

SECOND REPORT OF ESSEX EXPERT GROUP ON THE REVIEW OF THE STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS

March 2014

INTRODUCTION

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

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- 8) The replacement of outdated terminology;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

2. On 3 and 4 October 2012, the Detention, Rights and Social Justice Programme at the Human Rights Centre, University of Essex and Penal Reform International (PRI) convened an expert meeting on the proposed revision at the University of Essex. This meeting was financially supported by the UK Department for International Development, the Oak Foundation and the University of Essex Research and Enterprise Office. The purpose of the meeting was to identify current international norms and standards in the areas proposed for revision and any outdated language or gaps in the SMR as a result of the international legal developments that have taken place since their adoption in 1955. A report recording the broad majority agreement of the Essex Group of Experts was submitted to the United Nations Office on Drugs and Crime (UNODC) by PRI for consideration by the Intergovernmental Expert Group Meeting (IEGM) in Buenos Aires in December 2012 (hereinafter referred to as 'the Essex paper').²

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

² Expert Group Meeting on the Standard Minimum Rules for the Treatment of Prisoners, Buenos Aires, 11 – 13 December 2012,

3. The Essex Group of Experts reconvened on 12 and 13 September 2013 to discuss the developments in the process of the revision of the SMR arising from the December 2012 IEGM in Buenos Aires³ and the resolution adopted by the Crime Commission in April 2013.⁴ The Group of Experts decided to submit this report as a supplement to its first paper with the view to facilitating discussion on the following points in the revision process:

- safety of prisoners
- prisoners in a position of vulnerability
- use of force and restraints
- body searches
- deaths and injuries in custody
- record keeping and case management
- training.

The Experts considered that these issues merited further attention in order to enable full discussion at the next IEGM in Vienna on 25-28 March 2014.

4. The present report should be read together with the first Essex paper (the 2012 report of the Essex Group of Experts). As with the first Essex paper, it reflects the broad majority agreement of this Group.

A. SAFETY AND PERSONAL SECURITY OF PRISONERS

5. The Experts expressed their concern that safety and personal security in prisons have not been discussed within the Review process so far. It is well documented that a lack of safety and personal security in prisons can lead to grave threats to the life and dignity of prisoners. The Experts considered that safety and personal security in prisons underpin the SMR as a whole and are inextricably linked to other areas under revision such as; the use of force and restraints, searches, the prevention of torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment), and the protection of prisoners at risk of discrimination or abuse. The Essex Group of Experts considered that it is of key importance that the issues of safety and personal security in prisons are addressed at the outset of the Review as foundational issues and in order to frame the discussion of the other specific areas identified for review.

6. The IEGM in Buenos Aires made the proposal to incorporate the prohibition of torture and other ill-treatment into the SMR as a key safeguard to protect the life and dignity of prisoners.⁵ The Experts supported this proposition, but stressed that the prohibition not only requires prison officials to refrain from engaging in acts of torture or other ill-treatment but also requires that they take measures to prevent and protect prisoners and staff from risks to their safety and personal security such as inter-prisoner violence, self-harm and suicide and risks arising from the prison estate and its management, such as fires and floods (the principle

² 'Summary of Expert Meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review', the "Essex Paper" (20 November 2012), UN doc. UNODC/CCPCJ/EG.6/2012/NGO/1, available at www.unodc.org/unodc/en/justice-and-prison-reform/expert-group-meetings6.html, in Arabic, English, French, Spanish and Russian.

³ Commission on Crime Prevention and Criminal Justice, 'Work of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners: Report of the Secretariat' (4 February 2013), UN doc. E/CN.15/2013/23.

⁴ Commission on Crime Prevention and Criminal Justice, 'Report on the Twenty-Second Session 7 December 2012 and 22 - 26 December 2013', UN Doc. E/2013/30, E/CN.15/2013/27 (2013), p.20.

⁵ See the Essex Paper's recommendations on Rule 6, available at www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/IEGM_Brazil_Jan_2014/PRI-ESSEX-PAPER-ENGLISH.pdf, p.4.

of ‘due diligence’).⁶ The Experts recommended that these components of the prohibition of torture and other ill-treatment are set out in full in the SMR in order to provide clear direction to prison staff on their obligations.

7. The Experts also highlighted that ensuring safety and personal security in prisons not only protects prisoners but also prison staff while fulfilling their roles and responsibilities within the prison.

8. The Experts stressed that in order to ensure safety and personal security in prisons, prison authorities must exercise effective control over the prison. This obligation has been recognised in the Bangkok Rules⁷ and the European Prison Rules,⁸ particularly as a means of ensuring the safety of prisoners from inter-prisoner violence. The Experts highlighted that the ability to exercise effective control is intrinsically linked to the availability of sufficient resources, in particular an adequate staff-prisoner ratio, and is jeopardised in overcrowded prisons.⁹

9. The Experts noted that the SMR require updating to take into account the lessons learned over the last 60 years on techniques of conflict resolution and mediation as effective and human rights compliant means of providing safety and personal security. The Experts emphasised that the SMR would be greatly strengthened by the inclusion of overarching guidance to prison management and staff on techniques of conflict resolution in all areas of their work including as an alternative to the use of force, restraints, searches and the inclusion of guidance on individual assessments of risks for the safety and personal security of prisoners.

10. Accordingly, the Experts recommended that the issues of safety and security are introduced into the Review as overarching considerations that affect the specific rules under consideration. They proposed the incorporation of a new Rule *6bis* capturing the positive duty of due diligence to protect the safety and personal security of prisoners as well as staff; the acknowledgment of the role of mediation and other prevention techniques in conflict resolution; and the updating of the SMR on the requirements and measures of infrastructural safety.

RECOMMENDATIONS

Preamble

11. The Experts recalled that overcrowding in prisons can lead to a range of threats to the safety and personal security of prisoners and staff, alongside its negative impact on the conditions of detention overall as set out in a recent report of the UN Secretary-General, which states that:

“Overcrowding inevitably has an adverse impact on conditions in places of

⁶ Inter-American Commission on Human Rights, ‘Report on the Human Rights of Persons Deprived of their Liberty in the Americas’ OEA/Ser.L/V/II, Doc. 64 (31 December 2011) at para. 51. (citing the decision of the Inter-American Court of Human Rights in *Neira Alegria et al v Peru*. Judgment of January 19, 1995. Series C No. 20, para. 60. finding that “since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners”).

⁷ UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) 2010, Preliminary observations, para.9.

⁸ European Prison Rules, Rule 52(2): ‘Procedures shall be in place to ensure the safety of prisoners, prison staff and all visitors and to reduce to a minimum the risk of violence and other events that might threaten safety.’

⁹ UN General Assembly, 68th Session, Report of the Secretary-General, ‘Human rights in the administration of justice: analysis of the international legal and institutional framework for the protection of all persons deprived of their liberty’, (5 August 2013), UN Doc. A/68/261, para.49.

deprivation of liberty and leads to serious violations of human rights, such as denial of or insufficient access to medical care, food, sanitation, security, and rehabilitation services.¹⁰ It has also been mentioned that overcrowded cells in prisons foster the development of an offender subculture, which is difficult for prison staff to control.”¹¹

12. The Experts therefore recommended the insertion of an additional preambular paragraph as follows:

Recognizing that overcrowding inevitably has an adverse impact on conditions in places of deprivation of liberty and can lead to serious violations of human rights.

Rule 6

13. The Experts reiterated their proposal in the first Essex paper on Rule 6.¹² They further recommended the introduction of Rule 6(1*bis*) to include the duty to exercise meaningful and effective control over the prison. This builds on the first Essex paper which recommended the introduction of Rule 6(5) to capture the duty to protect prisoners from victimisation.¹³

6. (...)
(1*bis*) The prison authorities must exercise meaningful and effective control within the prison, which requires the allocation of sufficient resources for effective prison management, including adequate numbers of trained staff.

