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Promoting alternatives to imprisonment

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Ms Nataša VUČKOVIĆ, Serbia, Socialist Group

Summary

The Committee on Legal Affairs and Hum an Rights considers imprisonment as a measure of last resort. Community sanctions should be the punishment of choice, except in the case of particularly serious crimes.

Many Council of Europe member States have serious problems of prison overcrowding. The cost of imprisonment to European taxpayers is considerable. The average among Council of Europe member States is the equivalent of nearly €100 per inmate per day. The committee considers prison overcrowding unacceptable, both as a matter of protection against inhuman and degrading treatment (Article 3 of the European Convention on Human Rights) and of the negative practical consequences of overcrowding for the persons concerned and society as a whole; society stands to suffer from high rates of recidivism and the lost contributions to economic and social life of persons whose rehabilitation is hampered by overcrowding in prison.

Recent technological advances have expanded the potential uses of electronic monitoring devices such as electronic bracelets and GPS, and made them more cost-effective. Such devices, in particular when associated with other, more traditional measures, can expand the scope of non-custodial sanctions to include more serious offences.

The United Kingdom has in recent years successfully phased in and promoted novel types of non-custodial sentences as alternatives to imprisonment, whilst safeguarding the legitimate security needs of society.

The committee invites all member States, and in particular the States with the highest rates of imprisonment, to vigorously promote the use of non-custodial sentences, in particular for first-time and non-violent offenders, young offenders and women.

It recalls that non-custodial sentences must also fulfil basic human rights requirements, as specified in the United Nations Standard Minimum Rules for Non-custodial Measures ("Tokyo Rules", 1990) and the Council of Europe's European Rules on Community Sanctions and Measures (1992), and stresses that non-custodial sentences should be imposed in replacement of prison sentences and not to further widen the scope of criminal punishment.

1. Reference to committee: Doc. 12659, Reference 3815 of 3 October 2011.

Contents **Page**

A. Draft resolution[2]

1. The Parliamentary Assembly, referring to its Recommendation 1257 (1995) on conditions of detention in Council of Europe member States, reaffirms the principle that imprisonment should be a measure of last resort. It concurs with the Committee of Ministers, which noted already in its Resolution (76) 10 the tendency to avoid imposing prison sentences as far as possible on account of their many drawbacks as well as out of respect for individual liberty, believing that this process could be taken further without endangering public safety. Community sanctions should be the punishment of choice, except when the seriousness of the crime prohibits any penalty other than a prison sentence.

2. It takes note with particular interest of the following comparative data published in the Council of Europe's Annual Penal Statistics (SPACE I – 2010):

2.1. prison populations in Europe vary considerably. Azerbaijan, Georgia, Latvia, the Russian Federation and Ukraine exceed the Council of Europe average of 149 prisoners per 100 000 inhabitants by more than double, whereas Andorra, Bosnia and Herzegovina, Denmark, Finland, Iceland, Liechtenstein, Monaco, the Netherlands, Norway, San Marino, Slovenia, Sweden and Switzerland have imprisonment rates around half the European average or less. Trends over the past decade are generally on the rise in most of Europe;

2.2. a number of Council of Europe member States have serious problems of prison overcrowding. Twenty-one member States have more than 100 prisoners per 100 places of detention. According to the Council of Europe's Annual Penal Statistics, the six countries where the situation is worst are: Serbia, at 172, Italy at 153 prisoners, Cyprus at 151, Greece at 123, Turkey at 115 and France at 108 per 100 places;

2.3. the cost of imprisonment to European taxpayers is considerable. The average among Council of Europe member States is the equivalent of nearly €100 per inmate per day.

3. The Assembly considers prison overcrowding unacceptable, both as a matter of human rights principle, in particular protection against inhuman and degrading treatment (Article 3 of the European Convention on Human Rights (ETS No. 5)) and of the negative practical consequences of overcrowding for the persons concerned and society as a whole; society stands to suffer from high rates of recidivism and the lost contributions to economic and social life of persons whose rehabilitation is hampered by overcrowding in prison.

4. In view of the high cost of building and maintaining new prisons, the Assembly recommends concentrating scarce budgetary funds on improving conditions of detention in existing prisons rather than on expanding prison capacity.

5. The Assembly notes with satisfaction that the United Kingdom has in recent years successfully phased in and promoted novel types of non-custodial sentences as alternatives to imprisonment, whilst safeguarding the legitimate security needs of society.

6. In view of the above, the Assembly invites all member States, and in particular the States with the highest rates of imprisonment, to vigorously promote the use of non-custodial sentences, in particular for first-time and non-violent offenders, young offenders and women.

7. It stresses that non-custodial sentences should be imposed in replacement of prison sentences and not to further widen the scope of criminal punishment. Also, minor offences which have hitherto not given rise to any criminal sanctions should not be punished by non-custodial sentences.

8. The Assembly recalls that non-custodial sentences, whilst clearly preferable to prison sentences in all but the most serious cases, must nevertheless fulfil basic human rights requirements, as specified in the United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules, 1990) and the Council of Europe's European Rules on Community Sanctions and Measures (1992), including:

8.1. the principle of legality, namely the measures to be applied, the conditions for their application and the authorities responsible for their implementation must be prescribed by law;

8.2. the prohibition of discrimination in the application of non-custodial measures;

2. Draft resolution adopted unanimously by the committee on 19 March 2013.

8.3. the respect for the principle of proportionality between the seriousness of the offence and the intensity of the afflictive character and the interference of the measure applied with the rights of the offender;

8.4. the requirement of consent, where non-custodial measures are applied before or instead of formal proceedings or trial;

8.5. the right to review, namely judicial guarantees and complaint procedures;

8.6. the respect for offenders' rights to privacy and human dignity;

8.7. the protection from undue risk of physical or mental injury.

9. The following non-custodial sentences deserve particular attention, in light of the experience in countries successfully maintaining law and order with a comparatively low rate of imprisonment:

9.1. fines, which should be calculated in proportion to the offender's disposable income in a manner which permits a comparison with prison terms;

9.2. suspended prison sentences, be they completely suspended sentences or suspension of the final portion of a custodial sentence;

9.3. early release of a prisoner on compassionate grounds, in the presence of unforeseen developments concerning a prisoner's personal life or health;

9.4. intermittent/weekend sentences, allowing an offender to maintain his or her professional and family life whilst being deprived of liberty during his or her free time;

9.5. assistance and supervision by probation officers, including participation in "offending behaviour programmes" (drinking and driving, anger management, domestic violence);

9.6. drug detoxification/rehabilitation measures (drug treatment and testing orders);

9.7. community service obligations and "community payback" measures;

9.8. restorative justice measures actively involving victims of crime;

9.9. innovative offender rehabilitation programmes involving civil society, such as the "circles of support" programme in the United Kingdom;

9.10. curfews, house arrests and restraining or exclusion orders enforced by technological means.

10. The Assembly notes that recent technological advances have expanded the potential uses of electronic monitoring devices such as electronic bracelets or GPS, and made them more cost-effective. It considers that such devices, in particular when associated with other, more traditional measures, can expand the scope of non-custodial sanctions to include more serious offences that have hitherto been sanctioned by prison sentences.

11. The Assembly therefore encourages all member States of the Council of Europe to:

11.1. complete their legislation in the penal field, as necessary, to make available to their judicial authorities the full panoply of non-custodial sanctions providing viable alternatives to imprisonment in all cases where this would be appropriate;

11.2. develop and test new types and combinations of non-custodial sentences and community sanctions, whilst respecting the human rights requirements outlined in paragraph [8];

11.3. exchange information both on successes and difficulties encountered, making use of the Council of Europe's instruments for co-operation in the field of criminal law.

