1. Dignity

Issues/rules covered:
- Prohibition of torture and other ill-treatment (Rule 1)
- Conduct in case of death of a prisoner (Rule 72)
- Searches of prisoners, cells and visitors (Rules 50-52, 60)
- Non-discrimination (Rule 2)
- Prisoners with Disabilities (Rules 5(2) and 109)

This chapter addresses the meaning and scope of a number of new rules introduced in the Nelson Mandela Rules that require respect for the inherent dignity of prisoners. These include the introduction of an overarching framework on human dignity and the specific rules listed above.

Due to time constraints, the Essex Group was unable to discuss of the new Rules that address human dignity. These included Rules 29 (children accommodated in prison with their parent), Rules 96 and 97 (on work in prisons and the prohibition of slavery) and the protections and treatment necessary to protect prisoners and groups in positions of vulnerability. The Group noted the importance of developing guidance on the interpretation of these Rules and recalled previous coverage of these issues in the first and second reports produced by the Essex Group as submissions to the UN when developing the revised SMR.¹

Overarching Requirement to Respect Human Dignity

The Nelson Mandela Rules contain a new section entitled ‘Basic Principles’. The Essex Group of Experts underscored that the concepts contained in Rules 1 to 5 of this new section should not be seen as abstract. Rather, together they provide an overarching description of the concrete action states are required to take to ensure respect for prisoners' inherent human dignity.

The Essex Group noted the significance of the fact that the requirement to ‘respect human dignity’ is the very first standard set out in the new Rules. They pointed to Article 1 of the Universal Declaration of Human Rights which provides that, ‘[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’. They noted that ‘human dignity’ is not a

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singular rule but a general principle that underpins all of the Rules. This means that each Rule within the Nelson Mandela Rules can be interpreted as a detailed description of how dignity should be respected within prison.

The UN Special Rapporteur on Torture has noted that,

The principle of humane treatment of persons deprived of liberty constitutes the starting point for any consideration of prison conditions and the design of prison regimes. It complements and overlaps the principle on the prohibition of torture and other ill-treatment by requiring States (and consequently the prison authorities) to take positive measures to ensure minimum guarantees of humane treatment for persons in their custodial care (see Human Rights Committee general comment No. 21, para. 3). Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule, the application of which, at a minimum, cannot be dependent on the material resources available in the State party to the International Covenant on Civil and Political Rights (para. 4).2

Rules 1 to 5 of the Nelson Mandela Rules explain that states not only have negative duties to ensure that the treatment of prisoners does not offend human dignity but also positive obligations that require the prison administration to take specific action to protect prisoners’ dignity. These positive duties are set out throughout the Rules. For example, Rules 12 to 21 address basic issues fundamental to a prisoner’s inherent dignity on accommodation, hygiene, clothing and food, requiring the prison administration to take positive action such as:

- Ensuring that ‘all parts of the prison regularly used by prisoners [including cells, bathrooms and eating areas are] properly maintained and kept scrupulously clean at all times’3;
- Providing prisoners ‘with water and toilet articles as are necessary for health and cleanliness’4;
- Where a prisoner is not ‘permitted to where his or her own clothing’, providing him or her with adequate and clean clothing suitable for the climate5;
- Ensuring all prisoners have their own bed and ‘separate and sufficient bedding’6;
- Providing prisoners with drinking water whenever needed and ‘food of nutritional value adequate for health and strength, of wholesome quality’.7

The Essex Group pointed to the fundamental power imbalance between the prison administration and prisoners as imprisonment is a regime enforced upon prisoners, thereby placing their human dignity at constant risk. Certain acts or omissions by the prison

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3 Rule 17.
4 Rule 18(1).
5 Rules 19 and 20.
6 Rule 21.
7 Rule 22.
administration inherently violate human dignity, such as torture and other cruel, inhuman or degrading treatment or punishment ('other ill-treatment') or a failure to provide adequate sanitary facilities.

