APPENDIX I

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 17 June 2011
[CDPC plenary/2011 plenary/oj lp/cdpc list of participants] CDPC (2011) LP Final (Bil)

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMITE EUROPEEN POUR LES PROBLEMES CRIMINELS
(CDPC)

60th Plenary Session / 60ème Session plénière

Strasbourg, 14-17 June / 14-17 juin 2011

Agora Building / Bâtiment Agora

Room / Salle G02

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* * * * *

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OBSERVATEURS AUPRES DU CONSEIL DE L'EUROPE

HOLY SEE / SAINT-SIÈGE
Apologised/Excusé

UNITED STATES OF AMERICA / ÉTATS-UNIS D'AMÉRIQUE
**No nomination / Pas de nomination

CANADA
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APPENDIX II

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 10 June 2011 CDPC (2011) OJ
CDPC/CDPC 2011plenary/OJ+LP/cdpc (2011) OJ – E

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

60th Plenary Session

Strasbourg, 14 (2.00pm) - 17 June 2011 (1.00 pm)

DRAFT AGENDA

Council of Europe / Conseil de l'Europe
Agora Building / Bâtiment Agora
Room G 02 / Salle G 02

1. Opening of the meeting

2. Adoption of the draft agenda

Working documents

Draft agenda	CDPC (2011) OJ
Annotated agenda	CDPC (2011) 10

3. Council for Penological Co-operation (PC-CP)

Working documents

Summary report of the meeting of 8-10 December 2010	PC-CP (2010) 22
Summary report of the meeting of 21-23 March 2011	PC-CP (2011) 2
Summary report of the meeting of 16-18 May 2011	PC-CP (2011) 11

a. Dangerous offenders and preventive detention

Working documents

The sentencing, management and treatment of "dangerous" offenders	PC-CP (2010) 10rev5

b. Foreign nationals in prisons

Working documents

Draft Recommendation concerning foreign prisoners	PC-CP (2011) 5 rev3
Draft commentary on the Recommendation	PC-CP (2011) 6 rev

c. Draft European Code on Prison Staff Ethics

Working documents

Draft Code of Ethics for Prison Staff	PC-CP (2011) 7

d. Follow-up to the 30th Council of Europe Conference of Ministers of Justice, "Modernising Justice in the Third Milennium: transparent and efficient justice; prisons in today's Europe" (Istanbul, Turkey, 24 – 26 November 2010)

Working documents

Discussion paper on the follow-up to be given to resolution n°2 on prison policy in today's Europe adopted at the 30th Council of Europe conference of ministers of justice	CDPC (2011) 6
Questionnaire regarding the implementation of the most recent Council of Europe standards related to the treatment of offenders while in custody as well as in the community	PC-CP (2011) 10

e. 16th Council of Europe Conference of Directors of Prison Administration (CDAP)

Information document

Preliminary draft programme	Programme

f. SPACE statistics

Information documents

Annual Penal Statistics: SPACE I, Survey 2009 (Please note the document is 111 pages long)	PC-CP (2011) 3
Annual Penal Statistics: SPACE II, Survey 2009 (Please note the document is 67 pages long)	PC-CP (2011) 4

4. Committee of experts on the operation of European conventions on co-operation in criminal matters (PC-OC)

Working documents

List of Decisions of the 59th meeting of the PC-OC (3-5 November 2010)	PC-OC (2010) 21
List of Decisions of the 60th meeting of the PC-OC (17-19 May 2011)	PC-OC (2011) 13

Draft Fourth Additional Protocol to the European Convention on Extradition and its draft explanatory report

Working documents

Draft Fourth Additional Protocol to the European Convention on Extradition	PC-OC (2010) 13 rev 4
Draft Explanatory Report to the Fourth Protocol to the European Convention on Extradition	PC-OC (2010) 14 rev 4

5. Trafficking in organs

Working documents

Additional opinion of the Steering Committee on Bioethics (CDBI), the European Committee on Crime Problems (CDPC), the European Committee on Transplantation of Organs (CD-P-TO) on "Identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (OTC)"	CDPC/CDBI/CD-P-TO (2011)
Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of removal of organs. Joint Council of Europe/United Nations study (Please note the document is 103 pages long)	Study
Trafficking in organs executive summary	Exec summary

6. Draft Recommendation on the Promotion of the Integrity of Sport against the Manipulation of Results, notably match-fixing

Working documents

Background Paper and Draft Resolution	IM18 (2010) 4rev4
Draft Recommendation of the Committee of Ministers to member states	EPAS (2011) 32rev1
Provisions of international legal instruments on treating bribery in sport as a crime	EPAS (2011) 23

7. Reform process in the Council of Europe – Future activities and priorities of the CDPC

Working documents

Letter to the Committee Chairpersons	Letter
New set-up for intergovernmental structures	SG/Inf(2011)9
Priorities for 2012-2013 and their budgetary implications	CM(2011)48 rev
Report of the Group of Eminent Persons of the Council of Europe: Living together - Combining diversity and freedom in 21st-century Europe (Please note the document is 79 pages long)	Report

Information document

A Look Back at the proceedings of the first meeting of the CDPC	Memorandum

a. Future activities

Discussion paper on the reform process of the Council of Europe - Future activities and priorities of the CDPC	CDPC (2011) 11

b. Activities related to a) Scientific proof in criminal matters and b) Police matters

c. New Terms of Reference for the years 2012-2013 (CDPC, PC-OC, PC-CP)

Working documents

Non-paper - Possible main elements of future terms of reference for the CDPC	CDPC (2011) 14
Non-paper - Possible main elements of future terms of reference for the PC-CP	CDPC (2011) 15
Non-paper - Possible main elements of future terms of reference for the PC-OC	CDPC (2011) 16

8. Cybercrime

Working documents

List of decisions of the T-CY Bureau meeting, 10-11 March 2011	T-CY (2011) 5
Draft Opinion of the T-CY on the criteria and procedure to be followed, in conformity with Article 37 of the Convention, as regards accession of non-	T-CY (2011) 3

members of the Council of Europe to the Budapest Convention

9. Opinion of the CDPC on Criteria and procedure to be followed as regards the accession of non-member states to the Council of Europe to the conventions in criminal field

Working document

Draft opinion	CDPC (2011) 7

10. Reinforcing the effectiveness of Council of Europe treaty law

Working documents

Questionnaire	CDPC (2011) 8
Outline of Convention review	SG/Inf (2011) 2
"Reinforcing the effectiveness of Council of Europe treaty law" – Parliamentary Assembly Recommendation 1920 (2010)	Reply by the Committee of Ministers

11. Information points

a. Violence against women/domestic violence

Working documents

Convention on preventing and combating violence against women and domestic violence (Please note the document is 34 pages long)	Convention
Explanatory Report (Please note the document is 57 pages long)	Explanatory Report

b. Medicrime

Working documents

Convention on the counterfeiting of medical products and similar crimes involving threats to public health	Convention
Explanatory Report	Explanatory Report

c. Follow-up of the ratification process of the Lanzarote Convention and preliminary activities for the setting up of the Committee of the Parties

Information document

Information document concerning the Committee of the Parties to Convention on the protection of children against sexual exploitation and sexual abuse (T-ES)	T-ES (2011) 02

12. Any other business

13. Date of the next CDPC Bureau and Plenary meetings

APPENDIX III

http://www.coe.int/tcj/

Strasbourg, 12 August 2011 PC-OC (2010) 13 FIN

[PC-OC/Documents 2010/ PC-OC(2010)13E FIN

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
PC-OC

Draft Fourth Additional Protocol to the European Convention on Extradition

as amended by the CDPC during its 60th plenary session

Secretariat memorandum prepared by
the Directorate General of Human Rights and Legal Affairs (DG-HL)

The member States of the Council of Europe, signatory to this Protocol,

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Desirous of strengthening their individual and collective ability to respond to crime;

Having regard to the provisions of the European Convention on Extradition (ETS No. 24) opened for signature in Paris on 13 December 1957 (hereinafter referred to as "the Convention"), as well as the three additional protocols thereto (ETS Nos. 86 and 98, CETS No. 209), done at Strasbourg on 15 October 1975, on 17 March 1978 and on 10 November 2010, respectively;

Considering it desirable to modernise a number of provisions of the Convention and supplement it in certain respects, taking into account the evolution of international co-operation in criminal matters since the entry into force of the Convention and the additional protocols thereto;

Have agreed as follows:

Article 1 – Lapse of time

Article 10 of the Convention shall be replaced by the following provisions:

"**Lapse of time**

1. Extradition shall not be granted when the prosecution or punishment of the person claimed has become statute-barred according to the law of the requesting Party.

2. Extradition shall not be refused on the ground that the prosecution or punishment of the person claimed would be statute-barred according to the law of the requested Party.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right not to apply paragraph 2:

   a. when the request for extradition is based on offences for which that State has jurisdiction under its own criminal law; and/or

   b. if its domestic legislation explicitly prohibits extradition when the prosecution or punishment of the person claimed would be statute-barred according to its law.

4. When determining whether prosecution or punishment of the person sought would be statute-barred according to its law, any Party having made a reservation pursuant to paragraph 3 of this Article shall take into consideration, in accordance with its law, any acts or events that have occurred in the requesting Party, in so far as acts or events of the same nature have the effect of interrupting or suspending time-limitation in the requested Party."

Article 2 – The request and supporting documents

1. Article 12 of the Convention shall be replaced by the following provisions:

   "**The request and supporting documents**

   1. The request shall be in writing. It shall be submitted by the Ministry of Justice or other competent authority of the requesting Party to the Ministry of Justice or other competent authority of the requested Party. A State wishing to designate another competent authority than the Ministry of Justice shall notify the Secretary General of the Council of Europe of its competent authority at the time of signature or when depositing its instrument of ratification,

acceptance, approval or accession, as well as of any subsequent changes relating to its competent authority.

2. The request shall be supported by:

a. a copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;

b. a statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions, including provisions relating to lapse of time, shall be set out as accurately as possible; and

c. a copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his or her identity, nationality and location."

2. Article 5 of the Second Additional Protocol to the Convention shall not apply as between Parties to the present Protocol.

Article 3 – Rule of speciality

Article 14 of the Convention shall be replaced by the following provisions:

"**Rule of speciality**

1. A person who has been extradited shall not be arrested, prosecuted, tried, sentenced or detained with a view to the carrying out of a sentence or detention order, nor shall he or she be for any other reason restricted in his or her personal freedom for any offence committed prior to his or her surrender other than that for which he or she was extradited, except in the following cases:

a. when the Party which surrendered him or her consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention. The decision shall be taken as soon as possible and no later than 90 days after receipt of the request for consent. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken;

b. when that person, having had an opportunity to leave the territory of the Party to which he or she has been surrendered, has not done so within 30 days of his or her final discharge, or has returned to that territory after leaving it.

2. The requesting Party may, however:

a. carry out pre-trial investigations, except for measures restricting the personal freedom of the person concerned;

b. take any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time;

c. take any measures necessary to remove the person from its territory.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession or at any later time, declare that, by derogation from paragraph 1, a requesting Party which has made the same declaration may, when a request for consent is submitted pursuant to paragraph 1.*a*, restrict the personal freedom of the extradited person, provided that:

   a. the requesting Party notifies, either at the same time as the request for consent pursuant to paragraph 1.*a*, or later, the date on which it intends to apply such restriction; and

   b. the competent authority of the requested Party explicitly acknowledges receipt of this notification.

   The requested Party may express its opposition to that restriction at any time, which shall entail the obligation for the requesting Party to end the restriction immediately, including, where applicable, by releasing the extradited person.

4. When the description of the offence charged is altered in the course of proceedings, the extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition."

Article 4 – Re-extradition to a third state

The text of Article 15 of the Convention shall become paragraph 1 of that article and shall be supplemented by the following second paragraph:

"2. The requested Party shall take its decision on the consent referred to in paragraph 1 as soon as possible and no later than 90 days after receipt of the request for consent, and, where applicable, of the documents mentioned in Article 12, paragraph 2. Where it is not possible for the requested Party to comply with the period provided for in this paragraph, it shall inform the requesting Party, providing the reasons for the delay and the estimated time needed for the decision to be taken."

Article 5 – Transit

Article 21 of the Convention shall be replaced by the following provisions:

"**Transit**

1. Transit through the territory of one of the Contracting Parties shall be granted on submission of a request for transit, provided that the offence concerned is not considered by the Party requested to grant transit as an offence of a political or purely military character having regard to Articles 3 and 4 of this Convention.

2. The request for transit shall contain the following information:

   a. the identity of the person to be extradited, including his or her nationality or nationalities when available;

   b. the authority requesting the transit;

   c. the existence of an arrest warrant or other order having the same legal effect or of an enforceable judgment, as well as a confirmation that the person is to be extradited;

d. the nature and legal description of the offence, including the maximum penalty or the penalty imposed in the final judgment;

e. a description of the circumstances in which the offence was committed, including the time, place and degree of involvement of the person sought.

3. In the event of an unscheduled landing, the requesting Party shall immediately certify that one of the documents mentioned in Article 12, paragraph 2.*a* exists. This notification shall have the effect of a request for provisional arrest as provided for in Article 16, and the requesting Party shall submit a request for transit to the Party on whose territory this landing has occurred.

4. Transit of a national, within the meaning of Article 6, of a country requested to grant transit may be refused.

5. A State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it reserves the right to grant transit of a person only on some or all of the conditions on which it grants extradition.

6. The transit of the extradited person shall not be carried out through any territory where there is reason to believe that his or her life or freedom may be threatened by reason of his or her race, religion, nationality or political opinion."

Article 6 – Channels and means of communication

The Convention shall be supplemented by the following provisions:

"**Channels and means of communication**

1. For the purpose of the Convention, communications may be forwarded by using electronic or any other means affording evidence in writing, under conditions which allow the Parties to ascertain their authenticity. In any case, the Party concerned shall, upon request and at any time, submit the originals or authenticated copies of documents.

2. The use of the International Criminal Police Organization (Interpol) or of diplomatic channels is not excluded.

3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that, for the purpose of Article 12 and Article 14, paragraph 1.*a*, of the Convention it reserves the right to require the original or authenticated copy of the request and supporting documents."

Article 7 – Relationship with the Convention and other international instruments

1. The words and expressions used in this Protocol shall be interpreted within the meaning of the Convention. As regards the Parties to this Protocol, the provisions of the Convention shall apply, *mutatis mutandis*, to the extent that they are compatible with the provisions of this Protocol.

2. The provisions of this Protocol are without prejudice to the application of Article 28, paragraphs 2 and 3, of the Convention concerning the relations between the Convention and bilateral or multilateral agreements.

Article 8 – Friendly settlement

The Convention shall be supplemented by the following provisions:

“Friendly settlement

The European Committee on Crime Problems of the Council of Europe shall be kept informed regarding the application of the Convention and the additional protocols thereto and shall do whatever is necessary to facilitate a friendly settlement of any difficulty which may arise out of their interpretation and application.”

Article 9 – Signature and entry into force

1. This Protocol shall be open for signature by the member States of the Council of Europe which are Parties to or have signed the Convention. It shall be subject to ratification, acceptance or approval. A signatory may not ratify, accept or approve this Protocol unless it has previously ratified, accepted or approved the Convention, or does so simultaneously. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the deposit of the third instrument of ratification, acceptance or approval.

3. In respect of any signatory State which subsequently deposits its instrument of ratification, acceptance or approval, this Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit.

Article 10 – Accession

1. Any non-member State which has acceded to the Convention may accede to this Protocol after it has entered into force.

2. Such accession shall be effected by depositing an instrument of accession with the Secretary General of the Council of Europe.

3. In respect of any acceding State, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of accession.

Article 11 – Temporal scope

This Protocol shall apply to requests received after the entry into force of the Protocol between the Parties concerned.

Article 12 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Protocol shall apply.

2. Any State may, at any later time, by declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary

General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date or receipt of such notification by the Secretary General.

Article 13 – Declarations and reservations

1. Reservations made by a State to the provisions of the Convention and the additional protocols thereto which are not amended by this Protocol shall also be applicable to this Protocol, unless that State otherwise declares at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession. The same shall apply to any declaration made in respect or by virtue of any provision of the Convention and the additional protocols thereto.

2. Reservations and declarations made by a State to any provision of the Convention which is amended by this Protocol shall not be applicable as between the Parties to this Protocol.

3. No reservation may be made in respect of the provisions of this Protocol, with the exception of the reservations provided for in Article 10, paragraph 3, Article 21, paragraph 5, of the Convention as amended by this Protocol, and Article 6, paragraph 3, of this Protocol. Reciprocity may be applied to any reservation made.

4. Any State may wholly or partially withdraw a reservation or declaration it has made in accordance with this Protocol, by means of a notification addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

Article 14 – Denunciation

1. Any Party may, in so far as it is concerned, denounce this Protocol by means of a notification addressed to the Secretary General of the Council of Europe.

2. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General of the Council of Europe.

3. Denunciation of the Convention automatically entails denunciation of this Protocol.

Article 15 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and any State which has acceded to this Protocol of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force of this Protocol in accordance with Articles 9 and 10;

d. any reservation made in accordance with Article 10, paragraph 3, and Article 21, paragraph 5, of the Convention as amended by this Protocol, as well as Article 6, paragraph 3, of this Protocol, and any withdrawal of such a reservation;

e. any declaration made in accordance with Article 12, paragraph 1, and Article 14, paragraph 3, of the Convention as amended by this Protocol, as well as Article 12 of this Protocol, and any withdrawal of such a declaration;

f. any notification received in pursuance of the provisions of Article 14 and the date on which denunciation takes effect;

g. any other act, declaration, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at [Strasbourg], this […] day of […], in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the non-member States which have acceded to the Convention.

APPENDIX IV

http://www.coe.int/tcj/

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 18 August 2011 PC-OC (2010) 14 FIN

[PC-OC/Documents 2010/ PC-OC(2010)14E FIN]

EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMMITTEE OF EXPERTS

ON THE OPERATION OF EUROPEAN CONVENTIONS

ON CO-OPERATION IN CRIMINAL MATTERS

PC-OC

Draft Explanatory Report to the
Fourth Additional Protocol to the European Convention on Extradition

As revised further to the 60th plenary meeting of the CDPC

Secretariat memorandum prepared by

the Directorate General of Human Rights and Legal Affairs (DG-HL)

I. The Fourth Additional Protocol to the European Convention on Extradition, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), has been opened for signature by the member States of the Council of Europe, in …., on …., on the occasion of the ….

II. The text of this explanatory report, prepared on the basis of that Committee's discussions and submitted to the Committee of Ministers of the Council of Europe, does not constitute an instrument providing an authoritative interpretation of the text of the Additional Protocol although it may facilitate the understanding of its provisions.

Introduction

1. Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) is entrusted, in particular, with examining the functioning and implementation of Council of Europe conventions and agreements in the field of international cooperation in criminal matters, with a view to adapting them and improving their practical application where necessary.

2. The need for the modernisation of the legal instruments of the Council of Europe in the criminal justice field, including the European Convention on Extradition (hereinafter referred to as "the Convention"), in order to enhance international co-operation, has been highlighted on several occasions. In particular, the "New Start" report (PC-S-NS (2002) 7, presented to the CDPC by the Reflection Group on developments in international co-operation in criminal matters) approved by the CDPC in June 2002 pointed to the necessity of realising a European area of shared justice. The Warsaw declaration and the Plan of Action adopted by the third Summit of Council of Europe Heads of State and Government of the member States of the Council of Europe (Warsaw, 16-17 May 2005) underlined the commitment, at the highest political level, to making full use of the Council of Europe's standard-setting potential and to promoting implementation and further development of the Organisation's legal instruments and mechanisms of legal cooperation.

3. At the High-Level Conference of the Ministries of Justice and of the Interior entitled "Improving European Cooperation in the Criminal Justice Field" held in Moscow (Russian Federation) on 9 and 10 November 2006, the Council of Europe was encouraged to continue its efforts to improve the operation of the main conventions regulating international co-operation in criminal matters, in particular those regarding extradition, in order to identify the difficulties encountered and to consider the need for any new instruments.

4. At its 52nd meeting (October 2006) the PC-OC put forward a number of proposals relating to the modernisation of the European Convention on Extradition, as amended by the two additional protocols thereto of 1975 and 1978. The Convention, which dates from 1957, is indeed one of the oldest European conventions in the criminal law field and has a direct impact on individuals' rights and freedoms, to which the CDPC asked the PC-OC to pay particular attention.

5. In this context, the PC-OC suggested, on the one hand, to complement the Convention in order to provide a treaty basis for simplified extradition procedures, and on the other hand, to amend a number of provisions of the Convention in order to adapt it to modern needs. These provisions concerned, inter alia, the issues of lapse of time, rule of speciality and channels and means of communication.

6. The CDPC, at its 56th plenary session (June 2007), decided to mandate the PC-OC, to draft the necessary legal instruments for this purpose. Having studied various options, the PC-OC agreed to draw up two additional protocols to the Convention, a Third Additional Protocol providing for simplified extradition procedures by complementing the Convention, and a Fourth Additional Protocol amending and supplementing the Convention. The present Fourth Additional Protocol was finalised by the PC-OC at its 60th meeting (17 to 19 May 2011) and submitted to the CDPC for approval.

7. The drafts of the Fourth Additional Protocol and the Explanatory Report thereto were examined and approved by the CDPC at its 60th plenary session (14 to 17 June 2011) and submitted to the Committee of Ministers.

8. At the …th meeting of their Deputies on [date], the Committee of Ministers adopted the text of the Fourth Additional Protocol and decided to open it for signature, in [place] on [date].

Commentaries on the Articles of the Fourth Additional Protocol

Article 1 – Lapse of time

9. This Article is intended to replace the original Article 10 of the Convention which established lapse of time, under the law either of the requested Party or the requesting Party, as a mandatory ground for refusal. The current text takes account of changes that occurred as regards international co-operation in criminal matters since the opening to signature of the Convention in 1957, and notably the relevant provision of the Convention of 23 October 1996 relating to extradition between the member States of the European Union (Article 8).

10. The modified Article draws a distinction concerning immunity by reason of lapse of time from prosecution or punishment, depending on whether it obtains according to the law of the requesting or the requested Party.

11. As regards the law of the requesting Party, lapse of time remains a mandatory ground for refusal in accordance with paragraph 1 of this Article. The drafters considered excluding this as a ground for refusal, given that the requesting Party should, as a matter of course, not request the extradition of a person whose prosecution or punishment is statute-barred under its own law. However, they decided to keep this ground for refusal for the rare cases where a Party fails to withdraw an extradition request, despite this immunity.

12. Thus, the requested Party has an obligation to consider whether there is lapse of time under the law of the requesting Party before deciding on extradition. However, in order to allow the requested Party to fulfil this obligation, the requesting Party should provide the requested Party with a motivated statement specifying the reasons for which there is no lapse of time and including the relevant provisions of its law . In the rare cases that the requested Party has reasons to believe that immunity by reason of lapse of time might have been acquired, it should request information on this question from the requesting Party itself.

13. The requesting Party should provide this information together with the extradition request, without an explicit request to that effect from the requested Party being necessary (see also Article 12, paragraph 2, sub-paragraphs b and c of the Convention, as amended by the present protocol).

14. As regards the law of the requested Party, paragraph 2 of the modified Article 10 provides that lapse of time shall not serve as a ground for refusal in principle. This is in line with developments in international law1, as well as European Union law2, which have taken place since 1957.

15. Paragraph 3 qualifies the principle established under paragraph 2, by allowing the requested Party to invoke lapse of time under its own law as an optional ground for refusal in two hypotheses:

- the requested Party has jurisdiction on the relevant offences under its own criminal law;
- its domestic legislation explicitly prohibits extradition in case of lapse of time under its own law.

However, the possibility of doing so is conditional on a reservation to that effect having been made at the time of signature or when depositing the instrument of ratification, acceptance, approval or accession.

16. This reservation may concern either one of the two sub-paragraphs of paragraph 2, or both. The latter case would allow a Party to make a partial withdrawal of its reservation as regards the more far-reaching ground for refusal of sub-paragraph b, while maintaining the more limited ground for refusal of sub-paragraph a.

17. Paragraph 4, is intended to apply only in respect of Parties having made a reservation under paragraph 3. The principle reflected in this provision follows from the Resolution (75) 12 of the Committee of Ministers on the practical application of the European Convention on Extradition.

18. As reflected in the wording “in accordance with its law”, it is the law of the requested Party which determines if and to what extent acts and events in the requesting Party interrupt or suspend time-limitation in the requested Party.

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1 For example, the UN Model Treaty on Extradition and its revised Manual.

2 Notably, the Convention implementing the Schengen Agreement (19 June 1990) and the Convention of 23 October 1996 drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the member States of the European Union.

Article 2 – The request and supporting documents

19. Article 12, paragraph 1 of the Convention provides that requests for extradition shall be communicated through the diplomatic channel. Chapter V of the Second Additional Protocol to the Convention simplified this system by providing for extradition requests to be communicated between the Ministries of Justice concerned. However, for a number of countries the competent authority for sending and receiving extradition requests is not the Ministry of Justice, but another authority such as the Office of the Prosecutor General. The present wording is designed to accommodate this practice.

20. Any Party wishing to designate a competent authority other than the Ministry of Justice shall notify the Secretary General of the Council of Europe accordingly. The drafters agreed that any such authority shall be competent at the national level to send and receive extradition requests. In the absence of such notification, the competent authority with respect to that State is understood to be the Ministry of Justice.

21. The drafters took note of the practice of some Parties to the Convention to designate more than one competent authority. In such cases, the declaration of the Party concerned should make it clear how competences of the different authorities are apportioned in extradition cases.

22. It is important to note that Article 2, paragraph 2 of this Additional Protocol provides that Article 5 of the Second Additional Protocol shall not apply as between Parties to the Fourth Additional Protocol3.

23. Channels and means of communication are now dealt with in Article 6 of this Fourth Additional Protocol so as to create a common system in this respect.

24. It is important to note that although Article 5 of the Second Additional Protocol will not apply, it will still be possible to conclude agreements between Parties in accordance with Article 28, paragraph 2 of the Convention, as foreseen in Article 7, paragraph 2, of the Fourth Additional Protocol.

25. As regards paragraph 2 of Article 12 of the Convention as amended by this Fourth Additional Protocol, contrary to the Convention which requires an original or authenticated copy of the documents mentioned under sub-paragraph a, this Additional Protocol only refers to “a copy”. This is in line with the possibility introduced under Article 6 of the Fourth Additional Protocol to use modern means of communication. However, sub-paragraph a should also be read in conjunction with the reservation provided for under Article 6, paragraph 3 of this Additional Protocol. In cases where the requested Party has made such a reservation, the requesting Party would still have to send the originals or authenticated copies of these documents.

26. In addition, the Fourth Additional Protocol completes the original wording of paragraph 2 of Article 12 of the Convention in two respects. Firstly, Under sub-paragraph b, an explicit reference to provisions relating to lapse of time is included, with the understanding that the appraisal of lapse of time according to the law of the requesting Party, pursuant to Article 10, paragraph 1 of the Convention as amended by the Fourth Additional Protocol, should be based on the assessment made by that Party of lapse of time according to its own law. Secondly, under sub-paragraph c, the relevant information to be sent is completed with a reference to the location of the person, due to practical considerations.

Article 3 – Rule of speciality

27. The rule of speciality corresponds to the principle that an extradited person may not be arrested, prosecuted, tried, sentenced or detained for an offence other than that which furnished the grounds for his or her extradition. In this context, it is important to underline the responsibility of the requesting Party to ensure that the initial request for extradition is as complete as possible and based on all available information, in order to avoid future requests for the extension of extradition to other offences committed prior to the initial request.

28. This article rewords Article 14 of the Convention, by introducing the following amendments:

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3 Article 5 of the Second Additional Protocol will continue to apply in relations between Parties to the Second Additional Protocol and Parties to the Fourth Additional Protocol having ratified the Second Additional Protocol.

1. in paragraph 1, the words “proceeded against” are replaced by the words “arrested, prosecuted, tried” and a new sub-paragraph is inserted under paragraph 2, in order to clarify the scope of the rule of speciality ;

2. In paragraph 1, the sentence containing the words “nor shall he or she be for any other reason restricted in his or her personal freedom”, has been restructured in order to align the English and French versions;

3. in paragraph 1, sub-paragraph a, a time limit of 90 days is introduced for the formerly requested Party to communicate its decision on the extension of the extradition to other offences;

4. in paragraph 1, sub-paragraph b, the period of 45 days is reduced to 30 days;

5. a new paragraph 3 is introduced, creating the possibility for the requested Party to authorise the requesting Party to restrict the personal freedom of the extradited person pending its decision on extension of the extradition.

29. As regards point 1, the reason for the change is the fact that there had been many different and sometimes conflicting interpretations of the words “proceeded against” in different legal systems. The replies to a questionnaire sent by the PC-OC indicated notably that the authorities of some Parties to the Convention had interpreted the words “proceeded against” to cover any measure taken by the authorities of the requesting Party, even before a case is brought to trial. This had made it impossible for those Parties to investigate and collect evidence in relation to offences committed prior to a person’s extradition and which are discovered after her/his surrender. This has created significant difficulties in some Parties or led to the rejection of evidence collected on such offences by courts.

30. The drafters of the Fourth Additional Protocol were of the view that such an interpretation did not reflect the intention of the drafters of the Convention, as the requesting Party should not be barred from doing whatever is necessary in order to organise the file for a request to be addressed to the Party which surrendered the person in accordance with paragraph 1, sub-paragraph a, seeking the consent of that Party to the extension of the extradition to offences not covered in the initial extradition request. Such a request for consent should notably be accompanied by the documents mentioned in Article 12, which implies that the requesting Party may initiate or continue proceedings up to the point where it obtains the necessary documents for requesting the other Party’s consent, such as a new warrant of arrest.

31. The new wording of paragraph 1, in combination with the new paragraph 2, sub-paragraph a, makes it clear that the rule of speciality does not bar the requesting Party from conducting pre-trial investigations and doing what is necessary in order to obtain the documents mentioned under paragraph 1, sub-paragraph a, while still ruling out the possibility for the requesting Party to bring the case to trial or restrict the personal freedom of the extradited person, solely based on these newly discovered offences. In this context, pre-trial investigations are to be understood to comprise intrusive measures such as wiretapping or house searches with regard to the extradited person, as well as confrontation and interrogation of persons other than the extradited person in connection with these additional offences. The extradited person may be interrogated or confronted insofar as this investigative measure does not imply coercion, i.e. the restriction of the personal freedom of the extradited person. Article 14 of the Convention, as revised by this Fourth Additional Protocol, should also not prevent the requesting Party from summoning the extradited person for the purpose of gathering evidence in order to institute proceedings against other persons who are not covered by the rule of speciality.

32. The concept of “restriction of personal freedom” is to be interpreted so as to include not only deprivation of liberty in accordance with Article 5 of the European Convention of Human Rights, but also restrictions on “liberty of movement”, in accordance with Article 2 of Protocol No. 4 thereto. Thus, a ban to leave the territory of the requesting Party would for example qualify as a restriction of personal freedom.

Paragraph 1, sub-paragraph a

33. As regards point 3, the PC-OC considered that the introduction of a time limit for the requested Party would be an added value in the context of the modernisation of the Convention. This is linked to the observation of the PC-OC that extension of extradition to new offences is sometimes characterised by co-operation which is less prompt compared to the initial request and can cause significant delays, which causes problems in the

criminal procedures of requesting Parties and may also have negative consequences for the defendant. The PC-OC therefore agreed that the introduction of such a time limit would have a clear added value.

34. Even though some Parties to the Convention follow the same procedure for giving consent to the extension of the extradition decision as they do for the initial extradition request, the PC-OC observed that certain elements, such as the presence of the person already in the requesting Party or the technical nature of many extension requests, may allow for a speedy decision on extension. The drafters thus agreed that 90 days would be sufficient for the requested Party to take its decision on consenting to the extension of extradition.

35. However, in certain cases, it might not be possible for the requested Party to treat the request for consent within 90 days, in which case this period can be extended. This nonetheless constitutes progress vis-à-vis the mother Convention, as in such cases the requested Party would have an obligation to inform the requesting Party of the reasons for the delay and the time needed for reaching a decision. This would reduce uncertainty for the requesting Party and limit the disruption to its criminal procedure.

Paragraph 1, sub-paragraph b

36. The amendment to paragraph 1, sub-paragraph b concerns the delay following the final discharge of the extradited person after which the rule of speciality ceases to apply. The Convention provides that the rule of speciality shall not apply if the person has not left, having had the opportunity to do so, the territory of the requested Party within 45 days of the person's discharge or if the person has returned to that territory after leaving it. The drafters considered that the 45-day period had no objective justification 50 years after the Convention, given that it has become much easier to travel and leave the territory of Parties. They therefore agreed to restrict this delay to 30 days.

37. This provision also contains two conditions which have to be fulfilled for the rule of speciality to cease to apply. The person must have been "finally discharged" and had the "opportunity to leave the territory".

38. The term finally discharged should be interpreted in line with the meaning attributed to that term under the Additional Protocol to the Convention on the Transfer of Sentenced Persons. Paragraph 32 of the explanatory report to that Convention provides that:

> "The expression "final discharge" (in French: "élargissement définitif") means that the person's freedom to leave the country is no longer subject to any restriction deriving directly or indirectly from the sentence. Consequently, where, for instance, the person is conditionally released, that person is finally discharged if the conditions linked to release do not prevent him or her from leaving the country; conversely, that person is not finally discharged where the conditions linked to release do prevent him or her from leaving the country."

39. With regard to the words "opportunity to leave the territory", and as clarified in the explanatory report to Article 14 of the original Convention, the person must not only be free to leave the territory, but also not be hindered from doing so for other reasons (for example, for serious health reasons).

Paragraph 3

40. The rule of speciality prohibits any restriction of the personal freedom of the extradited person for offences committed prior to his or her extradition, other than those which furnished the grounds for this extradition. However, there might be rare cases where this principle could potentially create an impediment to the pursuit of the ends of justice, even where there is no oversight on the side of the requesting Party.

41. A typical example would be a situation where the requesting Party discovers new elements after the extradition implicating the extradited person in connection with an offence not included in the original extradition request, on the basis of new evidence or new links to existing evidence. Another example would be the situation where a third country submits a request for re-extradition after the surrender of a person. If the release of that person from custody for the initial offence is imminent, the requesting Party may have to release the person before it can obtain the consent from the requested Party to extend the extradition to the new offence.

