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Revised European Prison Rules

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The chair, Mr Kleijssen, distinguished participants,

It is a great honour to be asked to speak today; even more so because it is the second time I have been asked to give a lecture on the European Prison Rules to the conference of Directors of Prison and Probation Services. The first lecture, 16 years ago, was held in a palazzo on the *Piazza del Campidoglio* designed by Michelangelo and in the very room where the Treaty of Rome, which formed the basis for the modern EU, was signed in 1957. The venue was much grander than my home study, where I am today!

In my 2004 lecture I was presenting what was a final draft of the 2006 European Prison Rules. As background I sketched the history of international and European rulemaking for prisons and explained how the European Prison Rules had grown out of a European desire to have rules that built on, but went beyond, the 1955 UNSMR. I described how a happy alliance of the Parliamentary Assembly of the Council of Europe, the CPT and the decisions of the ECtHR had led to pressures for continued reform and to the production of what became the 2006 European Prison Rules.

The general mood in 2004 was perhaps more optimistic than we are today, but, nevertheless, the 2006 European Prison Rules have had even more impact than our best expectations back then. Quite simply, they have become embedded into the framework of European thinking about prisons. National European prison laws have been reformed with the Rules in mind, the CPT regularly refers to them when reporting on the treatment of prisoners, and the ECtHR has relied explicitly on the EPR in more than a 1000 instances since 2006, in particular when deciding on the application to prisoners of the prohibition, in Art 3 of the ECHR, on inhuman or degrading treatment. This is a significant legal development, which judge Pinto de

Albuquerque of the ECtHR has characterised as the gradual recognition of the EPR as embodying a form of de facto hard human rights law.

So, if the 2006 EPR has been such a success why bother to change it? The simplest answer is that the final rule of the EPR provides (Rule 108) "The European Prison Rules shall be updated regularly". Of course, this is not a sufficient reason to do anything. Dare I say, many Council of Europe recommendations have such provisions and that they are mostly observed in the breach.

Fortunately, in the case of the EPR there were larger forces at work. Within the Council of Europe structures, the very success of the 2006 EPR created a virtuous circle, with CPT and the Parliamentary Assembly and the ECtHR, developing new insights that were not part of the conversation in the early 2000s. The EU too has joined in with various projects to support the implementation of the EPR.

Outwith the magic circle of the Council of Europe, the United Nations has been playing an increasing role in prison standard setting. To take a few brief examples:

- **The entering into force shortly after the EPR of OPCAT (the Optional Protocol to the UN Convention against Torture) has encouraged the development in Europe in particular, of the National Preventive Mechanisms mandated for countries that adopt the Protocol. With this has come a growing interest in how prisons should be monitored and against what standards their performance should be measured.**

- **The Bangkok Rules, or to give them their full title, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, offered a gloss on the UNSMR that encouraged further reflection on how prison rules impact on women.**

- **And then the UNSMR themselves: They were not updated for 60 years but then finally in late 2015 came some major changes to the SMR, now called the Nelson Mandela Rules. It was not a complete rewrite, but the language was updated, together with some substantive changes in key areas, including, most importantly, a new restriction of the use of solitary confinement.**

It was against this background that the question of updating the Rules arose and in early 2017 the Penological Council of the Council of Europe (PCCP) invited me and my then student Harvey Slade as expert advisers to assist with the updating, initially not of the Rules but of the Commentary on them. However, in the course of updating the Commentary in 2017 and 2018, it became apparent that it would also be necessary to amend the Rules themselves. We advised accordingly and, after some debate between the (PCCP) and the European Committee on Crime Problems (CDPC), it was agreed that the PCCP would be allowed to recommend updating the EPR rules dealing with the following eight areas:

1. Separation and solitary confinement
2. Women
3. Foreign nationals
4. Instruments of restraint
5. Requests and complaints
6. Adequate prison staffing levels and minimum service guarantees
7. Records and file management
8. Inspections and monitoring

Updates in all eight areas were finally adopted by the CDPC in December 2019 and by the Committee of Ministers of the Council of Europe in July 2020.

What I propose to do is to consider these eight areas in order to understand the issue underlying the need for change and what actually emerged as revisions to the Rules. I will focus on the most controversial of these, which brings me immediately to <u>separation and solitary confinement,</u> and I will then return to the others at the end.

