



Promoting fair and effective criminal justice

### 3. Contact with the outside world<sup>1</sup>

Issues/rules covered:

- Visits (Rule 58)
- Legal representation (Rule 61 – general, Rules 119(2) and 120 – pre-trial)
- Access to legal documents (Rule 53)
- Diplomatic and consular assistance (Rule 622)
- Transfers (Rule 7(c), 47(2a) and Rule 68, transfer of files Rule 26(2))

#### Introduction

The Essex group acknowledged that by definition imprisonment implies severe restrictions for contact with the outside world which would not apply to other forms of deprivation of liberty, such as in psychiatric facilities. Yet, human contact, especially with family and friends, is a very basic human need. In prison, contact with the outside world is a right in itself and, in addition, acts as a safeguard, especially against torture and other ill-treatment. It enables prisoners to pursue legal procedures and manage other affairs including, for example, child custody.

When managing contact of prisoners with the outside world, prison administrations need to keep in mind that certain communication is privileged and confidential (legal representation) and that visits have to be assessed as a right not only of the prisoner, but also his/her family members, especially children.

More guidance will have to be provided regarding the permissible level of supervision of communications in the context of pre-trial detention, as compared to convicted prisoners and other forms of detention.<sup>3</sup> Furthermore, good practice should be identified on how to manage the necessary supervision of communications without isolating prisoners who speak different languages.

#### Contact with family and friends

Contact with family and friends has proven crucial for social reintegration of prisoners once released, but is vital also to their well-being overall, as a source of emotional comfort and often also for material support. The European Committee to Prevent Torture (CPT) has

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<sup>1</sup> This chapter was authored by Andrea Huber, Penal Reform International.

<sup>2</sup> Note that Rule 62 has not been changed in the course of the review.

<sup>3</sup> The Essex group recalled that Rule 122 (formerly Rule 95) was adopted in 1977 to clarify that the Rules as a whole as extending to all forms of deprivation of liberty (ECOSOC, *Resolution 2076 (LXII): Extension of the Standard Minimum Rules for the Treatment of Prisoners to persons arrested or imprisoned without charge*, 13 May 1977).

stressed the importance of good contact with the outside world, as a means to safeguard relationships with family and close friends,<sup>4</sup> alluding to the right to private and family life.

Prison administration, therefore, has a duty to encourage communication with the outside world. The UNODC Handbook on Dynamic Security clarifies that 'Prisoners' contacts must be seen as entitlements rather than privileges', and that they should, therefore, not be used as either rewards or punishments.<sup>5</sup>

The importance of maintaining social relations between prisoners and their family members is emphasised in Rule 106. Rule 59 underlines the importance of allocation 'to prisons close to their homes or their places of rehabilitation'.

A number of Rules capture the different facets of contact with family and friends, particularly in relation to notification and information about certain events:

- Rule 7 calls on prison administration to document the names of family members (including children), emergency contact details and prisoners' next of kin.
- Rule 68 concerns the right of prisoners to immediately inform their family (or another dedicated contact person) of their imprisonment and of any transfer, as well as of any serious illness or injury.
- The prison administration is obliged to notify the next of kin or emergency contact in the event of a prisoner's serious illness, injury or transfer to a health institution,<sup>6</sup> and in the event of death of a prisoner (Rule 69).
- Should a 'near relative or any significant other' die or get seriously ill, the prison administration is required to inform the prisoner. In such cases, prison administrations should also consider whether circumstances allow for the prisoner to visit the sick relative or attend the funeral, either under escort or alone (Rule 70).
- The right to issue requests and complaints, to the inspector of prisons, to the central prison administration and to judicial or other competent authorities with reviewing or remedial power, extends to family members,<sup>7</sup> pursuant to Rule 56(4). See Chapter 2, Prison management – complaints.
- The body of a deceased prisoner should be returned to the next of kin (Rule 72).
- Communication with family and friends 'at regular intervals' is enshrined in Rule 58, listing correspondence (in writing, telecommunication, electronic, digital and other means) and visits as the means of communication.

The Essex group noted the various ways in which prisoners can maintain contact with the outside: letters; visits; telephone calls; prison leave; books; newspapers; and the internet; but focused their discussion on visits of family and friends.

They pointed out that means of communication, including electronic ones, need to be facilitated with due regard to the principle of non-discrimination (see Rule 2(1)). This implies that means of communication are not only available to those prisoners who can afford to pay for them. The Essex Group noted other examples of discrimination, such as the practice documented by the UN Subcommittee on Prevention of Torture (SPT), where 'in the case of female prisoners, long visits by a civil partner were prohibited and prices for use of facilities for intimate visits were prohibitive and higher than in the male colonies'.<sup>8</sup>

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<sup>4</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, 1992*, CPT/Inf (92) 3, para. 51 (*CPT 2nd General Report*).

<sup>5</sup> United Nations Office on Drugs and Crime (UNODC), *Handbook on Dynamic Security and Prison Intelligence*, New York, 2015, p. 22 (*Handbook on Dynamic Security*).

<sup>6</sup> Note the formulation 'individuals designated by a prisoner to receive his/ her health information' in Rule 69.

<sup>7</sup> As well as legal advisers and 'any other person who has knowledge of the case' – see Rule 56(4).

<sup>8</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Indigent prisoners should be provided with appropriate support (including writing material, envelopes, postage stamps, telephone cards) so that they are not *de facto* deprived of communication with family and friends.

### Visits by family and friends

The Essex group emphasised that for visits at regular intervals it is essential that prisoners are not allocated or transferred to prisons far from their homes.

If families can only visit infrequently due to the location of the prison, prisoners could be permitted to accumulate visiting entitlements and have longer visits or several over a couple of days. The European Committee to Prevent Torture has emphasised the ‘need for some flexibility as regards the application of rules on visits and telephone contacts’ for families who live far away.<sup>9</sup>

For instance, the SPT has documented good practice of a 3-day visit with overnight stays, but has cautioned against a discriminatory effect due to high costs of overnight visits in the given context.<sup>10</sup>

The Essex group noted that virtual visits via video conferencing may be arranged in case of prisoners whose families live far away, and that this is particularly important for foreign national prisoners. However, the participants also stressed that video-conferencing and other forms of remote communication are not an adequate substitute for in-person visits.