42. Paragraph 3 contains an optional provision which will only apply between Parties to this Protocol having made a declaration to that effect. The provision introduces a special procedure within the rule of speciality for such exceptional cases, which allows the requesting Party to continue restricting the personal freedom of the

extradited person until the requested Party takes its decision on consent pursuant to paragraph 1, sub-paragraph a.

43. According to this procedure, in order to restrict the personal freedom of the extradited person on the basis of new offences, the requesting Party must notify its intention to do so to the requested Party. This notification must take place either at the same time as the request for consent pursuant to paragraph 1, sub-paragraph a, or at a later stage. No restriction on the basis of new offences can take place outside the knowledge of the requested Party and before its acquiescence, which is tacitly given by the competent authority acknowledging the receipt of the notification of the requesting Party of its intention to proceed to such a restriction. The competent authority is the authority referred to in Article 12, paragraph 1 of the Convention as modified by Article 2, paragraph 1, of the present Protocol. Parties making a declaration in favour of this optional provision are encouraged to indicate, by the notification foreseen under Article 12, paragraph 1, of the Convention as modified, who will be the competent authority delivering the acknowledgment of receipt. In the absence of such notification, the competent authority will be the Ministry of Justice (reference is made to paragraphs 19 to 21 of this Explanatory Report). An automatically generated receipt of acknowledgment can not be regarded as an explicit acknowledgment of the receipt by the competent authority.

44. This acquiescence allows the requesting Party to take measures on the basis of its warrant of arrest for new offences, according to its own law and subject to its procedural guarantees and to the control of its domestic courts. However, the requested Party may at any time express its opposition to such a restriction of personal freedom, either simultaneously with its acknowledgement of receipt or at a later stage. The requesting Party must comply with this opposition, in the former case by abstaining from taking the measure restricting the personal freedom of the extradited person, and in the latter case by putting an immediate end to the measure in question.

45. The drafters considered that the opposition of the requested Party pursuant to this paragraph may be only limited to certain types of restriction. For example, the requested Party could inform the requesting Party that the latter may not detain the person in question, but use alternative measures restricting her or his personal freedom, such as a house arrest or a ban to leave the country.

46. The drafters of the Additional Protocol considered that the changes to the rule of speciality have no impact on surrender procedures between EU member States on the basis of the EU Framework Decision on the European Arrest Warrant.

Article 4 – Re-extradition to a third state

47. The changes to Article 15 of the Convention are in line with the amendments to Article 14 of the Convention, and concern the introduction of a time limit not exceeding 90 days for the requested Party to decide whether or not it consents to a re-extradition of the person surrendered to another Party or to a third State.

Article 5 – Transit

48. This article, which was inspired by Article 11 of the Third Additional Protocol to the Convention, simplifies considerably the transit procedure foreseen in Article 21 of the Convention. The drafters of the Additional Protocol noted that, for an effective and speedy transit procedure, the request for transit should be sent as soon as possible. The drafters also took note of Recommendation No. R (80) 7 of the Committee of Ministers of the Council of Europe concerning the practical application of the European Convention on Extradition.

49. In accordance with paragraph 2, the request for transit does not have to be accompanied by the documents referred to in the new Article 12, paragraph 2 of the Convention. Accordingly, the information listed in this paragraph may be considered sufficient for the purposes of granting transit. Nevertheless, in exceptional cases where this information is not sufficient for the State of transit to reach a decision on granting transit, Article 13 of the Convention would apply and allow that Party to request supplementary information from the Party requesting transit. While information concerning lapse of time is not included in this list, the drafters agreed that

such information should also be provided in cases where lapse of time is likely to be of concern, for example due to the time of commission of the offence.

50. Pursuant to Article 6 of this Fourth Additional Protocol, communications for transit purposes may be made through electronic or any other means affording evidence in writing (such as fax or electronic mail), and the decision of the Party requested to grant transit may be made known by the same method. Parties can also make use of these means of communication for practical arrangements. Thus, the Party requesting transit is encouraged to communicate, to the extent possible, information such as the intended time and place of transit, the route, flight details, or the identity of the escorting officers, as soon as this information becomes available.

51. The drafters of this Fourth Additional Protocol considered that the new Article 21 of the Convention could also cover cases where only the Party requesting transit and the Party requested to grant transit are Parties to the Convention, and extradition has been granted on a legal basis other than the Convention.

52. It is no longer an obligation under this Fourth Additional Protocol to notify a Party whose air space will be used during transit when it is not intended to land. However, paragraph 3 foresees an emergency procedure in the event of an unscheduled landing. As soon as the requesting Party is informed of such an event, it shall notify to the Party on whose territory the unscheduled landing occurs that one of the documents mentioned in Article 12, paragraph 2, sub-paragraph a exists. While this Additional Protocol does not specify the form this notification should take, the relevant documentation carried by the escorting officers, or information contained in the INTERPOL or Schengen Information Systems could, for example, be considered sufficient in this respect.

53. Similarly to the original wording of Article 21, paragraph 4 of the Convention, the Party on whose territory the unscheduled landing occurs shall consider this notification as a request for provisional arrest, pending the submission of an ordinary request for transit in accordance with paragraphs 1 and 2.

Article 6 – Channels and means of communication

54. This Article, which is based on Article 8 of the Third Additional Protocol to the Convention, provides a legal basis for speedy communication, including electronic means of communication, while ensuring the authenticity of the documents and information transmitted. It would affect means of communication in relation to several provisions of the Convention, including Articles 12, 13, 14, 15, 16, 17, 18, 19 and 21. The Parties may also request to obtain the original document or an authenticated copy, in particular by mail.

55. The drafters of this Fourth Additional Protocol agreed that the current trend was towards a more intensive use of electronic means of communication, and that the text of the Convention should be open to future developments in this respect, including the possibility of sending all extradition documents using electronic means. However, some delegations considered that for the most essential documents, namely those referred to in Article 12, paragraph 2 and Article 14, paragraph 1, sub-paragraph a of the Convention as amended, it would be premature in the current circumstances to abolish the requirement for transmission by mail, until more reliable electronic means, such as communication with secure electronic signatures, are more widespread.

56. In order to accommodate these concerns, paragraph 3 of this Article allows States to declare that they reserve the right to require the original or authenticated copy of the request and supporting documents for these specific Articles in all cases. This reservation can be withdrawn as soon as circumstances permit.

Article 7 – Relationship with the Convention and other international instruments

57. This article clarifies the relationship between the Protocol on the one hand, and the Convention and other international agreements on the other hand.

58. Paragraph 1 ensures uniform interpretation of this Additional Protocol and the Convention by providing that the words and expressions used in the Protocol shall be interpreted within the meaning of the Convention. The Convention should be understood as the European Convention on Extradition of 1957 (ETS No. 24), as amended between Parties concerned by the Additional Protocol (ETS No. 86), the Second Additional Protocol (ETS No. 98) and/or the Third Additional Protocol (CETS No. 209) thereto.

59. Paragraph 1 further clarifies the relationship between the provisions of the Convention and those of this Fourth Additional Protocol, i.e. as between the Parties to this Protocol, the provisions of the Convention shall apply to the extent that they are compatible with the provisions of this Additional Protocol, in accordance with general principles and norms of international law.

60. Paragraph 2 is designed to ensure the smooth co-existence of this Fourth Additional Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 28, paragraph 2 of the Convention. It states that the Additional Protocol does not alter the relation between the Convention and such agreements or the possibility for Parties to regulate their mutual relations with regard to extradition exclusively in accordance with a system based on a uniform law (Article 28, paragraph 3 of the Convention).

61. This implies in particular that declarations made by EU member States in relation with the European Union Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (2002/584/JHA) would automatically apply to this Fourth Additional Protocol and would make it unnecessary for the States concerned to make new declarations to that effect.

Article 8 – Friendly settlement

62. This article recognises the important role of the European Committee on Crime Problems in the interpretation and application of the Convention and the Additional Protocols thereto, and follows the precedents established in other European conventions in the criminal justice field. It also follows Recommendation Rec (99) 20 of the Committee of Ministers, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field. The reporting requirement which it lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Convention and the Additional Protocols thereto, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and the Additional Protocols thereto which might prove necessary.

Articles 9 to 15 – Final clauses

63. Article 11 has been introduced to ensure clarity about the application in time between Parties to this Fourth Additional Protocol. The Protocol will only apply to new requests, received after the entry into force in each of the Parties concerned. The word “requests” covers requests for extradition, additional requests for consent and requests for transit.

64. The remaining Articles are based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the European Convention on Extradition.

65. Since Article 12 concerning territorial application is mainly aimed at overseas territories, it was agreed that it would be clearly against the philosophy of this Additional Protocol for any Party to exclude parts of its main territory from the application of this instrument, and that there would be no need to lay this down explicitly in this Fourth Additional Protocol.

66. Reservations and declarations made by a State with regard to any provision of the Convention or the Additional Protocols thereto, which is not amended by this Fourth Additional Protocol, shall also be applicable to this Additional Protocol, unless that State declares otherwise in accordance with Article 13, paragraph 1.

67. It is underlined that under the provisions of Article 13, no reservation may be made with regard to the provisions of this Additional Protocol except for the reservations provided for under Article 10, paragraph 3, Article 21, paragraph 5 of the Convention as amended by this Protocol, and Article 6, paragraph 3 of this Fourth Additional Protocol.

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APPENDIX V

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 20 December 2010
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

THE SENTENCING, MANAGEMENT AND TREATMENT OF 'DANGEROUS' OFFENDERS

FINAL REPORT

Nicola Padfield, the author, would be interested to receive further comments: nmp21@cam.ac.uk

CONTENTS

1. INTRODUCTION

Background

1. The treatment of long-term and 'dangerous offenders' has become an important question in many Council of Europe member countries, and thus for the CDPC, with concerns raised from a number of different perspectives. The PC-CP decided to carry out a study of the concept of dangerous offenders, following the conclusions of the 14th Conference of Directors of Prison Administration (CDAP), organised jointly with the Austrian Ministry of Justice (Vienna, 19-21 November 2007) which had discussed issues relating to managing prisons in an increasingly complex environment and more specifically the management of vulnerable groups of prisoners (women, juveniles, foreigners, elderly and mentally disordered) as well as of prisoners detained for terrorism or organised crime.

2. Meanwhile, the First Resolution of the 29th Council of Europe Conference of Ministers of Justice (18-19 June 2009), held at Tromso, Norway, (on preventing and responding to domestic violence) resolved (at paragraph 23):

   to entrust the European Committee on Crime Problems (CDPC), in co-operation with other competent bodies of the Council of Europe, to examine existing best practices in member states, in full respect of human rights, related to:

   a. the assessment of the risk of re-offending and the danger to victims and society posed by perpetrators of acts of domestic violence;

   b. the supervision and treatment of such perpetrators in serious and repeated cases, in closed settings and in the community, including surveillance techniques;

   c. programmes and measures aimed at helping perpetrators improve self-control and behaviour-management and, where possible, repairing the harm done to victims.

3. The PC-CP considered this resolution at its 62nd meeting (21-23 September 2009) and shared the opinion of the CDPC Bureau that this study should be carried out within the framework of the intended study of the concept of dangerous offenders and of their supervision and treatment.

4. The author of this Report was invited to the 63rd meeting (17-19 March 2010) after which a draft scoping paper was prepared, which was discussed at the 64th meeting (5-7 May 2010). The final scoping paper, outlining the work which it was proposed would be carried out over the following four months, was presented to the CDPC at its meeting on 7 June.

Methodology

5. The ground covered by this Report is vast: the sentencing, management and treatment of 'dangerous' offenders, throughout the 47 countries of the Council of Europe. The author was approached early in 2010, with a view to producing a Report within the calendar year 2010.

6. Initial discussions explored the possibility of researching the relevant law in all countries. This possibility was rejected for a number of reasons. A thorough and reliable review of the law would take much longer than the timescale permitted. Reliable and detailed data collection would have been very difficult to gather, and in any case, this is a fast moving field, with many countries considering legislation at the time of writing. It was agreed that a review of the law which was either out of date, or

contained significant inaccuracies would not be useful to the main project, which has remained to identify themes and trends. Examples of existing good (and perhaps bad) practice in the management of 'dangerous' offenders would be discussed.

7. In early 2010, the PCCP had received two papers which proved invaluable background material to this Report: Valloton (2010) and Canton (2010). As well, a brief questionnaire had been sent to representative of member states by the PCCP secretariat asking five wide-ranging questions relevant to the project. The responses were few, and rather generalised. Since, the Report was required to be concluded in draft by the end of September, it was agreed therefore that the Report would not attempt to analyse individual laws in detail. This is not to say that a major report which compared in detail law and practice in the countries of Council of Europe would not be valuable. Simply, this project does not enjoy the time or resources to achieve that challenging aim.

8. Instead, the author sent a draft scoping document to a number of personal contacts, largely academic, in a number of countries. The final scoping document was presented to the PCCP in May (see PC-CP (2010)10 rev). Members of the PCCP were invited in person at the meeting in May to contact the author with practical examples from their own countries. They were reminded of this request by email a month later. Members of the CDPC were also invited to comment. A draft version of the report was circulated to both the PC-CP and the CDPC for comments. As well, the author has sought to research a broad spread of relevant literature. Due to the limited time available, and the author's limited linguistic skills, the literature reviewed is only that available in English and French.

9. The work therefore fell into three phases:

   March-June: the scoping phase.

   June-September: the main phase.

   October-December: refinement and development.

10. It was conducted by one academic, working part-time on the project. It is hoped that the exploratory nature of the Report may encourage significant further research and analysis. The Report contains illustrative examples[4], but these should be used with caution. Full descriptions of national differences are not offered. As the project developed, it became increasingly clear that realistic hypothetical and generalised examples (rather than country-specific examples) might be more effective in focusing the debate on key issues. Again, although the bibliography contains a wide range of sources, references in the main text have been kept to a minimum in order to keep the Report more easily readable. Anyone interested in discussing issues raised is encouraged to contact the author, Nicola Padfield, at nmp21@cam.ac.uk.

2. DEFINING, IDENTIFYING AND MEASURING THE 'DANGEROUS'

11. The definition of a 'dangerous offender' adopted for the purposes of this Report by the PC-CP is **'an offender who has caused very serious personal physical or psychological harm and who presents a high probability of re-offending, causing similar (i.e. very serious) harm'.**

12. This definition was agreed in May 2010, after much debate. The term 'dangerous offender' is sometimes used in national laws, and much used in popular discourse. The PC-CP agreed that the term may be useful as a shorthand label, but was clear that it is potentially misleading. Are people

[4] Some of the hypotheticals are loosely based on examples used in MAPPA annual reports: www.probation.homeoffice.gov.uk/output/Page30.asp

dangerous, or is it the acts that they do that cause danger? Many acts or activities may be dangerous (paragliding? mountaineering? caving?) but that does not mean that all mountaineers are dangerous people. Conversely, many people may be inadvertently dangerous (the learner driver, or the person whose drinks have been laced with alcohol without them realising that this has happened). We shall explain here why our definition is not limited to specific offences; nor to all those punished to lengthy terms of imprisonment.

13. Importantly, the definition adopted here is deliberately narrow. It has two limbs: the offender has in the past committed a very serious harm, and is predicted to do so again. Both will be explored in a little more depth[5].

Defining Dangerousness

Previous serious harm

14. Clearly those who commit the most serious harms in society are likely to be considered 'dangerous'. Terrorists, murderers, sex offenders are frequently labelled dangerous. But already we must be careful. Let us start by defining these labels. A terrorist may be very dangerous: someone committed to waging an on-going murderous war. Yet recent developments in anti-terrorist laws often include within the concept of 'terrorist' people who play a distant and merely ancillary or preparatory role: thus, the French concept of *association de malfaiteurs* (conspiracy), or the Italian offence of assisting in "any other activity described as terrorist by international instruments signed by Italy" (see art 270 ter, *Codice Penale*). As well, as a result of European initiatives[6], many countries are introducing recruitment offences, offences of "glorification" or incitement to terrorism.

15. Are all such people necessarily 'dangerous'? Correspondents have suggested that many people consider political extremists (including neo-fascists or neo-nazis) to be dangerous. But dangerous views should surely be transformed into dangerous acts before the law can impose particularly severe penal sanctions. This is a traditional minefield for penal lawyers: intentions may be more important than outcomes for criminal liability, but how far back from completion should liability lie? Planning a murder may perhaps make a person dangerous, but no European legal system would impose liability unless at least some step beyond 'thought crime' had been taken towards commission. Again, many recent laws have broadened the scope of criminal liability for uncompleted offences. The French Penal Code (see article 222-14-2) has a new crime which penalises someone who participates in a gang with the intention to commit violent acts[7]. This Report simply raises the dangers caused by very broad definitions of criminal liability, including the danger that this may lead to over-inclusive definitions of 'dangerousness'.

16. Not only are definitions of criminal offences broad, they also vary significantly between countries, even within the Council of Europe. For example, all murderers may have proved that they are prepared to kill. But definitions of murder vary widely across the Council of Europe, and may include some people who many might not consider 'dangerous'. Let us choose a controversial example, the husband who

[5] Some concern was expressed late in the project that the definition might exclude those who caused serious harm to public institutions or public service employees. The author considers these cases to be within the definition agreed.

[6] For example, Council of Europe Convention on the Prevention of Terrorism (2005); Council Framework Decision (EC) 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism.

[7] The French *Conseil Constitutionnel (*Constitutional Council) upheld the constitutionality of the new offence in its decision 2010-604 DC of 25 February 2010

helps end the life of his beloved terminally-ill wife at her request. In some countries, he might commit no offence. In others he might face a mandatory life sentence for murder. Another relevant example is domestic violence. In some countries, it used to be the case that domestic violence was treated less seriously than offences committed against strangers. Indeed, it is only recently in some countries that a husband who had non-consensual sexual intercourse with his wife was considered to be a rapist (the early 1990s in both France and England). In this Report, those who commit serious domestic violence are treated every bit as 'dangerous' as those who commit violence on strangers. We report on good practice in relation to the treatment and management of those who commit domestic violence later in the Report. Of course an enormous problem here is the relative powerlessness of the state in offering protection to those behind the walls of their homes. There is a corresponding need to develop political, social, cultural and economic mechanisms to provide women (and men, of course) with alternatives to violent relationships: but this is beyond the scope of this Report.

17. Sexual offending stands out in the recent literature on 'dangerous offenders' for two main reasons. First, the public concern that the subject provokes, particularly in relation to those who offend against children. Sex offenders have become modern 'folk devils[8]', and the subject of 'stranger danger' provokes media 'moral panics' (despite the fact that it is abuse within the family, or by adults whom children trust, which is the more common form of sexual abuse). Secondly, it is an area where psychiatrists and psychologists have focused their work in developing convincing treatments. We will return to these later. But are all sex offenders dangerous? Clearly some are, within our definition. But others will not be. Some sexual offending is relatively minor: defining serious harm in this context is particularly difficult.

18. The definition adopted here is therefore not limited to specific offences. Some might not agree with the decision to limit the Report to discussion of those who have committed serious personal harm. This means that we are excluding those whose crimes have no obvious victims. Thus those who are guilty of corruption or illegal drug importations or arms dealing will fall outside the definition. The harm inherent in some offences is also much disputed: the harm caused by those who use pornography, for example. But we seek to limit the definition: as the definition widens, so it becomes increasingly less useful.

A high probability of re-offending

- Looking back - recidivism

19. Not all those who can be labelled recidivists or dangerous recidivists or habitual repeat offenders within existing legal frameworks are dangerous within our definition. The fact that an offender has committed a crime before may (or may not) be a reliable predictor of future offending. In many jurisdictions, certain offenders may be identified by the law for more severe punishments or longer sentences of imprisonment (or other preventive measures), on the basis of the number and/or severity of their past crimes. But this word 'recidivism' has very different meanings in different jurisdictional contexts: in ordinary language, it may simply mean 'a falling back into crime'. This immediately raises three difficult issues:

    (i) For recidivism to increase sentence levels, it must be based only on <u>conviction</u> records. Any other measure would be unjust. Yet it is well understood that conviction records do not properly reflect re-offending levels. They can only be taken as very approximate predictors of future offending (see below).

    (ii) Is the law to be concerned with all recidivism (previous convictions), or only serious previous convictions (however identified)?

[8] A term much used by criminologists since it was adopted in Cohen, S (1980) *Folk Devils and Moral Panics* (2nd ed, Routledge)

(iii) What is the justification for increasing sentence lengths because of recidivism? Is it because the offender is more culpable and 'deserves' more punishment, or is it for public protection? We return to a brief assessment of the general aims of sentencing in Chapter 4.

20. In some countries, the legal impact of previous offending on sentence levels is somewhat vague. For example, in England and Wales, s. 143(2) of the Criminal Justice Act 2003 provides that

21. "in considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to

(a) the nature of the offence to which the conviction relates and its relevance to the current offence, and

(b) the time that has elapsed since the conviction".

22. In other countries, the law is more precise. In France, the *Code Pénale* provides detailed rules on increases in sentence levels because of *récidivisme* (repeat offending by those already convicted of a offence subject to a 10 year penalty) or *réitération d'infraction* (less serious recidivism). Thus if someone has already been sentenced for an offence punishable by 10 years or more, the usual maximum of 20 or 30 years is raised to life, and a 15 year maximum is raised to 30 years (Art 132-8). In some other countries, minimum sentences are imposed for certain categories of repeat offenders. The law in other countries (for example, Greece) focuses on the concept of a habitual offender, rather than a recidivist (see Art 92 of the Greek Penal Code).

23. Thus, the level of recidivism (both the seriousness and the number of previous offences) which is used to justify an increased sentence varies from jurisdiction to jurisdiction. There is no 'agreed' answer. At a theoretical level, it is difficult to justify longer sentences simply on the basis of recidivism: desert theorists argue for proportionate sentences based on the seriousness of the current offence; a more utilitarian approach may justify longer sentences for repeat offenders if they are indeed 'dangerous', but that leads us to consider the reliability of predictions.

- The reliability of predictions

24. Having accepted a definition of the 'dangerous' offender as someone who presents a high probability of re-offending, causing similar harm, it becomes essential to identify whether one can with any degree of certainty indentify or measure the risk of future serious re-offending. And to ask who should do the assessment. We start by indentifying the most common ways used in Europe to identify 'dangerous' offenders.

Clinical expertise

25. Before offenders receive special sentences for the 'dangerous', judges are often assisted by reports written by experts. Clinical assessments by psychiatrists, psychologists and other experts are used to help judges make assessments, in both sentencing and other decision-making (e.g. before an offender can be sent to a mental hospital as an involuntary patient; or given treatment for drug or alcohol misuse). In most European countries, assessments are exclusively clinical (as opposed to actuarial – see below). Giovannangeli et al (2000) studied the ways the 'dangerousness' of alleged or convicted sexual offenders were assessed in 15 European countries. In virtually all of them, only clinical assessments were made. Even where traditional personality tests, such as the Rorschach or the

Minnesota Multiphasis Personality Inventory (MMPI) were used, the assessment was essentially clinical[9].

26. It is important to clarify:

- who is an expert in assessing dangerousness. There is increasing concern in many countries that experts may not be as expert in predicting dangerousness as might commonly be assumed. For example, Garraud (2006) discusses the poor status and pay of forensic psychiatrists in France, and recommends that priority should be given to improving training and conditions. Protais and Moreau (2009) encourage us to ask why a psychiatrist should be considered to be better equipped than anyone else in assessing a concept such as 'dangerousness', which is essentially a political and flexible label. Are we expecting too much of their expertise to ask them to predict with any certainty who may re-offend?

- the independence of those writing reports. If the writers are not 'independent', those affected should be able to access independent advice and expertise[10].

- the reliability of such assessments. Clinical assessments are obviously subject to subjectivity. Training and consistency of practice are particularly important here. Clinical assessments, in a risk averse political culture, will inevitably be cautious. This may well be particularly true in the case of serious sex offenders (Ansbro (2010), Hood and Shute (2002)). We should also be careful to assess the impact of these assessments on judges: the status of the person doing the clinical assessment can make the ultimate user of the assessment (normally a judge, but also penal administrators) ignore or underestimate the inherent weaknesses and dangers in any prediction.

Actuarial risk predictors

27. In some countries, a variety of different actuarial tools are used, for different purposes and at different stages in the process. Many of these tools have been developed in North America, and may or may not be adapted to local conditions. The Risk Management Authority in Scotland maintains a detailed directory of approved assessment tools, including summaries of the published evaluations of each tool (see www.RMAscotland.gov.uk). Some of the most commonly used tools are mentioned here by way of example:

- VRAG (Violence Risk Appraisal Guide) and its companion SORAG (Sex Offender Risk Appraisal Guide) was developed in Canada, and contains a 12-item actuarial scale which has been widely used to predict risk of violence within a specific time frame following release in violent, mentally disordered offenders.

- OGRS (Offender Group Reconviction Scale. OGRS) was introduced in England and Wales in 1996 to establish a uniform national reconviction score. It calculates the probability that a convicted offender (18 years plus) will be convicted at least once within two years for any type of offence. The latest version (OGRS 3) is based on age at the date of the current caution, non-custodial sentence or discharge from custody; gender; the type of offence for which the offender has currently been

[9] Some personality tests used to support clinical assessments, particularly those which have been simplified in order to be easier to administer, may in fact have deeply engrained cultural, gender and social biases. They should be carefully evaluated.

[10] Note European Probation Rules, rule 46: Offenders shall be given the opportunity, where appropriate, to be involved in the preparation of [reports], and … its contents must be communicated to them and/or to their legal representative.

cautioned or convicted; the number of times the offender has previously been cautioned and convicted; and the length in years of their recorded criminal history (see Justice, 2009 for an excellent account). These factors are static: they do not change and take no account of the individual's personal characteristics. So if someone has a 70% chance of reconviction within the next two years – OGRS gives no hint as to whether this individual is more likely to be in the 70% or 30% category.

- OASys (the Offender Assessment System), developed in the late 1990s by the Home Office Probation Unit and HM Prison Service for use in England and Wales, is very often used in post-conviction, pre-sentence, reports. Similarly, Repeat Offending Assessment Scales scores are widely used in the Netherlands. These consider static factors (age, previous offending) as well as dynamic (social, economic and personal) factors. Actuarial assessments which take account of dynamic factors may be more accurate in some senses – but they also allow for subjective person-by-person judgements. There are also concerns whether they have been adequately adapted and evaluated in relation to the assessment of the risk and needs of women offenders (Caulfield, 2010).

- There are also more dynamic predictors focused on criminogenic needs, used widely within prisons, that have implications for treatment, such the Level of Service Case Management Inventory (LS/CMI), which is an assessment and management tool that incorporates the principles of "risk, need and responsivity". LS/CMI is a substantial revision of an earlier, widely used Level of Service Inventory - Revised (LSI-R) assessment tool.

- There are various tools designed specifically for sex offenders: QIPAAS (Questionnaire d'Investigation pour les Auteurs d'Agressions Sexuelles) developed in 1997 is widely used in French prisons to assess the risk of re-offending by sexual offenders; Risk Matrix 2000 (RM2000) (also known as the Thornton Matrix) is a risk assessment tool, using static factors, for men over 18 with at least one conviction for a sexual offence. It is included in all parole assessment reports in England and Wales involving sexual offenders. STABLE 2007 examines the enduring dynamic risk factors amenable to intervention; ACUTE 2007 assess factors suggestive of sexual recidivism taking place within a short period of time.

- Numerous tools are used for identifying psychological disorders: for example, the PCL-R (The Hare Psychopathy Checklist-Revised); SAPAS (the Standardised Assessment of Personality-Abbreviated Scale). It is important to note that these are not risk assessment tools, but tools for identifying psychopathy and other disorders.

- Different tools have been developed to identify and to predict domestic violence. For example, the Spousal Assault Risk Assessment (SARA) was developed in Canada to identify violent spousal perpetrators with high risk of specific recidivism, and has been adapted for use in a number of European countries.

28. Assessment tools will never be truly accurate in predicting re-offending. We have already noted the vital differences between re-offending and re-conviction rates. Buchanan (2008), an academic psychiatrist reviewing actuarial approaches to predicting violence by psychiatric patients, states "a range of methods consistently predict violence at levels of accuracy better than chance…. [but] current approaches can prevent the violent acts of a few only by detaining many". A probability calculation is only ever a prediction. It will be accompanied not only by human errors, but also by many other uncertainties. The rare and more dangerous the behaviour predicted, the harder it is to predict. In many countries evaluation procedures are developed combining elements of various different evaluators and predictors (see the work of Volker Dittman in Switzerland discussed in Valloton (2010). Whatever methods of evaluation are chosen, it is important that those who use them are well trained in their use (and their limitations)[11].

[11] Recommendation (2003)22 of the Committee of Ministers to member states on conditional release (parole) recommends the use and development of reliable risk and needs assessment instruments to assist decision-making but also identifies the need for training programmes for decision-makers, with contributions from specialists in law and social sciences.

29. A risk predictor may help predict risk, but it should always be used in an individualised way as part of a structured clinical judgement (Farrington et al, 2008). This well-respected analysis of the usefulness of risk assessment tools for violence concludes that "users should always bear in mind the difficulties involved in moving from predictions about individuals, and should be extremely cautious in drawing any conclusions about a person's risk of future violence" (at page 2). It is thus vitally important to highlight the limitations and dangers of using both clinical and actuarial methods to label ('box') people and to identify the enormous consequences of such labels[12]. The purpose of any risk assessment tool must also be clearly identified.

30. What happens when clinical and actuarial assessments conflict? Practitioners are more likely to override actuarial information that indicates a low risk of harm rather than a high one, confirming the existence of risk aversion, or the 'precautionary principle' (Ansbro (2010)). Thus, Ansbro identified "a reluctance to reduce sexual offenders' risk of harm even when evidence of all types was compelling, and conversely, a willingness to reduce non-sexual offenders' risk on the basis of only flimsy dynamic evidence, and counter to actuarial pointers". She concludes that a more sophisticated understanding of the evidence around dynamic factors would enhance assessments[13]. Standardised tools must be carefully assessed for evidence of racial, gender and cultural bias.

Hypothetical Case A

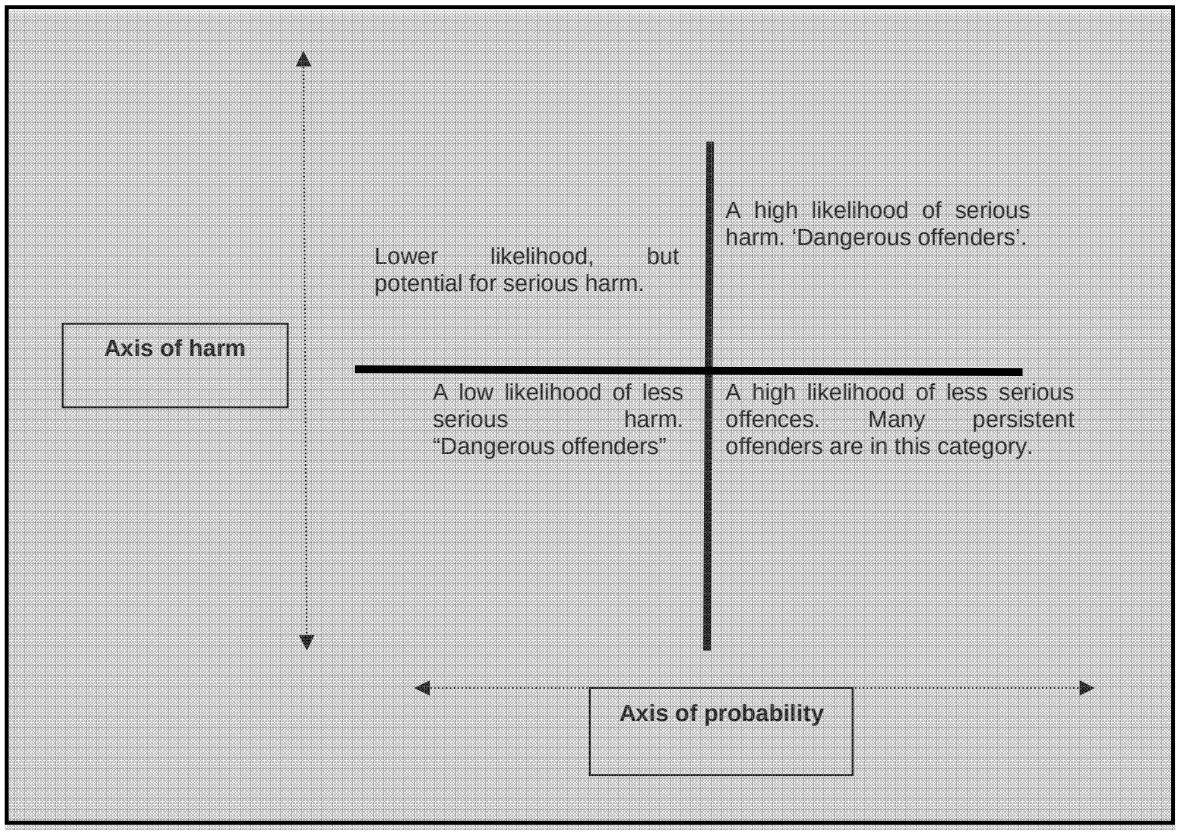
Mr A is arrested for a serious sexual assault, and subsequently prosecuted, convicted, and sentenced to a lengthy term of imprisonment. He is eventually released on conditions into the community, and does not re-offend. In many countries a huge battery of different clinical and actuarial assessments will be made on him, as he progresses through the criminal justice process. These could usefully be catalogued as a case study in order to question (i) their validity and (ii) the use to which they are put, particularly the extent to which they may be useful in facilitating his path to reintegration (or, conversely, used as hurdles preventing his re-integration).

Conclusion: the ethical challenge

31. It cannot be emphasised too much that prediction tools can never be truly accurate. Another way of looking at the problem of identifying 'dangerous offenders' is to indentify the number of offenders deemed 'dangerous' or meriting indefinite detention in different jurisdictions. In some countries, a significant number of offenders may be so labelled, in other very few. Reliable comparative data would be very useful. Many people who commit dangerous acts will not have been convicted of any offence previously. By using the term 'dangerous' offenders, we are well aware that there is a danger that we are seen to validate its use. There will be false positives (those who are predicted to re-offend, and who don't) and false negatives (those who are predicted not to re-offend, but who do so). Canton (2010) provides a simple diagram which illustrates the importance of keeping separate the risk of harm from the likelihood of its occurrence:

[12] See European Probation Rules, rule 71: Where national systems use assessment instruments, staff shall be trained to understand their potential value and limitations and to use these in support of their professional judgment.

[13] Hood and Shute (2002) showed that in England and Wales, the paroling rate for sex offenders with a risk of reconviction score (ROR) of 7% or less for a 'serious offence' (one likely to result in imprisonment) during the parole period was only 22%, whereas the paroling rate for non-sex offenders with a similar ROR was 60%.



