Strategies for improving prisoners' rights and prison conditions in Europe

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Summary and Recommendations

The Council of Europe has requested me to produce a report examining advantages and drawbacks of a Council of Europe binding legal instrument on prisons as compared to other options, such as systemising and establishing a hierarchy between all relevant existing Council of Europe standards and having it endorsed by the Committee of Ministers, or making better use of the current system. What follows is a summary of the Report and the key recommendations.

The current system

The Report reviews "the current system", and concludes that there have been major developments in terms of the international guidance to European states on prison matters. Most of this guidance comes from the organs of the Council of Europe: The European Court of Human Rights (ECtHR) gives judgments on a range of prison issues, and the Committee for the Prevention of Torture (CPT) reports to member states on how conditions of detention should be improved to avoid them remaining or becoming inhuman or degrading forms of treatment. Both of these have the backing of the treaties, the European Convention on Human Rights (ECHR) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) respectively, to which the member states have acceded and which oblige them to respond. Neither treaty however, deals directly with the full range of issues raised by imprisonment.

In contrast, the Recommendations of the Committee of Ministers of the Council of Europe in respect of imprisonment do cover the full range of issues. The 2006 European Prison Rules provide a general framework, while a growing number of specialist recommendations deal in more detail with a range of issues such as the medical treatment of prisoners. The Rules and Recommendations are not directly binding on member states.

In practice however, the 2006 European Prison Rules (EPR) and the related Recommendations are considerably strengthened by the reliance that the ECtHR and the CPT place on their formulations of what is required. Similarly the Standards set by the CPT are referred to by the CPT and also taken into account when new recommendations are developed by the Committee of Ministers.

In addition, the European Union has played an important additional role in various programmes to improve conditions imprisonment in Europe (both within and outside the EU) by supporting the implementation of Council of Europe based standards. The United Nations has also developed standards of its own. These are not so influential in Europe, although the recent ratification of the Optional Protocol to the Convention against Torture (OPCAT) by many European countries may contribute to United Nations norms and standards playing a greater role in the future.

The overall conclusion on the existing position is that, while there is a considerable and growing amount of sound international guidance on prison matters coming from the Council of Europe in particular, the legal status and practical implementation of such guidance varies and there is room for further reform. The Report considers various ways in which such reforms can be brought about.

A binding legal instrument?

The Report notes previous attempts to introduce a binding legal instrument on prisons and that such initiatives have been rejected in the past. However, strong arguments continue to be made for such an instrument and therefore the Report reconsiders the arguments for and against it. The Report does so and concludes that a binding legal instrument that deals specifically with prisons would be valuable, but

that a way should be found of enforcing it that does not duplicate mechanisms that operate to enforce existing general instruments.

One way in which this could be done is by adding an additional protocol to the ECHR. Once such a protocol has been ratified by a sufficient number of members, it would be enforced by the ECtHR. It would thus have the advantage of being binding without there being a need for a new enforcement agency having to be created. A new protocol could set a clearer framework for the development of prison law than the one that is implicit in the jurisprudence of the ECtHR as it interprets the general provisions of the ECHR. The same framework would be of use to CPT, although of course it would not be bound by it directly. The protocol would also form a useful apex for the EPR and other Recommendations and Resolutions on penal matters, which would by applied by the Court in interpreting it. Conversely, practitioners who use the EPR and other instruments would refer to the protocol to determine the principles that should be given priority.

Recommendation 1: *Accordingly, the Report recommends the addition to the ECHR of a new protocol on prisons*. *It also makes preliminary suggestions of what such a protocol should include to enable it effectively to perform the various functions suggested above.*

Systemising and establishing a hierarchy between all relevant existing Council of Europe standards?

The Report also considers the advantages and disadvantages of systematising the existing Recommendations and Resolutions on prison matters of the Committee of Ministers. It concludes that there are advantages of doing so by combining them in a new omnibus recommendation. Such an omnibus recommendation could declare some earlier recommendations and resolutions redundant in whole or in part. It could also re-enact the existing Recommendations as a series of linked appendices. If necessary, terminological changes could be made to them to ensure that the whole becomes more coherent, but a reconsideration is not proposed of the substance of the current Recommendations that are retained. The advantages of this reform exist independently of whether a new protocol on prisons is added to the ECHR. However, the Report concludes that there are no advantages in establishing an internal

hierarchy amongst the various Recommendations that are retained. It is therefore not necessary to consider this aspect formally in a new omnibus recommendation.

Recommendation 2: *Accordingly the Report recommends that consideration be given to a new omnibus recommendation from the Committee of Ministers that would formally systematise all existing recommendations and resolutions on penological matters.* More detail on how this should be done is contained in the detail of the Report below.

Making better use of the current system?

The Report reconsiders the range of activities that are used to propagate an approach to imprisonment contained in current European instruments. It notes that they are impressive, but that they could be better co-ordinated and that more emphasis could be placed on key principles. In particular, the European Prison Rules should be kept in mind in all instances. Improvements could be made that are independent of the recommendations made above that an optional protocol on prisoners' rights be added to the ECHR and that the existing Recommendations and Resolutions of the Council of Europe be systematised.

Recommendation 3 (a) *Accordingly, the Report recommends as a first step that the Council of Europe and the European Union develop a joint plan for the improvement of prison conditions throughout Europe and co-ordinate their activities in this regard.*

Recommendation 3(b): *The Report further recommends that all intervention programmes supported by the Council of Europe and the European Union be required explicitly to follow the standards set in the European Prison Rules when undertaking a specific project. (A similar requirement should be set with reference to other existing Recommendations).*

Report

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Chapter 1

The current impact of the Council of Europe and other international institutions on imprisonment in Europe

1. Various organs of the Council of Europe impact on the use that is made of imprisonment and on prison conditions in Europe. In this regard the European Court of Human Rights (ECtHR), the Committee for the Prevention of Torture (CPT) and the recommendations of the Committee of Ministers have all played substantive roles. Prison conditions are also a concern of the Commissioner on Human Rights and the Parliamentary Assembly. In addition, various ad hoc projects of prison reform have been supported by the Council of Europe, often with outside funding. The European Union has also supported such work. The United Nations, too, has added a further international dimension to various aspects of imprisonment in Europe. This chapter gives an overview of these developments as a basis for the rest of this Report

The European Court of Human Rights

2. In recent years the ECtHR has developed into a major source of European prison law. It has pronounced on a wide range of issues relating to imprisonment. In particular, in its recent decisions on prisoners' rights, in the cases of *Hirst v United Kingdom (no 2)* (6 October 2005) and *Dickson v United Kingdom* (4 December 2007) the Grand Chamber of the ECtHR has

engaged in defining the overall objectives of the implementation of imprisonment. This is a momentous development, for it has given the Court some important tools with which to evaluate national prison legislation and to judge the acts and omissions of the prison authorities in providing prisoners with opportunities to exercise their rights in order to facilitate their eventual reintegration into society.

3. The ECtHR has obvious advantages as an organ for pronouncing upon and developing European prison law. All European states, except Belarus, have ratified the European Convention on Human Rights (ECHR), which the ECtHR interprets, and are bound in international law to apply it. The pronouncements of the Court are eagerly awaited. They have considerable prestige and are commented on throughout Europe. Although there are legal variations in the extent to which the national prison law is directly determined by the decisions of the ECtHR, in practice these decisions have a significant impact in all jurisdictions and not only in those countries whose prison laws or policies have been challenged in individual cases.

4. In spite of these strengths, the ECtHR is hamstrung in developing prison law by the structure of the ECHR. As the ECHR does not deal directly with prisons, the Court inevitably has to proceed by interpreting the general rights contained in the Convention and then applying them to prisons. Although a clearer notion of the human rights that prisoners retain and a better understanding of the objectives of imprisonment have assisted in interpreting these general rights, problems remain. Some of these concern the 'margin of appreciation', which the Court has held it is bound to grant states when deciding whether rights that are qualified by the ECHR should be recognized in a particular case. This concept is not contained in the text of the ECHR but has been developed by the Court primarily in the context of provisions of the Convention that mention limitations of rights. The concept has been important in the interpretation of Articles 8 to 11, where the Convention spells out grounds of limitation, as well as in a number of other instances, such as the right to vote that is derived from Article 3 of Protocol 1 to the ECHR, in which

it has been accepted that a right may be restricted if similar grounds for limitation are present.