The experts held that in light of the rationale of visits the term ‘family’ should not be interpreted too narrowly and that in many countries the concept of family is broader than the next of kin or immediate family members.

The UN Committee on the Rights of the Child recognises that the term ‘family’ refers to a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern arrangements, provided these are consistent with children’s rights and best interests.<sup>11</sup> Similarly, regional bodies have adopted broad definitions. The European Court of Human Rights has interpreted the right to private and family life as not confined to legally acknowledged relationships.<sup>12</sup> The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also include ‘other persons’ in the right to contact with persons outside, even though the English version does not reflect the original Spanish version in this regard (‘*otras personas*’ in the original version).<sup>13</sup>

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*Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Ukraine*, 16 March 2016, CAT/OP/UKR/1, para. 140 (*SPT Report on visit to Ukraine*).

<sup>9</sup> *CPT 2nd General Report*, [CPT/Inf (92) 3], para. 51.

<sup>10</sup> *SPT Report on visit to Ukraine*, CAT/OP/UKR/1, para. 121.

<sup>11</sup> UN Committee on the Rights of the Child, *General Comment No. 7 (2005): Implementing child rights in early childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, para. 15.

<sup>12</sup> ‘The notion of the “family” in Article 8 is not confined solely to marriage-based relationships and may encompass other *de facto* “family” ties, where the parties are living together outside marriage’. (*Keegan v. Ireland*, Judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44); see also *Kroon and others v. The Netherlands* (Application no. 18535/91), Judgment of 27 October 1994, para. 30; *Mikulić v. Croatia* (Application no. 53176/99), Judgment of 7 February 2002, para. 51.

<sup>13</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XVIII. Note the original version in Spanish: ‘(...) a mantener contacto personal y directo, mediante visitas periódicas, con sus familiares, representantes legales, y con otras personas, especialmente con sus padres, hijos e hijas, y con sus respectivas parejas’.

→ See Chapter 5, Restrictions, discipline and sanctions – searches of visitors

## Specific groups of prisoners

In a report on children of incarcerated parents, the Committee on the Rights of the Child expressed concern ‘with regards to security matters and policies that often undermine the rights of the child’. It reiterated the ‘right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests’.<sup>14</sup> The Committee recommended that ‘[t]he rights of affected children should be regarded as a relevant factor in determining the security policy concerning incarcerated parents, including with regard to the proportionality of the measures in relation to areas that would affect the interaction with affected children’.<sup>15</sup>

The Essex group recalled the UN Bangkok Rules (Rules 26 and 43) which require prisons to encourage and facilitate visits for women prisoners. This is in recognition of their particular situation, including the usually lower number of visits women receive because of their particular stigmatisation and the higher physical distance from their homes. The Bangkok Rules stipulate that measures need to be taken to counterbalance disadvantages faced by women, including as a result of the smaller number of facilities for women. In view of the high rates of violence suffered by female prisoners prior to imprisonment and to prevent victimisation during visits, Bangkok Rule 44 calls on prison staff to consult women prisoners on who is allowed to visit them. Rule 23 of the Bangkok Rules states that disciplinary sanctions for female detainees shall not include a prohibition of family contact, especially with children.

Family visits are also particularly important for juvenile prisoners, and arrangements should therefore be favourable. Mindful of the importance of supportive family relationships of children and adolescents, the CPT has recommended for juveniles to ‘benefit from a visiting entitlement of more than one hour every week’, and promoted that they should also be able to receive visits at weekends. The Committee has also welcomed juveniles being ‘authorised to benefit from long-term unsupervised visits’.<sup>16</sup>

Prison administrations should also consider visits of prisoners to their families, especially in the period leading up to their release.

The Essex group stressed that prisoners in pre-trial detention should be allowed to receive visits and communicate with family and other persons at least in the same way as convicted prisoners, and may receive additional visits and have additional access to other forms of communication.<sup>17</sup>

## Restrictions

The group looked at Rule 43(3) in detail and deduced the following with regard to the

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<sup>14</sup> Article 9(3) of the Convention on the Rights of the Child. See also UN Committee on the Rights of the Child, *Report and Recommendations of the Day of General Discussion on ‘Children of incarcerated parents’ 30 September 2011*, undated, para. 35 (*CRC DGD 2011 Report*).

<sup>15</sup> *CRC DGD 2011 Report*, para. 14.

<sup>16</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *CPT Standards: “Substantive” sections of the CPT’s General Reports, 2015*, CPT/Inf/E (2002) 1 – Rev. 2015, para. 123. The Committee has observed juveniles being allowed to communicate with family members on a regular basis by using free-of-charge Voice over Internet Protocol (VoIP) services, and has highly welcomed such practices while stressing that they should not be considered as a substitute for visits.

<sup>17</sup> See Rule 99 of the European Prison Rules 2006, which makes it clear that untried prisoners should also be allowed to keep in contact with the outside world and that restrictions, if any, on such contact should be particularly carefully limited.

prohibition/restriction of family contact:

- The Rule differentiates between ‘disciplinary sanctions’ as compared to ‘restrictive measures’ referring to restrictions based on security grounds.
- The first sentence of Rule 43(3) refers to ‘prohibition’, whereas the second part governs ‘restrictions’.
- Accordingly, neither disciplinary sanctions nor measures based on security grounds may include the prohibition of family contact.
- Restrictions on the other hand are possible, but only ‘for a limited time period and as strictly required for the maintenance of security and order’. Moreover, it is the ‘means of family contact’ that may be restricted, not the contact itself. For example, a visit might be limited to a closed visit (behind a glass partition), but must not be denied entirely.
- The term ‘strictly required’ introduces a high bar for allowing the imposition of restrictions on family contact as well as the requirement of necessity and proportionality in such imposition.
- Should security concerns have arisen in connection with a particular visitor, this should not result in an automatic or complete ban of visits, but each case should be considered on its merits. For example, if a visitor has delivered contraband to a prisoner, it may be justified to order a closed visit next time, but it would not warrant a complete ban of all visits for the respective prisoner.

