APPENDIX I

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 31 May 2012
[CDPC plenary/2012 plenary_1/oj lp/cdpc list of participants] CDPC (2012) LP Fin (Bil)

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

COMITE EUROPEEN POUR LES PROBLEMES CRIMINELS (CDPC)

62nd Plenary Session / 62ème Session plénière

Strasbourg, 29 May – 1 June / 29 mai – 1 juin 2012

Agora Building / Bâtiment Agora

Room / Salle G01

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APPENDIX II

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 23 May 2012 CDPC (2012) OJ 1 Rev
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

62nd Plenary Session

Strasbourg, 29 (2.00pm) May - 1 June 2012 (1.00 pm)

DRAFT AGENDA

Council of Europe / Conseil de l'Europe
Agora Building / Bâtiment Agora
Room G 01 / Salle G 01

1. Opening of the meeting

2. Adoption of the draft agenda

Working documents

Draft agenda	CDPC (2012) OJ 1
Annotated agenda	CDPC (2012) 5 Rev
For information: List of decisions of the CDPC Plenary, 6-9 December 2012	CDPC (2011) 31
For information: List of decisions of the CDPC Bureau, 29-30 March 2012	CDPC-BU (2012) 2

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

Working documents

Summary report of the 2nd PC-CP plenary meeting, 28-30 March 2012	PC-CP(2012) 4

a. Foreign prisoners

Working documents

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

b. Preparation of the 17th Council of Europe Conference of Directors of Prison Administration (CDAP)

Working documents

Conclusions of the 16th Council of Europe Conference of Directors of Prison Administration (CDAP)	Conclusions

c. Electronic monitoring

Working documents

Discussion paper	PC-CP (2011) 21
Presentation by Mr Dominik Lehner	Presentation
Presentation by Mr Robert Michael Nellis	Presentation

d. SPACE statistics

Working documents

Annual Penal Statistics: SPACE I, Survey 2010 (Please note the document is 150 pages long)	PC-CP (2012) 1
Annual Penal Statistics: SPACE II, Survey 2010 (Please note the document is 72 pages long)	PC-CP (2012) 2

e. Elections of one member of the working group of the PC-CP

4. Dangerous offenders

Working documents

The sentencing, management and treatment of "dangerous" offenders	PC-CP (2010) 10 rev5
Scope and possible "roadmap"	CDPC-BU (2011) 5
Draft Terms of reference of the ad hoc Committee on dangerous offenders	Terms of reference

5. Trafficking in organs

Working documents

Terms of reference of the Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO)	Terms of reference
Draft additional opinion identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (OTC)	CDPC/CDBI/CD-P-TO (2011)
Preliminary Draft Convention against Trafficking in Human Organs	PC-TO (2012) 1

6. The 31st Council of Europe Conference of Ministers of Justice (Vienna, 19-21 September 2012) : "Responses of Justice to urban violence"

Working documents

	Resolution of the Committee of Ministers on Council of Europe conferences of specialised ministers	CM/Res(2011)7
	Information document on the state of preparation of the Conference	CDPC (2012) 4
	Elements for a draft resolution:	
	1. on juveniles in the context of urban violence	CDPC (2012) 6
	2. on responses to the use of the internet for acts of urban violence	CDPC (2012) 7
7.	**Committee of Experts on the operation of European conventions on co-operation in criminal matters (PC-OC)**	
a.	**Exchange of views with the vice-Chair of the PC-OC, Mr Erik Verbert**	
	Working documents	
	List of decisions of the 13th meeting of the restricted Group of experts on international co-operation (PC-OC Mod 22-23 March 2012)	PC-OC Mod (2012) 2
	Draft agenda of the 62nd meeting of the PC-OC (9-11 May 2012)	PC-OC (2012) OJ 1
	List of decisions of the 62nd meeting of the PC-OC (9-11 May 2012)	PC-OC (2012) 07
	Elaboration of draft practical guidelines as a follow-up of the replies to the questionnaire on jurisdiction and transfer of proceedings	PC-OC Mod (2012) 01 Appendix
	Finalisation of the information sheet on the PC-OC	PC-OC (2011) 08
8.	**Future activities and priorities of the CDPC**	
	Working documents	
	Terms of Reference of the CDPC	Terms of Reference
a.	**Activities related to transnational organised crime**	
	Working documents	
	Transnational organised crime - Possible activities under the aegis of the European Committee on Crime Problems (CDPC)	CDPC (2011) 20
	Preliminary draft Terms of Reference	Terms of reference
b.	**Activities related to piracy**	
	Working documents	
	The necessity to take additional international legal steps to deal with sea piracy" – Parliamentary Assembly Recommendation 1913 (2010) : Reply adopted by the Committee of Ministers on 6 July 2011 at the 1118th meeting of the Ministers' Deputies.	Reply
c.	**Alternative measures to imprisonment**	
	Working documents	
	Explicative paper by Belgium	CDPC (2012) 2
9.	**Information provided by the Secretariat**	
a.	**Medicrime**	
b.	**Cybercrime**	
c.	**Promotion of the Integrity of Sport against the Manipulation of Results, notably match-fixing**	
	Working documents	
	Feasibility study on a possible legal instrument on the integrity of sport against manipulation of results - Background Paper and Draft Resolution	MSL12 (2012) 4
	Feasibility study on criminal law on Promotion of the integrity of sport against manipulation of results, notably match-fixing (Please note the document is 102 pages long)	CDPC (2012) 1
	Resolutions adopted by Ministers of sports in Belgrade	MSL 12 (2012) 8
d.	**Information on other Council of Europe activities**	
10.	**Any other business**	

a. **Election of the Gender Equality Rapporteur**

Working document

Gender equality rapporteurs and their role — Information note

b. **Presentation by Mrs Laura d'Arrigo, Chairperson of the Permanent Correspondents of the Pompidou Group of the Council of Europe** — Pompidou Group

c. **The recommendations of the Parliamentary Assembly communicated by the Committee of Ministers to the CDPC for information and possible comments**

Working documents

1. Recommendation 1996 (2012) – "Equality between women and men: a condition for the success of the Arab Spring" — Recommendation
2. Recommendation 1997 (2012) – "The need to combat match-fixing" — Recommendation
3. Recommendation 1998 (2012) – "The protection of freedom of expression and information on the Internet and online media" — Recommendation

11. **Date of the next CDPC Bureau and Plenary meetings**

APPENDIX III

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 16 April 2012 PC-CP (2012) 4
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

2nd Plenary Meeting

Strasbourg, 28-30 March 2012

SUMMARY MEETING REPORT

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

BRIEF FOREWORD

The PC-CP plenary:

- welcomed Ms Khatuna Kalmakhelidze, Minister of Corrections and Legal Assistance, Georgia, and took note of the state of Georgian prison reform;
- considered Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods, and discussed its own working methods and rules of procedure;
- appointed Ms Alina Barbu as its gender equality rapporteur;
- revised and finalised the draft CM recommendation concerning foreign prisoners and its commentary in the light of the comments made by the CDPC delegations at their plenary meeting in December 2011 and sent the text to the CDPC for approval;
- in the light of the follow-up to be given to the conclusions of the 16th Conference of Directors of Prison Administration with the participation of Directors of Probation Services (13-14 October 2011) considered the issue of electronic monitoring;
- approved the theme and discussed the agenda and the organisation of the 17th Conference of Directors of Prison Administration;
- considered SPACE I and SPACE II for 2010 and made some proposals in this respect;
- took note of the state of preparation and the draft agenda of the 31st Conference of the Ministers of Justice (19-21 September 2012, Vienna).

1. The Council for Penological Co-operation (PC-CP) held its 2nd plenary meeting in Strasbourg on 28-30 March 2012 with Ms Sonja Snacken in the Chair. The list of participants is appended to this report (Appendix II).

I. Opening of the meeting and adoption of the agenda

2. The agenda was adopted (see Appendix I).

II. Summary report of the 68th meeting [Doc. PC-CP (2011) 11]

3. The PC-CP considered the summary meeting report of its 68th meeting and had no comments to make.

III. Items for information

4. Ms Khatuna Kalmakhelidze, Minister of Corrections and Legal Assistance, Georgia, welcomed the PC-CP work in the prison and probation field and informed the experts of the state of the on-going prison and probation reform in her country. This information was met with the great interest by the PC-CP members as an example of the tangible efforts made by the national authorities to implement the Council of Europe standards in this area.

5. Mr Ivan Koedjikov, Head of the Action Against Crime Department, welcomed the representatives of the national prison services and underlined that after 30 years of existence of the PC-CP as a restricted advisory council to the CDPC it has now become a committee in which all Council of Europe member states can take part. This is a real sign of the importance of its work. He then gave information on the current work in the criminal law field and more specifically on the forthcoming adoption by the Committee of Ministers of a recommendation containing a model European Code of ethics for prison staff. The participants also noted that the CDPC Bureau was currently having its meeting and that in case of any comments and observations on the text of the draft recommendation concerning foreign prisoners these would be communicated to the PC-CP over the course of the present meeting.

6. The PC-CP discussed Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods and the ensuing rules regulating the PC-CP's procedures regarding its working methods, the election of its Chair and Vice Chair, taking decisions, etc. It agreed that the current Chair's term of office will expire at the next CDPC plenary meeting (29 May - 1 June 2012) at which Ms Snacken would present the draft recommendation on foreign prisoners. At the same meeting a new member of the PC-CP needs to be elected to fill in the vacant seat. Therefore the new Chair and Vice-Chair of the PC-CP will be elected at the meeting of the PC-CP Working Group in June 2012.

IV. Draft recommendation concerning foreign prisoners and its commentary [Docs. PC-CP (2011) 5 rev 6 and PC-CP (2011) 6 rev2]

7. The PC-CP considered the two texts which were revised by the scientific experts in February 2012 in the light of the comments and observations made by the CDPC at their last plenary session in December 2011.

8. They noted that the definitions and scope had been thoroughly revised and that on most occasions the term "suspects and offenders" has been replaced by "prisoners". The part related to the tasks of consular representatives has been deleted as well as the rules related to international transfers. The rules related to the use of remand in custody have been revised in order to underline the fact that foreign suspects should be treated as other suspects and should therefore be considered for the same range of alternatives to custody. The term "be considered for" was clarified in that it does not oblige states to automatically release foreign suspects and replace custody with other measures but it draws the attention of the national authorities to the fact that the existing laws should be applicable to all suspects in the same non-discriminatory manner and that all individual circumstances of a given case should be taken into consideration before a decision is taken whether to remand a suspect or not. The rules on preparation for release were also revised.

9. The PC-CP continued with its consideration of the text of the draft recommendation and of its commentary. The scope was revised further as well as several of the basic principles. Rules 13 and 14 were further clarified. Rule 16.2 was also revised as it was considered that while family visits are important for every prisoner the contacts with consular representatives should not be an allocation consideration. The rule on exercise and recreation (Rule 28.1) was widely debated and revised as well Rule 29.1 related to education in order to accommodate concerns regarding costs and utility of educational activities. Rule 30.2 was revised in order to accommodate national practices related to allowing access to prison for representatives of different religions. Rule 31.3 related to healthcare was debated at length and revised as was the part dealing with infant children (Rule 34).

10. The commentary to the draft recommendation was also revised accordingly in order to reflect the amendments introduced in the text of the recommendation itself and to provide further comments and examples to clarify in greater detail the text of the draft recommendation.

V. Follow-up to the 16th Conference of Directors of Prison Administration with the participation of Directors of Probation Services (13-14 October 2011) [Doc. PC-CP (2011) 21]

11. The PC-CP took note of the presentations on electronic monitoring (EM) made by Mr. Robert (Mike) Nellis and Mr. Dominik Lehner, scientific experts. The discussions which followed showed that there is a general agreement in the committee regarding the need for setting ethical guidelines for the use of new tracking technologies in the work with offenders. The field is rapidly expanding and today EM is replacing detention in some countries at all stages of the penal process, namely during remand, during the execution of prison sentences and also after release. There is no clear definition at European level of the term EM. More in-depth knowledge is needed regarding its effects on offenders, families, victims and society in terms of supervision and control, at which stage of the penal process it should be put in place and its proportionality, length and intensity. The PC-CP agreed that the degree of intrusion needs to be carefully evaluated from a human rights perspective. The role of probation services in this respect needs also to be considered as the part played by them in the use of EM varies significantly from country to country.

12. The PC-CP plenary participants shared their practical experiences and the results of research related to the use of EM in their own countries. They agreed that while EM may facilitate supervision and contribute to desistance, it cannot have a lasting effect on offending behaviour as a stand-alone measure. It is only one of the means for dealing with offenders and should be used as part of a set of interventions tailored to different offenders in order to effectively reintegrate them and help them lead law-abiding lives.

13. The PC-CP plenary concluded that there is an evident and urgent need at Council of Europe level to set legal, ethical and procedural guidelines and safeguards for the use of EM and requested the CDPC to take a decision on this matter at its next plenary meeting.

VI. SPACE statistics [Docs. PC-CP (2012) 1 and PC-CP (2012) 3]

14. The PC-CP considered the provisional editions of the SPACE I and SPACE II data for 2010. It took note of the new categories of data included in the survey following the request of several national prison administrations. The delegations attending the meeting made some observations and corrections and answered requests for clarifications of the national data sent. Professor Marcelo Aebi, scientific expert, explained that systems differ significantly which necessitates on some occasions lengthy verifications with the respective correspondents before publishing the surveys. It was agreed that the next edition of the survey would contain a glossary of the terms used in English and French and the national correspondents would be requested to add the terms in their national languages in order to facilitate the comprehension and comparability of data in Europe and help maintain the quality of data collected in case of a subsequent change in the national correspondents.

15. Professor Aebi suggested that the Council of Europe hold a multinational meeting with the national correspondents for SPACE I and II in order to discuss and clarify issues related to the methodology of the collection and processing of data in the different countries. The same way of unification of data collection is used by Eurostat.

VII. 17th Conference of Directors of Prison Administration (2012) [Doc. PC-CP (2012) 3]

16. The PC-CP considered the topic of the next CDAP, namely foreign prisoners, and agreed that this is a priority for many European countries and it will be important to promote the forthcoming Committee of Ministers recommendation concerning foreign prisoners and to discuss their treatment and ways of reducing the numbers in custody. The main categories of interest are foreign prisoners who remain in the country after release and those who leave the country. The treatment of women and juvenile foreign prisoners is also of interest, as well as the co-operation between prison and probation services inside the country and between countries to ensure continuity of treatment. The dialogue and interaction between prison and probation services and the judiciary was considered an important element in the way countries deal with foreign prisoners.

VIII. 31st Council of Europe Conference of Ministers of Justice (Vienna, 19-21 September 2012)

17. Mr Ivan Koedjikov informed the PC-CP about the state of preparation of the 31st Council of Europe Conference of Ministers of Justice (19-21 September 2012, Vienna) and its topic "Responses of Justice to Urban Violence" (divided into two sub-topics "Organised groups and their new ways of communicating" and "Juveniles as perpetrators and victims"). He added that, unlike in previous years, the draft resolutions of the Conference will be validated/approved before the start of the Conference by the Committee of Ministers.

18. The PC-CP took note that the sub-topic related to juvenile offenders might require future work on its part in so far as it relates to the execution of sanctions and measures.

IX. Other business

19. The PC-CP appointed Ms Alina Barbu as its gender equality rapporteur. Ms Barbu noted that in terms of statistics, 30% of the participants in the PC-CP were women. Moreover, from the 9 elected members of the PC-CP working group, 3 were also women, including the Chair of the group and the rapporteur on gender equality. The PC-CP plenary meeting was opened by the Georgian Ministry of Justice, who is also a woman. Women participants in the meeting, both representing the member states as well as independent experts and members of the Secretariat, were actively involved in all the discussions. The issue of women and their particular needs was also discussed when considering the draft recommendation on foreign prisoners which contains a separate section on foreign women prisoners. A specific mention of women prison staff was also added to the text of the commentary.

X. Dates of the next meetings

20. The next meetings of the PC-CP working group were scheduled as follows: 11-13 June and 1-3 October 2012. The next PC-CP plenary meeting was scheduled for 6-8 March 2013.

OoO

APPENDIX I

AGENDA / ORDRE DU JOUR

1) Adoption of the agenda / Adoption de l'ordre du jour	**PC-CP (2012) OJ 1** *Bilingual / Bilingue*
2) Summary report of the last meeting / Rapport sommaire de la dernière réunion	**PC-CP (2011) 18** *English / Français*
3) Information / Informations	**CDPC (2011) 31** *English / Français*
4) Foreign nationals in prison / Détenus étrangers	
▪ **Draft recommendation concerning foreign prisoners** / Projet de Recommandation relative aux détenus étrangers	**PC-CP (2011) 5 rev 6** *English / Français*
▪ **Draft Commentary on the Recommendation concerning foreign prisoners** / Projet de commentaire sur la Recommandation relative aux détenus étrangers	**PC-CP (2011) 6 rev 2** *English / Français*
▪ **Ad Hoc Terms of Reference of the Council for Penological Co-operation (PC-CP) relating to detained foreign nationals** / Mandat occasionnel du Conseil de coopération pénologique (PC-CP) relatif à la détention de ressortissants étrangers	**PC-CP (2010) 01 rev 2** *English / Français*
5) SPACE statistics / Statistiques SPACE	**PC-CP (2012)1** **PC-CP (2012)2**
6) Follow-up to the 16th Conference of Directors of Prison Administration - electronic monitoring / Suivi de la 16e Conférence des directeurs d'administration pénitentiaire - surveillance électronique	**PC-CP (2011) 21**
7) 17th Conference of Directors of Prison Administration (2012) / 17e Conférence des directeurs d'administration pénitentiaire (2012)	**PC-CP (2012)3**
8) 31st Council of Europe Conference of Ministers of Justice (Vienna, 19-21 September 2012) / 31e Conférence du Conseil de l'Europe des ministres de la justice (Vienne, 19-21 septembre 2012)	
9) Any other business / Questions diverses	**CM/Res(2011)24**

10) Dates of the next meetings / Dates des prochaines réunions

APPENDIX II

LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

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Apologised/Excusé

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Lamya AMRANI, Attachée, Centre national de surveillance électronique, Bruxelles

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

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Apologised/Excusé

UNITED STATES OF AMERICA / ÉTATS-UNIS D'AMÉRIQUE

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* * * *

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INTERPRETERS / INTERPRÈTES

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APPENDIX IV

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 29 June 2012 PC-CP (2011) 5
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DRAFT RECOMMENDATION CONCERNING FOREIGN PRISONERS

Draft Recommendation CM/Rec (2012) … of the Committee of Ministers to member States concerning foreign prisoners

(adopted by the Committee of Ministers on … at the … meeting of the Ministers' Deputies)

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

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

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

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

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

Considering that such treatment should take into account the special needs of foreign prisoners, arising from the fact that they are detained in a state of which they are neither a national nor a resident, in order to provide them with opportunities equal to those of other prisoners;

- the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5);
- the Convention on the Transfer of Sentenced Persons (ETS No. 112);
- the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167);
- Recommendation No. R (92) 16 on the European rules on community sanctions and measures;
- Recommendation No. R (92) 17 concerning consistency in sentencing;
- Recommendation No. R (93) 6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison;
- Recommendation No. R (97) 12 on staff concerned with the implementation of sanctions and measures;
- Recommendation No. R (98) 7 concerning the ethical and organisational aspects of health care in prison;
- Recommendation No. R (99) 22 concerning prison overcrowding and prison population inflation;
- Recommendation Rec (2003) 22 on conditional release (parole);
- Recommendation Rec (2006) 2 on the European Prison Rules;
- Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse;
- Recommendation CM/Rec (2008) 11 on the European Rules for juvenile offenders subject to sanctions or measures;
- Recommendation CM/Rec (2010) 1 on the Council of Europe Probation Rules.

Bearing in mind:

The United Nations Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners (1985);

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

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

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

The European Union Council Framework Decision 2009/829/JHA on the application, between member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention;
Considering that Recommendation No. R (84) 12 of the Committee of Ministers to member States concerning foreign prisoners needs to be replaced by a new recommendation reflecting the developments since then in penal policy, sentencing practice and the overall management of prisons in Europe;

Taking into account the constitutional principles, legal traditions and the independence of the judiciary in its member States;

Recognising that a range of authorities and agencies deal with foreign persons who are subject to criminal proceedings, sanctions or measures, and that such bodies are in need of a coherent set of guiding principles in line with Council of Europe standards.

Recommends that governments of member States:

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

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

Appendix to Recommendation CM/Rec (2012) XX

I. Definitions and scope

Definitions

1. For the purpose of this Recommendation:

   a. **foreign person** means any person who does not have the nationality of and is not considered to be a resident by the state where he or she is;

   b. **foreign suspect** means any foreign person who is alleged to have committed but who has not been convicted of a criminal offence;

   c. **foreign offender** means any foreign person who has been convicted of a criminal offence;

   d. **prison** means an institution reserved primarily for the detention of suspects or offenders;

   e. **foreign prisoner** means any foreign person held in prison and a foreign suspect or a foreign offender detained elsewhere;

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

Scope

2. This Recommendation applies to foreign prisoners and to other foreign persons who are not in prison but who are subject to criminal proceedings, and criminal sanctions and measures, and who may be or have been deprived of their liberty.

II. Basic principles

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

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

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

6. Foreign offenders sentenced to imprisonment shall be entitled to full consideration for early release.

7. Positive steps shall be taken to avoid discrimination and to address specific problems that foreign persons may face while subject to community sanctions or measures, in prison, during transfer and after release.

8. Foreign prisoners who so require shall be given appropriate access to interpretation and translation facilities and the possibility to learn a language that will enable them to communicate more effectively.

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

10. Decisions to transfer foreign prisoners to a state with which they have links shall be taken with respect for human rights, in the interests of justice and with regard to the need to socially reintegrate such prisoners.

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

12. Appropriate training in dealing with foreign suspects and offenders shall be provided for the relevant authorities, agencies, professionals and associations which have regular contact with such persons.

III. Use of remand in custody

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

13.2 In particular:

a. alternatives to remand in custody shall always be considered for a foreign suspect; and

b. the fact that such a suspect is neither a national nor a resident of the state or has no other links with that state shall not, in itself, be sufficient to conclude that there is a risk of flight.

IV. Sentencing

14.1. In order to ensure that custodial sanctions are imposed on foreign offenders, as for other offenders, only when strictly necessary and as a measure of last resort, sentencing shall take into consideration Recommendation No. R (92) 17 concerning consistency in sentencing. In particular, foreign offenders shall be considered for the same range of non-custodial sanctions or measures as national offenders.

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

14.3. To avoid disproportionate hardship and obstacles to social reintegration, account shall be taken when considering sentences of the possible impact that such sentences may have on individual offenders and their dependants, without prejudice to the independence of the judiciary.

V. Conditions of imprisonment

Admission

15.1. At admission and during detention, foreign prisoners shall be provided with information, in a language they understand, about:

a. their rights and duties as prisoners including regarding contacts with their consular representatives;

b. the main features of the prison regime and the internal regulations;

c. rules and procedures for making requests and complaints; and

d. their rights to legal advice and assistance.

15.2. Immediately after admission, prison authorities shall assist foreign prisoners, who wish to do so, to inform of their imprisonment their families, legal advisers, consular representatives and other persons or organisations competent to assist them.

15.3. As soon as possible after admission, foreign prisoners shall be provided with information, in a language they understand, orally or in writing, of international transfer possibilities.

Allocation

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

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

16.3. Where appropriate and subject to the requirements of safety and security, foreign prisoners shall be allocated to prisons where there are others of their nationality, culture, religion or who speak their language.

Accommodation

17. Decisions on whether to accommodate foreign prisoners together shall be based primarily on their individual needs and the facilitation of their social reintegration, while ensuring a safe and secure environment for prisoners and staff.

Hygiene

18.1. Facilities for sanitation and hygiene shall, as far as practicable, accommodate the cultural and religious preferences of foreign prisoners, while maintaining appropriate medical standards.

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

Clothing

19.1. Clothes provided by prison authorities shall not offend the cultural or religious sensibilities of foreign prisoners.

19.2. Where clothes are not provided by the prison authorities, prisoners shall be allowed, subject to the requirements of safety and security, to wear clothes that reflect their cultural and religious traditions.

Nutrition

20. In addition to providing a nutritious diet that takes account of the cultural and religious requirements of prisoners, prison authorities shall, where possible, provide prisoners with opportunities to purchase and cook food that makes their diet more culturally appropriate and to take their meals at times that meet their religious requirements.

Legal advice and assistance

21.1. Foreign prisoners shall be informed, in a language they understand, about their right to legal advice on matters affecting their detention and status.

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

21.3. Foreign prisoners who need to communicate with their legal adviser shall be allowed access to interpretation where necessary.

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

21.5. Foreign prisoners who are subject to disciplinary proceedings shall be assisted by an interpreter where necessary.

Contact with the outside world

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

22.2. Unless there is a specific concern in individual cases related to safety and security, foreign prisoners shall be allowed to use a language of their choice during such contacts.

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

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

22.5. In order to optimise contact, visits to foreign prisoners from family members who live abroad shall be arranged in a flexible manner, which may include allowing prisoners to combine their visit entitlements.
22.6. Support and information shall be provided to the extent possible to enable family members who live abroad to visit foreign prisoners.

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

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

22.9. The authorities shall endeavour to ensure that foreign prisoners are able to inform family members about the prison or other facility in which they are held or to which they have been transferred.

22.10. In cases of emergency and where the foreign prisoner has given prior consent, the prison authorities shall endeavour to inform family members of the death, serious illness or serious injury of such a prisoner.

22.11.The authorities shall endeavour to keep up-to-date contact details of family members of foreign prisoners.

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

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

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

Contact with consular representatives

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

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

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

24.4. Foreign prisoners who are refugees, asylum seekers or stateless have the right to communicate with representatives of the national or international authorities whose task it is to serve the interests of such prisoners.

25.1. Prison authorities shall inform foreign prisoners about their right to request contact with their consular representatives or representatives of national or international authorities whose task it is to serve their interests.

25.2. Prison authorities shall, subject to the prisoner's request, inform consular representatives about their nationals held in prison.

25.3. Prison authorities shall co-operate fully with consular representatives and national or international authorities whose task is to serve the interests of foreign prisoners.

25.4. Prison authorities shall keep a record of instances where foreign prisoners waive their right to contact their consular representatives and of visits by consular representatives to foreign prisoners.

Prison regime

26.1. In order to ensure equal access to a balanced programme of activities, prison authorities shall, where necessary, take specific measures to counter the difficulties foreign prisoners may face.

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

Work

27.1. Foreign prisoners shall have access, where appropriate, to suitable work and vocational training, including programmes outside prison.

27.2. Where necessary, specific measures shall be taken to ensure that foreign prisoners have access to income-producing work.

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

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

Exercise and recreation

28.1. Exercise and recreational activities shall be arranged flexibly to enable foreign prisoners to participate in a manner that respects their culture.

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

Education and training

29.1. To enable foreign prisoners to relate effectively to other prisoners and staff, they shall be given the opportunity and be encouraged to learn a language that allows them to communicate, and to study local culture and traditions.

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

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

Freedom of religion or belief

30.1. Prisoners shall have the right to exercise or change their religion or belief and shall be protected from any compulsion in this respect.

30.2. Prison authorities shall, as far as practicable, grant foreign prisoners access to approved representatives of their religion or belief.

Health

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

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

31.3. Medical and health care staff working in prisons shall be enabled to deal with specific problems and diseases which may be encountered by foreign prisoners.

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

31.5. Health care shall be provided in a way that is not offensive to cultural sensitivities and requests by foreign prisoners to be examined by a medical practitioner of the same gender shall be granted as far as possible.
31.6. Where possible, psychiatric and mental health care shall be provided by specialists who have expertise in dealing with persons from different religious, cultural and linguistic backgrounds.

31.7. Attention shall be paid to preventing self harm and suicide among foreign prisoners.

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

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

Good order, safety and security

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

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

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

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

Women

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

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

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

Infant children

34.1. When deciding whether it would be in the best interests of an infant child of a foreign prisoner to be kept in prison, particular consideration shall be given to:

a. the conditions in which the child would be held in prison;

b. the conditions that would apply if the child is kept outside prison; and

c. the views of the legal guardians of the child.

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

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

VI. Release

Preparation for release

35.1. Preparation for release of foreign prisoners shall start in good time and in a manner that facilitates their reintegration into society.

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

a. their legal status and their situation after release shall be determined as early as possible during their sentence;

b. where appropriate, prison leave and other forms of temporary release shall be granted to them; and

c. they shall be assisted in making or re-establishing contact with family, friends and relevant support agencies.

35.3. Where foreign prisoners are to remain in the state in which they were held after release, they shall be provided with support and care by prison, probation or other agencies which specialise in assisting prisoners.

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

35.5. In order to facilitate continuity of treatment and care where foreign prisoners are to be transferred to another state to serve the remainder of their sentence, the competent authorities shall, if the prisoner consents provide the following information to the state to which the prisoners shall be sent:

a. the treatment the prisoners have received;

b. the programmes and activities in which they have participated;

c. medical records; and

d. any other information that will facilitate continuity of treatment and care.

35.6. Where foreign prisoners may be transferred to another state, they shall be assisted in seeking independent advice about the consequences of such a transfer.

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

Consideration for early release

36.1. Foreign prisoners, like other prisoners, shall be considered for early release as soon as they are eligible and shall not be discriminated against in this respect.

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

Release from prison

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

37.2. Where foreign prisoners will return to a country with which they have links and, if the prisoner consents, the consular representatives shall assist them where possible in this regard.

VII. Persons who work with foreign prisoners

Selection

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

Training

39.1. Staff involved in the admission of foreign prisoners shall be appropriately trained to deal with them.
39.2. Persons who work with foreign prisoners shall be trained to respect cultural diversity and to understand the particular problems faced by such prisoners.

39.3. Such training may include learning languages spoken most often by foreign prisoners.

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

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

Specialisation

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

VIII. Policy evaluation

41. The authorities shall regularly evaluate their policies for dealing with foreign suspects and offenders on the basis of scientifically validated research and revise them where appropriate.

APPENDIX V

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 29 June 2012 PC-CP (2011) 6 rev 6
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DRAFT COMMENTARY ON THE RECOMMENDATION CONCERNING FOREIGN PRISONERS

Introduction

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

As the Preamble to the new Recommendation concerning foreign prisoners recognises, foreign offenders often face a range of difficulties brought about by differences in language, culture, customs and religion, and by their lack of family ties locally and contact with the outside world. They are more likely to be remanded in custody while awaiting trial and are more likely to be sentenced to terms of imprisonment after conviction than other offenders. Evidence of these growing difficulties is provided *inter alia* by studies conducted by both the European Union and the United Nations[1].

The aim of the Recommendation is to draw the attention of the competent national authorities to the fact that foreign prisoners should be treated in a manner that ensures, as far as possible, substantive equality of treatment with other prisoners. This might require the authorities to take additional steps in order to combat possible discrimination against foreign prisoners. Such steps are not intended to give - and should not be interpreted as giving - foreign prisoners more rights and freedoms than other prisoners.

The Recommendation addresses the difficulties faced by foreign prisoners by recommending specific steps that need to be taken to reduce the number of foreign suspects and offenders that are incarcerated, to improve the treatment of foreign prisoners, and to meet their specific social and personal needs. The objective of such treatment is not only to deal with the conditions of imprisonment to which such prisoners are subject but also to improve their social integration after release, whether they remain in the countries in which they were imprisoned or return to their home countries.

The new Recommendation concerning foreign prisoners replaces the earlier Recommendation R(84)12 on the same subject with more detailed provisions aimed at addressing the growing problems in this area.

The steps recommended are in addition to those contained in the 2006 European Prison Rules. The new Recommendation also deals briefly with the need to explore alternatives to imprisonment for foreign offenders. In this regard, it refers specifically to the Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse and Recommendation R(92)17 concerning consistency in sentencing. The Preamble upholds the independence of the judiciary in respect of alternatives to imprisonment.

Juveniles are not formally excluded from this Recommendation. However, the European Prison Rules emphasise that juveniles should not be held in prisons for adults (Rule 11.1). The detention of juveniles is covered fully by Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, which provides specific rights and safeguards that are applicable to foreign juvenile offenders as well. Where this Recommendation provides foreign juveniles with additional protection it should be applied to them.

While the provisions contained in this Recommendation are primarily addressed to the prison authorities, there are some provisions which are addressed to other competent bodies dealing with foreign persons. Member states should draw this Recommendation to the attention of everybody who deals with foreign suspects and offenders in general, as well as with foreign prisoners in particular.

I. Definitions and scope

Definitions

Rule 1

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

This Rule defines the term foreign person in relation to nationality and residence. In other words, those who neither have the nationality of, nor resident status in, the state in which they are will be considered to be foreigners. This Recommendation does not purport to define nationality or residence. However, to ensure effective application, states are urged to adopt a flexible approach to both concepts for the purposes of implementing this Recommendation and applying it to the widest range of persons who it may benefit.
This Recommendation applies to foreign suspects, offenders and prisoners. This is necessary to ensure that the Recommendation is applicable to all those who are, may be or have been detained at the different stages of the criminal justice process. While the term suspect has been used throughout the Recommendation, this is intended to refer to suspects who have been accused of committing a criminal offence. In practice, most suspects and offenders who are detained will be held in a prison, but the term, foreign prisoner, also includes those suspects and offenders who are detained elsewhere, such as police cells. A similar approach is adopted in EPR Rule 10.3*b.*

This Recommendation is not designed to deal with persons who are not offenders or suspected of having offended. However, where such persons are held in a prison as defined in Rule *1d*, they are included. The Recommendation may therefore deal with persons such as those suffering from mental illnesses, refugees, asylum seekers and illegal immigrants but only where they are held in a prison. A similar approach is adopted in EPR Rule 10.3*a.*

Scope

Rule 2

The primary focus of this recommendation is on foreign persons who are in prison. It also deals with suspects and offenders who may be or who have been held in prison. This means that it includes those who face criminal proceedings that potentially may lead to incarceration. Although house arrest is typically considered to be an alternative to imprisonment, it may, in some cases, be deemed to constitute a deprivation of liberty. In such cases, this Recommendation will apply to the extent that it is relevant.

