

Policy meeting:
Overuse of pre-trial detention in Europe: How can we make legal
assistance more effective?
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**Overuse of pre-trial detention and overcrowding in European
prisons**

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1. Overcrowding and overuse of pre-trial detention as systemic human rights issues

1.1. Introduction

The contemporary society still needs prisons: the social experience and approach towards crime as well as legal research, practices and policies have still not found a more appropriate response to the occurrence of a criminal offence.

The prison is still considered to be the best means of ensuring a proportionate and humane reaction to the (presumed) commission of a criminal offence.¹ Of course, imprisonment can serve two largely different purposes:

(1) Ensuring - in some instances - proper conduct of criminal proceedings and public order when there is a reasonable suspicion that a criminal offence has been committed (remand prison); and

(2) Ensuring appropriate sanction for the commission of a criminal offence aimed at achieving desistance, appropriate retribution, rehabilitation and necessary incapacitation.

But prison can also be overused. In this context, 'overuse' can be the result of different failures at the policy, legislative and practical level and as such can, in turn, cause different social, political and legal disorders.

In other words, 'overuse' of the prison can cause different dysfunctions of the criminal justice system which ultimately undermines any justification, logic and purpose of imprisonment. The dysfunction of the criminal justice system of interest for the present intervention is overcrowding.

1.2. Trying to define terms: overcrowding and 'overuse' of pre-trial detention

But what is overcrowding? And when can we say that there is 'overuse' of pre-trial detention?

There is no common - European or for that matter universal - definition of overcrowding. Very often, overcrowding is measured as a ratio of the number of available

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¹ Imprisonment does not, in itself, constitute a human rights violation.

places in the prison system and the actual number of prisoners placed there. Thus, overcrowding occurs when the demand for space in prisons exceeds the overall capacity of prison places in a given member state or in a particular prison of that state.²

This definition is, however, inadequate for several reasons, such as:

- (1) Many European states (and elsewhere) do not have a precise definition of 'minimum space' per prisoner;
- (2) Countries use different methods of calculation of prison capacity: (i) design capacity - nominal number of places available in a given state or in a particular prison of that state; (ii) operational capacity - capacity under which the prison system can operate;³
- (3) It is possible that the prison system of a country is not experiencing overcrowding and that a particular prison is nevertheless overcrowded;
- (4) It is possible that there is overcrowding only in relation to the placement of a particular category of prisoners (women, juveniles, sexual offenders, remand prisoners);
- (5) In some systems, there is a high turnover of prisoners so reliance on the actual number of persons placed in a prison (system) is inadequate. In this connection, waiting lists, temporary and early releases should also be measured against the overall capacity of the prison system.⁴

A more appropriate method for the measurement of overcrowding seems to be the 'totality of conditions' test.⁵ In this context, the personal space allocated to each prisoner is only one of the factors for the measurement whether overcrowding occurred.

Thus, overcrowding occurs when the number of prisoners placed in prison(s) of a country reaches such a level that it is no longer possible to ensure adequate personal space, hygiene, sanitary and health conditions, nutrition, appropriate out-of-cell activities, and/or any meaningful programme for the social reintegration of prisoners.

This is the approach taken by the European Court of Human Rights ('the Court') for its assessment of prison overcrowding under Article 3 (prohibition of torture) of the European Convention on Human Rights ('the Convention').

² European Committee on Crime Problems (CDPC), *White Paper on prison overcrowding*, PC-CP (2015) 6 rev 7, 30 June 2016, paras. 10-11 and 20.

³ M.F. Aebi and M.M. Tiago, *SPACE I - 2018 - Council of Europe Annual Penal Statistics: Prison populations* (Strasbourg: Council of Europe), p. 63.

⁴ See further, D. Moolenaar, *Correlation between crime rates and imprisonment*, presentation at the High-level conference on prison overcrowding (Council of Europe 2019).

⁵ H.J. Albrecht, *Prison Overcrowding - Finding Effective Solutions: Strategies and Best Practices Against Overcrowding in Correctional Facilities* (Max Planck Institute for Foreign and International Criminal Law 2012), p. 6.