In discussing Rule 58, the experts stressed that the term ‘under necessary supervision’ implies an assessment, evaluating the risk for the specific visit and the specific type of communication (e.g. electronic, contact visits, letter). In the context of most visits, supervision will in particular imply visual control.

The group recalled Principle 19 of the Body of Principles, which requires that conditions and restrictions of visits have to be ‘specified by law or lawful regulations’.

→ See Chapter 5, Restrictions, discipline and sanctions

The Essex group recalled the European Prison Rules, which clearly outline that restrictions and monitoring of visits can only be implemented if and as far as they are ‘necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime’. The Rules also specify that ‘such restrictions shall nevertheless allow an acceptable minimum level of contact’.<sup>18</sup>

The CPT has also emphasised that ‘The guiding principle should be the promotion of contact with the outside world’, whereas ‘any limitations upon such contact should be based exclusively on security concerns of an appreciable nature or resource considerations’.<sup>19</sup>

The experts also referred to UNODC’s *Handbook on Dynamic Security*, according to which ‘Monitoring should be proportionate to the threat posed by a particular form of communication and should not be used as an indirect way of restricting communication’.<sup>20</sup>

Good practice was mentioned where the behaviour of prisoners is influenced through privileges and incentives rather than sanctions.

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<sup>18</sup> Rule 24 (2) of the European Prison Rules 2006. Furthermore, Rule 24 (3) requires national law to specify ‘national and international bodies and officials with whom communication by prisoners shall not be restricted’.

<sup>19</sup> *CPT 2nd General Report*, [CPT/Inf (92) 3], para. 51.

<sup>20</sup> *Handbook on Dynamic Security*, p. 50.

Prison administrations should exercise restraint when applying restrictions to visiting children, as their best interests must be an overriding consideration, based on the Convention on the Rights of the Child.<sup>21</sup>

There need to be safeguards in place for ensuring that any restrictions to contact with the outside world for pre-trial detainees, on the grounds of protecting the interests of an ongoing investigation for example, are not excessive. Restrictions need to be proportionate, allow some level of contact to the outside world and their necessity needs to be reviewed at regular intervals. The European Prison Rules (Rules 24 and 99) stipulate that any such restrictions must be only for a specified period, on an individual case-to-case basis and need to be imposed by a judicial authority.

## Visiting environment

The visiting environment needs to balance security considerations with the provision of a positive space for the interaction of prisoners with their families. Closed visits should not be the default design, given the importance of direct contact for the well-being of both the prisoner and the visitor, and of physical contact in particular for children with their parent.<sup>22</sup>

As for the setting of family visits, the Essex group noted the importance of an environment conducive to a positive visiting experience in particular for children, as emphasised in Rule 28 of the UN Bangkok Rules. This Rule underlines that open contact between mother and child should be allowed and that visits involving extended contact with children should be encouraged.<sup>23</sup> The commentary on the Bangkok Rules notes that a pleasant visiting experience will not only have a positive impact on the mental and emotional well-being of the mother and the children, but also affect social reintegration prospects.<sup>24</sup> The need for a child-friendly visiting environment conducive to building or maintaining strong relationships was also emphasised by the Committee on the Rights of the Child.<sup>25</sup>

Such conditions should equally be applied to fathers, as expressed in paragraph 12 of the preliminary observations to the UN Bangkok Rules, recognising 'the central role of both parents in the lives of children'.<sup>26</sup>

## Conjugal visits

The Essex group noted that conjugal visits<sup>27</sup> help maintain emotional bonds between partners and spouses and allow for some normalisation of relationships despite the limits placed on family life by the imprisonment of one partner. The maintenance of intimate bonds has a positive impact on the well-being and on rehabilitation and reintegration of prisoners.

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<sup>21</sup> Article 3(1) of the Convention requires that all decisions should be based on the need to protect the best interests of the child.

<sup>22</sup> For further guidance see United Nations Office for Project Services (UNOPS), *Technical Guidance for Prison Planning: Technical and operational considerations based on the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 2016 (*Technical Guidance for Prison Planning*), pp. 125-133.

<sup>23</sup> PRI/TIJ, Guidance Document on the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules), October 2013, p. 75.

<sup>24</sup> UN Bangkok Rules, Commentary on Rule 28.

<sup>25</sup> *CRC DGD 2011 Report*, para. 39.

<sup>26</sup> Preliminary observations, para. 12, states that 'Some of these rules address issues applicable to both men and women prisoners, including those relating to parental responsibilities (...). However, as the focus includes the children of imprisoned mothers, there is a need to recognize the central role of both parents in the lives of children. Accordingly, some of these rules would apply equally to male prisoners and offenders who are fathers.'

<sup>27</sup> Conjugal visit is a term used to describe a visit of a prisoner by their spouse or partner in order to be able to exercise an intimate relationship. This institution recognises the fact that intimacy between partners is an important prerequisite to preserve the bonds in a relationship, and acknowledges the positive impact of continued relationships for reintegration after release.

In the light of this rationale, the experts recommended to facilitate conjugal visits and not to interpret the beneficiaries of conjugal visits too narrowly.

The participants highlighted the contradiction between the denial of conjugal visits and the right to found a family, as enshrined in Article 23 of the International Covenant on Civil and Political Rights.

Furthermore, the group held that the denial of conjugal visits would contradict the principle that limitations should only be those 'demonstrably necessitated by the fact of incarceration', while otherwise prisoners retain all human rights and fundamental freedoms.<sup>28</sup> The European Court of Human Rights has also held that the 'inability to beget children is not an *inevitable* consequence of imprisonment'.<sup>29</sup>

At a minimum, Rule 58(2) requires that 'women prisoners shall be able to exercise this right on an equal basis with men', reiterating the UN Bangkok Rules. Where conjugal visits are allowed, they need to be applied without discrimination.<sup>30</sup>

The experts reflected on the argument used in some countries for denying women conjugal visits, namely to prevent pregnancy while in prison. The experts highlighted their concern that the consequences of limiting conjugal visits for women prisoners on these grounds may be permanent in that it may *de facto* deprive women of having children altogether. Moreover, such limitation denies the right to family and private life not only to the woman prisoner, but also to her partner.