14. Further, the Experts recommended the introduction of a new Rule 6*bis* to integrate operational guidance on safety and security as follows:

Rule 6*bis*
(1) The authorities shall act with due diligence in identifying specific needs as well as risks for the safety and personal security of every prisoner on entry to the prison and on a regular basis thereafter, and shall adopt and implement the requisite measures and safeguards.
(2) The authorities shall employ dynamic security, early warning systems and conflict resolution tools, such as mediation, as a primary means of preventing and responding to risks to the safety and personal security of prisoners and staff.
(3) The authorities shall adopt measures to ensure infrastructural safety, including with regard to the condition of the prison estate, fire hazards and risks arising from prisoners' belongings, and shall put in place appropriate procedures and evacuation policies.
(4) The authorities shall periodically and at least once a year assess the prison as a whole in order to ensure the safety and security of prisoners and prison staff and act expeditiously on any risks identified.

¹⁰ See UN Docs. A/HRC/22/53/Add. 2, para. 47; CAT/C/SLV/CO/2, para. 17 ; A/HRC/7/3/Add.3, para. 64; E/C.12/IND/CO/5, para. 35.

¹¹ UN General Assembly, 68th Session, Report of the Secretary-General, 'Human rights in the administration of justice: analysis of the international legal and institutional framework for the protection of all persons deprived of their liberty', (5 August 2013), UN Doc. A/68/261, para.49.

¹² For the rationale see the Essex Paper at p.5.

¹³ Rule 6 (1) and (2)to (8) see 2012 Essex paper.

RATIONALE FOR PROPOSED REVISIONS TO RULE 6

15. The Experts recalled the state’s obligation to exercise meaningful and effective control over prisons.¹⁴ Prisons only monitored at the perimeters by the prison administration can give rise to grave threats to the safety and personal security of prisoners for which the prison administration continues to remain responsible. As highlighted by the Inter-American Commission on Human Rights,

“[T]he fact that the State exercises effective control of the prisons implies that it must be capable of maintaining internal order and security within prisons, not limiting itself to the external perimeters of the prisons. It should be capable of ensuring at all times the security of the prisoners, their family members, visitors, and those who work in the prisons. It is not admissible under any circumstance for the prison authorities to limit themselves to external or perimeter surveillance, leaving the inside of the facilities in the prisoners’ hands. When this happens, the State puts the prisoners at permanent risk, exposing them to violence in the prison and to the abuses of other more powerful prisoners or the criminal groups that run such prisons.”¹⁵

16. With regard to inter-prisoner violence, both the UN Special Rapporteur on Torture and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have pointed out that “the State assumes a heightened duty of protection by severely limiting an inmates’ freedom of movement and capacity for self-defence”¹⁶ and that “[d]espite the unambiguous wording of the Convention against Torture, there is a lack of awareness of the obligation of the prison administration to intervene in inter-prisoner violence. The Special Rapporteur on Torture has noted that acquiescence in inter-prisoner violence is not simply a breach of professional responsibilities but that it amounts to consent or acquiescence to torture or other ill-treatment”.¹⁷

17. With regard to the level of staffing required, the SMR only address the numbers of “specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors” in Rule 49.¹⁸ They do not set out a general requirement to provide adequate resources, including sufficient staff as a key means to meet the obligation to exercise effective and meaningful control over prisons.

18. The requirement of adequate resources and staffing has been widely recognised and is set out in regional standards. For example, the Inter-American Principles and Best Practices

¹⁴ Committee against Torture, 46th session, ‘Fourth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (3 February 2011), UN Doc. CAT/C/46/2, para.57: ‘It is axiomatic that the State party remains responsible at all times for the safety and well-being of all detainees and it is unacceptable for there to be sections of institutions which are not under the actual and effective control of the official staff’.

UN General Assembly, 68th Session, Report of the Secretary-General, ‘Human rights in the administration of justice: analysis of the international legal and institutional framework for the protection of all persons deprived of their liberty’, (5 August 2013), UN Doc. A/68/261, para.49: ‘The fundamental role of authorities to exercise effective control over places of deprivation of liberty and ensure the personal safety of prisoners from physical, sexual or emotional abuse should be further strengthened as one of the most important obligations (see the United Nations Standard Minimum Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, para. 9, and the European Prison Rules, rule 52.2). In this respect, preventive measures include increasing the number of personnel sufficiently trained in using non-violent means of resolving conflicts.’

Also see UN Docs. CAT/C/BGR/CO/4-5, para.23 (c), and A/HRC/7/3/Add.3, para.90 (t): on the prompt and efficient investigation of all reports of inter-prisoner violence and prosecuting and punishing those responsible; and offering protective custody to vulnerable individuals without marginalizing them from the prison population more than is required for their protection.

¹⁵ Inter-American Commission on Human Rights (IACHR), ‘Report on the Human Rights of Persons Deprived of Liberty in the Americas’, (31 December 2011), OEA/Ser.L/V/II. Doc. 64, para.53.

¹⁶ UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report to the UN General Assembly, (5 September 2006), UN Doc. A/61/311, para.51.

¹⁷ UN Special Rapporteur on Torture, report to the UN General Assembly 2013, ‘Human rights in the administration of justice: analysis of the international legal and institutional framework for the protection of all persons deprived of their liberty’, 5 August 2013, UN-Doc. A/68/261, para 48.

¹⁸ Rule 49(1): So far as possible, the personnel shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors.

on the Protection of Persons Deprived of Liberty in the Americas (Inter-American Principles) provide that “[s]ufficient and qualified personnel shall be available to ensure security, surveillance, and custody”¹⁹ and require that the staff in places of deprivation of liberty “shall be provided with the necessary resources and equipment so as to allow them to perform their duties in suitable conditions, including fair and equitable remuneration, decent living conditions, and appropriate basic services.” The Kampala Declaration on Prison Conditions in Africa also states that “the State should provide sufficient material and financial resources for staff to carry out their work properly.”²⁰

19. Drawing on these standards and correctional experience, the Experts therefore recommended that the general principles in Rule 6 include a provision on the allocation of sufficient resources for effective prison management, including adequate numbers of trained staff as set out in the proposed 6(1)*bis* above.

RATIONALE FOR THE INTRODUCTION OF RULE 6*bis*

Rule 6*bis* (1)

20. Within the context of the state and prison administration’s duty of due diligence, the Experts highlighted the importance of carrying out regular risk and needs assessments. These assessments should cover the identification of any risks from or to prison staff and prisoners (whether inter-prisoner, a risk of self-harm or suicide) or from discrimination, abuse or violence; the identification of risks from the prison infrastructure; and the identification of any specific needs of prisoners. The new rule on assessments should be read together with Rule 63 on classification. Rule 63(1) and (2) provides that:

(1) The fulfilment of these principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups; it is therefore desirable that such groups should be distributed in separate institutions suitable for the treatment of each group.

(2) These institutions need not provide the same degree of security for every group. It is desirable to provide varying degrees of security according to the needs of different groups. Open institutions, by the very fact that they provide no physical security against escape but rely on the self-discipline of the inmates, provide the conditions most favourable to rehabilitation for carefully selected prisoners.

21. The reference to the “varying degrees of security” and “individualised treatment” should be interpreted and applied in line with the duty to protect prisoners and prison staff from violence and the needs of persons in a situation of vulnerability.

Rule 6*bis* (2)

22. Correctional science has progressed significantly since 1957, establishing that proactive and frequent interaction of prison staff with prisoners is an effective way to recognise a threat to personal security at an early stage.²¹ It is now “generally acknowledged that safety and security in prisons depend on creating a positive climate which encourages the cooperation of prisoners” and that “engaging with prisoners and getting to know them can enable staff to anticipate and better prepare themselves to respond effectively to any incident

¹⁹ Principle XX.

²⁰ See ‘Prison Staff’, para.3, Kampala Declaration on Prison Conditions in Africa, adopted in September 1996.