In *Muršić*,⁶ the Court took a numerical standard only as an indication (albeit strong) of whether overcrowding infringed the absolute prohibition of inhuman and degrading treatment or punishment under Article 3 of the Convention. It stressed that when the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. However, that presumption can be rebutted by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space. This will normally happen only when the following factors are cumulatively met:

- (1) The reductions in the required minimum personal space of 3 sq. m are short, occasional and minor;
- (2) Such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities;
- (3) The applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention.

Furthermore, in cases where a prison cell - measuring in the range of 3 to 4 sq. m of personal space per inmate - is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the 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.

Similarly, in cases where a detainee disposes of more than 4 sq. m of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under Article 3 of the Convention.

This approach is also supported by the Advocate General Campos Sánchez-Bordona in the currently pending case of the Court of Justice of the European Union ('the CJEU') *Dumitru-Tudor Dorobantu*, Case C-128/18.

Moreover, the same approach seems to be supported at the policy level of the Council of Europe. Thus, the White Paper on prison overcrowding notes difficulties in the definition of overcrowding and essentially refers to the totality of conditions.⁷

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('the CPT') established in its practice a basic 'rule of thumb' standard for the minimum amount of living space that a prisoner should be afforded in a

⁶ *Muršić v Croatia* [GC] 2016, paras. 136-140.

⁷ *White Paper on prison overcrowding*, paras. 10-11.

cell.⁸ However, as the CPT has recognised, when deciding whether accommodation in a particular cell amounts to inhuman or degrading treatment, the cell-size standards cannot be regarded as absolute and other elements of a prisoner's accommodation need to be taken into account.⁹

Overcrowding, as it will be addressed further below, often occurs as a result of overuse of pre-trial detention. However, similarly to the concept of overcrowding, there is no generally acceptable definition of 'overuse' of pre-trial detention, and there are no common criteria for the assessment whether the use of pre-trial detention amounts to 'overuse'.

In general, we may say that there is 'overuse' of pre-trial detention when the use of pre-trial detention results in or significantly contributes to the prison overcrowding. However, this is inadequate for defining the 'overuse' of pre-trial detention for two principal reasons:

- (1) It is often impossible to measure the extent to which one single element causes the state of prison overcrowding; and
- (2) Overuse of pre-trial detention, as it will be seen in the further discussion, is a human rights issue in itself, irrespective of the extent to which it contributes to overcrowding.

For the purpose of the present discussion, the following indicators may be proposed for defining 'overuse' of pre-trial detention:

- (1) Pre-trial detention is not applied with respect to the principle of innocence and only exceptionally as a measure of last resort but is envisaged in law and/or practice as the most appropriate and expedient means of ensuring the proper administration of justice and ensuring public order; and/or
- (2) Pre-trial detention is not used for the purposes recognised in national laws and international standards,¹⁰ but for other purposes,¹¹ and as an end in itself.¹²

Another difficulty with the pre-trial detention or 'detention on remand' is the absence of a universally acceptable definition of its scope. In chronological order, taking into account the flow of the criminal process, a person can be in one of the following categories: (1) arrested and remanded in the police custody; (2) under some sort of a

⁸ This is the following: (1) 6m² of living space for a single-occupancy cell and sanitary facility; (2) 4m² of living space per prisoner in a multiple-occupancy cell and fully-partitioned sanitary facility; (3) at least 2m between the walls of the cell; (4) at least 2.5m between the floor and the ceiling of the cell.

⁹ CPT, *Living space per prisoner in prison establishments: CPT standards*, CPT/Inf (2015) 44, 15 December 2015, paras. 21-23.

¹⁰ Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, 27 September 2006, paras. 6-12.

¹¹ This may be different ulterior purposes (see further, *White Paper on prison overcrowding*, para. 60), such as to suppress political pluralism (see *Navalnyy v Russia* [GC] 2018, para 175).

¹² Pre-trial detention may be (ab)used as a form of punishment and as a means of retribution.

formal ‘criminal charge’¹³ awaiting the completion of the investigation and/or commencement of the trial; (3) person whose trial has begun but has not reached the stage of a finding of guilt or innocence; (4) convicted but not sentenced; and (5) sentenced at first instance but the appeal proceedings are pending or are still within the statutory time-limit for lodging an appeal.

