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**OPEN-ENDED INTERGOVERNMENTAL EXPERT GROUP  
ON THE STANDARD MINIMUM RULES FOR THE  
TREATMENT OF PRISONERS**

**BRASILIA, BRAZIL, 28 – 31 January 2014**

**Contributions for the revision of the United Nations  
Standard Minimum Rules for the Treatment of Prisoners<sup>1</sup>**

**Prepared by**

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<sup>2</sup> The opinions expressed in this report are those of the authors and do not necessarily reflect those of the United Nations Office on Drugs and Crime.

## CONTRIBUTIONS FOR THE REVISION OF THE UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS

### I. INTRODUCTORY REMARKS

The present document gathers the proposals of the Center for Legal and Social Studies (CELS) and of the Conectas Human Rights (Conectas) for the review process of the Standard Minimum Rules for the Treatment of Prisoners of the United Nations (Standard Minimum Rules or SMR). Both organizations have been following this process since its beginning<sup>1</sup>.

The Centre for Legal and Social Studies (CELS) is a non-governmental organization, which has worked since 1979 for the promotion and protection of human rights and the strengthening of the democratic system in Argentina<sup>2</sup>. Its main objectives are to report human rights violations, influence the process and design of public policies based on the respect for fundamental rights, foster legal and institutional reforms aimed at improving the quality of democratic institutions, and promote the exercise of human rights among the most vulnerable sectors of society. CELS devotes itself to the protection of human rights of persons deprived of their liberty, by taking action before courts of justice through *amicus curiae*, producing specialized knowledge and seeking to influence the design and implementation of public policies. In this respect, CELS has been advocating for the validity of international human rights standards concerning institutional practices in places of detention, incorporating the instruments of the Universal system as well as the Inter-American human rights system<sup>3</sup>.

Conectas Human Rights is a non-governmental international organization founded in September 2012 in São Paulo, Brazil. Its mission is to promote the realization of Human Rights and the Rule of Law in the Global South – Africa, Latin America and Asia.<sup>4</sup> At the domestic level, Conectas works for the respect of

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<sup>1</sup> In this respect, these have taken part in both expert meetings held in Vienna and Buenos Aires in 2012, as well as in the Commission on Crime Prevention and Criminal Justice, monitoring together with a group of national and international organizations the progress in the discussion regarding the revision of the document.

<sup>2</sup> The CELS is a non-governmental organization with consultative status before the Economic and Social Council of the United Nations (ONU). Cf. List of non-governmental with consultative status in the Economic and Social Council, E/2012/INF/6, 5 April 2013, available in: <http://csonet.org/content/documents/E2012INF6.pdf>

<sup>3</sup> For Argentina and CELS, the review process of the Standard Minimum Rules for the Treatment of Prisoners of United Nations (Standard Minimum Rules) is particularly interesting, therefore the Supreme Court of Justice established the Standard Minimum Rules as the fundamental standard to which every detention should adjust. In this way, the amendments discussed during this revision process will affect the actual protection of the rights of persons deprived of their liberty in the country. Cfr. Resolution of the CSJN in the case V856/02, "Verbitsky, Horacio (representative of the Centre of Legal and Social Studies) s/Habeas Corpus", judgment of 3 May 2005. For more information about the case, the judgment and its execution, consult <http://www.cels.org.ar/agendatematica/?info=detalleTpl&ss=171&ids=158&item1=172&item2=192&idc=>

<sup>4</sup> Since January 2006, Conectas with consultative status before the Economic and Social Council of the United Nations and since May 2009 has the observer status in the African Commission of Human and Peoples' Rights.

human rights in the penitentiary and criminal justice system, through legal and administrative proceedings. Conectas is the Brazilian organization that has contributed the most with *amicus curiae* before the Federal Supreme Court regarding human rights issues. Moreover, Conectas relies upon regional and international mechanisms for human rights protection.

CELS and Conectas elaborate this proposal considering the reality of the places of detention in Latin America. For this reason, the decision has been taken to work specifically on some of topics defined as priority in the framework of process of revision<sup>5</sup> (primary topics), to which other topics of national and regional importance were added.<sup>6</sup>

Therefore, of the primary topics, this document includes contributions on:

- A. *Respect for prisoners' inherent dignity and value as human beings;*
- B. *Medical and health services;*
- C. *Disciplinary action and punishment, including the role of medical staff, solitary confinement and reduction of diet;*
- D. *Investigation of all deaths in custody, as well as any signs or allegations of torture or inhuman or degrading treatment of prisoners;*
- E. *Complaints and independent inspection;*
- F. *Protection and special needs of vulnerable groups deprived of their liberty;*

Moreover, proposals about the following additional topics are included:

- A. *Role of the State as guarantor;*
- B. *Non-violent management of places of detention;*
- C. *Body Searches;*
- D. *Definition of prison capacity\* and measures against overcrowding and*
- E. *Transfers*

In order to reflect the advances made in the protection of human rights of persons deprived of liberty in the Americas on the updating process of the Standard Minimum Rules, a study of the main standards defined by the bodies of the Inter-American human rights system has been carried out. Mainly, the proposals herein come from this base.

Hereinafter, CELS and Conectas contributions regarding some of the primary topics of the process will be presented. Secondly, the proposals in relation to the additional topics considered relevant for discussion will follow.

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<sup>5</sup> Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012. UNODC/CCPCJ/EG.6/2012/1, 16 February 2012.

<sup>6</sup> This document does not consider itself exhaustive regarding all the possible changes that the Standard Minimum Rules would require for their full adjustment to the current standards of the international human rights law. Furthermore, CELS took part in the Second Meeting of Experts convened by the University of Essex on 12 and 13 September 2013 and, hence, in the elaboration of its conclusions and contributions to the review process.

\* The concept of "*plaza penitenciaria*" does not correspond exclusively to the physical space indispensable for the survival of the person deprived of his/her liberty; rather, it is a broader concept referred to the set of necessary provisions to ensure a decent life to the persons deprived of their liberty.

## II. CONTRIBUTIONS ON THE PRIORITY TOPICS OF THE REVIEW PROCESS OF THE STANDARD MINIMUM RULES

### A. Respect for prisoners' inherent dignity and value as human beings

There is no contestation under international human rights law that the State has the obligation to treat persons deprived of their liberty according to the due respect for their inherent human dignity. Such has been reflected in the elaboration of several international human rights instruments, in which the principle of dignified treatment has been established as the guiding rule for their implementation and application.<sup>7</sup>

The present text of the Standard Minimum Rules does not include a rule of such kind. References to the dignity of the person deprived of liberty is included only in the Rule 60, which indicates that the prison establishment's regime should try to reduce the differences that may exist between life in prison and life in freedom, since these lessen the respect for human dignity.<sup>8</sup>

It is crucial to include a specific regulation that works as a general principle to fill in this regulatory gap and to refer specifically to the inherent human dignity of persons deprived of their liberty<sup>9</sup>. This principle must be understood as an insurmountable limit to the actioning of the Administration, and as the parameter for evaluating the opportunity and the convenience of public policies in the places of deprivation of liberty.<sup>10</sup>

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<sup>7</sup> Among these, it should be mentioned the International Covenant on Civil and Political Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of the United Nations, the American Convention on Human Rights and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

Article 10.1 The International Covenant on Civil and Political Rights (1966): "*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*"; Article 5.2 of the American Convention on Human Rights (1969): "*No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.*"; Principle 1 of The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988): "*All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person*"; Principle 1 of The Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Resolution 1/08 of the IACHR, OAS. (2008): "*Human treatment: All persons subject to the jurisdiction of any Member State of the Organization of American States shall be treated humanely, with unconditional respect for their inherent dignity, fundamental rights and guarantees, and strictly in accordance with international human rights instruments...*"

<sup>7</sup> Rule 60. 1) of the Standard Minimum Rules for the Treatment of Prisoners of the United Nations.

<sup>8</sup> Rule 60. 1) of the Standard Minimum Rules for the Treatment of Prisoners of the United Nations.

<sup>9</sup> In this point, it is relevant to point out that we understand that The Standard Minimal Rules shall be applicable to all persons deprived from their liberty, considering the deprivation of liberty in a broad sense, without restricting it to people in prison or police stations. Thus, we consider correct the definition of deprivation Principles and Best Practices on the Protection of Persons deprived of their liberty in the Americas, adopted in the resolution 1/08 The Inter-American Commission on Human Rights (IACHR), which expresses that deprivation of liberty is: "*Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty.*" On the other hand, the article 4.2 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment establishes that "*...deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.*" In this respect, the Special Rapporteur on Torture, regarding the process of revision of the Standard Minimum Rules, signaled that: "*...the Special Rapporteur urges that it be made explicit that the Rules are applicable to all forms of deprivation of liberty, without exception and regardless of the legal status of the imprisoned person...*" Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para. 28.

<sup>10</sup> In this respect: Report on the meeting of the Expert Group on the United Nations Standard Minimum Rules for the Treatment of Prisoners held in Buenos Aires from 11 to 13 December 2012. UNODC/CCPCJ/EG.6/2012/4 Para. 8.c); UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 4 and Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. E/CN.15/2013/CRP.6 Rules 1bis, 2bis and 6.4.

As a corollary of the obligation of humane treatment, the Standard Minimum Rules should specify that the deprivation of liberty under conditions of overcrowding, limited light or ventilation, or inadequate sanitary conditions, is against the human dignity and violates the integrity of persons deprived of liberty<sup>11</sup>. Moreover, the specific disposition contained in current Rule 57, which sets that the penitentiary system shall not worsen the sufferings of the deprivation of liberty, could be included in this general rule about the respect for human dignity. The latter must be articulated with current Rule 60.1 which states that the regimen in the institution should try to minimize any difference between life in prison and free life.<sup>12</sup>

## B. Medical and health services

The interpretation of the right to health adopted by the current international standards includes a wide range of socio-economic factors that promote the conditions in which persons can have a healthy life<sup>13</sup>, and comprise the basic determinant factors of health,<sup>14</sup> such as an adequate supply of safe food and nutrition, housing, access to safe water and adequate sanitary conditions, among others.<sup>15</sup> The fundamental line of this approach is to design public policies in terms of health promotion, defined by the World Health Organization (WHO) as “the process of enabling people to increase control over, and to improve, their health.”<sup>16</sup> As an operative pattern, this perspective requires to direct and define health public policies towards a model which ensures the highest level of health and well-being for all the population, through the promotion of environmental changes to protect health and reduce the probability of getting sick. The latter implies working in a preventive manner to reduce risk factors. The health promotion perspective – regarding levels of attention- correlates with the primary health care (PHC),<sup>17</sup> level which must be strengthened in the sanitary policies of the State, including those directed to the places of deprivation of liberty. According to this approach, for example, health promotion should be addressed in an

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<sup>11</sup> I/A Court HR. Case of Pacheco Teruel v. Honduras. Judgment of April 27, 2012. Merits, Reparations and Costs. Para.131; I/A Court HR. Case of Fleury and others v. Haiti. Judgment of November 23, 2011. Merits, Reparations and Costs. Para.85; I/A Court HR. Case of Yvon Neptune v. Haiti. Judgment of May 6, 2008. Merits, Reparations and Costs. Para.131; I/A Court HR. Case of Boyce and others v. Barbados. Judgment of November 20, 2007. Preliminary Exception, Merits, Reparations and Costs. Para. 94 and I/A Court HR. Report on the Human Rights of Persons Deprived of Liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, December 31, 2011. Para.103 and 460.

<sup>12</sup> In this respect: Report on the meeting of the Expert Group. Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para.8.b) and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 3.

<sup>13</sup> See in this respect, for example, the article 12 of the International Covenant on Economic, Social and Cultural Rights.

<sup>14</sup> In this respect, the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in 2008 highlights that: “...*The health of individuals, communities and populations requires more than medical care. For this reason, international human rights law casts the right to the highest attainable standard of physical and mental health as an inclusive right extending to not only timely and appropriate medical care but also the underlying determinants of health (...). The social determinants of health, such as gender, poverty and social exclusion, are major preoccupations of the right to the highest attainable standard of health (...).*”. Cf. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. A/HRC/7/11 31 January 2008, Para. 45.

<sup>15</sup> Committee on Economic, Social and Cultural Rights. General comment No. 14: the right to the highest attainable standard of health (art. 12) Twenty-second session (2000) E/C.12/2000/4 (2000), Para. 4. Similarly, the Committee on Social Determinants of Health of the World Health Organization in its report of March 16, 2009 (Documents A62/9 and WHA62.14). In this respect, regarding the determinants of health, see Report on the meeting of the Expert Group. Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para.9.a).

<sup>16</sup> Cf. Glossary on Health Promotion of the Division of Health Promotion, Education, and Communication, Health Education and Health Promotion Unit, World Health Organization (WHO), 1998 (WHO/HPR/HEP/98.1). Takes as a reference Ottawa Charter for Health Promotion, WHO, Geneva, 1986.

<sup>17</sup> According to the Declaration of Alma-Ata, adopted by the WHO in 1978 in Geneva, the primary health is the essential health care, universally accessible at a cost that the community and country can afford, it is performed by scientifically found and socially accepted methods. Cf. Glossary on Health Promotion of the Division of Health Promotion, Education and Communication, Health Education and Health Promotion Unit, World Health Organization (WHO), 1998 WHO/HPR/HEP/98.1.

interdisciplinary manner, since the integration of knowledge is essential to understand what are the social determinants of health and its particular characteristics in contexts of confinement.<sup>18</sup>

According to the principles of equity and integration, States have to ensure the articulation and integration between health policies directed to the population in general and those directed to persons deprived of liberty, guaranteeing equality in every stage: promotion, prevention, health care and treatment<sup>19</sup>. However, the current redaction of the Standard Minimum Rules evidences an anachronistic view concerning these standards that delimit the dimensions to be considered by States when designing their sanitary policies in contexts of imprisonment. It is therefore compelling to revise and adequate the general approach of Rules 22 to 26.

In this context, from the point of view of health promotion, the present section seeks to point out certain fundamental aspects to the guarantee of the enjoyment of the highest attainable standard of physical and mental health of persons deprived of their liberty. At the same time, the indicated provisions are fundamental for the prevention of acts of torture or other cruel, inhuman or degrading treatment in the sphere of sanitary intervention in situations of imprisonment.

Firstly, regarding the services of primary health care and of high complexity, it is essential to ensure the continuity of the provision of health care services before, during and after the deprivation of liberty.<sup>20</sup> The need for coordination between the health care services provided in the places of deprivation of liberty and the system of public health as a whole has been highlighted by the Inter-American Commission on Human Rights (IACHR)<sup>21</sup>. In this way, for example, before the release, the health personnel of the corresponding establishment should design an adequate plan with the aim of guaranteeing the continuity of the medical care and access to health care services of the person in the community.

Moreover, it is central to mention the importance of the independency and autonomy of the health personnel in places of deprivation of liberty. These not only contribute to the general articulation of the sanitary services and favor the development of sanitary policy, but also constitute a key factor to prevent torture, and other cruel, inhuman and degrading treatment<sup>22</sup>. Also, only health professionals should be

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<sup>18</sup> To design a health policy based on the principle of promotion of health, disciplines such as sociology, political science, work relations, recreation, physical education, among others, have to be part of the policymaking team. In this respect, the joint proposal of the States of Argentina, Brazil, EE.UU., South Africa, Uruguay and Venezuela contributes to this line of thought, stating that an effective prison management program should take into consideration the prisoners needs with respect to education, meaningful work, health care, exercise and cultural activities. Cf. Proposal of the Governments Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. E/CN.15/2013/CRP.6 Rules 6.5.

<sup>19</sup> Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Resolution 1/08 of the IACHR, OAS.(2008) and IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, 31 December 2011. Para. 534.

In the same respect: Report on the meeting of the Expert Group. Buenos Aires, 2012.UNODC/CCPCJ/EG.6/2012/4 Para.9.e); Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. E/CN.15/2013/CRP.6 Rule 22.1 and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Pages 5 and 6.

<sup>20</sup> In this respect: Report on the meeting of the Expert Group. Buenos Aires 2012. UNODC/CCPCJ/EG.6/2012/4 Para.9.a) and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 6.

<sup>21</sup> Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Resolution 1/08 of the IACHR, OAS.

<sup>22</sup> I/A Court HR. Case of Montero Aranguren and others (Retén de Catia) v. Venezuela.Preliminary exception, Merits, Reparations and Costs. Judgment of July 5, 2006. Para.102; I/A Court HR. Case of VélezLor v. Panamá. Preliminary exception, Merits, Reparations and Costs. Judgment of November 23, 2010. Para.220; I/A Court HR. Case of Díaz Peña v. Venezuela.Preliminary exception, Merits, Reparations and Costs. Judgment of June 26, 2012. Para.137; I/A Court HR. Case of Cabrera García and Montiel Flores v. México.Preliminary exception, Merits, Reparations and Costs. Judgment of November 26, 2010. Para.135 and IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, December 31, 2011. Para. 561.

present when medical examinations are required in order to avoid abuse by penitentiary personnel, and to preserve the principles of confidentiality, independence and autonomy of the health personnel<sup>23</sup>. This must be always accomplished, except in qualified cases for security reasons, which should be strictly defined and delimited.

Notwithstanding the State obligation to provide a regular, adequate and timely medical care through autonomous and independent medical personnel, it is furthermore relevant that, whenever possible, the State guarantees to all persons deprived of their liberty the possibility to be treated by the medical personnel of their preference. This criterion has been developed in various occasions by the Inter-American Court of Human Rights, under the reasoning that in the same way that any person has the right to be assessed and to be represented by a lawyer of their trust, also persons deprived of their liberty should be allowed to be treated by a doctor of their choice or chosen by their representatives or legal custody<sup>24</sup>.

All the general aspects presented up to this point regarding medical and health care services should be taken into consideration in the review of the current text of the Standard Minimum Rules in order to readjust it to the current standards of the international human rights law. Below, more specific issues are addressed, which are of particular relevance to the regulation of health care in places of deprivation of liberty.

#### *i. Informed consent*

As the UN Special Rapporteur on the right to health has acknowledged in his report of 2009<sup>25</sup>, the informed consent warranty is fundamental to the achievement of the enjoyment of the right to health through practices, policies and investigations in which the autonomy, the free determination and the human dignity are respected. In this respect, the Standard Minimum Rules should enshrine the duty of States to ensure an environment for health care in which informed consent is prioritized, regarding assessment, tests and treatment, in order to create a continuous and effective process of voluntary health care. Moreover, as developed in more detail further on, the Special Rapporteur against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has recently pointed out that the warranty of informed consent is closely related with the prevention of torture and ill-treatments in health interventions<sup>26</sup>.

The context of imprisonment favors the coercive interventions that weaken the voluntary health care. It is thus compelling that the Standard Minimum Rules establish safety measures of informed consent in every stage of health care. These measures require that States guarantee fully available, acceptable, accessible and good quality information, which is transmitted and understood through support and protective measures, such as the counseling and intervention of community nets. As a corollary, the standardization of restrictive practices and the unification of medical records' formats would facilitate the external control over the performance of professionals<sup>27</sup>.