²¹ Andrew Coyle, A human rights approach to prison management: handbook for prison staff, International Centre for Prison Studies, 2002, p. 59 and 71; see also United Nations Department of Peacekeeping Operations, Prison Incident Management Handbook, 2013, p. 15 and 21 et sqq.

that may threaten the security of the prison and the safety of staff and inmates”. This notion is usually referred to as ‘dynamic security’, describing an “emphasis on the need for prison staff to establishing good relationships with prisoners”.²²

23. With regard to resolving situations of conflict in custodial settings, correctional science acknowledges the primacy of non-violent means and affirms techniques of mediation as effective way of conflict resolution. As Professor Andrew Coyle, former director of the International Centre for Prison Studies and Visiting Professor at the Human Rights Centre at the University of Essex, has noted:

“The first message which staff must learn is that prevention is always better than cure. It is extremely rare that a major incident will occur without any advance warning. In almost all cases there will be some prior indication of a build up of tension at an individual or a group level. This is where the benefits of dynamic security will become apparent. On entering an accommodation block or a working area where tension is brewing an alert staff will immediately be conscious that something is wrong with the atmosphere. They will sense tension in the air. Since they will know all their prisoners, they will be able to identify any who are unsettled or likely to threaten violence and deal with them in a way which prevents the onset of violence. It will also be more difficult for prisoners who wish to create trouble to stir up other prisoners if the general approach of staff has been fair and consistent.”²³

Proposed Rule 6(*bis*)2 as set out above reflects this good practice.

Rule 6*bis* (3)

24. The Experts also highlighted that the SMR currently do not deal with infrastructural safety, for example with regard to 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 fire²⁴ or natural disaster.²⁵ Since the principle of due diligence also covers such risks, the Experts recommended the inclusion of a provision to provide guidance to the prison administration on its responsibilities in this regard.

Rule 6*bis* (4)

25. The periodic review of safety and personal security issues within prison reflects good prison management. It enables the prison administration to take a step back from the daily management of the prison to reflect, identify and resolve challenges and recurring issues in relation to prisoner safety and personal security. Periodic assessments enable the prison administration to identify questions of a systemic nature that require regulation or intervention by central authorities and that should be dealt with by those responsible for the prison system as a whole.

26. The UNODC Handbook on Prisoner File Management, for example, states that

²² United Nations Office on Crime and Drugs (UNODC), Handbook for Prison Leaders, (2010), p. 106.

²³ Andrew Coyle, A human rights approach to prison management: handbook for prison staff, International Centre for Prison Studies, 2002, p.70.

²⁴ See the Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of their Liberty in Honduras, OAS (18 March 2013), OEA/Ser.L/V/II.147.

²⁵ For example, a report published by the American Civil Liberties Union documents the lack of emergency planning at the Orleans Parish Prison which during Hurricane Katrina resulted in thousands of individuals being trapped. See American Civil Liberties Union, ‘Abandoned and abused’, August 2006, available at www.aclu.org/prisoners-rights/abandoned-and-abused.

“[p]rocesses and procedures should also be put in place to monitor the performance of various components of the organization in helping achieve the strategic objectives of the institution”.²⁶

27. The importance of periodic reassessments of fire safety specifically has been highlighted by the Inter-American Commission on Human Rights which recommended that the fire department should be requested to “periodically inspect and deliver assessments on the appropriateness of the fire safety and prevention measures” to prisons “nationwide”.²⁷

B. PRISONERS IN A POSITION OF VULNERABILITY

28. The Experts expressed particular concern that the 2012 IEGM only proposed terminological changes to Rules 82 and 83 in contrast to its previous recommendation to consider “the requirements and needs of prisoners with disabilities” as a key area for review of the SMR. The Experts urged that in the course of further discussion, the IEGM consider the proposals for revision of Rule 82 set out in the first Essex paper.²⁸

29. The Experts also expressed their concern that no attention has yet been devoted to the rights of children of imprisoned parents.

30. Moreover, the Essex Group of Experts highlighted the importance of addressing the situational vulnerability of certain prisoners. While all prisoners are in a position of vulnerability by virtue of their detention, certain prisoners can face heightened risks to their safety and personal security due to discrimination and/or their particular needs which the prison authorities need to accommodate.

31. As the SMR aim to be an operational document, the Experts recommended that the Review focus on incorporating the appropriate standards, procedures and training requirements into the Rules to enable prison staff to identify prisoners in a situation of vulnerability and to respond promptly and fully.

RECOMMENDATIONS

Prisoners with Disabilities

32. The Experts strongly recommended that the IEGM reconsider its proposals relating to Rules 82 and 83 and discuss changes beyond terminology in order to effectuate the rights of prisoners with disabilities within the Review process and to bring the SMR into line with the UN Convention on the Rights of Persons with Disabilities (CRPD). This is necessary in order to avoid placing prisoners with disabilities in a position of vulnerability due to a failure to reasonably accommodate their specific needs and thus be non-compliant with the CRPD.

33. Beyond the terminological changes currently proposed to Rules 82 and 83, the Experts underscored the critical importance of ensuring that the SMR contain clear guidance to the prison administration on its duties to respect and ensure the rights of prisoners with

²⁶ UNODC Handbook on Prisoner File Management, New York 2008, p. 44.

²⁷ Report of the Inter-American Commission on Human Rights on the Situation of Persons Deprived of their Liberty in Honduras, OAS (18 March 2013), OEA/Ser.L/V/II.147, paragraph 162 (10), page 62.

²⁸ Expert meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review, Summary, prepared by Penal Reform International in cooperation with Essex University, 21 November 2012, UN-Doc. UNODC/CCPCJ/EG.6/2012/NGO/1, Chapter J. Consideration of the Requirements and Needs of Prisoners with Disabilities.

disabilities in a manner consistent with international law, including as enshrined in the CRPD.

Persons in a Position of Vulnerability

34. In line with the proposed introduction of a Rule *6bis* above, the Experts recommended that the prison administration carry out risk and needs assessments on entry to prison and regularly thereafter. This is to determine any risk of discrimination, abuse and/or specific needs of individual prisoners that require reasonable accommodation or adjustment and to respond promptly, adequately and fully. The Experts noted that risk and needs assessments should be carried out in a participatory manner in consultation with the individual concerned.

35. The Experts also underscored that the SMR should make clear that in addressing discrimination, abuse and/or the particular needs of individual prisoners, the prisoner(s) in the position of vulnerability should not be disadvantaged or subjected to further suffering which could amount to a violation of the prohibition of torture and other ill-treatment, for example, through the imposition of solitary confinement. The European Committee on the Prevention of Torture has stated that “prisoners who are in a situation of vulnerability ... should never be accommodated under material conditions which are inferior to those prevailing on normal location”.²⁹

Children of imprisoned parents

36. The Experts reiterated their recommendation in the 2012 Essex paper, to incorporate a new Rule implementing the best interests of the child in line with the UN Convention on the Rights of the Child.³⁰

RATIONALE

37. The IEGM proposed that the Review address the needs of prisoners in a position of vulnerability. The Bangkok Rules similarly use the term ‘vulnerability’.³¹ The Experts noted that ‘vulnerability’ does not reflect an inherent characteristic of any person or group of persons. Rather, prisoners can find themselves in a position of vulnerability as a consequence of discrimination, abuse by prison staff or other prisoners and/or a failure to address their specific needs.

38. The UNODC Handbook on Prisoners with special needs notes that, “there are certain groups that are in a particularly vulnerable position in prisons and who therefore need additional care and protection. (...) Most of these prisoners are, in fact, vulnerable due to more than one reason. They suffer both due to their existing special needs, which are intensified in prisons, and due to the additional risks they confront, stemming from their particular status.”³²

39. The obligation to identify the risks and needs of prisoners in a position of vulnerability is inherent in the duty to protect and prevent violence, discrimination and abuse. The UN Human Rights Committee in its General Comment 21 states that,

“Article 10, paragraph 1, imposes on States parties a positive obligation towards

²⁹ Report to the Armenian Government on the visit to Armenia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 17 October 2002. See CPT report on Armenia, CPT/Inf(2004) 25, para.74.

³⁰ See 2012 Essex Paper, Section L(1), “Other Areas Highlighted by Experts”, p.37.

³¹ See preamble and Rules 2 and 65.

³² UNODC, Handbook on Prisoners with special needs, 2009, p. 4.

persons who are particularly vulnerable because of their status as person deprived of their liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.”³³

C. USE OF FORCE AND RESTRAINTS

40. The Experts expressed concern about the omission of Rule 33 on the use of force and restraints from the Review process. They noted that Rule 33 is significantly out of date and therefore does not provide the prison administration with accurate direction on the use of force and restraints, in conformity with international law.

