

INCORPORATING THE NELSON MANDELA RULES INTO NATIONAL PRISON LEGISLATION

A Model Prison Act and Related Commentary



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CRIMINAL JUSTICE HANDBOOK SERIES



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Introduction

For more than 60 years after its initial adoption in 1955, the Standard Minimum Rules for the Treatment of Prisoners (often referred to as the "SMRs") have set universal minimum standards for the operation of prison systems worldwide. Those Standard Minimum Rules were of tremendous value and influence in the development of prison laws, policies and practices in Member States all over the world. In recognition of the advances in international law and correctional science, however, the General Assembly initiated an intergovernmental revision process in 2011 with a view to updating these venerable Rules and render them fit for the twenty-first century.

The revision process, which took more than four years, focused on eight thematic areas: prisoners' inherent dignity as human beings; vulnerable groups of prisoners; medical and health services; restrictions, discipline and sanctions; investigation of deaths and torture in custody; access to legal representation; complaints and inspections; and staff training. In addition, terminology was updated throughout the document. In all, about 35 per cent of the Rules were revised.² When the General Assembly adopted the revised United Nations Standard Minimum Rules for the Treatment of Prisoners in 2015, it also decided that the Rules should be known as the Nelson Mandela Rules, in honour of the former President of South Africa, Nelson Rolihlahla Mandela, who spent 27 years in prison in the course of his struggle for global human rights, equality and democracy.³

The Nelson Mandela Rules are a crucial guide for prison practitioners and legislators alike because, in the words of the preliminary observations to the Rules, they "represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations". Moreover, in 2017, the General Assembly explicitly encouraged Member States "to use the [Nelson Mandela] Rules as a guide in the development of prison laws". In the same resolution, the General Assembly requested the United Nations Office on Drugs and Crime (UNODC) to continue ensuring broad dissemination of the Nelson

¹Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. On the history of the Rules, see Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation*, vol. 20, Procedural Aspects of International Law Series (Philadelphia, United States, University of Pennsylvania Press, 1994).

² See United Nations Office of Drugs and Crime (UNODC), "The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): an updated blueprint for prison management in the 21st century" (Vienna, 2015).

³ General Assembly resolution 70/175, para. 6.

⁴ Ibid., annex, preliminary observation 2, para. 1.

⁵ General Assembly resolution 72/193, para. 1.

Mandela Rules, to design guidance material and to provide technical assistance to Member States in the field of prison reform in order to "develop or strengthen penitentiary legislation, procedures, policies and practices consistent with the Rules".

The legal status of the Nelson Mandela Rules is complex. The General Assembly noted the "non-legally binding nature" of the Nelson Mandela Rules in its resolution 72/193 of 2017, in which it promoted the practical application of the Rules while equally emphasizing their status as "the universally acknowledged and updated minimum standards for the treatment of prisoners". The preliminary observations to the Nelson Mandela Rules emphasize that the Nelson Mandela Rules "set out what is generally accepted as being good principles and practices in the treatment of prisoners and prison management" and state that they represent, as a whole, the minimum prison conditions accepted as suitable by the United Nations.⁸

The reality is that in the years since the initial adoption of the Standard Minimum Rules for the Treatment of Prisoners in 1955, their status has grown. Not only have they influenced national developments in prison law and been applied by national courts in various countries, but they have also been highly influential in assisting the United Nations and other international bodies responsible for the interpretation and enforcement of binding international treaties, in particular those that prohibit torture or other cruel, inhuman or degrading treatment or punishment. The upshot has been that distinguished scholars have recognized that while the Rules as a whole are not legally binding, some of their provisions have reached the status of customary international law. Indeed, those rules that relate directly to the prohibition of torture reflect jus cogens.

This evolutionary pattern has continued. Since their adoption by the General Assembly in 2015, the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) have been applied by the Committee on the Rights of Persons with Disabilities,¹¹ the Committee against Torture¹² and the Human Rights Committee¹³ to applications from individuals alleging infringement of provisions of the Convention on the Rights of Persons with Disabilities, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, respectively. In each instance, the Nelson Mandela Rules were crucial to the interpretation of a general provision of those treaty-based instruments when applied to prisoners, thus underlining their importance in the application of international law.

Given their increasing status, the incorporation of the Nelson Mandela Rules into national prison legislation is more pressing than ever. The reality is that prison legislation in many countries is dated or incomplete. In such instances, its content should be

⁶ Ibid., para. 11.

⁷ General Assembly resolution 70/175, annex, preliminary observation 1.

⁸ Ibid., preliminary observation 2, para. 1.

⁹ Clark, *The United Nations Crime Prevention and Criminal Justice Program*; Nigel S. Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford, Oxford University Press, 2009), pp. 383–384.

¹⁰ For the classification of the prohibition of torture as jus cogens, see, for example, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T10, Judgment, 10 December 1998, para. 153.

¹¹ CRPD/C/20/D/38/2016, para. 11.3.

¹² CAT/C/62/D/672/2015, para. 5.3; CAT/C/68/D/817/2017, para. 8.5.

¹³ CCPR/C/119/D/2146/2012, para. 8.7; CCPR/C/123/D/2247/2013, para. 6.2.

assessed against the latest international standards and norms. If necessary, national prison laws should then be amended, either by changing individual provisions or by introducing new comprehensive national prison legislation. This Handbook is designed to assist in this process.

1. Purpose

The purpose of this Handbook is to provide guidance on developing national prison legislation that meets the minimum standards set by the Nelson Mandela Rules. At the core of this Handbook is a Model Prison Act, designed to guide Member States in understanding how the principles contained in the Nelson Mandela Rules could best be included in national prison legislation. The Model Prison Act is supported by a detailed commentary with references to not only the Nelson Mandela Rules but also other United Nations standards and norms relevant to prison management and the treatment of prisoners, as well as the binding international conventions that underpin them.

To some extent, the Nelson Mandela Rules are informed by earlier United Nations standards and norms in crime prevention and criminal justice. For example, the United Nations Rules on the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), ¹⁴ which were adopted by the General Assembly in 2010, had the purpose of setting more advanced standards on the treatment of women prisoners and offenders. The Bangkok Rules were carefully taken into consideration in developing the Nelson Mandela Rules, which also promote a gender-responsive prison regime that proactively caters for the specific needs of women prisoners. The Model Prison Act builds on this concern and consistently reflects the requirement of meeting the distinct needs of women prisoners and institutionalizing gender-responsive prison management more broadly.

The more detailed provisions of the Model Prison Act, which go beyond a statement of general principle, specify precisely what the rights and obligations of prisoners are. At the same time, prison officers will know what is legally expected of them when making decisions that affect fundamental rights of the prisoners with whom they interact.

This Handbook is part of a wider initiative by UNODC to promote and support the practical application of the Nelson Mandela Rules worldwide. The Handbook will be part of a comprehensive operational toolkit on the Nelson Mandela Rules, including the UNODC handbook entitled *Assessing Compliance with the Nelson Mandela Rules*, ¹⁵ which includes a checklist for internal prison inspection mechanisms; the UNODC e-learning course on the Nelson Mandela Rules, designed to complement national curricula for training prison staff; the UNODC instructional placards about the core content embodied in the Nelson Mandela Rules; as well as various promotional materials.¹⁶

¹⁴ General Assembly resolution 65/229, annex.

¹⁵ UNODC, Assessing Compliance with the Nelson Mandela Rules: A Checklist for Internal Inspection Mechanisms, Criminal Justice Handbook Series (Vienna, 2017).

¹⁶ For more information on the e-learning course and guidance material, see www.unodc.org/nelsonmandelarules.

2. Target group

The primary target group for this Handbook is the legislators and prison practitioners who are seeking to ensure that their prison legislation reflects international minimum standards and universally acknowledged best practice, as exemplified by the Nelson Mandela Rules and related instruments. That includes both policymakers who want to update prison legislation and the actual drafters of new legislation, who are tasked with converting the ideas reflected in the Nelson Mandela Rules into statute law that can be applied in their jurisdiction.

The Model Prison Act suggests precise language for legal drafters. In some instances, the Model Prison Act provides different options for certain provisions, the exact wording of which depends on the national context. These are marked in brackets. The Commentary is designed to enable the reader to engage with the text and consider different options, and it includes suggestions for alternative formulations and additional provisions that, subject to the national context, could be added to national prison legislation. The footnotes broaden the options by referring, inter alia, to key regional standards and to UNODC technical guidance material on different aspects of prison management.

3. Characteristics of the Model Prison Act

The Nelson Mandela Rules are an inspiration for good prison legislation in that they require a close look at what can be done from a legal perspective to ensure that prisoners are treated in conformity with what the Rules require. This is particularly true of the eight key thematic areas where the Rules reflect substantively revised principles which may now require embodiment in a new or amended law. The rules that have not been substantively altered but which remain part of the Nelson Mandela Rules in their current form all need to be considered too. They equally contain core provisions, which in many instances are missing in national prison laws.

Converting the Nelson Mandela Rules into legislation required grouping the provisions of the Model Prison Act into 12 chapters that bring together provisions relating to particular thematic areas. The end result was a legislative structure that overlaps with the thematic areas identified by UNODC in developing its checklist for internal inspection mechanisms to assess compliance with the Nelson Mandela Rules.¹⁷ This overlap should assist prison inspection mechanisms: if national legislation follows this pattern, it should result in clear laws that allow systematic monitoring of the practical application of the Rules.

It was also necessary to add some additional provisions not explicitly reflected in the Nelson Mandela Rules in order to convert the Rules into functioning prison legislation. The Model Prison Act therefore not only presents the provisions found in the Nelson Mandela Rules in legislative form but also contains further provisions to operationalize and interpret them. Although the focus in prison legislation must be on the "treatment of prisoners", any such legislation also has, for example, to include the structure and powers of the Prison Service that implements such legislation.

¹⁷ UNODC, Assessing Compliance with the Nelson Mandela Rules: A Checklist for Internal Inspection Mechanisms, Criminal Justice Handbook Series (Vienna, 2017).

4. Scope of the Model Prison Act

While there is broad consensus that basic principles that protect human dignity should apply to all persons who are deprived of their liberty, it is difficult to do so in detail in a single piece of national legislation. The pragmatic strategy adopted in the Model Prison Act in this Handbook is to focus, as do the Nelson Mandela Rules, on prisons for adults that are designed primarily to detain untried and sentenced prisoners. Technically, this is achieved by careful definitions of the terms "prisoner" and "prison" in the Act.

Some provision must, nevertheless, be made for children¹⁸ and persons such as irregular or non-documented migrants or persons with mental disabilities who are not facing criminal charges and who, contrary to international standards and norms, may nevertheless be being held in prisons. However, the expectation is that, at the national level, separate legislation will provide for these different classes of persons who are not – or should not be – held in prisons but who are nevertheless deprived of their liberty.

Some Member States may prefer to deal with sentenced and untried prisoners in separate acts. For example, they may wish to have legislation that deals exclusively with sentenced prisoners as their untried prisoners are held in different institutions. In those instances, they could still apply most of the Model Prison Act, but the definitions proposed in this Act would need to be modified accordingly. More than that, the ordering of the Act itself may need to be rearranged. If, for example, the legislation applied only to convicted prisoners, chapter XI, on untried prisoners, would fall away entirely and chapter X, on sentenced prisoners, would be absorbed into the other sections.

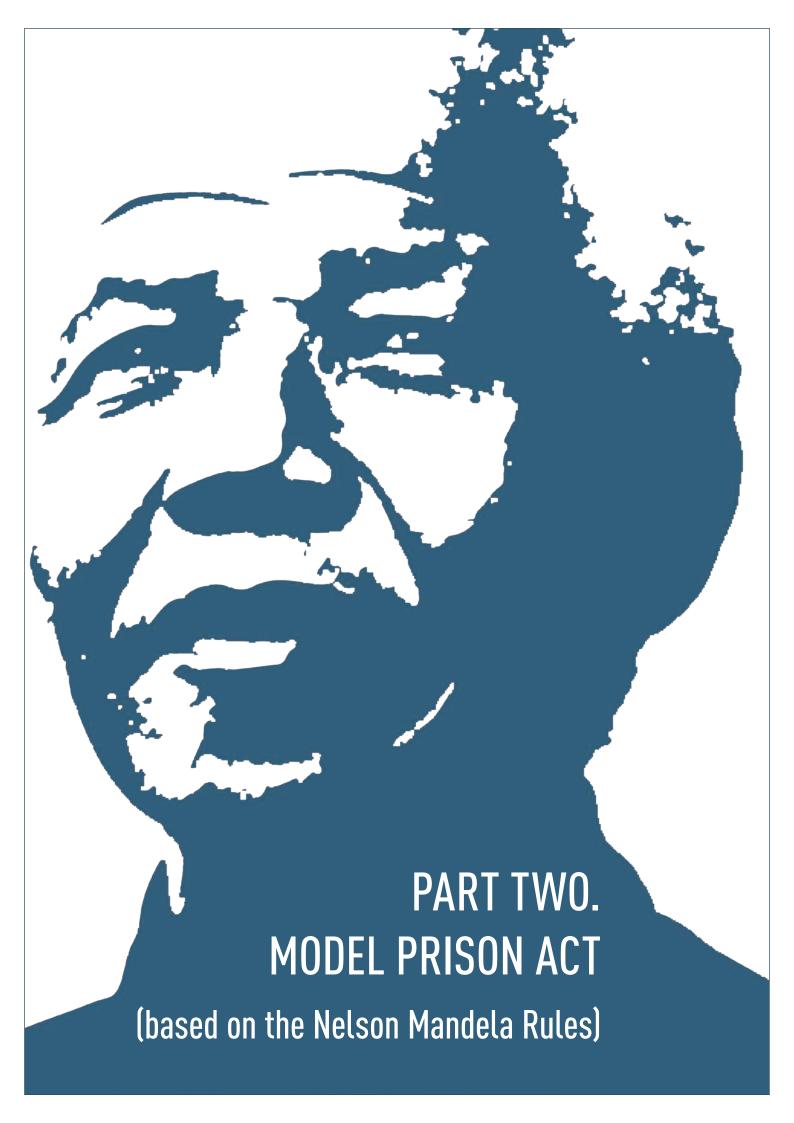
There are some limitations to the scope of the Model Prison Act. First, although the Act makes provision for a Prison Service, it restricts the elaboration of the structure of the Prison Service by focusing largely on the powers and duties of the Commissioner of Prisons, Prison Directors and health-care professionals. Modern prison services are much more complex than that and, as the commentary on the Act recognizes at various points, national legislation would require more elaboration of the structure of the Prison Service, either in the Act itself or through comprehensive regulations.

Secondly, the Model Prison Act focuses squarely on what ought to happen in prison. In this regard, it follows the Nelson Mandela Rules, which adopt a similar approach. The Model Prison Act therefore does not deal with what happens outside prison. For example, it deals with the preparation of prisoners for release but does not focus on the powers and duties of bodies such as courts or parole boards, which make decisions on the early release, conditional or otherwise, of prisoners. The underlying thinking is that deciding on the continuation of pretrial detention in prison or the continued execution of a sentence in prison is not the function of prison law, while how imprisonment is implemented, both for untried prisoners and for sentenced prisoners, is what prison law controls.

¹⁸ See UNODC, Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary (Vienna, 2013).

This conceptual approach is not universal.¹⁹ Several countries combine prison legislation with detailed rules on how release should be managed. Some go further and treat the implementation of community sanctions and prison sentences in the same legislation. In such instances, the Model Prison Act will be relevant only to the respective part of the national legislation.

¹⁹ See Dirk van Zyl Smit, "Prison law", in *Oxford Handbook of Criminal Law*, Markus D. Dubber and Tatjana Hörnle, eds. (Oxford, Oxford University Press, 2014), pp. 988–1015.



PART TWO. MODEL PRISON ACT (based on the Nelson Mandela Rules)

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Definitions

"Admissions officer"	means a member of the Prison Service designated by the Prison Director to control admission to the prison as required by article 4.
"Child"	means a person below the age of 18 years.
"Civil prisoner"	means a person legally detained in a prison other than by reason of a criminal charge or by reason of being deprived of liberty following a criminal conviction.
"Clinic"	means the dedicated facility in a prison used for the medical examination and treatment of prisoners and other health-related services.
"Commissioner"	means the Commissioner of Prisons, who is the head of the Prison Service.
"Commitment order"	means the document required for a prisoner to be admitted to a prison, or other institution, where he or she is to be detained.
"Health-care professional"	means a medical doctor or other qualified health-care practitioner, in line with national definitions.
"Minister"	means the Minister of Justice.
"Prison"	means all authorized places of detention within a criminal justice system, including those used for the purpose of imprisonment of untried and sentenced prisoners.
"Prison Director"	means the member of the prison staff appointed by the Commissioner to head a prison.
"Prisoner"	means any person detained in a prison, excluding a young child accompanying his or her incarcerated parent.
"Prison Service"	means the department of State responsible for administering prisons in terms of this Act and includes all infrastructure, as well as financial and human resources, allocated to the service.
"Prison staff"	means the members of the Prison Service and other employees of the service.
"Regulations"	mean secondary legislation made by the Minister in terms of the Act.
"Sentenced prisoner"	means a person who has been deprived of liberty following a conviction.
"Solitary confinement"	means confinement of prisoners for 22 hours or more a day without meaningful human contact.
"Untried prisoner"	means a person detained in a prison in connection with an alleged offence between the time of arrest and the time of judgment of first instance [and a person imprisoned for civil debt;] and any other person who may be held in a prison other than a sentenced prisoner.
"Young child"	means a child below the age of [] years accompanying his or her incarcerated parent.
["Young prisoner"	means a person below the age of [] years.]

Chapter I. Purpose, scope and principles

Article 1. Purpose of imprisonment

- (1) The primary purpose of imprisonment is to keep prisoners in secure and safe custody while treating them with respect for their human dignity.
- (2) As a sentence of imprisonment is designed primarily to protect society against crime and to reduce recidivism, the purpose of the regime for sentenced prisoners is to ensure, so far as possible, the reintegration of such prisoners into society, so that they are able to lead a law-abiding and self-supporting life upon release.
- (3) (a) For untried prisoners who are detained because they are suspected of having committed a criminal offence, the purpose of their imprisonment is to address the risk that they may abscond, commit a further criminal offence or interfere with the course of justice.
- (b) Untried prisoners are presumed to be innocent of having committed a criminal offence and therefore benefit from a special regime as established under this Act.

Article 2. Scope and application of this Act

- (1) This Act establishes the Prison Service with the power to detain, in accordance with the provisions of this Act, prisoners whose imprisonment has been lawfully ordered in prisons or other institutions where prisoners are deprived of their liberty.
- (2) This Act sets out the rights and obligations of prisoners and requires them to follow the provisions of this Act, including the instructions of prison staff who are carrying out their duties in terms of the Act.
- (3) (a) The Prison Service shall be under the political control of the Minister, who shall make regulations where required by this Act and who may make further regulations and develop policies not inconsistent with the Act on all matters necessary for the implementation of this Act.
- (b) The Prison Service is part of the national civil service and consists of staff appointed to carry out the functions of the Prison Service as set out in this Act.
 - (c) The Prison Service is under the direction of the Commissioner, who:
 - (i) Shall ensure that provisions of this Act are implemented and that the policies set by the Minister are applied; and

- (ii) May issue orders and standard operating procedures, not inconsistent with this Act and the regulations made thereunder, which shall be obeyed by all members of the Prison Service and other persons to whom such orders and operating procedures lawfully apply.
- (4) (a) Although this Act is applicable to all prisoners, it is primarily designed to apply to prisons for adults, as children [young prisoners] who are being detained by reason of a criminal charge against them or who have been sentenced by reason of their having committed a criminal offence shall not normally be held in a prison for adults.
- (b) If such children [young prisoners] are held in a prison for adults, this Act will apply to them as well as other legislation designed specifically for children [young prisoners].

Article 3. General principles governing imprisonment

- (1) All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.
- (2) No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment.
- (3) Prisoners retain all rights, except for those taken away from them as a specific consequence of the deprivation of liberty.
- (4) This Act shall be applied to all prisoners impartially and without discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status.
- (5) Provision shall be made to cater for the gender-specific needs of prisoners, and such provision shall not be regarded as discriminatory.
- (6) Reasonable changes to material conditions in prisons and adjustments to the prison regime shall be made to ensure that prisoners with physical or mental disabilities and other prisoners with special needs have full and effective access to prison life on an equitable basis, and such changes and adjustments shall not be regarded as discriminatory.
- (7) All reasonable steps shall be taken to communicate with prisoners in a language and form they understand.
- (8) Imprisonment shall be managed so as to support the social reintegration of all prisoners who are released from prison.

Chapter II. Admission, classification and allocation

Article 4. Admission

- (1) No person shall be admitted to a prison in order to be deprived of their liberty without a valid commitment order.
- (2) Imprisonment shall commence when a person is being admitted to a prison.
- (3) Every admitted prisoner shall have the right, and be given the ability and means, to inform immediately, in a manner determined by regulation, his or her family, or any other person designated as a contact person, about his or her imprisonment.
- (4) Upon admission of a prisoner, the following steps shall be taken:
 - (a) The prisoner shall be interviewed by the admissions officer.
- (b) On the basis of this interview, and using other sources as required, the admissions officer shall enter the following information in the prisoner's individual file in the prisoner file management system:
 - (i) Precise information about the prisoner, as required by the regulations, enabling determination of his or her unique identity;
 - (ii) The legal basis and reasons for his or her commitment and the responsible authority, including the date, time and place of arrest;
 - (iii) The day and hour of his or her admission and the prospective date of release, if available;
 - (iv) Any disabilities and visible injuries;
 - (v) Complaints about prior ill-treatment or sexual abuse;
 - (vi) An inventory of his or her personal property signed by the prisoner;
 - (vii) Any special communications, dietary or religious requirements;
 - (viii) The names of the prisoner's family members, including, where applicable, his or her children and the children's ages, location and custody or guardianship status;
 - (ix) Any caretaking responsibilities that the prisoner had prior to being detained; and
 - (x) Emergency contact details and information on the prisoner's next of kin.
- (c) If the admissions officer determines that the prisoner is unable to arrange for someone else to fulfil the prisoner's caretaking responsibilities, he or she shall contact the social services [or other relevant service provider] responsible for the dependants of the prisoner.
- (d) The admissions officer shall make a preliminary allocation of the prisoner to accommodation within the prison that meets the immediate requirements of safety and security of such prisoner.
- (e) All money, valuables, clothing and other effects belonging to the prisoner being admitted or received for a prisoner during the course of imprisonment, which he or she

is not allowed to retain under the prison regulations, shall be placed in safe custody and kept there in good condition.

- (f) Every prisoner being admitted shall be promptly provided with oral and written information, in a language and form he or she understands, about:
 - (i) This Act and the regulations applicable to prisoners made in terms of it;
 - (ii) His or her rights, including authorized methods of seeking information, access to legal advice, including through legal aid schemes, and procedures for making requests or complaints;
 - (iii) His or her obligations, including applicable disciplinary sanctions; and
 - (iv) All other matters necessary to enable the prisoner to adapt himself or herself to the life of the prison.

Article 5. Post-admission medical procedures

- (1) As soon as possible after admission, but before being allowed to integrate with the wider prison population the prisoner being admitted shall be interviewed and examined by a health-care professional to establish the following information, which shall be entered in the individual prisoner medical file:
 - (a) His or her health-care needs and any immediate treatment needs;
- (b) Whether any medicine that a prisoner seeks to bring into prison with him or her may continue to be used and whether the prisoner needs other essential medicine immediately;
- (c) Any ill-treatment that he or she may have been subjected to prior to admission;
- (d) Any signs of psychological or other stress, including, but not limited to, the risk of suicide or self-harm and withdrawal symptoms resulting from the use of drugs, medication or alcohol, which may require treatment;
- (e) Any contagious disease that may require temporary clinical isolation and treatment; and
 - (f) The fitness of prisoners to work, exercise and participate in other activities.
- (2) If the health-care professional who establishes the information in paragraph (1) finds that the information reveals a need for medical treatment of the recently admitted prisoner, the health-care professional shall ensure that the prisoner promptly receives such treatment.