B. Draft recommendation[3]

1. Referring to its Resolution … (2013) on promoting alternatives to imprisonment, the Parliamentary Assembly commends the Committee of Ministers for its earlier, groundbreaking work on promoting alternatives to imprisonment, in particular: Resolution (65) 1 on suspended sentence, probation and other alternatives to imprisonment; Resolution (76) 10 on certain alternative penal measures to imprisonment; Recommendation No. R (92) 16 on the European Rules on community sanctions and measures; Recommendation No. R (99)19 concerning mediation in penal matters; 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; and Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules.

2. In light of recent advances in technology allowing for novel uses of electronic supervision and making them more cost-effective, the Assembly invites the Committee of Ministers to consider addressing a new recommendation to all member States aimed at promoting alternatives to imprisonment with a view to reducing the prison population in Europe, paying special attention to the increased potential of electronic supervision measures, but also to new threats to human rights potentially inherent in such measures.

3. Draft recommendation adopted unanimously by the committee on 19 March 2013.

C. Explanatory memorandum by Ms Vučković, rapporteur

1. Introduction

1.1. Procedure

1. The motion for a resolution by Jean-Charles Gardetto (Monaco, EPP/CD) and others on "Promoting alternatives to imprisonment" was referred to the Committee on Legal Affairs and Human Rights for report on 3 October 2011.[4] At its meeting on 13 December 2011, the committee appointed me as its rapporteur and on 13 March 2012 it discussed an introductory memorandum. On 11 December 2012, it held a hearing with the following experts:

– Dr Jovan Ciric, Director of the Institute of Comparative Law, Belgrade (Serbia)

– Professor Marcelo Aebi, Deputy Director of the Institute of Criminology, University of Lausanne (Switzerland)

2. On 11 and 12 February 2013, I carried out a fact-finding visit to the United Kingdom in order to study recent measures aimed at promoting alternatives to imprisonment with a view to reducing recidivism and improving the security of the population whilst containing budgetary costs. I should like to thank the competent British authorities, and in particular the United Kingdom delegation to the Council of Europe, for their excellent co-operation and hospitality.[5] I was impressed with the professionalism and personal engagement of my interlocutors, both at the working level in the competent State bodies and at the political level, and not least among specialised non-governmental organisations or State-mandated autonomous bodies. Other European countries have a lot to learn from the way in which the United Kingdom has first experimented with and then phased in on a large scale a number of novel non-custodial sanctions which have indeed proven to be viable alternatives to imprisonment.

1.2. The Council of Europe at the forefront of promoting alternatives to imprisonment

3. The Council of Europe has long been at the forefront of the movement in favour of the wider use of non-custodial sanctions. As early as 1965, the Committee of Ministers adopted a resolution on suspended sentences, probation and other alternatives to imprisonment, "considering the disadvantages that imprisonment may have, particularly in the case of first offenders".[6] This resolution was inspired by an Assembly recommendation on penal reform dating back to 1959.[7] "Considering the tendency, which is observable in all member States, to avoid imposing prison sentences as far as possible on account of their many drawbacks as well as out of respect for individual liberty, and believing that this process could be taken further without endangering public safety", the Committee of Ministers adopted another resolution on certain alternative penal measures to imprisonment in 1976.[8]

4. Another milestone was Recommendation No. R (92) 16 on the European Rules on community sanctions and measures,[9] which is the European response to the United Nations Minimum Standards for Non-custodial Measures adopted in 1990 ("the Tokyo Rules").[10] The European Rules on community sanctions and measures (hereafter "the European Rules") were recently complemented by Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules.[11]

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4. Doc. 12659, Reference 3817.
5. The programme of the visit is available from the committee secretariat.
6. Resolution (65) 1 adopted by the Ministers' Deputies on 22 January 1965: https://wcd.coe.int/ViewDoc.jsp?id=636167.
7. Recommendation 195 (1959) on penal reform (in particular paragraph 3.*a*).
8. Resolution (76) 10 adopted by the Ministers' Deputies on 9 March 1976: https://wcd.coe.int/ViewDoc.jsp?id=663981.
9. Adopted by the Ministers' Deputies at their 482nd meeting on 19 October 1992.
10. Adopted by General Assembly Resolution 45/110 of 14 December 1990: https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_Non-custodial_Measures_Tokyo_Rules.pdf; see also the Office of the High Commissioner for Human Rights (OHCHR), "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers", Chapter 9, The Use of Non-Custodial Measures in the Administration of Justice: www.ohchr.org/Documents/Publications/training9chapter9en.pdf (hereinafter: "OHCHR Manual") and "Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), United Nations document St/CSDHA/22: https://www.ncjrs.gov/pdffiles1/Digitization/147416NCJRS.pdf (hereinafter: "Commentary on the Tokyo Rules").

5. These documents all state clearly that the purpose and added value of non-custodial measures is to find effective alternatives to imprisonment for offenders and to enable the authorities to adjust penal sanctions to the needs of the individual offender in a manner proportionate to the offence committed. They permit the offender to remain at liberty, thereby also enabling him or her to continue work, studies and family life.[12] At the same time, these documents – and I myself, I should like to add – also fully support the general aim of the criminal justice system, which is to reduce crime and the need to recognise the importance of taking into account the situation of victims of crime.[13]

6. Promoting alternatives to imprisonment is therefore by no means a novel or "revolutionary" approach – it is just plain common sense. As we will see, recent technological advances have added new options to the panoply of alternatives to imprisonment, which further strengthen the case for reducing imprisonment. At the same time, care has to be taken that these new options do not cause a "widening of the net" of criminal sanctions by targeting small-time or first-time offenders committing minor transgressions which might otherwise not have given rise to any formal criminal sanctions at all.

2. Imprisonment gaining ground again in Europe and the problem of prison overcrowding

2.1. Imprisonment rates in Europe: disparate but generally rising

7. Surprisingly, in view of the above, imprisonment has gained ground in Europe over recent years. Despite the general recognition that prison should be the "last resort" reaction to deviant behaviour, imprisonment rates have increased rather than decreased in many European countries since the 1990s. In most European countries, imprisonment rates are well above those in the 1970s and 1980s. The countries of central and eastern Europe still have the highest rates (around 200 prisoners per 100 000 inhabitants), and these rates are unfortunately on the rise again after an initial sharp fall immediately after the political changes at the end of the 1980s. A number of western European countries have also experienced steep increases in the number of prisoners in the last decade and have now reached imprisonment rates well above 100/100 000 (in particular the Netherlands, England and Wales and Spain). On a more positive note, some countries still have prisoner rates short of 100/100 000 (France, Germany and Greece), whilst the Scandinavian countries, Switzerland and Italy still have rates well below 100/100 000. In England and Wales, the Netherlands, Greece and Spain, prisoner rates increased at a particularly rapid pace between 1987 and 2006, whereas France, Germany, Denmark, Austria and Switzerland saw relatively small increases.[14]

8. The numbers cited above refer to the year 2006. The most recent figures, available from the SPACE I statistics (Annual Penal Statistics of the Council of Europe) published in 2012 referring to the situation on 1 September 2010, generally confirm the trend described by Professor Albrecht – with the positive exception of the Netherlands, where the imprisonment rate has decreased again to 70.8/100 000, and the negative ones of France and Italy, where imprisonment rates now exceed 100/100 000 (France 103.5 and Italy 113.3).[15] The countries with the highest imprisonment rates among the member States of the Council of Europe, namely more than double the European average of 149.3, are all in the east of the continent: the Russian Federation (590.8), Georgia (533.9), Azerbaijan (410.0) and Ukraine (332.4).

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11. Adopted by the Ministers' Deputies at their 1057th meeting on 20 January 2010. Other relevant work of the Committee of Ministers includes: Recommendation No. R (99) 19 concerning mediation in penal matters; 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.

12. See Commentary on the Tokyo Rules (footnote 10 above), p. 2.

13. Ibid., p. 6.

14. See Hans-Jörg Albrecht, Sanction Policies and Alternative Measures to Incarceration: European Experiences with Intermediate and Alternative Criminal Penalties, UNAFEI, 142nd International Training Course, Visiting Experts' Papers, Resource Material Series No. 80, Tokyo, March 2010, pp. 47-50: www.unafei.or.jp/english/pages/RMS/No80.htm.

