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Revision of the European Prison Rules and related commentary

Submission by Penal Reform International and the Association for the Prevention of Torture

to the

19th meeting of the Working Group of the Council for Penological Co- operation (PC-CP), 17-19 September 2018 in Strasbourg

Penal Reform International (PRI) and the Association for the Prevention of Torture (APT) welcome the decision of the European Committee on Crime Problems (CDPC) during its 74th Plenary in June 2018 (Session CDPC (2018)11) to mandate the PC-CP to prepare preliminary draft texts amending the several rules of the European Prison Rules. The revision also foresees some technical changes in the Preamble in order to align its content to the jurisprudence of the European Court of Human Rights (ECtHR), the standards of the European Committee for the Prevention of Torture (CPT), as well as the UN Standard Minimum Rules for the Treatment of Prisoners (The “Nelson Mandela Rules”).

The Rules being revised are as follows:

- Solitary confinement (Nos 3, 24, 53 and 60.5)
- Records and file management (No 15.1)
- Women (No 34)
- Foreign nationals (No 37)
- Use of restraints (No 68)
- Complaints (No 70)
- Adequate staffing level (Nos 71 to 91)
- Inspections and monitoring (Nos 92 and 93)

In this regard APT and PRI welcome the opportunity to submit information and invite the Working Group and the PC-CP members to consider their views and recommendations.

Context

The European Prison Rules (EPR or “the Rules”) are a key reference for both prison administrations and staff in the region. The Rules are also used by monitoring bodies and civil society, providing guidance on how to uphold the rights of people in prison in practice. Furthermore, the ECtHR frequently uses the European Prison Rules in their jurisprudence. It is therefore of utmost importance that the Rules are revised to ensure they reflect the most recent and highest protection availed to people in prison, as laid out in international and regional standards.

The EPR remain more detailed and more progressive than the Nelson Mandela Rules in some areas, in particular with regard to core issues of prison management such as classification, sentence planning, rehabilitation programmes and preparation for release. For example, provisions relating to

accommodation and allocation were not revised in the revision of the Standard Minimum Rules for the Treatment of Prisoners and therefore standards of higher protection are provided in the EPR.

However, in other areas the Mandela Rules now constitute the more progressive instrument, and practitioners in the Council of Europe area should be expected to apply the higher standard respectively. For instance, while the gap regarding gender-sensitive provisions has been filled at the international level by the adoption of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), no comparable step has been taken at the European level.

PRI and APT reiterate that the most important principle of the current revision should be not to lower existing standards. Key new standards to be incorporated during this revision process include the UN Nelson Mandela Rules, the UN Bangkok Rules, CPT standards, judgments of the European Court of Human Rights, as well as other relevant Recommendations from the Council of Europe's Committee of Ministers, such as the one on foreign prisoners.

This submission is based on the document that will be discussed by the Working Group during the 17-19 September meeting - [PC-CP/docs 2018/PC-CP\(2018\)5_E](#).

Format of the submission

APT and PRI submission is structured around the respective sections for revision, with short introductions, key messages and proposed substantive changes to the language for each section (for both the rules and the commentary).

The format of this document strictly replicates the document that will be revised during the working group's meeting, i.e. the text of the Rules are in blue and the text of the Commentary in italics, with changes made by the experts in bold. Changes proposed by PRI and APT are indicated in *red italics* and highlighted in grey. All proposed amendments or additions are followed by the reference in brackets.

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SOLITARY CONFINEMENT (Rules 3, 24, 53 and 60.5)

Introduction

The detrimental effect of isolation on human beings and the misuse of solitary confinement are well-documented. All states should avoid the use of solitary confinement where possible and take steps towards its total abolition.

The body of research on its negative impact on physical and mental health, and significant body of international law regulating and restricting the use of solitary confinement (a term used interchangeably with the terms “isolation” and “segregation”) was taken into account in the revision of the UN Standard Minimum Rules for the Treatment of Prisoners. The Nelson Mandela Rules now provide a definition for solitary confinement, and what would constitute “prolonged” solitary confinement and restrict its use.

Key messages

PRI and APT support the proposed comprehensive revision, given there is a critical need to provide clarification over legitimate use of solitary confinement, drawing on the UN Standard Minimum Rules for the Treatment of Prisoners is necessary

It is essential that the European Prison Rules on solitary confinement are updated so that **prison staff can separate a prisoner from the general prison population only if and when permissible by law**, irrespective of the length of the period of such separation and irrespective of the term used for such a measure (solitary confinement, isolation, segregation, special care units or restricted housing).

Comments on the revised rules and commentary (*changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red*). For this area of rules, PRI and APT did not replicate the entire text below but only the provisions where we have suggested changes (Rule 3 and Rule 53D).

3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed *ensuring safe custody and the secure operation of the prison. (Mandela Rule 36)*

This rule emphasises the limits to the restrictions that may be placed on prisoners. It highlights the overall principle of proportionality that governs all such restrictions. The ECtHR has also consistently held that under Article 3 of the European Convention on Human Rights (ECHR) the suffering involved must not go beyond that inevitable element of humiliation connected with detention. The State must ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the sanction or measure do not subject them to distress or hardship of an intensity exceeding the unavoidable suffering inherent in detention and that, given the practical demands of imprisonment, their health and well-being are adequately secured.¹ Restrictions can only be legitimately placed on persons if necessary to ensure the safety of prisoners and staff, and the secure operation of the prison. In accordance with Rule 53, special high security and safety measures should only be used as a last resort. The same applies to solitary confinement: Rules 53A-53D and 60.5.

In exceptional cases, where restrictive measures that amount to solitary confinement have to be used, the general considerations set out in the commentary to Rule 53 should be applied in all cases. In this

¹ *Kudła v. Poland* [GC], No. 30210/96, paragraphs 92-94, judgment of 26/10/2000.

~~regard the approach adopted by the CPT is to give guidance that applies to all forms of solitary confinement and then to develop more specific standards that apply to each individual form.² The general guidance developed by the CPT can be summarised as follows:~~

~~(a) The application of solitary confinement should be proportionate to the actual or potential harm a prisoner has caused or will cause by his or her actions, or the potential harm to which the prisoner is exposed in the prison setting.~~

~~(b) Solitary confinement should be lawful only in so far as there is provision for it in national law. Such law shall include the general principles governing all forms of solitary confinement and the specific requirements for particular forms of solitary confinement.~~

~~(c) Accountability for solitary confinement should be ensured by keeping full records of all decisions to impose solitary confinement and of all reviews of the decisions, and the reasons for taking these decisions.~~

~~(d) Prisoners in solitary confinement should be subject only to restrictions that are necessary for the safe and orderly implementation of the form of solitary confinement in which they are being held.~~

~~(e) Steps should be taken to ensure that solitary confinement is not imposed or implemented in a way that discriminates against any prisoner or group of prisoners.~~

Solitary confinement for protection purposes (53D)

53D.1 Solitary confinement for protection purposes shall only be used to detain prisoners who are at significant risk of serious harm if left in the general prison population.

53D.2 Alternative methods of protecting individual prisoners, including non-custodial measures, shall always be considered before they are detained in solitary confinement for protection purposes, regardless of whether they are detained at their own request.

53D.3 Where prisoners are detained against their will in solitary confinement for their own protection, they shall be given an immediate explanation of the decision and be able to challenge it and proffer alternative solutions.

53D.4 A written report shall be drawn up by the member of staff who has authorised solitary confinement for protection purposes in each individual case, recording the reasons for the detention and the precise time of the detention, as well as the views of the prisoner.

53D.5 Such report shall be submitted, as soon as possible, to the director of the prison, who shall order the continuation of the solitary confinement or its termination with immediate effect.

53D.6 Where solitary confinement for protection purposes continues for longer than 24 hours, the director of the prison shall conduct a full review of the necessity of its continuation.

53D.7 Such reviews shall be repeated at least once every 7 days.

53D.8 Solitary confinement for the protection purposes imposed against the will of the prisoner concerned that continues for longer than 14 days shall be subject to review by an independent authority with the power to terminate such solitary confinement.

53D.9 Prisoners subject to the solitary confinement for protection purposes imposed against their will shall have a right to make representations to such a reviewing authority and to be provided with a reasoned judgment for its decisions.

² 21st General Report of the CPT [CPT/Inf (2011) 28], paragraphs 37-50.

53D.10 Such a reviewing authority shall have access to all the records relating ~~to the~~ imposition and continuation of the solitary confinement as well as to any representations that the prisoner subject to the solitary confinement wishes to make.

53D.11 If the reviewing authority decides to allow the solitary confinement for protection purposes to be imposed against the will of the prisoner concerned to continue, the decision shall be reviewed again after further 14 days.

53D.12 Where prisoners request solitary confinement for their own protection it shall be ensured that they understand the full potential consequences of such confinement.

53D.13 A request from any prisoner who is being detained voluntarily in solitary confinement for their own protection to return to the mainstream shall be considered and granted if this can be safely done.

53D.14 If such a request is denied, the solitary confinement for protection purposes shall be deemed to have been imposed against the prisoner's will, and treated accordingly for purposes of review.

Rule 53D should be read the light of Rule 53A, which is also applicable to solitary confinement for protection purposes.

The CPT has recognised that it may, at times, be necessary to remove prisoners from the general prison population and place them in separate accommodation for their own protection. As a rule, such separation should be for as short a period as possible. All appropriate measures should be taken to facilitate the reintegration of the prisoner into the general prison population, either in the same establishment or in another one.³

In practice, there is a risk that solitary confinement for protection purposes may continue for excessively long periods. Like solitary confinement for preventative purposes, it is open to abuse, particularly if it is imposed against the will of the prisoners concerned. In order to prevent abuse, Rule 53D contains a number of additional safeguards. In the case of prisoners who are held in this form of solitary confinement against their will, these safeguards are largely similar to those for prisoners held in solitary confinement for preventative purposes.

~~60.5 Solitary confinement shall be imposed as a punishment in exceptional cases, and for a specified period of time, which shall be as short as possible.~~

60.5.a. Solitary confinement shall not be imposed as a punishment for a disciplinary offence, other than in exceptional cases and then for a specified period of time, which shall be as short as possible, and shall not exceed 14 consecutive days or 28 days within a 180-day period.

60.5.b. Where the director of a prison or the senior member of staff acting on behalf of the director in terms of Rule 53A.2.(j) terminates the solitary confinement of a prisoner, the director shall immediately inform the disciplinary body that imposed it.

