

***Foreign Prisoners in Europe: an analysis of the 2012 Council of Europe  
Recommendation and its implications for international penal policy***

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# **Foreign Prisoners in Europe: an analysis of the 2012 Council of Europe Recommendation and its implications for international penal policy**

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## *Abstract*

The issue of migration is attracting significant media and political attention in Europe. Migration has been one of the causes of the rapid rise in the number and proportion of foreigners in national prisons. In response to this problem, the Council of Europe's Committee of Ministers in 2012 adopted a recommendation concerning the treatment of foreign prisoners.

This article analyses the penological and human rights implications of this recommendation in relation to its objectives to reduce the number of foreigners in custody, improve the regime experienced by foreign offenders and enhance the prospects for their successful reintegration. While the 2012 Recommendation makes important contributions to regional penal policy, it also contains notable gaps and limitations. The paper discusses the significance of omissions in relation to the (potential) role of consular representatives, dealing with nationals detained abroad and the use of inter-state transfers.

Despite these criticisms and political resistance to some proposals in this field, there appears to be wide spread support for the Recommendation at a practitioner level. It may also have significance beyond domestic policy. There is a new and growing sub-category of foreign prisoner in Europe: the international prisoners convicted by international criminal courts that are serving their sentences in the prison systems of cooperating States. The paper concludes with a discussion of the potential influence regional penal policy can have on the implementation of international custodial sanctions.

*Keywords:* Foreign Prisoners; Council of Europe Recommendation; Reductionist Approach; Regime Improvement for Foreign Offenders; Reintegration; Transfer to Country of Origin; International Punishment

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## 1. Introduction

While political and media attention is very much focused on the reduction or prevention of migration into Europe, regional law has also recently had to address the penal consequence of the movement of people across international borders: a growing population of foreign prisoners. While systems that facilitate the transfer of sentences and measures to offenders' home countries can help reduce numbers in prison, 'such agreements alone cannot solve the problem... [a] solution can, and should also be sought... through an improvement in prison conditions and the treatment of foreigners'.<sup>1</sup> In 2012, therefore, the Council of Europe's Committee of Ministers adopted a new Recommendation concerning foreign prisoners.

This paper analyses this Recommendation in light of its reductionist, regime improvement and reintegration objectives and assesses the contribution it makes to regional soft law and policy. The evolution of soft law in this field and the political realities associated with drafting soft law at the regional level are highlighted throughout the paper. Notable gaps in the Recommendation's scope and provisions are discussed in detail. The article concludes with some thoughts on the potential of the 2012 Recommendation to impact upon a distinct subgroup of foreign prisoners: persons convicted and sentenced by international criminal courts that are serving their sentences in domestic prisons.

## 2. Foreign prisoners in Europe: a new Recommendation

Both the number and proportion of foreigners in European prisons continues to rise. In 2013, within the Council of Europe, foreigners represented, on average, 22.8% of the prison population.<sup>2</sup> Some countries have to deal with a population comprised of between 30 and 70% of foreigners.<sup>3</sup> For other countries this is not such a significant issue. In Armenia, Azerbaijan, Bulgaria, Georgia, Latvia, Lithuania, Moldova, Poland, Romania, Russia, Serbia, Slovakia, Macedonia and Turkey, for instance, foreigners represent less than 5% of the prison population.

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<sup>1</sup> Michael Plachta, "Transfer of Prisoners to and from Poland: Legal Ramifications, Reality and Future Perspectives" *European Journal of Crime, Criminal Law and Criminal Justice* Vol. 2, 1992, 278-290, p. 278.

<sup>2</sup> See Table 4: Foreign Inmates on 1<sup>st</sup> September 2013 in Council of Europe Annual Penal Statistics, *SPACE I Prison Populations* (Survey 2013), PC-CP(2014) 11, 15 December 2014 at 90. This represents a slight increase from 21% in 2012 – see Table 4 'Foreign Inmates on 1<sup>st</sup> September 2012' *SPACE I Statistics*, PC-CP(2014) 5, 29 April 2014 at 80-1.