(Source: Canton (2010))

32. Assessments of 'dangerousness' or 'lack of dangerousness' can be used for many purposes: to prioritise resources, for example. Many countries have created higher hurdles for 'dangerous' offenders (however defined, whether recidivist or sexual offenders) in prison, in the sense that it is more difficult for 'dangerous' offenders to get out of prison than for less serious offenders – why should this be so? We have already noted that predicting rare events is particularly difficult. Bottoms and Brownsword (1983) argued that people should only be detained because of the risk that they present if that risk is 'vivid'. The concept of vivid danger has three main components: **seriousness** (what type and degree of injury is in contemplation?); **temporality**, which breaks down into **frequency** (over a given period, how many injurious acts are expected?) and **immediacy** (how soon is the next injurious act?), and **certainty** (how sure are we that this person has acted as predicted?). Lippke (2008) calls preventive detention "pre-punishment" and points out that non-punitively confining those who have not re-offended may only be marginally different from punitively confining them. Whether it is punitive or not, any involuntary detention is likely to be perceived as punitive by the recipient. Even if predictions were reliable, we should be uncomfortable with the concept of the punitive or pre-punitive confinement of individuals simply for their unwillingness or inability to change.

33. As Vallotton (2010) points out, 'dangerousness' is essentially a political concept, with perceptions of dangerousness changing over time and place. These categorisations are often based as much on political imperatives as on criminological evidence. Fear of the "dangerous" has grown in Europe in recent years for many reasons: sociological explanations focus on the uncertainties of modern societies, and the perceived need to control risks (Garland (2001), Beck (2004)); the media focus attention on crime and 'bad events' (Mucchielli (2008)). Much more publicity is given to the 'false negatives' (those who commit unpredicted future serious crimes) than the invisible 'false positives' (those who remain in custody but would not have re-offended in the community). This explains why this Report seeks to limit the definition of 'dangerous offender': the identification of people as 'dangerous' is likely to be unreliable and over-inclusive: to include the dangerous, but also those who are not truly 'dangerous', according to our definition. It is vitally important that the public debate focuses on the position (human rights) of these 'false positives' as well as on the 'false negatives'.

34. This Report suggests that the PC-CP should focus attention on the limited utility of the term 'dangerous offender': at the minimum, it should only be used to describe those who have committed serious harm and who pose a significant risk of committing future serious harm. Both clinical assessments and

predictive tools may contribute usefully in identifying both differing risk levels, and the underlying causes behind offending behaviour, but in themselves should not be used to justify longer sentences.

3. MENTALLY DISORDERED OFFENDERS

35. This Report includes a chapter on mentally disordered offenders in order to underline the fact that mentally disordered offenders are a particularly vulnerable sub group of 'dangerous' offenders. Let us start with some important warnings. 'Mentally disordered offenders' are not an easily identified or indeed a homogenous group. It is all too easy to vilify the mentally ill or disordered as particularly 'dangerous': the same sociological and political explanations which have led to a focus on 'dangerous' offenders (see Chapter 2) have also focused inappropriate scare mongering on the mentally ill. Those with mental illness and mental disorders are not more likely than the general population to commit serious crime; mental disorder may correlate with some kinds of offending, but it is rarely causative; psychiatric patients who kill are more likely to kill themselves than others (on which see Bonta, Hanson and Law (1998), Peay (2007), amongst many others).

36. 'Dangerous offenders' may suffer from mental disorders. But many of those who commit dangerous acts and who are seriously mentally disordered may be held not to be criminally responsible. The treatment of the mentally disordered outside the criminal justice system lies largely outside the scope of this Report, but the subject cannot be ignored: there is no clear and agreed division between those who are prosecuted and those who are not. Those detained involuntarily in civil institutions are quite as vulnerable to inappropriate management and treatment as those within the criminal justice system. And many offenders may zigzag in and out of the criminal justice system.

Those who are not criminally responsible for their actions

37. Most countries have a procedural test which focuses on the ability of the suspect to understand court proceedings. Those who are not able to understand court proceedings will not be prosecuted. As well, a person is not criminally liable who, when the act was committed, was suffering from a mental disorder which 'destroys his discernment or his ability to control his action' (to cite the French Code Penale, Art 122). In practice, this test may be applied in very different ways.

38. The subject of the detention of mentally disordered people has already been much discussed at the highest levels within the Council of Europe. Thus, Recommendation (2004)10 of the Committee of Ministers concerning the protection of the human rights and dignity of persons with mental disorder was adopted by the Committee of Ministers on 22 September 2004. This provides detailed recommendations on, for example, minimum criteria for involuntary placement (article 17), criteria for involuntary treatment (article 18), principles concerning involuntary treatment (article 19) and procedures for taking decisions on involuntary placement and/or involuntary treatment (articles 20 and 21). Further to this, Recommendation (2009) 3 of the Committee of Ministers on monitoring the protection of human rights and dignity of persons with mental disorder (adopted by the Committee of Ministers on 20 May 2009 at the 1057th meeting of the Ministers' Deputies) included a checklist (general questions and supplementary indicators) designed to form the basis for the development of monitoring tools to help Governments monitor their level of compliance with Recommendation (2004)10.

39. Despite these initiatives, there are major concerns, well summarised in September 2009, by Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights in a published "Viewpoint"[14] in which he stated that the rights of persons with intellectual disabilities across Europe "are still not taken

[14] See www.coe.int/t/commissioner/viewpoints/090921_en.asp

seriously enough". He called on governments not merely to plan for action, but to take action. Commenting on both *Shtukaturov v Russia* (see Annex One) and the UN Convention on the Rights of Persons with Disabilities, he concluded clearly: "Any restrictions of the rights of the individual must be tailor-made to the individual's needs, be genuinely justified and be the result of rights-based procedures and combined with effective safeguards".

40. The number of mentally disordered offenders detained in hospitals needs to be carefully monitored. In many countries, the number of involuntary patients has been rising steadily. This, in England and Wales, in 2009, there were 4,300 restricted (involuntary) patients, an increase of 8 per cent on 3,900 in 2008 (NOMS statistics, 2009).

> Hypothetical Case B
>
> Mr B, who suffers from schizophrenia and depression, stops taking his medication. He is arrested having attempted to rob a shop by brandishing a toy gun and apologetically asking for money. He is in bedroom slippers, and a customer prevents him leaving with the money which frightened staff hand to him. Arresting police officers realize that he is mentally ill[15]. What happens next? What does good practice suggest? How long can he be detained in a civil hospital if not charged with an offence? On whose authority and what is the legal test? In practice, will he be supported by an independent legal advisor and/or independent psychiatric opinion?

41. The answers to these questions, of course, vary from country to country. It is important to distinguish the original decision to detain from the later decisions not to release. In many countries special courts (for example, social protection commissions (Belgium) or Mental Health Review Tribunals (England and Wales) exist. Much more detailed monitoring and research should be conducted into the detention of the mentally ill or disordered outside the criminal justice system. This includes monitoring the legal tests applicable in different countries to ensure that those who should not be prosecuted because their mental state reduces or diminishes their penal responsibility to such an extent that they are not deemed fit to stand trial. But the study of actual practice is even more important than a study of legal tests: particularly given the range of institutions in which people may be detained (including privately run psychiatric hospitals). The spotlight must be kept on guaranteeing the rights of those detained under civil law.

Mentally disordered offenders

42. Many people who are mentally ill or mentally disordered are prosecuted and convicted of criminal offences. Custodial institutions in all Council of Europe countries hold many mentally ill offenders. In some countries and in some circumstances, those who are criminally responsible but mentally ill may receive less punishment because they are considered to be less culpable. This may be explicit (see Art 34 of the Greek Penal Code, for example) but paradoxically even those offenders who receive shorter sentences because of their mental illness, disorder or disability, may still find that they serve their sentence in a more restrictive, even if supposedly non-punitive, way. Even at the end of a prison sentence a prisoner may not, of course, be released into the community. They may be transferred to a hospital or other institution (see chapter 5 on secure preventive detention).

43. Of the 2 million prisoners in Europe, at least 400,000 suffer from a significant mental disorder, and more suffer from common mental health problems such as depression and anxiety (World Health Organisation, 2010[16]). Individual country statistics may be more illustrative of the problem: in England

[15] This example is loosely based on the facts of an English case: the man, a recidivist, was convicted, received a life sentence, which was reduced on appeal to three years (*Offen (No 2)* [2001] 1 Cr App R 372)

and Wales, for example, of those in mainstream prisons, a recent study (Stewart, 2008) estimated that 10% of newly sentenced prisoners were likely to have a psychotic disorder (with the rate for female prisoners being double that for males (18% as opposed to 9%), and 61% were assessed as having a personality disorder (using SAPAS). Again, it may need underlining that this does not necessarily reflect the offending patterns of the mentally ill – they may simply be more easily detected than other offenders.

44. A look at the journey a mentally ill or disordered offender may take through the criminal justice system raises some simple questions:

> Hypothetical Case B (again)
>
> Mr B, who suffers from schizophrenia and depression, stops taking his medication. He is arrested having attempted to rob a shop by brandishing a toy gun and apologetically asking for money. He is in bedroom slippers, and a customer prevents him leaving with the money which frightened staff hand to him. Arresting police officers realize that he is mentally ill.
>
> - Arrest: steps taken to discover mental health issues?
> - Immediate detention: police station, or prison, or hospital? Mental health assessments?
> - Period of pre-trial detention: where? how long? legal criteria? Was mental health support and treatment available?
> - Post conviction and sentence: prison? hospital? hospital wing of a prison? treatment available? who decides and on what criteria? how are transfers between various different institutions decided? health care delays?
> - What are the criteria for release?

45. A key area of concern is the unconvicted mentally disordered suspect. Diversion services for offenders with mental health problems or learning disabilities are essential. All police stations should have access to mental health services to allow for the screening of vulnerable people and for assessing their needs. The Council of Europe could lead on the collection of more detailed data[17] to assess the number of mentally disordered individuals who are remanded in custody and how many are so unwell that they require transferring out of custody for treatment.

46. Convicted mentally disordered offenders are particularly vulnerable to the abuse of rights as they may move backwards and forwards through the two different systems, criminal justice institutions (prison) to civilian institutions (hospitals). Many may wait months or even years before being transferred from a prison to a suitable hospital. In many countries there are also institutions which may be difficult to classify between the penal and the civil: for example, French '*centres socio-médico-judiciaires de sûreté'*, institutions for social defence (Belgium) or *casa di cura e custodia*, and *ospedale psichiatrico giudiziale* (Italy). There are mixed institutions in which people may be detained under either criminal or civil law. The complexity of this categorisation is revealed in the most recent SPACE data[18]. Country

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[16] www.euro.who.int/en/what-we-do/health-topics/health-determinants/prisons-and-health/facts-and-figures

[17] The Annual Penal Statistics of the Council of Europe (SPACE) provide invaluable data: for example, the ECtHR cites the 2006 data in *M v Germany* (2009) at para 68: "the total number of prisoners sentenced to terms of imprisonment ranging from 10 years up to and including life imprisonment on September 1, 2006 was 2,907 in Germany, 402 in Estonia, 1,435 in the Czech Republic, 3,568 in Spain, 12,049 in England and Wales, 8,620 in France, 172 in Denmark and 184 in Norway". But since these statistics are based on national data, there is always room for more detail in order to facilitate reliable comparisons. It is important that the quality of all national data is carefully analysed and verified. See http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/prisons_and_alternatives/statistics_space_i/1List_Space_I.asp#TopOfPage

[18] See www.coe.int/t/e/legal_affairs/legal_co%2Doperation/steering_committees/cdpc/documents/1PC-CP(2010)07_E%20SPACE%20Report%20I.pdf, at p. 33.

respondents were asked whether the total number of prisoners given included various different categories of persons (and if so, how many), such as:

- Prisoners with psychological and/or psychotic disorders who were considered as non-criminally liable by the court, held in psychiatric institutions or hospitals

- Prisoners with psychological and/or psychotic disorders held in psychiatric institutions or hospitals in order to execute the main or the supplementary sanction (i.e. sexual offenders)

- Prisoners with psychological and/or psychotic disorders held in especially designed sections inside penal institutions in order to execute the main or the supplementary sanction (including sexual offenders)

47. Here we give two examples of the variety and complexity of the responses. For Portugal, "256 prisoners, including 86 prisoners held in penitentiary psychiatric institutions or hospitals, and 170 prisoners held in non-penitentiary psychiatric institutions or hospitals. 256 is the total number of persons considered non-criminally liable by the court, who are not stricto sensu sentenced prisoners, but persons under a security measure (which is rather therapeutic). These persons are under the authority of the Prison Administration and their files are managed by the Court of Execution of Sentences. Nevertheless, all decisions concerning this category of persons are taken on the advice of medical authorities". Secondly, the Swiss response explains that "there is a number of persons sentenced or interned (non-criminally liable), who are placed in special psychiatric institutions which are not under the Prison authorities, but are managed by special medical authorities; "The deprivation of liberty for the assistance purposes": persons under these measures are placed by medical (psychiatric) authorities, but their detention is managed by the Prison authorities of the cantons".

48. Clearly, there are many difficulties in understanding practice even within individual jurisdictions: institutions may be managed by health or prison authorities, and detainees' rights may be safeguarded under mental health or prison rules. Even where the law appears clear, there may in practice be significant ambiguity. Thus Pradel (2008) points out that the French label '*centres socio-médico-judiciaires de sûreté'* (see art. 706-53-13, al. 4) is deliberately chosen to illustrate the double responsibility of the penal system and the health authorities. But he suggests the division of responsibility is unclear. Are health or prison authorities in charge? In several countries, institutions may be under the joint administration of both health and prisons. Countries with federal constitutions may face even more difficult questions of accountability: as in Belgium, where an institution may be under the joint administration of the federal Ministry of Justice and a regional Ministry of Public Health. Regional variations in provision need to be monitored quite as much as international variations.

49. Dressing and Salize (2009), who surveyed 24 European countries, concluded that the vast majority apply a 'mixed model' of prison health care, with deeply inadequate levels of care:

mental state screening at prison entry by a psychologist or a psychiatrist, fulfilling the quality standards of general mental health care, seems to be a rare event across Europe. In many countries, inadequately trained staff are appointed to conduct a mental state screening at prison entry. The experts collaborating in this study were asked to provide an overall verdict on the extent to which the standards of mental health care in prisons approximate those of general mental health care standards. Answers showed that almost two-thirds of the included countries seem to suffer a considerable gap between general mental health care standards and those for prison inmates. In particular, Austria, Belgium, Bulgaria, the Czech Republic, England & Wales, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, The Netherlands, Portugal, and Spain were evaluated in this way, although these ratings must be seen as subjective opinions lacking sufficient supportive data. The most

frequently mentioned shortages included lack of places for (psycho-) therapeutic treatment programs, beds for psychiatric inpatient treatment, and appropriately trained staff. Other deficiencies were insufficient mental state screening routines, deficient or absent psychiatric aftercare, underfunding, and insufficient cooperation with the general health systems (at page 809-810)[19].

50. The reports of the Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the CPT: see www.cpt.coe.int), which regularly raise concerns about the interface between prison and public health care services[20] are vital sources of information. Recurrent themes are poor staffing levels; poor general conditions; the need for individualised treatment plans.

51. A key issue is cost, and whose budget is to be spent on providing care. Some hospitals or psychiatric prisons may resist accepting mentally disordered 'dangerous' prisoners, particularly on the basis that they are 'untreatable': for example, the Slovak government's recent response to the CPT's criticisms that most of the prisoners in the high security unit of Leopoldov Prison appeared to be in need of psychiatric care, was that "most of the prisoners did not need psychiatric care as they are affected by personality disorders". This raises important questions not only about the use of the label 'personality disordered', but also about where people with personality disorders should be detained. In several countries there are significant initiatives to limit the use of secure psychiatric hospitals (Italy; England). But it is vital that the mentally ill don't simply end up either in prison, or unsupported/supervised in the community.

52. In most systems, there are prisons and hospitals of varying degrees of security: offenders in both prisons and hospitals should be held in the least restrictive environment possible. Similarly, prisoners held in hospital should be allowed opportunities for rehabilitation and reintegration (for example, escorted or unescorted temporary community leave). Buchanan (2002) provides a multidisciplinary and multi-authored guide to the care of the mentally disordered offender in the community (see also Kemshall, 2008). Yet often both mentally disordered prisoners and patients are held in conditions which are more secure than strictly necessary for what may be largely administrative convenience. In some systems, a mentally disordered prisoner may face double hurdles to freedom. Thus in England and Wales, a prisoner held in a secure mental hospital may have to convince a Mental Health Review Tribunal to release him back to prison, and then face the hurdle of the Parole Board to be released into the community (Padfield, 2010). Grounds, Howes and Gelsthorpe (2003) explored the views of psychiatrists on their decisions to admit offenders to hospital from prison. A hierarchy of managerial and other non-clinical constraints had an impact on their decision-making role. They identified the difficulty of achieving and maintaining a balance between the individual patient's rights and needs, and a proper concern for public safety. The focus on risk adds another pressure on those working in mental health, people who are already operating under practical constraints such as limited capacity (bed space), as well as within a risk avers culture. Prioritising cases may work differently in hospital than it does in prison. With the boundaries between private and public health care becoming increasingly blurred in some countries, the question whether decision-making might be different in the private sector also needs to be explored.

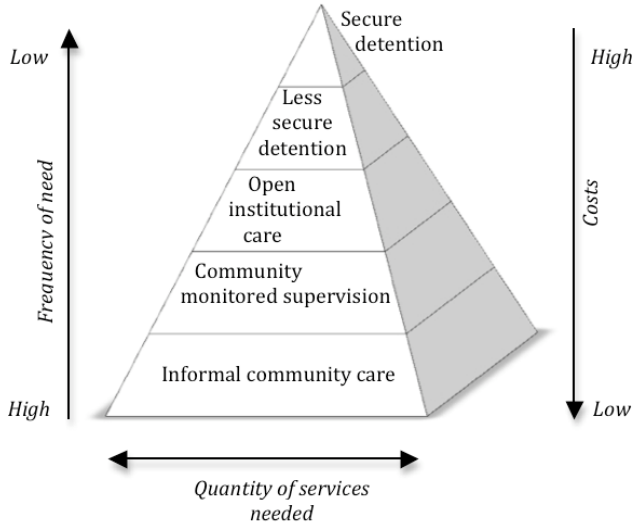
53. This Report includes a chapter on mentally ill and mentally disordered offenders in order to underline that greater priority should be given to meeting their needs: appropriate care and treatment in

[19] See also Bradley (2009); and Edgar and Rickford (2009) on how the needs of prisoners with mental health problems are not being met in England and Wales.

[20] Some recent examples: the report on Romania (August 2010) discussing Nucet Medico-Social Centre and at Oradea Hospital for Neurology and Psychiatry; the report on Belgium (July, 2010) raising concerns about the Hôpital d'Accueil Spécialisé (HAS) of the Fond'Roy psychiatric clinic in Uccle; the report on Italy (April 2010) commenting on the unacceptable standards of care in the Centre for Neuropsychiatric Observation (CONP) at Milan-San Vittore Prison; the report on Bosnia and Herzegovina (March 2010) with criticisms of Sokolac Psychiatric Clinic and Zenica Prison; the report on Hungary (June 2010) ; that on the Slovak Republic (February 2010) on the psychiatric ward at Trenčin Prison Hospital etc etc.

institutions of the minimum level of appropriate security. The Pyramid Framework (see below) may be a useful way of presenting the fact that supporting offenders at the lowest suitable level of intensity and security may be both cheaper and more effective. Only a very few need secure detention: the focus should be on pushing offenders down the pyramid.

Pyramid Framework
Adapted from WHO Mind Project, available at
http://www.who.int/mental_health/policy/services/2_Optimal%20Mix%20of%20Services_Infosheet.pdf



54. Mentally disordered prisoners should be prepared for release, and released as soon as possible. A key question is whether more detailed research would provoke real action. Mentally ill and otherwise mentally disordered offenders are often a 'hidden' population within a penal system. It is to be hoped that more research would lead to more attention being paid to them: in the interests of both wider society and the individual concerned that wider recognition is given to the needs and basic rights of the mentally disordered.

4. OPPORTUNITIES FOR RESOCIALIZATION AND REINTEGRATION

55. The right to liberty, which lies at the heart of the European Convention on Human Rights, applies to those who have served their penal sentences. During their sentence, the fundamental rights of the prisoner also require decent living conditions, active regimes and constructive preparations for release[21]. It is, of course, in the public interest that prisons should not be overcrowded and that offenders should be successfully reintegrated into mainstream society. In Chapter 2 we discussed the problems which arise in defining 'dangerous' offenders, and the very real risks associated with unreliable and false predictions. In this chapter we turn to the law and practice on dealing with 'dangerous' offenders, with an emphasis on what might be considered good practice.

56. Central to this study is an analysis of how dangerous offenders can be helped to lead law-abiding lives. Readers should keep in mind Recommendation (2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, in particular the key general principles for the management of life and long-term prisoners which it

[21] Recommendation (2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners

identifies: individualization, normalization, responsibility and security. This Report underlines the fact that the resocialisation and the reintegration of offenders lies at the heart of the criminal justice system.

57. We start this chapter by briefly reviewing the aims of punishment, before identifying the basic structure of custodial sentences: usually divided into determinate and indeterminate sentences. This leads to a review of what is understood to help to reduce re-offending, in order that best practice in applying this knowledge within the sentencing structure can be identified.

The aim and structure of sentences

58. There is no easily agreed fundamental aim of punishment. Some constitutions grant a constitutional right to rehabilitation: for example, article 27(3) of the Italian Constitution provides that punishments must aim at resocialising the convicted. Other countries have legislated the aims of sentencing. Some distinguish the aims of the implementation of sentences from the aims of sentencing more generally, particularly in systems which recognise the formal separation of the administration of sentences from the initial imposition of a sentence (as in France or Italy). Different aims may have priority at different stages in the sentence: for example when the initial sentence is imposed and later during its implementation. In England and Wales, where there is no such formal separation, on the other hand, the judge must have regard to the following broad and often inconsistent purposes of sentencing (see s. 142 of the Criminal Justice Act 2003):

the punishment of offenders,

the reduction of crime (including its reduction by deterrence),

the reform and rehabilitation of offenders,

the protection of the public, and

the making of reparation by offenders to persons affected by their offences.

59. This is not the place for a full discussion of the aims of sentencing, save to remark that without clear objectives, it is impossible to assess the efficacy of a penal system. In penal theory, there has been a long-standing debate between retributivist and utilitarian aims. The Council of Europe has been clear that while sentences should be proportionate (imprisonment should be used only as a last resort and for the minimum period necessary), it is also important that there be “constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community”[22]. These forward-looking aims appear utilitarian. But retributivist theorists, those who argue for deserved and proportionate sentences, are also likely to agree that punishment should be rehabilitative and seek to re-integrate offenders into mainstream society. This is a message underlying this Report.

60. The most famous exponent of modern retributivism is von Hirsch (see von Hirsch, 1986, 1993 amongst many other writings). For von Hirsch, punishment is and should be a blaming institution; and the severity of the punishment expresses the stringency of the blame. The key concept of just deserts sentencing is proportionality. The acceptance of a ‘just deserts’ model may lead to a decrease in the prison population since it will lead to a penalty scale which may be "anchored" in order to reduce overall punishment levels. Of course, political pressures impinge on sentencing policies but it is important to note that modern desert theory offers a coherent and humane way of allocating punishments, appropriate for a society that treats convicted offenders as citizens whose rights and

[22] Recommendation (2003) 22 on conditional release (parole)

choices should continue to be respected (see von Hirsch, 1993). Many penal theorists, even those who prefer a more utilitarian or 'neo-rehabilitationist' approach welcome desert as putting a proper upper limit to penal interventions: no-one should receive longer sentences than they deserve, even if they may not be 'treatable' (see Morris, 1998, Cullen and Gilbert, 1982), Whilst those who commit more serious offences, may often 'deserve' longer sentences, questions of personal culpability must be carefully assessed. 'Desert' should not be used to justify disproportionate, or unduly long, sentences on any offender, including those who may have been labelled 'dangerous'. Establishing appropriately 'proportionate' sentence lengths is a challenge for all criminal justice systems.

61. Utilitarian aims of sentencing focus on the prevention of re-offending, by a variety of means. One aim which remains popular with sentencers is deterrence. We must distinguish individual deterrence (the deterrence of the individual offender) from general deterrence (the deterrence of the general population). General deterrence can be achieved by some penalties for some length of time, some types of offence, some types of offender, and in some situations. However, more effective is a high probability of detection and conviction. Does deterrence through heavier sentencing work? In a major review of the literature on deterrence, Von Hirsch et al (1998) concluded that there were certain logical conditions which must exist before an increase in the severity of deterrents can work:

    (i) Potential offenders must realise sentence levels have increased

    (ii) Potential offenders must think about heavier sentence levels when contemplating their offences

    (iii) Potential offenders must believe they have at least a reasonable chance of being caught

    (iv) Potential offenders must believe that if caught the heavier sentencing policy will be applied to them

    (v) Potential offenders must be prepared to desist where (i-iv) are present.

    All these conditions must be present for general deterrence through heavier sentencing to work. Thus, it will only rarely work.

62. *Incapacitation* and the *protection of the public* are also utilitarian aims. These aims can be pursued within the limits of 'just deserts': but particular vigilance must be shown to protect the rights of offenders if their liberty is restricted for the protection of the public, and not for punishment. We return to this when we consider the topic of secure preventive detention, particularly incapacitative measures enforced beyond, or on top of, 'just desert' or proportionate sentences. The next aim is *reform.* The individual may be *reformed* or corrected, either by deterrence or by other more subtle means; but it is important to notice that the percentage of cases in which it matters whether imprisonment or non-custodial sentences are used seems to be small. We have already mentioned the blunt instruments which we have by which to measure effectiveness: normally, reconviction rates. If only perhaps 3% of reported offences result in a conviction, what does this tell us about the frequency of criminal activity? Finally, *rehabilitation* can be distinguished from reform in that it is often used to describe efforts which are made to make it easier for offenders not to re-offend for example, by improving their employment or social skills.

63. There are three other important preliminary factors to acknowledge. First, whatever the aims of sentencing, the protection of the rights of prisoners during the implementation of these sentences remains fundamental (see Snacken and van Zyl Smit, 2009). Indeed, the choice of sentencing aim should have no consequences on the protection of the fundamental rights of prisoners during the implementation of these sentences. Secondly, the huge amount of change in sentencing law and practice must be noted: the majority of Council of Europe countries have been undergoing significant changes. Austria, Cyprus, England, France, the Netherlands, Romania, Spain have all introduced vast reforms within the very recent past. Thirdly, alongside the challenge of change, is the increasing squeeze on financial resources. Academics throughout the Council of Europe have commented on the underfunding of support services, both in prison, but particularly, in the community. It is not only the support services which are struggling: courts and parole boards in many countries (notably in Belgium, Italy and England) are facing a huge backlog of cases, an overload on supervision judiciary. Legal aid budgets are squeezed making it ever more difficult to find skilled lawyers to work in this difficult area. Justice and fairness for sentenced prisoners can easily be overlooked: this is inappropriate both from

the prisoner's perspective, but also from society's.

Determinate (fixed term) sentences

64. Most 'dangerous' offenders will receive long term, but fixed term, sentences. It is rare in the Council for Europe for a fixed term to be served in its entirety, but the way in which countries organise their release systems varies enormously, sometimes within countries as well as between countries (see Padfield, van Zyl Smit and Dünkel, 2010). Although many countries have systems which allow automatic, or semi-automatic, release to many prisoners, very often only discretionary conditional release is available for the most serious or 'dangerous offenders'. There is a wide variety of practice in relation to conditions on release: in some countries conditions are routine and standardised, in others much more individualized. There are very different forms and degrees of freedom (van Zyl Smit, 1998). Even within jurisdictions there are many different sorts of prison, and a prisoner may proceed through his sentence from secure establishments to prisons of different levels of security. Some prisons will be better equipped to provide training and treatment opportunities. Yet the prisoner is unlikely to be able to select his or her prison, or his or her route through the penal system. Most decisions will be taken administratively. Thus, for example, in many countries, it is accepted that temporary leave (day leave, semi-detention, work or home leave) is granted by the prison administration, while courts decide only longer periods of conditional leave[23]. The distinction between those decisions which can be taken administratively, and those which require judicial authority vary between countries, and may have far-reaching impact: for example, since a court may not grant conditional leave to those who have not enjoyed successful periods of temporary leave, it is in effect the administration and not the court who hold the keys to release. If a court decides that a prisoner must complete a certain course before he will be released, it will be those who control his priority on the course waiting list who in reality delay his release, not the court.

Hypothetical Case C Mr C is sentenced to 10 years imprisonment for rape, having spent one year in prison pre-trial. He is immediately taken to prison (where he may have been on remand). He is assessed as a medium risk of escape, and sent to a secure prison for sex offenders. He is assessed as in need of a variety of programmes, and agrees to follow a sentence plan. His first release eligibility date is noted on his file, and after two years he has completed two courses, and moved to a less secure prison. He seeks the right for a temporary release in order to make plans for his eventual release. Who decides? What are the factors that the decision-maker takes into account, and how are these factors assessed?

65. This simple story, and the answers to these questions which country respondents may suggest, reveal immediately the variety of types of decision-making involved: different bodies in different countries will be responsible for categorising and assessing an offender, at different stages in their penal career. Dünkel et al (2009) in their review of long-term imprisonment (available on the internet) make it very clear that serving a sentence of the same length in two different European countries turns into two very different sanctions, differing in severity and length: not least because freedom is curtailed in varying degrees in different prison regimes. Different regimes also result in release rules being applied differently. Of course the differences are not only between different countries: the severity of a prison sentence varies within countries according to the particular institution or institutions to which the prisoner is sent. Again, the literature on decision-making underlines the need for careful analysis of the reality of criminal justice decision-making in practice (see Gelsthorpe and Padfield, 2003).

66. Automatic conditional release (at half time, or later for recidivists) may be the rule, or a fixed term prisoner may have to apply (or be referred to a special court for release). Many decisions which may impact on the decision to release may be taken by prison or probation/social work bodies. Rules may be applied differently in privately run prisons than in public sector prisons (and indeed, different rules

[23] In Ireland, exceptionally, all conditional release is considered temporary

may be applied). Even before we note differences between states, a number of researchers have commented with concern about the variations within their own countries: in Italy, between the north and the south, for example (see Gualazzi and Mancuso (2010), or in Austria, between different regions and individual prisons (Bruckmüller and Hofinger, 2010). Where the system is discretionary, there will usually be a court hearing, and indeed this is required by article 5(4) of the European Convention on Human Rights. But the nature of the 'court' varies enormously: Belgium's *Tribunal d'application des peines/strafuitvoeringsrechtbank* is multi-disciplinary, made up of a judge and two lay experts, whereas the French *tribunal d'application des peines* is made up only of professional judges[24]. The English Parole Board[25] is composed of judges, lawyers, criminologists, and independent members who sit in panels of three.

67. The rules which these sentence implementation or review courts follow also vary greatly, in particular in relation to the legal thresholds and criteria for release. The height of the hurdle varies enormously. The criteria laid down in the Austrian Criminal Code include a requirement that the conditional release has at least the same preventative effect on the offender as serving the remainder of the prison term. In Germany, a 'justifiable' degree of risk is acceptable for some offenders. There has been little empirical research on how these rules are applied in practice, on actual decision-making in sentence implementation courts (though see Padfield, van Zyl Smit and Dünkel, 2010 for an exploratory comparative study).

68. What is the evidence on which the body deciding release relies? Some jurisdictions explicitly look at behaviour in prison and see conditional release more as a reward for good behaviour (Turkey, Cyprus) than as a step in a journey towards resettlement. Sometimes it is the prisoner himself who has to present a 'reintegration plan' (Belgium), whereas in many others, the offender remains a more passive recipient of a release plan prepared by others. In France, the *tribunal* appears to be more influenced by attempts to resocialise, than by actual evidence of success, and also considers the offender's actual payment of financial compensation to his victim as evidence in favour of release.

69. Clearly, the court's decision is influenced by the evidence presented to it, and the way in which this evidence is presented. For example, it has been suggested that reports by the Italian *uffici di esucuzione penale esterna* (UEPE, or penal social services) are often not followed by the *tribunale* as they are too general or excessively positive (see Gualazzi and Mancuso, 2010), whereas the probation reports given to the Parole Board in England are often particularly cautious. The Board rarely recommends release if not recommended by the probation officer. It is thus the probation service in England who in effect hold the key to release (Padfield, 2002).

70. We should also note recall procedures. It is common in some countries, and rare in others, that released offenders are recalled to prison when in breach of their conditions of release. On Germany, Dünkel and Prins (2010, p 185) comment that it is very positive that less than half of all conditional releases are revoked. In England and Wales, a total of 13,900 determinate sentenced offenders were recalled to custody during the year 2009-10, up 18 % from 2008-09 (when 11,800 offenders serving determinate sentences were recalled to prison); in 2006 more life sentence prisoners were recalled to

[24] At the present time, France is considering whether to include lay members on the tribunal: already the "tribunal d'application des peines" attached to the Court of Appeal includes a representative from both victims groups and from reintergration organisations.

[25] which now decides few determinate cases (its main jurisdiction is indeterminate and recall cases) was held not to comply with the requirements of Article 5(4) of the ECHR in *R (Brooke) v Parole Board* [2008] EWCA Civ 29

prison (164) than were released on license (135)[26]. In other countries many fewer are recalled: in Finland there are only about 10 recall cases a year. It seems a fair assumption that prisoners are more likely to be recalled when they are more closely monitored/supervised, which seems somewhat perverse: where supervision is poor or non-existent the offender who breaches conditions is not penalised. Yet the low recall rate in Finland is not due to poor supervision. The impact of recall or the revocation of a license varies: in some countries, the court or tribunal responsible for reviewing revocations may simply make the conditions on release stricter. In others, a recalled offender may spend significant time back in prison without a court hearing. The mechanisms of recall also vary enormously: whether initiated by public prosecutors or probation officers, for example. Recall practice seems to have been studied very little nationally, yet alone comparatively (see Padfield and Maruna, 2007, Digard, 2010).

