

EXPERT MEETING AT THE UNIVERSITY OF ESSEX ON THE STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS REVIEW

SUMMARY

20 November 2012

Introduction

In April 2012, the UN Commission on Crime Prevention and Criminal Justice ('Crime Commission') proposed a targeted revision of the Standard Minimum Rules for the Treatment of Prisoners ('SMR') to the Economic and Social Council in the following areas:

- 1) Respect for prisoners' inherent dignity and value as human beings;
- 2) Medical and health services;
- 3) Disciplinary action and punishment, including the role of medical staff, solitary confinement and reduction of diet;
- 4) Investigation of all deaths in custody, as well as any signs or allegations of torture or inhuman or degrading treatment or punishment of prisoners;
- 5) Protection and special needs of vulnerable groups deprived of their liberty;
- 6) The right of access to legal representation;
- 7) Complaints and independent inspection;
- 8) The replacement of outdated terminology;
- 9) Training of relevant staff to implement the SMR;
- 10) Consideration of the 'requirements and needs of prisoners with disabilities'.¹

The 'Report on the Meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012' provides background on the suggestion of these areas for targeted reform.² ECOSOC Resolution E/RES/2012/13, adopted on 10 August 2012, refers to the report of the February 2012 meeting of the Intergovernmental Expert Working Group ('IEGM') which provided that 'the recommendations should be considered in the context of the deliberations of the meeting of the Expert Group'.³

On 3 and 4 October 2012, the Detention, Rights and Social Justice Programme at the University of Essex and Penal Reform International convened an expert meeting on the proposed reform at the University of Essex ('University of Essex meeting'). This meeting was financially supported by the UK Department for International Development ('DFID'), the Oak Foundation and the University of Essex Research and Enterprise Office. The

¹ Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012 (16 February 2012), UN Doc UNODC/CCPCJ/EG.6/2012/1.

² UNODC/CCPCJ/EG.6/2012/1 (16 February 2012).

³ At para. 6.

purpose of the meeting was to identify current international norms and standards in the areas proposed for possible reform and any outdated language or gaps in the SMR as a result of the international legal developments that have taken place since their adoption in 1955. The present document records the broad majority agreement of the experts at the University of Essex meeting on proposed changes to the SMR that would reflect current international norms and standards.

Mirroring the discussions at the University of Essex meeting, the present document only addresses those rules identified by the Crime Commission for consideration for review. It should not therefore be read as an interpretation of, or commentary on, any other rule contained in the SMR, including the compatibility of those other rules with current international norms and standards. In addition to the comments set out below on specific rules proposed for review, the experts at the University of Essex meeting strongly underscore the proviso set out in the resolution that ‘any changes to the Rules would not lower any existing standards’.⁴

Translations into further UN languages are being commissioned in order to make this document as broadly accessible as possible for further deliberations.

A. INCLUSION OF A PREAMBLE

Experts at the University of Essex meeting endorsed a proposal made at the first IEGM to include a preamble to the SMR. The inclusion of a preamble formed part of all four options considered at the IEGM in February 2012 with the suggestion that it could ‘include a list of the fundamental principles contained in the treaties, standards and norms with regard to the treatment of prisoners, as well as reference to international law and national legislation’.⁵

While the content of a preamble was not discussed extensively due to time constraints, the experts at the University of Essex meeting suggested that, at a minimum, the preamble should recognise the developments in international law since the adoption of the SMR, including the range of international and regional instruments, standards and guidelines on treatment in detention. Similar to the Preliminary Observations to the UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (‘Bangkok Rules’), the experts at the University of Essex meeting suggest the inclusion of the following paragraphs:

Considering the alternatives to imprisonment as provided for in the Tokyo Rules, and the consequent need to give priority to applying non-custodial measures to persons who have come into contact with the criminal justice system,⁶

Taking into consideration also the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, in which Member States declared, *inter alia*, that comprehensive crime prevention strategies at the international, national, regional and local levels must address the root causes

⁴ At para. 5.

⁵ UNODC Background Note, 22 February 2012, UN Doc E/CN.15/2012/CRP.2, section 4.

⁶ On the prerogative of alternatives *see also* Rule 58 of the current SMR; Rule 57 UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (‘Bangkok Rules’); and Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa, Article 1.

and risk factors related to crime and victimization through social, economic, health, educational and justice policies,

Bearing in mind Principle 5 of the UN Basic Principles for the Treatment of Prisoners, which states that ‘[E]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants’.

Recognising the developments on the treatment of detainees in international law through international and regional treaties, national, regional and international jurisprudence and instruments, guidelines and standards since the Standard Minimum Rules for the Treatment of Prisoners were first adopted, such as,

- The UN Code of Conduct for Law Enforcement Officials 1979
- The UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1982
- The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985
- The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) 1985
- The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988
- The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions 1989
- The UN Basic Principles for the Treatment of Prisoners 1990
- The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990
- The UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) 1990
- The UN Rules for the Protection of Juveniles Deprived of their Liberty 1990
- The United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) 1990
- The UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health-Care 1991
- The UN Guidelines for Action on Children in the Criminal Justice System 1997
- The UN Principles on the Effective Investigation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2000
- The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) 2011
- UNHCR, ‘Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the detention of Asylum Seekers and Alternatives to Detention’ (2012)
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems 2012

The present revisions to the Standard Minimum Rules for the Treatment of Prisoners are inspired by these developments and aim at ensuring the consistency of the Rules with provisions of existing international law but do not replace these and all relevant provisions contained in these instruments continue to apply.

B. SCOPE OF THE RULES

At the February 2012 IEGM, the suggestion was made to extend ‘the scope of the Rules to include all persons deprived of their liberty, be it on criminal, civil or administrative grounds (rules 4, 94 and 95)’.⁷

Proposed Revisions

The proposal made at the IEGM may be read as suggesting that the SMR currently only apply to certain situations in which persons are deprived of their liberty. However, the experts at the University of Essex meeting recall that Rule 95 reflects a later addition to the SMR which was adopted precisely to clarify the scope of Rule 4(1) and the Rules as a whole as extending to all forms of deprivation of liberty.⁸ For the avoidance of any doubt or confusion when implementing the SMR, the experts at the University of Essex meeting recommend the revision of Rule 4(1) as follows:

4. (1) Part I of the rules covers the general management of institutions, and is applicable to all persons under any form of detention or imprisonment, be it categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to “security measures”, ~~or~~ corrective measures ordered by the judge including all forms of detention as set out in Rule 95.

C. RESPECT FOR PRISONERS’ INHERENT DIGNITY AND VALUE AS HUMAN BEINGS

At the February 2012 IEGM, the recommendation was made to expand ‘the general principles in both paragraphs of Rule 6, perhaps drawing on the Basic Principles for the Treatment of Prisoners (General Assembly resolution 45/111, annex)’.

Proposed Revision of Rule 6

The experts at the University of Essex meeting propose the following revisions to Rule 6:

6. (1) All prisoners shall be treated with the respect due to their inherent dignity and human rights.
(2) Prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking into account considerations such as the prisoner’s role as sole or primary carer for minor children or other

⁷ Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012 (16 February 2012), UN Doc UNODC/CCPCJ/EG.6/2012/1, para. 41.

⁸ ECOSOC resolution 2076 (LXII), adopted on 13 May 1977 following a recommendation by the Committee on Crime Prevention and Control at its Fourth Session.

dependents, as well as each individual prisoner's preference and availability of appropriate programmes and services.

(3) Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation. The regime in the institution should seek to minimize any differences between prison life and life at liberty.

(24) ~~On the other hand, it is necessary to respect~~ [T]he religious beliefs and moral precepts of the group to which a prisoner belongs shall be respected.

(5) States shall ensure the safety and personal security of prisoners from exploitation, abuse and violence, including inter-prisoner violence, and shall take steps to minimize the risk of self-harm and to prevent suicide.

(6) No prisoner shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment under any circumstances. No circumstance whatsoever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

(7) The objective of the treatment of prisoners convicted of a criminal offence is social reintegration. Time spent in prison should be used for rehabilitation, education and preparation of the prisoner for reintegration into society upon release.

(8) The following Rules shall be applied impartially and with no discrimination, on one or more grounds such as race, colour, sex, language, religion or conviction, political or other opinion or belief, membership of a particular social group, status, activities, descent, national, ethnic, indigenous or social origin, nationality, age, economic position, property, disability, marital status, birth or other status. Particular attention should be given to aggravated forms of discrimination.

Rationale for Proposed Revision of Rule 6

Paragraph 1

The insertion of Rule 6(1) reflects common language employed in international agreements adopted after the SMR. For example, Article 10 of the International Covenant on Civil and Political Rights ('ICCPR')⁹ provides that, 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.¹⁰ This is also reflected at the regional level in instruments such as Article 5 of the African Charter on Human and Peoples' Rights¹¹ and the Kampala Declaration on Prison Conditions in Africa ('Kampala Declaration').¹²

Paragraph 2

Paragraph 2 advances a gender-neutral version of Rule 4 of the Bangkok Rules which is supported by the Preliminary Observations to the Bangkok Rules which 'address issues applicable to men and women prisoners, including those relating to parental responsibilities, some medical services, searching procedures, and the like, although the Rules are mainly

⁹ (1966) UNTS Vol.999 p.171.

¹⁰ See, also Principle 1 of the Basic Principles for the Treatment of Prisoners; Principle 1 of the UN Body of Principles on the Protection of All Persons under Any Form of Detention or Imprisonment; Principles 12 and 87 UN Rules for the Protection of Juveniles Deprived of their Liberty; the Guideline 8 of the Guidelines for Action on Children in the Criminal Justice System and Article 2 of the Code of Conduct for Law Enforcement Officials.

¹¹ (1982) 21 ILM 58.

¹² Kampala Declaration on Prison Conditions in Africa, ECOSOC Resolution 1997/36 (1997), para. 3.

concerned with the needs of women and their children'.¹³ This standard focuses on the rights and interests of the prisoner and child as is supported by the UN Convention on the Rights of the Child,¹⁴ as well as Principle 20 of the UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment ('UN Body of Principles'),¹⁵ and Rule 17(1) of the European Prison Rules.

Paragraph 3

The experts at the University of Essex meeting consider that Rules 57 and 60(1) of the current SMR which are organized under the heading 'A. Prisoners under sentence' are actually general principles which would be more appropriately located in Rule 6. Paragraph 3 brings together current Rules 57 and 60(1) in a shortened form. Principle 5 of the UN Basic Principles for the Treatment of Prisoners provides a comparable rule.¹⁶ If adopted, the experts note that Rules 57 and 60(1) could then be deleted. This would require a change in the numbering of current Rule 60(2) to Rule 60.

Paragraph 4

The insertion of a new Rule 6(1) necessitates the deletion of the words 'on the other hand'.

Paragraph 5

The introduction of Rule 6(5) is inspired by Article 16(3) of the Convention on the Rights of Persons with Disabilities ('CRPD')¹⁷ which provides that, '[i]n order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities'. It responds to the range of threats to safety and personal security experienced by many prisoners. One of the most important obligations of the prison authorities is to ensure the personal safety of prisoners from physical, sexual or emotional abuse by others.¹⁸ This is supported in international and regional instruments adopted since the SMR such as Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD')¹⁹, the Bangkok Rules,²⁰ and the European Prison Rules.²¹

The duty of states to effectively protect persons deprived of their liberty, including vis-à-vis third persons, has been recognised widely as an element of the right to life,²² including to

¹³ Para. 12.

¹⁴ (1989) UNTS Vol.1577 p. 3

¹⁵ Principle 20 of the UN Body of Principles provides that, 'if a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence'.

¹⁶ Principle 5 of the UN Basic Principles for the Treatment of Prisoners: 'Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants'.

¹⁷ (2006) UNTS Vol.2515, p.3.

¹⁸ See, for example, UN Commission on Crime Prevention and Criminal Justice 'Notes and Comments on the United Nations Standard Minimum Rules for the Treatment of Prisoners', 21st Session, the, 2012.

¹⁹ (1966) UNTS Vol.660 p.195.