Within the European Union, the average percentage of non-national prisoners rose sharply from 9 to 27%, although this seems to have stabilised in recent years to a level of around 18%. See para 12, *European Sourcebook of Crime and Criminal Justice Statistics*, 2010 (4<sup>th</sup> ed.) (2003-2007) (Den Haag, WODC, 2010) at 292-293; 'Table 4.2.1.5 'Prison population as percentage of total stock: Aliens' in *European Sourcebook of Crime and Criminal Justice Statistics*, 2014 (5<sup>th</sup> ed.) (2007-2011) (HEUNI, Helsinki, 2014) at 274.

<sup>3</sup> For example - Spain (35.4), Malta (35.6), Italy (36), Belgium (41.3), Austria (45.7), Cyprus (58), Greece (58.4), Luxembourg (68.6), Switzerland (71.4). See 'Table 4.2.1.5 'Prison population as percentage of total stock: Aliens' in *European Sourcebook of Crime and Criminal Justice Statistics*, 2014 (5<sup>th</sup> ed.) (2007-2011) (HEUNI, Helsinki, 2014) at 274.

The considerable variation between countries has been attributed to factors such as geographical location, economic development and immigration policies.<sup>4</sup> While it may be true that 'one should keep in mind that the phenomenon of overrepresentation of foreigners in custody is not at all problematic in Eastern European countries',<sup>5</sup> the fact remains that there are in excess of 150,000 foreigners in European prisons.<sup>6</sup>

Moreover, percentages do not always reveal the reality of the day-to-day situation in domestic prisons. For example, while foreigners make up over 50% of the prison population in Liechtenstein, this represents only 5 prisoners. In contrast, while foreigners make up less than 5% of the Russian prison population, this represents over 30,000 individuals.<sup>7</sup> It should be further noted that this population has become increasingly diverse. In the UK, for example, foreign prisoners come from over 150 different countries.<sup>8</sup>

Foreign prisoners are over-represented in comparison to their numbers in the general population.<sup>9</sup> This over-representation has been attributed to a range of factors including the increased mobility of individuals across territorial boundaries resulting in crime trips,<sup>10</sup> the disadvantages faced by foreigners during the criminal justice process (increased targeting by police, language barriers, lack of access to legal aid and discriminatory sentencing) and the increasingly punitive approach to immigration (related) offences.

Not only are foreigners more likely to be deprived of their liberty, they also often experience greater hardships during their time in custody than national prisoners. Non-nationals face challenges and obstacles due to overt and covert discrimination, isolation, a lack of linguistic proficiency and delays in relation to decisions about legal status. The de jure equality of rights granted by national law does not translate in practice: foreign prisoners often experience de facto discrimination at all stages of the criminal justice and penal process due to the

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<sup>4</sup> *European Sourcebook of Crime and Criminal Justice Statistics*, 2014 (5<sup>th</sup> ed.) (2007-2011) (HEUNI, Helsinki, 2014) at 268.

<sup>5</sup> Council of Europe Annual Penal Statistics, *SPACE I Prison Populations* (Survey 2013), PC-CP(2014) 11, 15 December 2014 at 23.

<sup>6</sup> For a break-down of the offences foreign prisoners are convicted for within each country of the Council of Europe, see Table AM7: Types of Main Offences of Foreign Sentenced Inmates on 1<sup>st</sup> September 2013 (Percentages) in Council of Europe Annual Penal Statistics, *SPACE I Prison Populations* (Survey 2013), PC-CP(2014) 11, 15 December 2014 at 182.

<sup>7</sup> See Table 4: Foreign Inmates on 1<sup>st</sup> September 2013 in Council of Europe Annual Penal Statistics, *SPACE I Prison Populations* (Survey 2013), PC-CP(2014) 11, 15 December 2014 at 90.

<sup>8</sup> See James Banks, "Foreign National Prisoners in the UK: Explanations and Implications" *The Howard Journal of Criminal Justice* Vol. 50, No. 2, 2011, 184-198, p. 186; Magali Barnoux and Jane Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country" *Aggression and Violent Behaviour* Vol. 18, 2013, 240-246, p. 241.

<sup>9</sup> See A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen and F. Dünkler, "Comparative Overview, Conclusions and Recommendations" in *Foreigners in European Prisons* (Vol I) (Wolf Legal Publishers, 2007) 7-88, p. 16; Liz Fekete and Francis Webber, "Foreign nationals, enemy penology and the criminal justice system" *Race & Class* Vol. 51, No. 4, 2010, 1-25, p. 13.