5. Fortunately, the ECtHR has not consistently refused to intervene in prison matters where there is no consensus across Europe on what should be done. In the *Hirst* case, for example, dissenting judges were left protesting that the question of whether sentenced prisoners could vote was one on which there was no consensus across Europe and therefore, in respect of prisoners, the Court could not rule against any form of derogation from the right to vote. However, the majorities in both the Chamber that initially heard the matter and the Grand Chamber that gave the final decision were prepared to go beyond this lack of consensus and analyse the scope of the restriction. While recognizing that countries had a wide margin of appreciation in this area, they came to the conclusion, nevertheless, that "such a general, automatic and indiscriminate restriction on a vitally important Convention right", in this instance the right of sentenced prisoners to vote, "must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be as being incompatible with Art. 3 of Protocol No. 1" of the ECHR (§ 82).

6. The decision of the Grand Chamber in *Hirst v United Kingdom (no 2)* illustrates that the ECtHR, when it recognizes squarely that an issue raises a "vitally important Convention right" of prisoners, may intervene, even in cases where it could decline to do so by relying on a margin of appreciation based on a lack of consensus. Whether the Court will intervene, however, will depend on the ability of prisoner-complainants to persuade it that their rights are vitally important in this sense. This in turn will depend on the overall approach to imprisonment adopted by the Court. The point remains that the refusal to analyse prison cases closely in some instances where there is no consensus amongst states on policy, makes the Court a potentially unpredictable ally for the development of prison law and policy. Fortunately, the overall tendency in recent years has been towards the ever greater recognition of prisoners' rights in instances where the provisions on which the Court has relied contain internal limitations on the rights they protect.

7. The ECtHR has also had to make important interpretive choices when applying to prison matters articles of the ECHR that do not contain internal limitations. Article 5, for example, offers opportunities for an interpretation that applies the principle that imprisonment should only be used as a last resort, although that interpretation of this Article has not been developed fully.(Snacken 2006)

8. The prohibition of torture and inhuman or degrading treatment or punishment in Article 3 has been of great significance in the development of prison law. In seminal cases such as *Peers v Greece (*19 April 2001) and *Kalashnikov v Russia* (15 July 2002) the ECtHR has extended the scope of Article 3 in prison matters by holding that mistreatment did not have to be intentional for it to be regarded as "inhuman or degrading" and that overcrowding in prisons could in itself be degrading to the prisoners concerned.

9. These important developments should not draw attention away from the fact that the Court has continued to accept that imprisonment inevitably leads to a restriction of many rights of prisoners, and to emphasise that conditions in prison must attain a certain level of severity before Article 3 becomes applicable. The evolutionary reassessment to which this 'minimum level of severity' has been subject is a positive development. Nevertheless, its very existence underlines that the Court must make important evaluative judgments about the underlying standard. In practice this standard too may be influenced by what is regarded as acceptable in European countries. In the early Article 3 case of *Tyrer v United Kingdom (*25 April 1978 § 31) the ECtHR held that it could not "but be influenced by the developments and commonly acceptable standards in the penal policy of member states of the Council of Europe". While such a comparative perspective may work to the advantage of a complainant, the danger is that, where a complainant is seeking to argue that a practice is inhuman or degrading notwithstanding the fact that it is commonly followed in some countries, this may work to the complainant's disadvantage. It is up to the Court to recognize that the ECHR is a "living instrument" and to take full note of what the Supreme Court of the

USA has called “evolving standards of decency that mark the progress of a maturing society” (*Trop v Dulles* 356 US 86 (1958) at 100). Fortunately, in interpreting Article 3 of the ECHR in *Selmouni v France* (28 July 1999) and applying it to whether a seriously ill prisoner who required hospital treatment should be held in prison, the Grand Chamber of the ECtHR took the view that “the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies” (§ 101). The challenge for the Court will continue to be to assert this noble sentiment in individual cases where national prison policies and practices differ.

The Committee for the Prevention of Torture (CPT)

10. In contrast to the careful development of prison law by the ECtHR, the CPT since its inception in 1987 has been a forceful agent for the adoption of a human rights approach to imprisonment in Europe. The breadth of its contribution is all the more impressive because Article 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), under which the CPT operates, mandates it to adopt “non-judicial means of a preventive character based on visits”, and thus to “examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment”. The CPT has used both its annual reports and the reports of its visits to individual states to convey, in a highly effective manner, its views on many aspects of imprisonment. It has not limited itself to determining whether prisoners are being ill-treated deliberately. As the CPT explained in its *2nd General Report*:

> Of course, [the CPT] pays special attention to any allegations of ill-treatment of prisoners by staff. However, all aspects of the conditions of detention in a prison are of relevance to the CPT's mandate. Ill-treatment can take numerous forms, many of which may not be deliberate but rather the result of organisational failings or inadequate resources. The

overall quality of life in an establishment is therefore of considerable importance to the CPT. That quality of life will depend to a very large extent upon the activities offered to prisoners and the general state of relations between prisoners and staff (CPT *2nd General Report* [CPT/Inf (92) 3] § 44).

11. A further strength of the CPT is that it reaches the policy recommendations expressed in its General Reports inductively, by generalizing from the large information base provided by the findings of its country reports. The validity of the findings contained in these country reports is enhanced by the involvement of independent members and experts, who have the advantage of unrestricted access, in the fact-finding process. Moreover, they bring into the process their own multidisciplinary expertise: many of the members of the CPT and their expert advisers are specialists with backgrounds in medicine, human rights or penology.

12. The fact remains that the CPT, like the ECtHR, is not charged with systematizing prison law and policy but it has used the flexibility of its mandate to do so where possible. The *CPT Standards*, which the CPT has culled from its General Reports, offer a thematic overview of the CPT standards and recommendations developed during the visits and the country reports. All country reports have to be approved, not only by the delegation who performed the visit, but also by the whole Committee, in order to guarantee consistency between country reports. At the same time, its inductive approach allows for a dynamic development of the standards following new realities found during the visits. This way of working means that the standards are not organized as a code. However, scholars[1] who have conducted careful analyses of both the CPT's more abstract General Reports and the factual richness of the country reports have compensated for this by

[1] M Evans and R Morgan *Preventing Torture: A Study of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press, 1999); R Morgan and M Evans *Combating Torture in Europe* (Strasbourg: Council of Europe, 2001); J Murdoch *The Treatment of Prisoners: European Standards* (Strasbourg; Council of Europe, 2006).

systematizing the views and recommendations that can be derived from the CPT's various published sources.

13. The specifically non-judicial nature of the CPT's mandate means that it cannot directly develop the law in the same way as the ECtHR has done. On the other hand, its findings are given considerable weight by the fact that it was set up by a Convention to which virtually all European countries are parties, and also by the extensive use that has been made of its findings by the ECtHR. Moreover, the principle of co-operation laid down in the Convention is not limited to steps being taken by the member states to facilitate the task of a visiting delegation, "it also requires that decisive action be taken to improve the situation in the light of the Committee's key recommendations." (CPT *Lithuania Visit 2004* [CPT/Inf (2006) 10] § 6). The CPT has thus stressed that in the absence of genuine efforts made to improve the situation, it will be obliged to consider having recourse to the public statement provided for by Article 10 (2) of the Convention (Ibid).