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<sup>23</sup> I/A Court HR. Case of Bulacio v. Argentina. Merits, Reparations and Costs. Judgment of September 18, 2003. Para. 131.

<sup>24</sup> I/A Court HR. Case of Bulacio v. Argentina. 2003 Op. Cit. Para. 131; I/A Court HR. Case of De la Cruz Flores v. Peru. Merits, Reparations and Costs. Judgment of November 18, 2004. Para. 132; I/A Court HR. Case of Montero Aranguren and others (Retén de Catia) v. Venezuela. 2006. Op. Cit. Para. 102

<sup>25</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 31 March 2009, A/HRC/11/12

<sup>26</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 1 February 2013, A/HRC/22/53.

<sup>27</sup> Regarding the external controls of clinical records and protocols, a specific recommendation will be given in the section related to "complaints and independent inspections".

## *ii. Role of the health personnel as guarantor*

The health personnel deployed in places of deprivation of liberty perform a fundamental role in safeguarding the rights to life, health care, and physical and mental integrity of persons deprived of their liberty. In this respect, the current Rule 25 points out that it is a duty of the physician to care for the physical and mental health of the person deprived of liberty. In the process of revision, this duty should be extended explicitly to all the health personnel and not just physicians.

In this context, a rule should be included to establish the health personnel's obligation to register all cases of abuse or torture that they may take cognizance while performing their job, and to report or inform to the corresponding authority with the previous consent of the person deprived of his/her liberty.<sup>28</sup>

Notwithstanding the relevance of the content of current Rule 26, regarding the duty of the doctor to perform periodic inspections and to advise the authority, it is necessary to reformulate it. On the one hand, in order to extend it to all the health personnel of the establishment, and on the other hand, to include among the main aspects to be inspected and assessed any other situation that may affect the physical or mental health of persons deprived of their liberty, related to the protection and promotion of health as a whole.

Furthermore, concerning the disciplinary regime inside the places of detention, the health personnel have traditionally performed two functions. First, as the legitimating authority for the sanction's imposition by certifying that the person is able to undergo it, and secondly, as a health professional that visits punished persons and informs to the authority whether the punishment has to be modified due to health reasons. According to current international standards, it clearly goes against medical ethics that health personnel verifies or certifies that a person deprived of liberty is under conditions to receive any type of treatment or punishment that could negatively affect his/her health.<sup>29</sup> It follows that current Rule 32, in its items 1 and 2, is in contravention of medical ethics and, therefore, should be eliminated from the new formulation.<sup>30</sup>

Similarly Rule 33.b), which allows the utilization of means of coercion for medical reasons, by medical prescription, must be eliminated from the text of the Standard Minimum Rules, since it goes against the basic principles of medical ethics and violates the dignity of the person deprived of liberty, who is subject to these "medical" coercive measures.<sup>31</sup>

## *iii. Specialised health care*

Notwithstanding the coordination and articulation between general health public policies directed to the free population with those directed to persons deprived of their liberty, and considering the special features of life in contexts of deprivation of liberty- which frequently includes overcrowding problems and deficient habitability conditions, which favors infections diseases transmission- it is necessary to incorporate a Rule

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<sup>28</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, 31 December 2011. Para. 564.

In this respect: Report on the meeting of the Expert Group. Buenos Aires. 2012, UNODC/CCPCJ/EG.6/2012/4, Para.9.d) and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2, Page 8.

<sup>29</sup> Principle 4.b of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN. 1982.

<sup>30</sup> In this respect: Report on the meeting of the Expert Group. Buenos Aires, 2012. UNODC/CCPCJ/EG.6/2012/4 Para.10.g and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Pages 7 and 14.

<sup>31</sup> Principle 5 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN. 1982.

regarding the obligation of the State to guarantee specialised health care and treatment for high risk groups inside places of detention, in particular for those infected with HIV, hepatitis, tuberculosis, etc.<sup>32</sup> In this respect, it is relevant to mention that the current Standard Minimum Rules refer to the infectious illnesses when dealing with the medical examination at the moment of entry to the establishment and only to ensure the isolation of the patient.

Moreover, some of the main problems with the specialised care and treatment of persons deprived of their liberty are the limitations of the places of deprivation of liberty, which generally lack the adequate facilities, the suitable health professionals and/or the necessary medical instruments. Rule 22.1 refers to the transfer of persons deprived of their liberty who require special care to specialised establishments or hospitals outside the centers of deprivation of liberty. It is important to reformulate this Rule in order to emphasize that the Administration has to guarantee the access of persons deprived of their liberty to specialised highly-complex care and treatment, ensuring their move to hospitals or other health services of the community whenever needed and/ or by way of regular visits by appropriate health professionals.<sup>33</sup>

#### **iv. *Women and children***

Regarding the medical care of women deprived of their liberty and children who live with them, current Rule 23 refers to the need of suitable facilities for pregnant and breastfeeding women, the prevention of children from being born inside the establishments and the existence of nurseries with qualified personnel for when children are allowed to be with their mothers.

In this context, it is foremost relevant to include in the Standard Minimum Rules a disposition that prioritizes alternatives to the deprivation of liberty in these cases. Without prejudice to it, it is also important to include in the reformulation of the SMR the duty of the State to ensure the provision of specialized health care for women deprived of their liberty, including, among others, pre and post-natal care by qualified health personnel in adequate facilities, taking into account that the need for specialized health care of women deprived of their liberty is bigger than the care related to pregnancy.<sup>34</sup>

Furthermore, it should be included a rule related to the need of suitable sanitary facilities and health professionals to provide an adequate medical care and treatment for children whose mother or father is deprived of liberty<sup>35</sup>

Considering the progressive development of the international human right law, it is indispensable that the Standard Minimum Rules incorporate the international standards recognized in the "Bangkok Rules", referring to them explicitly.<sup>36</sup>

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<sup>32</sup> Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Resolution 1/08 of the IACHR, OAS. (2008) and IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, 31 December 2011. Para. 535.

In this respect: Report on the meeting of the Expert Group. Buenos Aires, 2012. UNODC/CCPCJ/EG.6/2012/4 Para.9.a) and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 5.

<sup>33</sup> In this respect, Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. E/CN.15/2013/CRP.6 Rule 22.3

<sup>34</sup> Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Resolution 1/08 of the IACHR, OAS. (2008).

In this respect: Report on the meeting of the Expert Group. Buenos Aires, 2012. UNODC/CCPCJ/EG.6/2012/4 Para. 9.b)

<sup>35</sup> Principle X of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Resolution 1/08 of the IACHR, OAS. (2008).

In this respect: Report on the meeting of the Expert Group. Buenos Aires, 2012. UNODC/CCPCJ/EG.6/2012/4 Para. 9.c)

### C. Solitary Confinement<sup>37</sup>

This Section refers to solitary confinement, understood in its broad sense: as a disciplinary action, as part of the judicially imposed sentence and as a security or protective measure.

Current Rule 31 prohibits corporal punishment, solitary confinement in darkcell, or any other cruel, inhuman or degrading punishment; whereas Rule 32 establishes that solitary confinement may be possible only after previous medical certification. In view of the above, two issues arise: on the one hand, in general terms, the current Standard Minimum Rules do not prohibit solitary confinement *per se*; but on the other hand, it is forbidden if it occurs in a dark cell or in any other cruel, inhuman or degrading conditions. It is essential that the Standard Minimum Rules incorporate certain amendments and specifications in their present text in order to be adapted to the progressive development of the international human rights law.

Although the issue at stake has already been developed in the previous section about medical and health care services, it is important to reaffirm the need for the elimination of any reference to medical certifications regarding the capability of a person deprived of liberty to stand a punishment or any procedure that can negatively affect his/her health.<sup>38</sup>

Additionally, taking into account the international acknowledgment that deprivation of liberty in prolonged solitary confinement constitutes a form of cruel, inhuman and degrading treatment<sup>39</sup>, the present Rule 31 must be reviewed to explicitly include its prohibition, along with corporal punishment and placing in a dark cell.<sup>40</sup>

Regarding prolonged solitary confinement, the Inter-American Commission of Human Rights has pointed out that “... *the prohibition of torture and cruel, inhuman, and degrading treatment may not be abrogated and is universal. Accordingly, the OAS Member States must adopt strong, concrete measures to eliminate the use of prolonged or indefinite isolation under all circumstances*”<sup>41</sup> In this respect, the Interamerican Court of Human Rights has stated on several occasions that “*prolonged isolation and being held*

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<sup>36</sup> General Assembly of the UN, Res. 65/229. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). In this respect: Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. E/CN.15/2013/CRP.6 Rules 2 ter and 22.5.

<sup>37</sup> Priority area c) *Disciplinary action and punishment, including the role of medical staff, solitary confinement and reduction of diet*. Cfr. Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012, UNODC/CCPCJ/EG.6/2012/1, 16 February 2012.

<sup>38</sup> Principle 4.b) of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN. 1982.

Report on the meeting of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners held in Buenos Aires 2012. UNODC/CCPCJ/EG.6/2012/4, Para. 10. g) and UNODC Secretariat, Work document, UNODC/CCPCJ/EG.6/2012/2 Pages 7 y 14.

<sup>39</sup> This is the criterion adopted in the Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268 (2011), devoted to solitary confinement.

In this sense, the Human Rights Committee's General Comment No. 20. Forty-fourth session, Para. 6: “*The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.*” together with various reports of previous Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment. All: A/63/175 Para. 77 (2008), E/CN.4/2003/68 Para. 26.m) (2003) and E/CN.4/1999/61 Para. 394 (1999).

<sup>40</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295. A/68/295 Para. 61 and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 13.

<sup>41</sup> I/A Court HR. Press release No 51/2013. *IACHR expresses concern for the overuse of the solitary confinement in United States*. 18 July 2013.

*incommunicado constitute, in themselves, forms of cruel and inhuman treatment harmful to the mental and moral integrity of the person and to the right of respect for the inherent dignity of the human being.*<sup>42</sup>

Regarding the meaning of “prolonged solitary confinement”, it is important to consider that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, although he is aware of the “... *arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful*”, he maintains that “*15 days is the limit between “solitary confinement” and “prolonged solitary confinement” because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible...*”<sup>43</sup>, emphasising in this way that “...*prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition.*”<sup>44</sup>

In this context, the Rapporteur has highlighted the importance for the Standard Minimum Rules to establish “...*a maximum term of days beyond which solitary confinement is considered prolonged...*”<sup>45</sup>

Additionally, in order to prevent abuses from the authorities, the Rules should prohibit the frequent renewal of measures that amount to prolonged solitary confinement, even if formally this consists in a serie of not-prolongued solitary confinements.<sup>46</sup>

Together with the prolonged solitary confinement, the prohibition of solitary confinement for indefinite time should be included, since in practice this method not only exceeds the limit pointed out above, but also exacerbates the pain and suffering of the individuals who are subjected to it.<sup>47</sup> This method is also being used as a mean of extortion of persons in pretrial detention.<sup>48</sup>

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<sup>42</sup> I/A Court HR. Case of Ticona Estrada. 2008. Para. 58; I/A Court HR. Case of Chaparro Álvarez and Lapo Íñiguez. 2007. Para.171; I/A Court HR. Case of Velásquez Rodríguez. 1988. Para. 156 and 187; I/A Court HR. Case of De la Cruz Flores. 2004. Para. 128; I/A Court HR. Case of the Penalty Miguel Castro Castro. 2006. Para. 323; I/A Court HR. Case of Castillo Petruzzi. Merits, Reparations and Costs. Judgment of May 30, 1999. Para.195; I/A Court HR. Case of Fairén Garbí and Solís Corrales. 1989. Para. 149; I/A Court HR. Case of Godínez Cruz v. Honduras 1989. Para.164; I/A Court HR. Case of Maritza Urrutia. 2003. Para. 87; I/A Court HR. Case of Bámaca Velásquez. 2000. Para. 150; I/A Court HR. Case of Loayza Tamayo. 1997. Para. 58.

<sup>43</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268 Para. 26, 79 and 76: “[...] *the Special Rapporteur reiterates that, in his view, any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances. He calls on the international community to agree to such a standard and to impose an absolute prohibition on solitary confinement exceeding 15 consecutive days.*”

<sup>44</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268 Para. 88.

<sup>45</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para 61.

<sup>46</sup> The Special Rapporteur, regarding the current updating process of the Standard Minimum Rules, points out that these “*The Rules should also prohibit prolonged solitary confinement and frequently renewed measures that amount to prolonged solitary confinement.*” Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para 61.

<sup>47</sup> In this respect, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment maintains that: “*The feeling of uncertainty when not informed of the length of solitary confinement exacerbates the pain and suffering of the individuals who are subjected to it. [...]*”; then stating that, “*The use of solitary confinement can be accepted only in exceptional circumstances where its duration must be as short as possible and for a definite term that is properly announced and communicated [...]*” the Special Rapporteur finds that *indefinite imposition of solitary confinement violates the right to due process of the concerned individual.*” Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268 Para. 59 and 75.

<sup>48</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268 Para. 85. “[...] *The use of solitary confinement as an extortion technique during pretrial detention should be abolished [...]*”

From the abolition of the prolonged or indefinite solitary confinement, the Standard Minimum Rules should moreover absolutely prohibit solitary confinement as a judicially imposed sentence attending its inherently inhuman nature.<sup>49</sup>

At the same time, taking into account the heterogeneity of national regulations and the fact that in various jurisdictions the solitary confinement is accepted as a punishment or protection measure, it is important that the Standard Minimum Rules also establish clear limits to this practice. In this respect, the ‘Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ has noted *that solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible and minimum procedural safeguards must be followed*<sup>50</sup>, highlighting that it must be imposed *only as a last resort where less restrictive measures could not achieve the intended disciplinary goals*<sup>51</sup>. In a similar way, the Inter-American Court has maintained that the solitary confinement must only be used for strictly necessary duration and according to the strict application of the criteria of rationality, necessity and legality<sup>52</sup>.

The solitary confinement of a person deprived of his/her liberty, as well as any other measure that restricts fundamental rights, must comply strictly with the principle of legality<sup>53</sup>. Solitary confinement must only be used in cases and circumstances established by law and in accordance with its prescription.<sup>54</sup> Both the Special Rapporteur on torture and, similarly, the Inter-American Commission of Human Rights, reaffirm the need to apply the principle of proportionality when imposing solitary confinement.<sup>55</sup> It is central to note that proportionality applies not only to punishments, but also and even with more reason, to measures meant to protect, rather than punish, the person deprived of liberty.<sup>56</sup>

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<sup>49</sup> I/A Court HR. Case of Castillo Petruzzi and others v. Peru.Op.Cit.Para. 198. In this respect, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, in his reports in 2011 (A/66/268 Para. 84) and 2013 (A/68/295 Para 61).

<sup>50</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.A/63/175 Para.83, A/68/295 Para.60 and A/66/268 Para. 89.

In this respect, the experts gathered in Buenos Aires in December of 2012 agreed upon *“to limit, in rule 32, paragraph 1, the imposition of punishment by solitary confinement to a disposition of last resort to be authorized by the competent authority, to be applied in exceptional circumstances only and for as short a time as possible, to encourage efforts to increase the level of meaningful social contact for prisoners while in solitary confinement; and to provide for such punishment to be properly recorded”* Report on the meeting of the Expert Group. Buenos Aires, 2012.UNODC/CCPCJ/EG.6/2012/4 Para. 10.d) and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 13.

<sup>51</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.A/66/268 Para. 91.

<sup>52</sup> I/A Court HR. Case of Montero Arangueren and others (Retén de Catia) v. Venezuela.Op.Cit.Para. 94.

<sup>53</sup> Needless to say, that all the guarantees mentioned in this section regarding solitary confinement, are also applicable to other punishments to persons deprived of their liberty.

<sup>54</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LV/II.Doc. 64, 31 December 2011. Para.372, 377 and 411 and I/A Court HR. Case of Montero Arangueren and others (Retén de Catia) v. Venezuela. 2006. Op. Cit. Para. 94

<sup>55</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.A/66/268 Para. 90 *“[...] the solitary confinement, and in particular the duration of confinement, must be proportional to the severity of the criminal or disciplinary infraction for which solitary confinement is imposed.”*

In the same respect, the Inter-American Commission on Human Rights: *“Said punishment should always be proportional to the offense for which it was established; otherwise, it would be tantamount to improperly making the nature of the deprivation of liberty harsher.”*IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LV/II.Doc. 64, 31 December 2011. Para. 372

<sup>56</sup> We will refer briefly to the process of implementation of the protocol of *Protection of People in Specially Vulnerable Situations* in the federal jurisdiction of Argentina as a good practice to consider regarding the use of solitary confinement as a protective measure. This protocol is the result of the work of a dialogue table among the National Public Defenders Office, the Office of the Procurator of Prisons, the Federal Penitentiary Service, and civil society organizations, including CELS, which was judicially ordered when processing an *habeas corpus*. This protocol forbids the use of solitary confinement, individual or collective, as a protection measure, proposing alternative measures for the safeguard of persons deprived of liberty in cases in which it is specially required. The protocol foresees 5 protective measures: 1) lodging in a

It follows the need to guarantee that the affected person has the possibility to ask for a review of the authority's decision. For that to happen, the minimum procedural guarantees must be ensured, both at an administrative and judicial level. The Special Rapporteur on torture recommends to States to consider establishing appeal mechanisms that are available for persons deprived of their liberty or to their lawyers, foreseeing the right to recourse to Courts of Justice and international human rights mechanisms.<sup>57</sup> In this respect, an update of the Standard Minimum Rules should include rules that calls upon States to establish obligations of jurisdictional control of the measures of solitary confinement of persons deprived of their liberty. For the effectiveness of such control and for a better protection of the fundamental rights of persons subjected to these right's restrictive measures, it is necessary that the courts are informed when decisions in that regard have been taken. Courts must be entitled to revise the legality of the order, the reasons that justify it and the conditions under which it is carried out, holding the capacity to revoke the measure if necessary.<sup>58</sup>

The Inter-American Court of Human Rights has often addressed the issue of the respect for the minimum procedural guarantees in disciplinary proceedings against persons deprived of their liberty<sup>59</sup>, ensuring that the person deprived of liberty has the right to legal counseling by a lawyer, to prepare its defense and to argue against the decision of the authority, among others.<sup>60</sup>

Aiming at the acceptability of the solitary confinement measure and so it does not match the prohibition assumptions previously mentioned, it is essential that the solitary confinement does not take place in dark cells, in "punishment cells" or in any other conditions which could be considered as cruel, inhuman or degrading treatment. Specifically, the aim is for solitary confinement to cause the least possible harm and