²⁰ Bangkok Rules, Preliminary Observations, para.9, relating to women prisoners states that 'Physical and psychological safety is critical to ensuring human rights and improving outcomes for women offenders, of which the present rules take account'.

²¹ European Prison Rules, Rule 52(2): 'Procedures shall be in place to ensure the safety of prisoners, prison staff and all visitors and to reduce to a minimum the risk of violence and other events that might threaten safety'.

²² Article 6 International Covenant on Civil and Political Rights, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 4(1) African Charter on Human and Peoples' Rights, Guideline 4 of the Robben Island Guidelines.

take measures and precautions available to diminish opportunities for self-harm, without infringing on personal autonomy. The World Health Organization recommends the adoption of a ‘comprehensive suicide prevention policy’ including training, intake screening, post-intake observation, appropriate monitoring, communication, social intervention, mental health treatment, and a suicide-safe environment.²³

Paragraph 6

Rule 6(6) incorporates the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment which is currently absent from the SMR. The recommended change draws on the language of Principle 6 of the UN Body of Principles. This principle is supported by a wide range of international and regional norms and standards that underscore the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment.²⁴

Paragraph 7

Rule 6(7) incorporates the principle that imprisonment should be used for the purposes of reintegration and rehabilitation which was recognised as early as 1966 in Article 10(3) of the ICCPR which provides that, ‘[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’. This has been reiterated in international and regional norms and standards including Principle 10 of the Basic Principles for the Treatment of Prisoners, the report of the 18th Session of the Commission on Crime Prevention and Criminal Justice,²⁵ and most recently a Human Rights Council resolution on the administration of justice which provides that ‘the social rehabilitation of persons deprived of their liberty shall be among the essential aims of the criminal justice system, ensuring, as far as possible, that offenders are willing and able to lead a law-abiding and self-supporting life upon their return to society’.²⁶

Paragraph 8

International norms and standards adopted since the SMR mirror the structure of the current Rule 6(1) in providing examples of specific grounds of discrimination that are prohibited as illustration while confirming that the list is non-exhaustive. The experts at the University of Essex meeting recommend, at a minimum, the addition of other grounds listed in UN treaties in recognition that the overall list has been applied to cover a range of forms of discrimination.²⁷ The experts at the University of Essex meeting recommend that states

²³ World Health Organization, Preventing Suicide in Jails and Prisons, (2007), http://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf

²⁴ Article 7 of the ICCPR; Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 5 of the African Charter on Human and People’s Rights; Article 7 of the American Convention on Human Rights; Article 3 of the European Convention on Human Rights.

²⁵ Commission on Crime Prevention and Criminal Justice, Report on the 18th Session (18 April 2008 and 16-24 April 2009), E/2009/30 E/CN.15/2009/20, Economic and Social Council, Official Records, 2009 Supplement No. 10, para 57 (h).

²⁶ Human Rights Council Resolution, UN-Doc. A/HRC/18/L.9, 23 September 2011. The European Prison Rules also incorporate this objective, *see* Rules 6 and 102(1).

²⁷ Article 1(1) ICERD ‘...based on race, colour, descent, or national or ethnic origin...’; Article 2(1) ICCPR ‘...such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’; Article 26 ICCPR ‘...on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’; Article 2(2) International Convention on Economic, Social, and Cultural Rights ‘...as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’; Article 1(1) Convention for the Elimination of all forms of Discrimination Against Women ‘...on the basis of sex ...’; Article 2(1)-2(2) Convention on the Rights of the Child ‘...without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ ‘...to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.’; Article 1(1) International Convention on the Protection of the Rights of All Migrant Workers and Their Families ‘...without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality,

consider including other grounds recognised by the Human Rights Council²⁸ and regional bodies.²⁹ Rule 6(8) also recognises the problem of multiple and aggravated forms of discrimination as set out in later international instruments.³⁰

D. MEDICAL AND HEALTH SERVICES

At the February 2012 IEGM, the '[a]mendment of the rules relating to medical and health services, including consideration of the issue of confidentiality of medical records, and the role of medical staff in relation to disciplinary action (Rules 22-26, 32 and 82)' was recommended. Each rule identified by the Expert Group is discussed separately in this section.

Proposed Revision of Rule 22

22. (1) At every institution ~~there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry a health-care service equivalent to that in the community shall be available and accessible, without discrimination and without cost, to all prisoners. They shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality.~~

~~(2) Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.~~ The role of the health-care services shall be the prevention, screening, treatment and care of physical and mental illness, as well as health promotion.

(3) The ~~medical~~ health-care services should be organized in close relationship to the general health administration of the community or nation. Continuity of care between the prison and the community should be ensured through the integration of the prison health-care service into national health-care policies and programmes, including for HIV, infectious diseases, tuberculosis and mental health.

(4) The health-care services shall operate in full clinical independence and according to internationally accepted professional and ethical standards, in particular with regard to the autonomy, informed consent and confidentiality of prisoners in all health matters.

age, economic position, property, marital status, birth or other status.'; Article 13(7) International Convention for the Protection of All Persons from Enforced Disappearance [concerning the prohibition against extradition] '...for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.'; International Convention on the Rights of Persons with Disabilities, Preambular paragraph (p) 'Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'.

²⁸ United Nations Human Rights Council, Resolution regarding human rights, sexual orientation and gender identity, A/HRC/17/L.9/Rev.1, (15 June 2011). See also, Declaration on human rights, sexual orientation and gender identity, United Nations General Assembly A/63/635 (22 December 2008). Human Rights Committee, General Comment No. 18: Non-discrimination, para. 7 ('the term 'discrimination; as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.').

²⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence, CM(2011)49, 7 April 2011, Art. 4(3); Principle 2 of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

³⁰ Preamble to the Convention on the Rights of Persons with Disabilities, paragraph (p).

(5) The right of prisoners to medical confidentiality, including specifically the right not to share information shall be respected at all times. Only health-care professionals shall be present during medical examinations unless they are of the view that exceptional circumstances exist or the health-care staff requests a member of the prison staff to be present for security reasons. Women prisoners shall be examined in line with Rules 10(2) and 11 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules).

(6) Health-care personnel shall maintain an accurate, up-to-date and confidential medical file for each prisoner, including the results of all consultations and tests and the identity of the examining staff, and provide prisoners with access to their medical file upon request.

(7) Health-care professionals shall not perform medical duties or engage in medical interventions for any security or disciplinary purposes.

Rationale for Proposed Revision of Rule 22

Paragraph 1

Rule 22(1) stems from the right of everyone to the enjoyment of the highest attainable standard of physical and mental health as enshrined in Article 12 of International Covenant on Economic, Social and Cultural Right ('ICESCR'),³¹ and reflected in Principle 9 of the Basic Principles for the Treatment of Prisoners,³² Principle 1 of the Principles of Medical Ethics relevant to the Role of Health Personnel, Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, and Rule 40(3) of the European Prison Rules. The obligation to provide health-care services to the detainee 'without cost' is added to bring Rule 22(1) in line with both the UN Body of Principles³³ and existing guidance by the World Health Organization.³⁴ Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and Rule 40(3) of the European Prison Rules contain comparable provisions.

The experts at the University of Essex meeting suggest moving the 'organization of health-care in prisons in close relationship to the general health administration of the community or nation' from its current location in Rule 22(1) to the new Rule 22(3) and expand on the continuity of care.

Paragraph 2

Rule 22(2) replaces existing Rule 22(2). It clarifies the role of the health-care services in preventing, screening, treatment, and care of both physical and mental illness, as reflected in the Committee on Economic, Social and Cultural Rights' General Comment on the Highest Standard of Attainable Health³⁵, the UN Principles on Medical Ethics³⁶ the World Health

³¹ (1976) UNTS Vol. 993, p.3. See also UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health', 11th August 2000, UN Doc. E/C.12/2000/4, paragraphs 12(a)-(d).

³² See also Principle 1(4) of the United Nations Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. res. 46/119 1991 and Rule 54 of the Bangkok Rules.

³³ Principle 24.

³⁴ WHO Declaration on Prison Health as Part of Public Health (adopted in Moscow on 24 October 2003).

³⁵ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health', 11th August 2000, UN Doc. E/C.12/2000/4, paragraphs 12.2(d).

³⁶ Principle 1 of the UN Principles of Medical Ethics states that: 'Health personnel, particularly physicians, charged with the medical care of prisoners and detainees, have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained'.

Organization Guide to the Essentials in Prison Health³⁷, the International Council of Nurses' Code of Ethics,³⁸ and the International Dual Loyalty Working Group's Guidelines for Prison, Detention and Other Custodial Settings ('Dual Loyalty Guidelines').³⁹

Paragraph 3

Rule 22(3) incorporates measures to provide for the continuity of care between prison and society. This is partly addressed in Rule 22(1) of the current SMR. It requires the integration of prison health-care into national health-care policies as treatment suffers if prison health-care services operate in isolation from the community health services, standards and treatment, or if prison healthcare staff lack the professional support and ongoing training available to their colleagues in the community. The proposed rule builds on Rule 22(1) and is based on the World Health Organization's guide to health in prisons,⁴⁰ the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,⁴¹ and the recent UNODC Policy Brief on the treatment, prevention and care of HIV in prisons.⁴² Due to the importance of this issue for public health in the community⁴³ the experts at the University of Essex meeting propose a specific reference to HIV, infectious diseases, tuberculosis and mental health.

Paragraph 4

The experts at the University of Essex meeting highlight the duty to operate health-care services in accordance with internationally accepted professional and ethical standards. The proposed rule specifies the ethical obligations to respect the autonomy and informed consent of prisoners and their right to confidentiality, as well as the clinical independence of health professionals working in places of detention. The UN Principles on Medical Ethics relevant to the Role of Health Personnel, particularly Physicians in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,⁴⁴ the Bangkok Rules,⁴⁵ the UN Rules for the Protection of Juveniles Deprived of their Liberty,⁴⁶ World Medical Association documents,⁴⁷ the Background Paper for Trencin

³⁷ 'Health in Prisons. A WHO Guide to the Essentials in Prison Health, WHO 2007.

³⁸ The International Council of Nurses. Code of Ethics. *First adopted by the International Council of Nurses (ICN) in 1953*. Revised 2005.

³⁹ Dual Loyalty and Human Rights In Health Professional Practice; Proposed Guidelines & Institutional Mechanisms A Project of the International Dual Loyalty Working Group Guidelines for Prison, Detention and Other Custodial Settings ('Dual Loyalty Guidelines'), Principle 2.

⁴⁰ 'Health in Prisons. A WHO Guide to the Essentials in Prison Health', WHO 2007, Chapter 2, 7. and Chapter 2, 10 states: 'Continuity of care between prisons and communities is a public health imperative'.

⁴¹ Principle X provides that states shall 'ensure that health services provided in places of deprivation of liberty operate in close coordination with the public health system'.

⁴² UNODC Policy Brief, 'HIV Prevention, Treatment and Care in Prisons and Other Closed Settings: A Comprehensive Package of Interventions', 2012.

⁴³ WHO, in its Moscow Declaration of 2003 has stated that prison health is part of public health, and that to properly address health issues in the community (in particular HIV, TB and mental health) they must be addressed in the same way in prisons.

⁴⁴ Principle 1 of the UN Principles on Medical Ethics relevant to the Role of Health Personnel, particularly Physicians in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that: 'Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained'.

⁴⁵ Rule 8 of the Bangkok Rules provides that: 'The right of . . . prisoners to medical confidentiality, including specifically the right not to share information . . . shall be respected at all times'.

⁴⁶ 55. Medicines should be administered only for necessary treatment on medical grounds and, when possible, after having obtained the informed consent of the juvenile concerned.

⁴⁷ For example, World Medical Association International Code of Medical Ethics 1949 (revised 2006); World Medical Association Declaration of Malta (revised 2006), paragraph 6; World Medical Association Declaration of Tokyo (revised 2006), paragraph 5.