Indeterminate (life) sentences

71. Some European countries (Croatia, Norway, Portugal and Spain) have no provision for life sentences. Of those that do have life sentences, some have mandatory life sentences for some offences (UK, Turkey), for many, life is only ever at the discretion of the sentencing judge or judges. Some countries permit full or whole life tariffs (there are for example about 30 prisoners in England who know they are serving their whole life in prison), but most have an upper limit. Many systems do not individualise the tariff, but simply specify that a certain minimum term is to be served: 10 years in Belgium (for recidivists 14 years[27]), 12 years in Denmark and Finland, 15 years in Austria, Germany and Switzerland (in the latter this term might exceptionally be 10 years), 18 years in France (for recidivists 22 years), 20 years in the Czech Republic, Greece (with a possible remission to 16 years) and Romania, 25 years in Poland, Russia and Slovenia, 26 years in Italy and 30 years in Estonia and in certain cases in Hungary (Data here are from Dünkel, 2009, and van Zyl Smit, 2009). When Turkey abolished the death penalty in 2002, it was replaced by life-long aggravated (or heavy) imprisonment. In England and Wales, and in Scotland, the judge who sentences someone to life imprisonment, whether the sentence is discretionary or mandatory, may and usually does set a minimum period or tariff to be served.

72. A life sentence may therefore be seen to fall into three stages: a minimum term (or tariff), a post-tariff period of secure prevention detention (see Chapter 5) and then a period on release. However, there is usually more flexibility in those systems which allow sentence implementation courts to vary the sentence imposed by the sentencing judge or judges. Obviously a key difference for life sentence prisoners is that they have little idea at the beginning of their sentence when they will be released. This adds the enormous stress of uncertainty, for both them and their families, and it makes it very difficult to press forward with precise sentence plans. There is also a question of legitimacy: if prisoners perceive the system as unfair, it is much more difficult for them to work with the system.

73. The rules on release for lifers again vary very greatly (see van Zyl Smit, 2002). Even where countries have seemingly similar rules, the practice can be very different. Again, it is important to remember that not all life or indeterminate sentence prisoners are dangerous: many are first time offenders who have never previously committed a crime of violence. We need much more research: statistical data on comparative release and reconviction rates (to discover variations within countries as well as between different countries) but also qualitative research identifying the reality of decision-making in practice. Appleton (2010) highlights the difficulties faced by released life sentence prisoners through interviews with both those who have successfully reintegrated and those who have been recalled to prison to continue their life sentences. Throughout Europe both the quality and length of probation supervision and support varies enormously.

[26] see Offender Management Caseload Statistics, 2009, Tables 9.6 and 9.11

[27] Raised to 16 in 2006

What works to reduce re-offending?

74. Establishing what works to reduce offending by any offender, or proving any causal connection between individual interventions and an individual's desistance from crime or a criminal career, is fraught with difficulty. These difficulties are multiplied when it comes to those who are considered 'dangerous'. As we have noted, serious criminal acts are likely to be rare, difficult to detect and even more difficult to predict. Identifying a causal connection between different rehabilitative and protective initiatives may be equally difficult – but this is far from arguing that 'nothing works'.

Psychological interventions

75. Many countries have adopted and adapted treatment programmes based on cognitive-behavioural psychology. These are often aimed at identifying offenders' risks-needs and then seeking to modify their behaviour. Treatment may include cognitive 'self change' programmes, targeting high-risk offenders and including group and individual sessions. They may include anger management or violence reduction strategies, or specialised sex offender treatment programmes, domestic violence or healthy relationships programme (such as the Integrated Domestic Abuse Programme (IDAP) and the Community Domestic Violence Programme (CDVP) and the Healthy Relationships Programme (HRP)). Most programmes dealing with domestic violence, for example, conceptualise it as a multidimensional problem and consider the links between the social and psychological characteristics of individual perpetrators (e.g. his development, experiences of abuse, degree of empathy), his immediate patterns of interaction (e.g. his environment and patterns of family interaction) and the influence of his social context (e.g. his work and friendships) as well as wider influences (e.g. cultural norms endorsing male power and control, patriarchy). They also draw on social learning and cognitive-behavioural theory (see for details on domestic violence programmes in England, Bullock et al, 2010) . Alongside cognitive-behavioural group work, there may be individual one to one components, risk assessments, and structured victim contact. In many countries great emphasis has been put on accreditation of programmes and careful monitoring of their implementation. However, this can be seen to limit creativity and adaptability. To generalize, these programmes are generally found to have a small but significant treatment effect, even if it is difficult to predict for whom they will be successful and why (Lösel, 2007). There are concerns that resources must be spent appropriately: are the right offenders allocated to the right courses? Are waiting lists appropriate? Are courses for perpetrators funded at the expense of support for their victims?

76. In recent years, some programmes have become increasingly sophisticated, and are being used with more complex offenders, for example, those suffering from psychopathic disorders[28]: "there is no good evidence that psychopathy can be treated reliably and effectively – but neither is there any good evidence psychopathy is untreatable" (Hemphill and Hart (2002)). There are some obvious pre-requisites to success: programmes must be well structured, and implemented by well-trained, well-supported and well-supervised staff [29]. They must be carried out in an adequately supportive environment – there is evidence that some programmes are more effective if carried out in the community than in custody. It would appear that poorly run treatments may even impact negatively on an offender's cognitive needs. There are many examples of implementation studies which focus on the

[28] For example, 'Chromis' is a complex and intensive programme developed in England aiming to reduce violence in high-risk offenders whose level or combination of psychopathic traits disrupts their ability to accept treatment and change.

[29] see the work of the Correctional Services Accreditation Panel in England and Wales for an example of one Government's attempts to maintain high quality offender programmes: www.justice.gov.uk/publications/csap-annual-report-2008-9.htm

delivery of programmes[30]. Such evaluations often mention concerns about uneven implementation, the difficult of the work for staff as well as for offenders, and the problem of lengthy waiting lists.

77. Serious challenge to 'risk-needs' programmes has come from advocates of what is often called the 'good life' model, which gives greater priority to adopting a positive approach to treatment: a 'strength-based' rather than 'needs or risk based' approach. Here the emphasis is on the relationship between risk management and 'good lives', the importance of identifying and encouraging offender motivation, and the impact of therapists' attitudes toward offenders (Ward and Brown, 2004, Ward et al, 2007). Those who successfully desist from crime often have to make sense of their past lives, to reconstruct their life story and to take control (Maruna, 2001).

Social, economic and community opportunities

78. Treatment programmes alone are unlikely to be effective in reducing re-offending. Or rather, psychological interventions are more likely to be effective if they aren't used in isolation from an offender's other needs. Offenders must be helped to take control of their own lives. Releasing offenders into the community without practical support is not a realistic way of reducing offending. They may need help to find accommodation and employment. It is important not to underestimate the challenges that face someone who has been convicted of a serious offence, and served a custodial sentence, to find employment, accommodation and social networks. Many may not have had stable accommodation or employment for many years before their imprisonment. Prison may well have fractured already weak family and other social support networks. In many penal systems, not enough is done to foster and encourage social, family and community links. The problems are particularly acute for foreign prisoners. The use of modern technologies (such as skype, email) should be explored to encourage cheaper and more effective ways of maintaining contact with families.

79. Education and basic skills training is also essential, though again enforced learning, or what Hardy et al (2001) call *l'aide contrainte,* is less effective than where an offender is genuinely motivated. There are many other skills as well as literacy: many 'dangerous' offenders have poor budgeting skills, and may need help setting up a bank account, for example. Access to community-based health services is important. Social support networks can be offered not only by professional staff but also by volunteers: church groups or other 'circles of support'[31]. Voluntary organisations which may have greater legitimacy as helpers in the eyes of offenders, have traditionally been important in many countries, and are also growing in importance in others. A key can be sentence planning which recognises the need for 'through care' from the custodial setting to the community.

Monitoring and supervision

80. It is likely that, once they are released into the community, 'dangerous' offenders will be managed by monitoring and supervision. Granting liberty in stages (graduated freedom) can be effective. But any intrusion or limits on personal freedoms must be justified: if close monitoring is no more effective than releasing someone without such close monitoring, it should not be used.

81. Many countries use electronic monitoring and, a few, GPS satellite tracking of offenders. More research into the effectiveness of such monitoring should be carried out. While offenders being

[30] see Bullock et al (2010) on the implementation of domestic abuse programmes in England and Wales in prison and the community, for example.

[31] See www.circles-uk.org.uk: a group of volunteers from a local community form a Circle around an offender. They provide a supportive social network but also require the offender to take responsibility (be 'accountable') for his or her ongoing 'risk management'.

monitored may reduce their offending, and studies have reported offender support for 'tags', they may also either adapt their offending or indeed simply offend more when the monitoring ends. Satellite tracking was piloted in the UK between 2004 and 2006 (see Shute, 2007) but was abandoned, largely because it was both ineffective and expensive. Where electronic monitoring is used, it should always be combined with other interventions designed to support desistance[32],

82. Thus, one has to explore the reality of monitoring. In many countries, there is now a register of sex offenders (the sex offender register in England, the *fichier judiciare national automatisé des auteurs d'infractions sexuelles ou violentes* (FJNAIS) in France, for example). The mere existence of such registers is unlikely to be effective in either public protection or in rehabilitative terms. It depends, of course, on what is done with the information in the register, and indeed on the reliability of the information held. In several countries huge sums of money have been invested in improving the computerization of records, but not always successfully. As well as efficient usage, the sharing of this data between different agencies raises human rights (particularly privacy) issues. Vigilance and effective safeguards are required to ensure that there is no inappropriate access to information about offenders, particularly 'dangerous' offenders. Information should not be made public,

83. Monitoring may take place by the police, by probation or social services, or by various agencies (including private sector or non-governmental organisations) working together. Thus, in England and Wales, multi-agency public protection arrangements (MAPPA) were introduced in 2001 to supervise dangerous offenders in the community. Whilst this joint working seems to be working well, a vast numbers of offenders have been categorised as needing MAPPA supervision, thereby 'flooding' the system. There are currently more than 30,000 registered sex offenders (32,336 in 2008/09); all violent or other sex offenders who have received a sentence of more than 12 months (11,527 in 2008/09) as well as 'other dangerous offenders' (898 in 2008/09). These offenders are managed on one of three levels from ordinary case management to intensive multi-agency supervision. Clearly significant work has to be done to indentify properly those in need of the highest level of monitoring.

84. Close monitoring is expensive, and there are also important questions about both efficacy and the human rights of those monitored. Craissati (2007), a psychologist, identifies the paradoxical effects of stringent management, focusing on sex offenders, concluding that:

> there is a fine line between control and persecution, one that is difficult to detect at times, and that social exclusion – in the current climate – seems to be an unavoidable consequence of rigorous risk management... The possibility that stringent risk management approaches embodied within the MAPPA re-creates – for some offenders – the disturbing experiences of their early lives seems absolutely clear. That it may paradoxically result in triggering greater levels of offending is an uncomfortable idea, as is the suggestion that in order to reduce risk, sometimes professionals and agencies may need to take risks. (Craissati 2007, at page 227)

85. Some forms of monitoring and surveillance may be useful, but these must always themselves be monitored: are they the least intrusive appropriate forms of monitoring and are they regularly and thoroughly reviewed?

86. Probation services throughout Europe appear to be becoming more control and enforcement oriented. But alongside monitoring, consistent support and supervision may be more important. The bedrock of successful supervision is the ability to form and maintain a trusting working relationship with the offender and through it to model pro-social behaviour and attitudes (NOMS, 2006, 26). Given the fractured lives that many 'dangerous offenders' will have lived, it is hardly surprising that the "*continuity* of a stable and supportive relationship" (Appleton, 2010, p 88) is one of the most important keys to

[32] See European Probation Rules, Rule

successful resettlement, especially during the last year of imprisonment and the first year of release. A "pass-the-parcel" style of supervision is not appropriate, as desisting offenders appear to respond best to one-to-one relationships. Ideally, the named supervisor who engages with one-to-one supervision, over perhaps many years, should be supported by a named backup, who is also familiar with the offender.

87. The following hypothetical problem is designed to provoke debate about the complexity of what works to reduce re-offending:

Hypothetical Case D Mr D had served a long sentence for the sexual abuse of children. He had been very violent and had no insight into the hurt he caused. Having limited abilities and suffering from psychotic symptoms, he had spent nearly all his life in care, prison or hostels. He lacked any basic skills. A sentence plan was agreed in prison and he slowly completed a number of courses. He was eventually released into the community subject to electronic monitoring and a number of conditions. The police were informed of his release. He was recalled to prison after three months for failing to stay at the approved accommodation. He was subsequently re-released. He is now living in an approved hostel where staff have noticed that he has started to store children's toys and sweets. What should they do?

Surgical/medical interventions

88. Exceptionally, surgical castration continues to be used on some sex offenders. To most human rights observers, the process appears as inhuman treatment. As well, such irreversible procedures raise enormous questions concerning genuine and informed consent, particularly when the person concerned is a prisoner. Thus the CPT report in 2010, with concern, that at least six offenders had undergone surgical castration (testicular pulpectomies) in the Czech Republic in 2008-9. They state that "it is a fundamental principle of medicine that when a medical intervention on a human being is carried out, the least invasive option shall be chosen. In this context, the importance of physical integrity as guaranteed by Articles 2, 3 and 8 of the European Convention on Human Rights cannot be overemphasised. The position of the Czech authorities ignores the divergence of views amongst practising sexologists in the Czech Republic as to the desirability of surgical castration" (at para 9). The CPT reiterates its view that the surgical castration of detained sex offenders amounts to degrading treatment. They suggest that the Czech authorities should facilitate the abolition of surgical castration, by replacing it with other forms of treatment for sex offenders. However the Czech Government respond that "ethically and medically correct surgical castration and subsequent compliance with the prescribed medical follow up by a surgically castrated person can result in the effective protection of society and give that person the chance to return to society. Surgical castration achieves a significant and lifelong decline in the sexual activity of a man; this goal cannot be achieved by other means". The Czech Government state that surgical castration is only ever performed on request and after approval by an expert committee, which consists of a lawyer, at least two physicians specializing in the relevant field, and two other doctors not involved in the surgical operation (Section 27a of Act No 20/1966). This requires a careful analysis of the concepts of 'request' and 'informed consent': offenders may agree to, or even request, invasive and irreversible treatments in ignorance of the reality of the options.

89. An alternative to surgical castration is medication (anti-androgens or gonadoliberin analogues). Such treatment depends on the regular administration of drugs, and can have serious negative side effects (e.g. weight gain, fatigue, nausea, high blood pressure, depression, hypoglycaemia etc). Here, serious consideration should be given not only to the rights of the offender (particularly the right to refuse treatment), but also to the effectiveness of the treatment.

The seamless sentence: custody and community linked

90. Earlier in this chapter, we separated determinate and indeterminate sentences from each other, since an indeterminate (life) sentence prisoner may well follow a more complicated journey through the prison system. But for both, the system can be unpredictable[33]. It is difficult to identify a clear line between custodial and community stages in the implementation of a sentence: freedom is often gained in small steps, and, for many of the most 'dangerous' offenders, liberty may forever be bounded by restrictive conditions. This Report has suggested that, from the beginning of any sentence of imprisonment, the focus of the penal administration and the offender should be on his ultimate release and reintegration. This requires:

(i) meaningful sentence plans[34] which should be realistic and achievable, and not just aspirational. They should be structured in such a way as to allow the offender to understand clearly the objectives and actions required. They should be regularly reviewed. For example, in most countries, some courses are not available in many prisons: sentence plans must allow a prisoner successfully to negotiate a way through a system which may seem impenetrable and inflexible.

(ii) Where release is discretionary, as it will be for many 'dangerous' offenders, the offender must be helped in identifying the real hurdles to release and then in jumping them. Since decisions surrounding these hurdles affect release dates, administrative decision-making should be subject to independent judicial supervision. The hurdles may include:

- security classification: prisoners should be able to challenge this categorisation, especially if the proportion of the sentence which must be served depends on security classification (as in Hungary). They should also be able to proceed swiftly and appropriately to a less secure categorisation. The extent to which countries move prisoners up and down the security classifications varies: in some, such movements reflect the journey towards release; in others, prisoners are very rarely re-classified.

- detention in particular prisons or regimes: not only 'high security' (for example, Hungary's Special Regime Unit for prisoners serving lengthy sentences ("HSR Unit"))[35], but also special units for those belonging to terrorist or mafia organisations (Italy) or dangerous people with severe personality disorders ("DSPD units", England and Wales)[36]. Not only is it important for the administration to facilitate the prisoner's reintegration into the main prison system, but also to monitor carefully the assessment or diagnosis that led to the prisoner's detention in the special unit in the first place. The 'stigma' of having spent time in this Unit may well live on with the prisoner (and within his dossier) as he progresses (often very slowly) through the system.

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[33] For an excellent account of the modern 'pains of imprisonment', exacerbated for the prisoner who knows that he is being constantly measured and evaluated by officers and psychologists, see Crewe (2010).

[34] See http://psi.hmprisonservice.gov.uk/psi_2010_36_new_chapter_4_for pso_4700.doc for details on sentence planning in England and Wales

[35] See CPT Report on Hungary of June 2007: www.cpt.coe.int/documents/hun/2007-24-inf-eng.htm

[36] National research on the effectiveness etc of DSPD units is available www.dspdprogramme.gov.uk/research.html

- completing courses and treatment programmes (particularly if the completion of courses is seen as a way of proving risk reduction)

- paying compensation to victims

- securing appropriate accommodation

- securing work/employment

- securing temporary release, which is often an important step on the way to more permanent release. Some countries allow systematic prison leave, which may be seen as an important transitional measure to allow a prisoner to prepare for conditional release.

(iii) Having secured release back into the community, the offender must have appropriate support and monitoring. Throughout the Council of Europe, from Finland to Greece, one hears complaints of the severe underfunding of community work with offenders. Workloads vary enormously. In Greece, it is suggested that the new probation service is mainly preoccupied with running routine checks on parolees for technical infractions rather than assisting offenders with employment and housing (see Cheliotis, 2010). An appropriate balance must be struck.

Hypothetical Case E

Mr E was convicted of an offence of serious domestic violence. His partner had children and a social worker was allocated for their protection. The victim was re-housed, and herself supported by social workers.

Mr E was sent to a closed prison, where his sentence plan required him to attend suitable courses. On release, he lived initially at an approved hostel for ex-offenders. A condition of release was that he should not enter the city where his ex-partner lived. He completed a Domestic Violence programme run by the local probation service. He must inform his Probation Officer about any new relationships, and any future partner will be given information about his history. Who should decide if he is receiving adequate supervision? How should this be monitored?

91. Monitoring may involve the monitoring of conditions imposed on the release of an offender. The most common release conditions, as well as a standard condition not to re-offend, may include:

- meeting and keeping in touch with a probation officer
- a residence obligation, with possible curfew, which may or may not be electronically monitored
- treatment by a psychiatrist/psychologist/medical practitioner
- a positive work obligation (or a requirement not to take work with certain groups such as children)
- an obligation to make payments to victims
- a requirement not to reside in the same household as children
- a requirement not to approach or communicate with named people
- a requirement to avoid a particular area

- a requirement to attend courses for addictions etc

- a drug testing condition

92. Conditions should not be too burdensome: not only because this is unfair, but they may also be ineffective or unenforceable. Conditions should be assessed for their utility: many of the therapeutic or practical treatment programmes offered in prisons may be more effectively offered in the community, or an offender may benefit from a repeat or 'booster' programme in the community. As well as consistent support from a probation officer, it is important that released offenders develop relations with mainstream social welfare services. The role that voluntary organisations can play has already been noted[37]. These voluntary organisations may be effective, but they need to be accountable and supervised.

93. The term 'probation officer' has been used in this chapter, but the term is not universally used[38]. The label used is of course less important than the authority, skill and independence of the individual. The relative status, power, and influence of different players in the penal process need to be well understood. For example, Belgium's probation officers have become in this context *assistant de justice/justitieassistent*, and English probation officers are being re-rolled as 'offender managers'. Why is this? It is important to assess whether there has been too much focus on risk, and the management of risk, at the expense of reintegration and rehabilitation. We have already noted that emphasizing risk may make it more difficult for some to desist from crime. The proper responsibilities of police, probation and other services also need to be carefully assessed, and expectations of effectiveness must be realistic. Many dangerous offenders will spend many years under supervision: this long-term supervision requires special skills, and takes much time and many interviews. The work presents special challenges which require specific training of those involved in the supervision process.

94. Two conclusions:

First, there is no magic or easy way of desisting from crime, especially for 'dangerous offenders'. But many do move on from their criminal pasts. As McNeil et al (2005) put it, "desistance resides somewhere in the interfaces between developing personal maturity, changing social bonds associated with certain life transitions, and the individual subjective narrative constructions which offenders build around these key events and changes".

Secondly, the lack of rehabilitative provision offered in practice to many prisoners in Europe must be underlined. In many countries, opportunities are severely limited: the reports of the Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the CPT: see www.cpt.coe.int) make depressingly repetitive reference to the paucity of opportunities and rehabilitative programmes available to prisoners. Often, it would appear that those serving the longest sentences have fewer opportunities than other prisoners[39].

5. SECURE PREVENTIVE DETENTION

[37] As well as Circles of Support, an interesting example is *Stop it Now! UK & Ireland* (www.stopitnow.org.uk) which aims to prevent child sexual abuse by working with abusers themselves.

[38] (Add reference to European Probation Rules)

[39] Although this is not always the case: some systems give priority to long term prisoners with the result that short term prisoners may do little useful during the course of their sentence.

95. For our purposes, 'secure preventive detention' can be defined as the detention of offenders for the purpose of public protection (beyond the deserved, or proportionate punishment).

Categorising laws

96. The subject poses enormous challenges for those seeking to do comparative analysis and categorisation. The following categories can be identified (though several countries may fit into more than one category):

(i) systems which explicitly do not allow secure preventive detention, or non-punitive sentencing (for example, Slovenia). This clearly demonstrates an approach that recognises the right of an offender to be reintegrated into society once he or she has serve their deserved sentence. It is consistent with just desert principles. The remaining question here may well be whether such offenders receive adequate support to help them be successfully reintegrated (see Chapter 4).

(ii) systems which use life (or indeterminate) sentences as a public protection (secure preventive) measure. As we saw in Chapter 4, most European countries allow some form of life sentence. These may be imposed for desert reasons (including 'whole life' sentences, or life without parole, on those who have committed the most heinous crimes), but several countries explicitly use life or indeterminate sentences in order to keep in custody or under supervision in the community those who are considered to pose a significant risk of serious re-offending. The obvious examples are the United Kingdom and Ireland where large numbers of offenders receive a life sentence, where a tariff, or minimum individualised term for punishment, is fixed by the sentencing judge and the prisoner is only subsequently released, on the direction of a panel of the Parole Board, when they determine that it is 'safe' to do so. Many prisoners spend many years in prison post-tariff and so this can be seen as a form of secure preventive detention. The implementation of such sentences varies: for example, Switzerland's "*internement à vie pour les délinquants sexuels ou violents jugés dangereux et non amendables*" is also indeterminate but functions differently: it is only subject to review after an expert commission has reviewed therapeutic possibilities.

(iii) systems which identify longer than commensurate sentences for certain categories of offender such as recidivists or dangerous recidivists (see Chapter 2). This is sometimes justified because the repeat offender 'deserves' more punishment, or may be simply for public protection. The penal justification is not always made explicit in the law.

(iv) systems which use measures explicitly of public protection (for example, *detention de sûreté* or *Sicherungsverwahrung* or *misure di sicurezza*), imposed at the time of sentence to allow for an extended period of public protection. These measures of prevention may be imposed as well as, or instead of, a proportionate punishment. They may be for a fixed term, or indefinite. In several countries there has been debate whether such a measure is a criminal penalty or a civil order (see *M v Germany*, discussed in Annex One). These sentences pose significant human rights concerns: the offender is being detained simply because of the risk that he or she is perceived to represent: it is vitally important that their use is monitored to ensure that there is clear understanding about their use and potential abuse.

- In Austria both the dangerously disturbed and dangerous recidivists may be subject to preventative measures (see s. 21 ff of the Criminal Code). This may be for up to 10 years for dangerous recidivists and there is no upper limit for dangerously disturbed offenders.

- In England and Wales an extended sentence may be imposed on 'dangerous' offenders: this is an ordinary prison sentence with an extended period of supervision in the community

after release (up to 5 years for violent offenders, and 8 years for sexual offenders). Since a released offender remains liable to recall to prison throughout this extension period, and may not be released again until the end of that period, this can significantly extend a custodial sentence.

- Similarly, in Spain the Criminal Code was amended in 2010 to introduce *libertad vigilada* (see Art 106 of the Penal Code). This may be for a period of up to 5 years for less serious crimes, and 5-10 years for more serious crimes. The person released from prison on *libertad vigilada* may be subject to a number of conditions, including electronic tagging, regular judicial reviews, residence, contact and educational requirements.

- In Belgium an offender may be placed 'at the government's disposal' for a period from 5 – 20 years, according to the nature of the case: see the Social Protection Act 1964, as amended in 1990, 1998 and 2007. This may be implemented either by way of additional deprivation of liberty or by way of a conditional release. Currently, the decision whether or not to release is (controversially) taken by the Ministry of Justice, but this will be transferred shortly to Sentence Implementation Courts.

- In Germany secure preventive detention can be imposed by the court if the offender is to be sentenced for an intentional grave offence (for which is provided minimum two years of imprisonment) and who on the basis of an overall assessment is considered to pose a danger to the general public. The upper limit of detention is traditionally 10 years, but in cases were there is still a risk of committing serious offences resulting in serious emotional trauma or physical injury to the victims the time frame can exceed 10 years.

(v) systems which use secure preventive detention reserved at the time of sentence, to be decided later in the sentence. E.g. in Germany, the sentencing court may impose reserved secure preventive detention. In this case, at the time of the offender's earliest release the court has to make an assessment whether the offender is dangerous to the general public. If the offender is assessed to be dangerous, secure preventive detention can be imposed.

(vi) systems which use secure preventive detention measures, imposed at the time of release or subsequently. Some countries allow measures of prevention to be imposed at the end of the criminal penalty, or at the end of the custodial part of the penalty. Often these measures impose limits on the offender's freedom by way of conditions (post-sentence preventive surveillance), but they may also be custodial (secure). For example, in France, the law of 25 February 2008 *relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental* controversially increased the powers of the *Commission pluridisciplinaire des mesures de sûreté* to recommend the continued detention, post sentence, of someone sentenced to at least 15 years imprisonment, who is deemed 'dangerous' with a high risk of re-offending because of a serious personality disorder (see art 706-53-13). This Commission was originally created (by the law of 12 December 2005) to advise only on electronic monitoring. It is composed of a *magistrat,* a *préfet* (a senior civil servant), a psychiatrist, a psychologist, a prison governor, a lawyer and a representative of a victim's organisation. Prisoners coming to the end of a sentence for a serious offence who the Commission deem to be dangerous may be referred to the *procureur general* who takes the case to the *juridiction régionale de la rétention de sûreté* which can order the prisoner's continued detention. The person will be detained in a *centre socio-médico-judiciaire de sûreté*, under the joint governance of the Ministry of Justice and of Health. There must be an annual hearing to decide if the measure should continue, and the prisoner may demand a review at any time.. The *Conseil Constitutionnel* held in its decision n° 2008-562 DC – February 21st 2008[40] that post-sentence

[40] See for an English version of this decision

preventive detention is neither a penalty nor a sentence of a punitive nature. This meant that any argument based on the principle of legality[41] failed. But the *Conseil Constitutionnel* did hold that the law could not be applied to people convicted of offences committed prior to the enactment of the statute, so the first cases are unlikely to be heard before 2023. In Germany, too, there has been much controversy surrounding the introduction of post-sentence preventive detention. Fewer than 10 out of the more than 400 offenders currently held in preventive detention are being held under the very controversial subsequently ordered (post sentence) preventive detention (see Dünkel, 2010).

(vii) As we saw in Chapter 3, at the end of a period of imprisonment, or indeed before it, during it, or as an alternative to prosecution, a prisoner may be transferred to a civil secure mental hospital. All European countries permit to some degree the civil detention of those deemed to be a danger to themselves or others.

97. It is important to underline that these distinctions are not entirely convincing or indeed necessarily useful. First, the line between a 'secure' sanction and one served in the community can be blurred, especially where a prisoner is liable to recall if the conditions of his release are breached and he then serves a longer than proportionate sentence. Many prison systems use supervised hostels in the community which may be labelled 'open prisons' or 'community hostels': they reveal an unclear borderland between custody and community. Secondly, the line between proportionate penal sanctions and secure preventive detention is often blurred (see Annex One for the jurisprudence of the ECtHR). Even where there is a clear differentiation between criminal sanctions and measures of public protection, these differences may not translate into different practice.

98. This is the third and most important challenge: the differences between 'ordinary' imprisonment and secure preventive detention may often be illusory. If the person is in custody (in prison, hospital or elsewhere), perhaps indefinitely, any post-sentence detention restricts liberty. Such detention must therefore be fair and proportionate. We repeat the concern raised earlier about prisons and places of detention run by private sector or non-government organisations. Whilst these may prove cheaper to run (an important consideration) this may be inappropriate. For example, the CPT noted recently in its report on Hungary that the Government acknowledged that the National Penitentiary Establishment at Tiszalök, run by a private contractor, has had enormous difficulty recruiting medical staff because of the poor pay offered. Where 'dangerous' prisoners endure restricted regimes, it is important that prison authorities are clear whether this is disciplinary or preventative. An interesting example is the Turkish Government's regime for prisoners serving aggravated life sentences. Under Turkish law (Art 67(4) of Law No 5275 on the execution of penalties and security measures), the 'committee of administration and observation' of a prison may decide that prisoners who "present an absolute danger for society" are not allowed to receive radio or television broadcasts. Prisoners who maintain leadership of armed organizations may be banned from making all phone calls. It is not surprising that the CPT criticised these rules: they appear to be a form of punishment, rather than a necessary form of secure prevention. In many countries, the line between administrative convenience and disciplinary punishment can be a fine line: again, vigilance is required in seeking the minimum interference with prisoners' rights.

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www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2008562dc.pdf

[41] See Article 8 of the French Declaration of the Rights of Man and of the Citizen of 1789: "The Law must prescribe only punishments which are strictly and evidently necessary and no one shall be punished except by virtue of a statute drawn up and promulgated before the commission of the offence and legally applied".

Assessing risk

99. Just as there is no easy common language distinguishing 'ordinary' sentences from 'preventive' detention, neither is there agreement on the level of risk which an offender must present before he/she can be detained 'preventively'. The levels of risk for detention and for release may not be the same: it is important to monitor both the tests which qualify an offender for secure prevention detention, as well as the hurdles he must jump before he can leave this 'box'. In several countries the threshold of risk assessment appears to be higher for those serving secure preventive detention (or dangerous recidivists) than for 'ordinary' prisoners: it is more difficult for them to achieve their freedom. This is an area of some complexity, involving comparisons of both procedural and substantive law. A detailed review of the law is beyond the scope of this paper. But it would be an invaluable project to explore in greater detail the law and practice in different countries. Such a review should involve not only a comparison of legal rules, but their application in practice.

Hypothetical Case F

Mrs F has served a sentence for murder and other violence offences. At the end of her sentence, she is assessed by a court as still being 'dangerous', with a high risk of re-offending because of a serious personality disorder. Where is she held? What are the conditions in this institution? Are all the restrictions on freedom justified and necessary? Who decides? What are her opportunities to prove that she can be released under appropriate conditions of supervision and surveillance? Is the burden of proof on the state to prove at regular intervals the necessity for her detention? Once (if) released, does she remain liable to be recalled to closed (secure) conditions? What are the mechanisms for review?

Places and conditions of detention

100. Those who are being detained for preventive reasons, do not 'deserve' this punishment: with Lippke (2008), we might argue that they should be compensated for it. They are being detained not as punishment, but for public protection. At any rate, they should be detained in ways which respect their rights as far as possible. We have already noted that there are a wide variety of institutions used to detain dangerous people. In particular, their conditions of detention are sometimes worse than those imposed on offenders serving a sentence as punishment. As Walker (1999) puts it "The quality of his life is being sacrificed because it has been decided, correctly or incorrectly, that others will be safer as a result….making conditions as tolerable as possible should at least be a declared objective" (p. 183). A first step is to recognise and to highlight the special status of people whose detention is being prolonged solely for the sake of others. As with (even more than with?) people held in punitive detention, anyone held for preventive reasons only should be entitled to a written sentence plan which allows him to address specific risk factors, or clinical symptoms.

101. However 'secure preventive detention' is defined, it is essential that those detained are able to challenge their detention, or the limits on their freedom, before a court at regular intervals. The frequency of review may vary not only between jurisdictions, but also depending on the 'box' in which the offender finds himself. As we have seen, the nature and composition of courts and tribunals vary (judges only, or multidisciplinary), as do their powers. In reality, the 'gatekeepers' may be those professional and/or administrative officers advising the court, and responsible for preparing release plans. A court is unlikely to recommend the release of a 'dangerous' offender unless this is recommended by appropriate 'experts'.

102. What measures are in place to ensure a person's release as soon as practicable? Many systems allow preventive surveillance, though it may not go under this name. Offenders on conditional release may be closely monitored and supervised. There are numerous ways in which the freedom of a 'dangerous person' can be limited in the community. We have already noted (in Chapter 4) conditions which may be imposed on release. Some countries also allow civil protective orders such as England's Sex Offender Protection Orders and Foreign Travel Orders, breach of which constitutes a

criminal offence. These measures themselves are deeply controversial (not least because they are obtained in a civil court without the benefit of the usual 'due process' safeguards). Most controversial of all are control orders, a form of home detention for suspected terrorists. It is vital that such intrusive measures are imposed only on those who would otherwise be detained: and not unnecessarily on those who should be trusted with greater freedom. They are mentioned here to encourage a move away from custody as the default position, or normal response: supervised release or preventive surveillance, rather than detention, may be a more appropriate form of public protection.

103. In conclusion: those who are in custody simply for the protection of the public (as a measure of prevention), must have enhanced opportunities to rebut the state's view that it is necessary to detain them. Those who are being held not as punishment, but simply for public protection, should be held in conditions as tolerable as possible. Yet in many countries they will be held in ordinary prisons. Where they are held in separate wings of ordinary prisons, the conditions may not be any better than the conditions in ordinary prisons (indeed, they may be worse). This Report calls for a detailed and independent review, across all the Council of Europe, on how 'secure preventive detention' is being used, in practice and not just in law, and whether it is necessary, appropriate and effectively monitored.

6. Conclusions and Recommendations

104. The European Committee on Crime Problems (CDPC) and the Council for Penological Co-operation (PC-CP) have chosen to look at a crucially important area of European penal practice: the sentencing, management and treatment of 'dangerous' offenders.

