

## 5. Restrictions, discipline and sanctions<sup>1</sup>

Issues/rules covered:

- Disciplinary sanctions (Rules 36, 37, 39, 41, 42 and 43)
- Solitary confinement/isolation (Rules 38, 44, 45 and 46)
- Instruments of restraint (Rules 47, 48 and 49)

### Introduction

At the outset, the Essex group stressed that the Rules apply comprehensively to restrictions and sanctions, regardless of the term used to describe them.

The experts pointed to the structure of provisions in this section, with a number of Rules covering disciplinary sanctions (Rules 39-41) specifically, and others applying more broadly to ‘other restrictive measures’/‘restrictions’. The participants noted that these Rules apply regardless of whether the restriction is imposed as a disciplinary sanction (intended to be punitive in nature) or for other reasons, unless the text of a specific rule states otherwise.

The Essex group noted that the revised SMR use the term ‘other restrictive measures’ without defining it.<sup>2</sup> From the context of its use it can be deduced that the term:

- describes limitations in the context of contact to the outside world (visits)
- refers to measures imposed not as a disciplinary sanction, but in the context of ‘safety and security’, presumably including measures to prevent inter-prisoner violence and risks of self-harm and suicide
- is used in the context of the use of instruments of restraint.

The experts noted CPT-standards which also highlight that ‘Other procedures often exist, alongside the formal disciplinary procedure’, describing measures like involuntary separation from other detainees ‘for discipline-related/security reasons (e.g. in the interests of “good order” within an establishment)’ and pointing out that these procedures should also be accompanied by effective safeguards.<sup>3</sup>

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

<sup>2</sup> In Rule 36 (‘no more restriction than necessary’), Rule 43(3), Rule 46 (1, 2). Principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment uses the term in the context of access to the outside world (‘can only be denied subject to reasonable conditions and restrictions as specified by law’).

<sup>3</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. 55 (*CPT 2nd General Report*).

The Essex group noted that Rule 36 is laying down the only possible purposes for restrictions, i.e. safe custody, secure operation of the prison and a well-ordered community life.

The experts considered that more detailed discussion and guidance will be needed with regard to the differentiation between disciplinary sanctions and 'other restrictions'. Other issues identified as requiring more discussion and practical guidance were the application of Rule 39(3); compensatory measures as described in Rule 38(2); and criteria to assess whether solitary confinement would exacerbate the situation of prisoners with mental or physical disabilities.

## General principles

The Essex group emphasised the means and tools at the disposal of prison administrations in order to avoid and prevent disciplinary infractions in the first place, and pointed out five overarching principles:

1. Restrictions and disciplinary sanctions should not be a first response to problems within prisons – they may only be imposed once steps aimed at preventing conflicts or resolving them through other means have failed (Rule 38(1)).
2. Only such restrictions and disciplinary sanctions as are provided in laws and regulations may be imposed (Rules 37).
3. No restrictions or disciplinary sanctions may involve lowering the general living conditions (Rule 42).
4. Measures need to be necessary and proportionate, and need to be imposed through fair proceedings (Rule 39(1) and (2)).
5. Restrictions or disciplinary sanctions must never amount to torture or other cruel, inhuman or degrading treatment or punishment (Rule 43(1)).<sup>4</sup>

### Principle of legality

The Essex group pointed to Rule 37, which enshrines the principle of legality and clarifies that authorisation by law or by regulation is always required to determine:<sup>5</sup>

- what conduct constitutes a disciplinary offence and what conduct/situation may prompt 'other restrictions'
- types and duration of sanctions/restrictions that may be imposed
- the authority competent to impose such sanctions/restrictions
- any form of involuntary separation from the general prison population (whichever term is used e.g. isolation, segregation, restricted housing or special care units and regardless of whether or not it is applied as a disciplinary sanction or citing order and security reasons).

### Information about prison rules

The Essex group noted that provision of clear and comprehensive information about prison rules and procedures is an important tool in order to prevent disciplinary infractions in the first place.

The experts therefore stressed that Rule 37 should be made known to the prisoners, and

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<sup>4</sup> Rule 47(1) applies this principle specifically to instruments of restraint.

<sup>5</sup> Rule 37 reflects Principle 30(1) of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

should be part of the information provided under Rule 54 (a, c) in writing and in a language and format they understand (Rule 55). Such information should include what types of conduct constitute a disciplinary offence, and the possible sanctions associated with each.

The importance of making the rules and regulations for disciplinary procedures known amongst both prisoners and prison officials, including through the distribution of printed copies, has been emphasised by the Inter-American Commission on Human Rights.<sup>6</sup>

## Conflict prevention and mediation

The Essex group stressed the importance of conflict prevention, mediation and alternative dispute resolution as means to avoid disputes and disciplinary infractions. They pointed to the encouragement to this end in Rule 38(1) and also in Rule 76(1c) on dynamic security training for prison staff.

The experts referred to the first 'Essex paper', in which they had pointed to the 'many effective and well-proven ways in which to deal with security and order in places of detention such as the configuration and infrastructure of the place of detention; adequate numbers of well-trained staff; an effective system of classification and separation of detainees; positive staff-prisoner relationships, which enable prison staff to anticipate and proactively deal with problems; dynamic security and conflict resolution tools such as mediation'.<sup>7</sup>

The 'preventive principle' has also been stressed by the Special Rapporteur on Torture, who stated that 'it is essential that the Rules provide for an obligation for prison authorities to use disciplinary measures on an exceptional basis and only when the use of mediation and other dissuasive methods to resolve disputes proves to be inadequate to maintain proper order'.<sup>8</sup>

→ See Chapter 2, Prison management – dynamic security and conflict prevention

## Proportionality

The Essex group stressed the principle of proportionality for disciplinary sanctions and restrictive measures, enshrined in Rule 39 (2). They noted that Rule 36 provides guidance for applying this principle in that it requires discipline and order to be 'maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life'.

The experts reviewed the report of the UN Special Rapporteur on Torture who has stressed that a punishment disproportionate to the offence 'would be tantamount to improperly making the nature of the deprivation of liberty harsher'.<sup>9</sup>

The experts recalled that proportionality must be ensured on a case by case basis and any sanction must be commensurate with the harm caused by the infraction as well as the individual circumstances of the prisoner involved. The participants pointed to guidance provided by the European Committee for the Prevention of Torture (CPT), which held that in

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<sup>6</sup> 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. 380.

<sup>7</sup> University of Essex/Penal Reform International, *Second Report of Essex Expert Group on the Review of the Standard Minimum Rules for the Treatment of Prisoners, prepared by Penal Reform International/Essex University*, 20 March 2014, UNODC/CCPCJ/EG.6/2014/NGO.7, para. 43 (*Essex 2*), with reference to Penal Reform International/Association for the Prevention of Torture, *Balancing security and dignity in prisons: a framework for preventive monitoring*, 2013, p. 18.