Another argument often invoked for denying conjugal visits for women prisoners is the risk of violence from male partners. The experts noted that this concern would equally apply to women visiting their husbands in prison on a conjugal visit, yet is not brought up as an argument against conjugal visits for male prisoners. Moreover, the concern has been addressed by new Rule 58(2). It stipulates that procedures need to be in place and premises made available 'to ensure fair and equal access with due regard to safety and dignity'.

The Essex group reiterated that the non-discrimination requirement in Rule 58(2) means that the right to conjugal visits equally applies to prisoners in a same-sex relationship and/or for partners who are not legally married. The European Court of Human Rights has interpreted the right to private and family life as not confined to legally acknowledged relationships.<sup>31</sup>

In regards to the conditions of conjugal visits, the location and design of the visiting rooms must be private, in line with the right to privacy and family life, equipped with sanitary facilities and a bed.<sup>32</sup>

## Access to legal representation

The Essex group welcomed the fact that the revised SMR acknowledge the right of both

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<sup>28</sup> OHCHR, Basic Principles for the Treatment of Prisoners, 1990, Principle 5, referring to the rights set out in (among others) the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol.

<sup>29</sup> *Dickson v United Kingdom* [2007] ECHR 44362/04 (Grand Chamber, 4 December 2007), para. 74. The case concerned a prisoners' access to artificial insemination facilities whilst in prison and the right to family life under article 8 of the European Convention on Human Rights.

<sup>30</sup> Rule 27 of the UN Bangkok Rules; Rule 58(2) of the Nelson Mandela Rules.

<sup>31</sup> See for instance *Keegan v. Ireland*, Judgment of 26 May 1994, Series A no. 290, pp. 17-18, para. 44; *Kroon and others v. The Netherlands* (Application no. 18535/91), Judgment of 27 October 1994, para. 30; *Mikulić v. Croatia* (Application no. 53176/99), Judgment of 7 February 2002, para. 51.

<sup>32</sup> *Technical Guidance for Prison Planning*, p. 126.

untried and convicted prisoners to have access to legal representation and not only in the context of their criminal procedure.

The experts acknowledged that the revised Rules introduce general provisions for 'any legal matter' (Rule 61), and attach additional safeguards in the context of pre-trial detention (Rules 119, 120), while the entitlements and modalities of access to legal advisers and legal aid providers 'continue to be governed by Rule 61'.

The CPT has clarified that the 'right of access to a lawyer should be enjoyed by everyone who is deprived of their liberty, no matter how 'minor' the offence of which they are suspected'.<sup>33</sup>

Proceedings for which prisoners may require legal assistance beyond and outside the pre-trial and trial stages include appeals and other motions in the criminal procedure, but also civil proceedings (e.g. marital and parental affairs, inheritance law etc.), potential complaints on detention conditions and/or torture or other ill-treatment and any disciplinary sanctions or processes.<sup>34</sup> The experts stressed that prisoners must not be required to disclose the nature of their wish to see a legal representative as it would render the safeguard void.

### Detention pre-trial and during trial

Rule 119 incorporates state obligations relating to arrest and pre-trial detention which will predominantly be addressed to police and judicial authorities. Rule 119(1) reiterates the obligation to promptly inform every untried prisoner about the reasons for their detention and the charges against them.<sup>35</sup> (See Chapter 2, Prison management)

Yet, the reiteration of this principle in the revised SMR indicates a responsibility of prison administration to ensure that the detainee in fact has received this information.

Rule 119(2) emphasises the need for pre-trial detainees to receive some form of legal advice, either through a legal adviser of their own choice or - failing this - one assigned to the detainee. The requirement to establish a legal aid system ('without payment where the interests of justice so require', see below) is addressed primarily to the legislator/ policy-maker.

Should legal aid be denied, Rule 119(2) requires an independent review without delay. 'Without delay' recognises that the object and purpose of legal representation would be undermined if no speedy control mechanism were available.

The safeguards and rights in Rules 119 and 120 apply during the pre-trial and trial periods, as well as during the appeal procedure (i.e. until the sentence becomes final).

### Access to legal advice overall

While the obligation to establish legal aid schemes and review mechanisms must be fulfilled by legislators and policy-makers, the prison administration has a role to play in various

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<sup>33</sup> CPT, *21st General Report of the CPT: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: 1 August 2010-31 July 2011*, Strasbourg, CPT/Inf (2011) 28, 10 November 2011, para. 20 (*CPT 21st General Report*).

<sup>34</sup> The Inter-American Commission on Human Rights has also maintained that legal aid is a prerequisite to exercise the right to petition (Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, 31 December 2011, OEA/Ser.L/V/II.Doc 64, para. 254 (*IACHR Report on Persons Deprived of Liberty*)).

<sup>35</sup> See also Article 9(2) of the International Covenant on Civil and Political Rights and Principle 10 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

regards. Specifically, it is required to:

- Provide information in an accessible, understandable way to the prisoners about their rights (Rule 54(b))
- Facilitate access of prisoners to legal aid schemes (see requirement of ‘access’ to legal aid in Rule 61(3))
- Ensure physical access, ‘without delay’, to the legal adviser of choice and/or legal aid provider and provide the ‘opportunity, time and facilities’ for prisoners to be visited by and communicate with their legal representatives (Rule 61(1))<sup>36</sup>
- Refrain from interception or censorship and allow confidential communication (Rule 61(1))
- Provide the prisoner with writing material for their defence (Rule 120(2))
- Allow the prisoner possession of legal documents (Rule 53)
- Facilitate access to the services of an independent competent interpreter (Rule 61(2))
- Ensure prison facilities have the necessary visiting rooms which provide the confidentiality required.<sup>37</sup>

The Essex group emphasised the importance for the lawyer to be in the direct physical presence of the prisoner, as pointed out by the CPT, for example. Participants also pointed to the requirement of privacy of such consultation, as otherwise the ‘detained person may well not feel free to disclose the manner in which he is being treated’.<sup>38</sup>

The supportive role of prison administration in prisoners’ access to legal advice is outlined in the Commentary to the European Prison Rules as encompassing assistance ‘with writing materials to make notes and with postage for letters to lawyers when they are unable to afford it themselves’.<sup>39</sup> This should be read as including the facilitation of more modern forms of communication.