105. This Report has not sought to provide a detailed comparative study of law and practice[42] throughout the Council of Europe member countries. That would have been impossible within the time frame and available resources. It is of significance that there was some dispute between some correspondents even within the same jurisdiction as to the interpretation of relevant rules. It was therefore decided not to focus on these disputes which would have distracted from the paper's main purpose, a focus on general issues and concerns, not an analysis of specific laws. This is not to suggest that greater clarity is not an important prerequisite of a fair system. Over-complex laws themselves contribute to injustice.

106. The enormous difficulties in extracting reliable information from many quarters should not be underestimated, and the Council of Europe's work with the CPT, SPACE etc. is essential. This report has not itself provided quantitative data: attempts to verify published data often resulted in debates and discussions between correspondents. In many countries this is a subject studied very little by academics. Given the political prominence given to public protection, and the potential for ineffective management and the huge human rights issues, it is of concern that, within many countries, the research spotlight is not focussed more carefully on the subject matter of this Report. Future work by the Council of Europe should encourage Ministry of Justice officials to work closely with independent academics to explore the subject further, as well as with professionals working in the field (including independent legal practitioners). Complex laws may need simplifying to work fairly and efficiently, but an over-simplified analysis does not lead to better understanding.

107. Comparative work in this area is of course, fraught with dangers: the possibilities for misunderstandings are endless. Not only is language a very obvious barrier to understanding, but key concepts, in law and theory, may be understood very differently. Is an offender on conditional release still a 'prisoner'? Is a convicted prisoner transferred to hospital a 'prisoner'? Is an open prison a

[42] Both qualitative and quantitative data have been studied in the preparation of the Report, though empirical qualitative work on decision-making in many countries seems difficult to access. This may be because the researcher was working only in two languages. It may also be that, despite the importance of the subject, there is little reliable published research.

'prison'? What is the relevance of the title or distinction? What is the significance of the labels applied to various players and tribunals within the system? As we move towards more frequent transfer of prisoners from country to country[43], it is vital that these differences are better explored and understood. Both quantitative and legal data should be collected and analysed, but practical empirical qualitative research would be particularly valuable in order to assist an understanding of how 'dangerous' offenders are in reality managed and treated.

108. In chapter 2 we explored the concept of 'dangerousness'. It was clear that the term itself is dangerous – it is impossible to predict who will commit future dangerous acts with accuracy. Poor predictions not only mean many people may be detained unnecessarily, they also fail to protect the public and may lead to greater public anxiety. The label should be used with very great care.

109. The consequences of being labelled 'dangerous' are often enormous. Those who have been labelled 'dangerous' must therefore be given every opportunity to remove the label, to reduce their apparent level of risk. Where static factors have been used to predict risk, it is vital that dynamic factors and clinical assessments are also used. But clinical assessments may also be over-cautious and unreliable. The impact of categorisations and labels must be well understood, as well as routes in and out of these categories. Dangerous offenders must have sentence plans which include achievable targets. They must have access to good quality and independent legal advice. They must be able, regularly, to challenge the evidence of the state which is used to justify their detention.

110. The levels of risk presented by 'dangerous' people can be reduced. But public expectations are often unrealistic. This Report has given examples of risk reduction practices, and of ways risky people may be 'managed'. One conclusion of this Report is the importance of acknowledging the inadequacy of provision for the supervision and support of 'dangerous' offenders in the community. Many correspondents have pointed out that the better way to protect the public is not through new laws, but through better support and protection. The shortage of qualified staff, reflected in the large number of offenders on many probation officers' case lists, has been a common refrain. Successful supervision requires consistent and appropriate support.

111. However, the overriding message of this Report is that a focus on 'dangerousness' and 'risk' may not be the most effective way of reducing re-offending. Public expectations of safety have been encouraged by the media coverage given to dramatic and rare crimes. Policy makers, politicians and academics should seek to create a more informed public debate. People must understand the limits of risk assessment, and that they cannot be protected from unpredictable events. A time of sharp budget cuts throughout Europe is a good time to re-appraise our dependence on prison as a way of protecting people from 'dangerous offenders'. But lack of resources must never be an excuse to limit individual human rights. This Report seeks, in particular, by way of simple hypothetical case studies, to provoke serious debate both within individual countries, and within the Council of Europe itself.

[43] Council Framework Decision 2008/989/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. By Article 29, Member States are obliged to implement this Framework Decision by 5 December 2011.

Annex One

Any work that the Council of Europe does in this field needs, of course, to be firmly grounded in the law and jurisprudence of the European Convention on Human Rights. This brief Annex may provide a useful if brief check-list:

(i) Relevant Council of Europe texts (as well as the European Convention on Human Rights)

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987)

Recommendation Rec(2010)01 of the Committee of Ministers on the Council of Europe Probation Rules (2010)

Recommendation Rec(2006)02 of the Committee of Ministers on the European Prison Rules e.g. "In the case of those prisoners with longer sentences in particular, steps shall be taken to ensure a gradual return to life in free society" (rule 107.2).

Recommendation Rec(2003)23 of the Committee of Ministers on the management of life-sentence and other long-term prisoners

Recommendation Rec(2003)22 of the Committee of Ministers on conditional release

Recommendation n° R(1999)22 of the Committee of Ministers concerning prison overcrowding and prison population inflation

Recommendation n° R(98)7 of the Committee of Ministers concerning the ethical and organisational aspects of health care in prison

Recommendation n° R(82)17 of the Committee of Ministers on the custody and treatment of dangerous offenders

Reports by the Commissioner for Human Rights and by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

(ii) Some key jurisprudence of the ECtHR[44]

The rights of victims and society:

Osman v United Kingdom Application No 23452/94; 28 October 1998; (2000) 29 EHRR 245. 17-3 no violation of Art 2 or 3, but unanimously breach of Art 6 where family unable in domestic law to have the police account for their actions in failing to prevent crime (see also *Gunay v Turkey* (2010) 50 EHRR 19: breach of Art 2 and 3 where the competent authorities had failed to take measures which, judged reasonably, could be deemed appropriate to safeguard against the risk to the life of a suspect who had been arrested and then never seen again.).

Maiorano v. Italy Application No 28634/06, 2nd section; 15 December 2009 Double murder by prisoner on day release. The Court unanimously found a breach of Art 2 doubting the decision to release him (for taking inadequate note of the evidence of his behaviour in prison) and critical of the failure of the prosecutor to refer the case back to the Supervision Tribunal. Nor had the disciplinary investigations by the Ministry of Justice satisfied the procedural requirements of Art 2.

Rantsev v Cyprus and Russia Application No 25965/04, First section; 7 January 2010; [2010] ECHR 22 the Court found a procedural violation of Art 2 by Cyprus, because of the failure to conduct an effective investigation into daughter's death; also breaches of Art 4 by both Cyprus and Russia, and a breach of Art 5 by Russia.

[44] With thanks to westlaw on whose summaries this annex relies.

Relevant rights of the offender:

X v Norway Application No. 4210/69, 24 July 1970

X v Netherlands Application No 6591/74, 26 May 1975

Guzzardi v Italy (1981) 3 EHRR 333

Van Droogenbroeck v Belgium (A/50) (1982) 4 EHRR 443

E v Norway Application No 11701/85, 29 August 1990, [1990] ECHR 17

Dax v Germany Application No 19969/92; 7 July 1992

Aerts v Belgium (2000) 29 EHRR 50: the psychiatric wing of the prison could not be regarded as an appropriate institution since it was not a therapeutic environment and there was no regular medical attention. The proper relationship between the aim of the detention and the conditions in which it took place was deficient, and there had been a breach of Art.5(1)(e)

Erkalo v Netherlands (1999) 28 EHRR 509

Eriksen v Norway (2000) 29 EHRR 328

Litwa v Poland (2001) 33 EHRR 53

Saadi v UK (2008) 47 EHRR 17

Monne v France Application No 39420/06, 1 April 2008

Rusu v Austria Application No. 34082/02; First section; 2 October 2008**,** (2009) 49 EHRR 28, [2008] ECHR 959 The Court found for the detained person: detention of an individual is such a serious measure that it will be arbitrary unless it is justified as a last resort where other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.

Leger v France (Application No19324/02, Grand Chamber, 30 March 2009) (2009) 49 EHRR 41 L had been sentenced to life imprisonment for abduction and murder, complained that his detention for 41 years had violated art.3 and art.5(1)(a). His numerous applications for release had been refused by the Minister of Justice and, following the introduction of a new procedure, by the courts. After he was eventually released on licence, he brought the instant proceedings, but died while they were still ongoing. His lawyer died a few days later. (Chambers judgment of 11 April 2006) A new lawyer sought to pursue the proceedings on behalf of his niece and sole heir. Complaint struck out (by a majority of 13-4, Spielmann, Bratza, Gyulumyan and Jebens dissenting) Under art.37(1)(c), the Court could strike out a complaint if it was no longer justified to continue the examination, and it would usually do so where the complainant had died during the proceedings if no heir or close relative had wished to pursue the complaint, *Scherer v Switzerland* (A/287) (1994) 18 EHRR 276 and *Ohlinger v Austria* (21444/93) (1996) 22 EHRR CD75 applied. Here, the request to pursue the proceedings had been submitted by a person who had provided no evidence either of her status as L's heir or close relative, or of any legitimate interest. Furthermore, in view of the introduction of a new procedure and similar issues having been resolved in other cases before the Court, respect for human rights did not require it to continue the examination of the case. (Per Judge Spielmann dissenting: The Court could have determined issues on public policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the Convention states).

Kafkaris v Cyprus (Application No 21906/04) (2009) 49 E.H.R.R. 35; 25 B.H.R.C. 591 The Grand Chamber is significantly split (10-7) on whether there is a breach of Art 3. For the majority, "at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release" (see paragraph

104). Yet the minority identify a clear breach of art 3. A majority of 15-2 find a breach of art 7 with regard to the quality of the law applicable at the material time; This complex decision merits clear analysis: note the impassioned dissent of Judge Borrego Borrego who criticises the Court's "ivory tower reasoning".

Puttrus v Germany (Application No 1241/06, 5th Chamber, 24 March 2009) [2009] ECHR 687, (2009) 49 EHRR SE6 The Court decided that the appellant's claim was inadmissible. The appellant argued that his detention for more than 24 years was disproportionate, not least as he had been sentenced to a much shorter term of imprisonment. He further argued that the domestic courts' failure to hear the medical experts who had examined him in person at a hearing, despite the fact that they had taken different views on the question whether his detention in a psychiatric hospital had been justified, violated his rights under Art 6 § 3 (d) of the Convention. However, the Court held that his detention was in conformity with the procedural and substantive rules of domestic law, and was not arbitrary.

Enea v Italy Application No 74912/01 (2010) 51 EHRR 3, Grand Chamber, 17 September 2009 Prisoner held under s. 41bis of the Italian Prison Administration Act for 11 years. In order for a punishment or treatment associated with it to be inhuman or degrading, the suffering or humiliation involved had to go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, *Jalloh v Germany* (54810/00) (2007) 44 E.H.R.R. 32 applied. The treatment to which E was subjected did not exceed the unavoidable level of suffering inherent in detention. Accordingly, there had been no violation of art.3.

> In accordance with the Court's settled case law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of art.3 . The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Allegations of ill-treatment must be supported by appropriate evidence. To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (para 55).

Whilst the mere fact that the court had exceeded a statutory time limit for giving a ruling did not amount to an infringement of a guaranteed right, the time it took to hear an appeal might have an impact on the right's effectiveness. In the instant case, the court did not rule on the merits of E's appeal against one of the extensions, and that nullified the effect of the its review of the extension. There had therefore been a violation of art.6(1).

Whilst it was true that a prisoner could not challenge per se the merits of a decision to place him in a high-supervision unit, an appeal lay to the courts responsible for the execution of sentences against any restriction of a civil right, affecting, for instance, a prisoner's family visits or correspondence. However, given that in the instant case E's placement in the unit did not entail any restrictions of that kind, even the possible lack of such a remedy could not be said to amount to a denial of access to a court. Consequently, there had been no violation of art.6(1) as regards E's right to have a dispute concerning his civil rights and obligations determined by a court.

The regime was designed to cut the links between the prisoners concerned and their original criminal environment in order to minimise the risk that they would make use of their personal contacts with criminal organisations. Given the specific nature of Mafia-type crime and the fact that family visits had in the past frequently served as a means of conveying orders and instructions to the outside, the restrictions on visits, and the accompanying controls, could not be said to be disproportionate to the legitimate aims pursued, *Salvatore v Italy* (42285/98) (unreported, May 7, 2002) and *Bastone v Italy* (59638/00) applied. Thus the restrictions on E's right to respect for his private and family life did not go beyond what, within the meaning of art.8(2), was necessary in a democratic society in the interests of public safety and for the prevention of disorder and crime.

The interference with E's right to respect for his correspondence under art.8(1) had not been in accordance with the law, given that the Italian legislation did not regulate either the duration of measures monitoring prisoners' correspondence or the reasons capable of justifying such measures, and did not indicate with sufficient clarity the scope and manner of exercise of the discretion conferred on the authorities in the relevant sphere, *Labita v Italy* (26772/95) (2008) 46 E.H.R.R. 50 applied. Accordingly, there had been a violation of Art.8(1) in relation to E's correspondence.

Scoppola v Italy (Application No 10249/03, Grand Chamber, 19 September 2009) (2010) 51 EHRR 12 An

appeal court could not raise 30 year sentence to life imprisonment following change in law: 11 votes to six there had been a violation of Art 7, unanimously a violation of Art 6.
M v Germany (Application No 19359/04, Fifth section, 17 December 2009) [2009] ECHR 2071, (2010) 51 EHRR 41 The Court unanimously concludes that, where the prolongation of the applicant's preventive detention by the courts responsible for the execution of sentences following a change in the law, there had been a violation of Article 7 § 1 of the Convention. This decision contains much useful material (the summary of European preventive detention laws in paras 69-73 is partial, a little dated but a useful introduction) + recapitulation of relevant principles paras 86-91: compliance with national law is not enough: any deprivation of liberty "should be in keeping with the purpose of protecting the individual from arbirariness". On risk assessment: the potential further offences "must be "sufficiently concrete and specific as regards in particular the place and time of their commission and their victims" to fall within the ambit of Art 5(1)© (para 102) and the "national law must be of a certain quality, and in particular, must be foreseeable [at the time of the original offences] in its application, in order to avoid all risk of arbitrariness" (para 104). The Court rejected the Government's distinction between punitive 'penalties' and 'measures of correction and prevention' (para 113) and recognized that even the distinction between a measure that constitutes a penalty and a measure that concerns the 'execution or enforcement of that measure may not always be clear-cut (para 121). €50,000 non-pecuniary damage.

Onoufriou v Cyprus (Application No. 24407/04, First section, 7 January 2010)

Cypriot national detained for murder did not return to prison after a 24-hour leave; he was then arrested and placed in solitary confinement for 47 days. First chamber found unanimously a breach of Arts 3, 8 and 13.

> the State must ensure that a person is detained under conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92 to 94, ECHR 2000-XI; and *Cenbauer v. Croatia*, no. 73786/01, § 44, ECHR 2006-III). Further, when assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as the specific allegations made by the applicant (*Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). It is also relevant to recall that the authorities are under an obligation to protect the health of persons deprived of liberty (see *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79; and *Enea*, cited above, § 58). The lack of appropriate and timely medical care may amount to treatment contrary to Article 3 (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII). (para 68)

(iii) Other relevant legal materials

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APPENDIX VI

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 25 May 2011 PC-CP (2011) 5 rev 3
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DRAFT RECOMMENDATION CONCERNING FOREIGN PRISONERS

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The Committee of Ministers, under the terms of Article 15. b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members, in particular through harmonising laws on matters of common interest;

Considering the large number of foreign prisoners detained in the prisons in its member states;

Recognising the difficulties which these prisoners may face on account of such factors as differences in language, culture, customs and religion, and lack of family links and contact with the outside world;

Desirous of alleviating any possible isolation of foreign prisoners and of facilitating their treatment with a view to their social reintegration;

Considering that such treatment should take into account the special needs of foreign prisoners and ensure that it provides them with opportunities equal to those accorded to other prisoners;

Taking into consideration:

- the European on Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No.5);
- Convention on the Transfer of Sentenced Persons (1983) (ETS No.112);
- Additional Protocol to the Convention on the Transfer of Sentenced Persons (1997) (ETS No.167); Recommendation No. R(92)16 on European rules on community sanctions and measures;
- Recommendation R(92)17 concerning consistency in sentencing;
- Recommendation No. R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison;
- Recommendation No. R(97)12 on staff concerned with the implementation of sanctions and measures;
- Recommendation No. R(98)7 concerning the ethical and organisational aspects of health care in prison;
- Recommendation No, R(99)22 concerning prison overcrowding and prison population inflation;
- Rec(2003)22 on conditional release (parole);
- Recommendation (2006) 2 on the European Prison Rules;
- Recommendation (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse;
- Recommendation CM/Rec(2010) 1 on the Council of Europe Probation Rules

Bearing in mind:

The UN Model Agreement on the Transfer of Foreign Prisoners and recommendations on the Treatment of Foreign Prisoners (1985);

The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Resolution 2010/16);

The EU Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union;

The EU Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions;

The EU Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention;

Considering that Recommendation No. R(84)12 of the Committee of Ministers to member states concerning foreign prisoners needs to be replaced by a new recommendation reflecting the developments which have occurred meanwhile in penal policy, sentencing practice and the overall management of prisons in Europe,

Recommends that governments of member states:

- be guided in their legislation, policies and practice by the rules contained in the appendix to this recommendation, which replaces Recommendation No. R(84)12 of the Committee of Ministers to member states concerning foreign prisoners;

- ensure that this recommendation and the accompanying commentary to its text are translated and disseminated as widely as possible and more specifically to all relevant authorities, agencies, professionals and associations which deal with foreign offenders, as well as to the offenders themselves.

Appendix to Recommendation CM/Rec(2012)XX

I. Scope and basic principles

Scope

1.1 This Recommendation applies to foreign offenders who are, or may be, remanded in custody by a judicial authority or who have been, or may be, deprived of their liberty following conviction and are detained in a prison.

1.2. This Recommendation also applies to foreign persons:

a. who are detained for any other reason in a prison; or
b. who have been remanded in custody by a judicial authority or deprived of their liberty following conviction and who may, for any reason, be detained elsewhere.

1.3. All foreign persons who are detained in a prison or who are detained in the manner referred in section 1.2.*b*. are regarded as prisoners for the purpose of this Recommendation.

2. For the purpose of this Recommendation:

a. **an offender** means any person who is alleged to have or who has committed an infringement of the criminal law. The term "offender" shall include anyone facing criminal proceedings and is used without prejudice to the presumption of innocence and the establishment of guilt by a judicial decision.

b. **foreign offender** means an offender, as defined in section 2a, who does not have the nationality of the state in which he or she is subject to criminal proceedings, sanctions or measures or is deprived of liberty.

c. **foreign prisoner** means a foreign offender or other foreign person detained in a prison as defined in section 2e.

d. **judicial authority** means a court, a judge or a prosecutor.

e. **prison** means an institution reserved primarily for detainees who have been remanded in custody by a judicial authority or have been deprived of their liberty following conviction.

Basic Principles

3. Foreign offenders shall be treated with respect for their human rights and with due regard for their particular situation and individual needs.

4. Foreign offenders shall be entitled to be considered for the same range of non-custodial sanctions and measures as other offenders and shall not be excluded from consideration on the grounds of their status.

5. Foreign offenders shall not be remanded in custody or sentenced to custodial sanctions on the grounds of their status, but, as for other offenders, only when strictly necessary and as a measure of last resort.

6. Foreign prisoners shall be entitled to full consideration for early release.

7. Positive steps shall be taken to avoid discrimination and to address specific problems that foreign offenders may face while subject to community sanctions or measures, in prison, on transfer, and after release.
8. Foreign offenders who so require shall be given access to interpretation and translation facilities, and where appropriate, provided with an opportunity to learn a language that will enable them to communicate more effectively.

9. The prison regime shall accommodate the special welfare needs of foreign prisoners and prepare them for release and social reintegration.

10. When it is in the interests of justice and the social reintegration of foreign offenders, such offenders shall be transferred to serve their sentences in a state with which they have links, provided that their human rights will not be infringed by doing so.

11. Specialised training in dealing with foreign offenders shall be provided for the judiciary, prison, probation police staff and consular representatives, as well as all other relevant agencies, professionals and associations which have regular contact with such offenders.

12. Sufficient resources shall be allocated in order to deal effectively with the particular situation and specific needs of foreign prisoners.

II. Use of remand in custody

13.1. In order to ensure that remand in custody of foreign offenders is used only when strictly necessary and as a measure of last resort, it shall be governed by Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

13.2 In particular, foreign offenders:

a. shall always be considered for alternatives to remand in custody; and
b. shall not be regarded as a flight risk and remanded in custody solely on the basis of their nationality or paucity of their links with the state in which the offence is alleged to have been committed.

III. Sentencing

14.1. In order to ensure that custodial sanctions are imposed on foreign offenders only when strictly necessary and as a measure of last resort, sentencing shall be governed by Recommendation R(92)17 concerning consistency in sentencing. In particular, foreign offenders shall be considered for the same range of non-custodial sanctions or measures as national offenders.

14.2. The judicial authorities shall be provided with pre-sentence reports about the personal circumstances of foreign offenders and their families, the likely impact of various sanctions on them and the possibility and desirability of their being transferred after sentencing.

14.3. When imposing sentences, account shall be taken of the impact that different sentences may have on individual foreign offenders and on their dependants so as to avoid disproportionate hardship and obstacles to social reintegration.

IV. Conditions of imprisonment

Admission

15.1. At admission, foreign prisoners shall be provided with information, in a language they understand, orally and, where possible, also in writing about:

a. their rights and duties as prisoners including regarding contacts with their consular representatives;
b. the main features of the prison regime and the internal regulations;
c. rules and procedures for making requests and complaints;
d. their rights to legal advice and assistance; and

e. international transfer possibilities at different stages of the criminal process.

15.2. Prisoners shall be allowed to keep up-to-date versions of this information in their possession.

15.3. Immediately after admission, prison authorities shall assist foreign prisoners, who wish to do so, to inform their families, legal advisers, consular representatives and other persons or organisations competent to assist them, of their imprisonment.
15.4. Staff trained to deal with foreign prisoners shall be involved in their admission procedure.

Allocation

16.1. Decisions regarding the allocation of foreign prisoners shall take into account the views of such prisoners and the need to alleviate their potential isolation and facilitate their treatment and contact with the outside world.

16.2. Subject to the requirements of safety and security, and the individual needs of foreign prisoners, consideration shall be given to housing non-resident foreign prisoners in prisons close to transport facilities that would enable their families and consular representatives to visit them.

16.3. Where appropriate, foreign prisoners should be allocated to prisons where there are others of their nationality, culture or religion.

Accommodation

17. Decisions on whether to accommodate foreign prisoners together shall be based primarily on their individual needs and the facilitation of their social reintegration, while bearing in mind the requirements of safety and security.

Hygiene

18.1. Facilities for sanitation and hygiene shall accommodate the cultural and religious preferences of foreign prisoners.

18.2. Rules that require prisoners to keep their appearance clean and tidy shall be interpreted in a manner that respects prisoners' cultural and religious preferences.

Clothing

19.1. Where prisoners are allowed to wear their own clothes and provided that such clothes are compatible with the requirements of safety and security, they may reflect the prisoners' cultural and religious traditions.

19.2. Clothes provided by prison authorities shall, as far as possible, respect the cultural or religious sensibilities of foreign prisoners.

Nutrition

20.1. In addition to providing a nutritious diet that takes account of the cultural and religious requirements of prisoners, prison authorities shall, where possible, provide foreign prisoners with opportunities to purchase and cook food that make their diet more culturally appropriate.

20.2. The times at which meals are served shall be adjusted to meet the religious requirements of foreign prisoners.

Legal advice and assistance

21.1. Foreign prisoners shall be informed in a language they understand orally and, where possible, also in writing, about their right to legal advice in criminal proceedings and other legal matters, in particular those concerning their personal status while in prison and after release.

21.2. Foreign prisoners shall be informed about possible legal aid and, where necessary, assisted in accessing such legal aid.

21.3. Foreign prisoners who are not fluent in the language in which a judicial, administrative or disciplinary procedure involving them is conducted, shall be provided with a translation of the relevant documents and, if necessary, with an oral account of the contents of these documents in a language they understand.

21.4. An interpreter shall be provided to foreign prisoners who need one in order to communicate with their legal adviser.

21.5. Prison authorities shall facilitate the provision of administrative and legal assistance by outside agencies to foreign prisoners.

Contact with the outside world

22.1. To alleviate the potential isolation of foreign prisoners, special attention shall be paid to the maintenance and development of their relationships with the outside world, including contacts with family and friends, consular representatives, probation and community agencies and volunteers.

22.2. Foreign prisoners shall be allowed, as far as possible, to use a language of their choice during such contacts.

22.3. Rules for making and receiving telephone calls and other forms of communication shall be applied flexibly to ensure that foreign prisoners who are communicating with persons abroad have equivalent access to such forms of communication as other prisoners.

22.4. Indigent foreign prisoners shall be assisted with the costs of communicating with the outside world.

22.5. In order to optimise contact, visits to foreign prisoners from family members who live abroad shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements.

22.6. Support and information shall be provided to enable family members who live abroad to visit foreign prisoners.

22.7. Special measures shall be taken to enable foreign prisoners to maintain regular and meaningful contact with the children in their care.

22.8. In order that prison authorities are able to inform family members of foreign prisoners of the death, serious illness, injury or transfer of such prisoners to another prison or other facility, the authorities shall endeavour to keep up-to-date contact details of such family members.

22.9. Prison authorities shall endeavour to ensure that family members of foreign prisoners have up-to-date contact information about the prison or other facility in which such prisoners are held, unless the prisoner objects.

23.1. Foreign prisoners shall be allowed to keep themselves informed regularly of public affairs by subscribing to newspapers, periodicals and other publications in a language they understand.

23.2. To the extent possible, foreign prisoners shall be given access to radio and television broadcasts and other forms of communication in a language they understand.

23.3. Probation agencies, approved associations and volunteers providing support to foreign prisoners shall be given access to such prisoners who wish to have contact with them.

Contact with consular representatives

24.1. Foreign prisoners have the right to regular contact with their consular representatives.

24.2. Foreign prisoners shall be given reasonable facilities to communicate with their consular representatives.

24.3. Foreign prisoners who are without consular representation in the country in which they are detained have the right to regular contact and to facilities to communicate with representatives of the state which takes charge of their interests.

24.4. Refugees and stateless prisoners, have the right to regular contact and be given the same facilities to communicate with representatives of the national or international authorities whose task it is to serve the interests of such prisoners.

25.1. Prison authorities shall inform foreign prisoners of the role of consular representatives and the actions that may be taken on their behalf by such representatives.

25.2. Prison authorities shall cooperate fully with consular representatives and national or international authorities whose task it is to serve the interests of foreign prisoners.

25.3. Prison authorities shall keep a list of:

a. contacts between consular representatives and foreign prisoners; and
b. where foreign prisoners waive their right to such contact.

Role of Consular Representatives

26.1. With a view to facilitating the exercise of consular functions set out in the Vienna Convention on Consular Relations, consular representatives shall take the following measures in respect of, and with the consent of, foreign prisoners who are their nationals or for whom they are otherwise responsible, as soon as possible after admission:

a. provide oral and written information which shall include relevant contact details and the available forms of assistance;
b. regularly visit such prisoners;
c. offer any assistance possible to promote the social reintegration of such prisoners; and
d. contribute to the provision of reading materials in languages understood by the prisoners they represent.

26.2. In order to assist foreign prisoners, consular representatives shall keep themselves informed about the laws and regulations governing imprisonment in the state in which they are offering assistance, the services they are able to offer and the mechanisms for the international transfer of such prisoners.

Prison regime

27.1. In order to ensure that foreign prisoners have equal access to a balanced programme of activities additional positive measures shall be taken, where necessary. This may include assistance with interpretation and classes to learn the language in which the activities will be conducted.

27.2. Access to activities shall not be restricted because the prisoners concerned may be transferred, extradited or expelled.

Work

28.1. Foreign prisoners shall have opportunities equal to those of other prisoners in respect of work and vocational training, including programmes outside prison.

28.2. Where necessary, special measures shall be taken to ensure that foreign prisoners have the same access as other prisoners to income-producing work.

28.3. Foreign prisoners may transfer at least a part of their earnings to family members who are resident abroad.

28.4. Foreign prisoners who work and contribute to the social security system of the state in which they are imprisoned shall be allowed, where possible, to transfer such contributions to their state of nationality or another state.

Exercise and recreation

29.1. The exercise and recreational activities provided for foreign prisoners shall be consistent with their culture.

29.2. Prison authorities shall encourage activities that promote positive relations amongst prisoners from the same culture and between prisoners from different backgrounds.

Education and training

30.1. Foreign prisoners who are not fluent in the daily working languages of the prison shall be given the opportunity and encouraged to learn them.

30.2. To ensure that educational and vocational training is as effective as possible for foreign prisoners, prison authorities shall take account of their individual needs and aspirations, which may include working towards qualifications that are recognised and can be continued in the country in which they are likely to reside after release.

30.3. The prison shall be stocked with reading materials and other resources that reflect the linguistic needs and cultural preferences of the foreign prisoners in that prison and are easily accessible.

Freedom of thought, conscience and religion

31.1. Prison authorities shall facilitate the exercise of religious and other beliefs by foreign prisoners but shall not compel such prisoners to profess any faith or participate in any practice or service.

31.2. Prison authorities shall keep a list of approved representatives of the full range of the religions and beliefs professed by foreign prisoners and, as far as it is practicable, grant prisoners access to these representatives.

Health

32.1. Foreign prisoners shall have access to the same health care and treatment programmes that are available to other prisoners.

32.2. Sufficient resources shall be provided to deal with specific health problems faced by foreign prisoners.

32.3. Medical and health care staff shall be trained to interact with foreign prisoners and to deal with their individual problems and specific diseases.

32.4. To facilitate the health care of foreign prisoners, attention shall be paid to all aspects of communication. Such communication may require the use of an interpreter who is acceptable to the prisoner concerned and who shall respect medical confidentiality.

32.5. Health care shall be provided in a way that is not offensive to cultural sensitivities and requests by foreign prisoners to be examined by a medical practitioner of the same gender shall be granted as far as possible.

32.6. Where possible, psychiatric and mental health care shall be provided by specialists who have expertise in dealing with persons from different religious, cultural and linguistic backgrounds.

32.7. Special attention shall be paid to preventing self-harm and suicide among foreign prisoners.

32.8. Consideration shall be given to the transfer of foreign prisoners, who are diagnosed with terminal illnesses and who wish to be transferred, to a country with which they have close social links.

32.9. Steps shall be taken to facilitate the continuation of medical treatment of foreign prisoners who are to be transferred, extradited or expelled, which may include the provision of medication for use during transportation to that state and, with the prisoners' consent, the transfer of medical records to the medical services of another state.

Good Order, Safety and Security

33.1. Prison staff shall ensure that good order, safety and security are maintained through a process of dynamic security and interaction with foreign prisoners.

33.2. Prison staff shall be alert to potential or actual conflicts between groups within the prison population that may arise due to cultural or religious differences and inter-ethnic tensions.

33.3. To ensure safety in prison, every effort shall be made to enhance mutual respect and tolerance and prevent conflict between prisoners, prison staff or other persons working or visiting the prison, who come from different backgrounds.

33.4. The nationality, culture or religion of a prisoner shall not be determinative factors in the assessment of the risk to safety and security posed by such prisoner.

33.5. Prison directors shall keep themselves informed of the cultural and religious backgrounds of the foreign prisoners in their institutions.

Women

34.1. Special measures shall be taken to combat the isolation of foreign women prisoners.

34.2. Special attention shall be paid to meeting the psychological and healthcare needs of foreign women prisoners, especially those who have children.

34.3. Arrangements and facilities for pre- and post-natal care shall respect cultural and religious diversity.

Children

35.1. Arrangements and facilities for the care of children who are in prison with their parent shall respect cultural and religious diversity.

35.2. Decisions on whether the child of a foreign prisoner may be removed from prison, shall be taken by an impartial authority that considers the best interests of the child in the light of the views of the parents and the availability of appropriate care arrangements in the state in which the parent is in prison and in the state to which the child may be sent.

35.3. Special arrangements shall be made to facilitate visits, correspondence and other forms of communication by children with their imprisoned parent, in particular when they live in a different state.

35.4. The legal status of any children in prison with their foreign parent shall be determined as early as possible during the sentence of that parent, with special care being taken to resolve cases where children born in prison have a different nationality to that of their parent.

V. Release

Preparation for Release

36.1. All foreign prisoners shall be prepared for release in a manner that facilitates their reintegration into society whether they are to remain in the state in which they are detained or are to be transferred or expelled.

36.2. In order to facilitate the reintegration of foreign prisoners into society:

a. their legal status and their situation after release shall be determined as early as possible during their sentence;
b. support and care shall be provided by probation and other agencies which specialise in assisting former prisoners to find employment and housing and in meeting their other needs;
c. where appropriate, prison leave and other forms of temporary release shall be granted to them; and
d. they shall be assisted in making or re-establishing contact with family and friends.

36.3. Where foreign prisoners are to remain after release in the state in which they were detained, all necessary steps shall be taken to provide them with information about official and other forms of support and to assist them to communicate with the agencies that provide such support.

36.4. Where foreign prisoners are to be expelled from the state in which they are being detained, efforts shall be made, if the prisoners consent, to establish contacts with the authorities in the state to which they are to be sent with a view to ensuring support both immediately upon their return and to facilitate their reintegration into society.

36.5. Where foreign prisoners are to be transferred to another state to serve the remainder of their sentence, the prison authorities shall, if the prisoner consents, provide the following information to the state to which the prisoners shall be sent:

a. the treatment the prisoners have received;
b. the programmes in which they have participated;
c. medical records; and
d. any other information that will facilitate continuity of treatment and care.

36.6. Where foreign prisoners are to be transferred to another state to serve the remainder of their sentence, the authorities of the receiving state shall provide the prisoners with information on conditions of imprisonment, prison regimes and possibilities for release.

Consideration for release

37.1. Foreign prisoners, like other prisoners, shall be considered for release as soon as they are eligible.

37.2. In particular, steps shall be taken to ensure that detention is not unduly prolonged by delays relating to the finalisation of the immigration status of the foreign prisoner.

37.3. Decisions on the release of foreign prisoners shall not be influenced negatively by their immigration status, by the paucity of their social links or by the possibility that they may be transferred or expelled.