Other types of conduct may violate the principle in certain circumstances depending on how it is carried out, such as searches of cells, prisoners or the use of restraints. However, the need to treat prisoners with human dignity extends further than these specific instances; it applies to all activities and interactions in prisons. It therefore covers issues such as ensuring prisoners have adequate clothing, ensuring that female prisoners do not have to ask for sanitary pads, and the way in which prison staff speak to prisoners (for example by not using terms such as ‘inmate’, ‘felon’ or ‘convict’).

The Essex Group noted the need for training for prison staff to understand how the requirement to treat prisoners with human dignity cuts across all aspects of their work and how to incorporate it into their duties and responsibilities on a day-to-day basis.

Minimising the Difference between Life in Prison and at Liberty

Rule 5(1) requires the prison administration to minimise the differences between prison life and ‘life at liberty’. The Rule provides two justifications for this requirement. First, to avoid lessening the ‘responsibility of prisoners’. This connects to the importance of ensuring released prisoners can reintegrate into society through maintaining their ability to make decisions autonomously and preventing institutionalisation and dependence on prison life and routine. Second, Rule 5(1) connects to Rule 1 in referencing the requirement to respect prisoners’ human dignity. The requirement to respect human dignity is the first positive instruction to the prison administration in the Rules.

Imprisonment does not provide the prison administration with free rein to deny all rights. Imprisonment itself is the punishment; prisoners are not imprisoned for further forms of punishment. Therefore, any restrictions or limitations that differ from life in the outside world must be necessary to advance a legitimate aim and be necessary and proportionate. For example, the European Court of Human Rights has found that many fundamental rights cannot be subject to blanket restrictions because of ‘[t]he mere fact of imprisonment … [such as] the right of a prisoner to correspond … to have effective access to a lawyer or to court … to have access to his family … to practise his religion … to exercise freedom of expression … or to marry.’

Similarly, the Basic Principles for the Treatment of Prisoners provide that:

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

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9 Council of Europe: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT standards, 2015 (CPT/Inf/E (2002) 1 - Rev. 2015) Staff – prisoner relations. at para. 26, noting that: ‘[t]he cornerstone of a humane prison system will always be properly recruited and trained prison staff who know how to adopt the appropriate attitude in their relations with prisoners and see their work more as a vocation than as a mere job’. Available at: http://www.cpt.coe.int/en/documents/eng-standards.pdf (CPT Standards)

10 See Hirst v. UK (No 2), Application No. 74025/01 (ECHR, 6 October 2005) at para 69.

11 Principle 5.
Rule 5(1) provides a way for prison officials to test whether any form of treatment that differs from 'life at liberty' is legitimate and necessary, and to assess its impact on a prisoner’s self-determination and human dignity. It directs prison officials to think positively about ways to minimise the difference between prison life and life at liberty. The Essex Group noted that those in the community/outside world and those in prisons have a fundamental right to human dignity. This fundamental right underpins all other human rights such as the right to an adequate standard of living, adequate healthcare, a right to education, a right to family life and a right to work. They noted that where the standards of living and opportunities in the community are low, this does not remove the prison administration’s obligation to ensure that prisoners are able to exercise these rights. Rather, it must ensure that specific opportunities are available for work, family life, education and communication with the outside world. This aligns with the European Prison Rules that provide that ‘life in prison shall approximate as far as possible the positive aspects of life in the community’. It also connects to the objective of rehabilitation in preparing prisoners to undertake socially responsible roles on release.

Safety and Security

Rule 1 provides that the ‘safety and security of prisoners, staff, service providers and visitors shall be ensured at all times’. Personal safety is the bedrock of dignity. The Essex Group recalled that states have to ensure that prisoners, staff, service providers and visitors are safe and secure. They noted that safety and security should not be interpreted solely as protection from violence but also from threats, exploitation, abuse, theft, humiliation or any other form of victimization (whether by staff or a fellow prisoner). As noted in the second paper of the Essex Group, it also requires safety and security of infrastructure from ‘the condition of the prison estate (e.g. dilapidated buildings), the risks arising from prisoners’ belongings, fire hazards (e.g. smoking or use of unauthorised electrical equipment such as cooking stoves and non-fire resistant/proof mattresses) as well as procedures and evacuation policies in case of fire or natural disaster’. These obligations are addressed in greater detail in Chapter 6.