60.5.c. A disciplinary body that imposed the solitary confinement, which was terminated in terms of paragraph 5.b, may then impose an alternative punishment, taking into account the period of solitary confinement that has already been served.

The imposition and application of solitary confinement in Rule 60.5 should be interpreted in the light of Rule 53A which is also applicable to solitary confinement for disciplinary purposes. As amended in 2019, Rule 60.5a sets maximum period of 14 days for solitary confinement for disciplinary purposes. This follows a recommendation of the CPT.⁴ These maxima are

³ 21st General Report of the CPT [CPT/Inf (2011) 28], paragraph 61(d).

⁴ 21st General Report of the CPT [CPT/Inf (2011) 28], paragraph 56(b).

necessary, as prolonged periods of solitary confinement can have serious deleterious effects on prisoners.⁵ Consecutive periods of solitary confinement are limited for the same reason.

Solitary confinement, referred to in Rule 60.5 should be understood in the light of the commentary on solitary confinement in general made in the context of Rules 3 and 53 above.

The European Prison Rules do not set a maximum period for solitary confinement. However, the CPT has proposed that the maximum period should be 14 days for solitary confinement imposed for disciplinary purposes.⁶ Rule 43 of the Nelson Mandela Rules stipulates that solitary confinement imposed for disciplinary purposes should not be indefinite, or prolonged beyond a maximum period of 15 days. These maxima should guide disciplinary tribunals that impose solitary confinement, as prolonged periods of solitary confinement can have serious deleterious effects on prisoners.⁷ Consecutive periods of solitary confinement should not be imposed since these would effectively violate the restriction on the maximum length of such confinement.

During the period of solitary confinement, prison staff shall make regular and reasonably frequent contact with these prisoners (see the commentary on Rule 42). The CPT pays particular attention to the use of solitary confinement or any conditions similar to it. It noted in an early report that “solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible”.⁸

It must be stressed that the requirement of one hour of daily outdoor exercise for prisoners (Rule 27.1) applies equally to prisoners placed in solitary confinement as a punishment. Such prisoners should also be provided with reading material. The same applies to prisoners held under special high security measures (Rule 53).

⁵ 21st General Report of the CPT [CPT/Inf (2011) 28],

⁶ 21st General Report of the CPT [CPT/Inf (2011) 28], paragraph 53;

⁷ Ibid., paragraph 53; See also the Istanbul statement on the use and effects of solitary confinement, annexed to Interim report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 28 July 2008 A/63/175.

⁸ 2nd General Report of the CPT [CPT/Inf (92)3], paragraph 56.

RECORDS AND FILE MANAGEMENT (Rule 15.1)

Introduction

Good prisoner file systems are of crucial importance to protecting human rights, ensuring good prison management and strategic planning, and ensuring public trust in the prison system. While file management systems differ from country to country, the type of minimum information a prisoner file should contain should be regulated by law and accompanied by specific policies or guidelines.

Having an up-to-date file that goes beyond admission (Rule 15) and as soon as possible after admission (Rule 16) ensures comprehensive guidance is given, in line with best practice and international standards

Key messages

The revisions proposed to the European Prison Rules on the information to be captured at admission should **draw on the more detailed guidance provided in the Nelson Mandela Rules**, for example including in the Rules themselves (not only in commentary) to **require information about family members, particularly children**. This is also required by the UN Bangkok Rules in view of the importance of women prisoners being assisted in ensuring contact with their children can be maintained.

While the importance of good file management throughout the term of imprisonment has been recognised in the commentary, **a separate provision on records beyond admission would contribute to a blanket protection of the rights of the prisoners and the completeness** of the European Prison Rules. A new Rule should be added to capture this (as proposed below as Rule 15.A).

Comments on the revised rules and commentary (*changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red*).

15.1 At admission the following details shall be recorded immediately *in a standardized prisoner file system* concerning each prisoner:

- a. information concerning the *precise* identity of the prisoner; *enabling determination of his or her unique identity, respecting his or her self-perceived gender;*
- b. the reasons for commitment and the authority for it, *in addition to the place of arrest;*
- c. the day and hour of admission *and release as well as of any transfer;*
- d. an inventory of the personal property of the prisoner that is to be held in safekeeping in accordance with Rule 31;
- e. any visible injuries and complaints about prior ill-treatment; *and*
- f. subject to the requirements of medical confidentiality, any information about the prisoner's health that is relevant to the physical and mental well-being of the prisoner or others-;
- g. *the names of his or her family members, including, where applicable, at least the name of his or her children, the children's ages, location and custody or guardianship status; and*
- h. *emergency contact details and information on the prisoner's next of kin.*

(Nelson Mandela Rules 6-7, Bangkok Rule 3)

15.2 All information collected at admission and thereafter as required by the Rules shall be kept confidential and made available only to those whose professional responsibilities require access to such records.

15.3 Prisoners shall be granted access to all their medical and other records, other than those restricted under national law for purposes of safety and security, and be entitled to receive a copy of such records upon release.

15.4 At admission all prisoners shall be given information in accordance with Rule 30.

15.5 Immediately after admission notification of the detention of the prisoner shall be given in accordance with Rule 24.9.

15.A Continuously after admission the following information shall be entered in the prisoner file management system in the course of imprisonment, where applicable: (Nelson Mandela Rule 8)

a. Information related to the judicial process, including dates of court hearings and legal representation; and any other information in accordance with Rule 30; (Nelson Mandela Rule 8)

b. Initial assessment, sentence plans and the strategy for preparation for their release and classification reports as required by Rule 103; (Nelson Mandela Rule 8)

c. Information related to behaviour and discipline; (Nelson Mandela Rule 8)

d. Requests and complaints, including allegations of torture or other cruel, inhuman or degrading treatment or punishment, unless they are of a confidential nature; (Nelson Mandela Rule 8)

e. Information on the imposition of disciplinary sanctions, (Nelson Mandela Rule 8)

f. Information on any searches carried out, in particular strip and body cavity searches and searches of cells, as well as the reasons for the searches, the identities of those who conducted them and any results of the searches; (Nelson Mandela Rule 52)

g. Information on the circumstances and causes of any injuries or death and, in the case of the latter, the destination of the remains. (Nelson Mandela Rule 8)

Good record keeping is important to guarantee that persons are not deprived of their liberty arbitrarily and that due process is guaranteed. Meticulous record keeping for each prisoner should continue throughout the time that the prisoner is kept in prison. These details shall be recorded in a standardized prisoner file system; such a system may be an electronic database of records or a registration book with numbered and signed pages. Procedures shall be in place to ensure a secure audit trail and to prevent unauthorized access to or modification of any information contained in the system. (Nelson Mandela Rule 6). Access to all records generated at admission and subsequently should be regulated by national law to ensure that the privacy of prisoners is respected, **as outlined in Rule 15.2**, while balancing that against legitimate state interests **for the purposes of safety and security, as outlined in Rule 15.3**. Rule 7(a) of the Nelson Mandela Rules specifies that precise information about the unique identity of prisoners should include recording their self-perceived gender. This should be considered as a way to facilitate the placement of transgender detainees in facilities – male or female – of their choice.

Rule 15.1g reiterates the principle from Paragraph 13 of the Recommendation CM/Rec (2018) 5 of the Committee of Ministers to the member States concerning children with imprisoned parents which provides that, at admission, the number of children a prisoner has should also be recorded, together

with their ages and current primary caregiver. All information relating to the children's identity shall be kept confidential, and the use of such information shall always comply with the requirement to take into account the best interest of the children, consistent with case law of the European Court of Human Rights. (Bangkok Rule 3, Article 3(1) of the Convention on the Rights of the Child; see for example European Court of Human Rights *Frohlich v Germany*; <http://hudoc.echr.coe.int/eng?i=001-185320>)

The Nelson Mandela Rules also emphasise the importance of record-keeping and file management, not only at admission (Rule 7), but also throughout the duration of a prison term (Rule 8). Good file management includes recording any transfer date and the reason for the transfer that led to the prisoner being admitted to a new prison. An up-to-date, comprehensive prisoner file prevents errors that might lead to violation of due process and fair trial rights. The reports required by Rule 15A(b) should be kept in the prisoners' individual file to facilitate their treatment with a view to their social rehabilitation. Information related to behaviour and discipline, as required by article 15A(c) could include comments on prisoners' rapport with others, sudden behavioural changes etc. which could be useful in later assessments of whether behavioural difficulties may be related to mental health issues. The Nelson Mandela Rules also point out that good records can be used, amongst others, to generate reliable data about imprisonment trends and the characteristics of the prison population in order to create a basis for evidence-based decision-making (Rule 10). Good file management leads to effective prison management and supports strategic planning and reform.

Good records of a prisoner's state of health on admission are also a vital protective measure. Such records should ideally be made following a medical examination. In addition, prison officials generally should be encouraged to record anything that shows ill health immediately, including injuries that could disappear by the time the medical practitioner examines the prisoner.

According to the ECtHR's well-established case-law, unrecorded detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the ECHR.⁹

⁹ *Fedotov v. Russia*, No. 5140/02, paragraph 78, judgment of 25/10/2005

WOMEN (Rule 34)

Introduction

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) adopted in 2010 provided guidance for the first time on how to ensure treatment of women is gender-sensitive, complementing the UN Nelson Mandela Rules. Indeed, the Bangkok Rules cross-reference the relevant Mandela Rules.

Compared to standards at the international level, the European Prison Rules provide limited guidance on how to meet the different needs of women prisoners, and mostly this guidance is provided in the Commentary not the Rules themselves. It is therefore disappointing that the PC-CP has only been given mandate to amend Rule 34.

Key messages

PRI and APT consider that only amending Rule 34 as part of this revision is not adequate.

At a minimum the provisions under Rule 34 should be expanded to give more detailed **guidance to protect and meet the needs** of women prisoners.

The revision should explicitly cover protection from physical, mental or sexual abuse (in Rule 34.4) and adopt the same standard as in the Bangkok Rules in regard to action if such abuse occurs.

Rule 34.5 should explicitly **prohibit any birth certificate listing prison** as the place of birth for any child, and the rule should **require assistance to women to give birth outside of prison**, rather than simply permitting it.

Comments on the revised rules and commentary (*changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red*).

Women

34.1 In order for the principle of non-discrimination embodied in Rule 13 to be put into practice, *positive measures account* shall be taken ~~of to meet~~ the distinctive needs of women prisoners in the application of the Rules.