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section for inmates with safeguard measures, 2) regular medical examinations, 3) special custody, 4) permanent record off all the agents that have contact with the protected detainee and 5) electronic means. Together with these measures, the protocol considers certain requirements and steps preceding the "protection" measure, joining criteria and ways of action, emphasizing that the protection should end by the will of the person deprived of liberty and guaranteeing the protection of his rights regarding education, health, transfers, work, contact with the outside world, etc. The text of the protocol is available in: <http://www.mpd.gov.ar/articulo/index/articulo/protocolo-para-la-implementacion-del-resguardo-para-personas-en-situacion-de-especial-vulnerabilidad-3110>

<sup>57</sup> Regarding the need to establish certain guarantees to prevent arbitrary acts and abuses, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "[...] emphasizes that when solitary confinement is used in exceptional circumstances, minimum procedural safeguards must be followed. These safeguards reduce the chances that the use of solitary confinement will be arbitrary or excessive, as in the case of prolonged or indefinite confinement, [...]" Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268 Para. 89

<sup>58</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LV/II.Doc. 64, 31 December 2011. Para. 412

<sup>59</sup> The Court maintains that "the Court believes that both the jurisdictional organs and those of any other nature that exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the American Convention" I/A Court HR. Case of Ivcher-Bronstein v. Peru. Merits, Reparations and Costs. Judgment of February 6, 2001. Para.104 and I/A Court HR. Case of Constitutional Court v. Peru. Merits, Reparations and Costs. Judgment of January 31, 2001. Para. 71

The Inter-American Court shares: "For this reason, any administrative, legislative, or judicial authority, whose decisions may affect the rights of persons, adopt them in strict compliance with the guarantees of due process of law. Hence, Article 8 of the Convention contemplates the guidelines of due process of law, which is composed of all the requirements that must be observed by procedural instances, to ensure that the individual may defend himself or herself adequately with regard to any act of the State that may affect his rights. [...]. Therefore, the administration may not dictate punitive administrative actions without granting those subjected to these processes the minimum guarantees, which apply mutatis mutandis as appropriate." I/A Court HR. Case of Vélez Loor V. Panama. 2010 Op. Cit. Para. 142

<sup>60</sup> "[...] Even in that case, the State is obliged to ensure that the detainee enjoys the minimum and non-derogable guarantees established in the Convention and, specifically, the right to question the lawfulness of the detention and the guarantee of access to effective defense during his incarceration." I/A Court HR. Case of Suárez-Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Para. 51

In this respect, the Inter-American Commission on Human Rights: "It is essential that, within the framework of due process that must be followed in these types of disciplinary proceedings, the inmate is afforded the opportunity to be heard by the authorities and to introduce any evidence that he/she deems relevant prior to the decision to sanction him/her." IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LV/II.Doc. 64, 31 December 2011. Para. 378

to prevent the violation of other fundamental rights through the imprisonment in places in which the living conditions are worse than those of the place where they used to live before the restrictive measure. It is worth mentioning that the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas absolutely forbid the use of punishment cells<sup>61</sup>, while the Basic Principles for the Treatment of Prisoners of United Nations state that *"Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged."*<sup>62</sup>

In this respect, the Inter-American Commission on Human Rights has pointed out that conditions of the cells used for solitary confinement must adhere to the same international standards for spaces housing the general population of inmates, stating that *not only is there no valid justification for conditions in these punishment cells to be substandard, but such conditions also are tantamount to the improper harshening of the sentence and jeopardize the very health of the person held in solitary confinement.*<sup>63</sup>

Finally, the Standard Minimum Rules must forbid the solitary confinement for juveniles<sup>64</sup>, pregnant women, in nursing period or with minor children, and persons with psychosocial or mental disabilities deprived of their liberty, independently of the length of the confinement, the conditions under which it is carried out or the reasons for the measure.<sup>65</sup>

#### **D. The need to investigate all deaths in custody, as well as any sign or allegation of torture or inhuman or degrading treatment of prisoners.**

The updating of the Standard Minimum Rules must incorporate the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment; a prohibition which, besides being acknowledged in

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<sup>61</sup> Principle XXII.3 of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Resolution 1/08 of the IACHR, OAS.(2008): *"The law shall prohibit solitary confinement in punishment cells."*

<sup>62</sup> Principle 7 of the Basic Principles for the Treatment of Prisoners, UN (1990)

<sup>63</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, 31 December 2011. Para 414

<sup>64</sup> Rule 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990)

<sup>65</sup> Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. A/66/268 Para. 77: *"[...] the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture."*; Para. 78: *"[...] its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment and violates article 7 of the Covenant [on Civil and Political Rights] and article 16 of the Convention [against Torture]."*

Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay. CAT/OP/PRY/1 Para. 185. *"The SPT points out that prolonged solitary confinement may amount to an act of torture and other cruel, inhuman or degrading treatment or punishment and recommends that the State party should severely restrict the use of solitary confinement as punishment for persons deprived of their liberty. Solitary confinement should not be used in the case of minors or the mentally disabled."* Inter-American Commission on Human Rights. Press release No 51/2013. *IACHR Expresses Concern over Excessive Use of Solitary Confinement in the United States. July 18, 2013. "[...] international human rights law establishes as a standard that the use of solitary confinement should be absolutely prohibited in the following circumstances: for children under the age of 18, for persons with mental disabilities, and for death row and life-sentenced prisoners by virtue of their sentence."*

During the process of updating the Standard Minimum Rules, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment maintains that *"The Rules should explicitly prohibit the imposition of solitary confinement of any duration for juveniles, persons with psychosocial disabilities or other disabilities or health conditions, pregnant women, women with infants and breastfeeding mothers"* Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para. 61. In the meeting of the Expert Group held on December 2012 in Buenos Aires, the suggestion was even stronger, pointing out the need *"to add, in rule 31, a prohibition on imposing solitary confinement for juveniles, pregnant women, women with infants, breastfeeding mothers and prisoners with mental disabilities, as a disciplinary punishment; for life-sentenced prisoners and prisoners sentenced to death, by virtue of their sentence; and for pretrial detainees, as an extortion technique"* Report on the meeting of the Expert Group. Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 10.e) In this respect, recommending a comprehensive prohibition, UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 13.

several international instruments<sup>66</sup>, constitutes a *jus cogens* rule<sup>67</sup>. This prohibition could be incorporated in Rule 6 as part of the fundamental principles, or as a new general rule.<sup>68</sup>

From the general prohibition of torture and other cruel, inhuman or degrading treatment or punishment derives the prohibition to use any coercive means inherently inhuman, degrading or painful, as it is the case of strait-jackets, electro-shock stun belts and restraint chairs. Likewise, this prohibition is particularly important in relation to people with psychosocial (or mental) disabilities who are deprived of their liberty, either in police stations or prisons, as well as in psychiatric institutions. The prohibition applies, for instance, in cases of forced medication, sedatives or overmedication, electroconvulsive therapy (ECT) and other practices which are commonly used to annul the personality of those suffering from mental disorders, with devastating consequences for their health.<sup>69</sup> All of the above requires the reformulation of current Rule 33.

Moreover, as further explained in the pertinent section, the Inter-American Court of Human Rights has stated on several occasions that the State is in a position of guarantor with respect to the rights of persons deprived of liberty.<sup>70</sup> This principle entails that any death, torture or cruel, inhuman or degrading treatment of a person deprived of liberty under the custody of the State, entails specific duties for the State and in particular for the Administrations of the places of deprivation of liberty. It is hence essential that an adequate updating of the Standard Minimum Rules provide for said duties.

In this respect, several international bodies have established that there is a presumption of State responsibility for the death or injuries exhibited by a person who has been in the custody of state agents, due to the special situation of vulnerability of the person deprived of liberty<sup>71</sup>. This presumption implies that

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<sup>66</sup> Article 7 of the International Covenant on Civil and Political Rights (1966), Article 2 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Article 5 of the African Charter on Human and Peoples' Rights (1981), Article 7 of the American Convention on Human Rights (1969), Article 3 of the European Convention on Human Rights (1950).

<sup>67</sup> In this sense, the Human Rights Committee states: "...Provisions in the Covenant [on Civil and Political Rights] that represent customary international law (and "a fortiori" when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment..." "...some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character -the prohibition of torture and arbitrary deprivation of life are examples ...". United Nations Human Rights Committee's General Comment No. 24, 52<sup>nd</sup> session (1994) HRI/GEN/1/Rev.7Paras. 8 and 10.

And the International Criminal Tribunal for the former Yugoslavia states: "Because of the importance of the values it protects, this principle [the prohibition of torture] has evolved into a peremptory norm or "jus cogens", that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules" International Criminal Tribunal for the former Yugoslavia. Case of The Prosecutor v. Furundzija. Judgment of December 10, 1998. IT-95-17/1-T Para. 153.

<sup>68</sup> Likewise: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 33; UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2 Page 4 and Proposal of the Governments of Argentina, Brazil, Uruguay and Venezuela, E/CN.15/2013/CRP.6, Rules 2 bis and 6.4.

<sup>69</sup> In this respect, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment points out that "...] any restraint on people with mental disabilities, for even a short period of time, may constitute torture and ill-treatment. It is essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty, including in psychiatric and social care institutions. The environment of patient powerlessness and abusive treatment of persons with disabilities in which restraint and seclusion is used can lead to other non-consensual treatment, such as forced medication and electro-shock procedures..." Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 Para. 63.

<sup>70</sup> I/A Court HR. Case of Mendoza et. al. v. Argentina. Preliminary Objections, Merits and Reparations. Judgment of May 14, 2013. Para. 188; I/A Court HR. Case of Pacheco Teruelet. al. v. Honduras. 2012, Op. Cit. Para.63; I/A Court HR, Case of Yvon Neptune v. Haiti, 2008, Op. Cit. Para.130; I/A Court HR. Case of Caesar v. Trinidad y Tobago, Merits, Reparations and Costs. Judgment of March 11, 2005. Para. 97; I/A Court HR, Case of the Juveniles Reeducation Institute v. Paraguay. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 2, 2004. Para. 152; I/A Court HR, Case of Bulacio v. Argentina. 2003, Op. Cit. Para. 126.

<sup>71</sup> I/A Court HR, Case of Cabrera García and Montiel Flores v. México. 2010, Op. Cit. Para.134; I/A Court HR. Case of BaldeónGarcía v. Peru, Merits, Reparations and Costs. Judgment of April 6, 2006. Para.120; I/A Court HR, Matter of the UrsoBranco Prison regarding Brazil,

in case of death or worsening of physical conditions of an individual deprived of liberty the State has the duty to provide a satisfactory and convincing explanation in order to disprove the allegations regarding its responsibility. Consequently, the State is obliged to undertake *ex officio* and without delay a serious, impartial and effective investigation with the aim of clarifying the truth of the event, as well as judging and punishing perpetrators.<sup>72</sup>

Currently, the Standard Minimum Rules do not provide for any principle that determines the manner in which the authorities of detention centers should act pursuant to this State's duty. Thus, it is necessary to incorporate Rules establishing specific conducts, which emphasize, on the one hand, the duty to investigate all deaths in custody, notwithstanding their causes<sup>73</sup>, as well as all allegations of torture or cruel,

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Provisional Measures./IA Court HR' Resolution of June 18, 2002, Recital 8; IA Court HR, Case of the "Street Children" (Villagrán Morales et. al.) v. Guatemala, Merits. Judgment of November 19, 1999. Para. 170.

In this sense, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment stated in a recent report: *"The State bears the burden of evidentiary proof to rebut the presumption that the State is responsible for violations of the right to life and for inhuman treatment committed against persons in its custody [...]"* Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295, para. 62. Furthermore, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions states in one of his first reports: *"A death in any type of custody should be regarded "prima facie" as a summary or arbitrary execution, and appropriate investigations should immediately be made to confirm or rebut the presumption"* Report by the Special Rapporteur on extrajudicial, summary and arbitrary executions (1986) E/CN.4/1986/21, para. 209. A recent report enlarges on this duty stating that *"... the State's two-fold obligation to ensure and respect the right to life, together with its heightened duty and capacity to fulfill this obligations in the custodial environment, justifies a rebuttable presumption of State responsibility in cases of custodial death. One consequence of this presumption is that the State must affirmatively provide evidence that it lacks responsibility to avoid that inference. Another important consequence of this presumption is that, absent proof that the State is not responsible, the State has an obligation to make reparations to the victim's family. This is the case even if the precise cause of death and the persons responsible cannot be identified ..."* Report by the Special Rapporteur on extrajudicial, summary and arbitrary executions (2006), A/61/311, para. 54.

<sup>72</sup> Principle XXIII.3 of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, HRIC Resolution 1/08, OEA. (2008)

IA Court HR. Case of Cabrera García and Montiel Flores v. Mexico, 2010, Op. Cit.Para.134; IA Court HR. Case of Montero Aranguren et. Al (Retén de Catia) v. Venezuela, 2006, Op. Cit. Para. 80; IA Court HR. Case of Ximenes Lopes v. Brazil.Judgment of July 4, 2006.Paras.147 and 148; IA Court HR. Case of Bulacio v. Argentina, 2003, Op. Cit.Para.127; IA Court HR. Case of Juan Humberto Sánchez v. Honduras.Preliminary Objection, Merits, Reparations and Costs.Judgment of June 7, 2003.Para. 111

<sup>73</sup> Principle 34 of the Body of Principles for the protection of all persons under any form of detention or imprisonment (1988) establishes that: *"Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case..."* In turn, the Special Rapporteur on Torture has stated: *"In all cases of death occurring in custody or shortly after release, an inquiry should be held by judicial or other impartial authorities."* Cf. Report by the Special Rapporteur on torture 1995 - E/CN.4/1995/34, para. 926.g). Likewise, the Special Rapporteur on Extrajudicial Executions stated that: *"All deaths in custody should be thoroughly investigated including carrying out of a post-mortem. Family members of the deceased must be immediately informed and they should be present to inspect the dead body before burial"* Cf. Human Rights Committee, Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, 60<sup>th</sup> session, 2003 -E/CN.4/2004/7, para.96.4. In this respect, the United Nations Committee against Torture has also pointed out that States have a duty to *investigate in a prompt, thorough and impartial manner all deaths in custody.*Cf. Report of the Committee against Torture, sessions 45 and 46 (2011), A/66/44, para.61.16.a), and Report of the Committee against Torture, sessions 47 and 48 (2012), A/67/44, para. 57.20. In turn, the Inter-American Commission on Human Rights stated that: *"...as an effective guarantee of the right to life of persons deprived of liberty, [...] in cases of deaths occurring in State custody –including death from natural causes or suicide–, the State has the duty to initiate "ex officio" and without delay a serious, impartial and effective investigation, which must be conducted within a reasonable time and not as a mere formality..."*Cf. IACHR Report on Human Rights of persons deprived of liberty in the Americas OEA/Ser.LV/II.Doc. 64, December 31, 2011, para. 271

With reference to suicides, the IACHR underlines that the authority must ensure that said denomination is not used as a *quick way to conceal deaths that were caused by something else* and that even having established in a serious and impartial investigation that the person deprived of liberty himself was who attempted against his life, this does not exempt the State from its eventual responsibility for its failure to prevent it. Idem, paras. 324 and 325.

Likewise: Report on the meeting of the Expert Group, Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4, paras. 11.c), and UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2, page 17.

inhuman or degrading treatment;<sup>74</sup> and, on the other hand, clearly determine the role of the Administration to cooperate and not hinder these investigations.

In this respect, it is also necessary to incorporate Rules providing for the duty of the Administration to design clear protocols according to which the personnel in charge of the places of deprivation of liberty must act in cases of deaths in custody or allegations of torture or ill-treatment<sup>75</sup>. Such protocols must, in the first place, provide for the duty to collaborate with the investigation by not obstructing it in any way; and, secondly, for mechanisms of prompt intervention in relation to the collection and preservation of evidence, protection of victims and witnesses, and suspension from duty of the personnel suspected of having participated in the incidents<sup>76</sup>, among others. These measures, which require immediate action, are essential to ensure the success of a serious investigation of the facts.

In this respect, the Inter-American Court of Human Rights has stated that any failure or defect in the investigation that impacts adversely in its capacity to effectively establish the cause of death or identify the material and intellectual perpetrators corresponds to a violation of the duty to protect the right to life.<sup>77</sup>

Besides the foregoing, the Standard Minimum Rules should incorporate the duty of the authorities to immediately notify the death, as well as the injuries or any signs of ill-treatment that a person deprived of liberty might have suffered, to an independent external investigative entity, in charge of conducting a serious, thorough, impartial and prompt investigation.<sup>78</sup>

Besides the obligation to investigate all death and allegations of torture by an external independent and impartial body, it is also important to clarify that it remains the obligation of the Administration itself to undertake an internal investigation aimed at elucidating the possible administrative liability of the personnel

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<sup>74</sup> Principle 2 of the Principles related to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (2000)

Likewise: Report on the meeting of the Expert Group, Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4, para. 11.e), and UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2, page 18.

<sup>75</sup> In this respect, the Special Rapporteur on Torture has stated that there should exist "... protocols and guidelines for the prison Administration about cooperating with the authorities by not obstructing the investigation and by collecting and preserving evidence..." Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295, para. 65

<sup>76</sup> Principle 3. b) of the Principles related to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (2000)

With reference to the review process of the Standard Minimum Rules, the Special Rapporteur on Torture affirms that said rules "... should ensure that those potentially implicated in torture or other ill-treatment should immediately and for the duration of the investigation be suspended, at a minimum, from any duty involving access to detainees or prisoners because of the risk that they might undermine or obstruct investigations..." Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 66

<sup>77</sup> I/A Court HR. Case of Montero Aranguren et. al. (Retén de Catia) v. Venezuela, Op. Cit., 2006.Para. 83

<sup>78</sup> Principle 2 of the Principles related to the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (2000): "... The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial ..." Principle XXIII.3 of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, IACHR Resolution 1/08, OEA. (2008) "... States shall carry out serious, exhaustive, impartial and prompt investigations in relation to all acts of violence or situations of emergency that have occurred in places of deprivation of liberty, with a view to uncovering the cause, identifying those responsible, and imposing the corresponding punishments on them." Accordingly, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has highlighted: "... Allegations of torture and other ill-treatment should be investigated by an external investigative body, independent from those implicated in the allegations and with no institutional or hierarchical connection between the investigators and the alleged perpetrators." Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 64. In turn, the Special Rapporteur on extrajudicial executions has also stated that the investigation should be undertaken by a body which is independent of the police or prison authorities. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (2002), E/CN.4/2002/74, para.141. Accordingly: UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2, pages 17 and 18

and at applying the corresponding sanctions. Needless to say that these internal investigations must be conducted without obstructing in any way the investigation undertaken by the independent judicial or monitoring body.