Article 6. Classification

- (1) As soon as possible after admission, each prisoner shall be classified by means of an individual risk and needs assessment, conducted according to criteria to be determined by regulation.
- (2) The classification of prisoners shall encompass:
- (a) The categorization of each prisoner into one of several security categories, taking into account the probability of escape, the risk to public safety in the event of an escape and the risk to the good order within the prison; and

- (b) The identification of any special needs which may have an impact on the prisoner's safety, health and well-being in prison, as well as on interventions related to the rehabilitation for sentenced prisoners as required by articles 55 and 56.
- (3) The classification findings shall form the primary basis for the allocation of a prisoner to a suitable prison in accordance with article 7.
- (4) Classification findings shall be recorded in the prisoner's file and be reviewed at regular intervals.

Article 7. Allocation

- (1) Prisoners shall be allocated to prisons that are suitable to accommodate prisoners of their specific category, including with regard to their:
 - (a) Legal status;
 - (b) Gender;
 - (c) Age;
 - (d) Security category; and
 - (e) Special needs, as applicable.
- (2) Prisoners shall be allocated, to the extent possible and in consultation with the prisoner concerned, to prisons close to their homes or places most likely to facilitate their social reintegration, taking into account their caretaking responsibilities and the availability of relevant programmes and services.
- (3) The allocation of sentenced prisoners shall also consider their classification for purposes of treatment and training in terms of article 55.
- (4) (a) A prisoner shall not be allocated, or transferred, to a prison that does not have the capacity to hold him or her in accommodation that meets the requirements of article 13.
- (b) If a prisoner is nevertheless allocated to a prison that does not have the capacity to hold him or her in accommodation that meets the requirements of article 13, the Prison Director shall invoke the procedure [, as specified by regulation,] to deal with prison overcrowding.

Article 8. Separation of categories

- (1) Within a prison that accommodates different categories of prisoners, the following categories shall always be kept in separate parts of the prison:
 - (a) Men shall be kept separate from women;
 - (b) Untried prisoners shall be kept separate from sentenced prisoners;
- (c) Civil prisoners shall be kept separate from prisoners detained by reason of a criminal offence; and
 - (d) Young prisoners shall be kept separate from adults.

- (2) In a prison in which both men and women are housed, the separation of prisoners on the basis of gender shall further be governed by the following provisions:
- (a) Premises for women shall be entirely separate, including separate sanitary, bathing and shower installations for women prisoners;
- (b) The part of the prison set aside for women prisoners shall be under the authority of a responsible woman staff member and women prisoners shall be supervised by women staff members;
- (c) No male staff member shall enter the part of the prison set aside for women prisoners unless accompanied by a woman staff member.
- (3) Notwithstanding the provisions of paragraph 2(c), prison personnel, particularly health-care professionals and teachers, as well as service providers and inspectors who are not members of the prison staff, shall not be precluded from carrying out their duties in prisons or parts of prisons set aside for prisoners of a gender other than their own.

Article 9. Transfer

- (1) The criteria for allocation to a prison as described in article 7 shall apply equally when the transfer of prisoners to a new prison is considered.
- (2) Prisoners who have been diagnosed with severe mental disabilities that make it unreasonable to expect them to remain in prison shall be transferred to mental health facilities as soon as possible.
- (3) When prisoners are admitted to a new prison after transfer, the admission procedures in article 4 shall be followed and their files updated accordingly.
- (4) When prisoners are being moved to or from a prison, or other places, they shall be exposed to public view as little as possible, and proper safeguards shall be adopted to ensure their anonymity.
- (5) The transport of prisoners in conveyances with inadequate ventilation or light, or which would in any way subject them to unnecessary physical hardship or indignity shall be prohibited.
- (6) The transport of prisoners shall be carried out at the expense of the Prison Service.

Chapter III. Release

Article 10. Release principles

- (1) Every prisoner shall be released as soon as there is no further legal ground for his or her continued imprisonment.
- (2) If a prisoner is too ill to be released directly into the community, as certified by a health-care professional, urgent steps shall be taken for the prisoner to be released as soon as arrangements have been made for him or her to be transferred to a hospital or other health-care facility outside the prison.

Article 11. Preparation for release

- (1) In preparation for release, prisoners shall be offered a thorough medical examination as close as possible to the time of release, in which particular attention shall be given to the physical and mental condition of the prisoner, including any indications of ill-treatment.
- (2) Timely arrangements shall be made for the continuation of any necessary health services or medical treatment of the prisoner after release, provided that he or she consents to such arrangements, as well as for provision of prescribed medicines.
- (3) Shortly before release, prisoners shall be provided with:
 - (a) Immediate means of subsistence for at least three days;
 - (b) Suitable clothing for the climate and the season;
 - (c) Sufficient means to reach their permanent home; and
- (d) As far as possible, identification papers and other documents as specified in regulations.

Article 12. Release procedure

- (1) The staff member responsible for release shall verify the identity of the prisoner who is to be released and the legal grounds for release.
- (2) (a) Any personal property that has been stored by the prison shall be returned to the person to be released.
 - (b) The person to be released shall sign a receipt for the personal property returned.
- (3) The staff member responsible for release shall record in the individual prisoner's file:
 - (a) The name and surname of the released prisoner;
 - (b) The date and hour of the release;
 - (c) The legal grounds for release;
- (d) Any visible injuries and complaints about ill-treatment in the course of imprisonment; and
 - (e) The prisoner's signed receipt for his or her personal property.

Chapter IV. Material conditions

Article 13. Accommodation

(1) Accommodation provided for the use of prisoners, in particular all sleeping accommodation, shall respect human dignity and shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

- (2) In places where prisoners are required to live or work:
- (a) The windows shall be large enough to enable the prisoners to read or work by natural light and shall be so constructed that they can allow the entrance of fresh air, regardless of whether there is artificial ventilation; and
- (b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.
- (3) Accommodation shall include:
- (a) Sanitary installations that respect the privacy of prisoners and that are adequate to enable them to comply with the needs of nature in a clean and decent manner;
- (b) Bathing and shower installations that allow every prisoner to have a bath or shower, at a temperature suitable to the climate, as frequently as necessary for general hygiene; and
 - (c) Facilities that meet the needs of prisoners with disabilities.
- (4) (a) Where sleeping accommodation is in individual cells, each prisoner shall normally occupy by night a cell by himself or herself;
- (b) Where multiple occupancy cells or rooms are used, they shall be occupied by prisoners carefully selected, after considering their preferences, as being suitable to associate with one another in those conditions.
- (5) When prisoners are admitted to prison, the cells, or other accommodation to which they are allocated, shall be clean and shall be properly maintained and kept clean at all times.
- (6) Accommodation shall be sufficiently secure to ensure that prisoners of the category allocated to it can be held safely and securely.
- (7) In a prison that holds women, there shall be special accommodation for prenatal and postnatal care and treatment.
- (8) Specific minimum requirements in respect of the matters referred to in paragraphs 1 to 7 shall be determined in regulations.

Article 14. Facilities

In addition to sleeping and living accommodation, each prison shall have:

- (a) A clinic sufficient to meet the immediate health-care needs of prisoners;
- (b) Facilities for preparing and serving food;
- (c) Appropriate space, installations and equipment to enable prisoners to exercise and take part in sports;
- (d) Visiting rooms and technical facilities and equipment for maintaining contact with the outside world;
 - (e) Spaces appropriate for worship;
 - (f) Libraries;
 - (g) Classrooms;

- (h) Workshops;
- (i) Nurseries for young children if applicable;
- (j) Any further facility to fulfil the functions of a particular prison.

Article 15. Personal hygiene

- (1) Prisoners shall keep their persons, clothing and sleeping accommodation clean, neat and tidy, which shall not be regarded as work for the purposes of article 24.
- (2) In order to do so, prisoners shall be provided with water, cleaning materials and toiletries as specified by regulation, including, if applicable, sanitary towels and other products required by women and shaving equipment required by men, as well as any other products required by young children.

Article 16. Clothing and bedding

- (1) Prisoners who are not allowed to wear their own clothing or who do not have adequate clothing of their own shall be provided with clothing suitable for the climate.
- (2) Such clothing shall not be degrading or humiliating.
- (3) All clothing worn in prison, including prisoners' own clothing, shall be clean and kept in good condition.
- (4) Clothing, including undergarments, shall be changed and washed as often as necessary for the maintenance of hygiene.
- (5) Whenever prisoners are permitted to go outside prison, they shall be allowed to wear their own clothing or other clothing that does not identify them as prisoners.
- (6) Every prisoner shall be provided with a separate bed and with separate and sufficient bedding, which shall be clean when issued, kept in good order and regularly changed to ensure its cleanliness.

Article 17. Nutrition

- (1) Prisoners shall be provided by the prison administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.
- (2) The nutritional value of the food and the hours at which it shall be served shall be specified by regulation.
- (3) As far possible, such food shall meet the cultural and religious needs of prisoners.
- (4) Any special diet prescribed for a prisoner by a health-care professional shall be provided.
- (5) Clean drinking water shall be available to prisoners at all times.

Article 18. Oversight of material conditions

- (1) A member of the prison health-care team, or of a competent public health body, shall regularly inspect and advise the Prison Director on:
 - (a) The quantity, quality, preparation and service of food;
 - (b) The hygiene and cleanliness of the prison and the prisoners;
 - (c) The sanitation, temperature, lighting and ventilation of the prison; and
 - (d) The suitability and cleanliness of the prisoners' clothing and bedding.
- (2) The Prison Director shall take into consideration the advice provided in accordance with paragraph (1) and shall take immediate steps to give effect to the advice.
- (3) If giving effect to the advice does not fall within the Prison Director's competence, or if he or she does not concur with it, the Prison Director shall immediately submit to the Commissioner the advice and his or her own comments thereon.

Chapter V. Health care

Article 19. Prisoners' health care

- (1) Prisoners shall have access, free of charge and without discrimination on the grounds of their legal status, to adequate, gender-responsive health care which meets the actual needs of the prison population and is of at least the same standard that is available in the community.
- (2) Such health care shall include dentistry and psychological and psychiatric treatment, as well as preventive care and treatment, including for tuberculosis, HIV/AIDS, hepatitis C and sexually transmitted diseases.
- (3) Prisoners shall receive prompt medical attention in urgent cases.
- (4) Prisoners who require specialized treatment or surgery shall be transferred to specialized institutions within the Prison Service or to civil hospitals.
- (5) On a daily basis, prisoners shall have the ability to confidentially contact qualified health-care professionals about physical or mental health issues.
- (6) Prisoners shall be allowed to make autonomous decisions regarding their own health, including giving free and informed consent to any medical intervention.
- (7) (a) If a woman prisoner requests that she be examined, or treated, by a woman health-care professional, such request shall be granted unless medical attention is required urgently and no woman health-care professional is available.
- (b) If a male health-care professional undertakes the examination or treatment, contrary to the wishes of the woman prisoner, a woman staff member shall be present.

Article 20. Health-care service

- (1) The Prison Service shall safeguard the health of all prisoners in its care and shall establish a health-care service.
- (2) The health-care service shall be organized in close relationship to the general public health administration and in a way that ensures continuity of treatment and care.
- (3) Every prison shall have an interdisciplinary team of health-care professionals tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs while ensuring that the rights of prisoners related to health care as set out in article 19 are met.
- (4) The interdisciplinary prison health-care team shall consist of a sufficient number of qualified health-care professionals acting in full clinical independence and shall encompass sufficient expertise in dentistry, psychology and psychiatry.
- (5) Clinical decisions shall be taken only by health-care professionals and may not be overruled or ignored by prison staff who are not health-care professionals.

Article 21. Health-care professionals

- (1) Health-care professionals shall have daily access to all sick prisoners and all prisoners who complain of physical or mental health issues or injury and any prisoner to whom their attention is specially directed.
- (2) The relationship between health-care professionals and prisoners shall be governed by the same ethical and professional standards as those applicable to patients in the community, in particular:
- (a) The duty of protecting prisoners' physical and mental health and the prevention and treatment of disease on the basis of clinical grounds only;
- (b) Adherence to prisoners' autonomy with regard to their own health and informed consent to medical treatment;
- (c) The confidentiality of medical examinations and information, unless maintaining such confidentiality would result in a real and imminent threat to the patient or to others;
- (d) Keeping up-to-date and confidential prisoners' medical files as required by article 48, paragraph (3); and
- (e) An absolute prohibition on engaging, actively or passively, in acts that may constitute torture or other cruel, inhuman or degrading treatment or punishment, including medical or scientific experimentation that may be detrimental to a prisoner's health, such as the removal of a prisoner's cells, body tissues or organs.
- (3) Without prejudice to paragraph (2)(e), prisoners may be allowed, upon their free and informed consent and in accordance with [applicable law], to participate in clinical trials and other health research accessible in the community if these are expected to produce a direct and significant benefit to their health, and to donate cells, body tissues or organs to a relative.

- (4) If, in the course of examining a prisoner upon admission or providing medical care to the prisoner thereafter, health-care professionals become aware of any signs of torture or other cruel, inhuman or degrading treatment or punishment, they shall document such cases and refer them for investigation in terms of article 45.
- (5) A health-care professional shall determine a prisoner's fitness to work, exercise and to participate in other activities, as appropriate and may make recommendations in this regard.
- (6) While a health-care professional shall not have any role in the imposition of disciplinary sanctions or other restrictive measures, he or she shall:
- (a) Report to the Prison Director whenever he or she considers that a prisoner's physical or mental health has been, or will be, injuriously affected by continued imprisonment or by any condition of imprisonment; and
- (b) Pay particular attention to the health of prisoners held under any form of separation, including by visiting such prisoners on a daily basis, providing prompt medical assistance and treatment at the request of such prisoners or prison staff and by reporting to the Prison Director on such separation as required by article 33, paragraph (7).

Chapter VI. Prison regime

Article 22. Guiding principles

- (1) The prison regime provided for prisoners shall offer a balanced and gender-responsive programme of constructive activities drawn from those referred to in articles 23 to 28.
- (2) Such programme shall also meet the special needs of individual prisoners, to the extent and in the manner determined by regulation.
- (3) Particular attention shall be paid to the needs of prisoners who have experienced physical, mental or sexual abuse and of pregnant women, nursing mothers and women with children in prison.
- (4) The prison regime shall seek to minimize the negative effects of prison life by approximating as closely as possible the positive aspects of life in the community.
- (5) The prison regime shall facilitate provision for the welfare needs of prisoners.

Article 23. Education and vocational training

- (1) All prisoners shall be provided with the opportunity for further education, including vocational training.
- (2) Education and vocational training shall not have a lower status than work within the prison regime and prisoners shall not be disadvantaged by taking part in education or vocational training.

- (3) So far as practicable, the education and vocational training of prisoners shall be integrated with the public system of education and professional development of the country in order to allow:
- (a) Prisoners who were already enrolled in education or vocational training to proceed when they are admitted to prison;
- (b) Former prisoners to continue their education or vocational training after release; and
- (c) Prisoners to be given diplomas and certificates of completion that do not refer to the fact that they were obtained in prison.
- (4) Particular attention shall be paid to the education and vocational training of young prisoners and those with special needs.
- (5) As far as possible and subject to an assessment of their needs and skills, prisoners shall be able to choose the type of education, vocational training and work they wish to pursue.

Article 24. Work

- (1) Prisoners shall have the opportunity to work if they are fit to do so.
- (2) The Prison Director shall ensure that sufficient work of a useful nature is provided for prisoners who wish to work and for those who may be legally compelled to do so.
- (3) Such work shall prepare prisoners for occupational life by making work in prisons resemble as closely as possible similar work outside prison, and thus increasing, as far as possible, their ability to find gainful employment upon release.
- (4) (a) Work by prisoners shall be equitably remunerated.
- (b) Prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to send a part of their earnings to their family.
- (c) The Prison Service may set aside a part of a prisoner's earnings in a savings fund to be handed over to the prisoner on his or her release.
- (5) Prison work shall be subject to the following requirements:
 - (a) Work shall not be of an afflictive nature;
 - (b) No prisoner shall work for the personal or private benefit of any prison staff;
- (c) The interests of prisoners in having appropriate work shall not be subordinated to the purpose of making a financial profit for the Prison Service;
- (d) Where prisoners are employed in work not controlled by the Prison Service, they shall always be under the supervision of prison staff;
- (e) The precautions laid down to protect the safety and health of free workers shall be equally observed in prisons;
- (f) Provision shall be made to indemnify prisoners against industrial injury, including occupational disease, on terms not less favourable than those extended by law to workers in the outside community;

- (g) The maximum daily and weekly working hours of the prisoners shall be fixed by regulations;
- (h) The hours so fixed shall leave at least one rest day a week and sufficient time for sleep, education, recreation and other activities.

Article 25. Contact with the outside world

- (1) In order to minimize differences between prison life and life at liberty, the Prison Service shall facilitate prisoners' appropriate contact with the outside world.
- (2) Prisoners shall be allowed to communicate with their family and friends at regular intervals:
- (a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and
 - (b) By receiving visits.
- (3) (a) Restrictions and monitoring of such communications shall be imposed only when necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, the prevention of criminal offences and the protection of victims of crime.
- (b) The operation of such restrictions and monitoring shall be specified in regulations which shall always allow an acceptable minimum level of contact.
- (c) Visits involving children shall take place in an environment that is conducive to a positive experience and allow extensive open contact between prisoners who are parents and their children, wherever possible.
- (4) Admission of visitors to the prison is contingent upon the visitor's consent to being searched.
- (5) [Conjugal visits shall be allowed to both men and women prisoners with due regard to safety and dignity under conditions set out in regulations.]
- (6) (a) Any information received by the Prison Service of the death or serious illness of any near relative shall be promptly communicated to the prisoner concerned.
- (b) Whenever circumstances allow, the prisoner shall be authorized to leave prison either under escort or alone in order to visit a critically ill near relative, attend a funeral or for other humanitarian reasons.
- (7) (a) In the event of a prisoner's death, the Prison Director shall at once inform the prisoner's next of kin or emergency contact.
- (b) In the event of a prisoner's serious illness or injury, the Prison Director shall inform the prisoner's next of kin or emergency contact, unless the prisoner has explicitly requested otherwise.
- (8) (a) Prisoners shall be allowed to keep themselves regularly informed of public affairs by being granted access to news media, including newspapers, periodicals and other publications, radio, television and the Internet.

- (b) Access to information about public affairs shall be restricted only when necessary for the maintenance of good order, safety and security, the prevention of criminal offences and the protection of victims of crime.
- (9) Prisoners shall be given the opportunity to participate in elections, referendums and other aspects of public life, in so far as their right to do so is not restricted by national law.
- (10) Upon request, representatives of the media shall be allowed to visit prisons unless there are compelling reasons to forbid such access for the maintenance of safety and security, in the public interest or in order to protect the integrity of victims, other prisoners or staff.
- (11) (a) Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.
- (b) Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees, or stateless persons, shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.

Article 26. Religion

- (1) Every prisoner shall have the right to freedom of thought, conscience and religion.
- (2) The Prison Service shall respect prisoners' rights to freedom of thought, conscience and religion and ensure that prisoners are not subject to coercion which would impair their freedom to have, adopt or reject a religion or belief of their choice.
- (3) If the prison contains a sufficient number of prisoners of the same religion, a qualified, part- or full-time representative of that religion shall be appointed in accordance with the procedures set out in the regulations.
- (4) A qualified representative appointed under paragraph (3) of this article shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his or her religion as set out in the regulations.
- (5) Access to a qualified representative of any religion shall not be refused to any prisoner, but if a prisoner objects to a visit of any religious representative, his or her wish shall be fully respected.
- (6) So far as practicable, every prisoner shall be allowed to satisfy the needs of his or her religious life by attending the services provided in the prison and having in his or her possession the books of religious observance and instruction of his or her denomination, as well as objects necessary for such observance.

Article 27. Exercise

- (1) Purposeful activities to promote the mental and physical health of prisoners and adequate exercise shall form an integral part of a rehabilitative and constructive prison regime.
- (2) Every prisoner shall have at least one hour of suitable exercise, and more if possible, in the open air daily if the weather permits.
- (3) When weather does not permit outdoor exercise, arrangements shall be made to allow prisoners to exercise indoors.
- (4) Prisoners whose physical condition so requires shall have access to tailored training during the period of exercise.
- (5) The details of the exercise regime, both in general and for those who require tailored training, shall be specified in regulations, as well as the steps that shall be taken to supervise all forms of exercise.

Article 28. Recreation and cultural activities

- (1) Recreational and cultural activities shall be provided in all prisons for the benefit of the mental and physical health of prisoners.
- (2) Every prison shall have a library for the use of prisoners, adequately stocked with both recreational and instructional books and other media, and prisoners shall be encouraged to make full use of it.

Article 29. Young children

- (1) Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison, but if a child is born in a prison, this fact shall not be mentioned in the birth certificate.
- (2) A decision to allow a young child to stay with his or her parent in prison and the length of such stay shall be based on the best interests of the child concerned.
- (3) Prisoners whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children.
- (4) A young child staying in prison with a parent shall never be treated as a prisoner, and steps shall be taken to normalize their surroundings as much as possible.
- (5) Where young children are allowed to stay in prison with a parent, provision shall be made for:
- (a) Internal or external childcare facilities staffed by qualified persons, where the young children shall be placed when they are not in the care of their parent; and
- (b) Child-specific health-care services for the young children, including health screenings upon admission and ongoing monitoring of their development by specialists.

Chapter VII. Safety, security and discipline

Article 30. Guiding principles

- (1) Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life.
- (2) Prison staff are encouraged to use, to the extent possible, conflict prevention, mediation or other alternative dispute resolution techniques to prevent disciplinary offences or to resolve conflicts.

Article 31. Safety and security measures

- (1) Measures to ensure the safety and security of prisoners, staff, service providers and visitors shall be in place at all times.
- (2) Prisoners shall be held in conditions appropriate to their level of risk to safety and security and shall not be subject to restrictions that are not justifiable by the risk they pose.
- (3) Irrespective of their security classification, every effort shall be made to allow prisoners to participate safely in daily activities.
- (4) There shall be regular and direct supervision of prisoners at all times.
- (5) It shall be possible for prisoners to contact staff at all times, including during the night.
- (6) The security that is provided by physical barriers, other technical means and relevant procedures shall be complemented by the dynamic security provided by trained staff who know and professionally interact with the prisoners under their control.
- (7) National health and safety laws shall be observed in prisons.

Article 32. Special safety and security measures

- (1) Special safety and security measures go beyond those referred to in articles 30 and 31 and are measures imposed on individual prisoners who pose a particular risk to safety or security or who are at particular risk themselves.
- (2) Such measures shall be applied only in exceptional circumstances and for only as long as safety or security cannot be maintained by less restrictive means.
- (3) Prisoners shall always be informed of the reasons for imposing such measures and the procedures that will govern their revision or termination.
- (4) Such measures may include the involuntary separation of a prisoner from the general prison population or similar separation requested by a prisoner.

(5) Special and security measures as well as the procedures that govern their application shall be set out by regulation and shall not amount to inhuman or degrading treatment.

Article 33. Separation

- (1) Separation shall only be imposed for the briefest time practicable in the light of its purpose, and shall be reviewed regularly, with a presumption of cessation unless the justification remains strong.
- (2) Prisoners who are separated from other prisoners, except those in solitary confinement, shall be offered more than two hours of meaningful human contact per day.
- (3) The decision whether to separate prisoners shall take into account the state of health of the prisoners concerned and any disabilities or special needs they may have which may render them more vulnerable to the adverse effects of separation.
- (4) The longer a prisoner is separated from other prisoners, the more steps shall be taken to mitigate the negative effects of their separation by maximizing their contact with others and by providing them with facilities and activities.
- (5) Prisoners who are separated shall not be subject to further restrictions beyond those necessary for meeting the stated purpose of such separation.
- (6) The cells that are used for, and the services provided during, separation shall meet all minimum standards for general living conditions under this Act, including with regard to light, ventilation, temperature, sanitation, nutrition, drinking water, access to open air and physical exercise, personal hygiene, health care and adequate personal space.
- (7) Health-care professionals shall report to the Prison Director, without delay, any adverse effect of separation on the physical or mental health of a prisoner who is in separation and shall advise the Prison Director if they consider it necessary for physical or mental health reasons to terminate the separation or alter the manner in which it is imposed.
- (8) The regulations shall specify further policies and procedures governing the use and review, admission to and release from any form of involuntary separation, or separation requested by a prisoner.

