Conditions of detention in the case-law of the two European courts

Judge Síofra O'Leary
European Court of Human Rights

Keynote speech
Responses to Prison Overcrowding

Council of Europe, Strasbourg
23-24 April 2019

I - Introduction

The case-law of the European Court of Human Rights (ECtHR) in relation to Article 3 of the Convention and prison conditions is both well-known and, sadly, extensive.

To date the Court has found approximately 1300 violations of Article 3 of the Convention due to conditions in which prisoners were detained being found to be inhuman and degrading. In addition, many other cases have been concluded on the basis of a friendly settlement or unilateral declaration.

In some cases violations of both articles 3 and 8 ECHR have been found, the latter on account of, for example, a failure to fulfil positive obligations to provide suitable sanitary facilities[1] or recourse to strip-searching.[2] In many other cases an additional complaint will see articles 3 and 13 combined due to a lack of effective domestic remedies.[3]

[1] See, for example, *Szafrański v. Poland,* no. 17249/12, 15 December 2015.
[2] See, for example, *S.J. v. Luxembourg,* no. 34471/04, 4 March 2008.
[3] See, for examples, *Ananyev and Others v. Russia,* nos. 42525/07 and 60800/08, 10 January 2012; *Varga and Others v. Hungary,* nos. 14097/12 and 5 others, 10 March 2015; *Bamouhammad v. Belgium,* no. 47687/13, 17 November 2015.

When the Court examines the complaints in relation to prison conditions received from members of this population it may have to address a combination of several of the following – unhygienic condition of cells, ill-treatment by cellmates or prison officers, the personal space available to detainees in multi-occupancy cells and problems of prison overcrowding generally, recourse to solitary confinement, strip searching, video surveillance within a cell, repeat transfers between prisons and conditions when transferred.[4]

On 31st January 2018, there were over 1,229,000 inmates in the penal institutions of the 44 Council of Europe States covered by the 2018 Space 1 report.[5]

This statistic translates, for the ECtHR, into approximately 12,000 pending applications raising issues relating to conditions of detention.

In around 9,300 cases that is the main or only issue:

- 7,050 applications are pending but "frozen" in relation to Romania, with the Committee of Ministers supervising the execution of a pilot judgment I will mention in a moment;
- 1,600 case concern Russia.

I will explain later why Hungary, which until recently would have featured on such a statistical list, no longer does so.

For the purposes of today's address, I will concentrate on prison overcrowding and space requirements in multi-occupancy cells.[6]

---

[4] See, respectively, *Ananyev and Others*, cited above; *Gjini v. Serbia,* no. 1128/16, 15 January 2019; *Varga and Others*, cited above; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII; *Milka v. Poland,* no. 14322/12, 15 September 2015; *Van der Graaf v. the Netherlands* (dec.), no. 8704/03, 1 June 2004; *Bamouhammad*, cited above; *Ilgiz Khalikov v. Russia,* no. 48724/15, 15 January 2019.

[5] M. F. Aebi and M.M. Tiago, Prison Populations, Space 1 – 2018, Council of Europe, Strasbourg 20 December 2018.

[6] Note that, according to the ECtHR, different questions may arise under the Convention in the context of single-occupancy accommodation, isolation or other similar detention regimes, or waiting rooms or similar spaces used for very short periods of time (such as police stations, psychiatric establishments, immigration detention facilities). These questions are not the subject of the present address which looks at prison overcrowding and conditions in multi-occupancy cells. See, in any

The gravity of some of the problems which detainees, States and the Court have been facing is well-illustrated by the data provided in the 2017 pilot judgment *Rezmiveș and Others v. Romania*. In that case the Court referred to:

- a serious structural problem of overcrowding in that State which had been identified since 2012;
- a resulting influx of applications to the Court;
- an occupancy rate for all Romanian custodial facilities which varied between 149 and 154 %;
- the fact that the vast majority of recent judgments concerning this State involved applicants serving sentences in living space of less than 3 and sometimes less than 2 sq. m.

How has this issue been dealt with by the Strasbourg court and what are the ramifications of this human rights case-law in EU law and the case-law of the Court of Justice of the European Union (CJEU)?

II - What standard and methodology does the ECtHR apply?