<sup>8</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. 57 (*Special Rapporteur on Torture report 2013*).

<sup>9</sup> *Special Rapporteur on Torture report 2013*, A/68/295, para. 57.

order to be proportionate, any restriction of a prisoner's rights 'must be linked to the actual or potential harm the prisoner has caused or will cause by his or her actions (or the potential harm to which he/she is exposed) in the prison setting'.<sup>10</sup>

The experts reasoned that the interpretation of 'harshness' is subjective to some extent, and sanctions perceived as minor by one prisoner may have severe repercussions for another, depending on their personal circumstances.

This is supported by the commentary to Rule 5 of the UN Standard Minimum Rules for the Administration of Justice (Beijing Rules),<sup>11</sup> although it refers to criminal sanctions. It states that consideration should not only be based on the gravity of the offence but also on personal circumstances, and lists as examples 'social status, family situation, the harm caused by the offence or other factors affecting personal circumstances'.

In this context the Essex group reiterated that restrictive measures must not be applied to prisoners by virtue of their sentence and endorsed the assessment of the Committee Against Torture (CAT) which rejected 'the application of additional and severe punishments on prisoners serving life sentences, such as handcuffing when outside cells, and segregation'.<sup>12</sup>

Furthermore, the experts stressed that rules and regulations governing sanctions and restrictive measures need to be reviewed over time in the light of the proportionality principle.

The Essex group highlighted the considerable impact of the regime of disciplinary sanctions, discipline and restrictive measures on the institutional culture of a prison facility and on the rehabilitation and reintegration prospects of prisoners.<sup>13</sup> They noted an example documented by the UN Sub-committee for Prevention of Torture (SPT), where due to the modalities regarding disciplinary measures the 'overall attitude was one of resignation and fear of reprisals'.<sup>14</sup>

### Consideration of disabilities

The Essex group pointed to Rule 39(3) which requires that prison administrations consider 'whether and how a prisoner's mental illness or developmental disability may have contributed to his/her conduct' before imposing disciplinary sanctions.

Should a direct link be found between the conduct and the prisoner's 'mental illness or psychosocial disability',<sup>15</sup> then no sanction may be imposed, in line with Rule 39(3).

The Rule seeks to account for limitations persons with disabilities might have in regulating independently their behaviour in relation to obeying a norm.

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<sup>10</sup> CPT, *21st General Report: 1 August 2010-31 July 2011*, Strasbourg, 10 November 2011, [CPT/Inf (2011)28] para. 53 onwards (*CPT 21st General Report*), para. 55(a).

<sup>11</sup> Adopted by UN General Assembly resolution 40/33 on 29 November 1985.

<sup>12</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. 39 (*CAT SMR revision observations*).

<sup>13</sup> See PRI/APT, 'Institutional culture in detention: a framework for preventive monitoring', *Detention Monitoring Tool, 2nd edition*, 2016.

<sup>14</sup> Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *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. 124 (*SPT Report on visit to Ukraine*).

<sup>15</sup> The experts expressed their preference for the terminology used in the UN Convention on the Rights of Persons with Disabilities (CRPD) ('person with disability') as the internationally agreed and less ambiguous term.

The participants recommended that any suspicion that mental health problems may have contributed to an infraction should trigger a process which involves consultation with relevant staff, such as psychologists and medical staff.

When external medical practitioners are consulted on a prisoner's mental health status or intellectual or psychosocial disability in relation to a disciplinary infraction, the reasons for the consultation and their role within that process must be made clear to them. The participants stressed that such assessments should be inter-disciplinary and should take into account the psycho-social condition of the prisoner.

In this context, the experts recalled Rule 46, according to which '[h]ealth-care personnel shall not have any role in the imposition of disciplinary sanctions or other restrictive measures'. (See Chapter 4, Health-care – medical ethics)

It was noted that in a well-functioning prison system, prison officials are aware of physical, mental, intellectual or sensory illnesses or disabilities of prisoners, as they are required to ensure their full and effective participation, inclusion and access to prison life in line with Article 3(c) of the CRPD and Rules 5(2) of the Nelson Mandela Rules.

The Essex group recalled the confidentiality of medical records (Rule 26), but noted the recognised practice of information being provided to prison staff on a need-to-know basis, which protects privacy and confidentiality of sensitive information while enabling prison staff to fulfil their task, including provision for individual needs of prisoners in line with Rule 2(2).

The participants suggested that it may be useful to consult prison staff who are familiar with the prisoner alleged to have committed an infraction, especially in a dynamic security setting, which is based on frequent interaction and constructive relationships with prisoners. (See Chapter 2, Prison management)

## Procedural rights in disciplinary proceedings

The experts clarified that the 'principles of fairness and due process' (Rule 39(1)) must be interpreted in line with the principles reflected in Article 14 of the International Convention on Civil and Political Rights (ICCPR).

They drew on guidance provided by international human rights instruments, bodies and jurisprudence to list the following, non-exclusive elements of due process in disciplinary proceedings:

- information about the charges
- right to defence
- legal representation
- adequate time and facilities to prepare
- opportunity to cross-examine witnesses
- opportunity to examine evidence
- hearing in person
- receipt of a copy of any disciplinary decision
- possibility of review by independent authority against a sanction imposed (appeal).

Guidance on this issue has been provided by the UN Committee against Torture (CAT), for example, listing fair trial guarantees for disciplinary proceedings in prison, including 'to be heard in person; to call witnesses and examine evidence given against them; to be provided with a copy of any disciplinary decision concerning them and an oral explanation of the

reasons for the decision and the modalities for lodging an appeal, and to appeal to an independent authority against any sanctions imposed'.<sup>16</sup>

The CAT has emphasised that detainees need 'to be informed in writing of the charges against them'.<sup>17</sup> For juveniles this is supported also by Rule 70 of the Beijing Rules,<sup>18</sup> which states that 'No juvenile should be sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile'.

The CPT has also detailed procedural safeguards that should apply in the case of disciplinary proceedings, including that the 'prisoner should be informed in writing of the reasons for the measure taken against him (it being understood that the reasons given might not include details which security requirements justify withholding from the prisoner)' and 'be given an opportunity to present his views on the matter'.<sup>19</sup>

The requirement for the prisoner to be provided 'with a copy of any disciplinary decision concerning them and an oral explanation of the reasons for the decision and the modalities for lodging an appeal' has been enunciated by the CAT, for example.<sup>20</sup>

The Essex group discussed what would constitute 'adequate time and facilities' for the preparation of a defence (Rule 41(2)), and suggested that such facilities include, at a minimum, copies of or electronic access to the prison rules and regulations,<sup>21</sup> access to assistance from designated prison staff/other prisoners/civil society representatives and basic materials such as pen and paper or access to a computer.