The Recommendation also deals with offenders who have been released after a period of incarceration. It is recognised that the situation of foreign offenders may differ in various ways. For example, a foreign offender who is detained briefly before deportation may not have the full range of needs of someone who is likely to spend many years as a prisoner in a foreign country. Nevertheless, this Recommendation should be applied to this category to the extent practicable.

II. Basic principles

Rule 3

Respect for human rights is fundamental to the treatment of all prisoners. It is also important that it is not overlooked where foreign suspects and offenders are concerned. This principle emphasises that foreign prisoners may have specific needs that differ from those of national prisoners. Within the wide category of foreign prisoners, such needs may differ amongst particular groups or individuals. These various needs must be met as far as possible in order to ensure substantial equality of treatment of all prisoners. It is therefore important that staff who deal with foreign prisoners are reminded of the need to engage with and attempt to understand the potentially vulnerable position of such prisoners. This Recommendation has at several points addressed this issue (see for example Rules 16.3, 28.2, 38 and 39).

Rule 4

In some jurisdictions, foreigners are routinely excluded from consideration for non-custodial sanctions and measures because of their non-national and non-resident status. This includes consideration for release pending trial. It may simply be assumed that they will not be entitled to remain in the country after release, that they may not have sufficient social links or that they may pose a greater risk of flight. While these may, in certain circumstances, be valid factors to consider in deciding the appropriate sanction or measure, they should not constitute an automatic bar to eligibility for non-custodial measures.

In addition, non-custodial sanctions and measures imposed on foreign suspects and offenders may be executed in another state in terms of international agreements, such as the European Convention on the

Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964, CETS 051), the EU Council Framework Decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions and the EU Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. These possibilities must be taken into account in order to foster the application of such sanctions or measures.

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

Rule 5

The principle that custody should be used only when strictly necessary and as a last resort is widely recognised in Council of Europe legal texts. See for example Recommendation R(92)16 on European Rules on community sanctions and measures; Recommendation R(92)17 concerning consistency in sentencing; R(99)22 concerning prison overcrowding and prison population inflation; Rec(2003)22 on conditional release (parole); Recommendation Rec(2006)2 European Prison Rules; and Recommendation Rec(2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

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

Rule 6

The principle that foreign offenders who are sentenced to terms of imprisonment should be considered for early release is implicit in Rec(2003)22 on conditional release (parole) and other European instruments. In reality, foreign prisoners are often not considered for early release, or indeed, measures that would prepare them for and therefore enable them to successfully apply for such release. The steps prison authorities should take to prepare foreign prisoners for release are elaborated in Rule 35. Rule 36 deals with the detailed factors to be taken into account in decisions relating to early release.

Rule 7

This principle should be read against the background of Protocol 12 to the European Convention on Human Rights which outlaws discrimination. This principle emphasises the need to take positive steps to avoid discrimination and to find solutions for the problems faced by foreigners in this respect. Such interventions are required at all stages of the criminal justice process, to ensure substantial equality of treatment for foreign suspects and offenders. In this regard, the Committee for the Prevention of Torture, Inhuman and Degrading Treatment and Punishment (CPT) has recommended that states review their legal and administrative provisions to ensure that foreign prisoners are not discriminated against by being excluded from eligibility for a range of measures, such as more open conditions, home leave and conditional release[2].

Rule 8

The inability to communicate in the language most commonly spoken in a prison is a severe barrier to foreign prisoners' ability to participate in prison life. It is the root cause of many problems, such as isolation, lack of access to services, work and other activities, and an inadequate understanding of prison rules and regulations. Therefore, it is vital that prison authorities make every effort to facilitate communication and to enable offenders to overcome language barriers. This principle emphasises the importance of access to interpretation and translation facilities. Interpreters should be competent and

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

impartial. In addition, communication should be encouraged by creating opportunities for the learning of languages by foreign prisoners, and persons who work with them (see Rule 39.3). It is recognised that many prison systems have populations that speak a vast range of languages. This principle and other related rules (see Rule 29.1) convey the idea that communication can be facilitated by learning a language which can be understood by both prisoners and staff. This may be a national language of the state or a common international language.

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

Rule 9

This basic principle alerts authorities to the difficulties that foreign prisoners may face due to linguistic, cultural and religious differences and their lack of social support. Special welfare measures should be put in place to assist foreign prisoners to overcome the problems that these differences may cause and in so doing, to alleviate the potentially resulting isolation. Such measures may include financial and other material assistance, vocational and language training and a flexible approach to contact with the outside world (see, for example, Rules 22-25, 26.1, 27.1-2, 29.1-2, 33.1, 34.3 and 35.2*b*-*c*).

While the social reintegration of prisoners, both unsentenced and sentenced is important (Rule 6 European Prison Rules), the social reintegration of foreign prisoners poses particular challenges. Foreign prisoners who will return to their home countries after release may require different forms of preparation than foreign offenders who will remain in the state after release. To assist their social reintegration in foreign countries the preparation for release should therefore be tailored as far as possible to enable the foreign offenders to reintegrate into society in the particular state they will return to upon release. This is dealt with in Rule 35, which is primarily addressed to prison authorities. Consular representatives should also provide assistance in this regard. Probation agencies and social services also have a valuable role to play.

Rule 10

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

In addition to the pursuit of justice goals, international transfers should be undertaken with a view to improving the opportunities for social reintegration of the offender. This ground is emphasised both in the Council of Europe Convention on the Transfer of Sentenced Persons (CETS 112) and in the EU Council Framework Decision FD 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

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

All transfers should be subject to fundamental human right standards. This means that the transferring state should request the view of the foreigner concerned before any decision is taken. State authorities must also take into account other potential risks of human rights violations such a transfer would pose, ranging from the violation of the right to family life, poor prison conditions and regimes which would not facilitate social reintegration or treatment, to the more extreme situation where there is a risk of torture, inhuman or degrading treatment[3]. The assessment of the potential risks should be made by persons who have received appropriate training and have access to objective and independent information about the human rights situations in other countries.

Rule 11

Rule 4 of the European Prison Rules emphasises that 'prison conditions that infringe prisoners' rights are not justified by lack of resources'. This applies also to foreign prisoners whose management and treatment may require additional funds to deal with matters such as health care, interpretation and translation.

Rule 12

This Rule recognises that a wide range of officials and other persons, including professionals such as medical doctors and lawyers, who work with foreign suspects and offenders require training both in the specific legal and practical rules that relate to foreign suspects and offenders and in the underlying cultural and ethical bases for treating them appropriately. The details of what such training should entail are contained in Rule 39.

III. Use of remand in custody

Rule 13

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

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

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

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

Remand in custody is being ordered too readily for foreign suspects. With remand in custody being the norm rather than the exception, foreign suspects have become overrepresented in the pre-trial prison

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

populations of Europe. On average, they represent 40% of the pre-trial detention population in Europe.[4] Steps should be taken to investigate more fully before denying foreign offenders the possibility of awaiting trial in the community.

Both Recommendation (2006)13 (Rule 4) and Recommendation R(99)22 concerning Prison Overcrowding and Prison Population Inflation (Section 12) encourage states to adopt and use the widest possible range of alternatives to remand in custody. Even though alternatives are often available in national legal systems, practice seems to indicate that prosecutors and judges are reluctant to request and impose such alternatives in general and for foreign offenders in particular. This reluctance has been attributed to the need to protect society. It is also due to the perception that foreign suspects are more difficult to contain and monitor[5].

To overcome the difficulties surrounding the use of alternatives for non-resident foreign suspects, Rule 2.2 of Recommendation (2006)13 states that such measures should be applied in the state where the suspect is usually resident. The EU has adopted a Framework Decision[6] which enables the implementation of supervision measures, adopted as alternatives to provisional detention in the state in which suspects are subject to criminal proceedings, in the state in which they are lawfully and ordinarily resident. This mechanism is designed to reverse the current practice whereby non-residents are much more likely to be remanded in custody pending trial than resident suspects (para 5 Preamble). Moreover, it aims to enhance the protection of victims and the general public while also enhancing the right to liberty and presumption of innocence for non-resident accused persons (paras 3 and 4 Preamble and Article 2).

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

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

Rule 9[2] of Recommendation (2006)13, as well as Rule 13.2*b* of this Recommendation, make it clear that it should not be assumed automatically that foreign suspects pose a greater flight risk. All risk determinations must be taken on the basis of the individual circumstances of the suspect, examined in

[4] The most recent statistics on foreign prisoners in Council of Europe prisons are based on figures collected for 2010. The percentage of foreign prisoners in the prisons of Member States (42 of 52 prison administrations) ranged from 0.7% (Poland) to 91.7% (Monaco). The average percentage of foreign prisoners per prison population was 21.2% and the median percentage was 11.0% for those countries. The range of percentages of pre-trail detainees among foreign prisoners is relatively similar, ranging from 10.4% (Azerbaijan) to 75.6% (Bosnia and Herzegovina: Federal administration). However, the average percentage of foreign prisoners in pre-trial detention nearly doubles, with the average being at 40.1% and the median almost four times higher is 40.0%. Countries with 40% and over of foreigners who are in pre-trial detention are: Liechtenstein (40.0%), Croatia (43.0%), Luxembourg (45.3%), Italy (49.6%), Slovak Republic (50.6%), Finland (50.6%), Poland (50.7%), Latvia (51.8%), Turkey (52.1%), Norway (53.2%), the Netherlands (53.2%), Serbia (54.4%), Slovenia (55.0%), Andorra (56.0%), Denmark (57.2%), Albania (60.3%), UK: Northern Ireland (64.3%), and Bosnia and Herzegovina: Federal administration (75.6%). The average percentage of foreigners among the total number of pre-trial detainees (all those who are not serving a final sentence) is 28.1% and the median is 23.3%. The percentage of foreigners on the pre-trial populations is above 30% in Finland (32.2%), Denmark (34.6%), Portugal (34.8%), Estonia (38.0%), Italy (41.1%), Spain: State Administration (45.5%), Germany (46.1%), Liechtenstein (57.1%), Norway (57.5%), Switzerland (60.9%), Austria (62.5%), Spain: Catalonia (63.2%), Monaco (66.7%), Andorra (70.0%), Luxembourg (79.2%). See Council of Europe Annual Penal Statistics, SPACE I, 2010 [PC-CP (2012) 3] (website: www.coe.int/prison).

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

[6] EU Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention. Member States need to take the necessary measures to comply with this Framework Decision by 1 December 2012 (Art. 27(1)).

light of objective criteria (Rules 8[1] and 9[1] Recommendation (2006)13). Generalisations are not appropriate. Information about the personal and social circumstances of the suspect, provided by the probation or social services, will be valuable in making an assessment of the risk involved in making use of alternatives to remand in custody.

Alternatives to pre-trial detention should be tailored to deal with the specific problems faced by foreign suspects. For example, where foreign suspects do not have a fixed address, they could be required to reside at a specific approved address that may be operated by a state, local community or non-governmental agency. If there is a risk of flight, such an order may be coupled with other requirements, such as the surrender of passports, a ban on leaving the country, an obligation to report to police or judicial authorities at specific times or the use of electronic monitoring (see Section 12 Recommendation R(99)22 and Rule 2(1) Recommendation (2006)13). The availability of more suitable alternatives for foreign suspects should reverse the perceived flight risk such suspects pose, thereby reducing the present over-reliance on remand in custody in such cases. To promote the use of non-custodial alternatives for foreign suspects, 'links' should not be interpreted in a strict legal manner to only refer to legal residence or nationality, but may include residence, work or having family in the state (Rule 13.2*b*).

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

IV. Sentencing

Rule 14

As explained in the Commentary to Rule 5, Recommendation R(99)22 concerning prison overcrowding and prison population inflation and other Council of Europe Recommendations have strongly emphasised that sentences of imprisonment should only be used when absolutely necessary and as a measure of last resort. The challenge is to ensure that this principle is also applied to foreign offenders. If applied fully and in a non-discriminatory manner, the provisions of Recommendation R(92)17 concerning consistency in sentencing can assist states to meet this challenge. Its guidance on how to avoid custodial sentences should be applied in all cases. In this regard para B 5 of Recommendation R(92)17 should be noted, as not only does it emphasise that imprisonment should be regarded as a sanction of last resort, but it also goes on to explain that it "should therefore be imposed only in cases where, taking due account of other relevant circumstances, the seriousness of the offence would make any other sentence clearly inadequate". The same paragraph of Recommendation R(92)17 add:

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

Without prejudice to the independence of the judiciary, this approach should be applied to foreign offenders too (Rule 14.1). Its adoption requires the rejection of the assumption that imprisonment, often coupled with expulsion, is the only appropriate sentence for foreign offenders convicted of all but the most minor offences. If foreign offenders are routinely considered for the full range of sentences, this danger can be minimised.

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

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

In reality, a sentence may have a disproportionate impact on foreign offenders. This increased hardship may, in turn, act as an impediment to such offenders' social reintegration. Rule 14.3 reflects the need to ensure equality of outcomes as highlighted by Rule A 8 of Recommendation R92(17) on Consistency on Sentencing. Sentences may also have a devastating impact on the children and other dependants of offenders. This is particularly true of foreign offenders who may be the primary carers for their children. The UN Convention on the Rights of the Child requires that the best interests of the child be considered in all official decisions that may affect them[7]. Therefore, their interests should also be borne in mind when their foreign parents are sentenced (Rule 14.3).

V. Conditions of imprisonment

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

Admission

Rule 15

Admission to prison is always intimidating. It may be particularly so for foreign prisoners. Therefore, extra care needs to be taken to communicate effectively with them from the outset. Staff who are trained in accordance with Rule 41.1 should be involved in the admission process to facilitate such communication. The importance of effective communication is apparent from Rule 15.1. Prisoners should be provided with information in a language which they understand, orally and also, where possible, in writing. This need not be the prisoners' first language, but one which they can understand. A good practice which exists in some countries is for prisoners to receive a foreign prisoners' information pack which can be translated beforehand into the languages used by the majority of foreign prisoners. Such a pack should include, inter alia, the information set out in Rule 15.1 *a* to *d* and 15.3. In addition there should be information on the internal regulations and main feature of the prison regime, including the rules governing discipline, legal aid, the prisoners' rights and duties, complaints procedures, prison work and release as well as information on how to access services such as medical treatment, education and visits[8]. The CPT has also recommended that prisons provide foreign prisoners with translations of expressions most commonly used in everyday activities as this can prevent misunderstandings and thereby contribute to a less conflictual prison environment[9]. Prisoners should also be provided with information about the possibilities of transfer to another state at all the different stages of the criminal justice process (Rule 15.3, see also Rule 35.7). As this information has been provided by the prison authorities, and is therefore approved, prisoners should be allowed to keep this information in their possession. Moreover, the prison authorities should update it regularly. Prison authorities should also assist foreign prisoners who wish to communicate the fact of their imprisonment to relevant individuals or bodies, immediately after admission (Rule 15.2). Rule 15.2.draws attention to the need to assist foreign prisoners immediately after admission by informing about their whereabouts the persons and agencies capable of providing them help. The different ways of communicating such information are discussed in Rule 22.

Allocation

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

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

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

Rule 16

Decisions relating to the allocation of foreign prisoners to particular prisons require balancing a wide range of operational and other factors. Some of these are applicable to all prisoners, such as safety and security, capacity and the desirability of housing them close to their family and community ties (see Rule 17.1 European Prison Rules) and in facilities that can provide suitable programmes. Where foreign prisoners have close family or other social ties in the country in which they are detained, these may be the key considerations, balanced always with the requirements of safety and security. On the other hand, where foreign prisoners' primary contacts are abroad it may make more sense to house them close to transport facilities that would allow their families to travel from abroad to visit them (see Rule 16.2). Another factor to be considered is whether it is better to house foreign prisoners in prisons where there are others of their nationality, culture, religion or who speak their language (Rule 16.3). This may reduce their sense of isolation, but may conversely be undesirable from the point of view of safety and security. In all these scenarios, it is desirable to consult the foreign prisoners concerned to determine their views about allocation proposals (see Rule 17.3 European Prison Rules).

Accommodation

Rule 17

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

Hygiene

Rule 18

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

Clothing

Rule 19

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

Nutrition

Rule 20

Rule 22.1 of the European Prison Rules states that authorities must take cultural and religious preferences in relation to diet into account. The right to food that meets the religious traditions of prisoners has also been recognised by the European Court of Human Rights, which held that a refusal to provide a Buddhist prisoner with vegetarian meals infringed Article 9 of the European Convention on Human Rights[10]. One method of ensuring this right for foreign prisoners is to allow them to access a prison shop which stocks in hygienic conditions food they prefer. Consular representatives may be approached for help in this regard.

It is acknowledged that there are operational factors, such as space, security and hygiene, to be considered in relation to providing cooking facilities and that not all countries may provide such facilities. However, where such facilities and opportunities are provided, they have been found to enhance social interaction and reduce isolation.

In relation to the need to take account of the religious preferences in respect of meal times, this should be done where possible. A good practice recognised by the CPT was the special effort made at Woodhill Prison UK to keep food warm for prisoners observing Ramadan, the organisation of the Eid-ul-Fitr celebration and courses for staff on halal food, which have led to a better mutual understanding[11].

Legal advice and assistance

Rule 21

It is important to recognise that foreign prisoners may need legal advice not only on matters relating to their criminal trial or conviction, but also on a wide range of other matters including prison law, their immigration status and family affairs. Various steps should be taken to ensure that they benefit from the legal advice and assistance that is available to all prisoners in the country in which they are held. This may include access to legal aid the provision of assistance in practical measures such as filling out forms or making contact with the legal aid agency (see also EPR 23.3). Rule 21.2 does not place a direct obligation on prison authorities to provide legal aid directly. Foreign prisoners may also be assisted by outside agencies which specialise in the assistance of foreign prisoners (Rule 21.4). It is important in this regard that they have information about the services they can access and that such access is facilitated by the prison authorities. They may also need specific help in respect of interpretation (Rule 21.1, 21.3 and 21.5). It is important that such interpretation is accurate, impartial and recognises the requirements of legal confidentiality. It should be provided where a prisoner does not have a full understanding of the language used. In this regard, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter when participating in proceedings which concern them, including internal disciplinary proceedings[12] (see also EPR Rule 59.*e*). However, it is recognised that legal advice may be sought on a wide range of issues and from a range of advisers. While states must ensure that prisoners have access to such advice, it is for States to decide who must pay for it. For example, in some countries the state will pay for interpretation costs that arise from criminal justice, residential status and disciplinary procedures, whereas the prisoner must pay for interpretation costs arising from advice on other legal matters.

Contact with the outside world

Rule 22

Contact with the outside world is particularly important for foreign prisoners who may easily become isolated. Research has also shown that family connections are important for offenders' social

[10] Jakóbski v Poland (Application N°18429/06, 7 December 2010).

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

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

reintegration. It is therefore essential to minimise the damage that imprisonment causes to family ties. Rule 22.1 lists a wide range of forms that contacts with the outside world could take. Subject to safety and security considerations (see Rule 24.2 EPR), prison authorities should do what they can to facilitate contacts with family and friends, consular representatives, probation staff and approved community agencies and volunteers. This can best be achieved by flexibility in relation to the rules that govern the contact of prisoners with the outside world generally. Moreover, probation staff and community agencies and volunteers from both the state in which the prisoners are held and the state to which they will go upon release can assist in this regard. Accordingly, prisoners should be informed where organisations providing services to prisoners abroad exist in their country of residence or nationality. The Netherlands provides an example of good practice in this regard. Volunteers regularly visit Dutch nationals detained abroad and assist them in maintaining relations with their families and consular representatives and dealing with problems that may arise.

Rule 22.2 highlights the need for flexibility in relation to the use of language during contacts. The right of foreign prisoners to speak in their own language during communications with family and friends should only be restricted when absolutely necessary due to a specific, substantiated concern in relation to a particular individual. Whilst security concerns may arise when prisoners speak a language which the authorities do not understand, practical measures relating to interpretation can minimise this concern. If the translation required for active surveillance is not available, the right of foreign prisoners to speak in their language should only be postponed for a reasonable period necessary to rectify the problem. Other concerns are the time difference and costs of phone calls made abroad. Flexibility in respect of the time and length of telephone calls (Rule 22.3) – along with the length of visits (Rule 22.5) can also improve contact with the outside world. For those foreign prisoners classified as indigent, prison authorities should assist with the costs of communicating with the outside world (Rule 22.4). This assistance is, of course, only to the extent that is reasonable under all the circumstances.

A range of authorities and agencies can assist the families of foreign prisoners who are based abroad with the arrangement and financing of visits. This is an area for potential co-operation between prison authorities and consular representatives, other agencies and NGOs from the country to which the prisoner will eventually be sent. Support could include the provision of information and financial assistance. Authorities should also adopt a flexible approach to granting visas to family members who live abroad to promote the maintenance of familial relationships (Rule 22.6)[13].

In addition, the authorities are enjoined to assist prisoners with the cost of communication (Rule 22.4). As foreign prisoners often do not have work, and therefore may not have money to buy stamps or phone cards, the CPT has recommended that states ensure access to communications, and if they are externally provided, that they are reasonably priced[14]. In situations where high travel costs prevent regular, if any, visits, it may be possible to facilitate or improve contact using technology, such as videoconferences. However, the use of video links technology should not constitute the answer to all practical difficulties; ordinary visits, in particular contact visits, should always be preferable.

Special measures to enable foreign prisoners to keep in contact with their children are particularly important as they are valuable both to the prisoner concerned and are in the interest of the child (Rule 22.7 – see also Rule 34.1). Where children visit their imprisoned parent, there should be open contact with that parent wherever possible (Rules 26 to 28, UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Resolution 2010/16)).

In recognition that prison visits can be a difficult experience for children, and even more difficult for children living abroad, prison authorities should take particular care to ensure that the measures put in place as required by Rule 22 to maintain familial relations are implemented in a child-friendly and sensitive manner (Rule 22.8.). This should include consideration of the children's availability for such visits, bearing in mind they may be attending school. If children are living abroad, other forms of communication must be considered, such as video links and other forms of electronic communication. The rules relating to flexibility in relation to the times and types of communications (Rules 22.3 and 22.5)

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

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

should be implemented in a way that takes into consideration the children's schedules and ability to communicate. The flexibility referred to in Rule 22.6 should also be adopted to facilitate visits by children.

Where the prison authorities are given news of major events in the life of a member of the prisoner's family they should convey this information to the prisoner (Rule 24.6 European Prison Rules).The prison authorities can also assist directly in the preservation of family relationships by keeping family members informed about events in a foreign prisoner's life. The authorities should assist foreign prisoners who wish to inform their family about their location (Rule 22.8). Rule 22.9 deals with the situation in which a prisoner has suffered a serious injury or illness, or has died. Due to the need to respect the prisoner's right to privacy, the prisoner's consent must be obtained before such information can be released. However, it is also important to respect the family's right to information about their loved one. The most practical approach would be to request consent for such correspondence at admission. In this way, the prison authorities will be in a position to know how to deal with such humanitarian issues. It is also important in this regard that authorities try to maintain an up-to-date record of the contact details of the families of foreign prisoners (Rule 22.10). In exceptional circumstances, family members' right to know may prevail, when it is in the best interest of the prisoner. Such may be the case when the offender is mentally ill and, therefore, unable to consent.

Rule 23

Isolation can be prevented and combated by allowing foreign prisoners to remain informed about public affairs in their countries of origin. To this end, they should be allowed to subscribe to publications (Rule 23.1) and be given access to radio or television broadcasts (Rule 23.2). Both of these should be available in a language they understand. Access of this kind will also facilitate their reintegration, particularly if they return to their home country. Given the rapid development of forms of media, the words 'other forms of communication' in Rule 23.2 are intended to cover new and improving methods of information provision such as the Internet.

There should not be a general prohibition on access to materials and resources in a particular language or languages. However, access to particular materials or resources may be limited for a temporary period if this is based on a judicial order (see Rule 24.10 European Prison Rules).

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

Contacts with consular representatives

The role and duties of consular representatives are set out in the Vienna Convention on Consular Relations (United Nations, *Treaty Series*, vol. 596, p. 261). This section relates to the right of foreign prisoners to contact their consular representatives and the role prison authorities can play in facilitating such contact.

Rule 24

Rule 24 deals with contacts with consular representatives from the perspectives of foreign prisoners. Foreign prisoners have the right to such contacts (Rule 24.1) and to reasonable facilities to communicate with their consular representatives (Rule 24.2). If foreign prisoners have more than one foreign nationality, they have the right to contact consular representatives of all states concerned. Equally, foreign prisoners may refuse to make contact with consular representatives. There may be problems where prisoners are without consular representation in the country in which they are detained. In such cases, prisoners may communicate with consular representatives of another state which takes charge of their interests (Rule 24.3). Rule 24.4 refers to refugees, asylum seekers and stateless persons who are held in a prison. Refugees and asylum seekers may not wish to contact their consular representatives. This Rule therefore

entitles persons without effective representation to contact national or international authorities whose task it is to serve their interests, for instance, the UN High Commissioner for Refugees.

Rule 25

Prison authorities have duties to both foreign prisoners and authorities representing their interests. In the case of the former, the prison authorities should inform them about their right to contact their consular representatives or the authorities whose task it is to serve their interests (Rule 25.1). In the case of the latter, prison authorities should inform consular representatives about nationals who are detained where such prisoners request (Rule 25.2). The prison authorities should also cooperate with consular representatives and authorities that serve their interests and facilitate the provision of their services within the prison (Rule 25.3).

The prison authorities also have a duty to record information about the consular contacts with prisoners. The purpose is simply to have a record that such visits took place and not to record their content, which should normally be confidential (Rule 25.4). However, prison authorities should not press prisoners to take up contacts with consular representatives if they do not wish to do so. To ensure that pressure is not put on foreign prisoners a record should also be kept of where they waive their right to such contact (Rule 25.4).

Prison regime

Rule 26

Rule 26 deals with the prison regime as a whole. Rule 26.1 emphasises that in order to achieve a balanced programme of activities, it may be necessary to take additional positive measures to ensure that foreign prisoners can fully participate in such activities. The need to adopt specific measures should be considered from the outset, during sentencing planning. In this regard, the CPT has recommended that authorities aim to prevent the exclusion of foreign prisoners from prison regime activities whether due to language or more systemic barriers[15]. Positive measures may include assistance with interpretation and classes to learn the language in which activities are conducted (see Rule 29.1).

There is a danger that foreign prisoners will be regarded as less worthy of treatment and training because they may be transferred, extradited or expelled. Rule 26.2 states that access to such activities should not be generally restricted for foreign prisoners. If some activities are considered to be unsuitable for foreign prisoners due to the activities' focus on reintegration into the state in question, or because the activity takes place out of the prison premises, then suitable alternatives, which also focus on reintegration, should be provided.

Work

Rule 27

It is particularly important for foreign prisoners to be engaged in useful and productive work as they often do not receive financial support from outside the prison because of their lack of social links in the country of their detention. The authorities should take steps in order to ensure that foreign prisoners are not discriminated against in respect of work allocation and training (Rule 27.1-2). In organising work, account should be taken of religious and cultural practices, for example, differing days of rest. Foreign prisoners should also be considered for work programmes that occur outside the prison. Anti-discrimination principles dictate that foreign prisoners should be considered for all work opportunities available to national prisoners, unless there are specific legal impediments to their working. While there may be legitimate security concerns about the provision of work outside prison, it is important that states ensure equality of opportunities for foreign prisoners.

Rule 26.11 of the European Prison Rules already provides for prisoners to transfer some of their earnings out of prison. In the case of foreign prisoners, Rule 27.3 provides explicitly that they may transfer part of their earnings to family members abroad.

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

Building on Rule 26.17 of the European Prison Rules, which states that, as far as possible, prisoners who work should be included in national social security systems, Rule 27.4 provides that foreign prisoners who contribute to the social security system of the country in which they are detained shall be allowed, where possible, to transfer the benefits of such contributions to another state. This Rule enables foreign prisoners to contribute to the system in the country in which they are most likely to live after release, thus facilitating their social reintegration. As social security systems differ in the coverage that they provide – unemployment benefits, pensions and health care are funded differently in various countries – careful attention needs to be paid to where and how such contributions should best be made. Where the contributions are 'spent' in part, only the remaining benefit should be transferred: for example, contributions to a health care system may have been used, leaving a residual benefit to be transferred. This Rule may only be applicable where states allow prisoners to contribute to relevant schemes.

Exercise and recreation

Rule 28

It is important that foreign prisoners have adequate exercise and recreational activities. It may be necessary to apply internal regulations flexibly to ensure that foreign prisoners are not, in practice, excluded from such activities. Such flexibility may also be required to ensure that the manner in which such activities are conducted does not conflict with the cultural practices of these prisoners (Rule 28.1). For example, foreign prisoners should not be compelled to wear sports clothing that may conflict with their conceptions of modesty. Cultural differences can be used to positive effect. For example, prisoners may share different cooking techniques, games and entertainment. This may promote intercultural understanding and improve relationships amongst prisoners (Rule 28.2) or participate in foreign prisoners' national sports.

Education and training

Rule 29

The CPT has noted that an inability to communicate due to linguistic barriers may cause foreign prisoners deep moral distress[16]. The CPT has therefore recommended that prison authorities introduce programmes of language education for foreign prisoners[17]. Rule 29.1 encourages the learning of languages that assist with communication within a prison. This need not necessarily be the language spoken by the majority of the staff and prisoners, but a common language that enables prisoners and staff to communicate (see Rule 8). In addition, opportunities should be made available for prisoners who wish to learn or improve their knowledge of the language of the country of origin. In addition to linguistic communication, the quality of interaction between prisoners and between prisoners and staff can be improved by understanding different traditions and cultures. Rule 29.1 therefore also recommends that foreign prisoners be provided with opportunities to study local traditions and cultures.

The educational and vocational training provided for foreign prisoners should be tailored as far as possible to their specific needs, as this is important for their eventual social reintegration. Rule 29.2 sets out how this should be done.

To assist with this training, prisons should be stocked to the extent possible with reading materials and resources that reflect the linguistic and cultural backgrounds of the prison population. Whether these materials are held in the prison library or education and training centre, these resources should be accessible (Rule 29.3). Educational resources can be derived from audio, video and electronic material and means. Consular representatives and non-governmental organisations should be encouraged to contribute to the educational and training resources available and suited to the needs of foreign prisoners.

Freedom of religion or belief

Rule 30

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

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

Rule 30.1 is designed to give practical effect to the right to freedom of thought, conscience and religion that is recognised by Article 9 of the European Convention on Human Rights and Rule 29 of the European Prison Rules. Prisoners also have the right to change their religion or beliefs during their time in prison. The right is further strengthened by the requirement that foreign prisoners must not be compelled to practice any particular religion or belief. Indeed, prisoners should be protected against the risk of proselytisation both by representatives of any faith or religion and by staff or fellow prisoners. Prison authorities have a general duty to facilitate the exercise of this right by foreign prisoners. They may do so in various ways, including the provision of a multi-denominational faith room.

Rule 30.2 encourages prison authorities, as far as possible, to grant foreign prisoners access to approved representatives of their religion or belief. In some states, a religion or belief may be approved rather than individual representatives. In others, a list of approved representatives may be available. Or, states may choose to maintain a list of organisations that are not considered to be religious organisations for this purpose.

Religious observance may raise security concerns but these should not trump this fundamental right except where it is essential to impose limitations. Such limitations should be the minimum necessary to guarantee safety and security.

Health

Rule 31

Rule 31.1 highlights the need to ensure the implementation of the principle of equivalence of care. This principle relates not only to the provision of health care within prison which is of the same standard as is available in the general community, but also to ensuring that all prisoners can access this health care. In reality, however, foreign prisoners may not be covered by the national health care insurance system of the state in which they are detained. Prison authorities must therefore ensure that foreign prisoners have access to the necessary general medical and dental treatment and care, as well as to more specialised medical services that may be required. Given that foreign prisoners may also have specific health problems or suffer from diseases that are not common in the state in which they are detained (e.g. malaria, dengue), prison authorities should ensure that sufficient resources and funds are allocated to deal with these problems effectively[18] (Rule 31.2). The CPT has urged authorities to ensure that foreign prisoners have equal access to drug rehabilitation programmes.[19] In the case of transmissible and infectious diseases, it may also be necessary to ensure the health of other prisoners and staff who are in contact with foreign offenders (see Recommendation R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison).

In addition to being updated about potential or existing diseases and conditions which may affect foreign prisoners, medical and health care staff should also be made aware of the importance of respect for cultural diversity and sensitivity, as well as appropriate methods for interacting with prisoners coming from different backgrounds (Rule 31.3). In some circumstances, achieving these objectives may require additional training.

Given the difficulties foreign prisoners may encounter when trying to communicate with healthcare staff (and the risk that such difficulties may jeopardise the health of such prisoners), the CPT has recommended that steps be taken to ensure such prisoners benefit from the services of a professional interpreter as this helps best respect the prisoner's right to privacy and allows good quality of communication which is primordial for healthcare purposes.[20] However, for financial reasons and also in

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

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

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

cases of emergency, more informal methods of interpretation may have to be relied on, like interpretation offered by a fellow prisoner or by staff member. Extreme caution should be exercised in such cases, and informal interpretation used only if it respects the medical confidentiality of the patients concerned and they consent to this form of communication (Rule 31.4).

Some cultural traditions do not allow a prisoner to be examined by a medical practitioner of a different gender. Save in the case of a medical emergency, such requests should be met where possible (Rule 31.5).

An ability to communicate in a culturally sensitive manner is especially important for the provision of psychiatric and mental health care (Rule 31.6). A good practice may thus be to employ ethno-psychiatrists, as is the case in Belgium. It may be more difficult for prisoners coming from different religious, cultural and linguistic backgrounds to adjust to the culture of the country in which they are detained and more specifically to prison life. This may lead to excessive feelings of abandonment and anxiety. Accordingly, both prison authorities and medical and health care staff should pay particular attention to the prevention of self-harm and suicide among such prisoners (Rule 31.7).