41. The Experts reiterated their recommendations in the first Essex paper³⁴ and furthermore recommended the revision of Rule 54 which is the only dedicated rule in the SMR on the use of force, including reference to arms. The two Rules should therefore be revised in a consistent manner.

42. 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, they also noted 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. This is because the use of force and restraints can amount to torture or other ill-treatment and can cause significant and potentially irreversible harm.³⁵ The revision of Rules 33 and 54 is therefore necessary in order to provide the prison administration with clear guidance on when the use of force and restraints complies with international law, in particular the UN Basic Principles on the Use of Force and Firearms.

43. The Experts underscored that the SMR should also capture the alternatives to the use of force and restraints available to the prison administration so that prison staff can meet their obligation to ensure the maintenance of security and good order, in a manner that is consistent with the lawful and exceptional use of force. The Experts 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;³⁶ positive staff-prisoner relationships, which enable prison staff to anticipate and proactively deal with problems; dynamic security and conflict resolution tools such as mediation.³⁷

³³ UN Human Rights Committee (HRC), CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 10 April 1992.

³⁴ See Essex Paper, proposed Rule 33, p.24.

³⁵ 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, Ref.: CPT/Inf (92) 3, para.53: "Prison staff will on occasion have to use force to control violent prisoners and, exceptionally, may even need to resort to instruments of physical restraint. These are clearly high risk situations insofar as the possible ill-treatment of prisoners is concerned, and as such call for specific safeguards." (European Committee for the Prevention of Torture)

³⁶ See United Nations, Prison Incident Management Handbook, 2013, p.26.

³⁷ See Penal Reform International / Association for the Prevention of Torture, 'Balancing security and dignity in prisons: a framework for preventive monitoring,' 2013, p.18.

44. The Experts noted that, by contrast, the use of force and/or restraints may increase rather than decrease tensions. As captured in the 2010 Survey of the United Nations and other best practices in the treatment of prisoners in the criminal justice system:

“Excessive security and control can, at its worst, lead to a sense of injustice and increase the risk of a breakdown of control and of violent or abusive behaviour.”³⁸

45. The Experts therefore recommended the revision of both Rules 33 and 54 to accurately reflect current international norms and standards on the use of force and restraints and good practice and alternatives available to effectively provide security and good order in places of detention.

RECOMMENDATIONS ON RULE 33

46. The Experts reiterated the proposed revisions to Rule 33 made in the 2012 Essex paper. However, they pointed to two editorial errors in this paper dated November 2013:

In Rule 33(3), the second sentence correctly reads

“Other electro-shock devices and instruments of restraint, such as handcuffs, chains, irons and strait-jackets shall never be applied as a punishment.”

Secondly, Rule 33(4) requires an amendment in order to align with Rule 24 of the Bangkok Rules, as follows:

“(4) Prisoners undergoing medical treatment, women during labour, during birth and immediately after birth, should not be restrained unless they are an immediate threat to themselves or others.”

RATIONALE

47. The Experts recalled that force should only be used as a measure of last resort when all other non-violent means have been exhausted, that it may only be used as specified by law and in observance with the principles of necessary and proportionality (see proposal for revised Rule 33(1) in 2012 Essex paper). The Inter-American Principles and the European Prison Rules provide useful guidance to the IEGM on the content and language that could be used in the review of Rules 33 and 54.

Listing of prohibited instruments

48. The Experts noted the challenges involved in updating the lists of prohibited instruments and methods of restraint and the use of force in Rule 33, particularly as terminology varies between states and technology is always evolving with the risk that the list becomes quickly outdated and under-inclusive. Notwithstanding these challenges, the Experts emphasised that certain forms of restraint and force are subject to an absolute prohibition and recalled their proposal for Rule 33 to reflect this, even though any list can only be illustrative.

³⁸ Background Paper Workshop 2: Survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system, 28 January 2010, 6A/CONF.213/13, p.6 (p.136 of entire document); para. 45.

Corrigendum and clarification of proposed Rule 33(2)

49. The Experts pointed to two editorial errors in the first Essex paper with regard to Rule 33(3) and 33(4).

50. The Experts reiterated that body-worn electro-shock devices and restraint chairs never have a legitimate use and that the SMR should prohibit them explicitly alongside other instruments that are inherently degrading and painful. For example, the Omega Research Foundation has emphasised:

“The electrical current not only causes severe pain, with one survivor describing it as ‘very intense shocking pain, so intense I thought that I was actually dying’, but can cause short and long term physical side effects. These include; muscular weakness, urination and defecation, and heartbeat irregularities and seizures.”³⁹

51. In this context, the Experts stressed the distinction between body worn electro-shock devices and restraint chairs on the one hand and electrical discharge weapons (EDW) on the other hand; in some cases EDW may provide an alternative to the lethal use of firearms. However, the Experts recalled that by their nature EDWs “can cause acute pain and (...) are open to abuse,”⁴⁰ and therefore must be subject to strict circumscription in national law. The European Committee for the Prevention of Torture has expressed “strong reservations” about their use in prison settings, in which “only very exceptional circumstances (e.g. hostage-taking situation) might justify the resort to EDW”. It stressed that even then circumstances of use of EDW must be “strictly circumscribed” and “subject to the strict condition that the weapons concerned are used only by specially trained staff”.⁴¹

RECOMMENDATIONS ON RULE 54

52. The Experts recommended that Rule 54 be revised consistently, cross-referenced with the proposed revision of Rule 33, and amended to include respective training requirements on the use of force, arms and restraints, supporting the implementation of Rule 33.

53. They recommended the following revisions to Rule 54:

54. (1) As far as possible, prison officials shall apply non-violent means before resorting to the use of force, restraints or arms. They shall use such measures only in observance of the principles of legality, necessity and proportionality, in line with Rule 33. Officers of the institutions shall not, in their relations with the prisoners, use force except in self-defence or in cases of attempted escape, when strictly necessary for the maintenance of security and order, or when personal safety is threatened. ~~or active or passive physical resistance to an order based on law or regulations. Officers who have recourse to force must use no more than is strictly necessary and must report the incident immediately to the director of the institution.~~

(2) Lethal use of force or firearms may only be made as a last resort, when strictly unavoidable in the face of an imminent threat to life, and in a way that preserves life and minimizes damage and injury. Officers shall identify

³⁹ Omega Research Foundation, quoting Yoon, P. K. ‘The “Stunning” Truth: Stun Belts Debilitate, They Prejudice, and They May Even Kill,’ Capital Defense Journal, Volume 15, Issue 2, (2003) pp. 385, 286.

⁴⁰ Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 20th General (26 October 2010), p.35.

⁴¹ Ibid. Para.71, p.36.

themselves as such and give a clear warning of their intent to use firearms.

~~(23) Prison officers shall be given special physical training to enable them to restrain aggressive prisoners.~~ Staff who deal directly with prisoners shall be trained in techniques that employ the minimal use of force for the shortest possible time in the restraint of prisoners who are violent.

(34) Except in special circumstances, staff performing duties which bring them into direct contact with prisoners should not be armed. Furthermore, staff should in no circumstances be provided with arms unless they have been trained in their use.

(5) Detailed procedures shall be set out in national law and reviewed regularly about the use of force and arms including stipulations about:

- a. the types of use of force, restraints and arms that may be used;
- b. the circumstances in which each type of force and arm may be used;
- c. the members of staff who are authorised to use different types of force and arms;
- d. the level of authority required before any force or an arm is used; and
- e. the reports that must be completed once force or an arm has been used.

RATIONALE

54. The revisions proposed by the Experts are based on international and regional standards developed since the adoption of the SMR, in particular the UN Code of Conduct for Law Enforcement Officials⁴² and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Rule 54(1)

55. The Experts proposed that Rule 54(1) begin with the principle of applying non-violent means as set out in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the Code of Conduct for Law Enforcement Officials, as well as the Inter-American Principles⁴³. They considered the current language of Rule 54(1) unclear and too broad (“active and passive physical resistance to an order based on law or regulation”) and therefore recommended drawing on the language adopted in Principle 15 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials which relates specifically to ‘Policing persons in custody or detention’.⁴⁴

56. Provided that the changes of Rule 33 recommended in the 2012 Essex paper are taken into account, a reference to Rule 33 could replace the second sentence of current Rule 54. If, however, the respective changes are not given effect in Rule 33, Rule 54(1) would need to be amended to recognise that force and restraints may only be used as a measure of last resort, only as prescribed by law, “if unavoidable,”⁴⁵ in observance of the principle of proportionality⁴⁶ and minimising damage and injury.⁴⁷

⁴² 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.

