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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**WHITE PAPER ON PRISON OVERCROWDING**

**Document prepared by the Directorate General  
Human Rights and Rule of Law**

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## **List of abbreviations used**

CCJE = Consultative Council of European Judges

CCPE = Consultative Council of European Prosecutors

CDPPS = Conference of Directors of Prison and Probation Services

CM = Committee of Ministers

CommDH = Commissioner for Human Rights

CPT = European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

CSM = community sanctions and measures

ECtHR = European Court of Human Rights

EPR = European Prisons Rules

H/Exec = Memoranda of the Department for the execution of judgments of the European Court of Human Rights

JHA = Justice and Home Affairs, European Commission

No. = Number

NPM = National Preventive Mechanism

OPCAT = Optional Protocol to the UN Convention against Torture

PACE = Parliamentary Assembly of the Council of Europe

PC-CP = Council for Penological Co-operation

PC-OC = Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters

R or Rec = Recommendation

SPACE = Council of Europe Annual Penal Statistics

UK = United Kingdom

UN = United Nations

UNODC = United Nations Office on Drugs and Crime

## **Introduction**

1. Prison overcrowding is a recurring problem for many prison administrations in Europe. Many of the 47 Council of Europe member states have overcrowded prisons<sup>1</sup> and in many states where the total number of prisoners is lower than the available accommodation places still specific prisons may often suffer from overcrowding.
2. The Council of Europe has persistently recommended to the national authorities to remedy the problem considering that prison overcrowding and prison population growth represent a major challenge for prison administrations and the criminal justice system as a whole both in terms of ensuring human rights protection and in terms of efficient management of penal institutions. On 30 September 1999 the Committee of Ministers adopted Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation. This text contains a number of pertinent advices and suggestions for practical steps to be taken at all levels - legislative, judicial and executive.
3. More than 15 years after the adoption of the recommendation and despite the efforts made by the member states the problem is still considerable at European level as it is in many other parts of the world. Therefore over the past years the European Court of Human Rights has had to examine many complaints related to bad prison conditions and has found numerous violations of Article 3 of the ECHR.
4. In the inter-state relations the problem is felt sometimes acutely in cases of requests for extradition for prosecution or in cases of transfer of sentenced persons, where the requested measure may be problematic to carry out because of concerns regarding bad prison conditions, including in particular prison overcrowding, in the receiving state.
5. A recent example of this is the judgement of the European Court of Justice in joined cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldărăru, where the Court recalls that the absolute prohibition of inhuman or degrading treatment or punishment being part of the fundamental rights protected by Charter of Fundamental Rights of the EU, the authority dealing with the European arrest warrant must assess properly any such risks before deciding on the surrender of an individual. In particular, the Court states that where such a risk derives from the general detention conditions in the issuing Member State the execution of the warrant must be deferred until there is obtained additional information on the basis of which that risk can be discounted. If the existence of that risk cannot be discounted within a reasonable period, the authority must decide whether the surrender procedure should be brought to an end<sup>2</sup>.
6. Several Conferences of Directors of Prison Administration have debated the issue of prison overcrowding and at the 17<sup>th</sup> Conference in Rome (November 2012) a special meeting was held with European judges and prosecutors in order to raise their awareness of the impact of pre-trial detention and of sentencing policies on prison overcrowding and of the usefulness and effectiveness of alternatives to imprisonment. At the 19<sup>th</sup> Conference of Directors of Prison and Probation Services (CDPPS) (Helsinki, 2014) an initiative was launched to set up a Working Group, comprising judges, prosecutors, representatives of the ministries of justice, of prison and probation services in order to discuss these issues and to recommend steps to be taken to tackle prison overcrowding. The idea behind this is to assist national authorities in starting a dialogue between judges, prosecutors, legislators, decision-makers and prison and probation services with a view to agreeing on long-term national strategies and on specific actions to deal with prison overcrowding.
7. The present White Paper is the result of the joint efforts of the Drafting Committee mentioned above, comprising representatives of a number of Council of Europe bodies and intergovernmental committees which have the competence and vested interest in the field of crime prevention and penal policies and practices of the Council of Europe member states. The full list of members of the Drafting Committee on prison overcrowding, set up on the initiative of the European Committee on Crime Problems as well as the bodies and committees they represent may be found in Appendix I to the present document.

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<sup>1</sup> The term "prison" used in the present text is a general term covering the institutions as described in Rule 10 of the European Prison Rules.

<sup>2</sup> See at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/cp160036en.pdf>

8. The present White Paper does not contain new specific recommendations in relation to prison overcrowding - those found in Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation are still very valid. The White Paper highlights points that could be of interest for the dialogue mentioned above that should be initiated and maintained by the national authorities in order to agree on and implement efficiently long-term strategies and specific actions to deal with prison overcrowding as part of a general reform of their penal policies in line with contemporary academic research and realistic expectations of the role criminal law and crime policy should play in society. This document is thus aimed at inciting member states to open a debate at national level regarding their penal system and to take decisions based on clear needs and objectives to be met in shorter and longer time-spans. In doing so the national authorities should keep under review to what extent imprisonment is playing an appropriate role in tackling crime and to what extent those who are released are prepared for reintegrating society and for leading crime-free life.
9. The work of the Drafting Committee was carried out between December 2014 and April 2016. The Council for Penological Co-operation (PC-CP) endorsed the text at the meeting of its Working Group in May 2016. The White Paper was finally endorsed by the European Committee on Crime Problems (CDPC) in June 2016.

#### **I. Prison overcrowding and prison population growth**

10. There are no internationally agreed precise definitions of what constitutes overcrowding. It occurs generally speaking when the demand for space in prisons exceeds the overall capacity of prison places in a given member state or in a particular prison of that state. However, contrary to Section 18.3 of the European Prison Rules<sup>3</sup> there remain a number of member states who have not a definition of “minimum space”. As a result it is difficult to secure an agreement about the capacity of the prison systems.
11. It should be noted that there are significant differences in the methods for calculating prison places used by different Council of Europe member states and therefore the data related to prison capacity should be evaluated against the real space/square meters available to each prisoner as well as against time spent daily in the cells. It should also be taken into account that space and square meters are not the only relevant factors when assessing overcrowding issues. Overcrowding problems are also part of and closely linked to the general issue of providing for appropriate overall prison conditions, including staffing and offering meaningful activities that meet international standards and are aimed at re-socialising prisoners.
12. As stated in the preface, the principles expressed in Council of Europe Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation are still considered to be valid, but it has to be recognised that there have been developments in the Council of Europe member states since 1999 that may explain some of the difficulties in implementing the principles of the Recommendation.
13. The increased mobility of persons in Europe, the expansion and greater accessibility of international transport and the rapid development of new technologies worldwide have had many positive influences on our societies. At the same time a rise was observed in transnational serious and organised crime and terrorism which has led since the turn of the 21st century in many member states to an increase in the severity of criminal law responses to such crimes. A more severe approach very often implies the use of longer prison sentences without parole and also without necessarily addressing at the same time the implications this could have for the prison systems. It also seems as if many states have experienced a change in the public opinion on crime. The drive to be “tougher on crime” or to apply “zero tolerance” policies or similar have led to an increased use of imprisonment.
14. It is anyhow very important to remember that the member states of the Council of Europe have their own specificities when it comes to national responses to crime which impacts on sentencing practices, the time spent in detention and the use of community sanctions and measures. Furthermore, the development in crime may differ largely from increase to decline in crime and from situations of severe prison overcrowding in some states to states where prison facilities are closed, at least temporarily because there are no prisoners to place there. Where prison overcrowding occurs there may also be different root causes and combinations of such causes in the different countries. Therefore the White

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<sup>3</sup> European Prison Rules, 18.3: Specific minimum requirements in respect of the matters referred to in paragraphs 1 and 2 shall be set in national law.

Paper highlights issues to be considered in the light of national legal traditions, practices and cultures based on the relevant standards and principles of the Council of Europe.

## II. Prison overcrowding - the actual situation

15. Reality shows that in the course of the last decades and mainly as a response to the developments mentioned above under paragraphs 13 and 14 new types of offences have been introduced in the national criminal codes and some of these have been defined by international binding legal instruments obliging the signatories to use the same definitions in their national legislation. The offences defined in international legal acts relate to serious crimes for which the states are required to introduce the possibility of applying prison sentences within certain limits. While new types of offences have been added to the existing ones, at the same time rigorous revisions of the criminal legislation in order to re-organize definitions, re-define sanctions and measures and decriminalize certain petty crimes have not been carried out in most of the countries. This has very likely in some states contributed to the increased use of imprisonment as a sanction and to an increased length of imprisonment as well, two important factors leading to overcrowding.
16. This trend is anyhow not the same everywhere in Europe. There are big differences in this respect. Nevertheless it can be underscored that prison numbers are strongly influenced by the overall number of entries in the penal system, the duration of the sanctions imposed and the early release schemes like conditional release, probation periods and partial or total alternative execution of prison sentences. The average length of imprisonment has increased in quite a few countries in the course of the last decade by 1% on average and in some countries the increase is between 3 to 5%<sup>4</sup>. In 2014 the number of prisoners sentenced to 10 or more years has increased by 2.1% compared to 2013<sup>5</sup>.
17. There is also an opposite trend of slight decrease of the prison population in the past several years which is mainly due to the decrease in the number of prisoners serving short prison sentences. Between 2012 and 2013, the number of inmates held in penal institutions in the Council of Europe member states decreased by approximately 56,700 persons. In spite of the decrease of the raw number of inmates, the median prison population rate in Europe increased between 2012 and 2013 by 5%. In 2012 it was 127 inmates per 100,000 inhabitants and in 2013 it was raised to 134 inmates per 100,000 inhabitants. According to SPACE I, in 2012 there was overcrowding in 22 out of the 47 countries of the Council of Europe. In 2013, the number of countries with overcrowding went down to 21, and in 2014 to 13. In 2013, 19 of the prison administrations having overcrowded prisons were the same as in 2012<sup>6</sup>. In 2014 1,600,324 persons were held in prisons in Europe and the decrease compared to 2013 was by 78,893. The median prison population rate also decreased by 7% in comparison to 2013. Its value in 2014 was 124 inmates per 100 000 inhabitants<sup>7</sup>. These developments, although modest compared to the overall number of inmates in Europe are to be welcomed and the national authorities should be encouraged to maintain this positive trend. It is yet too early to assess all possible reasons behind this decrease in prison numbers.
18. It is important to clarify that in SPACE overcrowding is measured through an indicator of “prison density” which is obtained by calculating the ratio between the number of prisoners and the number of places available in prisons and is expressed as the number of prisoners per 100 available places. However the capacity of prisons is calculated in different ways in each country and SPACE statistics rely on the information provided by each country<sup>8</sup>. Without a common standard established by the Council of Europe to calculate prison capacity in the same way across Europe, the figures included in SPACE are not strictly comparable.
19. As already mentioned previously in the White Paper, the fact that the overall number of prisoners in a given country is less than the total number of prison places does not necessarily mean that this

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<sup>4</sup> Council of Europe Annual Penal Statistics (SPACE I, 2012).

<sup>5</sup> Council of Europe Annual Penal Statistics (SPACE I, 2013).