The Essex Group noted the relationship between the safety and security clause in Rule 1 and the requirement to ensure the human dignity of prisoners. In this respect, they suggested that when prisons are being refurbished or new prisons built, the human dignity, safety and security of prisoners should be taken into account including ensuring that they comply with the requirements of the Nelson Mandela Rules on accommodation.
example, what might have been acceptable at the time older prisons (such as in the 19th Century) were built may not be appropriate today.

**Prohibition of Torture and Other Ill-Treatment**

The revised Standard Minimum Rules on the Treatment of Prisoners explicitly incorporate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (‘other ill-treatment’) into Rule 1. This is an absolute prohibition under international law, permitting no exceptions. It is defined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Essex Group noted that the prohibition of other ill-treatment should not be understood as an abstract concept or one that does not carry the gravitas of the label of torture. It is a firmly established principle in international law with many illustrative cases decided by the regional human rights courts and commissions and UN treaty bodies. As the UN Special Rapporteur on Torture has pointed out, the prohibition of other ill-treatment covers:

> conditions of detention [that] can amount to inhuman and degrading treatment. Overcrowding, lack of ventilation, poor sanitary conditions, prolonged isolation, the holding of suspects incommunicado, frequent transfers from one prison to another, the non-separation of different categories of prisoners, the holding of persons with disabilities in environments that include areas inaccessible to them and the holding of persons without means of communication could constitute or lead to cruel, inhuman or degrading treatment or torture.

The type of conduct or omission that falls within the prohibition of other ill-treatment continues to develop with society’s standards. Therefore, what might have been seen as acceptable treatment or conditions for prisoners 20 years ago will not necessarily be seen as acceptable today.

As made clear by the UN Special Rapporteur on Torture, the prohibition of other ill-treatment does not only cover intentional physical and/or mental ill-treatment that does not reach the level of torture but also covers poor conditions of imprisonment, irrespective of whether

21 Article 7 of the ICCPR; Article 2 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; Article 5 of the African Charter on Human and People’s Rights 1981; Article 7 of the American Convention on Human Rights 1969; Article 3 of the European Convention on Human Rights 1950 (ECHR).

22 For examples, see Inter-American Court of Human Rights, Case of Cantoral Benavides v Peru (18 August 2000); Ireland v. the United Kingdom, Application no. 5310/71 (ECHR, 18 January 1978); UN Human Rights Committee, Vuolanne v. Finland, Communication No. 265/1987 (2 May 1989)

23 Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. at para 45.

these are imposed intentionally, purposefully or for a reason based on discrimination.\textsuperscript{25} It provides a framework not just for what prison staff must do and refrain from doing but also what prisoners do to themselves and to each other and to the treatment of visitors.\textsuperscript{26}

A violation of the prohibition of other ill-treatment cannot be justified on grounds of lack of resources which is critical on issues such as overcrowding and inadequate food, healthcare and accommodation. For example, citing the Inter-American Court on Human Rights, the UN Special Rapporteur on Torture has noted that:

\begin{quote}
Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule, the application of which, at a minimum, cannot be dependent on the material resources available in the State party to the International Covenant on Civil and Political Rights (para. 4). In this regard, the Inter-American Court of Human Rights has consistently affirmed that States cannot invoke economic hardship to justify imprisonment conditions that do not comply with the minimum international standards and respect the inherent dignity of the human being.\textsuperscript{27}
\end{quote}

While recognizing that penitentiary systems are almost universally severely underfunded and suffer from decades of accumulated problems, the Special Rapporteur recalls that a lack of financial resources cannot be an excuse for not refurbishing detention facilities, purchasing basic supplies and providing food\textsuperscript{5} and medical treatment, among other things.\textsuperscript{28}

→ See Chapter 4, Healthcare – Rule 34

**Principle of Non-Discrimination**

The Essex Group noted that the non-discrimination clause in Rule 2 provides specific illustration of forms of discrimination but also includes the clause ‘or any other status’. The inclusion of the clause ‘any other status’ is in line with a number of other international instruments. In common with these instruments, the list provided is illustrative and not exhaustive.