In its 2016 judgment in *Muršić v. Croatia*, the Grand Chamber, after reviewing its existing case-law, clarified the standards for the assessment of prison overcrowding.[7]

- It confirmed, as you know, that the minimum standard of personal space is 3 sq. m. per detainee; a standard which applies equally to remand detainees and prisoners.

---

event, for broader case-law on detainees, the ECtHR Factsheets on the following topics « Detention conditions and treatment of prisoners », « Detention and mental health » and « Prisoners' health-related rights ».

[7] Overcrowding was only one of the issues in *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012, and the other leading and pilot cases were examined in Chamber - *Orchowski v. Poland*, no. 17885/04, 22 October 2009 and *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009; *Ananyev and Others,* cited above; *Torreggiani and Others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, 8 January 2013; *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015; *Varga and Others,* cited above.

- It clarified how to calculate that minimum space, excluding in-cell sanitary facilities but including furniture.

- It indicated that personal space below this minimum gave rise to a strong presumption of a violation of Article 3 ECHR (but did not automatically constitute a violation).

- To rebut that strong presumption respondent States must demonstrate the presence of three *cumulative* factors capable of adequately compensating for the lack of sufficient personal space. Those factors are:

    - the fact that reductions in space below the minimum are short, occasional and minor;
    - such reductions in space must be offset by sufficient freedom of movement and adequate activities outside the cell;
    - and detention must be in an appropriate facility with no other aggravating factors when it comes to conditions of detention.

- The Court also clarified that personal space of between 3-4 sq. m. would constitute a weighty factor in its assessment of conditions of detention.[8] When assessing the latter, the Court looks at their cumulative effects.[9]

- Personal space of over 4 sq. m. would not, of itself, give rise to a violation of Article 3 ECHR, but again the Court could find a violation depending on the other physical conditions of detention.[10]

---

[8] In such instances a violation of Article 3 will be found if the reduced space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements.

[9] See also *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 163, 15 December 2016.

[10] *Muršić v. Croatia* [GC], no. 7334/13, §§ 136 – 141, 20 October 2016. In *Muršić*, one period of detention (27 days) in less than 3 sq.m. was considered not to qualify as short or minor criterion such that the presumption of a violation of Article 3 ECHR had not been rebutted by the Government. For the majority, that presumption was rebutted as regards other shorter periods of detention during which

The *Muršić* case had been referred to the Grand Chamber pursuant to Article 43 in order to clarify the Convention standard and method of assessment.[11]

The majority in *Muršić* highlighted the difficulties of setting a clear-cut numerical standard for the purpose of evaluating prison conditions from the perspective of Article 3.[12] For the reasons explained in the judgment, it set the minimum standard at 3 sq. m. and sought to provide domestic authorities with guidelines regarding how to proceed.

7 judges dissented, rejecting that figure as the trigger for closer scrutiny of prison conditions under Article 3 and preferring the CPT standard of 4 sq. m per prisoner in multi-occupancy cells.[13] In other words, for the dissenting judges, personal space of less than 3 sq. m. constituted an automatic violation of Article 3 ECHR.

The *Muršić* standard and methodology have been applied in numerous cases since 2016.[14]

---

the applicant had less than the 3 sq.m. minimum of personal space given their duration and given access to out-of-cell activities in a detention facility considered otherwise adequate.

[11] While some previous cases had proceeded on the basis of 3 sq. m. as the bare minimum, in others 4 sq. m. had sufficed to establish a violation. In addition, there was a lack of clarity regarding the application of the strong presumption criterion. See the case-law overview in the dissenting opinion of Judge Sicilianos attached to the chamber judgment in *Muršić*, cited above.

[12] See *Muršić*, cited above, §§ 96 - 101.

[13] See the joint partly dissenting opinions of Judges Lazarova Trajkovska, De Gaetano and Grozev in *Muršić*, cited above, § 2 and § 9. According to the CPT, the minimum standard for personal living space in prison establishments is: 6m² of living space (plus sanitary facility) for a single-occupancy cell, or 4m² per prisoner (plus fully-partitioned sanitary facility) in a multiple-occupancy cell; moreover, the walls of the cell must be at least 2m from each other, and the ceiling at least 2.5m from the floor. These standards are, however, meant to be a bare minimum: the CPT encourages States parties, especially when building new prisons, to follow the desirable standards (at least 10m² for a cell hosting two prisoners, 14m² for a cell hosting three, and so on).