Participants flagged that family members may be accused of prison rule violations, resulting in restrictions against the prisoner. They stressed that such allegations need to be documented and that there needs to be a possibility to dispute not only violations by the prisoner him/herself, but also those allegedly committed by family members if they impact on the prisoner's rights. It was also pointed out that denial of visits infringes on the right to a private and family life not only of the prisoner, but also their relative(s).

## Right to defence

The Essex group discussed Rule 41(3), requiring an opportunity for prisoners to defend themselves in the case of an allegation of a disciplinary nature. They may do so themselves or through legal assistance (see below).

The experts considered that the right of prisoners to defend themselves 'in person' should be interpreted as that person having the opportunity to appear in front of, and be heard by, the decision-making body.

Should the prisoner not understand the language used in such hearing, an interpreter needs to be made available free of charge (Rule 41(3)).

## Legal assistance

Rule 41(3) provides that detainees may want to defend themselves through legal assistance and specifies that such should be possible 'when the interests of justice so require'. This

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<sup>16</sup> CAT SMR revision observations, CAT/C/51/4, para. 41.

<sup>17</sup> CAT SMR revision observations, CAT/C/51/4, para. 41.

<sup>18</sup> UN Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>19</sup> CPT 2nd General Report, [CPT/Inf (92) 3], para. 55 including footnote 1.

<sup>20</sup> CAT SMR revision observations, CAT/C/51/4, para. 41.

<sup>21</sup> Rule 54 required the provision of written information 'promptly' upon admission, including information about prison law and regulations.

applies ‘particularly in cases involving serious disciplinary charges’. The Essex group considered that every allegation which can be prosecuted by judicial authorities *ipso jure* constitutes a ‘serious disciplinary charge’, but that the term is not limited to such offences. Other factors have to be taken into account when determining whether disciplinary charges are ‘serious’. The Essex group considered that the following are examples of such situations:

- in particularly complex cases
- if the applicable law or prison regulation is not clearly worded
- if the prisoner lacks the capacity to understand the process or the accusation against him/her or the ability to defend him/herself
- where infractions could lead to serious collateral consequences for the prisoner (e.g. removal of eligibility for parole or early release)
- where the disciplinary sanction would result in a material change in the conditions of imprisonment (e.g. transfer to solitary confinement; transfer to a high security prison).

## Judicial review

Rules 41(4) set out the right of prisoners to seek judicial review of disciplinary sanctions imposed on them. The Essex group pointed to the particular relevance of this right for serious forms of punishment (see above).

Rule 41(5) clarifies that criminal procedural standards and due process rights apply should an act in prison be prosecuted as a crime within the regular justice system. This provision intended to ensure that the fair trial rights enshrined in the International Covenant on Civil and Political Rights (ICCPR) and other respective treaties are not undermined by the formulation of disciplinary offences. The Nelson Mandela Rules call for ‘unimpeded access to a legal adviser’ in such cases.

The right to appeal to a competent impartial authority has also been enshrined explicitly in Rule 70 of the Beijing Rules. The CPT has incorporated a similar recommendation in their standards, calling for the right of appeal at a ‘higher authority’ and the ability to ‘contest the measure before an appropriate authority’.<sup>22</sup>

## Types of sanctions and restrictions

### Prohibited sanctions and restrictions

While focusing their deliberations on specific provisions, the Essex group recalled a number of sanctions and restrictive measures explicitly prohibited by the Nelson Mandela Rules:

- 1) collective punishment (Rule 43(1e))
- 2) restrictions of general living conditions (Rule 42)<sup>23</sup>
- 3) indefinite or prolonged solitary confinement (Rule 43(1a, 1b), see below)
- 4) placement in a dark cell (Rule 43(1c))
- 5) placement in a constantly lit cell (Rule 43(1c))
- 6) corporal punishment (Rule 43(1d))
- 7) reduction of a prisoner’s diet or drinking water (Rule 43(1d))

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<sup>22</sup> CPT 2nd General Report, [CPT/Inf (92) 3], para. 55.

<sup>23</sup> The Essex group recalled that a provision on the reduction or suspension of food has been deleted in the course of the review as it is incompatible with international law (*Special Rapporteur on Torture report 2013*, para. 58; Principle XI Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of the Inter-American Commission on Human Rights).

- 8) collective punishment (Rule 43(1e))
- 9) use of restraints as a punishment (Rule 43(2))
- 10) torture and any other cruel, inhuman or degrading treatment or punishment (Rule 1)
- 11) being sanctioned twice for the same act or offence (Rule 39(1)).

The Essex group pointed to the distinction between acts that can be pursued at the level of prison administrations as disciplinary offences, and those that need to be investigated and prosecuted by judicial authorities.<sup>24</sup> They shared the assessment of the Special Rapporteur on Torture who asserted that 'Any act that may amount to a crime should be dealt with by the authorities of justice administration and not by penitentiary or prison staff'.<sup>25</sup> The CAT has held that '[a]ny offences committed by a prisoner which might call for more severe sanctions should be dealt with through the criminal justice system'.<sup>26</sup>

The experts pointed out that any other form of punishment that constitutes torture or other cruel, inhuman or degrading treatment or punishment is prohibited.

They recalled jurisprudence of the Inter-American Court of Human Rights which has held that certain disciplinary punishments, including bodily punishments, placement in dark cells and prolonged confinement, as well as any other measure that could cause harm to the physical or mental state of the person, constitute cruel, inhuman or degrading treatment.<sup>27</sup> Where such punishments cause severe pain or suffering, they constitute torture.<sup>28</sup>

The experts noted further examples such as the 'deliberate non-separation of inmates from persons with active tuberculosis, and the denial of medical assistance'.<sup>29</sup>

The practice of frequent transfers to remote locations and different places in the country has been documented as a problematic form of punishment or reprisal, often taking place without the families being informed and in degrading conditions (poor state of vehicles, long periods of travel, sometimes without food).<sup>30</sup> (See Chapter 3, Contact with the outside world – transfers)

The experts noted reports about 'combinations' of prohibited practices, such as disciplinary and solitary confinement cells with poor material conditions and hygiene, without drinking water or inadequate lighting or ventilation, freezing or hot temperatures.<sup>31</sup>

## Collective punishment

<sup>24</sup> See deliberations on this question in ECtHR, *Campbell and Fell v The United Kingdom* (ECHR 28 JUN 1984).

<sup>25</sup> *Special Rapporteur on Torture report 2013*, A/68/295, para. 57.

