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

VIENNA, AUSTRIA, 25 – 28 March 2014

POSITION PAPER OF THE GOVERNMENT OF GERMANY[1]

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I. German Position Paper on the Revision of the UN Standard Minimum Rules on the Treatment of Prisoners

Germany thanks the UNODC-Secretariat for its very useful working paper.

1. Preliminary Observations

Germany has no reservations in respect of the inclusion of Preliminary Observations **1 *bis*, 2 *bis*, and 5 *bis*** in accordance with the joint response of the governments of Argentina, Brazil, South Africa, USA, Uruguay, and Venezuela ("Joint Proposal", which refers to the joint submission from the Governments of Argentina, Brazil, South Africa, United States of America, Uruguay and Venezuela (Bolivarian Republic of), circulated in a conference room paper at the twenty-second session of the Commission on Crime Prevention and Criminal Justice (E/CN.15/2013/CRP.6)).

In the recommended addition of 2 ***ter*** of the Preliminary Observations in the third line before the "Bangkok Rules" a reference to the "United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990" could be included.

The recommended revision to no. 5 is fully supported. The version up until now could lead to the misunderstanding that certain youth detention facilities are not directly encompassed by the scope of the Standard Minimum Rules. In fact, however, it apparently addresses "reformatories" or in our current terminology "alternative schools" or "youth welfare institutions".
In Preliminary Observation 5 (1) last sentence, the recommended addition could likewise include a reference to the "United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990".

2. Revision of the generally applicable principles in Rule 6

Germany has no reservations as to the recommendations of the Expert Group. New formulations, however, should not reduce the existing standards in any way.

3. Revision of Rule 7 – Register

In respect of Rule 7, the recommendation to take technological changes into consideration is supported. There should be no difference as to whether the prisoner register is maintained in a bound register or in an electronic data system.

4. Revision of Rule 9 – Accommodation

The proposal by New Zealand to replace Rule 9 (1) to more strongly define the prerequisites for double occupancy of a cell, is approved. Double occupancy of a cell should only be an

option when (a) it is established for each prisoner that he can be placed in shared accommodations without risk to his safety; (b) the size and facilities in the cell are adequate for the health and comfort of the number of prisoners sharing it; and (c) there is reasonable space for privacy (particularly with respect to toilet use). Individual accommodation serves to protect the sphere of privacy and intimacy and especially to protect against reciprocal attacks at night. At the same time, this recommendation takes account of the fact that some prisoners request shared accommodation. Moreover, the recommendation takes account of the duty of the institution to use utmost care in its discretion in the selection of prisoners to participate in shared accommodation.
The standards set forth, however, must also apply to accommodation in dormitories (subsection (2)).

5. Revision of the rules on health care (Rules 22 - 26)

- Rule 22

In respect of the revision of Standard Minimum Rule 22 it is pointed out that the German health care system is based on the principle of self-administration. The addition suggested by Norway (“integrated under the ministry of health”), thus, cannot be supported.

In addition, the out-of-date term “mental abnormality” should be replaced by a different suitable formulation. The term used in international papers, eg those drafted by WHO or the EU, is “mental disorder”.

It would be desirable if the recommendation of the Expert Group on Rule 22 “...to refer to the need to have in place evidence-based HIV, tuberculosis and other disease prevention, treatment, care and support services as well as refer to drug dependence treatment programmes in prison settings that are complementary to and compatible with those in the community;...” would be expanded to include mention of measures for drug-dependent prisoners such as substitution (as a form of treatment) and needle exchange (as a harm reduction measure).
The expanded formulation could state:
"...to refer to the need to have in place evidence-based HIV, tuberculosis and other disease prevention, treatment, care and support services as well as refer to drug dependence treatment programmes as recommended in the "WHO, UNODC, UNAIDS Technical Guide for countries to set targets for universal access to HIV prevention, treatment and care for injecting drug users" in prison settings that are complementary to and compatible with those in the community;..."

The position of New Zealand (cf. p. 14 of the working paper), whereby no reference should be made to the treatment of drug-dependent persons etc. because reference is not made to other significant illnesses, cannot be supported. The position of the Philippines to limit drug-dependency treatment to prisons of a certain size, likewise, cannot be supported. It is contrary to Standard Minimum Rule 63 (4). This rule states that prisons should have a specific minimum size in order to ensure that reasonable facilities can be made available. The suggestions by Finland are supported; in particular, treatment by a medical specialist only as part of in-patient treatment would not always be appropriate (Rule 22 (2) first sentence).