14. It is at the policy level, however, that the CPT has played its major role, for its orientation towards the future means that it focuses its recommendations on concrete improvements which invariably contain policy elements. The flexibility of the CPT's manner of working gives it the ability to react quickly to new issues that may arise. Thus, for example, the increasing use of life imprisonment in Eastern Europe has led to new problems to which the CPT has responded by visiting institutions where such prisoners are held and making recommendations for improvements. These have included recommendations about the release of lifers, which go beyond the immediate issues facing these prisoners, but which none the less are highly relevant to overall policy on this form of prison sentence.

Council of Europe recommendations

15. The recommendations (formerly called resolutions) on penal matters of the Committee of Ministers of the Council of Europe, do not have the status of the judgments of the ECtHR or the reports of the CPT. However, they have

the advantage that they are drafted specifically to give clear guidance to national governments on a range of topics relating to imprisonment.

16. The recommendations reflect the political consensus of all 47 member states at the Committee of Ministers' level, thus marking the importance of the issues with which they deal and of the steps they suggest be taken at European and national level. Still the Reccommendations have the weakness that they are officially regarded as "'non binding' texts."[2] However, this does not mean that they do not have an increasing impact on policy and, indirectly through their application by the ECtHR, on European case law.

17. There is considerable political support at the European level for the 2006 EPR in particular as perhaps the most prominent of the recommendations in the prison field and the one that most closely resembles a code. This view is encouraged by various European organs. For example, the European Commissioner for Human Rights, for whom "prison conditions" was a priority area in 2006, paid considerable attention to the new EPR. (Annual Activity Report 2006 by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe Strasbourg, CommDH (2007)3 (11 April 2007) 25-26). In his Annual Activity Report for 2006 to the Committee of Ministers and the Parliamentary Assembly he contrasted the requirement of the EPR that all detention shall be managed so as to facilitate the reintegration of the prisoners into free society, with the reality that too little was being done to rehabilitate and reintegrate. He also noted that the EPR lay down that conditions which infringe on the human rights of prisoners cannot be justified because of a lack of resources and that more should be done to create alternatives to imprisonment. The Committee of Ministers too has sought to add to the status of the 2006 EPR by encouraging the various initiatives that had been taken to publicise the EPR within Europe and to ensure their implementation at the national level (Reply adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers'

[2] See the foreword by Philippe Boillat, Director-General of Human Rights and Legal Affairs of the Council of Europe to the *Compendium of Conventions, Recommendations and Resolutions relating to Penitentiary Questions* (Strasbourg: Council of Europe, 2007) 9.

Deputies to the Parliamentary Assembly Recommendation 1747 (2006) on the European Prisons Charter (CM/AS (2006) Rec1747 final 29 September 2006)).

18. Individual European states and even the citizens of these states have engaged with the European Prison Rules in various ways. The Rules have been translated into at least 17 European languages in addition to the original English and French. More states have indicated that the text is available in their national language. Nor are the translated Rules being left on the shelves to gather dust. The majority of the states who replied to a request from the Secretariat for information on the implementation of the European Prison Rules in their countries indicated that the 2006 European Prison Rules form an important part of the training of prison officers in their countries (European Committee on Crime Problems (CDPC) *Replies Received from the CDPC Delegations following the Council of Europe Secretariat's Request for Information regarding the Translation and Implementation of the European Prison Rules* 19 June 2007 cdpc/docs 2007/cdpc (2007) 14rev2 – e).

19. The legal impact of the 2006 EPR at the national level is not being ignored either. In a number of countries that have recently adopted new prison legislation, the 2006 European Prison Rules have played an important part. In Romania, France and Finland, for example, the European Prison Rules form the basis for the new legislation on the execution of penal sanctions and measures ordered by judicial bodies. In Bosnia and Herzegovina too, a proposal for new prison legislation put forward by Council of Europe experts takes the European Prison Rules as their point of departure.

20. An interesting illustration of the increasing sophistication with which the European Prison Rules are being considered at a national level comes from Germany. In 2006 the German Federal Constitutional Court, which traditionally has not placed much emphasis on European human rights standards, preferring to focus on those in the German *Grundgesetz*, warned that the failure by the German legislator to take account of appropriate human rights standards of the Council of Europe might lead to a negative

finding that insufficient attention had been paid to the constitutional requirements of taking into account current knowledge and giving appropriate weight to the interests of prisoners (BVerfG – 2BvR 1673/04, 31 May 2006). The positive result of this intervention by the German Court has been that new legislation on detention has been drafted with instruments such as the 2006 EPR directly in mind as a standard against which each new provision must be weighed.[3] The resulting legislation is likely to be more protective of prisoners' rights than would otherwise have been the case.

21. This openness to the EPR and other European recommendations is widespread. Their status was thoroughly analysed by the Federal Court of Switzerland as far back as 1992 (BGE 118 Ia 64, at 70, 12 February 1992). The Swiss Court noted that, while rights and duties cannot be deduced directly from the recommendations of the Council of Europe, they are still of considerable significance. It explained that for the legislator and prison authorities they were guidelines as to how prisons should be administered appropriately. The Court declared that it would also take them into account in the concretization of the constitutional guarantees of the Federal Swiss Constitution, as well as the European Convention on Human Rights. These European recommendations contained, the Court continued, important guidelines for a modern practice of implementing criminal punishment that would guarantee the fundamental right of the recognition of human dignity and the freedoms that the Swiss Constitution allowed prisoners to continue to enjoy.

However, the significance of the recommendations of the Council of Europe is not recognized universally at the national level. In some Western European countries in particular the official line is to take a legalistic view of what these require. Professor Gerard de Jonge has commented that, while judgments of the ECtHR holding the Netherlands in contravention of the ECHR have led to changes, government ministers continue to disregard the EPR and other recommendations, emphasising the "soft law" status of the recommendations

[3] F Dünkel and D van Zyl Smit "The implementation of youth imprisonment and constitutional law in Germany" (2007) 9 *Punishment and Society* 347-369.

to which they themselves were party.[4] The result has been that their overall impact has been modest. A similar approach towards European prison policy recommendations is displayed by officials in the UK.[5]

Mutual reinforcement

22. The "soft law" status of the recommendations of the Council of Europe is, however, not as clear as it may appear. The reports of the CPT and the jurisprudence of the ECtHR, are giving increasing recognition to these recommendations and thus reinforcing their significance.

23. The ECtHR increasingly is quoting and relying on the recommendations of the Council of Europe on prison matters. Thus, for example, the decision of the Grand Chamber of the ECtHR in *Ramirez Sanchez v France* (4 July 2006 § 85).handed down on 4 July 2006, less than six months after the European Prison Rules were adopted, quoted no fewer than 44 individual provisions of the 2006 EPR. Detailed attention has also been paid to the EPR in other recent major prison law decisions of the Grand Chamber, including *Kafkaris v Cyprus* (12 February 2008 § 73).

24. Other recommendations of the Council of Europe have been treated equally fully. In *Léger v France (*11 April 2006 § 70). for example, the Court not only refers extensively to the 2006 EPR but also to two other major recent recommendations adopted in 2003, namely Recommendation Rec(2003) 22 on Conditional Release (Parole) and on the Recommendation Rec(2003) 23

[4] G de Jonge "European detention standards" in M Moerings and M Boone (eds) *Dutch Prisons* (The Hague: BJU Legal Publishers, 2007) 282-296.

[5] See the response of the UK government to a request from the Council of Europe for information on the implementation of the EPR:

> The position of the EPR within England and Wales is different to the position of other nations as the EPR are mirrored by internal prison rules which are included in staff training whereas EPR are not. It has never been the position that the European Prison Rules, UN Standard Minimum Rules or any of its international obligations are identified within its own domestic legislation or included in its staff training, but rather its own domestic legislation covers all its international obligations. It is therefore, not intended that a major launch is undertaken of the EPR, however, the policy leads of the Prison Service are aware of the need to ensure that their policies conform to international standards and the responsibility of insuring Prison Rules continue to reflect its obligations (19 June 2007 cdpc/docs 2007/cdpc (2007) 14rev2 – e.).

on Management by Prison Administrations of Life Sentence and other Long-term Prisoners. It relied on the EPR and these recommendations for recognizing as legitimate a policy of progressive social reintegration of persons sentenced to imprisonment.