15. The September 2010 figures for the other countries mentioned by Professor Albrecht are (prisoners per 100 000 inhabitants: Austria 102.6; Denmark 71.3; Finland 62.0; Germany 87.6; Greece 105.6; Iceland 51.9; Norway 74.8; Spain 164.8; Sweden 74.1; Switzerland 79.4 (source: SPACE I – 2010, Table 1, Situation of Penal Institutions on 1 September 2010, p. 37 (Strasbourg, 28 March 2012, pc-cp/space/documents/pc-cp(2012)1).

2.2. Prison overcrowding: a problem in 21 member States of the Council of Europe

9. Not surprisingly, in view of the above figures, and as indicated in the motion underlying this report, many member States of the Council of Europe suffer from prison overcrowding. According to the most recent statistics published by the Council of Europe,[16] 21 member States have more than 100 prisoners per 100 places of detention. This includes countries with mildly overcrowded prisons such as Iceland, Ireland, Sweden and Finland (less than 105 prisoners per 100 places), countries with more serious problems (such as France at 108.4, Turkey at 115, Greece at 123) up to countries with very severe overcrowding problems (including Serbia at 172.3, Italy at 153.2 and Cyprus at 150.8 prisoners per 100 places).

10. Numerous reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) show that this leads to substandard prison conditions. These cause serious human rights problems and dramatically reduce the impact prison can have on the rehabilitation of offenders. In addition to prisoners already convicted of an offence, there are hundreds of thousands of prisoners on remand and pre-trial detainees in Council of Europe member States. It should not be forgotten that these people benefit from the presumption of innocence. This is a powerful reason to make the best possible use of alternative measures in order to achieve the purposes habitually pursued by the imposition of pre-trial detention.[17]

11. In view of the difficult budgetary situation of most member States, the high cost of imprisonment[18] is also a factor that should spur reflection on alternatives to imprisonment. The SPACE I statistics[19] show that the cost per inmate per day (as of 2009) ranges between, for example, just over 2 euros in Armenia and Bulgaria, 9 euros in Azerbaijan, 15 euros in Albania and Serbia, between 80 and 120 euros in most western European countries up to 300 euros in Norway. Even for the countries in the middle range of expenditure per inmate, these expenses are considerable; and in the countries with particularly low expenses, the question arises whether those extremely limited resources can realistically be sufficient in order to guarantee the respect of human dignity and minimum standards of detention, especially with a view to rehabilitation.

12. Of course, legitimate security concerns of our societies and the perceived need for retributive justice must be taken into account. But I share the assumption of the signatories of the motion underlying my mandate that suitable alternatives to imprisonment do exist. This is particularly true for low-level or first-time offenders, juvenile delinquents and others who do not constitute a present danger for society and who may actually be in a better position to repair the damage they have done to their victims if they are allowed to benefit from alternatives to custodial sentences.[20]

3. Offenders suitable for alternative sanctions: taking into account the "purposes of punishment"

13. The types of offenders for whom the use of non-custodial sanctions would be socially acceptable and politically defensible depend on the different purposes of criminal sanctions and their complicated and sometimes contradictory relationship. I am aware that the relative weight attached to the different "purposes of punishment" goes to the very root of our cultural and political socialisation. The Assembly represents 47 countries with different national penal cultures and traditions and covers the full spectrum of political tendencies from the left to the right. It is therefore not likely and maybe not even desirable that we all agree on

16. SPACE II 2010, p. 51, Figure 1.B.
17. A specific report on "Abuse of pre-trial detention in States Parties to the European Convention on Human Rights" is currently under preparation by my colleague Pedro Agramunt (Spain, EPP/CD); I will therefore not go into any more detail on this issue in this report.
18. The motion cites the figure of €70 000 per year as the cost of imprisoning an offender; as we will see, this cost is obviously not the same in all member States, but it is considerable everywhere, in relation to available resources.
19. Space II 2010, p. 127, Table 16.
20. This is also the point of view of the French Minister of Justice, Ms Christiane Taubira. A conference initiated by the Minister and presided by Ms Françoise Tulkens, former Vice-President of the European Court of Human Rights ("Conférence de consensus sur la récidive") presented its conclusions to the French Prime Minister and the Minister of Justice on 20 February 2013. These include recommendations to move away from the perceived generalised use of custodial sentences (the "tout carcéral"); see *Le Parisien* of 21 February 2013, "Justice: l'efficacité de la prison mise en cause par des experts"; and the reply by Ms Laurence Neuer, "La prison est un instrument nécessaire pour la République", in: LePoint.fr, 21 February 2013; and *Le Monde* of 22 February 2013, "Récidive: la conférence de consensus contre le 'tout-carcéral'".

the relative importance that we attach to the different purposes of punishment, in quantitative terms. But I do think that there can be a consensus on a "non-weighted" list of purposes that criminal sanctions should pursue, including:

– *General prevention*, namely deterring potential offenders in the wider context. General prevention depends in particular on high elucidation rates for criminal offences, namely the probability that an offender is actually identified and convicted. It also requires that sanctions must be sufficiently "unpleasant" in order to have a deterrent effect on potential offenders. This means that non-custodial sanctions must not fall below a certain threshold of constraint.

– *Special prevention*, namely preventing (additional) offences by the person to be subjected to sanctions, both through deterrence and rehabilitation. As to deterrence, the same factors as above come into play. Rehabilitation, in turn, can be promoted both in prison and outside. It can also be affected negatively by prison. The "school of crime" effect, especially in overcrowded places of detention in which juvenile or first-time offenders are exposed to the influence of hardened multi-recidivists, is well-known.

– *Retributive justice*, namely upholding the law by punishing offenders as a matter of principle vis-à-vis society as a whole and the victims of the crime in question, is more of a metaphysical purpose of punishment. Its weight is difficult to quantify, but it plays an important role in the popular and (sometimes) populist understanding of the relationship between crime and punishment. Whilst all our societies have come a long way from the archaic principle of "an eye for an eye", custodial sentences are still widely seen as the inevitable consequence of particularly serious crimes, especially those involving wilful attacks on the life and health of others.

– *Restorative justice*, namely repairing the prejudice suffered by the victim, including, for some, an element of "moral satisfaction" for the victim seeing the perpetrator punished. Restorative justice can be promoted more effectively through non-custodial sanctions than through imprisonment, given that the perpetrator does not automatically lose his or her job and has therefore more funds for repairing the damage caused.

14. These "purposes of punishment" shall serve as guidance in evaluating possible alternatives to imprisonment, though much depends on the respective weight attached to the one or the other, possibly contradictory purpose in our respective countries.

15. As a general rule, it can be said that non-custodial sanctions are particularly suitable as punishment for non-violent crimes, especially when committed by juvenile and/or first-time offenders, and women.[21] But this does not mean that all others should systematically go to prison. This would be a serious step backwards in relation even to the existing practice in many countries. When discussing the different types of non-custodial sanctions, I will include references to the types of crimes and delinquents for which they have proved most suitable.

16. The Tokyo Rules, in conjunction with the Commentary thereon, give a first indication by stating that "imprisonment cannot be considered an appropriate sanction for a wide range of offences and many types of offenders, in particular those who are not likely to repeat offences, those convicted of minor crimes and those needing medical, psychiatric or social help".[22]

4. Different alternatives to imprisonment: legal and human rights standards

17. Possible alternatives to imprisonment include fines (section 4.1 below) as well as the use, separately or combined, of so-called community sanctions and measures (CSMs) defined as "sanctions and measures which maintain offenders in the community and involve some restrictions on their liberty through the imposition of conditions and/or obligations".[23] CSMs can either accompany a suspended prison sentence (section 4.2 below), or completely replace a custodial sentence. The Council of Europe SPACE II statistics[24] provide a wealth of interesting data on the use of non-custodial sanctions and measures (excluding fines) in most member States of the Council of Europe.