The Essex Group noted that while the list of illustrative grounds for discrimination was not changed from the original text of the SMR during the revision process, the word ‘any’ was added. This underscores states’ intention to clarify that the term ‘discrimination’ should be understood as reflecting and recognising the current meaning of the term in international law and standards, as it continues to expand.

For example, existing international human rights standards and norms prohibit discrimination on one or more grounds such as race, colour, sex, language, religion or conviction, political or other opinion or belief, membership of a particular social group,

\begin{itemize}
\item \textsuperscript{25} For example, see \textit{V. v. U.K Application no. 24888/94} (ECHR, 16 December 1999), para. 71
\item \textsuperscript{26} For examples of inter-prisoner violence cases, see \textit{Pantea v Romania} Application No. 33343/96 (ECHR, 3 June 2003) and \textit{DF v Latvia} Application no. 11160/07 (ECHR, 29 October 2013); For examples on self-harm, see \textit{Keenan v. the United Kingdom} Application no. 27229/95(ECHR, 3 March, 2001) and \textit{Renolde v France} Application no. 5608/05 (ECHR, 16 October 2008); and on treatment of visitors, see \textit{Wainwright V. The United Kingdom} Application no. 12350/04 (ECHR, 26 September 2006)
\item \textsuperscript{27} \textit{Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} at para. 35.
\item \textsuperscript{28} \textit{Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} at para. 46.
\end{itemize}
status, activities, descent, national, ethnic, indigenous or social origin, nationality, age, economic position, property, disability, marital status, sexual orientation, gender identity or birth. This list is also not exhaustive but illustrates the ongoing interpretation of the ‘any other status’ provision within international human rights standards and norms.

The Essex Group noted, therefore, that ‘or any other status’ must be interpreted as widely as possible in line with current international law and standards. As with human dignity, the Rule on non-discrimination is not a stand-alone provision but one that must be read together with all of the Nelson Mandela Rules.

**Conduct in Case of Death of a Prisoner**

Rule 72 requires that the prison administration treat ‘the body of a deceased prisoner with respect and dignity’. The underlying rationale for this Rule is that the human dignity of the prisoner must be respected following his or her death. Implicit in Rule 72 and the Rules general is also the duty to treat the family of a deceased prisoner with respect.

The Essex Group noted that prison officials should be trained in how to deal with a body in the same way in which a body is dealt with in an investigation outside of the prison context and that these practices should be followed within the prison.

The Rule specifies that the body should be returned ‘as soon as reasonably possible, at the latest upon completion of the investigation’. The Essex Group noted that this provides an upper time limit for the return of the body as there is no justification for keeping a body beyond the period of the investigation. However, in many situations, the experts noted that it may be possible to organise the investigation so that the body is dealt with first. This would enable it to be returned much earlier. In all cases, the Essex Group noted that the prison

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29 The illustrative but non-exhaustive lists contained in international norms and standards include, Article 1(1) International Convention on the Elimination of all forms of Racial Discrimination 1965 ‘…based on race, colour, descent, or national or ethnic origin…’; Article 2(1) ICCPR ‘…such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’; Article 26 ICCPR ‘…on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’; Article 2(2) International Convention on Economic, Social, and Cultural Rights 1966 ‘…as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’; Article 1(1) Convention for the Elimination of all forms of Discrimination Against Women 1979 ‘…on the basis of sex …’; Article 2(1)-2(2) Convention on the Rights of the Child 1989 ‘…without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ ‘…to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.’; Article 1(1) International Convention on the Protection of the Rights of All Migrant Workers and Their Families 1990 ‘…without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.’; Article 13(7) International Convention for the Protection of All Persons from Enforced Disappearance 2006 [concerning the prohibition against extradition] ‘…for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.’; International Convention on the Rights of Persons with Disabilities, Preambular paragraph (p) ‘Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status’; on sexual orientation and gender identity as a form of discrimination see, United Nations Human Rights Council, Resolution regarding human rights, sexual orientation and gender identity, A/HRC/17/L.9/Rev.1, (15 June 2011) and Declaration on human rights, sexual orientation and gender identity, United Nations General Assembly A/63/635 (22 December 2008).