⁴³ Principle XXIII(2): “The personnel of places of deprivation of liberty shall not use force and other coercive means, save exceptionally and proportionally, in serious, urgent and necessary cases as a last resort after having previously exhausted all other options, and for the time and to the extent strictly necessary in order to ensure security, internal order, the protection of the fundamental rights of persons deprived of liberty, the personnel, or the visitors.(...)”

⁴⁴ Principle 15, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials: “Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.”

⁴⁵ See Principle 5, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁴⁶ Article 3 of the Code of Conduct for Law Enforcement Officials (adopted in 1979) states that: “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty”. The Commentary elaborates on the exceptionality and proportionality, stating that “[i]n no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved”. Principle 5(a) of the Basic Principles on the Use of Force and Firearms equally enshrines the

57. The requirement of immediate reporting of incidents to the director of the institution should be retained, either by inclusion in Rule 33 - as suggested by the Experts previously - or otherwise needs to remain as in Rule 54(1) as to date.⁴⁸

Rule 54(2)

58. The Experts expressed concern that guidance provided by Rule 54(3) is limited to regulation of the carrying of arms by prison staff, while the SMR do not incorporate any operational rule on their use. They therefore recommended the incorporation of a new Rule 54(2) on the lethal use of force or firearms.

59. The recommended Rule draws on Principles 9, 10 and 16 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which restricts the permissible use of firearms to self-defence or defence of others, and limits an intentional lethal use of firearms to “when strictly unavoidable in order to protect life” and requires officers to identify themselves as such and give a clear warning of their intent to use firearms.

60. Principle XXIII(2) of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas provides that “[t]he personnel shall be forbidden to use firearms or other lethal weapons inside places of deprivation of liberty, except when strictly unavoidable in order to protect the lives of persons.”⁴⁹ Professor Andrew Coyle, former Director of the International Centre for Prison Studies, has underscored this cardinal principle in his handbook for prison staff, noting that:

“Lethal firearms should only be used when directly necessary to prevent loss of life. This means that there must be an immediate and clearly perceived threat to someone’s life. For example, lethal fire should not be used simply because a prisoner is escaping. Using lethal fire is only permissible when such an escape presents an immediate threat to someone’s life.”⁵⁰

61. Rule 54(2) furthermore draws on Rule Principle 5(b) of the Basic Principles on the Use of Force and Firearms. This is consistent with Article 3 of the Code of Conduct for Law Enforcement Officials which also states that “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty”. The Commentary elaborates that “[i]n no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved”.

Rule 54(3)

62. The Experts recommended the reformulation of current Rule 54(2) (new Rule 54(3)) using the structure of Rule 66 of the European Prison Rules which provides that “[s]taff who deal directly with prisoners shall be trained in techniques that enable the minimal use of force in the restraint of prisoners who are aggressive”. They considered that this formulation more

principle of proportionality by stating that, “[w]henver the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved”.

⁴⁷ See Principle 5, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

⁴⁸ See proposals on changes to Rule 33 in Expert meeting at the University of Essex on the Standard Minimum Rules for the Treatment of Prisoners Review, Summary, prepared by Penal Reform International in cooperation with Essex University, 21 November 2012, UN-Doc. UNODC/CCPCJ/EG.6/2012/NGO/1, Chapter F. Disciplinary Action and Punishment, including the Role of Medial Staff, Solitary Confinement and the Reduction of Diet.

⁴⁹ Montero Aranguren et al (Detention Center of Catia) v. Venezuela at para. 231

⁵⁰ Andrew Coyle, A human rights approach to prison management: handbook for prison staff, International Centre for Prison Studies, 2002, p. 30.

closely aligns with the principle that force should only be used as a last resort and even then with the minimum force strictly necessary and for the shortest period of time. They also considered that this sub-paragraph should refer to the training of staff. However, in contrast to the European Prison Rules, they considered that the use of the descriptor ‘aggressive’ was too subjective and vague. They therefore suggested that ‘aggressive’ could be replaced with ‘violent’.

Rule 54(4)

63. This paragraph retains the wording of current Rule 54(3), without any change.

New Rule 54(5)

64. The Experts recommended inclusion of a Rule that is in line with and provides guidance to states on the implementation of Principle 1 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, requiring governments to “adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials” and to “keep the ethical issues associated with the use of force and firearms constantly under review”.

65. In formulating Rule 54(4), the Experts drew on Rule 65 of the European Prison Rules to reflect the international standard that prison officials cannot determine the means of force subjectively, but may only employ techniques in the use of force and arms approved by law.

D. BODY SEARCHES

66. The Experts reiterated the importance of incorporating a provision on search procedures, recalling that while body searches can constitute a necessary and legitimate security measure, due to their intrusive nature they require clear regulation which is currently lacking entirely in the SMR.

RECOMMENDATIONS

67. The Experts supported the proposal made in the outcome paper of the Buenos Aires IEGM in 2012, to include a new provision in the SMR which ensures that searches comply with the prohibition of torture and other ill-treatment and with the right of all persons deprived of their liberty to be “treated with humanity and with respect for the inherent dignity of the human person” as per Article 10 of the International Covenant on Civil and Political Rights (ICCPR).

The Experts refer to their proposal for a new Rule 32a in the 2012 Essex paper.⁵¹

RATIONALE

68. Body searches are common in custodial settings, in particular police custody and prisons, upon admission and thereafter for reasons of security, order and to prevent dangerous or prohibited items from entering the prison.

⁵¹ See 2012 Essex Paper, Chapter F. Disciplinary Action and Punishment, including the Role of Medical Staff, Solitary Confinement and the Reduction of Diet.

69. Notwithstanding the underlying reasons for carrying out searches, the way in which the search is conducted may amount to inhuman or degrading treatment and even torture when conducted unnecessarily, in a humiliating, debasing and/or intrusive way, by prison staff of the opposite gender, or applying excessive sanctions to detainees who refuse to undergo body searches. Practice has shown that this may include strip searches in front of groups of security staff; queuing while naked for a search after transfer in unheated premises; searches conducted in insanitary and unhygienic conditions, causing infections; searches of children accommodated in detention with their parent - despite not being a prisoner; and systematic vaginal searches of female visitors.

70. Yet, while the risk of abuse (which would violate the prohibition of torture and other ill-treatment) in the conduct of body searches is undisputed, to date international standards of general application have failed to provide concrete guidance to prison staff on when and the manner in which body searches may be conducted.

71. Recent standards that have incorporated specific provisions dealing with body searches include the European Prison Rules (2006), the Inter-American Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008) and the UN Rules for the Treatment of Women Prisoners (Bangkok Rules, 2010). Recommendations have been included in visit reports of monitoring bodies such as the United Nations Subcommittee on the Prevention of Torture and the European Committee for the Prevention of Torture. The European Court of Human Rights has found strip searches to be degrading when not justified by compelling security reasons and/or due to the way they were conducted.⁵² The Inter-American Commission on Human Rights⁵³ and some national jurisdictions have prohibited invasive body searches altogether.⁵⁴

72. In order to implement the prohibition of torture and other ill-treatment and the right of all persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity, the Experts recommended the incorporation of a Rule capturing the following elements:

- Body searches need to be regulated by law and should be resorted to only when strictly necessary to ensure the security of staff and detainees;
- When body searches are unavoidable, the least invasive method should be applied, by staff of the same gender who has been appropriately trained;
- Alternatives, such as electronic scanning devices, should be developed and used wherever possible.

These elements have been reiterated by the Human Rights Committee⁵⁵ and the Special Rapporteur on Torture.⁵⁶

⁵² *Iwanczuk v Poland*, 15 November 2001; *Shennawy vs France*, 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*, 24 July 2001 (a male prisoner was obliged to strip naked in the presence of a woman prison officer, and then his sexual organs and his food were touched with bare hands; this constituted a degrading treatment); *Frerot v. France*, 12 June 2007.