In many legal systems,¹⁴ and in the European standards,¹⁵ persons in the category under (1) are excluded from the definition of ‘detention on remand’. At the same time, under the Court’s case-law, the Article 5 (right to liberty) guarantees apply from the moment of the initial deprivation of liberty.¹⁶ Moreover, it should be borne in mind that very often remand prisoners spend time in police custody for the purpose of the taking of investigative actions against them in the same or another pending criminal case.

On the other hand, in the Court’s case-law, for the purpose of Article 5 of the Convention, the category under (5) is not considered a detention on remand.¹⁷ However, for the purpose of the assessment of overcrowding, no distinction is made in the case-law between the serving and prisoners on remand.¹⁸

1.3. Systemic human rights issues

According to the CPT experience, overcrowding causes, in particular, cramped and unhygienic accommodation; constant lack of privacy; reduced out of cell activities; overburdened healthcare services; and increased tension and more violence between prisoners and between prisoners and staff.¹⁹

Similarly, the Fair Trials International (‘FTI’) report,²⁰ has effectively argued that, in addition to the loss of liberty of a presumably innocent person, individuals remanded in pre-trial detention experience serious and sometimes irreversible impacts to their livelihood, family, and health. Moreover, suicide rates are very high in the case of remand prisoners.²¹

¹³ In this context, ‘criminal charge’ is understood as any official notification by the public authority to an individual containing allegation that he or she has committed a criminal offence, which can already happen during the questioning of the person by the police (see, for instance, *Schmid-Laffer v Switzerland* 2015, paras. 30-31).

¹⁴ M. Schönteich, *The Scale and Consequences of Pretrial Detention around the World* (Open Society Justice Initiatives 2008), p. 12.

¹⁵ Recommendation Rec(2006)13, para. 1(1); Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, 11 January 2006, Rule 94.1.

¹⁶ For instance, most recently, *Haziyev v Azerbaijan* 2008, para. 37.

¹⁷ *Kudła v Poland* [GC] 2009, para. 104.

¹⁸ *Muršić*, para. 115.

¹⁹ CPT, *Living space per prisoner in prison establishments*, para. 5.

²⁰ FTI, *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU* (2016), para. 12.

²¹ Schönteich, p. 19.

At varying intervals in time, within the Council of Europe area, prisoners on remand make up roughly one fourth of the overall prison population.²² Within the European Union, pre-trial detainees make up roughly one fifth of the prison population.²³

According to the latest 2018 SPACE I statistics,²⁴ roughly 22% of the inmates held in European prisons are remand prisoners, namely those not serving a final sentence. The percentage of such detainees varies broadly across countries, ranging from 1.1% to 42% in countries with at least one million inhabitants, and reaching 56% in smaller countries.²⁵

At the same time, 12 out of 45 prison administrations in the Council of Europe, which provided information for the purpose of SPACE statistics, experienced prison density of more than 100 inmates per 100 places. Four had a density that was between 100 and 101 (Denmark, Slovenia, Austria, Greece) while others were experiencing serious overcrowding, with rates of more than 105 inmates per 100 places (the Czech Republic, Portugal, Serbia, the Republic of Moldova, Italy, France, Romania and North Macedonia).²⁶ It is important to note in this respect that 9 out of 12 countries experiencing overcrowding are European Union member States.

It should also be noted that according to the SPACE report, when the differences in reporting of the available personal space in prison are considered, it is well possible that penal institutions who are theoretically not experiencing overcrowding may have in practice overcrowded cells.²⁷

Moreover, according to the relevant European standards, there is an imminent prison overcrowding if prisons are filled at more than 90% of their capacity.²⁸ The SPACE report shows that 10 prison administrations had a prison density of more than 91.4 (Azerbaijan, Slovakia, Switzerland, Sweden, Iceland, Cyprus, Luxembourg, the United Kingdom (Scotland, England and Wales) and Finland).²⁹

These statistics are alarming. At the same time, as already noted, overcrowding and overuse of pre-trial detention create many adverse effects on the persons concerned and on the functioning of the prison system as a whole. They undoubtedly pose a serious challenge to the rule of law. It is therefore not surprising that they are addressed in conjunction as systemic human rights issues in different European policy documents and legal standards.

²² 26th General Report of the CPT, 2016, para. 53.