In recognition of the humanitarian principle that prisoners with a short-term fatal prognosis should be transferred to external medical facilities to ensure their best possible care, (Rule 51, Recommendation (98)7 concerning the ethical and organisational aspects of health care in prison) and based on the same humanitarian principle, consideration should also be given by the competent authorities of the state of detention to the possibility of transferring terminally ill foreign prisoners, who so request, to a state with which they have strong social links (Rule 31.8).

Where the prisoner is ill, steps should be taken to ensure that the transfer is prompt and humane. The prisoner should be accompanied by medical personnel and the mode of transport should be suitable[21]. In cases of transfer, extradition or expulsion, steps should be taken to ensure the continuation of medical treatment. This should involve the provision of medication for use during transit to the other state and, where the prisoner consents, the transfer of medical records. The CPT has stressed that any such provision of medication must only be done on the basis of a medical decision and in accordance with medical ethics[22].

Good order, safety and security

Rule 32

The maintenance of good order, safety and security in a prison housing prisoners of various backgrounds requires awareness of the potential conflicts that may arise between prisoners, and between prisoners and staff or other persons working in or visiting the prison. While such issues should be considered during the selection and training of staff (Rules 38 and 39), it is also important that prison authorities adopt the principles of dynamic security in their management of prisons (Rule 32.1), a concept which has been highlighted in the EPR (Rule 51.2) and in the European Rules for Juvenile Offenders (Rule 88.3). By doing so, and ensuring staff prioritise the creation and maintenance of everyday communications and interaction with all prisoners, any potential or current tensions or problems can be detected and dealt with as early as possible. Effective communication in this respect requires awareness and understanding of cultural and religious differences and possible inter-ethnic tensions (Rule 32.2). Understanding and tolerance among prisoners, and between prisoners and staff, can be enhanced by participation in activities that raise awareness of cultural, religious and ethnic diversity (Rule 32.3, see also Rule 28.2). For example, the CPT has highlighted the good practice at Woodhill Prison, UK, where the Imam has initiated programmes to provide prisoners and staff with a better understanding of Islam[23]. Staff should

[21] Para 9 Ethical and Organizational Aspects of Health Care in Prison COE Rec(98)7, para 37 CPT Third General Report; paras 112-117 Tarariyeva v Russia (4353/03) 14.12.06.

[22] 7th General Report, CPT/Inf(97)10, para 36. on medical ethics during expulsion procedures.

also be aware that tensions may arise due to linguistic barriers and therefore, be trained to deal with such situations[24] (see Rule 39.2). This may involve reliance on informal means of interpretation and translation, which can be offered by other prisoners. In addition, the CPT has recommended that foreign prisoners should have an effective right to the assistance of an interpreter in order to enable them to participate in disciplinary proceedings[25]. This assistance should also apply to the conversations that the foreign offender may have with his lawyer, when preparing for the disciplinary hearing.

With a view to ensuring dynamic security, prison authorities should endeavour to keep up-to-date records about the composition of their prison populations. While information on their backgrounds can be a useful tool in creating policies to prevent and manage potential and actual conflict, such information should not decisively affect decisions on the risk posed by an individual or a group of foreign prisoners to good order, safety and security (Rule 32.4). However, where information is available that there is a risk to the safety of a particular individual or group, all possible measures must be taken to ensure their safety (*Rodic and Others v. Bosnia and Herzegovina*, Application N°22893/05).

Women

Rule 33

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

Given that women represent only a small proportion of the prison population, there are fewer accommodation possibilities for them. This often results in women prisoners being housed far away from their families and children[26]. Research has shown that separation from family members, children and the community in general may have an extremely adverse impact on women prisoners. While this problem also affects foreign female prisoners whose families are resident in the state in which they are imprisoned, it is much more acute in the case of foreign female prisoners whose families are abroad. These women may become further isolated due to linguistic barriers that prevent or reduce access to social support and other services and activities in prison (Rule 33.1).

It is recognised that imprisonment may affect and impact on women differently from men. In particular, women with children may suffer from feelings of guilt and helplessness due to enforced separation, especially if the children are resident in a different country. Research has also shown that women are more likely to commit acts of self harm and suicide, particularly during the very early stages of detention. A history of abusive and violent relationships and experiences may also lead to heightened anxiety and post-traumatic stress disorders during detention. The situation may be more complicated for foreign female prisoners coming from different cultural backgrounds. Accordingly, medical and healthcare staff should be particularly attentive and trained to deal with these psychological needs (Rule 33.2). To ensure medication is not the primary means of dealing with the psychological problems women may face while in detention, support, counselling and treatment programmes should be provided when appropriate (see Rule 34.1 European Prison Rules).

This Rule also elaborates on Rule 31.6, which emphasises the need to provide health care in a culturally appropriate manner. Health care should be provided in a manner that recognises gender specific needs. In particular, attention should be paid to sexual and reproductive health issues and the provision of female hygienic and sanitary facilities and items[27] (Rule 33.2).

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

[24] 11th General Report, CPT/Inf(2001)16, para 27.

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

[26] 10th General Report [CPT/Inf(2000)13], para 21.

[27] 10th General Report [CPT/Inf(2000)13], para 31.

In general, imprisonment should not be used as a sanction for pregnant women[28]. However, in situations where such women are imprisoned, the prison authorities must provide the facilities necessary to meet their needs (Rule 33.3). In the case of foreign women prisoners, this may require cultural and religious sensitivity.

As it was established in Rule 34.3 of the European Prison Rules, prisoners should be allowed to give birth outside prison[29]. Women shall be transported to give birth in an outside hospital when labour begins[30]. There may still be occasions in which the child may be born within the prison. In such cases, prison authorities should call emergency services immediately and the child's birth certificate should not mention that he was born in a prison setting. Independent of whether the child is born in or outside of the prison, the authorities should respect the cultural and religious preferences of the mother in relation to the birth and post-natal care (Rule 33.3).

Infant children

Rule 34

Research has shown that maternal separation in the first months, and even years of childhood, can be very detrimental as it can cause long-term difficulties for children, including impairment of attachment to others, emotional adjustment and personality disorders. Even though the development of young children can be impaired as a result of confinement to a closed environment like a prison, this negative effect outweighs the benefits of remaining with their mother (see Parliamentary Assembly, Recommendation 1469 (2000) Mothers and babies in prison and Social, Health and Family Affairs Committee, Report 9 June 2000, Mothers and babies in prison). Any decision to admit or remove a child from prison should, therefore, only be taken after special consideration of all circumstances and only if this is in the best interests of the child (see Rule 36.1 European Prison Rules and Articles 3, 9(1) and 20(1) UN Convention on the Rights of the Child). The same criteria apply to the decision on whether to keep the child in the state where the parent is imprisoned or to send the child abroad. The views of both parents (or other legal guardians), if possible, shall be taken into account and all appropriate care arrangements shall be examined before a final decision is reached (Rule 34.1*c*) This basic test of the child's best interests remains unaltered, even though Rule 34.1 sets out factors to which require particular attention in the case of children of foreign prisoners. The conditions that will apply to an infant child kept outside prison will depend in practice on whether the child is likely to remain in the state where the parent is incarcerated or to be sent to another state. The authorities should consider both possibilities.

Practice may vary from country to country in relation to the upper age limit until which children may be kept in prison with their detained parent. In some cases, they can remain in prison up to the age of 6 years. In other countries, they may be put into state or foster care after their birth. Whatever the national practice is, prisons should have special facilities and arrangements for keeping such children with their parent. The facilities should be staffed with trained personnel (see Rule 36.2 European Prison Rules). The term infant is not defined in Rule 34 but is used as a qualifier to child as it is recognised that different rules apply across Europe as the maximum age up to which children may be allowed to remain in person with a parent.

In addition to ensuring that children receive appropriate care[31] (see Rule 36.3 European Prison Rules), the arrangements should respect different religious traditions and cultural approaches to parenthood (Rule

[28] COE Parliamentary Assembly Recommendation 1469 (2000) and Rule 10, 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.

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

[30] 10th General Report [CPT/Inf(1999)13], para 27.
[31] 10th General Report [CPT/Inf(2000)13], para 29.

34.2). Although there may be circumstances in which children may be allowed to remain with their father, (for example, in asylum and immigration cases where the father is the primary carer and is detained in prison) the vast majority of cases will involve the child remaining with the mother in prison.

Some countries apply *jus soli* so that children born to a foreign prisoner may obtain the nationality of the state in which they are born. In other countries, such children may remain stateless until the time their legal status is decided. In all cases, children should be provided with a birth certificate and any other identification papers needed to determine their legal status (Rule 34.3).

VI. Release

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

Preparation for release

Rule 35

Rule 35 is a continuation of the principle contained in Rule 9. Preparation for release for foreign prisoners should start, as for all other prisoners, as soon as possible after admission (Rule 35.1). This should occur notwithstanding the fact that decisions in relation to release are generally taken at a later point in the sentence. Careful consideration should be given to whether the prisoners will remain in the state in which they are detained. Irrespective of which country the prisoner will live in upon release, the sentence of a foreign prisoner should be planned with a view to their successful social reintegration. This is important as various instruments relating to the transfer of sentenced prisoners make reintegration an objective for all prisoners who are transferred to serve their sentences in their country of origin[32]. Foreign prisoners should not be excluded on the basis of any possible removal, from any treatment, work, education or activity programmes.

There is a range of steps which authorities should take to facilitate this. For foreign prisoners, one of the most important issues is often the determination of their legal status and situation. There may be cases of prisoners who may be legally residing in the country in which they are detained but whose residence permits may have expired during their detention. There may be other cases where the right to reside has been revoked due to the commission of an offence. There are also foreign prisoners who were illegally residing in the country. Prison authorities should ensure that foreign prisoners have access to all the relevant information and assist them to comply with the procedures necessary for the determination of their legal status. The legal status of foreign prisoners should be determined as soon as possible after they are admitted to prison. The early determination of legal status will assist prison authorities to plan the foreign prisoners' sentences with a view to their successful reintegration (Rule 35.2*a*).

Progressive preparation for release and social reintegration requires that prisoners benefit from prison leave and other temporary release schemes. In practice, foreign prisoners are often denied such possibilities due to a lack of a permanent address in the country and the flight risk they are considered to pose. To avoid this, leave requests should be dealt with on a case-by-case basis (Rule 35.2*b*). Good practice would entail also taking into consideration the address of family members resident in the state or associations that provide accommodation for such prisoners on prison leave and also for their families who may be visiting from abroad. Prison leave is therefore also important to facilitate the maintenance and re-establishment of contacts with family members, a crucial factor in successful reintegration. If foreign prisoners are denied requests for prison leave, steps should be taken to ensure that such prisoners have alternative supplementary means of maintaining or re-establishing contacts with their

[32] See the preamble of the Council of Europe Convention on the Transfer of Sentenced Persons and para 9 of the EU Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

family members. They may also need assistance, while in prison, to begin finding accommodation and employment that they can take up after release (Rule 35.2.c).

If foreign prisoners remain in the country in which they are detained, preparation for release should include assistance with social needs, such as housing and employment, in co-operation with probation and social welfare agencies (Rule 35.3). In this regard the prison authorities should allow such prisoners to communicate directly with such agencies, where appropriate.

If foreign prisoners will be transferred or expelled to another country, and if they consent, contacts should be established with the relevant authorities and support services in that country as soon as possible (Rule 35.*2c* and Rule 35.4), including the relevant probation service (see Rule 64, Council of Europe Probation Rules) or other agencies. In particular, a good practice might be, if the prisoner consents, to contact welfare services of the country the foreign prisoner is to be transferred or expelled to, and inform them directly of his or her arrival, so that adequate assistance may be provided to him or her as early as possible. Where the prisoner consents, the information listed in Rule 35.5 should also be transferred to the relevant authorities of that state. The transfer of such information is important to facilitate the continuity of treatment and care, whether the prisoner serves his sentence in prison or is released on probation. Useful information may include different forms of calculating sentencing credit. For example, some countries give additional early release credits where prisoners work in prison. This should be reflected, even if release decisions remain in the discretion of the state to which a prisoner is sent to complete his or her sentence.

It is important that prisoners understand the potential consequences of transfers, including eligibility for release (Rule 35.6).While prison authorities and consular representatives can play a crucial role in providing some information, they may not always be able to do so. It is therefore imperative that prisoners should have access to independent legal advice and assistance in this connection

To reduce anxiety and prevent misunderstandings, the authorities of the proposed receiving state should provide returning prisoners with information about prison life and possibilities for release in that state (Rule 35.7). This should happen in good time, to enable the prisoner to prepare for his or her transfer.

For foreign offenders sentenced by international tribunals, consideration shall be given by the authorities of the state in which the person is detained to consultation with such tribunals regarding their preparation for release.

Consideration for early release

Rule 36

This Rule applies to both remand and sentenced prisoners. In order to establish substantial equality of treatment, positive steps should be taken to ensure that foreign prisoners are considered for early release when they become eligible for such release (Rule 36.1). Given that foreign prisoners may be embroiled in immigration or other proceedings, care should be taken to avoid unnecessary bureaucratic delays to release decisions and to ensure co-ordination between relevant governmental agencies (Rule 36.2).

The criteria set by Recommendation (2003)22 on conditional release (parole) should be applied in all cases. Particular attention should be paid to Rule 20, which emphasises that conditional release should be granted to all prisoners who are considered as meeting the minimum level of safeguards for becoming law-abiding members of society.

The decision-making in respect of early release should not discriminate against foreign prisoners, but should be taken on the basis of the merits of each individual case. A lack of property or familial links should not alone be sufficient grounds to deny release. A refusal to grant early release should be based on additional factors; such as the possession of a false passport, the use of a false name, previous attempts to evade being taken into custody[33]. Decisions on the risk of absconding should be made on a case-by-case basis.

[33] Sardinas Albo v Italy (Application N° 56271/00) 17 February 2005, para 93 and Chraidi v Germany (Application N°65655/01) 26 October 2006, para 40.

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

Release from prison

Rule 37

Upon release from prison, some foreign prisoners may remain in the state in which they were detained while others will leave that state. In all cases, the relevant authorities, including, where necessary, the foreign prisoners' consular representatives, should assist such prisoners to have in their possession the necessary identification papers and other documents that would allow them to find housing and employment and to travel to their chosen place of residence (Rule 37.1, see also Rule 33.7 European Prison Rules). Foreign prisoners should also be provided with a copy of their medical records. Where they can do so, and where foreign prisoners consent, consular representatives should also assist them with travel arrangements that would enable them to reach their chosen destination (Rule 37.2, see also Rule 33.8 European Prison Rules).

In many countries, prisoners are paid for the work they undertake in prison. Upon release, salaries for such work may not yet have been paid. In such circumstances, the prison or consular authorities should facilitate the payment or transfer of such sums to the foreign prisoner (Rule 37.2). Where foreign prisoners are to return to another country, prison authorities shall ensure the return of any property or monies that may be owing to them at their release. Where social security benefits are to be transferred to another country (see Rule 27.4), consular representatives may be able to provide assistance.

VII. Persons who work with foreign prisoners

Selection

Rule 38

As noted in the preamble to the Recommendation, foreign prisoners may face specific problems and be prone to feelings of isolation. In order to alleviate these difficulties, persons selected to work with foreign prisoners should possess well-developed interpersonal communication skills[34], be familiar with different cultures and at least some of these people should have the language skills required to communicate with these prisoners,[35] through either the prisoners' language or a common international language. Where possible, such persons should also be selected to represent the various cultural and linguistic backgrounds of the prisoners with whom they work[36]. In addition, such persons should have the qualities necessary to form good human relationships and a willingness to learn (See paragraphs 7 and 10, Recommendation (97)12 on staff concerned with the implementation of sanctions and measures).

Training

Rule 39

Staff who work with foreign prisoners should be provided with specialised training on the specific issues that affect foreign prisoners. This applies particularly to those involved in the admission process when foreign prisoners may be particularly vulnerable and confused (Rule 39.1, see also Rule 15). Such training

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

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

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

should focus on respect for cultural diversity[37]. To enable staff to deal with particular problems faced by foreign prisoners training should be provided on methods to recognise possible symptoms of stress, whether post-traumatic or induced by socio-cultural change, and the appropriate action to be taken[38] (Rule 39.2). The CPT has commented that language barriers can prevent effective communication[39]. Accordingly, staff should be provided with information about the different languages spoken by the prisoners with whom they work and opportunities to learn such languages or a common language (Rule 39.3).

It is also important for all persons who deal with foreign suspects and offenders, to be aware of and understand relevant legal and human rights standards and to apply such standards in their everyday work. Training on these standards must therefore be provided and regularly revised to ensure it reflects changes in the law but also in the prison and probation population and the wider social situation (Rule 39.5). This will ensure these persons are equipped with the necessary knowledge to deal with foreigners. In addition to in-house training, those who work with foreigners may also benefit from exchange programmes where they spend time working in a prison or probation system in another country. A further example of good practice can be found in Austria, where the Ministry of Justice meets annually with the Consular Club to discuss the current state of the law and rules regarding foreigners.

Specialisation

Rule 40

Consideration should be given to creating specific posts or roles for persons who would be responsible for overseeing and evaluating the implementation of policies and practices relating to foreign prisoners. The creation of such posts would facilitate direct contact between the prison and probation services and other bodies, including national and international agencies, professionals and associations, consular representatives, the prisoners' families and volunteers who assist foreign suspects and offenders. This form of liaison is crucial for dealing effectively with foreign suspects and offenders and their specific needs.

VIII. Policy evaluation

Rule 41

In order to design effective policies to deal with foreign suspects and offenders, it is necessary to have access to current and accurate information and research about the proportion of foreign suspects and offenders involved in the criminal justice process, the range of sanctions or measures that are being imposed on such suspects and offenders and decisions on their release, transfer, extradition and expulsion (see §§J1-J5 of Recommendation on R(92)17 Consistency in Sentencing). Authorities therefore need to fund and initiate scientific research based on the collection of empirical information and data. This research should underpin the evaluation and revision of policies to reflect contemporary realities and standards. Ideally, this research should also facilitate comparisons and discussions with other states and organisations.

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

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

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

APPENDIX VI

14.10.2011

16th Conference
of
Directors of Prison Administration
with the participation of
Directors of Probation Services

"Working together to promote the social reintegration of prisoners"

Council of Europe, 13-14 October 2011
www.coe.int/prison

CONCLUSIONS

The 16th Conference of the Directors of Prison Administration (CDAP) with the participation of Directors of Probation Services was organised by the Council of Europe on 13-14 October 2011 in Strasbourg, France. The theme of the Conference was "Working together to promote the social reintegration of prisoners". During the plenary sessions and workshops, the participants discussed the latest Council of Europe standards in the area and their implementation by the member states, problems encountered in this respect and good practices. The forthcoming draft European Code of Ethics for Prison Staff was also presented.

The main focus of the discussions was how to improve co-operation between the prison and probation services both at national and European level in order to improve the treatment of prisoners and their preparation for release.

The Conference:

- **WELCOMED** the standard-setting, monitoring and capacity building work of the Council of Europe in the prison and probation field;

- **EXPRESSED** its adherence to the European Prison Rules, the European Rules for juvenile offenders subject to sanctions or measures and the Council of Europe Probation Rules as valuable sets of standards which help develop relevant national laws and practices;

- **SUPPORTED** the principle promoted by the Council of Europe that prison should be used as a last resort;

- **STRESSED** that offenders remain part of the community even if they are deprived of their liberty and hence have the right to fair access to services. Therefore their preparation for release, social reintegration and aftercare shall not only be the

responsibility of prison and probation services but also of other suitable agencies and civil society;

- **UNDERLINED** that the legitimacy of prison and probation services stems from the professional response to the difficulties experienced by offenders to adjust to society. Working with offenders should rely on mutual respect between staff and offenders and as far as possible on participative decision-taking. Decisions regarding the modalities of offenders' treatment shall be based on their personal strengths and not only on their weaknesses. Rule 50, EPR is a very good example of such an approach.

- **EMPHASIZED** that working together for social reintegration of offenders supposes normalisation of prison regimes as well as providing offenders with adequate opportunities for finding their place in society;

- **RECALLED** that in most countries the number of offenders dealt with in the community exceeds that of prisoners and therefore there should be equal attention to the challenges faced by them and the services dealing with them;

- **NOTED** the increasing use of electronic monitoring and **CALLED UPON** the Council of Europe to help countries set an ethical framework and introduce procedures in this respect;

- **UNDERLINED THE NEED** for the political, legislative and judicial authorities to initiate and maintain cooperation with prison and probation services with a view to reduce the number of detainees, improve the possibilities for conditional and other forms of early release, use community sanctions and measures more appropriately and treat juveniles differently from adults;

- **UNDERLINED** the importance of recruitment, selection and training of staff possessing the necessary professional and personal skills to work with offenders and recalled in relation to this Recommendation (97)12 on staff concerned with the implementation of sanctions and measures;

- **STONGLY ENDORSED** the initiative for an European Code of Ethics for Prison Staff which helps set the deontological frame of everyday work in European prisons and **WELCOMED** the Council of Europe work on the text;

- **CALLED UPON** the Council of Europe to consider drafting a European Code of Ethics for Probation Staff;

- **UNDERLINED** that prison and probation services in Europe wish to share among themselves contemporary good practices and **URGED** in this respect the Council of Europe to serve as a platform for offering regular access to and updates of such information;

- **UNDERLINED** the importance of the collection of the Council of Europe Annual Penal Statistics (SPACE I and II) and underlined in this respect the need for caution in using simple statistics without scientific comments as this may lead to misinterpretations and **CALLED UPON** the national authorities of all member states to provide accurate and timely data;

- **CONCLUDED** that there was not sufficient support at this moment for a legally binding instrument on prisons;

- **EXPRESSED** gratitude to the Council of Europe for the excellent organisation of the present Conference which is an important forum for discussions and exchanges.

APPENDIX VII

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Council for Penological Co-operation
(PC-CP)

DISCUSSION PAPER ON FOLLOW-UP TO BE GIVEN TO THE CONCLUSIONS ADOPTED AT THE 16TH CONFERENCE OF DIRECTORS OF PRISON ADMINISTRATION

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

1. The CDPC Bureau at its meeting on 20-21 October 2011 decided to: “instruct the Secretariat to prepare a working document on possible follow–up to the CDAP Conclusions to be submitted to the CDPC at its plenary meeting in December 2011, containing substantial elements for discussion on : a) how to provide the necessary follow-up to the establishment of an electronic platform for the exchange of best practices; b) the feasibility of developing ethical regulation on the use of electronic monitoring as a matter of priority and c) the possible drafting in the future of a European Code of Ethics for Probation Staff. As regards the latter points, the Bureau expressed its view that activity b) should be considered as a priority while activity c) may be given lower priority.”

2. In relation to p. (a) - electronic platform - please refer to document CDPC (2011) 25 which discusses in greater details the possible creation of such a platform and the steps necessary in this respect.

3. In relation to p. (b) please consider the below points:

4. Since 1992[40], the Council of Europe has been giving consideration to the kinds of regulation which should govern the use of electronic monitoring (EM) in member countries. The current Council of Europe Rules on Probation[41] (2010) contain the following recommendations:

> 58. When electronic monitoring is used as part of supervision, it shall be combined with interventions designed to bring about rehabilitation and to support desistance.
> 59. The level of technological surveillance shall not be greater than is required in an individual case, taking into consideration the seriousness of the offence committed and the risks posed to community safety

5. The aim of such rules has been to set (or at least imply) an ethical framework and ensure that EM is implemented in ways that are commensurate with the probation ideal of rehabilitating and resettling offenders. These rules remain though rather general as the scope of the Probation Rules is much broader.

6. The Rules do not contain such important definitions like what is EM and what it entails, technologically-speaking, as supervision and control, at which stage of the penal process it may be put in place, its length, intensity, essence as a means of enforcing compliance with the restrictions or measures imposed, etc. The rules further tend to have been conceived as constraints on potentially bad uses of EM – which is indeed a legitimate endeavour – but not to promote positive aspects of its use.

7. The new technological developments warrant further ethical reflection on the purposes of EM, and refinement of the Council of Europe standards relating to EM in the light of them. Proper ethical reflection on the nature of EM as a penal measure at all phases of the criminal justice system – pre-trial, sentence and post-release - is arguably long overdue, not only to better ground any regulation of existing practice in defensible moral principles, but to anticipate potential developments and indicate the kind of ethical stance which might be taken towards them.

8. The use of EM as a stand-alone measure may at first sight be defensible at the pre-trial stage as a means of reducing pressure on remand prison populations. Ethical questions

[40] Recommendation n°R(92)16 on the European Rules on Community Sanctions and Measures

[41] Recommendation CM/Rec (2010)1 on the Council of Europe Probation Rules

may though arise as at this stage of the process the person is not yet found guilty and issues such as the overall length of the order; the maximum period of home confinement in any given 24 hours; and the rights of third parties in this respect may have to be dealt with in greater details.

9. Because of the home confinement element of EM, the rights of third parties in the house where offenders live are more salient than they tend to be in relation to other community penalties – particularly the impact on female householders - and warrant ethical reflection in their own right.

10. Another important aspect relates to the question whether personalised "crime prevention" uses of EM seem feasible – imposing periods of home confinement at specific times when offenders shoplifters, car thieves have been known to offend - and if so should they actively be promoted as a constructive measure?

11. GPS tracking is both a form of mobility surveillance (if used indiscriminately to monitor persons wherever they go) and/or a means of enforcing exclusion from specified places (as well as confinement). Both can be undertaken on a 24/7 basis, and in "real-time", giving a hitherto unprecedented degree of both reach and immediacy to a community sanction.

12. Remote alcohol monitoring technology (which has been piloted in Europe but is not widespread) can check compliance with a court-ordered ban on consuming alcohol. This constitutes a move towards monitoring (and modifying?) behaviour rather than just monitoring the schedules and locations of the offender, which is primarily what EM has been upto now.

13. EM has generally been conceived as a restriction of liberty and compared (sometimes literally, sometimes metaphorically) to imprisonment, to which is has often been considered a lesser form of confinement. It might more accurately - in both its house arrest and tracking forms – be thought of as a restriction of mobility in the community, a way of constraining an offender's use of public space in which, as a free citizen, he would otherwise be entitled to roam during both the day and the night. All forms of community sanctions regulate spatial locations and temporal schedules to some degree – requiring attendance at particular places at particular times, and sometimes penalising unpunctuality – but EM takes such regulation to a level, monitoring compliance to an infinitely more meticulous degree, and automating the process. Probation and community service "appointments" notionally have an end beyond themselves – the benefits of being helped with problems, or of undertaking unpaid work for others, but in its stand-alone form EM arguably makes spatial and temporal regulation an end in itself. The ethics of spatial regulation as a penal measure – with or without EM - needs to be thought through more carefully than it has been. The role of probation services in this respect and the ethical value of their interventions under EM measures need to be dealt with as a matter of urgency.

14. In relation to point c) the PC-CP shares the CDPC Bureau view that it is indispensable to adopt first rules related to the ethical framework of EM and the applicable procedures of its use before drafting an European Code of Ethics for Probation Staff, as a number of ethical issues related to EM would be applicable also to the work of probation services.

APPENDIX VIII

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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

Council for Penological Co-operation
(PC-CP)

THE SENTENCING, MANAGEMENT AND TREATMENT OF 'DANGEROUS' OFFENDERS

FINAL REPORT

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

CONTENTS

1. INTRODUCTION

Background

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

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

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

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

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

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

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

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

Methodology

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

6. Initial discussions explored the possibility of researching the relevant law in all countries. This possibility was rejected for a number of reasons. A thorough and reliable review of the law would take much longer than the timescale permitted. Reliable and detailed data collection would have been very difficult to gather, and in any case, this is a fast moving field, with many countries considering legislation at the time of writing. It was agreed that a review of the law which was either out of date, or contained significant inaccuracies would not be useful to the

main project, which has remained to identify themes and trends. Examples of existing good (and perhaps bad) practice in the management of 'dangerous' offenders would be discussed.

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

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

9. The work therefore fell into three phases:

March-June: the scoping phase.

June-September: the main phase.

October-December: refinement and development.

10. It was conducted by one academic, working part-time on the project. It is hoped that the exploratory nature of the Report may encourage significant further research and analysis. The Report contains illustrative examples[42], but these should be used with caution. Full descriptions of national differences are not offered. As the project developed, it became increasingly clear that realistic hypothetical and generalised examples (rather than country-specific examples) might be more effective in focusing the debate on key issues. Again, although the bibliography contains a wide range of sources, references in the main text have been kept to a minimum in order to keep the Report more easily readable. Anyone interested in discussing issues raised is encouraged to contact the author, Nicola Padfield, at nmp21@cam.ac.uk.

2. DEFINING, IDENTIFYING AND MEASURING THE 'DANGEROUS'

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

12. This definition was agreed in May 2010, after much debate. The term 'dangerous offender' is sometimes used in national laws, and much used in popular discourse. The PC-CP agreed that the term may be useful as a shorthand label, but was clear that it is potentially misleading. Are people dangerous, or is it the acts that they do that cause danger? Many acts or activities may be dangerous (paragliding? mountaineering? caving?) but that does not mean that all

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

mountaineers are dangerous people. Conversely, many people may be inadvertently dangerous (the learner driver, or the person whose drinks have been laced with alcohol without them realising that this has happened). We shall explain here why our definition is not limited to specific offences; nor to all those punished to lengthy terms of imprisonment.

13. Importantly, the definition adopted here is deliberately narrow. It has two limbs: the offender has in the past committed a very serious harm, and is predicted to do so again. Both will be explored in a little more depth[43].

Defining Dangerousness

Previous serious harm

14. Clearly those who commit the most serious harms in society are likely to be considered 'dangerous'. Terrorists, murderers, sex offenders are frequently labelled dangerous. But already we must be careful. Let us start by defining these labels. A terrorist may be very dangerous: someone committed to waging an on-going murderous war. Yet recent developments in anti-terrorist laws often include within the concept of 'terrorist' people who play a distant and merely ancillary or preparatory role: thus, the French concept of *association de malfaiteurs* (conspiracy), or the Italian offence of assisting in "any other activity described as terrorist by international instruments signed by Italy" (see art 270 ter, *Codice Penale*). As well, as a result of European initiatives[44], many countries are introducing recruitment offences, offences of "glorification" or incitement to terrorism.

15. Are all such people necessarily 'dangerous'? Correspondents have suggested that many people consider political extremists (including neo-fascists or neo-nazis) to be dangerous. But dangerous views should surely be transformed into dangerous acts before the law can impose particularly severe penal sanctions. This is a traditional minefield for penal lawyers: intentions may be more important than outcomes for criminal liability, but how far back from completion should liability lie? Planning a murder may perhaps make a person dangerous, but no European legal system would impose liability unless at least some step beyond 'thought crime' had been taken towards commission. Again, many recent laws have broadened the scope of criminal liability for uncompleted offences. The French Penal Code (see article 222-14-2) has a new crime which penalises someone who participates in a gang with the intention to commit violent acts[45]. This Report simply raises the dangers caused by very broad definitions of criminal liability, including the danger that this may lead to over-inclusive definitions of 'dangerousness'.

16. Not only are definitions of criminal offences broad, they also vary significantly between countries, even within the Council of Europe. For example, all murderers may have proved that they are prepared to kill. But definitions of murder vary widely across the Council of Europe, and may include some people who many might not consider 'dangerous'. Let us choose a controversial example, the husband who helps end the life of his beloved terminally-ill wife at her request. In some countries, he might commit no offence. In others he might face a mandatory life sentence for murder. Another relevant example is domestic violence. In some countries, it used to be the case that domestic violence was treated less seriously than offences committed against strangers. Indeed, it is only recently in some countries that a husband who had non-

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

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

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

consensual sexual intercourse with his wife was considered to be a rapist (the early 1990s in both France and England). In this Report, those who commit serious domestic violence are treated every bit as 'dangerous' as those who commit violence on strangers. We report on good practice in relation to the treatment and management of those who commit domestic violence later in the Report. Of course an enormous problem here is the relative powerlessness of the state in offering protection to those behind the walls of their homes. There is a corresponding need to develop political, social, cultural and economic mechanisms to provide women (and men, of course) with alternatives to violent relationships: but this is beyond the scope of this Report.

17. Sexual offending stands out in the recent literature on 'dangerous offenders' for two main reasons. First, the public concern that the subject provokes, particularly in relation to those who offend against children. Sex offenders have become modern 'folk devils[46]', and the subject of 'stranger danger' provokes media 'moral panics' (despite the fact that it is abuse within the family, or by adults whom children trust, which is the more common form of sexual abuse). Secondly, it is an area where psychiatrists and psychologists have focused their work in developing convincing treatments. We will return to these later. But are all sex offenders dangerous? Clearly some are, within our definition. But others will not be. Some sexual offending is relatively minor: defining serious harm in this context is particularly difficult.

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

A high probability of re-offending

- Looking back - recidivism

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

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

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

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

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

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

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

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

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

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

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

- The reliability of predictions

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

Clinical expertise

25. Before offenders receive special sentences for the 'dangerous', judges are often assisted by reports written by experts. Clinical assessments by psychiatrists, psychologists and other experts are used to help judges make assessments, in both sentencing and other decision-making (e.g. before an offender can be sent to a mental hospital as an involuntary patient; or given treatment for drug or alcohol misuse). In most European countries, assessments are exclusively clinical (as opposed to actuarial – see below). Giovannangeli et al (2000) studied the ways the 'dangerousness' of alleged or convicted sexual offenders were assessed in 15 European countries. In virtually all of them, only clinical assessments were made. Even where traditional personality tests, such as the Rorschach or the Minnesota Multiphasis Personality Inventory (MMPI) were used, the assessment was essentially clinical[47].

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

26. It is important to clarify:

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

- the independence of those writing reports. If the writers are not 'independent', those affected should be able to access independent advice and expertise[48].