⁵³ 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."

⁵⁴ 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.

⁵⁵ UN Human Rights Committee, CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, (8 April 1988), para.8.

⁵⁶ UN General Assembly 68th Session, Report of the Special Rapporteur on Torture on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (9 August 2013), UN Doc: A/68/295, para. 59.

73. The preclusion of medical staff from engaging in security measures – such as body searches – stems from standards of medical ethics, i.e. the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the World Medical Association Statement on Body Searches of Prisoners.

74. In line with these standards, body searches should be conducted by medically trained staff that are not part of the regular health-care service of the prison or prison staff with sufficient medical knowledge and skills to safely perform the search.⁵⁷

E. DEATHS AND INJURIES IN CUSTODY

75. The Experts reiterated the importance of the revision of the SMR to include the duty to conduct an impartial investigation into all deaths in custody. The duty to investigate covers all deaths in custody, not only those that are apparently ‘unnatural, violent or unknown’ as proposed by the IEGM.⁵⁸ The Experts also supported the proposal to introduce a requirement to disclose the findings of investigations into deaths in custody to the competent authorities and selected control bodies into Rule 44*bis*.⁵⁹

RECOMMENDATION

76. The Experts reiterated the proposal they made in the first Essex paper to revise Rule 44(5) as follows:

(5) Notwithstanding internal investigations, the prison director shall report at once the injury or death to an independent investigatory body that is under a duty to initiate a prompt, impartial and effective investigation into the causes of and the circumstances surrounding deaths and serious injury in prison. The prison authorities are obligated to cooperate with this investigatory body and to ensure that all evidence is preserved.⁶⁰

77. In addition to individualised responses to each death and injury in custody, the Experts recommended a yearly assessment and analysis of all deaths and injuries in custody by a non-judicial body in order to identify any patterns or systemic issues. Data for this purpose would be anonymised and the scope, methodology and findings of the review made public.

RATIONALE

The Impartial Investigation of All Deaths in Custody

78. Since the adoption of the SMR, international norms and standards have developed to obligate states to account for deaths or injuries to prisoners while in the state’s custody or

⁵⁷ Principle 3 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (December 1982): ‘The physician’s obligation to provide medical care to the prisoner should not be compromised by an obligation to participate in the prison’s security system’ and therefore, involvement in ‘any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health’ is in contravention of medical ethics for health personnel.

⁵⁸ Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Buenos Aires from 11 to 13 December 2012, UNODC/CCPCJ/EG.6/2012/4, 27 December 2012, available at <www.unodc.org/documents/justice-and-prison-reform/EGM-Uploads/E.version.pdf>, para.11(c).

⁵⁹ *Ibid.*, Para.11(d).

⁶⁰ See Essex Paper, Section E(1), pp.17-19.

under its control. This duty recognises that by virtue of the detention, only the state is in the position to fully account for any death or injury. As a result, where a death or injury occurs in the state's custody or under its control, it has the burden of proof to provide "a satisfactory and convincing explanation" for the death or injury.⁶¹ International law requires states to account for suspicious deaths or injuries in prisons or deaths which appear to be "unnatural, violent or unknown."⁶² However, international law also requires the cause and manner of all deaths, including those which on their face appear to have been 'natural', to be investigated.

79. The reason for the broad coverage is that a 'natural' death may only refer to the specific medical condition that may have led to a death but may not explain the underlying causation or 'the cause of the cause'. A heart attack, for example, may be the result of heart disease but can equally be triggered by excessive use of force, physical restraint, torture or other ill-treatment. Similarly, respiratory failure may figure as a cause of death but could equally result from asphyxia due to the use of force or restraints. Further, a death may have been brought about by neglect (e.g. ignoring an alarm bell) or the lack of medical care. All three scenarios would engage the responsibility of the prison administration but would not be immediately obvious until investigated.

80. Whereas the 'cause of death' describes the physiological process that led to the death, the 'manner of death' must also be ascertained since this is crucial to determining responsibility for the death. There are five manners of death of which 'natural' is but one, whereas the other four possibilities of accident, suicide, homicide or undetermined must also be considered. A cause of death that appears to be 'natural', such as a heart attack, may have actually been produced by a suicide attempt and so is not necessarily a 'natural' death. Consequently, the term 'natural causes' does not necessarily rule out state responsibility for the death. States are therefore obligated to determine the cause and manner of all deaths and international law requires that these must be established by an impartial actor outside and unconnected to the prison administration including medical practitioners who work for the prison. This principle also serves to prevent abuses to prisoners and to protect prison staff and the prison administration from allegations of wrongdoing and cover-up.

81. In practice, the impartial investigation of all deaths in custody breaks down into two stages. First, in cases where it is possible to establish the absence of suspicious circumstances, the impartial investigation would end with the confirmation of the cause of death as not engaging state responsibility by the impartial actor and would therefore not require extensive state resources. Second, where the assessment of the impartial actor, complaints by family members or third party reports suggest suspicious or negligent action by the state,⁶³ a fuller impartial and independent investigation would be required. Jurisprudence issued by the European Court of Human Rights, for example, requires investigations of deaths in custody to be full, thorough and independent and to involve sufficient public scrutiny and family involvement.⁶⁴

Analysis of Data

82. In addition to the investigation of individual deaths in custody, the Experts also recommended a yearly assessment and analysis of all deaths and injuries in custody by a non-judicial body.

⁶¹ *Jordan v United Kingdom*, Application 24746/94, European Court of Human Rights (4 May 2001) at para. 103.

⁶² See footnote 58.

⁶³ Model Protocol for a legal investigation of Extra-legal, Arbitrary and Summary Executions ('Minnesota Protocol' (1991), UN Doc. E/ST/CSDHA/12.

⁶⁴ *Jordan supra* note 61 at paras. 102 – 109.

83. Systemic problems can include an unusually high number of deaths or injuries in general or from a specific cause in a particular prison or throughout the prison system. Broader patterns may be difficult to identify from the investigation of individual cases, but may become apparent through an analysis of the data as a whole, particularly where they relate to causes such as neglect of the health of prisoners, lack of sanitation, the spread of disease or dangerous infrastructure. The Experts noted that the UN Special Rapporteur on Torture has recommended that “[t]he prison administration should systematically identify and collect the patterns of deaths for further examination by independent bodies” and that “information related to the circumstances surrounding the death of a person in custody should be made publicly accessible, considering that public scrutiny outweighs the right to privacy unless otherwise justified”.⁶⁵

F. RECORD-KEEPING AND CASE MANAGEMENT

84. The Experts stressed the manifold importance of thorough record-keeping, including for the purposes of good prison management; to prevent torture and other ill-treatment, unofficial detention and enforced disappearance; and for strategic planning and reform.

85. Since the adoption of the SMR, standards have been developed with a view to preventing unofficial detention and enforced disappearance, in particular by the adoption of the UN Convention on Enforced Disappearance. Requirements of documentation also derive from the obligation to prevent torture and other ill-treatment, including access to complaints mechanisms and due diligence in preventing such abuse, including by avoiding overcrowding. Good practice has also evolved with regard to prison management and has been developed by the medical profession in standards relating to the documentation of a patient’s medical history.

86. As the UNODC Handbook for Prison Leaders stresses,

“Ensuring effective data management systems, including the basic prerequisite of maintaining adequate files for individual prisoners, is essential for the effective management of any prison system. (...) Prison registries and records are vital in order for managers to know who are in their prisons at all times. (...) Where prison records are poor, there is a great risk of individual prisoners becoming ‘lost’ in the system and no one knows why they are being detained, for how long and when they should be released. In many countries it has happened that ‘lost’ prisoners thought to have been released were ‘discovered’ still in prison many years later. Good prisoner data management is critical to ensuring that their human rights are respected and it is also important in terms of the management of the prison itself.”⁶⁶

87. The importance of proper record-keeping has also been captured in the 2010 Survey of the United Nations and other best practices in the treatment of prisoners in the criminal justice system, which states that “[a] reliable registration and file management system, either electronic or manual, enables the authorities to know whom they are detaining and for how long. (...) Collecting data about prisoners and prisons and developing information management systems can also better inform criminal policies and help to monitor compliance

⁶⁵ UN General Assembly 68th Session, Report of the Special Rapporteur on Torture on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (9 August 2013), UN Doc: A/68/295, para. 59.