Effective access to legal advice requires, as mentioned, measures to be taken by the central prison administration or policy-makers respectively. These include the following:

- Provide prison administrations with accessible information sheets for prisoners in the languages spoken within the prison population.
- Provide a contact where prison administrations can access a translator, including Braille.
- Provide legal aid schemes which are accessible to persons in prisons, in the context of criminal procedures and for other (e.g. personal) matters.
- Enshrine access to legal representation in the national prison laws and rules.
- Ensure prison facilities have the necessary visiting rooms which provide the confidentiality required for meetings with legal advisers.

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<sup>36</sup> See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17; Basic Principles on the Role of Lawyers, Principle 8; UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, para. 34. See also Vivienne O’Connor and Colette Rausch (eds.), *Model Codes for Post-Conflict Criminal Justice: Volume II: Model Code of Criminal Procedure*, United States Institute for Peace, 1 October 2008, Chapter 4: ‘Rights of the Suspect and the Accused’, Article 70.

<sup>37</sup> On the role of prison staff in ensuring confidentiality see also Council of Europe, *Commentary to Recommendation Rec(2006) 2 of the Committee of Ministers to Member States on the European Prison Rules*, pp. 910 (Commentary on Rule 23, with reference to jurisprudence of the European Court of Human Rights) (*Commentary to EPR*).

<sup>38</sup> *CPT 21st General Report*, CPT/Inf (2011) 28, para. 23.

<sup>39</sup> *Commentary to EPR*, commentary on Rule 23, with reference to ECtHR, *Cotlet v Romania*, 3 June 2003, appl. Nr. 38565/97.

While prison administrations may want to see some confirmation of an individual's function/qualification as legal adviser, the experts stressed that the term should not be interpreted narrowly in light of the rationale of this provision. Persons from poor and marginalised backgrounds, with limited financial means and little access to education are usually overrepresented in prison populations, making support even more relevant.

Imprisonment by definition implies reduced means to take care of one's affairs, especially those requiring 'legal literacy'. At the same time many countries lack the resources and capacity to provide comprehensive legal aid by lawyers. Access to legal advice in the context of prison should therefore encompass all possible ways for prisoners to avail themselves of support.

Conditions of visits from legal advisers and permissible restrictions are defined in Rule 61(1), which are generally applicable, including in the pre-trial context (pursuant to Rule 120(1)).

## Legal aid

Incorporation of provisions relating to legal aid in the Nelson Mandela Rules follows the adoption, in 2012, of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.<sup>40</sup>

The Principles and Guidelines define legal aid as including 'legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require'.<sup>41</sup>

The Principles and Guidelines recognise that 'legal aid is an essential element of a functioning criminal justice system that is based on the rule of law, a foundation for the enjoyment of other rights, including the right to a fair trial, and an important safeguard that ensures fundamental fairness and public trust in the criminal justice process' (Principle 1, paragraph 14). Guideline 6 makes it clear that prisoners must have access to legal aid and outlines measures to be introduced to ensure this. It was stressed that the right to legal aid applies in all criminal cases, including those involving terrorism and other serious offences.<sup>42</sup>

The Inter-American Court of Human Rights has consistently maintained that the right to defence is a central component of due process, and that the right to access legal aid is a crucial part of it.<sup>43</sup>

The term 'legal aid service provider' (used in Rule 61(1)) is defined in paragraph 9 of the Principles and Guidelines, referring to 'a wide range of stakeholders as legal aid service providers in the form of non-governmental organizations, community-based organizations, religious and non-religious charitable organizations, professional bodies and associations and academia'.

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<sup>40</sup> UN General Assembly, 67th Session, *Resolution adopted by the General Assembly on 20 December 2012: 67/187. United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, 28 March 2013, A/RES/67/187 (*Legal Aid Principles and Guidelines*).

<sup>41</sup> The *Legal Aid Principles and Guidelines* acknowledge that states employ different models for the provision of legal aid, and list as examples 'public defenders, private lawyers, contract lawyers, pro bono schemes, bar associations, paralegals and others' (para. 8, 10).

<sup>42</sup> UNODC, *Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners*, 2014, p. 46.

<sup>43</sup> I/A Court, *Ruano Torres et al. vs El Salvador*. Merits, Reparations and Costs. Judgment of October 5 of 2015. Serie C No. 303, para. 153.

Rule 61 of the revised SMR incorporated this understanding by requesting ‘access to effective legal aid’ and the ‘services of an independent competent interpreter’ where prisoners do not speak the local language.

While legal aid mechanisms and interpretation services need to be established at the level of policy-makers/central prison administration, local prison administrations and staff have a role to play in terms of practical measures to make legal aid effective within their role (see above).

The Essex group stressed that it is not for prison administrations to determine whether the interests of justice would be served by the assignment of legal aid. Decisions on eligibility criteria for legal aid are outside of the mandate of the prison administration.

→ See also Chapter 5, Restrictions, discipline and sanctions – legal assistance

### Restrictions of access

The experts stressed that restrictions on access to a legal representative constitute a significant infringement of safeguards. As a consequence, any restrictions need to be limited to exceptional situations and require clear prescription in law of the circumstances, decision-making body and remedies. This is supported by Rule 61(1) (see reference to ‘applicable domestic law’).

The experts discussed that in practice restrictions refer to security concerns such as charges of organised crime or terrorist offences, and may imply a delay in access to a lawyer, denial of access, or restrictions regarding the conditions of consultation (for the latter see ‘Conditions of consultation’ below).

While international standards do allow for restrictions in principle, the Essex group recalled Principle 18 of the Body of Principles, which clarifies that the right of a detained person to be visited by and to consult and communicate with his/ her legal counsel ‘may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order’.