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

Actuarial risk predictors

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

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

- OGRS (Offender Group Reconviction Scale. OGRS) was introduced in England and Wales in 1996 to establish a uniform national reconviction score. It calculates the probability that a convicted offender (18 years plus) will be convicted at least once within two years for any type of offence. The latest version (OGRS 3) is based on age at the date of the current caution, non-custodial sentence or discharge from custody; gender; the type of offence for which the offender has currently been cautioned or convicted; the number of times the offender has previously been cautioned and convicted; and the length in years of their recorded criminal history (see Justice, 2009 for an excellent account). These factors are static: they do not change and take no account of the individual's personal characteristics. So if someone has a 70% chance of reconviction within the next two years – OGRS gives no hint as to whether this individual is more likely to be in the 70% or 30% category.

- OASys (the Offender Assessment System), developed in the late 1990s by the Home Office Probation Unit and HM Prison Service for use in England and Wales, is very often used in post-conviction, pre-sentence, reports. Similarly, Repeat Offending Assessment

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

Scales scores are widely used in the Netherlands. These consider static factors (age, previous offending) as well as dynamic (social, economic and personal) factors. Actuarial assessments which take account of dynamic factors may be more accurate in some senses – but they also allow for subjective person-by-person judgements. There are also concerns whether they have been adequately adapted and evaluated in relation to the assessment of the risk and needs of women offenders (Caulfield, 2010).

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

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

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

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

28. Assessment tools will never be truly accurate in predicting re-offending. We have already noted the vital differences between re-offending and re-conviction rates. Buchanan (2008), an academic psychiatrist reviewing actuarial approaches to predicting violence by psychiatric patients, states "a range of methods consistently predict violence at levels of accuracy better than chance…. [but] current approaches can prevent the violent acts of a few only by detaining many". A probability calculation is only ever a prediction. It will be accompanied not only by human errors, but also by many other uncertainties. The rare and more dangerous the behaviour predicted, the harder it is to predict. In many countries evaluation procedures are developed combining elements of various different evaluators and predictors (see the work of Volker Dittman in Switzerland discussed in Valloton (2010). Whatever methods of evaluation are chosen, it is important that those who use them are well trained in their use (and their limitations)[49].

29. A risk predictor may help predict risk, but it should always be used in an individualised way as part of a structured clinical judgement (Farrington et al, 2008). This well-respected analysis of the usefulness of risk assessment tools for violence concludes that "users should always bear in mind the difficulties involved in moving from predictions about individuals, and should be extremely cautious in drawing any conclusions about a person's risk of future violence" (at page 2). It is thus vitally important to highlight the limitations and dangers of using both clinical and actuarial methods to label ('box') people and to identify the enormous consequences of such labels[50]. The purpose of any risk assessment tool must also be clearly identified.

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

30. What happens when clinical and actuarial assessments conflict? Practitioners are more likely to override actuarial information that indicates a low risk of harm rather than a high one, confirming the existence of risk aversion, or the 'precautionary principle' (Ansbro (2010)). Thus, Ansbro identified "a reluctance to reduce sexual offenders' risk of harm even when evidence of all types was compelling, and conversely, a willingness to reduce non-sexual offenders' risk on the basis of only flimsy dynamic evidence, and counter to actuarial pointers". She concludes that a more sophisticated understanding of the evidence around dynamic factors would enhance assessments[51]. Standardised tools must be carefully assessed for evidence of racial, gender and cultural bias.

Hypothetical Case A

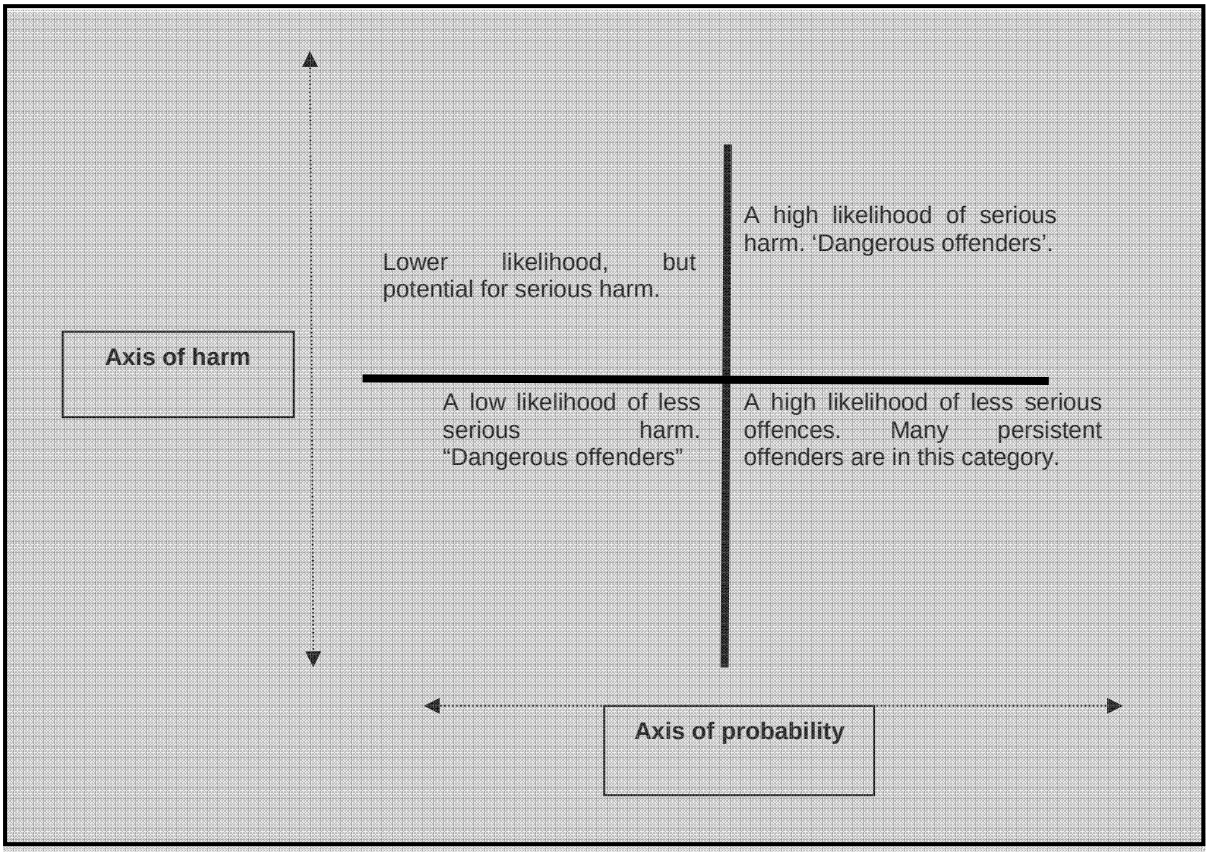
Mr A is arrested for a serious sexual assault, and subsequently prosecuted, convicted, and sentenced to a lengthy term of imprisonment. He is eventually released on conditions into the community, and does not re-offend. In many countries a huge battery of different clinical and actuarial assessments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

Conclusion: the ethical challenge

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

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

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



(Source: Canton (2010))

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

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

to include the dangerous, but also those who are not truly 'dangerous', according to our definition. It is vitally important that the public debate focuses on the position (human rights) of these 'false positives' as well as on the 'false negatives'.

34. This Report suggests that the PC-CP should focus attention on the limited utility of the term 'dangerous offender': at the minimum, it should only be used to describe those who have committed serious harm and who pose a significant risk of committing future serious harm. Both clinical assessments and predictive tools may contribute usefully in identifying both differing risk levels, and the underlying causes behind offending behaviour, but in themselves should not be used to justify longer sentences.

3. MENTALLY DISORDERED OFFENDERS

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

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

Those who are not criminally responsible for their actions

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

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

39. Despite these initiatives, there are major concerns, well summarised in September 2009, by Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights in a published "Viewpoint"[52] in which he stated that the rights of persons with intellectual disabilities across Europe "are still not taken seriously enough". He called on governments not merely to plan for action, but to take action. Commenting on both *Shtukaturov v Russia* (see Annex One) and the UN Convention on the Rights of Persons with Disabilities, he concluded clearly: "Any restrictions of the rights of the individual must be tailor-made to the individual's needs, be genuinely justified and be the result of rights-based procedures and combined with effective safeguards".

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

> Hypothetical Case B
>
> Mr B, who suffers from schizophrenia and depression, stops taking his medication. He is arrested having attempted to rob a shop by brandishing a toy gun and apologetically asking for money. He is in bedroom slippers, and a customer prevents him leaving with the money which frightened staff hand to him. Arresting police officers realize that he is mentally ill[53]. What happens next? What does good practice suggest? How long can he be detained in a civil hospital if not charged with an offence? On whose authority and what is the legal test? In practice, will he be supported by an independent legal advisor and/or independent psychiatric opinion?

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

Mentally disordered offenders

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

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

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

43. Of the 2 million prisoners in Europe, at least 400,000 suffer from a significant mental disorder, and more suffer from common mental health problems such as depression and anxiety (World Health Organisation, 2010[54]). Individual country statistics may be more illustrative of the problem: in England and Wales, for example, of those in mainstream prisons, a recent study (Stewart, 2008) estimated that 10% of newly sentenced prisoners were likely to have a psychotic disorder (with the rate for female prisoners being double that for males (18% as opposed to 9%), and 61% were assessed as having a personality disorder (using SAPAS). Again, it may need underlining that this does not necessarily reflect the offending patterns of the mentally ill – they may simply be more easily detected than other offenders.

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

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

45. A key area of concern is the unconvicted mentally disordered suspect. Diversion services for offenders with mental health problems or learning disabilities are essential. All police stations should have access to mental health services to allow for the screening of vulnerable people and for assessing their needs. The Council of Europe could lead on the collection of more detailed data[55] to assess the number of mentally disordered individuals who are remanded in custody and how many are so unwell that they require transferring out of custody for treatment.

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

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

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

in which people may be detained under either criminal or civil law. The complexity of this categorisation is revealed in the most recent SPACE data[56]. Country respondents were asked whether the total number of prisoners given included various different categories of persons (and if so, how many), such as:

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

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

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

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

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

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

mental state screening at prison entry by a psychologist or a psychiatrist, fulfilling the quality standards of general mental health care, seems to be a rare event across Europe. In many countries, inadequately trained staff are appointed to conduct a mental state screening at prison entry. The experts collaborating in this study were asked to provide an overall verdict on the

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

extent to which the standards of mental health care in prisons approximate those of general mental health care standards. Answers showed that almost two-thirds of the included countries seem to suffer a considerable gap between general mental health care standards and those for prison inmates. In particular, Austria, Belgium, Bulgaria, the Czech Republic, England & Wales, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, The Netherlands, Portugal, and Spain were evaluated in this way, although these ratings must be seen as subjective opinions lacking sufficient supportive data. The most frequently mentioned shortages included lack of places for (psycho-) therapeutic treatment programs, beds for psychiatric inpatient treatment, and appropriately trained staff. Other deficiencies were insufficient mental state screening routines, deficient or absent psychiatric aftercare, underfunding, and insufficient cooperation with the general health systems (at page 809-810)[57].

50. The reports of the Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the CPT: see www.cpt.coe.int), which regularly raise concerns about the interface between prison and public health care services[58] are vital sources of information. Recurrent themes are poor staffing levels; poor general conditions; the need for individualised treatment plans.

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

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

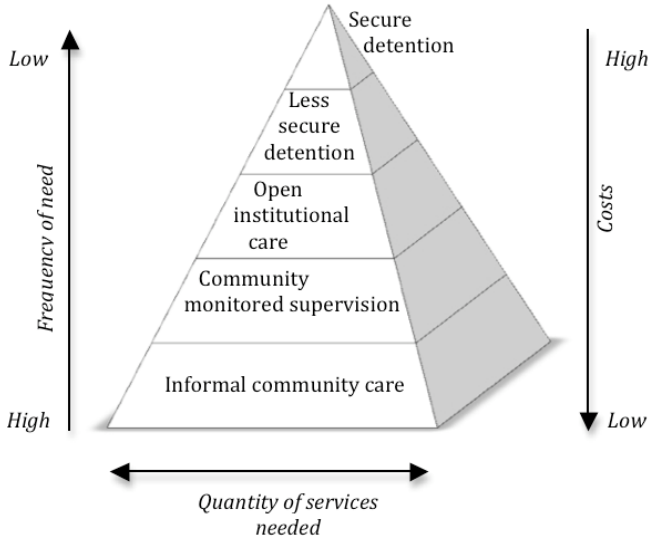
[57] See also Bradley (2009); and Edgar and Rickford (2009) on how the needs of prisoners with mental health problems are not being met in England and Wales.

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

between private and public health care becoming increasingly blurred in some countries, the question whether decision-making might be different in the private sector also needs to be explored.

53. This Report includes a chapter on mentally ill and mentally disordered offenders in order to underline that greater priority should be given to meeting their needs: appropriate care and treatment in institutions of the minimum level of appropriate security. The Pyramid Framework (see below) may be a useful way of presenting the fact that supporting offenders at the lowest suitable level of intensity and security may be both cheaper and more effective. Only a very few need secure detention: the focus should be on pushing offenders down the pyramid.

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



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

4. OPPORTUNITIES FOR RESOCIALIZATION AND REINTEGRATION

55. The right to liberty, which lies at the heart of the European Convention on Human Rights, applies to those who have served their penal sentences. During their sentence, the fundamental rights of the prisoner also require decent living conditions, active regimes and constructive preparations for release[59]. It is, of course, in the public interest that prisons should not be overcrowded and that offenders should be successfully reintegrated into mainstream society. In Chapter 2 we discussed the problems which arise in defining 'dangerous' offenders, and the very real risks associated with unreliable and false predictions. In this chapter we turn to the law and practice on dealing with 'dangerous' offenders, with an emphasis on what might be considered good practice.

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

56. Central to this study is an analysis of how dangerous offenders can be helped to lead law-abiding lives. Readers should keep in mind Recommendation (2003)23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners, in particular the key general principles for the management of life and long-term prisoners which it identifies: individualization, normalization, responsibility and security. This Report underlines the fact that the resocialisation and the reintegration of offenders lies at the heart of the criminal justice system.

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

The aim and structure of sentences

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

the punishment of offenders,

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

the reform and rehabilitation of offenders,

the protection of the public, and

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

59. This is not the place for a full discussion of the aims of sentencing, save to remark that without clear objectives, it is impossible to assess the efficacy of a penal system. In penal theory, there has been a long-standing debate between retributivist and utilitarian aims. The Council of Europe has been clear that while sentences should be proportionate (imprisonment should be used only as a last resort and for the minimum period necessary), it is also important that there be "constructive means of preventing reoffending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community"[60]. These forward-looking aims appear utilitarian. But retributivist theorists, those who argue for deserved and proportionate sentences, are also likely to agree that punishment should be rehabilitative and seek to re-integrate offenders into mainstream society. This is a message underlying this Report.

60. The most famous exponent of modern retributivism is von Hirsch (see von Hirsch, 1986, 1993 amongst many other writings). For von Hirsch, punishment is and should be a blaming institution; and the severity of the punishment expresses the stringency of the blame. The key concept of just deserts sentencing is proportionality. The acceptance of a 'just deserts' model may lead to a decrease in the prison population since it will lead to a penalty scale which may

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

be "anchored" in order to reduce overall punishment levels. Of course, political pressures impinge on sentencing policies but it is important to note that modern desert theory offers a coherent and humane way of allocating punishments, appropriate for a society that treats convicted offenders as citizens whose rights and choices should continue to be respected (see von Hirsch, 1993). Many penal theorists, even those who prefer a more utilitarian or 'neo-rehabilitationist' approach welcome desert as putting a proper upper limit to penal interventions: no-one should receive longer sentences than they deserve, even if they may not be 'treatable' (see Morris, 1998, Cullen and Gilbert, 1982), Whilst those who commit more serious offences, may often 'deserve' longer sentences, questions of personal culpability must be carefully assessed. 'Desert' should not be used to justify disproportionate, or unduly long, sentences on any offender, including those who may have been labelled 'dangerous'. Establishing appropriately 'proportionate' sentence lengths is a challenge for all criminal justice systems.

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

    (i) Potential offenders must realise sentence levels have increased

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

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

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

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

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

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

63. There are three other important preliminary factors to acknowledge. First, whatever the aims of sentencing, the protection of the rights of prisoners during the implementation of these sentences remains fundamental (see Snacken and van Zyl Smit, 2009). Indeed, the choice of sentencing aim should have no consequences on the protection of the fundamental rights of prisoners during the implementation of these sentences. Secondly, the huge amount of change in sentencing law and practice must be noted: the majority of Council of Europe countries have been undergoing significant changes. Austria, Cyprus, England, France, the Netherlands, Romania, Spain have all introduced vast reforms within the very recent past. Thirdly, alongside

the challenge of change, is the increasing squeeze on financial resources. Academics throughout the Council of Europe have commented on the underfunding of support services, both in prison, but particularly, in the community. It is not only the support services which are struggling: courts and parole boards in many countries (notably in Belgium, Italy and England) are facing a huge backlog of cases, an overload on supervision judiciary. Legal aid budgets are squeezed making it ever more difficult to find skilled lawyers to work in this difficult area. Justice and fairness for sentenced prisoners can easily be overlooked: this is inappropriate both from the prisoner's perspective, but also from society's.

Determinate (fixed term) sentences

64. Most 'dangerous' offenders will receive long term, but fixed term, sentences. It is rare in the Council for Europe for a fixed term to be served in its entirety, but the way in which countries organise their release systems varies enormously, sometimes within countries as well as between countries (see Padfield, van Zyl Smit and Dünkel, 2010). Although many countries have systems which allow automatic, or semi-automatic, release to many prisoners, very often only discretionary conditional release is available for the most serious or 'dangerous offenders'. There is a wide variety of practice in relation to conditions on release: in some countries conditions are routine and standardised, in others much more individualized. There are very different forms and degrees of freedom (van Zyl Smit, 1998). Even within jurisdictions there are many different sorts of prison, and a prisoner may proceed through his sentence from secure establishments to prisons of different levels of security. Some prisons will be better equipped to provide training and treatment opportunities. Yet the prisoner is unlikely to be able to select his or her prison, or his or her route through the penal system. Most decisions will be taken administratively. Thus, for example, in many countries, it is accepted that temporary leave (day leave, semi-detention, work or home leave) is granted by the prison administration, while courts decide only longer periods of conditional leave[61]. The distinction between those decisions which can be taken administratively, and those which require judicial authority vary between countries, and may have far-reaching impact: for example, since a court may not grant conditional leave to those who have not enjoyed successful periods of temporary leave, it is in effect the administration and not the court who hold the keys to release. If a court decides that a prisoner must complete a certain course before he will be released, it will be those who control his priority on the course waiting list who in reality delay his release, not the court.

Hypothetical Case C

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

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

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

literature on decision-making underlines the need for careful analysis of the reality of criminal justice decision-making in practice (see Gelsthorpe and Padfield, 2003).

66. Automatic conditional release (at half time, or later for recidivists) may be the rule, or a fixed term prisoner may have to apply (or be referred to a special court for release). Many decisions which may impact on the decision to release may be taken by prison or probation/social work bodies. Rules may be applied differently in privately run prisons than in public sector prisons (and indeed, different rules may be applied). Even before we note differences between states, a number of researchers have commented with concern about the variations within their own countries: in Italy, between the north and the south, for example (see Gualazzi and Mancuso (2010), or in Austria, between different regions and individual prisons (Bruckmüller and Hofinger, 2010). Where the system is discretionary, there will usually be a court hearing, and indeed this is required by article 5(4) of the European Convention on Human Rights. But the nature of the 'court' varies enormously: Belgium's *Tribunal d'application des peines/strafuitvoeringsrechtbank* is multi-disciplinary, made up of a judge and two lay experts, whereas the French *tribunal d'application des peines* is made up only of professional judges[62]. The English Parole Board[63] is composed of judges, lawyers, criminologists, and independent members who sit in panels of three.

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

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

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

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

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

70. We should also note recall procedures. It is common in some countries, and rare in others, that released offenders are recalled to prison when in breach of their conditions of release. On Germany, Dünkel and Prins (2010, p 185) comment that it is very positive that less than half of all conditional releases are revoked. In England and Wales, a total of 13,900 determinate sentenced offenders were recalled to custody during the year 2009-10, up 18 % from 2008-09 (when 11,800 offenders serving determinate sentences were recalled to prison); in 2006 more life sentence prisoners were recalled to prison (164) than were released on license (135)[64]. In other countries many fewer are recalled: in Finland there are only about 10 recall cases a year. It seems a fair assumption that prisoners are more likely to be recalled when they are more closely monitored/supervised, which seems somewhat perverse: where supervision is poor or non-existent the offender who breaches conditions is not penalised. Yet the low recall rate in Finland is not due to poor supervision. The impact of recall or the revocation of a license varies: in some countries, the court or tribunal responsible for reviewing revocations may simply make the conditions on release stricter. In others, a recalled offender may spend significant time back in prison without a court hearing. The mechanisms of recall also vary enormously: whether initiated by public prosecutors or probation officers, for example. Recall practice seems to have been studied very little nationally, yet alone comparatively (see Padfield and Maruna, 2007, Digard, 2010).

Indeterminate (life) sentences

71. Some European countries (Croatia, Norway, Portugal and Spain) have no provision for life sentences. Of those that do have life sentences, some have mandatory life sentences for some offences (UK, Turkey), for many, life is only ever at the discretion of the sentencing judge or judges. Some countries permit full or whole life tariffs (there are for example about 30 prisoners in England who know they are serving their whole life in prison), but most have an upper limit. Many systems do not individualise the tariff, but simply specify that a certain minimum term is to be served: 10 years in Belgium (for recidivists 14 years[65]), 12 years in Denmark and Finland, 15 years in Austria, Germany and Switzerland (in the latter this term might exceptionally be 10 years), 18 years in France (for recidivists 22 years), 20 years in the Czech Republic, Greece (with a possible remission to 16 years) and Romania, 25 years in Poland, Russia and Slovenia, 26 years in Italy and 30 years in Estonia and in certain cases in Hungary (Data here are from Dünkel, 2009, and van Zyl Smit, 2009). When Turkey abolished the death penalty in 2002, it was replaced by life-long aggravated (or heavy) imprisonment. In England and Wales, and in Scotland, the judge who sentences someone to life imprisonment, whether the sentence is discretionary or mandatory, may and usually does set a minimum period or tariff to be served.

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

73. The rules on release for lifers again vary very greatly (see van Zyl Smit, 2002). Even where countries have seemingly similar rules, the practice can be very different. Again, it is important to remember that not all life or indeterminate sentence prisoners are dangerous: many are first

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

[65] Raised to 16 in 2006

time offenders who have never previously committed a crime of violence. We need much more research: statistical data on comparative release and reconviction rates (to discover variations within countries as well as between different countries) but also qualitative research identifying the reality of decision-making in practice. Appleton (2010) highlights the difficulties faced by released life sentence prisoners through interviews with both those who have successfully reintegrated and those who have been recalled to prison to continue their life sentences. Throughout Europe both the quality and length of probation supervision and support varies enormously.

What works to reduce re-offending?

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

Psychological interventions

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

76. In recent years, some programmes have become increasingly sophisticated, and are being used with more complex offenders, for example, those suffering from psychopathic disorders[66]: "there is no good evidence that psychopathy can be treated reliably and effectively – but neither is there any good evidence psychopathy is untreatable" (Hemphill and Hart (2002)). There are some obvious pre-requisites to success: programmes must be well structured, and implemented

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

by well-trained, well-supported and well-supervised staff [67]. They must be carried out in an adequately supportive environment – there is evidence that some programmes are more effective if carried out in the community than in custody. It would appear that poorly run treatments may even impact negatively on an offender's cognitive needs. There are many examples of implementation studies which focus on the delivery of programmes[68]. Such evaluations often mention concerns about uneven implementation, the difficult of the work for staff as well as for offenders, and the problem of lengthy waiting lists.

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

Social, economic and community opportunities

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

79. Education and basic skills training is also essential, though again enforced learning, or what Hardy et al (2001) call *l'aide contrainte,* is less effective than where an offender is genuinely motivated. There are many other skills as well as literacy: many 'dangerous' offenders have poor budgeting skills, and may need help setting up a bank account, for example. Access to community-based health services is important. Social support networks can be offered not only by professional staff but also by volunteers: church groups or other 'circles of support'[69]. Voluntary organisations which may have greater legitimacy as helpers in the eyes of offenders, have traditionally been important in many countries, and are also growing in importance in others. A key can be sentence planning which recognises the need for 'through care' from the custodial setting to the community.

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

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

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

Monitoring and supervision

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

81. Many countries use electronic monitoring and, a few, GPS satellite tracking of offenders. More research into the effectiveness of such monitoring should be carried out. While offenders being monitored may reduce their offending, and studies have reported offender support for 'tags', they may also either adapt their offending or indeed simply offend more when the monitoring ends. Satellite tracking was piloted in the UK between 2004 and 2006 (see Shute, 2007) but was abandoned, largely because it was both ineffective and expensive. Where electronic monitoring is used, it should always be combined with other interventions designed to support desistance[70],

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

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

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

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

[70] See European Probation Rules, Rule

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

86. Probation services throughout Europe appear to be becoming more control and enforcement oriented. But alongside monitoring, consistent support and supervision may be more important. The bedrock of successful supervision is the ability to form and maintain a trusting working relationship with the offender and through it to model pro-social behaviour and attitudes (NOMS, 2006, 26). Given the fractured lives that many 'dangerous offenders' will have lived, it is hardly surprising that the "*continuity* of a stable and supportive relationship" (Appleton, 2010, p 88) is one of the most important keys to successful resettlement, especially during the last year of imprisonment and the first year of release. A "pass-the-parcel" style of supervision is not appropriate, as desisting offenders appear to respond best to one-to-one relationships. Ideally, the named supervisor who engages with one-to-one supervision, over perhaps many years, should be supported by a named backup, who is also familiar with the offender.

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

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

Surgical/medical interventions

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

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

The seamless sentence: custody and community linked

90. Earlier in this chapter, we separated determinate and indeterminate sentences from each other, since an indeterminate (life) sentence prisoner may well follow a more complicated journey through the prison system. But for both, the system can be unpredictable[71]. It is difficult to identify a clear line between custodial and community stages in the implementation of a sentence: freedom is often gained in small steps, and, for many of the most 'dangerous' offenders, liberty may forever be bounded by restrictive conditions. This Report has suggested that, from the beginning of any sentence of imprisonment, the focus of the penal administration and the offender should be on his ultimate release and reintegration. This requires:

(i) meaningful sentence plans[72] which should be realistic and achievable, and not just aspirational. They should be structured in such a way as to allow the offender to understand clearly the objectives and actions required. They should be regularly reviewed. For example, in most countries, some courses are not available in many prisons: sentence plans must allow a prisoner successfully to negotiate a way through a system which may seem impenetrable and inflexible.

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

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

- detention in particular prisons or regimes: not only 'high security' (for example, Hungary's Special Regime Unit for prisoners serving lengthy sentences ("HSR Unit"))[73], but also special units for those belonging to terrorist or mafia organisations (Italy) or dangerous people with severe personality disorders

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

[72] See http://psi.hmprisonservice.gov.uk/psi_2010_36_new__chapter_4_for_pso_4700.doc for details on sentence planning in England and Wales

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

("DSPD units", England and Wales)[74]. Not only is it important for the administration to facilitate the prisoner's reintegration into the main prison system, but also to monitor carefully the assessment or diagnosis that led to the prisoner's detention in the special unit in the first place. The 'stigma' of having spent time in this Unit may well live on with the prisoner (and within his dossier) as he progresses (often very slowly) through the system.

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

- paying compensation to victims

- securing appropriate accommodation

- securing work/employment

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

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

Hypothetical Case E

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

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

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

- meeting and keeping in touch with a probation officer

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

- a residence obligation, with possible curfew, which may or may not be electronically monitored
- treatment by a psychiatrist/psychologist/medical practitioner
- a positive work obligation (or a requirement not to take work with certain groups such as children)
- an obligation to make payments to victims
- a requirement not to reside in the same household as children
- a requirement not to approach or communicate with named people
- a requirement to avoid a particular area
- a requirement to attend courses for addictions etc
- a drug testing condition

92. Conditions should not be too burdensome: not only because this is unfair, but they may also be ineffective or unenforceable. Conditions should be assessed for their utility: many of the therapeutic or practical treatment programmes offered in prisons may be more effectively offered in the community, or an offender may benefit from a repeat or 'booster' programme in the community. As well as consistent support from a probation officer, it is important that released offenders develop relations with mainstream social welfare services. The role that voluntary organisations can play has already been noted[75]. These voluntary organisations may be effective, but they need to be accountable and supervised.

93. The term 'probation officer' has been used in this chapter, but the term is not universally used[76]. The label used is of course less important than the authority, skill and independence of the individual. The relative status, power, and influence of different players in the penal process need to be well understood. For example, Belgium's probation officers have become in this context *assistant de justice/justitieassistent*, and English probation officers are being re-rolled as 'offender managers'. Why is this? It is important to assess whether there has been too much focus on risk, and the management of risk, at the expense of reintegration and rehabilitation. We have already noted that emphasizing risk may make it more difficult for some to desist from crime. The proper responsibilities of police, probation and other services also need to be carefully assessed, and expectations of effectiveness must be realistic. Many dangerous offenders will spend many years under supervision: this long-term supervision requires special skills, and takes much time and many interviews. The work presents special challenges which require specific training of those involved in the supervision process.

94. Two conclusions:

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

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

[76] (Add reference to European Probation Rules)

Secondly, the lack of rehabilitative provision offered in practice to many prisoners in Europe must be underlined. In many countries, opportunities are severely limited: the reports of the Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the CPT: see www.cpt.coe.int) make depressingly repetitive reference to the paucity of opportunities and rehabilitative programmes available to prisoners. Often, it would appear that those serving the longest sentences have fewer opportunities than other prisoners[77].

5. SECURE PREVENTIVE DETENTION

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

Categorising laws

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

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

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

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

(iv) systems which use measures explicitly of public protection (for example, *detention de sûreté* or *Sicherungsverwahrung* or *misure di sicurezza*), imposed at the time of sentence to allow for an extended period of public protection. These

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

measures of prevention may be imposed as well as, or instead of, a proportionate punishment. They may be for a fixed term, or indefinite. In several countries there has been debate whether such a measure is a criminal penalty or a civil order (see *M v Germany*, discussed in Annex One). These sentences pose significant human rights concerns: the offender is being detained simply because of the risk that he or she is perceived to represent: it is vitally important that their use is monitored to ensure that there is clear understanding about their use and potential abuse.

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

- In England and Wales an extended sentence may be imposed on 'dangerous' offenders: this is an ordinary prison sentence with an extended period of supervision in the community after release (up to 5 years for violent offenders, and 8 years for sexual offenders). Since a released offender remains liable to recall to prison throughout this extension period, and may not be released again until the end of that period, this can significantly extend a custodial sentence.

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

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

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

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

(vi) systems which use secure preventive detention measures, imposed at the time of release or subsequently. Some countries allow measures of prevention to be imposed at the end of the criminal penalty, or at the end of the custodial part of the penalty. Often these measures impose limits on the offender's freedom by way of conditions (post-sentence preventive surveillance), but they may also be custodial (secure). For example, in France, the law of 25

February 2008 *relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental* controversially increased the powers of the *Commission pluridisciplinaire des mesures de sûreté* to recommend the continued detention, post sentence, of someone sentenced to at least 15 years imprisonment, who is deemed 'dangerous' with a high risk of re-offending because of a serious personality disorder (see art 706-53-13). This Commission was originally created (by the law of 12 December 2005) to advise only on electronic monitoring. It is composed of a *magistrat,* a *préfet* (a senior civil servant), a psychiatrist, a psychologist, a prison governor, a lawyer and a representative of a victim's organisation. Prisoners coming to the end of a sentence for a serious offence who the Commission deem to be dangerous may be referred to the *procureur general* who takes the case to the *juridiction régionale de la rétention de sûreté* which can order the prisoner's continued detention. The person will be detained in a *centre socio-médico-judiciaire de sûreté*, under the joint governance of the Ministry of Justice and of Health. There must be an annual hearing to decide if the measure should continue, and the prisoner may demand a review at any time.. The *Conseil Constitutionnel* held in its decision n° 2008-562 DC – February 21st 2008[78] that post-sentence preventive detention is neither a penalty nor a sentence of a punitive nature. This meant that any argument based on the principle of legality[79] failed. But the *Conseil Constitutionnel* did hold that the law could not be applied to people convicted of offences committed prior to the enactment of the statute, so the first cases are unlikely to be heard before 2023. In Germany, too, there has been much controversy surrounding the introduction of post-sentence preventive detention. Fewer than 10 out of the more than 400 offenders currently held in preventive detention are being held under the very controversial subsequently ordered (post sentence) preventive detention (see Dünkel, 2010).

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

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

98. This is the third and most important challenge: the differences between 'ordinary' imprisonment and secure preventive detention may often be illusory. If the person is in custody (in prison, hospital or elsewhere), perhaps indefinitely, any post-sentence detention restricts liberty. Such detention must therefore be fair and proportionate. We repeat the concern raised earlier about prisons and places of detention run by private sector or non-government organisations. Whilst these may prove cheaper to run (an important consideration) this may be inappropriate. For

[78] See for an English version of this decision

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

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

example, the CPT noted recently in its report on Hungary that the Government acknowledged that the National Penitentiary Establishment at Tiszalök, run by a private contractor, has had enormous difficulty recruiting medical staff because of the poor pay offered. Where 'dangerous' prisoners endure restricted regimes, it is important that prison authorities are clear whether this is disciplinary or preventative. An interesting example is the Turkish Government's regime for prisoners serving aggravated life sentences. Under Turkish law (Art 67(4) of Law No 5275 on the execution of penalties and security measures), the 'committee of administration and observation' of a prison may decide that prisoners who "present an absolute danger for society" are not allowed to receive radio or television broadcasts. Prisoners who maintain leadership of armed organizations may be banned from making all phone calls. It is not surprising that the CPT criticised these rules: they appear to be a form of punishment, rather than a necessary form of secure prevention. In many countries, the line between administrative convenience and disciplinary punishment can be a fine line: again, vigilance is required in seeking the minimum interference with prisoners' rights.