25. This approach is taken further by the Grand Chamber of the ECtHR in *Dickson v United Kingdom* (4 December 2007). In this important decision given in December 2007 the Court develops its most comprehensive statement hitherto of the objectives of imprisonment. The key objective of the implementation of the sentence of imprisonment is "re-socialisation through personal responsibility" (§ 28). The Grand Chamber describes it as developing "more recently and more positively" out of an earlier, more restrictive notion of rehabilitation, from what it calls the "Council of Europe's legal instruments" (Ibid). With apparent approval it quotes, in considerable detail as the instruments that underpinned this development, the provisions of the 2006 European Rules and the other two 2003 recommendations, which in different words support this objective.

26. The CPT too refers to the new 2006 European Prison Rules with growing frequency in order to underline a range of specific policies it wishes to see instituted. These range from designing regimes for lifers that allow for the possibility of their eventual release (CPT *Hungary Visit 2007* [CPT/Inf (2007) 24] § 33), more visits for both unconvicted and sentenced prisoners (CPT *Georgia Visit 2007* [CPT/Inf (2007) 42] § 89), to ensuring that doctors do not certify prisoners as fit for punishment (CPT *Armenia Visit 2006* [CPT/Inf (2007) 47] § 96). The latter reference to the Rules is particularly noteworthy because the CPT comments specifically that the 2006 European Prison Rules, unlike their 1987 predecessors, make it clear that prison doctors should not perform this function, thus drawing attention to and supporting the way in which the Rules are evolving.

27. Finally, it should be noted that ECtHR often relies on the CPT as well. The extent of the recognition is highlighted by the fact that in around 300 cases, decided between the beginning of 2006 and the end of 2009, the ECtHR

referred to the reports of the CPT. The ECtHR does this in two ways. The Court refers to the findings of fact made by the CPT in its reports on specific countries as an important source of evidence on what prison conditions in a particular country are like. This is very useful where there is a factual dispute between an applicant and a state about prison conditions or the treatment of prisoners. In these circumstances the CPT report is used to corroborate the evidence of one of the parties. More significantly for current purposes, the Standards that the CPT has culled from its general reports are regularly applied by the ECtHR as a bench mark on what should be regarded as inhuman or degrading treatment. For example, the standards developed by the CPT in respect of the space that prisoners should have in their cells, have played a key part in deciding when prison overcrowding should be regarded as an inhuman or degrading form of treatment for prisoners in contravention of Article 3 of the ECHR.

28. The overall effect of this process of mutual reinforcement is that the whole has become more than the sum of its parts. The legal status of recommendations may not have changed formally but their extensive application by the CPT, by the ECtHR and by some national courts has greatly increased the impact that they will have on the rapidly growing European case law as well as on the specific policies on imprisonment put forward by the CPT. The interactions between the ECtHR and the CPT have served a similar reinforcing function.

Other non-national influences on prison law and policy in Europe.

29. It should not be overlooked that, in addition to the Council of Europe, other international institutions and instruments contribute to penal policy in Europe. The following paragraphs outline key instances of such influence.

The European Union

30. Outside the various organs of the Council of Europe, the European Union has the potential to become a major force for the development of prison law and

policy in Europe and in many instances in applying the standards of various kinds developed by the Council of Europe. Hitherto most of the involvement of the European Union has been indirect. It has proceeded largely by engaging in practical interventions to strengthen the implementation of progressive prison polices. These initiatives have also stretched beyond the boundaries of the EU. For example, in the Western Balkans the EU is currently funding and implementing jointly with the Council of Europe a large project designed specifically to ensure that those countries develop prison systems "based on the rule of law and respect for fundamental rights and European democratic values and standards".[6] In Georgia the EU has a permanent presence engaged in prison reform, while in Turkey it is engaged in a large prison reform programme jointly with the Council of Europe.[7] Within the EU it is significant that funding has been found for a major new programme to reform prisons, specifically by propagating the European Prison Rules as a basis for reform.[8]

The United Nations

31. Another international body that has influenced prison law and policy in Europe in various ways is the United Nations. The International Covenant on Civil and Political Rights (ICPPR), a binding treaty which European states have ratified, contains in Article 7 a prohibition on torture and cruel, inhuman and degrading punishment and treatment, which is similar to Article 3 of the ECHR. In addition Article 10 (3) of the ICCPR specifies that "the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation". This provision has been directly applied in *Dickson v. United Kingdom* by the Grand Chamber of the ECtHR to establish the rehabilitative purpose that should underpin European prison law and policy.

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[6] See http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/technical_co-operation/cards_regional_prison_project/ .
[7] See http://www.coe.int/T/E/Legal_Affairs/About_us/Activities/7Prog_Turkey.asp.
[8] The 2006 Agis Project of the Directorate of Justice, Freedom and Security of the European Commission *The Europeanization of Prison Management: Best Practices* JLS/2006/AGIS/093.

32. The 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR) also remain an important international resource in this area, but in Europe they have largely been overtaken by the European Prison Rules. The UNSMR are still of some practical significance, however, as they have been used by the Human Rights Committee to interpret the prohibition against cruel, inhuman or degrading treatment of prisoners contained in Article 7 of the ICCPR. This applies also in cases where citizens of European countries have lodged complaints against their own governments with the Human Rights Committee (See, for example, *Lantsova v Russian Federation* (763/1997, UN Doc CCPR/C/74/D/763/1997 (2002)).

33. For the first time in more than 50 years there is also now a strong initiative within the United Nations to review and update the UNSMR. The United Nations Office on Drugs and Crime has been mandated by the 19th Session of the Commission on Crime Prevention and Criminal Justice, held in May 2010, to organize an intergovernmental expert group to review the Standard Minimum Rules for the Treatment of Prisoners, and recommend appropriate action.[9] This initiative has also been supported by the 12th United Nations Congress on Crime Prevention and Criminal Justice and included in the Salvador Declaration.[10] However, such a review will take some time and its long-term impact on the standing of the UNSMR is unclear.

34. From the current European perspective the most significant development at the United Nations level is the adoption of the Optional Protocol to the Convention on Torture (OPCAT). 17 of the 47 member states of the Council

[9] See http://www.unodc.org/unodc/en/frontpage/2010/May/crime-commission-tackles-new-challenges.html

[10] Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World A/CONF.213/L.6 19 April 2010

of Europe have ratified OPCAT. What OPCAT essentially does is to establish the Sub-committee for the Prevention of Torture (SPT) to enforce the prohibition on torture as defined by Article 1 of the Convention against Torture. This definition does not include pain or suffering arising from, inherent in or incidental to lawful sanctions. The SPT, which has 25 members to monitor the situation in the world, is a mechanism similar to the CPT in that it has a preventive function that it exercises through inspections; and in time, like the CPT, it can be expected to develop its own standards. However, OPCAT has one important additional feature. It requires states to do their own internal monitoring of all forms of detention, including imprisonment, through so called National Preventative Mechanisms. The gradual development of such mechanisms in European states could have a major impact on the control of prisons.