[14] See, for example, *Stănculeanu v. Romania*, no. 26990/15, 9 January 2018; *Dorneanu v. Romania*, no. 55089/13, 28 November 2017; *Á.R. v. Hungary*, no. 20440/15, 17 October 2017; *Domján v. Hungary* (dec.), no. 5433/17, decision of 14 November 2017.

III – How do ECtHR v. CPT standards compare?

In *Muršić* the Grand Chamber reiterated that when deciding cases in this field it remains attentive to CPT standards and to the Contracting States' observance of them. Clearly, States remain free to and are encouraged to follow those standards.

However, there appear to be two main reasons why the Court did not adopt the CPT standard as the Convention minimum:

> - On the one hand, under Article 3 the Court is under a duty to take into account *all* the relevant circumstances of a particular case, whereas other international institutions such as the CPT develop general standards in this area;
>
> - On the other hand, the Court and the CPT perform different roles. The CPT engages in pre-emptive action aimed at prevention. The Court is responsible for the judicial application in individual cases of the absolute prohibition contained in Article 3.[15]

As explained below, when adopting legislation in response Article 46 measures indicated by the Court in conditions of detention judgments, several States have opted to go beyond the *Muršić* minimum. Thus, following pilot judgments, in Bulgaria the minimum standard has been set at 4 sq. m. and in Italy at a more generous 5 sq.m.

IV - How has the ECtHR handled such a large number of applications relating to prison conditions and overcrowding?

The answer to this question is to be found in the pilot judgment procedure just referred to which has developed since 2004[16] - and for

[15] See *Muršić*, cited above, §§ 112-113.

[16] In the first pilot judgment, *Broniowski v. Poland* [GC], no. 31443/96, ECHR 2004-V, the Court drew attention to two instruments which had been adopted by the Committee of Ministers of the Council of Europe on 12 May 2004. The first, a resolution on judgments revealing an underlying systemic problem, invited the Court "to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications […]". The second, a recommendation on the

which a regulatory framework has since been established in the Rules of Court - and in the individual and general measures indicated to respondent States pursuant to Article 46 ECHR.

The pilot judgment procedure was developed to identify the structural problems underlying repetitive cases and with a view to imposing an obligation on the States in question to address those problems. Where the Court receives several applications that share a root cause, it can select one or more for priority treatment under the pilot procedure.

A pilot judgment thus seeks, inter alia, to:

- identify systemic or structural problems at national level, assisting High Contracting Parties in solving them by giving them clear guidance regarding the type of remedial measures needed;

- offer applicants the possibility of speedier redress;

- assist the Committee of Ministers in supervising the execution of judgments;

- protect the effectiveness of the Convention system by reducing the number of similar cases which may in themselves be complex but in relation to which the general principles applicable under the Convention are clear.

  As the Court stated in *Varga and Others v. Hungary*:

  > "an important aim of the pilot-judgment procedure is to induce the respondent State to resolve large numbers of individual cases arising from the same structural problem at

---

improvement of domestic remedies, emphasised that States had a general obligation to solve the problems underlying the violations found and recommended the setting up of "effective remedies, in order to avoid repetitive cases being brought before the Court". On pilot judgments generally see L. Wildhaber, "Pilot Judgments in Cases of Structural or Systemic Problems on the National Level" in R. Wolfrum and U. Deutsch (eds.), *The ECtHR Overwhelmed by Applications: Problems and Possible Solutions*, Berlin, 2009, pp. 69-75, or A. Buyse, "The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges" (2009) Greek Law Journal.

> the domestic level, thus implementing the principle of subsidiarity which underpins the Convention system. Indeed, the Court's task, as defined by Article 19, that is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto", is not necessarily best achieved by repeating the same findings in a large series of cases".[17]

It is important to stress, as the Court has always done, the absolute character of Article 3 ECHR and the fact that it enshrines one of the most fundamental values of democratic societies. Nevertheless, as the Grand Chamber indicated in its strike out decision in *Burmych v. Ukraine*, a large number of repetitive cases and, in particular, a failure by States to seek to resolve systemic problems in their domestic systems, risk encumbering the Court and constitute a threat to the Convention system itself.[18]

One key feature of the pilot judgment procedure is the possibility of adjourning, or "freezing," related cases for a period of time on the condition that the Government act promptly to adopt the national measures required to satisfy the judgment.[19]

In *Torreggiani and Others v. Italy*[20] and *Rezmiveș and Others v. Romania*[21] for example, pending applications (which had not been communicated) were adjourned, whereas in *Ananyev v. Russia* and *Varga v. Hungary* they

[17] *Varga and Others*, cited above, § 96.

