

Commentary on Council of Europe Recommendation CM/Rec(2012)12 concerning foreign prisoners

Introduction

The increased movement of people from one country to another has led to a growing number of foreigners being held in prison. This is true also of the Council of Europe member states where more and more people are detained who are not nationals of the country in which they are being held or who have no close ties to it. At the same time, increasing numbers of nationals of the member states are being held in prisons abroad.

As the Preamble to the new Recommendation concerning foreign prisoners recognises, foreign offenders often face a range of difficulties brought about by differences in language, culture, customs and religion, and by their lack of family ties locally and contact with the outside world. They are more likely to be remanded in custody while awaiting trial and are more likely to be sentenced to terms of imprisonment after conviction than other offenders. Evidence of these growing difficulties is provided *inter alia* by studies conducted by both the European Union and the United Nations².

The aim of the Recommendation is to draw the attention of the competent national authorities to the fact that foreign prisoners should be treated in a manner that ensures, as far as possible, substantive equality of treatment with other prisoners. This might require the authorities to take additional steps in order to combat possible discrimination against foreign prisoners. Such steps are not intended to give - and should not be interpreted as giving - foreign prisoners more rights and freedoms than other prisoners.

The Recommendation addresses the difficulties faced by foreign prisoners by recommending specific steps that need to be taken to reduce the number of foreign suspects and offenders that are incarcerated, to improve the treatment of foreign prisoners, and to meet their specific social and personal needs. The objective of such treatment is not only to deal with the conditions of imprisonment to which such prisoners are subject but also to improve their social integration after release, whether they remain in the countries in which they were imprisoned or return to their home countries.

The new Recommendation concerning foreign prisoners replaces the earlier Recommendation R(84)12 on the same subject with more detailed provisions aimed at addressing the growing problems in this area.

The steps recommended are in addition to those contained in the 2006 European Prison Rules. The new Recommendation also deals briefly with the need to explore alternatives to imprisonment for foreign offenders. In this regard, it refers specifically to the Recommendation [Rec\(2006\)13](#) on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse and Recommendation R(92)17 concerning consistency in sentencing. The Preamble upholds the independence of the judiciary in respect of alternatives to imprisonment.

Juveniles are not formally excluded from this Recommendation. However, the European Prison Rules emphasise that juveniles should not be held in prisons for adults (Rule 11.1). The detention of juveniles is covered fully by [Rec\(2008\)11](#) on the European Rules for juvenile offenders subject to sanctions or measures, which provides specific rights and safeguards that are applicable to foreign juvenile offenders as well. Where this Recommendation provides foreign juveniles with additional protection it should be applied to them.

While the provisions contained in this Recommendation are primarily addressed to the prison authorities, there are some provisions which are addressed to other competent bodies dealing with foreign persons. Member states should draw this Recommendation to the attention of everybody who deals with foreign suspects and offenders in general, as well as with foreign prisoners in particular.

I. Definitions and scope

Definitions

Rule 1

This Rule defines the term foreign person in relation to nationality and residence. In other words, those who neither have the nationality of, nor resident status in, the state in which they are will be considered to be foreigners. This Recommendation does not purport to define nationality or residence. However, to ensure effective application, states are urged to adopt a flexible approach to both concepts for the purposes of implementing this Recommendation and applying it to the widest range of persons who it may benefit.

This Recommendation applies to foreign suspects, offenders and prisoners. This is necessary to ensure that the Recommendation is applicable to all those who are, may be or have been detained at the different stages of the criminal justice process. While the term suspect has been used throughout the Recommendation, this is intended to refer to suspects who have been accused of committing a criminal offence. In practice, most suspects and offenders who are detained will be held in a prison, but the term, foreign prisoner, also includes those suspects and offenders who are detained elsewhere, such as police cells. A similar approach is adopted in Rule 10.3*b* of the European Prison Rules.

This Recommendation is not designed to deal with persons who are not offenders or suspected of having offended. However, where such persons are held in a prison as defined in Rule 1*d*, they are included. The Recommendation may therefore deal with persons such as those suffering from mental illnesses, refugees, asylum seekers and illegal immigrants but only where they are held in a prison. A similar approach is adopted in Rule 10.3*a* of the European Prison Rules.

Scope

Rule 2

The primary focus of this recommendation is on foreign persons who are in prison. It also deals with suspects and offenders who may be or who have been held in prison. This means that it includes those who face criminal proceedings that potentially may lead to incarceration. Although house arrest is typically considered to be an alternative to imprisonment, it may, in some cases, be deemed to constitute a deprivation of liberty. In such cases, this Recommendation will apply to the extent that it is relevant.

The Recommendation also deals with offenders who have been released after a period of incarceration. It is recognised that the situation of foreign offenders may differ in various ways. For example, a foreign offender who is detained briefly before deportation may not have the full range of needs of someone who is likely to spend many years as a prisoner in a foreign country. Nevertheless, this Recommendation should be applied to this category to the extent practicable.

II. Basic principles

Rule 3

Respect for human rights is fundamental to the treatment of all prisoners. It is also important that it is not overlooked where foreign suspects and offenders are concerned. This principle emphasises that foreign prisoners may have specific needs that differ from those of national prisoners. Within the wide category of foreign prisoners, such needs may differ amongst particular groups or individuals. These various needs must be met as far as possible in order to ensure substantial equality of treatment of all prisoners. It is therefore important that staff who deal with foreign prisoners are reminded of the need to engage with and attempt to understand the potentially vulnerable position of such prisoners. This Recommendation has at several points addressed this issue (see for example Rules 16.3, 28.2, 38 and 39).

Rule 4

In some jurisdictions, foreigners are routinely excluded from consideration for non-custodial sanctions and measures because of their non-national and non-resident status. This includes consideration for release pending trial. It may simply be assumed that they will not be entitled to remain in the country after release, that they may not have sufficient social links or that they may pose a greater risk of flight. While these may, in certain circumstances, be valid factors to consider in deciding the appropriate sanction or measure, they should not constitute an automatic bar to

eligibility for non-custodial measures.

In addition, non-custodial sanctions and measures imposed on foreign suspects and offenders may be executed in another state in terms of international agreements, such as the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964, CETS 051), the EU Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and the EU Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. These possibilities must be taken into account in order to foster the application of such sanctions or measures.

The consideration of non-custodial sanctions and measures will often require information about suspects' and offenders' personal and social circumstances and the resources available to support their resettlement in their home state. Arrangements should be made to ensure that this information can be obtained from the relevant probation and social services in the suspect's or offender's country of residence or nationality.

Rule 5

The principle that custody should be used only when strictly necessary and as a last resort is widely recognised in Council of Europe legal texts. See for example Recommendation R(92)16 on European Rules on community sanctions and measures; Recommendation R(92)17 concerning consistency in sentencing; R(99)22 concerning prison overcrowding and prison population inflation; [Rec\(2003\)22](#) on conditional release (parole); Recommendation [Rec\(2006\)2](#) European Prison Rules; and Recommendation [Rec\(2006\)13](#) on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

The principle is emphasised here because the danger exists that remand in custody and custodial sanctions will be used too readily in the case of foreigners due to what may be unfounded assumptions about their propensity to abscond or to fail to complete community sentences.

Rule 6

The principle that foreign offenders who are sentenced to terms of imprisonment should be considered for early release is implicit in [Rec\(2003\)22](#) on conditional release (parole) and other European instruments. In reality, foreign prisoners are often not considered for early release, or indeed, measures that would prepare them for and therefore enable them to successfully apply for such release. The steps prison authorities should take to prepare foreign prisoners for release are elaborated in Rule 35. Rule 36 deals with the detailed factors to be taken into account in decisions relating to early release.

Rule 7

This principle should be read against the background of Protocol 12 to the European Convention on Human Rights which outlaws discrimination. This principle emphasises the need to take positive steps to avoid discrimination and to find solutions for the problems faced by foreigners in this respect. Such interventions are required at all stages of the criminal justice process, to ensure substantial equality of treatment for foreign suspects and offenders. In this regard, the Committee for the Prevention of Torture, Inhuman and Degrading Treatment and Punishment (CPT) has recommended that states review their legal and administrative provisions to ensure that foreign prisoners are not discriminated against by being excluded from eligibility for a range of measures, such as more open conditions, home leave and conditional release.³

Rule 8

The inability to communicate in the language most commonly spoken in a prison is a severe barrier to foreign prisoners' ability to participate in prison life. It is the root cause of many problems, such as isolation, lack of access to services, work and other activities, and an inadequate understanding of prison rules and regulations. Therefore, it is vital that prison authorities make every effort to facilitate communication and to enable offenders to overcome language barriers. This principle emphasises the importance of access to interpretation and translation facilities. Interpreters should

be competent and impartial. In addition, communication should be encouraged by creating opportunities for the learning of languages by foreign prisoners, and persons who work with them (see Rule 39.3). It is recognised that many prison systems have populations that speak a vast range of languages. This principle and other related rules (see Rule 29.1) convey the idea that communication can be facilitated by learning a language which can be understood by both prisoners and staff. This may be a national language of the state or a common international language.