In turn, in cases of violent deaths in which no direct responsibility of state agents is proved, but which have been the consequence of violence among inmates deprived of liberty themselves, it is crucial to ensure its serious investigation with the aim of dismissing any type of omission in relation to the duty of the security staff to care for the protection of life and physical integrity of the persons deprived of liberty.<sup>79</sup>

It is moreover important to conduct serious and impartial investigations of deaths that, in definitive, have not been classified as “violent”. This is because they may show structural deficiencies of the places of deprivation of liberty, especially in relation to the appropriate and timely provision of health-care services.<sup>80</sup>

It is necessary to adapt the duty to investigate all deaths in custody, included in the Standard Minimum Rules, to all the pertinent international standards in force. Accordingly, the duty to investigate comprises not only a death while deprived of liberty but also a death occurred shortly after release.<sup>81</sup>

It is furthermore needed the incorporation of Rules that provide for the obligation to keep record of all deaths occurred, together with a description as detailed as possible of the context within which the deaths took place<sup>82</sup>. It is important that the criteria selected for the registries are elaborated in such a way that, being added to the information collected through the investigations undertaken by bodies independent from the Administration, it allows for an adequate diagnostic and, on the basis of the latter, the formulation of state prevention policies.<sup>83</sup>

Together with the obligation to notify the inmate’s relatives in case of death or serious harm, the Standard Minimum Rules must include the duty that such notifications are conducted by the Administration with due respect to the relatives’ dignity, taking into account the anguish caused by the death of or harm suffered by their cherished ones.

Lastly, it is important to mention the fundamental issue of the State’s duty to provide support and counseling to all persons involved as victims, relatives or witnesses in events of violence, torture or death within places of deprivation of liberty, bearing in mind how seriously affected their psychological integrity

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<sup>79</sup> In this respect, the Special Rapporteur on Torture has stated that “...*inter-prisoner violence may amount to torture or other ill-treatment if the State fails to act with due diligence to prevent it...*” Interim report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 48

<sup>80</sup> In the case of Argentina, the General Attorney of the Province of Buenos Aires Supreme Court of Justice, through resolution 115/13, provided that in any event of “non-traumatic” death in custody conditions, the prosecutor is bound to initiate a criminal inquiry, requesting the autopsy of the deceased and obtaining the pertinent information. Resolution available at: <http://www.mpba.gov.ar/web/Resoluciones/115-13.pdf>

<sup>81</sup> In this sense, the Special Rapporteur on Torture, within the context of the review of the Standard Minimum Rules for the treatment of prisoners, stated that “... *rule 44 should, at a minimum, require the Administration to ensure that, notwithstanding internal investigations, all complaints or reports of torture or other ill-treatment, including prison violence, threats and intimidation, as well as incidents of deaths in custody (irrespective of their cause) or shortly following release, are transmitted without screening to an external independent body for investigation. ...*” A/68/295, para. 65. In turn, his predecessor had stated in similar but equally peremptory terms: “... *In all cases of death occurring in custody or shortly after release, an inquiry should be held by judicial or other impartial authorities...*” E/CN.4/1995/34, para. 926.g)

<sup>82</sup> Likewise: Interim report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 43 and UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2, page 17.

<sup>83</sup> Likewise: Interim report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 65

may be as a consequence of those circumstances.<sup>84</sup> In relation to the foregoing, as a necessary measure for the success of the investigations of deaths and torture or ill-treatment in the places of deprivation of liberty and in order to put an end to the impunity of those actions, it must be ensured a real protection to the victims and witnesses of those crimes, by implementing witness and victim protection programs.<sup>85</sup>

## E. Complaints and independent inspection

In this section, we have chosen to exclusively address the need to update the Rule referred to independent inspections on the grounds of its insufficient current wording.

The importance of independent inspections in places of detention has been acknowledged by the international community through the signing of several instruments, among them, the most important one, the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>86</sup>

The Rule 55 of the current Standard Minimum Rules sets forth that qualified and experienced inspectors designated by a competent authority shall regularly inspect penal institutions with a view to ensuring that these institutions are administered in accordance with existing laws. In the light of the advancements of international human rights law, the amendment of Rule 55 is proposed as follows.

First, with respect to the "inspection commissions", it is recommended to include expressly the possibility of intervention by national and international bodies, either governmental or non-governmental human rights

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<sup>84</sup> It is necessary to take into account the affirmations of the Committee against Torture with reference to the concept of victim of torture or ill-treatment, stating that "*victims are persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention [against Torture] ...*" adding that "*... the term "victim" also includes affected immediate family or dependents of the victim ...*" Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 (2012), CAT/C/GC/3, para.3. In turn, the Inter-American Court of Human Rights has similarly affirmed the character of victim of the relatives of the direct victims. See I/A Court HR. Case of Bulacio v. Argentina. 2003, Op. Cit. Para.78 and I/A Court HR. Case of Juan Humberto Sánchez v. Honduras 2003, Op. Cit. Para. 156

With respect to the "rehabilitation" of the victims of torture or ill-treatment, the Committee Against Torture has stated that each State must "*... adopt a long-term integrated approach and ensure that specialist services for victims of torture are available, appropriate and readily accessible...*" adding that they should "*... include a wide range of inter-disciplinary measures, such as medical, physical and psychological rehabilitative services; re-integrative and social services; community and family-oriented assistance and services, and vocational training and education, among others...*" Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 (2012), CAT/C/GC/3 Para.13

<sup>85</sup> Principle 3.b) of the Principles on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (2000) "*Alleged victims of torture or ill-treatment, witnesses and those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation ...*" With reference to the Review process of the Standard Minimum Rules, the Special Rapporteur on Torture has stated that "*... serious consideration should be given to the creation of witness protection programs that fully cover persons with a previous criminal record and staff [of the places of deprivation of liberty]*" Interim report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 66

Likewise, the previous Special Rapporteur on Torture stated in two prior reports: "*... serious consideration should be given to the creation of witness protection programs for witnesses to incidents of torture and similar ill-treatment...*" Cf. E/CN.4/2003/68, para. 26.k) and E/CN.4/2004/56, para. 40. In turn, the Committee Against Torture sets forth that the State must provide protection to the victims "*... their families and witnesses, against intimidation and retaliation at all times before, during and after judicial, administrative or other proceedings that affect the interests of the victims. Failure to provide protection stands in the way of victims filing complaints and thereby violates the right to seek and obtain redress and remedy...*" Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 (2012), CAT/C/GC/3, para.31

<sup>86</sup> In this respect, the Special Rapporteur on torture has stated that "*... [t]he regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Inspections of all places of detention, including police lock-ups, pre-trial detention centers, security services premises, administrative detention areas and prisons should be conducted by teams of independent experts...*" Cf. Report of the Special Rapporteur on torture 1995 - E/CN.4/1995/34, para. 926.c

organizations.<sup>87</sup> Without prejudice to the foregoing, it is essential that irrespective of which body is undertaking the inspection these must be independent and autonomous from the authority in charge of the place of deprivation of liberty.<sup>88</sup>

With respect to the composition of said inspection commissions, it is important to include the duty to incorporate interdisciplinary health-care teams<sup>89</sup>, as well as to keep balanced gender representation according to the principles of equality and non-discrimination.<sup>90</sup> It must be mandatory the presence of female personnel during the inspections of places where there are women deprived of liberty.<sup>91</sup>

The current Standard Minimum Rules refer in a vague and imprecise manner to the function of inspectors. For this reason, it is recommended to emphatically point out that their main function is to verify the conditions of deprivation of liberty and the effective respect for the human rights of persons deprived of their liberty, as the Inter-American Commission on Human Rights has remarked.<sup>92</sup>

In this respect, in order for these inspection commissions to effectively comply with their mandate, it is necessary to clearly ascertain their powers so that bureaucratic obstacles and the habitual secrecy of the places of deprivation of liberty are avoided. Due to the foregoing, inspectors' powers should include, at least, the following<sup>93</sup>:

- a) Capacity to carry out unannounced inspections on their own initiative;

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<sup>87</sup> Principle XXV of the Principles and Best Practices on the protection of persons deprived of liberty in the Americas, Resolution 1/08 of the Inter-American Commission on Human Rights, OEA (2008). In turn, the Inter-American Court of Human Rights has acknowledged on several occasions the importance of independent inspections in places of detention by non-governmental bodies, notwithstanding the fact that it is also essential to have governmental and international inspection mechanisms. The Court has stated that *"the State must protect and respect the functions that may be exercised by non-governmental entities and by other groups or individuals that defend human rights and the essential liberties of persons deprived of liberty, since said actions are a positive contribution and a supplement to all efforts made by the State in its capacity of guarantor of the rights pertaining to the persons held under its custody"*. I/A Court HR. Case of Monagas Judicial Confinement Center "La Pica", Venezuela, Provisional Measures, Resolution of February 9, 2006, Recital 14, and I/A Court HR. Case of Mery Naranjo et. al., Colombia, Provisional Measures, Resolution of July 5, 2006, Recital 8. Likewise: Report on the meeting of the Expert Group, Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 14.g) and UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2 Page 29.

<sup>88</sup> Principle 29.1 of the Body of Principles for the protection of all persons under any form of detention or imprisonment (1988); Principle 7 of the United Nations Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions (1989); Rule 72 of the United Nations Rules for the protection of juveniles deprived of their liberty (1990) and Articles 1 and 18 of the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002). Likewise: UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2 Page 29.

<sup>89</sup> Principle 7 of the United Nations Principles on the effective prevention and investigation of extra-legal, arbitrary or summary executions (1989); Rule 73 of the United Nations Rules for the protection of juveniles deprived of liberty (1990). Likewise: Report on the meeting of the Expert Group, Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 14.i)

<sup>90</sup> Articles 5 and 18 of the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002). Likewise: Report on the meeting of the Expert Group, Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 14.i)

<sup>91</sup> Rule 25.3 of the United Nations Rules for the treatment of women prisoners and non-custodial measures for women offenders (Bangkok Rules) (2010). Likewise: UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2 Page 31 and Joint Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela, E/CN.15/2013/CRP.6, Rule 55.3

<sup>92</sup> Principle XXV of the Principles and Best Practices on the protection of persons deprived of liberty in the Americas, Resolution 1/08 of the Inter-American Commission on Human Rights, OEA (2008).

<sup>93</sup> Principle XXV of the Principles and Best Practices on the protection of persons deprived of liberty in the Americas, Resolution 1/08 of the Inter-American Commission on Human Rights, OEA (2008); Articles 14 and 20 of the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002); Rule 72 of the United Nations Rules for the protection of juveniles deprived of their liberty (1990); Principle 7 of the United Nations Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions (1989). Likewise: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295 Para. 82, Report on the meeting of the Expert Group, Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 14.h); UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2 Page 30, and Joint Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela, E/CN.15/2013/CRP.6, Rule 55.2

- b) Access to information and documentation related to the establishment and the persons deprived of their liberty;
- c) Liberty to choose the places they want to visit and the persons they want to interview;
- d) Access to all the facilities of the places of deprivation of liberty;
- e) The possibility to interview in private and confidentially any person deprived of liberty, staff and security personnel;
- f) The possibility to conduct interviews, either individually or collectively, as the inspector may deem convenient, always ensuring their confidentiality;
- g) Make complaints before courts of law and other national and international bodies;
- h) Liberty to verify compliance of health records with the formal requirements related to security, unity and inviolability, by inspecting health registries and assessing whether the health system is up to the proposed standards,
- i) The possibility to verify the effective compliance of the free and informed consent, what shall necessarily include confidential interviews with the persons deprived of their liberty;
- j) The possibility to compare the medication prescriptions to persons deprived of their liberty with the pharmacy purchases carried out by the institution in order to check that there is no surplus that may allow for non-prescribed medication as a method of social control. This issue is especially relevant in relation to persons with psychosocial disabilities.

On the other hand, the reformulation of this Rule must include the duty of the State to ensure effective and appropriate guarantees so that these bodies may freely carry out their inspection activities, with special attention to institutional hurdles or actions limiting or obstructing their work.<sup>94</sup>

In this sense, States must ensure that in all places of deprivation of liberty there are appropriate material conditions for the inspection bodies to carry out their functions, ensuring that there are places in which individual and collective interviews may be conducted in a confidential manner, without prejudice to inspectors' capacity to enter any area of the places of deprivation of liberty, including all rooms and cells.

Moreover, it is indispensable that the States ensure an appropriate budget to the funding of the inspection bodies' activities that are dependent on state Administration.

As a consequence, it is recommended to include that the right of inmates to communicate freely and in a confidential manner with the persons visiting the detention places must be guaranteed.<sup>95</sup> In addition, as widely agreed at the international level, it must be guaranteed that no retaliation is taken against the persons deprived of their liberty who hold interviews with and/or make complaints about irregular situations to the inspectors, by taking the necessary safeguards.

Finally, one of the main objectives of independent inspections at detention places is to verify wrong practices and identify good ones, as well as to propose solutions. It is hence necessary to record the findings and conclusions of the inspection commissions in a report that evaluates the compliance with

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<sup>94</sup> I/A Court HR. Case of Mery Naranjo et.al., Colombia, Provisional Measures, Resolution of July 5, 2006, Recital 8; I/A Court HR. Case of Carlos Nieto et. al., Venezuela, Provisional Measures, Resolution of July 9, 2004, Recital 8; I/A Court HR. Case of Lysias Fleury, Haiti, Provisional Measures, Resolution of December 2, 2003, Recital 10.

<sup>95</sup> Principle 29.2 of the Body of Principles for the protection of all persons under any form of detention or imprisonment (1988) y Rule 73 of the United Nations Rules for the protection of juveniles deprived of their liberty (1990)

national and international laws on the part of the Administration and gives an account of the human rights situation, and submits the pertinent recommendations to the competent authorities.<sup>96</sup>

## F. The rights and special needs of persons with disabilities<sup>97</sup>

Rules 82 and 83 require a structural transformation on the basis of the advancements in the international legal framework since the adoption of the Convention on the Rights of Persons with Disabilities (CRPD). Due to the scarce worldwide implementation of the rights of persons with disabilities (PWD) and the paradigm shift imposed by the CRPD, the considerations and recommendations stated in this section arise from the standards imposed by the CRPD<sup>98</sup>. Notwithstanding its limited development, taking into account the special vulnerable situation of PWD deprived of their liberty, it is essential to incorporate these standards into the Rules, even more due to the fact that a process of review as the current do not happen often.

In this context, to include the CRPD's definition of disability into the SMR allows to redirect the instrumental approach that States must incorporate in order to effectively fulfill the provisions of the convention within the context of deprivation of liberty.

PWD deprived of their liberty are exposed to greater vulnerability than other people. They are usually subjected to unspeakable victimization, neglect, serious forms of restraint and seclusion, as well as physical, mental and sexual violence, due to their disability.<sup>99</sup> Those forms of additional restraint and vulnerability determine a structural inequality based on determining factors, which may be removed by incorporating into the Standard Minimum Rules the ordering and transversal guidelines of the CRPD and the establishing of operational provisions to make them plausible.

The lack of reasonable "accommodation arrangements", pursuant to article 2 of the CRPD, constitutes an act of discrimination that increases the risk of neglect, violence, abuse and ill-treatment.<sup>100</sup> Although the

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<sup>96</sup> Rule 74 of the United Nations Rules for the protection of juveniles deprived of their liberty (1990). Likewise: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/68/295, para. 82, Report on the meeting of the Expert Group, Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4, para. 14.j), and UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2 Page 31.

<sup>97</sup> Priority area e): *Protection and special needs of vulnerable groups deprived of their liberty*. Cf. Report on the meeting of the Expert Group on the United Nations Standard Minimum Rules for the Treatment of Prisoners held in Vienna from 31 January to 2 February 2012, UNODC/CCPCJ/EG.6/2012/1, 16 February 2012.

<sup>98</sup> Due to its particular characteristics, in this item we have decided to use a different criterion from the rest of the document according to which, notwithstanding the consideration of the contributions provided by international human rights conventions and covenants, modifications are mainly proposed on the basis of the development of *soft law* standards.

<sup>99</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, before the United Nations General Assembly on July 28, 2008 (A/63/175), para. 38. See, for instance, the reports of the organization Mental Disability Rights International on Argentina (2007), Serbia (2007), Turkey (2005), Peru (2004), Uruguay (2004), Kosovo (2002), Mexico (2000), Russia (1999) and Hungary (1997), which may be accessed at [www.mdri.org](http://www.mdri.org); the regional report on Asia (2005) of the international Project of supervision of rights of persons with disabilities ([www.idealnet.org](http://www.idealnet.org)); the report of the protection centre of persons with mental disabilities on the use of "cage beds" in Hungary, the Czech Republic, Slovakia and Slovenia (2003) ([www.mdac.info](http://www.mdac.info)); the reports of Amnesty International on Bulgaria (2002) and Romania (2005) (<http://www.amnesty.org/es>); and the report of Human Rights Watch entitled "Ill-Equipped: U.S. Prisons and Offenders with Mental Illness" ([www.hrw.org](http://www.hrw.org)). See also the concluding observations of the Committee of the Rights of the Child on the initial report of the Democratic Republic of the Congo (CRC/C/15/Add.153, para. 50), on the initial report of Serbia (CRC/C/SRB/CO/1, paras. 35 and 36), and on the third periodic report of Colombia (CRC/C/COL/CO/3, para. 50); the concluding observations of the Human Rights Committee on the initial report of Bosnia and Herzegovina (CCPR/C/BIH/CO/1, para. 19); and the conclusions of the Committee against Torture on the fourth periodic report of the Russian Federation (CAT/C/RUS/CO/4, para. 18) and on the third periodic report of Bulgaria (CAT/C/CR/32/6, paras. 5 e) and 6 e)).

<sup>100</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, before the United Nations General Assembly on July 28, 2008, A/63/175 Para. 38.

modifications and adaptations referred to by this concept must find expression in every aspect regulated by the Standard Minimum Rules, it is fundamental to incorporate provisions about the full exercise of legal capacity, the compliance with free and informed consent, and accessibility, since those issues have a transversal impact on the autonomy of the PWD (CRPD, articles 9; 12; 15; 19 y 25).

The worsening of detention conditions due to the lack of adaptation of detention places to the needs of PWD, in addition to amounting to discrimination, may constitute torture or other form of ill-treatment if it inflicts suffering.<sup>101</sup> In order to avoid these situations, it is essential that the Standard Minimum Rules enshrine the duty of the States to survey on a regular basis the situation of persons with disabilities from an interdisciplinary perspective and elaborate a plan to adequate the facilities according to the registered needs and the identified barriers that prevent PWD from having access to the same rights as other people.

Respect for legal capacity is a way to avoid serious violations of the human rights of PWD deprived of their liberty, since the disability may contribute to their dependent situation and make these people easy targets of abuse. Accordingly, it is necessary that States adopt special protection measures. The deprivation of legal capacity has a more negative impact on persons deprived of their liberty because, in addition to being deprived of their liberty, they see themselves in a position where unable to take decisions about their most basic rights, and dependent on the will of others for the satisfaction of their needs.<sup>102</sup>

In order to prevent this additional violation it is fundamental that the Standard Minimum Rules limit the State's discretionary power to restrict the legal capacity of PWD deprived of their liberty and, above all, design programs to ensure the support – either technical or human – necessary for them to take their own decisions regarding their fundamental rights. Besides, they must provide for the implementation of an external control mechanism – judicial or extrajudicial – independent from the Administration and on a regular basis to verify the compliance with the rules related to the exercise of legal capacity of the PWD.

