



**Optional Protocol to the
Convention against Torture
and Other Cruel, Inhuman
or Degrading Treatment
or Punishment**

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**Subcommittee on Prevention of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment**

**Summary of the discussion on the on-going process to
amend the United Nations Standard Minimum Rules
for the Treatment of Prisoners (SMR) ***

* The present document was not edited before being sent to the United Nations translation services

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I. Introduction

1. This paper summarises discussions held by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT)'s Working Group on the Standard Minimum Rules in which we discussed the on-going process to amend the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR).

2. The SPT welcomes plans to make targeted changes to the SMR. Informed by its own experience and expertise, the SPT can take this valuable opportunity to share its concerns about several aspects of the SMR which are relevant to our mandate.

3. The following points are given purely as examples, but are intended to show the strong and urgent need for some changes and additions to be made to the SMR in order to fully embed a human rights approach in them. The SPT believes that the SMR should emphasise the need to guarantee human rights by taking appropriate measures where persons are deprived of liberty.

II. Suggested changes

A. Information to and complaints by prisoners

4. The SMR do not acknowledge the right to legal representation, in accordance with due process. The SPT considers access to legal representation to be an essential requirement, both to protect the inherent rights of detainees, (which include such matters as access to adequate food and lodging, visits and access to services) and exposing detainees to further information about their detention and means of enforcing their rights. All detainees should have access to legal representation regardless of whether their detention is pre-trial or post-conviction (see Rule 35).

5. The scope of the right to legal representation is very important in penitentiary situations. Legal representation should be available from the very outset of a person's detention, especially as this safeguard extends beyond the role of simply advising the detainee. A lawyer can see the physical situation of the detainee when they visit them.

6. In the case where a complaint arises, it must be possible for prisoners to come before a judge or any other competent, independent, judicial authority, to have their complaint heard. This is especially important if the issue cannot be resolved through a complaint to the prison administration.

7. Preventive measures should be taken to avoid any kind of reprisals – including from other inmates – for making complaints or lodging cases against the prison administration.

8. In the light of subsequent developments reflected in Rule 3.6 of the Tokyo Rules, Principles 3 and 4 of the Basic Principles on the Independence of the Judiciary¹, Article 13(b) and (c) of the Basic Principles on the Role of Lawyers², Principle 33 of the Body of Principles for the Protection of All Persons under Any Form of Detention, and the work of the SPT on the need for “procedural and due process guarantees pertaining to detention”,

¹ 7th United Nations Congress on the Prevention of Crime, 1985.

² Adopted by the 8th United Nations Congress on the Prevention of Crime (1990).

“the concept of prevention”³ and the detrimental impact that a lack of an appropriate a legal framework has, - both organizationally and procedurally, - to the protection of and respect for the rights of detainees⁴, the SPT requests that the following amendments be made:

(a) The development in international standards shall be mirrored in changes to Rule 35 of the SMR, reflecting that the rights of detainees to legal representation and to access to justice should not only pertain to fair trial, but are also necessary to protect detainees’ specific rights relating to detention regime and conditions;

(b) This protection should ensure that due process rules are applicable for both accused and convicted persons. Necessary arrangements should be made to provide legal aid for detainees - whether they are being held pre-trial or have been convicted - especially when they are not in a position to pay for a lawyer;

(c) The SMR should recognise that penitentiary cases are highly specialized and require the expertise of attorneys different from those engaged in criminal defence.

B. Contact with the outside world / social relations and after-care

9. Although Rule 37 of the SMR provides for contact with the outside world, the specific use of the word “allow” in its text indicates a restrictive approach. Communication with the outside world should be seen as essential and should be encouraged, rather than tolerated.

10. Taking into consideration Article 23(1) of the ICCPR, Articles 9, 10, 20 and 21 of the CRC, Articles 18 and 25 of the African Charter on Human Rights and Peoples’ Rights, Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms from the Council of Europe, Article 17 of the Arab Charter and Rule 28 of the Bangkok Rules, the SPT requests the following changes to the SMR:

(a) The prison administration should encourage communication between prisoners and their relatives and friends unless there is a reasonable / justified objection to the same. Communication must be carried out at regular intervals by mail, by telephone or by other means of communication, and through visits. Where a detainee’s partner/spouse or his or her family members visit, physical contact should be allowed;

(b) The prison administration should provide decent conditions for visits so that prisoners have the opportunity to maintain and strengthen family relationships in a natural manner without any discrimination. Body searches on visitors should be carried out in a way that is respectful of human dignity and conducted by appropriate personnel of the same gender as the person being searched.