The importance of communication and language in specific circumstances is emphasised throughout the Recommendation. Even where it is not mentioned explicitly, the facilitation of communication remains a fundamental underlying principle that should inform all interactions.

Rule 9

This basic principle alerts authorities to the difficulties that foreign prisoners may face due to linguistic, cultural and religious differences and their lack of social support. Special welfare measures should be put in place to assist foreign prisoners to overcome the problems that these differences may cause and in so doing, to alleviate the potentially resulting isolation. Such measures may include financial and other material assistance, vocational and language training and a flexible approach to contact with the outside world (see, for example, Rules 22-25, 26.1, 27.1-2, 29.1-2, 33.1, 34.3 and 35.2b-c).

While the social reintegration of prisoners, both unsentenced and sentenced is important (Rule 6 European Prison Rules), the social reintegration of foreign prisoners poses particular challenges. Foreign prisoners who will return to their home countries after release may require different forms of preparation than foreign offenders who will remain in the state after release. To assist their social reintegration in foreign countries the preparation for release should therefore be tailored as far as possible to enable the foreign offenders to reintegrate into society in the particular state they will return to upon release. This is dealt with in Rule 35, which is primarily addressed to prison authorities. Consular representatives should also provide assistance in this regard. Probation agencies and social services also have a valuable role to play.

Rule 10

This Rule emphasises the positive grounds on which a decision to transfer foreign prisoners may be taken. There are several justice and law enforcement related reasons for transferring persons to serve their sentences in a state with which they have links. It may be in the interests of public protection to transfer an offender. For example, where an offender will eventually settle in the country to which he is transferred the transfer of the sentence will allow some control to be exercised after conditional release from prison. If this is not done and the offender is expelled after having served the full sentence in the sentencing state, such control cannot be exercised.

In addition to the pursuit of justice goals, international transfers should be undertaken with a view to improving the opportunities for social reintegration of the offender. This ground is emphasised both in the Council of Europe Convention on the Transfer of Sentenced Persons (CETS 112) and in the EU Council Framework Decision FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

This principle should also be applied to all forms of transfer that enable foreigners to serve their sentences in another state. It thus includes not only those whose sentences will be continued in prison in the state to which they are transferred but also those who may serve conditional sentences or who may be conditionally released in such a state in terms of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964, CETS 051) and the EU Council Framework Decisions 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. Moreover, although the principle refers to prisoners transferred for the purpose of serving sentences, it should also be extended to the possibility of transferring persons remanded in custody, as envisaged by the EU Framework Directive 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

All transfers should be subject to fundamental human right standards. This means that the

transferring state should request the view of the foreigner concerned before any decision is taken. State authorities must also take into account other potential risks of human rights violations such as transfer would pose, ranging from the violation of the right to family life, poor prison conditions and regimes which would not facilitate social reintegration or treatment, to the more extreme situation where there is a risk of torture, inhuman or degrading treatment⁴. The assessment of the potential risks should be made by persons who have received appropriate training and have access to objective and independent information about the human rights situations in other countries.

Rule 11

Rule 4 of the European Prison Rules emphasises that 'prison conditions that infringe prisoners' rights are not justified by lack of resources'. This applies also to foreign prisoners whose management and treatment may require additional funds to deal with matters such as health care, interpretation and translation.

Rule 12

This Rule recognises that a wide range of officials and other persons, including professionals such as medical doctors and lawyers, who work with foreign suspects and offenders require training both in the specific legal and practical rules that relate to foreign suspects and offenders and in the underlying cultural and ethical bases for treating them appropriately. The details of what such training should entail are contained in Rule 39.

III. Use of remand in custody

Rule 13

Reiterating the basic principle stated in Rule 5, Rule 13.1 highlights that remand in custody should only be used when strictly necessary and as a measure of last resort. This principle is also set out in Rule 3.3 of Recommendation [Rec\(2006\)13](#) on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse. This Recommendation deals comprehensively with the use of remand custody and seeks to restrict its use as far as possible.

In particular, it states in Rule 7 of [Rec\(2006\)13](#) that remand in custody should only be imposed if four conditions are satisfied:

- a. there is reasonable suspicion that he or she committed an offence; and
- b. there are substantial reasons for believing that, if released, he or she would either (i) abscond, or (ii) commit a serious offence, or (iii) interfere with the course of justice, or (iv) pose a serious threat to public order; and
- c. there is no possibility of using alternative measures to address the concerns referred to in b.; and
- d. this is a step taken as part of the criminal justice process.

Problems arise if states apply these criteria to both national and foreign suspects in a way that appears to be formally equal but which ignores underlying substantive inequalities in the ability of foreigners to bring their circumstances to the attention of the courts. Although the burden of proving the risk that a suspect will abscond lies with the prosecutor or judge (Rule 8 [2] [Rec\(2006\)13](#)), many foreign suspects find they are unable to rebut the implicit presumption that they are more likely to do so. This reduces the likelihood that alternatives to remand in custody will be considered suitable for foreign suspects. In practice, the formally equal application of these criteria may lead to discrimination.

Remand in custody is being ordered too readily for foreign suspects. With remand in custody being the norm rather than the exception, foreign suspects have become overrepresented in the pre-trial prison populations of Europe. On average, they represent 40% of the pre-trial detention population in Europe.⁵ Steps should be taken to investigate more fully before denying foreign offenders the possibility of awaiting trial in the community.

Both Recommendation (2006)13 (Rule 4) and Recommendation R(99)22 concerning Prison Overcrowding and Prison Population Inflation (Section 12) encourage states to adopt and use the widest possible range of alternatives to remand in custody. Even though alternatives are often available in national legal systems, practice seems to indicate that prosecutors and judges are reluctant to request and impose such alternatives in general and for foreign offenders in particular. This reluctance has been attributed to the need to protect society. It is also due to the perception that foreign suspects are more difficult to contain and monitor⁶.

To overcome the difficulties surrounding the use of alternatives for non-resident foreign suspects, Rule 2.2 of Recommendation (2006)13 states that such measures should be applied in the state where the suspect is usually resident. The EU has adopted a Framework Decision⁷ which enables the implementation of supervision measures, adopted as alternatives to provisional detention in the state in which suspects are subject to criminal proceedings, in the state in which they are lawfully and ordinarily resident. This mechanism is designed to reverse the current practice whereby non-residents are much more likely to be remanded in custody pending trial than resident suspects (para 5 Preamble). Moreover, it aims to enhance the protection of victims and the general public while also enhancing the right to liberty and presumption of innocence for non-resident accused persons (paras 3 and 4 Preamble and Article 2).

To avoid discrimination in practice, states should encourage the use of available alternatives to remand in custody and develop options that are suitable for foreign suspects (Rule 13.2). They should also encourage practitioners to investigate more fully before denying foreign suspects the possibility of awaiting trial in the community. By ensuring that foreign suspects are considered for all available alternatives to remand in custody, states can effectively enforce criminal law while respecting the rights of non-nationals.

One of the major obstacles to the use of alternatives to remand in custody for foreign suspects is the presumption that such suspects are more likely to abscond (see Rule 7(b)(i) [Rec\(2006\)13](#)). This presumption has been attributed to the fact that many foreign suspects do not have a fixed address, or a residency permit. The lack of a residential link often leads to an exclusion from consideration for alternatives. In turn, therefore, it leads to the over-representation of foreign suspects in the pre-trial prison population.

Rule 9[2] of Recommendation (2006)13, as well as Rule 13.2*b* of this Recommendation, make it clear that it should not be assumed automatically that foreign suspects pose a greater flight risk. All risk determinations must be taken on the basis of the individual circumstances of the suspect, examined in light of objective criteria (Rules 8[1] and 9[1] Recommendation (2006)13). Generalisations are not appropriate. Information about the personal and social circumstances of the suspect, provided by the probation or social services, will be valuable in making an assessment of the risk involved in making use of alternatives to remand in custody.

Alternatives to pre-trial detention should be tailored to deal with the specific problems faced by foreign suspects. For example, where foreign suspects do not have a fixed address, they could be required to reside at a specific approved address that may be operated by a state, local community or non-governmental agency. If there is a risk of flight, such an order may be coupled with other requirements, such as the surrender of passports, a ban on leaving the country, an obligation to report to police or judicial authorities at specific times or the use of electronic monitoring (see Section 12 Recommendation R(99)22 and Rule 2(1) Recommendation (2006)13). The availability of more suitable alternatives for foreign suspects should reverse the perceived flight risk such suspects pose, thereby reducing the present over-reliance on remand in custody in such cases. To promote the use of non-custodial alternatives for foreign suspects, 'links' should not be interpreted in a strict legal manner to only refer to legal residence or nationality, but may include residence, work or having family in the state (Rule 13.2*b*).