1. The 2006 European Prison Rules contained general restrictions on the use of all special safety and security measures that might impact negatively on prisoners. The 2006 Rules did not specify, however, in what circumstances prisoners could be separated from others. It did deal briefly with solitary confinement (the most extreme form of separation) as a disciplinary sanction, but was silent about other forms of separation. This void has now largely been filled by the 2020 amendments to the EPR.

The background is that since 2006, in Europe and also worldwide, there have been several developments, both in the understanding of the deleterious

effects of long-term separation and in the provision of standards to guide prison administrators in this regard:

(1) In 2011 the CPT evaluated "solitary confinement", broadly defined to include prisoners who are held separately as a result of a court decision, as a disciplinary sanction, for preventive purposes, or for protection purposes. The CPT set general standards governing all these types of "solitary confinement" and developed standards to govern the procedures and safeguards for each of them.

(2) In 2015 the General Assembly of the United Nations amended the 1955 UN Standard Minimum Rules for the Treatment of Prisoners. The 2015 Nelson Mandela Rules (as they are now called) included as new provisions on solitary confinement which is defined as "confinement of prisoners for 22 hours or more a day without meaningful human contact" (NMR Rule 44). The Nelson Mandela Rules prohibit the use of indefinite solitary confinement, that is, the solitary confinement of a prisoner for more than 15 days. In addition, the Nelson Mandela Rules contain a somewhat vague requirement that "any form of involuntary separation from the general prison population" should be authorized by law or regulated by the competent administrative authority (Rule 37). However, this requirement is not directly linked to solitary confinement and the restrictions on its use.

(3) Thirdly the last decade has seen the emergence of an impressive body of scientific evidence on the negative effects of long-term solitary confinement (broadly defined).

The 2020 amendments to the European Prison Rules build on these developments but adopt a somewhat different approach. The key innovation is the introduction of a new provision, Rule 53A, which is bolstered by important amendments to Rule 53 and Rule 60.

Rule 53A deals with all forms of separation and requires that "prisoners who are separated shall be offered at least two hours of meaningful human contact a day". It follows from this provision that all prisoners who do not have access to such contact are being held in solitary confinement as defined in the UN Nelson Mandela Rules, and in breach of Rule 53A of the EPR. The revised Rules make an exception for solitary confinement, adopting a similar definition to the Nelson Mandela Rules (EPR Rule 60.6a) but <u>only</u> for solitary confinement as a disciplinary punishment.

Prisoners who are subject to disciplinary punishment are therefore the only prisoners who, in terms of the European Prison Rules, do not have a right to two hours of meaningful contact a day. The use of solitary confinement as a disciplinary punishment is subject, however, to restrictions on its use. Those restrictions are set out in the amended Rule 60(6). I will return to these rules in a moment, but first a few more thoughts about separation.

An important aspect of the EPR Rule on separation (Rule53A) is that it fully covers all the types of separation (other than solitary confinement as a disciplinary punishment) which the CPT addresses in its wider discussion of "solitary confinement" in its 2011 standards. This is the case regardless of how prison authorities refer to such separation; it may be called 'separation', 'segregation', 'isolation' or even 'solitary confinement'. In other words, where prisoners are separated from others as a result of a court decision, or for preventive or protection purposes, they not only have to have two hours of meaningful human contact a day, but all the other requirements of the EPR have to be met. These include not only those set by Rule 53A but also the requirements of Rule 53, which has been amended to emphasise that all special safety and security measures, of which separation is one, should "only be applied in exceptional circumstances and only for as long as security or safety cannot be maintained by less restrictive means". Rule 53 also sets out procedures that must be followed for the imposition of all special high security or safety measures, including separation.