<sup>6</sup> Council of Europe Annual Penal Statistics (SPACE I, 2014).

<sup>7</sup> The decrease of the number of prisoners by roughly 200 000 between 1999 and 2014 (as evidenced by SPACE I data for the same periods) is mainly due to the reduction of the number of detainees in Eastern Europe and in the first place in the Russian Federation.

<sup>8</sup> In their answer to the SPACE questionnaires, many countries do not specify the number of square meters per prisoner. Moreover, some countries use the concept of “operational capacity” to define the capacity of their penal institutions (for example the National Offender Management Service and HM Prison Service of England and Wales define the operational capacity of a prison as “the total number of prisoners that an establishment can hold taking into account control security and the proper operation of the planned regime: *Population Bulletin: monthly December 2015*). This implies that it is impossible to establish an objective measurement of overcrowding in such countries.

country is not facing overcrowding in some of its prisons. Therefore according to SPACE I, 13 European countries are facing overcrowding problems in 2014 (compared to 21 in 2013). According to the CPT published reports on visits the number of countries suffering from prison overcrowding is estimated to be higher. This difference is explained by the fact that each country used its own standards to calculate overcrowding when filling in the questionnaire on which SPACE is based. On the contrary, the CPT uses its own standards to calculate overcrowding.

20. If a given prison is filled at more than 90% of its capacity this is an indicator of imminent prison overcrowding. This is a high risk situation and the authorities should feel concerned and should take measures to avoid further congestion. This is due to the fact that a prison has usually several different sections and even if the overall number of prisoners is less than the capacity of places some of its sections like disciplinary cells, medical unit cells or section for women or juveniles might be half empty while other sections might experience situations of overcrowding. We should note in this respect that SPACE data for 2014 indicate that only 16 of the 52 prison administrations have filled their prison capacity below 90% and this trend is worrying.
21. Some countries use waiting lists in case of severe overcrowding which may lead to violation of Article 3 of the ECHR. While this may be a temporary solution it should not lead to situations when a prison sentence is not executed long months, even years after the court judgement or execution order as then the punitive and rehabilitative aim of the prison sentence has lost much of its force.
22. To address the problem of overcrowding, some countries have taken the route of increasing the number of prison places either by constructing new prisons or by reconstructing and enlarging the existing prisons. The Council of Europe in its Committee of Minister recommendations and the CPT in its reports have persistently underlined that this solution alone cannot reduce the rates of imprisonment. The practice has shown that prison population numbers rise as a result of extensive prison construction. Old and worn out prison buildings should be replaced by new prisons offering humane conditions of detention but such programmes should not lead to ever rising numbers of prison places and as a result to higher imprisonment rates.
23. In pilot judgments concerning overcrowding in detention facilities in Italy and Hungary, the Court highlighted this as structural problem in the respondent states. It reiterated in this context that the most appropriate solution for this problem would be the reduction of the number of prisoners by more frequent use of non-custodial punitive measures and minimizing the recourse to pre-trial detention<sup>9</sup>. In the pilot judgment concerning overcrowding and poor conditions of detention in several correctional facilities in Bulgaria<sup>10</sup>, the Court mentioned, among possible solutions, the construction of new prison facilities or major repair work on the existing ones. It appears thus that in the Court's opinion prison construction or reconstruction is a measure among many others which could be taken to address prison overcrowding, but emphasis should rather be placed on alternatives to detention and on reduced use of imprisonment<sup>11</sup>.
24. Information regarding the current situation with prison overcrowding in some Council of Europe member states from Eastern Europe can also be found in a study on prison overcrowding carried in four countries of the Eastern Partnership (Armenia, Georgia, Republic of Moldova and Ukraine) in October-November 2015 within the framework of the EU/Council of Europe Programmatic Framework Regional project "Promoting penitentiary reforms (from a punitive to a rehabilitative approach)".<sup>12</sup>
25. It should also be noted that the tendency of new prison construction in Europe currently is to opt for technologically expensive high security prisons. It should be underscored in this respect that prisoners who need to be placed in high security institutions represent a minority of all prisoners. The majority of prisoners will require normal security in prison and are in need of rehabilitation programmes rather

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<sup>9</sup> *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, § 94, 8 January 2013; *Varga and Others v. Hungary* (nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, § 104, 10 March 2015.

<sup>10</sup> *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015.

<sup>11</sup> *Torreggiani*, §95 ; *Varga*, §105.

<sup>12</sup> "Criminal justice responses to prison overcrowding in Eastern Partnership countries", Compilation of the reports of a study carried in Armenia, Georgia, Republic of Moldova and Ukraine, Council of Europe, March 2016 [http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/Criminal%20Justice%20Response%20to%20Prison%20Overcrowding%20in%20EaP%20Countries\\_ENG.pdf](http://www.coe.int/t/dgi/criminallawcoop/Presentation/Documents/Criminal%20Justice%20Response%20to%20Prison%20Overcrowding%20in%20EaP%20Countries_ENG.pdf)

than of conditions of imprisonment undermining their socialisation. Therefore consideration should be given to also constructing technologically modern but medium and low security prisons which cost less, are better staffed and are more adapted to the needs of inmates and of society in general and which allow for better involvement of the community in preparation for release and social reintegration. At the same time old and out-dated prison facilities should be closed down.

### **III. The Council of Europe's position on the issue of prison overcrowding and prison population growth**

#### **a. In general**

26. At the Council of Europe level prison overcrowding has been addressed both in standard setting texts and in relation to more specific assessments of individual situations. The Committee of Ministers recommendations state the basic principles to guide the European countries in maintaining prison conditions and treatment of prisoners in conformity with international standards (ref. Appendix II). Apart from the already mentioned Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation (which will be mentioned more in detail below) such standards can be found in the European Prison Rules (Rec(2006)2 of the Committee of Ministers)<sup>13</sup>.
27. Nevertheless the ECtHR, as stated earlier, has received numerous complaints in the course of the years and has delivered judgements because of violations of Art. 3 of the ECHR due, among others also to prison overcrowding. This has led and is still leading to decisions in individual cases and to pilot judgements (delivered in accordance with Rule 61 of the Rules of the Court). Such judgements are pronounced when a structural or systemic problem or other similar dysfunction is identified by the Court in a given respondent state. After a final judgement is pronounced by the Court, in accordance with Article 46, paragraph 2 of the Convention, the Committee of Ministers starts supervising the measures taken by the state to execute it.
28. In addition the European Committee for the Prevention of Torture and Inhuman or degrading Treatment or Punishment (CPT) and the European Court of Human Rights have assessed particular situations where prison overcrowding has occurred. The Court makes assessments of the specific circumstances in the cases brought before it and has the final say as to what constitutes a violation of the ECHR. The CPT issues general reports and country reports on specific visits to member states where it assesses concrete prison facilities and makes specific recommendations and also develops general standards regarding treatment of prisoners. While the CPT general reports are published, the country reports are published only if the respective country has consented to their publication; this is the case of most Council of Europe member states.
29. The Court has pointed out that overcrowding may in itself in certain situations be considered to be so severe as to justify a finding of a violation of Article 3. In a number of cases, the Court's finding that an applicant disposed of less than 3 m<sup>2</sup> of living space in detention directly led it to the conclusion that there is a violation of Article 3. In other cases even when the living space was more than 3 m<sup>2</sup> the Court examined the cumulative effects of the material and other conditions of detention and in particular the possibility of the freedom of movement and time spent outside the cell to determine whether Article 3 has been breached.
30. The Court has repeatedly found that accommodation involving sharing of cells not fit for that purpose and in particular in overcrowded and insanitary conditions constitutes inhuman or degrading treatment and thus violates Article 3 of ECHR.

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<sup>13</sup> 18.1 The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

18.2 In all buildings where prisoners are required to live, work or congregate: a. the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system;

b. artificial light shall satisfy recognised technical standards; and

c. there shall be an alarm system that enables prisoners to contact the staff without delay.

18.3 Specific minimum requirements in respect of the matters referred to in paragraphs 1 and 2 shall be set in national law.

18.4 National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons.



31. In the case of *Ananyev v. Russia*<sup>14</sup> the Court set out a test for overcrowding in cells with shared accommodation. Apart from stressing that each detainee must have an individual sleeping place in the cell the Court underlined that each detainee must dispose of at least 3 m<sup>2</sup> of living space and the overall surface area of the cell must be such as to allow detainees to move freely between items of furniture. In addition the Court found that the applicants remained inside the cell all the time, except for one hour of outside exercise; they had their meals and used sanitary facilities inside the cell in cramped conditions and one of them spent in those conditions more than three years. The Court therefore found a violation of Article 3 of the Convention.
32. The same general approach of the Court can be found also in a number of other cases<sup>15</sup>. However it should be stressed that in the subsequent case-law, developed both in respect of the conditions of detention on remand and sentenced prisoners the Court reiterated that it has always refrained from determining, once and for all, how many square metres should be allocated to a detainee in terms of the Convention as it depended on a number of relevant factors<sup>16</sup>.
33. Material conditions related to accommodation include, apart from the size of the cell and its overall state, access to natural light and fresh air. The commentary to Rule 18, EPR explains further that the more time a prisoner spends in the cell the more acutely the impact of overcrowded and unsanitary conditions of detention is felt.
34. The Court adopted the same position, arguing that whether or not there is adequate personal space in detention must be viewed in the context of the possibilities offered to spend time out of their cells; in addition prisoners should have access to natural light, air and ventilation in compliance with basic sanitary and hygienic requirements<sup>17</sup>.
35. Even in cases where no direct violation of Article 3 of the ECHR is found, prison overcrowding is to be considered highly problematic, because of its negative effects on prisoners, their state of health and their possibilities for following a programme aimed at their re-socialisation and because of its effects on overall prison management, good order and conditions to which staff working in prisons are subjected.
36. As the CPT has underlined in a number of its reports, an overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when using a sanitary facility)<sup>18</sup>; reduced out-of-cell activities, due to demand exceeding the available staff and facilities; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff.
37. In December 2015 the CPT issued a document "Living space per prisoner in prison establishments: CPT standards" in which can be found the CPT's basic minimum standards, namely 6m<sup>2</sup> for a single-occupancy cell, excluding sanitary facility; 4m<sup>2</sup> per prisoner in a multiple-occupancy cell, excluding fully-partitioned sanitary facility and at least 2m between the walls of the cell and at least 2.5m between the floor and the ceiling of the cell. For multiple-occupancy cells of up to four inmates 4m<sup>2</sup> should be added per additional inmate to the minimum living space of 6m<sup>2</sup>.

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<sup>14</sup> See *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012.

<sup>15</sup> *Torreggiani and Others v. Italy* (nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10; 8 January 2013); *Vasilescu v. Belgium* (no. 64682/12, 25 November 2014); *Canali v. France* (no. 40119/09, 25 April 2013); *Mandić and Jović v. Slovenia* (nos. 5774/10 and 5985/10, 20 October 2011) and *Štrucl and others v. Slovenia* (nos. 5903/10, 6003/10 and 6544/10, 20 October 2011); *Varga and Others v. Hungary* (nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015); *Butko v. Russia* (no. 32036/10, 12 November 2015) a leading judgment about overcrowding in correctional colonies; *Shishanov v. Moldova*, no. 11353/06, 15 September 2015) a leading judgment dealing with overcrowding in Moldovan prisons; *Iacov Stanciu v. Romania*, (no. 35972/05, 24 July 2012) a leading judgment in respect of overcrowding in Romanian prisons; *Melnik v. Ukraine*, (no. 72286/01, 28 March 2006) a leading judgment in respect of overcrowding in Ukrainian prisons.

