As it is stated in Preliminary Observations 1 and 2 of the SMRs, given "the great variety of legal, social, economic and geographical conditions in the world", these rules represent "the minimum conditions which are accepted as suitable by the United Nations", they are not applicable "in all places and at all times" and their purpose is "to set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management", not to describe "a model system of penal institutions".

Despite these limitations, 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. "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 rules are divided in two parts. The first part, regarding "the general management of prisons" includes rules of general application (: to all categories of prisoners, rules 1-85). The second part includes rules applicable to specific categories (: prisoners under sentence, prisoners with mental disabilities and/or health conditions, prisoners under arrest or awaiting trial, civil prisoners and persons arrested or detained without charge, rules 86-122). On the contrary, the European Prison Rules are divided in nine parts where basic principles and scope and application (rules 1-13), conditions of imprisonment (rules 14-38), health care (rules 39-48), good order (rules 49-70, management and staff (rules 71-91), inspection and monitoring (rules 92-93), untried prisoners (rules 94-101), regime for sentenced prisoners (rules 102-107), and updating the rules (rule 108) form different sets of rules.

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

1. Respect for prisoners' inherent dignity (rules 1 to 5): 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 (rules 24-27, 29-35): 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 (rules 36-39, 42-53): Detailed guidance is given on the use of instruments of restraint. Fairness and due process in disciplinary procedures are stressed and prohibited disciplinary sanctions (e.g. 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 (rules 6-10, 68-72): 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 (rules 2, 5(2), 39(3), 55(2) and 109-110): 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.

6. Access to legal representation (rules 41, 54-55, 58-61, 119-120): 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 (rules 54-57, 83-85): 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 (rules 75-76): The necessity of training for staff prior to entry into service, as well as on-going 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.

Another revised thematic area, not related to the content of the Rules, is terminology focused on health-related and gender-sensitive issues (https://www.unodc.org/documents/justice-and-prison-reform/Brochure_on_the_UN_SMRs.pdf).

The great majority of the 122 UN Nelson Mandela Rules (1, 2, 4-10, 24-27, 29-39, 41-61, 68-72, 75, 76, 83-85, 96.1, 97.2, 97.3, 109, 119 and 120) are substantively changed. One introductory observation is that it would be interesting to inquire if the Nelson Mandela Rules are an adaptation of the 1957 UN Standard Minimum Rules to the much posterior (2006) European Prison Rules or if the latter are now out-

dated and there is a need to bridge the gap created by the introduction of a contemporary set of rules at the UN level. Prima facie it seems that both answers are defensible, more or less for the same reasons; the rapid changes in the penitentiary field confirming that continuous reform is the programme of the prison, and the fluidity of the situation in the wider social world and the competing forces which shape it. In any case, it seems that the approach which supports the relative autonomy of the aims of imposing a sentence and the aims of its implementation which allows a distinction between "personal" liberty which is restricted by the sentence and "residual" liberty which is intact is consolidated. It is crucial that this view is quite compatible with a human rights friendly organisation and operation of institutions depriving liberty, promoting the normalisation of detention regimes, the responsabilisation of prisoners, and, further, their social reintegration. The UN 2015 and the CoE 2006 rules are following the same direction and share similar values in this area.

b. The Bangkok Rules

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" https://cdn.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf). 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 EPR recognize that women prisoners are a vulnerable category, but include only one rule (Rule 34) exclusively dealing with women's issues. In the EPR text though, there are more provisions (special hygiene needs, equal work opportunities, children care issues etc.). In any case the UN rules are obviously more advanced in the provision of women's treatment in prisons. It is acknowledged that women and girls characteristics and needs have remained largely unmet by prisons and their regimes, from architecture and security procedures to healthcare, family contact and training opportunities, because they represent less than a tenth of the prison population. The Bangkok Rules are crucial to address the needs that women have and the different situations they come from and the needs of children in prison with their parent. Providing guidance on a wide range of aspects of the prison regime (healthcare, rehabilitation programmes, the training of prison staff and visiting rights) they are, apparently, very useful in the revision and update of the EPR Commentary.

c. Dynamic Security, Prison Intelligence, Violent Extremism and Radicalisation

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.