In addition to the "two hours of meaningful human contact" requirement, Rule 53A specifies a number of other standards that must be met when prisoners are separated. These include a requirement that "prisoners who are separated shall not be subject to further restrictions beyond those necessary for meeting the stated purpose of such separation" (Rule53A.d). Implicit in this rule is the principle of proportionality in the implementation of separation. This principle is developed further in Rule 53A.f, which provides that "the longer a prisoner is separated from other prisoners, the more steps shall be taken to mitigate the negative effects of their separation by maximising their contact with others and by providing them with facilities and activities." The principle is also reflected in Rule 53.8, which, while applying more broadly to all high security and safety measures, states that "[s]uch measures shall only be based on the current risk that a prisoner poses, shall be proportionate to that risk and shall not entail more restrictions than are necessary to counter that risk." Any "decision on

separation shall take into account the state of the prisoners concerned and any disabilities they may have which may render them more vulnerable to the adverse effects of separation" (Rule 53A.b). It is also specified that "cells used for separation shall meet the minimum standards applicable in [the EPR] to other accommodation for prisoners" (Rule53A.e). Separated prisoners must also be given reading materials and an hour's exercise a day (Rule 53A.g). They must be visited daily by the director of the prison or by a member of staff acting on behalf of the director of the prison (Rule 53Ah), and retain their right to complain as spelt out in Rule 70 of the EPR, which was also substantially developed in the revised EPR (Rule 53A.j).

So much for separation: let me return to solitary confinement, in the sense we use it in the EPR, solitary confinement is separation with less than two hours a day of meaningful human contact. As there is now strong scientific evidence that separation with such a severe restriction on contact can have a very negative effect on prisoners, solitary confinement may only be imposed as a punishment. And even then, its imposition is subject to a range of limitations. In some instances, its use is totally excluded: Rule 60.6.a provides that solitary confinement shall "never be imposed on children, pregnant women, breastfeeding mothers or parents with infants in prison" – a provision that reiterates the principle set down by the UN Committee on the Rights of the Child and the UN Bangkok Rules on women prisoners. It shall also "not be imposed on prisoners with mental or physical disabilities when their condition would be exacerbated by it" (Rule 60.6.b).
Other restrictions are the provision that "[w]here solitary confinement has been imposed, its execution shall be terminated or suspended if the prisoner's mental or physical condition has deteriorated" (Rule 60.6.b). There is a further restriction on the use of solitary confinement in Rule 60.6.e, which provides: "Where a punishment of solitary confinement is imposed for a new disciplinary offence on a prisoner who has already spent the maximum period in solitary confinement, such a punishment shall not be implemented without first allowing the prisoner to recover from the adverse effects of the previous period of solitary confinement."

Unlike the CPT standards or the Nelson Mandela Rules, the EPR still do not specify a maximum number of days for which solitary confinement may be imposed. This is unfortunate, as a bright line prohibition is an effective safeguard against abuse. However, in addition to the restrictions I have mentioned, Rule 60.6. c contains an important further restriction:

"Solitary confinement shall not be imposed as a disciplinary punishment, other than in exceptional cases and then for a specified period, which shall be as short as possible and shall never amount to torture or inhuman or degrading treatment or punishment."

Furthermore, Rule 60.6.d requires that "[t]he maximum period for which solitary confinement may be imposed shall be set in national law". This last rule is significant, for it compels national legislatures to compensate for the failure of the EPR to set an appropriate maximum period of solitary confinement. On this point, the Commentary to the EPR emphasises that a15-day limit has been set by the Nelson Mandela Rules, while the CPT has repeatedly emphasised its own 14-day limit – standards which member States are obliged to bear in mind. If national legislatures were to set a maximum of longer than the 15 days prescribed by the Nelson Mandela Rules, they are likely to face a challenge before the European Court of Human Rights, which may well hold that a longer maximum period would amount to inhuman or degrading punishment and thus contravene Article 3 of the European Convention on Human Rights. In coming to such a conclusion, the Court would be able to rely on the scientific evidence , including the "Statement on Solitary Confinement" in which the General Assembly of the World Medical Association, after reviewing the medical evidence, declared in October 2019 that solitary confinement should never exceed 15 consecutive days.

The amended European Prison Rules present several difficult interpretative challenges. None of these is as complex as the term, "meaningful human contact", which the European Rules share with their UN counterpart, the Nelson Mandela Rules. Neither instrument specifies what the term means, but some indications are beginning to emerge of how it is likely to be used in practice. First indications for Europe come from the CPT, which has applied the concept of 'meaningful human contact' in a number of its reports on national prisons. When so doing, the CPT has regarded meaningful human contact as (quote) "the amount and quality of social interaction and psychological stimulation which human beings require for their mental health and well-being. Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity."