34.2 Meeting such needs in order to accomplish substantive gender equality shall not be regarded as discriminatory.

34.3 In addition to the specific provisions in these rules dealing with women prisoners, the authorities shall pay particular attention to the **needs and requirements of women, such as their physical, vocational, social and psychological needs, *as well as caretaking responsibilities*, when making decisions that affect any aspect of their detention. (Bangkok Rule 2)**

34.4 Particular efforts shall be made to *protect women prisoners from physical, mental or sexual abuse and* give access to specialised services for women prisoners *before or during imprisonment, including being informed of their right to seek recourse from judicial authorities, legal assistance, psychological support or counselling and appropriate medical advice.* ~~who have needs as referred to in~~ Rule 25.4. (Bangkok Rules 7 and 25)

34.5 Prisoners shall be *allowed assisted with arrangements* to give birth outside prison *wherever practicable*, but where a child is born in prison the authorities shall provide all necessary support and

facilities, including special accommodation. If a child is born in prison, this fact shall not be mentioned in the birth certificate. (Bangkok Rule 28)

This rule was added to the European Prison Rules in 2006 for the first time, in order to deal with the reality that prisoners who are women **or who do not identify as male** are a minority in the prison system, and who can easily be discriminated against. It is designed to go beyond the outlawing of negative discrimination and to alert the authorities to the reality that they need to take positive steps in this regard.

In order to bring the approach to the treatment of women in prison in line with international standards developments, this rule was amended in 2019 by the addition of Rules 34.1 and 34.2. These additions reflect the approach of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), which were adopted by the United Nations in 2010 2011. The Bangkok Rules include comprehensive guidance on the treatment of women prisoners. There is no direct European equivalent to them. The Bangkok Rules should ~~be borne in mind~~ **be followed** when issues arise relating specifically to the treatment of women which are not covered by the European Prison Rules.

The key message of Rule 34 is that achieving substantive equality of treatment in prison for women may requires the authorities to take positive steps to assist them that they would not necessarily undertake for all prisoners in order to protect women from human rights violations and meet their needs, recognising the unique harms of imprisonment on women. If done to avoid disadvantage and to meet the specific needs of women, such initiatives will not be discriminatory. Women may suffer disadvantages **because they constitute a minority there are few of them in the prison system and they are** ~~by being~~ relatively isolated. **Positive steps, for example, may therefore include devising strategies therefore need to be devised to deal with to combat** this isolation. Similarly, the provision in Rule 26.4, that there must be no discrimination on the basis of gender in the type of work provided, needs to be complemented by positive initiatives to ensure that women are not in practice still discriminated against in this respect by being housed in small units where less, or less interesting, work is on offer.

The requirement of **adapting the prison regime giving access to special services** for women prisoners is stated in general terms in order to allow for the imaginative development of a range of positive measures. However, one area stands out and this is recognised in Rule 34.2. Women prisoners are particularly likely to have suffered physical, mental or sexual abuse prior to imprisonment, **and further face victimisation while imprisoned.** Their distinctive needs in this respect are highlighted in addition to the general attention to be paid to all such prisoners in Rule 25.4. Similar emphasis on the needs of women in this regard is also found in Rule 30.b of Recommendation Rec(2003)23 of the Committee of Ministers on the management by prison administrations of life- sentence and other long-term prisoners.

It is important to recognise that women's distinctive needs cover a wide range of issues and should not be seen primarily as a medical matter. Within the European Prison Rules and its Commentary, women's sanitary, pregnancy and motherhood, and health care needs are all referenced, but these should not be seen as exhaustive. Securing the rights contained in the European Prison Rules for women prisoners requires additional positive steps in all areas, in recognition of the wide distinctive needs of women experienced in all aspects of prison life, **and children in prison with them.** Rule 50 of the Bangkok Rules provides that women whose infants are in prison with them should be given the maximum opportunities to spend time with them.

Where women are taken to outside facilities they should be treated with dignity there too. It is **prohibited not acceptable**, for example, for **women to be them to give birth** shackled to a bed or piece of furniture **during labour, during birth and immediately after birth (as stipulated in Rule 24 of the UN Bangkok Rules).** Further restrictions on the use of restraints, which apply to women too, can be found in Rule 68 of the European Prison Rules.

RULE 37: FOREIGN NATIONALS

INTRODUCTION

In the Council of Europe region, foreign detainees constitute a significant part of the general prison population, with an average of 11.6% of foreigners among the total number of inmates, a figure even much more important in pre-trial detention, with 37.3% of pre-trial detainees being foreigners according to the latest available data.¹⁰ In some countries, foreign detainees represent more than half of the prison population, such as in Austria (53.9%) or Greece (55.2%) or even much more, such as Switzerland (72%). Because of their status of foreigner, they may face heightened risks of abuse or ill-treatment and discrimination. Rule 37 shall therefore be strengthened to ensure that authorities should acknowledge these risks, take measures to prevent them, and address the specific needs of prisoners who are foreign nationals.

KEY MESSAGES

PRI and APT consider that the revision of Rule 37 of the European Prison Rules should be **based on the provision of Recommendation CM/Rec (2012)12**, which should be explicitly recognised as supplementing and completing the European Prison Rules.

Rule 37 and its commentary should acknowledge that **positive measures shall be taken to avoid discrimination** and that such measures shall not be regarded as discriminatory towards other detainees. They should further acknowledge that their needs may increase if their **status of foreigner intersects with other status or condition**, such as age, gender, sexual orientation and gender identity or expression, language, economic status, or other.

Rule 37 shall include a provision to ensure that foreign detainees are not excluded from consideration to certain measures, such as **non-custodial sanctions and early release**, on the grounds of their status.

To alleviate the potential isolation of foreign detainees, Rule 37 shall acknowledge that special attention shall be paid to the maintenance and development of their **relationships with the outside world**.

Comments on the revised rules and commentary *(changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red)*

37.1 Positive steps shall be taken to avoid discrimination against prisoners who are foreign nationals and to address ~~specific problems that they may face in prison~~ *individual needs of prisoners, in particular the most vulnerable categories. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory. (Nelson Mandela Rules 2)*

37.2 Prisoners who are foreign nationals shall be informed, without delay, of their right to request ~~regular~~ contact and be allowed reasonable facilities to communicate with the diplomatic or consular representative of their state, *subject to consent (Recommendation CM/Rec(2012)12, § 24.1).*

37.3 Prisoners who are nationals of states without diplomatic or consular representation in the country, and refugees or stateless persons, shall be allowed similar facilities to communicate with the

¹⁰ See Council of Europe Annual Penal Statistics, SPACE I, 2016.

diplomatic representative of the state which takes charge of their interests or the national or international authority whose task it is to serve the interests of such persons.

37.4 In the interests of foreign nationals in prison ~~who may have special needs~~, prison authorities shall co-operate fully with diplomatic or consular officials representing prisoners.

37.5 Specific information about legal assistance shall be provided to prisoners who are foreign nationals, *in a language they understand. (Recommendation CM/Rec(2012)12, § 21.1)*

37.A Foreign prisoners shall be entitled to be considered for the same range of non-custodial sanctions and measures as others. They shall not be excluded from consideration on the grounds of their status. Foreign prisoners shall not be remanded in custody or sentenced to custodial sanctions on the grounds of their status, but only when strictly necessary and as a measure of last resort. The fact that a prisoner is foreigner shall not, in itself, be sufficient to conclude that there is a risk of flight. Recommendation CM/Rec(2012)12, §§ 4, 5 and 13.2)

37.6 Prisoners who are foreign nationals shall be informed of the possibility of requesting that the execution of their sentence be transferred to another country.

37.B Foreign prisoners sentenced to imprisonment shall be entitled to full consideration for early release as soon as they are eligible" (Recommendation CM/Rec(2012)12, § 6)

37.C Special attention shall be paid to the maintenance and development of the relationships of prisoners who are foreign nationals with the outside world, including contacts with family and friends, consular representatives, probation and community agencies and volunteers" (Recommendation CM/Rec(2012)12, § 22.1)

Recommendation CM/Rec (2012)12 comprises to date the most elaborated standards on foreign detainees. It complements and supplements the European Prison Rules. Rule 37 reflects the growing importance of issues surrounding foreigners in European prisons by incorporating them in a separate rule. It applies to both untried and sentenced prisoners. It closely follows Rule 62 of the Nelson Mandela Rules and is in line with the Vienna Convention on Consular Relations.

Prison authorities should be alert to the general problems faced by prisoners who are foreign nationals as they may have specific needs that differ from those of the national prison population that require additional measures to assist them. If their primary social connections are to their countries of origin they should be assisted in maintaining them. However, if they have family and other links in the countries in which they are detained, these should be preserved too. In all, there should be no discrimination against foreign prisoners.

~~**Rule 37.1 requires positive steps to be taken by prison authorities to ensure that foreign prisoners are not in practice.** On this point, see the commentary to Rule 13, which references Rule 2 of the Nelson Mandela Rules to clarify that~~ **Rule 37.1 requires positive measures to be taken by prison authorities** ~~to protect and promote the rights of prisoners, who, as foreigners, may have with special distinctive needs. Such measures are not be regarded as not discriminatory: on this point, see the commentary to Rule 13. The needs of foreign prisoners must be met, as far as possible, to ensure substantive equality of treatment of all prisoners. More details on how to deal with the needs of such prisoners are contained in CM/Rec (2012) 12 of the Committee of Ministers to member States concerning foreign prisoners and in Rule 62 of the Nelson Mandela Rules.~~ **Particular attention should be given to intersectional forms of discrimination. Where relevant bilateral or multilateral agreements are in place, the transfer of non-resident foreign national women prisoners to their home country, especially if they have children in their home country, shall be considered as early as possible during their imprisonment, following the application or informed consent of the woman concerned (Bangkok Rule 53.1). Where a child living with a non-resident foreign-national woman prisoner is to be removed from prison, consideration should be given to relocation of the child to its home country, taking into account the best interests of the child and in consultation with the mother (Bangkok Rule 53.2).**

Rule 37.2-4. is in line with the Vienna Convention on Consular Relations. The underlying principle is that foreign nationals may be in particular need of assistance when a state other than their own is exercising the power of imprisoning them. This assistance is to be provided by representatives of their countries. Prison officials should also note that foreign prisoners may qualify for transfer under the European Convention of the Transfer of Sentenced Prisoners or in terms of bilateral arrangements and should inform such prisoners of the possibility (see paragraph 25 of Recommendation Rec(2003)23 of the Committee of Ministers on the management by prison administrations of life-sentence and other long-term prisoners).