Release from Prison

38.1. In order to assist foreign prisoners to return to society after release, practical measures shall be taken to provide appropriate documents and identification papers and assistance with travel.

38.2. Where foreign prisoners will return to a country with which they have links, the consular representatives shall assist them in this regard.

International Transfers

39.1. Foreign prisoners shall be advised about the possibility of serving their sentence in a state with which they have links and of the steps that they need to take to initiate transfer to such a state.

39.2. Where foreign prisoners qualify for transfer to another state, the prison authorities shall advise such prisoners about the consequences of such a transfer and assist them to seek independent advice about such consequences.

39.3. To ensure that transfers facilitate the social reintegration of foreign prisoners and do not infringe upon their human rights, the prisoners' views, the prisoners' familial, linguistic, cultural, social and economic links and the conditions of imprisonment in the proposed enforcing state shall be taken into account before the final decision is made.

39.4. States shall cooperate to facilitate transfers where they are in the interests of justice and the social reintegration of the prisoners concerned.

VI. Persons who work with foreign offenders

Selection

40. Persons who work with foreign offenders shall be selected on criteria that include cultural sensitivity, interaction skills and linguistic abilities.

Training

41.1 Persons who work with foreign offenders shall be trained to respect cultural diversity and to understand the particular problems faced by such offenders.

41.2. Such training may include learning languages spoken most often by foreign offenders.

41.3 Training programmes shall be evaluated and revised regularly to ensure they reflect changing populations and social circumstances.

41.4 Persons who work with foreign offenders shall be kept informed of current national law and practices and international and regional human rights law and standards relating to the treatment of foreign offenders, including this Recommendation.

Specialisation

42.1. Appropriately trained persons shall be appointed to engage in specialised work with foreign offenders and to liaise with the relevant agencies, professionals and associations on matters related to such offenders.

42.2. States shall provide their consular representatives with information and training on legal measures and practical problems that affect such offenders and the provisions of this Recommendation.

VII. General provisions

43.1. The authorities shall be responsible for the collection of empirical data related to foreign offenders.

43.2. Such data shall be collected in a way that allows regional and other comparisons.

43.3. Any policies and practices related to foreign offenders shall be based on such data and research and their effectiveness and impact of shall be evaluated regularly.

APPENDIX VII

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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DRAFT COMMENTARY ON THE RECOMMENDATION CONCERNING FOREIGN PRISONERS

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Introduction

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

As the Preamble to the new Recommendation concerning foreign prisoners recognises, foreign offenders often face a range of difficulties brought about by differences in language, culture, customs and religion, and by their lack of family ties locally and contact with the outside world. They are more likely to be remanded in custody while awaiting trial and are more likely to be sentenced to terms of imprisonment after conviction than other offenders. Evidence of these growing difficulties is provided *inter alia* by studies conducted by both the European Union and the United Nations.[45]

The Recommendation concerning foreign prisoners addresses these difficulties by recommending specific steps that need to be taken to reduce the number of foreign offenders that are incarcerated, to improve the treatment of foreign prisoners and to meet their specific social and personal needs. The objective of such treatment is not only to deal with the conditions of imprisonment to which such prisoners are subject but also to improve their social integration after release, whether they remain in the countries in which they were imprisoned or return to their home countries. The steps recommended are in addition to those contained in the 2006 European Prison Rules and other recommendations of the Council of Europe concerning the treatment of prisoners.

The new Recommendation concerning foreign prisoners replaces the earlier Recommendation No. R (84) 12 on the same subject with more detailed provisions aimed at addressing the growing problems in this area. It recommends that Member States draw it to the attention of everybody who deals with foreign offenders in general as well as foreign prisoners in particular.

I. Scope and basic principles

Scope

Rule 1

The primary focus of this recommendation is to deal with foreign offenders who are, or who may be, held in a prison. (Rule 1.1)This may include people who are facing criminal proceedings but whose status as offender has not yet been established. It also includes those who face proceedings that potentially may lead to incarceration. (Rule 1.2) Finally, the Recommendation deals with offenders who have been released after a period of incarceration. It is recognised that the situation of foreign offenders may differ in various ways. For example, a foreign offender who is detained briefly before deportation may not have the full range of needs of someone who is likely to spend many years as a prisoner in a foreign country. Nevertheless, this Recommendation should be applied to the first category to the extent practicable.

The Recommendation is not designed to deal with persons who are not offenders or suspected of having offended. However, where such persons are held in a prison as defined in Rule 2*e*, they are included. Thus, for example, a state may detain asylum seekers in a prison designed to house offenders. Although these asylum seekers may not be considered to be offenders, they will be covered if they are in a prison. In principle, persons remanded in custody or sentenced to imprisonment should only be detained in prisons. (Rule 10.2 Recommendation (2006) 2, European Prison Rules) However, foreign offenders who are held in places other than a prison, for example, in police cells, are also included in the Recommendation. (See Rule 1.2.*b*)

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

Juveniles are not excluded from this Recommendation. However, the Recommendation applies only to prisons that normally house adults. In practice, therefore, juveniles will only benefit from this Recommendation if they are held in such prisons (see Rule 11, European Prison Rules). The detention of juveniles is covered fully by Rec (2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, which provides specific rights and safeguards that are applicable to foreign juvenile offenders as well.

Rule 2

The term 'offender' is used to include, as explained in Rule 1, not only those who are actually incarcerated but also those who may be, or have been detained. For the purpose of this Recommendation, the term offender includes persons facing criminal proceedings. It should be noted that this definition is not prejudicial to the presumption of innocence (Rule 2a).

Rule 2*b* defines the term 'foreign offender' in relation to nationality; in other words, those who do not have the nationality of the state in which they are subject to criminal proceedings, sanctions or measures or are deprived of their liberty, will be considered to be foreign offenders. This Recommendation does not purport to define nationality. However, to ensure effective application, states are urged to adopt a flexible approach to nationality for the purposes of implementing this Recommendation. As stated in the preamble, this Recommendation is designed to provide assistance to those who lack linguistic, cultural, religious, residential, family and social links with the state in which they are detained or are subject to proceedings, sanctions or measures. Accordingly, in the case of persons who lack these links, and where it is in the best interests of such persons to do so, States should extend the protections of this Recommendation to those deemed to be nationals in the strict legal sense**.** Conversely, some of the recommendations may not be necessary for those who technically qualify as 'foreign offenders', but who have considerable linguistic, social or other links to the relevant state. Classification as a 'foreign offender' for the purposes of this Recommendation should be based, not on technical definitions of nationality, but on the objectives of alleviating isolation and enhancing possibilities for social reintegration. Furthermore, the term 'foreign offenders' includes persons with dual nationality, those awaiting the finalisation of decisions on immigration status and stateless persons.

Basic principles

Rule 3

Respect for human rights is fundamental to the treatment of all offenders. It is highlighted here as it is important that it is not overlooked where foreign offenders are concerned. This principle emphasises that foreign offenders may have specific needs that differ from those of national offenders. Within the wide category of foreign offenders, such needs may differ amongst particular groups or individuals. These various needs must be met as far as possible in order to ensure substantial equality of treatment of all offenders.

Rule 4

In some jurisdictions, foreign offenders are excluded from consideration for non-custodial sanctions and measures because of their status, either due to the fact that they are not perceived to be entitled to remain in the country after release, or may not have the same social capital or because they may be perceived to pose a greater risk of flight. However, this does not apply to all foreign offenders, many of whom may be entitled to remain in the country and serve a community sentence and who may not pose a flight risk. In addition, non-custodial sanctions and measures imposed on foreign offenders may be executed in another state in terms of international agreements, such as the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964, ETS 051), the EU Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and the EU Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. These possibilities must be taken into account in order to foster the application of such sanctions or measures.

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

Rule 5

The principle that custody should be used only when strictly necessary and as a last resort is widely recognised in the Council of Europe legal texts. See for example Recommendation No. R (92) 16 on European rules on community sanctions and measures; Recommendation No. R(92)17 concerning consistency in sentencing; No. R (99) 22 concerning prison overcrowding and prison population inflation; Rec(2003)22 on conditional release (parole); Recommendation Rec(2006) 2 European Prison Rules; Recommendation Rec(2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

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

Rule 6

The principle that foreign prisoners should be considered for early release is implicit in Rec (2003) 22 on conditional release (parole) and other European instruments. In reality, foreign prisoners are often not considered for early release, or indeed, measures that would prepare them for and therefore enable them to successfully apply for such release. The steps prison authorities should take to prepare foreign prisoners for release are elaborated in Rule 36. Rule 37 deals with the detailed factors to be taken into account in decisions relating to release.

Rule 7

This principle should be read against the background of Protocol 12 to the European Convention on Human Rights which outlaws discrimination. This principle emphasises the need to take positive steps to avoid discrimination and to find solutions for the problems faced by foreign offenders in this respect. Such interventions are required at all stages of the criminal justice process, to ensure substantial equality of treatment for foreign offenders. In this regard, the CPT has recommended that States review their legal and administrative provisions to ensure that foreign prisoners are not discriminated against by being excluded from eligibility for a range of measures, such as more open conditions, home leave and conditional release.[46]

Rule 8

The inability to communicate in the language most commonly spoken in a prison is a severe barrier to foreign offenders' ability to participate in prison life. It is the root cause of many problems, such as isolation, lack of access to services, work and other activities, and an inadequate understanding of prison rules and regulations. Therefore it is vital that prison authorities make every effort to facilitate communication and to enable offenders to overcome language barriers. This principle emphasises the importance of access to interpretation and translation facilities. Interpreters should be competent and impartial. In addition, communication should be encouraged by creating opportunities for the learning of languages by foreign offenders, as well as by other offenders, and persons who work with them (see Rule 41.2).

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

[46] CPT visit to Bulgaria, 2006 (CPT/Inf (2008) 11), para. 105.

Rule 9

This basic principle alerts authorities to the difficulties that foreign prisoners may face due to linguistic, cultural and religious differences and their lack of social support. Special welfare measures should be put in place to assist foreign prisoners to overcome the problems that these differences may cause and in so doing, to alleviate the potentially resulting isolation. Such measures may include financial and other material assistance, vocational and language training and a flexible approach to contact with the outside world (see, for example, Rules 21-24, 27.1, 28.1-2, 30.1-2, 34.1-2, 35.3 and 36.2*b*-*d*).

While the social reintegration of prisoners, both un-sentenced and sentenced is important (Rule 6 European Prison Rules) the social reintegration of foreign offenders poses particular challenges. Foreign prisoners who will return to their home countries after release may require different forms of preparation than foreign offenders who will remain in the state after release. To assist their social reintegration in foreign countries the preparation for release should therefore be tailored as far as possible to enable the foreign offenders to reintegrate into society in the particular state they will return to upon release. This is dealt with in Rule 36, which is primarily addressed to prison authorities. Consular representatives should also provide assistance in this regard (Rules 26.*1c* and 38.2). Probation agencies and social services also have a valuable role to play in this regard.

Rule 10

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

In addition to the pursuit of justice goals, international transfers should be undertaken with a view to improving the opportunities for social reintegration of the offender. This ground is emphasised both in the Council of Europe Convention on the Transfer of Sentenced Persons (ETS No.112) and in the EU Council Framework Decision FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. It follows therefore that offenders who are well integrated in the society in which they have committed their offence should not be transferred.

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

All transfers should be subject to fundamental human right standards. This means that the transferring state should request the view of the offenders concerned before any decision is taken and should in any event ensure that the offenders will not be subject to torture, or to inhuman or degrading treatment in the state to which they are to be sent.[47] This principle also applies to

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

decisions to extradite or expel a foreign prisoner. Other human rights issues, such as the right to family life, should also be taken into consideration.

Rule 11

This rule recognises that a wide range of officials and other persons, including professionals such as medical doctors and lawyers, who work with foreign offenders require training both in the specific legal and practical rules that relate to foreign offenders and in the underlying cultural and ethical bases for treating them appropriately. The details of what such training should entail are contained in Rule 41.

Rule 12

Rule 4 of the European Prison Rules emphasises that 'prison conditions that infringe prisoners' rights are not justified by lack of resources'. This applies also to foreign offenders whose management and treatment may require additional funds.

II. Use of remand in custody

Rule 13

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

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

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

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

Thus remand in custody is being ordered too readily for foreign offenders. With remand in custody being the norm rather than the exception, foreign offenders have become overrepresented in the pre-trial prison populations of Europe. On average, they represent 40% of the pre-trial detention population in Europe.[48] Steps should be taken to investigate more fully before denying foreign offenders the possibility of awaiting trial in the community

[48] The most recent statistics on foreign prisoners in Council of Europe prisons are based on figures collected in 2009. The percentage of foreign prisoners in the prisons of Member States ranged from 0.7% (Poland) to 91.2% (Monaco). The average percentage of foreign prisoners per prison population was 23.1%. The range of percentages of foreign prisoners in pre-trial detention is similar, ranging from 7.2% (Ukraine) to 100% (San Marino). However, the average percentage of foreign prisoners in pre-trial detention nearly doubles, with the average being at 40.4%. The percentage of foreigners on the pre-trial populations is above 40% in Albania, Andorra, Bosnia and Herzegovina, Croatia, Denmark, Hungary, Italy, Liechtenstein, Luxembourg, Malta,

Both Recommendation (2006) 13 (Rule 4) and Recommendation No. R (99) 22 concerning Prison Overcrowding and Prison Population Inflation (Section 12) encourage states to adopt and use the widest possible range of alternatives to remand in custody. Even though alternatives are often available in national legal systems, practice seems to indicate that prosecutors and judges are reluctant to request and impose such alternatives in general and for foreign offenders in particular. This reluctance has been attributed to the need to protect society. It is also due to the perception that foreign offenders are more difficult to contain and monitor.[49]

To overcome the difficulties surrounding the use of alternatives for non-resident foreign offenders, Rule 2.2 of Recommendation (2006) 13 states that such measures should be applied in the state where the suspect is usually resident. The EU has adopted a Framework Decision[50] which enables the implementation of supervision measures, adopted as alternatives to provisional detention in the state in which offenders are subject to criminal proceedings, in the state in which they are lawfully and ordinarily resident. This mechanism is designed to reverse the current practice whereby non-residents are much more likely to be remanded in custody pending trial than resident offenders (Para. 5 Preamble). Moreover, it aims to enhance the protection of victims and the general public while also enhancing the right to liberty and presumption of innocence for non-resident accused persons. (Paras. 3 and 4 Preamble and Article 2)

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

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

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

Alternatives to pre-trial detention should be tailored to deal with the specific problems faced by foreign offenders. For example, where foreign offenders do not have a fixed address, they could be required to reside at a specific approved address that may be operated by a state, local community or non-governmental agency. If there is a risk of flight, such an order may be coupled with other requirements, such as the surrender of passports, a ban on leaving the country, an obligation to report to police or judicial authorities at specific times or the use of electronic monitoring (See Section 12 Recommendation No. R (99) 22 and Rule 2(1) Recommendation (2006)13). The

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Monaco, the Netherlands, Norway, Poland, Serbia, Slovak Republic, Slovenia, Turkey and Scotland. See Council of Europe Annual Penal Statistics, SPACE I, 2009 [PC-CP (2011) 3] at 55.

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

[50] EU Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. This Framework Decision will be implemented by all Member States from 1 December 2012 (Art. 27(1)).

availability of more suitable alternatives for foreign offenders should reverse the perceived flight risk such offenders pose, thereby reducing the present over-reliance on remand in custody in such cases.

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

III. Sentencing

Rule 14

As explained in the Commentary to Rule 5, Recommendation No, R (99) 22 concerning prison overcrowding and prison population inflation and other Council of Europe Recommendations have strongly emphasised that sentences of imprisonment should only be used when absolutely necessary and as a measure of last resort. The challenge is to ensure that this principle is also applied to foreign offenders, particularly in an era where outsiders tend to be punished harsher than local people. If applied fully and in a non-discriminatory manner, the provisions of Recommendation R(92)17 concerning consistency in sentencing can assist states to meet this challenge. Its guidance on how to avoid custodial sentences should be applied in all cases. In this regard Para B 5 of Recommendation R (92)17 should be noted, as not only does it emphasise that imprisonment should be regarded as a sanction of last resort, but it also goes on to explain that and it "should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offence would make any other sentence clearly inadequate". The same paragraph of Recommendation R (92)17 add:

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

This approach should be applied to foreign offenders too. (Rule 14.1) Its adoption requires the rejection of the assumption that imprisonment, often coupled with expulsion, is the only appropriate sentence for foreign offenders convicted of all but the most minor offences. If foreign offenders are routinely considered for the full range of sentences, this danger can be minimised.

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

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

In reality, sentences may have a devastating impact on the children and other dependants of offenders. This is particularly true of foreign offenders who may be the primary carers for their children. The UN Convention on the Rights of the Child requires that the best interests of the child be considered in all official decisions that may affect them.[51] Therefore, their interests should also be borne in mind when their foreign parents are sentenced (Rule 14.3).

[51] See articles 3.1, 9.3, 18 and 20.

IV. Conditions of imprisonment

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

Admission

Rule 15

Admission to prison is always intimidating. It may be particularly so for foreign prisoners. Therefore, extra care needs to be taken to communicate effectively with them from the outset. Staff who are trained in accordance with Rule 41.1 should be involved in the admission process to facilitate such communication (Rule 15.4) The importance of effective communication is apparent from rule 15.1 which notes that prisoners should be provided with information in a language which they understand, orally and also, where possible, in writing. A good practice which exists in some countries is for prisoners to receive a foreign prisoners' information pack which can be translated beforehand into the languages used by the majority of foreign prisoners. Such a pack should include, inter alia, the information set out in rule 15.1 *a* to *e*. In addition there should be information on the internal regulations and main feature of the prison regime, including the rules governing discipline, legal aid, the prisoners' rights and duties, complaints procedures, prison work and release as well as information on how to access services such as medical treatment, education and visits,[52] the CPT has also recommended that prisons provide foreign prisoners with translations of expressions most commonly used in everyday activities as this can prevent misunderstandings and thereby contribute to a less conflictual prison environment.[53] Prisoners should be allowed to keep this information in their possession and the authorities should update it regularly (Rule 15.2). Prison authorities should also assist foreign prisoners who wish to communicate the fact of their imprisonment to relevant individuals or bodies, immediately after admission. (Rule 15.3)

Allocation

Rule 16

Decisions relating to the allocation of foreign prisoners to particular prisons require balancing a wide range of factors. Some of these are applicable to all prisoners, such as the desirability of housing them close to their family and community ties. Where foreign prisoners are resident in the country in which they committed an offence or have close family ties, these may be the key considerations, balanced always with the requirements of safety and security. On the other hand, where foreign prisoners' primary contacts are abroad it may make more sense to house them close to transport facilities that would allow their families to travel from abroad to visit them and that will enable them to keep in touch with their consular representatives (see Rule 16.2). Another factor to be considered is whether it is better to house foreign prisoners in prisons where there are others of their nationality, culture or religion. (Rule 16.3)This may reduce their sense of isolation, but may conversely be undesirable from the point of view of safety and security.

Accommodation

Rule 17

Decisions relating to the accommodation of foreign prisoners require the balancing of various factors. One factor to be considered is whether it is better to house foreign prisoners in a given

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

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

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

Hygiene

Rule 18

The general requirements of hygiene need to be applied to all prisoners. In the case of foreigners, however, a certain degree of flexibility may be necessary to make provision for their cultural and religious preferences and traditions, while not compromising on standards of cleanliness. (Rule 18.1) For example, where these preferences require men to grow beards, they should not be prohibited from doing so but there should be facilities for them to keep their beards clean and trimmed. The facilities provided should enable prisoners to shower in a way which is sensitive to their understandings of public decency. (Rule 18.2)

Clothing

Rule 19

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

Nutrition

Rule 20

Rule 22.1 of the European Prison Rules states that authorities must take cultural and religious preferences in relation to diet into account. The right to food that meets the religious traditions of prisoners has also been recognised by the European Court of Human Rights. In *Jakóbski v Poland* (Application No. 18429/06, 7 December 2010) the Court held that a refusal to provide a Buddhist prisoner with vegetarian meals infringed Article 3 of the European Convention on Human Rights. One method of ensuring this right for foreign prisoners is to allow them to access a prison shop which stocks in hygienic conditions food they prefer. (Rule 20.1) Consular representatives may be approached for help in this regard.

In relation to the need to take account of the religious preferences in respect of meal times (Rule 20.2), the CPT has praised the special efforts made at Woodhill Prison UK to keep food warm for prisoners observing Ramadan, the organisation of the Eid-ul-Fitr celebration and courses for staff on halal food, which have led to a better mutual understanding.[54]

[54] CPT visit to UK, 2008, CPT/Inf(2009)30, para. 80.

Legal advice and assistance

Rule 21

It is important to recognise that foreign prisoners may need legal advice not only on matters relating to their criminal trial or conviction, but also on a wide range of other matters including prison law, their immigration status and family affairs. Various steps should be taken to ensure that they benefit from the legal advice and assistance that is available to all prisoners in the country in which they are held. This may include access to legal aid (Rule 21.2) and the involvement of outside agencies which specialise in the assistance of foreign prisoners (Rule 21.5). It is important in this regard that they have information about the services they can access and that such access is facilitated by the prison authorities. They may also need specific help in respect of translation (Rule 21.1, 21.3 and 21.4). It is important that such translation is accurate, impartial and recognises the requirements of legal confidentiality. It should be provided where a prisoner does not have a full understanding of the language used. In this regard, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter when participating in proceedings which concern them, including internal disciplinary proceedings.[55]

Contact with the outside world

Rule 22

Contact with the outside world is particularly important for foreign prisoners who may easily become isolated. Research has also shown that family connections are important for offenders' social reintegration. It is therefore essential to minimise the damage that imprisonment causes to family ties. Rule 22.1 lists a wide range of forms that contacts with the outside world could take. The prison authorities should do what they can to facilitate contacts with family and friends, consular representatives, probation and community agencies and volunteers. This can best be achieved by flexibility in relation to the rules that govern the contact of prisoners with the outside world generally. Moreover, probation and community agencies from both the state in which the prisoners are held and the state to which they will go upon release can assist in this regard. Accordingly, prisoners should be informed where organisations providing services to prisoners abroad exist in their country of residence or nationality.

Rule 22.2 highlights the need for flexibility in relation to the use of language during contacts. Whilst security concerns may arise when prisoners speak a language which the authorities do not understand, practical measures relating to interpretation can minimise this concern Other concerns are the time difference and costs of phone calls made abroad.. Flexibility in respect of the time and length of telephone calls (Rule 22.3) – along with the length of visits (Rule 22.5) can also improve contact with the outside world. In addition to providing support and information, authorities should also adopt a flexible approach to granting visas to family members who live abroad to promote the maintenance of familial relationships (Rule 22.6).[56] This is an area for potential cooperation between prison authorities and consular representatives, other agencies and NGOs from the country to which the prisoner will eventually be sent.

In addition, the authorities are enjoined to assist prisoners with the cost of communication (Rule 22.4). As foreign prisoners often do not have work, and therefore may not have money to buy stamps or phone cards, the CPT has recommended that states ensure access to communications, and if they are externally provided, that they are reasonably-priced.[57] In situations where high travel costs prevent regular, if any, visits, it may be possible to facilitate or improve contact using technology, such as videoconferences.

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[55] CPT visit to Finland 1992, CPT/Inf(93)8, para. 142.

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

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

Special measures to enable foreign prisoners to keep in contact with their children are particularly important as they are valuable both to the prisoner concerned and are in the interest of the child (Rule 22.7 – see also Rule 35.3). Where children visit their imprisoned parent, there should be open contact with that parent wherever possible (Rules 26 to 28, UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Resolution2010/16)).

The prison authorities can assist directly in the preservation of family relationships by informing family members of major events in the life of the prisoner, including their transfer, major health issues and their death. To achieve this, the authorities need to keep in contact with known family members and have a record of their most recent contact details. Such contacts should of course always be subject to the approval of the prisoner (Rules 22.8 and 22.9). The reverse situation should also be considered. Where the prison authorities are given news of major events in the life of a member of the prisoner's family they should convey this information to the prisoner (Rule 24.6 European Prison Rules).

Rule 23

Isolation can be prevented and combated by allowing foreign prisoners to remain informed about public affairs in their countries of origin. To this end, they should be allowed to subscribe to publications (Rule 23.1) and be given access to radio and television broadcasts (Rule 23.2). Both of these should be available in a language they understand. Access of this kind will also facilitate their reintegration, particularly if they return to their home country.

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

Contacts with consular representatives

Rule 24

Rule 24 deals with contacts with consular representatives from the perspectives of foreign prisoners. They have the right to such contacts (Rule 24.1) and to reasonable facilities to communicate with their consular representatives. (Rule 24.2) Equally, foreign prisoners may refuse to make contact with consular representatives. There may be problems where prisoners are without consular representation in the country in which they are detained or indeed are stateless. In such cases, prisoners may communicate with consular representatives of another state which takes charge of their interests or with an international body whose task it is to do so. (Rule 24.3-4)

Rule 25

Prison authorities have duties to both foreign prisoners and consular representatives. In the case of the former, they must keep them informed of the role of consular representatives and the actions that such representatives may take on their behalf. (Rule 25.1) However, prison authorities should not place pressure on prisoners to take up contacts with consular representatives if they do not wish to do so. As regards the consular representatives themselves, the duty of the prison authorities is to cooperate with them and to facilitate their provision of services. (Rule 25.2)

The prison authorities also have a duty to record information about the consular contacts with prisoners. The purpose is simply to have a record that such visits took place and not to record their content, which should normally be confidential. (Rule 25.3*a*) To ensure that pressure is not put on foreign prisoners a record should also be kept of where they waive their right to such contact. (Rule 25.3*b*)

Role of consular representatives

Rule 26

Rule 26 deals with the duties of consular representatives towards foreign prisoners. Rule 26.1 makes it clear that this rule does not seek to modify the Vienna Convention on Consular Relations in any way but to foster its application in the case of foreign prisoners. In order to assist consular representatives to fulfil their duty to safeguard the interests of persons for whom they are responsible and that are detained in the country in which they are stationed, this rule sets out some specific measures. It should be emphasised that any assistance provided by consular representatives can make a major positive contribution to the lives of foreign prisoners. These measures should only, however, be put in place where the individual concerned consents.

Consular representatives may be an important source of information on legal and financial matters and the possibilities for international transfer. (Rule 26.1*a*). In addition to providing information and visiting, consular representatives can make an important contribution to the social reintegration of foreign prisoners (Rule 26.1*c*). Assistance in this regard could include social, legal and financial support for foreign prisoners and their families, the facilitation of visits from and contacts with family members through, inter alia, assistance with obtaining visas, and the return and transfer of property or money due to be received by such prisoners at release. Consular representatives may also be able to support prisoners in practical ways, for instance by providing them with literature and other reading materials (Rule 26.1*d*) and providing indigent prisoners with financial support.

Consular representatives may also provide an important link between national authorities, probation agencies and foreign prisoners (See Rule 65, Probation Rules). It is also important that there are good working relationships between consular representative and organisations that help prisoners abroad. Consular representatives may assist with organising volunteer visits to such prisoners.

In the event of the death of a foreign prisoner, consular representatives may assist with the repatriation of the body and help relatives deal with property or inheritance issues.

Given the complexity of their role, it is important that consular representatives keep themselves fully informed about the law and regulations governing all aspects of imprisonment of foreign prisoners and in particular of their duties in this regard. (Rule 26.2. See also Rule 42.2)

Prison regime

Rule 27

Rule 27 deals with the prison regime as a whole. Rule 27.1 emphasises that in order to achieve a balanced programme of activities, it may be necessary to take additional positive measures to ensure that foreign prisoners can fully participate in such activities. In this regard, the CPT has recommended that authorities aim to prevent the exclusion of foreign prisoners from prison regime activities whether due to language or more systemic barriers.[58]

There is a danger that foreign prisoners will be regarded as less worthy of treatment and training because they may be transferred, extradited or expelled. Rule 27.2 states that this should not be the case.

Work

Rule 28

It is particularly important for foreign prisoners to be engaged in useful and productive work as they often do not receive financial support from outside the prison because of their lack of social links in the country of their detention. The authorities should take steps in order to ensure that foreign prisoners are not discriminated against in respect of work allocation and training. (Rule 28.1-2) In organising work, account should be taken of religious and cultural practices, for example, differing

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

days of rest. Foreign prisoners should also be considered for work programmes that occur outside the prison.

Rule 26.11 of the European Prison Rules already provides for prisoners to transfer some of their earnings out of prison. In the case of foreign prisoners, Rule 28.3 provides explicitly that they may transfer part of their earnings to family members abroad.

Building on Rule 26.17 of the European Prison Rules, which states that, as far as possible, prisoners who work should be included in national social security systems, Rule 28.4 provides that foreign prisoners who contribute to the social security system of the country in which they are detained shall be allowed, where possible, to transfer such contributions to another state. This Rule enables foreign prisoners to contribute to the system in the country in which they are most likely to live after release, thus facilitating their social reintegration. As social security systems differ in the coverage that they provide – unemployment benefits, pensions and health care are funded differently in various countries – careful attention needs to be paid to where and how such contributions should best be made.

Exercise and recreation

Rule 29

It is important that foreign prisoners have adequate exercise and recreational activities. It may be necessary to apply internal regulations flexibly to ensure that foreign prisoners are not, in practice, excluded from such activities. Such flexibility may also be required to ensure that activities do not conflict with the cultural practices of these prisoners. (Rule 29.1) Cultural differences can be used to positive effects. For example, prisoners may share different cooking techniques, games and entertainment. This may promote intercultural understanding and improve relationships amongst prisoners. (Rule 29.2)

Education and training

Rule 30

The CPT has noted that an inability to communicate due to linguistic barriers may cause foreign prisoners deep moral distress.[59] The CPT has therefore recommended that prison authorities introduce programmes of language education for foreign prisoners.[60] Rule 30.1 encourages the learning of the daily working languages of the prison. In addition, opportunities should be made available for prisoners who wish to learn or improve their knowledge of the language of the country of origin.

The educational and vocational training provided for foreign prisoners should be tailored as far as possible to their specific needs, as this is important for their eventual social reintegration. Rule 30.2 sets out how this should be done.

To assist with this training, prisons should be stocked with reading materials and resources that reflect the linguistic and cultural backgrounds of the prison population. Whether these materials are held in the prison library or education and training centre, these resources should be accessible. (Rule 30.3) Educational resources can be derived from audio, video and electronic material and means. Consular representatives and non-governmental organisations should be encouraged to contribute to the educational and training resources available and suited to the needs of foreign prisoners.

Freedom of thought, conscience and religion

Rule 31

[59] CPT visit to Denmark 1990, CPT/Inf(91)12, para.107.

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

Rule 31.1 is designed to give practical effect to the right to freedom of thought, conscience and religion that is recognised by Article 9 of the European Convention on Human Rights and Rule 29 of the European Prison Rules. This right is strengthened by the requirement that foreign prisoners must not be compelled to practice any particular religion or belief. Indeed, prisoners should be protected against the risk of proselytisation both by representatives of any faith or religion and by staff or fellow prisoners.

Prison authorities have a general duty to facilitate the exercise of this right by foreign prisoners. They may do so in various ways. Rule 31.2 encourages prison authorities to keep a list of approved representatives of all the religions and beliefs of foreign prisoners. There may be many of these and it may be difficult to deal with all of them. However, the authorities should be as flexible as possible in this regard. Religious observance may raise security concerns but these should not trump this fundamental right except where it is essential to impose limitations. Such limitations should be the minimum necessary to guarantee safety and security.

Health

Rule 32

Rule 32.1 highlights the need to ensure the implementation of the principle of equivalence of care. This principle relates not only to the provision of health care within prison which is of the same standard as is available in the general community, but also to ensuring that all prisoners can access this health care. In reality, however, foreign prisoners may not be covered by the national health care insurance system of the state in which they are detained. Prison authorities must therefore ensure that foreign prisoners have access to the necessary general medical and dental treatment and care, as well as to more specialised medical services that may be required. Given that foreign prisoners may also have specific health problems or suffer from diseases that are not common in the state in which they are detained, prison authorities should ensure that sufficient resources and funds are allocated to deal with these problems effectively.[61] (Rule 32.2) The CPT has urged authorities to ensure that foreign prisoners have equal access to drug rehabilitation programmes.[62] In the case of transmissible and infectious diseases, it may also be necessary to ensure the health of other prisoners and staff who are in contact with foreign offenders (see Recommendation No. R (93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison).

In addition to being trained to diagnose and treat diseases and conditions that may be more typical for foreign prisoners, medical and health care staff should also be trained in cultural diversity and methods for interacting with prisoners coming from different backgrounds. (Rule 32.3) Given the difficulties foreign prisoners may encounter when trying to communicate with healthcare staff (and the risk that such difficulties may jeopardise the health of such prisoners), the CPT has recommended that steps be taken to ensure such prisoners benefit from the services of a professional interpreter as this helps best respect the prisoner's right to privacy and allows good quality of communication which is primordial for healthcare purposes.[63] However, for financial reasons and also in cases of emergency, more informal methods of interpretation may have to be relied on, like interpretation offered by a fellow-prisoner or by staff member. Extreme caution should be exercised in such cases, and informal interpretation used only if it respects the medical confidentiality of the patients concerned and they consent to this form of communication. (Rule 32.4)

Some cultural traditions do not allow a prisoner to be examined by a medical practitioner of a different gender. Save in the case of a medical emergency, such requests should be met where possible. (Rule 32.5)

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

[62] CPT visit to Malta, 2001, CPT/Inf(2001)16, para. 61.