²³ FTI, para. 112.

²⁴ The Council of Europe Annual Penal Statistics (SPACE). SPACE I provides data and statistics on imprisonment and penal institutions annually, and SPACE II on non-custodial sanctions and measures. The stock taking date for the 2018b report is 31 January 2018.

²⁵ See Aebi and Tiago, *Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report*, p. 3.

²⁶ *Ibid.*, p. 7.

²⁷ *Ibid.*, p. 6.

²⁸ *White Paper on prison overcrowding*, para. 20.

²⁹ *Prisons and Prisoners in Europe 2018: Key Findings of the SPACE I report*, p. 7.

For instance, it is stressed in the White Paper on prison overcrowding that “in many countries overcrowding is particularly problematic in remand facilities as too often suspects are detained”,³⁰ and the CPT has considered overcrowding of European prisons to be “to a large extent” caused by the overuse of pre-trial detention.³¹ The Recommendation on the use of remand detention has also noted a “considerable number of persons remanded in custody and the problems posed by prison overcrowding”.³² For its part, the FTI report has observed that the overuse of pre-trial detention is a “driver of high prison populations, resulting in prison overcrowding.”³³

Moreover, in practice, there is a paradox from the perspective of prison conditions and overcrowding associated with pre-trial detention: prisoners detained on remand - who are presumably innocent - are placed in much harsher conditions than serving prisoners and often they are victims of overcrowding. According to one explanation, prison administrators tend to see detainees on remand as a group whose imprisonment is temporary, while the main task of prison is to deal with and provide appropriate treatment to sentenced prisoners.³⁴ Prisoners on remand, due to pending criminal investigations and proceedings, are also often subjected to harsher regimes of contact with the outside world and restricted in access to meaningful out-of-cell activities.³⁵

2. Measures to address overcrowding and overuse of pre-trial detention in European policy documents, standards and practices

Given the existence of a link between overcrowding and overuse of pre-trial detention, it follows that reducing the recourse to pre-trial detention would also reduce overcrowding. However, detention on remand is not the sole cause of overcrowding, so it would be better to say that reducing the recourse to pre-trial detention would have an important impact on the overcrowding rates.

In this connection, it is also important to note that some prison administrations may have high rates of detention on remand and, at the same time, may not be experiencing overcrowding.³⁶ Similarly, prisons of a particular state may be overcrowded and rates of detention on remand may not be so high.³⁷ The pure statistics should therefore be taken with caution.

³⁰ *White Paper on prison overcrowding*, para. 59.

³¹ 26th General Report, para. 52. It should also be noted that the United Nations Office on Drugs and Crime (UNODC) has considered overcrowding as an acute global challenge and crisis and the overuse of pre-trial detention as one of the factors contributing to that crisis (UNODC, *Addressing the global prison crisis*, Strategy 2015-2017).

³² Preamble of the Recommendation Rec(2006)13.

³³ FTI, para. 100.

³⁴ Schönteich, p. 18.

³⁵ CPT 26th General Report, paras. 58-64.

³⁶ For instance, according to the 2018 SPACE report, the Netherlands has prison density (number of inmates per 100 detention places) 86.5 and, at the same time, has one of the highest rates of detention on remand (41.8% of the prison population).

³⁷ For instance, according to the 2018 SPACE report, North Macedonia has the most overcrowded prisons (density 122.3) while it has one of the lowest rates of detention on remand (8.4%).

In European policy documents, standards and practices,³⁸ the following measures related to the overuse of pre-trial detention are indicated as means of addressing the issue of overcrowding:

- (1) Deprivation of liberty to be used exceptionally and as a measure of last resort;
- (2) Deprivation of liberty not only in accordance with the principle of lawfulness, but also because that is reasonable and necessary in the circumstances of a particular case;
- (3) Application of the principle of proportionality and the careful assessment of the risk of reoffending and of the risk of causing harm to the society;
- (4) Devising and using alternative measures to imprisonment. However, there is a necessity of offsetting possible “net-widening effect”;³⁹
- (5) The length of pre-trial detention should be fixed by law and/or be reviewed at regular intervals. It should not exceed the length of the sanction provided for the offence alleged to have been committed;
- (6) Any period of deprivation of liberty prior to conviction, in whatever institution or facility spent, including house arrest, should be deducted from the overall length of the prison sentence;
- (7) Persons convicted by first instance court should be detained together with sentenced prisoners in order to avoid situations of overcrowding in remand facilities and to start preparing the persons for future release;
- (8) Extension of prison estate could be an important measure but does not solve the issue of overcrowding. The rule of “the more you build it, the more you fill it” applies;⁴⁰
- (9) Proper management of the prison system;
- (10) Putting in place a *numerus clausus* system. For instance, in Sweden, if the prison and probation service cannot find a place in a remand prison within 24 hours after an arrest warrant, the police will ask the prosecutor if the detainee should be released or not;⁴¹