The ECtHR has stressed that Article 8 of the ECHR requires that foreign prisoners have some contact with their families, at least through telephone conversations and occasional visits, where regular visits are impossible or very difficult to organise. Where possible, technological solutions should be considered as an additional means of enabling foreign prisoners to make contact with their families abroad. The CPT has invited national authorities to facilitate foreign prisoners' access to a telephone and to verify the situation as regards the costs of international phone communications and the possibility of cheaper audio-communications. Further, foreign national prisoners should be provided with clear information on immigration procedures. Distinction should be made between resident foreign nationals and non-resident regarding their treatment and needs.

Steps shall be taken to ensure that detention is not unduly prolonged by delays relating to the finalisation of the immigration status of the foreign prisoner. In order to assist foreign prisoners to return to society after release, practical measures shall be taken to provide appropriate documents and identification papers as assistance with travel. (Recommendation CM/Rec(2012)12, §§ 6, 36.1 and 36.2)

RULES ON INSTRUMENTS OF RESTRAINT (RULE 68)

INTRODUCTION

Prison authorities may resort under strict conditions to using restraint in order to ensure security in a place of detention. Means of restraint are instruments intended to restrict or temporarily limit the freedom of movement of a person without injuring him/her, for example, handcuffs, straps, straitjackets, or restraining beds. Even though they might be necessary and permitted, strict rules shall regulate their use since they also pose a high risk in terms of torture and ill-treatment due to their intrusive nature and the risk of causing pain and humiliation. Because of the higher risk of torture and ill-treatment when resorting to means of restraint, even stricter regulations shall apply with regard to certain categories of persons in detention, in particular pregnant women and children.

KEY MESSAGES

APT and PRI consider that the revision of Rule 68 should take into account all the new provisions contained in the **Nelson Mandela Rules at Rules 47 to 49**, including the prohibition of inherently degrading or painful instruments of restraint.

Instruments of restraint shall only be **used as a last resort**, in exceptional cases, when all other control methods have been exhausted and failed.

When using restraint, the **principle of legality, necessity and proportionality** shall always prevail.

Stricter rules shall apply to **prisoners in situations of vulnerability**, such as women during labour and childbirth, as well as children.

Comments on the revised rules and commentary (*changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red*)

68.A Instruments of restraint can only be used in exceptional cases, where all other control methods have been exhausted and failed" (CPT/Inf(92)3-part 2, §§ 53-54)

68.1 Instruments of restraint shall be imposed only when no lesser form of control would be effective to address the risks posed by unrestricted movement.

68.2 The method of restraint shall be the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed.

68.3. Instruments of restraint shall be imposed only for the time period required, and they shall be removed as soon as possible after the risks posed by unrestricted movement are no longer present.

~~68.3 Instruments of restraint shall not be applied for any longer time than is strictly necessary.~~

68.4 The use of chains, and irons or other instruments of restraint which are inherently degrading or painful shall be prohibited. (Nelson Mandela Rule 47.1)

~~68.5 Handcuffs, restraint jackets and other body restraints shall not be used except~~ *Other instruments of restraint shall only be used when authorised by law and in the following circumstances:*

1. if necessary, as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority unless that authority decides otherwise; or
2. by order of the director, if other methods of control fail, in order to protect a prisoner from self-injury, injury to others or to prevent serious damage to property, provided that in such instances the director shall immediately inform the medical practitioner and report to the higher prison authority.

68.6 ~~The manner of use of instruments of restraint shall be specified in national law.~~ Instruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth” (Nelson Mandela Rule 48.2; Bangkok Rule 24)

Use of restraints is rightly regarded as a major invasion of the rights of prisoners. Rule 68 is therefore designed to set acceptable limits for the use of restraints, which must be controlled strictly and avoided wherever possible.

Rule **68.1** reflects the general position that instruments of restraint should **always be used as last resort** ~~never be the first resort~~. There are inevitably occasions on which physical restraint will need to be applied with the additional help of specially designed equipment or instruments in order to prevent physical injury to the prisoners concerned or to staff, escape or **unacceptable serious damage to property**. In this regard, **as in Rule 64.2, which deals with the use of force**, Rule ~~68.3~~ **68.4** emphasises that the principle of proportionality ~~which~~ must be borne in mind in such circumstances. Routine use of instruments of restraint is not acceptable, for example, to escort prisoners to the prison. This principle is similarly reflected in Rule 48 of the Nelson Mandela Rules, ~~which further provides that methods of restraint should be the least intrusive method necessary and reasonably available, based on the level and nature of the risks posed.~~

The ECtHR has held that the use of pepper spray in a confined space, where alternative equipment was at the disposal of the prison guards, such as flak jackets, helmets and shields, was in breach of Article 3 of the ECHR. ~~Rule 48.2 of the Nelson Mandela Rules, following Rule 24 of the Bangkok Rules, provides that instruments of restraint shall never be used on women during labour, during childbirth or immediately after childbirth.~~

Rule **68.6** provides for the ultimate authority for the use of instruments of restraint to be vested in law or regulation and not depend on the discretion of the prison administration. The CPT has set out a series of principles and minimum standards concerning the resort to immobilisation of prisoners to a bed including that it should not take place in a non-medical setting. **Additional consideration should be given before applying any form of restraint to prisoners who are in situations of vulnerability, whose experience of the application of such measures may be exacerbated by their condition.**

RULE 70: REQUESTS AND COMPLAINTS

INTRODUCTION

Prisoners have the right to make complaints about any aspect of their treatment or conditions in detention to the prison authorities and external independent bodies. Effective complaints procedures help ensure that prisoners' rights are respected and act as a fundamental safeguard against ill-treatment in prisons.

Complaints procedures can help to foster trust in the system, ensure that rules and rights are respected, and prevent issues becoming sources of major trouble in the prison. They can also act as a deterrent for abuse. When applied in a fair and transparent manner, complaints procedures can benefit detainees, staff and prison management.

Procedures should be in place to ensure that detainees do not suffer any form of retaliations or reprisals – either from other detainees or staff – for lodging complaints.

KEY MESSAGES

PRI and APT consider that when complaints refer to **cases of torture, ill-treatment** or other serious human rights violation, the option of **mediation should not be considered**.

It is essential that **information** about request and complaint procedures is always conveyed **in a language understood** by all prisoners.

The revision of Rule 70 should better reflect the specific needs and situations of **female detainees**.

Rule 70 should explicitly provide for the possibility of **making complaints** and requests **during visits** by government inspections and independent monitoring bodies.

Comments on the revised rules and commentary (*changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red*)

70.1 Prisoners, individually or as a group, shall have ample opportunity to make requests or complaints, **without censorship as to the substance**, to the director of the prison ~~or to any other competent authority~~ **and directly to a judicial or other independent authority with reviewing and remedial power**.

70.2 If mediation seems **an appropriate way of resolving a complaint or request**, this should be tried first. *When complaints are made regarding ill-treatment or other serious human rights violations, mediation shall not be considered." (CPT, 27th annual report, CPT/Inf(2018), paragraph 78)*

70.3 **Practical information about request and complaint procedures shall be communicated effectively to all prisoners**, *in a language they understand. (Nelson Mandela Rules, 54-55)*

70.4 **Complaints relating to allegations of suspicious death or ill-treatment or other serious human rights violations shall be dealt with immediately and shall result in an impartial and effective investigation in accordance with Rule 55.**

70.5 **All requests and complaints shall be dealt with promptly and through a process that ensures, to the maximum possible extent, the prisoners' effective participation.**

70.6 If a request is denied or a complaint is rejected, reasons shall be provided to the prisoner **without delay** and, **if the decision was made by the director of the prison**, the prisoner shall have

the right to appeal to ~~an independent authority.~~ **a judicial or other independent authority with reviewing and remedial power.**

70.7 Measures shall be in place to ensure that prisoners can make requests or complaints confidentially, if they choose to do so.

70.8 Prisoners ~~shall not be exposed to any risk of financial or legal sanction, retaliation, intimidation, reprisals or other negative consequences as a result of having submitted a request or complaint.~~ ~~shall not be punished because of having made a request or lodged a complaint.~~

~~70.5 The competent authority shall take into account any written complaints from relatives of a prisoner when they have reason to believe that a prisoner's rights have been violated.~~

70.9 Prisoners may make a request or complaint personally or through a legal representative and are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.

70.10 No complaint by a legal representative or organisation concerned with the welfare of prisoners may be brought on behalf of a prisoner if the prisoner concerned does not consent to it being brought.

~~70.7 Prisoners are entitled to seek legal advice about complaints and appeals procedures and to legal assistance when the interests of justice require.~~

70.11 The competent authority shall take into account any written complaints from relatives of a prisoner or any other person or organisation concerned with the welfare of prisoners.

70.12 The relevant prison authority shall keep a record of requests and complaints made, with due consideration to the principles of confidentiality and safety.

70.A Prisoners shall have the possibility to make requests or complaints to any inspector during visits by regular government inspectors or independent monitoring bodies. The prisoner shall have the opportunity to talk to the inspector or any other inspecting officer freely and in full confidentiality, without the director or other members of the staff being present. (Nelson Mandela Rule, 56.2)

70.B Women prisoners who report abuse shall be provided immediate protection, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation. (Bangkok Rules, 25)

This rule makes a distinction between making requests and lodging complaints. Prisoners must have ample opportunity to make requests and must have avenues of complaint open to them both within and outside the prison system.

*The prison authorities shall not obstruct or punish the making of requests or complaints but shall facilitate the effective exercise of the rights embedded in this rule ~~This does not preclude the introduction of legal mechanisms to deal summarily with minor issues.~~ **One way in which this can be done is by ensuring that practical information about request and complaint procedures are communicated effectively to all prisoners, as required by Rule 70.3. Effective communication entails paying due regard to prisoners' linguistic capabilities and ensuring that special attention is paid when providing this information to foreigners and prisoners with disabilities, including psychological or learning disabilities.***

"Requests" of prisoners concern favours or facilities ~~to which they are not entitled to~~ by right, but which may be granted by the prison management or other competent authorities. For instance, in some prison systems extra visits may be allowed, though prisoners have no right to them. The same applies to requests for permission to leave the prison to attend the funeral of a relative and requests

for transfer to a specific prison or prison unit. In most cases the director will be entitled to decide, but in some jurisdictions specific requests can only be granted by judicial authorities or must be decided at ministerial level.