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

An ability to communicate in a culturally sensitive manner is especially important for the provision of psychiatric and mental health care. In particular, it may be more difficult for prisoners coming from different religious, cultural and linguistic backgrounds to adjust to the culture of the country in which they are detained and more specifically to prison life. This may lead to excessive feelings of abandonment and anxiety. Accordingly, both prison authorities and medical and health care staff should pay particular attention to the prevention of self-harm and suicide among such prisoners. (Rule 32.7)

In recognition of the humanitarian principle that prisoners with a short-term fatal prognosis should be transferred to external medical facilities to ensure their best possible care, (Rule 51, Recommendation (98)7 concerning the ethical and organisational aspects of health care in prison) consideration should also be given to the possibility of transferring terminally ill foreign prisoners, who so request, to a state with which they have strong social links. (Rule 32.8)

In any case of transfer, extradition or expulsion, steps should be taken to ensure the continuation of medical treatment. This should involve the provision of medication for use during transit to the other state and, where the prisoner consents, the transfer of medical records. The CPT has stressed that any such provision of medication must only be done on the basis of a medical decision and in accordance with medical ethics. [64]

Good order, safety and security

Rule 33

The maintenance of good order, safety and security in a prison housing prisoners of various backgrounds requires awareness of the potential conflicts that may arise between prisoners, and between prisoners and staff or other persons working in or visiting the prison. While such issues should be considered during the selection and training of staff (Rules 40 and 41), it is also important that prison authorities adopt the principles of dynamic security in their management of prisons. (Rule 33.1) By doing so, and ensuring staff prioritise the creation and maintenance of everyday communications and interaction with all prisoners, any potential or current tensions or problems can be detected and dealt with as early as possible. Effective communication in this respect requires awareness and understanding of cultural and religious differences and possible inter-ethnic tensions. (Rule 33.2) Understanding and tolerance among prisoners, and between prisoners and staff, can be enhanced by participation in activities that raise awareness of cultural, religious and ethnic diversity. (Rule 33.3. See also Rule 29.2) For example, the CPT has highlighted the good practice at Woodhill Prison, UK, where the Imam has initiated programmes to provide prisoners and staff with a better understanding of Islam.[65] Staff should also be aware that tensions may arise due to linguistic barriers and therefore, be trained to deal with such situations.[66] (See Rule 41.2) This may involve reliance on informal means of interpretation and translation, which can be offered by other prisoners. In addition, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter in order to enable them to participate in disciplinary proceedings.[67]

Prison authorities should keep up-to-date records about the composition of their prison populations. (Rule 33.5) While information on their cultural, religious and ethnic backgrounds can be a useful tool in creating policies to prevent and manage potential and actual conflict, such information should not decisively affect decisions on the risk posed by an individual or a group of foreign prisoners to good order, safety and security. (Rule 33.4) However, where information is available that there is a risk to

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[64] 7th General Report, CPT/Inf (97)10, para. 36.

[65] CPT visit to UK, 2008, CPT/Inf(2009)30, para. 80.

[66] 11th General Report [CPT/Inf (2001) 16, para. 27.

[67] CPT visit to Finland, 1992, CPT/Inf(93) 8, para. 142.

the safety of a particular individual or group, all possible measures must be taken to ensure their safety. (*Rodic and Others v. Bosnia and Herzegovina*, Application no 22893/05).

Women

Rule 34

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

Given that women represent only a small proportion of the prison population, there are fewer accommodation possibilities for them. This often results in women prisoners being housed far away from their families and children.[68] Research has shown that separation from family members, children and the community in general may have an extremely adverse impact on women prisoners. While this problem also affects foreign female prisoners whose families are resident in the state in which they are imprisoned, it is much more acute in the case of foreign female prisoners whose families are abroad. These women may become further isolated due to linguistic barriers that prevent or reduce access to social support and other services and activities in prison. (Rule 34.1)

It is recognised that imprisonment may affect and impact on women differently from men. In particular, women with children may suffer from feelings of guilt and helplessness due to enforced separation, especially if the children are resident in a different country. Research has also shown that women are more likely to commit acts of self-harm and suicide, particularly during the very early stages of detention. A history of abusive and violent relationships and experiences may also lead to heightened anxiety and post-traumatic stress disorders during detention. The situation may be more complicated for foreign female prisoners coming from different cultural backgrounds. Accordingly, medical and healthcare staff should be particularly attentive and trained to deal with these psychological needs. (Rule 34.2) To ensure medication is not the primary means of dealing with the psychological problems women may face while in detention, support, counselling and treatment programmes should be provided when appropriate. (See Rule 34.1 European Prison Rules)

This Rule also elaborates on Rule 32.6, which emphasises the need to provide health care in a culturally appropriate manner. Health care should be provided in a manner that recognises gender-specific needs. In particular, attention should be paid to sexual and reproductive health issues and the provision of female hygienic and sanitary facilities and items.[69] (Rule 34.2)

In general, imprisonment should not be used as a sanction for pregnant women.[70] However, in situations where such women are imprisoned, the prison authorities must provide the facilities necessary to meet their needs. (Rule 34.3) In the case of foreign women prisoners, this may require cultural and religious sensitivity.

As it was established in Rule 34.3 of the European Prison Rules, prisoners should be allowed to give birth outside prison.[71] Women shall be transported to give birth in an outside hospital when labour begins.[72] There may still be occasions in which the child may be born within the prison. In such cases, prison authorities should call emergency services immediately and the child's birth certificate should not mention that he was born in a prison setting. Independent of whether the child is born in or outside of the prison, the authorities should respect the cultural and religious preferences of the mother in relation to the birth and post-natal care. (Rule 34.3)

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[68] 10th General Report [CPT/Inf (2000) 13], para. 21.

[69] 10th General Report [CPT/Inf (2000) 13], para. 31.

[70] COE Parliamentary Assembly Recommendation 1469 (2000) and Rule 10 Rec 2006 (13) on the Remand Custody.

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

[72] 10th General Report [CPT/Inf (2000) 13], para. 7.[CHECK]

Children

Rule 35

Independent of whether children are born inside or outside the prison, they may be allowed to remain with their parent in prison. (Rule 35.2) Although there may be circumstances in which children may be allowed to remain with their father, (for example, in asylum and immigration cases where the father is the primary carer and is detained in prison) the vast majority of cases will involve the child remaining with the mother in prison.

Research has shown that maternal separation in the first months, and even years of childhood, can be very detrimental as it can cause long-term difficulties for children, including impairment of attachment to others, emotional adjustment and personality disorders. Even though the development of young children can be impaired as a result of confinement to a closed environment like a prison, this negative effect outweighs the benefits of remaining with their mother. Any decision to remove a child from prison should, therefore, only be taken after special consideration of all circumstances and only if this is in the best interests of the child. (See Rule 36.1 European Prison Rules and Articles 3, 9(1) and 20(1) UN Convention on the Rights of the Child) The same criteria apply to the decision on whether to keep the child in the state where the parent is imprisoned or to send the child abroad. The views of both parents, if possible, shall be taken into account and all appropriate care arrangements shall be examined before a final decision is reached.

Practices may vary from country to country in relation to the upper age limit until which children may be kept in prison with their detained parent. In some cases, they can remain in prison up to the age of 6 years. In other countries, they may be put into state or foster care after their birth. Whatever the national practice are, prisons should have special facilities and arrangements for keeping such children with their parent. The facilities should be staffed with trained personnel. (See Rule 36.2 European Prison Rules) In addition to ensuring that children receive appropriate care[73] (see Rule 36.3 European Prison Rules), the arrangements should respect different religious traditions and cultural approaches to parenthood. (Rule 35.1)

Where it is in the best interests of the child, preference should be given to options which enable the maintenance of regular contact between the children and their imprisoned parent. Such decisions should be taken by an impartial body with experience and knowledge of children's welfare rights and needs and should be subject to appeal. (Rule 35.2)

In recognition that prison visits can be a difficult experience for children, and even more difficult for children living abroad, prison authorities should take particular care to ensure that the measures put in place as required by Rule 22 to maintain familial relations are implemented in a child-friendly and sensitive manner. This should include consideration of the children's availability for such visits, bearing in mind they may be attending school. (Rule 35.3) The rules relating to flexibility in relation to the times and types of communications (Rule 22.3 and 22.5) should be implemented in a way that takes into consideration the children's schedules and ability to communicate.

Some countries apply *jus soli* so that children born to a foreign prisoner may obtain the nationality of the state in which they are born. In other countries, such children may remain stateless until the time their legal status is decided. In all cases, children should be provided with a birth certificate and any other identification papers needed to determine their legal status. (Rule 35.4)

V. Release

The release of foreign prisoners and the conditions to which they are subject should be governed by Recommendation 2003(22) concerning conditional release (parole) and Recommendation 2010(1) on the Council of Europe probation rules.

[73] 10th General Report [CPT/Inf (2000) 13], para. 29.

Preparation for release

Rule 36

Rule 36 is a continuation of the principle contained in Rule 9. Preparation for release for foreign prisoners should start, as for all other prisoners, as soon as possible after admission. (Rule 36.1) This should occur notwithstanding the fact that decisions in relation to release are generally taken at a later point in the sentence. Careful consideration should be given to whether the prisoners will remain in the state in which they are detained. Irrespective of which country the prisoner will live in upon release, the sentence of a foreign prisoner should be planned with a view to their successful social reintegration. Foreign prisoners should not be excluded on the basis of any possible removal, from any treatment, work, education or activity programmes.

There is a range of steps which authorities should take to facilitate this. For foreign prisoners, one of the most important issues is often the determination of their legal status and situation. There may be cases of prisoners who may be legally residing in the country in which they are detained but whose residence permits may have expired during their detention. There may be other cases where the right to reside has been revoked due to the commission of an offence. There are also foreign prisoners who were illegally residing in the country. Prison authorities should ensure that foreign prisoners have access to all the relevant information and assist them to comply with the procedures necessary for the determination of their legal status. The legal status of foreign prisoners should be determined as soon as possible after they are admitted to prison. The early determination of legal status will assist prison authorities to plan the foreign prisoners' sentences with a view to their successful reintegration. (Rule 36.2*a*)

Progressive preparation for release and social reintegration requires that prisoners benefit from prison leave and other temporary release schemes. In practice, foreign prisoners are often denied such possibilities due to a lack of a permanent address in the country and the flight risk they are considered to pose. To avoid this discrimination, leave requests should be dealt with on a case-by-case basis. (Rule 36.2*c*) Good practice would entail also taking into consideration the address of family members resident in the state or associations that provide accommodation for such prisoners on prison leave and also for their families who may be visiting from abroad. Prison leave is therefore also important to facilitate the maintenance and re-establishment of contacts with family members, a crucial factor in successful reintegration. If foreign prisoners are denied requests for prison leave, steps should be taken to ensure that such prisoners have alternative supplementary means of maintaining or re-establishing contracts with their family members.

If foreign prisoners are to remain in the country in which they are detained, preparation for release should include assistance with social needs, such as housing and employment in cooperation with probation and social services. (Rule 36.*2b* and 36.3) If foreign prisoners will be transferred or expelled to another country, and if they consent, contacts should be established with the relevant authorities and support services in that country as soon as possible. (Rule 36.*2b* and 36.4-5) In such cases, all relevant information about the prisoner should be transferred to the relevant authorities of that state. In order to ensure continuity of treatment and care, it is very important to transfer all relevant medical records in a manner that respects medical confidentiality. (Rule 36.5*c*) Other information and records that will facilitate the prisoners' reintegration should also be transferred. To reduce anxiety and prevent misunderstandings, the authorities of the proposed receiving state should provide returning prisoners with information about prison life and possibilities for release. (Rule 35.6. See also Rule 39.2*a*)

Consideration for release

Rule 37

This rule applies to both remand and sentenced prisoners. In order to establish substantial equality of treatment, positive steps should be taken to ensure that foreign prisoners are considered for release when they become eligible for such release. (Rule 37.1) Given that foreign prisoners may be embroiled in immigration or other proceedings, care should be taken to avoid unnecessary bureaucratic delays to release decisions. (Rule 37.2)

Foreign prisoners should not be excluded from consideration for release on the basis of their nationality or legal status. (Rule 37.3) The criteria set by Recommendation (2003)22 on conditional release (parole) should be applied in all cases. Particular attention should be paid to Rule 19 of this Recommendation which says that the lack of the possibility of work on release should not constitute a ground for refusing or postponing conditional release, and to Rule 20, which emphasises that conditional release should be granted to all prisoners who are considered as meeting the minimum level of safeguards for becoming law-abiding members of society.

Release decisions should, therefore, be taken on merits of individual cases. In the case of non-resident foreign prisoners, a lack of property or familial links should not alone be sufficient grounds to deny release. Other factors should be present; such as the possession of a false passport, previous attempts to evade being taken into custody, or the fact that the individual has been extradited for trial that cannot occur in absentia.[74] When considering cases involving settled foreigners, the authorities should take residential and familial links into account when deciding if detention is justified.[75] In either case, decisions on the risk of absconding should be made on a case-by-case basis.

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

Release from prison

Rule 38

Upon release from prison, some foreign prisoners will remain in the state in which they were detained while others will leave that state. In all cases, the relevant authorities, including the foreign prisoners' consular representatives, should assist such prisoners to have in their possession the necessary identification papers and other documents that would allow them to find housing and employment and to travel to their chosen place of residence. (Rule 39.1. See also Rule 33.7 European Prison Rules) Foreign prisoners should also be provided with a copy of their medical records. The authorities should also assist foreign prisoners with travel arrangements that would enable them to reach their chosen destination. (Rule 38.2. See also Rule 33.8 European Prison Rules)

In many countries, prisoners are paid for the work they undertake in prison. Upon release, salaries for such work may not yet have been paid. In such circumstances, the prison or consular authorities should facilitate the payment or transfer of such sums to the foreign prisoner. (Rule 38.2) Where foreign prisoners are to return to another country, prison authorities shall ensure the return of any property or monies that may be owing to them at their release.

International transfers

Rule 39

The CPT advocates the transfer of foreign prisoners to their home countries, regions of origin or places where they have family and social links, as a means to obtain both humanitarian goals and the penological objective of the social reintegration.[76] The Council of Europe Convention on the Transfer of Sentenced Persons and its Additional Protocol provide detailed procedures for the transfer of prisoners to other states to complete their prison sentences.

[74] *Sardinas Albo v Italy* (Application No. 56271/00) 17 February 2005, para.93 and *Chraidi v Germany* (Application No. 65655/01) 26 October 2006, para. 40.
[75] *Al Akidi v Bulgaria* (Application No. 35825/87) 31 July 2003, para.85.

[76] CPT visit to Luxembourg, 1993, CPT/Inf(93)19, para. 102.

It is important that foreign prisoners who are eligible for such transfers are informed about such possibilities, the necessary procedures to follow, and crucially, the consequences of such transfers, as soon as possible after admission, in a language which they understand. (Rule 39.1. See also Rule 15.1*e*) It is important that prisoners understand the potential consequences of transfers, particularly in relation to eligibility for release. (Rule 39.2) While prison authorities and consular representatives can play a crucial role in this regard, (See Rule 36.6) it is imperative that prisoners have access to independent legal advice and assistance in this connection.

In all decisions in relation to transfer, the prisoners' views must be taken into account. (Rule 39.3) The procedure for determining the prisoners' views must provide such prisoners with a real opportunity to present their views. This information enables state authorities to consider the potential impact of the proposed transfer on prisoners and their families. State authorities must also take into account other potential risks of human rights violations such a transfer would pose, ranging from the violation of the right to family life, poor prison conditions and regimes which would not facilitate social reintegration or treatment, to the more extreme situation where there is a risk of torture, inhuman or degrading treatment. (See Rule 10). Given the potential risks that may be involved, officials responsible for making such decisions should be provided with appropriate training and have access to objective and independent information about the human rights situations in other countries. (Rule 39.4)

VI. Persons who work with foreign offenders

Selection

Rule 40

Staff selected to work with foreign offenders should possess well-developed interpersonal communication skills,[77] be familiar with different cultures and at least some staff should have the language skills required to communicate with these offenders.[78] Where possible, such staff should also be selected to represent the various cultural and linguistic backgrounds of the offenders detained with whom they work.[79] In addition, staff should have the qualities necessary to form good human relationships and a willingness to learn (See paragraphs 7 and 10, Recommendation (97)12 on staff concerned with the implementation of sanctions and measures).

Training

Rule 41

Staff who work with foreign offenders should be provided with specialised training on the specific issues that affect foreign prisoners. (Rule 41.1) This should include training on the importance of respect for cultural diversity.[80] To enable staff to deal with particular problems faced by foreign offenders and in particular by detained foreign offenders, training should be provided on methods to recognise possible symptoms of stress, whether post-traumatic or induced by socio-cultural change, and the appropriate action to take.[81] The CPT has commented that language barriers can prevent effective communication.[82] Accordingly, staff should be provided with information about the different languages spoken by the offenders with whom they work and opportunities to learn such languages. (Rule 41.2)

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

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

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

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

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

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

It is also important for such staff to be aware of and understand relevant legal and human rights standards and to apply such standards in their everyday work. Training on these standards must therefore be provided and regularly revised to ensure it reflects changes in the law but also in the prison and probation population and the wider social situation. (Rule 41.3) This will ensure that staff are equipped with the necessary knowledge to work with and manage foreign prisoners. In addition to in-house training, staff who work with foreign offenders may also benefit from exchange programmes whereby they spend time working in a prison or probation system in another country.

Specialisation

Rule 42

Prison authorities should consider creating specific posts or roles for persons who would be responsible for overseeing and evaluating the implementation of policies and practices relating to foreign offenders. (Rule 42.1) The creation of such posts would facilitate direct contact between the prison and probation services and other bodies, including national and international agencies, professionals and associations, consular representatives, the prisoners' families and volunteers who assist foreign offenders. This form of liaison is crucial for dealing effectively with foreign offenders and their specific needs. As consular representatives are often involved with foreign offenders throughout the criminal justice process, they should receive training. (Rule 42.2) Training on relevant legal measures should be provided before consular representatives are posted to a particular country and this should be supplemented by country specific information on the applicable law and practices when they are stationed there.

VII. General Provisions

Rule 43

In order to design effective policies to deal with foreign offenders, it is necessary to have access to current and accurate information and research about the proportion of foreign offenders involved in the criminal justice process, the range of sanctions or measures that are being imposed on such offenders and decisions on their release, transfer, extradition and expulsion (See §§J1-J5 of Recommendation on R (92) 17 Consistency in Sentencing). Rule 43.1 therefore, emphasises the need for authorities to fund and initiate research, which should be based on the collection of empirical information and data. This body of information should be collated and analysed in a manner that enables comparisons and discussions with other states and organisations, and the evaluation and revision of policies to reflect contemporary realities and standards. (Rule 43.2-3)

APPENDIX VIII

Strasbourg, 17 May 2011
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DRAFT EUROPEAN CODE OF ETHICS FOR PRISON STAFF

Draft Recommendation CM/Rec (2012)XX of the Committee of Ministers to member states on the European Code of Ethics for Prison Staff

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve greater unity between its members;

Bearing in mind that it is also the purpose of the Council of Europe to promote the rule of law, which constitutes the basis of all genuine democracies;

Considering that the criminal justice system plays a key role in safeguarding the rule of law and that prison staff have an essential role within that system;

Having regard to the European Convention on Human Rights and the case law of the European Court of Human Rights;

Having regard also to the work carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and in particular the standards it has developed in its general reports;

Reiterating that no one shall be deprived of liberty save as a measure of last resort and in accordance with a procedure prescribed by law;

Stressing that the enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and good order, while also ensuring prison conditions which do not infringe human dignity and which offer meaningful occupational activities and treatment programmes to prisoners, thus preparing them for their reintegration into society;

Considering it important that Council of Europe member states continue to update and observe common principles regarding their prison policies;

Considering, moreover, that the observance of such common principles will enhance international co-operation in this field;

Considering that the achievement of a number of the objectives of the prison service depend on public involvement and cooperation and that the efficiency of the prison service is dependent on public support;

Noting the significant social changes which have influenced important developments in the penal field in Europe in the course of the last two decades;

Endorsing once again the standards contained in the recommendations of the Committee of Ministers of the Council of Europe, which relate to penitentiary policy and practice and in particular:
Recommendation n°R (89) 12 on education in prison;
Recommendation n°R (93) 6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison;
Recommendation n°R (97) 12 on staff concerned with the implementation of sanctions and measures;
Recommendation n°R (98) 7 concerning the ethical and organisational aspects of health care in prison;
Recommendation n°R (99) 22 concerning prison overcrowding and prison population inflation
Recommendation Rec(2003)22 on conditional release (parole);
Recommendation Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners;
Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules;
Recommendation Rec (2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse;

Rec (2008)11on the European Rules for juvenile offenders subject to sanctions or measures;

Bearing in mind the United Nations Code of Conduct for Law Enforcement Officials, United Nations Standard Minimum Rules for the Treatment of Prisoners and the United Nations Standard Minimum Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders (Bangkok Rules);

Considering the need to establish common European principles and guidelines for the overall objectives, performance and accountability of prison staff to safeguard security and individual's rights in democratic societies governed by the rule of law,

Recommends that the governments of member states be guided in their internal legislation, practice and codes of conduct of prison staff by the principles set out in the text of the European Code of Ethics for Prison Staff, appended to the present recommendation, which should be read in conjunction with the European Prison Rules, with a view to their implementation, and to give the widest possible circulation to this text.

Appendix to Recommendation CM/Rec (2012) XX

I. Definition of the Scope of the Code

This Code applies to prison staff at all levels .

In this Code the term "prison" is used to describe institutions reserved for holding persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following conviction.

Nothing in this Code ought to be interpreted as precluding the application of any relevant international human rights instruments and standards, especially the European Prison Rules, as well as other professional Codes of Ethics applicable to specialised groups of staff.

II. Objectives of Prison Staff

1. The main objectives of prison staff in a democratic society governed by the rule of law shall be:

- to protect and respect the fundamental rights and freedoms of individuals as enshrined, in particular, in the European Convention on Human Rights;

- to ensure that all prisoners are safe and held in conditions that comply with relevant international standards and in particular the European Prison Rules;[83]

- to respect and protect the right of the public to be safeguarded from criminal activity;

- to work towards the social reintegration of prisoners on release, by providing them with the opportunity to use their time in prison positively.

III. Prison Staff and the Criminal Justice System

2. Prison staff shall have roles and duties different from those of the police, the military, the prosecution and the judiciary in respect of prisoners.

3. Prison staff shall cooperate appropriately with relevant institutions of the criminal justice system, including with probation services, where they exist.

[83] Recommendation Rec(2006) 2 of the Committee of Ministers to member states on the European Prison Rules (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies)

IV. Guidelines for Prison Staff Conduct

A. Accountability

4. Prison staff shall carry out all their duties in accordance with national law and international standards.

5. Prison staff at all levels shall be personally responsible and accountable for their own actions or omissions or for orders to subordinates; they shall always verify the lawfulness of their intended actions.

B. Integrity

6. Prison staff shall maintain and promote high standards of personal honesty and integrity.

7. Prison staff shall maintain positive professional relationships with prisoners and members of their families.

8. Prison staff shall not allow their private, financial or other interests to conflict with their position. It is the responsibility of all prison staff to avoid such conflicts of interest and to request guidance in case of doubt.

9. Prison staff shall oppose all forms of corruption within the prison service. They shall inform superiors and other appropriate bodies of any corruption within the prison service.

10. Prison staff shall carry out instructions properly issued by their superiors, but they shall have a duty to refrain from carrying out any instructions which are clearly illegal and to report such instructions, without fear of sanction.

C. Respect and Protection of Human Dignity

11. Prison staff shall at all times respect and protect everyone's right to life.

12. In the performance of their daily tasks, prison staff shall respect and protect human dignity and maintain and uphold the human rights of all persons.

13. Prison staff shall not inflict, instigate or tolerate any act of torture or other inhuman or degrading treatment or punishment, under any circumstances, including when ordered by a superior.

14. Prison staff shall respect and protect the physical, sexual and psychological integrity of all prisoners, including against assault by fellow prisoners.

15. Prison staff shall at all times treat prisoners, visitors and colleagues with politeness and respect.

16. Prison staff shall only interfere with individual's right to privacy when strictly necessary and only to obtain a legitimate objective.

17. Prison staff shall not use force against prisoners except in self-defence or in cases of attempted escape or active or passive physical resistance to a lawful order and always as a last resort.

18. Prison staff shall carry out personal searches only when strictly necessary and shall not humiliate prisoners in the process.

19. Prison staff shall use instruments of restraint only as provided for by the European Prison Rules.[84] In particular they shall never use them on women during labour, during birth and immediately after birth.

D. Care and Assistance

[84] Rule 68

20. Prison staff shall be sensitive to the special needs of individuals, such as juveniles, women, minorities, foreign prisoners, elderly and disabled prisoners, and any prisoner who might be vulnerable for other reasons, and make every effort to provide for their needs.

21. Prison staff shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required.

22. Prison staff shall provide for the safety, hygiene and appropriate nourishment of persons in the course of their custody. They shall make every effort to ensure that conditions in prison comply with the requirements of relevant international standards, in particular the European Prison Rules.

23. Prison staff shall work towards facilitating the social reintegration of prisoners through a programme of constructive activities, individual interactions and assistance.

E. Fairness, Impartiality and Non-Discrimination

24. Prison staff shall respect plurality and diversity and not discriminate against any prisoner on the basis of sex, age, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status or the type of offence alleged or committed by that prisoner.

25. Prison staff shall take full account of the need to challenge and combat racism and xenophobia, as well as to promote gender sensitivity and prevent sexual harassment of any form both in relation to other staff and to prisoners.

26. Prison staff shall carry out their tasks in a fair manner, with objectivity and consistency.

27. Prison staff shall apply objective and fair disciplinary procedures as provided for by the European Prison Rules[85]. Moreover they shall respect the principle that prisoners charged with a disciplinary offence shall be considered innocent until proven guilty.

F. Cooperation

28. Prison staff shall ensure that prisoners have regular and adequate access to their lawyers and families throughout their imprisonment.

29. Prison staff shall promote cooperation with governmental or non-governmental organisations and community groups working for the welfare of prisoners.

30. Prison staff shall promote a spirit of cooperation, support, mutual trust and understanding among colleagues.

G. *Confidentiality and Data Protection*

31. Information of a confidential nature in the possession of prison staff shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise.

32. Particular attention shall be paid to the obligation to respect principles of medical confidentiality.

33. The collection, storage, and use of personal data by the prison staff shall be carried out in accordance with international data protection principles and, in particular, shall be limited to the extent necessary for the performance of lawful, legitimate and specific purposes.

V. General

[85] Rules 56-63

34. Prison staff shall respect the present Code. They shall also, to the best of their capability, prevent and rigorously oppose any violations of it.

35. Prison staff who have reason to believe that a violation of the present Code has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities.

36. Codes of ethics for prison staff, based on the above principles, shall be developed in member states and shall be overseen by appropriate bodies.

APPENDIX IX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 20 June 2011
cdpc/docs 2011/cdpc(2011)6erev

CDPC (2011) 6 rev

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

DISCUSSION PAPER ON THE FOLLOW-UP TO BE GIVEN TO RESOLUTION N°2 ON PRISON POLICY IN TODAY'S EUROPE ADOPTED AT THE 30TH COUNCIL OF EUROPE CONFERENCE OF MINISTERS OF JUSTICE

Prepared by the Secretariat of the Criminal Law Division

I) Source of the CDPC mandate

1. The 30th Council of Europe Conference of Ministers of Justice *(Istanbul, 24-26 November 2010)* adopted three Resolutions. Resolution n°2 "Prison Policy in Today's Europe" requests the Committee of Ministers to entrust the CDPC with a number of tasks related to the Council of Europe work in the prison field. It was considered by the Ministers' Deputies at their 1107th Meeting on 2 March 2011 [Doc. CM(2011)18 of 25 January 2011, item 10.1] The Ministers' Deputies took the following decisions:

b. Concerning Resolution No. 2 on prison policy in today's Europe

7. transmitted the resolution to the European Committee on Crime Problems (CDPC), the Steering Committee for Human Rights (CDDH) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), for them to bear it in mind in their future work;

8. entrusted the CDPC, in co-operation with the CDDH and the CPT, to:

a) evaluate the measures taken by member states to follow the European Prison Rules, the European Rules for juvenile offenders subject to sanctions and measures, the Council of Europe Probation Rules and the other relevant Council of Europe standards in the area;

b) take stock of problems faced by prison administrations, more particularly prison overcrowding, remand in custody, treatment of foreign nationals in prison, as well as other topics which may require additional guidance through standard-setting;

c) consider, in the light of the outcome of such an assessment and stocktaking, the necessity to reinforce the legal framework in this field, including the feasibility and advisability of a legally binding instrument regulating certain aspects of detention conditions, prison management and the treatment of prisoners, or undertaking other measures to achieve this aim, including the identification and dissemination of best practices;

9. invited member states to continue to provide accurate and timely data and to support by all means Council of Europe Annual Penal Statistics (SPACE) as a valuable tool in guiding the member states' penal policies;

10. entrusted the CDPC, in the light of the conclusions of the 15th Conference of Directors of Prison Administration (CDAP) (Edinburgh, 9-11 September 2009), to consider ways of involving judges, prosecutors, prison and probation services, in a joint discussion concerning imprisonment, as well as community sanctions and measures, with a view to avoiding prison overcrowding and improving social reintegration of offenders whilst protecting public safety;

11. urged the CPT to pursue its monitoring activity with a view to strengthening the protection of persons deprived of their liberty, thereby contributing to any further standard-setting work in this field and assisting member states in implementing such standards;

2. At its meeting in April 2011, the CDPC Bureau considered Doc. CM(2011)18 of 25 January 2011 and took the following decisions relating to the follow-up to be given to Resolution n°2:

" **3. Council for Penological Co-operation (PC-CP)**

d. Follow-up to the 30th Council of Europe Conference of Ministers of Justice, "Modernising Justice in the Third Milennium: transparent and efficient justice; prisons in today's Europe" (Istanbul, Turkey, 24 – 26 November 2010)

- instruct the Secretariat, on the basis of an inter-secretarial consultation with the relevant CoE bodies, to prepare for the CDPC meeting in June a discussion paper regarding the implementation of Resolution No 2 adopted at the Conference (see document "Decisions of the Committee of Ministers concerning the Resolutions adopted in Istanbul", paragraph 8), and in particular means to evaluate the measures taken by the Council of Europe member states to follow the relevant Committee of Ministers recommendations in the prison field and to take stock of the major problems faced by national prison administrations in this regard;

- with regard to paragraph 10 of the decision of the Committee of Ministers, instruct the Secretariat to examine the feasibility of holding a multi-disciplinary conference in 2012 involving representatives of Ministries of Justice, judges, prosecutors, prison and probation services to discuss penal policies, sentencing and the use of imprisonment;

- instruct the Secretariat to prepare a discussion paper regarding topics for the multi-disciplinary conference for the CDPC plenary in June;

- take note of the decision of the Committee of Ministers concerning Resolution no. 1 and of the fact that the T-CY is already dealing with the issue of jurisdiction and related matters on the Internet."

II) Possible working methods and deadlines to implement the above-mentioned follow-up tasks:

1. Draft a short questionnaire, in consultation with the CDDH and the CPT, and send it out to all CoE member states requesting them to provide information on the measures already taken as well as on measures envisaged in the near future to implement the three most recent Committee of Ministers recommendations mentioned above.

2. Prepare a compendium of the replies and analyse, in cooperation with the CPT, the conclusions from the survey deriving from the received replies.

3. Present Resolution n° 2 and the outcome of the above survey at the next CDAP (to be held in Strasbourg between 10 and14 October 2011) and base on them the ensuing discussions regarding the possible problems encountered in this respect by the prison and probation services. Organise the work of the Conference in three workshops where the main issues to be discussed will relate to remand in custody, foreign nationals, overuse of prisons and possible ways of reducing negative trend in overcrowded prisons. Each group will also discuss whether a new standard-setting work is needed, whether a binding instrument is feasible, whether this should be coupled with practical measures and exchange of best practices or whether the latter two will suffice and what exactly would need to be done.

4. 16th CDAP to adopt conclusions and recommendations in relation to the above issues which are to be reported back to PC-CP at its enlarged meeting (9-11 November 2011).

5. The PC-CP is to examine the outcome of the CDAP and to report in turn to the CDPC with a view to presenting specific conclusions and proposals to the CM in a follow-up to the decisions contained in Doc. CM(2011)18 of 25 January 2011, item 10.1.

6. Present a detailed overview of the outcome of the 16th CDAP at an International Conference to be organised in 2012 (as provided for by Doc.CM(2011)18 of 25 January 2011, item 10.1 and further developed in the CDPC Bureau decisions, see above under item 3d of the list of decisions). The

Conference shall aim at involving Ministries of Justice, judges, prosecutors, representatives of prison and probation services, possibly representatives of the national preventive mechanisms. [86]

7. On the basis of the outcome of these activities, the CDPC to proceed with assessing the necessity of reinforcing the legal framework in the penitentiary field, including the feasibility and advisability of a legally binding instrument or of undertaking other measures, including the identification and dissemination of best practices.

[86] The Conference may base its discussions on the implementation by the different authorities represented at it of CM Recommendation No, R (99) 22 concerning prison overcrowding and prison population inflation and CM Recommendation R(92)17 concerning consistency in sentencing.

APPENDIX X

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

"THE EFFECTIVENESS OF THE COUNCIL OF EUROPE TREATY LAW" CONTRIBUTION OF THE CDPC

Document prepared by the Directorate General of
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Contribution
of the CDPC to the work of the Council of Europe to reinforce "the effectiveness of the Council of Europe treaty law"

1. At its 1084th meeting, the Committee of Ministers (CM) adopted the proposal of the Secretary General of the Council of Europe (CoE) to conduct a critical review of the relevance of CoE Conventions as one of the priorities for 2011 and to enhance their effectiveness through increased visibility. For this purpose, a "Task Force on Convention Review" composed of representatives of the Secretariat of the relevant bodies of the CoE (and notably steering committees and the Treaty Office) has been established to discuss possible means to implement this priority proposal in view of the elaboration of a Comprehensive Report of the Secretary General for the attention of the Committee of Ministers.

2. It shall be recalled the already existing contribution provided by the CDPC to this conventions' review exercise. Indeed, at its 1087th meeting on 9 June 2010, the CM agreed to communicate Parliamentary Assembly's (PACE) Recommendation 1920 (2010) "Reinforcing the effectiveness of Council of Europe treaty law" to the CDPC for information and possible comments (Appendix I). The CDPC has thus examined the status of all binding criminal law instruments and has adopted its opinion in this regard including on their classification which may be summarised as follows:

   - **Group A** : Active treaties (as listed under item 3.0 of CDPC's opinion in appendix II to this document);

   - **Group B** : Treaties that are still relevant but might require updating (as listed under item 3.1 of CDPC's opinion);

   - **Group C** : Treaties which may be considered as inactive (as listed under item 3.2 and 3.3 of CDPC's opinion).

3. This item was discussed at the Bureau meeting of the CDPC (Prague, 19-20 April 2011) which instructed the Secretariat to prepare a document on the state of affairs and a questionnaire as regards criminal law instruments and treaties for its plenary meeting (Strasbourg, 14-17 June 2011).

4. For this purpose, a document containing information on the ongoing exercise on the "Effectiveness of the treaty law in the Council of Europe" and a questionnaire concerning the criminal law conventions which may fall under the above-mentioned Groups A, B, C was sent to all CDPC delegations in May. At its 60th plenary meeting, the CDPC held a discussion on that issue. This documents is a summary of the replies received by the CDPC delegations and contains the main outcome from the discussions held by the CDPC with regard to the work currently carried out by the CoE on the effectiveness of the treaty law. It has been prepared by the Secretariat of the Criminal Law Division.