<sup>16</sup> See *Suldin v. Russia*, (no. 20077/04, § 43, 16 October 2014) and regarding convicted prisoners see *Semikhvostov v. Russia*, no. 2689/12, § 79, 6 February 2014; and *Logothetis and Others v. Greece*, no. 740/13, § 40, 25 September 2014).

<sup>17</sup> See, for example, *Kulikov v. Russia*, no. 48562/06, § 37, 27 November 2012; and *Butko v. Russia*, no. 32036/10, 12 November 2015.

<sup>18</sup> See *Szafranski v. Poland*, (no. 17249/12, 15 December 2015) where the Court found a violation of Article 8 for lack of privacy because of the non-separation of toilets.

38. In the same report the CPT states that “Minimum standards for personal living space are not as straightforward a matter as they might appear at first sight.” They differ according to the type of the establishment, according to the initially intended occupancy level of the cell and the regime activities. For these reasons, the CPT promotes the application of higher desirable standards by the member states in particular when constructing new prisons. The desirable standard for a cell of 8 to 9m<sup>2</sup> is to hold one prisoner and a cell of 12m<sup>2</sup> - two prisoners.
39. In addition it has to be taken into account that prisons are places where some people may be feeling vulnerable, some of them in search of their identity and in need of protection which is a fertile ground for organized gangs and radicalised prisoners to find followers and influence minds. Management and staff are often powerless in overcrowded prisons against such influences, due to a lack of resources to ensure space, time and attention to individual work with prisoners and proper preparation for release and reintegration.
40. Running overcrowded prisons is difficult also from a managerial point of view (thus posing problems at all levels of the prison service); from a healthcare point of view; and from the point of view of ensuring contacts with the family, with legal representatives and with outside agencies working towards the social reintegration of prisoners.
41. In some countries there are financial incentives for staff working in overcrowded prisons. The CPT has rightly underlined in this respect that a system whereby there are financial incentives to run a prison on the basis of constant overcrowding would not appear to be compatible with achieving the Prison Service’s goal of holding all prisoners in a safe, decent and healthy environment<sup>19</sup>.
42. The commentary to the European Prison Rules also underscores the fact that prison population is the product of the functioning of the criminal justice systems and it is not always directly correlated to the crime rates in a given country. Therefore when designing general criminal justice policies and strategies and when adopting specific sanctions and measures due regard needs to be had to their effect on the rates of imprisonment<sup>20</sup>.

**b. Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation**

43. The Recommendation addresses all relevant authorities at national level: legislators, ministries of justice and of the interior, judges, prosecutors, prison and probation services and local authorities.
44. Recommendation<sup>o</sup> R (99) 22 should thus be carefully considered by all relevant institutions both when overall strategies for preventing and dealing with crime are adopted and when specific national rules to prevent overcrowding are developed.
45. The basic principles in Heading I of the Recommendation refer to principles which are still as relevant and valid today as when they were approved<sup>21</sup>.
46. Furthermore the Recommendation in Heading II contains ideas how to cope with a shortage of prison places. Apart from recommending setting and strictly respecting maximum capacity for each penal institution - which is also in line with the European Prison Rules - it is dealing with the situation where the overcrowding actually occurs. It recommends introducing more out-of-cell activities, providing for more family visits, improving food and hygiene, training staff to apply humane and positive treatment, using more home leaves and placement in semi-open or open institutions.
47. Heading III is dedicated to measures related to the pre-trial stage. It recommends inter alia discretionary prosecution, simplified procedures, out-of-court settlements like mediation, diversion, shortening the length of criminal proceedings as far as possible, different alternatives to remand

<sup>19</sup> Cf. § 32, visit to UK in 2008. The UK government has taken into account these comments and has since then rectified the situation.

<sup>20</sup> See commentary to Rule 18

<sup>21</sup> Deprivation of liberty should be regarded as a sanction or measure of last resort

- Extension of prison estate/capacity should be seen an exceptional measure, as it is generally unlikely to offer lasting solutions
- Provision should be made for an appropriate array of community sanctions and measures
- Decriminalisation or reclassification of offences (so that the penalties no longer entail deprivation of liberty)
- The need for a detailed analysis of the main contributing factors in order to devise coherent strategies against prison overcrowding.

detention and ensuring adequate financial and human resources for the proper running of prison and probation services.

48. In Heading IV measures relating to the trial stage are addressed and it is recommended inter alia to make more use of different alternatives to deprivation of liberty and to reduce the length of sentences by combining deprivation of liberty with non-custodial measures. Probation, treatment orders, mediation and combined sanctions are some of the examples. The role of judges and prosecutors in designing and applying penal policies is specially highlighted. It is recommended that judges and prosecutors should be constantly aware of the consequences of sentencing practices on prison overcrowding and should have a clear view on the evolution of prison populations before a judgement is pronounced. The sentences should be individualised so as to take into account not only the seriousness of the offence but also the personal circumstances of the offender, including aggravating and mitigating factors.
49. Finally Recommendation Rec (99)22 under Heading V contains measures related to the post trial stage. The effective implementation of community sanctions and measures is recommended and the need to create the necessary infrastructures to effectively implement and monitor such sanctions and measures and to develop risk (and needs) assessment tools is also underlined. Stress is put on resettlement and it is underscored that treatment measures should begin in detention in order to effectively prepare for release and social reintegration.

### **c. Other relevant legal texts**

50. Since 1999 several other recommendations were adopted by the Committee of Ministers which reinforce the position of the Council of Europe regarding the execution of penal sanctions and measures. The most known and important text is Recommendation Rec (2006)2 on the European Prison Rules (referred to previously). Other relevant recommendations in this respect are 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 (2012)12 concerning foreign prisoners and Recommendation CM/Rec (2014)4 on electronic monitoring. In all these texts the principle of using deprivation of liberty as a measure of last resort is continuously underlined and is underscored the need to develop alternative measures replacing remand in custody as well as community sanctions and measures instead of imprisonment.
51. Recommendation, Rec (2003)22 on conditional release (parole) promotes its use<sup>22</sup> in order to avoid de-socialisation of prisoners, improve resettlement and improve community safety. In order to be effective conditional release needs to be carefully planned; minimum periods of detention should be fixed by law (and should not be too long so as not to hinder the positive impact of early release); victim compensation schemes should be defined by law; treatment for substance abuse; entering education, training or occupational activities; restriction of movement or settlement should be among the requirements set for releasing a person.
52. Other organisations have also considered the issue of overcrowding and have suggested measures to be taken to deal with this problem<sup>23</sup>.

## **IV. Root causes of overuse of deprivation of liberty and of prison overcrowding**

### **a. Penal policy and legislation leading to overuse of the penal system**

53. The question why prison overcrowding occurs is not an easy one to answer in a general manner as different legal systems and sentencing practices exist in Europe. Legislation and sentencing practices are in any case among the root causes for increased rates of imprisonment. As a result in some countries overcrowding exists in pre-trial detention institutions, in others the rising numbers of foreigners in prison lead to prison inflation or overcrowding may occur due to increased length of sentences and the ensuing congested numbers of long-term prisoners and those sentenced to life imprisonment. This is compounded by the erroneous belief that imprisonment works as a deterrent

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<sup>22</sup> It states in its Preamble the following: "Recognising that conditional release is one of the most effective and constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community".

<sup>23</sup> The UN Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules 2015); the UNODC Handbook on strategies to reduce overcrowding in prisons (2013), and Report of the UN High Commissioner for Human Rights (Doc. A/HC/30/19).

resulting in increased sentences. In some countries the increased number of short-term prisoners can also cause overcrowding. It should be noted that in most countries the reasons for prison overcrowding are a combination of several or of all these factors.

54. The problem of prison overcrowding is closely linked to the functioning of the national criminal justice systems and the values, ideas and traditions behind these particular systems. These values, ideas and traditions are the result of very long processes and they are sometimes difficult to change, because they reflect history as well as cultural and social realities and are also partly based on political choices. Furthermore criminal law systems are often a “patchwork” of rules that have come to existence on a case-by-case basis over a considerable span of years or even centuries, meaning that the general lines and principles may never or at least not very often have been analysed as a whole. Imbalances in the system like prison overcrowding are reflections of these realities and therefore difficult to deal with. Evolution and societal changes may also not be very well reflected in criminal law in a coherent and timely manner.
55. Since the end of the 18th century and still today prison is considered to be the main form of reaction or punishment to serious violations of social norms and rules. In a democratic society the question which behaviour should constitute a criminal offence as well as the question whether a prison sanction is the best response are subject to political decisions to be taken by parliaments and governments.
56. The responsibility and the possibilities for solving the problem of prison overcrowding and prison population inflation are thus to a considerable degree to be placed upon political decision makers and law makers. The same decision makers also decide wholly or partly on those resources, both economic and human, which should be at the disposal of prison and probation services. There is also a responsibility on the actors of the criminal justice system - police, prosecutors, judges and prison and probation services - to deal with the issue of prison overcrowding.
57. It should not be forgotten that the views and values adhered to by decision makers and law makers are often related to similar views and values of their constituents. Such views and values related to crime and punishment may be of a nature that is not facilitating a reduction in the prison population and not leading to solutions to the problem of prison overcrowding. Such views, of course within the limits of protection of human rights, must be respected as part of democratic pluralism. The criminal justice system and the use of punishment have a crucial function also in respect of the rights of victims or potential victims. There is a need to address social unrest caused by serious crimes. Supporting the feeling that justice is being done and that impunity does not prevail are of importance for states when taking decisions on punishment and crime.
58. It should be remembered that democratic pluralism also includes that open debates are held on crime policy and the criminal justice system with a view to listening to different arguments and to being informed and guided by research results and experiences based on facts about the true functioning of criminal justice.

#### **b. The limited use of alternatives to detention on remand<sup>24</sup>**

59. The Council of Europe in a number of texts adopted by the Committee of Ministers as well as its European Court of Human Rights has persistently upheld the principle that deprivation of liberty should be a sanction or measure of last resort due to the fact that the right to freedom is one of the most fundamental human rights and that deprivation of this right has harsh and serious consequences on the individuals affected by it<sup>25</sup>. In many countries overcrowding is particularly problematic in remand facilities as too often suspects are detained.
60. The use of pre-trial detention in order to intimidate suspects, political opponents or journalists should not take place. Such cases have given rise to strong critiques from different Council of Europe bodies like the Commissioner for Human Rights<sup>26</sup> or the Parliamentary Assembly<sup>27</sup> as this goes contrary to

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<sup>24</sup> The definition of the term “remand” is to be found in Recommendation Rec (2006)13 of the Committee of Ministers on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

<sup>25</sup> See *Varga and Others v. Hungary* (nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13; 10 March 2015), where the Court urged the Hungarian authorities to reduce the number of prisoners and to minimise recourse to pre-trial detention and to encourage the use of alternatives to detention.