35. *In sum, from this overview it is clear that there have been major developments in terms of the international guidance to European states on prison matters. Most of this guidance comes from the organs of the Council of Europe: The ECtHR gives judgments on a range of prison issues, and the CPT reports to member states on how conditions of detention should be improved to avoid them remaining or becoming inhuman or degrading forms of treatment. Both of these have the backing of the treaties to which the member states have acceded and which oblige them to respond. Neither treaty however, deals directly with the full range of issues raised by imprisonment.*

36. *In contrast, the Recommendations of the Committee of Ministers in respect of imprisonment do cover the full range of issues. The European Prison Rules provide a general framework while a growing number of special recommendations deal in more detail with a range of issues such as the medical treatment of prisoners. The Rules and Recommendations are not however directly binding on member states.*

37. *In practice however, the European Prison Rules and the related Recommendations are considerably strengthened by the reliance that the ECtHR and the CPT place on their formulations of what is required. Similarly the Standards set by the CPT are referred to by the Court and also taken into account when new recommendations are developed by the Committee of Ministers.*

38. *Furthermore, the European Commission has played an important additional role in various programmes to improve imprisonment in Europe by supporting the implementation of Council of Europe based standards. The United Nations has also developed standards of its own. These are not so influential in Europe, although the recent ratification of OPCAT by many European countries may contribute to United Nations norms and standards playing a greater role in the future*

39. *The overall conclusion on the existing position is that, while there is a considerable and growing amount of sound international guidance on prison matters coming from the Council of Europe in particular, the legal status and practical implementation of such guidance varies. The question is whether this position could be improved. The next chapter outlines attempts that have been made to develop binding instruments that relate specifically to prisons.*

Chapter 2

Past attempts to introduce a binding legal instrument on prisons

1. There have been a number of attempts to develop a binding legal instrument that would give additional authority to key aspects of the many 'non binding' international and regional standards that exist in respect of prisons. Such attempts have been made within the framework of the Council of Europe. Recently the issue of some binding instrument on prisons has also been raised by both the European Union and organs of the United Nations. This chapter first describes the various aborted developments that there have been in the context of the Council of Europe. It then turns to the recent developments in the EU and the UN as they are an important part of the context of any new initiative that the Council of Europe may wish to undertake in this regard.

Council of Europe: An additional protocol to the European Convention on Human Rights

2. An early initiative towards creating a binding legal instrument on prisons came in 1994 from the Committee of Experts for the Development of Human Rights, which recommended that the ECHR be supplemented by a protocol on prisoners' rights. It produced a first draft of a protocol "guaranteeing certain additional rights to persons deprived of their liberty" (See Appendix A to this Report). Nothing came of this initiative, but in September 2000 the Italian government used its presidency of the Council of Europe to revive it. At its request, the Committee of Ministers sought an opinion from the Steering Committee for Human Rights (CDDH) on whether such a protocol should be introduced (Item 4.8 of Decision No. CM/760/13092000 taken during their 720th meeting on 13 September 2000). However, in November 2001 the Steering Committee responded negatively (Council of Europe Steering Committee for Human Rights (CDDH) Interim Activity Report of its 52nd meeting from 6-9 November 2001 CDDH(2001)029). It recommended that

energy should be focused instead on updating the European Prison Rules and that the judgments of the ECtHR and the findings of the CPT should be a key part of this process. As a result of this recommendation the initiative to introduce the protocol was abandoned and steps were duly taken to update the European Prison Rules, an initiative that bore fruit in the current, fully modernised, 2006 European Prison Rules. However, the attempts to develop a binding prison law instrument within the Council of Europe did not cease.

A Binding Prison Charter from the Council of Europe?

3. Another strategy that has been considered within the Council of Europe is a binding treaty containing a free-standing Prison Charter. The introduction of such a Charter in parallel with the European Prison Rules was strongly supported by both the European Parliament and the Parliamentary Assembly of the Council of Europe. The ambitions of the proponents of the Charter were expressed clearly by one of its proponents Mr Turco, a Member of the European Parliament, who explained as guest speaker at a key debate on prison matters of the Parliamentary Assembly of the Council of Europe in 2004:

> There was also a large body of 'soft' law which needed to be turned into 'hard' law in terms of national and international law. In that way, non-compliant states could be subjected to sanctions (Report of the Eleventh Ordinary Sitting of the Parliamentary Assembly of Tuesday 27 April 2004).

4. Further support was also forthcoming from European Ministers of Justice, who at their 26th Conference held in Helsinki from 7-8 April 2005 not only pressed for the updated European Prison Rules to be adopted as soon as possible, but also supported further work on a European Prison Charter to be undertaken once the Rules had been approved (Resolution No. 4 on Updating the European Prison Rules and on the Possibility of a European Prison Charter MJU-26 (2005)). A draft Charter containing the same basic principles as the 2006 European Prison Rules and a summary of its most important

other Rules, was duly prepared by the Penological Council (See Appendix B to this Report). However, discussion of it was overtaken by the EPR. However, after the adoption of the EPR early in 2006, the Parliamentary Assembly continued to insist on the adoption of an additional binding Charter (Recommendation 1747 (2006) of the Parliamentary Assembly of the Council of Europe adopted by the Standing Committee on behalf of the Council of the Assembly on 29 May 2006).

5. Finally, in September 2006 the Committee of Ministers of the Council of Europe firmly rejected the idea of a binding Charter (Reply of the Committee of Ministers to the Parliamentary Assembly regarding Parliamentary Assembly Recommendation 1747 (2006) on the European Prisons Charter, adopted by the Committee of Ministers on 27 September 2006 at the 974th meeting of the Ministers' Deputies CM/AS (2006) Rec1747 final, 29 September 2006). The alternatives that the Committee of Ministers put forward at its 2006 meeting in place of a Prison Charter were somewhat limited. They consisted primarily of placing a renewed emphasis on publicising, and if necessary amending, the European Prison Rules and to a lesser extent other recommendations. In addition, the Committee of Ministers signalled the importance of the CPT by recognizing it as "*de facto* play[ing] the role of a European prison observatory". This role should in the view of the Committee of Ministers not be duplicated. In addition, European states that had not yet done so were encouraged also to sign up to the Optional Protocol to the UN Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (OPCAT).

6. The practical reform initiatives that the EU has undertaken hitherto (See Chapter 1 above) suggest that it is content to encourage the implementation of substantive prison law and polices that have been developed primarily through the organs of the Council of Europe, including the ECtHR. However, this may change. As early as 2004 the European Parliament had called for the Council of Europe to adopt a binding prison charter as well as the EPR and had threatened to take action at the EU level if both were not forthcoming. Now that the idea of a binding Charter has been rejected by the Committee of

Ministers of the Council of Europe it is at least possible that the Parliament may take steps to encourage a specifically EU initiative to create a binding legal instrument dealing with prison conditions .

7. Such an initiative may also be forthcoming from the European Commission. The reason is to be found in the developments in respect of the mandatory transfer of prisoners within the EU, such as the European Arrest Warrant and the Framework decision on the transfer of sentenced prisoners. While formally these measures are based on the mutual recognition by EU member states of each other's legal systems, they need to have confidence in each other's systems to underpin such recognition. In order to build this confidence the EU has a real interest in ensuring that minimum prison standards are maintained across the member states. The Commission is therefore examining whether in terms of the Treaty of Lisbon it would be possible to create some binding legal instrument that would require member states to meet such standards. These considerations are at an early stage – at the moment consideration is being given to a Green Paper on the subject which is to be finalised during the first half of 2011 - and there is some doubt about whether, even if there were the political will to develop such an instrument, the legal authority for the EU to enact it exists.

8. Finally, it is worth noting that there has also been some movement within the United Nations to introduce a binding legal instrument on substantive prison matters. In his 2009 Report to the General Assembly of the United Nations, Professor Manfred Nowak, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, formally recommended that:

> The Human Rights Council should consider drafting a United Nations Convention on the Rights of Detainees to codify all human rights of persons deprived of liberty, as laid down in the Standard Minimum Rules for the Treatment of Prisoners and similar soft law instruments, in a legally binding human rights treaty with effective monitoring and implementation mechanisms (A/HRC/13/39).

9. This recommendation was also discussed at the Twelfth United Nations Congress on Crime Prevention and Criminal Justice 12th UN Crime Congress that was held in Salvador, Brazil, from 12-19 April 2010. Although several states were in favour of such a binding Convention on the Rights of Detainees, the suggestion did not get sufficient support to be included in the Salvador Declaration at the end of the Congress. It was therefore not pursued, by the 19th Session of the Commission on Crime Prevention and Criminal Justice at its most recent meeting in Vienna in May 2010. There is, however, a strong likelihood that the issue will be raised again in United Nations fora.