As a consequence of the restrictions of legal capacity, the requirement to obtain the free and informed consent in order to perform health interventions in PWD is not complied with in practice,<sup>103</sup> especially in the case of persons with psychosocial disabilities (PWPSD). Some common practices on these persons, lacking a therapeutic purpose or directed to allegedly correct the disability, constitute torture or other cruel, inhuman or degrading treatment, but are usually naturalized under the explanation of “medical need”.<sup>104</sup> Irrespective of the discussions regarding the therapeutic aims of said interventions, the limit for health-care professionals is the exercise of the free and informed consent, without which said interventions amount to ill-treatment or torture.<sup>105</sup> Because of this, it is fundamental to subject the possibility of a health intervention to the effective compliance with free and informed consent.

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<sup>101</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, before the United Nations General Assembly on July 28, 2008, A/63/175 Para.55

<sup>102</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, before the United Nations General Assembly on July 28, 2008, A/63/175, paras. 49 to 55. According to article 12 of the CRPD, protection measures may not be understood as a greater restriction of their capacity to take decisions, but they must tend to strengthen the capabilities of PWD and ensure the necessary measures so that PWD may exercise the same rights as other people.

<sup>103</sup> With respect to the standard and recommendations on free and informed consent in order to perform a health intervention on any person deprived of liberty, see heading B related to medical and health-care services, item i).

<sup>104</sup> Interventions such as prolonged confinement, the use of solitary confinement or isolation cells, physical restrictions or restraint, forced methods of treatment and medical treatments of an intrusive and irreversible character.

<sup>105</sup> Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, before the United Nations General Assembly on February 1, 2010, (A/HRC/22/53) Paras.57 to 70.

In relation to the sanitary policy aimed at persons with psychosocial or mental disabilities, in order to ensure that they are gradually des-institutionalized, either inside detention facilities or due to their unnecessary deprivation of liberty in hospitals or other institutions, it is essential that the Standard Minimum Rules provide for the implementation of a health-care services program based on the promotion of mental health and community mental health-care services, with a view to achieving an integral, preventive, participative and community-based approach.<sup>106</sup>

### III. TOPICS PROPOSED BY CELS AND CONECTAS TO BE INCLUDED IN THE REVIEW OF THE STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS

#### A. Role of the State as guarantor

Among the topics we propose to incorporate in the debate, we believe the role of the State as guarantor is crucial, regarding the fundamental rights of the persons deprived of their liberty, because it constitutes the grounds of all State's obligations and in particular of the authorities in charge of detention places regarding persons deprived of their liberty.

Firstly, we shall revise what the role of the State as guarantor is, outlining its grounds and the obligations it entails. Following, we formulate a proposal in the framework of the process of revision of the Standard Minimum Rules.

##### *i. Role of the State as guarantor in the jurisprudence of the Inter-American Court of Human Rights*

During the twentieth century, initially in the field of Administrative German Law and then worldwide, the so-called doctrine of the special subjection was developed and applied to certain groups, such as, persons deprived of their liberty. This doctrine basically stated that because of the special position in which those persons were in relation to the State, the way in which it could intervene in their rights and duties did not respond to the same standards applied to the rest of the population.

It was based on this doctrine that the flexibility of the guarantees enjoyed by persons deprived of their liberty was justified, enabling a greater bearing on those persons, limiting and infringing their fundamental rights.

At the Inter-American System of Human Rights, especially through the case-law of the Inter-American Court, a new interpretation of this doctrine of special subjection was elaborated. The reasoning of the Court suggests that whereas there is, in effect, a special relationship between the State and the persons deprived of their liberty, because they are under State's custody; this does not justify for any flexibility whatsoever of their guarantees as recognized to all persons<sup>107</sup>, but, conversely, it accounts for the strengthening of those guarantees.

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<sup>106</sup> Likewise: IACHR Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Principle III.3 regarding "special measures for persons with mental disabilities").

<sup>107</sup> I/A Court HR. Case of Mendoza and others v. Argentina, 2013. Op. Cit, Para.188; I/A Court HR. Case of Pacheco Teruel and others v. Honduras, 2012. Op. Cit, Para. 63; I/A Court HR. Case of Yvon Neptune V.Haiti,2008.Op.Cit. Para. 130; I/A Court HR. Case of Caesar V. Trinidad y Tobago. 2005. Op.Cit. Para. 97; I/A Court HR. Case of Minors Reeducation Institution v. Paraguay,2004. Op.Cit. Para.152; International Court of Human Rights.Case ofBulaciov.Argentina.2003.Op.Cit.Para. 126.

The Court points out that this special relationship and interaction of subjection between the State and the persons deprived of their liberty is characterized by the particular intensity with which the State may regulate its rights and obligations and by the particular circumstances of confinement, where the person is prevented from satisfying by his own means a series of basic needs that are essential for the development of a decent life.<sup>108</sup>

It is, therefore, in the light of these circumstances that the Court considers that the State, as responsible for the establishments of deprivation of liberty, is in the position of guarantor regarding the rights of these persons.<sup>109</sup>

Thereby, the Inter-American Court asserts that the State, as guarantor of the rights of persons deprived of their liberty, must assume a number of particular responsibilities and take special initiatives<sup>110</sup> to:

- Guarantee that the form of deprivation of liberty does not exceed the inevitable level of suffering inherent to the detention<sup>111</sup>.
- Contribute to the effective enjoyment of those rights which under no circumstance may be restricted or of those rights which are not necessarily restricted as a result of the deprivation of liberty and of which, therefore, restriction is not allowable<sup>112</sup>.
- Guarantee the necessary conditions for persons deprived of their liberty to develop a decent life while in centers of deprivation of liberty.<sup>113</sup>

The Court has pointed out that the State may not invoke financial hardships to justify conditions of deprivation of liberty that do not comply with the minimum international standards and respect the inherent dignity of the human being.<sup>114</sup>

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<sup>108</sup> I/A Court HR. Case of Mendoza and others v. Argentina, 2013. Op. Cit. Para. 188; I/A Court HR. Case of Minors Reeducation Institution v. Paraguay, 2004. Op. Cit. Para. 152

<sup>109</sup> I/A Court HR. Case of Mendoza and others v. Argentina. Op. Cit. Paras. 188, 189, 191, 202 and 219; I/A Court HR. Case of Díaz Peña V. Venezuela. 2012. Op. Cit. Para. 135; I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Paras. 63 and 65; I/A Court HR. Case of Fleury and others V. Haiti. 2011. Para. 84; I/A Court HR. Case of Torres Millacura and others V. Argentina. 2011. Para. 99; I/A Court HR. Case of Vera Vera and others V. Ecuador. Preliminary Exception, Merits, Reparations and Costs. Judgment rendered on May, 19, 2011. Paras. 42, 43 and 88; I/A Court HR. Case of Vélez Loo V. Panamá. 2010. Op. Cit. Paras. 198 and 276; I/A Court HR. Case of Cabrera García and Montiel Flores V. México. 2010. Op. Cit. Para. 134; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Paras. 152, 159, 160; I/A Court HR. Case of Bulacio V. Argentina. 2003. Op. Cit. Paras. 126, 138; I/A Court HR. Case of Neira Alegria and others V. Peru. Merits. Judgment rendered on January, 19, 1995. Para. 60.

<sup>110</sup> I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Para. 64; I/A Court HR. Case of Fleury and others V. Haiti. 2011. Op. Cit. Para. 84; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Para. 153

<sup>111</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para. 202; I/A Court HR. Case of Díaz Peña V. Venezuela. 2012. Op. Cit. Para. 135; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 42; I/A Court HR. Case of Vélez Loo V. Panamá. 2010. Op. Cit. Para. 198

<sup>112</sup> I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Para. 64; I/A Court HR. Case of Fleury and others V. Haiti. 2011. Op. Cit. Para. 84; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Paras. 153, 154 and 155.

<sup>113</sup> I/A Court HR. Case of Díaz Peña V. Venezuela. 2012. Op. Cit. Para. 135; I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Paras. 63 and 64; I/A Court HR. Case of Fleury and others V. Haiti. 2011. Op. Cit. Para. 83; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 42; I/A Court HR. Case of Vélez Loo V. Panamá. 2010. Op. Cit. Para. 198; I/A Court HR. Case of Caesar V. Trinidad y Tobago. 2005. Op. Cit. Para. 97; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Paras. 151, 153 and 159; I/A Court HR. Case Neira Alegria and others V. Peru. 1995. Op. Cit. Para. 60

<sup>114</sup> I/A Court HR. Case of Díaz Peña V. Venezuela. 2012. Op. Cit. Para. 135; I/A Court HR. Case of Fleury and others V. Haiti. 2011. Op. Cit. Para. 83; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 42; I/A Court HR. Case of Vélez Loo V. Panamá. 2010. Op. Cit. Para. 198; I/A Court HR. Case of Boyce and others V. Barbados. 2007. Op. Cit. Para. 88; I/A Court HR. Case of Montero Aranguren and others (Retén de Catia) V. Venezuela. 2006. Op. Cit. Para. 85.

As explained below, certain particular obligations arise from these general duties. Firstly, the guarantor-state is responsible for the compliance to the rights to life and personal integrity of all individuals under its custody<sup>115</sup>. Due to the foregoing, and as mentioned above in the corresponding section, the State has the duty to grant an immediate, satisfactory and convincing explanation of what happened to a person under its custody and to impair the allegations on its liability, by providing the appropriate evidence.<sup>116</sup>

The Court also asserts that the State may be deemed liable for the cruel, inhuman or degrading treatment suffered by person under state agents' custody or for his/her death under such circumstances, when the authorities have not carried out a serious investigation of the facts followed by the prosecution of the responsible.<sup>117</sup> Accordingly, the State, in its position of guarantor, has the responsibility not only of guaranteeing the rights of the individuals under its custody, but also of providing information and evidence related to what might happen to the person deprived of his/her liberty.<sup>118</sup>

On the other hand, the Court has pointed out that the State, as responsible for the centers of deprivation of liberty, has the duty to safeguard the health and the welfare of the persons deprived of their liberty.<sup>119</sup> In particular, as the State is the guarantor of the health of the persons under its custody, it has the duty to provide those deprived of their liberty with regular health care, and suitable medical assistance and treatment when required<sup>120</sup>, in accordance with what has been set forth in the section referred to the provision of medical and health services.

Furthermore, the State has the duty to devise and apply a prevention policy of critical situations which could endanger the fundamental rights of the persons under its custody<sup>121</sup>. This duty of prevention encompasses all those measures of legal, political, administrative and cultural nature, that promote the safeguard of the human rights.<sup>122</sup>

## ***ii. Role of the State as guarantor and the process of review of the Standard Minimum Rules for the treatment of prisoners***

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<sup>115</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para. 219; I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Para. 63; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 88; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Para. 151; I/A Court HR. Case of Bulacio V. Argentina. 2003. Op. Cit. Para. 126; I/A Court HR. Case of Neira Alegría and others V. Peru. 1995. Op. Cit. Para. 60.

<sup>116</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para. 202; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 88; I/A Court HR. Case of Cabrera García and Montiel Flores V. Mexico. 2010. Op. Cit. Para. 134; I/A Court HR. Case of Bulacio V. Argentina. 2003. Op. Cit. Para. 126 and 138.

<sup>117</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para. 219; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 88; I/A Court HR. Case of Cabrera García and Montiel Flores V. Mexico. 2010. Op. Cit. Para. 134; I/A Court HR. Case of Bulacio V. Argentina. 2003. Op. Cit. Para. 126 and 138 and I/A Court HR. Issue of the Prison of Urso Branco, Brazil, Provisional Measures Resolution of the I/A Court HR of 18 June 2002, Recital 8.

<sup>118</sup> I/A Court HR. Case of Bulacio V. Argentina. Op. Cit. 2003 Para. 138.

<sup>119</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para. 202; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 42; I/A Court HR. Case of Vélez Loo V. Panamá. 2010. Op. Cit. Para. 198.

<sup>120</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para. s. 189 and 190; I/A Court HR. Case of Díaz Peña V. Venezuela. 2012. Op. Cit. Para. 135; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 43

<sup>121</sup> I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Para. 68; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Para. 178; I/A Court HR. Issue of the Urso Branco prison. Provisional Measures. Resolution of the I/A Court HR, July, 7, 2004, Recital 13

<sup>122</sup> I/A Court HR. Case of Torres Millacura and others V. Argentina. Merits, Reparations y Costs. Judgment rendered on August, 26, 2011. Para. 99; I/A Court HR. Case of Gelman V. Uruguay. Merits and Reparations. Judgment rendered on February, 24, 2011. Para. 77; I/A Court HR. Case of Gomes Lund and others ("Guerrilha do Araguaia") V. Brazil. Preliminary Exceptions. Merits, Reparations and Costs. Judgment, November, 24, 2010. Para. 106; I/A Court HR. Case of Velásquez Rodríguez V. Honduras. On the merits. Judgment rendered on July, 29, 1988. Para. 175.

In view to what has been stated in the foregoing section, an interesting advancement would be that the Standard Minimum Rules incorporate, at the beginning of their drafting, the development of the special role of the State as guarantor regarding the protection of the rights and guarantees of the persons deprived of their liberty and the specific obligations arising from this circumstance.<sup>123</sup>

This general rule should include duties referred to the obligation of the State to guarantee the effective enjoyment of those rights whose restriction does not necessarily derive from the deprivation of liberty<sup>124</sup>, duties to guarantee that the detention conditions are compatible with the inherent dignity of the human being<sup>125</sup> and that the form of deprivation of liberty does not exceed the inevitable level of suffering resulting from the detention.<sup>126</sup>

This last duty is enshrined in current Rule 57, but it would be advisable to relocate it in a general rule at the beginning of the Rules, either this rule be referred to the role of the State as guarantor or to the respect for the inherent dignity to the persons deprived of their liberty.<sup>127</sup>

Notwithstanding the need to incorporate specific rules on the scope and content of the obligation to investigate all the deaths in contexts of confinement, being the State the guarantor of the right to life and personal integrity of the persons deprived of their liberty, it is advisable to include in this general Rule the duty of the Administration, in case of death or injuries, to provide an immediate, satisfactory and convincing explanation of what might happen to any person under the custody of the State and the duty to impair the allegations on its responsibility. This has to be done by means of the appropriate evidence, adopting the criteria followed by the Inter-American Court of Human Rights<sup>128</sup> and pursuant to what has been set forth in the section correspondent to the investigation of all the deaths and signs of tortures or mistreatment.<sup>129</sup>

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<sup>123</sup> Similarly: Joint Proposal of Argentina, Brazil, Uruguay and Venezuela (EE.UU. and South Africa did not concur in this point) E/CN.15/2013/CRP.6 Rule 2bis.

<sup>124</sup> I/A Court HR. Case Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Paragraoh.64; I/A Court HR. Case Fleury and others V. Haiti. 2011. Op. Cit. Para. 84; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Para.s. 153, 154 and 155

<sup>125</sup> I/A Court HR. Case of Díaz Peña V. Venezuela.2012.Op. Cit. Para.135; I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Para.s.63 and 64; I/A Court HR. Case of Fleury and others V. Haiti. 2011. Op. Cit. Para. 83; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para..42; I/A Court HR. Case of Vélez Loor V. Panamá. 2010. Op. Cit. Para..198; I/A Court HR. Case of Caesar V. Trinidad y Tobago. 2005. Op. Cit. Para..97; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004 Op. Cit. Paras.151, 153 and 159; I/A Court HR. Case of NeiraAlegría and others V. Peru. 1995. Op. Cit. Para. 60

<sup>126</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para. 202; I/A Court HR. Case of Díaz Peña V. Venezuela. 2012. Op. Cit. Para. 135; I/A Court HR. Case of Vera Vera and others V. Ecuador. 2011. Op. Cit. Para. 42; I/A Court HR. Case of Vélez Loor V. Panamá. 2010. Op. Cit. Para.198

<sup>127</sup> Similarly; UNODC Secretariat, Working Paper, UNODC/CCPCJ/EG.6/2012/2 Page 3

<sup>128</sup> I/A Court HR. Case of Mendoza and others V. Argentina. 2013. Op. Cit. Para.219; I/A Court HR. Case Vera Vera and others V. Ecuador. 2011. Op. Cit. Para.88; I/A Court HR. Case of Cabrera García and Montiel Flores V. México. 2010. Op. Cit. Para. 134; I/A Court HR. Case of BulacioV. Argentina. 2003. Op. Cit. Paras. 126 and 138.

<sup>129</sup> See Interim Report of Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment (2013) A/68/295 Para. 62; Report of the Committee against Torture(2012) A/67/44 paragraphs 57.20; Inter-American Court of Human Right. Report on Human Rights of the persons deprived of liberty in the Americas.OAS/Ser.LV/II.Doc. 64 (2011) Para. 271;Report of the Committee against Torture(2011)A/66/44 Para. 61.16.a); Report by the Special Rapporteur on extrajudicial, summary and arbitrary executions(2006)A/61/131 Para. 54; Report by the Special Rapporteur on extrajudicial, summary and arbitrary executions(2003) - E/CN.4/2004/7. Para.96.4;Report of the Special Rapporteur on Torture (1995)- E/CN.4/1995/34.Para. 926.g); Report by the Special Rapporteur on extrajudicial, summary and arbitrary executions(1986) E/CN.4/1986/21, Para. 209. Similarly, UNODC has proposed certain specific standards for the clarification of the deaths occurred in confinement. UNODC Secretariat, Working Paper UNODC/CCPCJ/EG.6/2012/2 Pages 16, 17 y 18.

Furthermore, it is fundamental that this general rule, as reiterated by the Inter-American Court of Human Rights, provides that the State shall not be able to invoke financial hardships to justify for detention conditions that do not comply with the minimum international standards and that do not respect the dignity of the human being.<sup>130</sup>

### *ii) a. Prevention duties*

The State's prevention duties, derived from its special position of guarantor regarding the rights of the persons deprived of their liberty, deserve to be mentioned separately. In this sense, the Inter-American Court of Human Rights has pointed out in several occasions that the State must design and implement public policies of prevention of critical situations in the places of deprivation of liberty, aiming to protect the fundamental rights of the persons deprived of their liberty.<sup>131</sup>

As highlighted, in accordance with the Court, this duty to prevent comprises the adoption of all legal, political, administrative and cultural measures that promote the protection of human rights.<sup>132</sup>

Within this framework, the health of the persons deprived of their liberty deserves particular attention. As stated above, the policies of health prevention and promotion are vitally important for the comprehensive protection of health. In contexts of confinement, it is crucially important that all efforts are directed at avoiding that people get sick. This requires, on the one hand, that there are regular medical checkups in all the places of deprivation of liberty and, most importantly, that the health determinants of persons deprived of their liberty are ensured, particularly, regarding the conditions in which they live – in general overcrowded places, with unsanitary conditions, low light and ventilation, exposed to the weather, etc.