<sup>26</sup> CommDH/(2011)44; 4 October 2011.

<sup>27</sup> Recommendation 2081 (2015) “Abuse of pre-trial detention in States Parties to the European Convention on Human Rights”.

the political commitments and legal obligations the states undertake when joining the Council of Europe and is a clear violation of the European Convention on Human Rights.

61. In some countries there may be a tendency to arrest and then to prolong the detention in remand facilities of a person at a stage of the investigation where this may not be fully needed and justified, if needed at all during the investigation phase. Such approaches may violate basic human rights, in particular article 5 of the European Convention of Human Rights and the recognised principles of rule of law and contributes in addition to prison overcrowding and bad prison conditions.
62. In view of the presumption of innocence remanding a person in custody should not be the first but the last resort after evaluating on a case-by-case basis (in accordance with the European Convention on Human Rights and ensuing practice of the Court) the risks of committing a new crime, of absconding, of tampering with evidence or witnesses and of interfering with the course of justice.
63. In some countries in case of recidivists the law provides for automatic remand in custody. This principle may be problematic because the definition of recidivism varies a lot. In some countries recidivism is the repetitive commission of any offence, independent of its gravity, even of petty crimes. In other cases the personality of the offenders or their personal circumstances may require the use of alternatives. Therefore the courts should have the possibility to take decisions on an individual basis.
64. In most European countries sufficient numbers and types of alternatives to pre-trial detention exist. The problem is their limited use by the courts for different reasons, which may be related to public opinion pressure and fear of crime. In other countries legislation provides for alternatives to remand in custody but in reality no social or administrative structures exist which can accommodate or deal with high numbers of persons under trial that could possibly be subject to the use of the alternatives. This leaves the courts with only one remaining option - deprivation of liberty. Although investing in developing such structures, ensuring their adequate staffing and their training may represent an important initial financial burden, such an investment is likely to pay off in the long term. Deprivation of liberty as it will be developed further under paragraph 78 is in itself the most expensive sanction or measure and to that fact should be added the resulting losses related to the deteriorated situation of the offender ending up in prison losing employment and housing and being thus a possible future social client in the different public systems.
65. Some recent research based on SPACE statistics<sup>28</sup> shows that despite the introduction of new alternatives to custody this has not contributed or has contributed very little to the reduction of the use of deprivation of liberty. It seems that there is a net widening of the criminal justice system. Such possible effects should be carefully evaluated and any negative impact should be avoided.
66. Examples of alternatives to remand custody are home arrest, curfew order, bail, retention of travel documents, reporting obligations, etc. It should not be forgotten that the existing laws in the European countries provide also for release pending trial without any attached conditions. The courts should be more pro-active in using all these alternative options.

### **c. Length of detention on remand**

67. In some member states detention on remand is sometimes very long and this is among the major causes for overcrowding. Apart from undermining the principle of efficiency of justice and prolonging the period of uncertainty as to the presumption of innocence this has also strong negative impact on the persons concerned and on their families. In general the remand facilities lack the necessary means for organising regime activities, visits and contacts with the outside world are limited and preparation for release is non-existent.
68. Long periods of pre-trial detention should not result in automatically pronouncing prison sentences which equal the period already spent in custody. While the period of remand should be deducted from any sentence imposed it should not increase the length of the final sentence.
69. Few countries have taken decisions to allow remand prisoners to take part in regime activities designed for sentenced prisoners. This measure although based on good intentions is not applicable everywhere because of the principle of presumption of innocence and also because in many countries remand facilities are separated from other prison institutions.

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<sup>28</sup> Ref. "Have community sanctions and measures widened the net of the European criminal justice systems?" in « Punishment and Society » 2015, Vol. 17(5) pages 575-597.

70. Detention on remand may have a particularly adverse effect on some vulnerable groups like children in conflict with the law, parents of infant children, substance-abusers and persons with mental disorders. Therefore noncustodial measures should be considered first. Children of imprisoned parents remain in the grey area of public attention and the impact of the temporary loss of their parent has not been properly understood by society so far. The two last groups are in need of treatment and care which often lack in remand facilities and the delay in receiving such treatment and care once sent to an adequate institution may have serious effects on their health and well-being. Taking out such persons from remand custody and from prison in general and directing them to proper treatment arrangements would help them re-socialise better and would also decrease significantly prison numbers. Some countries report that up to 70% of their prison population has substance abuse problems.

#### **d. Limited use of community sanctions and measures**

71. Recommendation N° R(92)16 on the European Rules on community sanctions and measures (CSM)<sup>29</sup> sets a number of standards and principles for their use and by doing so incites the member states to introduce a reliable system in order to motivate courts to make more use of CSM instead of imprisonment. CSM can maintain the right balance between protection of society, reparation of the harm done to victims and dealing with the needs of social adjustment of the offenders.
72. Such alternatives can fully or partially replace prison sentences and may include for example treatment orders, fines, confiscation of assets, suspended sentences linked to the fulfilment of certain conditions by the offender, community service/sanctions and many other sanctions and measures, often specially adapted to the particular offender and the circumstances of the crime. What they all have in common is that the crime committed will indeed be met with an adapted and therefore efficient sanction/reaction which can also help prevent future offences. Economic sanctions together with CSM or as standalone alternatives to imprisonment seem to be quite efficient and have often more effects on offenders than the mere use of prison.
73. SPACE data show that use of CSM in Europe has recently started to increase rapidly. Part of that is due to change in legislation, the creation of probation services or their restructuring in most countries as well as the development of new technologies allowing for better supervision of offenders in the community.
74. Nevertheless there is still more room for use and even for better and more efficient use of CSM in Europe. One indicator of such use is the decreasing numbers of prisoners. If such a decrease is not visible then the use of CSM is not efficiently done and (as said earlier) the net of the criminal justice system widens instead of shrinking and shows the preferred use of criminal responses to offences.
75. Community service is an example in this respect as it helps maintaining offenders in the outside social environment, developing their social and employment skills and working towards their reintegration into society. The role of the local communities in relation to this is very important as they should provide for such possibilities for community service. They thus become a partner in dealing with crime in a manner which steps out of the traditional criminal justice methods and on the other hand become facilitators in social integration of offenders which is a basic indicator of inclusive communities.
76. To the serious negative effect which deprivation of liberty can have on individuals should also be added the impact it has on their families, especially on their children which is rarely taken into consideration or evaluated<sup>30 31</sup>. Apart from material losses for the family because of loss of income and often of shelter, imprisonment causes often loss of social status, feeling of shame and stress for the partner and the children, loss of parental care and assistance. It is roughly estimated that at any given point in time about 2 000 000 children in Europe have a parent in prison. Stigmatisation and personal and educational problems arise in most cases and these should be born in mind by the authorities when seeking the best ways of fighting crime.

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<sup>29</sup> The Recommendation is currently being updated and will be replaced by a new one in 2017.

<sup>30</sup> The 2015 and 2016 Council of Europe Conferences of Directors of Prison and Probation Services specifically dealt with these issues.

<sup>31</sup> The same logic, namely preserving family and social relations at the pre-trial and trial stages lies also behind the 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.

77. The Committee for the Prevention of Torture considered that in the context of high incarceration rates, “throwing increasing amounts of money at the prison estate will not offer a solution” (see paragraph 28 of the 11th General Report, CPT/Inf(2001)16), and has advocated active review of pre-trial custody policy. In 2010 the Committee of Ministers indicated that “the creation of new places of detention cannot in itself provide a lasting solution to the problem of prison overcrowding and that this measure should be closely supported by others aimed at reducing the overall number of remand prisoners” (see Interim Resolution CM/ResDH(2010)35).
78. In addition it should be noted that prison is a very costly sanction. There are big differences between the expenses incurred for each prisoner in the Council of Europe member states, but it is worth underscoring that 27 billion euros was the total amount spent for prisons in Europe in 2013<sup>32</sup>.

**e. Other factors which prolong deprivation of liberty**

79. Some prison administrations have repeatedly expressed their concern that prisons become more and more often places to hold persons from socially deprived backgrounds, often substance abusers, often with personality disorders or with other mental disorders. Apart from the fact that this is a source of everyday strain for staff who are not necessarily trained to deal with such cases, it contributes in no way to dealing with the special needs of such persons and to protecting society in long term.
80. Lengthy criminal proceedings are often the source of unjustified long deprivation of liberty especially at the pre-trial phase. This may be due to too complex justice systems allowing for significant delays or it may be due to complicated cases involving organised crime groups where difficulties exist in collecting evidence, finding witnesses and investigating the offence.
81. In South Eastern Europe the prison sentences are longer than in Northern Europe so that the turnover is slower. SPACE data show that the turnover in Northern Europe is much higher and prisoners stay for shorter periods of time in detention (which does not mean that in some of these countries prison overcrowding is not experienced).
82. Measures for public protection and sentences involving organised crime groups, persons sentenced for terrorism related crimes and sex offenders also are among the root causes for long prison sentences. Despite the fact that they concern small numbers of prisoners such prisoners accumulate for long periods of time in prison and are often sentenced to life imprisonment. Therefore this can lead to prison congestions in certain high security prisons where usually such prisoners are held.
83. In cases of long prison sentences where the prospects for release are vague, structured sentence planning is difficult to achieve and so is structured return to society. In other words such prisoners and the length of their stay in prisons give rise to difficult and sensitive issues. In many cases there is a need for public protection reasons to have intensive supervision measures once the person is released, and mandatory treatment orders in the case of sex offenders may be needed. This means that sufficient targeted resources for dealing with serious, persistent and violent offenders are needed in order to re-socialise them and sometimes to supervise them even if that will be for years. Due to the length of their sentences and the burden this is for society and prisons it makes sense to try to look for secure ways of bringing such persons out of prison in due course.

**V. How to address prison overcrowding?**

**a. Deprivation of liberty as a measure of last resort**

84. As mentioned earlier, this principle is to be found in the relevant Committee of Ministers recommendations. These texts invite the member states to use deprivation of liberty only when the seriousness of the offence combined with consideration of the individual circumstances of the case would make any other sanction or measure clearly inadequate. If this view is largely accepted in reality its interpretation differs which may lead to divergent transpositions into concrete action and rules in the different criminal justice systems. The legislative approach as to the principle is considered further down under VI b.

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<sup>32</sup> SPACE I, 2014 data.