Complaints are formal objections against decisions, actions or lack of action of the prison administration or other competent authorities. In some jurisdictions the appropriate remedy is called an “objection” or an “appeal”. The term “appeal” in this rule, however, is reserved for legal action against a denial of a request or the rejection of a complaint.

The new Rule 70.1, amended in 2019, observes the clear distinction made between these internal and external complaints mechanisms in the ECtHR case-law¹¹ and CPT practice.¹² In accordance with ECtHR case law, the internal complaints mechanism does not in itself satisfy the requirements of an effective remedy under Article 13 of the ECHR. Rule 70.1 therefore makes it clear that national systems may provide for a possibility that a request or complaint be made first before an internal complaints mechanism (director of the prison or the central prison administration) or directly to an external complaints mechanism (judicial or other independent authority). 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.¹³

In this connection, it should be noted that different bodies may exercise the function of an external complaints mechanism and that different solutions may exist in national systems as to the manner in which these mechanisms operate. However, the CPT has stressed that such bodies need to have the power to make binding decisions.¹⁴ For its part, the ECtHR has explained that an authority referred to in Article 13 ECHR does not have to be a judicial one and that an administrative authority can satisfy the requirements of this Article concerning prisoners’ complaints. However, it has set the following criteria which such other authorities must satisfy:

- (a) they must be independent of the authorities in charge of the prison system**
- (b) they must secure the inmates’ effective participation in the examination of their grievances**
- (c) they must ensure the speedy and diligent handling of the inmates’ complaints**
- (d) they must have at their disposal a wide range of legal tools for eradicating the problems that underlie these complaints, and (e) be capable of rendering binding and enforceable decisions.¹⁵**

Provision may also be made for specialised complaints procedures. Ideally, national law should allow prisoners also to complain against the decisions, conduct or inactivity of medical personnel to existing national medical disciplinary bodies.

This rule does not require that requests or complaints be submitted in writing. Given the illiteracy of quite a number of prisoners, a prisoner should be able to ask to meet the civil servant or the competent agency in order to transmit the request or the complaint orally,¹⁶ and the authorities have the obligation to put it in a written form.

The competent authorities should deal promptly with requests and complaints and should accompany this with reasons making it clear whether action will be taken and if so, what action. In their reactions to requests and complaints, which should always be accompanied by reasons, the authorities should make clear whether action will be taken and if so, what action. This also follows from the ECtHR case

¹¹ See, for instance, *Ananyev and Others v. Russia*, Nos. 42525/07 and 60800/08, paragraphs 93-112, judgment of 10/01/2012.

¹² See 27th General Report of the CPT [CPT/Inf (2018) 4], paragraphs 70-71.

¹³ *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, paragraphs 102-106, judgment of 10/01/2012; *Neshkov and Others v. Bulgaria*, nos. 36925/10 et al., paragraph 212, judgment of 27/01/2015.

¹⁴ 27th General Report of the CPT [CPT/Inf (2018) 4], paragraph 71.

¹⁵ *Neshkov and Others v. Bulgaria*, Nos. 36925/10 et al., paragraphs 182-183, judgment of 27/01/2015.

¹⁶ Report to the Government of Slovenia on the visit to Slovenia carried out by the CPT from 19 to 28 February 1995 [CPT/Inf (96) 18].

law.¹⁷ This also applies to requests or complaints from prisoners' **legal representatives or organisations referred to in Rules 70.9-70.10.** ~~relatives or organisations referred to in Rule 70.6.~~

Complaints can lead to antagonistic attitudes of the parties involved, which can harm the relations between prisoners and staff. Therefore, it seems sensible to try mediation first. This calls for a mediation mechanism to be inserted in the **prison penitentiary** legislation. This task could be entrusted, for example, to a member of a local supervisory committee or a judicial authority. If the conflict cannot be resolved by mediation, the prisoner must still have the right to lodge a formal complaint. National law can state that complaints about trivial matters can be declared inadmissible. **The CPT has stated that mediation cannot be considered when complaints are made regarding ill treatment or other serious human rights violations.**¹⁸

The requests are submitted to the prison administration or another authority empowered to decide on the matter **or, alternatively, directly to a judicial or other independent authority with revising and remedial power.** Prisoners must have the opportunity to convey complaints to any authority inspecting or supervising the prison regardless of previous or simultaneous complaints. When this authority is not empowered to handle the complaint itself it should send it on to the competent body.

Complainants shall be allowed to communicate on a confidential basis with the independent authorities entrusted with the handling of complaints and appeals. The decisions of these authorities shall be made accessible to prisoners.

Requests and complaints should be registered for the benefit of the prison administration itself and for inspection by visiting bodies.¹⁹ An analysis of the substance of requests and complaints can contribute to a better management of the institution, **including National Preventive Mechanisms established under the OPCAT.**

The right to make requests and complaints is primarily granted to prisoners but national law may allow third parties to act on behalf of a prisoner, for instance when a prisoner's mental or physical condition prevents him from acting himself and he does not have a lawyer to act on his behalf. Relatives of a prisoner are entitled to complain where the prisoner's rights may be infringed, while organisations that have the interests of prisoners at heart may also be allowed by the director to bring such complaints. However, Rule **70.10** ~~70.6~~ allows the prisoner to oppose the complaint being made in this way.

~~When, after~~ **If an internal appeal has failed, a complaint is successfully made to an** ~~independent authority~~ **can still be made to an external complaints mechanism, as envisaged in Rule 70.1.** ~~independent authority~~ **If such a complaint is successful,** complainants must have confidence that the decision of that authority will be executed fully and promptly by the prison administration. **Equally, the right to complain to an external complaints mechanism in case of an unfavourable or a delayed, and thus ineffective, examination of a request or complaint by the internal complaints mechanism is a requirement flowing from Article 13 of the ECHR.**²⁰ **Thus, if a legal system should decide not to make provision for a direct complaint to "a judicial or other independent authority vested with reviewing and remedial power", as provided for in Rule 70.1, it should at least ensure that the decisions of the prison director or prison administration, which are not in themselves considered to satisfy the requirements of an effective remedy under Article 13 of the ECHR, are subject to a review by an independent external authority. This also follows from the CPT standards.**²¹

To ensure the effective exercise of the right to lodge complaints, forms, stationery and, if necessary, stamps should be provided to prisoners. The complaint forms should be freely available to prisoners at a specified place (for example, the library), thereby enabling a prisoner to avoid asking for them

¹⁷ *Lonić v. Croatia*, No. 8067/12, paragraphs 53-64, judgment of 04/12/2014.

¹⁸ 27th General Report of the CPT [CPT/Inf (2018) 4], paragraph 78.

¹⁹ Report to the Bulgarian Government on the visit to Bulgaria carried out by the CPT from 25 April to 7 May 1999 [CPT/Inf (2002) 1]; and Report to the Government of "The former Yugoslav Republic of Macedonia" on the visit to "The former Yugoslav Republic of Macedonia" carried out by the CPT from 17 to 27 May 1998 [CPT/Inf (2001) 20].

²⁰ *Longin v. Croatia*, No. 49268/10, paragraph 41, judgment of 06/11/2012.

²¹ 27th General Report of the CPT [CPT/Inf (2018) 4], paragraph 86.

specifically. A system of transmission should be devised so that prisoners are not obliged to personally hand the confidential access envelope to prison staff.²²

Confidential communication with national and international bodies authorised to receive complaints is essential. This rule does not attempt to prescribe an exclusive model of a complaints procedure but sets out the basic requirements such procedures should comply with in order to be considered to represent effective remedies in terms of Article 13 of the ECHR. What is important is that the complaint procedure ends with a final binding decision taken by an independent authority. The member States are free to designate the independent authority that has the power to handle complaints. This can be an ombudsman or a judge (enforcement magistrate or executing or supervisory judge), a supervising prosecutor, a court, or a public defender.²³ However, the CPT has made it clear that “it is inadvisable for national preventive mechanisms or other similar monitoring bodies also to deal directly with formal complaints”. These two “functions should preferably be kept separate and performed by clearly distinct entities, each with its own staff”.²⁴

The ECtHR has considered complaints about inadequate conditions of detention from the perspective of Article 13 of the ECHR, and has held that 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 prisoners have been held in conditions that are in breach of Article 3 of the ECHR, a domestic remedy capable of putting an end to the ongoing violation of their right not to be subjected to inhuman or degrading treatment, is of the greatest value. Once, however, they have left the prison in which they endured the inadequate conditions, they 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. 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.²⁵ The remedy should not only exist in law, but should also offer a reasonable prospect of success in practice.²⁶

Rule 70.4 is a new rule added in 2019. The obligation to investigate suspicious deaths, ill-treatment and other serious allegations of breaches of human rights in prisons is an obligation flowing from well-established ECtHR case law²⁷ and CPT standards.²⁸ This provision should be read in conjunction with Rule 55, which refers to the duty to investigate criminal acts in prisons in general. See also the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, of 30 March 2011.

In its 2017 Annual Report the CPT spells out general principles that should guide the operation of all complaints systems in prison. In summary they are: Such systems should be easily available and accessible to prisoners. Complexities should be investigated thoroughly and expeditiously. Prisoners should be able to use the complaints procedures confidentially and without risk to their own safety. Where complaints are found to be justifiable, the prison authorities should take specific steps to rectify the conditions that led to the complaint. Finally, a traceable record of all complaints and the action, if any, that is taken in response to them, should be kept. Rule 70 is compatible with these principles, and should be interpreted in light of them.²⁹

Prisoners shall have the possibility to make complaints and requests including during inspections and visits from monitoring bodies, including National Preventive Mechanisms established under the Optional Protocol to the Convention against Torture. It is therefore important that inspectors and monitors have the possibility to interview prisoners in full confidentiality, without any member of the

²² Report to the United Kingdom Government on the visit to the United Kingdom carried out by the CPT from 29 July 1990 to 10 August 1990 [CPT/Inf (91) 15].

²³ Report to the Georgian Government on the visit to Georgia carried out by the CPT from 6 to 18 May 2001 [CPT/Inf (2002) 14].

²⁴ 27th General Report of the CPT [CPT/Inf (2018) 4], paragraph 73.

²⁵ *Ananyev and Others v. Russia*, Nos. 42525/07 and 60800/08, paragraphs 97-98, judgment of 10/01/2012.

²⁶ *Rodić and 3 Others v. Bosnia and Herzegovina*, No. 22893/05, paragraph 58, judgment of 27/05/2008.