In turn, a major concern at the regional level refers to fires in the places of deprivation of liberty. These events have been a constant in Latin American countries, claiming the lives of hundreds of persons.<sup>133</sup> Despite the fact that the regularity of these incidents in the places of deprivation of liberty, in most cases, responds to structural problems, such as the current critical situation of overcrowding, it is important for the Standard Minimum Rules to include in their text direct injunctions on States so that they adopt the appropriate prevention and mitigation measures.

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<sup>130</sup> Inter-American Court of Human Right. Case of Díaz Peña V. Venezuela. 2012. Op. Cit. Para. 135; Inter-American Court of Human Right. Case Fleury and others V. Haiti. 2011. Op. Cit. Para. 83; Inter-American Court of Human Right. Case of Vera Vera and others V.Ecuador.2011 Op.Cit.Párr.42; Inter-American Court of Human Right. Case of VélezLooV.Panamá.2010.Op. Cit. Para.198; Inter-American Court of Human Right. Case of Boyce et al. V. Barbados. 2007. Op. Cit. Para. 88; Inter-American Court of Human Right. Case of Montero Aranguren and others (Retén de Catia) V.Venezuela.2006 Op. Cit. Párr. 85. Similarly: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para. 35, 46 and 88.f) and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 4.

<sup>131</sup> I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Para. 68; I/A Court HR. Case of the Juvenile Reeducation Institute V. Paraguay. 2004. Op. Cit. Para. 178; I/A Court HR. Issue of the UrsoBranco prison .Provisional Measures. Resolution of the I/A Court HR, July, 7, 2004, Recital 13.

<sup>132</sup> I/A Court HR. Case of Torres Millacura and others V. Argentina. 2011. Op. Cit. Para. 99; I/A Court HR.CaseofGelmanV.Uruguay.2011. Op. Cit. Para. 77; I/A Court HR. Case of Gomes Lund and others (Guerrilha do Araguaia) V. Brazil. 2010. Op. Cit. Para.106; I/A Court HR. Case of Velásquez Rodríguez V. Honduras. 1988. Op. Cit. Para. 175.

<sup>133</sup> As an example, some of the main fires since 2010: on July, 8,2010, 12 people died in a fire in the Departmental Prison of Rocha, Uruguay; on November,10, 2010; 16 people died due to a fire in the Alternative Centre for Young Offenders in Ilobasco, El Salvador; on December, 8, 2010, 81 people died in a fire in the Prison of San Miguel, Santiago de Chile, on January, 9, 2011; 4 young people died in a fire in the Juvenile Detention Centre in Tocumen, Panamá, on February, 15,2012: more than 380 people died in the fire in the Criminal Farm of Comayagua, Honduras: whereas on August,5, 2012, 7 people died in the Agricultural Criminal Colony Énio Pinheiro, located in Porto Velho. In Argentina, 2 fires in places of deprivation of liberty can be mentioned: in the Prison of Magdalena(UP28) 33 people died due to a fire on October,15,2005 and in the Prison of Santiago del Estero, on November, 4,2007, 34 prisoners passed away.

For the effective prevention of fires inside the places of deprivation of liberty, it is required firstly that the infrastructure and the fixtures and fittings thereof are not made of flammable material and, particularly, that the mattresses and pillows are made of fireproof material. The latter is of great importance because of its fire retardant qualities, giving more time for the authorities to react, as well as for the lower toxicity of its components, considering the great number of people that die of intoxication instead of calcined in the fires<sup>134</sup>.

Moreover, it is vital that every place of deprivation of liberty counts on an appropriate infrastructure, whereby the anti-fire hydrant system (dry and wet) is in optimal condition for use. The same measure should be applied to fire suits (firefighters' suits) and to fire extinguishers, which should be available to the staff.

Another necessary measure in this area is the design and socialization of "contingency plans" or "action protocols" that define the steps to be followed in case of an emergency, as well as the responsibilities of the staff in charge, so that eventually, everybody knows how and when to act. It is also necessary to provide for the means of evacuation of the persons deprived of their liberty in emergency situations, such as in the case of fires.

In this sense, it is very important that simulations and rehearsals are done so that the protocols of action are tested and that the response elements, such as hoses and extinguishers, are found to be in good condition.

Finally, it is fundamental that the staff in charge of the detention places receives appropriate training to deal with critical situations such as fires. This training should be addressed to all the staff, it should be periodic and carried out by skilled professionals.

## B. Non-violent management of places of detention

In view of the developments of international human rights law and, in particular, of the rules on the use of force, current Rule 54 is outdated, resulting in gaps that may allow for arbitrariness. As a consequence, its complete reformulation is essential.

In the first place, it is necessary that the new text of the Standard Minimal Rules explicit that the Administration personnel of the centers of deprivation of liberty *"shall not use force and other coercive means, save exceptionally and proportionally, in serious, urgent and necessary cases as a last resort after having previously exhausted all other options, and for the time and to the extent strictly necessary in order to ensure security, internal order, the protection of the fundamental rights of persons deprived of liberty, the personnel, or the visitors."*<sup>135</sup>

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<sup>134</sup> According to the National Fire Protection Association (NFPA), around 50% of fire-related deaths are exclusively caused by smoke inhalation, while deaths from burns add up only to 25-30%. The remaining 20-25% is made up by deaths caused by both smoke inhalation and burns. Therefore, fire-related deaths caused by smoke inhalation, either caused exclusively by it or together with burns, add up to 70-75%. HALL, John R. Fire Analysis and Research Division, National Fire Protection Association. *"Fatal Effects of Fire"*.2011. Page 2: "...the smoke inhalation to burns ratio has been about 2-to-1, as smoke inhalation only has accounted for roughly half the deaths, burns only for roughly one-quarter of the deaths, smoke inhalation and burns for roughly one-quarter of the deaths, and other conditions with neither smoke inhalation nor burns reported for only 1-2% of the deaths..." Available in <http://www.nfpa.org/-/media/Files/Research/NFPA%20reports/Overall%20Fire%20Statistics/osfataleffects.pdf>

<sup>135</sup> Principle XXIII.2.ofThe Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Resolution 1/08 of the IACHR, OAS. (2008). In this sense: Interim Report of the Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment. A/68/295 Para. 58.

Such formulation reflects the limitations on the use of force according to the principles of exceptionality, legality, proportionality and strict necessity, as provided in the Code of Conduct for Law Enforcement Officials<sup>136</sup> and the Basic Principles on the use of Force and Firearms by Law Enforcement Officials<sup>137</sup> as well as in the regional standards in the field<sup>138</sup> and in the jurisprudence of regional systems of human rights protection.<sup>139</sup>

In recognition of the above-mentioned international<sup>140</sup> and regional standards, it is recommended that the SMR text incorporates the prohibition of the use of fire arms or other lethal weapons in the places of deprivation of liberty, except when strictly unavoidable to protect lives of people. Similarly, it is important to clarify in the text of the Standard Minimum Rules that the principles of proportionality and strict necessity also govern the use of the so-called non-lethal or incapacitating weapons.<sup>141</sup>

In this sense, it is necessary that States establish clear protocols of action to react to situations requiring the use of force by staff in charge of places of deprivation of liberty, in which the above principles are expressed and put into action, by providing them with various elements and methods of control, so that there is an effectively differentiated use of force.<sup>142</sup>

In relation to the aforementioned, it is essential that the personnel in charge of places of deprivation of liberty receive adequate training regarding the proper use of force, including, of course, training on the national and international regulation on human rights in contexts of deprivation of liberty.<sup>143</sup>

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<sup>136</sup> Section 3 of the Code of conduct for the law enforcement officials, together with its comment, adopted by the General Assembly in its resolution 34/169, on December,17,1979. In this sense: Interim Report of the Special Rapporteur on Torture and other cruel, inhuman and degrading treatment or punishment A/68/295 Para. 58.

<sup>137</sup> Principles 4,5 and 9 of the Basic Principles on the Use of Force and Firearms by the Enforcement Officials, adopted by the eight Congress of the United Nations on Crime Prevention and Treatment of Prisoners, held in La Habana (Cuba) from August,27 to September,7, 1990.

<sup>138</sup> See from Rule 64.1. to Rule 69.3 of the European Prison Rules, Recommendation (2006)2 of the Committee of Ministers of the European Council. Also see the European Code of Ethics of the Police, Recommendation (2001)10 Adopted by the Committee of Ministers on September,19,2001.

<sup>139</sup> Principle XXIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Resolution 1/08 of the IACHR, OAS. Also see the Report on Human Rights of the Persons Deprived of their Liberty in the Americas, Inter-American Commission on Human Rights, OAS,Ser.LV/II.Doc. 64, December,31,2011, pages 82-90

<sup>140</sup> Regarding said standards, the Special Rapporteur of ONU on Extrajudicial, Summary or Arbitrary Executions emphasizes that "...some provisions of the Code of Conduct and the Basic Principles are rigorous applications of legal rules that States have otherwise assumed under customary or conventional international law. Among these are the instruments' core provisions on the use of force. Thus, the substance of article 3 of the Code of Conduct and principle 9 of the Basic Principles reflects binding international law." See the UN Doc A/61/311 dated September,5, 2006, Para. 35.

<sup>141</sup> In this regard, the Inter-American Commission of Human Rights points out that "*repression cannot be the only tool used by the authorities to preserve order*". The use of other deterrent methods should always be preferable. See Report on Human Rights of the Persons Deprived of their Liberty in the Americas, Inter-American Commission of Human Rights, OAS/Ser.LV/II.Doc. 64, December,31,2011, Para. 240.

<sup>142</sup> Principle 2 of the Basic Principles on the Use of Force and Firearms by the Law Enforcement Authorities.

<sup>143</sup> Principle 20 of the Basic Principles on the Use of Force and Firearms by the Law Enforcement Authorities. In this respect, the Experts Meeting has considered that a priority area on which the amendment of the Standard Minimum Rules should be discussed is the training of the staff in charge of the places of deprivation of liberty, and the appropriate training on national and international regulation on human rights is of vital importance. Particularly, it has been stated that: "*... the training (...) includes, at least, instructions referred to the international and regional instruments on human rights (...), as well as laws and the pertaining regional and national codes of conduct, as appropriate; (...) security matters, including the use of force and the management of violent offenders, especially in preventive and relaxation techniques, such as persuasion, negotiation and mediation (...)*" Report on the meeting of the Expert Group. Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 16.b). The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment warns that "*special attention should be paid to training in human rights matters, which is given to police, military and prison officers and an emphasis should be laid, among other things, on their efforts to protect human rights in international regulations and their practical application in everyday work, and the rights and safeguards for the persons deprived of their liberty.*" Fifth Annual Report of the

Finally, we consider that the principle of non-violent management of places of deprivation of liberty should be incorporated at the beginning of the Standard Minimum Rules as a general principle by virtue of which all places of deprivation of liberty should be administered.

### C. Body searches

Since the recognition of great damages to the right of physical integrity involved in body searches in the places of deprivation of liberty, international human rights law has generated standards to limit and restrict this practice<sup>144</sup>. The current process of the SMR review offers a key opportunity to incorporate to the text a new Rule, which addresses these developments.

Pursuant to these guidelines, the rule should specify that body searches to the persons deprived of their liberty and their visitors, when appropriate in accordance to the law, must obey the criteria of necessity, reasonableness and proportionality<sup>145</sup>. It should also rule that this practice should only be performed in the

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Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. CAT/C/48/3 Para. 72. On the other hand, the United Nations Declaration on education and training on human rights sets out in section 1.2 “*Education and training in human rights matters is essential for the promotion of the universal and effective respect of all human rights and fundamental liberties of all the persons, pursuant to the principles of universality, indivisibility and interdependency of the human rights*”, whereas section 2.1 establishes that “*Education and training on human rights matters is made up by the set of educational and training activities, information, awareness and learning, whose aim is to promote the universal and effective respect of all human rights and fundamental liberties, thus cooperating, among others, with the prevention of abuses and violation of human rights by providing people with the knowledge, skills and comprehension and by developing their attitudes and behaviors so that they can contribute to the creation and promotion of an universal culture of human rights*”. Resolution of the General Assembly of UN, December, 19, 2011, A/RES/66/137.

<sup>144</sup> In terms of body searches, the Committee against Torture of the United Nations (CAT) has established in recent Concluding Observations the need to: “(a) *Ensure that strip searches for persons in police custody are limited to cases where there is a reasonable and clear justification; if carried out, the search has to be conducted with the least intrusive means and in full conformity with article 16 of the Convention; an independent mechanism to monitor those searches, upon request of the detainee, should also be provided; (b) Establish precise and strict guidelines regulating the strip searches conducted by all law-enforcement officials, including those from the Immigration and Correctional Services Department; if these guidelines are already in place, they should be strictly abided by and their observance consistently monitored; records of searches should be made and all abuses committed should be thoroughly investigated and, if substantiated, punished; and (c) Seek alternate methods to body cavity search for routine screening of prisoners; if such search has to be conducted, it must be only as a last resort and should be performed by trained health personnel and with due regard for the individual's privacy and dignity.*” CAT Concluding Observations to the Report of the Special Administrative Region of Hong Kong (HKSAR), part of the fourth periodic report of China (CAT/C/HKG/4), CAT/C/HKG/CO/4 January 19, 2009, Para. 10. Emphasis added. Also see CAT, Concluding Observations, Fifth and Sixth periodic evaluation to Greece CAT/C/GRC/CO/5-6, June, 27, 2012, Para. 16 and 17. In turn, the Committee for the Elimination of Discrimination against Women has urged the States to adopt “...*appropriate steps to guarantee full respect for the dignity and human rights of all persons during body searches, in full compliance with international standards, and to establish an external redress and oversight mechanism for women prisoners that is independent, comprehensive and accessible.*” CEDAW, Concluding Observations, Sixth periodic Report on Argentina, CEDAW/C/ARG/CO/6, August 16, 2010, p.28. In addition to the specific development of the field of requisitions in the Universal and Regional Humans Rights' protection system, it should be noted that the World Medical Association (WMA) has urged “*all Governments and public figures responsible for the security of the population, to acknowledge that these intrusive examinations constitute serious attacks to the privacy and dignity of a person, and that they also pose risks of physical and psychological harm.*” Therefore, the WMA has required that “... *alternative methods for the routine testing of prisoners be considered and that the examinations on body cavities be applied only as last resort...*” Emphasizing that “... *if there is a need to carry out examinations of the body cavities, the public responsible must ensure that these examinations are performed by staff that is qualified and has the sufficient medical experience to safely practice said examination*” and that “...*the same responsible authority must ensure that the privacy and dignity of the examined person is safeguarded...*” See Declaration of World Medical Association on Body Searches of Prisoners, adopted by the 45<sup>th</sup> World Medical Assembly, Budapest, Hungary, in October, 1993 and editorially revised at the 170<sup>th</sup> Council Session, Divonne-les-Bains, France, May, 2005.

<sup>145</sup> Similarly: Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment and other punishment, A/68/295 Para. 59 and Report on the meeting of the Expert Group. Buenos Aires, 2012, UNODC/CCPC/JEG.6/2012/4 Para. 10.c)

adequate sanitary conditions, by qualified personnel of the same sex of the person<sup>146</sup>, in conformity with the human dignity and in respect for fundamental rights. For this purpose, alternative means that take into consideration technological equipment and other appropriate methods<sup>147</sup> should be given priority.

In turn, the Rules should provide that body searches must be carried out pursuant to the protocols and procedures clearly established by law<sup>148</sup>, and the personnel in charge of them should be identified at all times and keep track of its performance<sup>149</sup>.

Finally, for the appropriate updating of the Standard Minimum Rules pursuant to international standards, these should include the prohibition of intrusive vaginal, anal or nude body searches regarding the persons deprived of their liberty as well as their visitors.<sup>150</sup>

Notwithstanding the foregoing, in light of the heterogeneity of national regulations, but also taking into account the necessity to establish effective mechanisms for the protection of the rights of persons deprived of liberty and their visitors, it is crucial that the Standard Minimum Rules also incorporate certain minimum requirements for those contexts where this bad practice still persists. In order to evaluate the legitimacy of such intrusive searches, at least the following requisites should be met comprehensively: 1) that the body search is absolutely necessary to attain the security purpose in the specific case; 2) that there is no other alternative whatsoever; 3) that the body search is authorized by a court order<sup>151</sup>; and 4) only performed by health professionals.<sup>152</sup>

#### D. The definition of prison capacity and measures against overcrowding

Overcrowding is one of the main problems of the places of deprivation of liberty in Latin America and in many other parts of the world. The extreme overpopulation results in serious and continuous violation of

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<sup>146</sup> The European Committee for the Prevention of Torture has determined that “[...] mixed gender staffing also allows for appropriate staff deployment when carrying out gender sensitive tasks, such as searches. In this respect, the CPT wishes to stress that, regardless of their age, persons deprived of their liberty should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender [...]” Standards for the European Committee for the Prevention of Torture, CPT/Inf/E (2002) 1 - Rev. 2011, p.85.

Similarly: Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment and other punishment, A/68/295 Para. 59.

<sup>147</sup> Principle XXI of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Resolution 1/08 of the IACHR, OAS.

Likewise: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para. 59

<sup>148</sup> IACHR, Report on Human Rights of the Persons Deprived of their Liberty in the Americas, OAS/Ser.L/V/II.Doc. 64, December,31, 2011, Para.419. Similarly: Report on the meeting of the Expert Group. Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para. 10.b)

<sup>149</sup> IACHR, Report on Human Rights of the Persons Deprived of their Liberty in the Americas, OAS/Ser.LV/II.Doc. 64, December,31,2011, Para.263.5.

<sup>150</sup> Principle XXI of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, Resolution 1/08 of the IACHR, OAS. *“Intrusive vaginal and anal searches shall be forbidden by law.”*

Similarly, the Report on the visit to Brazil of the Subcommittee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, 2012, CAT/OP/BRA/1 Para 118 and 119

<sup>151</sup> In accordance with the IACHR, a judicial control of this practice is crucial because if the decision to subject a person to this type of intimate search is exclusively done at the total discretion of the prison personnel, there are risks that this practice may be used as a form of intimidation and abuse. IACHR Report N° 38/96 Case 10.506 Argentina. “Case X and Y”. October, 15,1996. Para. 82.

<sup>152</sup> IACHR. Report N° 38/96 Case 10.506 Argentina. “Case X and Y”. October, 15,1996. Para. 72. Similarly: Interim Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment. A/68/295 Para. 59

dignity and human rights of the persons deprived of their liberty, and structural reforms are required for its management<sup>153</sup>.

In this regard, the Inter-American Commission and Court have pointed out that detention in overcrowded conditions, with low light or ventilation, or inadequate sanitary conditions, is against human dignity and violates the personal integrity of those persons deprived of their liberty.<sup>154</sup> Such conditions contribute to a violent atmosphere<sup>155</sup>, and hinders the normal operation of essential functions of the detention places such as “health, rest, hygiene, diet, security, visits, education, work, recreation and conjugal visits”<sup>156</sup>.