Statement on Prisons and Mental Health ('the Trencin Statement'),⁴⁸ the Council of Europe Committee of Ministers' Recommendation No. R (98) 7,⁴⁹ and Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas⁵⁰ indicate international acceptance of such obligations. The provision of health-care services operated with full clinical independence has also been established in the Dual Loyalty Guidelines⁵¹ and in the World Medical Association Declaration of Tokyo.⁵²

Paragraph 5

Rule 22(5) enshrines the right to medical confidentiality, which includes the right of prisoners to not have their medical information shared as well as the right to be examined individually, on their own and without the presence of any other person, unless specifically requested by the prisoner. Proposed Rule 22(5) recommends the incorporation of the language of Rules 8 and 11 of the Bangkok Rules. Given the complex particularities of the examination of women prisoners, the experts at the University of Essex meeting suggest the inclusion of a reference to the relevant provisions in these Rules. The principle of medical confidentiality is a fundamental tenant of medical practice and derives from the right to privacy as recognized in the ICCPR and has also been set out in Rule 8 of the Bangkok Rules, the World Medical Associations International Code of Medical Ethics 1949 (revised 2006),⁵³ the World Medical Association Declaration of Lisbon on the Rights of the Patient,⁵⁴ the Dual Loyalty Guidelines,⁵⁵ Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, and the European Committee for the Prevention of Torture (CPT) Standards.⁵⁶

Paragraph 6

This rule outlines the requirement that a medical record must be kept for all detainees, in exclusive responsibility of the health-care personnel as acknowledged by Rule 19 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.⁵⁷ The requirement to

⁴⁸ Background Paper for Trencin Statement on Prisons and Mental Health: (2007) WHO Collaborating Centre on Health in Prisons, states that: 'in general medical or psychiatric care the prison doctor has the same ethical duties as those who practice in the community, and in particular with regard to autonomy, consent and the confidentiality of medical information'.

⁴⁹ Council of Europe, Committee of Ministers, Recommendation No. R (98) 7 Concerning the Ethical and Organisational Aspects of Health-Care in Prison (Apr. 8, 1998). Para. 13. Medical confidentiality should be guaranteed and respected with the same rigour as in the population as a whole.

⁵⁰ Principle X: 'The provision of health services shall, in all circumstances, respect the following principles: medical confidentiality; patient autonomy; and informed consent to medical treatment in the physician-patient relationship'.

⁵¹ Guidelines for Prison, Detention and Other Custodial Settings of the Working Group on Dual Loyalties Paragraph 12: 'The health professional should have the unquestionable right to make independent clinical and ethical judgements without untoward outside interference'.

⁵² WMA Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, 1975 and revised 2005, para. 5: 'A physician must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible'.

⁵³ The World Medical Association International Code of Medical Ethics of the World Medical Association (adopted in 1949, amended in 1968, 1983 and 2006), states that '[a] physician shall respect a patient's right to confidentiality. It is ethical to disclose confidential information when the patient consents to it or when there is a real and imminent threat of harm to the patient or to others and this threat'.

⁵⁴ Para. 7a and para. 8.

⁵⁵ Guidelines for Prison, Detention and Other Custodial Settings of the Working Group on Dual Loyalties Paragraph 11: 'The health professional should respect medical confidentiality; should insist on being able to perform medical duties in the privacy of the consultation, with no custodial staff within earshot; should divulge information strictly on a need-to-know basis, when it is imperative to protect the health of others'.

⁵⁶ CPT, Health-care services in prisons, Extract from the 3rd General Report [CPT/Inf (93) 12], para. 45. Freedom of consent and respect for confidentiality are fundamental rights of the individual.

⁵⁷ 19. All reports, including '(...) medical records (...) should be placed in a confidential individual file, which should be kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood. (...)'

document the name of the physician and the results of examinations as well as access of prisoners to their record has been enshrined, for example, in Principle 26 of the UN Body of Principles.⁵⁸

Paragraph 7

Rule 22(7) stresses that any role of health-care staff in disciplinary or other security measures is in contradiction with their professional and ethical obligations as enshrined in the UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁹ Similar provisions are included in the World Medical Association Statement on Body Searches of Prisoners,⁶⁰ the International Council of Nurses Position Statement,⁶¹ and the Dual Loyalty Guidelines.⁶²

Proposed Revision of Rule 23

23. **(1) There shall be available the services of at least one appropriately qualified physician and sufficient nursing and allied health staff to meet the health needs of the prisoners, including access without delay in cases of emergency.**
- (2) The health-care service shall provide for the promotion, protection and care of the mental health needs of the prisoners through the availability of a sufficient number of psychiatrists, psychologists and nurses with **adequate** psychiatric training.
- (3) Prisoners who require specialist treatment, or treatment that is not available in the institution, shall have access to **hospitals or to other community health services, through transfer or regular visits of an appropriate health-care provider.**
- (4) ~~Where hospital facilities are provided in an institution,~~ Equipment, furnishings and pharmaceutical supplies shall be **suitable to ensure screening, prevention and adequate medical care and treatment of sick prisoners.** ~~and there shall be staff of suitable trained officers.~~
- (5) The services of a qualified dental officer shall be available to every prisoner.

Rationale for Proposed Revision of Rule 23

Paragraph 1

⁵⁸ UN Body of Principles, Principle 26: The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

⁵⁹ Principle 3 of the UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 'It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health', and Principle 2: 'It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity or incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment'.

⁶⁰ WMA Statement on Body Searches of Prisoners, adopted by the 45th World Medical Assembly, Budapest, Hungary, October 1993 and editorially revised by the 170th WMA Council Session, Divonne-les-Bains, France, May 2005.

⁶¹ The International Council of Nurses, 'Position statement on Nurses' role in the care of detainees and prisoners' (adopted in 1998, reviewed and revised in 2006 and 2011).

⁶² Dual Loyalty and Human Rights Guidelines, Guideline 14: '15. The health professional should not participate in police acts like body searches or the imposition of physical restraints unless there is a specific medical indication for doing so or, in the case of body searches, unless the individual in custody specifically requests that the health professional participate. In such cases, the health professional will ascertain that informed consent has been freely given, and will ensure that the prisoner understands that the health professional's role becomes one of medical examiner rather than that of clinical health professional'. See also Background Paper for WHO Trencin Statement on Prisons and Mental Health 2007, 13-14.

Rule 23(1) modifies and moves the existing SMR Rule 22(1). It also acknowledges that health-care is provided not only by physicians, but by nurses and allied health staff that can include pharmacists, health assistants, physiotherapists and mental health professionals. The incorporation of access in cases of emergency draws on Rule 41(2) of the European Prison Rules, and is vital in detention settings in which the prisoner is dependent upon the prison administration to access health-care because they cannot freely move when it may be necessary.

Paragraph 2

Rule 23(2) has been adapted and revised from the existing SMR Rules 49(1) and Rule 82(3) and (4) and acknowledges the importance of the provision of mental health-care to prisoners. Adequate training of medical staff has been incorporated into Rules 22(1), 22(3) and 22(4), through provision of health-care equivalent to that in the community and the integration of policies and programmes into those of the public health system.

Paragraph 3

Specialised treatment has been captured in current Rule 22(2), and has been moved to new Rule 23(3) for reasons of consistency and in a modernised wording.

Paragraph 4

Rule 23(4) incorporates current Rule 22(2) in a more modern wording, and takes into account that adequate facilities and equipment for health-care provision in prisons is a prerequisite for the provision of all forms of health-care in prisons, not only where hospital facilities are provided in an institution.

Paragraph 5

Rule 23(5) is identical to current Rule 23(3).

Proposed Revision of Rule 24

<p>24. (1) The <u>physician and other health-care staff</u> medical officer shall have the care of the physical and mental health of the prisoners shall see daily all sick prisoners, all who complain of <u>illness, physical or mental health issues or injury</u>, and any prisoner to whom <u>his their</u> attention is specially directed.</p> <p>(2) <u>Every prisoner shall be examined as soon as possible upon admission, by a physician or by a nurse who reports to the physician. The purpose of the initial assessment and of subsequent contact with the health services is to:</u></p> <p><u>(a) provide information on the availability and access to the health-care service, and on health promotion and prevention;</u></p> <p><u>(b) determine the primary health-care needs of the individual and to provide individualized health-care plans;</u></p> <p><u>(c) provide appropriate treatment in case of sexually transmitted infections, blood-borne diseases, hepatitis, tuberculosis and to offer voluntary HIV testing and counselling;</u></p> <p><u>(d) determine the reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues;</u></p> <p><u>(e) determine sexual abuse and other forms of violence;</u></p> <p><u>(f) assess the mental health-care needs, including post-traumatic stress disorder and any risk of suicide and self-harm, and provide appropriate treatment, care or transfer as specified in Rule 23(2) and (3);</u></p>
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(g) provide appropriate treatment in case of drug or other dependencies according to the national policies and programmes available in the community;
(h) detect, treat, properly document and report to the authority responsible for such investigations, where there are allegations or reasonable grounds to suspect torture or other forms of cruel, inhuman or degrading treatment or punishment that may have occurred prior to or subsequent to admission;
(i) determine the physical capacity of every prisoner for work and exercise.
(3) In developing responses to HIV/AIDS in prisons, programmes and services shall be responsive to the specific needs of prisoners, who have, or are at risk of acquiring HIV/AIDS and other blood-borne infections. In this context, prison authorities shall encourage and support the development of a comprehensive package of interventions for HIV prevention, treatment and care.
(4) If, on admission a prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health-care, at least equivalent to that in the community, shall be provided for these accompanying children.
(5) Prison health services shall provide or facilitate specialized treatment programmes designed for prisoners who use drugs, taking into account prior victimization, the special needs of pregnant women and women with children, as well as their diverse cultural backgrounds.
(6) The ~~medical officer~~ physician shall report to the director whenever they consider that a prisoner's physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment.
(7) The health-care services shall facilitate pre-release preparations that are adequately planned and provided so as to ensure continuity of care and access to health and other services after release.

Rationale for Proposed Revision of Rule 24

Paragraph 1

The proposed Rule updates the outdated language used in Rule 25(1) of the current SMR with regard to the use of terminology for health-care personnel, and clarifies that the term 'illness' as in the current text comprises not only illness, but injuries and other physical and mental health issues.

Paragraph 2

The experts at the University of Essex meeting recommend the addition of this paragraph to incorporate the international legal requirement that all detainees undergo a medical examination on admission as set out in Principle 24 of the UN Body of Principles.⁶³ The proposed new Rule draws on and incorporates Rule 6 of the Bangkok Rules,⁶⁴ providing for a comprehensive health screening to determine primary health-care needs and further medical treatment, and furthermore incorporates the obligation to document and report allegations of torture and other cruel, inhuman or degrading treatment or punishment. At the regional level, the European Prison Rules and the Principles and Best Practices on the Protection of Persons

⁶³ UN Body of Principles, Principle 24: 'A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge'.

⁶⁴ Rule 6 of the UN Bangkok Rules: 'The health screening of women prisoners shall include comprehensive screening to determine primary health-care needs, and also shall determine: (a) The presence of sexually transmitted diseases or blood-borne diseases; and, depending on risk factors, women prisoners may also be offered testing for HIV, with pre- and post-test counselling; (b) Mental health-care needs, including post-traumatic stress disorder and risk of suicide and self-harm; (c) The reproductive health history of the woman prisoner, including current or recent pregnancies, childbirth and any related reproductive health issues; (d) The existence of drug dependency; (e) Sexual abuse and other forms of violence that may have been suffered prior to admission'.

Deprived of Liberty in the Americas also include provisions on an initial medical examination and provision for specific health screening that should be undertaken for each newly admitted prisoner. The importance of screening for specific diseases is also established in the UNODC Policy Brief on HIV prevention, treatment and care,⁶⁵ and in the World Medical Association Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and other communicable diseases.⁶⁶

The legal and ethical obligation of physicians and nurses in prisons to record all signs of torture and other cruel, inhuman or degrading treatment or punishment of which they become aware, whether upon admission or subsequently, derives from the UN Convention against Torture, the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Istanbul Principles'), and UN General Assembly resolution 55/89,⁶⁷ which set out states' obligations to carry out a prompt, independent and effective investigation of any allegations of, or reasonable grounds to suspect, acts of torture or other cruel, inhuman or degrading treatment or punishment. Relevant international standards of medical and health ethics include the UN Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the World Medical Association Declaration of Tokyo, and the International Council of Nurses Position Statement on the role in the care of detainees and prisoners. Paragraph 6 of the Guidelines for Prison, Detention and Other Custodial Settings of the Working Group on Dual Loyalties reiterates the obligation of physicians to gather evidence and report such cases.⁶⁸

The Istanbul Principles provide, in Principle 6 (a) and (c), that the medical expert 'prepares an accurate written report' 'to the authority responsible for investigating the allegation of torture or ill-treatment' and underscore that '[i]t is the responsibility of the State to ensure that it is delivered securely to these persons'.