- Rules 24 and 25

Germany has no reservations regarding the recommendations of the Expert Group. New formulations, however, should not reduce the existing standards in any way.

- New Rule 26 *bis*

Insofar as a provision – such as Rule 26 *bis* – contains prospective rules on clinical trials or other health research, attention must be paid that national or regional standards (eg subsequent to a future European GCP-VO or medical devices VO) are not weakened.

6. Revision of the rules on discipline and punishment (Rules 27 - 34)

- Rule 32

In regard to the rules on punishment, the recommendation of the Expert Group to delete reference to reduction of diet as a possible punishment for prisoners is supported. Such a disciplinary measure is incompatible with the fundamental right of a prisoner to receive adequate and healthy nutrition on a daily basis as well as with the duty of prisons to observe and protect the dignity of the persons imprisoned therein.

In respect of the recommendation of the Expert Group on solitary confinement it should not simply be stated that this disciplinary measure should only be used as a last resort in cases of serious or repeated transgressions for as short a time as possible, but rather, it should be expanded to include an expressly stated maximum time limit of at most four weeks. It is stated in no. 29 of the UN Standard Minimum Rules that the type and duration of permissible disciplinary measures should be regulated by national law. However, given the materiality of solitary confinement as a disciplinary measure, deviating therefrom with a direct, specific time-limit in the rules would be desirable.

If prisoners are housed in a special cell for solitary confinement, this cell must be equipped by the institution with furniture and sanitary facilities and the size, ventilation, light, and

electricity must comport with requirements appropriate for a cell used for incarceration during the day and at night. In addition, in accordance with the European Prison Rules (No. 60.4), inclusion should be made of the fact that no disciplinary measures – especially solitary confinement – should include an absolute prohibition on family contact.

- Rule 33

The suggestion by Norway to delete letter b) is supported, given that the substance of the rule is already encompassed by letter c).

7. Revision of the rules on information to and complaints by prisoners (Rules 35 and 36)

- Rule 36 (3)

The suggestion by Norway and New Zealand to amend subsection (3) in principle is agreed. However, the requirement of the compulsory presence of only full-time officials should be relinquished. The use of officials can only be required for official state duties; there are no fundamental concerns against part-time employees (eg for reasons of family).

8. Revision of the rules on contact with the outside world (Rules 37 - 39)

A minimum amount of privacy and confidentiality in communication must also be ensured for prisoners. Contact with the outside world could be included with, eg Rules 37 and 38 (see page 30 et seq. of the working paper); other States have already commented in this regard. With respect to the suggested formulation of 38 (1) by Morocco, it should be noted that it is unclear what is intended by the use of “automatically”. If what is meant is that the person concerned should be offered the opportunity to make contact without having requested it, there would be nothing wrong with the suggestion. The second suggestion by Morocco according to its wording leads to a situation where a person who bears two nationalities will not be allowed to contact either of the States to which he belongs (which cannot be the intent). There is no basis for a limitation to a right to only contact one State nor is there a suggestion as to the criteria in accordance with which this should be determined.

9. Revision of Rule 44 (Notification of death, illness, transfer, etc.)

Germany has no reservations with respect to the revision. New formulations, however, should not reduce the existing standards in any way.

10. Revision of rules regarding institution personnel

- Rule 46

In respect of Rule 46, the suggestion by New Zealand for a new draft of the rule is viewed as positive. The goal of this is to even more strictly consider the selection of personnel. Prison personnel must have suitable education and other attributes required to operate a humane prison system and to support the resocialisation of the prisoners. This emphasises that not only proper management is dependent upon prison personnel but also the resocialisation and reintegration of the prisoners into society.

- Rule 47

There are no reservations as to the recommended additions.

- Rule 50

The revision recommended by New Zealand to Rule 50 (3) is approved. An obligation that the directors of prisons must reside on-site no longer seems up-to-date given the changes in means of communication and, thus, should be stricken or at the least – as suggested – replaced by a rule regarding on-call duty.

- Rules 52 and 53

The suggested change to Rule 53 by South Africa is supported.
The standard postulated in Rule 53 (2), that a male staff member will only be allowed to enter the women's section when accompanied by a female officer and that female prisoners can only be attended to and supervised by female personnel, as well as that male personnel can only be used as an exception, does not correspond to the successful actual practice in German prisons. Female employees work in male prisons and male employees work in female prisons. The employment of men and women has proven to be positive within the entire prison system. Thus, it is Germany's opinion that there is no need for the present Rule 53 for the protection of female prisoners from attacks by male employees.