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21. See Criminal Justice Joint Inspection (England & Wales) "Thematic Inspection Report: Equal but different? An inspection of the use of alternatives to custody for women offenders", ISBN 978-1-84099-485-8, London, 2011. The study concludes that women offenders are most often suffering from several social and health (including mental health) problems that should be addressed by appropriate social and health measures rather than imprisonment, which raises special problems in the presence of young children.

22. Commentary on the Tokyo Rules, *op. cit.*, p. 5.

23. Definition as in Recommendation CM/Rec(2012)1 of the Committee of Ministers on the Council of Europe Probation Rules (adopted by the Committee of Ministers on 20 January 2010 at the 1075th meeting of the Ministers' Deputies).

18. Minimum standards for non-custodial measures were first set in 1990 in the Tokyo Rules. In 1992, the Committee of Ministers adopted Recommendation No. R (92) 16 on the European Rules on Community Sanctions and Measures, complemented in 2010 by Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules.

19. Non-custodial sentences, whilst clearly preferable to prison sentences in all but the most serious cases, must nevertheless fulfil basic human rights requirements, as specified in the Tokyo Rules, and the European Rules on Community Sanctions and Measures, including the following, which apply in principle to all non-custodial sentences.

4.1. The principle of legality

20. This principle means that the measures to be applied, the conditions for their application, and the authorities responsible for their implementation must be prescribed by law. Rule 3 of the European Rules on Community Sanctions and Measures specifies that "[t]he definition, adoption and application of community sanctions and measures shall be laid down in law". Whilst flexibility allowing the personalisation of sanctions, in the interest of the rehabilitation of the offender, is one of the strengths of alternative sanctions, this must not allow for arbitrariness. The law must set a clear, predictable framework for all penal sentences, including non-custodial ones. The latter can also involve heavy interferences with the fundamental rights of offenders. As regards the authorities responsible for the implementation of such sanctions, the law may allow for the "privatisation" of certain aspects. I am myself in favour of greater involvement of civil society actors in this field, as their good will, experience and human engagement can make a crucial difference for the chances of rehabilitation of offenders. The "circles of support" launched in the United Kingdom by the Quakers which I learned about in some detail during my fact-finding visit are an interesting example. By contrast, I am sceptical about the involvement of private enterprises trying to derive a financial profit from measures such as community work obligations imposed on offenders, or to whom the monitoring of electronic devices may be delegated. In such cases, the law must make it very clear that the ultimate legal responsibility rests with the competent public authority, which cannot escape its duties by delegating them to private actors.

4.2. Prohibition of discrimination

21. Another important legal requirement in the application of non-custodial measures is the prohibition of discrimination. According to Rule 2.2, the Tokyo Rules shall be applied "without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status". But not all differences in treatment are discriminatory. Differentiation based on reasonable and objective criteria does not amount to prohibited discrimination.[25] One of the great advantages of non-custodial measures is precisely their flexibility, that is to say the possibility to adjust them to the needs of the individual offender. It may in fact be justified, objectively, to treat persons differently in view of their particular backgrounds and personal needs and problems. But the decision-makers must be constantly aware of the risk that the element of discretion involved in the implementation of measures may, intentionally or not, reflect an element of discrimination currently existing in the relevant community.[26]

4.3. Principle of proportionality

22. Respect for the principle of proportionality means that there must be a reasonable relation between the seriousness of the offence on the one side and the intensity of the afflictive character and the interference of the measure applied with the rights of the offender on the other. In the terms of Rule 6 of the European Rules, "the nature and the duration of community sanctions and measures shall be in proportion to the seriousness of the offence for which an offender has been sentenced or of which a person is accused and take into account his personal circumstances".

23. This does not mean that alternative sanctions shall necessarily place only a mild burden on the offender. On the contrary, if we are serious about reducing imprisonment by promoting alternative sanctions, we must be ready to include in the scope of such measures perpetrators of fairly serious offences who might otherwise go to prison for some time. For such offenders, the availability of fairly "heavy" measures such as

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24. The most recent data currently available are those for 2010 (Council of Europe Annual Penal Statistics, SPACE II, Persons Serving Non-Custodial Sanctions and Measures in 2010), published on 23 March 2012 by the Council of Europe and the University of Lausanne (document PC-CP (2012) 2): http://www3.unil.ch/wpmu/space/2012/04/space-i-ii-2009-available-online/.
25. See the OHCHR Manual (footnote 10 above), p. 377 with further references.
26. Commentary on the Tokyo Rules, *op. cit.*, pp. 8-9.

fines syphoning off the offender's disposable income for many months, possibly combined with house arrests over numerous weekends and evenings, strictly enforced by electronic devices, can provide a credible alternative to a prison sentence, taking into account most, if not all, of the "purposes of punishment" outlined above.

4.4. Consent of the offender

24. The offender's consent is required especially in cases where non-custodial penal measures are applied before or instead of formal proceedings or a trial (for example, the use of electronic monitoring devices during the pre-trial phase in order to avoid pre-trial detention; or so-called "diversion" measures intended to prevent the stigmatisation of first-time offenders by a formal conviction).[27]

25. But in the interest of the success of the measure taken, the offender's consent and co-operation should be sought also in those cases where he or she was formally convicted. The European Rules on Community Sanctions and Measures include a very detailed set of rules designed to ensure that the offender's consent is informed, explicit and not the result of undue pressure.[28]

4.5. Right to review

26. Both the European Rules and the Tokyo Rules foresee that the offender subjected to community sanctions and measures enjoys judicial guarantees and complaint procedures.[29] The European Rules are more protective than the Tokyo Rules in that they require that the decision to impose or revoke a community sanction or pre-trial measure shall be taken by a judicial authority, whereas the Tokyo Rules also allow for "another competent independent authority". Less formal complaint procedures suffice for decisions concerning the mere implementation of a sanction, once imposed by a judicial authority.

4.6. Respect for the rights to privacy and human dignity of the offenders

27. The Tokyo Rules specify that "in the application of non-custodial measures, the offender's right to privacy shall be respected, as shall be the right to privacy of the offender's family" (Rule 3.11). The Commentary on the Tokyo Rules warns against surveillance measures that treat offenders solely as objects of control and specifies that surveillance techniques should not be used without the offender's knowledge.[30] Rule 23 of the European Rules adds that self-respect, family relationships, links with the community and ability to function in society shall not be jeopardised and that "safeguards shall be adopted to protect the offender from insult and improper curiosity or publicity".

28. It is worth recalling these rules in view of some experimental practices in certain jurisdictions which in my view have clearly gone too far, at least by European standards.[31]

29. Nevertheless, those restrictions to privacy which are inevitably inherent in electronic surveillance measures must be accepted if we are to promote these measures as a credible alternative to custodial sentences, which interfere with the offender's rights much more intensively. This said, the practical implementation of electronic surveillance measures can be modulated in such a way as to limit interferences with privacy as much as possible without jeopardising the objective of the measure (for example, prevent recidivism or enforce curfews at specified times).

4.7. Protection from undue risk of physical or mental injury.

30. Based on Articles 2 and 3 of the European Convention on Human Rights (ETS No. 5), Rule 26 of the European Rules stipulates that the "nature, content and methods of implementation of a community sanction or measure shall not involve undue risk of physical or mental injury". Rule 25 specifies that a community sanction or measure "shall never involve medical or psychological treatment or procedures which are not in

27. See Rule 3.4. of the Tokyo Rules and Rule 35 of the European Rules.
28. Chapter IV, Rules 30-36.
29. European Rules, Chapter II, Rules 12-19; Tokyo Rules, Rule 3.5.
30. Commentary on the Tokyo Rules, p. 13.
31. For example, the case of a woman from Cleveland (United States) convicted of a driving offence obliged to exhibit herself at a busy crossroads under a judge's order holding a sign that said, "Only an idiot would drive on the sidewalk to avoid a school bus".

conformity with internationally adopted ethical standards". In the same spirit, Rule 3.8 of the Tokyo Rules prohibits non-custodial measures involving "medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender".