³⁸ See, for instance, *White Paper on prison overcrowding*, paras. 84-90; Recommendation Rec(2006)13; Recommendation No.R (99)22 concerning Prison Overcrowding and Prison Population Inflation; Strengthening mutual trust in the European judicial area - A Green Paper on the application of EU criminal justice legislation in the field of detention, COM (2011) 327, 14 June 2011; Parliamentary Assembly of the Council of Europe, Resolution 2077 (2015) Abuse of pretrial detention in States Parties to the European Convention on Human Rights, 1 October 2015; Key messages and conclusions of the High Level Conference “Responses to Prison Overcrowding” (Strasbourg, 24-25.04.2019).

³⁹ *White Paper on prison overcrowding*, para. 65.

⁴⁰ *Ibid.*, para. 22; FTI, para. 10.

⁴¹ K. Eriksson, *Responses to Prison Overcrowding Pre-trial phase: Reducing the influx - shared responsibility*, presentation at the High-level conference on prison overcrowding (Council of Europe 2019).

(11) Adjusting domestic laws and practices⁴² with the Court's case-law and the relevant Council of Europe standards;

(12) Strengthening procedural safeguards;

(13) Devising the responses to overcrowding as a matter of shared responsibility of prosecutors, judges, prison and probation services and the members of government responsible for the prison service;

(14) Further research and education.

3. European judicial responses to overcrowding and overuse of pre-trial detention

3.1. European Court of Human Rights

The Court is often called upon to examine complaints alleging a violation of Article 3 of the Convention on account of insufficient personal space allocated to both remand and serving prisoners. In addition, the Court regularly has to rule on complaints relating to the issues of unlawfulness and/or inordinate length of pre-trial detention under Article 5 of the Convention.

The Court has so far found some 1300 violations of Article 3 related to inadequate conditions of detention. In many cases, the Court has also found a violation of Article 13 relating to the lack of an effective domestic remedy for allegations of inadequate conditions of detention. In addition, many cases have been concluded on the basis of a friendly settlement or unilateral declaration.⁴³

The Court has also found some 950 violations of Article 5 related to unlawfulness (including absence of any justification) and/or length of pre-trial detention.⁴⁴

Moreover, it should be noted that at present there are approximately 12,000 pending applications⁴⁵ 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 in relation to Romania, and 1,600 cases concern Russia.

Although in the absence of precise statistics, these numbers have to be taken with caution, they clearly indicate that the Court faced overcrowding and overuse of pre-trial detention as systemic human rights issues. It has thus addressed them through its pilot and leading judgment procedures.

⁴² Very often, an issue of overcrowding arises from inadequate practices and not norms (see further, *The Scale and Consequences of Pretrial Detention around the World*, p. 5).

⁴³ An overview of the Court's statistics in this respect was provided by Judge Síoifra O'Leary in her Keynote speech *Conditions of detention in the case-law of the two European courts* at the High Level Conference "Responses to Prison Overcrowding" (Strasbourg, 24-25.04.2019). It is not known how many of these cases concern detention on remand.

⁴⁴ This data is based on a HUDOC search of violations of Article 5 §§ 1 (c) and 3 of the Convention, and is not necessarily precise. However, the Court's general statistics are not helpful in this respect as they only indicate the overall number of violations of Article 5, which include many other reasons/grounds for deprivation of liberty and not only detention on remand.

⁴⁵ According to the most recent statistics, the total number of pending applications before the Court on 31 August 2019 was 62,100.