<sup>26</sup> *CAT SMR revision observations*, CAT/C/51/4, para. 33.

<sup>27</sup> I/A Court H.R., *Case of Pacheco Teruel et al v. Honduras*. Merits, Reparations and Costs. Judgment of April 27, 2012. Series C No. 241, para. 67.k.

<sup>28</sup> See, for instance, Commission on Human Rights, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37 B, E/CN.4/1997/7*, 10 January 1997, paras. 7-8; *Curtis Francis Doebbler v Sudan* (236/2000), African Commission on Human and Peoples' Rights (2003), para. 42; *Caesar v Trinidad and Tobago* (Ser. C No. 123), Inter-American Court of Human Rights (2005), para. 73.

<sup>29</sup> *SPT Report on visit to Ukraine*, CAT/OP/UKR/1, para. 133.

<sup>30</sup> See for example *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; see also *CPT 2nd General Report*, para. 57.

<sup>31</sup> A report by the SPT on its visit to Ukraine is referred to in this context merely as an illustrative example, *SPT Report on visit to Ukraine*, CAT/OP/UKR/1, para. 116. See also SPT, *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. 84. Flooding of punishment cells with rainwater have been documented in Brazil, for example (see SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Brazil*, 5 July 2012, CAT/OP/BRA/1, para. 124.)



The Essex group highlighted that the prohibition of collective punishment in Rule 43(e) reflects a well-established principle in human rights law. The experts referred to comparable prohibitions enshrined in the African Charter on Human and Peoples' Rights and the American Convention on Human Rights, the former stating that '[p]unishment is personal and can only be imposed on the offender'.<sup>32</sup> The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas emphasise that '[t]he imposition of collective punishments shall be prohibited by law'.<sup>33</sup>

The experts underlined that the term 'collective punishment' describes sanctions intentionally directed at the whole prison population, a group of prisoners or specific ones (for example prisoners in a specific cell) for infractions for which they bear no responsibility.

An example was mentioned, documented by the SPT, where 'extended lock-downs were used as a form of collective punishment for all those in a block or unit where there has been an incident, regardless of their involvement in an alleged offence'.<sup>34</sup>

The participants mentioned the problem that security breaches of individuals often result in sweeping changes affecting the whole prison population. For example, misuse of the ability to deliver items to prisoners (e.g. hiding prohibited items in goods) may lead to the prohibition of the respective good or goods brought by relatives overall. However, the experts reasoned that such measures have the effect of collective punishment and are particularly problematic in countries/locations where prisoners depend on family members to bring food, medication and hygiene products.

### Restrictions on family visits

The experts noted that solitary confinement must not be compounded by restrictions on family contact unless strictly required for the maintenance of security and order (Rule 43(3)). Family contact in 43(3) must be understood to include visits and other means of contact as defined in Rule 58(1b).

The experts clarified that restrictions on family contact may be imposed if visiting rights were abused to break prison rules and regulations (e.g. a family member smuggling illegal items into the prison during the visit), but that restrictions should only be imposed on the particular family member involved, and not on the family as a whole.

The Essex group highlighted Principle 19 of the UN Body of Principles, which stipulates that access to the outside world can only be denied subject to reasonable conditions and restrictions as specified by law or lawful regulations.

For juveniles, the CPT has stressed that their 'contact with the outside world should never be denied as a disciplinary measure; nor should it be limited unless the disciplinary offence relates to such contact'.<sup>35</sup> The experts recalled Rule 23 of the Bangkok Rules which states that disciplinary sanctions for women prisoners shall not include a prohibition on family contact, especially with children.

→ See Chapter 3, Contact with the outside world – contact with family and friends/

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<sup>32</sup> Article 7(2) of the African Charter on Human and People's Rights; Article 5(3) of the American Convention on Human Rights.

<sup>33</sup> Inter-American Commission on Human Rights, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Principle XXII.4.

<sup>34</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. 37.

<sup>35</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *24th General Report of the CPT: 1 August 2013-31 July 2014*, Strasbourg, 2014.

restrictions

## Solitary confinement

The Essex group recalled the rationale for introducing provisions on solitary confinement in the course of the review of the SMR, in particular the severe and long-lasting damage isolation can cause to human beings. Medical research 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.<sup>36</sup>

The experts recalled that isolation and solitary confinement constitute a high-risk situation for human rights abuse.<sup>37</sup> It has also been found that placement in segregation or solitary confinement can increase the risk of suicide.<sup>38</sup> Furthermore, it was emphasised that solitary confinement/isolation is typically linked with limitations in access to family visits, work, educational, recreational, sports and other activities, which exacerbate its negative impact.

Therefore, a significant body of international law and standards has developed requiring restrictions of the use of solitary confinement, which the review of the Standard Minimum Rules incorporated into the Nelson Mandela Rules.<sup>39</sup>

In introducing this topic, the Essex group noted that the new provisions encapsulate absolute prohibitions of the practice of solitary confinement, but also further limitations. First and foremost, it should be imposed only 'in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority'.<sup>40</sup>

The experts stressed that prohibitions and limitations apply regardless of the purpose of the practice, i.e. whether applied as a disciplinary sanction, or citing safety and security reasons or the risk of interference with the course of justice pre-charge and/or pre-trial.

It was emphasised that the Rules apply irrespective of whether solitary confinement is imposed by the prison administration or as part of a judicially imposed sentence or

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<sup>36</sup> Grassian S, 'Psychiatric effects of solitary confinement', *Journal of Law and Policy*, Vol. 22, 2006, pp. 325-383 (*Psychiatric effects of solitary confinement*); Craig Haney, 'Mental health issues in long-term solitary and "supermax" confinement', *Crime & Delinquency*, Vol. 49, No. 1, 2003, pp. 124-156; Sharon Shalev, *A sourcebook on solitary confinement*, Mannheim Centre for Criminology, London School of Economics, 2008 (*A sourcebook on solitary confinement*); UN General Assembly, 66th Session, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, 5 August 2011, A/66/268 (*Special Rapporteur on Torture report 2011*).

<sup>37</sup> Penal Reform International/Association for the Prevention of Torture, *Balancing security and dignity in prisons: a framework for preventive monitoring: 2nd edition*, 2016, p. 14 (*Balancing security and dignity 2nd edition*).

<sup>38</sup> WHO/International Association for Suicide Prevention, *Preventing Suicide in Jails and Prisons*, Geneva, 2007, p.16.