Non-custodial alternatives will usually be preferable where the foreign suspect has a dependant. This dependant could be a young child, who may be at a higher risk of being put in a foster care than a child of an offender who is a national of the state. Dependants could also include a disabled or elderly relative or partner.

IV. Sentencing

Rule 14

As explained in the Commentary to Rule 5, Recommendation R(99)22 concerning prison

overcrowding and prison population inflation and other Council of Europe Recommendations have strongly emphasised that sentences of imprisonment should only be used when absolutely necessary and as a measure of last resort. The challenge is to ensure that this principle is also applied to foreign offenders. If applied fully and in a non-discriminatory manner, the provisions of Recommendation R(92)17 concerning consistency in sentencing can assist states to meet this challenge. Its guidance on how to avoid custodial sentences should be applied in all cases. In this regard para B 5 of Recommendation R(92)17 should be noted, as not only does it emphasise that imprisonment should be regarded as a sanction of last resort, but it also goes on to explain that it "should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offence would make any other sentence clearly inadequate". The same paragraph of Recommendation R(92)17 add:

"Where a custodial sentence on this ground is held to be justified, that sentence should be no longer than is appropriate for the offence(s) of which the person is convicted. Criteria should be developed for identifying the circumstances which render offences particularly serious. Wherever possible, negative criteria to exclude the use of imprisonment, in particular in cases involving a small financial loss, may be developed".

Without prejudice to the independence of the judiciary, this approach should be applied to foreign offenders too (Rule 14.1). Its adoption requires the rejection of the assumption that imprisonment, often coupled with expulsion, is the only appropriate sentence for foreign offenders convicted of all but the most minor offences. If foreign offenders are routinely considered for the full range of sentences, this danger can be minimised.

Although foreign offenders should be considered for the same range of sentences as national offenders, it should also be borne in mind, that sentences may have a harsher impact on foreign offenders, both in terms of their experience in prison and as regards their possibilities for social reintegration. This should be taken into consideration when the type or quantum of the sentence is being determined. Pre-sentence information required by Rule 14.2 will enable the judicial authorities to make informed judgement on these factors. States in which courts do not routinely use sentence reports, should thus be encouraged to do so especially in the case of foreign offenders.

Sentencing authorities should also bear in mind that member states have ratified bilateral and multilateral treaties to facilitate the transfer of sentenced persons to states with which they have legal and social links (see Rules 10 and 39). As these transfer mechanisms enable sentenced persons to serve both custodial and non-custodial sentences in their own community, this should further encourage judicial authorities to consider the fullest range of sanctioning options.

In reality, a sentence may have a disproportionate impact on foreign offenders. This increased hardship may, in turn, act as an impediment to such offenders' social reintegration. Rule 14.3 reflects the need to ensure equality of outcomes as highlighted by Rule A 8 of Recommendation R92(17) on Consistency on Sentencing. Sentences may also have a devastating impact on the children and other dependants of offenders. This is particularly true of foreign offenders who may be the primary carers for their children. The UN Convention on the Rights of the Child requires that the best interests of the child be considered in all official decisions that may affect them.⁸ Therefore, their interests should also be borne in mind when their foreign parents are sentenced (Rule 14.3).

V. Conditions of imprisonment

The conditions of imprisonment for foreign offenders are, subject to the rules below, governed by the European Prison Rules as they apply to all prisoners including foreigners.

Admission

Rule 15

Admission to prison is always intimidating. It may be particularly so for foreign prisoners. Therefore, extra care needs to be taken to communicate effectively with them from the outset. Staff who are trained in accordance with Rule 41.1 should be involved in the admission process to facilitate such communication. The importance of effective communication is apparent from Rule 15.1. Prisoners should be provided with information in a language which they understand, orally and also, where possible, in writing. This need not be the prisoners' first language, but one which

they can understand. A good practice which exists in some countries is for prisoners to receive a foreign prisoners' information pack which can be translated beforehand into the languages used by the majority of foreign prisoners. Such a pack should include, inter alia, the information set out in Rule 15.1 a to d and 15.3. In addition there should be information on the internal regulations and main feature of the prison regime, including the rules governing discipline, legal aid, the prisoners' rights and duties, complaints procedures, prison work and release as well as information on how to access services such as medical treatment, education and visits.⁹ The CPT has also recommended that prisons provide foreign prisoners with translations of expressions most commonly used in everyday activities as this can prevent misunderstandings and thereby contribute to a less conflictual prison environment¹⁰. Prisoners should also be provided with information about the possibilities of transfer to another state at all the different stages of the criminal justice process (Rule 15.3, see also Rule 35.7). As this information has been provided by the prison authorities, and is therefore approved, prisoners should be allowed to keep this information in their possession. Moreover, the prison authorities should update it regularly. Prison authorities should also assist foreign prisoners who wish to communicate the fact of their imprisonment to relevant individuals or bodies, immediately after admission (Rule 15.2). Rule 15.2 draws attention to the need to assist foreign prisoners immediately after admission by informing about their whereabouts the persons and agencies capable of providing them help. The different ways of communicating such information are discussed in Rule 22.

Allocation

Rule 16

Decisions relating to the allocation of foreign prisoners to particular prisons require balancing a wide range of operational and other factors. Some of these are applicable to all prisoners, such as safety and security, capacity and the desirability of housing them close to their family and community ties (see Rule 17.1 European Prison Rules) and in facilities that can provide suitable programmes. Where foreign prisoners have close family or other social ties in the country in which they are detained, these may be the key considerations, balanced always with the requirements of safety and security. On the other hand, where foreign prisoners' primary contacts are abroad it may make more sense to house them close to transport facilities that would allow their families to travel from abroad to visit them (see Rule 16.2). Another factor to be considered is whether it is better to house foreign prisoners in prisons where there are others of their nationality, culture, religion or who speak their language (Rule 16.3). This may reduce their sense of isolation, but may conversely be undesirable from the point of view of safety and security. In all these scenarios, it is desirable to consult the foreign prisoners concerned to determine their views about allocation proposals (see Rule 17.3 European Prison Rules).

Accommodation

Rule 17

Decisions relating to the accommodation of foreign prisoners require the balancing of various factors. One factor to be considered is whether it is better to house foreign prisoners in a given prison together with their compatriots or others who share their culture or religion. As is the case with allocation, while this may reduce their sense of isolation, it may conversely be undesirable from the point of view of safety and security. It may also be detrimental to their interaction with other prisoners. If the foreign prisoners are to be released in the country in which they are imprisoned, such an accommodation policy may hamper their social reintegration. When deciding whether to allocate foreign prisoners to single or communal cells within a prison, the cultural preferences of such prisoners should be borne in mind.

Hygiene

Rule 18

The general requirements of hygiene need to be applied to all prisoners. In the case of foreigners, however, a certain degree of flexibility may be necessary to make provision for their cultural and religious preferences and traditions, while not compromising on standards of cleanliness (Rule 18.1). For example, where these preferences require men to grow beards, they should not be prohibited from doing so but there should be facilities for them to keep their beards clean and trimmed. The facilities provided should enable prisoners to shower in a way which is sensitive to

their understandings of public decency (Rule 18.2).

Clothing

Rule 19

In the case of clothing for foreign prisoners, a balance of various concerns is required. Prisoners may legitimately wish to wear clothing that reflects their cultural and religious traditions. However, requirements of safety and security may not allow certain forms of dress which, for example, could enable them to hide objects, or make identification or searches difficult, particularly when prisoners are outside their cells. Safety and security concerns should not be used as an excuse to forbid a particular form of dress where it does not pose a substantial risk (Rule 19.2). An example of good practice may be to allow such clothing in the cell, and to forbid it in the collective parts of the prison. Where prison uniform is required, concessions should still be made: for example, Sikhs could still be allowed to wear their headdresses. Respect for the cultural and religious sensibilities of foreign prisoners in respect of clothing (Rule 19.1) should be understood in terms of Rule 20.2 European Prison Rules which forbids degrading or humiliating clothing.

Nutrition

Rule 20

Rule 22.1 of the European Prison Rules states that authorities must take cultural and religious preferences in relation to diet into account. The right to food that meets the religious traditions of prisoners has also been recognised by the European Court of Human Rights, which held that a refusal to provide a Buddhist prisoner with vegetarian meals infringed Article 9 of the European Convention on Human Rights¹¹. One method of ensuring this right for foreign prisoners is to allow them to access a prison shop which stocks in hygienic conditions food they prefer. Consular representatives may be approached for help in this regard.