85. In many of its judgements the Court has reiterated that, in view of both the presumption of innocence and the presumption in favour of liberty, remand in custody must be the exception rather than the norm and should be a measure of last resort<sup>33</sup>. In *Torreggiani v. Italy* the Court reminds of the relevant Committee of Ministers recommendations to be taken into consideration when devising penal policies and reorganising the penitentiary system and invites judges and prosecutors to make more use of alternatives to custody and make lesser use of detention in order, among others, to reduce the growth of prison population.
86. In order to avoid the excessive use of remand in custody and imprisonment courts should apply the principle of using deprivation of liberty as a measure of last resort. Unfortunately only too often deprivation of liberty is a measure of first resort instead of being seen and accepted as an exceptional method of execution of a penal sanction. Courts should not deprive a person of his/her liberty simply because it is provided by law and is carried out in a lawful manner, but also because it is reasonable and necessary in all circumstances (evaluated on a case-by-case basis). This requires the application of the principle of proportionality and the careful assessment of the risk of reoffending and of the risk of causing harm to the society.
87. The length of pre-trial detention should be fixed by law and/or be reviewed at regular intervals. The length of pre-trial detention should in no case exceed the length of the sanction provided for the offence alleged to have been committed. In addition to the length of pre-trial detention being fixed by law, the need for continuation of detention on remand of any suspect or accused should be reviewed at regular intervals as with time the pressing necessity to remand someone in custody may decrease or even disappear.
88. Remand detention can last many months, sometimes years because a person may be considered to be a remand detainee until the last instance court has delivered its judgement. It seems therefore advisable to consider detaining such persons convicted by first instance court together with sentenced prisoners after the judgement of the first instance court is delivered in order to avoid situations of overcrowding in remand facilities and to start preparing the persons for rehabilitation in view of their future release. (ref. also to paragraph 68 above).
89. There should be no automatic deprivation of liberty either at the pre-trial stage or in case of non-compliance with probation conditions. The courts and other deciding authorities should instead have not only the right but also the obligation to examine the circumstances of all individual cases before a decision is taken regarding the most appropriate sanction or measure to be imposed. The decisions of the courts should be reasoned.
90. Any period of deprivation of liberty prior to conviction, in whatever institution or facility spent, or in some countries spent in house arrest, should be deducted from the overall length of the prison sentence.
91. In some countries discretionary prosecution exists and allows for balancing the legality of prosecuting a given case with the need for such action. Diversion from prosecution is also an efficient way of responding to offending behaviour and protecting the rights of the victims. These methods may also have a beneficial effect on reducing prison overcrowding.
92. Measures aimed at improving access to justice and good administration of justice, including fixing and respecting time limits in criminal proceedings can, apart from ensuring respect for the rule of law, also contribute to decreasing overcrowding especially at the pre-trial stage.
93. Before final judgement is delivered the judge should systematically weigh the pros and cons of sentencing someone to imprisonment including the possible effect this could have on the individual and their family and also the general consequences and costs for society.
94. Caution should be exercised with laws providing for mandatory prison sentences and for mandatory minimum prison sentences for specific types of offences. Such legal provisions are among the factors leading to overuse of imprisonment and therefore to overcrowding. In addition they limit the discretionary power of courts to examine each individual case and to take a proportionate decision based on the crime committed but taking also into consideration any mitigating or aggravating circumstance.

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<sup>33</sup> See, among many others, *McKay v. the United Kingdom* [GC], no. 543/03, § 41, ECHR 2006 X.



95. Individualisation of the sentence goes hand in hand with the proportionality of the punishment and should remain within the discretionary power of the judiciary. Pre-sentencing reports can provide valuable information to the courts in this respect and can allow them to base their judgements on reliable information regarding the social, family and other situation of each offender. This is particularly important in the case of young offenders. It is therefore advisable in relevant cases to consider introducing such reports in the countries where such possibilities do not exist and to broaden their use in the countries where they already exist but are not obligatory in all court cases.
96. The recent developments in the use of restorative justice, including mediation between victims and offenders have proven efficient even in cases of serious crimes. Although mediation may not always lead to avoiding imprisonment such options should be carefully explored also in the light of addressing prison overcrowding.
97. Rules related to early release from prison should be set by law and clear conditions and procedures should be attached to these rules. Prisoners should have the right to initiate the procedure themselves (or with the help of their lawyers) independent of the right of the prison authorities to initiate such a procedure *ex officio*. It should be possible to take into account a prisoner's engagement in work, education or programmes addressing offending behaviour to prompt early release in appropriate cases.
98. It is important to note that prisoners should know as early as at the outset of execution of their prison sentence at what moment of execution of their prison sentence and under what criteria they can request and/or be granted conditional release. There are basically two distinct systems of conditional release in Europe – discretionary (a minimum fixed or proportionate to the length of the sentence period of prison sentence to be served and clear and realistic criteria to be fulfilled before a decision is taken by the responsible body) and mandatory (the prisoner has an automatic right to be granted conditional release after a certain minimum period of the prison sentence is served, unless exceptionally the behaviour of a particular prisoner bars him or her from this right for a certain period of time)<sup>34</sup>.
99. Some countries have the so-called temporary release schemes whereby a prisoner can be released conditionally but continues to be considered a prisoner and in case of committing a new crime can be recalled back to prison without a new judicial decision. In most European countries persons who are conditionally released are no longer considered prisoners. If during this period they commit a new crime new criminal proceedings are initiated against them and no automatic recall to prison is possible.
100. Long prison sentences or prison sentences for life concern usually a minority of the prison population. Nevertheless with time their number rises and more prisoners accumulate who tend to stay locked up for decades or sometimes for life. In accordance with the case-law of the European Court of Human Rights<sup>35</sup> any such prisoners should have the right at regular intervals to request early release and this request should be properly considered and reasons given for decisions<sup>36</sup>.
101. The execution of judicial decisions in quite a few European countries is carried out by the executive, under judicial control. This derives from the logic that the specific manner of execution of individual penal sanctions and measures should better be placed under the primary responsibility of the prison and probation services and not of the judiciary as these are the services whose staff is in everyday contact with persons deprived of their liberty<sup>37</sup>. This allows more flexibility and better individualisation of these sanctions and measures in order to adapt them to the specific offenders and thus to contribute to their management and rehabilitation.

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<sup>34</sup> See Recommendation Rec (2003)22, Rule 7, where a preference towards using the mandatory system can be seen as it requires fewer resources.

<sup>35</sup> See for example the case *Vinter and others v. UK* (nos. 66069/09, 130/10 and 3896/10, judgement of the Grand Chamber, 9 July 2013), where the Court found that a "whole life" tariff, which forces murderers to die in jail, was "inhuman and degrading".

<sup>36</sup> See also Recommendation (2003)22 which states in its Rule 4a: "In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life sentence prisoners".

<sup>37</sup> See also Recommendation Rec (2003)22, Rules 28, 32 to 36.

102. In some countries not only the initial but all subsequent re-classifications of prisoners in the course of the execution of prison sentences is decided by the judiciary. This system could be rather rigid as it does not allow the prison administration to take decisions in this respect, including action in case of severe overcrowding by transferring prisoners from closed to open or semi-open institutions.
103. An issue that deserves attention is the aging prison population. This may be a particular problem in countries where long prison sentences and life-long sentences are a common practice. This leads to congestion of such types of prisoners for long periods of time but it also poses managerial and ethical problems. Very few prisons in Europe are adapted for holding seriously or terminally ill or heavily handicapped prisoners and for providing the necessary healthcare and everyday services. Staff is also rarely trained how to deal with such prisoners and the suffering this entails for the prisoners and for their families is significant. The question of release on compassionate grounds has been raised at national and international level and most recently PACE<sup>38</sup> recommended a number of measures in this respect and urged the national authorities to consider introducing possibilities for compassionate (temporary and indefinite) release of prisoners and other categories of persons in detention in their legislation. Again such decisions should ideally be the responsibility of the prison services themselves under judicial control in order to allow for flexible managerial decisions to be taken on a case-by-case basis.

#### **b. Revision of penal law, decriminalisation and alternatives to penal proceedings**

104. It is recommended that the member states, including those that do not face acute overcrowding regularly assess their criminal justice system or substantial parts of it and consider which are the objectives of crime policy, the available resources and what is really achieved by the different sanctions and measures provided by law and practice. It may also be added that many professionals like judges or prosecutors are not, or not very often at least, invited to reflect more profoundly on the outcomes of their decisions and the factors influencing the exercise of their discretion in relation to sentencing.
105. The reasons behind decriminalising of certain behaviour should not derive from existing prison overcrowding but from principles of humane and proportionate sanctioning of a given socially unacceptable act. Of course such legal reforms are expected to decrease imprisonment rates and the authorities should be aware of that.
106. Particular care should be exercised when considering whether certain acts should be criminalised or whether they pose issues mostly of an ethical nature. A given behaviour may be ethically highly questionable in a given society but it may not necessarily need to carry a criminal sanction and even less so prison sentence. It is important to note that decriminalisation does not necessarily mean to declare certain behaviour legal or moral but it means proposing responses which lay fully or partially outside the criminal justice system. A given act may still be considered illegal and immoral but other measures and sanctions may be more suitable to address it. Further, it has to be remembered that in all legal systems not all illegal acts are criminalised but other measures or interventions may be provided instead to rectify the situation.
107. In certain areas today “a helping hand” in the form of social, administrative, civil or healthcare measures may be far more beneficial for all. Basically the purpose should be to get as many petty offenders as possible away from the penal system and at least from the prison system. Criminal law measures should not be used automatically from the outset of a given problem as they are often costly and do not necessarily deal with the root causes of the problems faced.
108. Another useful way to follow in the field of decriminalisation could be to decrease the duration of the sanctions foreseen in the law by lowering the maxima of the prison sentences. This can be done for specific crimes, but due to coherence issues which are crucial to most criminal justice systems this should generally be done with due respect for the context e.g. compared to the sanctions foreseen for other (similar) crimes.
109. As a means for reducing prison overcrowding should also be mentioned such methods like substitution in part or in total of prison sentences with community sanctions and measures or with administrative sanctions (including economic sanctions) as well as reducing the length of imprisonment or releasing certain offenders or groups of offenders by way of individual pardons or collective amnesties. In its report following its visit to Georgia in 2012 the CPT when commenting on the collective amnesty

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<sup>38</sup> Recommendation 2082 (2015) and Resolution 2082 (2015) on the fate of critically ill detainees in Europe.

responding to the extremely serious level of prison overcrowding stated that “the problems of prison overcrowding and prison population inflation cannot be addressed in a comprehensive and lasting way through the use of such exceptional measures”. It goes further to state that “the relative haste with which the amnesty has been carried out and the connected absence of preparation for release, together with the lack of suitable outside support structures, carries with it the risk of seeing a large proportion of the released inmates back in prison within a short period of time”<sup>39</sup>.