Article 34. Discipline of prisoners

- (1) Discipline in prison shall be maintained by preventing criminal and disciplinary offences as far as possible and by taking disciplinary or other action where prevention has not been successful.
- (2) If a Prison Director suspects that a prisoner has committed a serious criminal offence in the course of imprisonment, he or she shall inform the competent prosecuting authorities.
- (3) Alleged disciplinary infringements shall be investigated promptly, but disciplinary procedures shall be instituted only as a last resort, when mediation or alternative dispute resolution mechanisms are not appropriate or available.

- (4) No prisoner shall be sanctioned twice for the same offence.
- (5) Prisoners shall not be used in any disciplinary capacity or fulfil any disciplinary function.

Article 35. Disciplinary offences

- (1) Conduct constituting a disciplinary offence by prisoners shall be defined by regulation.
- (2) Only conduct likely to constitute a threat to good order, safety or security may be defined as a disciplinary offence by such regulation.
- (3) Disciplinary offences included in such regulation shall be defined with sufficient clarity for prisoners to know what conduct constitutes a disciplinary offence.

Article 36. Sanctions

- (1) The following sanctions may be imposed singly or in combination for disciplinary offences:
 - (a) Reprimand;
 - (b) Warning;
 - (c) Suspension of privileges or of leave from prison;
 - (d) Restriction on disposal of money;
- (e) Separation from the general prison population for a limited period as prescribed by regulation;
 - (f) Solitary confinement of up to 15 days; and
 - (g) Forfeiture of a period of remission.
- (2) Sanctions shall be proportionate to the offence or offences of which the prisoner has been convicted.
- (3) In no circumstances may disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment.
- (4) The following practices, in particular, shall be prohibited:
 - (a) Solitary confinement for more than 15 days;
 - (b) Placement of a prisoner in a dark or constantly lit cell;
 - (c) Corporal punishment;
 - (d) Reduction of a prisoner's diet or access to drinking water;
 - (e) Collective punishment;
- (f) The use of instruments of restraint, including chemical restraints, as a sanction for disciplinary offences; or
 - (g) The prohibition of family contact.

Article 37. Solitary confinement

- (1) Solitary confinement shall be used as a disciplinary sanction only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority.
- (2) Solitary confinement shall not be imposed by virtue of a prisoner's sentence.
- (3) Solitary confinement shall not be imposed on:
 - (a) Children;
- (b) Women who are pregnant, breastfeeding or imprisoned with their young children.
- (c) Prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.
- (4) The safeguards for prisoners in involuntary separation set out in article 33, paragraphs (4)–(7), including the role to be played by health-care professionals, equally apply to prisoners in solitary confinement.
- (5) Where solitary confinement is imposed for a new disciplinary offence on a prisoner who has already spent 15 days in solitary confinement, such sanction shall not be implemented without first allowing the prisoner sufficient time to recover from the adverse effects of the previous period of solitary confinement.

Article 38. Disciplinary procedure

- (1) Any allegation of a disciplinary offence by a prisoner shall be reported promptly to the competent authority, which shall investigate it without undue delay.
- (2) When the competent authority receives a report of such infringement of discipline, it shall decide, based on the gravity of the infringement, whether the matter should proceed to a formal disciplinary hearing or be resolved through alternative dispute resolution techniques.
- (3) Where the matter is resolved through alternative dispute resolution techniques, the competent authority shall record the action taken and send a report to the higher authority.
- (4) Where the [competent authority] decides to proceed to a disciplinary hearing, it shall inform the prisoner without delay, in writing and in a language which they understand:
 - (a) Stating which offence or offences he or she is alleged to have committed;
 - (b) Giving a brief description of the allegation or allegations against him or her;
- (c) Advising the prisoner of his or her rights in relation to the disciplinary proceedings; and
- (d) Informing him or her of the date and time when the [competent body] will hear the evidence relating to the allegation or allegations and reach its conclusions.

- (5) The prisoner against whom an allegation of a disciplinary offence has been made shall be allowed adequate time and facilities to prepare before attending a disciplinary hearing.
- (6) At the hearing, the presiding officer of the [competent body] shall explain the procedure to the prisoner and satisfy him or herself that such person is adequately prepared to proceed with the hearing.
- (7) If the prisoner does not understand or speak the language used at a disciplinary hearing, he or she shall be assisted by a competent interpreter free of charge.
- (8) Prisoners shall always be allowed to defend themselves in person in a fair and impartial disciplinary process.
- (9) If the disciplinary offence is of sufficient gravity to possibly require a sanction in terms of article 36, paragraph (1)(e)-(g), the prisoner shall have the right to defence by a legal adviser.
- (10) Further details of the procedure of the disciplinary hearing, including the applicable law of evidence shall be set by regulation.
- (11) A prisoner convicted of a disciplinary offence shall be able to appeal to a higher authority in the Prison Service and to seek judicial review of the finding that he or she has committed a disciplinary offence and of the sanction imposed on him or her.
- (12) In the event that a breach of discipline is prosecuted as a criminal offence, a prisoner shall be entitled to all due process guarantees applicable to criminal proceedings, including access to legal advice.

Article 39. Use of force

- (1) The use of force by prison officers against prisoners shall be restricted to a measure of last resort and shall be governed by regulation.
- (2) Prison staff shall not use force against prisoners except in self-defence or in defence of others, cases of attempted escape, or active or passive physical resistance to a lawful order.
- (3) No more force shall be used than is strictly necessary to deal with the risk and danger presented and shall be used for the shortest necessary time.
- (4) Lethal force may be used only when strictly unavoidable in order to protect life.
- (5) Force may be used only when authorized by the Prison Director, unless a member of staff reasonably believes that the Prison Director would authorize the use of force and that the delay in obtaining such authorization would defeat the objective of using it.
- (6) Authorization or instruction to use force may include the use of weapons, subject to the restrictions set out in article 41.
- (7) If force is used without prior authorization, the member of staff involved shall report the action taken to the Prison Director as soon as reasonably possible.

(8) A full record of all occasions when force was used, including copies of all reports made in relation to each incident, shall be kept in the prison management file.

Article 40. Instruments of restraint

- (1) The use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited.
- (2) Chemical restraints shall never be used for disciplinary or security purposes, except when prescribed by a health professional for therapeutic reasons.
- (3) Other instruments of restraint shall be used only in the following circumstances:
- (a) As a precaution against escape during transport, provided that they are removed when the prisoner appears before a judicial or administrative authority; or
- (b) By order of the Prison Director, if other methods of control fail, in order to prevent a prisoner from injuring himself or herself or others or from damaging property.
- (4) Where the Prison Director orders the use of restraints, he or she shall immediately alert a qualified health-care professional and report to [the higher administrative authority].
- (5) When the use of instruments of restraint is authorized in accordance with paragraphs (2) or (3), the following principles shall apply:
- (a) Instruments of restraint are to be used only when no lesser form of control would be effective to address the risks posed by unrestricted movement.
- (b) The method of restraint shall be the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed.
- (c) Instruments of restraint shall be imposed only for the time period required, and they are to be removed as soon as possible after the risks posed by unrestricted movement are no longer present.
- (6) Instruments of restraint shall never be used on women during labour, during child-birth or immediately after childbirth.
- (7) A full record on the use of restraints shall be kept in the prison management file.

Article 41. Weapons

- (1) The types of weapons that may be used by prison staff, which may include batons, other non-lethal weapons and firearms, and the manner in which such weapons shall be handled and stored, shall be set by regulation.
- (2) Prison staff shall not be provided with weapons of a particular type unless they have been trained in the use of that type of weapon.
- (3) Prison staff performing duties which bring them into direct contact with prisoners shall not carry weapons except when strictly required for safety and security.

(4) Prison staff shall not use firearms except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a serious crime involving a grave threat to life, to arrest a person posing such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.

Article 42. Searches

- (1) The purpose of a search is to detect concealed articles that a person is not allowed to bring into, or have, in prison and to prevent any attempt to escape.
- (2) All searches shall be conducted in a manner that respects the human dignity and privacy of a person being searched and shall not be used to harass or intimidate such person.
- (3) Searches shall be conducted only by trained staff of the same sex as the person being searched.
- (4) Searches shall be proportionate, legal and necessary, always applying the least invasive method possible.
- (5) Screening methods, such as electronic scanning devices or metal detectors, shall be used first wherever possible.
- (6) (a) Intrusive searches, including strip and body cavity searches, shall be employed only when absolutely necessary and when less intrusive searches, such as pat-down searches or electronic scans, if available, would manifestly be ineffective.
- (b) A person facing an intrusive search shall be informed of the intention to conduct a strip search or body cavity search and be given the opportunity to surrender any concealed object.
- (c) Strip searches and body cavity searches shall only be conducted in private, hygienic conditions and in a manner that ensures that the person being searched is never fully unclothed.
- (d) Visual body cavity searches of the lower body shall be conducted only by staff appropriately trained by a medical professional in the standards of hygiene, health and safety.
- (e) Manual body cavity searches shall be applied only when there are compelling reasons to suspect that the person to be searched may be hiding a dangerous object and shall not be conducted by prison staff.
- (f) Manual body cavity searches shall not be conducted if it is possible, without endangering the health of the person to be searched, to keep such person under close surveillance and wait for the illicit object to be expelled.
 - (g) There shall be no body cavity searches of children.
- (7) Searches of visitors shall be governed by the following principles:
 - (a) Paragraphs (1) to (6) shall apply fully in order to not deter such visits;
 - (b) Intrusive searches shall be avoided wherever possible;
 - (c) If a visitor refuses to be searched, the Prison Service may refuse access.

- (8) Where personal property or cells of prisoners are searched, paragraphs (1) to (4) apply fully, and the confidentiality of legal documents in their possession shall be respected, and the prisoner shall be present unless he or she poses a serious risk to the persons conducting the search.
- (9) A full record of all searches, including the reasons, identities of those who conducted them as well as the results, shall be kept in the prison management file.
- (10) Procedures shall be set out by regulations, which staff have to follow when searching:
 - (a) All places where prisoners live, work and congregate;
 - (b) Prisoners;
 - (c) Visitors and their possessions; and
 - (d) Staff.
- (11) Any article seized as a result of a search shall be dealt with in the manner prescribed by the regulations.

Chapter VIII. Safeguards

Article 43. Requests and complaints

- (1) Every prisoner shall have the opportunity each day to make requests or complaints orally or in writing to the Prison Director or the prison staff member authorized to represent him or her.
- (2) Every prisoner shall be allowed to make requests or complaints in full confidentiality to:
 - (a) The central prison administration;
 - (b) The judicial or other competent authorities; and
 - (c) Inspectors of prisons during their monitoring and inspections visits.
- (3) Complaints as specified under paragraphs (1) and (2) may also be made by the prisoner's legal adviser acting with the consent of the prisoner, or, if neither the prisoner nor his or her legal adviser is capable of doing so, by a member of the prisoner's family or any other person who has knowledge of the case.
- (4) Every request or complaint shall be dealt with promptly and replied to without delay.
- (5) If the request or complaint is rejected, or in the event of undue delay, the complainant shall be entitled to bring it before a judicial or other authority.
- (6) Safeguards shall be in place to ensure that prisoners can make requests or complaints safely and, if requested by the complainant, in a confidential manner.

- (7) A prisoner or other person mentioned in paragraph (3) shall not be exposed to any risk of retaliation, intimidation or other negative consequences as a result of having submitted a request or complaint.
- (8) Complaints relating to torture or other cruel, inhuman or degrading treatment or punishment of prisoners shall be dealt with immediately and shall result in a prompt and impartial investigation in accordance with article 45.
- (9) Prisoners who report sexual abuse shall be provided immediate protection, support and counselling.

Article 44. Access to legal aid

- (1) All prisoners are entitled to legal advice and shall be provided with adequate opportunity, time and facilities to access such advice.
- (2) All prisoners shall be able to access freely or keep in their possession, in full confidentiality, documents relating to their legal affairs.
- (3) Prisoners may consult on any legal matter with a legal adviser of their own choice or with an adviser from a legal aid provider, without delay, interception or censorship and in full confidentiality.
- (4) The Prison Service shall bring to the attention of all prisoners the provision of legal aid which is available to them.
- (5) In cases where prisoners who do not speak the local language wish to consult a legal adviser, the Prison Service shall facilitate access to the services of an independent competent interpreter.
- (6) Consultations may be within sight, but shall not be within hearing, of prison staff.
- (7) Denial of access to legal advice shall be subject to independent review without delay.

Article 45. Investigations

- (1) The Prison Director shall investigate and report on, without delay, any custodial death, disappearance or serious injury, or any evidence of torture or other cruel, inhuman or degrading treatment or punishment, to [the police and the prosecuting authorities] to enable them to conduct a prompt, impartial and effective investigation.
- (2) The Prison Service shall cooperate fully with the [police and the prosecuting authorities] and take steps to ensure that evidence that is collected in the course of investigations is protected and preserved and that potentially implicated persons have no contact with witnesses, the victim or the victim's family.

Article 46. Death of a prisoner

(1) The Prison Service shall treat the body of a deceased prisoner with respect and dignity and keep appropriate records of how it has done so.

- (2) The body of a deceased prisoner shall be returned to his or her next of kin as soon as reasonably possible, at the latest upon completion of the investigation in terms of article 45.
- (3) The Prison Service shall facilitate a culturally appropriate funeral if there is no other responsible party willing or able to do so.

Article 47. Prison inspections

- (1) The purpose of prison inspections shall be to ensure that the provisions of this Act are implemented in order to protect the rights of prisoners and to meet the objectives of the Prison Service.
- (2) Inspections shall be undertaken by means of a twofold system:
- (a) Internal inspections conducted by inspectors who are appointed by the Commissioner and whose primary focus shall be on the implementation of this Act and on whether the objectives of the Prison Service, including the protection of rights of prisoners, are being met;
- (b) External inspections, structurally and financially independent from the Prison Service, conducted by inspectors who are appointed by [the national ombudsman/other body independent of the Prison Service] [and are constituted as a national preventative mechanism in terms of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] and whose primary focus shall be on prisoners' rights.
- (3) Inspectors shall work in teams that have a balanced gender representation and include qualified and experienced persons with knowledge of health care and other aspects of imprisonment that they are required to inspect.
- (4) Inspectors shall provide regular reports and recommendations and for this purpose they shall have the authority:
- (a) To access all information on prisons, their capacity, location and the number of prisoners actually being held, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention;
- (b) To freely choose which prisons to visit, including by making unannounced visits at their own initiative, and which prisoners to interview;
- (c) To conduct private and fully confidential interviews with prisoners and prison staff in the course of their visits.
- (5) All inspection reports shall exclude any personal data on prisoners, unless they have given their explicit consent.
- (6) Internal inspection reports shall be submitted in writing to the Commissioner.
- (7) External inspection reports shall be submitted in writing to the Minister and the Commissioner and shall be tabled simultaneously in [national legislature].

(8) The Minister shall indicate publicly, within a reasonable time, whether recommendations resulting from an external inspection will be implemented and give reasons for his or her decisions.

Article 48. Filing system

- (1) The Commissioner shall ensure that every prison, and the Prison Service as a whole, has a standardized filing system, consisting of:
 - (a) Individual files for each prisoner;
 - (b) Separate individual medical files for each prisoner; and
 - (c) Files on prison management practices and processes as required by this Act.
- (2) The individual file for each prisoner shall include the information entered on each prisoner at admission in terms of articles 4 and 6, and on release in terms of chapter III, as well as the following:
- (a) Information related to the judicial process, including dates of court hearings and legal representation;
 - (b) Information on transfers;
 - (c) Initial assessment and security classification reports;
 - (d) Information related to behaviour and discipline;
- (e) Information related to disabilities that require adjustments for communication, mobility or the prisoner's safety;
- (f) Requests and complaints, including allegations of torture or other cruel, inhuman or degrading treatment or punishment, unless they are of a confidential nature;
 - (g) Information on the imposition of disciplinary sanctions;
- (h) Information on the circumstances and causes of any injuries or death and, in the case of the latter, the destination of the remains; and
- (i) In the case of sentenced prisoners, their classification into different categories, their sentences plans and any information necessary to calculate the length of their sentences.
- (3) The individual medical files for each prisoner, initiated in terms of article 5, shall be administered by the prison health-care service and kept separate from the general individual prisoner files.
- (4) Procedures, as specified by regulation, shall be followed to ensure a secure audit trail and to prevent unauthorized access to or modification of any information contained in the prisoner file management system.
- (5) The general individual files and the individual medical files of all prisoners shall be confidential and made available only to those whose professional responsibilities require access to them.
- (6) Every prisoner shall have access to both their personal files and medical files pertaining to him or her, subject to redactions authorized by regulation, and shall be entitled to receive an official copy of such redacted files upon his or her release.

- (7) The general individual files and the individual medical files of prisoners shall be transferred with them when they are moved from one prison to another.
- (8) The Prison Director shall ensure that files on prison management practices and processes as required by this Act include, at a minimum, records on:
 - (a) Discipline and sanctions;
 - (b) Searches;
 - (c) The use of instruments of restraint;
 - (d) The use of force;
 - (e) Occupancy rates;
 - (f) Death and serious injuries; and
 - (g) Any other matter required by regulation.
- (9) While ensuring confidentiality of information about individual prisoners, the filing system shall be used to generate reliable data about trends relating to and characteristics of the prison population, including occupancy rates.

Chapter IX. Prison Service

Article 49. Staffing complement

- (1) The Prison Service shall consist of sufficient and well-qualified male and female staff to ensure the safe, secure and humane custody of all prisoners by carrying out the functions of the Prison Service as provided in this Act.
- (2) Such staff shall include a sufficient number of specialists, such as health-care professionals, social workers, teachers and trade instructors and other such specialists as specified in regulations.
- (3) All prison staff shall at all times perform their duties in such a manner as to influence the prisoners by good example and to command their respect.
- (4) Prison staff shall be subject to a disciplinary regime as specified by regulation.

Article 50. The Commissioner

- (1) The Prison Service is under the direction of the Commissioner, who shall:
- (a) Determine the fixed establishment of the Prison Service and the number and grading of posts;
- (b) Decide on the numbers and distribution of the prison staff in the Prison Service in order to maintain a safe and secure environment in all prisons at all times;
- (c) Appoint, remunerate, promote, transfer, discipline or dismiss prison staff in accordance with [the law governing the civil service];
- (d) Organize or reorganize the Prison Service into various components, units or groups; and

- (e) Establish and maintain training institutions for prison staff.
- (2) The Commissioner shall adopt systems of organization and management that:
 - (a) Ensure that all the requirements of this Act are met;
 - (b) Prisons operate at consistently high standards; and
- (c) Facilitate good communication between prisons and between the different categories of staff in individual prisons and proper coordination of all the departments, both inside and outside the prison, that provide services for prisoners.
- (3) The Commissioner and prison staff shall perform the functions of the Prison Service as prescribed in this Act, subject to such policy as the Minister may determine.
- (4) The Minister may allow the Commissioner to delegate to any other member of the prison staff any of his or her powers and duties to the extent authorized by regulation.

Article 51. Prison Director

- (1) Every prison shall have a Prison Director, appointed by the Commissioner, who shall be adequately qualified for his or her task by character, administrative ability, suitable training and experience.
- (2) The Prison Director shall be appointed on a full-time basis to carry out, under the direction of the Commissioner, the duties of the Prison Director specified in this Act and the regulations.
- (3) Every prison shall at all times be under the control of the Prison Director, or a duly appointed deputy.

Article 52. Appointment

- (1) The prison staff shall be appointed on a full-time basis and have civil service status with security of tenure, subject only to good conduct, efficiency and physical fitness, whereas specialist staff may be appointed on a part-time basis.
- (2) Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work.
- (3) Prison staff shall be carefully selected with clear criteria that identify adequate standards of education for their particular roles and the ability to carry out their duties in a professional manner as set out in regulations.
- (4) As far as possible, the staff of each prison shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.

Article 53. Training

(1) Prior to assuming their work, all prison staff shall be provided with induction training tailored to their general and specific duties, which shall reflect contemporary evidence-based best practice.

- (2) Only candidates who successfully pass the theoretical and practical tests at the end of such training shall be allowed to enter the Prison Service.
- (3) The Prison Service shall ensure the continuous provision of in-service training courses with a view to maintaining and improving the knowledge and professional capacity of its staff.
- (4) Induction training for all staff shall include, at a minimum, training on:
- (a) Relevant national legislation, regulations and policies, as well as applicable international and regional instruments;
 - (b) Rights and duties of prison staff in the exercise of their functions;
- (c) Safety and security, including the concept of dynamic security, alternative dispute resolution, the use of force and instruments of restraint;
- (d) First aid and the psychosocial needs of prisoners, including early detection of mental health issues; and
- (e) Physical fitness, including training to enable prison staff to restrain aggressive prisoners.
- (5) Prison staff who work with certain categories of prisoners, or who are assigned other specialized functions, shall receive training that has a corresponding focus.
- (6) Training and capacity-building for women staff shall enable them to access senior positions both with regard to the development of policies and strategies relating to the treatment of women prisoners and, more generally, in the Prison Service as a whole.

Chapter X. Sentenced prisoners

Article 54. Guiding principles

- (1) In addition to the provisions of this Act that apply to all prisoners, and in the light of the purpose of the regime for sentenced prisoners set out in article 1, paragraph (2), the regime for sentenced prisoners shall encourage their self-respect and develop their sense of responsibility.
- (2) The sentence of imprisonment constitutes a punishment by depriving the offender of his or her liberty, and the regime for sentenced prisoners shall therefore not aggravate the suffering inherent in imprisonment but shall seek to contribute to their rehabilitation and social reintegration upon release.
- (3) The treatment of sentenced prisoners shall emphasize not their exclusion from the community but their continuing part in it.

Article 55. Classification

(1) Prisoners who are admitted to prison as sentenced prisoners or whose status is changed to that of sentenced prisoners shall be classified, in the manner required

by regulation, into categories that facilitate their treatment and training with a view to their social rehabilitation.

- (2) (a) A system of privileges may accompany such classification.
- (b) Details of such a privilege system and the classes to which they are related shall be specified in regulations.
- (3) The classification of sentenced prisoners shall be updated regularly and recorded in their individual prisoner files.

Article 56. Individualized sentencing planning

- (1) For prisoners with sentences of suitable length, as determined in regulations, a sentence plan setting out a programme of treatment shall be prepared, which will promote the prisoner's rehabilitation and social reintegration in the light of the knowledge obtained about his or her personal background, needs, skills, goals and reasons for offending.
- (2) Such plans shall be designed to address the individual root causes of a prisoner's criminal behaviour, and treatment programmes provided accordingly, including, as far as is practicable:
 - (a) Education, including vocational training;
 - (b) Work;
- (c) Other activities, such as social programming, counselling, cognitive behavioural therapy, alcohol and substance abuse programmes and other specialized treatment programmes; and
 - (d) Preparation for release.
- (3) The individual sentence plans of sentenced prisoners shall be updated regularly and recorded in their individual prisoner files.
- (4) Prisoners whose sentences are too short to justify the development of sentence plans in terms of paragraph (1) shall be given a treatment programme as determined by the Prison Director and shall receive preparation for release.
- (5) Sentenced prisoners who have not reached the normal retirement age and who are fit to work may be required to do so as part of their sentencing plan.
- (6) Sentenced prisoners who are illiterate may be required to attend a literacy course as part of the educational element of their sentence.

Article 57. Release of sentenced prisoners

- (1) Sentenced prisoners shall be assisted in good time prior to release by means of procedures and special programmes enabling them to make the transition from life in prison to a law-abiding and self-supporting life in the community.
- (2) Such procedures and special programmes may include prisoners being granted periods of leave prior to release, as determined by regulations.

- (3) In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return from life in prison to life in society.
- (4) The Prison Service shall work closely with governmental and other agencies that assist former prisoners in the community and are able to provide them with suitable homes and work after release.
- (5) Sentenced prisoners' contact with approved agencies or persons that will support them in the community shall be encouraged, and such agencies and persons shall be given the access to the prison and to prisoners to advise them on their future.
- (6) Where sentenced prisoners are released conditionally or on health grounds, the Prison Service shall ensure that such agencies and persons are made aware of the conditions to which they will be subject and the agencies that will supervise them.