Assessing risk

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

Hypothetical Case F

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

Places and conditions of detention

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

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

102. What measures are in place to ensure a person's release as soon as practicable? Many systems allow preventive surveillance, though it may not go under this name. Offenders on conditional release may be closely monitored and supervised. There are numerous ways in which the freedom of a 'dangerous person' can be limited in the community. We have already noted (in Chapter 4) conditions which may be imposed on release. Some countries also allow civil protective orders such as England's Sex Offender Protection Orders and Foreign Travel Orders, breach of which constitutes a criminal offence. These measures themselves are deeply controversial (not least because they are obtained in a civil court without the benefit of the usual 'due process' safeguards). Most controversial of all are control orders, a form of home detention for suspected terrorists. It is vital that such intrusive measures are imposed only on those who would otherwise be detained: and not unnecessarily on those who should be trusted with greater freedom. They are mentioned here to encourage a move away from custody as the default position, or normal response: supervised release or preventive surveillance, rather than detention, may be a more appropriate form of public protection.

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

6. Conclusions and Recommendations

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

105. This Report has not sought to provide a detailed comparative study of law and practice[80] throughout the Council of Europe member countries. That would have been impossible within the time frame and available resources. It is of significance that there was some dispute between some correspondents even within the same jurisdiction as to the interpretation of relevant rules. It was therefore decided not to focus on these disputes which would have distracted from the paper's main purpose, a focus on general issues and concerns, not an analysis of specific laws. This is not to suggest that greater clarity is not an important prerequisite of a fair system. Over-complex laws themselves contribute to injustice.

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

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

107. Comparative work in this area is of course, fraught with dangers: the possibilities for misunderstandings are endless. Not only is language a very obvious barrier to understanding, but key concepts, in law and theory, may be understood very differently. Is an offender on conditional release still a 'prisoner'? Is a convicted prisoner transferred to hospital a 'prisoner'? Is an open prison a 'prison'? What is the relevance of the title or distinction? What is the significance of the labels applied to various players and tribunals within the system? As we move towards more frequent transfer of prisoners from country to country[81], it is vital that these differences are better explored and understood. Both quantitative and legal data should be collected and analysed, but practical empirical qualitative research would be particularly valuable in order to assist an understanding of how 'dangerous' offenders are in reality managed and treated.

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

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

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

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

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

Annex One

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

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

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

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

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

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

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

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

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

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

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

(ii) Some key jurisprudence of the ECtHR[82]

<u>The rights of victims and society</u>:

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

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

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

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

Relevant rights of the offender:

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

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

Guzzardi v Italy (1981) 3 EHRR 333

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

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

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

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

Erkalo v Netherlands (1999) 28 EHRR 509

Eriksen v Norway (2000) 29 EHRR 328

Litwa v Poland (2001) 33 EHRR 53

Saadi v UK (2008) 47 EHRR 17

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

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

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

Kafkaris v Cyprus (Application No 21906/04) (2009) 49 E.H.R.R. 35; 25 B.H.R.C. 591 The Grand Chamber is significantly split (10-7) on whether there is a breach of Art 3. For the majority, "at the present time there is not yet a clear and commonly accepted standard amongst the member States of the Council of Europe concerning life sentences and, in particular, their review and method of adjustment. Moreover, no clear tendency can be ascertained with regard to the system and procedures implemented in respect of early release" (see paragraph 104). Yet the minority identify a clear breach of art 3. A

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

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

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

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

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

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

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

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

Scoppola v Italy (Application No 10249/03, Grand Chamber, 19 September 2009) (2010) 51 EHRR 12 An appeal court could not raise 30 year sentence to life imprisonment following change in law: 11 votes to six there had been a violation of Art 7, unanimously a violation of Art 6.
M v Germany (Application No 19359/04, Fifth section, 17 December 2009) [2009] ECHR 2071, (2010) 51 EHRR 41 The Court unanimously concludes that, where the prolongation of the applicant's preventive detention by the courts responsible for the execution of sentences following a change in the law, there had been a violation of Article 7 § 1 of the Convention. This decision contains much useful material (the summary of European preventive detention laws in paras 69-73 is partial, a little dated but a useful introduction) + recapitulation of relevant principles paras 86-91: compliance with national law is not enough: any deprivation of liberty "should be in keeping with the purpose of protecting the individual from arbirariness". On risk assessment: the potential further offences "must be "sufficiently concrete and specific as regards in particular the place and time of their commission and their victims" to fall within the ambit of Art 5(1)© (para 102) and the "national law must be of a certain quality, and in particular, must be foreseeable [at the time of the original offences] in its application, in order to avoid all risk of arbitrariness" (para 104). The Court rejected the Government's distinction between punitive 'penalties' and 'measures of correction and prevention' (para 113) and recognized that even the distinction between a measure that constitutes a penalty and a measure that concerns the 'execution or enforcement of that measure may not always be clear-cut (para 121). €50,000 non-pecuniary damage.

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

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

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

(iii) Other relevant legal materials

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APPENDIX IX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 15 November 2011 CDPC-BU (2011) 5
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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

Bureau
(CDPC-BU)

DANGEROUS OFFENDERS
PROPOSED SCOPE OF WORK

CDPC website: www.coe.int/cdpc
CDPC e-mail: dgi.cdpc@coe.int

Dangerous offenders

Proposed scope of work:

The Secretariat proposes that the scope of the CDPC's work on dangerous offenders should focus on elaborating a recommendation containing guidelines and best practices as regards **risk and threat assessment** of dangerous offenders, their **treatment** and **conditions of detention**, as well as on how to prevent **re-offending**, to the extent that this regime applies to the criminal justice system.

The work of the CDPC in this regard should take into account the relevant jurisprudence of the ECtHR and best practices in member states. The experts tasked with the work may also wish to consult the report recently commissioned by the CDPC and prepared by Professor Nicola Padfield, entitled "Sentencing, management and treatment of "dangerous" offenders".

Roadmap

1. The CDPC agrees on setting up a restricted group consisting of maximum 10 participants reflecting the various legal systems of the member states of the Council of Europe, the Chair of the PC-CP, a representative of the Registry of the ECtHR, a representative of the CPT and supported by one or two academic experts to prepare a draft recommendation on dangerous offenders – **December 2011.**

2. The restricted group holds a series of maximum 4 meetings, of two days each, to draft the recommendation – **January – September 2012.**

3. The draft recommendation is submitted to the Bureau – **end of 2012.**

4. The recommendation is submitted for adoption by the CDPC Plenary – **2013.**

APPENDIX X

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 9 April 2012

DRAFT TERMS OF REFERENCE
RESTRICTED GROUP OF EXPERTS
ON
DANGEROUS OFFENDERS
2012 - 31 December 2012

DRAFT TERMS OF REFERENCE

Name of Committee**: Restricted Group of Experts on Dangerous Offenders**

Category: subordinate body

Set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods

Terms of Reference valid from … 2012 until 31 December 2012

Main tasks
1. Under the authority of the European Committee on Crime Problems (CDPC), the Restricted Group of Experts shall prepare a non-binding legal instrument on dangerous offenders. 2. The Restricted Group of Experts shall, in particular, examine the following issues: • risk and threat assessment of dangerous offenders in criminal proceedings which could result in detention due to the danger posed by the offenders, • treatment and conditions of detention of dangerous offenders, • measures for the prevention of re-offending by dangerous offenders to the extent that such measures are covered by the criminal justice system. 3. The Restricted Group of Experts shall limit its work to offenders deemed to represent a threat to society, notably because of their personality, the violent character of the criminal offence(s) which they have committed, and the risk of re-offending. 4. Other issues related to dangerous offenders, in particular with regard to offenders whose dangerousness is determined by their involvement in organised crime and/or terrorism, should not be examined as a matter of priority by the Restricted Group of Experts, but shall be the subject of future work by the CDPC. 5. In its work, the Restricted Group of Experts should take into account the relevant jurisprudence of the European Court of Human Rights and best practices of member states. The experts may also consult the report by Professor Nicola Padfield entitled "sentencing, management and treatment of "dangerous" offenders" commissioned by the CDPC. 6. The Restricted Group of Experts shall report to the Bureau of the CDPC on a regular basis. The Bureau of the CDPC may issue instructions to the Restricted Group of Experts with regard to its work.

Pillar / Sector / Programme (s)

Pillar : Rule of Law.
Sector : Common standards and policies.
Programme : Development and implementation of common standards and policies.

Expected result (s)

Expected result 1. "Standards are prepared on dangerous offenders" :
Draft non-binding legal instrument concerning dangerous offenders to be considered by the Committee of Ministers in 2013, after validation by the CDPC.

Composition

Members:

16 representatives of member states of the highest possible rank, with recognised expertise in the field of criminal law and treatment of dangerous offenders appointed by the Steering Committee on Crime Problems (CDPC) on a proposal of the respective member states and 1 scientific expert appointed by the Secretary General. The composition of the Committee will reflect an equitable geographic distribution amongst the member states.

The Council of Europe will bear the travel and subsistence expenses of the 16 representatives and of the scientific expert.

Other member states may designate representatives without defrayal of expenses.

Members of the committee designated by Governments of member states shall have one vote each. The scientific expert appointed by the Secretary General shall not have the right to vote.

Participants:
The following may send representatives without the right to vote and at the charge of their corresponding administrative budgets:

- The Parliamentary Assembly;
- The European Court of Human Rights;
- The Office of the Commissioner for Human Rights;
- The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);
- The Council for Penological Co-operation (PC-CP).

The following may send representatives without the right to vote and without defrayal of expenses:

- The European Union ;
- the states with observer status with the Council of Europe (Canada, Holy See, Japan, Mexico, United States of America) ;
- United Nations Office for Drugs and Crime (UNODC);

Observers:

The following may send representatives without the right to vote and without defrayal of expenses:

- relevant International Organisations;

- civil society and representatives of professional communities (to be determined).

Working methods

Meetings:
16 members (+ 1 scientific expert), 3 meetings, 3 days

The rules of procedure of the Committee are governed by Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.

Meetings per year	Number of Days	Members	Plenary	Secretariat (A, B)
3	3	16 + 1 = 17		0.5 A ; 0.5 B

APPENDIX XI

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 20 April 2011

CDPC/CDBI/CD-P-TO (2011)

Additional Opinion

of

the Steering Committee on Bioethics (CDBI),

the European Committee on Crime Problems (CDPC),

the European Committee on Transplantation of Organs (CD-P-TO),

identifying the main elements that could form part of a binding legal instrument against the trafficking in organs, tissues and cells (OTC)

I. Background:

1. At its meeting on 16 November 2010, the Group of rapporteurs of the Committee of Ministers, on legal cooperation (GR-J), examined the opinions adopted by the Steering Committee on Bioethics (CDBI), the European Committee on Crime Problems (CDPC), the European Committee on Transplantation of Organs (CD-P-TO) and the Group of Experts on Action against Trafficking in Human Beings (GRETA) on the recommendations made in the Joint Council of Europe - United Nations Study on Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the purpose of the removal of organs, in particular on the elaboration of an international legal instrument setting out a definition of trafficking in organs, tissues and cells (OTC) and the measures to prevent such trafficking and protect the victims, as well as the criminal law measures to punish the crime.

2. In this context, and following a proposal by the Deputy Secretary General, the CDPC, the CDBI and the CD-P-TO were invited to "identify the main elements that could form part of a binding legal instrument and report back to the GR-J by next April."

3. In reply to the request of the Committee of Ministers, representatives of the three Committees (CDBI, CDCP, and CD-P-TO) met on 9 – 10 February and 31 March – 1 April 2011, to prepare the present additional opinion, which was adopted by the aforesaid three Committees on 15 and 19 April 2011, respectively.

II. Introductory remarks

4. As demonstrated in the joint Council of Europe/United Nations Study on trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs from 2009, the trafficking in human organs, tissues and cells is a problem of global proportions that violates basic human rights and constitutes a direct threat to individual and public health.

5. Despite the existence of two international legal instruments (see paragraph III. 1. below), important loopholes, that are not sufficiently addressed by these instruments, continue to exist in the international legal framework.

6. The three Committees acknowledge the transnational dimension of trafficking in organs, tissues and cells and the need to combat the criminal acts related thereto at international level.

III. Scope of a binding instrument:

III. 1. The scope of criminalization and the concept of "trafficking"

7. The three Committees note that the trafficking in persons for the purpose of removal of organs is already criminalized in international law through the trafficking protocol[83] of the 2000 UN Convention Against Transnational Organized Crime ("Palermo Convention") and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings[84] respectively. However, the three Committees consider that the trafficking in human organs, tissues and cells is a broader concept than trafficking in human beings for the purpose of removal of organs.

8. In fact, the aforesaid international legal instruments only address the scenario where recourse is had to various coercive or fraudulent measures to exploit a person in the context of the removal of organs, but do not sufficiently cover scenarios, in which the donor has – adequately – consented to the removal of organs or – for other reasons – is not considered to be a victim of trafficking in terms of the above mentioned conventions.

9. For example, the scenario where an organ is transplanted, and the donor has knowingly and willingly agreed to have the organ removed for financial gain or comparable advantage, and/or where this takes place in breach of applicable domestic legislation, is presently not criminalized at international level, although posing equally serious threats to human rights and individual and public health.

10. In the view of the three Committees, a separate draft convention should be negotiated in order to address, inter alia, the removal of organs with consent, but for financial gain or comparable advantage and/or outside of the approved domestic systems in order to close the current loopholes in international law.

11. Against this background, it is the opinion of the three Committees that a certain level of overlap in the proposed criminalization of acts related to the trafficking in human organs, tissues and cells with provisions of the existing international instruments against trafficking in

[83] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, Articles 3 (a) and 5.

[84] Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), Articles 4 (a), 18 and 19.

human beings does not pose a legal problem and is unavoidable, as the three Committees recommend that a possible future binding instrument against trafficking in human organs, tissues and cells should be a stand-alone instrument, cf. paragraph VII below, open not only to the member states of the Council of Europe, but to all states, some of which may not be Parties to the two existing international anti-trafficking instruments.

12. The three Committees have discussed the feasibility to include in the proposed scope not only human organs but also tissues and cells. While the risk to public health as well as to the health of the recipient posed by unauthorised and uncontrolled activities in these fields is essentially the same, the risks to life and health of the donor are often more limited in the case of removal of tissues and cells than is the case for removal of organs.

13. The three Committees note that, at present, important differences exist in the regulatory and institutional frameworks governing the removal and transplantation of human organs on the one hand, and the removal, distribution and subsequent use of human tissues and cells for transplantation and/or other purposes, on the other. In fact, the domestic regimes governing the latter are extremely diverse (if at all existing) and cannot be compared to the regimes governing the removal and transplantation or other use of human organs.

14. Some delegations have also expressed concerns as to whether cells should be dealt with in the same way as tissues, and whether tissues and cells should at all be covered by the scope of a possible binding instrument. Hence the three Committees recommend that the experts that may be tasked with the drafting of a binding legal instrument should further look into the feasibility – at the current stage – of including human tissues and cells under the scope of a possible binding instrument and discuss in more depth – and taking into account the relevant legislation of all member states – the possibility to criminalize certain conduct also in respect of tissues and cells.

15. The three Committees further recommend, that a possible binding instrument be focused on the illicit removal, obtention, trading, distribution and subsequent use of human organs, tissues and cells as such (i.e. in an unprocessed form), whereas the legal trade in medicinal products such as highly innovative and complex advanced therapy medicinal products based on human organs, tissues and cells should be excluded from the scope of such an instrument.

16. Even though cells as such cannot, at present, be extracted directly from the donor, but are always subject to a secondary extraction from tissues, the three Committees are of the opinion that, in so far as the inclusion of human tissues and cells under the scope of a future binding legal instrument is considered feasible by the experts that may be tasked with drafting it, human cells should be covered in their own right and not merely be considered as ”tissue”. The Committees further suggest that human blood and the related issue of transfusion should be excluded from the scope of a binding instrument. There are strong arguments for such a proceeding, mainly the specific regulations or specific standards for this field such as the respective EU Directives and Recommendation R(95)15 on the Preparation, Use and Quality Assurance of Blood Components that resulted for instance in the exclusion of the issue from the Additional Protocol concerning the Transplantation of Organs and Tissues of Human Origin (ETS No. 186).

17. Also, questions remain as to the inclusion under the scope of a possible future instrument of other types of tissues and cells, such as cord blood cells and gametes, to name just two examples. These issues should be looked into by the expert group that may be tasked with the drafting of a binding legal instrument.

18. The term “trafficking” has long been used in international criminal law instruments (e.g. on trafficking in drugs or trafficking in human beings) and is immediately recognizable. However

attempting to lay down a legal definition of “trafficking in human organs tissues and cells” for use as a constituting element for criminalization may prove impractical and may not be necessary or appropriate for realizing the aim of a possible binding instrument. The three Committees recommend further discussions in the framework of the expert group that may be tasked with the drafting of a binding legal instrument in order to achieve a consensus on what conducts and practices are to be targeted and constitute "trafficking" within the framework of a new binding legal instrument in this field.

19. The Committees consider the notion of financial gain or comparable advantage to be central to the concept of “trafficking” and propose that a number of specific acts related to the removal and transplantation of human organs as well as to the obtention, trading and distribution of human tissues and cells could be criminalized. In general terms these could cover three types of situation which may warrant criminalization of certain conduct:

    - providing **financial gain or comparable advantage** for the removal, obtention, trading, distribution and subsequent use of human organs, tissues and cells
    - removal, obtention, trading and distribution and subsequent use of human organs, tissues and cells **without the appropriate consent** of the donor
    - removal, transplantation, obtention, trading, distribution and subsequent use of human organs, tissues and cells **outside of approved domestic systems**.

III. 2. Financial gain or comparable advantage:

20. The three Committees propose to criminalize certain conduct, if a financial gain or comparable advantage is requested, offered or taken[85] for removal, distribution and use of organs, tissues or cells as such, either from a living or a deceased person. A legally binding instrument may need to specify the term “financial gain” (where criminalization should be foreseen) as opposed to providing or taking of an acceptable “compensation” in line with the principles laid down in Article 21 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (CETS No 186) from 2002.

III. 3. Consent:

21. The absence of an appropriate consent by the donor to removal of organs, tissues and cells, or the use of removed organs, tissues and cells for other purposes than those covered by the consent of a donor are key components of the description of a number of the proposed criminal acts (see above). The term “consent” should be understood as “free and informed consent” (cf. the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (CETS No. 164) and its Additional Protocol concerning Transplantations of Organs and Tissues of Human Origin (CETS No. 186)). A new legally binding instrument will need to address the concept of “consent” in case of removal of organs, tissues or cells from a deceased person. In such a case, specific consent may have been given by that person prior to his death. If not, such consent by the donor may be replaced by authorisation given by the family of the deceased. Or, as an alternative, states may choose to apply a concept of “presumed consent”.

III. 4. Outside of approved domestic systems:

[85] The expert group tasked with drafting a possible new instrument should examine to which extent donors and recipients should be exempt from criminalization based on the requesting, offering or taking of financial gain or comparable advantage.

22. While most states, as far as the removal and transplantation of organs are concerned, appear to have approved domestic systems (officially approved, regulated and controlled institutions, procedures etc), this does not necessarily hold true for the removal of tissues and cells from bodies of deceased persons and/or the removal of organs, tissues and cells for purposes other than transplantation.

23. The three Committees believe that in case a legally binding instrument will be elaborated, drafters should look at the need/feasibility to have the instrument address the advisability of establishing such systems where they do not yet exist.

24. As to criminalization, the three Committees believe that a legally binding instrument should foresee criminalization of removal of organs, tissues and cells, obtention and distribution thereof outside of the approved domestic systems, if such systems exist, since the very existence of a parallel "black market" for organs, tissues and cells in itself constitutes a serious threat to human rights and to public health, eventually risking to undermine public confidence in the approved domestic systems.

25. However, taking into account the potential broad spectrum of possible conduct in non-compliance with applicable legislation regulating the removal, transplantation, storage, import, export etc. of human organs, tissues and cells, any requirement to "criminalize" should allow for states to respond by the imposing of administrative fines rather than criminal sanctions strictu sensu, cf. paragraph V. 2. "Criminal and administrative sanctions" below.

26. Furthermore, it should be noted that not any act in breach of any rule governing an approved domestic system is necessarily to be subject to criminalization/administrative sanctions under a possible new binding legal instrument, but only such conduct as is related to the trafficking in organs tissues and cells.

27. In so far as the possible unauthorised manufacturing of medicinal products on the basis of illegally removed human organs, tissues and cells is concerned, the three Committees find that it should fall outside the scope of a possible new binding instrument, since such acts are already criminalized under Article 8 of the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health ("Medicrime Convention").

IV. Main elements related to substantive criminal law:

28. More specifically, the three Committees recommend that a group tasked with drafting a possible new binding instrument should examine the feasibility of criminalizing the following conduct:

29. In case of organs:

- The offering and the receipt of financial gain or comparable advantage in the context of the removal, distribution and use of human organs
- Removal of human organs from living or deceased donors for purpose of transplantation or other purposes without the appropriate consent of the donor or authorisation substituting such consent.
- The recruitment of donors and solicitation of recipients outside of the approved domestic transplantation systems.

- The performance of transplantations outside of the approved domestic transplantation systems.

30. In case of tissues and cells (if included under the scope of a binding legal instrument, cf. paragraph 14 above):

    - The offering and the receipt of financial gain or comparable advantage[86] in the context of the removal and subsequent distribution and use of tissues and cells as such from living or deceased donors.
    - The removal of tissues and cells from living or deceased donors without the appropriate consent of the donor or authorisation substituting such consent.
    - The obtention, trading and distribution of tissues and cells as such outside of the approved domestic systems, where such systems exist.
    - The obtention, trading and distribution of bodies and body parts for the purpose of removal of tissues and cells outside of the approved domestic systems, where such systems exist.
    - The use of tissues and cells removed from living or deceased donors outside the approved domestic systems or imported in non-compliance with the applicable domestic legislation on importation of tissues and cells.

V. Other criminal law provisions

V. 1. Criminal intent, aggravating/mitigating circumstances, aiding, abetting, attempt:

31. The three Committees consider that the focus of a possible binding legal instrument should be on criminal intent as a precondition for applying sanctions. However, it recommends that an expert group that may be tasked with the drafting of a binding legal instrument should also consider the possible need for applying the concept of criminal negligence in certain cases.

32. Furthermore, the three Committees suggest addressing such issues as aggravating and mitigating circumstances, aiding, abetting and attempt. As regards an example of a possible aggravating circumstance, the three Committees point to the perpetration of certain of the above listed possible offences by healthcare professionals. A mitigating circumstance, on the other hand, could be the special vulnerability of an organ recipient.

V. 2. Criminal and administrative sanctions:

33. Whereas the three Committees agree that the most serious criminal acts listed above should as a starting point be subject to criminal sanctions, they note that depending on the domestic legal systems of States Parties, the application of administrative sanctions for lesser crimes could be an option. The three Committees recommend that this issue be looked into in detail by the expert group tasked with the drafting of a binding legal instrument in particular in respect of the criminalization of removal, transplantation, subsequent distribution and use of organs, tissues and cells outside of approved domestic systems, cf. paragraph III. 4. “Outside approved domestic systems” above.

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[86] Other than fees for medical and technical services performed and linked to costs of retrieval, transport, preparation and storage.

V. 3. Other sanctions:

34. Given the clear financial incentives to commit these types of offences, the three Committees strongly recommend that a binding legal instrument will oblige States Parties to permit the seizure and confiscation of proceeds stemming from offences. It should also be possible for States Parties to ban the exercise of a professional activity by a person sentenced for having committed one of the possible offences listed above, if the professional activity is directly related to his/her ability to commit that offence. Finally, the three Committees note that a number of both public agencies and private companies are active in the field of obtention, trading and distribution of in particular human tissues and cells. In order to ensure an efficient protection in the entire field, it is considered necessary to also introduce corporate liability.

V. 4. Jurisdiction

35. In terms of jurisdiction, the three Committees recommend that in addition to the obligatory jurisdiction based on the territorial principle, jurisdiction based on the nationality and passive nationality principles (with possibilities to enter reservation) should be included.

36. In addition to the principles of jurisdiction to be applied by the Parties to a possible binding legal instrument, a provision on the principle of “extradite or prosecute” (aut dedere, aut judicare) should be included. In accordance with this principle, a Party is obliged to establish jurisdiction over, and prosecute, an alleged offender, present on its territory, whom it has declined to extradite to another Party having so requested, solely on the basis of the nationality of the alleged offender.

37. In the view of the three Committees, a possible group of experts to be tasked with the drafting of a new binding legal instrument should examine the phenomenon of “transplantation tourism” with a view to identifying possible solutions.

38. As in the case of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), where the specific purpose was to combat the phenomenon of “sex tourism”, eliminating the normally applicable principle of “double criminality” (i. e. making the establishment of jurisdiction over a criminalized act dependent on the criminalization of the act in the place where it was performed and not only in the focal state), could be considered.

39. Finally, the jurisdiction provisions should include a safeguard clause to the effect that a possible binding instrument would not exclude any criminal jurisdiction exercised by a Party under its national law.

V. 5. International cooperation on criminal matters

40. The three Committees note that in the framework of the Council of Europe cooperation on criminal law matters, the issues of mutual legal assistance and extradition are governed by a number of horizontal instruments, namely the European Convention on Extradition (ETS No. 24) from 1957 and the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) from 1959 together with their Additional Protocols and the Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime (ETS No. 141) from 1990.

41. A possible binding legal instrument should as a minimum contain a general provision enabling a Party to process a request for legal assistance or extradition from a Party with

which it has not concluded mutual legal assistance treaty, by considering the possible binding legal instrument as the proper legal basis for mutual legal assistance and extradition in respect of offences established under that instrument.

42. However, since the three Committees recommend that a possible binding legal instrument should be open to non-member states of the Council of Europe, a group of experts tasked with the drafting of a possible legal instrument may also look into the need/feasibility of including provisions based on the aforesaid Council of Europe conventions.

V. 6. Victims

43. In line with the recent practice of the Council of Europe, the three Committees propose to include provisions on the protection and standing of victims in criminal proceedings against alleged perpetrators of the aforesaid proposed offences. Taking into account the particular nature of the crimes which may be covered by a possible binding instrument, the three Committees note that there is a need to define in more detail which persons could be covered by provisions on victims, as in some instances not only donors, but also recipients, might be considered as victims.

44. Moreover, the experts that may be tasked with drafting a binding legal instrument should examine the issue of compensation to victims, including for subsequent damages.

V. 7. Protection of witnesses

45. Given the organised nature of the crime of trafficking in human organs, tissues and cells, a group of experts tasked with drafting of a possible binding instrument may examine the need/feasibility of providing protection to witnesses.

VI. Main elements not related to substantive criminal law:

46. The three Committees also propose that a binding legal instrument could address a number of issues not related to substantive criminal law, including the following.

VI. 1. Prevention

47. A possible binding legal instrument should contain provisions calling on Parties to ensure equitable access to transplantation services for patients, in particular through the adoption of relevant legislation and the establishment of transparent approved domestic systems for transplantation and removal of organs, and for the obtention, trading, distribution and subsequent use of tissues and cells along the lines laid down in the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (CETS No 186).

48. The criminalisation of acts related to the illicit removal of, and trade in, human organs, tissues and cells will only be effective in so far as States Parties have established regulatory systems at national level for transplantation and removal of organs, and for the obtention, trading, distribution and subsequent use of tissues and cells. Whereas most member states of the Council of Europe have such systems in place at least in respect of the transplantation of organs, these systems may vary considerably. The three Committees propose that an expert group tasked with the drafting of a binding legal instrument should examine this issue in depth in particular in view of the removal, subsequent distribution and use of organs, tissues and cells for purposes other than transplantation. Also, such an expert group should

look into particular issues that may arise in this respect in case of import of organs, tissues and cells from third states.

49. Furthermore, the three Committees recommend that a provision calling on Parties to carry out awareness raising measures, directed both at the general public and at healthcare professionals, is included.

VI. 2. International cooperation in the prevention of such crimes

50. The three Committees strongly recommend that a possible binding legal instrument should contain provisions on international cooperation for the purpose of crime prevention with a view to enhancing the ability of the various domestic health and other competent authorities involved to detect and combat the trafficking in human organs, tissues and cells in the most efficient way. Such international cooperation may include the establishment of a system for information exchange and early warning, e. g. through dedicated national contact points. In line with the recommendations of the joint Council of Europe/United Nations study, the three Committees agree that collection of data and the exchange of information are key elements in the fight against trafficking in human organs, tissues and cells.

VI. 3. Cooperation at domestic level

51. Similarly, the three Committees propose that a group of experts tasked with drafting a possible binding legal instrument could examine the need/feasibility of obliging Parties to ensure proper information exchange at domestic level between their competent authorities in order to improve the capacity of these authorities to tackle the many challenges posed by trafficking in human organs, tissues and cells.

VII. Form of a legally binding instrument

VII. 1. Stand-alone instrument or additional protocol

52. Finally, the three Committees suggest that a possible binding legal instrument should be elaborated in the form of a stand–alone convention in its own right, and not as an additional protocol to an already existing instrument. The main reasons for this recommendation are that the scopes of the two instruments in question, namely the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (CETS No. 164) and the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), are not easily compatible with the aforesaid proposed scope of a new binding legal instrument.

VII. 2. Participation of non-member states of the Council of Europe

53. Given the global character of the criminal phenomena related to the trafficking in human organs, tissues and cells, it would in the view of the three Committees be desirable to open up a new binding legal instrument for participation by non-member states, as has also been the case of the Convention on Cybercrime (CETS No. 185) and the recently adopted Medicrime Convention. Such participation may however be hampered, if as a prerequisite non-member states would also have to sign a “mother convention”, and the three Committees consider this to be an additional argument for elaborating a possible binding legal instrument in the form of a stand-alone instrument.

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APPENDIX XII

Strasbourg, 16 March 2012 PC-TO (2012) 1- rev 1

RESTRICTED

Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO)

Preliminary draft Council of Europe Convention against Trafficking in Human Organs

Document prepared by the Secretariat of
the Directorate General Human Rights and Rule of Law (DG1)

Preamble

The member States of the Council of Europe and the other signatories hereto:

[……]

[Reference to the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (2000)" and the "Council of Europe Convention on Action against Trafficking in Human Beings (CETS No 197, 2005)"]

Chapter I – Purpose and scope

Article 1 – Purpose

1 The purposes of this Convention are:

a to prevent and combat the trafficking in human organs by providing for the criminalisation of certain acts;

b to protect the rights of victims of the offences established under this Convention;

c to facilitate cooperation at national and international levels on action against the trafficking in human organs.

2 In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific follow-up mechanism.

[Article 2 – Scope and use of terms

1 This Convention applies to the illicit removal and trafficking in human organs for purposes of transplantation or other purposes.[8788]

2 For the purposes of this Convention, the term[89]

[- "trafficking in human organs"]

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[87] Some delegations considered that the proposed scope in paragraph 1 is too limited in not describing other relevant offences. This point is related to the question of whether or not the draft Convention will include a definition of trafficking in human organs. Two delegations wish to see wording on the draft Convention not affecting legal trade in medicinal products, in particular advanced therapy medicinal products, based on human organs included in paragraph 1. The PC-TO for the time being agreed that wording to this effect could be included in the accompanying explanatory report.

[88] A number of delegations pointed out that the term 'other purposes' should be clarified throughout the text.

[89] A number of delegations expressed their concern that a definition of "trafficking in human organs" had not been included. Two delegations provided proposals for a definition of "trafficking in human organs", which are available on the PC-TO restricted website. As the PC-TO could not reach agreement on such a definition, the question was postponed to be addressed again at a later meeting.

- "human organ" shall mean a differentiated part of the human body, formed by different tissues, that maintains its structure, vascularisation, and capacity to develop physiological functions with a significant level of autonomy. A part of an organ is also considered to be an organ if its function is to be used for the same purpose as the entire organ in the human body, maintaining the requirements of structure and vascularisation;

- ["transplantation" shall mean the complete process of removal of a human organ from one person (the "donor") and implantation of that organ into another person (the "recipient"), including all procedures such as for preparation, preservation, transportation and storage.]

Article 3 – Principle of non-discrimination

The implementation of the provisions of this Convention by the Parties, in particular the enjoyment of measures to protect the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, age, religion, political or any other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, state of health, disability or other status.

Chapter II – Substantive Criminal Law

Article 4 – Illicit removal of human organs for transplantation or other purposes[90]

1. Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the removal of human organs[91] from living or deceased donors:

a where the removal is performed without the free, informed and specific consent of the living or deceased donor, or, in the case of the deceased donor, without the removal being authorised under its domestic law;

b where, in exchange for the removal of organs, the living donor, or a third party, has been offered or has received a financial gain or other comparable advantage. The notion of financial gain or other comparable advantage does not include compensation for loss of earnings and any other justifiable expenses caused by the removal or by the related medical examinations, or compensation in case of undue damage resulting from the removal of organs[92];

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[90] The wording of Article 4, including in particular the question of whether paragraph 2 should refer to "offence" or "criminal offence", is not yet agreed by the Committee. Some delegations hold, that the concept of "offence" waters down the political message of the draft Convention. If, on the other hand, the concept of "criminal offence" is agreed upon, other delegations would prefer to replace in paragraph 2 the wording "shall take the necessary…" with "shall consider taking the necessary…" in order to provide flexibility with regard to applying criminal or administrative procedures, measures and sanctions.

[91] One delegation indicated its concern that the offences contained in Article 4 should not be construed as applying to the donor, who should not be criminalised.