110. Other ways like removing the actual possibilities to commit and benefit from crime have also proven efficient in reducing crime rates and as a result in some cases also imprisonment rates. This is seen by some researchers as a kind of “false” decriminalisation, others refer to it as general prevention measures. Whatever the case it can be quite efficient although depending on many other social and economic factors. For example investment in good locking and alarm systems reduces burglaries. Fraud and other types of economic crime, where the actual opportunities (for instance lack of effective control and security measures and certain technical/practical issues related to IT systems) may drive a lot of often quite serious criminality. Therefore improving technical control and IT systems may help reducing crimes in this area.
111. One important issue to consider is how to deal with offenders with mental health disorders, as in some countries there is a tendency to keep such persons in prisons and not to take care of them in facilities adapted for their treatment; thus apart from possible human rights issues involved they may also contribute to the overcrowding problems. The European Prison Rules are quite explicit in this respect<sup>40</sup>. Obviously any decision should take into account the individual circumstances of a given person and should attempt to give prevalence to healthcare reasons regarding detention in special institutions or sections.
112. It can be argued that only acts and behaviour that are seriously harmful or causing a risk of harm or real danger to other persons should be criminalised and should entail prison sentences. The need for proportionality between the real harmfulness of the offence committed and the real risk posed by the offender and the degree of punishment is also a very important point to be considered.
113. On the other hand it should be fully recognised that crimes committed by dangerous offenders merit special attention and often bring about the use of prolonged deprivation of liberty to protect society and potential victims, which must be seen as fully justified. The definition of dangerousness may vary, but the definition from the Committee of Ministers Recommendation CM/Rec (2014) 3 on dangerous offenders may be useful as a starting point in this respect. “A dangerous offender is a person who has been convicted of a very serious sexual or very serious violent crime against persons and who presents a high likelihood of re-offending with further very serious sexual or very serious violent crimes against persons.” Violence may be defined as the intentional use of physical or psychological force.
114. So in total, general revisions of the criminal justice systems or at least revision of the types of crimes, of their dangerousness for society and of the sanctions contained in the criminal codes would be welcomed as this could offer an opportunity to study the coherence and ideas and values behind the penal policy of a given country and would simultaneously offer a chance to address prison overcrowding. This is a demanding but not impossible task and it can pave the way to more lasting reforms of criminal law bringing it up-to-date.
115. Therefore in order to obtain long lasting reduction of prison numbers it is important to consider legislative possibilities for:
  - decriminalising some offences (some countries have decriminalised drunken driving and substance abuse and have replaced these with administrative sanctions and treatment orders, others have decriminalised irregular immigration, others have replaced imprisonment of fine defaulters with community service);
  - Individualising the sentences pronounced regarding their necessity and proportionality;
  - diverting from the criminal justice process (for example suspension of the case, suspension of the pronouncement of a sentence) by way of mediation, reparation and victim compensation schemes;
  - providing for sufficient alternatives to pre-trial detention;
  - suspending prison sentences with or without imposing certain conditions;

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<sup>39</sup> CPT/Inf (2013)18.

<sup>40</sup> Rule12.1.: “Persons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for the purpose”.

- replacing prison sentences for some offences by sanctions and measures enforced in the community (community service, victim compensation schemes, electronic monitoring, etc.);
- introducing sufficient types of community sanctions and measures and stopping automatic recall to prison in case of non-respect of the conditions imposed by the court sentence or treatment order;
- providing more possibilities for early release schemes.

### **c. Prison capacity and number of prisoners**

116. Good management of the system for execution of penal sanctions and measures requires respect for the legislation in force, for human rights of suspects, offenders and staff, and the provision of updated information on the prison capacity and the exact number of suspects and offenders detained or under supervision.
117. Many European countries have legal provisions regarding the minimum personal space each prisoner should have while in prison (see under p. III.a. above the position of the European Court of Human Rights on this issue and latest CPT standards in this area). Recommendation (99)22 concerning prison overcrowding and prison population inflation recommends fixing maximum prison capacity for each prison as a way of combatting prison overcrowding<sup>41</sup>. Some countries have defined such maximum prison capacity of each penitentiary institution and such an approach helps manage better prison numbers, allocate prisoners elsewhere, seek early release schemes, replace prison sentences with alternative sanctions, etc.
118. The Council of Europe member states should adopt methods of calculation of prison capacity based on Council of Europe standards, and corresponding to the criteria set by the Court and the CPT as stated above. This will permit the gathering of reliable information regarding overcrowding which needs to be accessible not only inside the penitentiary system but also to the probation services and to the judiciary. This will allow taking decisions, including judicial decisions best adapted to the capacity for intake and management of certain number of prisoners depending not only on the available prison places but also on the resources, including the number of staff who can deal with such offenders in a way allowing their proper rehabilitation. Collecting accurate prison and probation statistics also allows making comparisons, studying trends in sentencing policies and execution practices and taking informed decisions.
119. The Council of Europe Annual Penal Statistics<sup>42</sup> (SPACE I - prisons and SPACE II - community sanctions and measures) are a valuable source of information and analysis in this respect as trends and developments can be analysed at the level of Europe.

### **d. Prevention and dealing with recidivism**

120. Dealing with recidivism and preventing future offending has been for many years the subject of scientific research and reasons for policy concerns. Despite this fact no simple solutions have been found. Some possible ways of dealing with these problems involve viewing them from a broader perspective than the one offered by criminal justice. The development of new technologies nowadays offers more possibilities to prevent some types of offences. In order to efficiently reduce recidivism additional efforts are needed for the successful preparation for release and social reintegration of former prisoners.
121. Some countries invest in situational prevention by analysing the living conditions in a given place where certain types of offences are committed and by improving both its safety and the quality of life and social services. This may include changing urban planning and design.
122. Enrolment of offenders in programmes which deal with substance abuse, with aggression management, which improve educational and employment skills is also an important factor. It should be noted in this respect that such enrolment is efficient when done with the informed consent and willingness to change on the part of the offender and not as a deal for being released from prison earlier.

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<sup>41</sup> Rule 6: "In order to avoid excessive levels of overcrowding a maximum capacity for penal institutions should be set."

<sup>42</sup> <http://wp.unil.ch/space> and also [http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/default\\_en.asp](http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/default_en.asp)

123. Some offenders need to be restricted from visiting certain places or meeting certain persons and such measures can also prove efficient in dealing with specific recidivism risk. Examples could be domestic violence or sex offending.
124. It is important to note that imposing individualised conditions when an offender is released should include not only supervision but also assistance measures in order to achieve their successful reintegration<sup>43</sup>.
125. Work with the families of offenders and their direct social environment (school, peer groups) both during and after a prison sentence has proven also to help prevent further offending. Special attention should be paid to the situation of prisoners immediately after release as this period is crucial for their getting back on the right track.
126. The role of courts can be decisive in this respect as by looking into the circumstances of each individual case they may seek to find the most appropriate sanction but also the most appropriate intervention needed to deal with recidivism. The courts should seek to strike the balance between public safety and addressing the individual risks and needs of offenders.

#### **e. The role of monitoring mechanisms and of consultative bodies**

127. There should be a distinction made between governmental inspection of prisons which may be carried out either by a body internal to the prison system or by an inspectorate attached to the ministry of justice or to the judiciary and an independent monitoring mechanism functioning at national or local level. Both of these mechanisms for overseeing prisons are a valuable source of information regarding the actual situation and also valuable partners in any reform of the criminal justice system.
128. The co-existence of both mechanisms at national level is not superfluous as explains the Commentary to Rules 92 and 93 of the European Prison Rules as “even in countries with well-developed and relatively transparent prison systems, independent monitoring of conditions of detention and treatment of prisoners is essential to prevent inhuman and unjust treatment of prisoners and to enhance the quality of detention and of prison management”.
129. Also, as stated above, the European Committee for the Prevention of Torture (CPT) has functioned since 1989 under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CETS No.126). It has proven to be a highly respected and efficient monitoring mechanism on the European level. Since the beginning of its existence the CPT has carried out more than 2500 visits to police facilities; 1100 visits to prisons; 350 visits to immigration detention centres and 400 visits to psychiatric facilities and social care homes. In total about 400 visits to member states have been carried out. The majority of these visits (232) are regular periodic visits, while 159 are *ad hoc* visits with the Committee responding to particular circumstances in member states. The overwhelming majority of country reports are published at the request of the member states concerned and are available at the CPT website ([www.cpt.coe.int](http://www.cpt.coe.int)).
130. Most European countries have ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>44</sup>. The Protocol requires the creation of independent national preventive mechanisms (NPM) which have the right to visit places for deprivation of liberty, including prisons. Most of the European signatory states have created NPMs or have entrusted the existing Ombudsmen or similar bodies with the tasks described in the Optional Protocol. The OPCAT enables direct contacts between NPMs and the UN Subcommittee on Prevention of Torture (SPT) and creates triangular relationship between SPT, NPMs and States Parties which is aimed at facilitating the dialogue in order to ensure greater protection for persons who are detained for any reason.
131. In many European countries parliamentarians can also visit places of detention and deliver public statements. These is very important, as parliamentarians vote laws and also have their own direct contacts with their voters and can serve as vectors of reforms. In many countries prisons can be monitored in some form or another by boards of visitors, consisting of volunteers recruited from the

<sup>43</sup> See Rule 8, Recommendation Rec (2003)22, Rule 1, Recommendation CM/Rec (2010)1 on the Council of Europe Probation Rules and Rule 8, Recommendation CM/Rec (2014)4.

<sup>44</sup> As of 22.02.2016 the following Council of Europe member states are not signatories to the Protocol: Andorra, Latvia, Monaco, The Russian Federation, San Marino and Slovakia. Belgium, Iceland and Ireland have signed but have not ratified the Protocol. (UN-CAT; G.A. resolution A/RES/57/199. adopted Dec. 18, 2002).

local community which is also a positive way of keeping local society informed of the situation with prison conditions and of better involving local communities in the preparation of prisoners for release and social reintegration. Civil society organisations should also be encouraged to be involved in improving prison conditions and the treatment of prisoners.

132. It is also important to maintain contacts and exchange of information between the national monitoring bodies and also between the national and the international monitoring mechanisms in order to co-ordinate the recommendations and proposals made for improving the treatment of prisoners and prison management and assist the respective authorities in finding realistic adapted solutions to the problems.

#### **f. Coherence of the tasks and objectives of the different actors in the criminal justice process**

133. There are many actors of the criminal justice process and they belong to all three divisions of state authority. In addition their work is assisted or complemented by the involvement of representatives of civil society and private businesses. As mentioned earlier political traditions and the will of politicians play a significant role in taking important decisions related to criminal justice policy and practice. The legislative, the executive and the judicial authorities are all inter-related in the role they play in this field and there is an evident need for a constant coherence of their actions and objectives. Coherence is possible only if based on dialogue, trust and co-operation and this often demands sharing of information and data, sharing ownership and bearing responsibility for important decisions.
134. Prison overcrowding may at times be the result of commonly perceived objectives but also of often inefficient division of tasks and responsibilities in the criminal justice system (different actors, different responsible ministries, separate budgets) leading to systems that can have problems with coherence in implementing penal policies and facing management difficulties.
135. The Ministry of Justice may be the primary responsible ministry for execution of penal sanctions and measures but the Ministry of Finance has an important role to play in this respect as well. Any reform, including criminal justice reform and penal reform requires adequate funding and well managed budgets. Initial investments may represent a significant amount of money and the Ministry of Finance is a partner which needs to be convinced that such an initial investment will pay off in the long run by decreased use of imprisonment (the most costly sanction), by decreased complaints and requests for compensation related to lengthy criminal proceedings and to poor prison conditions, decreased loss of jobs and housing by offenders and loss of economic and social status by their families, etc. The local communities are also a valuable partner in this process as are the private agencies in countries where part or the whole process of execution of penal sanctions and measures is subcontracted to external agencies (private prisons, private probation agencies, etc.). The responsibility of the state for the overall process of execution of penal sanctions and measures in the latter case remains unchanged no matter which implementing agency is entrusted with the task<sup>45</sup>.
136. The situation with overcrowding and the problems faced in this respect may seem similar in many European countries, but the sources of the problem may be different or may demand different solutions depending on the existing legal traditions and practices (see also paragraph 53). Much depends on the situation in the particular countries affected by overcrowding. There is little doubt that better management of the prison system and the criminal justice system as a whole may alleviate or end overcrowding without the need to take legislative measures. In some countries a basic balance is sought to be preserved between the use of imprisonment by the criminal justice and the existing prison capacity. Constant dialogue between the different actors is more than evidently needed in this respect in order to keep such a difficult balance between the need to protect the public and the capacity of the prison system to hold humanely those who need to be deprived of their liberty. Politicians and the media have an important role to play in this respect and to tone down the fear of crime which often is the root cause for taking decisions leading to harsh replies to crime. Political choices need to be made but the authorities also need to have clear ideas why certain trends in penal policy are followed and whether they need to be changed.
137. Another issue related to capacity in prisons has to do with timing and foreseeability. There again coherent action of the relevant actors of the criminal justice process is needed. Every case in the criminal justice system goes through different stages, but the case and the situation of the offender should be perceived as a whole at the different stages and individual needs should ideally be adjusted to each other in terms of resources. This may not always be possible, but the different actors in the

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<sup>45</sup> See Rule 71, European Prison Rules and Rule 9, Council of Europe Probation Rules.

criminal justice system can at least try jointly to do more planning based on statistics and experience, also when it comes to capacity and budget issues. An example: If large police actions take place or a new strategy in fighting crime is introduced there may be, at least locally, a need for a considerable capacity in remand facilities and if the persons are later charged, indicted and convicted the problem will be moving up through the system. Appropriate planning may at least partly remedy such a situation that risks leading to overcrowding.