In practice, these procedures operate so that the Court takes one or more cases that have the same underlying problem for priority treatment. When examining the selected cases, it seeks to find a solution that extends beyond the particular case. At the same time, in the context of the pilot judgment procedure, the examination of all other related cases is adjourned for a certain period, during which time the government is obliged to address the systemic problem identified. The leading judgment procedure is a variation of the pilot judgment procedure and is normally characterised by the Court's indication under Article 46 of the Convention of the necessary measures that need to be taken by the government to address the underlying systemic human rights issue.⁴⁶

Under Article 46, the respondent state has a legal obligation to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress so far as possible its effects.⁴⁷

So far, the Court has adopted pilot judgments concerning conditions of detention in respect of the following states: Bulgaria (*Neshkov and Others v Bulgaria* 2015); Hungary (*Varga and Others v Hungary* ECHR 2015); Italy (*Torreggiani and Others v Italy* 2013); Poland (*Orchowski v Poland* and *Norbert Sikorski v Poland* 2009); Romania (*Rezmiveş and Others v Romania* 2017); and Russia (*Ananyev and Others v Russia* 2012).

The most relevant leading cases on the matter concerned the following States: Belgium (*Vasilescu v Belgium* 2014); Greece (*Samaras and Others v Greece*, *Tzamalīs and Others v Greece* 2012, and *Al. K. v Greece* 2014); Slovenia (*Mandić and Jović v Slovenia* and *Štrucl and Others v Slovenia* 2011); and the Republic of Moldova (*Shishanov v the Republic of Moldova* 2015).

Concerning, more specifically, overcrowding related to the overuse of pre-trial detention, it should be noted that the Court often observed that the solutions to overcrowding are indissociably linked to the solutions for addressing the issue of overuse of pre-trial detention.⁴⁸ It also held that a reduction in the number of remand prisoners would be the most appropriate solution to the problem of overcrowding.⁴⁹

However, in some cases, the Court abstained from indicating any specific general measures that needed to be taken at the domestic level,⁵⁰ while in others it provided indications of the necessary measures to be adopted, such as the necessity to minimise

⁴⁶ See further, Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Brill 2013); Lize R. Glass, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice' (2016) 34(1) *Netherlands Quarterly of Human Rights* 41; A. Uzun Marinković and K. Kamber, 'Fostering Domestication of Human Rights through the Exhaustion of Domestic Remedies: A Lesson Learned from the ECtHR Pilot and Leading Judgment Procedures', 9(2) *Inter-American and European Human Rights Journal* (2016) 334; ECHR, The Pilot-Judgment Procedure Information note issued by the Registrar (available at www.echr.coe.int).

⁴⁷ *Scozzari and Giunta v Italy* [GC] 2009, para. 249.

⁴⁸ In addition to the mentioned cases concerning overcrowding under Article 3, the Court has adopted leading judgment concerning overuse of pre-trial detention under Article 5 with regard to: Hungary (*Lakatos v Hungary* 2018); Poland (*Kauczor v Poland* 2009); Russia (*Zherebin v Russia* 2016); and Ukraine (*Kharchenko v Ukraine* 2011).

⁴⁹ *Ananyev and Others v Russia*, para. 197.

⁵⁰ *Orchowski v Poland*, para. 150;

recourse to pre-trial detention and to encourage prosecutors and judges to use as widely as possible alternatives to detention and redirect their criminal policy towards reduced use of imprisonment.⁵¹ The Court has also, for instance, indicated the necessity of a prompt transfer of pre-trial detainees from the facilities for police custody - which are structurally unsuitable for any longer deprivation of liberty - to appropriate prison facilities.⁵²

In this context, a particularly pressing problem of overcrowding related to the overuse of pre-trial detention was addressed in the case of *Ananyev and Others v Russia* in which the Court indicated under Article 46 an array of measures that needed to be taken at the domestic level. This included the following:

- (1) The necessity of devising domestic penitentiary programmes and measures in line with the relevant European standards;
- (2) The necessity of ensuring full compliance with the requirements of Article 5 § 3, in particular by applying pre-trial detention as a measure of last resort;
- (3) Putting in place a system where prosecutors are formally encouraged to decrease the number of applications for detention orders, except in the most serious cases involving violent offences;
- (4) Improvement of the material conditions of detention; and
- (5) Establishment of the maximum capacity (*numerus clausus*) for each remand prison through the definition of space per inmate as a minimum of square and possibly cubic metres, and, in addition, defining an operational capacity which is based on control, security and the proper operation of the regime, with a view to ensuring a smooth turnover of inmates and accommodating partial renovation work or other contingencies.