Jurisprudence has also clarified that restrictions on the principle of confidentiality are only justified if there are ‘compelling reasons’ for it, and that they must be subject to review.<sup>44</sup>

The European Committee for the Prevention of Torture (CPT) considers that it might exceptionally be necessary to delay for a certain period a detained person’s access to a lawyer of his choice, but stressed, that this must not result in the denial of a lawyer. The Committee recommended, in such cases, ‘access to another independent lawyer who can be trusted not to jeopardise the legitimate interests of the investigation’. The Committee noted that it is ‘perfectly feasible to make satisfactory arrangements in advance for this type of situation, in consultation with the local Bar Association or Law Society’.<sup>45</sup>

The CPT has stressed that once such a ‘replacement lawyer’ has been chosen it ‘fails to see any need for derogations to the confidentiality of meetings between the lawyer and the

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<sup>44</sup> See *Commentary to EPR*, commentary on Rule 23, with reference to jurisprudence of the European Court of Human Rights.

<sup>45</sup> *CPT 21st General Report*, CPT/Inf (2011) 28, para. 22, and CPT, *Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 17 January 2013*, Strasbourg, 13 March 2014, CPT/Inf (2014) 7, para. 19.

person concerned'.<sup>46</sup>

## Conditions of consultation

Rule 61(1) states that 'Consultations may be in sight but not hearing' of prison staff, and requires access to legal representation 'without interception'.<sup>47</sup>

The experts emphasised that consultations with legal advisers in full privacy, in a separate room, should be the norm. In most cases the presence of a prison officer will neither be required nor an efficient use of staff resources. Even if not listening, the presence of a prison officer may still be intimidating and impact negatively on the conversation between legal adviser and prisoner. The Rule clarifies that, if ever the presence of a prison officer is deemed necessary for security reasons, it must not be within hearing (e.g. rooms should be designed so prison staff can observe the consultation, but unable to hear the conversations inside). It should be noted that the safety of the legal adviser is the only conceivable rationale behind the presence of staff, except for when restrictions are required by a judicial authority (see above).

Where prison administrations seek to keep oversight for security considerations it could apply the practice of multiple meetings in parallel in a large room with staff present in the distance (out of hearing).

Decisions on limiting confidentiality is outside of the prison administrations' mandate, but would have to be taken by a judicial authority. Guidance can be drawn, for example, from the European Prison Rules, which state that 'A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security'.

Confidentiality of legal correspondence needs to be ensured as well.

## Access to legal documents

The experts discussed the relevance of Rule 53 which enshrines the right of prisoners to have access to their legal documents 'without access by the prison administration'.

The Rule acknowledges that physical access to legal documents is a prerequisite to exercising one's rights. It also seeks to protect the privacy of a prisoner's legal matters, which is particularly important should a prisoner issue a complaint against a staff member of the prison.

The Essex group recognised that lockable cabinets may not be possible in a prison context, but maintained that efforts can be made to maintain some privacy nevertheless. This implies that staff are prevented from reading prisoners' legal documents. In order to ascertain this, prisoners should be allowed to be present while their cell is being searched. The latter policy has been established as good practice, including in jurisprudence.<sup>48</sup>

It was further noted that legal files are increasingly stored digitally and this may require prisoners being enabled to access them at a computer.

Legal documents were highlighted as one of the possessions that need to accompany a

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<sup>46</sup> CPT 21st General Report, CPT/Inf (2011) 28, para. 23.

<sup>47</sup> European Court of Human Rights jurisprudence held that authorities cannot prevent prisoners contacting a lawyer, or delay it. See *Golder v The United Kingdom*, Application no. 4451/70, 21 February 1975.

<sup>48</sup> House of Lords, *R. v Secretary of State for the Home Department Ex p. Daly*, 23 May 2001.

prisoner if and when he/she is transferred.

## Transfers

The Essex group noted the importance of guidance for prison administrations on the transfer and transportation of prisoners. While this area has not been revised as such within the SMR review, several provisions of other areas affect transfers directly.

The experts stressed that the obligations invoked when a prisoner is transferred apply regardless of the agency or authority in charge of the transport means. This stems from the responsibility of the state for anyone it deprives of their liberty.<sup>49</sup> In this context, the participants also noted that transport of prisoners must be carried out at the expense and under the direction of the public authorities.<sup>50</sup>

The Essex group recalled that transfers must not be exercised with the intention of punishing, repressing or discriminating the persons deprived of their liberty, their family or their representative.<sup>51</sup>

### Documentation/ notification

Rule 7(c) requires documentation of the day and hour of a prisoner's transfer in the prisoner file system. In addition, prisoners are to be afforded the right and means to immediately notify their family or any other person designated. The experts stressed the importance of notification of the prisoner's legal representative of a transfer, invoking the term 'any other person designated' in Rule 68.

This is supported by the Inter-American Commission on Human Rights who have maintained that prisoners have the right to immediately communicate with their family or third parties when he/she is going to be transferred to another prison.<sup>52</sup>

### Safety during transfer

The experts noted the relevance of the last sentence of Rule 1 also in the context of transfer, namely that safety and security need to be ensured 'at all times'.

The Essex group noted that safety during transfers of prisoners from one facility to another include prevention of escape, but also safety from violence by other prisoners or escorting staff. It further implies measures to prevent injuries through accidents (e.g. in case of use of restraints, with regard to the vehicles used etc.), which comprises regular checks of vehicles.

It was emphasised that provisions regarding separation of prisoners and supervision by staff continue to apply during transfer. Female and male prisoners should not be transported together (Rules 11(a) and 81(2)), and young prisoners must be kept separate from adults (Rule 11(d), Rule 26.3 Beijing Rules<sup>53</sup>). Rule 81(3) requires that women prisoners are

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<sup>49</sup> UN General Assembly, 68th Session, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General*, 9 August 2013, A/68/295, para. 31.

<sup>50</sup> This is made explicit in the European Prison Rules 2006 (Rule 32.3). Paragraph 1 of this Rule refers to prisoners being moved 'to or from a prison, or to other places such as court or hospital'.

<sup>51</sup> Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle IX, 4. See also SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, 27 November 2013, CAT/OP/ARG/1, para. 37.

<sup>52</sup> *ACHR Report on Persons Deprived of Liberty*, para. 498 and 499.

<sup>53</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), adopted 29 November 1985 by UN General Assembly resolution 40/33.

supervised by female officers.