31. These rules inevitably raise the issue of the use of surgical or chemical castration for sex offenders. Whilst castration was used frequently in the more or less distant past as a sanction for various types of crimes,[32] laws enabling forced surgical castration were either amended to ban involuntary castration or completely repealed. Although laws allowing for (voluntary) castrations in some countries are still in force (Denmark, Finland, Germany and Sweden), the actual practice of surgical castration has been abandoned, with the exceptions of the Czech Republic, where voluntary surgical castration of sex offenders is practiced not infrequently to the present day, and of Germany, where it is very rare. The CPT has strongly criticised both countries,[33] stating that "surgical castration is a mutilating, irreversible intervention and cannot be considered as a medical necessity in the context of the treatment of sexual offenders".[34] Voluntary chemical castration, on the other hand, is practised today in Belgium, the Czech Republic, Denmark, France, Germany, Hungary, Italy, Sweden and the United Kingdom.[35]

32. In 2009, a law on compulsory chemical castration was enacted in Poland, making it the first country in Europe to allow such treatment to be imposed on certain sex offenders (paedophiles). In March and June 2012, the Republic of Moldova and Estonia passed similar laws.[36]

33. In view of the difficult medical, ethical and legal issues raised by surgical or chemical castration, I prefer not to take position on this type of sanction in the framework of this report. This issue, in my view, requires a separate report in order to be treated with the necessary attention to detail. I trust that the report by Ms Liliane Maury Pasquier under preparation in the Committee on Social Affairs, Health and Sustainable Development on "Putting an end to coercive sterilisations and castrations" will do this subject justice.

5. The need to avoid "widening the net"

34. Special care should be taken to ensure that non-custodial sentences are imposed instead of prison sentences, and certainly not in addition to them, in such a way as to avoid widening the scope of criminal punishment. Minor offences hitherto not giving rise to any criminal sanctions should also not be punished by non-custodial sentences. This issue was already flagged in the Commentary on the Tokyo Rules in which it is pointed out that the reference to "the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender" means, *inter alia*, that, while the Tokyo Rules aim at guaranteeing more frequent use of non-custodial measures, such use should not lead to an increase in the number of people subject to penal measures or to an increase in the intensity of such measures.[37] More recent studies do indeed show the need to be vigilant regarding the "net-widening effect" of an increased use of non-custodial sentences.[38] Professor Aebi, at the hearing on 11 December 2012, also provided us with some interesting data pointing to an apparent net-widening effect of the increased use of alternative sanctions in certain countries, which have not experienced a parallel reduction of their rates of imprisonment.

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32. And even until well into the 19th century, in Europe, on boys in order to preserve their soprano voices for the sake of opera performances.
33. See BBC News, 22 February 2012, "Germany urged to end sex offender castration": www.bbc.co.uk/news/world-europe-17124604; concerning the Czech Republic, see in particular Voislav Stojanovski, "Surgical Castration of Sex Offenders and its Legality: The Case of the Czech Republic", with detailed references to the relevant CPT reports and the responses of the Czech authorities: www.iusetsocietas.cz/fileadmin/user_upload/Vitezne_prace/Stojanovski.pdf
34. See Voislav Stojanovski, ibid., pp. 12-16.
35. Ibid., pp. 5-6.
36. For the Republic of Moldova, see BBC News 6 March 2012, "Moldova introduces chemical castration for paedophiles": www.bbc.co.uk/news/world-europe-17278225; Estonia: see Voice of Russia, 5 June 2012, "Estonia passes chemical castration law": http://english.ruvr.ru/2012_06_05/77079747/.
37. Commentary on the Tokyo Rules, p. 7.
38. See, for example, Hans-Jörg Albrecht, Sanction Policies and Alternative Measures to Incarceration: European Experiences with Intermediate and Alternative Criminal Penalties, UNAFEI, 142nd International Training Course, Visiting Experts' Papers, Resource Material Series No. 80, Tokyo, March 2010, p. 44: www.unafei.or.jp/english/pages/RMS/No80.htm; Shauna Bottos, An Overview of Electronic Monitoring in Corrections: the Issues and Implications, Research Branch, Correctional Service Canada, April 2007, 2008 No. R-182 (p. 8); Commentary on the Tokyo Rules, p. 7; several interlocutors during my fact-finding visit in London made the same point: sentencers who might hesitate to place a low-level offender in custody may well be tempted to make use of an existing offer of non-custodial sentences rather than imposing no sanction at all, as they otherwise might have.

35. But it would appear from these findings that a "net-widening" effect is not inevitable, provided judges and the general public are aware of the risk and share the assumption that an increase in the pressure of penal sanctions applied to lesser offences is indeed undesirable. We must in any case be vigilant, which is why I propose to dedicate a special paragraph to this issue in our resolution.

6. Summary review of different alternatives to imprisonment

6.1. Fines (including "day fines" calculated in proportion to the offender's disposable income)

36. Fines are by far the most frequently used alternatives to imprisonment. In Germany, for example, fines are imposed in 80.7% of cases, as compared to 13.5% of suspended prison sentences and 5.8% of non-suspended prison sentences.[39] In France, 35.7% of all punishments handed down are fines,[40] against 48.6% prison sentences (of which 19.6% non-suspended).[41] In the United Kingdom, 65.6% of all offenders sentenced receive a fine, 3.6% a suspended sentence and 7.5% are given a custodial sentence.[42] Serbia, finally, has the lowest percentage of fines, at 16.5%, and the highest of non-suspended prison sentences (23.9%). These numbers cannot be compared directly. For example, in France, less than 630 000 punishments were handed down, which compares to almost 1.3 million in England and Wales alone, whose population is well below that of France. This shows that France uses responses to deviant behaviour other than criminal sanctions more frequently than the United Kingdom. This explains why in the remaining – presumably more serious – cases, custodial sentences are, in turn, more prevalent in France than in England and Wales. In Germany,[43] the above-mentioned percentages apply to 645 000 persons sentenced under general criminal law (thus excluding juvenile offenders), whilst less than half of the proceedings brought before the criminal courts end in a judgment.[44]

37. The German figures show that criminal fines can be used to sanction a substantial part of the overall criminal activity that is serious enough to warrant a criminal court judgment; this is even the case in criminal justice systems such as that in Germany where other forms of reaction to deviant behaviour play a relatively important role. This may be linked to the fact that criminal fines in Germany can be rather substantial, as their amounts are calculated on the basis of the delinquent's daily disposable income – one "day fine" (*Tagessatz*) being the equivalent of 1/30th of the person's monthly net income, after deduction of any maintenance obligations towards family members, etc. The system of "day fines" has been in use in Germany since 1975 and was inspired by Scandinavian countries such as Finland, where the system was created as early as 1921. Both the number of "daily amounts" (from 5 to 360, and in exceptional cases up to 720) and the amount per day (from a minimum of € 5 up to € 30 000 per day!) make this punishment a sufficiently deterrent option even for fairly serious offences, in particular economic crimes with a pecuniary motive. In such cases, the punishment (fine) is added to the confiscation of the proceeds or profits of the crime.

38. The "day fine" system has the advantage that it modulates the "pain" involved in the punishment in such a way that it is in principle the same for all, independently of a person's financial resources. It also ensures that the "pain" and the expression of disapproval by society is both considerable and perfectly comparable with a term of imprisonment of a given length – which a fine actually turns into if it is not paid in due time. Its adoption in other European countries which do not yet have such a system might in fact open up an as yet underexploited avenue for reducing imprisonment.