138. Coherence of actions of the different actors will help decrease the growing gaps sometimes observed between the points of view on crime policy which professionals from different sections of the criminal justice system, politicians, the media and the general public may have. This will increase public trust in the authorities and eventually will also lead to more efficient processing of the cases which would in itself be of benefit. The opinion expressed sometimes that justice systems cannot be measured in accordance with clearly set objectives and managed like other public institutions is simply not true. All depends largely on the political will.
139. Visits to and short-term practices in penitentiary institutions and probation services should be included in the initial and in-service courses for judges and prosecutors in order to give them an objective vision of the system of execution of penal sanctions and measures and of the effect of the work of the judiciary in this field. This approach will provide them with a better knowledge of the way the penitentiary and probation systems function and of the everyday management of prisons in order to make these professionals fully aware of the way judgments and decisions are executed in practice.

## **VI. Need for national strategies and action plans regarding crime policy**

140. Prison and probation services are at the receiving end of the criminal justice chain and their task is to implement the existing legal provisions, court judgements and relevant decisions taken by other criminal justice agencies and related to the execution of sanctions and measures. Therefore any successful and well planned reform of the criminal justice system aimed at dealing with prison overcrowding and at reducing the excessive use of deprivation of liberty should begin often at the start of the criminal justice chain to achieve long lasting effects from one to the other end of it. It should involve not only the prison and probation services but also, as stated above, the prosecution, the judiciary and the authorities responsible for designing crime policies and for adopting legislation. This requires dialogue, coordination and co-operation among the different actors in this field in order to agree on long-term strategies or action plans for dealing with overcrowding and poor prison conditions and in more general terms to reconsider crime policies and their impact on penal sanctions and measures and on fighting crime.
141. Some countries are good examples of regular dialogue and co-operation between the different actors in the criminal justice field. One recent example is the significant decrease of the prison population in the Netherlands which had to close down several of its prisons. This has not had any tangible negative effects on crime rates whatsoever. This reform was the result of a combination of several factors like legislative changes; change in court practices and better use of alternatives to custody, including of new surveillance technologies, use of better designed combinations of penal and non-penal measures to tackle crime, etc.
142. Other countries were obliged to do so following judgments of the European Court of Human Rights, which delivered a number of judgements related to poor prison conditions and to prison overcrowding which were found by the Court to amount to inhuman and degrading treatment<sup>46</sup>.
143. The Court has found in many cases that there is a systemic problem<sup>47</sup> related to poor prison conditions or prison overcrowding. The Court has started delivering pilot judgements in some cases of repetitive serious violations of the Convention. When a pilot judgement is delivered the Court imposes an obligation on the state concerned to address the existing problems within fixed deadlines and the state is obliged to report to the Committee of Ministers on the progress achieved in implementing the Court's judgement. In a pilot judgment, the Court's task is not only to decide whether a violation of the

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<sup>46</sup> [http://www.echr.coe.int/Documents/FS\\_Detention\\_conditions\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Detention_conditions_ENG.pdf)

<sup>47</sup> The first specific reference to the term "systemic problem" is made by the Committee of Ministers in its Resolution adopted on 12 May 2004 - Resolution (Res(2004)3) on judgments revealing an underlying systemic problem" where it invited the Court "to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist States in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments".

European Convention on Human Rights occurred in the specific case but also to identify the systemic problem, if any, and to give the government clear indications of the type of remedial measures needed to resolve it. The Committee of Ministers, in accordance with Article 46, paragraph 2 of the European Convention on Human Rights supervises the execution of all Court's judgements.

144. Italy's response to the pilot judgement in the case of *Torreggiani and others v. Italy*<sup>48</sup> provides an example of wide ranging measures taken to deal with prison overcrowding. It comprises several lines of action: (a) Legislative actions taken to reduce prison entry flows included adoption of alternative measures; (b) managing and organising actions through the implementation of more open prison regimes; (c) building actions, planned according to the present needs of the prison estate, mainly focused on refurbishing the existing prisons or rebuilding (part of) them rather than expanding the prison estate; (d) provision of modalities and procedures for a system of remedies. No pardon, amnesty or other special laws were adopted. The measures adopted in the course of the past years have proven their effectiveness.
145. In *Stella and Others* (a follow-up decision to *Torreggiani and others* pilot judgment) (September 2014), the European Court welcomed the significant efforts made by the Italian authorities to address the structural problem of overcrowding and concluded that whilst the problem persisted, it was of less dramatic proportions; the European Court urged the authorities to consolidate the positive trends in this respect. In March 2016, the Committee of Ministers decided to close its supervision of the execution by Italy of the abovementioned pilot judgment. The Committee based its decision not only on the remedies introduced in domestic law, the major reforms undertaken to solve the problem of prison overcrowding and the significant results achieved in this area but also on the governments' commitment to continue its efforts in order to achieve a lasting solution to overcrowding and to keep the situation under strict monitoring.
146. In *István Gábor Kovács Group of cases and pilot judgement in Varga and others v. Hungary*<sup>49</sup> the Court found that the limited personal space available to the detainees, aggravated by the lack of privacy when using the sanitary facilities, inadequate sleeping arrangements, insect infestation, poor ventilation and restrictions on showers or time spent away from their cells, had amounted to degrading treatment as per Article 3 of the Convention. The Court also found that the domestic remedies available in the Hungarian legal system to complain about detention conditions, although accessible, were ineffective in practice and as a result also established the violation of Article 3 in conjunction with Article 13 of the Convention. The Hungarian government adopted an Action plan for the execution of the Court's judgements which was presented in December 2015 to the Committee of Ministers. The taken or envisaged measures include prison reconstruction and increase of the number of available places in the Hungarian prison facilities; amendment of the legislation to allow for petty crimes to be dealt with by using electronic monitoring schemes and investing more attention and efforts in social reintegration of prisoners, defining of minimum living space per prisoner as well as setting of compensatory schemes in case of indecent prison conditions amounting to inhuman or degrading treatment.
147. In 2012 The Greek authorities also provided the Committee of Ministers with an action plan setting out the measures aimed at preventing violations similar to the ones found in the *Nisiotis group of cases v. Greece*<sup>50</sup>. Following a request from the Committee of Ministers to draw up a comprehensive strategy against overcrowding in all Greek prisons the action plan was subsequently updated and broadened. The authorities informed that they have taken a number of steps to fight prison overcrowding in Greek prisons which related to the introduction or to the better use of non-custodial measures as well as the transfer of prisoners to establishments which were not overcrowded, construction of new prisons or refurbishment of the existing ones. In 2012 and 2013 two laws were adopted which allowed not to sanction by imprisonment petty offences and misdemeanours. In addition statutory limitations for prosecution were introduced for petty offences and misdemeanours which were punishable by up to

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<sup>48</sup> *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, § 77, 8 January 2013.

<sup>49</sup> *István Gábor KOVÁCS v. Hungary* (no. 15707/10, judgment of 17/01/2012); *SZÉL v. Hungary* (no.30221/06, judgment of 07/06/2011); *ENGEL v. Hungary* (no. 46857/06, judgment of 20/05/2010); *CSÜLLÖG v. Hungary* (no. 30042/08, judgement of 7/06/2011); *FEHÉR v. Hungary* (no. 69095/10, judgment of 02/07/2013); *HAGYÓ v. Hungary* (no. 52624/10, judgment of 23/04/2013); *Lajos VARGA* (no. 14097/12, judgment of 10 March 2015); *Tamás Zsolt LAKATOS* (no. 45135/12, judgment of 10 March 2015); *Gábor TÓTH* (no. 73712/12, judgment of 10 March 2015); *László PESTI* (no. 34001/13, judgment of 10 March 2015). *Attila FAKÓ* (no. 44055/13, judgment of 10 March 2015); *Gábor KAPCZÁR* (no. 64586/13, judgment of 10 March 2015)

<sup>50</sup> *Nisiotis group of cases v. Greece*, Doc. H/Exec(2015)12 - 7 May 2015.



one year of imprisonment and were still pending trial. By passing other special laws early release schemes were introduced, certain prison terms were converted into fines or community service and house arrest and electronic monitoring were also introduced. As a result of these measures about 4800 detainees had been released until November 2013. Until August 2014, further 800 prisoners benefited from early release scheme. More remains to be done<sup>51</sup>. The CPT report of 2014 remains critical as to the prison conditions in Greek prisons and urges the authorities to continue making more use of alternatives to detention.