30 UNOPS, Technical Guidance for Prison Planning, at 157 (providing that, ‘[p]risons may require a facility where prisoners who have died can be prepared for burial or cremation, or where they can be stored while awaiting family arrangements’).
should respect the relevant religious and cultural norms regarding the proper treatment of the body of a deceased person.

**Searches of Prisoners, Cells and Visitors**

Rule 1 on the requirement to respect human dignity frames how the specific rules on searches of prisoners, cells and visitors in Rules 50 – 52 and 60 should be interpreted and applied. These Rules cover whether searches should be carried out in the first place and when they are, how they are conducted.

**Types of Searches**

Searches cover all personal searches, including pat down and frisk searches, as well as strip and invasive searches. A strip search refers to the removal or rearrangement of some or all of the clothing of a person so as to permit a visual inspection of a person’s private areas. Invasive body searches involve a physical inspection of the detainee’s genital or anal regions. Other types of searches include searches of the property and rooms of prisoners. Visitors to prison are also frequently searched.

**Searches as a Last Resort and the Use of Alternatives**

The Essex Group recalled that international standards and norms set out clear requirements on when searches are legal, proportionate and necessary. The Essex Group recalled the second Essex paper that emphasized the requirement for the prison administration to ensure that alternatives to searches (and other invasive measures) are in place so that searches are a means of last resort.

The Essex Group also emphasised the particular position of vulnerability in which women are placed with regard to body searches, especially of an invasive nature. This vulnerability arises because of the way in which body searches are conducted (for example, requiring women to remove items of clothing and lifting their breasts) as well as reasons such as prior abuse. These risks again underscore the importance of prioritizing alternatives to searches and ensuring that searches are used only as a last resort as well as the importance of complying with Rule 19 of the Bangkok Rules that require searches of women to be conducted by women staff.

A fact-sheet by the Association on the Prevention of Torture and Penal Reform International sets out a list of concrete questions for prison officials to ask themselves when assessing if a search is necessary in the first place and if they are to be carried out, how and by whom in line with the NMR and international standards and norms.

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32 *Second Report of the Essex Group of Experts*, at paras. 9 and 72.

General Principles for the Conduct of Searches

Rule 50 of the Nelson Mandela Rules provides that searches must be respectful of the ‘inherent dignity and privacy of the individual being’. The Essex Group emphasized that searches must be conducted in line with the prohibition of torture and other ill-treatment and the right to health.

The Essex Group noted that searches should be conducted in a designated search room in a prison facility where a prisoner can be searched with dignity away from the sight of other prisoners. They pointed out that international standards and norms require that strip-searches must never be conducted within a group and that prisoners must never be completely naked.

Similarly, the Essex Group noted that cell searches must respect prisoners’ property, especially that with legal, sentimental, religious or similar value.

They noted that the laws and regulations on searches should be clearly specified and that a system and procedures for searches should be in place.

Rule 60 of the Nelson Mandela Rules provides that ‘search procedures for visitors must not be degrading and be governed by principles at least as protective’ as for prisoners.

Where searches are considered absolutely necessary, the Essex Group recalled that the least intrusive means should be used and that searches should be intelligence-led rather than based on profiling or presumptions. They also noted that it is particularly important for prison officials to be clear that the easiest or most convenient way in which to carry out a search does not establish necessity.

Avoidance of Normalisation or Conditioning to Operating in Ways that Offend Human Dignity

The Essex Group raised the importance of maintaining sensitivity and awareness of the concepts of proportionality and necessity in practice. They noted that there is a risk that prison officials become normalised to certain ways of operating. This could mean that they carry out searches more frequently or in circumstances that are not proportionate or necessary but that over time become seen as acceptable or the ‘way things are done’ internally.