10. *In sum, the Council of Europe has in the past considered a binding legal instrument on prisons and rejected the idea. However, calls for such an instrument continue to be made. Such calls are also being heard increasingly within the European Union and from the United Nations. It is therefore worth considering the arguments that can be advanced for and against such an instrument in more detail. This is done in the next chapter.*

Chapter 3

A legal instrument binding on prisons?

1. Arguments for and against a binding legal instrument should be considered against the background, sketched in Chapter 1, of growing activity on prisons by the Council of Europe and other international bodies, and against the reality, sketched in Chapter 2, that previous attempts to introduce such an instrument have failed.

2. In the context of the Council of Europe any argument about the desirability of such an instrument must be cast in terms of the overall human rights objectives of the Council. In other words, it should be taken as given, in an institution that recognises fundamental human rights, that the objective of ensuring that prisoners are treated fairly and with human dignity is uncontroversial.

3. The primary argument in favour of a binding legal instrument is that it would spell out the rights of prisoners and the obligations of states in regard to how they treat prisoners and make them more easily enforceable. It would clarify and strengthen the legal position of prisoners and thus make it easier to ensure that states fulfil their obligations to treat prisoners fairly and with recognition of their inherent human dignity. Conversely, the primary argument against such an instrument is that the introduction of a binding instrument would have a negligible impact, or even that it would make it harder to ensure that prisoners are treated fairly and with human dignity. Both primary arguments are developed more fully below in the light of current circumstances and the different possible forms that binding instruments could take.

In favour of a binding legal instrument

4. In favour of a new binding instrument one must weigh that such an instrument could fill gaps left by the existing, binding, Council of Europe instruments of greatest relevance to prisons, that is, the ECHR and the ECPT that created the CPT. Neither of these deals fully with the range of issues that imprisonment raises. As explained above, the brief of the CPT is limited to the prevention of torture and inhuman and degrading treatment or punishment. Although this brief has successfully been interpreted very widely by the CPT, particularly in the development of standards that are designed to prevent the prohibited forms of treatment before they occur, the fact remains that there are aspects of prisoners' rights and state obligations to prisoners that go beyond the prevention of such treatment. These aspects could be included in a legal instrument of the Council of Europe and given further force by making them binding.

5. The other binding instrument, the ECHR, recognises a wider range of human rights than the ECPT but suffers from a different weakness. These rights, except perhaps for the right to be free from torture and inhuman and degrading treatment and punishment, were not formulated with prisoners specifically in mind. The ECtHR has done a good job in developing a wider range of prisoners' rights from other rights guaranteed by the ECHR. However, in the absence of a clear framework of prisoners' rights, underpinned by a legally binding statement of the purpose of imprisonment, this process is patchy and subject to reversal. A binding legal instrument dealing specifically with prisoners' rights could overcome this weakness, particularly if the ECtHR was mandated to enforce it.

6. A binding legal instrument related specifically to prisons would have the further advantage that it could serve as the apex of European prison law and policy. A few carefully chosen principles could reinforce the European Prison

Rules which would then provide the second level policy and serve as a source of interpretative material of the primary, fully binding, instrument. Other rules and recommendations could provide additional support.

Against a binding legal instrument

7. The arguments against a binding legal instrument were largely made when the two attempts to introduce such an instrument, that is, an additional protocol to the ECHR and the draft European Prison Charter were rejected. In dismissing the latter in 2006 the Committee of Ministers of the Council of Europe commented that

> it would be difficult for the states to reach a consensus on more than a very limited number of binding legal rules, which could impoverish and stigmatise existing standards and could, moreover, lead to weakening the importance and the impact of the European Prison Rules on the work of the prison administrations in the member states and at the European level in general (FULL REF § 3).

8. A further argument that can be advanced against a binding legal instrument relates to its enforcement. It can be argued that, if the instrument lacks an enforcement mechanism, it is of little practical value. On the other hand, if a new instrument were not only to create a binding framework of prisoners' rights and state obligations to facilitate their fulfilment, but also a new European mechanism to enforce them, it would come into conflict with existing mechanisms for the enforcement of these rights. In particular it would conflict with the work of the CPT. It would also duplicate the work of the SPT and the National Preventative Mechanisms set up in terms of OPCAT.

Discussion

9. A reconsideration of the arguments about a binding legal instrument would suggest the following:

10. If such an instrument were necessarily to require the introduction of a new supervisory instrument, that would be problematic. The existing CPT and the further protection offered by the OPCAT through the SPT and the activation of national mechanisms already perform major oversight functions. A specialist oversight body for prisons may be able to add some value by covering those aspects of imprisonment that are not fully included in the brief of bodies whose focus is exclusively on the prevention of torture or inhuman or degrading treatment. However this contribution would be relatively limited precisely because the CPT has defined its brief so widely that it already covers most aspects of imprisonment.

11. Conversely, a binding instrument that spelled out prisoners' rights would be of limited value if it had no enforcement mechanism attached to it whatsoever. At best it would spell out the key principles of the European approach and set them at the pinnacle of European prison law. However, if it were not enforced as such, an instrument would soon lapse into insignificance.

12. The one strategy that may be worth reconsidering is the addition of a new protocol of the ECHR. Once such a protocol has been ratified by a sufficient number of members it would of course be enforced by the ECtHR. It would thus have the advantage of being binding without there being a need for a new enforcement agency having to be created.

13. A new protocol could set a clearer framework for the development of prison law than the one that is implicit in the jurisprudence of the ECtHR as it interprets the general provisions of the ECHR. The same framework would be of use to CPT, although of course it would not be bound by it directly. The protocol would also form a useful apex for the EPR and other rules, recommendations and resolutions on penal matters that would be applied by

the Court in interpreting it and by practitioners who use the EPR and other instruments.

14. If the new protocol is to be proposed as a useful step, one should consider closely the criticisms advanced by the Steering Committee for Human Rights (CDDH) when it advised against the adoption of a Protocol in 2001. The Steering Committee concluded that such a Protocol would run the risk of simply codifying existing case law and thus stultifying its development. With respect, this is not a convincing objection. If one bears in mind what the ECtHR has managed to achieve by interpreting the ECHR, which does not deal with prisoners' rights directly, it is arguable that it will be able to develop prison law much more effectively by applying and interpreting a protocol written for the specific purpose of advancing and protecting prisoners' rights.

15. The argument is also sometimes advanced that, if a protocol is ratified by some states but not others, it will result in a 'two-speed' development of the law on prisons, in which prisoners in states that have ratified it will have their rights protected more fully than those in states that have not done so. Such a risk arises whenever an optional protocol is added to a binding convention. However, this will not necessarily be the outcome. It is submitted that, given the trajectory of its jurisprudence on prison matters, the ECtHR is more likely to adopt the view that the protocol reflects "evolving standards of decency" in the prison sphere and interpret the ECHR accordingly.

16. Finally, if an additional protocol is contemplated some attention must be paid, even at a preliminary stage, to its content. The two draft instruments produced in appendices present two models of such instruments. However, it appears the original draft additional protocol (in Appendix A below) was not constructed on the basis of the European Prison Rules or any other

systematic approach to imprisonment. The result is that it lays itself open to the criticism that it does not adopt a systematic approach to imprisonment, but instead focuses only on selected rights.

17. In contrast, the draft European Prison Charter (in Appendix B below) was written as a précis of the European Prison Rules and therefore has a coherent basis. The Charter could not be used directly as an addition protocol. However, Articles 4 to 30 of the Charter should be used as the basis for such a protocol and be modified to fit the technical requirements of the ECHR.