<sup>39</sup> See, for example, Principle 7 of the Basic Principles for the Treatment of Prisoners 1990; the Human Rights Committee, 44th Session, *General Comment No. 20: Article 7: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, 30 September 1992; International Psychological Trauma Symposium, *Istanbul Statement on the use and effects of solitary confinement*, Istanbul, 9 December 2007 (*Istanbul Statement on solitary confinement*); Rule 22 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders; Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty; European Prison Rules, Rule 60(5); Principle XXII(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. The European Court of Human Rights has also recognised that 'complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason' (*Ilaşcu and others v. Moldova and Russia*, Application No. 48787/99, European Court of Human Rights (2004), para. 432).

<sup>40</sup> Rule 45 of the Nelson Mandela Rules.

disciplinary measure.<sup>41</sup> This means, among other things, that neither a prison administration nor a court may impose solitary confinement for more than 15 days.

The Essex group noted guidance on solitary confinement provided by the CPT in its 21st General Report (2011),<sup>42</sup> the Special Rapporteur on Torture's report on solitary confinement (2013),<sup>43</sup> and the *Sourcebook on Solitary Confinement*.<sup>44</sup>

The participants also took note of a chapter in the UNOPS *Technical Guidance for Prison Planning*, which compiles minimum requirements with regard to 'isolation cells', referencing the Nelson Mandela Rules and other international standards. The *Manual* points out that isolation cells must not be considered part of the overall prison capacity. Using an example, the *Manual* notes that a prison 'with regular housing units for 490 prisoners and 10 isolation cells can accommodate 490 and not 500 prisoners'. The participants noted guidance on operational and security considerations in the *Manual*.<sup>45</sup>

### Absolute prohibitions

The Essex group recalled absolute prohibitions of the use of solitary confinement, namely if it is:

- indefinite
- prolonged
- imposed on juveniles<sup>46</sup>
- imposed on pregnant women, women with infants and breastfeeding mothers in prison<sup>47</sup>
- imposed on 'prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures'
- applied by virtue of a prisoner's sentence, as is the case in some countries, for example for prisoners on death row or persons serving a life sentence<sup>48</sup>
- used as coercion intended to intimidate, to elicit cooperation or extract a confession within the justice system.<sup>49</sup>

The participants recalled the UN Special Rapporteur on Torture's report on solitary confinement, calling for a ban on prolonged and indefinite solitary confinement as incompatible with the prohibition of torture and other ill-treatment<sup>50</sup> and as a harsh measure that is contrary to rehabilitation, the aim of the penitentiary system.<sup>51</sup>

The experts clarified that the term 'indefinite solitary confinement' (Rule 43(a)) means that the person concerned does not know when this confinement will end.

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<sup>41</sup> *Special Rapporteur on Torture report 2013*, A/68/295, para. 61.

<sup>42</sup> *CPT 21st General Report*, [CPT/Inf (2011)], para. 53 onwards.

<sup>43</sup> *Special Rapporteur on Torture report 2011*, A/66/268.

<sup>44</sup> *A sourcebook on solitary confinement*.

<sup>45</sup> 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, p. 111 onwards.

<sup>46</sup> Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>47</sup> Rule 22 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

<sup>48</sup> Rule 45 of the Nelson Mandela Rules. This has been emphasised also by the Special Rapporteur on Torture, in e.g. *Special Rapporteur on Torture report 2013*, A/68/295, para. 61.

<sup>49</sup> Article 14(3)(g) of the International Convention on Civil and Political Rights.

<sup>50</sup> *Special Rapporteur on Torture report 2011*, A/66/268. The European Committee for the Prevention of Torture (CPT) has made comparable recommendations: *CPT 21st General report*, 1 August 2010–July 2011, November 2011.

<sup>51</sup> *Special Rapporteur on Torture report 2011*, A/RES/65/205, para. 79.

They looked at the definition of 'solitary confinement' in Rule 44 as 'the confinement of prisoners for 22 hours or more a day without meaningful human contact'.

The Essex group discussed elements that help determine what constitutes 'meaningful human contact' referred to in Rule 44, using the rationale of the provision and relevant documents from international human rights bodies.<sup>52</sup>

The term has been used to describe the amount and quality of social interaction and psychological stimulation which human beings require for their mental health and well-being. Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity.

Rule 5 provides another indicator for interpretation, stipulating as a general principle that '[t]he prison regime should seek to minimize any differences between prison life and life at liberty'.

The experts stressed that the provision needs to be interpreted in good faith and conscious of its intent and purpose. They emphasised that, therefore, it does not constitute 'meaningful human contact' if prison staff deliver a food tray, mail or medication to the cell door or if prisoners are able to shout at each other through cell walls or vents. In order for the rationale of the Rule to be met, the contact needs to provide the stimuli necessary for human well-being, which implies an empathetic exchange and sustained, social interaction. Meaningful human contact is direct rather than mediated, continuous rather than abrupt, and must involve genuine dialogue. It could be provided by prison or external staff, individual prisoners, family, friends or others – or by a combination of these.

The Essex group recalled that the absolute prohibition of solitary confinement had already been incorporated into standards for juveniles,<sup>53</sup> and for pregnant women, women with infants and breastfeeding mothers in prison.<sup>54</sup> Rule 45(2) reiterates the prohibition of solitary confinement in other UN standards, referring to the Bangkok Rules and the Beijing Rules.

For children, segregation has been found to be particularly traumatic,<sup>55</sup> and the imposition of solitary confinement on children, of any duration, has been considered to constitute cruel, inhuman or degrading treatment or punishment or even torture.<sup>56</sup> The Essex group noted a Council of Europe Recommendation, whereby young adults under the age of 21 would be

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<sup>52</sup> The concept of 'meaningful human contact' has been borrowed from the *Istanbul Statement on solitary confinement* and from the UN Committee against Torture. See *CAT SMR revision observations*, para. 34. The *Istanbul Statement on solitary confinement* states 'The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic'. See also *CAT SMR revision observations*, para. 34.

<sup>53</sup> Rule 67 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>54</sup> Rule 22 of the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). This is reflected also in Principle 22(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas which states that 'It shall be strictly forbidden to impose solitary confinement to pregnant women; mothers who are living with their children in the place of deprivation of liberty; and children deprived of liberty'.

<sup>55</sup> Council of Europe, *Commentary to the European Rules for juvenile offenders subject to sanctions or measures*, CM(2008)128 addendum 1, p. 34.