It is acknowledged that there are operational factors, such as space, security and hygiene, to be considered in relation to providing cooking facilities and that not all countries may provide such facilities. However, where such facilities and opportunities are provided, they have been found to enhance social interaction and reduce isolation.

In relation to the need to take account of the religious preferences in respect of meal times, this should be done where possible. A good practice recognised by the CPT was the special effort made at Woodhill Prison UK to keep food warm for prisoners observing Ramadan, the organisation of the Eid-ul-Fitr celebration and courses for staff on halal food, which have led to a better mutual understanding¹².

Legal advice and assistance

Rule 21

It is important to recognise that foreign prisoners may need legal advice not only on matters relating to their criminal trial or conviction, but also on a wide range of other matters including prison law, their immigration status and family affairs. Various steps should be taken to ensure that they benefit from the legal advice and assistance that is available to all prisoners in the country in which they are held. This may include access to legal aid the provision of assistance in practical measures such as filling out forms or making contact with the legal aid agency (see also EPR 23.3). Rule 21.2 does not place a direct obligation on prison authorities to provide legal aid directly. Foreign prisoners may also be assisted by outside agencies which specialise in the assistance of foreign prisoners (Rule 21.4). It is important in this regard that they have information about the services they can access and that such access is facilitated by the prison authorities. They may also need specific help in respect of interpretation (Rule 21.1, 21.3 and 21.5). It is important that such interpretation is accurate, impartial and recognises the requirements of legal confidentiality. It should be provided where a prisoner does not have a full understanding of the language used. In this regard, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter when participating in proceedings which concern them, including internal disciplinary proceedings¹³ (see also EPR Rule 59.e). However, it is recognised that legal advice may be sought on a wide range of issues and from a range of advisers. While states must ensure that prisoners have access to such advice, it is for States to decide who

must pay for it. For example, in some countries the state will pay for interpretation costs that arise from criminal justice, residential status and disciplinary procedures, whereas the prisoner must pay for interpretation costs arising from advice on other legal matters.

Contact with the outside world

Rule 22

Contact with the outside world is particularly important for foreign prisoners who may easily become isolated. Research has also shown that family connections are important for offenders' social reintegration. It is therefore essential to minimise the damage that imprisonment causes to family ties. Rule 22.1 lists a wide range of forms that contacts with the outside world could take. Subject to safety and security considerations (see Rule 24.2 EPR), prison authorities should do what they can to facilitate contacts with family and friends, consular representatives, probation staff and approved community agencies and volunteers. This can best be achieved by flexibility in relation to the rules that govern the contact of prisoners with the outside world generally. Moreover, probation staff and community agencies and volunteers from both the state in which the prisoners are held and the state to which they will go upon release can assist in this regard. Accordingly, prisoners should be informed where organisations providing services to prisoners abroad exist in their country of residence or nationality. The Netherlands provides an example of good practice in this regard. Volunteers regularly visit Dutch nationals detained abroad and assist them in maintaining relations with their families and consular representatives and dealing with problems that may arise.

Rule 22.2 highlights the need for flexibility in relation to the use of language during contacts. The right of foreign prisoners to speak in their own language during communications with family and friends should only be restricted when absolutely necessary due to a specific, substantiated concern in relation to a particular individual. Whilst security concerns may arise when prisoners speak a language which the authorities do not understand, practical measures relating to interpretation can minimise this concern. If the translation required for active surveillance is not available, the right of foreign prisoners to speak in their language should only be

postponed for a reasonable period necessary to rectify the problem. Other concerns are the time difference and costs of phone calls made abroad. Flexibility in respect of the time and length of telephone calls

(Rule 22.3) – along with the length of visits (Rule 22.5) can also improve contact with the outside world. For those foreign prisoners classified as indigent, prison authorities should assist with the costs of communicating with the outside world (Rule 22.4). This assistance is, of course, only to the extent that is reasonable under all the circumstances.

A range of authorities and agencies can assist the families of foreign prisoners who are based abroad with the arrangement and financing of visits. This is an area for potential co-operation between prison authorities and consular representatives, other agencies and NGOs from the country to which the prisoner will eventually be sent. Support could include the provision of information and financial assistance. Authorities should also adopt a flexible approach to granting visas to family members who live abroad to promote the maintenance of familial relationships (Rule 22.6)¹⁴.

In addition, the authorities are enjoined to assist prisoners with the cost of communication (Rule 22.4). As foreign prisoners often do not have work, and therefore may not have money to buy stamps or phone cards, the CPT has recommended that states ensure access to communications, and if they are externally provided, that they are reasonably priced¹⁵. In situations where high travel costs prevent regular, if any, visits, it may be possible to facilitate or improve contact using technology, such as videoconferences. However, the use of video links technology should not constitute the answer to all practical difficulties; ordinary visits, in particular contact visits, should always be preferable.

Special measures to enable foreign prisoners to keep in contact with their children are particularly important as they are valuable both to the prisoner concerned and are in the interest of the child (Rule 22.7 – see also Rule 34.1). Where children visit their imprisoned parent, there should be open contact with that parent wherever possible (Rules 26 to 28, UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Resolution 2010/16)).

In recognition that prison visits can be a difficult experience for children, and even more difficult for children living abroad, prison authorities should take particular care to ensure that the measures put in place as required by Rule 22 to maintain familial relations are implemented in a child-friendly and sensitive manner (Rule 22.8.). This should include consideration of the children's availability for such visits, bearing in mind they may be attending school. If children are living abroad, other forms of communication must be considered, such as video links and other forms of electronic communication. The rules relating to flexibility in relation to the times and types of communications (Rules 22.3 and 22.5) should be implemented in a way that takes into consideration the children's schedules and ability to communicate. The flexibility referred to in Rule 22.6 should also be adopted to facilitate visits by children.

Where the prison authorities are given news of major events in the life of a member of the prisoner's family they should convey this information to the prisoner (Rule 24.6 European Prison Rules). The prison authorities can also assist directly in the preservation of family relationships by keeping family members informed about events in a foreign prisoner's life. The authorities should assist foreign prisoners who wish to inform their family about their location (Rule 22.8). Rule 22.9 deals with the situation in which a prisoner has suffered a serious injury or illness, or has died. Due to the need to respect the prisoner's right to privacy, the prisoner's consent must be obtained before such information can be released. However, it is also important to respect the family's right to information about their loved one. The most practical approach would be to request consent for such correspondence at admission. In this way, the prison authorities will be in a position to know how to deal with such humanitarian issues. It is also important in this regard that authorities try to maintain an up-to-date record of the contact details of the families of foreign prisoners (Rule 22.10). In exceptional circumstances, family members' right to know may prevail, when it is in the best interest of the prisoner. Such may be the case when the offender is mentally ill and, therefore, unable to consent.

Rule 23

Isolation can be prevented and combated by allowing foreign prisoners to remain informed about public affairs in their countries of origin. To this end, they should be allowed to subscribe to publications (Rule 23.1) and be given access to radio or television broadcasts (Rule 23.2). Both of these should be available in a language they understand. Access of this kind will also facilitate their reintegration, particularly if they return to their home country. Given the rapid development of forms of media, the words 'other forms of communication' in Rule 23.2 are intended to cover new and improving methods of information provision such as the Internet.

There should not be a general prohibition on access to materials and resources in a particular language or languages. However, access to particular materials or resources may be limited for a temporary period if this is based on a judicial order (see Rule 24.10 European Prison Rules).

A wide range of agencies can contribute to better contacts for foreign prisoners with the outside world. Volunteers have a particularly important role to play in this regard. Compatriots, who may be members of associations or individual volunteers, may play an important part in preserving foreign prisoners' links with their home countries. A degree of flexibility on the part of the prison authorities is required when recognising such associations or individuals and ensuring that they have appropriate access to foreign prisoners (Rule 23.3). Probation agencies can assist in this process, *inter alia*, by liaising with their counterparts in the country of origin of foreign prisoners (Rules 63-65 CoE Probation Rules, Recommendation [CM/Rec\(2010\)1](#)).

Contacts with consular representatives

The role and duties of consular representatives are set out in the Vienna Convention on Consular Relations (United Nations, *Treaty Series*, vol. 596, p. 261). This section relates to the right of foreign prisoners to contact their consular representatives and the role prison authorities can play in facilitating such contact.

Rule 24

Rule 24 deals with contacts with consular representatives from the perspectives of foreign prisoners. Foreign prisoners have the right to such contacts (Rule 24.1) and to reasonable facilities to communicate with their consular representatives (Rule 24.2). If foreign prisoners have more than one foreign nationality, they have the right to contact consular representatives of all states concerned. Equally, foreign prisoners may refuse to make contact with consular representatives.