C. Religion or belief

11. In respect of religion or belief, the SMR focus on access to spiritual leaders and religious ceremonies. While standards are adequate on this issue, a general provision highlighting respect for, and tolerance of all religions is desirable and recommended.

12. In addition to the amendments suggested to the SMR, the SPT recommends the following additions to the SMR.

³ CAT/OP/12/6 (2010).

⁴ 5th Annual Report (2011).

1. Focus on persons in conditions of vulnerability

13. The SMR offer general guidelines, and are not sensitive to issues faced by persons in conditions of vulnerability – e.g. women, children, foreign nationals, persons with health problems, persons with disabilities, LGBT people etc.

14. In this regard, socio-criminological aspects ought to be understood and used to ensure that the services provided to inmates are adequate, accessible, acceptable and adaptable. This should be done considering:

(a) Specific health care, hygiene and other needs of people in conditions of vulnerability, e.g. women, children, elderly and persons with disabilities are not met. There is a need to address these issues in detention;

(b) The circumstances in which different groups commit crimes vary;

(c) Stigmatization and media sensationalism and its impact on personal/family life, heightened sense of shame, labelling etc. contributing to patterns of offending;

(d) Attitudes of the criminal justice system and society in respect of vulnerable groups may be harsh as individuals may be seen as not only having committed a crime, but as having transgressed their role / place in society - leading to double jeopardy when facing the actual punishment as they are often treated more severely;

(e) The majority of people in conditions of vulnerability who are incarcerated have, at some point in their lives, suffered abuse, whether physical, sexual or psychological. There is a need to address these issues in detention;

(f) Abuse, whether physical, mental or sexual – whether by law enforcement officials or inmates. Rape and transactional sex are a means of survival in prison – psychological effect / scars;

(g) Persons in conditions of vulnerability have an increased possibility / risk of contracting HIV/AIDS, hepatitis, or other blood borne diseases;

(h) Impact of routine strip searches – correlation with history of abuse of persons in conditions of vulnerability;

(i) Reduced access to justice related to socioeconomic disadvantages – ranging from poverty, lack of education and resources;

(j) Inadequately funded legal aid schemes and the lack of resources on the part of accused or convicted persons among other things greatly affect their treatment in the justice and penitentiary system.

2. Special categories of prisoners

15. In general, focus on special categories of prisoners is non-existent in the SMR despite the fact that international regulations are becoming more and more detailed and focused. In addition to highlighting issues pertaining to vulnerable persons highlighted above, the following categories should also be considered:

(a) “Lifers”;

- Life sentences are meted out quite often in the majority of the United Nations countries. The number of cases where persons are sentenced to life in prison will continue to grow since there is a move towards abolishing the death penalty, and a life sentence is seen as its natural alternative. Despite this, there is no commonly accepted set of rules regarding this category of prisoners except the general provisions stated in the ICCPR and CAT. Hence, revising the SMR to address this gap is absolutely crucial for two reasons:

- Firstly, persons imprisoned for life should not be automatically considered and treated as “dangerous” prisoners, and that very fact of life imprisonment should not mean that such detainees are subjected to more strict regime than those not serving a life sentence, or held in isolation.
- Secondly, so called “lifers” should be accommodated in well protected prisons and have open access to different activities, including treatment and / or medical rehabilitation, culture and / or sport. They should also be allowed to personalise / furnish their cells as they wish within the bounds of reasonable standards decided by the prison authorities.
 - (b) “Dangerous” prisoners
- In many prison systems there is a category of offenders who, for different reasons, are deemed to be “dangerous”. They are declared so as they pose a threat to other prisoners, to the institution in which they are held, and to the society as a whole. The fact that they are considered “dangerous” does not mean that it is acceptable to restrict their freedom to such an extent that it amounts to torture or inhuman treatment;
- the SPT appreciates the broad and progressive approach of the CPT, which highlighted “that the various concepts of "dangerousness to society" (expressly mentioned in the legislation), criminal dangerousness (the risk of recidivism) and psychiatric dangerousness (linked to mental pathology) [...] lend themselves to very broad, subjective interpretations, [...]”⁵. The SPT reiterates that persons deprived of liberty should be placed in isolated detention only if required as a measure of last resort, but that such placements should be temporary, under medical supervision and subject to review. The SPT requests changes to the SMR to reflect the following:
 - (a) Social contact for people who may pose a risk to their safety or that of others should be permitted. Social contact shall not be debarred as, indeed, it has been observed that some inmates may even partly lose their ability to speak freely after years in isolation;
 - (b) Security measures should be applied only to the extent it is justified (i.e. necessary and proportionate), and is reasonable for the situation of the person in question;
 - (c) The status of the person as a “dangerous prisoner” should be subject to review.