Chapter XI. Untried prisoners

Article 58. Additional protections

- (1) In addition to the rights set out in this article, untried prisoners shall have at least the same rights as all other prisoners, subject to exceptional restrictions necessary to prevent interference with course of justice.
- (2) The regime for untried prisoners shall not be influenced by the possibility that they may be convicted of a criminal offence in the future.
- (3) As far as possible, untried prisoners shall be given the option of accommodation in single cells, unless they may benefit from sharing accommodation with other untried prisoners, or unless a court has made a specific order on how a specific untried prisoner should be accommodated.
- (4) Untried prisoners shall be allowed to receive food from outside the prison, in addition to the food provided by the Prison Service in terms of article 17.
- (5) (a) Untried prisoners shall be allowed to wear their own clothing if it is suitable for wearing in prison.
- (b) Untried prisoners who do not have suitable clothing of their own shall be provided with clothing that shall not be the same as any uniforms that may be worn by sentenced prisoners.
- (6) (a) Untried prisoners shall be offered the opportunity to work but shall not be required to work.
- (b) If untried prisoners choose to work, all the provisions of article 24 shall apply to them, including those relating to remuneration.
- (7) Untried prisoners shall be allowed to be visited and treated at their own expense by health-care professionals or dentists of their own choice.

- (8) (a) The Prison Director shall ensure that untried prisoners have appropriate access to legal advice.
- (b) Untried prisoners shall, upon request, be provided with writing materials for the preparation of documents related to their defence, including confidential instructions for their legal advisers.

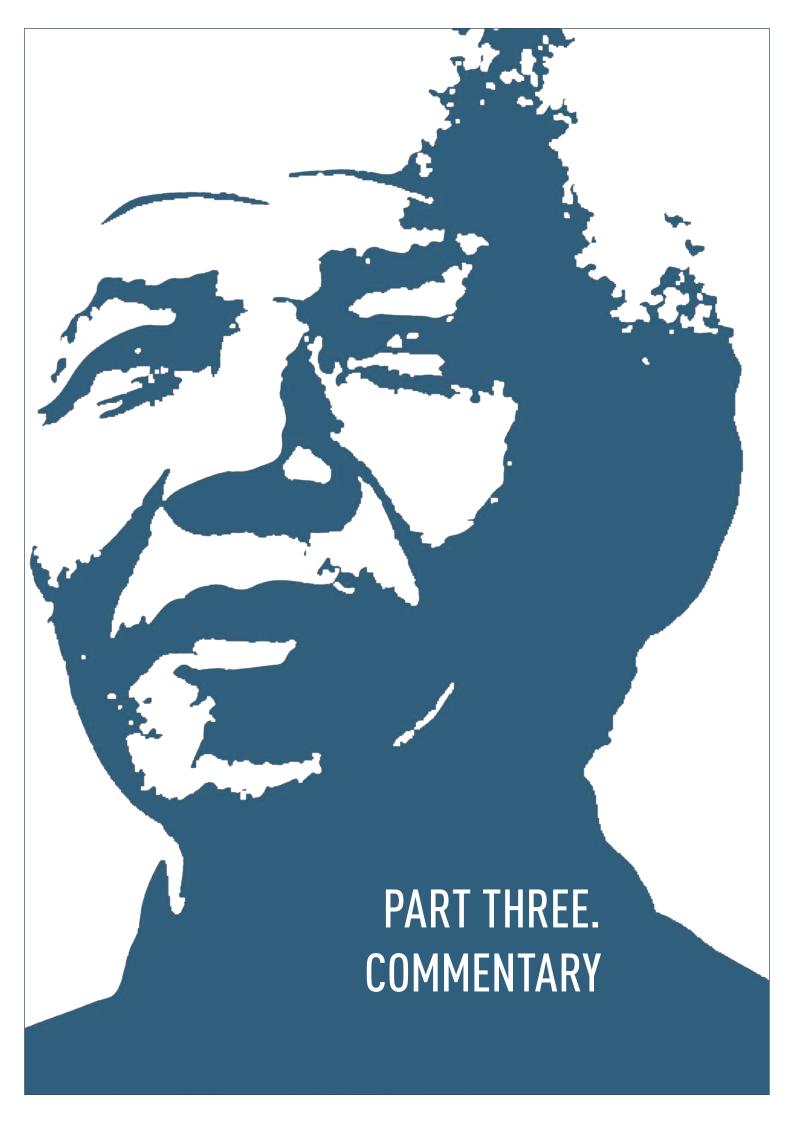
Chapter XII. General provisions

Article 59. Repeal of laws

This Act repeals the following legislation [...].

Article 60. Title and commencement

This Act is to be called the Prison Act of [2022] and is to come into operation on a date fixed by the President by proclamation.



PART THREE. COMMENTARY

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Definitions

The definitions have been placed in the Act, but not as one of the numbered sections. This has been done in order to bring them to the immediate attention of the reader, who needs them to understand subsequent provisions, without distracting attention from the key general provision in chapter I. National drafting practices differ in how to deal with definitions. A national legislator may choose to include them as a numbered provision at the start or the end of the Act or to incorporate them in another way.

Some of the definitions are self-explanatory and do not need further comment.

"Child" is defined in line with article 1 of the Convention on the Rights of the Child.

"Civil prisoner"

is a residual category designed to include all people who may be legally detained in a prison, other than untried and sentenced prisoners. The Nelson Mandela Rules make provision for such prisoners in rule 121 (civil debtors and administrative detention), rule 122 (persons detained without charge) and rule 109 (persons who are not criminally responsible). In practice, a national prison system may not have all of these. For example, the imprisonment of civil debtors is not as common as it was in 1955, when the Standard Minimum Rules for the Treatment of Prisoners were first drafted. The International Covenant on Civil and Political Rights, adopted in 1976, further restricted this practice by prohibiting imprisonment merely on the grounds of a persons' inability to fulfil a contractual obligation. On the other hand, the detention of irregular or nondocumented migrants has developed into a controversial practice in various Member States. National legislation may seek to spell out in more detail the rights of various subcategories of civil prisoners. However, the way they are dealt with in this Act is designed to ensure that civil prisoners have all the safeguards of untried prisoners.

"Commitment order"

is an example of a term that is given its meaning by national law outside the scope of this Act, where such legislation lays down the legal steps that must be taken to render the imprisonment of a person lawful. Such legislation may also expand further on what requirements such a document should specify: for example, who may issue such an order and what information about legal reasons for the commitment it should contain.

"Health-care professional"

is a broad term designed to encompass a range of medical practitioners, including medical doctors and nurses. National legislation should follow national practice for defining the type of medical practitioners which it wishes to include in this definition: for example, professionals included in the national register of medical practitioners. National legislation should also include dentists, psychologists, psychiatrists, nurses and other professionals who should be encompassed in the definition of "health-care professional". They, too, should be defined in terms of national practice with references to the national legislation that regulates their professional status.

"Minister of Justice": in order to ensure the independence of prisons from the police, the Act should nominate an appropriate Minister who is not directly responsible for a security service. Here, the Minister has been defined as "Minister of Justice" as one possibility, but it could also be another Minster who meets the criteria. The United Nations system common position on incarceration contains an explanation of the underlying thinking:

> The organizational culture in prison services greatly influences how the overall principles governing prison management are translated into practice. Where and how prisons are administered within the government plays an important role in this regard. In order to ensure a strict separation between law enforcement or military entities on the one hand, and the agency in charge of the implementation of prison sentences on the other, the existence of a civilian prison system with professional prison staff is key. Depending on the national context and the access to sufficient resources, this may include placing the responsibility for prisons with the Ministry of Justice or similar government department.²⁰

"Prison": this definition, which is largely based on the United Nations system common position on incarceration, is crucial for establishing the scope of this Act. As explained in the commentary on article 2(4), this Model Prison Act is designed to deal essentially with adults awaiting trial and sentenced prisoners, and the focus is on institutions that hold such prisoners. However, it is recognized that exceptionally, such prisoners may also be held in other institutions.

> If legislation is required to deal only with a more restricted body of people, a different definition of a "prison" would be required. For example, the legislator may want to make it clear that police custody, although part of the criminal justice system, is excluded, in some or all instances, as it is governed by other legislation. Also, if legislation is sought only to cover institutions where sentenced prisoners are housed, the definition will have to be narrower.

"Prison Director"

is the term used in the Nelson Mandela Rules for the head of a prison. National legislation may use different terminology, such as Chief Warden or Officer in Charge.

"Prisoner": this definition is related to the definition of "prison" and, as explained there, is part of the legal framework establishing the scope of this Act. The Act does not use the term "detainee" for some or all prisoners, as it is not used in the Nelson Mandela Rules. It does, however, draw a distinction between "sentenced prisoners" and "untried prisoners", both defined below, in view of some differences in treatment, as reflected in chapters X and XI.

"Prison staff": the definition of prison staff may be varied by national legislators to bring it in line with national legislation governing the civil service, which should include prison staff.

"Sentenced the practical meaning of this term will vary according to national prisoner": interpretations of whether someone becomes a "sentenced prisoner" immediately after conviction, or only after all avenues of appeal have been exhausted.

²⁰ United Nations, "United Nations system common position on incarceration", April 2021, p. 14.

confinement"

"Solitary is defined in the same way as in rule 44 of the Nelson Mandela Rules. The term "meaningful human contact" is a new and evolving concept in prison law. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has regarded meaningful human contact as follows:

> The amount and quality of social interaction and psychological stimulation which human beings require for their mental health and well-being. Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity.²¹

"Untried prisoner": the definition of "untried prisoner" like that of "prisoner" and "sentenced prisoner" is crucial in determining the scope of this Act. The definition of "untried prisoner" is designed to cover all prisoners dealt with in rules 111-122 of the Nelson Mandela Rules. Any person lawfully detained in a "prison" (as defined in the Act) other than a "sentenced prisoner" is an "untried prisoner". The words in brackets refer to variations that countries may wish to include. They may, for example, not have civil debtors imprisoned at all and therefore would not need to make provision for them. Countries may also wish to have a different legal framework for police custody.

"Young child": this definition should be shaped by policy choices on how to implement preliminary observation 4 and rule 29 of the Nelson Mandela Rules. The term "young child" is used in article 29, which deals with young children accompanying their incarcerated parent. As suggested in the brackets, the definition could specify an upper age. Its effect would be to preclude children older than that age from being held with their incarcerated parent at all. Alternative language would be to use "infant" instead of "young child".22 Linguistically, "infant" may refer only to very young children. National legislators should choose the language that best reflects their intention and the underlying principle that the interests of the child come first. If the word "child" is used without qualification, here or elsewhere, it should be read to mean anyone under the age of 18 years, the internationally acceptable definition reflected in the Convention on the Rights of the Child.

"Young prisoner"

is an additional classification that may be used to include a prisoner who is under a specific age but older than a child, who should be separated from adult prisoners or treated differently in other ways. It is in brackets because the legislator might not use this category at all. If used, the legislator must set a maximum age: for example, "a person below the age of 22 years". Note that, by definition, a child is always a young person too, but a young person is not always a child.

²¹ See Council of Europe, documents CPT/Inf (2019) 29, footnote 55, and CPT/Inf (2019) 1, footnote 65.

²² See, for example, revised European Prison Rules, rule 36 (Council of Europe recommendation (*Rec*(2006)2-rev) of the Committee of Ministers to member States on the European Prison Rules, as revised and amended by the Committee of Ministers on 1 July 2020, hereinafter cited only as the "European Prison Rules").

Chapter I. Purpose, scope and principles

Article 1. Purpose of imprisonment

Article 1(1) is a broad statement of the approach to imprisonment that applies to all prisoners. It seeks to capture the basic principles of the Nelson Mandela Rules (rules 1-5), which are further developed in article 3.

In the case of the additional purpose applicable only to sentenced prisoners, article 1(2) follows rule 4.1 of the Nelson Mandela Rules, which focuses specifically on sentenced prisoners. The limits of this purpose are also clear from rule 122 of the Nelson Mandela Rules, which provides that "no measures shall be taken implying that re-education or rehabilitation is in any way appropriate to persons not convicted of any criminal offence". The details of how sentenced prisoners should be treated are found in chapter X, which adds the detail required by rule 4.1 of the Nelson Mandela Rules on the treatment of sentenced prisoners.

Article 1(3)(a) recognizes that most untried prisoners are being detained because of a suspicion of having committed a criminal offence. The purpose of their imprisonment is not only to ensure that they do not abscond but may also be to ensure that they do not commit further offences or interfere with the judicial process. Interference may take various forms, such as intimidating witnesses or tampering with evidence. Courts may order that specific restrictions be placed on such prisoners, including that they be separated from other categories of prisoners. If such restrictions are based in law, including legislation other than the provisions of this Act, the Prison Service will have to apply them. It should do so proportionately, as required by chapter VII.

As provided in article 1(3)(b), untried prisoners who have not been convicted of an offence are not being held for the purpose of responding to their criminal behaviour, as it has not been proved that they have committed a criminal offence, and they are entitled to the presumption of innocence. The presumption of innocence most clearly applies to the large majority of untried prisoners who are detained in a prison in connection with an alleged offence between the time of arrest and the time of judgment of first instance. However, all other persons who may be held in a prison other than sentenced prisoners (for example, persons who may be held because of a civil debt and are therefore not tried as part of the criminal justice process, or persons with no criminal capacity, who may briefly be held in a prison pending their transfer to a mental institution) are included

in the definition of "untried prisoners". These other persons are innocent in the eyes of the criminal law, and the presumption of innocence should be applied to them as well.

One of the purposes of the Act is to ensure that all untried prisoners, as defined, benefit from a special regime as required by rule 111.3 of the Nelson Mandela Rules. The conditions of imprisonment for untried prisoners should be shaped not only by the provisions of the Act that apply to all prisoners, but also by the additional protections set out in chapter XI. The Nelson Mandela Rules achieve the same effect by providing in preliminary observation 3 that rules applicable to sentenced prisoners should be equally applicable to other categories of prisoners "provided they do not conflict with the rules governing those categories and are for their benefit".

Article 2. Scope and application of this Act

As the Act is primary legislation, it can establish rights and duties which are enforceable in national law. Article 2(1) begins this process by establishing a Prison Service with the key power to detain prisoners. However, this power is limited to what the Act as a whole allows and must always be exercised in terms of the general principles stated in article 3 and made more specific in subsequent provisions, which closely follow the Nelson Mandela Rules. The powers of the Prison Service to detain people against their will can only be exercised over "prisoners". The definitions of "prisoner" and "prison" are therefore key to determining the scope of this Act. On the wider question of the scope of prison legislation, see also the introduction to this Handbook.

Article 2(2) underlines the rights-based approach adopted by the Act by establishing that prisoners can derive rights from this Act, but also that they are bound by its provisions and, accordingly, have an obligation to obey them.

Article 2(3) establishes a basic structure for a Prison Service and its control. The legislator could choose to spell it out in more detail here or in chapter IX, which deals with the Prison Service. Article 2(3)(a) establishes the political control of the Prison Service. When it comes to political control, prisons should be seen not simply as an appendage of the police and the security services but as an independent part of the criminal justice system.

Article 2(3)(a) gives the Minister the crucial power of making regulations to specify the application of the Act to the operation of the Prison Service. The stipulation of how this power is exercised is critical to embedding the operation of the Act in the rule of law. For this reason, the Minister may never make regulations that are not compatible with the Act. Regulations should always be published in an official government source available to the public and form part of the package of information given to prisoners in terms of article 4. In the commentary on specific provisions below, there are further indications of why regulations are considered necessary in those instances and some guidance on what they should contain.

A feature of article 2(3)(a) is that it distinguishes instances where the Act requires the Minister to make regulations from a wider power of the Minister to elect to make further regulations that are not inconsistent with the Act. Were a Minister not to make regulations where required by the Act, that would be a failure to fulfil a legal duty. It remains open, however, for the legislator to incorporate more detail in the

Prison Act itself and to legislate directly on matters that the Act indicates should be dealt with by regulation.

Article 2(3)(b) provides a legislative basis for establishing the Prison Service as an organization within the national civil service.²³ It is designed to emphasize that the Prison Service is not part of the military and that it should be the responsibility of civil authorities, separate from the military, the police or criminal investigation services. Further details about the Prison Service and its civil service status are provided in chapter IX of this Act.

The powers of the Commissioner, defined as the Commissioner of Prisons who is the executive head of the Prison Service, are based on article 2(3)(c). What is legislated here is the bare minimum. National legislators may want to spell these powers out further. This could also be done by way of regulation if the Minister chooses to do so.

The Minister may, for example, allow the Commissioner to delegate some, but not all, of his or her powers to other members of the prison staff. What is clear is that the Commissioner's powers, including his or her powers to issue orders and standing operating procedures, are limited by both the Act and the regulations made in terms of it. The power of the Commissioner to issue orders and standard operating procedures in terms of article 2(3)(c)(ii) is a significant further building block in the law-bound structure of the Act. The orders and standard operating procedures are limited to implementing the Act. They will therefore largely be binding on prison staff and prisoners. However, they may be binding for other categories of persons who the Act allows to interact with prisoners in various ways, for example, external contractors or visitors.

Article 2(4) reflects preliminary observation 4 of the Nelson Mandela Rules and its clarification that the Rules do not seek to regulate the detention of children. It is recommended that Member States develop separate legislation to regulate the deprivation of liberty of children, applying the principles contained in the Convention on the Rights of the Child and applicable international standards and norms.²⁴ The assumption of this Act is that the legislator wishes to adopt the same approach.

Note that many States exclude not only children (i.e. persons under the age of 18 years)²⁵ from prisons for adults but also other young persons who may be somewhat older. If this is the case, the draft should be adjusted accordingly, and the words "young prisoner" be used instead of "child". Note also that "young children" who are held in prison with their incarcerated parents should in no way be regarded as prisoners. For what is meant by "young children" and how they should be treated, see the definition of "young child" and article 29, respectively.

²³ See also the Nelson Mandela Rules, rule 74.3 and the revised European Prison Rules, rule 71.

²⁴ Such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113, annex), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (General Assembly resolution 40/33, annex), the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 69/194, annex) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) (General Assembly resolution 45/112, annex).

²⁵ As defined in article 1 of the Convention on the Rights of the Child.

Article 3. General principles governing imprisonment

The general principles set out in article 3 are an essential part of the Act as they provide in national law an interpretive framework for the Act as a whole. The core principle is article 3(1), which uses the same words as the first sentence in rule 1 of the Nelson Mandela Rules.²⁶ It is very broadly phrased and essentially covers the same ground as article 10, paragraph 1, of the International Covenant on Civil and Political Rights, which provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Including a principle reflecting "hard" international law in the Act helps to bind the broader principles of international law on imprisonment into the interpretation of the current Act, as it is assumed that national law should be interpreted in the light of the State's international law obligations.

The provision in article 3(2) captures the gist of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, which is also found in rule 1 of the Nelson Mandela Rules. It is important to include it, as it reflects a key provision of two major United Nations conventions, namely article 10 of the International Covenant on Civil and Political Rights and article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 of the latter Convention goes on to provide that a State party is responsible for taking "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction". Rule 1 of the Nelson Mandela Rules further emphasizes this principle by requiring that prisoners should be protected from forbidden forms of treatment. This aspect is equally included in article 3(2). In the first instance, the duty to protect falls squarely on the Prison Service, whose actions have to be guided by these principles. Any form of abuse and ill-treatment by members of the prison staff, other prisoners or anyone else who has access to such prisoners should be regarded as cruel, inhuman or degrading treatment or punishment for the purpose of applying this principle.

Article 3(3) states the legal position of prisoners positively and complements the prohibition in article 3(2). This is important, also for courts that have to develop the full meaning of prisoners' human rights in their jurisprudence, while interpreting specific provisions of this Act. Article 3(3) reflects the spirit of the Nelson Mandela Rules as expressed in rules 3 and 5.1.²⁸ Rules that establish the specific principle that prisoners retain their rights, subject to limited exceptions are also found in regional instruments.²⁹

²⁶ See also, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 1 (General Assembly resolution 43/173, annex); revised European Prison Rules, rule 1; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle I; Kampala Declaration on Prison Conditions in Africa (Economic and Social Council resolution 1997/36, annex), Prison conditions, paras. 1 and 3. On the importance of "respect" as a foundational concept in the Nelson Mandela Rules, see Gabrielle Watson, *Respect and Criminal Justice* (Oxford, Oxford University Press, 2020).

²⁷ CAT/C/63/D/637/2014, para. 9.3.

²⁸ See, for example, CRPD/C/20/D/38/2016, para. 11.3. "The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, inter alia, the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)".

²⁹ Revised European Prison Rules, rule 2; Kampala Declaration on Prison Conditions in Africa, Prison conditions, para. 2; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle VIII.

The anti-discrimination provision in article 3(4) closely follows the wording of rule 2.1 of the Nelson Mandela Rules. Similar provisions are also reflected in international treaties and policy documents.³⁰ Constitutions and constitutional law of some Member States prohibit additional grounds of discrimination. These should be included, if appropriate. At the regional level, prison rules for the Americas³¹ and for Europe³² also have anti-discrimination provisions that are formulated slightly differently. States should take such regional guidance into consideration as well.

Articles 3(5) and 3(6) reflect the wider principle in rule 2.2 of the Nelson Mandela Rules that measures to protect and promote the rights of prisoners with special needs of all kinds should not be regarded as discriminatory. Article 3(5) follows the lead of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) of 2010. While the Bangkok Rules focus specifically on gender-responsive prison management and the specific needs of women prisoners, article 3(5) equally allows consideration of the gender-specific needs of others, including transgender prisoners. It still captures the idea contained in rule 1 of the Bangkok Rules, which explains that providing for women prisoners in this way is designed to accomplish "substantial gender equality" in their treatment. Article 3(5) reflects the growing importance of integrating provisions for women in prison, as well as for other prisoners whose gender-specific needs have not been met in the past. The provision further reflects principle 5(2) of the earlier Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,³³ which makes clear that special measures to address the particular needs of women prisoners and other special categories are not to be deemed discriminatory. It is also in accordance with article 4 of the Convention on the Elimination of All Forms of Discrimination against Women.

Article 3(6) is based on rules 2.2 and 5.2 of the Nelson Mandela Rules. The words "material conditions" and "prison regime" refer to the provisions governing those key aspects of imprisonment referred to in chapters III and V of this Act. It also gives practical effect in the prison context to the Convention on the Rights of Persons with Disabilities. Prisoners may have a wide range of special needs. The UNODC *Handbook on Prisoners with Special Needs* identifies, in addition to prisoners with disabilities, prisoners with mental health-care needs, prisoners belonging to ethnic and racial minorities and indigenous peoples, foreign national prisoners, lesbian, gay, bisexual, transgender and intersex (LGBTI) prisoners, older prisoners, prisoners with terminal illness and prisoners under sentence of death, as falling into this category.³⁴

Article 3(7) develops as a general principle the overall importance of communication with prisoners in a language they can understand. This not only helps to prevent discrimination on language grounds, as required by rule 2.1 of the Nelson Mandela Rules but also underpins a number of specific provisions of the Act based on related provisions of the Nelson Mandela Rules on making available relevant materials in different

³⁰ International Covenant on Civil and Political Rights, art. 26; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5; see also Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, principle 9.

³¹ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle II.

³² Revised European Prison Rules, rule 13.

³³ General Assembly resolution 43/173, annex.

³⁴ Handbook on Prisoners with Special Needs, Criminal Justice Handbook Series (United Nations publication, 2009), p. 1.

languages and on the use of interpreters: see article 4(4) on the provision of information to newly admitted prisoners (rule 55 of the Nelson Mandela Rules); article 38(7) on disciplinary procedures (rule 41 of the Nelson Mandela Rules); and article 44 on legal aid (rule 55 of the Nelson Mandela Rules). The importance of language also underpins the requirement in article 52(4) that prison staff must have appropriate linguistic competences (rule 80 of the Nelson Mandela Rules). Reasonable steps to communicate across linguistic boundaries may include providing written material in a range of languages and using competent interpreters. Sign language interpreters are particularly important for prisoners with disabling hearing loss.

It is important to have article 3(8) as a final general principle applicable to all prisoners. Rule 4 of the Nelson Mandela Rules deals with what should be done for sentenced prisoners to ensure, as far as possible, their social reintegration into society. This issue is addressed in more detail in chapter X, on sentenced prisoners. However, the Nelson Mandela Rules are silent on the social reintegration of unsentenced prisoners of all kinds. In reality, many prisoners may not be sentenced before they are released from prison. They, too, need to be treated in prison in a way that enables them to reintegrate into society upon release. This is the focus of article $3(8)^{35}$ and is in line with the recognition of reintegration as a purpose of imprisonment set in article 1.