There may be problems where prisoners are without consular representation in the country in which they are detained. In such cases, prisoners may communicate with consular representatives of another state which takes charge of their interests (Rule 24.3). Rule 24.4 refers to refugees, asylum seekers and stateless persons who are held in a prison. Refugees and asylum seekers may not wish to contact their consular representatives. This Rule therefore entitles persons without effective representation to contact national or international authorities whose task it is to serve their interests, for instance, the UN High Commissioner for Refugees.

Rule 25

Prison authorities have duties to both foreign prisoners and authorities representing their interests. In the case of the former, the prison authorities should inform them about their right to contact their consular representatives or the authorities whose task it is to serve their interests (Rule 25.1). In the case of the latter, prison authorities should inform consular representatives about nationals who are detained where such prisoners request (Rule 25.2). The prison authorities should also cooperate with consular representatives and authorities that serve their interests and facilitate the provision of their services within the prison (Rule 25.3).

The prison authorities also have a duty to record information about the consular contacts with prisoners. The purpose is simply to have a record that such visits took place and not to record their content, which should normally be confidential (Rule 25.4). However, prison authorities should not press prisoners to take up contacts with consular representatives if they do not wish to do so. To ensure that pressure is not put on foreign prisoners a record should also be kept of where they waive their right to such contact (Rule 25.4).

Prison regime

Rule 26

Rule 26 deals with the prison regime as a whole. Rule 26.1 emphasises that in order to achieve a balanced programme of activities, it may be necessary to take additional positive measures to ensure that foreign prisoners can fully participate in such activities. The need to adopt specific measures should be considered from the outset, during sentencing planning. In this regard, the CPT has recommended that authorities aim to prevent the exclusion of foreign prisoners from prison regime activities whether due to language or more systemic barriers.¹⁶ Positive measures may include assistance with interpretation and classes to learn the language in which activities are conducted (see Rule 29.1).

There is a danger that foreign prisoners will be regarded as less worthy of treatment and training because they may be transferred, extradited or expelled. Rule 26.2 states that access to such activities should not be generally restricted for foreign prisoners. If some activities are considered to be unsuitable for foreign prisoners due to the activities' focus on reintegration into the state in question, or because the activity takes place out of the prison premises, then suitable alternatives, which also focus on reintegration, should be provided.

Work

Rule 27

It is particularly important for foreign prisoners to be engaged in useful and productive work as they often do not receive financial support from outside the prison because of their lack of social links in the country of their detention. The authorities should take steps in order to ensure that foreign prisoners are not discriminated against in respect of work allocation and training (Rule 27.1-2). In organising work, account should be taken of religious and cultural practices, for example, differing days of rest. Foreign prisoners should also be considered for work programmes that occur outside the prison. Anti-discrimination principles dictate that foreign prisoners should be considered for all work opportunities available to national prisoners, unless there are specific legal impediments to their working. While there may be legitimate security concerns about the provision of work outside prison, it is important that states ensure equality of opportunities for foreign prisoners.

Rule 26.11 of the European Prison Rules already provides for prisoners to transfer some of their earnings out of prison. In the case of foreign prisoners, Rule 27.3 provides explicitly that they may

transfer part of their earnings to family members abroad.

Building on Rule 26.17 of the European Prison Rules, which states that, as far as possible, prisoners who work should be included in national social security systems, Rule 27.4 provides that foreign prisoners who contribute to the social security system of the country in which they are detained shall be allowed, where possible, to transfer the benefits of such contributions to another state. This Rule enables foreign prisoners to contribute to the system in the country in which they are most likely to live after release, thus facilitating their social reintegration. As social security systems differ in the coverage that they provide – unemployment benefits, pensions and health care are funded differently in various countries – careful attention needs to be paid to where and how such contributions should best be made. Where the contributions are ‘spent’ in part, only the remaining benefit should be transferred: for example, contributions to a health care system may have been used, leaving a residual benefit to be transferred. This Rule may only be applicable where states allow prisoners to contribute to relevant schemes.

Exercise and recreation

Rule 28

It is important that foreign prisoners have adequate exercise and recreational activities. It may be necessary to apply internal regulations flexibly to ensure that foreign prisoners are not, in practice, excluded from such activities. Such flexibility may also be required to ensure that the manner in which such activities are conducted does not conflict with the cultural practices of these prisoners (Rule 28.1). For example, foreign prisoners should not be compelled to wear sports clothing that may conflict with their conceptions of modesty. Cultural differences can be used to positive effect. For example, prisoners may share different cooking techniques, games and entertainment. This may promote intercultural understanding and improve relationships amongst prisoners (Rule 28.2) or participate in foreign prisoners’ national sports.

Education and training

Rule 29

The CPT has noted that an inability to communicate due to linguistic barriers may cause foreign prisoners deep moral distress.¹⁷ The CPT has therefore recommended that prison authorities introduce programmes of language education for foreign prisoners.¹⁸ Rule 29.1 encourages the learning of languages that assist with communication within a prison. This need not necessarily be the language spoken by the majority of the staff and prisoners, but a common language that enables prisoners and staff to communicate (see Rule 8). In addition, opportunities should be made available for prisoners who wish to learn or improve their knowledge of the language of the country of origin. In addition to linguistic communication, the quality of interaction between prisoners and between prisoners and staff can be improved by understanding different traditions and cultures. Rule 29.1 therefore also recommends that foreign prisoners be provided with opportunities to study local traditions and cultures.

The educational and vocational training provided for foreign prisoners should be tailored as far as possible to their specific needs, as this is important for their eventual social reintegration. Rule 29.2 sets out how this should be done.

To assist with this training, prisons should be stocked to the extent possible with reading materials and resources that reflect the linguistic and cultural backgrounds of the prison population. Whether these materials are held in the prison library or education and training centre, these resources should be accessible (Rule 29.3). Educational resources can be derived from audio, video and electronic material and means. Consular representatives and non-governmental organisations should be encouraged to contribute to the educational and training resources available and suited to the needs of foreign prisoners.

Freedom of religion or belief

Rule 30

Rule 30.1 is designed to give practical effect to the right to freedom of thought, conscience and religion that is recognised by Article 9 of the European Convention on Human Rights and Rule 29 of

the European Prison Rules. Prisoners also have the right to change their religion or beliefs during their time in prison. The right is further strengthened by the requirement that foreign prisoners must not be compelled to practice any particular religion or belief. Indeed, prisoners should be protected against the risk of proselytisation both by representatives of any faith or religion and by staff or fellow prisoners. Prison authorities have a general duty to facilitate the exercise of this right by foreign prisoners. They may do so in various ways, including the provision of a multi-denominational faith room.

Rule 30.2 encourages prison authorities, as far as possible, to grant foreign prisoners access to approved representatives of their religion or belief. In some states, a religion or belief may be approved rather than individual representatives. In others, a list of approved representatives may be available. Or, states may choose to maintain a list of organisations that are not considered to be religious organisations for this purpose.

Religious observance may raise security concerns but these should not trump this fundamental right except where it is essential to impose limitations. Such limitations should be the minimum necessary to guarantee safety and security.

Health

Rule 31

Rule 31.1 highlights the need to ensure the implementation of the principle of equivalence of care. This principle relates not only to the provision of health care within prison which is of the same standard as is available in the general community, but also to ensuring that all prisoners can access this health care. In reality, however, foreign prisoners may not be covered by the national health care insurance system of the state in which they are detained. Prison authorities must therefore ensure that foreign prisoners have access to the necessary general medical and dental treatment and care, as well as to more specialised medical services that may be required. Given that foreign prisoners may also have specific health problems or suffer from diseases that are not common in the state in which they are detained (e.g. malaria, dengue), prison authorities should ensure that sufficient resources and funds are allocated to deal with these problems effectively¹⁹ (Rule 31.2). The CPT has urged authorities to ensure that foreign prisoners have equal access to drug rehabilitation programmes.²⁰ In the case of transmissible and infectious diseases, it may also be necessary to ensure the health of other prisoners and staff who are in contact with foreign offenders (see Recommendation R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison).

In addition to being updated about potential or existing diseases and conditions which may affect foreign prisoners, medical and health care staff should also be made aware of the importance of respect for cultural diversity and sensitivity, as well as appropriate methods for interacting with prisoners coming from different backgrounds (Rule 31.3). In some circumstances, achieving these objectives may require additional training.

Given the difficulties foreign prisoners may encounter when trying to communicate with healthcare staff (and the risk that such difficulties may jeopardise the health of such prisoners), the CPT has recommended that steps be taken to ensure such prisoners benefit from the services of a professional interpreter as this helps best respect the prisoner's right to privacy and allows good quality of communication which is primordial for healthcare purposes.²¹ However, for financial reasons and also in cases of emergency, more informal methods of interpretation may have to be relied on, like interpretation offered by a fellow prisoner or by staff member. Extreme caution should be exercised in such cases, and informal interpretation used only if it respects the medical confidentiality of the patients concerned and they consent to this form of communication (Rule 31.4).