The concept of dynamic security is included in the EPR (rule 51.2) and its meaning and uses are explained in the Commentary (rules 51, 52, 64). Intelligence, a prison function which consists of information and analysis "seeks, through objective strategic and operationally driven planned collection, to identify those prisoners, visitors, staff and organizations planning to engage in activity, or who are engaged in an activity that may be a threat to the good order, safety and security of a prison before the event occurs" (UNODC Handbook) as such is not included in the EPR and the Commentary and its potential introduction is an issue to be considered.

The UN handbook on the management of violent extremist prisoners and the prevention of radicalization to violence in prisons constitutes the first technical guidance tool to address the manifestation of radicalization to violence and violent extremism in prison settings at the level of the United Nations. It provides practical guidance on (1) the management of violent extremist prisoners (prisoners who have embraced violent extremism), (2) preventing the progression to violent extremism in prisons (prisoners who may be vulnerable to radicalization to violence), (3) interventions aimed at disengaging violent extremist prisoners from violence and at facilitating their social reintegration upon release. It 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 (http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202017/PC-CP%20(2016)%202_E%20Rev%204%20(CM(2017)21-add)%20Council%20of%20Europe%20Handbook%20for%20Prison%20and%20Probation%20Services%20regarding%20Radicalisation%20and%20Violent%20Extremism%20FinalDecember%202016.pdf.). The aim of these documents is to provide specific directions and suggested recommendations to achieve good practises in the risk assessment, management and reintegration of radicalised offenders and their content can be used to supplement comments to different rules in different parts of the Commentary (good order, prison management, needs and risks assessments, offenders' reintegration etc.).

d. Monitoring bodies

The entry into force, in June 2006, of the Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (to be referred to as UN-CAT; G.A. res. A/RES/57/199. adopted Dec.18, 2002) gave a new impulse to the monitoring of detention places and the prevention of torture and ill-treatment. First, it established an independent international monitoring mechanism, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT), a structure replicating the CPT at a wider, universal level. Another significant aspect of the OPCAT is the so-called "second pillar", namely the obligation of states adhering to the Protocol to provide for their national preventive mechanisms (NPMs) with extensive monitoring powers in relation to detention issues.

As it is mentioned in the Commentary, the EPR leave room for the various forms monitoring bodies may have. The CPT in their 22nd General Report identified three main models of NPMs operating in Europe:

a) Ombudsman/Ombudsman plus: in countries following this approach (e.g. Albania, Estonia, Georgia, Spain), the pre-existing functions of the Ombudsman institution are extended to encompass the NPM mandate. In certain countries (e.g. Republic of Moldova, Slovenia), the NPM mandate is carried out by the Ombudsman office together with civil society actors (NGOs).

b) Stand-alone single body model: that is the establishment of a specific body exclusively devoted to carrying out the NPM mandate. Examples of this approach are the mechanisms established in France, Liechtenstein and Switzerland.

c) Multi-body model: in certain countries (e.g., the Netherlands and the United Kingdom), several existing inspectorates and/or specialised independent institutions have been jointly designated as the NPM, with one institution having a coordinating role.

This development is an example supporting the argument that the commentary can be updated without changing the EPR themselves.

4. Concluding remarks

The decision to update and revise the Commentary to the EPR is not ungrounded. Various developments in penal and prison policies, management, principles and practices, "coded" in various documents and

sources of different origin, offer a wide range of useful information, worthy to be included in the text which accompanies the EPR. All the above mentioned standards, judgements, recommendations, guidelines, handbooks etc. are the living proof of the on-going changes in the penitentiary field and show how much wisdom is included in the recognition of the need to keep these documents (Rules and Commentaries) under continuous scrutiny. In my view, the unavoidable extended update of the Commentary should not leave the corpus of the Rules untouched. One cannot ignore that, even if in the CoE context new CM Recommendations, ECtHR judgments, and the CPT standards and reports, despite their different functions and roles, address in a complementary way the majority of emerging issues, the pressure the UN “Nelson Mandela Rules” put on the eastern side of the Atlantic to “match” the EPR to the substantive areas covered by them, is not negligible. This “matching” may result in the “completion” of the rules, where the strengths of both documents will be combined.