Rule 53 of the UN Standard Minimum Rules reaches far beyond the European Prison Rules. In no. 85 of those rules it is recommended that men and women be represented in a balanced manner on the staff. No. 54 (5) states that examinations of persons can only be conducted by an employee of the same gender. This provision seems sufficient.

- Rule 54

There are no reservations in respect of the addition of a new Rule **54 *bis***.

11. Revision of Part II – Rules for special prisoner categories, A. Prisoners under sentence, Rules 57 – 59 and 60

The suggestion by Brazil in Rule 57 to replace the word “offender” with “person who has violated the law” cannot be supported. A violation of the law does not always have imprisonment or the imposition of another measure depriving liberty as its consequence. The prerequisite for the imposition of a deprivation of liberty is the commission of a crime. This is better expressed by the term “offender”. It can remain open whether Rule 58 should contain “prisoner” or “offender”. Likewise, the suggested term “person” does not seem very informative.

With respect to Rule 60 (1) it is pointed out the currently applicable rule is acceptable without revision nor does it appear to “require modernisation”. But the formulation suggested by Finland (“Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community”) can be supported inasmuch as to some extent this appears oriented toward Basic Principle No. 5 of the Recommendation of the Council of Europe Rec(2006)2 [“Life in prison shall approximate as closely as possible the positive aspects of life in the community”].

12. Revision of Rule 65 (treatment of prisoners)

The request by Spain in regard to 65 is not supported. Essentially the question here is how “treatment” is to be understood. While the current formulation goes further and in any case seems to also encompass general treatment prisons with the goal of resocialisation, the suggestion by Spain is aimed at the medical-psychiatric-psychological treatment of specific “behavioural disorders”. Whether and to what extent such illnesses could lead to the crimes specified in the suggestion and the extent to which they are available for “treatment” in prison is quite disputed. Accordingly, the more general formulation should be maintained.

13. Revision of heading “B. Insane and mentally abnormal prisoners” and of Rule 82

Substantively no. B. 82 of Resolution (73)5 of the Council of Europe setting forth Standard Minimum Rules for the treatment of prisoners and the Council of Europe Recommendations Rec(2006)2 nos. 12 and 47 are comparable to the UN Standard Minimum Rules. The term “insanity” used for those requiring treatment in the resolution is replaced in the recommendation by “Persons who are suffering from mental illness and whose state of mental health is incompatible with detention in prison”. Regarding those persons who are not encompassed by the scope of the formulation “suffering from mental disorder or abnormality” was chosen. It would seem to make sense, thus, to take these formulations into account in the event of a re-formulation of the UN Standard Minimum Rules.

To the extent the term “insane” is out-of-date or too laden with value judgments and, thus, should be replaced, of the suggested changes only the formulation “prisoners with mental illnesses” or – better still – “mentally ill” for Rule 82 (1) should be considered in reliance on the Recommendation of the Council of Europe. It would also be useful to consider introduction of the passage contained in the Recommendation of the Council of Europe: “and whose state of mental health is incompatible with detention in prison”. In contrast, any reference to a (simple) “mental disorder” in Rule 82 (1) should be rejected to avoid inconsistencies with German law. This also applies to the recommendation to replace “insane” with “persons who suffer severe mental illnesses or disorders” in Rule 82 (1).

In subsection (2) the formulations “mental illnesses” or “other mental illnesses or disorders” cannot be supported when “mental illness” is used in subsection (1) (suggestion of Brazil and South Africa) because it is not clear where the difference lies between subsection (1) and subsection (2). It would be viable to either retain the current formulation or to use the formulation “other mental disorder or abnormality” in reliance on the Recommendation of the Council of Europe.

The **formulation of the heading** initially depends on the term used in Rule 82. The formulation “prisoners with mental illnesses” may not be sufficient when subsection (2) (which, in our opinion, should only take place in subsection (2), see above) also refers to “mental disorder”; but since a heading, on the other hand, is not required to cover the substance of the entire provision, in this case as well a heading that only relates to “mental illnesses” would be acceptable. The suggestion of using “prisoners with psychological and psychiatric illnesses” in the heading (and also in the Rule itself) is not supported because these terms have not been used in international conventions up until now and, thus, would only provoke further controversial questions and ambiguity.
Replacement of the term “mental institution” with “mental health service” does not seem necessary.

14. Revision of Rule 83

Similarly, Rule 83 essentially addresses the question of how “treatment” is to be understood. The current formulation is viewed as too restrictive and the formulation suggested by Brazil – more general and broader – is supported in that it also seems to encompass a general treatment prison with the goal of resocialisation.

15. Revision of Rule 93

The change suggested by Finland is supported.