The Essex Group emphasized the importance of regularly re-examining the rationale and justification for searches to ensure that they are not conducted on a routine basis, but rather their necessity and proportionality assessed on a case-to-case basis. For example, repeated body searches during periods when prisoners are not in touch with others outside their cell are not necessary or proportionate. The frequency of cell searches should also be examined

35 European Committee for the Prevention of Torture (CPT), Report to the Government of Bosnia and Herzegovina on the Visit to Bosnia and Herzegovina carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 29 September to 9 October 2015, CPT/Inf (2016) 17 (5 July 2016) at para 79 (CPT Report to the Government of Bosnia and Herzegovina); CPT, Report to the Czech Government on the Visit to the Czech Republic carried out by the European Committee for the Prevention of Torture from 1 to 10 April 2014, CPT/Inf (2015) 18 (31 March 2015) at para. 86.
36 See, Rule 54(1) of the European Prison Rules, Rule XXI of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.
37 CPT Report to the Government of Bosnia and Herzegovina, at para 79.
to ensure that they are necessary and proportionate rather than simply the way the prison has always worked.

Recording of Searches

The Essex Group pointed to the rationale underlying the recording of the use of searches within Rule 51. They noted that Rule 51 is clear on the dual purpose of recording the use of searches as first, for accountability and second, to prevent the elimination of the use of searches to harass, humiliate or intimidate prisoners as set out in Rule 51.38

The Essex Group recommended that prison staff should be trained in methods to identify whether there are grounds for searching in the first place, whether searches are necessary and proportionate and which alternatives can be used.

Rule 51 requires the prison administration to keep records of the search including the identity of the officials who conducted the search and the reasons and results of the search. The experts particularly emphasized the importance of recording why intrusive searches are necessary given the harm they can have on prisoners as set out below. The experts also noted that evidence of the specific alternatives considered should be included in the documentation and records of the use of searches. The experts discussed that in order to ensure accountability, as explicitly captured in Rule 51, records need to include whether and which alternatives to searching had been considered and why they were not deemed suitable in the circumstances.

Intrusive Body Searches

Rule 52(1) specifies that intrusive body searches may only be used if absolutely necessary. This is because intrusive searches can be particularly harmful and have an adverse impact on prisoners’ human dignity, particularly for women prisoners, and can amount to a violation of the prohibition of torture and other ill-treatment, depending on how they are carried out. It is for this reason, the Inter-American Commission on Human Rights39 and some national jurisdictions have prohibited intrusive body searches altogether.40

The Essex Group suggested that ‘absolutely necessary’ should be understood in the same way in which it is applied to the use of instruments of restraint, meaning situations in which there is an immediate risk to the prisoner or other persons41.

The Essex Group pointed out that intimate, strip and cavity searches may be conducted using force, with an even heightened potential of misuse by prison officials seeking to assert power and control over new prisoners. As noted above, in such cases, it may also violate the prohibition of torture and other ill-treatment.42

38 See also, Rule 54.4 of the European Prison Rules.
39 Principle XXI, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas: “Intrusive vaginal or anal searches shall be prohibited by law.”
40 See Article 57 of the 2009 French Prison Law. In Brazil, five states have also prohibited invasive searches: Paraíba, Goiás, Rio Grande do Sul, Rio de Janeiro and Minas Gerais.
41 See Rule 48 of the Nelson Mandela Rules.
42 Iwanczuk v Poland, Application No. 25196/94 (ECHR, 15 November 2001); EL Shennawy v France Application no. 51246/08 (ECHR, 20 January 2011) (during two weeks, the applicant was subjected to 4 to 8 searches a day, when going and leaving the tribunal; during the first week, searches were video recorded and carried out by hooded law enforcement personnel; these searches, under these conditions and frequency, were not justified by pressing security need); Valasina v Lithuania, Application No. 44558/98 (ECHR, 24 July 2001) (a male prisoner was obliged to strip naked in the presence of a woman prison officer, and then his sexual organs
In line with international standards and norms, Rule 52(1) requires that alternatives should always be pursued instead of intrusive body searches. Where available, technology should be used such as electronic detection scanning methods although certain forms of technology will not pick up an organic package, for example.