5. As part of the general ongoing process of modernising the CoE's activities, the CDPC welcomes the proposals concerning an assessment of the effectiveness of the corpus of treaties drawn up by the CoE during its 60 years of existence. As regards the treaties in criminal law field, the CDPC believes that it is the main CoE body in a position to provide a

solid contribution to the CM when the latter comes to examine the effectiveness of these treaties and decide on the possible follow-up to the CoE's work in this field.

6. In the list of decisions of the 60th plenary session of the CDPC (June 2011), it is stated : "The CDPC examined the replies by the CDPC delegations to the questionnaire sent by the Secretariat on 13 May on "Reinforcing the effectiveness of Council of Europe treaty law" and considered that the large majority of CDPC delegations agrees with the proposed classification of conventions and draws the attention of the Secretary General of the readiness of the CDPC to provide its advice/contribution when the update of relevant criminal law conventions is envisaged. Concerning criminal law conventions classified as "inactive"/"obsolete", the CDPC considers that the legal validity of Council of Europe criminal law conventions which have entered into force should be respected. Furthermore, the CDPC considers that the existence of international legal instruments of other international organisations, in particular the European Union, should not be a ground for considering the status of Council of Europe criminal law conventions as being invalid.".

7. Following the replies to the above mentioned questionnaire and the discussions held during its plenary session of June 2011, it should be noted that :

I. All the delegations of the CDPC agree with the classification of the criminal law conventions included in the Group A and consequently that they are to be considered as key treaties whose active status should be maintained, either because they have been ratified by all/a vast majority of member states or because they are quite recent and states need more time to ratify them.

II. The vast majority of the CDPC delegations also agree that the few (four) criminal law conventions classified in Group C can be considered as inactive, either because they are obsolete (two) or because they have not entered into force (two). In the case of these four conventions, CDPC delegations, whilst not specifically opposing in principle the classification, expressed concerns about the possible consequences that the CoE could envisage with regard to those treaties classified as "inactive" or "obsolete": CDPC delegations considers that : a) it remains the states' prerogative to denounce specific treaties, b) that the CoE treaty law as a whole deserves to be respected and c) that the CoE, however, may not want to spend time and resources to promote and/or provide assistance for promoting these conventions.

III. The CDPC delegations do not hold an unanimous common position with regard to several of the treaties in the Group B (treaties that are still relevant but might require updating). In this case, few delegations expressed an interest in updating or reviewing or supplementing some of these treaties, whilst other delegations do not see the need for that.

IV. In the light of the foregoing, the CDPC reiterates its call to draw " (…) attention of the Secretary General [of the CoE] of the readiness of the CDPC to provide its advice/contribution when the update of relevant criminal law conventions is envisaged."

APPENDIX I

Parliamentary **Assembly**
Assemblée parlementaire

Recommendation 1920 (2010)[1]

Reinforcing the effectiveness of Council of Europe treaty law

1. The Parliamentary Assembly, referring to its Resolution 1732 (2010) on reinforcing the effectiveness of Council of Europe treaty law, considers that one of the Council of Europe's main functions is to draw up standards on human rights and the rule of law that together form a coherent body of European conventions. It therefore asks the Committee of Ministers to:

1.1. approve an action plan to secure the early ratification by all member states of the core Council of Europe treaties, as defined in the appendix to the Assembly resolution, with the fewest possible reservations;

1.2. urge member states to withdraw their reservations, derogations and restrictive declarations concerning Council of Europe treaties, particularly the European Convention on Human Rights (ETS No. 5), and instruct the Committee of Legal Advisers on Public International Law (CAHDI) to intensify its existing efforts in this area to reduce the use of such clauses;

1.3. agree on a programme of action for new conventions to be drawn up, as a matter of priority, over the next five years;

1.4. instruct the Steering Committee for Human Rights (CDDH), the European Committee on Legal Co-operation (CDCJ) and the European Committee on Crime Problems (CDPC), in close co-operation with the Council of Europe's Legal Advice Department and the Treaty Office, to examine the binding legal instruments within their respective areas of authority, with a view to identifying:

1.4.1. treaties that are still relevant but require updating;

1.4.2. treaties that are obsolete and should be abrogated;

1.4.3. treaties which have lost their relevance and have not come into force within a certain number of years of their adoption and which should be withdrawn;

1.5. in the light of changes in European law within the European Union, particularly the advent of framework decisions or community acts, consult the CAHDI on the possible adoption by the Council of Europe of pan-European model acts to supplement its treaties.

2. The Assembly is also concerned about the possible effects of the increased use, at the request of the European Union, of so-called disconnection clauses in Council of Europe treaties. To ensure the coherence of Council of Europe treaty law, and to avoid establishing new dividing lines in Europe, it asks the Committee of Ministers to draw up strict guidelines to control this practice, based on the work of the CAHDI. The Assembly also urges the European Union to accede to the Council of Europe's conventions, in particular the European Convention on Human Rights, as provided for in the Lisbon Treaty.

1. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 21 May 2010 (see Doc. 12175, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Prescott).

APPENDIX II

Comments by the European Committee on Crime Problems (CDPC) on PACE Recommendation 1920 (2010) on "Reinforcing the effectiveness of Council of Europe treaty law"

1.0 Introduction

At its 1087th meeting on 9 June 2010, the Committee of Ministers (Deputies) agreed to communicate the Parliamentary Assembly's Recommendation 1920 (2010) "Reinforcing the effectiveness of Council of Europe treaty law" to the CDPC for information and possible comments, by 15 October 2010.

The CDPC takes note of the request to the Committee of Ministers in paragraph 1.4 of the Recommendation to 'instruct…the (CDPC)…in close cooperation with the Council of Europe's Legal Advice Department and Treaty Office, to examine the binding legal instruments within its area of authority,' to identify treaties that are still relevant but might require updating, treaties that are obsolete and treaties which have lost their relevance and have not come into force within a certain number of years of their adoption. Under its terms of reference, the CDPC regularly follows up the functioning and implementation of treaties coming within its field of competence.

In order to assess the relevance or obsolescence of a particular instrument, the CDPC report considers the overall number of states to have ratified it (both member and non-member states), in the context of the circumstances of each Convention or Protocol: for example, have member states had sufficient time to implement it, or has the instrument been superseded by subsequent instruments.[6] Whilst these are not necessarily the only criteria to evaluate the effectiveness of treaties, they are of particular importance and provide a sound basis for the analysis.

The findings of this assessment have then been evaluated in order to define the three principal contexts specified by section 1.4 of the Recommendation, thus:

- treaties that are still relevant but require updating (section 1.4.1 of the Recommendation);
- treaties that are obsolete (section 1.4.2 of the Recommendation);
- treaties which have lost their relevance and have not come into force within a certain number of years of their adoption (section 1.4.3 of the Recommendation).

It should be noted at the outset that by far the majority of extant instruments in the criminal law field appear to be sufficiently active and well-supported by member states to require no further action.

2.0 By Percentage of Member States ("MS") Ratifications

2.1 Ratification by All 47 member states

The following criminal law Conventions/Protocols have been ratified by all forty-seven Council of Europe member states:

CETS No.	Title
024	European Convention on Extradition (47+2) *Status: active.*
030	European Convention on Mutual Assistance in Criminal Matters (47+1) *Status: active.*
141	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (47+1) *Status: active.*

Suggested Status: Active and complete

2.2 80-99% MS Ratified

The following eight instruments have been ratified by most member states:

CETS No.	Title
098	Second Additional Protocol to the European Convention on Extradition (40+1) *Status: active.*
099	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (40) *Status: active.*
112	Convention on the Transfer of Sentenced Persons (46+ 18) *Status: active.*
120	European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (41) *Status: active.*
135	Anti-Doping Convention (46+4) *Status: active.*
173	Criminal Law Convention on Corruption (42 +1) *Status: active.*

2.3 50-79% MS Ratified

CETS No.	Title
073	European Convention on the Transfer of Proceedings in Criminal Matters (25) *Status: update.*
086	Additional Protocol to the European Convention on Extradition (37+1) *Status: active.*
116	European Convention on the Compensation of Victims of Violent Crimes (25) *Status: update.*
167	Additional Protocol to the Convention on the Transfer of Sentenced Persons (35) *Status: active.*
185	Convention on Cybercrime (29+1) *Status: active*
188	Additional Protocol to the Anti-Doping Convention (25+1) *Status: active.*
191	Additional Protocol to the Criminal Law Convention on Corruption (25) *Status: active.*
197	Council of Europe Convention on Action against Trafficking in Human Beings (30) *Status: active.*

2.4 30-49% MS Ratified

CETS No.	Title
051	European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (19) *Status: update.*
070	European Convention on the International Validity of Criminal Judgments (22) *Status: update.*
182	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (19+1) *Status: active.*
189	Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a

	racist and xenophobic nature committed through computer systems (18) *Status: active.*
198	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (21) *Status: active.*

2.5 <30% MS Ratified

This group represent the instruments most sparsely supported by member states.

CETS No.	Title
052	European Convention on the Punishment of Road Traffic Offences (5) *Status: update.*
119	European Convention on Offences relating to Cultural Property (0) *Status: lost its relevance.*
130	Convention on Insider Trading (8) *Status: update/ lost its relevance.*
133	Protocol to the Convention on Insider Trading (8) *Status: update/ lost its relevance..*
156	Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (13) *Status: update.*
172	Convention on the Protection of Environment through Criminal Law (1) *Status: lost its relevance.*
201	Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (8) *Status: active.*

3.0 Opinion on the Parliamentary Assembly's Recommendation 1920 (2010).

In light of this analysis, the CDPC finds that the following treaties should be considered to remain active, either because they have been ratified by a majority of member states, or because they are recent and, as such, states still need time to ratify:

(024) European Convention on Extradition (47+2)
(030) European Convention on Mutual Assistance in Criminal Matters (47+1)
(086) Additional Protocol to the European Convention on Extradition (37+1)
(098) Second Additional Protocol to the European Convention on Extradition (40+1)
(099) Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (40)
(112) Convention on the Transfer of Sentenced Persons (46+ 18)
(120) European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (41)
(135) Anti-Doping Convention (46+4)
(141) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (47+1)
(167) Additional Protocol to the Convention on the Transfer of Sentenced Persons (35)
(173) Criminal Law Convention on Corruption (42+1)
(182) Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (19+1)

(185) Convention on Cybercrime (29+1)
(188) Additional Protocol to the Anti-Doping Convention (25+1)
(189) Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (18)
(191) Additional Protocol to the Criminal Law Convention on Corruption (25)
(197) Council of Europe Convention on Action against Trafficking in Human Beings (30)
(198) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (21)

(201) Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (9)

3.1 Treaties that are still relevant but might require updating.

The CDPC considers that the following criminal law instruments are still relevant but may require updating:

(051) European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (19)
This instrument was originally signed by 17 member states, and was ultimately ratified by 19. The issues it was designed to address are partly dealt with in the European Convention on the International Validity of Criminal Judgments (CETS 070), which it has been proposed to update in section 3.1, above.

(052) European Convention on the Punishment of Road Traffic Offences (5)
In spite of the low number of states who have ratified this Convention, it has been deemed worthy of updating this instrument, as the issue remains very much a priority of member states.

(070) European Convention on the International Validity of Criminal Judgments (22)
and;

(073) European Convention on the Transfer of Proceedings in Criminal Matters (25)
Similarly, these two instruments deal with pertinent issues and it is noted that they have been ratified by roughly half of the Council of Europe's member states. Given recent developments in international legal cooperation within the criminal law field, it may be necessary to update or perhaps even consolidate them, in light of such changes.

(116) European Convention on the Compensation of Victims of Violent Crimes (25)
This issue is likewise an issue which continues to be debated, currently within the wider context of the general standing and rights of victims. Given more than half of member states have ratified it, it has been deemed more appropriate to review and update it.

(156) Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances (13)
This Convention came into force in 2000 and was originally signed by 22 member states. However it was only ratified by 13, most recently the Ukraine and Ireland in 2007. Of the member states who signed up to it in 1995, the year it was adopted (Greece, Italy, Norway, Sweden and the UK), only Norway subsequently ratified.

Of the 13 states which did ratify however, the geographic distribution is interesting, as they together form a corridor of states from central Europe to the rest of the world. This corridor begins with the Black Sea coastlines of the Ukraine and Romania, through the land-locked states of Hungary, Slovakia, Austria and the Czech Republic, to states with access to every European coast: the Atlantic Ocean (Ireland); the Adriatic Sea (Slovenia); the Mediterranean Sea (Cyprus); the Baltic Sea (Lithuania, Latvia, Germany); and the North/Norwegian Seas (Norway).

This, plus the fact that the most recent ratifications occurred less than three years ago, indicates it is potentially highly relevant to specific member states, and the CDPC considers that it should therefore be reviewed with a view to updating.

3.2 Treaties that have entered into force but may be considered to be obsolete.

As a result of this review, the CDPC proposes that the following criminal law instruments may be judged obsolete:

(130) Convention on Insider Trading (8
and;
(133) Protocol to the Convention on Insider Trading (8)

These were originally signed by 9 member states, of which only 8 ultimately ratified. It is likely that they have simply been superseded by more recent legal instruments.

3.3 Treaties which have not entered into force and which may be considered to have lost their relevance.

The following two treaties never came into force, and it is considered that they have lost their relevance:

(119) European Convention on Offences relating to Cultural Property (0)
This Convention was immediately superseded by a UN instrument. It was also problematic for many states, as it instigated the criminalisation of perpetrators even in cases where there existed no apparent intent. Of only six original signatories, none ultimately ratified it.

(172) Convention on the Protection of Environment through Criminal Law (1)
Of fourteen original signatories, only one member state has ratified this Convention. This is perhaps explained by an EU Directive that was implemented along these lines almost immediately, thus EU member states were focused more upon the EU instrument than this Convention. Furthermore, the sanctions were considered to be very harsh, as their application was envisaged even where there was no intent. Some states were also reluctant to ratify the articles relating to corporate responsibility.

4.0 Conclusion

In conclusion, whilst it may appear that some criminal legal instruments have been ratified by only very few member states, this can be for a variety of reasons: some have only recently been adopted, for example the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (8 ratifications since 2007); the Additional Protocol to the Convention on Cybercrime (18 since 2003); and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (21 since 2005).

Furthermore, some instruments appear to have specific relevance for some states, but not for others, for example the Agreement on Illicit Traffic by Sea (13 since 1995). In other cases, Conventions or Protocols addressing issues which remain widely debated by member states, but which have only been ratified by a few - such as the European Convention on the Compensation of Victims of Violent Crimes - have been listed for review: such instruments may still be highly relevant for the states party to them, and it may simply be a question of updating.

On this basis, the CDPC is of the opinion that by far the majority of criminal legal instruments are active and up-to-date: indeed only two have not yet made it into force and only three appear under-supported by member states, all of which deal with issues that have subsequently been addressed by other instruments.

Complete List of Criminal Law Instruments

		Total No. of Signatories		Total Ratifications	
CETS No.	**Title**	**Member States**	**Non Member States**	**Member States**	**Non Member States**
024	European Convention on Extradition	42	0	47	2
030	European Convention on Mutual Assistance in Criminal Matters	43	0	47	1
051	European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders	17	0	19	0
052	European Convention on the Punishment of Road Traffic Offences	15	0	5	0
070	European Convention on the International Validity of Criminal Judgments	28	0	22	0
073	European Convention on the Transfer of Proceedings in Criminal Matters	32	0	25	0
086	Additional Protocol to the European Convention on Extradition	35	0	37	1
086	Additional Protocol to the European Convention on Extradition	35	0	37	1
098	Second Additional Protocol to the European Convention on Extradition	37	0	40	1
099	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters	39	0	40	0
112	Convention on the Transfer of Sentenced Persons	39	2	46	18
116	European Convention on the Compensation of Victims of Violent Crimes	31	0	25	0
119	European Convention on Offences relating to Cultural Property	6	0	0	0
120	European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches	37	0	41	0
130	Convention on Insider Trading	9	0	8	0
133	Protocol to the Convention on Insider Trading	9	0	8	0
135	Anti-Doping Convention	40	2	46	4
141	Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	46	1	47	1

156	Agreement on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances	22	0	13	0

		Total No. of Signatories		Total Ratifications	
CETS No.	**Title**	**Member States**	**Non Member States**	**Member States**	**Non Member States**
167	Additional Protocol to the Convention on the Transfer of Sentenced Persons	36	0	35	0
172	Convention on the Protection of Environment through Criminal Law	14	0	1	0
173	Criminal Law Convention on Corruption	45	3	42	1
182	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters	35	0	19	1
185	Convention on Cybercrime	42	4	29	1
188	Additional Protocol to the Anti-Doping Convention	31	1	25	1
189	Additional Protocol to the Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems	32	2	18	0
191	Additional Protocol to the Criminal Law Convention on Corruption	35	0	25	0
197	Council of Europe Convention on Action against Trafficking in Human Beings	43	0	30	0
198	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism	32	0	21	0
201	Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse	41	0	9	0

APPENDIX XI

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 17 August 2011
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

DRAFT OPINION ON CRITERIA AND PROCEDURE FOR ACCESSION BY NON-MEMBER-STATES TO COUNCIL OF EUROPE CRIMINAL LAW CONVENTIONS

Introduction

1. At its 1095th meeting (13 October 2010), the Committee of Ministers:

"invited the CDPC to provide an opinion to the Committee of Ministers on the criteria and procedure to be followed as regards the accession of non-member states to Council of Europe conventions in the criminal law field, in order to contribute to the extension of these conventions beyond Europe."

2. The European Committee on Crime Problems (CDPC) welcomes the request by the Committee of Ministers for an opinion on such an important issue, noting in particular that the fight against serious and organised crime is increasingly becoming a global challenge involving not only states of the same region as partners. Thus, the Committee is of the opinion that the question of how to facilitate accession to certain Council of Europe conventions in the criminal law field by non-member states in order to promote adherence to these international legal instruments beyond Europe itself merits further consideration.

3. The Committee underlines that the below recommendations are not intended to cover the general matter of the accession to Council of Europe criminal law conventions by the European Union.

4. When examining the issue of the extension of criminal law conventions of the Council of Europe to States beyond Europe, it is the view of the Committee that focus should be on identifying the criminal law conventions that could meaningfully be opened for participation by non-member states rather than on identifying certain non-member states which should be invited to accede to all relevant conventions.

Criteria for differentiating between criminal law conventions

5. In this regard, the Committee is of the opinion that effective use and application of certain Council of Europe criminal law conventions which provide a legal basis for cross-border cooperation (such as e. g. the Convention on Extradition (CETS No. 24) have as a prerequisite a high degree of mutual trust, based on adherence to the European Convention on Human Rights (CETS No. 5), or similar international human rights instruments, and that the Parties share Council of Europe core values (in particular its human rights standards) and are willing to subject themselves to regular monitoring by the designated Council of Europe bodies, including the European Committee for the Prevention of Torture (CPT), and the legal control by the European Court of Human Rights or similar international bodies. This category of instruments will be referred to below as "conventions of the 1st category".

6. In the case of the conventions of the 1st category, the Committee, for both technical and political reasons, recommends that the Committee of Ministers should only invite non-member states to accede where the mutual trust, on which effective cooperation under these conventions depends, is preserved. The necessary mutual trust may indeed suffer, if non-member states adhering to lower human rights standards were to accede. As regards the procedure for accession of non-member states to conventions of the 1st category, the Committee is of the opinion that the existing procedure should remain unchanged.

7. On the other hand, the Committee considers that it could be advisable to foresee a more transparent procedure for accession by non-member-states to conventions which focus on certain matters of substantive criminal law and which set minimum standards on criminalisation of certain conduct, primarily in the area of organised crime. The main component of this more transparent procedure would be the introduction of a review by the CDPC, in cooperation with the relevant Committee of the Parties, of the ability of a non-member state to effectively apply the Council of Europe convention in question. The conventions, which the Committee has in mind mostly have limited provisions on cross-border cooperation, merely referring to applicable other instruments or arrangements on cross-border cooperation (such as e. g. the Lanzarote Convention (CETS No. 201) and the Medicrime Convention) or they do contain some specific provisions on cross-border cooperation, but also provide for conditions and safeguards (such as in Art.15 of the Convention on Cybercrime (CETS No. 185). The Committee believes that larger adherence to those conventions beyond Europe may indeed substantially increase their effectiveness as their main objective is to more efficiently fight transnational (organised) criminal groups. This category of instruments will be referred to below as "conventions of the 2nd category". A list of conventions of the 1st and 2nd categories is appended to this opinion.

Technical criteria

8. One of the main obstacles to the promotion of Council of Europe legal instruments beyond Europe is a perceived lack of transparency as to the basis on which the Committee of Ministers and the Parties decide on a request for accession to such instruments.

9. In order to facilitate accession by non-member states to certain already existing Council of Europe criminal law instruments (conventions of the 2nd category), the Committee recommends to provide for a more transparent review process by developing a set of technical minimum criteria, which any non-member state requesting accession to such conventions and instruments must fulfill.

10. Based on practical experience, the Committee recommends that the following technical criteria for reviewing a request for accession to an already existing Council of Europe criminal law instrument are applied:

a) The requesting non-member state has the necessary legal framework, including adherence to relevant international human rights' standards, in place to apply the minimum standards of the instrument in question or has expressed its firm commitment to have in place such a legal framework no later than at the time of ratification/accession. Indicators may include, for example: the enactment of legal provisions and/or administrative guidelines implementing the instrument in question in the domestic law.

b) The requesting non-member state has expressed its firm commitment to put in place the mechanisms (e. g. efficient administrative infrastructures, training of staff) necessary to enforce the instrument in question and co-operate with other Parties to the widest extent possible. Indicators may include, for example:

- the existence of efficient administrative infrastructures;
- the availability of trained staff; or
- the requesting non-member state has indicated its willingness to work with other Parties on a bilateral basis and/or the Council of Europe on training of its staff.

c) The requesting non-member state is committed to participate actively in the Committee of the Parties of the instrument in question, and thus to realise the aims of that instrument. Indicators may include, for example:

- the requesting non-member state has already an established record of co-operation relevant for the subject matter of the instrument in question under bilateral or international treaties and agreements; or
- the requesting non-member state has received or will be able to receive technical assistance from the Council of Europe, and/or from other Parties on a bilateral basis, with satisfying results.

A more transparent procedure

11. The Committee notes that the conventions of the Council of Europe usually contain specific provisions governing the procedure for accession by non-member states after the entry into force of the instrument in question. The recently adopted Medicrime Convention, as a first, even allows for non-member states, upon invitation by the Committee of Ministers, to sign and ratify that Convention from the outset.

12. Under the current procedure, the Committee of Ministers is not systematically provided with technical reviews of the capabilities of non-member states requesting accession to Council of Europe criminal law instruments. The Committee proposes a new procedure according to which the Committee of Ministers will have to take into account the outcome of a technical review by the competent steering committee and the relevant committees of the Parties when deciding on a request for accession by a non-member state.

13. In order to make the best possible use of the expertise available to the Council of Europe, the review of whether the aforementioned technical criteria are fulfilled by a non-member state could be carried out under the auspices of the Committee of the Parties of the criminal law instrument in question and, through the CDPC, be submitted to the Committee of Ministers and the Parties for the final decision on accession in accordance with the procedures prescribed by that instrument.

14. In terms of facilitating the existing procedure for processing requests for accession by non-member states to existing instruments of the 2nd category, the Committee recommends the following:

15. When approached by a non-member state with a request to be invited to accede to a convention of the 2nd category, the Secretary General shall simultaneously inform the Committee of Ministers, the CDPC and the Committee of the Parties of the instrument in question about the request.

16. The Committee of Ministers shall task the Committee of the Parties of the instrument in question, in close cooperation with the CDPC, to provide it with a review according to the criteria set out above.

17. The Secretariat shall provide the Committee of the Parties of the instrument in question and the CDPC with all information relevant for the review of the request for accession and seek additional information from the requesting state, if necessary in the course of the review.

18. The Committee of the Parties of the instrument in question shall, through the CDPC, provide the Committee of Ministers with the results of its review as soon as possible, and not later than three months after the receipt of the request from a non-member state to be invited to accede, or provide an explanation why the deadline could not be met.

19. Where the Committee of the Parties, and the CDPC respectively, unanimously agree on the review of the request for accession of a non-member state, they will recommend the Committee of Ministers to invite this non-member state to accede to the instrument in question.

20. Where an agreement could not be reached in the Committee of the Parties of the instrument in question and/or the CDPC on the review of the request for accession of a non-member state, the opinion shall set out the views of the majority, as well as the dissenting views.

21. The review by the Committee of the Parties of the instrument in question and the CDPC should always be presented in a general form without any reference to the position taken by individual Parties or member states' delegations to the CDPC.

22. The request by the non-member state will be examined, in the light of the review by the Committee of the Parties of the instrument in question and the CDPC, by the Committee of Ministers or, where appropriate, by one of its rapporteur groups. Once there is agreement in within the Committee of Ministers to give a positive reply to a request, the decision to invite the non-member state in question shall become definitive. An invitation to accede to the instrument in question will be sent to the state concerned by the Secretariat General.

23. As stated above, the main purpose of introducing a mandatory hearing of the CDPC and relevant committees of the Parties as regards the technical capabilities of the requesting non-member state is to provide more certainty and clarity to the accession procedure for non-member states, in comparison to the existing procedure.

Future Council of Europe criminal law instruments

24. The Committee takes note of the ongoing discussions within the Committee of Ministers to examine ways to extend certain Council of Europe criminal law conventions beyond Europe, in particular by opening them for participation by non-member states.

25. As regards future Council of Europe criminal law instruments of the 2nd category which the Committee of Ministers may wish to promote beyond Europe, the Committee considers that a new set of standard provisions aiming at significantly facilitating the accession by non-member states should be examined and prepared in order to be included in those future instruments.

26. Moreover, the feasibility of introducing provisions on the mandatory financial contribution of non-member states to the activities related to the instruments to which they are Parties, including how they could be involved more directly in the relevant decision-making process, should also be examined and proposals be prepared. In the view of the Committee

such provisions may lead to a heightened interest by non-member states in acceding to Council of Europe instruments in the field of criminal law.

27. Finally, the Committee recommends that when in the future the Committee of Ministers may decide to adopt terms of reference for committees tasked with drafting new criminal law instruments of the 2nd category, which should be promoted beyond Europe, the Council of Europe should take all necessary measures to inform non-member states about the upcoming negotiations, including by liaising with the United Nations at global level and other relevant inter-governmental organisations at regional level.

28. The Committee remains available to work on new proposals with regard to the aforesaid new set of standard provisions for future Council of Europe criminal law instruments of the 2nd category.

ANNEX

Council of Europe criminal law instruments of the 1st category:

CETS No 24: European Convention on Extradition*

CETS No 30: European Convention on Mutual Assistance in Criminal Matters*

CETS No 51: European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders

CETS No 70: European Convention on the International Validity of Criminal Judgments

CETS No 73: European Convention on the Transfer of Proceedings in Criminal Matters

CETS No 86: Additional Protocol to the European Convention on Extradition*

CETS No 98: Second Additional Protocol to the European Convention on Extradition*

CETS No 99: Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

CETS No 112: Convention on the Transfer of Sentenced Persons

CETS No 141: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

CETS No 167: Additional Protocol to the Convention on the Transfer of Sentenced Persons

CETS No 182: Second Additional protocol to the European Convention on Mutual Assistance in Criminal Matters*

CETS No 209: Third Additional Protocol to the European Convention on Extradition*

*(Treaties marked with an * also have non-member states as Parties (Israel, Korea, South Africa))*

Council of Europe criminal law instruments of the 2nd category:

CETS No 52: European Convention on the Punishment of Road Traffic Offences

CETS No 116: European Convention on the Compensation of Victims of Violent Crimes

CETS No 119: European Convention on Offences relating to Cultural Property

CETS No 130: Convention on Insider Trading

CETS No 133: Protocol to the Convention on Insider Trading

CETS No 172: Convention on the protection of Environment through Criminal Law

CETS No 173: Criminal Law Convention on Corruption

CETS No 185: Convention on Cybercrime

CETS No 189: Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of a Racist and Xenophobic Nature committed through Computer Systems

CETS No 191: Additional Protocol to the Criminal Law Convention on Corruption

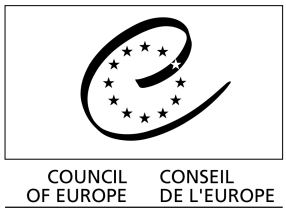
CETS No 197: Council of Europe Convention on Action against Trafficking in Human Beings

CETS No 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

CETS No 210: Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

(CETS No 21X: Council of Europe Convention on Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health)

APPENDIX XII



Web site: http://www.coe.int/T-CY

Strasbourg, 30 May 2011 T-CY (2011) 3 E

Draft Opinion of the Cybercrime Convention Committee (T-CY)

on the criteria and procedure to be followed, in conformity with Article 37 of the Convention, as regards accession of non-members of the Council of Europe to the Budapest Convention

Document prepared by the Secretariat

Draft Opinion of the Cybercrime Convention Committee (T-CY) on the criteria and procedure to be followed, in conformity with Article 37 of the Convention, as regards accession of non-members of the Council of Europe to the Budapest Convention

The Committee of Ministers (Deputies), at its 1095th meeting on 13 October 2010, decided:

"to mandate the T-CY, in close co-operation with the European Committee on Crime Problems (CDPC), to provide advice to the Committee of Ministers on the criteria and procedure to be followed, in conformity with Article 37 of the Convention, as regards the accession of non-members of the Council of Europe to the Budapest Convention."

Given the potential global application of the Convention, the T-CY considers the issue of how best to review and process requests for accession by non-member states to be of the highest importance, and consequently the T-CY welcomes the above invitation from the Committee of Ministers.

The T-CY is of the opinion, that the broadest possible implementation of the Budapest Convention, including accession by non-member states, will serve the aim of effective international cooperation against cybercrime. Accession by countries meeting the minimum requirements of the Convention should therefore be facilitated. The purpose of the criteria and procedure proposed below is to make the accession process more transparent and predictable, and to encourage States that are committed to implement the Budapest Convention and to cooperate against cybercrime to seek accession.

The T-CY sees it as its primary task to provide the Committee of Ministers and the Parties to the Convention with a technical review by experts in the field of combating cybercrime regarding the ability of a non-member state requesting accession to fully co-operate with the other Parties under the Budapest Convention, including whether the aims of the Convention would be served by the requesting non-member state acceding to it.

On the basis of such a technical review, the Committee of Ministers can then complete the procedure, in consultation with the Parties, foreseen by Article 37 of the Convention.

Criteria:

The T-CY, having consulted the European Committee on Crime Problems (CDPC), is of the opinion that a state that meets the minimum requirements of the Budapest Convention and that is committed to cooperate with the other Parties to this treaty should be invited to accede. The review as to whether this is the case will be based on the following criteria:

- The requesting non-member state has the necessary legal framework in place to apply the minimum standards of the Convention or has expressed its firm commitment to

have in place such a legal framework no later than at the time of accession. Indicators may include, for example:

  - the enactment of legal provisions and/or administrative guidelines implementing the Convention in the domestic law of the requesting state.

- The requesting non-member state ensures in its domestic law that the procedural law powers and procedures provided for in Section 2 of Chapter II of the Budapest Convention are subject to safeguards and conditions which shall provide for the adequate protection of human rights and liberties as stipulated by Article 15 of the Convention.

- The requesting non-member state has expressed its firm commitment to put in place the mechanisms (e. g. efficient administrative infrastructures, training of staff, ability to reply to requests for assistance from other Parties on a 24/7 basis, cf. Article 35 of the Convention) necessary to enforce the Convention and co-operate with other Parties to the widest extent possible. Indicators may include, for example:

  - the existence of efficient administrative infrastructures;
  - the availability of trained staff; or
  - the requesting non-member state has indicated its willingness to work with other Parties on a bilateral basis and/or the Council of Europe on training of its staff.

- The requesting non-member state is committed to participate actively in the Consultations of the Parties in line with Article 46 of the Convention, and thus to realise the aims of the Convention. Indicators may include, for example:

  - the commitment to contribute actively to the international cooperation under the Convention is expressed firmly in the request for accession; or
  - the requesting non-member state has already an established record of co-operation relevant for the fight against cybercrime with one or more Parties to the Convention under bilateral or international treaties and agreements; or
  - the requesting non-member state has received technical assistance from the Council of Europe and/or from other Parties on a bilateral basis, with satisfying results.

Procedure:

In terms of procedure, the T-CY recommends the following:

When approached by a non-member state with a request to be invited to accede to the Budapest Convention, the Secretary General shall simultaneously inform the Committee of Ministers and the T-CY, consisting of the representatives of the Parties to the Convention, about the request.

The Committee of Ministers shall task the T-CY to provide it with a review according to the criteria set out above whenever such a request is received, prior to issuing an invitation to a non-member state to accede to the Convention in accordance with the procedure laid down in Article 37.

The Secretariat shall provide the T-CY with all information relevant for the review of the request for accession and seek additional information from the requesting state, if necessary in the course of the review.

The T-CY shall provide the Committee of Ministers with the results of its review as soon as possible, and not later than three months after the receipt of the request from a non-member state to be invited to accede, or provide an explanation why the deadline could not be met.

Where the T-CY unanimously agrees on the review of the request for accession of a non-member state, it will recommend the Committee of Ministers to invite this non-member state to accede to the Convention.

Where an agreement could not be reached in the T-CY on the review of the request for accession of a non-member state, the opinion of the T-CY shall set out the views of the majority, as well as the dissenting views.

The review by the T-CY should always be presented in a general form without any reference to the position taken by individual Parties or member states.

The T-CY recommends that the aforesaid list of criteria is made available through the Secretariat to non-member states requesting to be invited to accede in order to improve the level of transparency as regards the review of requests for accession.

The T-CY, on the initiative of one or more of the Parties, may carry out a review of a non-member state without having received a request to be invited to accede. Should this review be positive, the T-CY may invite the Secretary General to encourage the non-member state in question to seek accession to the Budapest Convention.

The request by the non-member state will be examined, in the light of the T-CY review, by the Committee of Ministers or, where appropriate, by one of its rapporteur groups. Once there is agreement in principle within the Committee of Ministers to give a positive reply to a request, the Committee of Ministers shall instruct the Secretariat to consult the other non-member states which are Parties to the Convention. Following this consultation, and if there are no objections, the decision to invite the non-member state in question shall become definitive. An invitation to accede to the Budapest Convention will be sent to the state concerned by the Secretariat General.

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