The Inter-American Commission on Human Rights has maintained that “*The overcrowding of persons deprived of liberty generates constant friction between inmates and increases levels of violence in prisons. Overcrowding also makes it difficult for prisoners to have a minimum of privacy; reduces opportunity for access to showers, bathrooms and the prison yard, etc; fosters the spread of illness; creates an atmosphere in which health, sanitary and hygienic conditions are deplorable; constitutes a risk factor for fires and other emergency situations; and prevents access to the –usually few- opportunities to work and study; thus, overcrowding poses a true barrier to the achievement of the purposes of the punishment of deprivation of liberty*”.<sup>157</sup> Additionally, the IACHR has pointed out that this situation of “*overpopulation generates serious problems in the management of prison facilities, adversely affecting, for example, the provision of medical services and implementation of prison security systems. Additionally, it creates conditions for the commission of routinely and systematic acts of corruption, in which prisoners must pay for receiving basic and necessary goods and even for the access to educational and working programs and other resources that should be normally provided freely by the State.*”<sup>158</sup>

In view of the foregoing, and notwithstanding the fact that overcrowding is closely linked to decisions of criminal policy that determine the incarceration rate of a State<sup>159</sup>, we consider essential to incorporate concrete rules aimed to prevent overcrowding in the reformulation of the Standard Minimum Rules.

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<sup>153</sup> Here, it is worth mentioning that the Report on the meeting of the Experts Group in Buenos Aires included the following recommendation “... to include, in rule 7, the necessity of establishing systems of information on the prison personnel capacity and the occupation rate per prison...” Report on the meeting of the Experts Group. Buenos Aires, 2012 UNODC/CCPCJ/EG.6/2012/4 Para. 11.b)

<sup>154</sup> I/A Court HR. Case of Pacheco Teruel V. Honduras. 2012. Op. Cit. Para. 131; I/A Court HR. Case of Fleury and others V. Haiti. 2011. Op. Cit. Para. 85; I/A Court HR. Case of Yvon Neptune V. Haiti. 2008. Op. Cit. Para. 131; I/A Court HR. Case of Boyce and others V. Barbados. 2007. Op. Cit. Para. 94 and IACHR, Report on Human Rights of the Persons Deprived of their Liberty in the Americas, OAS/Ser.L/V/II.Doc. 64, December, 31, 2011. Para. 103 and 460.

<sup>155</sup> IAHCRC. Report on Human Rights of the Persons Deprived of their Liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, December, 31, 2011. Paras. 15, 21, 103, 106, 115, 281, 282 and 455

<sup>156</sup> I/A Court HR. Case of Pacheco Teruel and others V. Honduras. 2012. Op. Cit. Para. 67 a); I/A Court HR. Case of Vélez Loo V. Panamá. 2010. Op. Cit. Para. 204; I/A Court HR. Case of Boyce and others V. Barbados. 2007. Op. Cit. Para. 93.

<sup>157</sup> IAHCRC. Report on Human Rights of the Persons Deprived of their Liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, December, 31, 2011. Para. 455

<sup>158</sup> IAHCRC. Report on Human Rights of the Persons Deprived of their Liberty in the Americas, OAS/Ser.L/V/II.Doc. 64, December, 31, 2011. Para. 456

<sup>159</sup> The IAHCRC considers that the typical responses to overcrowding (building of new spaces, release of groups of prisoners, special or general pardons, etc.) do not provide a sustainable solution to the problem and, for this reason, recommends other strategies of criminal policy. Among these it enumerates: “... (a) the legislative and institutional reforms required to ensure a more rational use of preventive detention, and for this measure to only be used as a last resort and an exception to the rule; (b) enforcement of the maximum time periods established by law for detainees to remain in preventive detention; (c) promotion of the use of alternative measures or substitutes for preventive detention and the deprivation of liberty as a sentence; (d) the use of other methods to serve sentences such as probation, supervised release and work or school release; (e) modernization of Administration of justice systems to streamline criminal proceedings; and (f) prevention of illegal or arbitrary detention by law enforcement agents.” IAHCRC. Report on the Human Rights of persons deprived of liberty in the Americas. OEA/Ser.L/V/II.Doc. 64, 31 December 2011. Paras. 461 y 462

In the first place, it is necessary to expressly set out in the Standard Minimum Rules that the prison capacity does not correspond exclusively to the physical space indispensable for the survival of the person deprived of his/her liberty; rather, it is a broader concept referred to the set of necessary provisions to ensure a decent life to the persons deprived of their liberty.<sup>160</sup> Consequently, in addition to the physical space that each person deprived of liberty must be provided with, the notion of individual accommodation space used to measure the capacity of the places of deprivation of liberty must, in turn, ensure the services and provisions that contribute to the living conditions of the place, such as, heating, bathrooms, light and air spaces, ventilation, as well as the access to medical services and opportunities to study and work.<sup>161</sup>

Accordingly, the IACHR has endorsed the assessment of the International Red Cross, which holds that to determine the accommodation capacity of a place of deprivation of liberty it should be take in account the actual space available for the person deprived of liberty, ventilation, light, access to sanitary services, number of hours that the inmates spend in their cells or rooms; number of hours that they spend outdoors; and the possibilities that they have to do physical exercise, work, among other activities<sup>162</sup>.

Furthermore, it is advisable to include a Rule that provides that the State have the fundamental duty to determine, grounded on clear criteria, the accommodation capacity of centers of deprivation of liberty. In this respect, for example, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas point out that the number of places available should be defined "*according to international standards related to living conditions.*"<sup>163</sup>

For an effective control of overcrowding, it is necessary that information regarding the capacity of establishments and their actual ratio occupation is available to the public. Also, that the possibility exists for inmates, their relatives and attorneys, as well as the different bodies of control and monitoring, to question the official data submitted by the authorities<sup>164</sup>.

In parallel, it is necessary that the Standard Minimum Rules contemplate a norm compelling States to establish mechanisms that allow for the immediate repair of any situation of accommodation over the set limit of available space, as well as the adoption of measures to ensure the no repetition of such situation<sup>165</sup>.

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<sup>160</sup> Although the concept of penitentiary space does not refer exclusively to the available physical space for each person deprived of liberty, it is important to consider the standards which several international organisms of Human Rights have established regarding this issue. In this vein, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, has pointed out that the desirable standard for individual cells to measure at least 7 m<sup>2</sup>, with a minimum distance of 2 meters between walls and at least 2.5 meters between the floor and the ceiling. *Cfr.* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)/Inf (92) 3 [EN], *2nd General Report*, 13 April 1992, Para.43.

<sup>161</sup> In other words, adding a second bed in a cell does not duplicate its lodging capacity if is not considered the proportional enlargement of the services and provisions mentioned earlier, which guarantee the minimum conditions for human dignity while imprisoned.

<sup>162</sup> International Committee of the Red Cross (ICRC), *Water, Sanitation, Hygiene and Habitat in Prisons* (2011), page 19 and ICHR. OAS/Ser.LV/II.Doc. 64, December, 31, 2011. Para. 465

<sup>163</sup> Principle XVII of the Principle and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas, Resolution 1/08 of the ICHR., OAS. "*The competent authority shall determine the maximum capacity of each place of deprivation of liberty according to international standards related to living conditions...*"

<sup>164</sup> Principle XVII of the Principle and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas, Resolution 1/08 of the ICHR.,OAS.

<sup>165</sup> Principle XVII of the Principle and Good Practices on the Protection of Persons Deprived of their Liberty in the Americas, Resolution 1/08 of the IACHR., OAS. *The occupation of an institution over its maximum capacity shall be prohibited by law (...) The law shall establish remedies intended to immediately address any situation of overcrowding. The competent judicial authorities shall adopt adequate measures in the absence of an effective legal regulation (...) Moreover, States shall adopt measures to prevent the repetition of such situations.*"

Furthermore, it is advisable to include a specific mention in the Rules that provides that persons deprived of their liberty, their relatives or attorneys shall have access to a straightforward remedy in order to present complaints about situations of overcrowding before a competent authority.<sup>166</sup>

Ultimately, the Rules shall be updated in a way that include, at least, the comprehensive notion of prison capacity, the necessity of clear criteria to determine the accommodation capacity of the places of deprivation of liberty accordingly to what has been explained in this section, the guarantee of access to the information regarding the accommodation capacity of centers of deprivation of liberty and their actual ratio occupation, the establishment of a simple and effective recourse to complain about overpopulation situations, and the provision of effective mechanisms to repair such situations.

## **E. Transfers**

The last relevant issue which should be revised by the Standard Minimum Rules is the transfer of persons deprived of their liberty, either from one place of detention to another or within them. This is because the arbitrariness in the definition of transfers and the lack of proper conditions in carrying it out leads, in many cases, to the violation of the rights of persons deprived of liberty.

The current Rules refer frequently to the transfer of persons deprived of their liberty, though often in an indirect way. Firstly, Rule 37 establishes that persons deprived of liberty shall be allowed to communicate with their family and friends regularly, through mail and visits. In the same vein, Rule 79 points out the need to ensure the maintenance and improvement of relations between the inmate and his family. Needless to say, these dispositions indefectibly lose operability when the person deprived of liberty is transferred to a detention place extremely far away from his family and community, as it becomes illusory their chance to receive regular visits.<sup>167</sup>

Moreover, Rule 44.3 indicates that the person deprived of liberty has the right to immediately communicate to his family about his/her transfer to another institution. Finally, Rule 45 refers to the way transfers must be conducted, stating succinctly that the transferred person must not be exposed to the public, that the transfer shall not be done under conditions of limited light or ventilation or in a way that causes "unnecessary" physical suffering, and that it shall be paid by the State.

In this regard, we understand that the current SMR are insufficient, as the rules do not establish even a minimum level of conditions for transfers. The Standard Minimum Rules thus fail to set up criteria to define the new place of detention, or the reasons that may give motive for the transfer of the person deprived of his/her liberty. Neither do these rules refer to the required jurisdictional control of transfers nor to the prohibition of using it as a mean of punishment. For those reasons, consequently, an amendment is required.

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<sup>166</sup> IACHR. Report on Human Rights of the persons deprived of their liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, December, 31, 2011. Para. 265

<sup>167</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.L/V/II.Doc. 64, 31 December, 2011. Para. 594

Concerning the right to family protection<sup>168</sup> and the importance of persons deprived of their liberty to have contact with the outside world, both acknowledged in Rules 37 and 79, it is important for the Standard Minimum Rules to explicitly recognize the right of persons deprived of their liberty to maintain a personal and direct bond, through regular visits, with their community and family; and consequently, the responsibility of the Administration to ease that bond.<sup>169</sup>

In order for this right not to lose effectiveness, we consider essential to include a general principle which states that persons deprived of their liberty should be kept, if possible, in an establishment located at a reasonable distance from their place of residence.<sup>170</sup> Moreover, it should be clearly set out that in order to decide on a person's re-location, it is necessary to consider his/her need to be deprived of liberty in a place close to his/her residence.<sup>171</sup>

On the other hand, an effective jurisdictional control upon Administration's performance is necessary to avoid abuses or arbitrariness and to guarantee persons deprived of their liberty the right to maintain a direct and regular contact with their family and community. In this respect, the Inter-American Commission on Human Rights has pointed out that there should be a jurisdictional control over transfers. For this matter, the authority must inform the competent Court before carrying out the re-location or immediately after it. In any case, to ensure an effective control, the tribunal must have the authority to overturn transfers that it considers illegal, arbitrary or amounting to any violation of the fundamental rights of the inmate.<sup>172</sup> The Inter-American Commission pointed out the need for the person deprived of liberty and his/her family to have access to effective legal remedies in order to complain about prejudices resulting from a transfer.<sup>173</sup>

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<sup>168</sup> Article 23.1 of the International Covenant on Civil and Political Rights (1966): "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*"; and the Article 17 of the American Convention on Human Rights (1969): "*Rights of the Family:1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*"

<sup>169</sup> Principle XVIII of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Resolution 1/08 of Inter-American Commission on Human Rights, OAS (2008): *Contact with outside world. Persons deprived of liberty shall have the right (...) to maintain direct and personal contact through regular visits with members of their family, legal representatives, especially their parents, sons and daughters, and their respective partners.* And Rule 26 from United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (2010): *Women prisoners' contact with their families, including their children, their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means.*

<sup>170</sup> Principle 20 from Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988): "*If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence*"; and Rule 4 from United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (2010): "*Women prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman's preference and the availability of appropriate programs and services.*". Accordingly, Report on the meeting of the Expert Group. Buenos Aires, 2012, UNODC/CCPCJ/EG.6/2012/4 Para.8 c) and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Page 16.

<sup>171</sup> Principle IX.4 First SubPara. of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the America, Resolution 1/08 of Inter-American Commission on Human Rights, OAS (2008): *The transfers of persons deprived of liberty shall be authorized and supervised by the competent authorities, who shall, in all circumstances, respect the dignity and fundamental rights of persons deprived of liberty, and shall take into account the need of persons to be deprived of liberty in places near their family, community, their defense counsel or legal representative, and the tribunal or other State body that may be in charge of their case.*

<sup>172</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS /Ser.LV/II.Doc. 64, December 31, 2011. Para. 500. In the same sense, the Special Rapporteur on Torture asserts that regardless of which authority is competent to authorize and/or execute transfers, the authority releasing the detainee, as guarantor of the right to life and

humane treatment of the persons under its custody, must act with due diligence and objectivity in assessing potential risk factors and the feasibility of the transfer, and must inform the judge in charge, prior to carrying out the transfer, to give him or her the opportunity to overturn said transfer Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment A/68/295.Para. 31.

<sup>173</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LV/II.Doc. 64, December 31, 2011. Para.500 and 601.

In relation to the above, the Standard Minimum Rules must include a specific norm which refers to the required jurisdictional control over transfers of persons deprived of their liberty and to the need for a simple and effective means to complain about re-location orders.

For its part, current Rule 44.3 enshrines the right of persons deprived of their liberty to inform their family about transfers to other institutions. The importance of letting somebody else know about their transfer has also been recognized by other international instruments subsequent to the Standard Minimum Rules.<sup>174</sup> Therefore, the Inter-American Commission on Human Rights set out that when massive transfers are carried out, in addition to the right of persons deprived of their liberty to immediately inform their family or any other person about their transfer, it is the duty of the Administration to inform as soon as possible about the new location and the personal conditions of the persons deprived of their liberty.<sup>175</sup>

It should be considered the modification of Rule 44.3 to indicate that persons deprived of their liberty have the right to inform their family or any other person they deem necessary about their re-location. Also, to include the Administration's duty to notify the family or contact person in the case of juveniles or disabled persons<sup>176</sup>, as well as in the case of massive transfers.

Moreover, current Rule 7 regarding "Registers" points out certain minimum records which should be kept in each detention place, disregarding issues concerning the transfer of persons deprived of liberty. When updating the Standard Minimum Rules it is essential to include a norm that forces the Administration to record, at least, the date and time of the transfer, the identification of the authority who ordered it and the place of destination of the person deprived of his/her liberty.<sup>177</sup>

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<sup>174</sup> Principle 16 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988): "16.1: Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody. (...) 16.3 If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians." Principle 6 of Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (1989): "Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence." Article 18.1 of International Convention for the Protection of All Persons from Enforced Disappearance (2006): "...each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information: (...) d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer..."

<sup>175</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LN/II.Doc. 64, December 31st, 2011. Para.498 and 499.

<sup>176</sup> Principle 16.3 from Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988): "If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians."

<sup>177</sup> Principle IX.2 of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Resolution 1/08 of Inter-American Commission on Human Rights, OAS (2008): *The personal data of persons admitted to places of deprivation of liberty shall be recorded into an official register, which shall be made available to the person deprived of liberty, his or her representative, and the competent authorities. The register shall include, as a minimum the following information: ...e) The authority that conducted the person deprived of liberty to the institution; h) Time and date of transfers to another place and the destination; i) Identity of the authority who ordered the transfer and of the one who is responsible for it...* Likewise: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para.43 and Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. (USA and Venezuela disagreed on this point.) E/CN.15/2013/CRP.6 Rule 7 bis. 1)

The need to keep a record of these circumstances has been internationally recognized as a necessary safeguard against enforced disappearance.<sup>178</sup> Likewise, at the regional level, the Inter-American Commission on Human Rights has highlighted the responsibility of the authorities of the places of deprivation of liberty for keeping records of these circumstances, as a way to protect the rights of persons deprived of their liberty.<sup>179</sup>

In parallel, regarding the conditions of transfers, the Inter-American Commission on Human Rights in their Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, has added a central point when highlighting the prohibition of carrying out transfers under conditions that can cause *physical or mental suffering*, contrasting with current Rule 45.2 which foresees only physical suffering.

Finally, an extremely worrying aspect about the transfer of persons deprived of their liberty is its use as an informal sanction and as a control mechanism, by eluding fundamental guarantees, such as the principle of legality, due process, and presumption of innocence, among others. This is a current practice in Latin America that has been verified by the Inter-American Commission on Human Rights<sup>180</sup> and that is expressly forbidden at the regional level in the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.<sup>181</sup>

Regarding the serious violation of rights that this practice involves, an update of the Standard Minimum Rules should necessarily include a norm which forbids the Administration to use transfers as a means of punishing, repressing or discriminating against persons deprived of their liberty, their families or representatives.

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<sup>178</sup> Article 17.3 of International Convention for the Protection of All Persons from Enforced Disappearance (2006): *"Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers (...) The information contained therein shall include, as a minimum: (...) h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer..."*

<sup>179</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LV/II.Doc. 64, December 31, 2011. Para. 498

<sup>180</sup> IACHR. Report on the Human Rights of persons deprived of liberty in the Americas. OAS/Ser.LV/II.Doc. 64, December 31, 2011. Para.490, 492 and 598.

<sup>181</sup> Principle IX.4 Second subPara. of Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas Resolution 1/08 of Inter-American Commission on Human Rights, OAS (2008): *"The transfers shall not be carried out in order to punish, repress, or discriminate against persons deprived of liberty, their families or representatives..."* In the same sense: Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. A/68/295 Para. 37.

#### IV. Summary of Proposals

In conclusion, it is convenient to summarize the proposals that have been elaborated in this document.

Firstly, it is essential that the Standard Minimum Rules accept **the broad concept of deprivation of liberty** which does not limit itself to prison, in line with the current international standards. In particular, we consider the definition set out in the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, approved by resolution 1/08 of CIDH, the most accurate one. This definition describes the deprivation of liberty as: *“Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under de facto control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses. This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty”*

Moreover, the inclusion of some **fundamental principles** at the beginning of the Rules would mean a very important progress. These principles could be incorporated in a reformulation of the general Rule on non-discrimination, currently included in Rule 6, or in a brand new Rule in which all the fundamental principles could be gathered.<sup>182</sup> Among these, it is essential to include:

- a) the Administration's duty to treat persons deprived of their liberty according to their inherent dignity;
- b) the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment;
- c) the special role of the State as guarantor of the rights of persons deprived of liberty and;
- d) the non-violent management of places of detention, as a general rule

Regarding the duty of **dignified treatment of persons deprived of liberty** as a fundamental principle, it is also recommended the relocation of the following Rules as one general norm:

- a) Rule 57, regarding the State's obligation to avoid aggravating the sufferings already intrinsic to the deprivation of liberty; and
- b) Rule 60.1, regarding the need for the institutional regime to minimize any difference between life in prison and life at liberty.