<sup>56</sup> UN Human Rights Council, 28th Session, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Mendez*, 5 March 2015, A/HRC/28/68, paras. 44, 86(d). Furthermore, research has indicated that solitary confinement, as a disciplinary measure, does not reduce violence among juvenile offenders detained in the youth prison. *Special Rapporteur on Torture report 2011*, A/66/268, with reference to Robert Wildeboer, 'The Impact of Solitary Confinement in a Youth Prison', *Inside and Out*, Chicago, 2010.

treated in a way comparable to the treatment of juveniles considering their level of maturity and responsibility for their actions.<sup>57</sup>

The prohibition of solitary confinement enshrined in the Bangkok Rules is based on evidence that the practice has a particularly harmful impact on the mental well-being of women prisoners, due to women's strong need for close contact with their children, as well as the health of pregnant women and women who have recently given birth, who need to receive appropriate pre- and post-natal care in suitable surroundings.<sup>58</sup>

The Essex group noted that there are also prohibited purposes of solitary confinement, namely if the measure were used 'intentionally for purposes such as punishment, intimidation, coercion or obtaining information or a confession, or for any reason based on discrimination'.<sup>59</sup>

### Prolonged solitary confinement

The Essex group discussed the absolute prohibition in Rule 43(1b) of prolonged solitary confinement, reiterating that the practice in itself amounts to torture or other cruel, inhuman or degrading treatment, as established by the UN Special Rapporteur on Torture.<sup>60</sup>

Prolonged solitary confinement is defined as solitary confinement in excess of 15 consecutive days (Rule 44).

The Essex group stressed that the prohibition applies to periods of isolation imposed in close succession, and pointed to the recommendation of the CAT that there should be a prohibition on sequential disciplinary sentences resulting in an uninterrupted period of solitary confinement in excess of the maximum period.<sup>61</sup>

The Special Rapporteur on Torture has also stressed that the prohibition should include 'frequently renewed measures that amount to prolonged solitary confinement'.<sup>62</sup>

The Essex group pointed out that in the case of a transfer from one prison to another the maximum time limit still applies.

Furthermore, the participants pointed to the effect of 'prolonged solitary confinement' based on '[a]dvancements in new technologies', which 'have made it possible to achieve indirect supervision and keep individuals under close surveillance with almost no human interaction'.<sup>63</sup>

### Mental and physical disabilities

The Essex group discussed Rule 45 (2) which prohibits the use of solitary confinement of 'prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures'.

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<sup>57</sup> Council of Europe, Council of Europe Recommendation Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rule 11.

<sup>58</sup> Penal Reform International and Thailand Institute of Justice, *Guidance Document: United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)*, London and Bangkok, October 2013, p. 66.

<sup>59</sup> *Special Rapporteur on Torture report 2013*, A/68/295, para. 60.

<sup>60</sup> *Special Rapporteur on Torture report 2011*, A/66/268, e. g. paras. 21, 58 and 81.

<sup>61</sup> CAT SMR revision observations, para. 33.

<sup>62</sup> *Special Rapporteur on Torture report 2013*, A/68/295, para.61.

<sup>63</sup> *Special Rapporteur on Torture report 2011*, A/66/268, para. 55.

With regard to prisoners with mental disabilities the experts referred to the Special Rapporteur on Torture who has drawn attention to the fact that solitary confinement often severely exacerbates mental disabilities, and that '[p]risoners with mental health issues deteriorate dramatically in isolation'.<sup>64</sup>

The Rapporteur has therefore held that the imposition of solitary confinement, 'of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment and violates Article 7 of the Covenant and Article 16 of the Convention [against Torture]'. He has therefore called for the abolition of the use of solitary confinement for persons with mental disabilities.<sup>65</sup>

Calls for a prohibition of solitary confinement 'in the case of prisoners with mental illness' and of 'persons with mental disabilities' have been made by the SPT,<sup>66</sup> and also in the Istanbul Statement on the Use and Effects of Solitary Confinement 2007.<sup>67</sup>

### Further limitations on use of solitary confinement

Where no absolute prohibition applies, solitary confinement should still only be imposed 'in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority' (Rule 45).<sup>68</sup>

This has been emphasised also by the Special Rapporteur on Torture and the CAT.<sup>69</sup>

The experts recalled the commitment of the Basic Principles for the Treatment of Prisoners 'towards the abolition of solitary confinement or the reduction of its use'.<sup>70</sup> The Istanbul Statement on the Use and Effects of Solitary Confinement, the European Prison Rules<sup>71</sup> and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas all reiterate that solitary confinement should be used only in very exceptional cases, as a last resort and for as short a time as possible, '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'.<sup>72</sup>

The CPT added guidance by stating that, '[g]iven that solitary confinement is a serious restriction of a prisoner's rights which involves inherent risks to the prisoner, the level of actual or potential harm must be at least equally serious and uniquely capable of being addressed by this means'.<sup>73</sup>

### Procedural safeguards

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<sup>64</sup> *Special Rapporteur on Torture report 2011*, A/66/268, para. 68, quoting *A Sourcebook on Solitary Confinement*, pp. 10, 26; and *Psychiatric effects of solitary confinement*.

<sup>65</sup> *Special Rapporteur on Torture report 2011*A/66/268, paras. 78, 81 and 86.

<sup>66</sup> SPT, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay*, 7 June 2010, CAT/OP/PRY/1, para. 185.

<sup>67</sup> *Istanbul Statement on the use and effects of solitary confinement*, adopted on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul.

<sup>68</sup> Rule 45 Nelson Mandela Rules.

<sup>69</sup> *Special Rapporteur on Torture report 2013*, A/68/295, para. 60; *CAT SMR revision observations*, CAT/C/51/4, para. 32.

<sup>70</sup> Principle 7 of the UN Basic Principles for the Treatment of Prisoners 1990.

<sup>71</sup> European Prison Rules 2006, 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'.

<sup>72</sup> Principle XXII (3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

<sup>73</sup> *CPT 21st General Report*.

The CPT has pointed out that clear disciplinary procedures need to be both formally established and applied in practice, and that any grey zones in this area involve the risk of seeing unofficial (and uncontrolled) systems developing.<sup>74</sup>

The Essex group noted that under the Rules, solitary confinement must be 'subject to independent review, and only pursuant to the authorization by a competent authority'. The participants recalled that this principle has been enshrined in Rule 41(4) for disciplinary sanctions in general, but is reiterated in Rule 45(1), clarifying that it applies to solitary confinement regardless of the reason for which this measure is imposed.<sup>75</sup>

Referring to their discussions at the first expert meeting, the Essex group stressed that such reviews need to be substantive and comprehensive assessments, rather than a brief schematic review.<sup>76</sup>

## Reducing the negative impact of sanctions and restrictions

### Compensatory measures

The Essex group drew attention to Rule 38(2) which calls on prison administrations to establish 'compensatory measures' for prisoners separated from the general prison population in order to 'alleviate the potential detrimental effects of their confinement on them and on their community following their release from prison.'<sup>77</sup>

With regard to solitary confinement, the European Court of Human Rights has also called on states to 'take steps to reduce the negative impact'.<sup>78</sup>

This means that prison administrations should put effort into raising the level of meaningful social contacts with others,<sup>79</sup> for example by facilitating more visits and access to social activities with other prisoners, by arranging talks with social workers, psychologists, psychiatrists, volunteers from NGOs, from the local community, or religious prison personnel, if so wished by the prisoner. Regular contact with family members through visits, letters, phone calls or emails are crucial for detainees. The provision of meaningful in-cell and out-of-cell activities, such as educational, recreational and/or vocational programmes, are equally important to prevent infringements of prisoners' dignity and health, and will have a positive effect on levels of violence.<sup>80</sup>

### Monitoring/inspections

Given the particular risk of torture and other ill-treatment in solitary confinement, the Essex group pointed to the particular attention that monitoring bodies should pay to prisoners in isolation.