It is also important to note that in all pilot cases and great majority of the leading cases cited above, the Court indicated the necessity of putting in place an effective system of remedies - preventive and compensatory - for the breaches of prisoners' rights.

In some cases, the pilot and leading judgment procedures have yielded concrete results. In particular, the most commonly noted successfully implemented pilot and leading judgment procedures concern: *Torreggiani and Others*;⁵³ *Neshkov and Others*;⁵⁴ *Varga and Others*;⁵⁵ and *Shishanov*.⁵⁶ In response to each of these cases, the domestic authorities have implemented a number of substantive measures addressing the problem of prison overcrowding and, importantly, introducing a system of preventive and compensatory remedies capable of addressing the issue of prison overcrowding when it occurs.

⁵¹ *Varga and Others v Hungary*, paras. 104-105; *Torreggiani and Others v Italy*, paras. 94-95.

⁵² *Rezmiveş and Others v Romania*, para. 117.

⁵³ See *Stella and Others v Italy* (dec.) 2014.

⁵⁴ See *Atanasov and Apostolov v Bulgaria* (dec.) 2017.

⁵⁵ See *Domján v Hungary* (dec.) 2017.

⁵⁶ See *Draniceru v the Republic of Moldova* (dec.) 2019.

Nevertheless, caution is needed when accepting the success of a particular pilot or leading judgment procedure. For instance, following the adoption of *Torreggiani and Others*, the Italian prison system effectively addressed the issue of overcrowding and was considered to be a model for EU legislation in some respects.⁵⁷ However, according to the latest SPACE statistics, Italy is experiencing prison overcrowding and has a high percentage of remand prisoners.⁵⁸

In sum, the Court's pilot and leading judgment practices show that prison litigation at the European level is capable of producing concrete results but is not, in itself, sufficient. It has to be accompanied with structural and substantive reforms envisaged in the mentioned European policy documents, standards and practices. The intended ideal must be the creation of a permanent state of affairs - both in law and practice - where recourse to pre-trial detention and imprisonment as a whole is exceptional, lawful and proportionate.

3.2. Court of Justice of the European Union

The CJEU plays a leading role at the European Union ('EU') level in raising awareness about the adverse effects of overcrowding, and its case-law is shaping many EU policies in this respect.

However, due to a complex institutional arrangement of EU law, there is no EU legislation on prison conditions. The EU Commission,⁵⁹ the Council⁶⁰ and the Parliament⁶¹ have published documents on proposed ways in which the matter can be taken further within the EU but so far this has not led to any legislative initiatives.

The area in which the question of prison conditions is addressed within EU law is the area of freedom, security and justice.⁶² The functioning of the EU in this area rests on the principle of mutual recognition or trust, which may be affected by inadequate conditions of detention. This is particularly true in relation to the mutual cooperation in the context of the European Arrest Warrant ('EAW'),⁶³ which, it is worth reminding, must respect

⁵⁷ FTI, para. 127.

⁵⁸ According to the 2018 SPACE I report, Italy had 34.5% of detainees not serving a final sentence in the prison population on 31 January 2018. Its prison density (number of inmates per 100 detention places) on 31 January 2018 was 115, which is one of the highest rates of prison density in Europe. Only France (116.3), Romania (120.5) and North Macedonia (122.3) had higher rates of prison density.

⁵⁹ Green Paper on the application of EU criminal justice legislation in the field of detention (2011).

⁶⁰ Council note *Mutual recognition in criminal matters - enhancing mutual trust*, 11956/18, 14 September 2018.

⁶¹ European Parliament resolution of 5 October 2017 on prison systems and conditions (2015/2062(INI)).

⁶² Article 3(2) of the Treaty on European Union (Consolidated version), OJ C 326, 26.10.2012; Title V of the Treaty on the Functioning of the European Union (Consolidated version), OJ C 326, 26.10.2012.