The participants noted specific risks in some countries, such as attempts to free prisoners or attack prisoner transports. To address such risks countries may consider measures that reduce the necessity of transports, such as by courts coming to prison rather than prisoners being transported to court; hearings by video etc. However, such solutions should be implemented weighing the risk against infringements of the right to fair trial and the presumption of innocence.

## Conditions of transfer

Conditions of transfer need to comply with Rule 42, which specifies minimum material conditions that 'apply to all prisoners without exception'. These include light, ventilation, temperature, sanitation, nutrition (see also Rule 22), drinking water (see also Rule 22, 'whenever he/she needs it'), access to open air and physical exercise (breaks depending on duration of travel), personal hygiene (toilet breaks etc.), health-care and adequate space.<sup>54</sup> This implies that individuals must not be transported in extreme heat or cold.

Specific provisions may need to be made for pregnant women, especially when advanced in pregnancy. Pregnancy or an illness of a prisoner may impact on the composition of the team of escorting officers, for example medical staff may need to be present. A medical practitioner should advise on a prisoner's fitness to travel or any adjustments that need to be made.

Adjustments may be prompted by physical as well as psychological health considerations. Vehicles used for transports of sick prisoners to external health-care facilities need to be adequate to their medical condition.<sup>55</sup> Also, cellular (or custodial) vehicles, which often have small or no windows and are dark, would not be suitable for detainees who are suffering from Post-Traumatic Stress Disorder (PTSD) or claustrophobia. The experts noted that in the UK, therefore, the Inspectorate of Prisons recommends that authorities use alternative vehicles for women affected by previous trauma because of the inappropriateness of cellular vehicles.<sup>56</sup>

The Essex group highlighted the relevance of Rule 5(2), i.e. the obligation to make reasonable accommodation and adjustments for persons with disabilities. The Convention on the Rights of Persons with Disabilities (CRPD) defines 'reasonable accommodation' 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'.<sup>57</sup>

This applies not only for logistical requirements such as wheelchair ramps, but may include a range of other measures, e. g. breaks. The CRPD requires consultation with and active involvement of persons with disabilities including through their representative organisations

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<sup>54</sup> This is supported in the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, stating that transfers cannot be carried out in conditions that can cause physical or mental suffering, humiliate or facilitate public exhibition. See also UN Subcommittee against Torture (SPT), for example in *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Kyrgyzstan*, 28 February 2014, CAT/OP/KGZ/1, para. 95, expressing concern about the means of transportation, dark, without any ventilation and excessively cramped, transporting detainees with tuberculosis at the same time as other detainees without the use of preventive measures. See also Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle IX, 4.

<sup>55</sup> See, for example, concern expressed in *SPT Report on visit to Ukraine* CAT/OP/UKR/1, para. 77.

<sup>56</sup> Her Majesty's Inspectorate of Prisons, *Expectations: Criteria for assessing the treatment of and conditions for women in prison, Version 1*, 2014, p. 17.

<sup>57</sup> Article 2, Convention on the Rights of Persons with Disabilities, A/61/611.

in the development of policies and other decision-making processes concerning issues relating to persons with disabilities.<sup>58</sup>

## Use of restraints

Transfers are one of the situations in which the use of restraints is common to prevent prisoner escapes. Rule 47(2) acknowledges this and provides a basis for national laws to authorise the use of restraints ‘as a precaution against escape during a transfer’.

However, the Essex group recalled that such authorisation is subject to Rule 43(1), which prohibits the use of any restrictions that ‘amount to torture or other cruel, inhuman or degrading treatment or punishment’. Nor does such authorisation render void the principles of necessity and proportionality. This means that restraints may only be used when such use is deemed necessary, rather than automatically during every transfer. Precautions need to be taken to prevent physical harm of passengers who are restrained in vehicles in case of break action or accident, in particular as restraints compromise the ability of prisoners to protect themselves from falling forward.

Concern has been expressed, for example, by the SPT, regarding the use of extreme security measures irrespective of the detainee’s category (remand or convicted) or their security assessment, and with regard to the practice of routinely using handcuffs or waist restraints during transfers of detainees by air.<sup>59</sup>

Furthermore, Rule 47(2) is explicit regarding the obligation to remove restraints when the detainee or prisoner appears before a judicial or administrative authority. This is in recognition of the subliminal message restraints may send to judges or juries; as regards untried prisoners, this is a precondition for the presumption of innocence.

It should also be noted that when prisoners are transported to medical care facilities outside the prison, e.g. for specialised treatment in hospitals, restraints need to be removed unless strictly necessary, as they may hinder medical treatment and compromise the doctor-patient relationship. Also, if restraints are used routinely rather than when strictly necessary, medical personnel may wrongly presume that the prisoner (their patient) is dangerous.<sup>60</sup>

Restraints should not be used if they are contraindicated in light of the medical condition of the prisoner. For example, there should be a presumption against the use of restraints on women in the later stages of pregnancy. Rule 48(2) of the Bangkok Rules enshrine a prohibition against the use of restraints on women during labour or birth or immediately after birth.<sup>61</sup>

→ See Chapter 5, Restrictions, discipline and sanctions – instruments of restraint

## Respect for human dignity

The experts also discussed implications of the obligation to respect the human dignity of

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<sup>58</sup> Article 4(3), Convention on the Rights of Persons with Disabilities.

<sup>59</sup> SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand*, 28 July 2014, CAT/OP/NZL/1, para. 111 (*SPT Report on visit to New Zealand*).

<sup>60</sup> See, for example, concern expressed in *SPT Report on visit to Ukraine*, CAT/OP/UKR/1, para. 77, and *SPT Report on visit to New Zealand*, CAT/OP/NZL/1, para. 110, expressing concern about transportation in vehicles with single ‘cages’, prisoners routinely handcuffed and often waist-restrained, regardless of their security classification; as well as about transfers in small cages with metal benches and without proper windows for long journeys (up to twelve hours).

<sup>61</sup> UN Bangkok Rules, Rule 24.

prisoners (Rule 1) in the context of transfers.

They stressed that the application of this principle means that prisoners should not be exposed to public view especially while dressed in prison uniform or with instruments of restraint such as handcuffs. It was highlighted that Rule 19(3) caters for this situation explicitly, requiring that a prisoner be 'allowed to wear his or her own clothing or other inconspicuous clothing' whenever removed outside the prison. Where prisoners do not possess non-uniform clothing, good practice is for prison administrations to provide such clothing, especially for prisoners who appear at court.