[18] *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al, 12 October 2017 (extracts). It should be stressed that that case involved Article 6 ECHR and the non-enforcement of domestic judgments and not Article 3 ECHR. Nevertheless, it also concerned more generally the consequences for the ECtHR of State failure to comply with the indications provided in a pilot judgment and, more generally, with State failure to act in accordance with their primary responsibility pursuant to the Convention. See also, in this regard, the Copenhagen Declaration, Article 8 "affirming that the States Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the Court."

[19] Rules of Court, 1 August 2018, Rule 61 § 6.

[20] *Torreggiani and Others v. Italy*, nos. 43517/09 and 6 others, § 101, 8 January 2013.

[21] *Rezmiveș and Others v. Romania*, nos. 61467/12 and 3 others, § 128, 25 April 2017.

were not.[22] Not adjourning cases appears to be a form of continued or additional pressure on the respondent State.

As indicated previously, in February 2011, the Court added a new rule to its Rules of Court codifying the developing pilot judgment procedure and establishing a clear regulatory framework in which it would operate.[23]

The Court has thus far adopted pilot judgments addressing the question of prison overcrowding in respect of Bulgaria,[24] Hungary,[25] Italy,[26] Poland,[27] Romania[28] and Russia.[29] In these cases it characterised prison overcrowding as a systemic problem arising out of chronic dysfunction in the domestic penal systems under review affecting and liable to affect a large number of people.[30]

---

[22] See *Ananyev and Others*, cited above, § 236, and *Varga and Others*, cited above, § 128: "Having regard to the fundamental nature of the right protected by Article 3 of the Convention and the importance and urgency of complaints about inhuman or degrading treatment, the Court does not consider it appropriate at this stage to adjourn the examination of similar cases pending the implementation of the relevant measures by the respondent State. Rather, *the Court finds that continuing to process all conditions of detention cases in the usual manner will remind the respondent State on a regular basis of its obligation under the Convention and in particular resulting from this judgment* …"

[23] Rules of Court, 1 August 2018, Rule 61. A distinction can be drawn between pilot judgments in the strict sense – those which specify, in accordance with Rule 61 § 3 of the Rules of Court, in the operative part of the judgment the nature of the systemic problem and the type of remedial measures that the State concerned must adopt and those which merely mention the systemic nature of the problem in the Court's reasoning without more.

[24] *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015.

[25] *Varga and Others*, cited above; and previously *Szél v. Hungary*, 30221/06, 7 June 2011; *István Gábor Kovács v. Hungary*, 15707/10, 17 January 2012; *Hagyó v. Hungary*, 52624/10, 23 April 2013; and *Fehér v. Hungary*, 69095/10, 2 July 2013.

[26] *Torreggiani and Others*, cited above.

[27] *Orchowski v. Poland*, no. 17885/04, 22 October 2009; and *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009. In 2008 the Polish Constitutional Court had found that detention facilities in Poland suffered from a systemic problem of overcrowding which was of such a serious nature as to constitute inhuman and degrading treatment. At the time of the judgment in *Orchowski*, 160 applications were pending in which inadequate prison conditions were at issue.

[28] See *Rezmiveș and Others v. Romania*, cited above; following on from the leading judgment in *Iacov Stanciu v. Romania*, no. 35972/05, 24 July 2012.

[29] See *Ananyev and Others*, cited above, which in annex lists the 88 judgments in which the Court had previously found Articles 3 and/or 13 ECHR violations as regards conditions of detention. At that time, a further 250 cases were pending. This was the second pilot judgment against Russia but the first concerning conditions of detention, in that case, as regards detainees pending trial.

[30] See, for example, *Torreggiani and Others*, cited above.

In some cases, which are not strictly speaking pilot judgments, the Court has nevertheless provided indications, pursuant to Article 46 ECHR, regarding the need to improve conditions of detention with concrete suggestions how this might be done. Leading judgments of this nature have been pronounced in relation to Belgium,[31] Greece,[32] Slovenia,[33] and the Republic of Moldova.[34]

Given that I will address later the question of prison overcrowding under EU law, it is important to note the number of EU Member States in relation to which pilot and leading judgments of this nature have been handed down.[35]

V - So what should happen after a pilot judgment?

