

Position paper of the United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez

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The UN Standard Minimum Rules on the Treatment of Prisoners (SMRs) carry significant weight as an authoritative set of principles and practices applicable to the treatment of prisoners and the management of penitentiary institutions globally. However, some provisions are either out-dated or in contradiction with current international human rights standards. The revision process accordingly presents an excellent opportunity to bring the SMRs in line with existing international law provisions on the prohibition of torture and other cruel, inhuman or degrading treatment (ill-treatment) and to reaffirm States' commitment to fully respecting the inherent dignity and fundamental rights of all persons deprived of liberty.

From the perspective of preventing torture or ill-treatment, several Rules under review require particular consideration. I was able to comment on many of them in detail in my 2013 thematic report on the SMRs.¹ Because the SMRs establish a *minimum* threshold of safeguards and protections applicable to persons deprived of their liberty, **the principle expressed by the Expert Group's consolidated Working Paper² that "any changes to the Rules should not lower any of the existing standards" remains paramount.** Revising the SMRs to reflect the most up-to-date international legal standards will be essential in assisting States to live up to their obligations under international human rights law and to effectively implement the prohibition of torture and ill-treatment in practice.

In this context, **I highly recommend the adoption of the proposed Rule 6 (1), which explicitly recognizes the absolute prohibition of torture and ill-treatment, and find that this explicit recognition should also be included in a Preamble to the Rules.** The Rules should define the crime of torture in accordance with international law. I suggest that the Rule should explicitly condemn not only acts of torture or ill-treatment, but also attempts to commit such acts and acts of complicity, participation, or incitement, by all persons, whether committed *de jure* or *de facto*, in the name of, in conjunction with, or at the behest of the State. The Rule should furthermore specify that offenders will be subject to prosecution. In addition, I encourage an explicit recognition that the Rules apply to all arrangements for the custody and treatment of persons subjected to any form of arrest, detention, or imprisonment.

In my 2011 thematic report on solitary confinement³ I reported on the pervasive use of solitary confinement as both an administrative and disciplinary tool. In the report I concluded that the practice of solitary confinement in many States around the world frequently results in mental and physical suffering or humiliation that effectively amounts to cruel, inhuman or degrading treatment or punishment or even torture. Whilst States should always be encouraged to seek alternatives to solitary confinement, when used it must be subject to strict limits and safeguards.

¹ UN Special Rapporteur on Torture, thematic report on the SMRs, A/68/295. The thematic report was prepared with the assistance of the Anti-Torture Initiative (ATI), a project of the Center for Human Rights & Humanitarian Law at the American University Washington College of Law. The ATI works with my mandate to expand and support the practical implementation of my country-specific and thematic recommendations.

² UNODC/CCPCJ/EG.6/2015/2

³ UN Special Rapporteur on Torture, thematic report on solitary confinement, A/66/268.

The identification of indefinite and prolonged solitary confinement as a prohibited disciplinary measure in Rule 31 (2) is an encouraging start. **I encourage the experts to further specify a maximum term of days beyond which solitary confinement is considered prolonged, namely 15 days for regimes of absolute isolation⁴ and 30 days for regimes that include some mitigation.⁵**

I welcome the proposed revisions to Rule 32 (1), which states that “solitary confinement shall only be used in exceptional cases as a last resort, for as short a time as possible and subject to regular independent control.” In addition, **the Rules should specify that the imposition of solitary confinement requires authorization by competent authorities.** While I encourage the adoption of additional language specifying that solitary confinement should never be imposed “by virtue of a prisoner’s sentence,” **I propose further clarification that it should never be used as a part of any judicially imposed sentence or because of the gravity of a crime, including in the cases of prisoners serving life sentences or of prisoners on death row.**

The proposed Rule 32 (2) provides that solitary confinement, as a disciplinary measure shall be prohibited in the case of juveniles, pregnant women, women with infants, breastfeeding mothers, and prisoners with mental disabilities. In addition, **I suggest the absolute prohibition of solitary confinement for prisoners with psychosocial disabilities, intellectual disabilities or any other disabilities or health conditions.**

Lastly, the proposed Rule 32 (3) provides that health personnel shall not have any role in the imposition of disciplinary measures and that they shall pay particular attention to prisoners held under conditions of solitary confinement. I strongly support these additions to the Rules.

The obligation to conduct independent and impartial investigations into all deaths and every allegation of mistreatment in custody is mandatory under international law and should be reflected in the updated Rules. I remind the experts that under international law, the State bears the burden of proof to rebut the presumption that the State is responsible for such violations.

Rule 44bis (1) provides that prison directors shall report such cases to a competent authority that is independent from the prison administration and mandated to conduct prompt, impartial and effective investigations, and that the prison administration is required to fully cooperate with such an authority and ensure that all evidence is preserved. **In this context, I recommend that the Rule should provide more detailed guidance on the purpose, modalities, and overall parameters of effective investigations and the documentation of torture or ill-treatment** in accordance with the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol),⁶ *inter alia* that a prompt investigation must be initiated within hours or, at most, within days, if it is to be effective. Investigations should be conducted by an independent authority with unimpeded access to detainees, and any officials implicated in the investigation should, at a minimum, be suspended from contact with detainees during the course of investigations. Finally, I urge that that information related to the circumstances surrounding deaths in custody should be made publicly accessible⁷ and that the prison administration should systematically identify and collect patterns of deaths for further investigation by independent bodies.

⁴ A period of time beyond which, according to medical and scientific evidence, the harmful physical and psychological effects of isolation can become irreversible.

⁵ E.g. access to exercise once a day, reading and writing materials, radio or television.

⁶ OHCHR, Professional Training Series No. 8/Rev.1, 2004.

⁷ Public scrutiny outweighs the right to privacy unless otherwise justified.

Rule 44bis (2) specifies that para. 1 equally applies whenever there are reasonable grounds to believe that an act of torture or other ill-treatment has been committed in prison, irrespective of whether a formal complaint has been received. Furthermore, **the Rules should specify that all complaints of torture or other ill-treatment, including prison violence, threats and intimidation, must be transmitted to an external independent body for investigation *without screening*, and not only in the absence of an express complaint, but also in cases of the withdrawal of a complaint (provided that the security of the complainant is guaranteed), if there are other indications that torture or ill-treatment might have occurred.**

I encourage serious consideration of the Expert Group's proposed revisions, as well as the incorporation of suggestions from civil society, human rights experts, NGOs, and other regional and international organizations during the review process of the SMRs. States should renew their commitment to humane treatment and conditions in all places of deprivation of liberty, and spare no effort in the allocation of adequate resources, including properly trained staff, to ensure full and effective implementation of the revised SMRs. I urge all States to take advantage of this important opportunity to strengthen the SMRs to reflect the most up-to-date legal norms, with a view to recognizing the inherent dignity of all persons deprived of their liberty and ensuring humane treatment in full compliance with the absolute legal prohibition of torture and other forms of ill-treatment.



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