²⁷ See, for instance, *Gladović v. Croatia*, No. 28847/08, paragraphs 39-40, judgment of 10/05/2011, and *Volk v. Slovenia*, No. 62120/09, paragraphs 97-98, judgment of 13/12/2012.

²⁸ 27th General Report of the CPT [CPT/Inf (2018) 4], paragraph 86.

²⁹ 27th General Report of the CPT [CPT/Inf (2018) 4], paragraphs 76-90.

staff present. Any measure of retaliation is prohibited and specific measures shall therefore be taken to protect all prisoners from such risks, in particular women who are particularly exposed to such risks.

ADEQUATE STAFFING LEVELS (Rules 71 to 91)

Introduction

Those who work in prisons perform an important public service, and they often work in difficult, stressful and sometimes dangerous conditions. Furthermore, the role and functions of prison staff are often misunderstood or subject to negative stereotyping. The media and public might perceive their role as simply to lock people up. In fact, prison staff also play a key role in the rehabilitation and reintegration of prisoners and their job is complex and multi-faceted, requiring a specific and diverse skill set, including good interpersonal skills and the ability to deal with many different and often challenging situations and individuals.

Inadequate levels of staff can lead to worsening conditions for prisoners and working conditions for staff on duty. For example, the CPT has pointed out that high levels of stress in staff can “exacerbate the tension inherent in any prison environment”.³⁰

Adequate staffing levels in prisons are only achievable if the working conditions and remuneration reflect the difficult nature of the work carried out.

Key messages

Continuous and tailored training is a requirement for retaining staff and ensuring prisoners are supervised professionally, with the purposes of imprisonment in mind. PRI and APT propose Rule 81.4 should better **outline what topics training should be provided on**.

There needs to be specific measures in place to **ensure gender equality for female prison staff**, given the traditionally male-dominated justice and corrections systems, and therefore revisions to the relevant rules and commentary below should be adopted to highlight this to prison administrations.

PRI and APT recommend Rule 85 is revised to explicitly include the principle **that female prisoners are only supervised by female staff**.

Comments on the revised rules and commentary *(changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red)*

Prison work as a public service

71. Prisons shall be the responsibility of public authorities separate from military, police or criminal investigation services.

This rule requires prisons to be under the responsibility of public authorities, separate from military, police or criminal investigation services. Prisons are places that should be placed under the control of the civil power. Imprisonment is part of the criminal justice process and in democratic societies people are sent to prison by independent judges. The administration of prisons should not be directly in the hands of any police or military power. Working in prison should be respected as a specialism in its own right.

30 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 11th General Report on the CPT's activities, 3 September 2001, para. 26.

In some countries the head of the prison administration is a serving member of the armed forces who has been seconded or sent for a limited time to the prison administration to carry out that role. Where this is the case, this person shall be acting in a civilian capacity as head of the prison administration.

It is important that there should be a clear organisational separation between the police and the prison administrations. In most European countries the administration of the police comes under the ministry of the interior while the administration of prisons comes under the ministry of justice. The Committee of Ministers of the Council of Europe has recommended that “there shall be a clear distinction between the role of the police and the prosecution, the judiciary and the correctional system.” (Recommendation Rec(2001)10 of the Committee of Ministers, the European Code of Police Ethics).

72.1 Prisons shall be managed within an ethical context which recognises the obligation to treat all prisoners with humanity and with respect for the inherent dignity of the human person.

72.2 Staff shall manifest a clear sense of purpose of the prison system. Management shall provide leadership on how the purpose shall best be achieved.

72.3 The duties of staff go beyond those required of mere guards and shall take account of the need to facilitate the reintegration of prisoners into society after their sentence has been completed through a programme of positive care and assistance.

72.4 Staff shall operate to high professional and personal standards.

This rule underlines the ethical context of prison management. Without a strong ethical context the situation where one group of people is given considerable power over another can easily become an abuse of power. This ethical context is not just a matter of the behaviour of individual members of staff towards prisoners: see Recommendation 2012(5) of the Committee of Ministers to member States on the European Code of Ethics for Prison Staff.

Those with responsibility for prisons and prison systems need to be persons who have a clear vision and a determination to maintain the highest standards in prison management.

Working in prison therefore requires a unique combination of personal qualities and technical skills. Prison staff need personal qualities which enable them to deal with all prisoners in an even-handed, humane and just manner.

73. Prison authorities shall give high priority to observance of the rules concerning staff.

This rule places a positive obligation on prison authorities to ensure the observance of the rules concerning staff. This is important to ensure that prisons are operated in terms of the rule of law.

There shall be a clear and sustained commitment at the managerial level to prevent and address gender-based discrimination against women staff (see Rule 30 of the Bangkok Rules).

74. Particular attention shall be paid to the management of the relationship between first line prison staff and the prisoners under their care.

This rule concerns the relationship between first line prison staff and the prisoners under their care. Special attention has to be paid to these staff members because of the human dimension of their contacts with prisoners. Dynamic security, as required by Rule 51.2, is the principle underlying this relationship.

75. Staff shall at all times conduct themselves and perform their duties in such a manner as to influence the prisoners by good example and to command their respect.

This rule deals with the conduct of staff in performing their duties. The staff are to treat prisoners in a manner which is decent, humane and just; to ensure that all prisoners are safe; to make sure that prisoners do not escape; to make sure that there is good order and control in prisons; to provide prisoners with the opportunity to use their time in prison positively so that they will be able to resettlement when they are released. This work requires great skill and personal integrity. Those who undertake

this work need to gain the personal respect of the prisoners. High personal and professional standards should be expected of all prison staff but especially of those who are going to work directly with prisoners.

Selection of prison staff

76. Staff shall be carefully selected, properly trained, both at the outset and on a continuing basis, paid as professional workers and have a status that civil society can respect.

This rule relates to the selection, training and conditions of recruitment of prison staff. Recruitment is very important. The prison administration should have a clear policy to encourage suitable individuals to apply to work in prisons and to inform them of the required ethical rules. In particular, paragraph 38 of the Recommendation 2012(12) of the Committee of Ministers to member States concerning foreign prisoners states that persons who work with foreign prisoners shall be selected on criteria that include cultural sensitivity, interaction skills and linguistic abilities. This requirement applies generally to all relationships with prisoners.

Many prison authorities have great difficulty in recruiting staff of a high quality. This can be for a variety of reasons. It may be due to low salary levels. It may be because the standing of prison work in the local community is very low. It may be because of competition from other law enforcement agencies, such as the police. Therefore, prison administrations should pursue an active recruitment policy and take steps to overcome these potential barriers to recruiting high-quality staff.

77. When selecting new staff the prison authorities shall place great emphasis on the need for integrity, humanity, professional capacity and personal suitability for the complex work that they will be required to do.

This rule deals with the staff selection criteria. The prison administration should introduce a clear set of procedures to test the integrity and humanity of the applicants and how they are likely to respond to difficult situations which they may face so as to ensure that only those applicants who are suitable are in fact selected to join the prison system.

78. Professional prison staff shall normally be appointed on a permanent basis and have public service status with security of employment, subject only to good conduct, efficiency, good physical and mental health and an adequate standard of education.

This rule is a consequence of Rule 71. If staff are to be committed to their work on a long-term basis, they need to be secure in their employment. In jurisdictions where there are prisons that are managed by private contractors, individual members of staff employed by these contractors should be approved by the prison authority before working with prisoners. They should also be employed on a permanent basis. Attention should also be paid to ensuring that staff have a level of education which is adequate for them to be able to benefit from specialist training and enables them to deal humanely with prisoners.

79.1 Salaries shall be adequate to attract and retain suitable staff, **both men and women.**

This rule underlines the importance of adequate salaries and to ensure equal pay for men and women employed as prison staff. (Mandela Rule 74(3), Bangkok Rule 30)

79.2 Benefits and conditions of employment shall reflect the exacting nature of the work as part of a law enforcement agency.

This rule underlines the need to ensure attractive salaries and working conditions. The standing of a profession is measured in large part by the level of salary which it attracts. Governments should recognise that prison staff are entitled to a proper remuneration corresponding to the public service character of prison work as well as to their difficult and sometimes dangerous work, while also taking into consideration that if staff are not paid at an appropriate level this may lead to corruption.

In many countries prisons are in very isolated locations, thus depriving not only staff but also their families of access to schools, to medical facilities, to shops and to other social activities. In addition,

many prison staff are expected to transfer regularly from one prison to another, to uproot their families and to move them to places that are sometimes far away. In some countries prison staff were keen to continue to be part of the ministry of the interior in order to benefit from a higher status (access to free health care, to free education, to free housing and to free or subsidised transport and holidays). In such circumstances, other conditions of employment are as important as levels of pay and should be carefully examined.

80. Whenever it is necessary to employ part-time staff, these criteria shall apply to them as far as that is appropriate.

This rule refers to part-time staff. In smaller prisons it may be necessary to recruit some staff, especially for specialist tasks, on a part-time basis. They should have the same conditions of employment pro rata as full-time staff.

Training of prison staff

81.1 Before entering into duty, staff shall be given a course of training in their general and specific duties and be required to pass theoretical and practical tests, *reflective of contemporary evidence-based best practice in penal sciences. (Mandela Rule 75(2))*

81.2 Management shall ensure that, throughout their career, all staff maintain and improve their knowledge and professional capacity by attending courses of in-service training and development to be organised at suitable intervals.

81.3 Staff who are to work with specific groups of prisoners, such as foreign nationals, women, juveniles or ~~mentally ill~~ prisoners *with mental health conditions*, etc., shall be given specific training for their specialised work.

81.4 The training of all staff shall include:

- a) instruction in the international and regional human rights instruments and standards, especially the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as in the application of the European Prison Rules;
- b) *instruction in security and safety, including the concept of dynamic security, the use of force and instruments of restraint in line with Rules 60 and 64, with due consideration of preventive and defusing techniques such as negotiation and mediation.*
- c) *Rights and duties of prison staff in the exercise of their functions, including respecting the human dignity of all prisoners and the prohibition of certain conduct, in particular torture and other cruel, inhuman or degrading treatment or punishment; (Nelson Mandela Rule, 76.1.b)*
- d) *First aid, the psychosocial needs of prisoners and the corresponding dynamics in prison settings, as well as social care and assistance, including early detection of mental health issues (Nelson Mandela Rule, 76.1.d)*

Rule 81.1 addresses the requirements for initial training of newly selected staff. This training should be adequate and should emphasise the ethical context of their work. Best practice requires that prison staff receive sufficient training to enable them to operate as professionals in the same way as other professional groups that work in the criminal justice system.