Subparagraph (i) is based on current Rule 24, according to which the medical officer shall examine every prisoner, 'with a view particularly to (...) the determination of the physical capacity of every prisoner for work'.

Paragraph 3

Rule 24(3) incorporates Rule 14 of the Bangkok Rules in a gender-neutral way, as its rationale applies to all prisoners. The importance of implementing HIV interventions in prisons was recognised early in the epidemic.⁶⁹ The 1993 World Health Organization Guidelines on HIV infection and AIDS in prisons,⁷⁰ the UNODC and UNAIDS Policy Brief on the reduction of HIV transmission in prisons,⁷¹ and the 2006 Framework for an effective

⁶⁵ UNODC Policy brief 'HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions' (2012).

⁶⁶ WMA Declaration of Edinburgh on Prison Conditions and the Spread of Tuberculosis and Other Communicable Diseases, 2000 and revised in 2011 (<http://www.wma.net/en/30publications/10policies/p28/index.html>)

⁶⁷ Recommended by General Assembly resolution 55/89 of 4 December 2000.

⁶⁸ Dual Loyalty and Human Rights In Health Professional Practice; Proposed Guidelines & Institutional Mechanisms - A Project of the International Dual Loyalty Working Group Guidelines for Prison, Detention and Other Custodial Settings, paragraph 6.

⁶⁹ Harding, T.W. (1987) AIDS in prison, *Lancet*, Nov 28, 1260-1263 (cited in UNODC, WHO, HIV testing and counselling in prisons and other closed settings, Technical paper, 2009, p. 8.

⁷⁰ WHO (1993) guidelines on HIV infection and AIDS in prisons, Geneva: WHO (WHO/GPA/DIR/93.3).

⁷¹ WHO/UNODC/UNAIDS (2004) Policy brief: HIV transmission in prisons. Geneva.

national response to HIV/AIDS in prisons, jointly published by UNODC, WHO, and UNAIDS,⁷² detail the comprehensive package of interventions aimed at curbing the spread of HIV and other blood borne infections in prisons and other closed settings, and emphasise that ‘all prisoners have the right to receive health-care, including preventive measures, equivalent to that available in the community without discrimination’.⁷³

Paragraphs 4 to 7

Rule 24(4) incorporates Rule 9 of the Bangkok Rules.⁷⁴ Rule 24(5) incorporates Rule 15 of the Bangkok Rules in a gender-neutral way, and consistent with the UNODC Drug Abuse Treatment Toolkit,⁷⁵ as its rationale applies to all prisoners. Rule 24(6) is identical to current Rule 25(2) SMR. Proposed Rule 24(7) seeks to ensure continuity of care post release.

Proposed Revision of Rule 25

25. (1) The ~~medical officer~~ **physician** shall **ensure** that there is regular inspection of the **prison** and advise the director upon:

- (a) The quantity, quality, preparation and service of food;
- (b) The hygiene and cleanliness of the institution and the prisoners;
- (c) The sanitation, heating, lighting and ventilation of the institution;
- (d) The suitability and cleanliness of the prisoners' clothing and bedding;
- (e) The observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities;
- (f) Any other issues related to the promotion and protection of the health of prisoners and the prevention of physical or mental health problems, including evolving medical research on prison conditions that may affect the health of prisoners.**

(2) The director shall take into consideration the reports and advice that the **physician** submits according to Rules **24(5) and 25** and ~~in case he concurs with the recommendations made~~, shall take immediate steps to give effect to those recommendations; if they are not within his competence or if he does not concur with them, he shall immediately submit his own report and the advice of the **physician** to a higher authority.

Rationale for Proposed Revision of Rule 25

Paragraph 1 & 2

Rule 25(1) moves existing Rule 26(1) forward and modernises the terminology employed with regard to health-care personnel. Since the role of the health-care service has been defined as one of promoting and protecting the health of the prison population an additional subparagraph (f) has been added to further strengthen the public health role of the medical staff that takes into account ongoing medical research into the health aspects of imprisonment.

⁷² UNODC/WHO/UNAIDS (2006) HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings. A Framework for an Effective National Response. New York.

⁷³ WHO (1993) guidelines on HIV infection and AIDS in prisons, Geneva: WHO (WHO/GPA/DIR/93.3).

⁷⁴ UN Bangkok Rules, Rule 9: ‘If the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health-care, at least equivalent to that in the community, shall be provided’.

⁷⁵ UNODC Drug Abuse Treatment Toolkit, Substance abuse treatment and care for women: Case studies and lessons learned, United Nations, New York, 2004. http://www.unodc.org/docs/treatment/Case_Studies_E.pdf

Proposed Rule 26a

~~23a.~~ **26a. (1)** ~~In women's institutions~~ There shall be special accommodation for women prisoners for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.

(2) Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.

Rationale for Proposed Rule 26a

Rule 26a is identical to current Rule 23. For reasons of consistency, the experts at the University of Essex meeting propose that all health-care related provisions be listed in consecutive order, while current Rule 23 be moved to become Rule 26a, including provisions specific to pregnant women, women with new born children and children imprisoned with their mother. The term ‘in women’s institutions’ was deleted in order to clarify that such care needs to be provided not only in women’s institutions but wherever women prisoners are held. (See also Chapter L – Other Areas, on children of imprisoned parents).

E. INVESTIGATION OF ALL DEATHS IN CUSTODY, AS WELL AS ANY SIGNS OR ALLEGATIONS OF TORTURE OR INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT OF PRISONERS

At the February 2012 IEGM, some speakers recommended that the Rules ‘[r]eflect ... the duty to investigate all deaths in custody, as well as any signs or allegations of torture or inhuman or degrading treatment against prisoners in rule 44’.

Proposed Revision of Rule 44

The experts at the University of Essex meeting propose the following revisions to Rule 44:

~~Notification of death illness, transfer, etc.~~

Notifications and investigations

44. (1) Upon the death or serious illness of, or serious injury to a prisoner, or his removal to an institution for the treatment of mental affections, the director shall at once inform the spouse, if the prisoner is married, or the nearest relative unless in the case of illness or injury the prisoner has explicitly indicated to the prison administration that such a person should not be informed. In ~~and~~ any event, the director shall at once inform any other person previously designated by the prisoner.

(2) The prison administration shall inform a prisoner ~~shall be informed~~ at once of the death or serious illness of any near relative. In case of the critical illness of a near relative, the prisoner should be authorized, whenever circumstances allow, to go to his bedside either under escort or alone.

(3) Every prisoner shall have the right and shall be enabled to inform at once his family and persons designated by the prisoner as contact persons of his imprisonment or his transfer to another institution.

(4) Prison officials shall report cases of injury or death of a prisoner to their superiors and medical staff without delay.

(5) Notwithstanding internal investigations, the prison director shall report at once the injury or death to an independent investigatory body that is under a duty to initiate a prompt, impartial and effective investigation into the circumstances surrounding causes of deaths and serious injury in prison. The prison authorities are obligated to cooperate with this investigatory body and to ensure that all evidence is preserved.

(6) The body of the deceased prisoner should be transferred to the family as promptly as is reasonable or on completion of investigation, and at no cost to the family.

(7) The prison authority shall ensure that the dead are treated with respect and dignity.

Rationale for Proposed Revision of Rule 44

Paragraph 1

The experts at the University of Essex meeting propose the preservation of this paragraph with the exception of the acknowledgment that notification should not take place if the prisoner has explicitly indicated to the prison administration that he does not wish this to happen.

Paragraph 2

The experts at the University of Essex meeting recommend the addition of ‘prison administration’ to Rule 44(2) in order to clarify the authority with the responsibility to inform the prisoner.

Paragraph 3

The experts at the University of Essex meeting recommend the inclusion of the final sentence in Rule 44(3) in order to ensure that the prisoner has the right to inform his family and other designated persons of injury or transfer and that the prison administration ensures that he or she is able to do so and that facilities are in place for such communication and are freely accessible.

Paragraph 4

International law provides for the duty to investigate allegations of torture or other cruel, inhuman or degrading treatment or punishment,⁷⁶ including inter-prisoner violence, serious injuries and deaths in custody.⁷⁷ While the SMR focus on the treatment of prisoners, they currently do not contain any rules that address this well-established international legal obligation. As the SMR mainly address the obligations of the prison administration as an organ of the state, the experts at the University of Essex meeting recommend the introduction of Rules 44(4) and (5) in order to reflect the prison administration’s role in ensuring that the obligation to investigate allegations of torture or other cruel, inhuman or degrading treatment or punishment and deaths in custody is met. International law requires that such investigations are carried out independently. Therefore, the duty to investigate will not and cannot be fulfilled by investigations conducted by the prison administration alone. While such inquiries may result from complaints made by prisoners or their families, states are under an *ex officio* obligation to conduct such investigations. Independent bodies will only be able to carry out these investigations when on notice of allegations of torture or other cruel, inhuman

⁷⁶ Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁷⁷ Principle 34 of the UN Body of Principles.

or degrading treatment or punishment, serious injuries or deaths in custody. The prison administration is therefore under an obligation to report any serious injuries or deaths in custody to the independent investigatory body, regardless of whether a complaint is made.

In recognition of this obligation, Rule 44(4) requires all prison officials to report any serious injury or death in custody to their superior. This underscores the responsibility of all prison officials in recognising and reporting serious injuries and deaths in custody promptly. This obligation is currently set out in the UN Basic Principles on the Use of Force and Firearms.⁷⁸ The effectiveness of investigations requires that medical staff are notified without delay in order for an examination, documentation and treatment to be initiated.

Paragraph 5

Rule 44(5) similarly requires the prison director to promptly report any serious injury or death to an independent investigatory body and to cooperate with that body in their investigations, including by preserving any evidence.⁷⁹ This internal (in Rule 44(4)) and external reporting duty is supported in other international instruments. For example, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials obligates States to ‘establish effective reporting and review procedures’ for such incidents.⁸⁰ Principle 22 further provides that, ‘in cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control’. Principle 8 also provides that ‘Law enforcement officials who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power’.

Paragraph 6

This rule recognises the universal right to family life, involving the right of families and other partners to bury their loved ones. The corpse of a person who dies in custody needs to be returned to his or her next of kin.

Paragraph 7

The experts at the University of Essex meeting recommend the inclusion of this paragraph in recognition of the fundamental international legal principle to respect an individual’s dignity.

F. DISCIPLINARY ACTION AND PUNISHMENT, INCLUDING THE ROLE OF MEDICAL STAFF, SOLITARY CONFINEMENT AND THE REDUCTION OF DIET

At the February 2012 IEGM, some speakers suggested that ‘rules 31-33 in respect of close and solitary confinement and the unacceptability of reduction of diet as a punishment’ be considered for review’.

⁷⁸ UN Basic Principles on the Use of Force and Firearms provide that law enforcement officials provides that ‘shall report the incident promptly to their superiors’.

⁷⁹ Principle 2 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: ‘(...) The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts.’ The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

⁸⁰ Principle 6.

Proposed Revision of Rule 31

31. (1) Corporal punishment, **prolonged confinement without sustained and meaningful daily human contact**, punishment by placing in a dark cell, **the suspension or restriction of water or food** and all **other** cruel, inhuman or degrading punishments shall be completely prohibited ~~as punishments for disciplinary offences.~~

(2) Solitary confinement shall only be used in exceptional cases when deemed absolutely necessary for as short a time as possible and subject to regular, substantive independent review.

(3) Solitary confinement of juveniles, of pregnant women, women with infants and breastfeeding mothers in prison and of persons with mental illnesses shall be prohibited.

(4) All punishments shall be duly recorded.