39. At our hearing on 11 December 2012, the Serbian expert, Dr Jovan Ciric, presented the practical obstacles that the "day fine" system – which is available in law – still encounter in Serbia: the delinquents' resources are difficult to establish when he or she works in the "grey economy" or in agriculture; and the rampant economic crisis has led to widespread poverty, which makes it actually preferable for certain delinquents to go to prison rather than to pay a fine, which they could simple not afford. In my view, these difficulties should not deter courts from applying this type of sanction in many more cases. The difficulty of evaluating a person's resources can be overcome by imposing a duty to present vouchers to establish actual

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39. Jörg-Martin Jehle, Criminal Justice in Germany, Facts and Figures, published by Federal Ministry of Justice (2009), Diagram 14.
40. Plus 3.9% day-fines ("jour amende") categorised as an "alternative punishment".
41. Ministère de la Justice, Les chiffres-clés de la Justice 2011, p. 18.
42. Ministry of Justice, Quarterly Main Sentencing Tables, March 2012, Tables Q1.6 and Q5.1: Offenders sentenced by offence group and outcome: www.justice.gov.uk/downloads/statistics/criminal-justice-stats/sentencing-tables-0312.xls.
43. Referring only to former West Germany and West Berlin (for the sake of comparability over time).
44. See Ministry of Justice, footnote 39, Diagram 11. The remainder of the cases are dealt with following different "diversion" strategies, including unconditional termination of proceedings in petty or first-time offender cases and termination of proceedings under conditions (such as payment of a fine, reparation of damage caused, etc.).

income in order to avoid the use of estimations by the court based on the person's apparent living standard (house, car and so on). It is likely that the extra time and effort to be invested by the courts would be far outweighed by the savings through a less frequent use of imprisonment – and the fines themselves, which should be ploughed back into the budget of the judiciary.

6.2. Other non-custodial sanctions, including community sanctions and measures

40. Community sanctions and measures (CSMs) are particularly important tools to limit the prison population. According to the SPACE II (2010) statistics,[45] the mean number of people under the supervision or care of probation agencies per 100 000 inhabitants is 205.7; the lowest number (0.1) is in Serbia, the highest (721) in Georgia. Poland (654.2), Estonia (564.7), Latvia (466), Belgium (370.4), Hungary (310.3), England and Wales (307.5) and France (280.6) also have far more people in probation than the Council of Europe average, whereas the numbers in Croatia (14.6), Cyprus (37.6), Romania (44.9), Norway (47.8), Iceland (56.4) and Italy (59.3) are either below or just above a quarter of the European average, still in terms of persons in probation per 100 000 inhabitants.[46] In Serbia, as Dr Ciric explained at our hearing, the extremely low number is to a large extent explained by the organisational weaknesses of the probation system, which does not appear to "cover" most of the persons sentenced to a suspended prison sentence,[47] and which does not even offer community service measures except in a small number of cities. I agree with him that there is a lot of scope for improvement in Serbia on this count, and I intend to follow this up politically in my home parliament. The following measures are available:

6.2.1. Suspended sentences[48]

41. A traditional means of reducing actual imprisonment is the suspension of prison sentences, which can take the form either of suspending the sentence from the start, or of suspending the remainder of the sentence after the offender has spent a given proportion of the original sentence in detention and he or she is found to present a low risk of recidivism. The suspension of a prison sentence is usually tied to "probation" conditions. Probation is defined as the "implementation in the community of sanctions and measures, defined by law and imposed on an offender. It includes a range of activities and interventions, which involve supervision, guidance and assistance aiming at the social inclusion of an offender, as well as contributing to community safety".[49]

42. Again, the use of suspended sentences differs widely between countries. In Germany, suspended sentences are used more than twice as often as non-suspended ones, at 13.5% of all criminal sanctions against 5.8%. France also uses suspended sentences far more often than non-suspended ones: 29% of all criminal sanctions are suspended prison sentences, whereas only 19.6% are at least in part not suspended.[50] By contrast, the United Kingdom (England and Wales) hands down twice as many non-suspended sentences as suspended ones (only 3.6% of all criminal sanctions are suspended prison sentences, 7.5% non-suspended ones). In Serbia, according to the 2009 data provided by Dr Ciric, suspended prison sentences, at 57.2%, are handed down more than twice as often as non-suspended ones (23.9%). According to the SPACE II statistics, the mean number of persons per 100 000 inhabitants who are under probation after having been given a fully or partially suspended prison sentence is 35.9, the lowest number being 0 (in Serbia[51]), the highest (100) in Romania. Monaco (80.6), Poland (79.5), France (79.2) and Latvia (66.1) also have fairly high numbers of person under probation following a suspended prison sentence, England and Wales (25.6), Italy (10.7) and Spain (9.2) are in the lower range.

43. National practices also vary widely as regards suspension of the remainder of a prison sentence. In Germany, early release is quasi-automatic after two thirds of the originally imposed sentence (one half in the case of juvenile offenders), provided the prisoner has behaved adequately in detention and benefits from a favourable "social prognosis". In France, the part of the sentence to be served in prison and the part suspended is fixed in the original judgment. In England and Wales, early release is usually granted at the

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45. See footnote 16, Table 1.3 (pp. 23-24).
46. But it should be noted that the figures for important countries such as the Russian Federation, Turkey and Ukraine are missing and those for Germany go back to 2009 and are not broken down in detail.
47. 57.2% of all convicted persons in 2009, according to Dr Ciric.
48. I have chosen to present suspended sentences along with CSMs because, in practice, suspended sentences are often combined with different kinds of CSMs, under the general responsibility of the probation authorities.
49. Definition as in Recommendation CM/Rec(2010)1.
50. "avec partie ferme".
51. Again, this number seems to point to a low level of development of the probation services, given the frequent use of suspended prison sentences (see above).

halfway point of a fixed sentence, whereas sentences of indefinite duration include a "tariff" period meted out in proportion to the seriousness of the offence; after the expiry of the "tariff", release is possible if and when the risk of recidivism is considered acceptably low.[52] France has a particularly interesting system regarding early release, on the basis of the Law of 9 March 2004.[53] This system, designed to motivate prisoners to co-operate with the prison authorities in order to improve their chances of rehabilitation, functions as follows: for the first year of the prison sentence, three months are deducted, and two months for each further year (except for recidivists). This basic "credit" can be either reduced, in case of bad behaviour, or increased, by up to three months per year of imprisonment, when the prisoner behaves in a particularly exemplary fashion (for example, by taking an exam).

44. In addition, early release is possible in many if not most jurisdictions on compassionate grounds, when new circumstances arise that were not foreseeable at the time of the judgment (in particular serious medical grounds).[54]

45. In Serbia, as Dr Ciric explained at our hearing, the number of persons released early on parole has considerably decreased in the last few years. Whilst the Criminal Code of 2006 allowed for release on parole after one half of the original sentence, it was amended in 2009 to allow early release only after two thirds of the original sentence. Even then, judges are reluctant to proceed with early releases due to pressures from certain media and political forces.

6.2.2. Curfews, house arrest and restraining/exclusion orders enforced by technological means such as electronic bracelets and GPS

46. Curfews, house arrests and restraining or exclusion orders, more and more often enforced by technological means (for example electronic bracelets or other GPS-based devices) can either be alternative sanctions in their own right or accompanying measures for the suspension of prison sentences for all or part of the probation period. With reference to the "purposes of punishment",[55] it is clear that such measures are particularly useful both as regards the need to protect society from re-offending (general prevention) and the need either to rehabilitate the offender or to prevent him or her from becoming de-socialised in the first place (special prevention). The former is true, in particular, when technological means are used to enforce curfews, house arrests and restraining or exclusion orders (for example, against harassers/stalkers or violent family members). Offenders subjected to such sanctions must bear many of the – intended – negative aspects of a prison sentence – in particular the loss of personal liberty in what would normally be their "free time". But they can be spared many of the unintended negative aspects of imprisonment – in particular job loss, disruption of normal family relations and exposure to nefarious influences in the prison context.

47. The relevant statistics (SPACE II) are difficult to compare in detail, but it is quite clear from them that these measures are still underused in most jurisdictions, despite their high potential.