Following this, Rule 81.2 requires that staff should be given the necessary technical training. They need to be made aware of security requirements and to learn how to keep proper records and what sort of reports need to be written. Paragraph 29 of the Guidelines for prison and probation services regarding radicalisation and violent extremism adopted by the Committee of Ministers on 2 March 2016 further emphasises that frontline staff “shall be trained to act in line with principles of dynamic security in order to maintain safety, security and good order in prison and to contribute to the prisoner’s rehabilitation”. It further emphasises that staff should be trained “in particular to use intercultural mediation and different techniques of intervention in case of crisis management”.

Furthermore, Rule 76 of the Nelson Mandela Rules require training on the concept of dynamic security and other tools for ensuring security and safety. Dynamic security approaches have been shown to improve security.

Rule 81.3 requires that staff working with specific groups of prisoners shall be given specific training for their specialised work. However, all staff shall receive basic training to be able to identify specific vulnerabilities and refer those situations to qualified staff. Specific training should include notions of how to properly treat foreign nationals, women, juveniles and prisoners with mental health conditions, but also any other prisoner in vulnerable situations. Such training should therefore also address sexual orientation and gender identity (Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, Principle 9.g), as well as cultural diversity and minorities (United Nations Special Rapporteur on minority issues, Report to the General Assembly, 30 July 2015, A/70/212, paragraphs, 84-86). Such specific training should involve - to the extent possible – organisations from civil society specialised in those fields.

The proper training of staff is a requirement that continues from the moment of recruitment to that of final retirement. There should be a regular series of opportunities for continuing development for staff of all ages, gender and ranks.

Women prison staff shall receive equal access to training as male staff, and all staff involved in the management of women's prisons shall receive training on gender sensitivity and prohibition of discrimination and sexual harassment, as provided in Rule 32 of the Bangkok Rules.

Prison management

82. Personnel shall be selected and appointed on an equal basis, without discrimination on any ground such as sex, sexual orientation and gender identity, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This rule recalls that there should be no discrimination in the selection of staff. Women should have the same opportunities as men to work in prisons and should be paid the same salaries, given the same training and have the same opportunities for promotion and for assignment to posts requiring specific abilities. These principles shall be applied to staff belonging to racial, cultural, religious or sexual minorities. In some prisons a substantial number of prisoners come from these minority groups. Where this is the case, prison authorities should seek to recruit sufficient proportions of staff from similar backgrounds.

83. The prison authorities shall introduce systems of organisation and management that:

- a. ensure that prisons **operate at** ~~are managed to~~ consistently high standards, **and that are in line with international and regional human rights instruments; are adequately staffed at all times to meet the requirements of national and international law and the provisions of these rules;** and
- b. facilitate good communication between prisons and between the different categories of staff in individual prisons and proper co-ordination of all the departments, both inside and outside the prison, that provide services for prisoners, in particular with respect to the care and reintegration of prisoners.

Rule 83.a ~~This rule requires that careful management of all prisons in the national system by member States should ensure that individual prisons are managed to a consistent standard which conforms with international human rights instruments.~~ One way of achieving this is by having a system of internal auditing and inspection to ensure that relevant law is being implemented. **It is not possible to ensure consistently high standards in a prison unless it is adequately staffed. It is therefore particularly important that strategies are in place to deal with strikes by prison staff officers or other reasons leading to staffing shortages, which could disrupt the proper functioning of individual prisons or even the system as a whole. Investment is required to ensure prison staff are recruited and retained, including by resourcing safe working conditions and training.**

~~different from and complementary to the independent monitoring, which is referred to in Part VI of these rules.~~

Rule 83.b refers to the need for good communication between prisons and within each prison. Given the increasing sophistication of operational routines and regimes there is a need for management to encourage and facilitate a style of working in which staff can learn from each other, share experiences and work together for the benefit of the prisoners in their care.

84.1 Every prison shall have a director, who shall be adequately qualified for that post by character, administrative ability, suitable professional training and experience. *Female prisons should be managed by a female director. (Principles and Best Practices of the Protection of Persons Deprived of Liberty in the Americas, Principle XX)*

84.2 Directors shall be appointed on a full-time basis and shall devote their whole time to their official duties.

84.3 The prison authorities shall ensure that every prison is at all times in the full charge of the director, the deputy director or other authorised official.

84.4 If a director is responsible for more than one prison there shall always be in addition an official in charge of each of them.

This rule contains provisions related to the prison director. Given what has been said in previous rules about the need for a sense of purpose, leadership and vision, it is essential that there should be in each prison a professional, sufficiently qualified, non-political director who has been carefully selected for their suitability and integrity to carry out what is one of the most complex tasks in public service. The CPT has commented on the necessity to introduce a professional management career path within the prison system and to ensure that prison directors and senior managers are recruited and given security of employment subject to satisfactory performance and are provided with relevant management training to enable them to fulfil their tasks competently.³¹

85. Men and women shall be represented in a balanced manner on the prison staff. *Women prisoners shall be supervised only by women staff members. (Mandela Rule 81)*

The mix of men and women on the prison staff is designed to contribute to the normalisation of prison life and have a positive effect on good order and discipline in the prison. It should also serve to minimise the risk of sexual harassment or mistreatment of prisoners.

~~Special arrangements about the gender balance of staff need to be made for prisons housing women.~~ *This rule reiterates the principle from Rule 81 of the Nelson Mandela Rules stresses that women prisoners should be supervised only by women staff members, while the part of the prison set aside for women shall be under the authority of a responsible woman staff member. Further, no male staff member should enter this part of the prison, unless accompanied by a woman staff member. This is a critical safeguard against abuse and furthermore it is important that the re-traumatisation of women prisoners, who may have suffered sexual abuse, is avoided.*

86. There shall be arrangements for management to consult with staff as a body on general matters and, especially, on matters to do with their conditions of employment.

This rule concerns the requirement to arrange appropriate consultations on the conditions of employment between the management and the staff. Prison systems are hierarchical organisations, but this does not mean that staff should be treated unreasonably or without respect for their position. In most countries staff are entitled to belong to trade unions. If there is no formal trade union, staff should at least have a recognised negotiation machinery. Trade union and other staff representatives should not be penalised for the work which they do in representing their fellow members of staff.

³¹ Report to the Government of "The former Yugoslav Republic of Macedonia" on the visit to "The former Yugoslav Republic of Macedonia" carried out by the CPT from 6 to 9 December 2016 [CPT/Inf (2017) 30], paragraph 22.

87.1 Arrangements shall be in place to encourage the best possible communication among management, other staff, outside agencies and prisoners.

87.2 The director, management and the majority of the other staff of the prison shall be able to speak the language of the greatest number of prisoners, or a language understood by the majority of them.

Prisons are institutions in which people have priority and in which human relationships are important. Rule 87 stresses that the proper functioning of these relationships depends on good communication.

In most European prison systems, a significant proportion of prisoners are foreign nationals, many of whom do not speak the native language of the country. The director and majority of personnel should be able to speak the language of the majority of prisoners. However, the needs of other prisoners also have to be recognised and, if possible, some staff should be able to speak the language of any significant minorities. See Rule 39.3 of Recommendation 2012(12) of the Committee of Ministers to member States concerning foreign prisoners. Where necessary an interpreter should be available as stipulated in Rule 37.4 of the European Prison Rules.

88. Where privately managed prisons exist, all the European Prison Rules shall apply.

In a small number of member States some prisons are now managed by private contractors. Rule 88 stresses that all European Prison Rules without exception apply also to them.

Specialist staff

89.1 As far as possible, the staff shall include a sufficient number of specialists such as psychiatrists, psychologists, social and welfare workers, teachers and vocational, physical education and sports instructors.

89.2 Wherever possible, suitable part-time and voluntary workers shall be encouraged to contribute to activities with prisoners.

Rule 89.1 deals with the need for prison services to have a sufficient number of appropriate specialists to work with prisoners to promote their physical and mental health, to prevent any deterioration and to assist their development in order to facilitate their reintegration into society. These specialists should work alongside and complement the custodial staff.

Given that almost all prisoners will one day return to their communities, it is important that associations and volunteers from the community be encouraged to come into prisons to contribute to many of the activities which take place there. Their presence also contributes to the normalisation of prison life and may give prisoners a better perspective of life on the outside.

Public awareness

90.1 The prison authorities shall continually inform the public about the purpose of the prison system and the work carried out by prison staff in order to encourage better public understanding of the role of the prison in society.

90.2 The prison authorities should encourage members of the public to volunteer to provide services in prison where appropriate.

This rule reflects that it is important that the public and the media be aware of the values within which its prisons operate. The prison administration should develop good relations with their local public and media, and inform them about the daily realities of prison life. Prison administrations should encourage prison directors to meet regularly with groups in civil society, including non-governmental organisations, and where appropriate to invite them into the prison. The media and representatives of local communities should be encouraged to visit prisons, provided care is taken to safeguard the privacy of prisoners.

Research and evaluation

91. The prison authorities shall support a programme of research and evaluation about the purpose of the prison, its role in a democratic society and the extent to which it is fulfilling its purpose.

This is the third set of what are now known as the European Prison Rules since 1973. The rules are likely to require further updating as time passes because of developments in civil society, the expanding jurisprudence from the ECtHR and the reports of the CPT. Rule 91 recognises that fact in encouraging a programme of research and evaluation about the purpose of the prison, its role in a democratic society and the extent to which it is fulfilling its purpose.

RULES 92-93: INSPECTION AND MONITORING

INTRODUCTION

Independent monitoring of prisons, complemented by governmental inspection, are crucial mechanisms to ensure that the provisions of the rules are respected and that prisons are managed in accordance with national law and international standards. Because of the imbalance of power between representatives of the authority and detainees, prisons are environments where risks of abuse are particularly high. Both governmental inspections and independent monitoring are therefore necessary in order to reduce the opacity typical of places of deprivation of liberty as well as to guarantee respect for prisoners' rights and to ensure that authorities are accountable.

The European Prison Rules should better reflect the major advancements in the region since the entry into force of the Optional Protocol to the Convention against Torture (OPCAT) in 2006. At the time of writing, 38 member States of the Council of Europe have ratified the OPCAT, out of which 37 have established a National Preventive Mechanism.

KEY MESSAGES

APT and PRI consider that the **purpose** of inspections – whether by governmental agencies and independent monitoring bodies - should be **broadened**, in particular to ensure that inspections focus on ensuring that the **rights of prisoners** are protected.