[92] The Committee will consider whether it would be more appropriate to place this sentence into a definition in Art 2 in order to clarify that this interpretation applies also in all other cases where it is used

c where in exchange for the removal of organs from a deceased donor, a third party has been offered or has received a financial gain or comparable advantage.

2. Each Party shall take the necessary legislative and other measures to establish as an [a criminal] offence[93] under its domestic law, when committed intentionally, the removal of human organs from living or deceased donors where the removal is performed outside of the framework of its domestic transplantation system, and/or in breach of its domestic law governing the removal of human organs.[94]

Article 5 – Use of illicitly removed organs for purposes of implantation or purposes other than for implantation

Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the use of illicitly removed organs, as described in Article 4, paragraph 1, for purposes of implantation or other purposes than implantation.

Article 6 – Implantation of organs outside of the domestic transplantation system

Each Party shall take the necessary legislative and other measures to establish as an offence[95] under its domestic law, when committed intentionally, the implantation of human organs from living or deceased donors where the implantation is performed outside of the framework of its domestic transplantation system, and or in breach of its domestic law governing the transplantation of human organs.

Article 7 – Illicit solicitation, recruitment, offering and requesting of undue advantages

1 Each Party shall take the necessary legislative and other measures to establish as a criminal offence under its domestic law, when committed intentionally, the solicitation and recruitment of an organ donor or a recipient, where carried out for financial gain or comparable advantage for the person soliciting or recruiting or for a third party. [96]

2 Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to healthcare professionals, its public officials or

[93] The PC-TO has not yet taken a final decision as to whether reference should be made to a “criminal offence” or an “offence”. The latter terminology would specifically allow States Parties to determine whether they want to apply criminal law or administrative measures, procedures and sanctions.

[94] The Committee does not consider the wording “outside of the framework of its domestic transplantation system, and/or in breach of its domestic law governing the removal of human organs” as satisfactory, and will revisit this question at its next meeting.

[95] The PC-TO has not yet taken a final decision as to whether reference should be made to a “criminal offence” or an “offence” (c.f. footnote 8)..

[96] Two delegations wished to add “or for the purposes of the illicit removal of organs” in order not to restrict the application of the provision only to situations where it can be demonstrated that solicitation or recruitment has been carried out for financial gain or comparable advantage.

persons who, in any capacity, direct or work for private sector entities,[97] with a view to having a[n] [illicit][98] removal, implantation or transplantation of a human organ performed or facilitated.

3 Each Party shall take the necessary legislative and other measures to establish as a criminal offence, when committed intentionally, the request or receipt by healthcare professionals, its public officials or persons who, in any capacity, direct or work for private sector entities,[99] of any undue advantage with a view to performing or facilitating the performance of a[n] [illicit] removal, implantation or transplantation of a human organ.

Article 8 – Preparation, preservation, storage, transportation, transfer, receipt, import and export of illicitly removed human organs

Each Party shall take the necessary legislative and other measures to ensure that the following acts, when committed intentionally, are sanctioned [either in accordance with Article 9 or][100] as a separate criminal offence[101]:

a the preparation, preservation, and storage of illicitly removed human organs as described in Article 4, paragraph 1,[102] of this Convention;

b the transportation, transfer, receipt, import and export of illicitly removed human organs[103] as described in Article 4, paragraph 1,[104] of this Convention;

Article 9 – Aiding or abetting and attempt

1 Each Party shall take the necessary legislative and other measures to establish as [criminal][105] offences when committed intentionally, aiding or abetting the commission of any of the [criminal] offences established in accordance with this Convention.

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[97] This wording proposed by the Secretariat reflects the assumption that in cases covered by this provision the element of corruption will be prevalent. The wording is taken from Articles 2 and 7 of the Criminal Law Convention on Corruption (CETS No. 173).

[98] A number of delegations were in favour of deleting the word "illicit" in order that the provision may apply also to removal, implantation and transplantation inside of the domestic system for organ transplantation of a State Party.

[99] This wording proposed by the Secretariat reflects the assumption that in cases covered by this provision the element of corruption will be prevalent. The wording is taken from Articles 3 and 8 of the Criminal Law Convention on Corruption (CETS No. 173).

[100] Delegations have not agreed on whether or not to refer here to Article 9. Should such reference be deleted, the sentence may need to be reworded

[101] One delegation proposed that the term "offence" should be used so as to allow for the possibility to apply non-criminal sanctions.

[102]The question of whether reference should only be made to Article 4, paragraph 1, or in addition to Article 4, paragraph 2, will be revisited once the wording of Article 4 has been agreed. If the final text of Art 4 will differentiate in its paragraphs 1 and 2 between "criminal offences" and "offences", and if accordingly the text of Art 9 refers only to Art 4 par 1, delegations will consider adding a separate paragraph 2 of Art 9 which refers to Art 4 par

[103] Three delegations proposed to add the wording "for financial gain or comparable advantage".

[104] The question of whether reference should only be made to Article 4, paragraph 1, or in addition to Article 4, paragraph 2, will be revisited once the wording of Article 4 has been agreed.

2 Each Party shall take the necessary legislative and other measures to establish as a [criminal][106] offence the intentional attempt to commit any of the [criminal] offences established in accordance with this Convention.

[3 Each state or the European Union may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply, or to apply only in specific cases or conditions, paragraph[s 1 and] 2 to offences established in accordance with Article ……][107]

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[105] Some delegations are in favour of removing square brackets, while others would agree only if the term "criminal" appears also in the second line. A possible alternative to be further discussed is to differentiate between cases where reference is made to "criminal offences" and those where a reference to "offences" would be appropriate. This issues is related to the eventual outcome of the discussion on terminology to be used in particular in Art 4 paragraph 2.

[106] Some delegations are in favour of removing square brackets, while others would agree only if the term "criminal" appears also in the second line (c.f. also footnote 20)

[107] One delegation would prefer to delete this paragraph, while others would need paragraph 3. Some delegations have suggested that paragraph 3 should also refer to paragraph 1, which could also help to solve the issue of terminology there (c.f. footnote 20).

Article 10 – Corporate liability

1 Each Party shall take the necessary legislative and other measures to ensure that legal persons can be held liable for offences established in accordance with this Convention, when committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within it based on:

a a power of representation of the legal person;
b an authority to take decisions on behalf of the legal person;
c an authority to exercise control within the legal person.

2 Apart from the cases provided for in paragraph 1, each Party shall take the necessary legislative and other measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of an offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

3 Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.

4 Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 11 – Sanctions and measures

1 Each Party shall take the necessary legislative and other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for offences established in accordance with Articles 4 to 9,[108] when committed by natural persons, penalties involving deprivation of liberty that may give rise to extradition.

2 Each Party shall take the necessary legislative and other measures to ensure that legal persons held liable in accordance with Article 10 are subject to effective, proportionate and dissuasive sanctions, including criminal or non-criminal monetary sanctions, and may include other measures, such as:

a temporary or permanent disqualification from exercising commercial activity;
b placing under judicial supervision;
c a judicial winding-up order.

3 Each Party shall take the necessary legislative and other measures to:

a permit seizure and confiscation of proceeds of these offences, or property whose value corresponds to such proceeds;

b enable the temporary or permanent closure of any establishment[109] used to carry out any [110]of the offences established in accordance with this Convention,

[108]Final list of articles to be decided at a later date.

[109] Certain delegations were of the opinion that the provision should not apply to all establishments but only to those where medical treatments are performed

without prejudice to the rights of bona fide third parties, and/or[111] to deny the perpetrator,[112] temporarily or permanently, the exercise of a professional activity relevant to the commission of any of the offences established in accordance with this Convention;[113]

[c take any other appropriate measures in response to an offence, in order to prevent future offences.][114]

Article 12 – Aggravating circumstances[115]

Each Party shall take the necessary legislative and other measures to ensure that the following circumstances, in so far as they do not already form part of the constituent elements of the offence, may, in conformity with the relevant provisions of domestic law, be taken into consideration as aggravating circumstances in determining the sanctions in relation to the offences established in accordance with this Convention:

a the offence[116] caused the death of, or [serious/undue][117] damage to the physical [or mental][118] health of, the victim[119];

b the offence was committed by persons abusing their position;

c the offence was committed in the framework of a criminal organisation;

d the perpetrator has previously been convicted of offences established in accordance with this Convention;

e the offence was committed against a particularly vulnerable person[120].

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[110] One delegation questioned the use of the word "any", and would like to see it replaced with a list of relevant offences.

[111] Some delegations were in favour of using 'and/or' while others would like to use only 'or'

[112] Certain delegations were of the opinion that the provision should not apply to all perpetrators (but only to medical staff).

[113] Three delegations need to consider paragraph b further.

[114] Some delegations wished to delete this paragraph, one delegation wished to leave this paragraph in the text.

[115] Two delegations have entered a general reservation on this provision.

[116] A number of delegations would like to have a precise reference to relevant provisions describing the offences to be covered by Article 12 a.

[117] Some delegations preferred that the damage be qualified by using the terms "serious" or "undue", since removal of organs always causes damage to the donor.

[118] A number of delegations proposed to delete the reference to "mental health"..

[119] The PC-TO will continue its examination of the question whether recipients of organs could, under certain circumstances, also be considered as victims.

[120] Certain delegations requested that a definition of particularly vulnerable persons be added to the text, others to the explanatory memorandum. Also one delegation proposed that this paragraph should specify that it refers to the donor only.

Article 13 – Previous convictions

Each Party shall take the necessary legislative and other measures to provide for the possibility to take into account final sentences passed by another Party in relation to the offences established in accordance with this Convention when determining the sanctions.

Chapter III – Criminal Procedural Law

Article 14 – Jurisdiction[121]

1 Each Party shall take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:

a in its territory; or
b on board a ship flying the flag of that Party; or
c on board an aircraft registered under the laws of that Party; or
d by one of its nationals; or
e by a person who has his or her habitual residence in its territory.

2 Each Party shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of its nationals or a person who has his or her habitual residence in its territory.

3 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraph 1.e of this article.

4 For the prosecution of the offences established in accordance with Articles 4 to 9, of this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraph 1.d [and e] is not subordinated to the condition that the acts are criminalised at the place where they were performed.

5 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right to limit the application of paragraph 4 of this article, with regard to offences established in accordance with Article 7, to cases where its national has his or her habitual residence in its territory.

6 For the prosecution of the offences established in accordance with Articles 5 to 10 of this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1.d and e is not subordinated to the condition that the

[121] One delegation has put forward a written proposal regarding the implementation of the “extradite or prosecute” principle.

prosecution can only be initiated following a report from the victim or a denunciation from the State of the place where the offence was committed.

7 Each Party shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged offender is present on its territory and it does not extradite him or her to another State, solely on the basis of his or her nationality.

8 When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

9 Without prejudice to the general rules of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with its internal law.

Article 15 – Initiation and continuation of proceedings[122]

Each Party shall take the necessary legislative and other measures to ensure that investigations or prosecution of offences established in accordance with this Convention should not be subordinate to a complaint and that the proceedings may continue even if the complaint is withdrawn.

Article 16 – Criminal investigations

Each Party shall take the necessary legislative and other measures, in conformity with the principles of its domestic law, to ensure effective criminal investigation and prosecution of offences established in accordance with this Convention[, allowing, where appropriate, for the possibility of carrying out financial investigations, of covert operations, controlled delivery and other special investigative techniques][123].

Article 17 – International cooperation

1 The Parties shall co-operate with each other, in accordance with the provisions of this Convention and in pursuance of relevant applicable international and regional instruments and arrangements agreed on the basis of uniform or reciprocal legislation and their domestic law, to the widest extent possible, for the purpose of investigations or proceedings concerning the offences established in accordance with this Convention, including seizure and confiscation.

2 The Parties shall co-operate to the widest extent possible in pursuance of the relevant applicable international, regional and bilateral treaties on extradition and mutual legal assistance in criminal matters concerning the offences established in accordance with this Convention.

3 If a Party that makes extradition or mutual legal assistance in criminal matters conditional on the existence of a treaty receives a request for extradition or legal assistance in criminal matters from a Party with which it has no such a treaty, it may, acting in full compliance with its

[122] One delegation has put forward a written proposal regarding the implementation of the “extradite or prosecute” principle.

[123] The PC-TO decided to examine the need for including this list of specific investigative measures.

obligations under international law and subject to the conditions provided for by the law of the requested Party, consider this Convention as the legal basis for extradition or mutual legal assistance in respect of the offences established in accordance with this Convention.

Chapter IV – Protection measures

Article 18 – Protection of victims

Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims, in particular by:

a ensuring that victims have access to information relevant to their case and which is necessary for the protection of their health;
b assisting victims in their physical, psychological and social recovery;
c providing, in its domestic law, for the right of victims to compensation from the perpetrators.

[Provisions on protection of victims of trafficking for the purpose of the removal of organs, cf. Article 9?]

Article 19 – Standing of victims in criminal proceedings

1 Each Party shall take the necessary legislative and other measures to protect the rights and interests of victims at all stages of criminal investigations and proceedings, in particular by:

a informing them of their rights and the services at their disposal and, unless they do not wish to receive such information, the follow-up given to their complaint, the possible charges, the general progress of the investigation or proceedings, and their role therein as well as the outcome of their cases;

b enabling them, in a manner consistent with the procedural rules of domestic law, to be heard, to supply evidence and to choose the means of having their views, needs and concerns presented, directly or through an intermediary, and considered;

c providing them with appropriate support services so that their rights and interests are duly presented and taken into account;

d providing effective measures for their safety, as well as that of their families [and witnesses on their behalf], from intimidation and retaliation.

2 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings.

3 Each Party shall ensure that victims have access, provided free of charge where warranted, to legal aid when it is possible for them to have the status of parties to criminal proceedings.

4 Each Party shall take the necessary legislative and other measures to ensure that victims of an offence established in accordance with this Convention committed in the territory of a Party

other than the one where they reside can make a complaint before the competent authorities of their State of residence.

5 Each Party shall provide, by means of legislative or other measures, in accordance with the conditions provided for by its domestic law, the possibility for groups, foundations, associations or governmental or non-governmental organisations, to assist and/or support the victims with their consent during criminal proceedings concerning the offences established in accordance with this Convention.

[Article 20 – Protection of witnesses

1 Each Party shall, within its means and in accordance with the conditions provided for by its domestic law, provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings, who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2 Paragraph 1 of this Article shall also apply to victims insofar as they are witnesses.]

Chapter V – Prevention measures

Article 21 – Measures at domestic level

1 Each Party shall take the necessary legislative and other measures to ensure:

i the establishment of a transparent approved domestic system for the transplantation of organs;
ii equitable access to transplantation services for patients;
iii adequate collection, analysis and exchange of information related to the offences covered by this Convention in cooperation between all relevant authorities.

2 With the aim of preventing trafficking in organs, each Party shall take the necessary measures to provide, *inter alia*, for:

i training of healthcare professionals, police and customs authorities, as well as relevant regulatory authorities;

ii the promotion of awareness-raising campaigns addressed to healthcare professionals and the general public respectively, providing relevant information about trafficking in organs.

Article 22 – Measures at international level

The Parties shall, to the widest extent possible, co-operate with each other in order to prevent trafficking in organs. In particular, the Parties shall:

i on an annual basis report to the Committee of the Parties on the number of cases of trafficking in organs detected [and prosecuted] within their respective jurisdictions;

ii establish a network of single contact points for exchange of information pertaining to the prevention and detection of trafficking in organs.[124]

Chapter VI – Follow-up mechanism

Article 23 – Committee of the Parties

1 The Committee of the Parties shall be composed of representatives of the Parties to the Convention.

2 The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention for the tenth signatory having ratified it. It shall subsequently meet whenever at least one third of the Parties or the Secretary General so requests.

3 The Committee of the Parties shall adopt its own rules of procedure.

4 The Committee of the Parties shall be assisted by the Secretariat of the Council of Europe in carrying out its functions.

5 A contracting Party which is not a member of the Council of Europe shall contribute to the financing of the Committee of the Parties in a manner to be decided by the Committee of Ministers upon consultation of that Party.

Article 24 – Other representatives

1 The Parliamentary Assembly of the Council of Europe, the European Committee on Crime Problems (CDPC), as well as other relevant Council of Europe intergovernmental or scientific committees, shall each appoint a representative to the Committee of the Parties in order to contribute to a multisectoral and multidisciplinary approach.

2 The Committee of Ministers may invite other Council of Europe bodies to appoint a representative to the Committee of the Parties after consulting them.

3 Representatives of relevant international bodies may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

4 Representatives of relevant official bodies of the Parties may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

5 Representatives of civil society, and in particular non-governmental organisations, may be admitted as observers to the Committee of the Parties following the procedure established by the relevant rules of the Council of Europe.

6 In the appointment of representatives under paragraphs 2 to 5, a balanced representation of the different sectors and disciplines shall be ensured.

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[124] One delegation prefers that the obligation contained in Article 23, ii, is limited to offences of a serious nature.

7 Representatives appointed under paragraphs 1 to 5 above shall participate in meetings of the Committee of the Parties without the right to vote.

Article 25 – Functions of the Committee of the Parties

1 The Committee of the Parties shall monitor the implementation of this Convention. The rules of procedure of the Committee of the Parties shall determine the procedure for evaluating the implementation of this Convention, using a multisectoral and multidisciplinary approach.

2 The Committee of the Parties shall also facilitate the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat trafficking in organs. The Committee may avail itself of the expertise of relevant Council of Europe committees and other bodies.

3 Furthermore, the Committee of the Parties shall, where appropriate:

a facilitate the effective use and implementation of this Convention, including the identification of any problems and the effects of any declaration or reservation made under this Convention;
b express an opinion on any question concerning the application of this Convention and facilitate the exchange of information on significant legal, policy or technological developments;
c make specific recommendations to Parties concerning the implementation of this Convention.

4 The European Committee on Crime Problems (CDPC) shall be kept periodically informed regarding the activities mentioned in paragraphs 1, 2 and 3 of this article.

Chapter VII – Relationship with other international instruments

Article 26 – Relationship with other international instruments

1 This Convention shall not affect the rights and obligations arising from the provisions of other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention.

2 The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.

Chapter VIII – Amendments to the Convention

Article 27 - Amendments

1 Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the Parties, the member States of the Council of Europe, non-member States having

participated in the elaboration of this Convention or enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention.

2 Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental or [scientific committees], which shall submit to the Committee of the Parties their opinions on that proposed amendment.

3 The Committee of Ministers, having considered the proposed amendment and the opinion submitted by the Committee of the Parties, may adopt the amendment.

4 The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5 Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

Chapter IX – Final clauses

Article 28 – Signature and entry into force

1 This Convention shall be open for signature by the member States of the Council of Europe, the European Union and the non-member States which have participated in its elaboration or enjoy observer status with the Council of Europe. It shall also be open for signature by any other non-member State of the Council of Europe upon invitation by the Committee of Ministers. The decision to invite a non-member State to sign the Convention shall be taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers. This decision shall be taken after having obtained the unanimous agreement of the other States/European Union having expressed their consent to be bound by this Convention.

2 This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which five signatories, including at least three member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

4 In respect of any State or the European Union, which subsequently expresses its consent to be bound by the Convention, it shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.

ALTERNATIVE TO ARTICLE 28:

[Article 28bis – Signature and entry into force

1 This Convention shall be open for signature by the member States of the Council of Europe, the non-member States which have participated in its elaboration and the European Union.

2 This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 10 signatories, including at least eight member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of paragraph 2.

4 In respect of any State referred to in paragraph 1 or the European Union, which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 28ter – Accession to the Convention

1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Parties entitled to sit on the Committee of Ministers.

2 In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.]

Article 29 – Territorial application

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

2 Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

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

Article 30 – Reservations

1 No reservation may be made in respect of any provision of this Convention, with the exception of the reservations expressly established.

2 Each Party which has made a reservation may, at any time, withdraw it entirely or partially by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect from the date of the receipt of such notification by the Secretary General.

Article 31 – Friendly settlement

The Committee of the Parties will follow in close co-operation with the European Committee on Crime Problems (CDPC) and other relevant Council of Europe intergovernmental [or scientific committees] the application of this Convention and facilitate, when necessary, the friendly settlement of all difficulties related to its application.

Article 32 – Denunciation

1 Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

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

Article 33 – Notification

The Secretary General of the Council of Europe shall notify the Parties, the member States of the Council of Europe, the non-member States having participated in the elaboration of this Convention or enjoying observer status with the Council of Europe, the European Union, and any State having been invited to sign this Convention in accordance with the provisions of Article 30, of:

a any signature;
b the deposit of any instrument of ratification, acceptance or approval;
c any date of entry into force of this Convention in accordance with Article 28;
d any amendment adopted in accordance with Article 27 and the date on which such an amendment enters into force;
e any reservation made under Article 14, paragraph 5, any withdrawal of a reservation made in accordance with Article 30;
f any denunciation made in pursuance of the provisions of Article 32;
g any other act, notification or communication relating to this Convention.

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

Done in [.....], this [..] day of [.....], in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention or enjoy observer status with the Council of Europe, to the European Union and to any State invited to sign this Convention.

APPENDIX XIII

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 22 May 2012
cdpc/docs 2012/cdpc (2012) 4 - e

CDPC (2012) 4REV

EUROPEAN COMMITTEE ON CRIME PROBLEMS (CDPC)

Information on the state of preparation of the Conference

of the

31st Council of Europe Conference of Ministers of Justice

RESPONSES OF JUSTICE TO URBAN VIOLENCE

- Organised groups and their new ways of communicating;
- Juveniles as perpetrators and victims

19 – 21 September 2012
Hofburg Congress Center, Vienna, Austria

Document prepared by the CDPC Secretariat
Directorate General I – Human Rights and Rule of Law

CDPC website: www.coe.int/cdpc
CDPC e-mail: dgi.cdpc@coe.int

The themes

RESPONSES OF JUSTICE TO URBAN VIOLENCE

- Organised groups and their new ways of communicating;
- Juveniles as perpetrators and victims

The theme of this year's Council of Europe Conference of Ministers of Justice is focused on the way justice should and could respond to riots and similar types of urban violence, which a number of member states have experienced in recent years.

In particular, the Conference is expected to debate a series of questions on how the various justice systems of member states tackle issues such as:

- collective criminal responsibility,
- dealing with alleged juvenile offenders and juvenile victims in the justice system and in connection with urban violence,
- sentencing of offenders found guilty of having committed acts of urban violence and,
- the role of social media in the planning and execution of acts of urban violence.

In the context of urban violence, the need and ways to balance the application of certain repressive measures by the authorities in the interest of upholding law and order vis-à-vis the rights to freedom of expression and freedom of assembly guaranteed under the European Convention on Human Rights are also expected to be addressed by the Ministers of Justice.

Calendar

- Invitation letters, co-signed by the Minister of Justice of Austria and the Secretary General of the Council of Europe, to be sent early June 2012 by the Council of Europe Secretariat.

- Report of Minister of Justice of Austria to be ready in English for June 2012 and sent to all delegations by Austria and available on Conference website.

- Report of the Secretary General of the Council of Europe on the follow-up of the Resolutions of the CoE Istanbul Conference of the Ministers of Justice (2010) to be ready mid-June 2012, available on Conference website before the summer break .

- Steering Committees will meet on :

  - **European Committee on Crime Problems (CDPC) -** Plenary on 29 May to 1 June 2012

  - **European Committee on Legal Co-operation (CDCJ) -** plenary on 18 – 20 June 2012

  - **Steering Committee for Human Rights (CDDH) -** 85th CDDH-BU: 7-8 June, 75th CDDH plenary: 19-22 June

  - **Steering Committee on Media and Information Society (CDMSI) –** Bureau meeting: 29-30 May

Time frame for Resolution

- Elements for resolutions prepared by the Secretariat to be sent to CDCJ, CDPC, CDDH and CDMSI Bureau members prior to the Conference, ie 4th week of May 2012 for CDPC, CDCJ CDDH and CDMSI.

- The draft resolutions (only 1 Resolution would be welcome) to be finalised by the Bureaux & Plenaries late June 2012 at the latest.

- Draft resolution to be on the agenda of **Rapporteur Group on Legal Cooperation of the Committee of Ministers' Deputies (GR-J)** on 6 September 2012.

- Draft resolution to be sent during summer break to the Permanent Representatives for forwarding to the Senior Officials for possible comments within 2 weeks before the Conference, ie comments by 3 September 2012 at the latest.

- Draft resolution to be finalised by the Senior Officials at the Vienna Conference on 19 September 2012.

- Resolution to be adopted by the Ministers of Justice in Vienna on 21 September 2012.

APPENDIX XIV

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 1 June 2012
cdpc/docs 2012/cdpc (2012) 6 - e

CDPC (2012) 6 Fin

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

31st COUNCIL OF EUROPE CONFERENCE OF MINISTERS OF JUSTICE

(Vienna, Austria, 19-21 September 2012)

ELEMENTS for DRAFT RESOLUTION on juveniles and children as perpetrators and victims in the context of urban violence

CDPC website: www.coe.int/cdpc
CDPC e-mail: dgi.cdpc@coe.int

31st COUNCIL OF EUROPE CONFERENCE OF MINISTERS OF JUSTICE

(Vienna, Austria, 19-21 September 2012)

ELEMENTS for DRAFT RESOLUTION on juveniles and children as perpetrators and victims in the context of urban violence

THE MINISTERS participating in the 31st Council of Europe Conference of Ministers of Justice (Vienna, Austria, 19-21 September 2012),

1. Welcoming the report of the Minister of Justice of Austria "XXXXX" and the contributions made by the delegations attending the Conference;

2. Recalling the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and its Protocols and the case law of the European Court of Human Rights related to the response of the justice system to juvenile perpetrators;

3. Recalling moreover the United Nations Convention on the Rights of the Child, the Committee of Ministers' Recommendations Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions and measures, Rec (2009)10 on integrated national strategies for the protection of children from violence, and the Committee of Ministers Guidelines on Child-Friendly Justice (2010);

4. Concerned about the rise of intensive and unexpected outburst of collective violence in some major urban areas in Europe, such as riots, arsons, muggings, pillaging and other forms of urban violence, in which many of those involved, as perpetrators and/or victims, are juveniles and children[125];

5. Having discussed the responses of justice to urban violence, including the responses of justice to juveniles and children as perpetrators and victims in this context;

6. Noting that European societies are currently facing a deepening economic and social crisis which exacerbates unemployment and financial hardship and favours the deterioration of living conditions and the social climate in certain urban areas;

7. Aware of the fact that these factors may contribute to increased social tensions and to the feeling of social exclusion and neglect, especially among children and juveniles who are vulnerable when confronted to instigators who incite riots and

[125]The UN Convention on the Rights of the Child defines a "child" as a person below the age of 18. For the purpose of this Resolution "juvenile" means a child who has reached the age of criminal responsibility.

other forms of urban violence, notably through Internet and information and communication technologies;

8. Underlining that acts of urban violence may range from minor offences to very serious crimes and that therefore the response of the criminal justice system should take into consideration the specific circumstances of each individual case and should be based on the principle of proportionality;

9. Underlining that, in particular in the context of urban violence, a rapid, appropriate and effective response of the justice system to juvenile and children perpetrators and victims is required to protect public order, avoid the feeling of insecurity in society and prevent the deterioration of social peace;

10. Considering that penal responses to the criminal behaviour of juveniles should be adapted to their age and mental development and should take due account of their educational needs and personal development, and that deprivation of liberty often has harmful effects on the personal and social development of juveniles;

11. Conscious that a child's mentality and stage of development are different from those of an adult and that the justice systems are designed primarily to deal with the latter;

12. Considering also that any intervention should take a multi-disciplinary and a multi-agency approach in order to address effectively the variety of problems children and juveniles may face;

13. Convinced of the importance of working with the parents and the family in order to help socialize juveniles and children and thus prevent their involvement in acts of urban violence;

14. Underlining therefore the need to develop child-friendly justice and to divert, where possible, children and juveniles away from the formal criminal justice system or ordinary criminal proceedings to more adapted forms of response, such as mediation and restorative justice which also take into consideration the interests of victims;

* * *

15. INVITE the Committee of Ministers to CALL UPON Council of Europe member states to implement the relevant Council of Europe standards, and in particular: the Committee of Ministers' Recommendations, Recommendation N° R (99) 19 on mediation in penal matters, Rec(2000)20 on the role of early psychosocial intervention in the prevention of criminality, Rec(2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice and Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions and measures; Rec (2009)10 on integrated national strategies for the protection of children from violence, and the Committee of Ministers' Guidelines on Child-Friendly Justice (2010);

16. REITERATE the general principle that detention should only be used as a last resort due to its especially damaging effects on juveniles, in particular in cases of police custody and pre-trial detention;

17. AGREE to consider:
    - the possibility of adopting or further consolidating juvenile justice systems;

- to develop restorative justice measures adapted to the needs of children and juveniles and use them, where appropriate, at all stages of the criminal justice procedure;
- to develop specialised and appropriate training procedures for professionals dealing with children and juvenile perpetrators or victims, such as judges, prosecutors, police officers, social workers, mediators, probation and prison staff;
- as a specific action for the Council of Europe's future work the involvement of families of juvenile and children perpetrators in projects related to prevention and education;
- [to promote closer co-operation between law enforcement authorities on the one hand and telecommunication providers and providers of services on the Internet on the other hand in order to facilitate prevention of urban violence as well as to gather evidence and ensure accountability of instigators of violence, while guaranteeing full compliance with the safeguards provided by law and by the European Convention on Human Rights.[126]]

18. INVITE the Committee of Ministers to instruct the European Committee on Crime Problems (CDPC) to:

    a) examine the experiences of member states with regard to preventing the involvement of children and juveniles in urban violence as perpetrators and/or victims and recommend, as necessary, suitable measures, in particular related to the criminal justice systems;
    b) examine the existing laws and practices in Europe concerning the sanctioning and treatment of children and juveniles involved in acts of urban violence, draw up best practices in this regard and recommend, as necessary, suitable measures, in particular related to the criminal justice systems;
    c) examine the existing laws and practices in Europe regarding restorative justice and recommend, as necessary, specific restorative justice measures aimed at dealing with the phenomenon of urban violence and adapted to the needs of children and juveniles at all stages of the criminal justice procedure;
    d) [examine ways to enhance cooperation between law enforcement authorities and telecommunication providers and providers of services on the Internet in order to facilitate prevention of urban violence, to gather evidence and to ensure accountability of instigators of violence[127].]

19. ASK the Secretary General of the Council of Europe to present a report on the steps taken to give effect to this Resolution on the occasion of their next Conference.

* * *

[126] The CDPC recommends including this paragraph in the final version of the Resolution to be submitted to the Ministers for adoption, after consideration by the CDCJ and CDDH. A reference to this issue should also be included in the introductive part of the resolution.

[127] The CDPC recommends including this paragraph in the final version of the Resolution to be submitted to the Ministers for adoption, after consideration by the CDCJ and CDDH. A reference to this issue should also be included in the introductive part of the resolution.

APPENDIX XV

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 23 March 2012 PC-OC Mod (2012) 02
[PC-OC/GM/Docs 2011/ PC-OC Mod (2012) 02E]
http://www.coe.int/tcj/

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

List of decisions taken at the 13th meeting of the restricted Group of experts on international co-operation (PC-OC Mod) enlarged to all PC-OC members 22-23 March 2012

The PC-OC Mod decided to:

1. Elaboration of draft practical guidelines as a follow-up to the replies to the questionnaire on jurisdiction and transfer of proceedings

discuss the outline for draft guidelines prepared by the Secretariat (Document PC-OC Mod (2012) 01, and

- instruct the Secretariat to amend this draft outline on the basis of the discussions held and to present this draft for consideration and further guidance to the PC-OC plenary;
- ask Mr Erik Verbert (Belgium) to update the standard model request form on transfer of proceedings (prepared in the context of the Project on the development of effective practical tools to facilitate judicial co-operation in criminal matters and present it to the PC-OC plenary for consideration.

2. Presentation and content of the PC-OC website

a. Relevant case law of the ECtHR

consider the revised draft list as proposed by Mr Miroslav Kubicek (Czech Republic), thank him for the excellent work accomplished, and

- make a proposal to the PC-OC plenary that it endorses the approach adopted in this list;
- ask Mr Kubicek to coordinate the update and finalisation of the list with contributions to be made by Ms Barbara Goeth-Flemmich (Austria), Mr Erik Verbert (Belgium) and Mr Stéphane Dupraz (France) for consideration by the PC-OC plenary;
- make a proposal to the PC-OC plenary that it asks the Secretariat to publish section A of the list on the PC-OC website, pending finalisation of the remaining sections;
- ask the Secretariat to inquire about the budgetary feasibility of having the list translated into French.

b. Updated list of useful links

take note of the list of links proposed as updated by the Secretariat, noting that some issues will require further discussion at the PC-OC plenary.

3. Possible ways of allowing practitioners to submit questions to the PC-OC

a. Finalisation of the information sheet on the PC-OC

- agree, with minor amendments, on the text proposed in this respect and submit the amended text of the information sheet, contained in Document PC-OC (2011) 08 rev 3, for adoption by the PC-OC plenary.

b. Proposals for its publication and dissemination

- take note of the Secretariat proposals to have the information leaflet published on the PC-OC website, printed as a small coloured pamphlet and distributed by the members of the PC-OC to practitioners in their home country and submit this proposal for consideration to the PC-OC plenary;
- make a proposal that the plenary considers the possibility that delegations translate the leaflet into their national language, indicating national contact points for practitioners in their countries.