48. I have been particularly impressed, during my fact-finding visit to the United Kingdom, by the efficient utilisation of high-tech supervision devices in this jurisdiction. The cost per day and offender is only a fraction of that of a custodial sentence, whereas the rate of recidivism is considerably lower than that of former prison inmates. Unit costs have also gone down considerably by the combination of economies of scale due to the growing use of these measures and to the reduction in the cost of the electronic hardware. It is clear that the outcomes of different punishments in terms of recidivism are difficult to compare because much depends on the selection of the respective "populations" to which the one or the other punishment measure is applied. But the United Kingdom experience does show that curfew orders enforced by technical means have a very good safety record. Electronic tagging also helps police investigations by reducing the number of potential suspects. Limited investigatory resources need not be wasted on persons whose whereabouts at the time of the offence can be established by a few mouse-clicks. There are also critical comments, such as the finding in the June 2012 Criminal Justice Joint Inspection Report[56] that electronically-monitored curfews may well be

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52. An excellent overview of the different types of early release is provided in: Early release for prisoners, UK parliament briefing papers (SN/HA/5199 of 15 October 2009): www.parliament.uk/briefing-papers/SN05199.pdf.
53. www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005765479&dateTexte=20100517.
54. See, for example, for the United Kingdom: Parliament briefing paper, op. cit., p. 7 and following; for Germany: paragraph 455 StPO/Code of Criminal Procedure; France: early release for health reasons, see for example the explanations of the International Prison Observatory (French section) (in French): www.oip.org/index.php/lasuspensiondepeinepourraisonsmedicales.
55. See paragraph 13 above.
56. Criminal Justice Joint Inspection, "It's Complicated: The Management of Electronically Monitored Curfews, A follow-up inspection of electronically monitored curfews, An inspection by HMI Probation", London, June 2012, ISBN: 978-1-84099-550-3.

used effectively for the purpose of punishment, but only rarely for promoting lasting change on the side of the offenders. This would require a more targeted, personalised use of these measures that in turn require a better flow of information between the different actors in the process.

49. The effect on recidivism of the early release of prisoners on home detention curfew (HDC), accompanied by an electronic tag, was the subject of in-depth research by the United Kingdom Ministry of Justice.[57] HDC was introduced across England and Wales in 1999 to enable early release on an electronic tag for offenders who had received relatively short prison terms and who posed a less serious threat of reoffending upon release. The study is based on data concerning almost 500 000 prison discharges between 2000 and 2006, including over 63 000 early discharges receiving HDC. The study shows that offenders who received HDC were no more likely to reengage in criminal behaviour when released from prison when compared to offenders with similar characteristics who were not eligible for early releases on HDC. As the cost of monitoring an offender on HDC is considerably lower than that of keeping an offender in custody, these findings suggest that HDC is probably a cost-effective policy.

50. In France, different forms of electronic surveillance are available at different stages of the criminal justice process.[58] According to the French Government's reply to a parliamentary question in 2011,[59] the "placement sous surveillance électronique" is used quite frequently (almost 65 000 cases between 2000 and 2010) and is in fact the fastest-growing measure accompanying or modulating custodial sentences. By contrast, the "placement sous surveillance électronique mobile", which has only been available throughout France as of August 2007, is still only used in a small number of cases (54 ongoing measures on 1 September 2011).[60]

51. In Germany, the possibility of imposing mobile electronic supervision devices (Elektronische Aufenthaltsüberwachung or EAÜ) was included in the Criminal Code as of 1 January 2011.[61] It is applicable only in fairly serious cases, to supervise an offender presenting a high risk of recidivism during the probation period following release from a prison sentence of three years or more. An extension of this type of measure to cases in which potentially dangerous offenders can no longer be kept in preventive security detention due to the case law of the European Court of Human Rights,[62] or to other groups of cases with a view to reducing prison overcrowding is currently under discussion.

52. The noticeable reluctance concerning the imposition of mobile surveillance devices in France and Germany has the merit of drawing attention to the fact that this is not a "soft" measure, also in fairly severe cases. Electronic surveillance imposes considerable constraints upon offenders and has psychological effects that should not be underestimated. But in comparison with a custodial sentence, it has clear advantages both for the offender and for society at large, by avoiding the de-socialising effects of prison, including job loss, severe reduction of relations with family and friends, and the risk of criminal "contagion". I was told in London that even certain media which generally condemn any policies seen as "soft on crime", have accepted the point made by proponents of non-custodial measures that being forced to go out and work with tough curfews enforced by electronic tagging is much more demanding and in fact "harder" on offenders than "sleeping off" or spending in front of the television a few weeks or months in custody.

53. In Serbia, the case of a famous folk singer sentenced to house arrest[63] for an economic crime has triggered a wide public debate. While it was argued that house arrest is a privilege for the rich and famous, who did not want to give up the comforts of their luxurious homes, the debate had the merit of creating an awareness of this type of sanction among the general population, which has promoted its increased use by the courts. As our colleague, Renato Farina, indicated, house arrests are also difficult to administer in the numerous cases of homeless or migrant offenders.

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57. See Ministry of Justice, Research Summary 1/11, "The effect of early release of prisoners on Home Detention Curfew (HDC) on recidivism", May 2011: www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/effect-early-release-hdc-recidivism.pdf; and the Inspection report by the Criminal Justice Joint Inspection of June 2012 "It's Complicated: The Management of Electronically Monitored Curfews, A follow-up inspection of electronically monitored curfews, An inspection by HMI Probation", ISBN: 978-1-84099-550-3.

58. See the overview provided by the French Ministry of Justice (in French): www.justice.gouv.fr/prison-et-reinsertion-10036/la-vie-hors-detention-10040/le-placement-sous-surveillance-electronique-11997.html.

59. 13th législature, question No. 113971 by Mr Nicolas Dupont-Aignan, published on 12 July 2011, reply published on 8 November 2011 (in French): http://questions.assemblee-nationale.fr/q13/13-113971QE.htm.

60. +35% between September 2010 and September 2011 (source: Reply, ibid.).

61. Paragraph 68 b I 1 Nr. 12 StGB (German Criminal Code).

62. See the judgments of the European Court of Human Rights in the cases of *S. v. Germany* (Application No. 3300/10, judgment of 28 June 2012) and *M. v. Germany* (Application No. 19359/04, judgment of 17 December 2009): www.echr.coe.int/ECHR/FR/Header/Case-Law/Decisions+and+judgments/HUDOC+database/.

63. Article 45 of the Serbian Criminal Code ("House imprisonment").

54. Nevertheless, on the basis of the positive experience in the United Kingdom based on a large number of cases, I would recommend an increased use of such measures, in place of custodial sentences, in other European countries, including my own, which is still quite far behind in this respect.

6.2.3. Intermittent or weekend sentences

55. Intermittent or weekend sentences are distinct from curfews, house arrests, etc. (including those enforced by electronic surveillance measures) in that offenders actually have to go to prison for some time – offenders having to spend their free time at night, on weekends and possibly their annual vacation time in detention, away from home.

56. Depending on how much time is to be spent in prison, this can be a sanction of intermediary severity between uninterrupted prison time and electronically enforced curfews or house arrests. It avoids some but not all the negative effects associated with prison.

6.2.4. Assistance and supervision programmes

57. Programmes providing assistance and supervision by probation officers, including participation in "offending behaviour programmes" (drug rehabilitation programmes, drinking and driving, anger management, domestic violence), have been used increasingly since the 1970s. Whilst their focus was at first on the rehabilitation of the offender, punitive and risk-controlling conditions have been increasingly added to the panoply of such alternative measures since the 1990s. It would exceed the limits of space available for my report to try and give a full overview of all the measures in use in different member States of the Council of Europe. In the following text, I will just mention a few categories of measures which can usefully be "mixed and matched" to achieve the desired result of rehabilitating offenders, protecting society by reducing the risk of recidivism, and providing adequate punishment whilst reducing imprisonment. The package of measures must in each individual case be tailored to fit the specific needs of each offender. I should like to encourage the judicial authorities in all our member States to make the best use of the considerable degree of flexibility that this "toolbox" provides. The United Kingdom (England and Wales) experience that I had the privilege of studying a little closer shows that all actors involved in the treatment of offenders, including those providing social assistance to particularly vulnerable groups such as young offenders and women, and those implementing and supervising specific measures must co-ordinate their efforts. The "Multi-Agency Public Protection Arrangements" (MAPPA) in England and Wales provide a good model for other countries. The recent "Thematic Inspection Report" by the Criminal Justice Joint Inspection for England and Wales[64] provides useful information on the strengths and weaknesses of these arrangements and makes constructive proposals for further improvements.