The Essex Group underscored the critical importance that alternatives are also in line with the respect for a prisoner’s human dignity. For example, the use of laxatives is viewed as bad practice and not respectful of human dignity.

**Body Cavity Searches by Healthcare Professionals**

Rule 52(2) specifies that body cavity searches ‘shall only be conducted by qualified health-care professionals other than those primarily responsible for the care of the prisoner’. This is in line with medical ethics and the Bangkok Rules.

The second clause in Rule 52(2), however, recognises that in certain situations this is not possible. Where it is not possible, the Rule provides that the search should not be conducted by the primary health-care provider for the prisoner but by ‘staff appropriately trained by a medical professional in standards of hygiene, health and safety’. For example, the European Committee for the Prevention of Torture has found that, ‘such examinations [body cavity searches] should only be carried out by a medical practitioner, who is not the treating doctor of the prisoner concerned, and under conditions which respect physical safety and human dignity’. The World Medical Association has asserted that:

> These searches are performed for security reasons and not for medical reasons. Nevertheless, they should not be done by anyone other than a person with appropriate medical training. This non-medical act may be performed by a physician to protect the prisoner from the harm that might result from a search by a non-medically trained examiner. In such a case the physician should explain this to the prisoner. The physician should furthermore explain to the prisoner that the

and his food were touched with bare hands; this constituted a degrading treatment); Frerot v. France, Application No. 70204/01 (ECHR, 12 June 2007).

See, for example, Rule 20 of the Bangkok Rules and Principle XXI of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.


CPT, Report to the Estonian Government on the Visit to Estonia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 30 May to 6 June 2012, CPT/Inf (2014) 1 (21 January 2014) at para. 83.
usual conditions of medical confidentiality do not apply during this imposed procedure and that the results of the search will be revealed to the authorities.

Finally, the World Medical Association urges all governments and responsible public officials to provide body searches that are performed by a qualified physician whenever warranted by the individual’s physical condition.49

Searches of Visitors

Rule 60(1) of the Nelson Mandela Rules provides that visitors must consent to being searched in order to be admitted to the prison and where they do not ‘the prison administration may refuse access’. The experts recalled that during the negotiations it was recognized that searches of prisoners and searches of visitors are different as visitors are not in prison following a conviction for a criminal offence. Therefore, searches can never be enforced upon visitors. However, during the negotiations, states pointed out that the prison administration also needs to ensure safety and security in prisons including preventing contraband being brought into the prison. Yet, even on this rationale, a search may not be required or be necessary or proportionate if the visit is not open thus removing the risk of any contraband being transferred.

The Essex Group noted that consent must be interpreted as informed consent and the procedures used to conduct searches announced and explained before entering the facility.

They also pointed out that when visitors are aware that they may be searched, it gives them the opportunity to explain to the prisoner that the risk of the search meant that they had to dispose of any contraband which they are sometimes put under pressure to bring in.

The Essex Group emphasised that there should not be a blanket method of carrying out body searches. Rather, it should be intelligence-led, that is, used only when there is evidence that it is required or evidence that a body search is necessary and proportionate to the identified risks. Further, the experts suggested that search procedures for visitors should ‘recognise that visitors are not themselves prisoners and that the obligation to protect the security of the prison has to be balanced against the right of visitors to their personal privacy’.50

The Essex Group also pointed out that children should not be subject to body searches as it will never be in their best interests. However, if there is a suspicion that a child may have been pressured into bringing contraband to the prison, alternatives may be possible, such as a non-contact visit. This would still mean that the child could visit his or her family member.

Prisoners with Disabilities

Two key rules deal with the rights of prisoners with disabilities. These are Rule 5(2) and Rule 109. Rule 5(2) requires prison administrations to make all ‘reasonable accommodation and adjustments to ensure that prisoners with physical, mental or other disabilities have full and effective access to prison life on an equitable basis’. This is because a disability is as much a reflection of the environment, structure and circumstances in which people live that

49 WMA, Statement on Body Searches of Prisoners, 212
disadvantage them as an individual trait. Therefore, the idea underpinning reasonable accommodation and adjustment is that the environment and structure should accommodate the trait. If the structure inherently imposes a detrimental experience on any disability, the disadvantage for the person amounts to arbitrary deprivation or punishment. For example, if showers are equipped with a sill that prevents access to wheelchair users, the disability is disadvantaged by a structure, which prison officials will be required to correct.