The participants referred to guidance in a thematic paper published by PRI and APT,

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<sup>74</sup> CPT 2nd General Report, [CPT/Inf (92) 3], para. 55.

<sup>75</sup> Principle 22(3) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas also states that 'In all cases, the disposition of solitary confinement shall be authorized by the competent authority and shall be subject to judicial control'.

<sup>76</sup> University of Essex/ Penal Reform International, *Summary of Expert meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review*, 21 November 2012, UN-Doc. UNODC/CCPCJ/EG.6/2012/NGO/1, pp. 20-21 (Essex 1).

<sup>77</sup> Rule 38(2) of the Nelson Mandela Rules.

<sup>78</sup> *Mathew v. Netherlands*, Application No. 24919/03, para. 202.

<sup>79</sup> *Istanbul Statement on solitary confinement*, p. 4.

<sup>80</sup> *Balancing security and dignity 2nd edition*, p. 15.

recommending that:

*'Monitors should ensure that their visits include a thorough examination of the use of isolation, segregation and solitary confinement, including its frequency and length. They should closely review the classification systems, and decisions to isolate prisoners, including whether these are based on an individual risk assessment. The use of isolation for 'protection' of vulnerable groups should be examined carefully.*

*Monitoring bodies should also pay particular attention to the conditions in segregation units and their impact on the mental well-being of the prisoners, examining in particular the possibility for detainees to maintain meaningful human contact. Furthermore, monitoring bodies should inquire whether segregation is applied in a discriminatory way towards certain groups or individuals.'*<sup>81</sup>

The experts added that prison inspectors (Rules 83-85) need to have access to the prisoner's file, including to information about the use of disciplinary procedures, the records of sanctions and restrictive measures imposed. Their assessment should include recommendations on the proportionality of disciplinary sanctions.<sup>82</sup>

The CAT has stressed that '[q]ualified medical personnel should regularly monitor every detainee's physical and mental condition after solitary confinement has been imposed and should also provide such medical records to the detainees and their legal counsel upon request'.<sup>83</sup>

## Record-keeping

The Essex group emphasised the importance of record-keeping for disciplinary procedures and sanctions as a part of due process. This is supported by the Rules on prisoner files (Rules 8 (c, e) and 39 (2)), which call for the recording of information 'related to behaviour and discipline' and 'the imposition of disciplinary sanctions'.<sup>84</sup>

Rule 19 of Beijing Rules details that '[a]ll reports, including (...) records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment, should be placed in a confidential individual file, which should be kept up to date.'

More detailed guidance with regard to the documentation of solitary confinement has been provided by the Special Rapporteur on Torture, who stated, that:

*'All assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the source of his or her legal attributes to impose it, a statement of underlying justification for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person's mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular review of the justification for solitary*

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<sup>81</sup> *Balancing security and dignity 2nd edition*, p. 15.

<sup>82</sup> Rule 84 (1a) of the Nelson Mandela Rules according to which inspectors shall have the authority: 'To access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention'.

<sup>83</sup> CAT SMR revision observations, CAT/C/51/4, para. 34.

<sup>84</sup> See also Rule 70 of the Beijing Rules which states that 'Complete records should be kept of all disciplinary proceedings'.



*confinement, and medical assessments of the detained person's mental and physical health.*<sup>85</sup>

## Instruments of restraint

Drawing on the second 'Essex paper' and referring to discussions on the use of force (See Chapter 6, Incident management) the experts noted that international law recognises certain legitimate reasons for using force or restraints such as to protect prisoners or staff, to prevent escape, to prevent self-harm and suicide and in self-defence.

However, the experts emphasised that international law only permits the use of force and restraints in very narrow and exceptional circumstances, in line with the principles of legality, necessity and proportionality and when all other methods have been exhausted and no alternatives remain. The use of force and of restraints are 'clearly high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards'<sup>86</sup> – as the CPT has diagnosed.

The Essex group discussed the update to provisions on the use of instruments of restraint, and noted overarching principles<sup>87</sup> which apply to the use of force, of arms and of instruments of restraints, measures that are often used in combination by staff responding to incidents. (See Chapter 6, Incident Management – Use of force and arms):

- prohibition of certain methods/instruments
- legality
- necessity
- proportionality
- use in the least painful way, not causing humiliation or degradation.

The Essex group recalled the prohibition of the use of restraints that are 'inherently degrading or painful' (Rule 47(1)), which derives from the general prohibition of torture and other cruel, inhuman or degrading treatment or punishment. They emphasised that such cases foreclose the invocation of considerations of necessity or proportionality to ever justify their use.

The experts noted the explicit prohibition of chains and irons as illustrative examples of instruments of restraint which have been considered inherently degrading and painful. They emphasised that the absence of a longer list of prohibited items merely reflects reasons of practicality. They referred to their second expert meeting, where they had noted the 'challenges involved in updating the lists of prohibited instruments and methods of restraint' as terminology varies between states and technology is always evolving with the risk that the list becomes quickly outdated and under-inclusive.<sup>88</sup>

The Essex group stressed that the term 'instruments of restraint' should be interpreted to include all forms of restraint, including chemical restraints, and noted the prohibition in the Beijing Rules of administering medicines as a means of restraint.<sup>89</sup>

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<sup>85</sup> *Special Rapporteur on Torture report 2011A/66/268*, para. 93.

<sup>86</sup> *CPT 2nd General Report*, CPT/Inf (92) 3, para. 53.

<sup>87</sup> *Balancing security and dignity 2nd edition*.

<sup>88</sup> *Essex 2*, para. 48.

<sup>89</sup> Rule 55 of the UN Rules for the Protection of Juveniles Deprived of their Liberty states that medicines 'must not be administered with a view to eliciting information or a confession, as a punishment or as a means of restraint'.