4. Practical problems and concrete cases concerning the implementation of conventions

a. Consideration of the replies received to the questionnaire on legal and technical aspects of video conferences and proposal for follow-up

take note of the replies to the questionnaire contained in Document PC-OC (2012) 01 bil Restricted, and

- ask the Secretariat to send a reminder to states that have not yet replied;
- make a proposal to the plenary that it agrees to the publication of the replies on the website of the PC-OC.

b. Preparation of discussion paper/questions on the relationship between extradition and expulsion

discuss the questions as proposed in Document PC-OC Mod (2012)Misc 02 and

- ask the Chair in co-operation with the vice-Chair and the Secretariat to finalise the questions and forward them to the plenary as a basis for further discussion on this topic.

c. Consideration of a draft note on discussions held on "dual criminality in abstracto or in concreto"

discuss the draft note contained in document PC-OC (2012) 02 prepared by the Secretariat, and

- submit this note to the plenary in view of its adoption and publication on the website of the PC-OC.

d. Finalisation of a draft questionnaire on "in absentia cases" in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition.

discuss the draft questionnaire on the basis of the proposals by Mr Miroslav Kubicek and

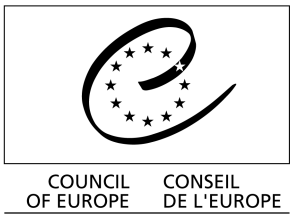
- finalise the draft questionnaire by written procedure;
- submit the draft questionnaire for consideration to the plenary, with a proposal to consider the draft questionnaire proposed by the German delegation separately

5. Any other business

take note of the proposal of the Czech Republic to discuss at the plenary the issue of bilateral treaties with the Bailiwick of Guernsey, the Isle of Man and the Bailiwick of Jersey on exchange of information relating to tax matters between Parties to the European Convention on Mutual Assistance in Criminal Matters.

* * * * *

APPENDIX XVI



Strasbourg, 11/05/2012 PC-OC (2012) 07
[PC-OC/Documents 2012 / PC-OC (2012) 07]
http://www.coe.int/tcj/

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

List of decisions taken at the 62nd meeting of the PC-OC
under the Chairmanship of Mr Per Hedvall (Sweden)

Strasbourg
9-11 May 2012

1. Elaboration of draft practical guidelines as a follow up to the replies to the questionnaire on jurisdiction and transfer of proceedings

The PC-OC considered and endorsed the approach proposed for the draft outline for practical guidelines proposed by the PC-OC-Mod (PC-OC Mod (2012) 01 Rev) as well as for the model request form on laying of information (contained in document PC-OC (2012)06), made suggestions for their further development

and decided to instruct the PC-OC Mod to:

- finalise the draft guidelines and the model request form, taking into account the comments made by the plenary and to present it for consideration at its next plenary meeting.

2. Presentation and content of the PC-OC website

The PC-OC welcomed the information provided by the Secretariat about the creation of a shared office space allowing the members of the PC-OC Mod and other interested members of the PC-OC to work together in-between meetings on the development of the draft guidelines and other documents as appropriate. Noting that country information on the website was often outdated, the PC-OC decided to:

- instruct the Secretariat to invite delegations to update the information concerning their country.

- With regard to the draft list of relevant case law of the European Court of Human Rights (ECtHR)

The PC-OC considered the provisional Index of Case Law by the ECtHR of relevance for the application of the European Conventions on international judicial co-operation in criminal matters

(contained in Document PC-OC (2012)03) and suggested that it be completed with some further keywords (for example "*in absentia*"; "*ne bis in idem*") and related cases. The PC-OC also took note of the information provided by the Secretariat about the consultation with the Case-law information and publications division of the Court, and decided to:

- invite delegations to send further suggestions for keywords and cases to the Secretariat by 11 June;
- instruct the Secretariat to publish the index on the public website of the PC-OC, taking into account the amendments proposed and in consultation with the European Court of Human Rights;
- ask the PC-OC Mod to make proposals as to the possible indexing of decisions concerning admissibility of complaints.

The PC-OC also discussed the approach to be adopted with regard to the summaries of the case law by the ECtHR, and decided to:

- endorse the approach proposed and instruct the PC-OC Mod to finalise the work undertaken and present it for consideration at the next plenary meeting in view of its publication.

The PC-OC also discussed ways to ensure the regular updating of the case law published and decided to:

- invite all delegations to keep the Secretariat informed of new Court decisions of relevance to the PC-OC;
- instruct the Secretariat to update the publication at a regular basis in consultation with the Chair.

- With regard to the proposed useful links

The PC-OC discussed the amended list prepared by the Secretariat (PC-OC (2011) 25 Rev2), noting the usefulness of creating links to websites of relevant international governmental organisations and courts, proposed some additional links and decided to:

- instruct the Secretariat to post these links on the public website of the PC-OC;
- instruct the PC-OC Mod to make proposals to improve the country information available on the website, including by introducing links to national websites of relevance to international judicial co-operation in criminal matters.

- With regard to the use of the forum

The PC-OC, noting the usefulness of the forum for raising issues of common interest, decided to:

- encourage all delegations to make regular use of the forum.

3. Possible ways of allowing practitioners to submit questions to the PC-OC

The PC-OC considered the information leaflet on the PC-OC as amended by the PC-OC Mod (Document PC-OC (2011) 08 rev3)

and decided to:

- agree with the text, as amended during the meeting (Document PC-OC (2011) 08 rev4), noting that additional editorial changes might be proposed by the publications department of the Council of Europe.

The PC-OC furthermore considered the proposals for dissemination and publication of the leaflet and decided to:

- have the information leaflet published on the PC-OC website and, subject to approval by the Council of Europe's Committee for the rationalisation of publications, to have the information leaflet

printed as a small coloured pamphlet, including a space to allow each delegation to insert contact details for practitioners in their home country;
- invite the members of the PC-OC to distribute the leaflet to practitioners in their home country in the best possible way, including by posting the text on an appropriate national website ;
- take note of the proposal by the Romanian and Russian delegations to translate the leaflet into their national language and invited them to inform the Secretariat of the number of leaflets requested in each of these languages.

4. Practical problems and concrete cases concerning the implementation of conventions

a. Presentation by PC-OC Rapporteurs on recent developments and forum discussions related to extradition, mutual assistance and transfer of sentenced persons

The PC-OC took note of the information provided by Ms Barbara Goeth-Flemmich (Austria), Mr. Erik Verbert (Belgium) and Mr. Eugenio Selvaggi (Italy) with regard to transfer of sentenced persons, extradition and mutual assistance in criminal matters respectively and decided to discuss at a future meeting:

- the question raised on the reference moment to be applied when considering double criminality in respect of extradition;
- the question raised with regard to the interpretation of Article 14, paragraph 2b of the European Convention on Extradition;
- the experience within the EU of the transposition and application of the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

b. Consideration of the replies received to the questionnaire on legal and technical aspects of video conferences and proposal for follow-up.

The PC-OC, underlining the growing interest and possibilities for the use of video conferences in international judicial co-operation, considered the replies contained in Document PC-OC (2012) 01 rev and the proposal to publish the replies on the website of the PC-OC and decided to:

- instruct the Secretariat to invite delegations that had not yet replied to the questionnaire to do so;
- publish the updated compilation of replies on the restricted website of the PC-OC;
- instruct the Secretariat to invite delegations to reconsider their replies by 11 June in view of their publication as a useful tool for practitioners on the public website of the PC-OC;
- invite delegations to send further documentation on this issue, specifying whether this may be posted on the public or on the restricted website;
- instruct the PC-OC-Mod to look into the feasibility of developing guidelines on the use of videoconferences and report to the plenary at its next meeting;
- take note of the information provided on the European e-Justice Portal: https://e-justice.europa.eu/content_videoconferencing-69-en.do.

c. Discussion on the relationship between extradition and expulsion

In the light of the discussion paper (Document PC-OC (2011) 09rev) prepared by Mr Eugenio Selvaggi (Italy) and taking into account the questions prepared by the PC-OC-Mod, the PC-OC had a discussion on the relationship between extradition and expulsion (disguised extradition). The PC-OC decided to:

- instruct the Secretariat to reflect the discussions held in a draft note;
- instruct the PC-OC Mod to consider this draft note in view of its adoption by the PC-OC and publication on the website as an information document for practitioners and to make proposals for follow-up to this discussion.

d. Consideration of a draft note on discussions held on "dual criminality *in abstracto* or *in concreto*"

The PC-OC considered the draft note (PC-OC (2012)02) as proposed by the PC-OC Mod and decided to:

- publish the note on the website as an information document for practitioners.

e. Finalisation of a draft questionnaire on "*in absentia* cases" in connection with Article 3 of the Second Additional Protocol to the European Convention on Extradition.

The PC-OC considered the draft questionnaire proposed by the PC-OC Mod, as well as the draft questionnaire proposed by the German delegation and decided to:

- instruct the PC-OC Mod to finalise the questionnaire in the light of the comments made and submit it to the PC-OC plenary for adoption.

f. Discussion on the application of interim measures (rule 39) of the ECtHR in cases of extradition

Following an introduction by Mr Erik Verbert (Belgium), the PC-OC had an exchange of views on the application of interim measures by the European Court of Human Rights in cases of extradition with Mr Stephen Phillips, Deputy Section Registrar at the ECtHR and Ms Irène Kitsou-Milonas, Head of Section of the Department for the Execution of Judgments of the ECtHR.

g. Discussion on relations with non-member states of the Council of Europe that are Parties to European Conventions on co-operation in penal matters

The PC-OC considered the proposals made by the Secretariat to develop its relations with the non European states that are Parties to the European conventions on extradition, on mutual assistance in criminal matters and on the transfer of sentenced persons. The PC-OC, underlining the importance of strengthening these relations for the mutual benefit of all Parties, decided to:

- invite the states concerned to give the names of persons to be included in the list of officials involved in the application of the conventions on co-operation in penal matters and the network of single points of contact;
- invite them also to participate in the forum of the PC-OC collaborative space;
- organise at each plenary meeting a session devoted to one of the three main conventions, inviting the Parties that have no permanent observer status to participate;
- organise at the 63rd plenary meeting a session devoted to the European Convention on Extradition and invite Korea and South-Africa to attend.

h. Discussion proposed by the Czech Republic on the issue of bilateral treaties with the Bailiwick of Guernsey, the Isle of Man and the Bailiwick of Jersey on exchange of information relating to tax matters between Parties to the European Convention on Mutual Assistance in Criminal Matters.

On the basis of the discussion paper (Document PC-OC (2012)04) introduced by Mr Jakub Pastuszek (Czech Republic), the PC-OC had an exchange of views and experiences on the above issue, and in particular whether information obtained under these treaties could be used in criminal cases without the consent of the state concerned.

5. Elections

a. Composition of the PC-OC Mod

During its 61st meeting, the PC-OC decided that the composition of the PC-OC Mod would be reconsidered at the next plenary session. However, considering the fact that the PC-OC will have to elect a new Chair and Vice-Chair during its 63rd meeting and that the Chair and Vice-Chair are members of the PC-OC Mod, the PC-OC decided to:

- postpone a decision on the composition of the PC-OC Mod until its 63rd plenary meeting.

b. Gender Equality Rapporteur

In line with its terms of reference, the PC-OC elected Ms Antonella Sampo-Couma (Monaco) as Gender Equality Rapporteur.

6. Points for information and any other business

The PC-OC took note of the information provided by the Secretariat as regards:

- the entry into force on 1 May 2012 of the Third Additional Protocol to the European Convention on Extradition;
- the state of procedure of the adoption of the Fourth Additional Protocol to the European Convention on Extradition;
- the agenda of the 62nd meeting of the CDPC (29 May-1 June);
- the preparation of the 31st Council of Europe Conference of Ministers of Justice (Vienna, 19-21 September 2012) which will be held on the theme: “Responses of Justice to urban violence”.

The PC-OC also took note of the information provided by the representative of the Council of the European Union and in particular with regard to the negotiation of the draft Directive of the European Parliament and the Council on the European Investigation Order, of the draft Directive establishing minimum standards on the rights, support and protection of victims of crime and of the recent entry into force of the European Criminal Records Information System (ECRIS,) providing for the exchange of criminal records of EU nationals between member states.

APPENDIX XVII

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 2 April 2012 PC-OC Mod (2012) 01Rev
[PC-OC/Docs GM 2012/ PC-OC Mod (2012) 01E]
http://www.coe.int/tcj/

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

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

Working paper
Outline for draft guidelines on practical measures
to improve co-operation in respect of transfer of proceedings

Prepared by the Secretariat and updated further to the discussions held in the 13th meeting of the PC-OC-Mod (22-23 March 2012)

Draft guidelines on practical measures
to improve co-operation in respect of transfer of proceedings

inter alia in application of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and Article 6, paragraph 2 of the European Convention on Extradition[128]*.*

Background

The PC-OC decided at its 60th plenary meeting to send out a questionnaire to all delegations related to the transfer of proceedings and jurisdiction so as to gather information about the application of the relevant Council of Europe instruments and to assess the need for initiatives to improve their effectiveness or for the development of a new instrument in this field.

The following instruments and/or specific provisions were covered by the questionnaire

- The European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73)
- Laying of information under Article 21 of the European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)
- Transfer of proceedings as an alternative to extradition: the application of the 'aut dedere, aut judicare' principle under Article 6, paragraph 2, of the European Convention on Extradition (ETS No. 24)

The questionnaire, its introductory note and the compendium of replies are contained in Document PC-OC(2011)14. A summary of the replies is contained in Document PC-OC (2011) 16 rev.

The PC-OC considered, at its 61st plenary meeting, the replies to the questionnaire as well as the follow-up to be given and decided:

- to develop practical guidelines, if appropriate contained in a legal instrument, in respect of transfer of proceedings *inter alia* in application of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and Article 6, paragraph 2 of the European Convention on Extradition. The guidelines would *inter alia* address the following issues:
  - bilateral consultation between the requesting and the requested states before, during and after (feedback) the submission of requests for co-operation;
  - proportionality of the case with regard to the procedure initiated and the appropriateness of submitting the request;
  - ways to accelerate and facilitate procedures so as to avoid impunity while lowering costs and efforts involved (eg. by suggested time limits to react to a request; development of a model form for submitting requests, including a coversheet and/or a summary; reconsider translation requirements and burden of costs);
  - ways to deal with differences in national legislation as regards extraterritorial jurisdiction; admissibility of evidence, and mandatory and discretionary prosecution;

- to instruct its working group, the PC-OC Mod, to elaborate draft guidelines for consideration at its next plenary meeting;
- to keep the CDPC informed on future developments.

The PC-OC Mod discussed, during its 13th meeting, the outline for draft guidelines prepared by the Secretariat and decided to ask the Secretariat to amend the draft outline on the basis of the discussions held and to present it to the PC-OC plenary for consideration and further guidance. Due to a lack of time, the PC-OC Mod did not finish the discussions on the draft guidelines 4 and 5 under chapter B.

The PC-OC Mod also discussed the possible status of the guidelines. It considered the possibility of appending them to a recommendation or declaration of the Committee of Ministers to member states but

[128] *Including regional multilateral and bilateral agreements and treaties such as the Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings.*

decided to postpone further discussion on this point until the content and nature of the guidelines are defined.

General introduction (rationale of the guidelines)

In reply to the questionnaire on transfer of proceedings and jurisdiction sent out in 2011 to members of the PC-OC, many delegations reported practical difficulties in applying transfer of proceedings on the basis of the European Convention on the Transfer of Proceedings in Criminal Matters, of Article 21 of the European Convention on Mutual Assistance in Criminal matters and of Article 6, paragraph 2 of the European Convention on Extradition.

Any decision to transfer proceedings serves to determine which jurisdiction is in the best position to prosecute, in the interest of justice and to avoid impunity. However, each legal instrument mentioned above has its own legal procedure and conditions to be observed. In addition, each case is unique and any decision for transfer should therefore be taken on its individual facts and merits.

In taking these individual decisions, national authorities will observe the interest and good administration of justice which include not only legal considerations - the respect of the law, the relevant international legal instrument and fundamental principles of law (such as the *ne bis in idem* principle)- but also practical considerations (such as avoiding unnecessary costs).

Guidance on the legal considerations can be found in the explanatory reports to the provisions of the relevant legal instruments, as well as in the various recommendations of the Committee of Ministers related to them. Particular reference is hereby made to Recommendation R(79) 12 concerning the application of the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73). The texts of all relevant standards and reports are to be found on the website of the PC-OC (www.coe.int/tcj)

Guidance on the practical considerations, establishing a good practice for authorities so as to accelerate and facilitate procedures, to avoid unnecessary efforts or costs, is still lacking. The present guidelines aim therefore at facilitating the practical aspects of the application of the legal instruments and its specific provisions mentioned above by proposing a step by step check-list of procedure for the requesting and the requested state.

These guidelines address all practitioners involved in the application of the relevant conventions, including, but not only, the central authorities of States Parties.

One of the key elements for co-operation is the existence of a reliable list of contact points between Parties. The need for Parties to ensure a regular update of the list of officials involved in the practical application of the European Convention on Extradition and the European Convention on mutual assistance in criminal matters as well as of the network of single points of contact is hereby underlined.

Guidelines[129]

A. Guidelines to the Requesting State

When considering making a request concerning transfer of proceedings, laying of information etc, states should:

1. a Consider the proportionality of the case with regard to the procedure initiated as well as its appropriateness [and possibility of achieving the purpose of criminal proceedings in the other state that also has jurisdiction to prosecute the case,] taking into account the need to combat impunity, the efficiency of proceedings and the specific requirements of the convention to be applied .

[129] *The guidelines are drafted in very general terms. Is it necessary to add technical details or requirements for each type of request (transfer of proceedings, laying of information under MLA, or Art 6§2 of the extradition convention)?.*

[The following should be taken into account for example:
- whether it is not possible to request extradition or issue a European Arrest Warrant (in the EU)
- results of an international search for the person without an arrest warrant under Article 98 of Schengen Implementing Treaty (for states of Schengen co-operation)
- whether it is not possible or effective to solve the case by using MLA requests (temporary transfer of a person to the requesting state, use of videoconference, ...)
- whether the majority of the criminality occurred in the jurisdiction of the other state
- whether it is practicable to deal with all the prosecutions in one jurisdiction in cases where the criminality occurred in several jurisdictions,
- the willingness and ability of witnesses to travel and give evidence in the other jurisdiction,
- the interests of victims and whether they would be prejudiced if any prosecution were to take place in one jurisdiction rather than another - such consideration would include the possibility of victims claiming compensation.]

[b. Transfer of proceedings to another state might notably be considered appropriate if that state can achieve the purpose of criminal proceedings more effectively. In this context account should be taken of the cases mentioned by Article 8 of the European Convention on the Transfer of Proceedings in Criminal Matters[130]:

a if the suspected person is ordinarily resident in the requested state;
b if the suspected person is a national of the requested state or if that state is his state of origin;
c if the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested state;
d if proceedings for the same or other offences are being taken against the suspected person in the requested state;
e if it considers that transfer of the proceedings is warranted in the interests of discovering the truth and in particular that the most important items of evidence are located in the requested state;
f if it considers that the enforcement in the requested state of a sentence, if one were passed, is likely to improve the prospects for the social rehabilitation of the person sentenced;
g if it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting state and that his or her presence in person at the hearing of proceedings in the requested state can be ensured;
h if it considers that it could not itself enforce a sentence, if one were passed, even by having recourse to extradition, and that the requested state could do so.]

2. Before submitting the request, proceed, if necessary, with an informal preliminary consultation (for example by phone, e-mail or videoconference) with the requested state so as to discuss:
- the appropriateness and potential successfulness of the request envisaged
- ways to deal with differences in national legislation (eg. extraterritorial jurisdiction; admissibility of evidence, mandatory or discretionary prosecution.)[131] ;
- the timeframe and practicalities of the co-operation (contact persons, special elements to be included in the request, translation requirements and costs etc).

3. Submit the request, taking into account the outcome of the informal consultation where this applies, using, for example, the model form presented in the appendix to these guidelines.

4. If considered necessary by either the requested or the requesting state, have consultations on the progress of, or any difficulties raised by the request (for example to ensure that the request is clearly understood, complete and that evidence is admissible and agree on a timeline/date for decision on the request).

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[130] The PC-OC Mod felt that this issue needed further discussion on how to adapt the criteria to different conventions and other requirements.

[131] It might be considered that the guidelines, instead of proposing a case by case discussion on differences in legislation, contain some more general considerations on how to deal with issues such as extraterritorial jurisdiction, admissibility of evidence, and mandatory or discretionary prosecution.

B. Guidelines to the Requested State

In order to facilitate co-operation the requested state should:

1. If the requesting state asked for an informal preliminary consultation as mentioned under Chapter A, guideline 2, provide clear indications on the legal and practical issues of importance to a successful and rapid follow-up to the request;

2. Once the request has been received, confirm receipt without delay, while specifying the files received and indicating the contact details of the person in charge of the request/ the case manager;

3. If a request received is unclear or incomplete, consult the requesting state without delay.
   Facilitate informal consultation with the requesting state, for example by promoting direct contact between prosecutors involved in a particular case;

4. Take all possible measures to ensure that a decision on [the acceptance of] the transfer of proceedings to the judicial authorities is taken within a reasonable delay /the timeframe agreed. If unforeseen delays occur, inform the requesting country accordingly.

5. Once the decision has been taken:
   - to accept the request for transfer of proceedings, keep the requesting state informed on the follow-up of the case by the judicial authorities;
   - to reject the request, inform the requesting state about the reasons.

APPENDIX XVIII

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 15 November 2011 CDPC (2011) 20
cdpc/docs 2011/cdpc (2011) 20 - e

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

TRANSNATIONAL AND ORGANISED CRIME
Possible activities under the aegis of the European Committee on Crime Problems (CDPC)

Document prepared by the CDPC Secretariat
Directorate General I – Human Rights and Rule of Law

CDPC website: www.coe.int/cdpc
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Introduction:

1. Transnational and organised crime poses a direct threat to the internal security of all European states. By its very nature, this kind of crime, mostly transnational in character, usually cannot be efficiently suppressed by each state on its own, but requires a targeted and comprehensive approach, including through international co-operation mechanisms.

2. In response to this threat, European states have co-operated in the combat against transnational and organised crime using the framework of various international and supranational fora. Many of these frameworks, e.g. the UNODC, Interpol and the EU, have already proven their worth, however, a truly pan-European framework and a common strategic approach by all European states to tackling transnational and organised crime are arguably still lacking.

3. On the other hand, criminal organisations and individual criminals, from both within and outside Europe, have been making steady progression demonstrating their ability to forge alliances and operate across borders in all parts of Europe, thus further complicating the detection work and subsequent criminal prosecution in individual member states. As an example, Yakuza (Japanese mafia) gangs are known to have sub-contracted criminals based in the Western Balkans region to plan and execute robberies in London and Paris[132].

4. The Council of Europe is ideally/uniquely placed to deal with this problem/threat with the European Committee on Crime Problems (CDPC) well-established in the field of criminal law co-operation and capable of addressing the many-facetted issues related to transnational and organised crime **in a pan-European context**.

5. Since 1958 the CDPC has contributed to the development of international criminal law, drafting a number of important legal instruments in the fight against transnational and organised crime. Moreover, criminal law issues have recently been identified by the Committee of Ministers as one of the top priorities in the work programme of the Council of Europe for the years to come[133].

6. In bringing together all the member states of the Council of Europe, the CDPC could lead the fight against transnational and organised crime, in close co-ordination with strategic partners, in particular the European Union and its various bodies, the United Nations and Interpol.

A common objective: a more secure and just European continent

7. Since its creation in 1949 the Council of Europe has been dedicated to the promotion human rights, democracy and the rule of law among its member states and beyond.

8. As stated above, transnational and organised crime constitutes a threat to the internal security of Europe and contributes significantly to undermining the rule of law and compromising the integrity of democratic institutions.

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[132] Cf. H. Brady: "The EU and the fight against organised crime", Centre for European Reform, April 2007, p. 31.

[133] • ***Threats to the Rule of Law***
(…) The new programme line *Organised Crime, Money Laundering – MONEYVAL – Terrorism, Cybercrime, Trafficking in Human Beings – GRETA – and Counterfeiting of Medical Products* develops an integrated approach and response to major threats to the rule of law building on the significant set of standards and follow-up mechanisms it has developed over the years. In these areas, the Organisation will pursue its active partnerships with other international organisations including UN, UNODC, OECD, FATF, EU, OSCE and OAS. (…)
• ***Development of Pan-European Common Standards and Policies***

(…) Under the programme line *Development and Implementation of Common Standards and Policies* activities will aim either at updating existing standards or addressing new challenges such as for instance, in the criminal field, trafficking in organs, tissues and cells.

9. It has also a negative impact on national economies, particularly in the current context where states are facing the consequences of a global economic crisis. Significant amounts of money are lost through tax evasion, money laundering and illegal economic markets, not to mention the indirect economic harm caused by organised crime as criminal activity can undermine the credibility and competitiveness of a state's financial and commercial sectors.

10. Furthermore, transnational and organised crime can have a direct impact on the lives of ordinary law-abiding citizens and businesses, creating a feeling of insecurity and contributing to social tension. There are thus many important reasons for the Council of Europe, taking into account its core mandate/values, to engage actively in the fight against transnational and organised crime with a view to creating a more secure and just Europe for its citizens.

11. Given the fact that some other international and supranational fora are already engaged in combating transnational and organised crime, the aim of the Council of Europe should be to identify and carry out activities which are compatible with, and complementary to, those of the aforementioned fora, acting as a bridge-builder, creating synergies and promoting co-operation across Europe.

Proposed range of activities

12. The proposed range of activities is the following:

    - the identification of current and future transnational and organised crime issues;
    - the development, in close co-ordination with strategic partners, of pan-European strategies and possible common policies on preventing and combating transnational and organised crime;
    - the collection, assessment and exchange of best practices in the prevention of, and fight against, transnational and organised crime from all Council of Europe member states;
    - the preparation and dissemination of an annual report to the Committee of Ministers on trends and developments in transnational and organised crime in the Council of Europe member states with recommendations as to possible action by the Council of Europe (in particular the elaboration of new binding/non-binding legal instruments, revision of existing legal instruments, the organisation of seminars or conferences);
    - the preparation and dissemination of special thematic reports focusing on specific types of transnational and organised crime;
    - the preparation of awareness-raising seminars and conferences on various aspects of transnational and organised crime.

13. Although some of these activities may already be carried out by some European states in other fora, in particular the EU, none of them are currently carried out on a comprehensive pan-European level.

An ad-hoc committee on transnational and organised crime

14. Taking into account the existing strong political commitment of member states regarding specific issues related to "transnational and organised crime", the CDPC should take a step further by providing a global vision of the dimension of organised crime which would strengthen the power of governments to fight the scourge of crime as a universal problem. The regular assessment of the global security climate in relation to transnational organised crime, in the European region in particular, would inevitably strengthen and widen the "leading and indispensable steering" role of the CDPC in dealing with specific forms of organised criminal networks involved, for example, in drug trafficking, money laundering, trafficking in human beings, corruption, terrorism, or financial fraud.

15. The challenges and threats posed by the changing nature of transnational organised crime jeopardize the health and future of all countries. Organised crime and its current and future trends in the European region could be analysed on a worldwide/global scale so that concrete strategies could be set up in order to assist member states in tackling this phenomenon.

16. To undertake these activities, the Secretariat proposes to establish a restricted ad-hoc committee of experts on transnational and organised crime, reporting directly, as a consultative body, to the CDPC.

17. The restricted ad-hoc committee should be composed of:

    - 12 representatives of the member states' governments with practical experience in the fight against transnational and organised crime;
    - 2 scientific experts appointed by the Secretary General, at least one of whom should be a specialist in criminology;
    - representatives of the European Commission, Europol and Eurojust, the United Nations Office on Drugs and Crime (UNODC) and Interpol as observers. In addition, other relevant international organisations may be invited to participate as observers, if needed;
    - representatives of other relevant Council of Europe committees and bodies as observers;
    - representatives of observer states and states having acceded to the relevant Council of Europe legal instruments as observers.

18. The restricted ad-hoc committee would/should meet two or three times a year, each meeting lasting for three days. If needed, the ad-hoc committee may decide to invite representatives of

academic research institutions with particular expertise in the field to make presentations and participate in debates as observers.

19. The restricted ad-hoc committee would/should co-ordinate its work with the aforementioned strategic partners (EU, UNODC, Interpol) with a view to assuring compatibility and complementarity of activities and avoid any unnecessary overlaps.

Expected benefits and added value for the Council of Europe and its member states

20. The results of the work of the restricted ad-hoc committee, in particular its annual and thematic reports, should be transmitted to the CDPC for further discussion and finalisation. The finalised reports together with the comments of the CDPC should be submitted to the Committee of Ministers with view to contributing to **the identification of priorities and the formulation of comprehensive policies and strategies by the Organisation in the field of transnational and organised crime**.

21. In addition, member states faced with specific challenges from transnational and organised crime would benefit from the promotion and **exchange, on a pan-European level, of best practices** and information on prevention, detection and investigation developed by other member states.

22. Moreover, co-operation in the framework of the Council of Europe would very likely act as a **catalyst for trust building and improving everyday co-operation** between the law enforcement and judicial authorities of member states, where such close co-operation does not already exist.

23. Finally, the Council of Europe could provide a **level playing field** for co-operation at a strategic level not only between the EU and non-EU member states of the Council of Europe, but also, and just as significantly, by providing the possibility of **involving key non-European states** in particular observer states and non member states parties to legal instruments of the Council of Europe in the field of criminal law.

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Appendix

Roadmap

1. Following the decision taken by the Plenary at its meeting in June 2010, the Bureau examine, at its meeting in October, the document "Transnational and organised crime - Possible activities under the aegis of the European Committee on Crime Problems (CDPC)" prepared by the Secretariat and instruct the Secretariat to amend it according to the Bureau's discussions and comments – **October 2011**.

2. The revised above-mentioned document is presented to the CDPC Plenary in December for examination and approval – **December 2011**

3. A possible preliminary draft terms of reference of a restricted Committee of Experts on Transnational and Organised Crime (PC-SOC) is prepared by the Secretariat and presented to the CDPC Bureau for examination – **March 2012**

4. A possible draft terms of reference of a restricted Committee of Experts on Transnational and Organised Crime (PC-SOC) is prepared by the Secretariat and presented to the CDPC Plenary for examination and final approval – **June 2012**

5. The draft terms of reference of a restricted Committee of Experts on Transnational and Organised Crime (PC-SOC) is presented to the Committee of Ministers, together with the entire CDPC report of the June plenary meeting, for approval – **October/November 2012**

6. The first meeting of the restricted Committee of Experts on Transnational and Organised Crime (PC-SOC) takes place – **February/March 2013**.

APPENDIX XIX

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 9 April 2012

DRAFT TERMS OF REFERENCE
COMMITTEE OF EXPERTS
ON
TRANSNATIONAL ORGANISED CRIME
1 January 2013 - 31 December 2013

DRAFT TERMS OF REFERENCE

Name of Committee**: Committee of experts on Transnational Organised Crime**

Category: subordinate body

Set up by the Committee of Ministers under Article 17 of the Statute of the Council of Europe and in accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods

Terms of Reference valid from 1 January 2013 until 31 December 2013. The Committee of Ministers will consider the need for renewing these Terms of Reference for a new period of two years, before their expiry on 31 December 2013.

Main tasks

2. Taking into account the strong political commitment of member states with regard to preventing and combating transnational organised crime and the serious risks to human rights, democracy and the rule of law posed by transnational organised crime, there is a need for the Council of Europe to provide an inter-governmental platform in order to enable a global, overall assessment of the character and dimensions of transnational organised crime in a pan-European context and the development of common policies and exchange of best practices with regard to the prevention and combating thereof. Accordingly, a restricted Committee of Experts on Transnational Organised Crime shall be established under the authority of the European Committee on Crime Problems (CDPC). This Committee shall, in particular, carry out the following tasks:

    - the identification of relevant and emerging transnational organised crime issues which require criminal law response ;
    - the development, in close co-ordination with strategic partners, of pan-European strategies, and where possible, common policies on preventing and combating transnational organised crime;
    - the collection, assessment and exchange of best practices in the prevention of, and fight against, transnational organised crime from all Council of Europe member states;
    - the preparation of a White Paper for consideration by the Committee of Ministers, after validation by the CDPC, on selected trends and developments in transnational organised crime in the Council of Europe member states which may be considered as priority areas, focusing on identifying possible gaps in the criminal law cooperation, taking into account the legal framework available to all member states, and clarifying where additional action by the Council of Europe would be necessary, including an assessment of the financial and organisational consequences for member states
    - The preparation of a user friendly reference tool for practitioners in member states, containing information about all relevant activities undertaken by the Council of Europe in the field of combating transnational organised crime as well as a global overview of relevant legal and other texts adopted by the Organisation.

7. In discharging its tasks, the Restricted Group of Experts shall consider the previous

and current work carried out in this field by the relevant international and supranational organisations, notably the European Union, and the previous work of the Council of Europe in this area.

8. The Restricted Group of Experts shall report to the Bureau of the CDPC on a regular basis. The Bureau of the CDPC may issue instructions to the Restricted Group of Experts with regard to its work.

Pillar / Sector / Programme (s)

Pillar : Rule of Law.
Sector : Common standards and policies.
Programme : Development and implementation of common standards and policies.

Expected result (s)

Expected result 1 : A White Paper on selected trends and developments in transnational organised crime in the Council of Europe member states which may be considered as priority areas, focusing on identifying possible gaps in the criminal law cooperation taking into account the legal framework available to all member states, and clarifying where additional action by the Council of Europe would be necessary, including an assessment of the financial and organisational consequences for the member states, is prepared.

Expected result 2 : A user friendly reference tool for practitioners in member states, containing information about all relevant activities undertaken by the Council of Europe in the field of combating transnational organised crime as well as an overview of relevant legal and other texts adopted by the Organisation is prepared.

Composition

Members:

16 representatives of member states of the highest possible rank with recognized expertise in the field of transnational organised crime, criminal law and criminology appointed by the Steering Committee on Crime Problems (CDPC) on a proposal of the respective member states and 1 scientific expert appointed by the Secretary General. The composition of the Committee will reflect an equitable geographic distribution amongst the member states.

The Council of Europe will bear the travel and subsistence expenses of the 16 representatives and of the scientific expert.

Other member states may designate representatives without defrayal of expenses.