This exposition is still only a starting point. In due course, national prison systems will have to produce detailed guidance for their staff on how to provide daily meaningful human contact for their prisoners. Failure to do so may well result in what was intended to be mere separation to be regarded by monitoring bodies or courts as an illegitimate form of solitary confinement.

To wrap up this section: the importance of this new web of rules can be illustrated by a single example: The risk that a prisoner has COVID-19 is undoubtedly a ground for separating such a prisoner. On the other hand, it is clearly not a ground for subjecting such a prisoner to disciplinary solitary confinement. The prisoner who has, or may have, COVID-19 should therefore have access to at least two hours of meaningful human contact daily and also all the other rights and facilities set out in Rule 53A. Prison authorities have to think carefully how to do so, as failing to provide these rights and facilities for prisoners in COVID-19 separation will expose the authorities to allegations that they are meting out inhuman and degrading treatment to these prisoners. More positively, the amended EPR may encourage widespread reforms in the way in which prisoners are treated in 'the prisons within a prison' in which they are segregated. This could lead to a long-term reform of prison regimes throughout Europe.

The other rule changes I will deal with more briefly.

2. Women: a general clause has been added to the existing rule on women, Rule 34 "Specific gender sensitive policies shall be developed and positive measures shall be taken to meet the distinctive needs of women prisoners in the application of these rules." (34.1) and a few other adjustments have been made to strengthen the Rules in this regard. This is largely a reflection of the Bangkok Rules. However, there is clearly scope for a fuller Council of Europe recommendation on women's prisons, which would enable this issue to be addressed more systematically

3. In the case of foreign nationals there has been an important further European recommendation post-2006, the 2012 Recommendation of the Committee of Ministers to member States concerning foreign prisoners. Changes to the existing Rule 37 build on this recommendation. Without going into detail, the amended Rule 37 now emphasises the importance of taking positive measures to ensure that the distinctive needs of prisoners who are

foreign nationals are met, and that they receive programs and access to the outside world that are on a par with those available to national prisoners. They are also entitled to be considered for early release in the same way as other prisoners.

4 The current Rule dealing with instruments of restraint (Rule 68) has been strengthened by including principles restricting their use. Instruments of restraint should be used only when authorised by law and then only when no lesser form of control would be effective to address the risks posed by a prisoner. Moreover, this should be done in the least intrusive way possible and for the minimum period required.

5. The rule on requests and complaints (Rule 70) has been tightened up considerably. Much of the change is procedural and inspired both by the need to set a clear process for prisoners to follow if they are unhappy about their complaints not being addressed, and by the requirement of European human rights law that domestic remedies must be exhausted before the ECtHR can be approached to intervene. It must be clear what the internal domestic remedies are, so that one can judge whether they have been used to the full.

6. Further, there has been a small but strategic change to Rule 83 to provide that prisons must be adequately staffed at all times and be "capable of withstanding operational emergencies" The intention here is to ensure that staff shortages, during a strike, for example, cannot be used as a justification for keeping prisoners locked in their cells for excessive periods.

7. The rules on records and file management have been much expanded, and a new rule, Rule, 15A introduced. This change is driven by the increasing recognition that good records are essential, not only for the protection of prisoners (and of staff against claims of abuse) but also for the smooth operation of the prison system as a whole.

8. Finally, there are now much more extensive provisions in Rules 92 and 93 that deal with Inspections and monitoring. Some of these give more powers to independent monitors and incorporate changes presaged in the Nelson Mandela Rules. A valuable change is a specific provision that recommendations made by independent monitors must be considered by the prison authorities, who are required to respond to them, explaining, not only to the monitors but also to the public, whether they will adopt the

recommendations and if not, why not. I see this development as important for the many NPMs that are emerging in European countries.

A last reflection. I think that the growing recognition of the EPR by the ECtHR made the process of amending the Rules harder, as member States were rightly concerned to examine carefully rules that will be considered binding upon their prison services, even if indirectly. However, now that the changes have been adopted, the increased status of the EPR is a heartening development, for it should encourage states to apply the modified provisions. If they don't, they run the risk that they will be held responsible by the Court and others for failing to meet their legal obligations. If they do apply the new provisions, we can expect prisoners throughout Europe to be treated more humanely. This is the positive outcome on which we should be focusing.

Thank you