The pilot judgments in relation to Italy, Bulgaria, Hungary and Romania provide an illustration.

In these judgments, under Article 46 ECHR, the Court will have held that the domestic authorities should promptly put in place an effective remedy or a combination of remedies, both preventive and compensatory, to guarantee genuinely effective redress for violations of

[31] *W.D. v. Belgium*, no. 73548/13, 6 September 2016 (although it should be noted that this case related to detention in a prison psychiatric wing); and previously *Vasilescu v. Belgium*, no. 64682/12, 25 November 2014. See also recently *Sylla and Nollomont v. Belgium*, nos. 37768/13 and 36467/14, 16 May 2017.

[32] *Samaras and Others v. Greece*, no. 11463/09, 28 February 2012; *Tzamalis and Others v. Greece*, no. 15894/09, 4 December 2012; and *Al. K. v. Greece*, no. 63542/11, 11 December 2014.

[33] *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, 20 October 2011; and *Štrucl and Others v. Slovenia*, nos. 5903/10, 6003/10 and 6544/10, 20 October 2011.

[34] *Shishanov v. the Republic of Moldova*, no. 11353/06, 15 September 2015. See, however, the recent decision in *Draniceru v. the Republic of Moldova* (dec.), no. 31975/15, decision of 12 February 2019, in which the Court examined, and deemed as effective, domestic remedies adopted by legislation in 2017 and 2018 and which had entered into force on 1 January 2019. The effectiveness of the remedy meant that there was an immediate obligation on applicants to exhaust it, with the proviso that anyone with an application pending at the date of the decision was allowed an additional four months to use it.

[35] See also *Nikitin and Others v. Estonia*, nos. 23226/16 and 6 others, 29 January 2019, and the pending applications in *Karp v. Estonia*, no. 57738/16 and *Savva v. Estonia*, no. 60178/16; and the reports by the European Parliament, ¨Prison Conditions in the Member States: selected European standards and best practices" Policy Department C: Citizens' Rights and Constitutional Affairs, January 2017, and by the FRA, "Criminal Detention and alternatives", 2016.

the Convention originating in overcrowding. A compensatory remedy will not be sufficient redress in relation to persons who remain in detention.[36]

In *Stella and Others v. Italy*,[37] the Court examined the measures adopted by Italy following the pilot judgment in *Torreggiani*:

- A new preventive remedy had been adopted which specified that the decisions taken by the judge responsible for the execution of sentences on prisoners' complaints concerning the prison administration were binding on the relevant administrative authorities. The latter were obliged to comply within a deadline set by the judge, which, in principle, satisfied the criterion that judicial proceedings be expeditious, failing which enforcement proceedings could be initiated;

- Crucially, the respondent State had put in place a series of substantive measures intended to resolve the structural problem of overcrowding in prisons. It had sought to make greater use of alternatives to detention; reduce sentences laid down for minor offences; introduced organisational changes allowing prisoners more time outside their cells and carried out works renovating existing prison buildings and constructing new premises.

- As regards the new Italian compensatory remedy, it provided for either a reduction in sentence or per diem compensation for each day spent in conditions considered contrary to the Convention.

Since the Court in *Stella* considered the new remedies to be effective, applicants were required to use them in order to obtain acknowledgment of any violation and, where appropriate, adequate compensation.

[36] See, for example, *Torreggiani and Others*, cited above; *Neshkov and Others,* cited above; *Varga and Others*, cited above.

[37] *Stella and Others v. Italy* (dec.), nos. 49169/09, 54908/09, 55156/09, 16 September 2014.