Rationale for the Proposed Rule 31

Paragraph 1

The experts at the University of Essex meeting recall that since the adoption of the SMR a significant body of international law has developed that requires the restriction on the use of solitary confinement.⁸¹ The UN Rules for the Protection of Juveniles Deprived of their Liberty,⁸² and the Bangkok Rules,⁸³ provide for an absolute prohibition on the use of solitary confinement. Most recently, the UN Special Rapporteur on Torture has recommended a ban of prolonged or indefinite solitary confinement as a punishment or extortion technique, as contrary to the prohibition of torture and other ill-treatment, and as a ‘harsh’ measure, which is contrary to rehabilitation, the aim of the penitentiary system.⁸⁴ The proposed language in Rule 31(1) focuses on the aspects of solitary confinement that are most damaging to a person’s psychological health and wellbeing and therefore justify a ban on the use of such confinement generally and not limited to disciplinary purposes. This is based on medical research which confirms that the denial of meaningful human contact can cause ‘isolation syndrome’ the symptoms of which include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia, psychosis, self-harm and suicide, and can destroy a person’s personality.⁸⁵

The experts at the University of Essex meeting further recommend the inclusion of a prohibition of the suspension or restriction of water or food in paragraph 1 of Rule 31. This aligns with international law on the obligation to provide prisoners with healthy living conditions,⁸⁶ including sufficient, safe and adequate food and drinking water,⁸⁷ as set out in a

⁸¹ See for example, Principle 7 of the Basic Principles; the Human Rights Committee, General Comment No.20.

⁸² Rule 67.

⁸³ Rule 22 in relation to pregnant women, women with infants and breastfeeding mothers in prison.

⁸⁴ First interim report to the General Assembly on 18 October 2011, UN-Doc A/RES/65/205 at para. 79 (noting that, ‘that solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions. He finds solitary confinement to be contrary to one of the essential aims of the penitentiary system, which is to rehabilitate offenders and facilitate their reintegration into society’.)

⁸⁵ Grassian, S. (2006) Psychiatric Effects of Solitary Confinement. *Journal of Law and Policy* Vol. 22:325-383.; Haney, C. (2003) Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement. *Crime & Delinquency* 49(1) 124-156; Shalev, S. (2008) *A Sourcebook on Solitary Confinement*. London: Mannheim Centre for Criminology, LSE.

⁸⁶ Constitution of the World Health Organization, preamble setting forth principles accepted by Contracting Parties, Article 25 (1) of the Universal Declaration of Human Rights, Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 24 of the Convention

range of international instruments such as the UN Rules for the Protection of Juveniles Deprived of their Liberty, the World Health Organization's Social Determinants of Health,⁸⁸ and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principles XI.1. and XI.2).⁸⁹

Paragraph 2

The experts at the University of Essex meeting recommend the addition of paragraph 2 in the spirit of Principle 7 of the Basic Principles for the Treatment of Prisoners which commit to 'efforts towards the abolition of solitary confinement or the reduction of its use'. The proposed restrictions on the use of solitary confinement are based on the Istanbul Statement on the use and effects of solitary confinement, the European Prison Rules,⁹⁰ and Principle XXII (3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas which provides that, 'as a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort' and 'shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel'.

Given that the period of isolation resulting in a deterioration of mental health differs depending on other factors of detention and the individual, the experts recommend such confinement is subject to a substantive independent review, drawing on the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas providing for a regular review by an independent body,⁹¹ and clarifying that a comprehensive assessment is required rather than a brief schematic review.

Paragraph 3

Paragraph 3 incorporates the absolute prohibition on the use of solitary confinement for particularly vulnerable groups in line with international instruments adopted after the SMR. Such groups include pregnant women, women with infants and breastfeeding mothers in prison,⁹² and children and juveniles;⁹³ and persons with mental illness as recommended in the Istanbul Statement on the use and effects of solitary confinement.⁹⁴

Paragraph 4

The experts at the University of Essex meeting underscore that documentation of disciplinary punishments constitutes a prerequisite for the effective implementation of the existing Rules

on the Rights of the Child.

⁸⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), E/C.12/2000/4, para. 42.

⁸⁸ WHO Social Determinants of Health as detailed in the Final report of the World Congress on the Social Determinants of Health, Brazil 19-21 October 2011 (http://www.who.int/social_determinants/en/).

⁸⁹ Adopted unanimously by the Inter-American Commission on Human Rights (IACHR) by Resolution 01/08 on 31 March 2008.

⁹⁰ European Prison Rules, Rule 60 (5): 'Solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible'.

⁹¹ Principle XXII (3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas: 'In all cases, the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control, since its prolonged, inappropriate or unnecessary use would amount to acts of torture, or cruel, inhuman, or degrading treatment or punishment'.

⁹² UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, Rule 22.

⁹³ UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 67.

⁹⁴ The Istanbul Protocol on the use and effects of solitary confinement, Adopted on 9. December 2007 at the International Psychological Trauma Symposium, Istanbul.

on disciplinary sanctions as otherwise compliance with the SMR could not be established, including by inspection and monitoring bodies. The proposed rule draws on Rule 19 of the UN Rules for the Protection of Juveniles Deprived of their Liberty⁹⁵ and recommendations of the CPT.⁹⁶

Proposed Revision of Rule 32

32. (1) ~~Punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.~~ The requirements set forth in these Rules, in particular regarding accommodation, personal hygiene, access to open air, light, to medical care, water and adequate nutrition and the right to exercise continue to apply where prisoners are undergoing punishment.

(2) ~~The same shall apply to any other punishment that may be prejudicial to the physical or mental health of a prisoner. In no case may such punishment be contrary to or depart from the principle stated in rule 31.~~ Disciplinary sanctions shall not include a prohibition of family contact, especially with children.

(3) ~~The medical officer shall visit daily prisoners undergoing such punishments and shall advise the director if he considers termination or alteration of the punishment necessary on grounds of physical or mental health.~~ The physician shall provide for the protection of the mental and physical health of prisoners undergoing punishment by ensuring they are visited as deemed medically necessary. The physician shall report to the director, without delay, any adverse effect on the physical or mental health of a prisoner undergoing punishment.

Rationale for the Proposed Rule 32

Paragraph 1

Since the adoption of the SMR, the international standards on the role of doctors have evolved significantly and now prohibit a role of medical staff in disciplinary measures. For example, Principle 4 (b) of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stresses that ‘[i]t is a contravention of medical ethics for health personnel, particularly physicians, to certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health (...).’⁹⁷ Accordingly, the experts at the University of Essex meeting recommend the deletion of current Rule 32(3). They further recommend the replacement of Rule 32(1) with language that recognises the continuing applicability of the right to humane treatment and the right to health while undergoing punishment as further explained in relation to Rule 31(1).

Paragraph 2

⁹⁵ UN Rules for the Protection of Juveniles Deprived of their Liberty, Rule 19: ‘All reports, including (...) records of disciplinary proceedings (...), details of treatment should be placed in a confidential file, which should be kept up to date.’ Rule 70 reiterates, that ‘Complete records should be kept of all disciplinary proceedings’.

⁹⁶ The CPT ‘considers that fundamental safeguards granted to persons in police custody would be reinforced if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them’ (Extract from the 2nd General Report (CPT/Inf (92) 3), and has further elaborated on the documentation of solitary confinement in its 21st General Report (European Committee to Prevent Torture (CPT), Extract from the 21st General Report, CPT/Inf (2011) 28, para. 55 (c)).

⁹⁷ Furthermore, according to Principle 3 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it constitutes ‘a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health’.

The experts at the University of Essex meeting recommend the addition of paragraph 2 to reflect current international law that prohibits the withdrawal of contact with family as a disciplinary measure.⁹⁸

Paragraph 3

Current Rule 32(3) suggests a role of medical personnel in advising the prison administration on the termination or alteration of punishment based on medical considerations. The experts at the University of Essex meeting point out that under today's standards, health personnel cannot participate or play a role in the determination of a prisoner's fitness to undergo punishment. Equally, the experts note that prisoners continue to have the right to access to health-care even if undergoing punishment. When providing health-care, the experts recount the duty of medical personnel to report the deteriorating health of a detainee. In order to ensure that medical personnel only play a protective health role and are not involved or do not appear to be involved in the sanctioning of punishments, the experts at the University of Essex meeting recommend that Rule 32 underscores that the role of health personnel exclusively relates to supporting the health of the prisoner and is not permissive of punishment.

Proposed New Rule 32a

While the humiliating and traumatising effect of invasive body searches has been widely recognized, the SMR do not provide any guidance on the personal searches of prisoners, including strip searches and cavity searches. The experts therefore recommend the incorporation of a new Rule 32a, drawing on Principle XXI of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and Rule 19 of the Bangkok Rules,⁹⁹ taking into account the Statement on Body Searches of Prisoners of the World Medical Association¹⁰⁰ as the following:

32a. (1) The procedures for searches of prison premises, prisoners, visitors and other staff shall be defined by law and based on the criteria of necessity, reasonableness and proportionality. Appropriate training shall be provided to all staff.

(2) Searches of a person shall be carried out by staff of the same gender, with respect for the dignity and privacy of the individual.

(3) Alternative screening methods, such as scans, shall be developed to replace strip searches and body cavity searches.

(4) Strip searches and body cavity searches shall only be carried out as a last resort. They shall be authorized by the supervisor on duty and a full record maintained of the reason for the search, those conducting it and any findings.

(5) When body cavity searches are deemed necessary they shall be conducted in private by medically trained staff of the same gender that are not part of the regular health-care service of the prison or by prison staff with sufficient medical knowledge and skills to safely perform the search.

⁹⁸ Rule 23 of the UN Bangkok Rules read together with the Preliminary Observations that clarify the applicability of certain rules in a gender-neutral way.

⁹⁹ Rule 19 of the UN Bangkok Rules: 'Effective measures shall be taken to ensure that prisoners' dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures'.

¹⁰⁰ Adopted by the 45th World Medical Assembly, Budapest, Hungary, October 1993 and editorially revised at the 170th Council Session, Divonne-les-Bains, France, May 2005. (<http://www.wma.net/e/policy/b5.htm>)

Rationale for Proposed New Rule 32a

Paragraph 1

The requirement of prescription by law, appropriate training of staff, and the application of these principles on prisoners as well as visitors have been enshrined in both, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle XXI) and the European Prison Rules (Rule 54 (1) and (2)). The latter expand their application on prison premises and other staff.

Paragraph 2

The principle that persons should only be searched by the same gender has also been emphasised by the Human Rights Committee¹⁰¹, in Rule 54(5) of the European Prison Rules, and in the European Committee for the Prevention of Torture Standards (para. 26).¹⁰²

Paragraph 3

Additional principles and rules have been incorporated in the Bangkok Rules and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas stating that alternative means shall be applied wherever possible, through technological equipment and procedures, or other appropriate measures. Rule 32a(2) suggests incorporating into the SMR Rule 19 of the Bangkok Rules in a gender-neutral wording. The proposed Rule 32a(3) draws on Rule 20 of the UN Bangkok Rules, a prerogative of modern scanning technology or making arrangements to keep the prisoners under close supervision until such time as any forbidden item is expelled from the body.

Paragraph 4

Rule 32a(4) draws on the Commentary to the Bangkok Rules, capturing the importance of authorisation of strip and invasive body searches, and documentation of their justification.

Paragraph 5

Rule 32a(5) takes into account that the ‘physician's obligation to provide medical care to the prisoner should not be compromised by an obligation to participate in the prison's security system’¹⁰³ and therefore, involvement in ‘any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health’ in contravention of medical ethics for health personnel.¹⁰⁴

Proposed Revision of Rule 33

33. (1) Force and instruments of restraints may only be used as specified by law, in exceptional circumstances when strictly necessary to prevent the detainee

¹⁰¹ Human Rights Committee in General Comment 16 on Article 17 of the ICCPR, para. 8: ‘(...) So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex’.

¹⁰² CPT Standards, para. 26.: ‘(...) the CPT wishes to stress that, regardless of their age, persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender; these principles apply *a fortiori* in respect of juveniles’.