Some cultural traditions do not allow a prisoner to be examined by a medical practitioner of a different gender. Save in the case of a medical emergency, such requests should be met where possible (Rule 31.5).

An ability to communicate in a culturally sensitive manner is especially important for the provision of psychiatric and mental health care (Rule 31.6). A good practice may thus be to employ ethno-psychiatrists, as is the case in Belgium. It may be more difficult for prisoners coming from different religious, cultural and linguistic backgrounds to adjust to the culture of the country in which they are detained and more specifically to prison life. This may lead to excessive feelings of

abandonment and anxiety. Accordingly, both prison authorities and medical and health care staff should pay particular attention to the prevention of self-harm and suicide among such prisoners (Rule 31.7).

In recognition of the humanitarian principle that prisoners with a short-term fatal prognosis should be transferred to external medical facilities to ensure their best possible care, (Rule 51, Recommendation (98)7 concerning the ethical and organisational aspects of health care in prison) and based on the same humanitarian principle, consideration should also be given by the competent authorities of the state of detention to the possibility of transferring terminally ill foreign prisoners, who so request, to a state with which they have strong social links (Rule 31.8).

Where the prisoner is ill, steps should be taken to ensure that the transfer is prompt and humane. The prisoner should be accompanied by medical personnel and the mode of transport should be suitable.²² In cases of transfer, extradition or expulsion, steps should be taken to ensure the continuation of medical treatment. This should involve the provision of medication for use during transit to the other state and, where the prisoner consents, the transfer of medical records. The CPT has stressed that any such provision of medication must only be done on the basis of a medical decision and in accordance with medical ethics.²³

Good order, safety and security

Rule 32

The maintenance of good order, safety and security in a prison housing prisoners of various backgrounds requires awareness of the potential conflicts that may arise between prisoners, and between prisoners and staff or other persons working in or visiting the prison. While such issues should be considered during the selection and training of staff (Rules 38 and 39), it is also important that prison authorities adopt the principles of dynamic security in their management of prisons (Rule 32.1), a concept which has been highlighted in the EPR (Rule 51.2) and in the European Rules for Juvenile Offenders (Rule 88.3). By doing so, and ensuring staff prioritise the creation and maintenance of everyday communications and interaction with all prisoners, any potential or current tensions or problems can be detected and dealt with as early as possible. Effective communication in this respect requires awareness and understanding of cultural and religious differences and possible inter-ethnic tensions (Rule 32.2). Understanding and tolerance among prisoners, and between prisoners and staff, can be enhanced by participation in activities that raise awareness of cultural, religious and ethnic diversity (Rule 32.3, see also Rule 28.2). For example, the CPT has highlighted the good practice at Woodhill Prison, UK, where the Imam has initiated programmes to provide prisoners and staff with a better understanding of Islam.²⁴ Staff should also be aware that tensions may arise due to linguistic barriers and therefore, be trained to deal with such situations²⁵ (see Rule 39.2). This may involve reliance on informal means of interpretation and translation, which can be offered by other prisoners. In addition, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter in order to enable them to participate in disciplinary proceedings.²⁶ This assistance should also apply to the conversations that the foreign offender may have with his lawyer, when preparing for the disciplinary hearing.

With a view to ensuring dynamic security, prison authorities should endeavour to keep up-to-date records about the composition of their prison populations. While information on their backgrounds can be a useful tool in creating policies to prevent and manage potential and actual conflict, such information should not decisively affect decisions on the risk posed by an individual or a group of foreign prisoners to good order, safety and security (Rule 32.4). However, where information is available that there is a risk to the safety of a particular individual or group, all possible measures must be taken to ensure their safety (*Rodic and Others v. Bosnia and Herzegovina*, Application N° 22893/05).

Women

Rule 33

The Council of Europe recognises the need to respect principles of individualisation and non-discrimination in relation to prisoners (see Rules 3 and 7). These principles apply also to women prisoners.

Given that women represent only a small proportion of the prison population, there are fewer

accommodation possibilities for them. This often results in women prisoners being housed far away from their families and children.²⁷ Research has shown that separation from family members, children and the community in general may have an extremely adverse impact on women prisoners. While this problem also affects foreign female prisoners whose families are resident in the state in which they are imprisoned, it is much more acute in the

case of foreign female prisoners whose families are abroad. These women may become further isolated due to linguistic barriers that prevent or reduce access to social support and other services and activities in prison (Rule 33.1).

It is recognised that imprisonment may affect and impact on women differently from men. In particular, women with children may suffer from feelings of guilt and helplessness due to enforced separation, especially if the children are resident in a different country. Research has also shown that women are more likely to commit acts of self harm and suicide, particularly during the very early stages of detention. A history of abusive and violent relationships and experiences may also lead to heightened anxiety and post-traumatic stress disorders during detention. The situation may be more complicated for foreign female prisoners coming from different cultural backgrounds. Accordingly, medical and healthcare staff should be particularly attentive and trained to deal with these psychological needs (Rule 33.2). To ensure medication is not the primary means of dealing with the psychological problems women may face while in detention, support, counselling and treatment programmes should be provided when appropriate (see Rule 34.1 European Prison Rules).

This Rule also elaborates on Rule 31.6, which emphasises the need to provide health care in a culturally appropriate manner. Health care should be provided in a manner that recognises gender specific needs. In particular, attention should be paid to sexual and reproductive health issues and the provision of female hygienic and sanitary facilities and items²⁸ (Rule 33.2).

In general, imprisonment should not be used as a sanction for pregnant women.²⁹ However, in situations where such women are imprisoned, the prison authorities must provide the facilities necessary to meet their needs (Rule 33.3). In the case of foreign women prisoners, this may require cultural and religious sensitivity.

As it was established in Rule 34.3 of the European Prison Rules, prisoners should be allowed to give birth outside prison.³⁰ Women shall be transported to give birth in an outside hospital when labour begins.³¹ There may still be occasions in which the child may be born within the prison. In such cases, prison authorities should call emergency services immediately and the child's birth certificate should not mention that he was born in a prison setting. Independent of whether the child is born in or outside of the prison, the authorities should respect the cultural and religious preferences of the mother in relation to the birth and post-natal care (Rule 33.3).

Infant children

Rule 34

Research has shown that maternal separation in the first months, and even years of childhood, can be very detrimental as it can cause long-term difficulties for children, including impairment of attachment to others, emotional adjustment and personality disorders. Even though the development of young children can be impaired as a result of confinement to a closed environment like a prison, this negative effect outweighs the benefits of remaining with their mother (see Parliamentary Assembly, Recommendation 1469 (2000) Mothers and babies in prison and Social, Health and Family Affairs Committee, Report 9 June 2000, Mothers and babies in prison). Any decision to admit or remove a child from prison should, therefore, only be taken after special consideration of all circumstances and only if this is in the best interests of the child (see Rule 36.1 European Prison Rules and Articles 3, 9(1) and 20(1) UN Convention on the Rights of the Child). The same criteria apply to the decision on whether to keep the child in the state where the parent is imprisoned or to send the child abroad. The views of both parents (or other legal guardians), if possible, shall be taken into account and all appropriate care arrangements shall be examined before a final decision is reached (Rule 34.1c) This basic test of the child's best interests remains unaltered, even though Rule 34.1 sets out factors to which require particular attention in the case of children of foreign prisoners. The conditions that will apply to an infant child kept outside prison will depend in practice on whether the child is likely to remain in the state where the parent is incarcerated or to be sent to another state. The authorities should consider both possibilities.

Practice may vary from country to country in relation to the upper age limit until which children may be kept in prison with their detained parent. In some cases, they can remain in prison up to the age of 6 years. In other countries, they may be put into state or foster care after their birth. Whatever the national practice is, prisons should have special facilities and arrangements for keeping such children with their parent. The facilities should be staffed with trained personnel (see Rule 36.2 European Prison Rules). The term infant is not defined in Rule 34 but is used as a qualifier to child as it is recognised that different rules apply across Europe as the maximum age up to which children may be allowed to remain in person with a parent.

In addition to ensuring that children receive appropriate care³² (see Rule 36.3 European Prison Rules), the arrangements should respect different religious traditions and cultural approaches to parenthood (Rule 34.2). Although there may be circumstances in which children may be allowed to remain with their father, (for example, in asylum and immigration cases where the father is the primary carer and is detained in prison) the vast majority of cases will involve the child remaining with the mother in prison.

Some countries apply *jus soli* so that children born to a foreign prisoner may obtain the nationality of the state in which they are born. In other countries, such children may remain stateless until the time their legal status is decided. In all cases, children should be provided with a birth certificate and any other identification papers needed to determine their legal status (Rule 34.3).

VI. Release

The release of foreign prisoners and the conditions to which they are subject should be governed by Recommendation [Rec\(2003\)22](#) concerning conditional release (parole) and Recommendation [CM/Rec\(2010\)1](#) on the Council of Europe probation Rules.