Chapter II. Admission, classification and allocation

Article 4. Admission

Precise admission procedures are essential for the protection of liberty and for the rights of those detained. Such procedures need to be spelled out in some detail in primary legislation. The strict legal requirement that must be met prior to the admission of a prisoner is set by article 4(1). This provision flows from the first sentence of rule 7 of the Nelson Mandela Rules and gives effect to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, which protects individual liberty by providing that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".³⁶

While prison legislation is not the place for spelling out details of other procedural measures, such as the rules explaining when someone can be arrested, it should complement other national law that guarantees individual liberty against arbitrary interference. Precise requirements on when someone can be admitted to prison are vital additional protections to the right to liberty guaranteed in the prohibition, in article 9 of the International Covenant on Civil and Political Rights, against arbitrary detention. National terminology on what is to be regarded as a "valid commitment order" may differ and should be adjusted accordingly.

 $^{^{\}rm 35}\,\mbox{See}$ also the revised European Prison Rules, rule 6.

³⁶ See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 4; revised European Prison Rules, rule 14; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle 9.

Article 4(2) is not directly related to a provision in the Nelson Mandela Rules. However, it is essential for national prison legislation to specify in its primary law when detention starts, not only as a general protection of liberty but also for determining the period of time that a person admitted to prison will have served as a prisoner when he or she is eventually released from prison.

Article 4(3) reflects the right of the admitted prisoner to inform others of their admission, as reflected in rule 68 of the Nelson Mandela Rules. This provision counters the risk of *incommunicado* detention and serves the implementation of the Declaration on the Protection of All Persons from Enforced Disappearance.³⁷ It equally forms part of the right to have contact with the outside world, in terms of article 25 of this Act and also applies to transferred prisoners, as transfer entails admission to a new prison. The regulation referred to in article 4(3) cannot undermine this basic right to the effect that a person who is admitted to prison simply disappears or that links with family and others are broken. However, the regulation may specify that, if the prison authorities have reason to be concerned that the notification may be abused to convey information other than the admission to prison, the notification takes a particular form that would prevent such abuse. The regulation could also specify how the designation of someone as a contact person should be done.³⁸

Article 4(4) summarizes all steps that need to be taken "upon admission". Combining these steps in a dedicated section of the legislation is strongly recommended, as they form the basis of many of the processes that have to take place during the detention of an individual prisoner. The role of the admissions officer, mentioned for the first time in article 4(4)(a), is key to the admissions process as a whole. For this reason, "admissions officer" is one of the few roles in the Prison Service formally specified in the Act.

One of the key duties of the admissions officer is to collect a range of information about the prisoner, as specified in article 4(4)(b)(i)-(x). A legislator may be inclined to prescribe the collection of more information, but there is a delicate balance to be maintained between collecting information and recognizing the privacy rights of both the prisoners and others with respect to about whom information may be collected due to their relationship with the prisoner. Also see article 48 (Filing system) and its commentary in this regard, where this aspect is considered in further detail.

The specific information sought that is listed in article 4(4)(b) is largely derived from rule 7 of the Nelson Mandela Rules, which includes the information listed in article 4(4)(b)(i)-(vi), and (viii)-(x). In article 4(4)(b)(i), provision is made for specifying by regulation detailed information that will be required to establish the identity of the admitted prisoner. This is likely to include first name, surname and any previous name, nationality, gender, any alias, parents' names, date of birth, address and identifying marks. In countries with a system of identity numbers, those too should be added in the regulation to the list of required information. With regard to gender, rule 7(a) of the

³⁷ General Assembly resolution 47/133. For the drafting history of the Nelson Mandela Rules, see UNODC/CCPCJ/EG.6/2012/2.

³⁸ Rule 24.9 of the revised European Prison Rules provides that the authorities have to communicate with the prisoner's family unless the prisoner asks them not to do so. This avoids the danger of abuse but puts the prisoner in a more passive position than that provided for in rule 68 of the Nelson Mandela Rules.

³⁹ See also the revised European Prison Rules, rule 15.1; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle IX.2.

Nelson Mandela Rules also refers to respecting the "self-perceived gender" of the prisoner being admitted,⁴⁰ but the regulations may require more information about gender than what the prisoner perceives or claims. Recording the prisoner's nationality is particularly important as it triggers a number of actions required by article 25(11) below.

Subparagraph (ii), which requires the recording of the legal basis and reasons for a prisoner's admission, constitutes a further protection against arbitrary detention, the risk of which article 4(1) is designed to address.

The recording of any visible injuries and immediate complaints, required by article 4(4) (b)(iv)–(v), is also particularly important as a safeguard and as an opening step for the provisions relating to the first medical examination in article 5, as well as the provision of subsequent health-care services in articles 19–20.

The recording of special dietary and religious requirements provided for in article 4(4)(b)(vii) is necessary to ensure that article 17 (Nutrition) and article 26 (Religion) can be given effect. In practice, dietary requirements and religious observance are often interlinked, as some religions prohibit the consumption of certain types of food or prescribe specific food preparation. Prison authorities need to be aware of this as soon as prisoners are admitted.

Article 4(4)(b)(viii) follows the wording of rule 7(f) of the Nelson Mandela Rules. However, legislators should be aware that this is a complicated area as it requires the collection of information about persons other than the admitted prisoner. This may raise difficult issues relating to the privacy rights of prisoners' children, for example. Rule 3 of the Bangkok Rules therefore add the caveat that information on the identity of children should be kept confidential and only used in their best interests. At regional level, the European Prison Rules were amended in 2020 to only ask for information about "the number of children, their ages and their current primary caregiver". 41

The requirements relating to the recording of the prisoners' caretaking responsibility is designed to create a paper trail to allow for the effective implementation of article 4(4)(c). Article 4(4)(c) is designed to ensure that people, such as children or the elderly, who are dependent on the prisoner are provided for. In practice, this may particularly apply in the case of women prisoners. Rule 2.2 of the Bangkok Rules therefore suggests that women prisoners should be allowed to make arrangements for the care of dependents before they are admitted to prison. While this is not a matter to be regulated in prison law directly, article 4(4)(c) addresses care issues that have not been resolved prior to admission. It applies to all prisoners, as male prisoners may be caregivers, too. Article 4(4)(c) should be shaped to be in line with the national system of social care. This may require cross-references in the Act to related national legislation.

The purpose of article 4(4)(d) is to provide an immediate temporary classification of admitted prisoners. This has to happen promptly at admission as, in terms of rule 1 of the Nelson Mandela Rules, the safety and security of prisoners has to be "ensured at all times". See also article 6, which deals with the more in-depth classification that has to take place shortly after admission.

⁴⁰ See also, Yogyakarta Principles, which in its principle 9 call on States to avoid "further marginalising persons on the basis of sexual orientation or gender identity".

⁴¹ Revised European Prison Rules, rule 15.1.h.

The safekeeping of all property that prisoners bring into prison, regulated by rule 67 of the Nelson Mandela Rules, must also take place at admission. Article 4(4)(e) should be read in conjunction with article 4(4)(b)(vi) which provides for the initial inventory of the prisoner's property being recorded and with article 12(2) on the return of prisoners' property upon release.

Reflecting rule 54 of the Nelson Mandela Rules, article 4(4)(f) elaborates on the range of information that should be provided to prisoners upon admission, including on rights and obligations that arise throughout the Act. It should be read together with article 43 (Requests and complaints), articles 44 and 58(8)(b) (legal aid) and articles 34-38 (discipline). As per article 4(4)(f), this information should be communicated "in a manner that the prisoner understands". Rule 55.2 of the Nelson Mandela Rules further emphasizes that prisoners with sensory disabilities should be provided with information in a manner appropriate to their needs.

Article 5. Post-admission medical procedures

It is essential that a basis for the health care of prisoners be established as soon as possible after admission. For this reason, article 5, which closely follows rule 30 of the Nelson Mandela Rules, is included in the admission section. It should be read in conjunction with the wider provisions of chapter V (Health care).

The steps that article 5 requires to be taken build on other steps that need to be taken at admission. The continued use of prescription medicines referred to in article 5(1)(b), for example, also relates to prisoners' property that has to be processed in terms of article 4(4)(e), while the establishment of possible ill-treatment required by article 5(1)(c) goes together with the duty of the admissions officer to record any visible injuries and complaints about prior ill-treatment that the newly admitted prisoner may have (article 4(4)(b)(iv-v)).

Article 5(1) does not refer to young children who are admitted to prison with their parents, as they are technically not prisoners. However, a duty to also examine such young children upon admission is provided by article 29(5)(b). This duty can be derived from rule 9 of the Bangkok Rules, which further indicates a preference for such examination to be conducted by a child health specialist.

Article 5(2) makes provision for responding immediately to any health-care needs that the admission process may reveal. The importance of identifying and responding to any form of ill-treatment, including sexual or other forms of violence, to which the prisoners may have been subjected prior to imprisonment, is further stressed in Rules 6 and 7 of the Bangkok Rules. In terms of article 21(4) of this Act, the health-care professional concerned also has a duty to report any signs of torture or other cruel, inhuman or degrading treatment or punishment noted at admission for further investigation.

Article 6. Classification

Article 6(1) deals with assessing in detail, as soon as possible after admission, the risk that each prisoner may pose and the needs that they may have in prison. The manner in which this assessment should be conducted and the categories that should be used must be spelled out by regulation. This flexibility is built into the Act as assessment techniques

are evolving and the authorities need the flexibility to prescribe new methods of assessment. For practical guidance in this regard, see the UNODC *Handbook on the Classification of Prisoners*.⁴²

The security categorization of prisoners has an important bearing on the operation of prison systems. While the Nelson Mandela Rules do not spell out which or how many security categories should be used but, in practice, schemes for the security categorization of prisoners typically distinguish between prisoners requiring maximum, medium or minimum security. This being said, other schemes may be adopted, including with a view to reflect gender-related differences. Rule 41 of the Bangkok Rules makes the case for "gender-sensitive risk assessment and classification of prisoners" that would "take into account the generally lower risk posed by women prisoners to others, as well as the particularly harmful effects that high-security measures and increased levels of isolation can have on women prisoners".

The individual assessments of needs of prisoners in terms of article 6(2)(b) is the second key feature of classification processes and is designed to ensure that any special needs are recorded shortly after admission and catered for in the course of imprisonment. This is particularly relevant in terms of article 7 (Allocation) and chapter VI (Prison regime). Article 6(3) alerts the authorities to the possibility that a sentenced prisoner may be admitted to prison directly upon sentencing. The full classification of such a prisoner for rehabilitative purposes will be required, as it will be for a newly sentenced prisoner who was already in prison prior to receiving his or her sentence. The details of this type of classification are not included here, as this form of classification applies only to sentenced prisoners, whose position is considered more fully in articles 55 and 56 of chapter X (Sentenced prisoners).

Article 6(4) provides that all classification findings should be recorded in the prisoner's file as equally required by rule 8(b) of the Nelson Mandela Rules. Due to the dynamic nature of various risk factors and with a view to allow for the progression of a prisoners towards a less restrictive prison regime over time, as appropriate, classification findings should be reviewed at regular intervals.

Article 7. Allocation

At the core of the decision of to which prison a prisoner should be allocated is the information gathered about such prisoner at admission (article 4) and at the security classification that takes place shortly after admission (article 6). In the light of this information, prisoners must be allocated to prisons that have the capacity to deal with prisoners of the categories referred to in article 7(1).

Article 7(2), following rule 59 of the Nelson Mandela Rules,⁴³ highlights the importance of allocating prisoners close to their homes or places that may assist their social reintegration. Also important in article 7(2) is that prisoners should be consulted about which prisons they are allocated to. This does not mean that the prisoners' view must prevail. However, in practice the impact of where they are allocated may affect their fundamental rights, to family life for example, and therefore their views need to be

⁴² UNODC, Handbook on the Classification of Prisoners, Criminal Justice Handbook Series (Vienna, 2020).

⁴³ See also the revised European Prison Rules, rule 17.1.

taken into account before making a decision that could limit their exercise of their rights fundamentally. Article 7(2) also supports the taking into account of caretaking responsibilities, which is encouraged by rule 4 of the Bangkok Rules with reference to women prisoners. It is followed here, as the same considerations apply to male prisoners as well. In practice, when making decisions on allocation, it should be borne in mind that caretaking responsibilities may press particularly heavily on women prisoners.

Article 7(4)(a) addresses the problem of prison overcrowding by providing that prisons should not be filled beyond capacity. This is implicit in rule 12 and 13 of the Nelson Mandela Rules, which sets minimum standards for accommodation. However, article 7 makes the prohibition on overcrowding explicit. In some countries this is achieved by not admitting persons to the prison at all if the system has no place to accommodate them. This could be done, for example, by implementing a policy which provides that persons whose immediate detention is not essential for the protection of the public are put on a waiting list and allocated to a prison only when a place becomes available. If a country follows such a policy, there should be legislative provision for it: article 7(4)(b) could be elaborated accordingly.⁴⁴ In other countries, prisons have to accept anyone whose detention has been legally ordered. In such cases, there is need for a "bursting" procedure which allows prison directors to bring this to the attention of higher authorities.

Article 7(4)(b), provides for, but does not spell out the details of such a "bursting" procedure, as it depends on what mechanisms are available to deal with having more prisoners in the system than it can accommodate. A legislator may choose to specify the Act rather than leaving it to a regulation. If, for example, a state wishes to deal with such crises by using presidential pardons, the appropriate procedure may be for the Prison Director to report it to the Commissioner, who in turn would have a duty to report to the Minister when the system as a whole cannot provide sufficient accommodation. The Minister would then inform the Head of State. Alternatively, the procedure could involve the judiciary, with, for example, the Chief Justice being presented with such reports and having the legal power to intervene systematically to reduce sentences or to order the release of awaiting trial prisoners. Such a procedure is of particular importance when there are pandemic diseases, such as the coronavirus disease (COVID-19), where the necessity to meet health requirements reduces the capacity of a prison to house as many prisoners as it could previously.

Article 8. Separation of categories

If a prison is authorized to receive prisoners of different categories they must be separated as specified in article 8(1), which deals with the separation of different categories of prisoners as set out in rule 11 of the Nelson Mandela Rules. Rule 11(a) emphasizes that a prison that receives both men and women should keep premises allocated to women entirely separate from those for men. Noteworthy in the subparagraphs is article 8(1)(c) which refers to "civil prisoners". As defined in this Act, they include prisoners who are not involved in the criminal justice process – see also the commentary on the definition. The reference to young prisoners in article 8(1)(d) may be made more specific in national legislation by stipulating, for example, that prisoners under the age of 21 years should

⁴⁴ For further information, see Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XVII and, in respect of remand prisoners, see Kampala Declaration on Prison Conditions in Africa, Remand prisoners, para. 1.

be housed separately. As noted in article 2(4), the prisons referred to in this Act are not designed to deal with children (i.e. people under the age of 18 years). However, if children are held in prisons for adults, international law – particularly article 37(c) of the Convention on the Rights of the Child – requires that they be separated from all persons aged 18 years or above "unless it is considered in the child's best interest not to do so". This provision should also be included in national legislation, although not necessarily in this Act.

The purpose of article 8, paragraphs (2) and (3), derived from rule 81 of the Nelson Mandela Rules, is primarily to protect women prisoners from abuse. Preliminary observation 2.2 to the Nelson Mandela Rules allows for "experiments" as long as they are within the general principles of those Rules. To this end, national legislation does not have to follow these provisions but can modify them. However, the restrictions on the separation of categories should not be relaxed if it would pose a risk to women prisoners in any way.

Article 9. Transfer

Transfers of prisoners are new allocation decisions. Accordingly, article 9(1) provides that the same criteria that are used to make allocation decisions should equally apply to transfers. As the transfer to a new prison may affect a prisoner's ability to exercise various rights, including the right to family life, sound administrative process requires that a prisoner's views should be considered. As with allocation decisions, the prisoner's view may be outweighed by other factors. If a transfer has to be done quickly, for example, on grounds of safety or security, the consultation of a prisoner may be delayed.

Article 9(3) points to the fact that sound administrative process also requires the transfer of a prisoner to be accompanied by the physical transfer of his or her individual file, as further elaborated in article 48(7). Electronic file management systems will equally need to be able to reflect the transfer of a prisoner.

Article 9(4)–(6) address how transfers should be effected in practice, including related conditions, and follow rule 73 of the Nelson Mandela Rules. First and foremost, these provisions are designed to prevent prisoners from being subjected to ill-treatment or exploited during transfers. Article 9(6) further seeks to ensure that prisoners who are being transported are not expected to pay for their own transport. The legislator may specify another part of the State apparatus that will pay for their transport by amending the reference to the Prison Service.

Chapter III. Release

Article 10. Release principles

Article 10(1) sets out the basic requirement that no prisoner should be kept in prison for any longer than is justified by law. It thereby reinforces the fundamental right to liberty embodied in article 9 of the International Covenant on Civil and Political Rights. As noted in the introduction to this Handbook, the Act does not spell out the legal requirements for early release on medical grounds or for conditional release of sentenced prisoners. However, where there is provision for early release in national legislation,

in a Prison Act or elsewhere, it should be taken into account when determining the continued legal justification for keeping someone in prison.

Article 11. Preparation for release

Although the Nelson Mandela Rules do not require a medical examination prior to release, article 11(1) mirrors the Rules' requirement for the medical examination of prisoners upon admission. In fact, many prison systems go further and require prisoners to be medically examined prior to release. National legislation may decide that a compulsory examination is appropriate in order to protect prisoners and public health, as well as protecting members of the Prison Service from any unfounded allegations that prisoners were ill-treated in the course of imprisonment.

Article 11(2) follows rule 110 of the Nelson Mandela Rules but sets an additional requirement of consent, as clearly the ex-prisoner cannot be compelled to undergo medical treatment. It is an example of setting up the bridging arrangements that need to be applied between health care in prison and in the wider society.

Article 11(3) spells out the minimum provisions that should be made for all prisoners shortly before release, as all prisoners who are released have basic needs in the immediate post-release period, which need to be catered for. In this respect it reflects rule 108(1) of the Nelson Mandela Rules, a rule for sentenced prisoners. The additional preparations that must be undertaken before releasing sentenced prisoners are dealt with in article 57.

National legislators may consider whether it is possible to set a requirement in relation to suitable homes and work for all prisoners and, if so, on whom the responsibility should fall. National legislators should also consider the proposed requirement that the Prison Service should be responsible for providing all released prisoners with means of subsistence for at least three days. It may be that the period should be shorter or longer, or that there should be another mechanism for determining how the duties of the Prison Service and welfare authorities should be demarcated. Finally, the regulations on documentation should specify what documentation is required that is specific to the needs of the society concerned.

Article 12. Release procedure

The information elicited in article 12(1) provides an additional safeguard. Although not specifically required by the Nelson Mandela Rules at the release stage, rule 8 of the Nelson Mandela Rules encourages the recording of such information at any time during imprisonment.

Article 12(2) reflects the requirement in rule 67(2) of the Nelson Mandela Rules to return a prisoner's property upon release, thereby following up on the recording and safe storage of a prisoner's property undertaken upon admission (article 4(4)(e)).

Article 12(3) mirrors the procedures and record-keeping initiated upon the admission of the prisoner. The reason for specifying them in primary legislation is that they ensure that the Prison Service fulfils its legal obligations to detain those persons who should

be detained, but only for as long as it has legal authority to do so, for the periods provided in legally binding instruments that authorize their detention.

Chapter IV. Material conditions

Article 13. Accommodation

The overarching requirement in article 13(1), that is, that all accommodation must meet the standards of human dignity, is derived from rules 13 and 42 as read with rule 1 of the Nelson Mandela Rules. In order to achieve the specific requirements for different aspects of accommodation, the regulations required by article 13(8) are of particular importance. Not only is there a general duty of the Minister to make regulations, but they are also essential in this instance, both to inform the prison authorities of what needs to be provided and inform prisoners of what they are entitled to expect. The regulations must deal with every aspect of accommodation mentioned in paragraphs (1)–(7) and specify minimum requirements for each of these, for example, minimum floor space per prisoner, as expressed in square meters, for their sleeping accommodation. These must not be so limited that prisoners could not sleep in conditions of human dignity. Since the concept of human dignity tends to expand over time, minimum requirements in prisons will equally have to be adjusted. In this regard, specific standards developed by bodies such as the International Committee of the Red Cross may be of value.⁴⁵ The relative flexibility of regulations allows the Minister to improve the minimum requirements as more resources become available. Courts may also test the minimum requirements as measured against the specific standards set by article 13 and the more general standard of human dignity.

The detailed requirements set out in article 13(2) are derived from rule 15 of the Nelson Mandela Rules, while provisions on sanitation and washing in article 13(3) draw on rule 16 of the Nelson Mandela Rules, as well as on rule 5 of the Bangkok Rules.

The provisions for sleeping accommodation set out in article 13(4) reflect a long-standing preference, expressed in rule 12 of the Nelson Mandela Rules, for single cells for prisoners. In some systems, single sleeping accommodation is recognized as a prisoner's fundamental right. Where this is the case, an exception is allowed by the word "normally" in this provision in order to deal with sharing for a limited period, for example, if a prisoner has to be accommodated for a single night while travelling between two prisons. In many systems, however, the situation is more complicated. Prisoners may have a preference for shared accommodation and may even regard being compelled to sleep in single cells as an additional form of punishment. In other instances, a Prison Service may simply not be able to provide sufficient single cells but have shared accommodation that meets the minimum standards set in terms of article 13(1). To deal with these eventualities, article 13(4)(b) sets out factors to be considered when prisoners have to share accommodation.

⁴⁵ Pier Giorgio Nembrini, *Water, Sanitation, Hygiene and Habitat in Prisons* (Geneva, International Committee of the Red Cross, 2013).

⁴⁶ See also the revised European Prison Rules, rule 18.5-18.8.

The cleanliness of accommodation, referred to in article 13(5), should be read with article 15, which requires prisoners to keep their own sleeping accommodation clean.

The security of accommodation, referred to article 13(6), should be read together with article 31, which spells out safety and security measures, including measures for prisoners to be able to contact staff at all times. This may require the installation of alarms.

The requirements of special accommodation for prenatal and post-natal care and treatment in prisons which accommodate women as set out in article 13(7) are derived from rule 28 of the Nelson Mandela Rules.

Article 14. Facilities

Article 14 deals with the facilities that all prisons need in addition to the sleeping accommodation and related ablution amenities that are dealt with in article 13. The facilities that are named in article 14 are necessary for activities specified in various provisions of the Act: article 14(a) for health care (article 19); 14(b) for nutrition (article 17); 14(c) for exercise (article 27); 14(d) for contact with the outside world (article 25); 14(e) for religion (article 26); 14(f) for recreation and cultural activities (article 28); 14(g) for education and vocational training (article 23); 14(h) for work (article 24); and 14(i) for young children (article 29). Facilities specified in article 14 (a)–(h) should be provided in all prisons and should be sufficient to enable all prisoners to use the facilities for medical care and nutrition, and also for the various aspects of their regime as specified in the Act. Facilities should be planned with this in mind: for example, there should be sufficient space for all prisoners to exercise within the time allowed by a reasonable daily prison timetable. Article 14(i) provides for nurseries for young children only "if applicable". This is because in many systems young children, who are not "prisoners" but nevertheless held in prison with their parent, are concentrated in specialized prisons. Article 14(j) is designed to ensure that prisons that house particular categories of prisoners have additional facilities, such as specialized classrooms or workshops geared to the type of training they provide.

Article 15. Personal hygiene

Article 15 is largely the same as rule 18 of the Nelson Mandela Rules. In order to meet the requirements of article 15(1), the accommodation of prisoners should be clean when they are first allocated to it (see article 13(5)). As article 15 applies to all prisoners, it imposes limited duties that form part of ordinary prison life on untried prisoners as well as sentenced prisoners. Not regarding the hygiene duties as work means that they are not covered by the provision in article 58(6)(a) that untried prisoners cannot be compelled to work. This exception is limited, however, to the duties listed in article 15(1). The products that should be provided for prisoners in article 15(2) are reflecting the requirements of rule 18 of the Nelson Mandela Rules and rule 6 of the Bangkok Rules, explicitly including sanitary products for women.⁴⁷

⁴⁷ See also, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XII.2.