¹⁰³ WMA Statement on Body Searches of Prisoners, adopted by the 45th World Medical Assembly, Budapest, Hungary, October 1993 and editorially revised by the 170th WMA Council Session, Divonne-les-Bains, France, May 2005.

¹⁰⁴ Principle 3 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

from inflicting self-injury, injuries to others or serious destruction of property. Force and restraints must not cause humiliation or degradation, and shall be used in observance of the principle of proportionality, where all other control mechanisms have been exhausted and failed and for the shortest possible period in time.

(2) The use of force and application of restraints shall be authorized by the director and be recorded.

(13) Inherently degrading or painful instruments such as chains or irons and body-worn electro-shock devices shall be prohibited. Other electro-shock devices and instruments of restraint, such as handcuffs, chains, irons and strait-jackets shall never be applied as a punishment, ~~Other instruments of restraint~~ and shall not be used except in the following circumstances:

(a) As a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority;

~~(b) On medical grounds by direction of the medical officer;~~

(eb) By order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property; in such instances the director shall at once consult the medical officer and report to the higher administrative authority.

(4) Prisoners undergoing medical treatment, or childbirth, should not be restrained unless they are an immediate threat to themselves or others.

Rationale for the Proposed Rule 33

Paragraphs 1 & 2

In recognition of the developments on the use of force in international law since the adoption of the SMR, the experts at the University of Essex meeting recommend the introduction of a new paragraph 1 that incorporates the requirements of prescription by law, necessity and proportionality as provided in the Code of Conduct for Law Enforcement Officials,¹⁰⁵ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,¹⁰⁶ calling on them to, ‘as far as possible, apply non-violent means’ and to use force only ‘if other means remain ineffective or without promise of achieving the intended result’. Basic Principle 5 states that whenever the lawful use of force is ‘unavoidable, law enforcement officials shall (a) exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved’ and to ‘(b) minimise damage and injury (...)’. Basic Principle 9 limits the use of force to ‘self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives’.

Paragraph 3

The prohibition on the use of restraints that are ‘inherently degrading or painful’ derives from the general prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Body-worn electro-shock belts,¹⁰⁷ due to their nature inflicting severe physical

¹⁰⁵ Article 3 of the Code states that ‘Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty’. The Commentary elaborates on the exceptionality and proportionality, stating that ‘[i]n no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved’.

¹⁰⁶ In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term ‘law enforcement officials’ includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention.

¹⁰⁷ Body-worn electro-shock devices (for example belts, sleeves, cuffs,) encircle various parts of the subject’s body (usually the waist, but

pain and mental suffering, as well as due to their humiliating and degrading effect, have been increasingly condemned and their use nowadays has been abandoned in most states. The UN Committee against Torture has recommended the abolition of electro-shock stun belts and restraint chairs as methods of restraining those in custody, noting that their use often violates Article 16 of the Convention.¹⁰⁸ The CPT opposes the ‘use of electric stun belts for controlling the movement of detained persons, whether inside or outside places of deprivation of liberty.’¹⁰⁹ The European Union has gone as far as prohibiting the export of electric-shock devices which are intended to be worn on the body by a restrained individual as goods ‘which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment’.¹¹⁰

The deletion of Rule 33 (b) follows Principle 5 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians which prohibits health personnel from participating ‘in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria’.

G. PROTECTION AND SPECIAL NEEDS OF VULNERABLE GROUPS DEPRIVED OF THEIR LIBERTY

At the February 2012 IEGM, the ‘[e]xpansion of the provisions dealing with the protection and special requirements of vulnerable prisoners, e.g. older prisoners; foreign national prisoners; ethnic and racial minorities and indigenous people; transgender prisoners etc.’ was recommended.

The SMR currently fail to address the needs of persons particularly vulnerable to violence, abuse and discrimination in the detention context. Since the adoption of the SMR, norms and standards have been adopted to address the needs of juveniles and women in prison, but the international framework still fails to acknowledge the specific needs of other groups even though they are well documented and reflect a serious and ongoing problem in many places of detention in every region of the world. The experts at the University of Essex meeting recommend acknowledgment of the central importance of devising specific rules to deal with the protection and special requirements of prisoners particularly vulnerable to discrimination, violence and other disadvantages such as older prisoners, foreign nationals, ethnic and racial minorities and indigenous people, persons who identify or alleged to be lesbian, gay, bisexual or transgender, persons living with HIV/AIDs, tuberculosis or terminal illnesses, drug-dependent prisoners, and persons with disabilities.

However, as the University of Essex meeting was limited to two days in duration, the experts did not have sufficient time to discuss this complex and important issue in addition to the other proposed targeted changes. The experts at the University of Essex meeting anticipate that the IEGM may face similar time constraints at the December 2012 meeting in Argentina and therefore recommend that the IEGM propose a subsequent meeting to the Crime

variants have been developed to fit on legs or arms) and deliver an electric shock when a remote control device is activated.

¹⁰⁸ UN Committee against Torture, for example, Concluding observations A/55/44, para. 180(c) (May 2000).

¹⁰⁹ 20th report of the European Committee for the Prevention of Torture, para. 74, CPT (2011) CPT Standards CPT/Inf/E (2002) 1 - Rev. 2011. <http://www.cpt.coe.int/en/documents/eng-standards.pdf>

¹¹⁰ EC Regulation 1236/2005, Article 3 referring to Annex II, which lists in para. 2.1 ‘Electric-shock devices which are intended to be worn on the body by a restrained individual, such as belts, sleeves and cuffs, designed for restraining human beings by the administration of electric shocks having a no-load voltage exceeding 10 000 V’.

Commission, dedicated to the protection and special requirements of vulnerable detainees in order to ensure it receives the full and detailed analysis and discussion it both requires and deserves.

The experts at the University of Essex meeting also recommend the revision of Rules 82 and 83 to align with the CRPD as the current language which references ‘insane and mentally abnormal prisoners’ falls short of today’s standards and acceptable terminology.

H. THE RIGHT OF ACCESS TO LEGAL REPRESENTATION

At the February 2012 IEGM meeting, the ‘[a]ddition of the right of access to a lawyer to all prisoners to rule 37’ was recommended. While the Expert Working Group referred exclusively to Rule 37, Rule 93 additionally concerns legal aid and meetings between prisoners and their lawyers. Accordingly, the experts at the University of Essex meeting discussed the possible review of both rules 93 and 37.

Proposed Revision of Rule 37

As Rule 93 only deals with ‘untried’ or ‘pretrial’ prisoners, the experts at the University of Essex meeting recommend the following revisions to Rule 37:

Contact with the outside world

37. (1) Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence, **by telephone** and by receiving visits.

(2) All prisoners shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a legal adviser of their own choice on any legal matter, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

(3) Denial of access to a legal adviser shall be subject to independent review without delay.

(4) Detainees shall have access to and be allowed to keep in their possessions without access by the prison administration, documents relating to legal proceedings.

(5) Prisoners shall be provided with effective, independent and competent legal aid at all stages of the criminal justice process, and shall be informed of legal aid schemes to which they are entitled.

Rationale for Proposed Revision of Rule 37

Paragraph 1

The experts at the University of Essex meeting recommend the addition of ‘by telephone’ in recognition of the developments in modern technology and also the appropriateness of the availability of this form of communication, particularly where prisoners are not held close to their family or where travel expenses inhibit regular visits.

Paragraph 2

Currently, the SMR only provide for a right to receive visits from legal counsel in Rule 93 which is limited to pre-trial detention and for the purpose of defence. The addition of Rule

37(2) recognises the continuation and institution of legal proceedings after conviction. It is intended to ensure that prisoners can exercise their rights to complain and appeal effectively, particularly in relation to issues such as allegations of torture or other ill-treatment, allegations of a failure to adhere to the SMR, appeals against conviction and motions for early release and probation arrangements. The experts at the University of Essex meeting emphasise that none of these proceedings could be undertaken effectively without access to a lawyer. The proposed rule does not specify these specific areas as grounds for access to a lawyer post-conviction taking into account that access to a lawyer constitutes a fundamental safeguard against abuse in detention, recognised in international law. If the prisoner was required to disclose the nature of his complaint, this safeguard would be rendered nugatory.

The experts at the University of Essex meeting draw on language adopted in the UN Basic Principles on the Role of Lawyers, which provide that ‘All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.’¹¹¹ They suggest the replacement of ‘lawyer’ with ‘legal adviser’ as set out in the later Kampala Declaration as this encompasses accredited paralegals,¹¹² as well as the range of terms employed in different states to refer to qualified lawyers as recognised by the national bar association or law society. The term ‘legal adviser’ is also the terminology used in Rule 93 of the current SMR.

The experts at the University of the Essex meeting draw on the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,¹¹³ as the most recently adopted standard relevant to legal representation, which would be devoid of meaning without access of legal aid providers to their clients. For example, Principle 2 provides that states should ‘ensure that a comprehensive legal aid system is in place that is accessible, effective, sustainable and credible and Principle 7 provides for prompt and effective provision of legal aid ‘at all stages of the criminal process’ and including ‘unhindered access to legal aid providers for detained persons.’ Finally, Principle 12 requires states to ensure that legal aid providers are able to carry out their work effectively (...)’ and to ensure that ‘legal aid providers are able (...) to consult and meet with their clients freely and in full confidentiality (...), and to freely access prosecution and other relevant files.’ The principle of confidentiality of communication with legal counsel is mirrored in various other relevant international standards such as Principle 33 of the UN Body of Principles and Principle 22 of the UN Basic Principles on the Role of Lawyers.

Paragraph 3

The experts at the University of Essex meeting recommend the inclusion of the right to challenge a denial of access to a lawyer based on the principle of effective access to a court under international law, which necessarily includes the ability to challenge the denial or restrictions of access to a legal adviser while in detention. The proposal is supported by the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems on remedies and safeguards, which provides that ‘States should establish effective remedies and

¹¹¹ Principle 8.

¹¹² Para. 6.

¹¹³ ECOSOC, UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems UN Doc E/RES/2012/15 (26 July 2012).

safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.’¹¹⁴

Paragraph 4

The proposal to include the right to keep legal documents in the prisoners’ possession draws on the language of Rule 23(6) of the European Prison Rules, according to which ‘Prisoners shall have access to, or be allowed to keep in their possession, documents relating to their legal proceedings’, which the experts consider an essential requirement of access to remedies in the context of detention.

Paragraph 5

Currently, the provision of information on existing legal aid systems is limited to untried prisoners (Rule 93(1)), whereas in most countries legal aid schemes are available beyond this period of detention. The experts at the University of Essex meeting recommend the inclusion of information on legal aid schemes to all prisoners as supported by Principle 13 of the UN Body of Principles according to which any person, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, shall be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of one’s right and how to avail oneself of such rights.

The amendment combines language from Principles 2, 7 and 12 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems as relevant in the given context. These recently agreed standards on legal aid promote an ‘accessible, effective and credible’ legal aid system ‘at all stages of criminal procedure’ that can carry out their work ‘effectively, freely and independently’ and possesses ‘education, training, skills and experience that are commensurate with the nature of their work.’

Proposed Revision of Rule 93

The experts at the University of Essex meeting recommend the following changes to Rule 93:

93. (1) All persons detained have the right to be informed about the reasons for detention.

(2) For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available.

(3) From the moment of arrest, an untried prisoner shall be entitled to communicate and consult with his legal adviser without delay or censorship and in full confidentiality. They have the right to receive visits from his legal adviser of their own choice, with a view to his defence.

(4) An untried prisoner shall be allowed adequate time and facilities for consultation with his legal counsel and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material.

(5) An untried prisoner shall be entitled to keep materials prepared for or provided by his legal adviser in his personal effects.

Rationale for Proposed Revision of Rule 93

Paragraph 1

¹¹⁴ Principle 9, para. 31.

This Rule reiterates the well-established principle in international law that persons deprived of their liberty shall be informed of the reasons for their arrest.