As regards Bulgaria, a programme of prison refurbishment was undertaken and legislation was adopted in 2017. It specified 4 sq. m. as the minimum required living space, introduced more flexibility in the allocation of prisoners to correctional facilities and in the imposition and modification of prison regimes, widened the scope for conditional release and introduced preventive and compensatory mechanisms in relation to poor conditions of detention. The Court deemed these mechanisms to be effective in its 2017 decision in the case of *Atanasov and Apostolov v. Bulgaria*.[38]

When the Court handed down its pilot judgment in *Varga v. Hungary* in 2015, 450 prima facie meritorious applications were pending against that State. That number grew to some 8000 cases. Given these numbers, the domestic response to *Varga* was important. In November 2017, in *Domján v. Hungary*, the Court held that legislation adopted in 2016 which provided for a combination of remedies, both preventive and compensatory in nature, guaranteed in principle genuine redress for Convention violations originating in prison overcrowding and other unsuitable conditions of detention in Hungary:

- Complaints could be submitted to prison governors who had to act on them swiftly;

- Judicial review was available as regards the prison governor's decision;

- The provisions on per diem compensation due to unsuitable conditions of detention were considered not unreasonable, having regard to economic realities.

Once again, the effectiveness of the remedy meant, in essence, that applicants had to exhaust it before coming to the Court. However, in *Domján* the Court did indicate that it might review its position on the

[38] *Atanasov and Apostolov v. Bulgaria* (dec.), nos. 65540/16 and 22368/17, 27 June 2017. Note that, since the remedy in question had been put in place in response to a pilot judgment, the Court considered that it could be taken into account even though it was not yet in force when the applications were lodged.

effectiveness of the new Hungarian remedy if, in practice, it was demonstrated that detainees were being refused relocation and/or compensation on formalistic grounds, that the domestic proceedings were excessively long or that domestic case-law was not in compliance with the requirements of the Convention. This type of "wait and see" policy in relation to a new remedy, initially deemed effective, is not unusual and not restricted to prison conditions cases.

As regards Romanian cases, in the pilot judgment in *Rezmiveș* the Court indicated that, pending the adoption by the domestic authorities of the necessary measures at national level, it would adjourn the examination of any uncommunicated applications where the sole or main complaint concerns overcrowding and poor detention conditions in prisons and police cells in Romania. That process is now under the supervision of the Committee of Ministers. In that judgment, the Court went into considerable detail regarding the general measures required to reduce prison overcrowding in Romania and deal with material conditions of detention.

In these cases the Court tends to stress that it is not for it to indicate to States how to run their penal and prison systems.[39] However, with reference to recommendations from the Committee of Ministers,[40] the CPT and the White Paper on prison overcrowding,[41] it can engage in quite detailed examination of what may need to be done. Article 46 indications can extend to recommending greater recourse to non-custodial measures and minimising recourse to pre-trial detention.[42] Article 46 indications which are regarded as particularly intrusive when it comes to domestic penal systems have attracted criticism from within the Court itself.[43]

[39] See, for example, *Torreggiani and Others*, cited above, § 95 or *Ananyev and Others*, cited above, § 194.
[40] See, for example, Recommendation (99) 22 concerning prison overcrowding and prison population inflation.
[41] See European Committee on Crime Problems (CDPC), White Paper on Prison Overcrowding, 2016.
[42] See, for example, *Varga and Others*, cited above, § 104.
[43] See the concurring opinion of Judge Wojtyczek in *Rezmizes*, cited above.

VI – EU law, the CJEU and prison overcrowding

Given the origins of EU law and the main stays of the TEU and TFEU, even lawyers specialised in a wide variety of EU legal questions are still surprised to learn that the question of prison conditions now appears with relative frequency on the docket of the Luxembourg court.

The reason for this can be found of course in the Area of Freedom, Security of Justice (AFSJ), first developed as a separate pillar in the Treaty of Amsterdam and since fully integrated by the Treaty of Lisbon in 2009.

As you know, the EU and the AFSJ, in particular, operate on the basis of a principle of mutual recognition or trust. In the words of the CJEU in Opinion 2/13 on accession:

> "Th[e EU] legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected".[44]

Action by the EU in the field of judicial cooperation in criminal matters may be affected by detention conditions across EU Member States since, without mutual confidence in the area of detention, EU mutual recognition instruments which have a bearing on imprisonment will not work properly. The EAW framework decision, for example, proceeds on the basis of this system of trust between the authorities of the State which issues a warrant and those of the State which is intended to execute it.[45]

---

[44] Opinion 2/13, EU:C:2014:2454, § 168.