Article 16. Clothing and bedding

Article 16 (1)–(5) are based on rules 19 and 20 of the Nelson Mandela Rules.⁴⁸ The provisions relating to prisoners' clothing must be understood against the background of article 58(5)(a), which provides that untried prisoners have to be allowed to wear their own clothing, subject only to its suitability for wearing in prison. However, there is no provision in the Nelson Mandela Rules saying that sentenced prisoners must wear some sort of uniform. Accordingly, it is open to a Prison Service to decide whether to allow all prisoners to wear their own clothes. If there is a policy of allowing prisoners to wear their own clothes, the words "who are not allowed to wear their own clothing or" should be omitted from article 16(1). Conversely, if sentenced prisoners are going to be compelled to wear prison uniforms, a provision to that effect should be added to chapter X, which deals with prisoners under sentence.

Article 16(6) largely follows rule 21 of the Nelson Mandela Rules. Rule 21, however, qualifies the provision of a bed with the words "in accordance with local or national standards". These words do not fit into national legislation, but the Minister may use his or her general power to make regulations to specify, for example, what is meant by a "bed", as there may be cultural differences within a jurisdiction in this regard.

Article 17. Nutrition

Article 17 is largely based on rule 22 of the Nelson Mandela Rules.⁴⁹ The regulations on food referred to in article 17(2) should contain detailed specifications of what is appropriate in terms of nutritional value so that the adequacy of what is provided can be evaluated as measured against a clear standard. Similarly, the regulations should also provide when and how the food will be served in order to ensure that the food service meets requirements.

Article 17(3) is necessary to ensure the ability of prisoners to fulfil the tenets of their religion (see article 26 for the basis of this right), while article 17(4) is required to ensure that prisoners receive the health care to which they are entitled (see article 19) and that the instructions of health-care professionals in respect to a prisoner's diet are carried out.

Water must be suitable for human consumption to be regarded as "drinking water" as required by article 17(5).

Article 18. Oversight of material conditions

Historically, the oversight set out in article 18(1) was the function of a prison doctor. Rule 35 of the Nelson Mandela Rules refers to a "physician" as a member of the health-care team who could perform this function. However, there is a good case for saying that it could be another qualified member of the health-care team, particularly as the same function could be performed by a member of a public health body, who may not be a qualified medical doctor. The underlying principle is that there should be functionally

⁴⁸ See also the revised European Prison Rules, rule 20, and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XII.3.

⁴⁹ See also the revised European Prison Rules, rule 22, and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XI.1.

independent and effective oversight of material conditions. A legislator could stipulate another specialist public body that could provide the appropriate oversight.

Article 18, paragraphs (2) and (3), spell out the process by which oversight should lead to action being taken to deal with material conditions that are not up to standard. They emphasize that the authority to act on these matters lies in the first instance with the Prison Director. However, Article 18(3) spells out procedures to be followed if doing so would go beyond the authority of the Prison Director, or if he or she decides not to act on the advice from the inspectors outlined in article 18(1). In practice, the Prison Service may have a more complex structure than a Prison Director who reports directly to the Commissioner. If so, the legislation should reflect this by stipulating, for example, that the Prison Director must report to a regional office or other entity of the Prison Services.

Chapter V. Health care

Article 19. Prisoners' health care

Article 19 stipulates the health care that should be provided for all prisoners and at the same time sets out, in detail, the expectations with regard to health care that prisoners can reasonably have. This focus is different from that of the Nelson Mandela Rules, which concentrates on the structure of the health-care services. The rights and expectations of prisoners are, however, all implicit in the Nelson Mandela Rules but stated as services that should be provided, rather than as rights of prisoners.⁵⁰ The advantage of stating them clearly in this Act is that it gives not only prisoners but also the prison authorities a clear understanding of what prison health care is designed to achieve.

Article 19(1) requires that prison health care must be "adequate" under all circumstances.⁵¹ While it must at least be of the same standard as health care in the community, inadequate care for persons outside the prison may not be used as an excuse for failures of health care in the prison. The "actual needs" of the prison population may be greater, and there is a clear duty on the Prison Service as a whole to take responsibility for it, made explicit in article 20(1), as discussed below.

Article 19(2) highlights aspects of health care of prisoners that need particular emphasis because they are often overlooked (dentistry and psychological and psychiatric services, which are highlighted in rule 25.2 of the Nelson Mandela Rules) or because they are particularly prevalent in prisons (HIV and tuberculosis, which are highlighted in rule 24.2 of the Nelson Mandela Rules). The wording must be sufficiently open-ended to provide for newly emerging diseases (e.g. COVID-19).

⁵⁰ See, for example, article 16 and the Nelson Mandela Rules, rule 25, para. 2; article 16, paras. 3–4 and the Nelson Mandela Rules, rule 27, para. 1; article 16, para. 5 and the Nelson Mandela Rules, rule 31; and article 16, para. 6 and the Nelson Mandela Rules, rule 32, para. 2 (b).

⁵¹ Inadequate access to health care might also amount to a violation of article 10 of the International Covenant on Civil and Political Rights. See, for example, CCPR/C/116/D/2231/2012, para. 8.5: "The Committee notes that the State party is under an obligation to observe certain minimum standards of detention, which include provision of medical care and treatment for sick prisoners, in accordance with rule 24 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). [...] In view of the fact the State party itself acknowledged the overcrowding, and taking into account the author's detailed description of his health condition and lack of access to adequate medical care, the Committee concludes that the State party violated the author's rights under article 10 (1) of the Covenant".

Some of the wording of article 19 is drawn from rules 6 to 18 of the Bangkok Rules, which deal in detail with the medical needs of women prisoners. The emphasis on gender-specific care in article 19(1) is an example of the Act drawing attention to an aspect of medical care that mostly affects women. Article 19(7) provides a specific guarantee that women prisoners will be protected during medical examinations.⁵²

Article 20. Health-care service

Article 20 is concerned with the structure of health-care services. The legislator may choose to put this provision in chapter IX, which is concerned with the structure of the Prison Service as a whole. It is put here in order to group together the core provisions relating to health care.⁵³

Rule 24 of the Nelson Mandela Rules emphasizes that health care for prisoners "is a State responsibility". National legislation spelling out this responsibility will largely depend on the way in which public health care is structured in a particular country. Article 20, paragraphs (1) and (2), envisage a prison health-care service that is part of the larger Prison Service. However, it is possible to envisage prison health care provided by a national health-care service outside the Prison Service. If this is the preferred model, article 20, paragraphs (1) and (2), would have to be drafted differently. Note that in terms of article 58(7), untried prisoners are allowed access to private health care.

It is important, however, to emphasize that, no matter how it is structured, health care is not the responsibility of health-care professionals alone but involves the whole Prison Service. That is the purpose of article 20(1).

Article 20, paragraphs (3) and (4), follow rule 25 of the Nelson Mandela Rules in establishing a health-care team at the prison level. The term "team" is preferred to the term "service" used in rule 25 as "service" may be used for a larger structure. The health-care team is the basic unit through which health care is provided at the prison level. However, the legislator may wish to add further detail about a health-care structure (or "service") that may operate at the level of the prison system.

Article 20(5) mirrors rule 27.2 of the Nelson Mandela Rules and is an important safeguard for the standing and clinical independence of health-care professionals working in prisons as described in article 20(4). A decision by a health-care professional to transfer a prisoner to a hospital for specialized treatment could, for example, not be overruled by prison staff.

Article 21. Health-care professionals

Article 21 provides a legal basis for the work of health-care professionals in prison. The underlying philosophy of article 21, which is derived from rules 31 and 32 of the Nelson Mandela Rules, is that health-care professionals should treat prisoners as they would treat any other patient. In practice, aspects of this relationship are complicated, as demonstrated by the detailed provision in article 21(2)(e) to prevent the abuse of prisoners

⁵² See the Bangkok Rules, rule 10, para. 2.

⁵³ On prison health care in general, see, Stefan Enggist and others, eds., *Prisons and Health* (Copenhagen, World Health Organization, WHO Regional Office for Europe, 2014).

by medical experimentation, while at the same time in article 21(3) allowing prisoners to take part in clinical trials or other medical research subject to their "free and informed consent". A national legislator is advised to carefully consider whether this should be allowed and, if so, to add to article 21(3) a reference to the applicable national law on human experimentation in order to ensure further protections.

Health-care professionals must walk a careful line to ensure that their clinical independence is maintained, while alerting prison authorities when prisoners' health is being endangered. Thus, article 21(4) reflects a duty to report torture, derived from rule 34 of the Nelson Mandela Rules, while article 21(6) places a general duty on health-care professionals to report to the Prison Director when the way a prisoner is being treated, or continued imprisonment itself, threatens a prisoner's health.

Article 21(5) deals with the duty, derived from rule 30(e) of the Nelson Mandela Rules, of a health-care professional to declare a prisoner fit to work, exercise and participate in other activities. This duty exists not only shortly after admission (see article 5(1)(f)) but throughout the time a prisoner remains in prison. It may include a recommendation that a prisoner can only undertake light work or should have a special exercise regime (see article 27(4)).

Article 21(6) reflects rule 46 of the Nelson Mandela Rules, which excludes a health-care professional from playing a role in the imposition of punishment, by certifying a prisoner as fit or not for separation or solitary confinement. It thus reverses the policy, reflected in the provision of the 1955 Standard Minimum Rules for the Treatment of Prisoners, that "punishment by close confinement ... shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it". This was done because the earlier language was considered to be in contradiction to medical ethics, as also reflected in principles 3 and 4 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. Protection of Separation. This duty also requires them to alert the authorities when such separation should not be continued (also see article 33(7) and, in respect of solitary confinement, article 37(4)).

Chapter VI. Prison regime

Article 22. Guiding principles

Article 22 sets out general considerations that should be borne in mind when considering the prison regime as a whole, while the rest of chapter VI deals with specific aspects of the regime. The regime and the activities that it encompasses should be made available as far as possible to all prisoners, and not only to sentenced prisoners, as set out in

⁵⁴ See rule 32, para. 1 of the Standard Minimum Rules for the Treatment of Prisoners, discussed in document UNODC/CCPCJ/EG.6/2012/2, pp. 13–14.

⁵⁵ General Assembly resolution 37/194.

chapter X or to untried prisoners, whose regime may be modified as set out in chapter XI.

Article 22(1) draws attention to the fact that the different activities referred to in chapter VI, that is, education and vocational training (article 23), work (article 24), contact with the outside world (article 25), religion (article 26), exercise (article 27) and recreation and cultural activities (article 28), all need to be considered in the course of designing a programme that balances the various activities. There is provision for all these activities in the Nelson Mandela Rules, and it is reasonable to assume that they should form the core of any prison regime designed to meet the overall purpose of imprisonment, that is treating all prisoners with human dignity and preparing them for their reintegration into society (see article 1 as read with rule 4 of the Nelson Mandela Rules).

Article 22(2) builds on the identification and recording of special needs shortly after admission, as required by article 6. It also allows for regulations to specify ways of meeting such needs. Reference to the special needs of individual prisoners in the Nelson Mandela Rules is made in rules 2 and 92. However, it is widely recognized that individual prisoners may have a wide variety of such needs. Some of these special needs, such as those relating to many prisoners' physical or mental needs, are dealt with in other provisions of this Act. Other special needs are not fully met by the provisions of the Act or are not mentioned in the Act at all and may be accommodated by article 22(2).

Article 22(3), which is derived from rule 42.2 of the Bangkok Rules, focuses on a number of factors which might require special consideration when programmes of activities involve women prisoners.

Article 22(4) captures the essence of rule 5.1 of the Nelson Mandela Rules, which deals specifically with the prison regime. As rule 5.1 goes on to explain, such differences "tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings". At stake is the principle of normalization of prison life. However, it is reasonable for prison authorities to limit normalization of prison life for prisoners to the positive aspects of what happens in the community.

The Nelson Mandela rules do not mention "welfare needs" of prisoners directly, but rule 107 does refer to the need to establish or maintain "relations with persons or agencies outside the prison as may promote the prisoner's rehabilitation and the best interests of his or her family", and rule 108.2 provides for representatives of such agencies, whether governmental or not, to be given appropriate access to prison and prisoners. Rules 107 and 108 deal with sentenced prisoners, but it is clear that all prisoners should have such contacts in order to meet their welfare needs, both as far as their families and their own needs are concerned. There is, of course, nothing to stop a national legislator from specifying that the Prison Service should employ social workers directly to provide welfare services. Article 22(5), which refers to "welfare needs", may also be elaborated further in national legislation by linking it to the legislation governing the national welfare system and the duties that national welfare system may have with respect to prisoners and their families.

⁵⁶ See *Handbook on Prisoners with Special Needs*, and the discussion of the range of special needs in the commentary on article 3, para. 6, above.

Article 23. Education and vocational training

Education and vocational training, like work, is dealt with in the Nelson Mandela Rules in the section on prisoners under sentence. For the same reasons as work, educational and professional development opportunities should be open to all prisoners. Indeed, there is no indication in the Nelson Mandela Rules to the contrary.⁵⁷ Prisoners, like everyone else, have the right to education as enshrined in article 13 of the International Covenant on Economic, Social and Cultural Rights. Untried prisoners may be in prison only for a relatively short period, which would make formal education programmes problematic for them. However, they may be there for longer and, in any event, may have urgent educational needs that have to be met to facilitate their successful return to society. For this reason, article 23(1) provides that all prisoners should be given the opportunity for education and vocational training. The remaining paragraphs provide details within this framework.

A noteworthy aspect of these provisions is the potential overlap between education and work. Vocational training, which is recognized by rule 98.2 of the Nelson Mandela Rules and mentioned in article 23(1), is a good example of such overlap. Also important in this regard is article 23(2), which provides that prisoners should not be disadvantaged by taking part in education or vocational training rather than working. This may mean that they should be rewarded equally for time spent taking an active part in an educational programme.

The provision in article 23(3) about linking prison education and vocational training to the public system of education and professional development system in the country is derived from rule 104.2 of the Nelson Mandela Rules. The legislator may specify how this should be done by providing specific references to national education legislation in this provision.

Article 23(4) follows rule 104.1 of the Nelson Mandela Rules in providing for the needs of young prisoners. It also deals with prisoners with special needs, which in the case of education may point to the need for literacy courses. Literacy education for sentenced prisoners is considered further in article 56(6).

Article 23(5), following rule 98.3 of the Nelson Mandela Rules, gives prisoners a qualified right to choose from the available types of education, vocational training or work. However, this right is subject to an assessment of their needs and skills.

Article 24. Work

All prisoners may be allowed to work in prison. For this reason, article 24 is included in the chapter on the prison regime, which applies to all prisoners, rather than in the chapter on sentenced prisoners. To understand the full context of this proposition, it is important to note that, in accordance with the Forced Labour Convention,⁵⁸ only sentenced prisoners may be compelled to work, a duty set out and qualified in

⁵⁷ See also the revised European Prison Rules, rule 28; Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XIII; and Kampala Declaration on Prison Conditions in Africa, Prison conditions, para. 7.

⁵⁸ See Forced Labour Convention (No. 29), art. 2, para. 2 (c) and International Covenant on Civil and Political Rights, art. 8, para. 3 (c) (i).

article 56(5). Untried prisoners should be given the opportunity to work but should not be required to do so. If untried prisoners do choose to work, article 24 applies to them, too.

The Prison Director should ensure that appropriate work is provided (article 24(2)) and prepare prisoners, whether sentenced or not, for a future outside prison (article 24(3)). The UNODC Handbook on rehabilitation programmes⁵⁹ gives useful guidance on how this can be done. In practice, it is often hard for the authorities to find such work for all prisoners. Nevertheless, rule 96.2 of the Nelson Mandela Rules, followed in this Act, expresses that duty.

Rule 96.1 of the Nelson Mandela Rules qualifies that duty by allowing prisoners to be given an opportunity "to actively participate in their rehabilitation", instead of an opportunity to work. Rule 96.1 lays the groundwork for the sentiment, expressed in article 23(2), that work and education should have a similar status, thus placing further emphasis on alternatives to work. However, this would depend on alternative rehabilitative educational opportunities in fact being provided.

Article 24(4)(a) follows rule 103 of the Nelson Mandela Rules in requiring equitable remuneration of the work of prisoners. A national legislature may also want to reward prisoners who work in other ways, for example, by allowing for a modest reduction in sentence for prisoners who work a specified number of days ("good time"). If so, national legislation should also make provision for this form of reward. The provisions on how prisoners may spend their earnings and the provision on saving some of their earnings in article 24(4)(b) and (c) follow from rule 103.2 and 103.3 of the Nelson Mandela Rules.⁶⁰

Article 24(5) lists the various protections that must be in place for prisoners that work. The underlying reason for having them are not only the requirements of the Nelson Mandela Rules but also the complex international law relating to the exception for some types of prison labour from the general prohibition on slavery and forced labour in article 8 of the International Covenant on Civil and Political Rights. Thus, while article 8(3)(b) of the Covenant allows sentenced prisoners to be compelled to work, it does not go as far as allowing slavery. Hence, the further protections are necessary to ensure that prison labour is not exploitative and does not become a form of slavery. This is also the idea that underlies the provisions in article 24(5)(b), (c) and (d), derived from rules 97.3, 99.2 and 100.2 of the Nelson Mandela Rules respectively, namely that prisoners should not work for prison staff, the primary purpose of prison labour should not be to make a profit, and that there is a requirement that prisoners who work for organizations other than the Prison Service should be supervised by prison staff.⁶¹ Rule 100.2 goes further and provides

⁵⁹ See UNODC, Roadmap for the Development of Prison-based Rehabilitation Programmes, Criminal Justice Handbook Series (Vienna, 2017).

⁶⁰ For further guidance on acceptable forms of prisoner remuneration, see UNODC, *Roadmap for the Development of Prison-based Rehabilitation Programmes*, Criminal Justice Handbook Series (Vienna, 2017), p. 46 onwards.

⁶¹ Article 24, paragraph 5, is also designed to conform with the Forced Labour Convention, 1930 (No. 29), of the International Labour Organization. Article 2 (c) of this Convention excludes from the definition of forced or compulsory labour "any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations". See also, Colin Fenwick, "Private use of prisoners' labour: paradoxes of international human rights law" (*Human Rights Quarterly*, vol. 27 (2005)), pp. 249–293.

that "unless the work is for other departments of the government, the full normal wages for such work shall be paid to the prison administration by the persons to whom the labour is supplied, account being taken of the output of the prisoners".

Further protections of prisoners who work, derived from rules 101 and 102 of the Mandela Rules are contained in article 24 (5)(e)–(h). A national legislator may wish to reinforce these protections by means of cross-reference to similar protections that may already exist in legislation dealing with workers in free society and applying them to prisoners working in prison.

Article 25. Contact with the outside world

Imprisonment inevitably limits the contact of prisoners with life outside prison. In order to normalize life in prison as much as possible, as required by rule 5.1 of the Nelson Mandela Rules, careful provision should be made for maintaining prisoners' contacts with the outside world. Article 25(1) states this general proposition in legal terms, while article 25(2)–(11) lays down how aspects of such contact should be facilitated and managed. Much of the more detailed provisions of article 25 is derived from rules 58–63 of the Nelson Mandela Rules. However, other provisions such as article 7 (Allocation), article 19 (Prisoners' health care), article 44 (Access to legal aid) and article 26 (Religion) are equally important in this regard.

The purpose of article 25 is to allow prisoners to maintain contact with the outside world and not to compel them to do so. For example, prisoners may choose to see visitors but should not be obliged to do so. As regards women prisoners, for example, rule 44 of the Bangkok Rules states that "in view of women prisoners' disproportionate experience of domestic violence, they shall be properly consulted as to who, including which family members, is allowed to visit them". The same principle applies to male prisoners.

The regulations that govern restrictions and monitoring of contact (article 25(3)(b)) will exercise considerable influence on the operation of article 25(2). Key to what these regulations should contain is the injunction that "acceptable levels of contact" must be allowed. This requires a setting of a minimum level of contact. If that minimum is too restrictive, it may well be challengeable on the basis that it offends against various fundamental rights, including the right to family life and ultimately to human dignity.

Article 25(3)(c) follows rule 26 of the Bangkok Rules in placing particular emphasis on visits by children, as in many cases, if not most, it will be in their best interest to maintain contact with their imprisoned parent.⁶²

Article 25(4), which deals with the searching of visitors, should be read with article 42, which sets out the general approach to searches and stipulates that procedures which staff have to follow for all searches, including those of visitors, should be set by regulation (article 42(10)).

Provision for conjugal visits, as provided in article 25(5), is designed to strengthen the right to family life. However, if conjugal visits are not allowed at all, national legislation

⁶² See also Council of Europe recommendation CM/Rec(2018)5 of the Committee of Ministers to the member States concerning children with imprisoned parents, para. 17.

would obviously not include this provision. Rule 58.2 of the Nelson Mandela Rules is tentative in this regard, as it is introduced with the phrase "when conjugal visits are allowed", suggesting that this will not always be the case.⁶³ Rule 27 of the Bangkok Rules emphasizes that "where conjugal visits are allowed, women prisoners shall be able to exercise this right on an equal basis with men". The principle should be contained in the regulations mentioned in article 25(5).

Article 25, paragraph (6)(a) and (b), both refer to a "near relative" about whose death or serious illness a prisoner should be informed or whom a prisoner may be allowed to visit outside prison in certain circumstances. Rule 70 of the Nelson Mandela Rules also refers to a "significant other" in this regard. These are difficult terms to translate into national legislation. Legislators should therefore consider which familial relationships are significant enough to trigger the provisions of article 25, paragraph (6)(a) and (b), in their country and adjust the law to reflect this. Information on a prisoner's emergency contacts and next of kin should be recorded at admission (see article 4(4)(b)(x)).

Access to information on public life via the media, as guaranteed by article 25(8), is an important part of access to the outside world. Rule 63 of the Nelson Mandela Rules makes provision for access to the media. The legislator may specify further that restrictions on access to such information may only be imposed by a judicial authority. This would offer a further guarantee against abuse of the power to restrict access.

In democracies, untried prisoners do not have their substantive right to vote limited, and it is therefore particularly important that arrangements for them to do so are facilitated. There is a growing worldwide tendency to recognize that sentenced prisoners have the right to vote. Where this is the case, participating in the electoral process should be encouraged. The legislator may rephrase article 25(9) in order to reflect such developments.

Article 25(10) attempts to balance the competing concerns of the media and the prison system deriving from the right to freedom of speech and expression as stipulated in article 19 of the International Covenant on Civil and Political Rights and valid safety and security interests of prison staff, prisoners and victims, including their right to privacy. The media should only be allowed to speak to prisoners with the permission of the prison authorities and the prisoner concerned.

Foreign prisoners often suffer many disadvantages by not being held in their home countries. The increasing number of foreign nationals held in prisons worldwide requires specific provisions to be made for them in prison legislation, if the principle of the Nelson Mandela Rules that all prisoners should have adequate contacts with the outside world are to be maintained. An important safeguard for ensuring that prisoners who are foreign nationals have adequate contact with the outside world lies in establishing and maintaining contact with diplomatic and consular representatives of the States to which they are affiliated. Article 25(11)(a) and (b), enacting rule 62 of the Nelson Mandela Rules, reflect the provisions of the Vienna Convention on Consular Relations in this regard. National legislators could consider going further by requiring in law that foreign prisoners' contacts with the outside world be facilitated by paying special attention to

⁶³ The Yogyakarta Principles would allow conjugal visits "regardless of the gender of the partner" (principle 9 (e)).

⁶⁴ Art. 36, para. 1 (b).

maintaining and developing their regular contacts with family and friends, probation and community agencies and volunteers, as well as, subject to the prisoners' consent, with their diplomatic or consular representatives.

Article 26. Religion

The general principle that all prisoners have a right to freedom of thought, conscience and religion is derived directly from article 18(1) of the International Covenant on Civil and Political Rights. The general principle in article 26(1) provides a basis for the provisions that follow. In the prison context, this freedom cannot be exercised without the cooperation of the prison authorities. To this end, article 26(2) enjoins the Prison Service to prevent undue pressure being placed on prisoners to adopt a particular religion or belief.