It should be noted that Rule 73(1) states that while prisoners are being transferred the vehicle must ensure they are 'exposed to public view as little as possible' and 'safeguards should be in place to avoid publicity or curiosity from the public'.

### Transfer of possessions and files

Where prisoners are transferred to another prison facility, their possessions and files need to be transferred with them.<sup>62</sup> The experts noted that Rules 67(1) and (2) need to be read as an instruction to transfer the prisoners' belongings to any new facility. This also applies to legal documents, which the prisoner is entitled to keep in his/her possession pursuant to Rule 53. Transferring such documents with the prisoner is key to preventing loss of documents, which might infringe procedural rights, result in a delay of procedures, impede fair trial or lead to a failure to attend court hearings.

In order to ensure professional prison administration, the entire prisoner file should be transferred to any new facility since it provides the prison authority with crucial information about risks and needs associated with the individual prisoner.

Medical records also need to be transferred, along with the prisoner (Rule 26(2)), to the health-care service of the receiving institution, while retaining medical confidentiality. The UN Committee against Torture, for instance, has emphasised the fact that the confidentiality of medical data persists beyond the transfer and/or release of an inmate.<sup>63</sup>

It was highlighted that measures must be taken to ensure that a prisoner taking any form of medication is provided the respective medicine during transfer and upon arrival at the new facility.

### Foreign national prisoners

The experts analysed Rule 62 in the light of the importance of contact with the outside world for foreign national prisoners, although the Rule was not itself revised in the course of the review.<sup>64</sup> Alongside Rule 62, the experts flagged the relevance of Rules 2(2), 54, 55 and 80(1) for foreign national prisoners.

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<sup>62</sup> See, for example, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *3rd General Report on the CPT's activities covering the period 1 January to 31 December 1992, 1993*, CPT/Inf (93) 12, para. 59: 'Steps should also be taken to ensure a proper flow of information – both within a given establishment and, as appropriate, between establishments (and more specifically between their respective health-care services) – about persons who have been identified as potentially at risk'.

<sup>63</sup> UN Committee against Torture, *Observations of the Committee against Torture on the revision of the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR)*, 16 December 2013, CAT/C/51/4, para.21

<sup>64</sup> See also UN Bangkok Rules, Rule 2(1) last sentence, which captures information about and the opportunity to access consular representatives upon admission.

Given the high number of foreign national prisoners in many countries, practical guidance on how to effectuate the revised standards for this group is of particular interest.<sup>65</sup>

As a starting point, the experts noted the relevance of Rule 2(2) in the context of foreign national prisoners, stipulating that ‘taking account of individual needs of prisoners, in particular vulnerable categories’ does not constitute discrimination.

The participants emphasised that access to rights such as legal aid, complaints procedures and procedural safeguards depend on prisoners being provided with the means to exercise them, including the ability to understand them and to communicate. The written information prisoners ought to receive upon admission according to Rules 54 and 55 (prison law and regulations; rights including legal advice and legal aid, requests and complaints; obligations and disciplinary sanctions) therefore needs to be available ‘in the most commonly used languages in accordance with the needs of the prison population’.

Should a prisoner not understand any of these languages, interpretation assistance should be provided (Rule 55(1)). Creative solutions may be required, such as the availability of telephone interpreters. The experts also highlighted that solutions imply the recruitment of prison staff taking into account fluency in the languages common in a country's prison population, as captured in Rule 80(1).<sup>66</sup>

Good practice in reducing the common isolation of foreign national prisoners has been enshrined in the Council of Europe recommendations, suggesting that they be ‘allocated to prisons where there are others of their nationality, culture, religion or who speak their language’. It is also recommended that special attention is paid ‘to the maintenance and development of their relationships with the outside world, including contacts with family and friends, consular representatives, probation and community agencies and volunteers’.<sup>67</sup> Recommendation 22.2. explicitly states that foreign prisoners ‘shall be allowed to use a language of their choice during such contacts’ unless there is ‘a specific concern in individual cases related to safety and security’. (See detailed provisions on the facilitation of contact to the outside world and contact with consular representatives in Recommendations 22.1. to 25.4.)

Consideration should be given, where possible, to providing teleconferencing facilities so foreign national prisoners can maintain contact with their families.<sup>68</sup>

## Diplomatic and consular representation

Foreign individuals deprived of their liberty are entitled to have consular authorities of their State or origin notified ‘without delay’ of the fact and place of their detention and/or that of questioning if they so request.<sup>69</sup>

The International Court of Justice has clarified that ‘without delay’ does not necessarily mean ‘immediately’ upon arrest, but that ‘there is nonetheless a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a

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<sup>65</sup> The Council of Europe, for example, has adopted specific recommendations concerning foreign prisoners (Council of Europe, *Recommendation CM/Rec (2012)12 of the Committee of Ministers to member States concerning foreign prisoners*, 10 October 2012 (*CoE Recommendation on foreign prisoners*)).

<sup>66</sup> Rule 80(1): The prison director, his or her deputy, and the majority of other prison staff shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.

<sup>67</sup> *CoE Recommendation on foreign prisoners*, CM/Rec (2012)12, 16.3. and 22.1.

<sup>68</sup> *Technical Guidance for Prison Planning*, p. 126.

<sup>69</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 16(2); Vienna Convention on Consular Relations, Article 36(1)(b); Asia Pacific Forum of National Human Rights Institutions, *Minimum Interrogation Standards*, 2005, para. 2.

foreign national, or once there are grounds to think that the person is probably a foreign national'.<sup>70</sup>

It was noted that prisoners need to be consulted prior to making contact with the diplomatic or consular representation of the prisoners' country of citizenship, as they are entitled to waive this right and may in fact fear persecution from this state in some cases. In this instance, Rule 62(2) points to national and international agencies established to protect or assist refugees or stateless persons, such as the United Nations High Commissioner for Refugees (UNHCR).

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<sup>70</sup> International Court of Justice, *Case concerning Avena and other Mexican nationals (Mexico v. United States of America)*, para. 87-88.