[45] See Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1–20). Other EU mutual recognition instruments of relevance would be Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal

However, the EAW Framework Decision also states that: "it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 [EU]'.[46]

Article 6 TEU is of course the provision which not only recognises the EU Charter as having the same legal value as the Treaties, but it also provides for the obligation, subject to conditions, to accede to the ECHR, and maintains in place the general principles of EU law as a source of fundamental rights, a source in turn inspired by the ECHR and common Member State constitutional traditions.

In 2016, in a landmark case called *Aranyosi and Căldăraru*, a German court asked the CJEU whether the possibility or probability of degrading detention conditions, resulting from a systemic deficiency in the prisons of the issuing Member State, permit the executing judicial authorities in another Member State to refuse to surrender the person concerned?[47] The EAWs in question had been issued by authorities in Hungary and Romania.

The underlying question was whether the force of the principle of mutual recognition is limited if there is a breakdown in the confidence which the Member States should have in each other, owing to a potential infringement of the fundamental rights which they are presumed to respect. How, in such cases, would the CJEU weigh respect for the fundamental rights of the person surrendered against the necessity to achieve the objectives of the AFSJ and, in that context, protecting the rights and freedoms of others? As you know, when interpreting and

---

matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU; Council Framework Decision 2008/947/JHA of 27 November 2008 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; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the EU, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention.

[46] See Article 1(3) of Framework Decision 2002/584/JHA.

[47] Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198.

applying the EU Charter, the CJEU frequently refers to the need to protect the effectiveness of EU law.

The CJEU and its Advocate General answered the question posed differently.

For the Advocate General, it was the responsibility of the issuing State to conduct a human rights/proportionality review prior to a warrant being issued.

For the CJEU, where the authority responsible for the execution of a warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, that authority *must* further assess that risk before deciding on the surrender of the individual concerned. That assessment should cover whether the risk derives from the general detention conditions in the Member State concerned (which risk cannot, in itself, lead to the execution of the warrant being refused) and whether there are substantial grounds for believing that the individual concerned will in fact be exposed to such a risk because of the conditions in which it is envisaged that he/she will be detained. In this latter regard, the issuing authority must be asked, as a matter of urgency, for all information necessary on the relevant conditions of detention. If this confirms a real risk, the execution of the EAW must be deferred until additional information has been obtained from the issuing authority on the basis of which that risk can be discounted. Regardless of their different approaches, both the CJEU and the Advocate General paid considerable attention to the relevant case-law of the ECtHR on Article 3 ECHR and conditions of detention.[48]

[48] For Advocate General Bot (Opinion delivered on 3 March 2016, EU:C:2016:140), § 180, who saw the obligation as lying mainly with the issuing State, the very large number of individual applications brought before the ECtHR was a sign that the legal remedies provided for in Hungary and Romania enabled individuals exposed to physical conditions of detention which are contrary to the safeguards laid down in Article 3 ECHR to obtain protection of their fundamental rights. This was, it should be argued, an incorrect deduction from the large number of applications before the ECtHR from certain States which point to the systemic nature of the problem in relation to conditions of detention and, at least until recently, the absence of effective domestic remedies.

It is important to note, as an aside, that the case of *Aranyosi and Căldăraru* marked an important inflection by the CJEU in relation to the principle and operation of mutual trust more generally. It appeared to become clearer that EU law permitted, even mandated, national judges to do what the Strasbourg court indicated in *Avotiņš v. Latvia* they must be able to do in relation to mutual trust in the context of the AFSJ. In that case the Strasbourg court held that:

> "it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention.
>
> Nevertheless, the methods used to create that area must not infringe […] fundamental rights […] the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".[49]

The CJEU's first engagement with conditions of detention in 2016 was followed by another preliminary ruling in 2018 in *ML v. Generalstaatsanwaltschaft Bremen* in relation to the execution of an EAW in order for the person subject to it to serve a custodial sentence in Hungary.[50] In that case the German executing authority had sought additional information from the issuing authorities regarding where the sentence would be served. The question referred to the CJEU was whether, in cases of systemic or generalised deficiencies in the detention conditions in the prisons of the issuing Member State, the risk of inhuman and degrading treatment could be excluded merely because of the availability in the issuing Member State of a legal remedy enabling the person subject to the warrant to challenge the conditions of his detention. In addition, the CJEU had to address whether the risk

[49] *Avotiņš v. Latvia* [GC], no. 17502/07, §§ 113-114, 23 May 2016.
[50] *ML v. Generalstaatsanwaltschaft Bremen*, Case C-220/18 PPU, EU:C:2018:589.

assessment had to look at the conditions of detention in all the prisons in which the person concerned *could potentially* be detained or those in which he *is likely* to be detained for most of the time and the role played by any assurances provided by authorities in the issuing Member State.