The Nelson Mandela Rules also deal with religion, but the focus of rule 65 is on the practical matter of appointing qualified representatives and regulating the performance of their duties in the prison. Their focus is reflected in article 26(3), which places a positive duty on the Prison Service to appoint representatives of the religions adhered to by prisoners. The regulations required by article 26(3) in this regard should also deal with the qualifications of such representatives. Article 26(4), which follows rule 65.2, grants these representatives access to prisons and to prisoners, to minister to their religious needs, while article 26(5) follows rule 65.3. It guarantees prisoners access to religious representatives and protects them from unwanted proselytization, as does article 26(2). Article 26(6) follows the wording of rule 66 of the Nelson Mandela Rules but adds to it objects required for religious observance, because for many religions, access to such objects is key to the proper observance of religious rituals. Note also that article 17(3) provides for food that meets "the religious needs of prisoners".

Article 27. Exercise

The purpose of article 27 is to spell out the basic right that in terms of rule 23 of the Nelson Mandela Rules, all prisoners should be able to exercise daily. Article 27(1) links exercise to the general purposes of the prison regime spelled out in article 22.

Rule 23.1 of the Nelson Mandela Rules does not encompass the right to exercise for prisoners who are employed in outdoor work. Article 27(2) includes all prisoners, however, as it cannot be assumed that outdoor work is always an opportunity for suitable exercise.

Article 27(3) places a duty on prison authorities to provide alternatives when exercise in the open air is not possible, which, in some climates, may be several months a year.

It is important that exercise regimes be shaped to reflect the needs of all prisoners. Rule 23.2 of the Nelson Mandela Rules refers to young prisoners and others of suitable age and physique. This being said, other categories of prisoners, such as prisoners with physical disabilities or pregnant women, may equally need a special exercise regime. Provision for this is made in article 27(4).

Article 27(5) allows for the details of an exercise regime to be spelled out in regulations. It allows the implementation of what rule 35.1(e) of the Nelson Mandela Rules refers

to as "rules concerning physical education and sport". It also allows for their supervision, which is encouraged by rule 35 of the Nelson Mandela Rules.

Article 28. Recreation and cultural activities

Article 28(1) on recreational and cultural activities deals with a further topic that relates to all prisoners, but that the Nelson Mandela Rules (rule 105) consign to the section on prisoners who are sentenced. Since untried prisoners are presumed innocent and should generally benefit from the same rights as sentenced prisoners, article 28(1) equally applies to them.

The provision on libraries for prisoners in article 28(2) is dealt with in the general part of the Nelson Mandela Rules. Rule 64 of the Nelson Mandela Rules focuses on books in a library. A useful addition is the words "and other media", as that allows the provision of recreational and instructional material other than books.

Article 29. Young children

A young child is defined in this Act. In that definition, the legislator must determine what it regards as the maximum age up to which a child can be allowed to remain in prison with their parent. In practice, this will usually be the mother, but the term "parent" is used to leave open the possibility of young children being kept with their father. The dominant principle of all decisions governing young children, including whether they should stay in prison with their parent, is contained in article 3 of the Convention on the Rights of the Child, which provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The same analysis is applied in rule 53.2 of the Bangkok Rules, which recommends that where a young child living with a foreign national woman prisoner is to be removed from prison, consideration should be given to relocating such a child to its home country. The best interest of the child is also the justification for article 29(1), flowing from rule 28 of the Nelson Mandela Rules, which assumes that a child will avoid stigma by not being born in prison and by not having their birth registered as being born in prison.

Article 29(3) requires that imprisoned parents be given maximum opportunities to spend time with their young children who are imprisoned with them. In this respect, it follows rule 50 of the Bangkok Rules but applies not only to mothers but any parent of such children.

Young children staying in prison with a parent are not prisoners and should never be treated as such. Instead, article 29(4) provides steps that should be taken to normalize the conditions under which they are held, while article 29(5) contains detailed rules on how this should be done. Both these provisions follow from rule 29 of the Nelson Mandela Rules and the wider principle of normalization derived from rule 5.

Chapter VII. Safety, security and discipline

Article 30. Guiding principles

Article 30 sets out the principles that should guide all aspects of maintenance of safety, security and discipline in prison.

Article 30(1), which follows the wording of rule 36 of the Nelson Mandela Rules exactly, contains a principle of proportionality by restricting all measures to maintain safety, security and good order to what is "necessary" to achieve this. Proportionality is best understood as requiring three questions to be posed. Firstly, is the measure to be imposed suitable to achieve its intended purpose? Secondly, is there a less restrictive measure, equally serving the purpose? And thirdly, is the achieved purpose of the measure in proportion to the infringed right of the individual?

The general means for doing this are spelled out in article 30(2), which emphasizes the importance of conflict prevention and resolution techniques that do not involve resorting to the formal disciplinary process. The wording of article 30(2) largely follows the wording of rule 38 of the Nelson Mandela Rules. The legislator may choose to include restorative justice as one of the techniques of conflict resolution.

Article 31. Safety and security measures

Article 31 spells out what should be done to ensure that the prison authorities fulfil their duty of care. They have to ensure that prisoners and all other persons who may be in a prison are kept safe and protected from harm, while ensuring that security is not breached by prisoners escaping from lawful custody. These general measures are not spelled out in detail in the Nelson Mandela Rules but must be developed against the background of rule 1, which requires that "the safety and security of prisoners, staff, service providers and visitors shall be ensured at all times", while safeguarding prisoners against torture and other illegal forms of treatment. As to the latter safeguards, see also the general principles in article 3 of this Act.

Article 31(1) refers to the need for both safety and security in prison. Rules 1 and 36 of the Nelson Mandela Rules draw a basic distinction between safety and security, requiring both to be ensured for "prisoners, staff, service providers and visitors ... at all times". The UNODC Handbook on the Classification of Prisoners, which describes a core prison management practice designed to ensure the safe and secure custody of prisoners, draws a similar distinction. In this regard, safety refers primarily to ensuring that prisoners, prison staff and anyone who enters a prison are kept safe while they are in the prison. Security is primarily concerned with the risk that prisoners may escape or pose a wider threat to society on the outside. Accordingly, the Act focuses on ensuring both safety and security, recognizing that although prisoners may pose risks of both kinds, they do not necessarily do so.

⁶⁵ The Nelson Mandela Rules, rule 1.

⁶⁶ UNODC, The Classification of Prisoners, Criminal Justice Handbook Series (Vienna, 2020).

⁶⁷ Rules 51 and 52 of the European Prison Rules draw a similar distinction between security and safety respectively. See also, Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford, Oxford University Press, 2009); Rodley and Pollard, *The Treatment of Prisoners under International Law*, pp. 267–268).

Article 31, paragraphs (2) and (3), refer to the principle of proportionality, as excessive safety and security measures can increase the pains of imprisonment. Also note in this regard that rule 89 of the Nelson Mandela Rules encourages the use of open prisons so far as possible where the risk to safety and security allows reliance on the self-discipline of the prisoners held in such prisons.

Article 31(4) sets out what prison authorities have to do to ensure prisoners remain in prison and do not escape from lawful custody or encourage the commission of crimes outside the prison. Following rule 12.2 of the Nelson Mandela Rules, it also highlights unintrusive supervision at night as a specific measure to maintain safety and security in prison.

Article 31(6) emphasizes that good security depends not only on physical and procedural security, but also on "dynamic security" – a strategy which relies on alert prison staff able to establish professional and positive relations with prisoners. Dynamic security is explicitly mentioned in rule 76 the Nelson Mandela Rules as a technique which prison staff should be trained to use. Its broadly acknowledged value, as equally reflected in the UNODC *Handbook on Dynamic Security and Prison Intelligence*,⁶⁸ justifies it being given more prominence in prison legislation, hence its inclusion here and in article 31(6).

Article 31(7) makes national health and safety laws applicable to prisons. The legislator may make more precise reference to specific national laws governing health and safety in this provision.

Article 32. Special safety and security measures

Special safety and security measures are measures that, for reasons of safety or security, place restrictions on prisoners that go beyond those inherent in the routine measures undertaken in terms of article 31.⁶⁹ Since these restrictions place an additional burden on prisoners, article 32(2) restricts their use to "exceptional circumstances" and underlines that they should be used only when safety and security requirements cannot be met using less restrictive means. This provision should be regarded as an indication of how restrictively the principle of proportionality, included in rule 36 of the Nelson Mandela Rules and in article 30 of the Act, should be applied to special safety and security measures.

While not being imposed as disciplinary sanctions, special safety and security measures might have a similar impact on a prisoner. Hence article 32(3) requires the adherence to a minimum set of procedural safeguards, such as the right to be informed about the reasons for the imposition of a special measure about the procedures that will be followed in implementing it.

In one respect, article 32 goes further than rule 37(d) of the Nelson Mandela Rules, as article 32(4) also includes prisoners who are subject to voluntary separation, for example because they ask to be separated for their own protection. Article 32(4) does not provide

⁶⁸ Handbook on Dynamic Security and Prison Intelligence, Criminal Justice Handbook Series, (United Nations publication, 2015).

⁶⁹ See also the types of risk outlined in UNODC, *Handbook on the Management of High-Risk Prisoners*, Criminal Justice Handbook Series (Vienna, 2016); in part 3.1.3 of the *Handbook*, distinctions are drawn between security-related, harm-related, order-related, re-offending and crime-related risks.

for solitary confinement as defined in this Act, that is, separation with less than two hours of meaningful human contact daily, as a special safety and security measure. Separation, as set out in article 33, provides a sufficient basis for the maintenance of order and security and meets the requirement of authorization by law as required by rule 37 of the Nelson Mandela Rules. There is provision for solitary confinement as a disciplinary sanction in article 37, subject to strict limits, which are dealt with in articles 36 and 38.

The requirements of article 32(5) in respect of regulations for all special safety and security measures underline the importance of the principle of legality, even when there are additional risks to safety and security to be dealt with. It reflects the requirement in rule 37 of the Nelson Mandela Rules that the special measures listed there should always be subject to authorization by law or regulation. Similarly, the explicit recognition of the human dignity of prisoners subject to special safety and security measures is designed to ensure that they are not abused by the exercise of these additional powers.

Article 33. Separation

The most prominent of the special safety and security measures is the separation of a prisoner from the rest of the prison population. Rule 37(d) of the Nelson Mandela Rules provides that "involuntary separation from the prison population" must be authorized by law or regulation but does not set out details of what such law should contain. Article 33 takes up this challenge and regulates such separation by law and by regulation. Terminology in this area is still uncertain. Rule 37(d) of the Nelson Mandela Rules refers to "separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing". National legislators may use these terms if they better encompass local practice, but they should be careful to include all forms of separation that are used in their prisons.

Article 33(1) recognizes the drastic nature of separation and emphasizes the importance of using it proportionately and parsimoniously.

A key provision in article 33 is paragraph 2, which guarantees all prisoners in separation, except for those in solitary confinement, a minimum of "two hours of meaningful human contact a day". The legislator may choose to set a period longer than two hours, but a minimum of at least two hours of such contact is what the Nelson Mandela Rules require to ensure that prisoners who are separated are not held in solitary confinement. This provision should be read bearing in mind the definition of solitary confinement. Underlying article 33 as read with article 32 is a policy choice that prisoners subject to separation, on any ground other than solitary confinement as punishment for a disciplinary infringement, should have at least two hours of meaningful human contact a day.

Article 33 spells out in legislation a range of further safeguards that must be applied when separation of any kind is used. These safeguards are derived from the Nelson Mandela Rules, most prominently from rule 38. In addition, article 33(3) is based on the general principle in rule 2.2, as reflected in article 3(6) of the Act. Article 33(6) is an illustration of the requirement of rule 42 that standards for general living conditions should be applied to all prisoners without exception.

Health-care professionals have a duty in terms of article 21(6) to visit daily all prisoners who are in separation. Article 33(7), which follows rule 46.2 and 46.3 of the Nelson

Mandela Rules, gives health-care professionals the power to raise concerns relating to separation and to recommend changes or its termination due to physical or mental health reasons. Note that in line with rules 27.2 and 35.2 of the Nelson Mandela Rules, the Prison Director should normally take immediate steps to give effect to such advice or recommendations. If these go beyond his or her competence or if he or she does not concur with them, the Prison Director must immediately submit both his or her own assessment, as well as the advice or recommendation of the health-care professional, to a higher authority.

In addition, regulations must be made in terms of article 33(8) to deal with the process whereby special safety and security measures are imposed. Such regulations should stipulate, for example, who has the authority to impose separation and how it should be reviewed. The regulations may establish that segregation for the purposes of dealing immediately with a dangerous offender may be ordered by a category of prison officers that is different from those who are authorized to allow separation that prisoners request for their own protection.

Article 34. Discipline of prisoners

Article 34 is based on rules 1 and 41 of the Nelson Mandela Rules and introduces a system of prison discipline. Article 34 should be read with the guiding principles contained in article 30, as discipline is a means of maintaining safety, security and good order in prison. Articles 30 and 34 provide for alternative dispute settlement, which should be considered in appropriate cases.

It is important to note that next to prison disciplinary offences, prisoners may still commit serious criminal offences in the course of their detention or imprisonment. Article 34(1) therefore sets out the steps that should be taken to deal with both types of offences. In practice, there may be an overlap between the two that may be hard to handle.

Article 34(2) lays down that in a case where a serious criminal offence may have been committed, the Prison Director should approach the prosecuting authorities. National legalisation may specify more precisely how this should be worded because there may be a difference of opinion about which offences are regarded as sufficiently serious to require reference to the prosecution authorities. If no prosecution follows, there may still be the possibility of charging a prisoner with a disciplinary offence.

Article 34(3) emphasizes the importance of dealing promptly and effectively with disciplinary offences without ignoring the encouragement in rule 38.1 of the Nelson Mandela Rules, to use, to the extent possible, mediation or other alternative disputes mechanisms.

It is important to note that article 34(4), following rule 39.1 of the Nelson Mandela Rules, prohibits punishing a prisoner twice for the same offence.⁷⁰ This provision clearly imposes a prohibition of double jeopardy within the framework of the disciplinary regime.

⁷⁰ See also rule 63 of the revised European Prison Rules; and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XXII.4.

Legislators should specify the extent to which the principle of double jeopardy applies to situations where conduct is subject to both disciplinary sanction and criminal punishment.⁷¹

Article 34(5) follows rule 40.1 of the Nelson Mandela Rules in stipulating that prisoners should not be used to exercise discipline. This is a clear and simple legislative provision.⁷² Rule 40.2 of the Nelson Mandela Rules qualifies this provision by saying that it should not impede prisoner self-government. However, self-government does not relate directly to discipline and, accordingly, is not dealt with in this provision.

Article 35. Disciplinary offences

Rule 37(a) of the Nelson Mandela Rules does not specify what conduct should be criminalized but does require that the conduct constituting a disciplinary offence has to be defined by law or regulation. In either case, legal certainty is important. If in terms of the national legal tradition, regulations are regarded as insufficient for this purpose, legislators will have to insert their own language describing what constitutes a disciplinary offence and not use the proposed text of this article of the Act. However, such a provision should apply the principles now included in article 35(2) and (3) to determine what the substantive disciplinary offences should comprise.

If a decision is made that disciplinary offences should be defined by regulation, there must be provision in the primary legislation for such regulation and article 35 must be included. In this instance, article 35(1) specifies that legal certainty requires a clear statement in the regulation of what will be regarded as disciplinary offences. In order to prevent the definitions of disciplinary offences from being too wide, article 35(2) sets a principled limit to the type of conduct that regulations may specify as constituting a disciplinary offence, while article 35(3) requires precision in the definition of disciplinary offences.

Article 36. Sanctions

Rule 37(b) of the Nelson Mandela Rules requires national legislation to spell out the types of sanctions that may be imposed. Article 36(1) proposes a list of such sanctions that can be imposed, but a legislator could omit some of these, as the Nelson Mandela Rules do not prescribe the use of any of these. Conversely, if a national legislator wanted to add to the list, it would have to avoid several types of sanctions that are outlawed by the prohibition on torture or other cruel, inhuman or degrading treatment or punishment in article 36(3) and in international law, as well as by article 36(4), which, following rule 43 of the Nelson Mandela Rules, lists specific sanctions that should never be imposed. Note also that rule 23 of the Bangkok Rules provides that disciplinary sanctions for women prisoners should not include a prohibition of family contact, especially with children.

Article 36(4)(a) clearly limits solitary confinement to a maximum of 15 days, following the prohibition of indefinite or prolonged solitary confinement as embodied in

⁷¹ See, for example, European Court of Human Rights, *Milenko Toth v. Croatia*, Application No. 49635/10), 6 November 2012, para. 26 onwards.

⁷² See also rule 62 of the European Prison Rules; and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XXII.5.

rules 43.1(b) and 44 of the Nelson Mandela Rules. Article 36(4)(a) should be read with article 37, which spells out further limitations on the use of solitary confinement.

The legislator could choose not to allow solitary confinement but could use separation (as provided in article 36(1)(e)) as a less severe sanction, which would still retain an element of segregation but would allow the prisoner who is being sanctioned at least two hours of meaningful human contact a day. In order to avoid abuse, separation as a sanction cannot be for an indefinite period, and article 36(1)(e) requires that a time limit be set. Such a time limit could be included directly in the Act, or it could be set by regulation. National legislators should include such limits in the Act itself if they regard that as a better way to avoid uncertainty. Other requirements for the imposition and implementation of separation are governed by article 33. The regulations should also spell out in more detail how these requirements relate to separation as a disciplinary sanction, provided that such regulations do not undercut article 33.

If forfeiture of a period of remission, as provided in article 36(1)(g), is used as a sanction, the legislator should be aware that additional procedural safeguards may be required. The Nelson Mandela Rules give no guidance in this regard, but the European Court of Human Rights has found that a disciplinary sanction that amounts to a de facto extension of a prison term can only be imposed following a procedure which meets the full due process standards of a criminal trial.⁷³ A disciplinary sanction that extended a fixed term sentence of imprisonment beyond the original full term would never be acceptable as the sentenced prisoner has a right to be released once he or she has served their full sentence.

Article 37. Solitary confinement

Although the use of solitary confinement is already restricted to a maximum of 15 days by article 36(1)(f), article 37 provides further guidance on its use. This guidance should be understood against the background of the growing recognition that solitary confinement can be highly dangerous. The United Nations Special Rapporteur on Torture has acknowledged that "the weight of accumulated evidence to date points to [...] serious and adverse health effects" of solitary confinement.⁷⁴ He urged States to prohibit the imposition of solitary confinement and recommends that States develop and implement alternative disciplinary sanctions to avoid the use of solitary confinement.⁷⁵ The World Medical Association's recently amended statement on solitary confinement acknowledges that "persons with psychotic disorders, major depression, or posttraumatic stress disorder or people with severe personality disorders may find isolation unbearable and suffer considerable health harms" and that "prisoners with physical disabilities or other medical conditions often have their conditions aggravated" by solitary confinement.⁷⁶

Article 37(1) limits the imposition of solitary confinement by setting out a number of principles derived from rule 45.1 of the Nelson Mandela Rules. A national legislator may specify more closely who is to be regarded as a "competent authority". It may, for example,

⁷³ European Court of Human Rights, *Ezeh and Connors v. United Kingdom*, Applications Nos. 39665/98 and 40086/98, 9 October 2003.

 $^{^{74}}$ A/63/175, para. 82. See also the Istanbul Statement on the Use and Effects of Solitary Confinement (A/63/175, annex, policy implications).

⁷⁵ A/66/268, para. 84.

 $^{^{76}}$ World Medical Association, "WMA statement on solitary confinement", 28 September 2020. Available at www. wma.net/.

require approval from the Prison Director, if the Prison Director does not chair the body imposing it, or by a regional director who is the superior of the Prison Director.

Article 37, paragraphs (2) and (3), list instances where the imposition of solitary confinement is excluded completely, following rule 45.2 of the Nelson Mandela Rules and other United Nations instruments.⁷⁷

Article 37(4) provides that prisoners in solitary confinement should be subject to the same protections as prisoners who are separated because solitary confinement too is a form of separation.

A further protection against the adverse effects of solitary confinement is contained in article 37(5), which ensures that in practice no prisoner should spend more than 15 consecutive days in solitary confinement. Instead, there should be a period of recovery between terms of solitary confinement before it can be implemented again. This avoids the harm inherent in prolonged solitary confinement, that is solitary confinement for more than 15 consecutive days, which rule 43.1(b) of the Nelson Mandela Rules is designed to prevent.

Article 38. Disciplinary procedure

Rules 37(c) and 41 of the Nelson Mandela Rules provide that there should be an authority, established by law, which is competent to initiate and impose disciplinary sanctions. Similarly, article 38 refers to a "competent authority" for initiating disciplinary proceedings. The precise mechanism entrusted with initiating and imposing disciplinary sanctions will vary as countries have different systems for dealing with prison discipline.

On the substance, it is important to note that not every allegation that a disciplinary offence has been committed needs to lead to a formal disciplinary hearing. Article 38(2) gives the competent authority a discretion to deal with less serious matters by using alternative dispute resolution techniques (see also article 30 on the use of such techniques).

Much turns on who is regarded as the "competent authority" for this purpose. It is recommended that the national legislator specifies who should fulfil this role in article 38(1)–(4). Similarly, national legislation should specify the "competent body" referred to in article 38, paragraphs (4) and (6), to decide on allegations that prisoners have committed disciplinary offences.

Article 38(8) reflects rule 41 of the Nelson Mandela Rules which prescribes that prisoners be allowed to defend themselves in person. Article 38(9) further defines this right by linking the provision to legal assistance at a hearing to the disciplinary offences being of a certain gravity which would allow for more serious sanctions listed in article 36(1) (e)–(g). However, this is only a minimum standard and legislators could equally decide always to grant this right for any disciplinary proceedings.

The exact procedure to be adopted at a disciplinary hearing, stipulating what and how evidence can be presented, including rules for the examination of witnesses, will have

⁷⁷ See the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, rule 67; and the Bangkok Rules, rule 22.

⁷⁸ See also, for further guidance, the revised European Prison Rules, rule 59.

to be determined in further detail by regulation (article 38(10)). Legislators may want to link it directly to the national law of evidence applicable in criminal or administrative proceedings.

Article 38(11) stipulates the requirement of a possible review of a disciplinary decision as an additional safeguard for the rule of law, as foreseen in rule 41.4 of the Nelson Mandela Rules.

Article 38(12) confirms that if the breach of discipline is prosecuted as a criminal offence the full set of due process guarantees applicable to criminal proceedings becomes mandatory, including unimpeded access to legal advice which follows rule 41.5 of the Nelson Mandela Rules.

Article 39. Use of force

The provisions relating to the use of force should be interpreted in the light of the general principles governing the maintenance of safety, security and good order set out in article 30. Article 39(1), which is based on rule 82.1 of the Nelson Mandela Rules, supplements these principles by limiting the use of force to particular situations and authorizing it only as a last resort. What is meant by "last resort" may be further specified by regulation.

Article 39(3) further limits the degree of force used to the minimum necessary and for the shortest possible time. These various limitations should be read as explaining how the principle of proportionality, which forms the core of article 30, should be interpreted.

Article 39(4) contains further strict limits on the use of lethal force derived from principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

Article 39(5)–(6) set out additional procedural safeguards by requiring an authorization, or a situation of emergency which does not allow an authorization for the use of force.⁷⁹ Finally, the seriousness of using force is underlined by the strict requirement in article 39(8) relating to record-keeping.

Article 40. Instruments of restraint

The use of instruments of restraint should be seen in the light of the general principles set out in article 30 that provide that no more restrictions should be applied in prison than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life. Note that the restrictions on the use of force in article 39 also apply to the use of instruments of restraint, which also entails using force. Article 40 spells out the restriction on the use of instruments of restraint in more detail and in this regard follows rule 47 of the Nelson Mandela Rules. The legislator may wish to amend the details of article 40 to reflect instruments of restraint that are more recent than those mentioned. Thus, the legislator may specify further instruments of restraint, other than those mentioned in article 40(1), that should never be used. The legislator may also

⁷⁹ See the revised European Prison Rules, rule 65 (a)–(e).

specify in article 40(4) to which "higher administrative authority" the Prison Director must report, depending on the structure of the Prison Service.

Article 41. Weapons

Rule 82.3 of the Nelson Mandela Rules only refers to "arms" and does not distinguish between different types of weapons. However, given the range of weapons that are available, it is essential to have regulations, as provided in article 41(1), that determine what weapons are fit for use in prison conditions and how they should be looked after.