Each member of the committee designated by Governments of member states shall have one vote. The scientific expert appointed by the Secretary General shall not have the right to vote.

Participants:
The following may send representatives without the right to vote and at the charge of

their corresponding administrative budgets:

- The Parliamentary Assembly
- PC-OC
- MONEYVAL
- GRECO
- GRETA
- T-CY
- CODEXTER
- The Pompidou Group

The following may send representatives without the right to vote and without defrayal of expenses:

- The European Union;
- the states with observer status with the Council of Europe (Canada, Holy See, Japan, Mexico, United States of America);
- United Nations Office for Drugs and Crime (UNODC);
- International Criminal Police Organization (INTERPOL).

Observers:

- relevant International Organisations ;

- civil society and representatives of professional communities (to be determined).

Working methods

Plenary meetings:
16 members (+ 1 scientific expert), 3 meetings, 2 days

Meetings per year	Number of Days	Members	Plenary	Secretariat (A, B)
3	2	16 + 1 = 17		0.5 A, 0.5 B

APPENDIX XX

Parliamentary **Assembly**
Assemblée parlementaire

Parliamentary Assembly
Assemblée parlementaire
COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Doc. 12685

18 July 2011

The necessity to take additional international legal steps to deal with sea piracy

Recommendation 1913 (2010)

Reply from the Committee of Ministers

adopted at the 1118th meeting of the Ministers' Deputies (6 July 2011)

1. The Committee of Ministers has carefully examined Parliamentary Assembly Recommendation 1913 (2010) on "The necessity to take additional international legal steps to deal with sea piracy". It has brought the recommendation to the attention of their governments and has also communicated it to the European Committee on Crime Problems (CDPC) and to the Committee of Legal Advisors on Public International Law (CAHDI), for information and possible comments.[1]

2. The Committee of Ministers agrees that it is necessary for the international community to combat piracy effectively as it is seriously threatening shipping traffic and the safety of people and goods. It considers that the United Nations remains the most appropriate institution to discuss the issue of piracy and its legal framework, given the global scope of the law of the sea.

3. The Committee underlines the importance of the existing legal instruments in this field, in particular the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS). Articles 100 to 111 of the convention provide mechanisms of dissuasion and rules on the legal action to be taken following the arrest of persons suspected of piracy on the high seas. The UNCLOS, a large part of which reflects customary law, is the legal reference in this field given that 162 states or entities, 42 of which are Council of Europe member states, are party to it. The Committee of Ministers encourages those member states which are not yet party to consider ratifying or acceding to this instrument. It also draws member states' attention to the importance of bringing their national legislation on combating piracy into line with the related provisions of the UNCLOS so as to enable, as appropriate, the exercise of national criminal jurisdiction.[2]

4. The Committee of Ministers notes that experience in the fight against piracy has shown that there are a number of difficult legal issues involved in case of anti-piracy measures taken by naval ships far away from their home state. Furthermore, protection of piracy victims should be duly considered.

5. Concerning the specific situation in Somalia, mentioned in the Parliamentary Assembly's recommendation, the Committee of Ministers evokes the resolutions taken in this context[3] by the UN Security Council pursuant to Chapter 7 of the UN Charter, and in particular welcomes the Security Council's latest Resolution 1976 (2011). It further notes that the UN Security Council has expressed its intention to remain seized of this matter. The Committee also welcomes the work of the Contact Group on Piracy off the Coast of Somalia, including its Working Group 2 on legal issues, as well as the report of the United Nations Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia[4] and the appointment in the context of that report of Mr Jack Lang as Special Adviser on Legal Issues related to Piracy off the Coast of Somalia. As noted by the President of the Security Council, the report provides a solid base for future work in order to enhance international, regional and national co-operation in bringing pirates to justice. The Committee of Ministers also notes the recent adoption of the report of the United Nations Secretary General on the modalities for the establishment of specialised Somali anti-piracy courts.

6. The Committee of Ministers observes furthermore that UNODC runs assistance programmes in the region, in particular in favour of Kenya, Seychelles and the Puntland and Somaliland regions of Somalia. Kenya and Seychelles also benefit from assistance provided by the European Union and the states that have concluded transfer arrangements with them. The assistance provided by the European Union and these states is principally delivered under the UNODC Counter-Piracy Programme, although some of them also provide substantial assistance on a bilateral basis. The Committee of Ministers notes that sustainable financing is needed to maintain efficiency of the Counter-Piracy Trust Fund's important work, and encourages member states to take active participation in these efforts.

7. The Committee of Ministers notes with grave concern that, according to UN findings, Somali sea piracy has developed links with money laundering and organised crime on a transnational level.[5] The Committee of Ministers is well aware of and underlines the importance of strengthening international co-operation in launching prosecutions against persons suspected of piracy, as well as those who illicitly plan, organise, finance or unlawfully profit from piracy. It notes that important initiatives have already been taken at international level, as reflected also in the recommendation of the Assembly, such as the proposed initiative to establish a special mechanism for prosecution of persons suspected of sea piracy. The Committee of Ministers encourages member states to take an active part in these initiatives, and in their implementation, as well as to conclude further bilateral or regional agreements or to develop joint strategies, while taking into account existing international law and the demands of national legal systems.

8. In light of the UN's leading role on the subject of sea piracy and the present budgetary situation in the Council of Europe, the Committee of Ministers will not at this stage instruct the steering committees concerned to undertake any major work in this field or set up any new structure for this purpose. However, it will continue, as will the CAHDI and, as regards criminal law matters, the CDPC, to follow the situation closely and if further issues arise on this subject, the Committee of Ministers will invite these committees to consider possibilities for co-ordinating the position of Council of Europe member states on these issues at the international level and possible other steps to aid the international effort of combating sea piracy.

9. In relation to the treatment of suspected pirates, the Committee of Ministers reaffirms that Council of Europe member states are required to fulfil their obligations under different international human rights instruments, in particular the European Convention on Human Rights. These concern, *inter alia*, the right to a fair trial, the prohibition of torture and inhuman or degrading treatment, the non-application of the death penalty and respect for the rights of detainees. In this regard, the Committee of Ministers refers to the well-established case law of the European Court of Human Rights.[6]

Appendix 1 to the reply

Comments by the European Committee on Crime Problems (CDPC)

1. At its 1085th meeting on 26 May 2010, the Committee of Ministers' Deputies communicated the Parliamentary Assembly's Recommendation 1913 (2010) on "The necessity to take additional legal steps to deal with sea-piracy" to the CDPC for information and possible comments.

2. The CDPC welcomes the opportunity to provide an opinion on the important issue of combating sea-piracy.

3. The Committee notes that there exist various international legal instruments and guidelines dealing with the issue of prevention and combating of acts of violence against ships on the high seas or their passengers: the International Maritime Organisation's (IMO's) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ('SUA Convention' of 1988 and the 2005 Protocol thereto; the United Nations' ('UN') Convention on the Law of the Sea ('UNCLOS') of 1982, articles 101-107, as well as the IMO's Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (Resolution A.922(22)) specifically dealing with piracy in the waters off Somalia there is the ('IMO') Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden.

4. Both the United Nations Security Council and the Contact Group on Piracy off the Coast of Somalia deal with sea-piracy and related issues on a regular basis. In his report to the Security Council of 26 July 2010 (doc. S/2010/394) on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, the Secretary General of the UN has outlined a number of options concerning the establishment of regional or international tribunals to try persons alleged to have committed acts of piracy. The Committee also notes that UNODC runs assistance programmes in the region, in particular in favour of Kenya, Seychelles and the Puntland and Somaliland regions of Somalia. Kenya and Seychelles also benefit from assistance provided by the European Union and the states that have concluded transfer arrangements with them. The assistance provided by the European Union and these states is principally delivered under the UNODC Counter-Piracy Programme, although some of them also provide substantial assistance on a bilateral basis.

5. The Committee further notes the existence of the Regional Co-operation Agreement on Combating Piracy and Armed Robbery against Ships in Asia ('RECAAP').

6. The Committee stresses that bringing alleged pirates to justice is an important element of the overall efforts of the international anti-piracy coalition. To ensure, without delay, criminal investigation and prosecution of persons suspected of committing acts of piracy and of financing or otherwise assisting in the preparation of such acts would enhance the effectiveness of combating piracy. Impunity, on the contrary, as in any other criminal activity, encourages more individuals to get involved.

7. Some CDPC delegations consider that existing international instruments are for now sufficient, and that what it is needed is more action-orientated tactics and, for those countries facing specific legal problems, a thorough review of national relevant laws with the aim of assessing whether or not those existing instruments are properly implemented on a more global scale than that possible within Council of Europe member states' geographic scope.

8. The Committee is of the opinion that a further review is required in order to determine if existing ad hoc arrangements to deal with piracy in national and international waters, including the aforementioned RECAAP, should be further supported by a detailed and consistent international legal framework prescribing the criminalisation of acts of piracy at sea and providing a firm basis for co-operation between participating states with regard to criminal law and administrative measures in order to effectively combat piracy at sea, including by ensuring that alleged pirates are brought to justice.

9. In the view of the Committee, the current international legal framework could at the very least be examined to determine the extent to which it may be insufficient, with particular regard to the following:

• While UNCLOS provides for a clear definition of acts of piracy, it does not require states to criminalise acts of piracy or armed robbery;

• UNCLOS also does not contain any provisions on international co-operation in the fight against piracy or armed robbery;

• UNCLOS, however, includes a provision allowing other states than the flag state to seize a pirate ship or a ship taken by pirates and arrest and prosecute the pirates;

• The SUA Convention and its 2005 Protocol are not specifically directed at acts of piracy for private ends (as defined in article 101 of UNCLOS); not all acts of piracy can be considered to fall under the provisions of the SUA Convention and its 2005 Protocol;

• The 2005 SUA Protocol foresees, where applicable, a mechanism to request a flag state's authorisation to stop, board and search a ship, its cargo and persons on board and a mechanism to request the flag state's consent to exercise jurisdiction including seizure, forfeiture, arrest and prosecution;

• There may be uncertainty as to the application of the SUA Convention in the fight against piracy at sea and in particular the applicability of its provision on jurisdiction in case pirates are captured by warships patrolling the sea.

10. In addition, experience in the fight against piracy has shown that there are a number of difficult legal issues involved in case of anti-piracy measures taken by naval ships far away from their home state. In particular, this applies to the questions of detention of pirates (detention periods, needs and possibilities for judicial review) and transfer of pirates to other states that may agree to accept the detained persons for the purpose of criminal investigation and prosecution.

11. The CDPC is of the opinion that an in-depth review should be undertaken on the basis of reliable data and in close co-operation with other relevant international organisations and experts in the field to evaluate current legal difficulties that arise in the fight against piracy and that may call for a comprehensive international criminal law instrument against piracy at sea.

12. The Committee considers on a preliminary basis that such an instrument may deal with the following elements regarding international criminal law:

• provide a clear definition of 'piracy at sea';

• criminalise acts of piracy and those closely related to piracy;

• establish a clear jurisdictional framework for the efficient international co-ordination of policing, investigation, apprehension, transfer or extradition and prosecution in piracy cases;

• where necessary, establish means to protect suspects in case they are being transferred to third countries for the purpose of criminal prosecution, as well as for victims and witnesses in piracy cases;

• establish rules on the collection of evidence that will facilitate their admissibility.

13. The Committee believes that a small expert team should be set up, working under the auspices of the CDPC in close co-operation with the CAHDI and the Committee of Ministers, to further study the needs for such an international legal instrument and the feasibility for its development in the framework of the Council of Europe.

Appendix 2 to the reply

Comments by the Committee of Legal Advisors on Public International Law (CAHDI)

1. On 26 May 2010, the Ministers' Deputies communicated Parliamentary Assembly Recommendation 1913 (2010) to the Committee of Legal Advisors on Public International Law (CAHDI) for information and possible comments by 20 September 2010.

2. In its recommendation, the Assembly recommends that the Committee of Ministers, with the help of a newly mandated expert group or through an already existing mechanism:

- conduct an in-depth study on member states' practice in dealing with suspected pirates and the state of national criminal law concerning the repression and prosecution of acts of piracy;

- prepare, according to existing international guidelines, a code of conduct on how to deal with suspected pirates in full compliance with international human rights standards in order to ensure the harmonisation of national criminal legislation on the subject of combating sea piracy;

- promote the conclusion of international agreements clearly specifying state responsibility for the prosecution of pirates and the elaboration of common procedures to be followed for this purpose;

- seek appropriate ways in which the existing international legal framework can be adapted to face current needs of policing at sea and consider creating, provided all existing disadvantages in this field are removed, a special mechanism (international or with international participation) for the prosecution of persons suspected of piracy.

The Assembly further recommends that the Committee of Ministers enhance co-operation in combating sea piracy with other international organisations, including the United Nations, the African Union, NATO and the European Union, with a view to eradicating it from the waters off the Somali coast, while ensuring full observance of the requirements stemming from the European Convention on Human Rights and other pertinent international legal instruments.

3. The CAHDI examined the above-mentioned recommendation at its 40th meeting (Tromsø, 16-17 September 2010) and adopted the following comments on aspects of the recommendation which are of particular relevance to the mandate of the CAHDI (public international law).

4. From the outset, the CAHDI agrees that it is necessary for the international community to combat piracy effectively as it is seriously threatening shipping traffic and the safety of people and goods. The CAHDI takes note of the work of the Contact Group on Piracy off the Coast of Somalia, including its Working Group 2 on Legal Issues, as well as the recent report of the United Nations Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia[7] and the appointment of Mr Jack Lang as Special Adviser on Legal Issues related to Piracy off the Coast of Somalia. As noted by the President of the Security Council, the report provides a solid base for future work in order to enhance international, regional and national co-operation in bringing pirates to justice. The CAHDI considers that, as in the past, the United Nations remains the most appropriate institution to discuss the issue of piracy and its legal framework, given the global scope of the law of the sea.

5. The CAHDI first wishes to underline the importance of the existing legal instruments in this field, in particular the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS). Articles 100 to 111 of the Convention provide mechanisms of dissuasion and rules on the legal action to be taken following the arrest of persons suspected of piracy on the high seas.

6. The UNCLOS, a large part of which reflects customary law, is the legal reference in this field given that 160 states or entities, 42 of which are Council of Europe member states, are party to the Convention.[8] The CAHDI therefore recommends that the Ministers' Deputies invite the Council of Europe member states which have not yet done so to consider the ratification or accession to this instrument. The Committee also draws states' attention to the importance of bringing their national legislation on combating piracy into line with the related provisions of the UNCLOS so as to enable, as appropriate, the exercise of national criminal jurisdiction.

7. Furthermore, the CAHDI notes the relevance of the 1958 Geneva Convention on the High Seas – which defines piracy in almost identical terms to those used in the UNCLOS – to states which are not party to the UNCLOS. Certain other international texts may also be relevant to the fight against piracy. In this context, the CAHDI refers to the 1988 International Maritime Organisation Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention), the 1979 International Convention against the Taking of Hostages, the 2000 United Nations Convention against Transnational Crime and the Djibouti Code of Conduct to repress acts of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden.

8. Concerning the specific situation in Somalia, mentioned in the Parliamentary Assembly's recommendation, the CAHDI evokes the resolutions taken in this context[9] by the UN Security Council pursuant to Chapter 7 of the UN Charter. The CAHDI further takes note of the fact that the UN Security Council has expressed its intention to remain seized of this matter.

9. The CAHDI underlines that Council of Europe member states are required to fulfil their obligations under different international human rights instruments, in particular the European Convention on Human Rights. These concern, *inter alia*, the right to a fair trial, the prohibition of torture and inhuman or degrading treatment, the non-application of the death penalty and respect for the rights of detainees. In this regard, the CAHDI refers to the well-established case law of the European Court of Human Rights.[10]

10. Finally, the CAHDI would underline the importance for states to strengthen international co-operation in launching prosecutions against persons suspected of piracy. In this connection, it notes that important initiatives have already been taken at international level and that these are reflected in the recommendation of the Parliamentary Assembly. Moreover, the Committee can but encourage member states and international organisations to conclude further bilateral or regional agreements or to develop joint strategies, while taking into account the existing international law and the demands of national legal systems.

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[1] Comments received from these committees are attached to the present reply.

[2] The Committee of Ministers notes the relevance of the 1958 Geneva Convention on the High Seas – which defines piracy in almost identical terms to those used in the UNCLOS – to states which are not party to the UNCLOS. Certain other international texts may also be relevant to the fight against piracy, such as the 1988 International Maritime Organisation (IMO) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention), the 1979 International Convention against the Taking of Hostages, the 2000 United Nations Convention against Transnational Crime, the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (Resolution A.922(22)) and the Djibouti Code of Conduct to repress acts of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden.

[3] Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011) of the UN Security Council and Statement by the President of the Security Council S/PRST/2010/16 of 25 August 2010.

[4] Reference S/2010/394.

[5] Resolution 1950 (2010) of the UN Security Council, paragraph 15-17.

[6] See, *inter alia*, recently Medvedyev and others v. France judgment of 29 March 2010 [GC], No. 3394/03, paragraphs 64-65.

[7] Reference S/2010/394.

[8] State of signatures and ratifications at the date of 16 September 2010. See following link for further details: http://treaties.un.org.

[9] Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010) of the UN Security Council and Statement by the President of the Security Council S/PRST/2010/16 of 25 August 2010.

[10] See, *inter alia*, recently Medvedyev and others v. France judgment of 29 March 2010 [GC], No. 3394/03, paragraphs 64-65.

APPENDIX XXI

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 8 March 2012 CDPC (2012) 2

EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

ALTERNATIVE MEASURES TO IMPRISONMENT

Explicative paper by Belgium

CDPC website: www.coe.int/cdpc
CDPC e-mail: dgi.cdpc@coe.int

During the plenary session, the CDPC requested the delegations to come up with proposals on topics for the Conference of the ministers of justice to be held in 2011. Among the topics that could be discussed during that event, the issue of "quasi compulsory measures" in the area of criminal justice would constitute an interesting subject, in our opinion.

1) The notion of "quasi-compulsory measures":

In general, the expression "(formal) compulsory measures" is used when someone is actually forced to undergo a treatment. On the contrary, the wording 'quasi-compulsory measures' is often used as a hybrid concept which lies between voluntary and compulsory undergoing of a treatment. Both compulsory and quasi-compulsory measures pursue a twofold objective: the amelioration of the situation of a person and the decrease of the troubles that this person causes to the community.[134]

However, a slight difference exists between both notions. Indeed, under a "quasi compulsory" measure, the person actually has a choice to make even though it is merely a "constrained" one. Indeed, the choice is constrained by the fact that each decision is attached to a different consequence, which might eventually influence the final decision.

For instance, when one chooses to undergo a specific treatment and to comply with the conditions set out under that treatment, he/she is offered a "reward". That "reward" consists, for example, of not applying more stringent measures or avoiding further prosecution or not implementing a sanction, etc. When the "quasi-compulsory" measure successful is, the measure originally provided for is eventually suppressed.
On the contrary, when one chooses not to undergo a treatment or does not comply with conditions provided for (e.g. Disrespect of applicable rules, relapse into addiction, abandonment of the treatment for some time, etc.) he/she will be subjected to a sanction which mostly consists of adopting a new measure or implementing a penalty already provided for.

Thus, the nature of a 'non-compulsory measure' consists of the fact that negative consequences can be avoided when a person chooses to accept the alternative measure (usually, a treatment) and actually does something to change his/her situation or behavior.[135]

2) Proposal:

The issue of "quasi-compulsory measures" is increasingly on the agenda in the area of criminal justice. This trend reflects a wider tendency towards increased social control by the authorities.

The application of "quasi-compulsory measures" raises various issues that could lead to an interesting debate at the political level. The issues/questions which could be discussed are the following:

- Does the concept of "quasi-compulsory measures" exist in the member states?
- If yes, which institutions/mechanisms play a role in providing the "quasi-compulsory" treatment?
- What types of "quasi-compulsory" measures, if any, exist in the Member States?
- Is it effective to impose a treatment to a person who does not want to undergo it?
- What are the conditions for a person to undergo a "quasi-compulsory" treatment?
- What would be the legal basis for the adoption of a "quasi-compulsory measure"?
- What are/should be the legal safeguards to put "quasi-compulsory measures" into a frame?
- What are the good practices of cooperation between the justice authorities and the welfare/assistance organisations in Member states?

[134] A. STEVENS et al., "On coercion", *International Journal of Drug Policy* 2005, 207-209

[135] M. VAN OOYEN-HOUBEN, D. ROEG, C.H. DE KOGEL en M. KOETER, "Zorg onder dwang en drang. Een verkenning van mogelijkheden en grenzen", *Justitiële verkenningen* 2008, 26-27

APPENDIX XXII

Strasbourg, 26 April 2012

Council of Europe Transversal Programme on Gender Equality

Gender equality rapporteurs and their role

Information note prepared by the Gender Equality team,
Gender Equality and Human Dignity Department, DGI

Introduction – the transversal programme

1. The Transversal Programme on Gender Equality has been launched by the Secretary General to improve the visibility and impact of the Council of Europe's work on gender equality in the member states ; to move from legal equality to real equality as member states were called upon to do by the Committee of Ministers in its Declaration, « Making Gender Equality a Reality »[136].

2. The programme has several objectives, including the mainstreaming of gender equality at the level of policy and practice in the member states and within the Council of Europe. In this context, the programme will seek to mobilise all Council of Europe bodies (including the intergovernmental structures) and its external partners.

3. To this end, the programme is composed of several inter-dependent elements, namely :

- A Gender Equality Commission, composed of 16 members appointed by member states[137]
- A network of national focal points in each member State,
- Gender equality rapporteurs appointed within the membership of the steering committees and other intergovernmental structures of the Council of Europe,
- The Committee of Ministers Thematic Co-ordinator on Equality and Trafficking,
- An Inter Secretariat gender equality mainstreaming team/network.

Since the beginning of 2012, steps have been taken to progressively put in place these various elements. The process is still on-going. The Gender equality team within the Gender Equality and Human Dignity Department of DGI provides the secretariat for the programme.

Contributing to gender equality by integrating a gender perspective into a committee's activities

4. Most, if not all, Council of Europe committees can contribute to gender equality in member states by ensuring that their activities integrate a gender perspective. This does not imply additional tasks or a

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[136] 119th Session of the Committee of Ministers, Madrid 12 May 2009. The declaration was circulated to committees in accordance with the decision of the Committee of Ministers taken at the 1057th meeting of their deputies.

[137] Open to participation by all member states in accordance with Resolution CM\Res(2011)24.

requirement to embark on new additional activities. It does, however, imply a change of approach. Essentially, it requires committees to consider proposals for new activities from a gender perspective before finalising them and to adapt or formulate activities as a result of such an analysis ; i.e. by taking account of the likely impact of a proposed activity on women and men.

5. Integrating a gender perspective into a committee's activities is a practical follow-up to the Madrid Declaration.[138] A few committees are already explicitly required to integrate a gender perspective into their activities. Appointing a gender equality rapporteur will facilitate this objective.

6. The majority of intergovernmental structures are required in their current terms of reference to appoint a gender equality rapporteur from amongst their members. Of course, other committees and structures are free to appoint a gender equality rapporteur should they so wish and they are encouraged to do so. In principal, convention committees should also be able to appoint a gender equality rapporteur within the framework of their internal rules.

Role of the gender equality rapporteur

7. The person appointed as a gender equality rapporteur will not be required to make reports. Although s/he will be invited, along with the committee secretary, to liaise with the Gender Equality Commission (see below) and will be in contact with gender equality rapporteurs from other committees.

8. Essentially, the gender equality rapporteur should watch over the programming process of his or her committee (i.e. the process of identifying priorities, preparing activity proposals, setting-up and implementing the activities, and evaluating the results) in order to ensure that a gender perspective is properly integrated. The person appointed as the committee's gender equality rapporteur should not be expected to do this alone. It should be the responsibility of the committee as a whole. In this sense, the appointment of a gender equality rapporteur is a minimum, to ensure that there is a least one member taking responsibility ; but ideally this should be shared by all the members.

9. It is recognised that committees have increasingly heavy agendas and, in some cases, meet less frequently than in the past. Consequently, the bureaux have an increasingly important role in identifying activities and preparing, reviewing and evaluating their implementation. For this reason, it is recommended that the gender equality rapporteur be appointed from amongst the members of the bureau ; although this is not essential, provided s/he is involved in the Bureau's discussions on the programme of activities.

10. Finally, it should be noted that this is a new initiative and necessarily the precise tasks of the gender equality rapporteur will be further refined with time and in the light of experience.

Support to gender equality rapporteurs

11. A training programme has been put in place to ensure that all committee secretaries have the necessary knowledge and skills to assist the gender equality rapporteur and the committee as a whole in integrating a gender perspective into their programme of activities. An information session for gender equality rapporteurs will also be organised in Strasbourg during the second half of 2012 in order to familiarise them with their role and the basic notions of gender mainstreaming.

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[138] The origins of the gender equality rapporteur lie in an initiative of the former CDMM to appoint such a person as part of its follow-up to the Madrid Declaration and as a means of ensuring that it integrated a gender perspective into its work.

12. Also, with a view to providing support to the committees in integrating a gender perspective, the Gender Equality Commission is required to maintain close links with the other elements of the transversal programme and, in particular, engage in regular exchanges of views with the gender equality rapporteurs. These exchanges will most likely be organised on either a collective or thematic basis. This will involve travelling to a meeting, at least in the early stages. With time, hopefully it will be possible to introduce video or telephone conferencing. In any event, members of the Gender Equality Commission will attend the information session for gender equality rapporteurs mentioned above.

13. The Gender Equality team of the Secretariat in DGI is available to provide advice and information to committees and their gender equality rapporteurs if required. Moreover, the team welcomes feedback on the experience of appointing the rapporteurs and their functioning in order that this initiative can be improved and developed.

APPENDIX XXIII

Parliamentary Assembly
Assemblée parlementaire

Recommendation 1996 (2012)[1]
Provisional version

Equality between women and men: a condition for the success of the Arab Spring

Parliamentary Assembly

1. Referring to its Resolution 1873 (2012) "Equality between women and men: a condition for the success of the Arab Spring", the Parliamentary Assembly reiterates its conviction that no State can be called truly democratic unless it relies on the balanced participation of women and men in public life and recognises that women and men have equal dignity and should enjoy the same human rights.

2. The Assembly believes that the Council of Europe has both an interest and the instruments to contribute to building an area of democratic stability in its neighbourhood, sharing the same values and the same commitment to democracy, human rights and the rule of law. It therefore welcomes the timely initiatives taken by the Secretary General and a number of Council of Europe bodies to establish closer dialogue with the countries of the region, especially Morocco and Tunisia.

3. The Assembly calls on the Committee of Ministers to pursue this course of action through political dialogue and country-specific action plans and co-operation programmes, drawn up in consultation with the authorities of the countries concerned and other stakeholders. It asks the Committee of Ministers to ensure that, in this context, gender equality and the enhancement of the status of women are included as high priorities.

4. Recalling that both Morocco and Tunisia are members of the European Commission for Democracy through Law (Venice Commission), the Assembly recalls that it attaches great importance to the role that this body can play in providing advice on the new Tunisian Constitution, on legislation which will be adopted to implement the Constitutions in Morocco and Tunisia, as well as on the reforms which are necessary to bring the national legislation of these countries into line with international human rights standards. It therefore encourages the Committee of Ministers to support the Venice Commission in these tasks.

5. The Assembly is of the opinion that, in addition to a process of legislative reform, the citizens of Morocco and Tunisia, in particular women, would benefit from a more consistent and efficient implementation of the law.
To this end, the Assembly recommends that the Committee of Ministers propose to the authorities of Morocco and Tunisia that its relevant bodies:

5.1. organise and/or deliver training to members of the judiciary in the area of human rights law;

5.2. provide advice and exchange of good practice on how to remove the practical and legal barriers to women's effective access to justice.

6. Considering that violence against women is a widespread problem, the Assembly proposes that the Committee of Ministers offer the countries of the region, in particular Morocco and Tunisia, extensive cooperation in this area, in particular as regards:

6.1. the organisation of awareness-raising campaigns and activities, addressed to the general public;

1. Assembly debate on 24 April 2012 (13th Sitting) (see Doc. 12893, report of the Committee on Equality and Non-Discrimination, rapporteur: Ms Saïdi). Text adopted by the Assembly on 24 April 2012 (13th Sitting).

6.2. exchange of best practice and advice on legislative reform in order to effectively prevent violence against women, protect its victims and prosecute the perpetrators;

6.3. information and training on the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210).

7. With a view to promoting an evolution of mentalities among the general public, the Assembly encourages the Committee of Ministers to propose to the countries of the region the organisation of activities aimed at:

7.1. training civil servants in gender equality and human rights;

7.2. teaching gender equality and human rights education in schools;

7.3. training and raising awareness of the media on gender equality and sharing good practice on how to avoid stereotyping of women;

7.4. enhancing the capacity for action of civil society and non-governmental organisations.

8. The Assembly believes that the consolidated experience of the European Centre for Global Interdependence and Solidarity (North-South Centre) is an important asset in the elaboration, implementation and evaluation of action plans with Morocco and Tunisia, as well as in the establishment of co-operation with other countries in the region. It therefore calls on the Committee of Ministers to confirm its support to the North-South Centre and to its specific activities aimed at:

8.1. developing further the network of the North-South women's empowerment process, which was set up in the framework of the follow-up of the Conference "Women as agents of change in the South of the Mediterranean", organised by the North-South Centre in co-operation with the Italian Parliament (Rome, 24-25 October 2011);

8.2. strengthening relations with civil society and non-governmental organisations and contributing to capacity building, in particular for youth.

APPENDIX XXIV

Parliamentary Assembly
Assemblée parlementaire

Recommendation 1997 (2012)1
Provisional version

The need to combat match-fixing

Parliamentary Assembly

1. Referring to its Resolution 1876 (2012) on the need to combat match-fixing, the Parliamentary Assembly wishes to draw the attention of the Committee of Ministers to this issue of organised crime, which raises a genuine problem for the entire sports movement.

2. The Assembly considers the Council of Europe to be the best placed Organisation to deal effectively with the question of the preservation of European sport as an expression of democracy, fundamental rights and social cohesion. Furthermore, a pan-European, or even global, approach is needed in order to combat effectively both bribery of people involved in sport and match-fixing.

3. The Council of Europe, together with the International Olympic Committee (IOC), should continue to perform a leading role in the search for effective ways of combating this problem and should advocate constructive dialogue between the stakeholders in order to achieve the desired result together.

4. The Council of Europe's Criminal Law Convention on Corruption (ETS No. 173) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) should be used as major standard-setting reference points in the definition of the mechanisms and legal means needed to combat the criminal organisations which bribe persons involved in sport to manipulate sports results, and thereby use sports betting as a means of laundering money and as a source of finance for their activities.

5. Consequently, the Assembly invites the Committee of Ministers to:

5.1. support the work being done by the members of the Enlarged Partial Agreement on Sport (EPAS) on the drafting of a European convention on match-fixing, based on Committee of Ministers Recommendation CM/Rec(2011)10; this convention, which should be prepared as a matter or urgency, should aim at establishing an appropriate general legislative framework, taking into account the findings of the feasibility study presented in February 2012;

5.2. stipulate that the Additional Protocol to the Criminal Law Convention on Corruption also applies to national and foreign match officials in accordance with the idea set out in Assembly Opinion 241 (2002) ;

5.3. create an ad hoc committee responsible for:

5.3.1. identifying the good practices and legal tools needed to prevent and combat corruption in sport and match-fixing, on the basis of the methods, experience and expertise of the Group of States against Corruption (GRECO) and of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL);

5.3.2. studying the possibility of harmonisation of European legislation on sports betting, taking account of the legislation and prerogatives of the European Union, and thus drawing up guidelines in this respect;

5.3.3. studying the possibility of extending the field of application of the Criminal Law Convention on Corruption in order to include in it in clear terms cases of bribery of persons involved in sport;

5.3.4. defining a minimum framework in order to establish sports fraud as a criminal offence in different countries;

5.4. promote effective co-ordination at international level of the fight against match-fixing.

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1. Assembly debate on 25 April 2012 (14th Sitting) (see Doc. 12891 , report of the Commitee on Culture, Science, Education and Media, rapporteur: Ms Brasseur). Text adopted by the Assembly on 25 April 2012 (14th Sitting).

APPENDIX XXV

Parliamentary Assembly
Assemblée parlementaire

Recommendation 1998 (2012)1
Provisional version

The protection of freedom of expression and information on the Internet and online media

Parliamentary Assembly

1. Referring to its Resolution 1877 (2012) on the protection of freedom of expression and information on the Internet and online media, the Parliamentary Assembly recalls the Action Plan of the Warsaw Summit of 2005 which instructed the Council of Europe to elaborate principles and guidelines to ensure respect for human rights and the rule of law in the information society and to address challenges created by the use of information and communication technologies with a view to protecting human rights against violations stemming from the abuse of such technologies.

2. The Assembly therefore recommends that the Committee of Ministers:

2.1. take account of Resolution 1877 (2012) in its own work and forward it to the competent national ministries and regulatory authorities responsible for media based on information and communication technologies (ICTs);

2.2. develop guidelines on domestic jurisdiction over, and the legal and corporate responsibility of, private companies which are intermediaries for ICT-based media, focusing such work in particular on the responsibility of intermediaries for the functioning of the Internet and online media and the respect for freedom of expression and information;

2.3. co-operate with the European Commission and the European Union Body of European Regulators for Electronic Communications (BEREC) to ensure a common application of Article 10 of the European Convention on Human Rights (ETS No. 5) and Article 11 of the European Union Charter of Fundamental Rights with regard to freedom of expression and information on ICT-based media;

2.4. promote the signature and ratification of the Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189) by all member States as well as by non-member States and the European Union.

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1. Assembly debate on 25 April 2012 (15th Sitting) (see Doc. 12874 and Addendum , report of the Committee on Culture, Science, Education and Media, rapporteur: Ms Postanjyan). Text adopted by the Assembly on 25 April 2012 (15th Sitting).