In the same Rule referring to the obligation of dignified treatment, it should be specified that deprivation of liberty in a situation of overcrowding, or limited light or ventilation, or inadequate sanitary conditions, is against human dignity and violates the personal integrity of persons deprived of their liberty.

Considering the inviolability of human dignity and as a consequence of the State's especial position as a guarantor, the Standard Minimum Rules should explicitly ascertain that **States may not invoke financial**

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<sup>182</sup> Report on the meeting of the Expert Group. Buenos Aires 2012, UNODC/CCPCJ/EG.6/2012/2 Para.8.b); Proposal of the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela. E/CN.15/2013/CRP.6 Rules 2.bis 6 and 6bis and UNODC Secretariat, Working paper, UNODC/CCPCJ/EG.6/2012/2 Pages 3 and 4.

**hardships to justify conditions of deprivation of liberty** that do not comply with the minimum international standards and respect the inherent dignity of the human being.

Alongside with the needed inclusion of the absolute prohibition of torture and other cruel, inhuman or degrading treatments, it is proposed the incorporation of some basic standards regarding **the investigation of all deaths in custody, as well as any signs or allegations of torture or inhuman or degrading treatment or punishment in places of deprivation of liberty:**

- a) In the event of death or degradation of the physical condition of a person deprived of liberty, the State has the obligation to provide a satisfactory and convincing explanation of what happened.
- b) Every death, regardless of its alleged cause, must be notified to an external and independent organ charged of carrying out a serious, exhaustive, convincing, impartial and agile investigation. This obligation to investigate should be made equally extensive to the deaths occurred short-after the release of the deceased.
- c) Without prejudice to the foregoing, it must be included the duty of the Administration to carry out an internal investigation with a view to establish the corresponding administrative responsibilities, without hampering the investigation of the independent organ.
- d) It is important to make explicit the duty of the Administration of places of deprivation of liberty to collaborate and not to hamper, at any level, the investigation of independent and external organs.
- e) The States should design and apply protocols of action aimed to react in cases of deaths under custody or allegations of tortures or ill-treatment, in order to contribute with the investigation.
- f) According to these protocols, authorities should ensure the recollection of necessary proofs, keep the corresponding evidence, provide protection to victims and witnesses and put aside the personnel suspected of having any responsibility in the events.
- g) Regarding deaths or injuries as a consequence of aggressions among persons deprived of their liberty, a serious investigation should be equally carried out to exclude any possibility of omission of the personnel's care duty.
- h) The Standard Minimum Rules should establish the same obligation for those deaths catalogued as "non-violent", because these may give account for structural deficiencies of the places of deprivation of liberty, especially regarding medical care.
- i) Moreover, it should be established the duty of the Administration to notify the deaths in custody to family relatives with due regard for their dignity, taking into account the suffering this may cause them.
- j) To ensure the effectiveness of the investigation, States must be obliged to guarantee the protection of victims and witnesses of deaths or tortures in places of deprivation of liberty.
- k) Likewise, it is necessary that States provide support and assistance to victims, witnesses and relatives of those affected, to help them face the disturbance that these situations cause.
- l) The Rules should establish the obligation to keep a record of every death occurred in places of deprivation of liberty, detailing the circumstances. These records should be made according to clear criteria which allow independent organs to subsequently elaborate adequate diagnoses and design public policies of prevention.

Furthermore, from the absolute prohibition of torture and other ill-treatments, it derives the absolute prohibition of the use of any element or means of coercion inherently inhuman, degrading or painful, which should also be included in the Standard Minimum Rules. This is especially relevant in relation to persons with psychosocial disability that are deprived of their liberty.

Regarding the incorporation of the standard of **the State as guarantor of the fundamental rights of persons deprived of their liberty**, it is necessary to make explicit certain **specific duties regarding State's obligation to design and apply public policies of prevention** aimed at protecting the rights of persons deprived of their liberty. Particularly, those policies related to prevention and promotion of health (as developed in the corresponding section) and prevention of critical situations:

- a) The Standard Minimum Rules should establish the obligation of the State to design and implement policies to prevent critical situations in places of deprivation of liberty, especially measures aimed to prevent and confront fires.
- b) In order to prevent fires at places of deprivation of liberty, it is essential for establishments to be built with non-inflammable materials, and that mattress and pillows are made of flame-retardant materials.
- c) It is essential that the hydrant anti-fire system (both "dry and wet network") is ready to be used whenever needed and that the personnel has immediate access to the elements needed to extinguish fire (fire extinguishers, special suits, axe, chain-breakers, among others)
- d) Personnel should be trained to fight the fire. The training should be periodical and carried out by qualified staff.
- e) States should be compelled to generate contingency plans in case of a fire inside a place of deprivation of liberty, contemplating effective means for evacuation of persons deprived of their liberty.
- f) Action plan procedures must be perfectly known by all the staff, and simulations and rehearsals must be carried out in order to test all the necessary elements of response, such as hoses and extinguishers.

For a correct adaptation of the Standard Minimum Rules to the current international Human Rights standards, together with the incorporation of a general principle of non-violent management of places of deprivation of liberty, the inclusion of certain **specific norms regarding the use of force** is required:

- a) The Rules should provide that the use of force must be in accordance with the principles of exceptionality, legality, proportionality and strict necessity, according to international standards.
- b) Furthermore, it should be forbidden the use of firearms and other lethal arms, unless strictly necessary for the protection of life.
- c) It is essential that States devise and implement clear protocols for the differentiated use of force, according to the above mentioned principles.
- d) States should be obliged to provide appropriate training to the personnel working in the places of deprivation of liberty regarding the differentiated use of force, with emphasis on the protection of human rights.

Regarding **health services** inside the centers of deprivation of liberty, and with the aim of implementing a system of prevention and promotion; primary assistance in health and highly complex care that meets the particular features in the context of confinement, States must:

- a) Carry out a periodic survey to identify the determinants of health factors, based on indicators that allow measuring the fulfillment of human rights that have a bearing as social determinants of health<sup>183</sup>.
- b) Based on the information derived from the survey, devise a comprehensive health plan of which purpose is to remove the factors that negatively affect health and to strengthen those

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<sup>183</sup> Within the ISHR the creation of the progress indicators for the measurement of the rights enshrined in the Additional Protocol of the American Convention of Human Rights in Economics, Social and Cultural matters provides a concrete tool for the measurement of the compliance with the right to health, from a perspective of work on the social determinants.(OAS/Ser.L/XXV.2.1)

- factors that have a positive impact on health. This plan shall be grounded on promotion/prevention health strategies, which call for an interdisciplinary approach.
- c) Within this comprehensive health plan, it is important to create a program of primary health care and establish its articulation with highly complex care strategies.
  - d) The interdisciplinary approach shall be cross-cutting and be present at all stages, of periodic survey, design, implementation and monitoring of the medical plan<sup>184</sup>.
  - e) Clearly address the need of continuity in the rendering of the medical care services, before, during and after the deprivation of liberty.
  - f) Establish that the health personnel working in the places of deprivation of liberty must be autonomous and independent from its Administration.
  - g) Ensure an environment of health care in which priority is given to the informed consent – associated with counseling, tests and treatment – in order to create a continuous and effective process of voluntary health assistance. In terms of the operation of the service, it is necessary to devise protocols for action that ensure:
    - i. The realization of the free and informed consent – in all types of health assistance, regardless of its complexity – by means of the manifestation of will of the person that shall receive medical assistance, keeping records which are available for external control.
    - ii. The access to prior information on the patient's health condition, on the proposed treatment procedure and its sought objectives, on the expected benefits of the procedure, its risks, discomfort and foreseeable side-effects; the specification of the alternative procedures and their risks, benefits and damages; and the foreseeable consequences of the non-realization of the proposed procedure or of its alternatives.
  - h) The creation of recording mechanisms of advance instructions, also subject to external controls
  - i) Create intervention protocols for restrictive practices and unify the format of chronological, foliated and unique sanitary records.
  - j) Devise specific strategies for the specialized treatment of high-risk groups inside the centers of deprivation of liberty (particularly, but not limited to, persons living with HIV, hepatitis, tuberculosis)
  - k) Without prejudice to the prioritization of alternatives to the deprivation of liberty, States should carry out a periodic survey of the specific needs of women and children and, based on that survey, adapt the facilities and the services. Particularly, giving account of: pre and post natal health care required by pregnant women, and that both boys and girls are not born inside the centers of deprivation of liberty, the importance of the existence of nurseries with qualified personnel when mothers are allowed to be with their children and the necessary pediatric assistance.
  - l) As explained in the preceding corresponding section, in the reformulation of the Standard Minimum Rules, the following shall be removed:
    - a. Rule 32.1 and 32.2, because it is against medical ethics that health personnel certifies or takes part in the certification that a person deprived of his/her liberty is in condition to receive any form of treatment or punishment, which could negatively affect his/her health.
    - b. Rule 33.b), because it is against medical ethics that coercive methods on a person deprived of liberty are allowed when prescribed by the health personnel.

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<sup>184</sup> In this respect: Report on the meeting of the Expert Group. Buenos Aires, 2012.UNODC/CCPCJ/EG.6/2012/4 Para. 9.a): "...to refer to a global and comprehensive approach to preventive and curative health care, taking into account health determinants such as hygiene..."

With the purpose of ensuring the effective exercise of the **fundamental rights of the psycho-social disabled persons** and preventing the forms of additional violations to which they are exposed, the Standard Minimum Rules should:

- a) Establish the express prohibition of intervening in medical searches in persons with disabilities (PWD) without their free and informed consent pursuant to the standard of article 15 of the CRPD
- b) Stipulate that a periodic and interdisciplinary survey on the specific needs of the PWD shall be carried out, taking into account their functional diversities, in order to identify what type of support these persons require. Taking this information as a basis, devise the necessary support systems – either technical or human – to develop their lives inside the centers of deprivation of liberty, exercising the same rights as any other person on equal opportunities.
- c) As regards the free and informed consent, a periodic and interdisciplinary survey, which allows to identify the specific needs of the disabled persons, shall be carried out (with special attention to the requirements of the psycho-social disabled persons) to have access to all the information referred to in the recommendation “g” of the section on health<sup>185</sup> and exercise its self-determination.
- d) Devise external mechanisms that periodically control, through direct appointments with the PWD and by other means, that the disabled persons have had access to the required information to give their free and informed consent, and have been able to express their will related to the health care they receive and that their will has been respected.
- e) Devise a program of assistance services based on the promotion of mental health and communitarian mental care, with a view to attain a comprehensive, preventive, participative and communitarian approach.
- f) Carry out a periodic survey of the barriers – either communicative or structural – that prevent persons with disabilities from having access to the same rights as any other person and devise strategies for the adaptation of facilities.

Additionally, the Standard Minimum Rules need a profound review regarding the **inspection of the places of deprivation of liberty**:

- a) It is necessary that the Rules contemplate inspection by national and international organs; either they are governmental or intergovernmental agencies, of the universal or regional systems of protection, as well as non-governmental organizations.
- b) Regardless of the kind of agency, the most important aspect is that it must be an autonomous inspection agency, consisting of qualified persons and independent from those responsible of the places of deprivation of liberty.
- c) The inspection groups shall include health specialized personnel and shall observe a gender equilibrium in its structure. The presence of women inspectors is mandatory when the inspection is carried out in places in which women are deprived of liberty.
- d) The Rules should expressly include the minimum powers that said agencies shall have to comply with their functions,<sup>186</sup> as well as the correlated duty of the State to ensure and facilitate those functions inside the places of deprivation of liberty and the duty to allocate adequate budget for the state agencies.

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<sup>185</sup> Access to the information on: the health condition, the proposed procedure, with an specification of the sought objectives; the expected benefits of the procedure; the risks, discomfort and foreseeable side-effects; the specification of the alternative procedures and its risks, benefits and damages related to the proposed procedure, the foreseeable consequences of the non-performance of the proposed procedure or of the stated alternative methods.

<sup>186</sup> See the powers included in the specific paragraph about independent inspections.

- e) The Rules should include the inspectors' duty to draft a detailed report, whereby the corresponding recommendations are formulated and the necessary complaints are made.
- f) The Rules should envisage States' duty to protect those who have an appointment with the inspectors or those who file complaints, in case of possible retaliation.

Regarding the imposition of the **solitary confinement** regime to persons deprived of their liberty, either as a punishment, a disciplinary penalty or as a protective measure, the Standard Minimum Rules should be amended to include rules that will govern and limit the use of this measure, which is restrictive of rights.

- a) Firstly, as stated in the section about health, it is essential to remove from Rule 31 the medical certification that a person deprived of liberty is in condition to stand the isolation.
- b) The Rules should establish the absolute prohibition of the prolonged or indefinite solitary confinement and the prohibition of the solitary confinement as penalty.
- c) The Standard Minimum Rules should observe the international standard by virtue of which all solitary confinement that exceeds 15 days is understood as prolonged and, therefore, is forbidden. In order to prevent the breach of this prohibition, the frequent renewal of this measure is to be forbidden to avoid a situation that might derive in a prolonged solitary confinement.
- d) It must be prohibited the solitary confinement in a dark cell, in punishment cells or, in general, in any space in which the person is under worse conditions than the rest of the population deprived of their liberty.
- e) Any type of solitary confinement, irrespective of its duration, justification or material conditions must be prohibited in relation to juveniles, pregnant women, women while breastfeeding or with under aged children or persons with psycho-social disabilities deprived of liberty.
- f) When the solitary confinement does not coincide with any of the aforementioned assumptions, the measure, as disciplinary penalty or as protective measure, shall comply with certain basic principles that must be expressly stated in the Standard Minimum Rules:
  - i. Solitary confinement regime shall be used only in very exceptional circumstances, as a last resort and for as short a time as possible.
  - ii. The solitary confinement measure must be proportional with the reason triggering it, being it a disciplinary infraction or the need to safeguard the integrity of the isolated person.
  - iii. The principle of legality shall be strictly complied with, and the isolation regime can only be imposed on those cases permitted by law and only in the manner prescribed by it.
  - iv. An effective jurisdictional control of any solitary confinement measure imposed on a person deprived of liberty shall be guaranteed. The court shall be informed regarding the imposition of said measure and it must be empowered to modify or revoke the measure if pertinent.
  - v. The person deprived of liberty subject to this measure shall be provided with all procedural guarantees that constitute the right to due process; particularly, the right to defend him/herself in trial with access to a lawyer, having the possibility of preparing the defense.

Regarding **transfers**, an update of the Standard Minimum Rules is required to ensure the better protection of the fundamental rights of the persons deprived of their liberty and their relatives:

- a) Firstly, it is essential that the Rules clearly set out the right of the persons deprived of their liberty to keep personal and direct contact, through periodic visits, with their social and familiar unit; and that the Administration must assume the duty to guarantee this right.
- b) Consequently, a general principle should be included in the Standard Minimum Rules providing that the persons deprived of their liberty shall be kept in establishments near their residence. This principle shall be taken into account when deciding the transfer of a person deprived of liberty.

- c) The current Rules establish that the transfer shall not be done in a manner that produces physical harm, but it should also be added that transfers should be carried out in such a way that it does not produce mental suffering, neither.
- d) The Standard Minimum Rules should envisage the obligation of an effective jurisdictional control of the transfers of persons deprived of their liberty, as an essential safeguard for the protection of their fundamental rights.
- e) Along with the aforesaid, the Rules should consider the provision of a simple, summary and effective remedy to complain about a transfer, which should be available to the persons deprived of their liberty, their representatives and relatives.
- f) The right of the person deprived of liberty to inform a third party of his choice regarding his transfer should be envisaged. Also, the Standard Minimum Rules should establish the Administration's duty to inform about massive transfers as well as transfer of juveniles and persons with psycho-social disabilities.
- g) In all the places of deprivation of liberty, when a transfer takes place, reliable evidence shall be given of, at least, the date and the time of the transfer, the identification of the authority in charge of carrying out the transfer, the identification of the authority ordering it and the destination of the persons deprived of their liberty.
- h) Finally, it is essential to rigorously prohibit the use of transfers as a mechanism to punish or discriminate against persons deprived of their liberty or their relatives.

A very relevant aspect that is not incorporated in the current Standard Minimum Rules is the one referred to the **body searches** of persons deprived of their liberty and their visitors, in regard to which specific rules limiting this practice should be included.

- a) It should be established that body searches, only when appropriate by law, shall meet the necessity, reasonability and proportionality criteria.
- b) Body searches shall only be made in appropriate sanitary conditions, by qualified personnel of the same gender and in a manner consistent with the human dignity of the person undergoing it and respecting his/her human rights.
- c) Priority should always be given to the use of alternative means of body search, incorporating non-invasive procedures and technological equipment.
- d) It is essential to determine that body searches are made pursuant to clear protocols.
- e) Furthermore, the personnel in charge of the body searches shall be identified at all times and keep a reliable record as a measure to prevent abuses.
- f) The Standard Minimum Rules should prohibit the intrusive anal and vaginal searches, taking into account the development of international human rights law.
- g) Without prejudice to the above mentioned, when States allow this practice in their jurisdictions, the Rules shall point out certain minimum essential requisites: 1) that it is absolutely necessary to meet the security objective in the specific case; 2) that there is no other alternative whatsoever; 3) that it is authorized by a judicial decision and 4) only carried out by health professionals.

Finally, a major concern in Latin-America is the critical overpopulation of the places of deprivation of liberty. Notwithstanding that overcrowding derives from profound problems of the criminal policy, which gives priority to massive confinement, the Standard Minimum Rules should establish **certain specific rules aimed at preventing overcrowding in the places of deprivation of liberty:**

- a) Firstly, it is essential that the Standard Minimum Rules clearly affirm that the prison capacity not only refers to the physical space essential for the person deprived of liberty to live, but also to a broader concept that involves all the necessary provisions to ensure that the person deprived of

liberty has a decent life inside the center of deprivation of liberty, by the provision of, for instance, sanitary services, diet, an appropriate health care, and access to work and study, leisure places, among others.

- b) The Standard Minimum Rules should establish that States have the fundamental duty to define the actual capacity of the places of deprivation of liberty pursuant to clear criteria that contemplate the comprehensive concept of prison capacity, as explained above.
- c) All the information regarding the determination of the capacity of the places of deprivation of liberty, as well as the information referred to the actual occupation ratio thereof, shall be available to the public so that it can be controlled and challenged by the civil society.
- d) Simple, summary and effective remedies shall be provided so that persons deprived of their liberty, their representatives or relatives may claim before the Courts of Justice in case of overcrowding.
- e) It is also advisable that the Rules contain the obligation of States to provide solutions or response mechanisms in case of overcrowding in the places of deprivation of liberty, including efficient measures to prevent such situations.