Article 41(4) follows principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in restricting the use of firearms. It supplements the general restriction on the use of force in article 39.

Article 42. Searches

Article 42 deals with all types of searches and authorizes different methods of searches, subject to the purposes and certain conditions. While being a necessary security and safety feature, searches in prison settings can be extremely humiliating and traumatic and have the potential to amount to torture or degrading treatment.⁸⁰ Article 42 should be read in conjunction with article 25(4), which deals with searches of visitors, who can refuse to be searched, but would then not be allowed to visit a prison.

Article 42(1) clarifies that searches should only be conducted for the purpose of detecting forbidden articles in prisons, while article 42(2), based on rules 1, 50 and 51 of the Nelson Mandela Rules, requires that every method of search is respectful of the basic principle of human dignity and should never be used as a form of harassment or intimidation.

Article 42(3) is based on rule 52 of the Nelson Mandela Rules and is designed to take gender sensitivity into account during searches. Although the wording of article 42(3) as well as rule 52 of the Nelson Mandela Rules refers to "the same sex", legislators could go beyond a binary biological concept of sexes and adopt additional provisions that would allow for more gender sensitivity. They could, for example, stipulate that in cases of doubt as to a person's sex, these persons should be asked what sex they consider themselves to be and whether they would be preferred to be searched by a male or female prison officer.⁸¹

Article 42(4) follows the wording of rule 50 of the Nelson Mandela Rules and contains the principle of proportionality and legality. Similar to article 30, this should encompass the following three criteria: firstly, the imposed method of search should be suitable to achieve the purpose of the search. Secondly, the method of searching should be the least invasive measure for this purpose. And thirdly, the objective of the search should be proportionate to the infringement of the rights of the person being searched. More invasive searches will always require more justification based on special circumstances, since they infringe more rights (e.g. psychological and physical integrity of the person

⁸⁰ A/HRC/31/57, para. 23; see also, Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Punishment, document CPT (2001) 66, p. 2.

⁸¹ This would be in conformity with the recommendation of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), para. 70 (u), and the World Medical Association, "WMA statement on body searches of prisoners", 15 June 2020, para. 11. Available at www.wma.net/.

being searched). Based on rule 20 of the Bangkok Rules, article 42(5) gives more practical guidance on the principle of proportionality.

Article 42(6) largely reflects rule 52 of the Nelson Mandela Rules and deals with more intrusive search methods, such as strip and body cavity searches. Following the principle of proportionality, article 42(6)(a) requires the exhaustion or a manifest inefficiency of all other available search methods which are less intrusive, including pat-down searches. Rule 52 of the Nelson Mandela Rules requires that such searches should only be undertaken when absolutely necessary. Article 42(6)(b) clarifies that the person being searched should always be informed about the procedure and be given the opportunity to surrender any hidden object. In cases where a prisoner opposes a justified intrusive search, proportionate disciplinary sanctions may apply, which should be narrowly defined by regulations.⁸² Article 42(6)(c) spells out privacy and hygienic requirements as stipulated in rule 52 of the Nelson Mandela Rules and adds an additional, dignity-based, safeguard by requiring a procedure that ensures that the person being searched is never fully unclothed.⁸³ Based on rule 52 of the Nelson Mandela Rules which refers to body cavity searches in general and sets specific safeguards, article 42(6)(d)-(g) attempt to go into more detail by further differentiating between visual body cavity searches of the lower body, which can be performed by prison staff trained by a medical professional and manual body cavity searches, which cannot be performed by prison staff and require compelling reasons that a dangerous object is hidden. The prohibition of manual body cavity searches by prison staff in article 42(6)(e) follows several regional minimum standards⁸⁴ and mitigates the risk of physical and psychological harm and sexual abuse. Article 42(6)(f) specifies the principle of proportionality in this context and requires to keep a prisoner under close surveillance and wait for the illicit object to be naturally expelled if this does not endanger the health of this person.⁸⁵ If national legislators wish to explicitly allow manual body cavity searches in a prison act, they could include a provision that clarifies that such searches should only be conducted by health-care professionals other than those primarily responsible for the care of the prisoner. However, in order to respect general principles of medical ethics, such a provision should also be limited to cases where the hidden object poses a threat to the health of a prisoner.86 Article 42(6)(g) imposes a prohibition of body cavity searches of children, as stipulated in rule 60 of the Nelson Mandela Rules.

Article 42(7) should be read with article 25(4) which requires the consent of the visitor to be searched and reflects rule 60 of the Nelson Mandela Rules by limiting intrusive searches of visitors to exceptional circumstances. Before conducting an intrusive search on a visitor, the principle of proportionality will require to test whether a close surveillance of the visit or a physical separation barrier or other means might not be more suitable to balance the competing interests.

⁸² See, for example, European Court of Human Rights, Syrianos v. Greece, Application No. 49529/12, 7 October 2021.

⁸³ This follows a recommendation by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/31/57), para. 70 (j).

⁸⁴ See Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, principle XXI, which prohibits intrusive anal or vaginal searches altogether, and revised European Prison Rules, rule 54.6, which prohibits internal physical searches of prisoners' bodies by prison staff.

⁸⁵ See also UNODC/CCPCJ/EG.6/2012/2; and Lars Møller and others, eds. *Health in Prisons: A WHO Guide to the Essentials in Prison Health* (Copenhagen, WHO Regional Office for Europe, 2007), p. 36.

⁸⁶ See, for example, 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, principle 3.

Article 42(8) reflects the idea of rule 53 of the Nelson Mandela Rules and is designed to establish an additional safeguard for the confidentiality of legal documents when searching a prisoner's property or cell. Cell searches should comply with the general principles applicable to all searches outlined in article 42(1)–(4). Such searches should be conducted in a way that treats the personal possession of prisoners with respect and without causing unnecessary damage or disorder.

Article 42(9) reflects rule 51 of the Nelson Mandela Rules and serves the purpose of accountability. Article 42(10) and (11) seek to strengthen legality by prescribing regulations with more precise guidance on the procedure of searches in prisons.

Chapter VIII. Safeguards

Article 43. Requests and complaints

An effective complaints system is a key component of safeguarding prisoners against abuse. The complaints procedure for prisoners in article 43 largely follows rule 56 of the Nelson Mandela Rules.⁸⁷ Prison staff too may need a complaints procedure. However, that is not included in this Act as it may be dealt with by general civil service regulations to which prison staff are subject. The legislator may, however, include a framework for such complaints as well in national prison legislation.

Article 43(1) is the key provision that guarantees the right of prisoners to make requests and complaints in the prison where they are held, while article 43(2) widens the scope of persons and institutions to which such complaints can be made. National legislators can make the words "other competent authorities" more specific by replacing them with authorities that have such competence in their jurisdiction. For example, other competent authorities may include an ombudsperson.

Article 43(3) is designed to create the possibility for complaints to be brought on prisoners' behalf where they may find it difficult to do so. Prisoners are also protected against intimidation by article 43(7) and, indirectly, also by the safeguards required to ensure confidentiality in article 43(6).

Article 43(5) is crucial to giving prisoners the opportunity to have their complaints reviewed independently. National legislators may specify the form that such review should take, and the judicial or other authorities involved, depending on their legal and administrative structures.

Article 43(8) links the complaints procedure directly to the investigations that need to be done to deal with the most serious forms of abuse.

Article 43(9) follows rule 25 of the Bangkok Rules in providing for support and counselling where there is a complaint of abuse but extends it, beyond women, to all prisoners.

⁸⁷ See also rule 70.1 of the revised European Prison Rules, and principle VII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

Article 44. Access to legal aid

Legal advice is a vital safeguard for all prisoners as their legal status and their rights are inevitably affected by their imprisonment. Article 44 follows rule 61 of the Mandela Rules in setting out the access to legal advice and to effective legal aid that should be available to all prisoners.⁸⁸ It should be read with article 58(8) that emphasizes further access to legal advice for untried prisoners.

Article 44(1) sets out the general principle governing access to legal advice in prison. Wider questions about legal aid and legal representation are not a matter for prison legislation. However, a legislator may add cross-references to such legislation. For example, article 44(4) could be adjusted to reflect the types of legal aid that are available in the country and the legalisation governing it.

Details of how effective access should be provided in prison to legal advice are given in further paragraphs of article 44. On the subject of documents that prisoners may keep in their possession, article 44(2) reflects the essence of rule 53 of the Nelson Mandela Rules. However, the term "documents" should be understood to include electronic documents in order to effectively protect a prisoner's fair trial rights and related rights. Note that the confidentiality of legal documents is not limited to those related to criminal matters but extends also to documents related to other legal affairs, such as contracts and wills.

Article 45. Investigations

Article 45, which is largely based on rule 71 of the Nelson Mandela Rules, should be read against the background of the general principles in article 3, paragraphs (1) and (2), and the sources cited in the respective commentaries. The investigation described in article 45 is part of steps that all prison services have to take in order to prevent ill-treatment and abuses that could result in infringements on the right to life⁸⁹ and the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.⁹⁰

A crucial question is which authorities are in the best position to conduct an investigation that is "prompt, impartial and effective". The legislator could choose to specify more precisely "the police" or "the prosecuting authorities" referred to in article 45(2), if there are specialist bodies that perform this function.

Article 46. Death of a prisoner

Article 46 deals with the specific duties that the Prison Service has to safeguard the dignity of all deceased prisoners. These are derived from rule 72 of the Nelson Mandela

⁸⁸ See also the revised European Prison Rules, rule 23; United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (General Assembly resolution 67/458, annex), principle 3, para. 20, principle 7, para. 28 and guideline 3, para. 43; and Kampala Declaration on Prison Conditions in Africa, Prison conditions, para. 6.

⁸⁹ International Covenant on Civil and Political Rights, art. 6.

⁹⁰ International Covenant on Civil and Political Rights, art. 7; and International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, art. 2.

⁹¹ On how deaths should be investigated, see International Committee of the Red Cross, "Guidelines for investigating deaths in custody" (Geneva, 2013).

Rules. In the case of indigent prisoners this could be done in cooperation with other State institutions, but the overall duty remains with the Prison Service.

Article 47. Prison inspections

While internal inspection by the Prison Service of its own prisons has long been a feature of prison management, the external inspection of prisons has become a more prominent feature with the growth of regional and international bodies, which States have agreed by treaty to allow to inspect their prisons. At the international level, the most important innovation has been the adoption of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as States that have ratified the Optional Protocol are obliged to cooperate with international inspections conducted by the Subcommittee on the Prevention of Torture and to set up national preventive mechanisms to conduct independent inspections of prisons at the national level. Article 47 reflects rules 83–85 of the Nelson Mandela Rules in respect of both internal and external inspections.

The wording of article 47(2)(b) should name the inspection mechanism to which the State concerned is committed and be adjusted accordingly. It may be necessary to have further legislation spelling out the details of the external inspecting bodies, whether in the Prison Act or elsewhere. External inspections bodies should meet the guidelines on national preventive mechanisms set, in the terms of the Optional Protocol, by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁹³ The basic principle contained in paragraph 12 of those guidelines specifies that the national preventive mechanism should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol.

Article 47(3) is designed to provide that inspecting bodies are adequately staffed, while article 47(4), following rules 84.1 and 85.1 of the Nelson Mandela Rules, ensures that inspectors, both internal and external, have adequate powers to fulfil their functions.

External inspection reports, required by rule 85.1 of the Nelson Mandela Rules, should play an important part in opening up prison policy to outside scrutiny. For this reason, article 47(7) provides that the reports and recommendations of external inspections must go to both the operational head of the Prison Service (the Commissioner) and to the political head (the Minister). In addition, reports must be tabled in the national legislature. This provision is designed to strengthen public trust in transparent systems of prisons and gives due consideration to the publicity of inspection reports as required by rule 85.1 of the Nelson Mandela Rules.

Article 47(8) is designed to ensure official engagement with recommendations from external inspectors and thus meet the policy preference expressed in rule 85.2 of the Nelson Mandela Rules. While external inspectors cannot compel the Minister to act, the Minister has to give public reasons for their response to the recommendations they make.

⁹² General Assembly resolution 57/199, annex, arts. 1-4.

⁹³ CAT/OP/12/5.

Article 48. Filing system

The filing system is included in the chapter on safeguards because there is growing recognition that having appropriate information is essential to ensuring the safety and security of prisoners and for running the prison system in a transparent, accountable and effective manner. The importance of the filing system is underlined in the prominence that files and record-keeping are given by rules 6–10 of the Nelson Mandela Rules. The legislator may vary the provisions of article 48 to reflect the type of filing system, that is, electronic or paper, that is used, without undermining the underlying principles.

Article 48(1) consolidates the three key types of files that make up the prison filing system. In practice, the method of keeping files varies greatly from country to country and national legislation or regulations may prescribe, for example, that they be maintained electronically. Where possible, a centralized electronic system with back-ups may be preferable to a decentralized paper-based system, since it would allow improved tracking and preservability of data, in particular in cases of transfers of prisoners. Note that what in article 48(1)(a) and elsewhere is called an "individual prisoner file" in the filing system, is what in rule 8 and elsewhere in the Nelson Mandela Rules is referred to as the "prisoner file management system".

The rest of article 48 gives guidance on what these various files should contain. Thus article 48(2) sets out what rule 8 of the Nelson Mandela Rules requires to be included in an individual prisoner file and links it to admission and other processes in the Act. Article 48(3) deals more briefly with the individual prisoner's medical file and places it in the context of prison health care. Further provisions relating to access to files and to confidentiality in article 48, paragraphs (4) and (5), are drawn respectively from rules 6 and 9 of the Nelson Mandela Rules.

Article 48(8) is a list of the information for which the Prison Director is responsible. It is drawn from various provisions of the Nelson Mandela Rules that require information to be recorded on specific practices in prison. Note also that article 48(8)(g) gives the Minister the power to specify by way of regulation any other information that the Prison Director may be required to include in the file on prison management.

Finally, article 48(9), follows rule 10 of the Nelson Mandela Rules in emphasizing that the filing system should be used to provide reliable data on the prison population. Rule 10 of the Nelson Mandela Rules stresses the importance of doing so as a basis for evidence-based decision-making.

Chapter IX. Prison Service

As explained in the introduction to this Handbook, this chapter is not a comprehensive blueprint on legislation relevant to the Prison Service. Such legislation would require a comprehensive understanding of how the Prison Service will be structured. The Prison

⁹⁴ The Nelson Mandela Rules, rules 6-10, 39, 51 and 72.

Service itself is created by article 2. The articles in this chapter are provisions that would have to be included, no matter what additional structures there are.

Article 49. Staffing complement

Article 49 sets basic requirements for all prison staff that are reflected in rules 77 and 78 of the Nelson Mandela Rules. The powers of the prison staff to perform their functions are derived from article 2(3) of this Act.

Article 49(4) provides for a system of discipline of prison staff. Given the extensive power exercised by prison staff, such a system is necessary in order to maintain high standards and to ensure accountability. In some countries, prison staff may automatically be bound by wider civil service rules. In such a case, the legislation may have to be adjusted accordingly.

Article 50. The Commissioner

Article 50 spells out the powers and the duties of the Commissioner in some detail. It should be read with article 2(3)(c), which gives the Commissioner the power to issue orders. The powers are not derived directly from the Nelson Mandela Rules but are what is required to give minimum shape to the hierarchy of the Prison Service. The legislator may want to define some relationships more precisely, for example by specifying the legislation governing the civil service in article 50(1)(c).

Article 50(3) establishes the relationship between the Minister and the Commissioner. Article 50(4) allows the Minister and the Commissioner to build up the complex structure of functions and duties that comprise a modern Prison Service. National legislation may spell out more of this detail.

Article 51. Prison Director

Article 51, largely mirroring rule 79 of the Nelson Mandela Rules, spells out the functions and qualities of a Prison Director which play a key role in the administration of prisoners. In a more complex prison system, the legislator may deal in the Act with other named functionaries in the same way.

Article 52. Appointment

Article 52 is designed to ensure that the Prison Service attracts and retains competent staff who have the ability to meet the challenges of running a modern prison system. Article 52, paragraphs (1) and (2), on the civil service basis for appointing staff and on the importance of adequate salaries, follow rule 74 of the Nelson Mandela Rules, while article 52(3), on the education standards to expect from would-be appointees, is derived from rule 75.1 of the Nelson Mandela Rules.

The importance of prison staff being able to speak languages that prisoners understand is emphasized in article 52(4). The general proposition is derived from rule 80.1 of the Nelson Mandela Rules, which focuses on languages that prison directors should speak. However, language competence is a wider issue, as is the importance of providing

interpretation to overcome the possible lack of language skills of staff members. See also article 3(7) of this Act.

Article 53. Training

Article 53 emphasizes the importance of training, both before joining the Prison Service and while being employed by it.⁹⁵ The details that it contains are derived from rules 75 and 76 of the Nelson Mandela Rules.⁹⁶ Article 53(6) on the development of women prison staff is supported by rule 29 of the Bangkok Rules and, more widely, the implementation of target 5 of goal 5 of the Sustainable Development Goals.⁹⁷

Chapter X. Sentenced prisoners

Article 54. Guiding principles

Article 54 contains the key guiding principles that apply only to sentenced prisoners. They are derived in broad terms from rule 4 and rules 86–90 of the Nelson Mandela Rules. They should be read with article 1(2), which lays down the general purpose of the implementation of imprisonment, and article 3, which includes the guiding principles that apply to all prisoners and that therefore remain valid for sentenced prisoners.

Article 55. Classification

The classification of sentenced prisoners in article 55(1) follows from rule 93 of the Nelson Mandela Rules. 98 It provides the framework for managing the various initiatives for social rehabilitation that the Prison Service should seek to provide for sentenced prisoners in terms of article 56. The legislator may elaborate further on this classification according to the needs of a particular prison system.

The system of privileges, established for prisoners of different categories by article 55(2), is derived from rule 95 of the Nelson Mandela Rules, which explains that its function is "to encourage good conduct, develop a sense of responsibility and secure the interest and cooperation of prisoners in their treatment".

Article 56. Individualized sentencing planning

Sentence planning, as described in article 56(1), in the light of rule 94 of the Nelson Mandela Rules, is a process that must be conducted with sentenced prisoners as soon as possible after admission, in addition to all the other steps specified in article 6, which must be taken at or shortly after admission.

⁹⁵ Handbook for Prison Leaders: A Basic Training Tool and Curriculum for Prison Managers Based on International Standards and Norms, Criminal Justice Handbook Series (United Nations publication, 2010).

⁹⁶ See also, Yogyakarta Principles, principle 9 (g); Kampala Declaration on Prison Conditions in Africa, Prison staff, para. 4.

⁹⁷ General Assembly resolution 70/1.

⁹⁸ UNODC, Handbook on the Classification of Prisoners, Criminal Justice Handbook Series (Vienna, 2020).

Article 56(2) gives guidance on what the sentence plans could contain, while leaving scope for "other activities" in article 56(2)(c). Rule 92.1 of the Nelson Mandela Rules gives a wide range of potential activities which legislators may choose to include. Further updated guidance can be found in the UNODC *Roadmap for the Development of Prison-based Rehabilitation Programmes*.⁹⁹ A national legislator may adjust the examples given in this article to reflect the specific activities that it requires the national prison system to offer.

Article 56(2)(d), on preparation for release, should be read together with article 57 on release, as there is an inevitable overlap between pre- and post-release activities. In this regard, rule 46 of the Bangkok Rules requires that "prison authorities, in cooperation with probation and/or social welfare services, local community groups and non-governmental organizations, shall design and implement comprehensive pre- and post-release reintegration programmes which take into account the gender-specific needs of women". National legislators may spell out more of this in legislation, as it may require coordination of prison law with welfare law more generally.

When considering what educational, or work components this plan should contain, the general provisions of this Act should also be consulted. In the case of education article 23 is key. In addition, article 56(6) allows education to be made compulsory for sentenced prisoners who are illiterate. In this, it follows rule 104 of the Nelson Mandela Rules. The main focus on the education of sentenced prisoners, is, however, on encouragement rather than compulsion.

Rule 104 of the Nelson Mandela Rules also allows for compulsory education of "young prisoners". However, as prisons for adults should not hold children under the age of 18 years, and as education is not normally compulsory for persons above that age, it would not be appropriate to include this provision in legislation on prisons for adults. The inclusion of work in the sentence plan should be read in conjunction with article 23(2), which provides that work should not be prioritized over education and should be rewarded, appropriately.

Further guidance on the implementation of article 56(2) in respect of work is to be found in article 24. It should be emphasized that rule 96 of the Nelson Mandela Rules allows, but does not require, a State to compel sentenced prisoners to work. If it is not the intention to do so, article 56(5) should be omitted entirely.

Article 57. Release of sentenced prisoners

Article 57 should be read with chapter III which provides for release generally and article 22(5), which provides for links with welfare agencies. Article 57 spells out, in the light of rules 87, 107 and 108 of the Nelson Mandela Rules, various additional steps that need to be taken to facilitate the integration of sentenced prisoners into society so that they can eventually lead a law-abiding and crime-free life.

The form that national legislation will take will depend also on the structure of the national welfare system and the existing legation governing it. For example, the national

⁹⁹ UNODC, Roadmap for the Development of Prison-based Rehabilitation Programmes, Criminal Justice Handbook Series (Vienna, 2017).

legislature may want to specify in article 57(4) which agencies have specific functions, such as related to the housing of ex-prisoners or other benefits to which they may be eligible or entitled.

Chapter XI. Untried prisoners

Article 58. Additional protections

Article 58 is designed to deal with a widespread paradox. Although untried prisoners are presumed to be innocent of any offence and their imprisonment is not as a punishment, they are often treated more harshly than sentenced prisoners. Untried prisoners therefore require the additional protections that article 58, following rules 111–120 of the Nelson Mandela Rules, enacts. To this end, article 58(1) begins by emphasizing that untried prisoners should not have fewer rights than other prisoners, while article 58(2) emphasizes that the regime for untried prisoners should not be influenced by the possibility of their eventual conviction. In so doing, they reflect the purpose of imprisonment for untried prisoners spelled out in article 1(3) of the Act, as well as rule 111 of the Nelson Mandela Rules. The remaining provisions of article 58 all deal with areas in which untried prisoners should be treated slightly differently from sentenced prisoners.

Article 58(3) is largely following rule 113 of the Nelson Mandela Rules and stipulates that untried prisoners should be given a choice to be held in single cells. This goes beyond the way such cells are otherwise allocated in terms of article 13.

Untried prisoners may receive food from outside prison, as set out in article 58(4), which follows rule 114 of the Nelson Mandela Rules. However, that does not mean that the Prison Service is not obliged to provide them with food, but it is an additional right.

Following rule 115 of the Nelson Mandela Rules, article 58(5), read with article 16, allows untried prisoners to wear their own clothes. However, they can still rely on the Prison Service to provide them with clothing.

In conformity with rule 116 of the Nelson Mandela Rules, article 58(6)(a) provides that untried prisoners have a choice to work. If they do work, they have the protection granted by article 24.

When it comes to health-care services, untried prisoners have a right to private medical treatment, at their own expense, as set out in article 58(7), while retaining the overall rights to health care that all prisoners have in terms of article 19. This mirrors rule 118 of the Nelson Mandela Rules.

Finally, while, in terms of article 44, all prisoners have a right to legal aid, article 58(8) places additional duties on the Prison Director to facilitate the provision of legal advice to untried prisoners, as the majority of them will be awaiting trial, if not currently being

tried.¹⁰⁰ Article 58(8) which is largely reflecting rule 119 of the Nelson Mandela Rules, can also be seen as a contribution to reducing the pretrial prison population in over-crowded prison systems.¹⁰¹

Chapter XII. General provisions

Article 59. Repeal of laws

It is necessary to repeal all existing legislation that conflicts with the Act.

Article 60. Title and commencement

Article 60 is purely formal. As noted in the introduction to this handbook, countries have different ways of naming legislation and bringing it into force. Whether this legislation is to be called an Act, a Law or a Code will depend on local practice in respect of the designation of primary legislation. National practice may also dictate that legislation is to be preceded by an explanatory preamble or, more rarely, followed by an explanatory postamble, which formally sets out the background to the legislation.

¹⁰⁰ See also, Basic Principles on the Role of Lawyers (*Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.3, annex), principle 8.

¹⁰¹ UNODC, *Handbook on Strategies to Reduce Overcrowding in Prisons*, Criminal Justice Handbook Series (Vienna, 2013), p. 78.



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