The experts recalled the prohibition of instruments of restraint being used on women during labour, during childbirth and immediately after childbirth, enshrined in Rule 48(2) as well as in Rule 24 of the Bangkok Rules. They recommended this principle to be expanded to late pregnancy and noted that the prohibition has been introduced to account for the fact that the use of restraints on women in such situations raises concerns about degrading treatment as well as medical complications. They noted that women in labour need to be mobile to assume various positions and so they can be moved to an operating room quickly if necessary.<sup>90</sup>

Drawing on the first 'Essex paper' the experts recalled that body-worn electro-shock belts,<sup>91</sup> which by their nature inflict severe physical pain and mental suffering and due to their humiliating and degrading effect, have been increasingly condemned and their use nowadays has been abandoned in most states.<sup>92</sup> The CAT 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.<sup>93</sup> 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.'<sup>94</sup> 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'.<sup>95</sup>

The Essex group stressed the requirements of legality (prescription by law), necessity and proportionality: these are invoked in Rules 47(2) and 48, and provided for in the Code of Conduct for Law Enforcement Officials<sup>96</sup> and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,<sup>97</sup> which continue to supplement the revised SMR.

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<sup>90</sup> See concerns detailed by Dr Garcia, obstetrician and gynaecologist at Northwestern University's Prentice Women's Hospital: 'Having the woman in shackles compromises the ability to manipulate her legs into the proper position for necessary treatment. The mother and baby's health could be compromised if there were complications during delivery, such as haemorrhage or decrease in fetal heart tones. If there were a need for a C-section (caesarean delivery), the mother needs to be moved to an operating room immediately, and a delay of even five minutes could result in permanent brain damage for the baby'. (Statement provided to Amnesty International by Chicago Legal Aid to Incarcerated Mothers, December 1998, in Amnesty International, *Not part of my sentence: Violations of the Human Rights of Women in Custody*, March 1999, AI Index: AMR 51/01/99); see also American College of Obstetricians and Gynaecologists, *Committee Opinion Number 511, Reaffirmed 2016*, November 2011.

<sup>91</sup> Body-worn electro-shock devices (for example belts, sleeves, cuffs) encircle various parts of the subject's body (usually the waist, but variants have been developed to fit on legs or arms) and deliver an electric shock when a remote control device is activated.

<sup>92</sup> *Essex 1*, pp. 25, 26.

<sup>93</sup> UN Committee against Torture, for example, 23rd and 24th Sessions, *Report of the Committee against Torture: Consideration of reports submitted by States Parties under article 19 of the Convention: M. United States of America, May 2000, A/55/44*, para. 180(c).

<sup>94</sup> CPT, *20th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* [CPT/Inf(2010)28], para. 74; 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.

<sup>95</sup> European Union, *Council Regulation (EC) No. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*, 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'.

<sup>96</sup> 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 'In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved'.

<sup>97</sup> 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.

These principles have also been enshrined in the Beijing Rules.<sup>98</sup>

The Essex group noted that Rule 47(2) limits the cases of lawful use of restraints to:

- a) precaution against escape during a transfer (note restrictions before courts etc)
- b) instances where other methods of control fail to prevent self-injury, injury to others or damage to property (note restrictions).

The experts recalled that health-care personnel must not play any role in the application of sanctions or restrictive measures, including instruments of restraint, and that therefore, in the course of the SMR review, their use on 'medical grounds' has been deleted.

The Essex group reiterated the recommendation of their second meeting, that the principle of legality requires detailed procedures in national law under regular review, laying out the types of restraints that may be used, the circumstances in which each type may be applied, the members of staff who are authorised to take respective decisions and which clarify the recording requirements (see also Rule 8(c, e)).<sup>99</sup>

Recalling the negotiations on this provision, the Essex group noted that Rule 48(1a) encapsulates the principle of necessity in that it limits the use of instruments of restraint to situations where 'no lesser form of control would be effective to address the risks posed by unrestricted movement'.

The experts recalled guidance provided by the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which uses the formulation 'if other means remain ineffective or without promise of achieving the intended result', and only where use of force is 'unavoidable'.

They also highlighted the relevance, in this regard, of Rule 49, which requires the provision of 'training in the use of control techniques that would obviate the need for the imposition of instruments of restraint or reduce their intrusiveness'.

The Essex group referred to Rule 48(1b) which captures the principle of proportionality in more practical terms, i.e. the method of restraint used must be the 'least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed'.

It was further noted that the principles of necessity and proportionality imply an assessment on an individual, case-to-case basis and a regular review. This is captured in Rule 48(1c), which determines that instruments of restraint shall be 'imposed only for the time period required', i.e. they have to be 'removed as soon as possible after the risks posed by unrestricted movement are no longer present'.

Furthermore, it was emphasised that even if the use of instruments of restraint is legal, necessary and proportionate it must be applied in the least painful way. The Beijing Rules, for example, reflect this by stating that their use 'should not cause humiliation and degradation'. They also add the requirement that 'the director should at once consult medical and other relevant personnel and report to the higher administrative authority'.<sup>100</sup>

Rule 47 (2b) requires not only that the physician or another qualified health-care professional be alerted to the situation, but also that they personally check on the individual concerned.

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<sup>98</sup> Rule 64 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>99</sup> *Essex 2*, p. 13.

<sup>100</sup> Rule 64 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

It was emphasised that in order to be in a position to apply these principles prison staff need to be provided with appropriate practical training, as is enshrined in Rule 49 and Rule 76(1c). (See Chapter 2, Prison Management)

## Role of medical personnel

The Essex group highlighted Rule 46, which is dedicated to the role of health-care personnel in the context of disciplinary sanctions and other restrictive measures. The experts stressed that these provisions apply to both (disciplinary) sanctions and ‘other restrictive measures’ and irrespective of the type of sanction or restriction, including instruments of restraint.

The experts noted that the provision has been informed by 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, and in particular Principle 5 which states that:

*‘[I]t is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.’<sup>101</sup>*

The Essex group pointed out that the Nelson Mandela Rules have sought to reconcile the tension between this principle and the specific duty of care towards prisoners under such measures. While required to pay ‘particular attention to the health of prisoners held under any form of involuntary separation, including by visiting such prisoners on a daily basis’ they ‘shall not have any role in the imposition of disciplinary sanctions or other restrictive measures’.

At the same time, health-care personnel should report adverse effects of such measures to the director of the facility, without delay, and have the authority to review and recommend changes ‘to ensure that such separation does not exacerbate the medical condition or mental or physical disability of the prisoner’.<sup>102</sup>

→ See Chapter 4, Health-care – medical ethics

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<sup>101</sup> 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, adopted by UN General Assembly resolution 37/194 of 18 December 1982.

<sup>102</sup> *Balancing security and dignity*, 2nd edition, p. 15, with reference to Rule 46 of the Mandela Rules.