⁶⁶ United Nations Office on Crime and Drugs (UNODC), Handbook for Prison Leaders, (2010), p.94.

with international standards. Maintenance of accurate prisoner records is also crucial to prevent overcrowding and rights violations.”⁶⁷

RECOMMENDATION

88. The Experts recommended that the Review incorporate the distinct requirements of a (general) registration book, individual files and communication of information required by central administration within the revision of Rule 7 of the SMR.

Register-Registration book and filing

7.

(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages or other reliable means of maintaining and preserving data, in which shall be entered in respect of each prisoner received:

(a) Information concerning his identity;

(b) The reasons for his commitment and the authority therefor;

(c) The date, time and place of arrest, of the taking of the arrested person to a place of custody, his admission to the place of detention, any transfer and the destination, as well as appearance before a judicial or other authority;

(d) The identity of the law enforcement officials concerned;

(e) The authority that ordered the deprivation of liberty and the responsible supervising authority;

(f) Precise information concerning the place of custody;

(g) For parents with caretaking responsibilities for children, the names of the children, their ages, and, if not accompanying the parent, their location and custody or guardianship status. Information relating to the children’s identity shall be kept confidential.

(h) The day and hour of his admission and release, and in the event of death the circumstances and cause of death and the destination of the remains.

(2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.

(3) Individual files shall include disciplinary measures and sanctions, body searches, the use of force and of restraints (Rules 31, 32, 32a, 33, 54), as well as a list of personal property and information on the next of kin (Rules 43, 44).

(4) Individual and medical records shall accompany every prisoner if transferred, and any urgent medical requirement must be highlighted to healthcare personnel at the place of destination.

(5) Files must be stored in a secure area accessible only to authorized personnel and shall be communicated to the detained person or his counsel in the form prescribed by law.

(6) Information on capacity and on cases of deaths, serious injuries and allegations of torture or ill-treatment shall be communicated to the central administration at regular intervals in order to prevent overcrowding, to identify systemic issues and to inform penal policies.

89. With regard to medical files, which must be stored separately for confidentiality purposes, the Experts recalled their proposal in the first Essex paper.⁶⁸

⁶⁷ Background Paper Workshop 2: Survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system, 28 January 2010, 6A/CONF.213/13, p.6 (p.136 of entire document); See also, UNODC, ‘Handbook on Prisoner File Management’ (2008), which contains practical guidance on setting up effective registration systems.

⁶⁸ See Essex Paper, proposed revision of Rule 22, p.8.

RATIONALE

Rule 7(1) – Registration book

90. The requirement to administer a registration book (also known as a ‘central file register’) or other reliable means of maintaining and preserving data derives from both good prison management and the obligation to prevent torture and other ill-treatment,⁶⁹ unofficial detention⁷⁰ and enforced disappearance.

91. The safeguard not only requires the documentation of detention but also of transfers as set out in Principle 16(1) of the UN Body of Principles for the Protection of All Persons under Any Form or Detention or Imprisonment.⁷¹ The UNODC Handbook on Prisoner File Management states that “[t]ransfer details of prisoners should be duly recorded to ensure these rights⁷² are exercised and to ensure against disappearances. Accurate records should also contain parole eligibility and/or release dates.”⁷³

92. As the UNODC Handbook on Prisoner File Management also stresses, “[t]he presence of complete, accurate and accessible prisoner files is not only a prerequisite for effective prison management and strategic planning, it is also an essential tool for ensuring the human rights of prisoners are respected and upheld. If prison systems deny such rights, the rehabilitative purpose of imprisonment is necessarily undermined, along with public confidence in the criminal justice system and the rule of law in general.”⁷⁴ The former Chairperson of the UN Working Group on Arbitrary Detention has stated that:

“We cannot guarantee that justice is administered lawfully unless there is clear written information about an individual’s imprisonment. For example, if there is no record of a detainee’s arrival at a place of custody, then it may be that they have been detained for longer than the law permits. A single register of information for each detainee must record not only when the individual arrived and left, but also who arrested them, who warranted the arrest, who questioned them, and when these events took place. It should also record who is in charge of the investigation. This will help ensure detainees’ protection under the rule of law.”⁷⁵

93. In order to reflect modern standards, data currently listed in Rule 7 should be expanded to include information required in line with Principle 12 of the Body of Principles; Article 17 of the Convention for the Protection of All Persons from Enforced Disappearance

⁶⁹ UNODC, Handbook on Prisoner File Management (2008), p. 9 et sqq, quoting, *inter alia*, Manfred Nowak, United Nations Special Rapporteur on Torture: “The compilation and maintenance of an official register of persons deprived of their liberty is the basic precondition for any outside control of treatment of detainees. The UN Convention on Enforced Disappearance obliges States to keep an official register of persons deprived of their liberty, including information such as the person’s identity, the date, time and place of detention, any medical examinations as well as date of release or transfer to another place of detention. Given that torture often takes place during incommunicado detention, a proper prison register is a very effective tool for the prevention of incommunicado detention and therefore for the prevention of torture.”

⁷⁰ Also stressed in UNODC, Handbook on prisoner file management, (2008), p. 7 et sqq., quoting, *inter alia*, Philip Alston, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions: “There is no surer way to facilitate torture, disappearances or extrajudicial killings than failing to keep adequate records of detainees.”

⁷¹ The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, Principle 16(1): “Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.”

⁷² Quote features in chapter on Principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and in this context “these rights” refers to the entitlement to notify family members and other persons.

⁷³ UNODC, Handbook on Prisoner File Management, (2008), p.21.

⁷⁴ UNODC, Handbook on Prisoner File Management, (2008), p.1.

⁷⁵ UNODC, Handbook on Prisoner File Management, (2008), p.13.

and Rule 3 of the Bangkok Rules (with regard to caretaking responsibilities).⁷⁶

Rule 7(3) - Individual files

94. In addition to the general registration book, the maintenance of “adequate files for individual prisoners” has been identified as “essential for the effective management of any prison system.”⁷⁷ Such files are required to allow for proper classification; to provide the relevant personnel with the information needed in order to meet the protection and other needs of detainees; and to ensure due process in the context of disciplinary measures and sanctions.

95. The Experts therefore recommended the explicit incorporation of a requirement of individual files in Rule 7, including the documentation of disciplinary measures and sanctions (Rules 31, 32, 33 and 54), as well as search procedures (see new Rule 32a.); a list of personal property⁷⁸ (Rule 43) and details on next of kin (Rule 44).⁷⁹

Rule 7(4) – Transferal of files

96. Individual and medical files need to accompany detainees if transferred and any urgent medical requirements such as medication needed should be highlighted to the healthcare personnel at the destination of transfer. Related good practice has been noted, for example in the 2010 Survey of the United Nations and other best practices in the treatment of prisoners in the criminal justice system, citing a country example where “the electronic medical record belongs to the prisoner and follows him or her in every situation, such as transfer to another prison”.⁸⁰

Rule 7(5) – Storage of data

97. This proposed Rule draws on the United Nations Rules for the Protection of Juveniles Deprived of their Liberty which requires, in Rule 19, that all “reports, including legal records, medical records and 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, accessible only to authorized persons and classified in such a way as to be easily understood.”

98. This is also supported, for example, by the UNODC Handbook on Prisoner File Management, which highlights that “[a]ccess to prisoner files by personnel should be on a ‘need to know’ basis; the central file register should record all access given to prisoner files” and that “[f]iles should be [not] left out where unauthorized persons could potentially access them”. It also emphasizes that “[a]ccess to information contained in the general prisoner files by external parties should follow national legislation and protocols relating to data protection and should at all times respect the prisoner’s right to privacy and confidentiality.”⁸¹

⁷⁶ Rule 3 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), UN-Doc. A/RES/65/229; see also Rule 41(b)

⁷⁷ UNODC, Handbook for Prison Leaders, (2010), p.95.