<sup>10</sup> Stijn Van Daele, Tom Vander Beken and Gerben J.N. Bruinsma, "Does the mobility of foreign offenders fit the general pattern of mobility" *European Journal of Criminology* Vol. 9, No. 3, 2012, 290-308, pp. 293-5.

application of criteria that they cannot fulfil and the prioritisation of resources for nationals.

The management of increasingly large and diverse foreign populations in overcrowded prison systems designed to deal with the needs of national prisoners is challenging. Until recently, policies or programmes dealing with this issue tended to be localised and piecemeal. This contrasted with the UNODC recommendation that clear strategies be put in place to deal with foreign prisoners as a distinct category of individuals with particular management and welfare needs.<sup>11</sup>

Given the continuing rise in the numbers of, and the worsening situation for, foreign prisoners in Europe, the COE Committee of Ministers felt it was time to re-visit the issue and revise or replace its 1984 Recommendation to member States concerning foreign prisoners.<sup>12</sup> In addition to measures that would ensure the individual and equal treatment of foreign prisoners, the Committee of Ministers felt that a new or revised recommendation should be adopted to provide 'human and tangible long-term solutions based on European best practice'.<sup>13</sup>

In particular, they felt that an updated or new recommendation should address the number of foreigners in detention, their treatment while imprisoned, policies aimed at preparing foreign prisoners for release and reintegration (including transfer to their country of origin), the training of staff and the facilitation and maintenance of social, legal and consulate support.<sup>14</sup>

The Committee of Ministers is assisted in the development of penological standards by the European Committee on Crime Problems (CDPC). The CDPC, comprised of State representatives with relevant expertise or experience, has drafted over a hundred and fifty resolutions and recommendations setting standards on a range of penological issues and dealing with specific categories of prisoners since its creation in 1953. The CDPC relies on one of its permanent standing committees, the Council for Penological Cooperation (PC-CP) to help it develop recommendations. Created in 1981,<sup>15</sup> the PC-CP is comprised of a working group of experts<sup>16</sup> elected by the CDPC in their personal capacity and a

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<sup>11</sup> See Chapter 4 "Foreign Prisoners" *Handbook on Prisoners with Special Needs* (New York: UNODC, 2009), pp. 79-101. While the UN did introduce Recommendations on the Treatment of Foreign Prisoners (UNRTFP) in 1985 (Annexed to the UN Model Agreement on the Transfer of Foreign Prisoners) these are very brief and do not provide sufficient guidance for prison authorities.

<sup>12</sup> Rec. R (84) 12 concerning foreign prisoners.

<sup>13</sup> See the *Ad Hoc Terms of Reference of the Council for Penological Cooperation (PC-CP) relating to Detained Foreign Nationals*, PC-CP (2010) 01rev2, Strasbourg, 23 April 2010, CM/Del/Dec(2010)1083/10/10.5E, adopted at the 1083<sup>rd</sup> meeting of Ministers' Deputies, 21 April 2010, Appendix 13, Item 10.5 (hereafter PC-CP Terms of Reference).

<sup>14</sup> PC-CP Terms of Reference.

<sup>15</sup> Under article 17 of the COE Statute and in accordance with Resolution CM/Res (2011)24.

<sup>16</sup> In addition to the high-level representatives of prison administrations, probation services or juvenile justice agencies, researchers or experts with a thorough knowledge of penological issues that meet three times a year in Strasbourg, the PC-CP can appoint scientific experts with specialised knowledge on relevant law and contemporary practice to assist with particular ad

larger committee of representatives of member States designated by their governments that sits in plenary.

From the outset, the PC-CP working group decided to replace the 1984 recommendation<sup>17</sup> to ensure that the new recommendation would be in line with the 2006 European Prison Rules.<sup>18</sup> In addition to the input from and debate by governmental representatives and experts,<sup>19</sup> the Recommendation was drafted with reference to European Court of Human Rights (ECtHR) jurisprudence, European Committee for the Prevention of Torture (CPT) standards, recent studies on the treatment of foreign prisoners and presentations made by consultants.<sup>20</sup> The recommendation<sup>21</sup> and its accompanying commentary were approved by the CDPC at its 62<sup>nd</sup> plenary session in June 2012<sup>22</sup> and adopted by the Committee of Ministers on 10 October 2012 at the 1152<sup>nd</sup> meeting of the Ministers' Deputies.