The revision of Rule 92 should **spell out the powers of inspection mechanisms**, whether government inspections or independent monitoring bodies. In particular it should be explicit that authority be granted to inspection mechanisms to **access all information** on prisoners, places and locations of detention, to **freely choose which prisons** to visit, to make **unannounced visits** and which prisoners to interview, to **conduct private interviews** in private, and to make recommendations to relevant authorities.

The revision of Rule 93 should clarify that the **publication** by inspection and monitoring bodies of **findings including personal data** on prisoners shall be **subject to explicit consent** of the concerned prisoners.

The revision should include specific provisions ensuring that independent monitoring bodies are **composed of qualified and experienced** monitors and encompass **health-care professionals**. Furthermore, due regard shall be given to balanced **gender representation** and adequate representation of **ethnic and minority groups** in the country.

Both governmental inspections and independent monitoring bodies shall have the authority to make **recommendations to competent authorities**, who shall, in turn, indicate, within a reasonable time, **whether and when such recommendations will be implemented**.

The revision should clarify that the existence of both governmental inspection and independent bodies **should not preclude other entities, including civil society**, from monitoring prisons.

Although **Rule 9** is not open to revision, its commentary should be revised to reflect the most recent developments, in particular regarding the **National Preventive Mechanisms** established under the OPCAT.

Comments on the revised rules and commentary (changes recommended indicated in red italics, with grey highlight, and source of language in brackets/red)

9. All prisons shall be subject to regular government inspection and independent monitoring.

Rule 9 raises the need for inspection and monitoring to the status of a general principle. Independent monitoring of prisons, complemented by governmental inspection, are crucial mechanisms to ensure that the provisions of these rules are respected. The objective of both inspection and monitoring is to ensure that prisons are managed in accordance with national law *and international standards*, with a view to bringing about the objectives of penal and corrections services, and to protect the rights of prisoners (Nelson Mandela Rule 83.2). *Independent monitoring bodies, in particular National Preventive Mechanisms (NPMs) established under the Optional Protocol to the UN Convention against Torture (OPCAT), have strong statutory powers and their main objective is to prevent torture and other cruel, inhuman or degrading treatment or punishment. The importance of such inspection and monitoring is spelled out further in part VI of the rules. The existence of both governmental inspection and independent bodies should not preclude other entities, including from civil society, from monitoring prisons.*

Governmental inspection

92. Prisons shall be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements of national and international law, *regulations, policies and procedures, and the provisions of these rules, and with a view to ensure that the rights of prisoners are protected (Nelson Mandela Rules, 83.2).*

This rule uses the neutral term “governmental agency”. This agency can be part of one ministry, for example, the ministry of justice or the ministry of the interior, or can be an agency under the control of more than one ministry. The essential point is that such an agency or inspectorate is established by, and reports to, the highest authorities. The existence of such agency or inspectorate is also a recognition of the fact that prison administration has a special duty of care towards prisoners and the authorities have an obligation to take positive measures to protect and promote the dignity of all prisoners”. (Nelson Mandela Rules, 2.2).

Any prisoner shall have the right to communicate freely and in full confidentiality with representatives of governmental agencies who inspects the facility”. (Body of principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 29.1).

The ways in which governmental inspection is organised will vary from checking of the bookkeeping of prisons to in-depth and on-the-spot audits, which take into account all aspects of prison administration to whether what is being done in prison is in conformity with national law. Governmental inspection should not focus narrowly on technical administrative matters. While ensuring that budgeted moneys are well spent is important, its wider obligation is to take into account international law and these rules, as they impact on prison administration. This means that governmental inspection also has to concern itself with ensuring that administrative processes result in prisoners being treated with respect for their human rights. The results of these inspections should be reported to the competent authorities and made accessible to other interested parties without undue delay.

These rules do not specify how planning and control systems and audits should be organised, as this is for the governmental authorities to decide. *However, governmental agencies should have the authority (a) to have access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention; (b) to freely choose which prisons to visit, including by making unannounced visits at their own initiative, and which prisoners to interview; (c) to conduct private and fully confidential interviews with prisoners and prison staff in the course of their visits; (d) to make recommendations to the prison administration and other competent authorities.” (Nelson Mandela Rules, 84.1).*

Independent Monitoring

93.1 To ensure that the conditions of detention and the treatment of prisoners meet the requirements of national and international law, regulations, policies and procedures and the provisions of these rules, and that the rights and dignity of prisoners are upheld at all times, they shall be monitored by an independent body or bodies, whose findings shall be made public, excluding any personal data on prisoners unless they have given their explicit consent. (OPCAT art. 21.2, Nelson Mandela Rules, 85.1)

93.2 Such independent monitoring body or bodies shall have the authority: ~~be guaranteed:~~

~~a. access to prisons and to all prison records, including those relating to requests and complaints, that they require to carry out their monitoring activities; and~~

~~b. permission to conduct private and fully confidential interviews with prisoners and prison staff.~~

(a) To access all prisons and their installations and facilities;

(b) To access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention;

(c) To freely choose which prisons to visit, including by making unannounced visits at their own initiative, and which prisoners to interview;

(d) To conduct private and fully confidential interviews with prisoners and prison staff in the course of their visits. (OPCAT art. 20c, Nelson Mandela Rules, 84.1)

93.3 Such Independent monitoring body or bodies shall be encouraged to co-operate with those international agencies that are legally entitled to visit prisons.

~~93.4 Where independent monitoring bodies find that the detention and treatment of prisoners is not in accordance with the standards set by national and international law, and these rules, they may make recommendations on what needs to be done to meet these standards. Independent monitoring bodies shall have the authority to make recommendations to the prison administration and other competent authorities. (OPCAT art. 19.b, Nelson Mandela Rules, 85.1)~~

93.5 The prison authorities or other competent authorities, as appropriate, shall enter into a dialogue on possible implementation measures and they shall indicate, within a reasonable time, if whether and when such recommendations will be implemented (OPCAT art. 22, Nelson Mandela Rules, 85.2)

93.A Independent monitoring bodies shall be composed of qualified and experienced monitors appointed by a competent authority and shall encompass health-care professionals. Due regard shall be given to balanced gender representation and adequate representation of ethnic and minority groups in the country (OPCAT, 18.2, Nelson Mandela Rules, 84.2, Bangkok Rule 25(3))

In the member States of the Council of Europe, different models of independent monitoring of conditions of imprisonment can be found. The OPCAT is not prescriptive with regards of the type of institution to be designated or created as NPM (art. 17) and rather requires that the institution have functional independence as well as the independence of its personnel (art. 18.1), has necessary resources for performing its mandate (art. 18.3) and has broad visiting powers and mandate (art. 19, 20, 21). As a result, NPMs may be newly created institutions or be established within existing institutions, including Ombudsman and National Human Rights Institutions. ~~In some countries an~~

~~ombudsman has powers in this respect; in other states this task is entrusted to judicial authorities, often combined with the power to receive and handle complaints of prisoners.~~ This rule does not intend to prescribe one single form of monitoring but underlines the need for the high quality of such independent supervision. This presupposes that these monitoring bodies are **composed of qualified and experienced experts and are** supported by a qualified staff. **They shall also have the authority to be supported by** ~~and have access to~~ independent experts. In many member States, monitoring bodies have been reorganised to act as national preventive mechanisms as required by OPCAT.

Rule 93 leaves room for the various forms independent monitoring bodies may **take** have. ~~Some countries will opt for a prison ombudsman, others for a national supervising committee. Other formats are not precluded by this rule, as long as the authorities involved are independent and well equipped to perform their duties. It should be noted, however, that under Article 13 of the ECHR there should be an effective remedy concerning conditions of imprisonment (see further Rule 70).~~ 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.

~~In order to ensure that monitoring is truly independent, as required by Rules 93.1, .1 and 93.2, its members of monitoring bodies shall be experts on prison matters, appointed in a way that ensures their impartiality. The members should~~ **have the required capabilities and professional knowledge** ~~be experts on prison matters and seeks to include members~~ with a range of skills, including medical expertise. Due regard should also be paid to gender representation (see Rule 84.2 of the Nelson Mandela Rules, and Rule 25.3 of the Bangkok Rules **and OPCAT art. 18.2**), **as well as to ensure adequate representation of ethnic and minority groups in the country (OPCAT art. 18.2).** **The functional independence of the monitoring body is important as well: See Article 18.1 of OPCAT.** ~~The~~ monitoring body should be able to propose its own budget directly to the government, so that it is not constrained in this regard by the prison authorities. Monitoring bodies should also have wide authority to access information, choose freely which prisons to visit, conduct private and fully confidential interviews with prisoners and prison staff, and make recommendations on what needs to be done to meet standards set by national and international law. Rule 84.1 of the Nelson Mandela Rules spells out what the scope of such authority should be.

It is important that the findings of these bodies, together with any observations that may have been submitted by the management of the prison concerned, are open to the public, **while ensuring that no personal data shall be published without the explicit consent of the person concerned.** ~~In addition to their~~ reports, ~~of the~~ monitoring bodies may ~~contain~~ submit proposals and observations concerning existing or draft legislation. As Rule 85 of the Nelson Mandela Rules specifies, it is reasonable to require that the authorities respond within a reasonable time to such reports and indicate how they intend to implement proposals contained in them.

Independent monitoring bodies should be encouraged to forward copies of their reports and the responses of the governments concerned to international bodies authorised to monitor or inspect the prisons, such as the European Committee for the Prevention of Torture. This would assist these international bodies to plan their visits, **ensure coherence in the recommendations made to the authorities** and allow them to keep their finger on the pulse of the national penitentiary systems. Because of their limited financial resources and the increase the number of states to be visited, international bodies must rely increasingly on communication with independent national monitoring bodies.

~~In many penitentiary systems individual prisons are being monitored in some way or another by boards consisting of interested volunteers recruited from the community. A common approach of these boards is that its members take turns to visit the prison, talk to prisoners about their worries and complaints and, in most cases, try to mediate between the prison management and the prisoners to find solutions for perceived problems. Such engagement~~ **Monitoring** by civil society should be encouraged by prison administrations and should include, where possible, non-governmental organisations working on prison issues. ~~They~~ ~~These boards~~ should liaise with national independent monitoring ~~bodies~~. They may also play a role in resolving complaints by mediation, as spelt out in Rule 70.

Persons in contact with monitoring bodies, and in particular detainees, shall be protected against any forms of sanctions and reprisals. (OPCAT art. 21.1)