Rule 5(2) should be read together with Rule 4(2) which requires that all programmes, services and assistance are ‘delivered in line with the individual treatment needs of prisoners’ and Rule 109 on the detention and treatment of prisoners with mental health disabilities and/or health conditions.

The first step in making reasonable accommodation or adjustments is to identify what the individual needs of the prisoner are. The Essex Group underscored that it is vital that the prisoner has input into what his or her needs are.51 The prison is then required to make the reasonable accommodation or adjustments to meet the needs of the prisoner. Article 2 of the UN Convention on the Rights of Persons with Disabilities defines ‘reasonable accommodation’ as the ‘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’.52

The Essex Group noted that in addition to specific accommodation and adjustments tailored to individual prisoners, the prison itself and the way in which it is run can be adapted so that it is not disadvantageous to any prisoner with learning needs or a physical, intellectual or mental disability. Prisons have traditionally been designed and run with young, healthy men in mind despite the fact that many statistics show high levels of prisoners with mental or intellectual disabilities or needs.53 This calls into question both the justifications for and wisdom of incarcerating many of these individuals in the first place. This is addressed by Rule 109 which has three levels. It first recognises that certain individuals should not be held in prisons and if they are found to be, they should be transferred out of the prison. This is an assessment for the courts. The Essex Group noted that this Rule includes the requirement for ongoing and regular assessment as mistakes may have been made during the initial assessment or a prisoner’s health may deteriorate while in prison. The Essex Group also pointed out that ‘severe mental’ attaches to disabilities and health conditions. Second, Rule 109 identifies prisoners who may need to be accommodated within ‘specialized facilities’. Third, it places an obligation on the prison administration to provide psychiatric treatment to those ‘prisoners who are in need of such treatment’. The Essex Group emphasised that any assessment or treatment should only be provided where the prisoner provides his or her informed consent.

51 Article 3(a) of the UN Convention on the Rights of Persons with Disabilities.
52 For direction on the application of reasonable adjustment/accommodation in prison, see The National Offender Management Service (England and Wales) policy on reasonable adjustments, Annexes G and H.
Beyond Rule 109, a general shift is needed in the majority of prisons in addition to meeting individual prisoners’ needs. For example, written and oral instructions and signs can be produced and communicated in a way that is accessible and understandable to all prisoners.

The Essex Group also noted that the prison administration must recognize that prison staff will not have all of the expertise and knowledge on strategies and approaches to put in place. Community partnerships are therefore needed so that prisons can benefit from expertise within the community and align prisons with best practice in the outside world in order to minimise differences between life in prison and ‘at liberty’.

The Essex Group also noted the importance of cross-referencing Rule 5(2) with Rule 39(3) which addresses the impact of ‘mental illness or developmental disability’ on conduct and the need for the prison administration to take this into account when deciding upon disciplinary sanction. The experts noted that disabilities should also be taken into account in any reward or privilege system based on ‘good’ behaviour and assessment of risk reduction for release.54 The experts pointed out that if certain programmes or activities are only accessible to prisoners who progress in a certain way then some prisoners with mental, intellectual or learning disabilities may be excluded, which constitutes discrimination. They also recalled the first paper of the Essex Group in which the experts emphasized the requirement of reasonable accommodation (or reasonable adjustments) that underpin the UN Convention on the Rights of Persons with Disabilities.55 Article 9 provides:

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

In the first Essex paper, the experts noted that, ‘[t]he principle of reasonable accommodation is defined in Article 2 of the CRPD as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’. This therefore requires that the state ensures that it reasonably accommodates a particular individual’s needs. This must be done in consultation with the individual, as in accordance with the principle of established in Article 3(a) of the CRPD’. The experts underscore that the principle of reasonable accommodation must also apply to sanctions and systems of reward and privilege.

54 See rules 36-46 on discipline.