6.2.4.1. Drug detoxification and rehabilitation measures (drug treatment and testing order)

58. The so-called war on drugs has filled prisons in many countries, the success in terms of reduction of drug crime being at best doubtful. It is therefore increasingly accepted that for drug offenders, who are themselves addicted, recidivism is best avoided by drug detoxification and rehabilitation measures.

59. In my view, imprisonment (together with the confiscation of any ill-gotten gains) is still an appropriate punishment for larger-scale dealers who make a fortune off the backs of addicts who jeopardise their health and often their lives. But the addicts themselves are more akin to victims – of the said dealers – than to perpetrators, and should be treated accordingly.

60. In order to maximise the chances of success, the consent of the offender (see paragraph 24 above) is a particularly important requirement for this type of measure. The same is true for the general safeguards and standards laid down by the Tokyo Rules and the European Rules on alternative sanctions regarding the protection of the offenders' dignity and health and the need to respect medical and other professional standards.[65]

64. Criminal Justice Joint Inspection, "Thematic Inspection Report: Putting the pieces together, An inspection of Multi-Agency Public Protection Arrangements", A Joint Inspection by HMI Probation and HMI Constabulary, London, 2011, ISBN: 978-1-84099-488-9.

65. See, for example, Rule 3.8. of the Tokyo Rules, which prohibits "medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender".

6.2.4.2. Community service obligations

61. Community service has been introduced as a sanction in its own right in several European countries, including England and Wales, France, the Netherlands and Norway. In Germany (for adult offenders), it is only available as a condition for a suspended prison sentence or as a substitute for prison following the failure to pay a fine. Measures such as the "community payback" programme that I encountered during my fact-finding visit to London can include clean-up work in public parks, removing graffiti, shovelling snow or any other type of work that is both useful and "additional", that is to say not in direct competition with work done by paid employees. Once again, community service obligations or community payback sanctions are not necessarily a "soft option". In fact, in October 2012, a "new approach" to Community Payback was launched in London "that will see offenders completing tougher, more intensive punishments".[66] I have had an interesting information visit with SERCO, a private company tasked with implementing the "community payback" scheme in the London area.[67] I could see for myself that the work projects were being implemented and supervised in a business-like, efficient manner, by highly-motivated staff members in part recruited from the public probation service. But I also heard criticism, both on grounds of principle – is law enforcement not one of the fundamental functions of the State, even in the view of the strongest defenders of free-market views? – and on grounds of possible conflict-of-interest situations and the difficulty of quality control. These issues are closely linked to the "Payment by Results" approach of which we heard both the pros and cons in London. Personally, I am rather sceptical about the commercialisation of aspects of law enforcement. This may function, to an extent, in the United Kingdom, which has both strong institutions capable of effectively supervising any work delegated to the private sector and generally has a low level of corruption. Such "privatisation" may be a lot more difficult to implement properly in other countries, such as those of central and eastern Europe. I am therefore not suggesting the pursuit of privatisation in this sector in the draft resolution and recommendation.

6.2.4.3. Victim-oriented measures: restorative justice, restitution, compensation, mediation

62. The issues of reparation, restitution, compensation, victim-offender mediation or reconciliation received much attention during the 1980s in western European countries. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[68] recognised for the first time, at the international level, that there was a need to improve access to justice also for victims of crimes.

63. Restitution, for example of a stolen object, or compensation for losses suffered by victims of crime, provided by the perpetrator, should normally go without saying. In most, if not all jurisdictions, criminal acts causing damage to others are at the same time civil torts giving rise to claims in damages before the civil courts. Unfortunately, the barriers for victims to access courts to obtain reparation can be very high – which is why the French instrument of *constitution de partie civile*, namely of the victim of a crime joining the criminal procedure against the perpetrator as a civil party, is of particular interest: provided proof of the criminal (and at the same time tortuous) deed is not a problem (despite the fact that the standard of proof is stricter in criminal cases), the victim is saved the effort and expense of litigation in the civil courts.

64. The reparation of the damage done by an offender is not normally on its own sufficient to fulfil the above-mentioned[69] "purposes of punishment" – there should be a "downside risk" in the form of an additional punishment for the sake of deterrence of potential offenders as the elucidation rate is necessarily below 100%. But when an offender co-operates in undoing the consequences of the offence for the direct victim(s), to the extent possible, society's "need for punishment" is clearly reduced considerably. Whilst care must be taken that the necessary contact with the offender does not deepen the trauma of the victim, restorative justice measures involving different forms of "mediation" between the offender and the victim can make a contribution both to alleviating the suffering of the victim and to improving the chances of rehabilitation of the offender.

65. In November 2012, the United Kingdom Government launched a new action plan for restorative justice, supported by Justice Minister Jeremy Wright in the following terms: "Victims deserve access to a high standard of restorative justice no matter where they are in the country and at a time that's right for them".[70]

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66. See Press release of the Ministry of Justice of 31 October 2012, "New approach to Community Payback begins in London".
67. See presentation available at www.serco.com: Community Payback, Serco & London Probation Trust, Bring service to life; Ministry of Justice, National Offender Management Service, Community Payback, The Unpaid Work Sentence.
68. Adopted by United Nations General Assembly Resolution 40/34 of 29 November 1985.
69. Paragraph 13 above.
70. See press release of the Ministry of Justice of 19 November 2012, "More victims to get a say – restorative Justice": www.justice.gov.uk/news/features/more-victims-to-get-a-say-restorative-justice.

The Restorative Justice Council,[71] whose leadership we met, has developed a highly professional and co-operative approach aimed at reconciling the interests of victims and perpetrators. The testimony I received in London from people involved in such work was very impressive.

66. During my visit to the United Kingdom, I also learnt about experimental measures designed specifically for sex offenders presenting a high-risk of recidivism. The success of such measures depends very much on the devotion and professionalism of the actors involved. In the case of the "Circles of support" project presented to me by representatives of the Quakers, the devotion and professionalism of the initiators and leaders of this project is unquestionable; their faith-based engagement in favour of rehabilitation of offenders enjoys great respect also among public officials and other non-governmental bodies involved in offender rehabilitation work. I can only encourage similar initiatives to be developed in other member States. The Quaker representatives have declared their readiness to freely share their experience.

67. In light of available statistics, it cannot be denied that "compensation and restitution as a main response or a sole penalty range far behind imprisonment, probation and day-fines".[72] On a more positive note, there is still plenty of room for increases in the use of these progressive measures in most, if not all, of our countries.

7. Conclusions

68. The information I have been able to collect, from public, official sources, academic research, the contributions of our experts at the hearing on 11 December 2012 and my fact-finding visit to the United Kingdom has confirmed that the signatories of the motion for a resolution underlying my mandate were quite right: available alternatives to imprisonment, which have been tested in different jurisdictions, are still very much underused and therefore deserve to be promoted along the lines that I have presented in this report.

69. In the draft resolution, I have proposed to sum up the present state of affairs and encourage all member States, but in particular those with particularly high rates of imprisonment, to reduce imprisonment by the increased use of alternative sanctions.

70. In the draft recommendation, I suggest that the Assembly invite the Committee of Ministers – which in fact has an excellent track record regarding the promotion of alternatives to imprisonment – to take new, specific action aimed at increasing the concrete use of alternatives to imprisonment, in all member States.

71. www.restorativejustice.org.uk and the quarterly newsletter "Resolution", available on the website.
72. See Hans-Jörg Albrecht (footnote 14).