⁷⁸ Reflecting Rule 43 of the Standard Minimum Rules which establishes the requirement to carefully record all items belonging to the prisoner. The UNODC Handbook on Prisoner File Management stressed that this information “is to be included in the prisoner file”. See p.19.

⁷⁹ See Essex Paper, proposed revision of Rule 44(6), p.18.

⁸⁰ Survey of the United Nations and other best practices in the treatment of prisoners in the criminal justice system, 28 January 2010, 6A/CONF.213/13, Background Paper Workshop 2: Survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system, para. 34, p. 6 (p. 136 of entire document).

⁸¹ UNODC Handbook on Prisoner File Management, (2008), pp. 58, 59.

99. Relating to the communication to the detainee, the UNODC Handbook on Prisoner File Management stresses that “[t]hese principles not only require that information pertaining to an individual’s arrest, detention or imprisonment is recorded, but also that this information is made available to the individual, including an explanation of their rights and how to access them.”⁸²

Rule 7(6) – Analysis of information

100. It is generally recognised that “prison systems with weak data management systems are poorly placed to be able to either review or monitor the overall profile of the prisoner population” and that, “without such information, any attempt at strategic planning and reform efforts, including the design of adequate alternatives to imprisonment, would be impossible.”⁸³ The UNODC Handbook on Prisoner File Management elaborates that,

“The careful collection of information about those being held in custody is critical to informing both day to day prison administration and long-term prison planning. The total number of people held in custody, their classification, along with their health and rehabilitative needs provides important information for prison managers to identify resource requirements, set budgets, manage health and safety, and develop appropriate rehabilitative and treatment programmes. At the operational level, for example, prisoner information enables prison managers to plan daily activities such as meals, medical treatment and cell allocations, as well as determine appropriate staffing levels and the deployment of individual responsibilities. At the strategic level, the size and profile of the prison population guides managers in planning the development and delivery of prison services, such as health care, vocational training, education, and rehabilitation programmes, as well as relevant personnel support.”⁸⁴

101. The Experts therefore recommended capturing the regular analysis of data in Rule 7(6), in order to enable the central administration to monitor capacity with a view to preventing overcrowding, as well as cases of deaths, serious injuries and incidents of torture and other ill-treatment in prisons and to identify and address systemic concerns.

102. This has been reiterated by the survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system in 2010 which highlighted that “[c]ollecting data about prisoners and prisons and developing information management systems can also better inform criminal policies and help to monitor compliance with international standards. Maintenance of accurate prisoner records is also crucial to prevent overcrowding and rights violations.”⁸⁵

Medical files

103. With regard to medical files the Experts recalled their proposal for the revision of Rule 22(6) in the 2012 Essex paper,⁸⁶ to meet the requirement of due diligence in health-care, documenting medical conditions, diagnosis and medication, with no different rationale from that applying in general healthcare in the community, as well as documentation requirements

⁸² Ibid. p.12.

⁸³ UNODC, Handbook for Prison Leaders, (2010), p.95.

⁸⁴ UNODC, Handbook on Prisoner File Management, (2008), p.3.

⁸⁵ Survey of the United Nations and other best practices in the treatment of prisoners in the criminal justice system, 28 January 2010, 6A/CONF.213/13, Background Paper Workshop 2: Survey of United Nations and other best practices in the treatment of prisoners in the criminal justice system, para. 18.

⁸⁶ See Essex Paper, Proposed Rule 22(6): “Health-care personnel shall maintain an accurate, up-to-date and confidential medical file for each prisoner, including the results of all consultations and tests and the identity of the examining staff, and provide prisoners with access to their medical file upon request.”

also comprised in Article 17(3f) of the Convention on Enforced Disappearance.

104. The separation of the medical file from other records has also been emphasised by the 2010 Survey of the United Nations and other best practices in the treatment of prisoners in the criminal justice system, which notes that “medical records are not part of the general prison records, but must remain either under the control of the detainee or prisoner (where the law gives this right to patients generally) or under the control of the medical officer.”⁸⁷

G. TRAINING

105. The Experts stressed that the regular training of staff is a central means of ensuring the implementation of the SMR and the overarching safety and personal security of prisoners and prison staff. In addition to the recommendations the Experts made in the first Essex paper, they identified the following specific training needs that should be incorporated into the revised SMR:

- 1) **Assessments:** prison staff should receive regular training on how to carry out risk assessments to ensure the safety and personal security of prisoners, prison staff and the prison including risks to prisoners in a position of vulnerability on grounds of discrimination, abuse and/or specific needs that require accommodation.
- 2) **Conflict resolution:** The UN Special Rapporteur on Torture notes that “[p]reventive measures include increasing the number of personnel sufficiently trained in using non-violent means of resolving conflicts”.⁸⁸ The Experts recommended that prison staff are regularly trained in good practice and the most up-to-date and effective means of early warning and conflict de-escalation and resolution.
- 3) **Suicide and self-harm:** The Experts recommended that prison staff should be trained to detect mental health care needs and risk of self-harm and suicide among prisoners and to offer assistance by providing support, monitoring and referring such cases to specialists.⁸⁹
- 4) **Use of force:** The Experts stressed the close link between the regulation of the use of force and restraints and prison safety and personal security. They therefore recommended that the SMR include a specific requirement for initial and regular retraining on the circumstances in which force and restraints can be legitimately and proportionately used; alternatives to the use of force and restraints and prevention, pre-emption and de-escalation techniques; and prohibited forms of force and restraint in order to enable prison personnel to carry out their functions safely, effectively and in line with international standards (see also chapter C.). This is in line with Principles 19 and 20 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials which explicitly require training “to include issues of police ethics and human rights, especially (...) alternatives to the use of force and firearms, including the peaceful settlement of conflicts, (...) the methods of persuasion, negotiation and mediation, as well as technical means, with a view to limiting the use

⁸⁷ See foot note 85, para. 34.

⁸⁸ UN General Assembly 68th Session, Report of the Special Rapporteur on Torture on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, (9 August 2013), UN Doc: A/68/295, para.49.

⁸⁹ See UN Bangkok Rules (2010), Rule 35: Prison staff shall be trained to detect mental health-care needs and risk of self-harm and suicide among women prisoners and to offer assistance by providing support and referring such cases to specialists.

of force (...).”⁹⁰ Wording could include the requirement of training, including practical training, on cases of legitimate, proportionate and safe use of force and restraints in order to enable prison personnel to exercise their duties.

- 5) **Restraints:** The importance of training on the use of physical restraints has been stressed by the UN Committee against Torture.⁹¹ The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas list the requirement of training “on national and international principles and rules regarding the use of force, firearms, and physical restraint” explicitly.⁹² Professor Andrew Coyle has also noted that,

“All staff who deal directly with prisoners should be trained in techniques which enable them to physically subdue prisoners using minimal force. They should not have to rely on simply overpowering troublesome prisoners by a show of superior physical force. On many occasions this will not be possible. Even when it is possible, the result may well be serious injury to both staff and prisoners. There are a variety of control and restraint techniques in which staff can be trained which will allow them to gain control without injuring either themselves or the prisoners involved. Management should be aware of what these are and should ensure that all staff are competent in the basic skills and that sufficient staff are trained in advanced techniques.”⁹³

CONCLUDING REMARKS

106. The Group of Experts hope that this supplemental report together with the 2012 Essex Paper will be a useful contribution to the IEGM and revision process going forward. The submissions intend to facilitate discussion on the areas identified for revision, including by identifying current international norms and standards as a result of the international legal developments that have taken place since their adoption in 1955.

107. The Experts reiterated that any changes to the Rules must not lower any existing standards and welcomed the repeated clear language of resolutions adopted at the level of the UN in this regard.

⁹⁰ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), Principle 20: “In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.”

⁹¹ CAT recommended (Germany) to “ensure adequate training for law enforcement and other personnel on the use of physical restraints”. UN Committee Against Torture, Concluding observations on Germany, 12 December 2011, UN-Doc. CAT/C/DEU/CO/5, para. 16.

⁹² Principle XX, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

⁹³ Andrew Coyle, A human rights approach to prison management: handbook for prison staff, International Centre for Prison Studies, 2002, p. 69.

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