D. Other issues

1. Independent inspection

16. Detainees are vulnerable because they are detained. Accordingly, there should be as many safeguards as possible in place in respect of imprisonment. Scrutiny of prisons by public institutions such as the National Preventive Mechanisms (NPM), Ombudsmen’s Offices and others, including international organizations, is of critical importance. In addition, prisons should be opened up to public scrutiny by civil society. This can be achieved by bringing greater transparency in prisons and the criminal justice system. Different visiting schemes should be seen as complementary to each other, and are not mutually exclusive. States should encourage and promote the activities of independent

⁵ Report on the visit to Italy (2008), paragraph 160.

oversight bodies to supervise the conditions in which prisoners are held and the way that they are treated. Such oversight bodies should have a mandate which gives them the unhindered access to the prison facility as well as the possibility to communicate with prisoners in confidence. Independent oversight bodies should also be in a position to inform the public authorities responsible for the prison system, and the public in general, about the results of their activities.

17. The SMR should also highlight the differences in supervision by different oversight mechanisms, including that there may be differences in their competence and capacity, which inform a different approach. For example, a visit by the NPM or an Ombudsman, (notwithstanding that in some states the Ombudsman is the NPM) may be different; e.g. it may be a preventive visit or it may be to investigate a complaint. A visit by a judge should be identified as different again. The role of judges is not to consider living conditions or other detention-related issues from a preventive viewpoint. Instead, a judge may visit a prison to help him or her make a judicial decision in respect of a case or complaint. Assigning judges supervisory roles which lead to recommendations (of a preventive nature) could have a detrimental impact on their role to decide cases.

2. Prevention of torture

18. Some provisions in the SMR should be used to address the prevention of torture and other ill treatment specifically. There should be measures in place so that injuries and complaints can be registered by a qualified doctor when a detainee arrives at the prison, or when such injuries or allegations are complained of or discovered. Upon detecting injuries or in cases where a complaint of ill-treatment has been made, the prison personnel should immediately report this to the appropriate authorities responsible for investigating such allegations. Similarly, access to a doctor of the inmate's choice (a decision that could be based on medical speciality and or the particular doctor) should be ensured for this purpose.

3. Private prisons

19. There must be a provision stating that SMR regulations apply to the same extent to private prisons as they do to prisons under public administration. Private prisons should be subject to special scrutiny from the NPM or other independent bodies, such as an ombudsman or parliamentary commission. The SMR should make this clear.

4. The replacement of out-dated terminology/concepts

20. The use of concepts and terms which appear to regard inmates as clinical patients or the objects of treatment or rehabilitation should be entirely abolished. Instead, a human rights approach based on accountability, rights, obligations and due process should be used and emphasised for example terminology in relation to persons with mental disabilities.

21. Observations of behaviour during detention, and a common sense approach based on objective facts should inform decisions as to the different premises and areas within them that an individual detainee is held. An approach based on labelling a detainee in this respect, is not appropriate.

22. Assumptions that people convicted of crimes lack self-respect or a sense of responsibility, that they need to show progress, or that they should be otherwise assessed on pathological grounds, should be avoided.

23. It should be stressed that while prisons are not considered part of the criminal justice system in some States (i.e. they are not governed by the judiciary and are operated by auxiliary administrative authorities), they must abide by the judgements and sentencing that gives them the legitimate authority to detain inmates. That is, prisons must work within the parameters of their legitimate power, working within the legal framework and respecting

human rights. No administrative authority is entitled to increase the gravity of a judicial sentence by its own decision.

24. Statements and inferences condoning the practice of reducing the diet of a prisoner as a form of punishment, under any circumstance, should be revised.

25. Detainees' freedom of conscience shall be respected at all times. The personality studies considered by the SMR should be abandoned altogether as should any attempts to change the inner personality of the detainee. Instead, attention must be placed on the services provided by the institutions, good governance and accountability.