In *ML* the CJEU did not itself address whether there were systemic deficiencies in prison conditions in Hungary. It proceeded instead on the basis presented by the referring court that there were. It held that the existence of effective legal remedies in the issuing State did not absolve the executing authority from the obligation to undertake an individual assessment of the situation of each person concerned. Pointing to the ECtHR decision in *Domján v. Hungary*, the Luxembourg court pointed out that the effectiveness of the remedy meant, on the one hand, that applicants had to exhaust it and in any event, the ECtHR had reserved the right to re-examine the effectiveness of the newly established remedy in the light of its application in practice.[51] In addition, the Luxembourg court stipulated that the executing judicial authority is required to assess only the conditions of detention in the prisons in which the person is likely to be detained. The assessment need solely relate to the actual and precise conditions of detention of the person concerned and account may be taken of an assurance issued by an authority in the issuing State other than the executing one that the individual concerned will not be subject to inhuman or degrading treatment.

To the extent that we are witnessing dialogue between the two European courts regarding the interpretation of Article 3 ECHR and Article 4 of the EU Charter in the context of conditions of detention, it looks set to continue.

In February this year, the CJEU held a hearing in a case where the *Muršić* standards and methodology were directly at issue. The questions for the CJEU arise in the context of a preliminary reference from the Hanseatisches Oberlandesgericht Hamburg in Case C-128/18 *Criminal proceedings against Dumitru-Tudor Dorobantu*. They relate to the minimum

[51] *ML*, cited above, §§ 72-76.

standards for custodial conditions required under Article 4 of the Charter (equivalent to Article 3 ECHR) and whether, under EU law, there is an 'absolute' minimum limit for the size of custody cells.[52] As you know, Article 53 § 2 of the Charter provides for a sort of correspondence clause such that where Charter and Convention rights correspond, "the meaning and scope of those rights shall be the same as those laid down in the Convention".[53] The Charter does specify that "this shall not prevent Union law providing more extensive protection". It remains to be see whether the CJEU will decide to stick to the *Muršić* minimum or whether, for 28 EU Member States, it will raise the minimum space required per detainee in multi-occupancy cells.

VII - Conclusions

The repetitive nature of the case-law just described should not blind us to the fundamental character of the right which this Article 3 case-law seeks to protect.

In *Samaras and others v. Greece*, for example, following a visit to one prison, the ombudsman of the Republic described the proportion of space to the number of detainees as being "absolutely intolerable", with some detainees not enjoying, when standing, even as much as 1 m^2 of space.[54]

Added to this are the other aggravating factors which often characterise the life of detainees in such facilities – poor light, ventilation, the absence of adequate sanitary facilities, fewer beds than inmates, little or no access to outdoor space or activities, poor food and infestations of different kinds.[55]

---

[52] The questions the subject of the preliminary reference are available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=204484&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13420457.

[53] The explanations which accompany the Charter refer, moreover, to the case-law of the ECtHR – OJ 2007 C 303, p. 17.

[54] See *Samaras and Others v. Greece*, no. 11463/09, § 60, 28 February 2012.

[55] See, for example *Iacov Stanciu*, cited above, §§ 173 – 178.

The statistics, which this speech has included, should not blind us to the daily reality of what these cases entail.

I explained above when and why the Court has recourse to the pilot judgment procedure and the significant improvements which those judgments have sought to achieve at national level. Whether this occurs will depend on the measures adopted by the States in question, which it falls to the Committee of Ministers to supervise.

In the 2018 Space 1 report published by the Council of Europe, in terms of prison density based on the number of inmates per 100 detention places, Greece, the Czech Republic, Portugal, Italy, France and Romania, to name but a few, all registered prison density figures above 100, rising to 120.5 in the case of Romania. In Ireland, a State which falls on the right side of the median in the Space 1 report, an NGO recently reported that one women only facility was at 196 % capacity.

Clearly across Council of Europe States there is work still to be done.[56]

[56] See *Prisons and Prisoners in Europe 2018: Key findings of the Space 1 report*, pp. 6-7 on prison density.