Paragraphs 3 and 4

The experts at the University of Essex meeting recommend the amendments to Rule 93 in light of the importance of effective access to legal representation for prisoners under arrest or awaiting trial in order to meet State obligations concerning fair trial safeguards. In addition to using the current text of the SMR, the recommended text draws on Principle 8 of the UN Basic Principles on the Role of Lawyers, providing that ‘All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials’. Further references and rationale for the use of the respective text are indicated under Rule 37 above. The proposed addition of the right of the prisoner to preferably choose their own legal adviser is inspired by Article 14 ICCPR and Guideline 27 of the Robben Island Guidelines.

Paragraph 5

As under the proposed Rule 37(4), the experts at the University of Essex meeting recommend the incorporation of this Rule as an essential requirement of access to remedies provided by law and, in the context of detention, benefits from explicit provision.

I. COMPLAINTS AND INDEPENDENT INSPECTION

At the February 2012 meeting of the IEGM, the ‘[i]nclusion of the right of access to external means of complaint in rule 36 [and the] [r]einforcement of the importance of monitoring and independent inspection (rules 36 and 55)’ was recommended.

Proposed Revision of Rule 35

Although the IEGM did not recommend the review of rule 35, the experts at the University of Essex meeting consider some revisions necessary in order to ensure the effectiveness of the complaint system for prisoners. They propose the following:

<p>35. (1) Every prisoner on admission shall be provided with written and oral information in a language he understands about the regulations governing the treatment of prisoners of his category, the disciplinary requirements of the institution, the authorized methods of seeking information and making complaints, and all such other matters as are necessary to enable him to understand both his rights and his obligations and to adapt himself to the life of the institution.</p> <p>(2) Information shall also be provided in accessible formats, including Braille and easy-to-read formats, and in sign languages for deaf or hard-of-hearing individuals. If a prisoner is illiterate, the aforesaid information shall be conveyed to him orally.</p>

Rationale for Proposed Revision of Rule 35

The experts at the University of Essex meeting recommend the additions in paragraphs 1 and 2 in recognition that the provision of written information only will not be suitable or appropriate for all prisoners, and that particularly in the case of foreign prisoners or persons

from a state in which a number of languages are spoken, the main language used for communicating with prisoners may not be appropriate. The suggestion of a range of accessible formats is therefore intended to ensure that all prisoners receive information in an accessible format. The language suggested in paragraphs 1 and 2 and deleted from paragraph 2 is intended to update Rule 35 with contemporary standards and language and align it with Article 21 of the CRPD on freedom of expression and opinion.

Proposed Revision of Rule 36

The experts at the University of Essex meeting recommend the following revisions to Rule 36:

36. (1) The prison administration shall ensure that every prisoner ~~shall have the~~ has the opportunity ~~every ach week~~ day of making requests or complaints to the director of the institution or the officer authorized to represent him.
- (2) It shall be possible to make requests or complaints to the inspector of prisons during his inspection. The prisoner shall have the opportunity to talk to the inspector or to any other inspecting officer in private without the director or other members of the staff being present.
- (3) Every prisoner shall have the right to make a request or complaint regarding his treatment without delay or censorship directly to the central prison administration and to judicial or other competent complaints bodies, vested with reviewing or remedial powers and independent from the authority directly in charge of the prison.
- (4) In those cases where neither the imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 3, a member of the family of the imprisoned person or any other person who has knowledge of the case may exercise such rights.
- (5) Confidentiality concerning any request or complaint shall be maintained if so requested by the complainant.
- (6) Unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the imprisoned person nor any complainant under paragraph 4 of this Rule shall suffer prejudice for making a request or complaint.

Rationale for Proposed Revision of Rule 36

Paragraph 1

The experts at the University of Essex meeting recommend the change in the order to the sentence to underscore the obligation on the prison administration to provide an internal complaints system to prisoners. The replacement of ‘each week day’ with ‘every day’ is suggested in order to clarify that prisoners must be able to complain every day, including weekends.

Paragraph 3

The experts at the University of Essex meeting note that the text of the SMR does not include the well-established right of prisoners to issue complaints to external bodies in addition to the internal complaints system set out in the first two paragraphs of Rule 36. The proposed revisions to Rule 36 incorporate the language of Principle 29 (1) of the UN Body of

Principles.¹¹⁵ This standard is mirrored at the regional level, for example, in the CPT standards.¹¹⁶

The experts at the University of Essex meeting also recommend the alignment of Rule 26 with Principles 29(1) and 33(1) of the UN Body of Principles, by inserting ‘the right to make a request or complaint regarding his treatment to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers’ into this paragraph.

The experts understand that the wording ‘through approved channels’ used in the current SMR refers to the authorities tasked with complaints according to national law, which is captured in the suggested language ‘competent authority’ and does not require repetition, hence its deletion. Equally, the experts consider that the ‘proper form’ refers to formal requirements enshrined in national law.

Paragraphs 4

The expansion of the right to complain to ‘a member of the family of the imprisoned person or any other person who has knowledge of the case may exercise such rights’ in Rule 36 (4) accounts for the well acknowledged barriers of persons deprived of their liberty to contact the outside world and as captured, for example in Principle VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.¹¹⁷

Paragraphs 5 and 6

The experts at the University of Essex meeting suggest updating the SMR with regard to the confidentiality of complaints and the risk of reprisals by incorporating the language of the UN Body of Principles.¹¹⁸ The respective standards have also been captured in international instruments such as the Istanbul Principles, , the Bangkok Rules,¹¹⁹ and Article 21 of the Optional Protocol to the Convention against Torture (‘OPCAT’) in the context of persons communicating with national preventive mechanisms.

Proposed Revisions of Rule 55

The experts at the University of Essex meeting recommend the following revisions to Rule 55,

55. **(1)** There shall be a regular **and ad hoc monitoring and** inspection of penal institutions and services by qualified and experienced **and independent** inspectors appointed by a competent authority. Their task shall be in particular to ensure that **the**

¹¹⁵ Principle 29(1) of UN Body of Principles: ‘In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment’.

¹¹⁶ CPT Standards, para 54: ‘Effective grievance and inspection procedures are fundamental safeguards against ill- treatment in prisons. Prisoners should have avenues of complaint open to them both within and outside the context of the prison system, including the possibility to have confidential access to an appropriate authority’.

¹¹⁷ Principle VII of the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas states: ‘Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law. This right comprises, amongst others, the right to lodge petitions, claims, or complaints before the competent authorities, and to receive a prompt response within a reasonable time’.

¹¹⁸ Principle 33, paras 2 – 4.

¹¹⁹ Rule 25(1).

rights of prisoners are protected, and identifying risks of torture and other cruel, inhuman or degrading treatment or punishment, these institutions are administered in accordance with existing laws and regulations and with a view to bringing about the objectives of penal and correctional services’.

(2) Inspection mechanisms shall have access to all installations and facilities, to all information referring to the treatment of prisoners and to their records.

(3) The members of such inspection shall have proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty, and shall include medical personnel. Due consideration shall be given to balanced gender representation on the basis of the principles of equality and non-discrimination.

Rationale for Proposed Revision of Rule 55

The experts at the University of Essex meeting recall the importance and proven effectiveness of regular and independent inspections in the prevention of torture and other cruel, inhuman or degrading treatment or punishment and for the observance of the relevant laws and regulations, emphasised by various international and regional instruments. The proposed text modifies the language in Rule 55 (1) to recognise that a range of national and international bodies carry out monitoring visits of prisons beyond the prison inspectorate. The Istanbul Principles (Principle 7), the Guidelines for Action on Children in the Criminal Justice System (Guideline 21), the OHCHR Manual on Human Rights Training for Prison Officials,¹²⁰ the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas,¹²¹ the European Prison Rules,¹²² and the European Committee for the Prevention of Torture Standards¹²³ mirror the importance of independent inspections.

The deletion of ‘penal institutions and services’ accounts for the fact that the scope of the SMR goes beyond penal institutions. The proposed additional language is inspired by Rule 72 of the Rules for the Protection of Juveniles Deprived of their Liberty, which provides that,

‘qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities’.

This Rule also supports the inclusion of the term ‘ad hoc’ which can also be found in the OPCAT.

Finally, the reference to the duty to have ‘special attention to observance to human rights and the legitimate interests of inmates’ is taken from the Guidelines on Inspections and Monitoring of Prisons, Council of Europe, Prison and Police Unit 2010.

¹²⁰ OHCHR, Human Rights and Prisons - Manual on Human Rights Training for Prison Officials, 2005, p. 137: (‘Internal inspection is not in itself sufficient. It is therefore essential that there should also be a form of inspection which is independent of the prison system’).

¹²¹ Principle XXIV - Institutional Inspections.

¹²² Rules 92 and 93.

¹²³ CPT Standards, para 54.

Paragraph 2

This Rule captures that, in order to ensure that the institutions under the scope of the SMR are administered in accordance with existing laws and regulations as the current SMR already require, inspection and monitoring mechanisms need to have access to all facilities of such institutions, and to information referring to the treatment of prisoners, which includes their records. The phrase, ‘inspection of all such institutions, related installations, facilities and services’ ensures that inspection bodies are capable of accessing all areas within and relating to a place of detention including vehicles and draws on Article 14(1) of OPCAT which acknowledges the need for ‘unrestricted access to all places of detention and their installations and facilities’, and on the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, which provide ‘full access to places of deprivation of liberty and their installations, access to the information and documentation relating to the institution and the persons deprived of liberty therein’ (Principle XXIV).

Paragraph 3

This Rule accounts for the fact that the effectiveness of inspection mechanisms depends on the qualification and independence of its members, and requires a multi-disciplinary composition. The wording also draws on Rule 25(3) of the Bangkok Rules, which provide for visiting of monitoring boards or supervisory bodies to include women members.

J. CONSIDERATION OF THE REQUIREMENTS AND NEEDS OF PRISONERS WITH DISABILITIES

Proposed Revision of Rule 82

The experts at the University of Essex meeting propose the following revisions to Rule 82:

<p>B. <u>Insane and mentally abnormal prisoners</u> <u>Persons with Disabilities</u></p> <p>82. <u>(1) Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in prison life on an equal basis with others. All Rules apply to prisoners with disabilities. The principles contained in this Rule apply to prisoners who have existing or who develop disabilities while imprisoned.</u></p> <p><u>(2) Persons with disabilities may only be held in institutions adequate and appropriate to their individual needs as determined by a physician in consultation with the individual concerned and as authorised by a judge. In this regard, the state is obligated to ensure that the facilities, programmes and services are accessible and that the individual’s needs are addressed in consultation with that individual, in line with the principle of reasonable accommodation and that the individual is able to participate fully in prison life.</u></p> <p><u>(3) Persons who are found to have committed a criminal act but are incapable of attracting criminal responsibility, shall not be detained in prisons and alternative and appropriate arrangements for their individual needs shall be identified. Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible;</u></p> <p><u>(4) Prisoners having acute mental health conditions, such as psychosis, shall be referred to specialized treatment in community-based hospitals with appropriate facilities for as long as necessary.</u></p>

(5) Chronic cases of mental illness should be transferred to appropriate community based facilities.

(6) States shall ensure effective access to justice for persons with disabilities on an equal basis with other detainees as set out in Rules 35, 36, 37 and 93 through the provision of procedural and age-appropriate accommodations appropriate to the disability of the individual prisoner.

~~(2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.~~

~~(7) During their stay in prison, such prisoners shall be placed under the special supervision of a medical officer;~~

(7) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment provided prior informed consent is given by the prisoner.

Rationale for Proposed Revision of Rule 82

The proposed changes are based on international legal developments on the rights of persons with disabilities since the adoption of the SMR. In particular, the proposed amendments align with the terms of the CRPD and seek to give effect to the treaty provisions in the context of detention as required by Article 14(2) which provides that:

‘States parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation’.

Paragraph 1

Paragraph 1 adopts the language of Article 1 of the CRPD in providing a definition of persons with disabilities. The only modification is the replacement of the term ‘society’ with ‘prison life’ in order to apply the definition to the context in which the SMR operate. The final sentence of this paragraph underscores that the principles contained in this paragraph apply to all persons with disabilities whether existing or developed while imprisoned.

Paragraph 2

Paragraph 2 incorporates the central principles of accessibility and reasonable accommodation (or reasonable adjustments) that underpin the CRPD. Article 9 provides:

‘To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities, access on an equal basis with others, to the physical environment, to transportation, to information and communication, including information and communication technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas’.