Recommendation

18. Recommendation 1: *A new protocol on prisons should be added to the ECHR*. *Such a protocol should be comprehensive enough to provide overall guidance on prison conditions and the rights of prisoners.*

Chapter 4

Systemising and establishing a hierarchy between all relevant existing Council of Europe standards

1. To some extent the EPR and the other recommendations can be seen as a move towards a codification of European prison law and policy. However, to describe the body of recommendations as a code would be exaggerated. Not only are they a form of "soft law", as explained above, but also there is the difficulty that the Recommendations and the Resolutions that preceded them have been adopted over a number of years, sometimes without thought about overlap or even consistent use of terminology. In recent years modest attempts have been made to reduce the confusion that this may cause: both the 2006 recommendations, that is, the 2006 European Prison Rules and the Recommendation Rec(2006)13 on the Use of Remand in Custody, the Conditions in which it Takes Place and the Provision that Safeguards against Abuse, explicitly replace the recommendations that precede them. Moreover, in November 2007 the Council of Europe published a *Compendium of Conventions, Recommendations and Resolutions relating to Penitentiary Questions*, [11] which deliberately excluded those recommendations and resolutions that it regarded as outdated or substantially replaced by more modern, up to date versions. This fell short, however, of a systematic process of eliminating all overlaps by 'repealing' formally the redundant recommendations and resolutions.

2. The question asked by the brief is whether further steps should be taken to systematise and establish a hierarchy of all the relevant Council of Europe standards. Although the recommendations and resolutions are not formally legislation that can be repealed, there does not seem to be any legal barrier to

[11] This Compendium has recently been updated and republished as a book by the Council of Europe: *Penitentiary Questions: Council of Europe conventions, recommendations and resolutions* (Council of Europe Publishing 2009).

systemisation. The Committee of Ministers could simply adopt a new recommendation in which it declares that a number of its earlier recommendations and resolutions should be regarded as replaced by specified later recommendation. This approach regarding explicitly replacing specific recommendations by new ones has already been used by the Committee of Ministers.[12] In the *Compendium* there is already a list of recommendations and resolutions that were not republished simply because they were largely redundant. The proposed measure would place this on a more formal basis and thus bring further clarity to this area.

3. Such a step should be combined with a review of existing recommendations to see whether or not they should be updated. At the same time some specific recommendations are being reviewed and expanded; For example the PCCP is currently working on a new recommendation on foreign prisoners that will replace the existing recommendation R (84) 12 on this subject.

4. The establishment of an internal hierarchy of recommendations is more complex. Currently the European Prisons Rules is a recommendation of the Committee of Ministers like any other recommendation in the prison field and has no primacy above other recommendations. Other special recommendations on, say, conditional release are also applied in practice and referred to by the ECtHR. They fulfil a valuable function as they go into more detail on particular matters than the more general European Prison Rules do. In practice this has not presented much difficulty as there are no major differences between them. However, there is a risk that such differences may arise. A good drafting practice therefore would be to bear in mind the more general European Prison Rules whenever new specialist recommendations are drafted and to cross-refer to them when appropriate. An illustration of how this can be done is to be found in the Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, section 35 of which provides: “The

[12] See Recommendation Rec(2003)20 of the Committee of Ministers concerning new ways of dealing with juvenile delinquency and the role of juvenile justice and Recommendation rec(2006)02 of the Committee of Ministers on the European Prison Rules

conditions of remand in custody shall, subject to the Rules set out below, be governed by the European Prison Rules."

5. As explained above, the existing recommendations already play a role in the interpretation of the various binding instruments, such as the ECHR and the ECPT that impact on prisons. This interpretative function will become even more important if an optional protocol on prisons is added to the ECHR. The binding instruments are clearly above the Recommendations and Resolutions of the Committee of Ministers in the legal hierarchy. It is not proposed to change this as the ECtHR (and the CPT) are able to draw on the most appropriate Rule, Recommendation or Resolution without considering subtle questions of their relative legal weight.

6. ***Recommendation 2:*** *it is recommended that the Committee of Ministers consider adopting a new omnibus recommendation that would formally systematise existing recommendations and resolutions on penological matters. Such an omnibus recommendation could declare some earlier recommendations and resolutions redundant, in whole or in part. It could also re-enact the existing recommendations as a series of linked appendices. If necessary, terminological changes could be made to them to ensure that the whole becomes more coherent, but it is not proposed that the substance of recommendations that are retained should be reconsidered.*

7. *This recommendation is independent of the recommendation made above that an optional protocol on prisoners' rights be added to the ECHR.*

8. *It is <u>not</u> recommended that a formal hierarchy of recommendations be established.*

Chapter 5

Making better use of the "current system"

1. In Chapter 1 some indication is given of the range of activities undertaken by the Council of Europe, the European Union and various European states in which they use the "current system" that is, the Recommendations of the Committee of Ministers and the standards developed by the CPT. It should also not be overlooked that recommendations and strands that make up the current system are applied routinely by the many NGO's working in this field. What is being done already is impressive.

2. There is however the possibility that more could be done by way of coordination between the major institutional supporters of prison reform and targeting the systematic implementation of specific standards. If this is done, key instruments such as the European Prison Rules can be strengthened, by ensuring that their provisions are considered in practice. Such steps could be taken immediately. They are not dependent on any other reforms.

3. ***Recommendation 3****: it is recommended as a first step that the Council of Europe and the European Union develop a joint plan for the improvement of prison conditions throughout Europe and co-ordinate their activities in this regard.*

4. *It is also recommended that all intervention programmes be required specially to follow the standards set in the European Prison Rules when undertaking a*

specific project. This would ensure that the recommendations contained there are kept in mind in all cases. (A similar requirement with reference to other existing Recommendations of the Committee of Ministers could be set in appropriate cases).

5. *The recommendations made here are independent of the recommendation made above that an optional protocol on prisoners' rights be added to the ECHR and that the existing Recommendations and Resolutions of the Council of Europe be systematised.*

APPENDICES

Appendix A

Draft Protocol to the European Convention of Human Rights guaranteeing certain additional rights to persons deprived of their liberty (Drafted by the Committee of Experts for the Development of Humans Rights in 1994 –considered and rejected by the Steering Committee for Human Rights (CDDH) at its 52nd meeting (Strasbourg 6-8 November 2001).

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention").

Have agreed as follows:

Article 1 – Right to be informed

A person deprived of his liberty shall be informed promptly, in a language he understands, of the reasons for the deprivation of his liberty, of his rights relating thereto and how to avail himself of such rights.

Article 2 – Right to inform others of deprivation of liberty

1. A person deprived of his liberty shall have the right to promptly inform a lawyer, or to have him promptly informed, of the fact and place of his deprivation of liberty and every change thereof.

2. A person deprived of his liberty shall have, in addition, the right to promptly inform a member of his family or another person of his choice, or to have that person promptly informed, of the fact and place of his deprivation of liberty and every change thereof.

3. A person deprived of his liberty abroad shall have the right to promptly inform diplomatic or consular representatives of his own country, or, where appropriate, a national or international organisation whose aim is to serve the interests of refugees or stateless persons, or to have them promptly informed, of the fact and place of his deprivation of liberty and every change thereof.

4. The exercise of the right laid down in paragraph 2 may be restricted as prescribed by law and when it is necessary in a democratic society in the interests of a preliminary investigation or for the prevention of crime.

Article 3 – Right to instruct a lawyer

1. Without prejudice to the rules concerning granting of legal aid, a person deprived of his liberty shall have the right to instruct, at his own expense, a lawyer of his choice and to communicate with him on a confidential basis.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of a preliminary investigation of for the prevention of crime. Such restrictions shall be subject to judicial review.

Article 4 - Right to the assistance of an interpreter

A person deprived of his liberty shall be entitled to the free assistance of an interpreter in a language he understands, for the exercise of rights in relation to the deprivation of his liberty and when the interests of justice so require.

Article 5– Right to medical care

A person deprived of his liberty shall have the right to adequate medical care on the same conditions as are in general available to any citizen, subject to reasonable restrictions imposed by the conditions of the deprivation of liberty.

Article 6 – Medical research or experimentation

A person deprived of his liberty shall not be subjected to medical research or experimentation. He may receive experimental medical treatment provided that he has given his free and informed consent and provided that the treatment is reasonably expected to benefit his health.