Preparation for release

Rule 35

Rule 35 is a continuation of the principle contained in Rule 9. Preparation for release for foreign prisoners should start, as for all other prisoners, as soon as possible after admission (Rule 35.1). This should occur notwithstanding the fact that decisions in relation to release are generally taken at a later point in the sentence. Careful consideration should be given to whether the prisoners will remain in the state in which they are detained. Irrespective of which country the prisoner will live in upon release, the sentence of a foreign prisoner should be planned with a view to their successful social reintegration. This is important as various instruments relating to the transfer of sentenced prisoners make reintegration an objective for all prisoners who are transferred to serve their sentences in their country of origin.³³ Foreign prisoners should not be excluded on the basis of any possible removal, from any treatment, work, education or activity programmes.

There is a range of steps which authorities should take to facilitate this. For foreign prisoners, one of the most important issues is often the determination of their legal status and situation. There may be cases of prisoners who may be legally residing in the country in which they are detained but whose residence permits may have expired during their detention. There may be other cases where the right to reside has been revoked due to the commission of an offence. There are also foreign prisoners who were illegally residing in the country. Prison authorities should ensure that foreign prisoners have access to all the relevant information and assist them to comply with the procedures necessary for the determination of their legal status. The legal status of foreign prisoners should be determined as soon as possible after they are admitted to prison. The early determination of legal status will assist prison authorities to plan the foreign prisoners' sentences with a view to their successful reintegration (Rule 35.2a).

Progressive preparation for release and social reintegration requires that prisoners benefit from prison leave and other temporary release schemes. In practice, foreign prisoners are often denied such possibilities due to a lack of a permanent address in the country and the flight risk they are considered to pose. To avoid this, leave requests should be dealt with on a case-by-case basis (Rule 35.2b). Good practice would entail also taking into consideration the address of family members resident in the state or associations that provide accommodation for such prisoners on prison leave and also for their families who may be visiting from abroad. Prison leave is therefore also important to facilitate the maintenance and re-establishment of contacts with family members, a crucial factor in successful reintegration. If foreign prisoners are denied requests for prison leave, steps should be taken to ensure that such prisoners have alternative supplementary means of

maintaining or re-establishing contacts with their family members. They may also need assistance, while in prison, to begin finding accommodation and employment that they can take up after release (Rule 35.2.c).

If foreign prisoners remain in the country in which they are detained, preparation for release should include assistance with social needs, such as housing and employment, in co-operation with probation and social welfare agencies (Rule 35.3). In this regard the prison authorities should allow such prisoners to communicate directly with such agencies, where appropriate.

If foreign prisoners will be transferred or expelled to another country, and if they consent, contacts should be established with the relevant authorities and support services in that country as soon as possible (Rule 35.2c and Rule 35.4), including the relevant probation service (see Rule 64, Council of Europe Probation Rules) or other agencies. In particular, a good practice might be, if the prisoner consents, to contact welfare services of the country the foreign prisoner is to be transferred or expelled to, and inform them directly of his or her arrival, so that adequate assistance may be provided to him or her as early as possible. Where the prisoner consents, the information listed in Rule 35.5 should also be transferred to the relevant authorities of that state. The transfer of such information is important to facilitate the continuity of treatment and care, whether the prisoner serves his sentence in prison or is released on probation. Useful information may include different forms of calculating sentencing credit. For example, some countries give additional early release credits where prisoners work in prison. This should be reflected, even if release decisions remain in the discretion of the state to which a prisoner is sent to complete his or her sentence.

It is important that prisoners understand the potential consequences of transfers, including eligibility for release (Rule 35.6). While prison authorities and consular representatives can play a crucial role in providing some information, they may not always be able to do so. It is therefore imperative that prisoners should have access to independent legal advice and assistance in this connection

To reduce anxiety and prevent misunderstandings, the authorities of the proposed receiving state should provide returning prisoners with information about prison life and possibilities for release in that state (Rule 35.7). This should happen in good time, to enable the prisoner to prepare for his or her transfer.

For foreign offenders sentenced by international tribunals, consideration shall be given by the authorities of the state in which the person is detained to consultation with such tribunals regarding their preparation for release.

Consideration for early release

Rule 36

This Rule applies to both remand and sentenced prisoners. In order to establish substantial equality of treatment, positive steps should be taken to ensure that foreign prisoners are considered for early release when they become eligible for such release (Rule 36.1). Given that foreign prisoners may be embroiled in immigration or other proceedings, care should be taken to avoid unnecessary bureaucratic delays to release decisions and to ensure co-ordination between relevant governmental agencies (Rule 36.2).

The criteria set by Recommendation (2003)22 on conditional release (parole) should be applied in all cases. Particular attention should be paid to Rule 20, which emphasises that conditional release should be granted to all prisoners who are considered as meeting the minimum level of safeguards for becoming law-abiding members of society.

The decision-making in respect of early release should not discriminate against foreign prisoners, but should be taken on the basis of the merits of each individual case. A lack of property or familial links should not alone be sufficient grounds to deny release. A refusal to grant early release should be based on additional factors; such as the possession of a false passport, the use of a false name, previous attempts to evade being taken into custody³⁴. Decisions on the risk of absconding should be made on a case-by-case basis.

In some countries it may be possible to grant conditional release even where a foreign prisoner is

subject to expulsion but where the possibility exists that such order may be reversed at a later stage in case the prisoner has abided by the conditions set for his release. Moreover, foreign prisoners should be considered for all possible early release schemes, particularly where they are parents with young children. In order to enable them to understand and participate in the decision-making process relating to their release, foreign prisoners should have access to legal advice and assistance (see Rule 21).

Release from prison

Rule 37

Upon release from prison, some foreign prisoners may remain in the state in which they were detained while others will leave that state. In all cases, the relevant authorities, including, where necessary, the foreign prisoners' consular representatives, should assist such prisoners to have in their possession the necessary identification papers and other documents that would allow them to find housing and employment and to travel to their chosen place of residence (Rule 37.1, see also Rule 33.7 European Prison Rules). Foreign prisoners should also be provided with a copy of their medical records. Where they can do so, and where foreign prisoners consent, consular representatives should also assist them with travel arrangements that would enable them to reach their chosen destination (Rule 37.2, see also Rule 33.8 European Prison Rules).

In many countries, prisoners are paid for the work they undertake in prison. Upon release, salaries for such work may not yet have been paid. In such circumstances, the prison or consular authorities should facilitate the payment or transfer of such sums to the foreign prisoner (Rule 37.2). Where foreign prisoners are to return to another country, prison authorities shall ensure the return of any property or monies that may be owing to them at their release. Where social security benefits are to be transferred to another country (see Rule 27.4), consular representatives may be able to provide assistance.

VII. Persons who work with foreign prisoners

Selection

Rule 38

As noted in the preamble to the Recommendation, foreign prisoners may face specific problems and be prone to feelings of isolation. In order to alleviate these difficulties, persons selected to work with foreign prisoners should possess well-developed interpersonal communication skills³⁵, be familiar with different cultures and at least some of these people should have the language skills required to communicate with these prisoners,³⁶ through either the prisoners' language or a common international language. Where possible, such persons should also be selected to represent the various cultural and linguistic backgrounds of the prisoners with whom they work.³⁷ In addition, such persons should have the qualities necessary to form good human relationships and a willingness to learn (See paragraphs 7 and 10, Recommendation (97)12 on staff concerned with the implementation of sanctions and measures).

Training

Rule 39

Staff who work with foreign prisoners should be provided with specialised training on the specific issues that affect foreign prisoners. This applies particularly to those involved in the admission process when foreign prisoners may be particularly vulnerable and confused (Rule 39.1, see also Rule 15). Such training should focus on respect for cultural diversity.³⁸ To enable staff to deal with particular problems faced by foreign prisoners training should be provided on methods to recognise possible symptoms of stress, whether post-traumatic or induced by socio-cultural change, and the appropriate action to be taken³⁹ (Rule 39.2). The CPT has commented that language barriers can prevent effective communication.⁴⁰ Accordingly, staff should be provided with information about the different languages spoken by the prisoners with whom they work and opportunities to learn such languages or a common language (Rule 39.3).

It is also important for all persons who deal with foreign suspects and offenders, to be aware of and understand relevant legal and human rights standards and to apply such standards in their

everyday work. Training on these standards must therefore be provided and regularly revised to ensure it reflects changes in the law but also in the prison and probation population and the wider social situation (Rule 39.5). This will ensure these persons are equipped with the necessary knowledge to deal with foreigners. In addition to in-house training, those who work with foreigners may also benefit from exchange programmes where they spend time working in a prison or probation system in another country. A further example of good practice can be found in Austria, where the Ministry of Justice meets annually with the Consular Club to discuss the current state of the law and rules regarding foreigners.