Paragraph 2 requires the application and contextualisation of Article 9 to prisons. The principle of reasonable accommodation is defined in Article 2 of the CRPD as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. This therefore requires that the state ensures that it reasonably accommodates a particular

individual's needs. This must be done in consultation with the individual, as in accordance with the principle of established in Article 3(a) of the CRPD.

Paragraph 3

This paragraph does not change the meaning of the previous language contained in Rule 82(1) which recognised that certain persons may lack legal capacity to be held criminally responsible for the commission of a crime, and serve a prison sentence as a consequence. However, the proposed revisions update the language to fit within today's accepted use of terminology.

Paragraphs 4 and 5

Paragraphs 4 and 5 build on paragraph 3 and incorporate the preference in international law for care in the community rather than institutionalisation of persons with disabilities. The principles contained in these paragraphs are also supported in other international instruments such as Rule 41(d) of the Bangkok Rules which provides that:

‘Ensure that those with mental health-care needs are housed in accommodation which is not restrictive, and at the lowest possible security level, and receive appropriate treatment, rather than being placed in higher security level facilities solely due to their mental health problems’.

Paragraph 6

Paragraph 6 ensures that the provisions on access to a lawyer, court and complaints mechanisms, as set out in Rules 35, 36, 37 and 93, are applied in line with Article 13 of the CRDP which requires that,

‘(1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through provision of procedural and age-appropriate accommodations ...
(2) In order to help ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff’.

Paragraph 7

Paragraph 7 modifies current Rule 82(4) to incorporate the principle of individual autonomy as set out in Article 19 of the CRPD.

K. TRAINING OF RELEVANT STAFF TO IMPLEMENT THE SMR

The experts at the University of Essex meeting note that staff in places of detention and deprivation of liberty should be carefully selected based on professional and personal standards, taking into account specialised skills required for specific groups of prisoners, such as foreign nationals, women, juveniles and persons with disabilities. Staff shall include a sufficient number of medical personnel, psychiatrists, psychologists, social workers and teachers, and shall include an appropriate number of female staff, particularly in prisons with women prisoners.

The experts at the University of Essex meeting also recommend that the SMR include provision that prison staff shall receive training on a continuing basis. The training of all staff shall comprise international and regional human rights instruments and standards on the

legality and legitimacy of deprivations of liberty and treatment of prisoners. This should include specialised training to all staff on the particular needs and rights of female prisoners, persons with disabilities and mental health-care needs, the detection and identification of gender-based violence and threats to the safety and personal security of prisoners and appropriate responses, limitations of permissible use of force and appropriate searching methods.

The experts at the University of Essex meeting also note that other than staff working in places of detention, any monitoring bodies or agencies such as national human rights institutions and ombudsmen, and parliamentarians, diplomats, and state representatives stationed in other countries should be trained on the SMR and related international law.

L. OTHER AREAS HIGHLIGHTED BY EXPERTS

The following proposed revisions were not discussed by experts at the University of Essex meeting but were suggested by individual participants in discussions following the meeting and have been commented upon and endorsed by the experts.

(1) Children of Incarcerated Parents

While not discussed at the University of Essex meeting, a recommendation on children of incarcerated parents emerged subsequently and was endorsed by participants as the following:

Children of Incarcerated Parents

(1) If a prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health-care, at least equivalent to that in the community shall be provided.

(2) Children living with an imprisoned parent:

(a) Decisions to allow children to stay with an imprisoned parent in prison shall be based on the best interests of the child. Children in prison with an imprisoned parent shall never be treated as prisoners and should be free to leave the prison at any time. The removal of the child from prison shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.

(b) Prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.

(c) Children living with a parent in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with appropriate community services.

(d) The environment provided for such children's upbringing shall resemble as closely as possible that of a child outside prison.

(3) Children living outside of prison with an imprisoned parent

(a) Prisoners' contact with their families, including their children, their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to

counterbalance disadvantages faced by prisoners detained in institutions located far from their homes.

(b) Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between parent and child. Visits involving extended contact with children should be encouraged, where possible.

Rationale for Proposed Introduction of a New Rule

Paragraph 1

Paragraph 1 sets out a gender-neutral version of Rule 9 of the Bangkok Rules, as envisaged by its Preliminary Observations,¹²⁴ which provides that ‘if the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs. Suitable health-care, at least equivalent to that in the community, shall be provided.’ The experts at the University of Essex meeting consider this an important amendment as both the SMR and the UN Body of Principles require a medical screening of all “prisoners”, which does not apply to accompanying children.

Paragraph 2

Sub-paragraph (a) incorporates the recognition in international law that the best interests of the child¹²⁵ present the central factor in determining whether the child can live with the parent in detention, rather than an assumption that a child should not live in a prison setting. It is a gender-neutral modification of Rule 49 of the Bangkok Rules which provides that ‘Decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children. Children in prison with their mothers shall never be treated as prisoners.’ This standard was reiterated by the Committee on the Rights of the Child¹²⁶ and implies that children staying with an imprisoned parent must be able to leave the prison at any time. The proposed rule incorporates Rule 52(2) of the Bangkok Rules on the care arrangements for children who leave prison.

Sub-paragraph (b) provides a gender-neutral modification of Rule 50 of the Bangkok Rules which provides that, ‘Women prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.’

Sub-paragraphs (c) and (d) provide a gender-neutral modification of Rule 51 of the Bangkok Rules which provides that:

‘(1) Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.

(2) The environment provided for such children’s upbringing shall be as close as possible to that of a child outside prison’.

¹²⁴ Para. 12.

¹²⁵ Convention on the Rights of the Child, Article 3.

¹²⁶ Committee on the Rights of the Child, Report and recommendations of the Day of General Discussion on ‘Children of Incarcerated Parents’, 30 September 2011, para. 8 and Recommendations 33 and 37 ([shttp://www2.ohchr.org/english/bodies/crc/docs/discussion/2011CRCGDReport.pdf](http://www2.ohchr.org/english/bodies/crc/docs/discussion/2011CRCGDReport.pdf))

This new proposed rule is also supported by a range of other authorities including Article 30 of the African Charter on the Rights and Welfare of the Child,¹²⁷ Rule 36 of the European Prison Rules, Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas and the recommendations made by the UN Committee on the Rights of the Child at its 2011 General Day of Discussion which focused on the rights of children of incarcerated parents.¹²⁸ The recommendations made by the Committee on the Rights of the Child, in particular, support the gender-neutral approach to the new proposed rule to the SMR.

Paragraph 3

This paragraph implements the rights of children left outside when their parent is imprisoned, drawing on Rules 26 and 28 of the Bangkok Rules and the recommendations of the Committee on the Rights of the Child.¹²⁹

(2) Imprisonment of Debtors

While not discussed at the University of Essex meeting, a recommendation to remove the references to persons imprisoned for debt emerged subsequently and was endorsed by participants as the following:

Separation of categories

8. The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

- (a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate;
- (b) Untried prisoners shall be kept separate from convicted prisoners;
- (c) ~~Persons imprisoned for debt and o~~Other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;
- (d) Young prisoners shall be kept separate from adults.

D. Civil Prisoners

94. ~~In countries where the law permits imprisonment for debt, or b~~ By order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work.

Rationale for the Proposed Revision

¹²⁷ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), (entered into force 29 November 1999), Article 30.

¹²⁸ Committee on the Rights of the Child, 'Report and Recommendations of the Day of General Discussion on 'Children of Incarcerated Parents' (30 September 2011) <http://www2.ohchr.org/english/bodies/crc/docs/discussion/2011CRCDGDRReport.pdf>

¹²⁹ Committee on the Rights of the Child, Report and recommendations of the Day of General Discussion on 'Children of Incarcerated Parents', 30 September 2011, Recommendations 35 and 38-40.

The report of the February 2012 IEGM provided that, ‘One clear example for possible deletion was rule 94, on civil prisoners, as it was considered inconsistent with more recent human rights provisions’.¹³⁰ The proposal to remove reference to imprisonment for debt from the SMR is based on Article 11 of the ICCPR which provides that ‘[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation’ such as payment of a debt. The ICCPR provides that this is a non-derogable part of the Convention under Article 4(2). This is also supported in regional instruments such as the Fourth Protocol to the European Convention on Human Rights.

(3) Labour in Detention

While not discussed at the University of Essex meeting, a recommendation on the inclusion of a reference to the prohibition of slavery, servitude and forced labour was made subsequently and endorsed by participants as the following:

Work

71. (1) Prison labour must not be of an afflictive nature. No prisoner shall be held in slavery or servitude.

(2) All prisoners under sentence and as a consequence of a conviction in a court of law shall be required to work, subject to their physical and mental fitness as determined by the medical officer.

(3) Sufficient work of a useful nature shall be provided to keep prisoners actively employed for a normal working day.

(4) So far as possible the work provided shall be such as will maintain or increase the prisoners, ability to earn an honest living after release.

(5) Vocational training in useful trades shall be provided for prisoners able to profit thereby and especially for young prisoners.

(6) Within the limits compatible with proper vocational selection and with the requirements of institutional administration and discipline, the prisoners shall be able to choose the type of work they wish to perform.

72. (1) The organization and methods of work in the institutions shall resemble as closely as possible those of similar work outside institutions, so as to prepare prisoners for the conditions of normal occupational life.

(2) The interests of the prisoners and of their vocational training, however, must not be subordinated to the purpose of making a financial profit from an industry in the institution.

73. (1) Preferably institutional industries and farms should be operated directly by the administration and not by private contractors.

(2) Where prisoners are employed in work not controlled by the administration, they shall always be under the supervision of the institution's personnel. Unless the work is for other departments of the government the full normal wages for such work shall be paid to the administration by the persons to whom the labour is supplied, account being taken of the output of the prisoners.

74. (1) The precautions laid down to protect the safety and health of free workmen shall be equally observed in institutions.

(2) Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to free workmen.

¹³⁰ Para. 43.

75. (1) The maximum daily and weekly working hours of the prisoners shall be fixed by law or by administrative regulation, taking into account local rules or custom in regard to the employment of free workmen.

(2) The hours so fixed shall leave one rest day a week and sufficient time for education and other activities required as part of the treatment and rehabilitation of the prisoners.

76. (1) There shall be a system of equitable remuneration of the work of prisoners.

(2) Under the system prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to send a part of their earnings to their family.

(3) The system should also provide that a part of the earnings should be set aside by the administration so as to constitute a savings fund to be handed over to the prisoner on his release.

Rationale for Proposed Revision

Rule 71(1)

The inclusion of the prohibition of slavery and servitude in Rule 71(1) underscores the absolute nature of this prohibition in all circumstances, including in relation to persons deprived of their liberty. This absolute prohibition is set out in all major international human rights treaties, for example, Article 8(1) of the ICCPR.¹³¹

Rule 71(2)

The additional language included in Rule 71(2) does not change the meaning of the rule but for implementation purposes, underscores that labour may only be required of prisoners who have already been convicted as directed by their conviction. In doing so it incorporates the language of the International Labour Organisation Convention 29, providing as an exception to the prohibition of forced or compulsory labour, ‘any work or service exacted from any person as a consequence of a conviction in a court of law.’ This is also supported in other international instruments such as Article 8(3)(c) of the ICCPR provides that ‘forced or compulsory labour’ shall not include:

‘(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;’¹³²

This necessarily implies that if not ordered by a court of law, any work required of a prisoner and without his or her consent will constitute forced or compulsory labour in violation of international law.

(4) Gender Neutrality

The experts at the University of Essex meeting note that the language employed in the SMR is not gender-neutral. As this is out of line with the language now used in international norms and standards, the IEGM may wish to revisit this issue as part of its review of the SMR.

¹³¹ See also Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 6(2); *Convention for the Protection of Human Rights and Fundamental Freedoms* (entered into force 3 September 1953) ETS No. 5, Article 4(2).

¹³² See also Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Article 6(3); *Convention for the Protection of Human Rights and Fundamental Freedoms* (entered into force 3 September 1953) ETS No. 5, Article 4(3).

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