Article 7 – Disciplinary punishment

1. A person deprived of his liberty shall not be submitted to a disciplinary punishment unless the conduct for which he is held responsible constitutes a disciplinary offence and unless such conduct, the punishment and its duration as well as the authority competent to impose such punishment are specified by law.

2. The person concerned shall have the right to have the decision reviewed by another competent authority without undue delay.

3. In the case of solitary confinement or of another disciplinary punishment of comparable gravity, the person concerned shall have the right to have the decision reviewed by an independent and impartial authority without undue delay.[37]

Article 8 – Right to submit a complaint

A person deprived of his liberty shall have the right to confidentially submit a complaint to the competent authority concerning the manner in which he is treated, and to receive a reply within a reasonable period of time.

Article 9 – Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.

2. Any State may at any later date, by a 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 two months after the date of receipt by the Secretary General of such declaration.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

Article 10 – Relationship to the Convention

As between the State Parties, the provisions of Articles 1 to 9 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 11 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneous ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 12 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which … member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 11.

2. In respect of any member States which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 13 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

a. any signature;

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

c. any date of entry into force of this Protocol in accordance with Articles 9 and 12;

d. any other act. Notification or declaration 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.

Appendix B

DRAFT EUROPEAN PRISON CHARTER

(as discussed by the CD PC in 2006 add full reference)

The member States of the Council of Europe, signatory hereto,

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Considering that deprivation of liberty should always be a measure of last resort;

Noting that the protection of persons deprived of their liberty is being assisted by visits conducted in terms of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;

Recognising that the [2006] European Prison Rules provide an overall indication of good prison practice;

Recognising also that more detail on good prison practice and on alternatives to imprisonment are contained in the recommendations of the Committee of Ministers of the Council of Europe, particularly, ……

Convinced that the protection of persons deprived of their liberty can be strengthened by a European Prison Charter recognising specific requirements in respect of how such persons shall be treated and the institutions that detain them administered,

Have agreed as follows:

Scope of the Charter

1. 1. The European Prison Charter applies to persons who have been remanded in custody by a judicial authority and to persons who are deprived of their liberty following conviction.
   2. In principle persons who have been remanded in custody by a judicial authority and persons who are deprived of their liberty following conviction should only be detained in a prison, that is, in an institution reserved for detainees of these two categories.
   3. The Charter also applies to persons:
      a. who may be detained for any other reason in a prison; and
      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

   4. All persons who are detained in a prison or who are detained in the manner referred to in paragraph 3 b. are regarded as prisoners for the purpose of this Charter.

2. The provisions of the Charter are also applicable to persons deprived of their liberty by state authority who are not prisoners in terms of Article 1 in so far as such provisions are relevant to the circumstances of their detention.

3. There shall be no derogation from the human rights of prisoners or other persons deprived of their liberty on the basis that this Charter does not mention such rights or that it recognises them to a lesser extent.

4. This Charter shall be applied impartially, without discrimination on grounds of race, gender, sexual orientation, language, religion, political or other opinion, national, ethnic or social origin, birth, age, disability, economic or other status.

Basic Principles

5. Prisoners shall be treated with respect for their human rights.

6. Prisoners retain all rights that are not lawfully taken away from them.

7. Restrictions placed on prisoners shall be the minimum necessary and proportionate to the objective for which they are imposed.

8. Where the decision is made to deprive persons of their liberty, the economic situation of the state or lack of resources cannot justify prison conditions that infringe human rights.

9. Life in prison shall approximate as closely as possible the positive aspects of life in the community.

10. All detention shall be managed so as to facilitate the reintegration of prisoners into free society.

11. Prison staff carry out an important public service and shall have conditions of work that enable them to maintain high standards in their care of prisoners.

Prison Regimes

12. 1. No person shall be admitted to a prison as a prisoner without a valid commitment order.

2. Detailed records on all prisoners, including information on their prisoner status and health, shall be begun at their admission, kept up to date throughout their imprisonment and completed at their release.

3. Prisoners may nominate a member of their family or other relative, or any other person with whom they have close ties, who shall be informed by the prison authorities of their time and place of detention, subsequent transfer, serious illnesses and death or release, unless a judicial authority decides that for a specific period such information should not be revealed.

4. All prisoners shall be released when their commitment orders expire or when a court or other authority orders their release.

13. Prisoners shall be accommodated in buildings that give them sufficient floor space, heating, natural light and air, that are appropriate to the climatic conditions and that meet requirements of health and hygiene.

14. Prisoners shall be provided with adequate clean clothing and bedding and given the means of keeping themselves and their clothes clean.

15. Prisoners shall be provided with sufficient nutrition that takes into account their physical condition and age, and as far as possible their religion and culture.

16. Prisoners shall be provided with adequate health care.

17. Prisoners shall be allowed to exercise in the open air and take part in religious and leisure activities.

18. Prisoners shall be provided with opportunities to work and further their education.

19. 1. Prisoners shall be allowed to remain in contact with the outside world.
2. Such contact may include communication by post, telephone or otherwise and by receiving visits.

20. Prisoners shall be allowed to consult legal advisors and be given facilities to access their advice effectively.

21. 1. Special provisions shall be made to meet the needs of prisoners who are women, children, disabled, foreigners or members of ethnic, religious, linguistic or cultural minorities.
2. Children should not be detained in a prison for adults but if they are, there shall be special provision made for their needs and they shall be detained separately from adults.

22. Good order shall be maintained in prison by achieving a proper balance between considerations of security, safety and discipline, and the obligation to treat prisoners with humanity and to provide them with a full programme of activities.

23. 1. Considerations of security and safety may be taken into account when making decisions about the regimes to which prisoners are subject.
2. These considerations shall not affect decisions about nutrition, clothing, bedding, hygiene, health and exercise or deprive prisoners of a reasonable minimum of activities and contact with the outside world

24. Disciplinary procedures shall be mechanisms of last resort.
1. The types of conduct by prisoners that constitute disciplinary offences, the description and duration of disciplinary punishment that may be inflicted, and the authorities competent to impose such punishment shall be specified by law.
2. Disciplinary punishment shall be imposed and implemented fairly.

25. 1. Force may only be used against prisoners in self-defence or in cases of attempted escape, active or passive physical resistance to a lawful order or other illegal activity and always as a last resort.

2. The amount of force used shall be proportionate and appropriate to the legitimate interest being protected.

26. Prisoners shall be given information about all prison law and regulations applicable to them.

27. 1. Prisoners shall be able daily to make requests and complaints to the prison authorities, who within a reasonable period shall act on them or explain why they are not doing so.
2. If their requests or complaints are not resolved prisoners shall be able to appeal to a competent higher authority.

28. Prisons shall be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements of national and international law, including the provisions of this Charter.

29. 1. The conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public.
2. The work of such independent monitoring body or bodies shall be coordinated with that of international agencies that are legally entitled to visit prisons.

30 As the European Prison Rules [Recommendation Rec. (2006) XX] and the recommendations of the Council of Ministers addressing specific prison issues contain provisions relating to the implementation of the prison regime required by the Charter, they shall be updated regularly.

Accession to the Charter

31. This Charter shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

32. 1. This Charter shall enter into force on the first day of the month following the expiration of a period of three months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Charter in accordance with the provisions of Article 31.
2. In respect of any State which subsequently expresses its consent to be bound by it, this Charter 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 of the instrument of ratification, acceptance, approval or accession.

33. 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 Charter shall apply.

34. 1. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Charter to any other territory specified in the declaration.

2. In respect of such territory this Charter 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. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

35. No reservation may be made in respect of the provisions of this Charter.

36. 1. Any State Party may, at any time, denounce this Charter 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 twelve months after the date of receipt of the notification by the Secretary General.

37. The Secretary General of the Council of Europe shall notify the member States 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 Charter in accordance with Articles X and Y; and

d. any other act, notification or communication relating to this Charter.