Specialisation

Rule 40

Consideration should be given to creating specific posts or roles for persons who would be responsible for overseeing and evaluating the implementation of policies and practices relating to foreign prisoners. The creation of such posts would facilitate direct contact between the prison and probation services and other bodies, including national and international agencies, professionals and associations, consular representatives, the prisoners' families and volunteers who assist foreign suspects and offenders. This form of liaison is crucial for dealing effectively with foreign suspects and offenders and their specific needs.

VIII. Policy evaluation

Rule 41

In order to design effective policies to deal with foreign suspects and offenders, it is necessary to have access to current and accurate information and research about the proportion of foreign suspects and offenders involved in the criminal justice process, the range of sanctions or measures that are being imposed on such suspects and offenders and decisions on their release, transfer, extradition and expulsion (see §§J1-J5 of Recommendation on R(92)17 Consistency in Sentencing). Authorities therefore need to fund and initiate scientific research based on the collection of empirical information and data. This research should underpin the evaluation and revision of policies to reflect contemporary realities and standards. Ideally, this research should also facilitate comparisons and discussions with other states and organisations.

¹ This document has been classified restricted until its examination by the Committee of Ministers.

² A M van Kalmthout, F B A M Hofstee-van der Meulen and F Dünkel (eds.), *Foreigners in European Prisons* (2007); United Nations Office on Drugs and Crime, *Handbook on Prisoners with special needs* (2009).

³ CPT visit to Bulgaria, 2006 (CPT/Inf(2008)11), para 105.

⁴ See Art. 19(2) EU Charter of Fundamental Rights of the European Union (2000/C 364/01).

⁵ The most recent statistics on foreign prisoners in Council of Europe prisons are based on figures collected for 2010. The percentage of foreign prisoners in the prisons of Member States (42 of 52 prison administrations) ranged from 0.7% (Poland) to 91.7% (Monaco). The average percentage of foreign prisoners per prison population was 21.2% and the median percentage was 11.0% for those countries. The range of percentages of pre-trial detainees among foreign prisoners is relatively similar, ranging from 10.4% (Azerbaijan) to 75.6% (Bosnia and Herzegovina: Federal administration). However, the average percentage of foreign prisoners in pre-trial detention nearly doubles, with the average being at 40.1% and the median almost four times higher is 40.0%. Countries with 40% and over of foreigners who are in pre-trial detention are: Liechtenstein (40.0%), Croatia (43.0%), Luxembourg (45.3%), Italy (49.6%), Slovak Republic (50.6%), Finland (50.6%), Poland (50.7%), Latvia (51.8%), Turkey (52.1%), Norway (53.2%), the Netherlands (53.2%), Serbia (54.4%), Slovenia (55.0%), Andorra (56.0%), Denmark (57.2%), Albania (60.3%), UK: Northern Ireland (64.3%), and Bosnia and Herzegovina: Federal administration (75.6%). The average percentage of foreigners among the total number of pre-trial detainees (all those who are not serving a final sentence) is 28.1% and the median is 23.3%. The percentage of foreigners on the pre-trial populations is above 30% in Finland (32.2%), Denmark (34.6%), Portugal (34.8%), Estonia (38.0%), Italy (41.1%), Spain: State Administration (45.5%), Germany (46.1%), Liechtenstein (57.1%), Norway (57.5%), Switzerland (60.9%), Austria (62.5%), Spain:

Catalonia (63.2%), Monaco (66.7%), Andorra (70.0%), Luxembourg (79.2%). See Council of Europe Annual Penal Statistics, SPACE I, 2010 [PC-CP (2012) 3] (website: www.coe.int/prison).

⁶ Van Kalmthout, Knapen and Morgenstern (eds.) Pre-Trial Detention in the European Union, 2009 at 95.

⁷ EU Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. Member States need to take the necessary measures to comply with this Framework Decision by 1 December 2012 (Art. 27(1)).

⁸ See articles 3.1, 9.3, 18 and 20.

⁹ CPT visit to Sweden, 2009, CPT/Inf(2009)34 para 76; CPT visit to Austria 2004, CPT/Inf(2005)13, para 108; CPT visit to Denmark 1990, CPT/Inf(91)12, para 109; CPT visit to Germany, 2005, CPT/Inf(2007)18, para 153; CPT visit to the Slovak Republic, 1995, CPT/Inf(97)2, para 147; CPT visit to Norway, 1993, CPT/Inf(94)11, para 130; CPT visit to Finland, 1992, CPT/Inf(93)8, para 142; CPT visit to Greece, 1993, CPT/Inf(94)20, para 102; CPT visit to Spain, 2007, CPT/Inf(2011)11, para 118; CPT visit to Italy 1992, CPT/Inf(95)1, para 61.

¹⁰ CPT visit to Greece, 1997, CPT/Inf(2001)18, para 190; CPT visit to the Slovak Republic, 1995, CPT/Inf(97)2, para 147.

¹¹ Jakóbski v Poland (Application N° 18429/06, 7 December 2010).

¹² CPT visit to UK, 2008, CPT/Inf(2009)30, para 80.

¹³ CPT visit to Finland 1992, CPT/Inf(93)8, para 142.

¹⁴ See 2nd General Report [CPT/Inf (92) 3] para 5.1, CPT visit to Bulgaria 2006, CPT/Inf(2008)11, para 105; CPT visit to Netherlands (Antilles) 1994, CPT/Inf(96)1, para 110.

¹⁵ CPT visit to Bulgaria 2008, CPT/Inf(2010)29, paras 79-80; CPT visit to Hungary 2003, CPT/Inf(2004)18, para 52.

¹⁶ CPT visit to Portugal 2008, CPT/Inf(2009)13, para 65; CPT visit to Austria 1994, CPT/Inf(96)28, para 140.

¹⁷ CPT visit to Denmark 1990, CPT/Inf(91)12, para 107.

¹⁸ CPT visit to Austria 2004, CPT/Inf(2005)13, para 108; CPT visit to Denmark 1990, CPT/Inf(91)12, para 109.

¹⁹ CPT visit to the Netherlands (Aruba) 2007, CPT/Inf(2008)2, para 70.

²⁰ CPT visit to Malta, 2001, CPT/Inf(2001)16, para 61.

²¹ CPT visit to Austria 2009, CPT/Inf(2010)5, paras 52 and 111; CPT visit to Norway 2005, CPT/Inf(2006)14, para 77; CPT visit to Serbia and Montenegro 2004, CPT/Inf(2006)18, para 285.

²² Para 9 Ethical and Organizational Aspects of Health Care in Prison COE [Rec\(98\)7](#), para 37 CPT Third General Report; paras 112-117 Tarariyeva v Russia (4353/03) 14.12.06.

²³ 7th General Report, CPT/Inf(97)10, para 36. on medical ethics during expulsion procedures.

²⁴ CPT visit to UK, 2008, CPT/Inf(2009)30, para 80.

²⁵ 11th General Report, CPT/Inf(2001)16, para 27.

²⁶ CPT visit to Finland, 1992, CPT/Inf(93) 8, para 142.

²⁷ 10th General Report [CPT/Inf(2000)13], para 21.

²⁸ 10th General Report [CPT/Inf(2000)13], para 31.

²⁹ COE Parliamentary Assembly Recommendation 1469 (2000) and Rule 10, Recommendation [Rec\(2006\)13](#) on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

³⁰ See also 3rd General Report [CPT/Inf(93)12] para 65.

³¹ 10th General Report [CPT/Inf(1999)13], para 27.

³² 10th General Report [CPT/Inf(2000)13], para 29.

³³ See the preamble of the Council of Europe Convention on the Transfer of Sentenced Persons and para 9 of the EU Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

³⁴ *Sardinas Albo v Italy* (Application N° 56271/00) 17 February 2005, para 93 and *Chraidi v Germany* (Application N° 65655/01) 26 October 2006, para 40.

³⁵ See 2nd General Report, CPT/Inf(92)3, para 60.

³⁶ See 7th General Report, CPT/Inf(97)10, para 29.

³⁷ See 11th General Report, CPT/Inf(2001)16, para 26.

³⁸ CPT visit to Austria 2009, CPT/Inf(2010)5, para 110; CPT visit to Austria 2004, CPT/Inf(2005)13, para 108; CPT visit to Malta 2001, CPT/Inf(2002)16, para 61; CPT visit to Denmark 1990, CPT/Inf(91)12, para 109; CPT visit to Switzerland, 1991, CPT/Inf(93)3, para 65; CPT visit to Greece, 1993, CPT/Inf(94)20, para 102.

³⁹ See 7th General Report, CPT/Inf(97)10, para 29.

⁴⁰ See CPT visit to Spain, 2007, CPT/Inf(2011)11, paras 87 and 118.