⁶³ 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.

fundamental rights and observe the principles recognised in the Charter of Fundamental Rights of the European Union ('the Charter')⁶⁴ and the Convention.⁶⁵

In the case of *Aranyosi and Căldăraru*,⁶⁶ the CJEU was called upon to examine the manner in which the principle of mutual recognition and trust in the execution of the EAW must be understood against the wider background of the necessity to protect fundamental rights set out in the Charter and the Convention. More specifically, a German court asked the CJEU whether systemic deficiencies in prison conditions of the issuing member States (Hungary and Romania) permit the German authorities to refuse to surrender the person concerned to those states.

The CJEU answered this question by indicating that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing member State demonstrating that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must:

- (1) Determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by an EAW will be exposed, because of the conditions for his or her detention in the issuing member State, to a real risk of inhuman or degrading treatment, in the event of surrender to that State;
- (2) To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk;
- (3) If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

Further, in the *ML* case⁶⁷ the CJEU also dealt with the issue of conditions of detention in the context of the EAW. In this case, the person concerned was sought to serve a custodial sentence in Hungary. A German court asked the CJEU whether, in case of systemic or generalised deficiencies in the detention conditions in the prisons of the issuing member State, the executing authority may rule out the existence of a real risk of inhuman and degrading treatment merely because of the existence of a legal remedy enabling the person concerned to challenge the conditions of his detention. The German court also asked whether, in case that such a risk cannot be discounted, the executing authority is required to assess the conditions of detention in all the prisons in which the person concerned could potentially be detained or only the conditions of detention in the prison in which, according to the information available to that authority, he is likely to be detained for most of the time. In addition, a question was posed regarding assurance that

⁶⁴ OJ 2012 C 326/391.

⁶⁵ Recital 12 of the Framework Decision 2002/584/JHA.

⁶⁶ Joined Cases C-404/15 and C-659/15 PPU, 5 April 2016.

⁶⁷ C-220/18 PPU, 25 July 2018.

the person concerned will not be subjected to inhuman or degrading treatment issued by the authorities of the requesting state.

The CJEU held that a real risk of inhuman or degrading treatment cannot be ruled out merely because of the existence of remedies, although the existence of a remedy may be taken into account by the executing judicial authority for the purpose of deciding on the surrender of the person concerned. It also held that the executing judicial authority is required to assess only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis. However, it must assess only the actual and precise conditions of detention of the person concerned. Lastly, the CJEU explained that the executing judicial authority may take into account information provided by authorities of the issuing member State other than the issuing judicial authority, such as, in particular, an assurance that the individual concerned will not be subjected to inhuman or degrading treatment.

As already noted, currently the case of *Dumitru-Tudor Dorobantu*⁶⁸ is pending before the CJEU for a preliminary ruling in which the main question is whether the CJEU will follow the *Muršić* test in determining whether inadequate personal space infringes the prohibition of inhuman and degrading treatment. If the CJEU were to follow the Advocate General's opinion, it will accede to the *Muršić* test.

4. Conclusion

The problem of prison overcrowding and overuse of pre-trial detention is affecting different spheres of social and legal functioning of European societies. It undermines the very foundations of the European social progress and democratic achievements, and is antithetical to the concept of the rule of law.

The fact that the discussion on the issues of overcrowding and overuse of pre-trial detention has come to the forefront of European legal debates is an important step in the resolution of that problem. However, as matters currently stand, we are still far away from finding solid and durable solutions both at the European level and globally.

Different measures still need to be taken in this respect. They include, in particular, the following:

- rethinking the purpose and meaning of imprisonment (remand and as punishment) in contemporary society;
- defining and agreeing over the concepts of 'overcrowding' and 'overuse' of pre-trial detention;
- recognising in social, political, legislative and legal discourses that overcrowding and overuse of pre-trial detention are systemic human rights issues;
- researching and further developing best policies, standards and laws on imprisonment (remand and as punishment) at the international and national levels and ensuring that they are followed in practice; and

⁶⁸ Case C-128/18.

- ensuring that effective judicial protection is provided against overcrowding and overuse of pre-trial detention.

It is hoped that the initiatives such as this one taken by the FTI and its partners will contribute to these efforts to address - and hopefully reduce - overcrowding and overuse of pre-trial detention.