148. Since 2008 the Romanian authorities have started taking general measures related to the execution of judgements of the European Court in the *Bragadireanu group of cases v. Romania* (currently there are more than 100 cases pending execution) concerning mainly overcrowding, poor material conditions of detention in penitentiary and police detention facilities and lack of effective remedies<sup>52</sup>. In October 2014 was sent a consolidated action plan which was further revised and updated in the course of its implementation. The reform of the criminal law policy led to the entry into force, in February 2014, of a new Criminal Code, a new Code of Criminal Procedure and of new laws on probation and execution of custodial and non-custodial sentences and measures. The new legislation notably introduced new alternatives to detention on remand and to imprisonment for juveniles, extended the scope of criminal fines for various offences punished so far by custodial sentences, reformed the system of alternative measures and strengthened the role of the probation service. The legislative reform was accompanied by training of professionals (the judiciary, staff of the Ministry of Justice, Ombudsman's office, the national prison and probation service and the police forces). In parallel were carried out prison construction and reconstruction works which resulted in the creation of several thousand new prison places. In two years there was a decrease of 15.25% of the number of prisoners (decrease by more than 5 000 persons). The number of persons under probation is currently higher than those in detention (more than 42 000 under probation versus 28 399 in prison in April 2016). Despite these measures the number of prisoners is still higher than the prison capacity of 18,986 places (calculated on the basis of 4m<sup>2</sup> per prisoner).
149. The Bulgarian authorities also had to take measures to implement a pilot judgement (*Neshkov and Others v. Bulgaria*)<sup>53</sup>. In response to the pilot judgment the Minister of Justice set up a working group ("the Neshkov working group") which has two tasks (a) to elaborate measures to tackle the problems identified in the pilot judgment, and (b) to propose a system of preventive and compensatory remedies. The group finished its work at the end of October 2015. A draft law for amendments in the Law on execution of penal sanctions and measures, the Criminal Procedure Code, the Criminal Code and the Law on State's and Municipalities' Responsibility for Damages is posted on the website of the Ministry of Justice for public discussion. It will then be submitted to the Council of Ministers for approval and to Parliament for adoption. The measures envisaged include expanding the scope of non-custodial measures, modifying conditional release procedures, defining of minimum living space per prisoner in line with the CPT standards and construction or renovation works. At the same time, the Bulgarian authorities undertook to reassess the accommodation capacity of the penitentiary system in accordance with the latest CPT standards. It should be noted that in contrast to the police detention centres the major problem of Bulgarian prisons is not so much overcrowding or insufficient use of alternative sanctions and measures or early release schemes but the poor material conditions which have deteriorated significantly in the course of the last decades.
150. In the context of its supervision of the execution of the above judgments, the Committee of Ministers examined the action plans presented by the Hungarian, Greek, Romanian and Bulgarian authorities<sup>54</sup>. While noting the measures set out therein, the Committee identified further avenues that the authorities could pursue to provide a lasting and sustainable solution to prison overcrowding. For instance, in *Nisiotis*, was outlined the importance of developing a comprehensive strategy guided by the CM various relevant recommendations as well as by the ones provided by the Council of Europe specialised bodies in this field. In *Varga and Others*, the CM encouraged the taking of steps in order to

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<sup>51</sup> The Greek Minister of Justice informed the Greek Parliament that on 1 November 2014, there were 11 988 prisoners, while the overall prison capacity stood at 9 886 places.

<sup>52</sup> Group of cases *Bragadireanu v. Romania* (No. 22088/04; 6 December 2007) Doc. H/Exec(2015)7 - 12 February 2015.

<sup>53</sup> *Neshkov and Others v. Bulgaria* (Applications nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13; 27 January 2015) (pilot judgment) and *Kehayov v. Bulgaria* group of cases (Application 2No. 41035/98; 18 January 2005), Doc. DH-DD(2016)25 of 12 January 2016.

<sup>54</sup> For the decisions adopted by Committee of Ministers following its assessments, see CM/Del/Dec(2016)1250/H46-11 / 11 March 2016 ; CM/Del/Dec(2015)1230/9 / 12 June 2015 ; CM/Del/Dec(2015)1222/12 / 13 March 2015 ; and CM/Del/Dec(2016)1250/H46-6/11 March 2016 .

increase the use of the existing alternative non-custodial measures, to promote further alternative measures in the legislation and to minimise the recourse to pre-trial detention. In Bragadireanu, having regard to the severity of overcrowding affecting the penitentiary facilities, the CM underlined the importance of adopting other measures complementing the legislative reform. In Neshkov and Others, the Committee encouraged the authorities to adopt rapidly the measures presented in their action plan for tackling overcrowding and expressed satisfaction with the authorities' intention to reassess the accommodation capacity of their penitentiary system on the basis of the CPT standards. In addition to the measures aimed at reducing overcrowding, the CM paid particular attention to the domestic procedures which would allow prisoners to file a complaint against situations of overcrowding and to obtain relief and identified the measures still required for such procedures to be introduced in the domestic law or to be made effective, if already available in the legislation.

## **VII. Work with the media and the public opinion**

151. The media is a key element in securing the acceptance by the public of the functioning and of any reform of the criminal justice system including the system for execution of penal sanctions and measures. Society has the right to be informed about the way these systems work, the reasons for any reform initiated, the aims sought and the results achieved<sup>55</sup>.
152. Work with the media should involve not only providing regular information, ensuring transparency of the actions undertaken, but also being proactive in explaining to journalists in the best possible way the actions planned or already taken and the reasons for these actions.
153. When the media coverage of a given event or action related the criminal justice system (including prison riots, escapes, suicides, etc.) creates strong negative reactions among the public, it is the responsibility of the authorities concerned to make all efforts to communicate to the public via the media in a transparent manner the situation and to deal as quickly as possible with public tensions.
154. Any major reform of the criminal justice system needs to be carefully planned in advance and explained to the media and the public, including its financial and other implications in order to seek public support and understanding. The media and the public should be updated on a regular basis regarding the advancement of the reform in order to avoid public tension as much as possible.
155. Criminal justice agencies, including prisons, probation and courts administrations, should generate strategies and opportunities for communicating directly with the public. These could include public meetings, open days, and the use of social media and other direct communication with members of the public.

## **VIII. Conclusions**

156. Prison overcrowding is a recurring problem in many countries and each country needs to deal with it in the best suited way. Some countries have seen the number of inmates decrease in the recent years using long-term strategies and specific actions. Such countries need to maintain this trend as this can often be a real challenge. In the past there have been remarkable decreases of prison population in some European countries which have not lasted more than a decade.
157. The Council of Europe member states should follow the standards and criteria set by the European Court of Human Rights and the CPT when adopting specifications of what space each prisoner is entitled to in order to provide an objective picture of the situation and take appropriate decisions in case of overcrowding.
158. The major challenges today are ensuring human rights protection and efficient management of penal institutions. As already mentioned, there is a risk of violating Article 3 of the ECHR because of overcrowded and insanitary conditions which facilitate or lead to inhuman or degrading treatment. That is why the European Court of Human Rights recommends replacing old and worn out prison buildings with new modern prisons offering human conditions of detention. As a minority of inmates need high security prisons, the new penal institutions should be mostly low security prisons which cost less and are more adapted to the needs of the inmates for re-socialisation.

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<sup>55</sup> See Opinion no 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on "justice and society" (adopted by the CCJE at its 6th meeting (Strasbourg, 23-25 November 2005).

159. Member states may also face overcrowding as a result of new types of serious criminality which lead to an increase in the severity of criminal law responses. Prison sentences become longer and re-socialisation becomes difficult. Good prison management and adequate staff selection and training are indispensable pre-requisites for ensuring safety and good order even in prisons which may work at their full capacity. In this respect attention should be given to the comparable cost-effectiveness of prison sentences and possible alternatives.
160. Eliminating overcrowding, improving prison conditions and the treatment of prisoners will improve inter-state trust and will facilitate judicial co-operation, including transfers of detained persons to their home countries thus improving their family relations and social reintegration. Overcrowded and dilapidated prisons in the receiving country can be a reason to refuse transfers because of human rights concerns.
161. There should be constant dialogue and common understanding and action involving policy makers, legislators, judges, prosecutors and prison and probation managers in each member state in order to deal with execution of penal sanctions and measures in a humane, just and efficient manner and to avoid among others prison overcrowding and net widening of the criminal justice system. Recommendation No. R(99)22 of the Committee of Ministers to member states concerning prison overcrowding and prison population inflation remains a very valid text and the authorities should take all possible measures to better implement the standards and principles provided by it.
162. The media should be regularly informed about the functioning and the intended reform of the penal policy and wide public support should be sought in this respect. This requires communication, transparency and opening up of the criminal justice world to the public so that the latter can see all its different aspects.
163. It cannot be overstated that investing in good preparation for release and social reintegration of prisoners, as well as in good systems of community sanctions and measures is an effective way of reducing recidivism and of ensuring public safety. This will also have an effect on reducing the rates of imprisonment and prison overcrowding.
164. Overcrowding is a recurrent problem in many Council of Europe member states and therefore there is a need to ensure that a follow-up is given to the White Paper by the national authorities. It is also advisable to update at some point in the future the White Paper and its findings and conclusions based on information regarding the measures taken for the implementation of Recommendation No. R (99)22 and the rates of imprisonment and prison capacity in the different European countries.

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**List of Council of Europe reference texts**

**I - Recommendations and Resolutions of the Committee of Ministers**

- Recommendation CM/Rec (2014)4 on electronic monitoring
- Recommendation CM/Rec (2014)3 on dangerous offenders
- Recommendation CM/Rec (2012)12 concerning foreign prisoners
- Recommendation CM/Rec (2010)1 on the Council of Europe Probation 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
- Recommendation Rec (2006)2 on the European Prison Rules
- Resolution Res Rec (2004)3 on judgments revealing an underlying systemic problem
- Recommendation Rec (2003)22 on conditional release (parole)
- Recommendation Rec (2003) 23 concerning the management by the prison administrations of lifers and other long-term prisoners
- Recommendation No. R(99)19 concerning mediation in penal matters
- Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation
- Recommendation No. R (92)16 on the European Rules on community sanctions and measures

**II - Judgments of the European Court of Human Rights**

- *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012
- *Butko v. Russia*, no. 32036/10, 12 November 2015
- *Iacov Stanciu v. Romania*, no. 35972/05), 24 July 2012
- *Kulikov v. Russia*, no. 48562/06, § 37, 27 November 2012.
- *Logothetis and Others v. Greece*, no. 740/13, § 40, 25 September 2014.
- *Melnik v. Ukraine*, no. 72286/01, 28 March 2006
- *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015.
- *Suldin v. Russia*, no. 20077/04, § 43, 16 October 2014.
- *Semikhvostov v. Russia*, no. 2689/12, § 79, 6 February 2014.
- *Shishanov v. Moldova*, no. 11353/06, 15 September 2015
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- *Varga and Others v. Hungary* nos 14097/12, 45135/12, 73712/12, 73712/12, 34001/13, 44055/13 and 64586/13, 10 March 2015.
- *Vinter and others v. UK*, nos. 66069/09, 130/10 and 3896/10, judgment of the Grand Chamber, 9 July 2013.

**III – Opinions**

- Opinion no 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers on “justice and society”

**IV - Resolutions and Recommendations of the Parliamentary Assembly**

- Recommendation 2081 (2015) “Abuse of pre-trial detention in States Parties to the European Convention on Human Rights”
- Report “Abuse of pre-trial detention in States Parties to the European Convention on Human Rights” (PACE Doc.13863)
- Recommendation 2082 (2015) and Resolution 2082 (2015) on the fate of critically ill detainees in Europe
- Report “The fate of critically ill detainees in Europe” (PACE Doc.13919)

## **V – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)**

- Doc. CPT/Inf/E (2002) 1 - Rev. 2015 - the CPT standards which can be found at: <http://www.cpt.coe.int/en/docsstandards.htm>
- Living space per prisoner in prison establishment – the CPT standards Doc. CPT/Inf (2015) 44
- Situation with life sentenced prisoners – Doc. CPT/Inf (2015) 10 part
- Report to the Georgian Government on the visit to Georgia from 19 to 23 November 2012 - Doc. CPT/Inf (2013)18

## **VI – Council of Europe Annual Penal Statistics (SPACE)**

- All data can be found at: <http://wp.unil.ch/space>

## **VII - Reports**

- “Criminal justice responses to prison overcrowding in Eastern Partnership countries”, Compilation of the Reports on Study carried in Armenia, Georgia, Republic of Moldova and Ukraine, Council of Europe, March 2016