The 2012 Recommendation adopts a human rights approach to the penological treatment of foreigners, which dictates the application of the principles of equalisation and individualisation.<sup>23</sup> The Recommendation seeks to ensure equal and individual treatment throughout the criminal justice and penal process by focusing attention on three key areas: reductionism, regime improvement and reintegration.

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hoc tasks. Professors Dirk Van Zyl Smit and Martine Herzog-Evans and the author assisted the PC-CP with the drafting of the 2012 Recommendation.

<sup>17</sup> Para. 9, Summary Meeting Report of the PC-CP's 64<sup>th</sup> Meeting, Strasbourg, 5-7 May 2010 (pc-cp\docs 2010\pc-cp (2010) 12 e) 20.05.10.

<sup>18</sup> Recommendation Rec (2006) 6.

<sup>19</sup> Numerous versions of the recommendation (and its accompanying commentary) were discussed at the PC-CP Working Group's 64<sup>th</sup>, 65<sup>th</sup>, 66<sup>th</sup> and 68<sup>th</sup> meetings (May 2010 – May 2011) and at its first two plenary sessions in March 2011 and November 2012. Input on drafts was received from various States (written comments from CDPC delegates and oral comments during the two PC-CP Plenary Sessions), inter-governmental and non-governmental organisations, the CDPC Bureau and the CDPC's other permanent standing committee (PC-OC). See para. 11, Summary Meeting Report of the PC-CP's 68<sup>th</sup> Meeting, Strasbourg, 16-18 May 2011 (pc-cp\docs 2010\pc-cp(2011)11 e) 26.05.11; Summary Meeting Reports of the PC-CP's 1<sup>st</sup> Plenary Meeting, Strasbourg, 8-10 November 2011 (pc-cp\docs 2011\pc-cp(2011)18e) 19.11.11; para. 7, Summary Meeting Report of the PC-CP's 2<sup>nd</sup> Plenary Meeting, Strasbourg, 28-30 March 2012 (pc-cp\docs 2012\pc-cp(2012)4e) 16.04.12.

<sup>20</sup> Presentations were provided by Emily Trombik (personal experience of German prisoners in France and French prisoners in Germany), Femke Hofstee Van Der Meulen (statistics and conclusions on the treatment of foreign prisoners in the EU. See also a more recent study by this author - *Detained Abroad: Assisting Dutch nationals in foreign prisons* (2015) available online at [www.prisonwatch.org](http://www.prisonwatch.org)) and the author (prisoner consent in international transfers). See para. 11, Summary Meeting Report of the PC-CP's 65<sup>th</sup> Meeting, Strasbourg, 27-29 September 2010 (pc-cp\docs 2010\pc-cp (2010) 19 e) 21.10.10; para. 9, Summary Meeting Report of the PC-CP's 66<sup>th</sup> Meeting, Strasbourg, 8-10 December 2010 (pc-cp\docs 2010\pc-cp(2010)22 e) 14.12.10; para. 10, Summary Meeting Report of the PC-CP's 68<sup>th</sup> Meeting, Strasbourg, 16-18 May 2011 (pc-cp\docs 2010\pc-cp(2011)11 e) 26.05.11.

<sup>21</sup> Recommendation CM/Rec(2012)12 of the Committee of Ministers to member States concerning foreign prisoners.

<sup>22</sup> See para. 3(a), List of Decisions, European Committee on Crime Problems (CDPC), 62<sup>nd</sup> Plenary Session, Strasbourg, 29 May-1 June 2012 CDPC (2012) 8, 1 June 2012.

<sup>23</sup> Preamble and Rule 3 Recommendation (2012) 12; Commentary on Rule 3, Ministers' Deputies, CM Documents, CM(2012)108 add 9 August 2012, 1151<sup>st</sup> meeting, 18 and 19 September 2012 (hereafter Commentary on Rule x CM(2012) 108)).

### 3. Reducing the Number of Foreigners in European Prisons

Foreigners in Europe are less likely to receive bail, be sentenced to community sanctions and measures or be granted conditional release.<sup>24</sup> In other words, they are more likely to be placed in and kept in custody than nationals. The COE advocates a reductionist approach, which involves ‘both “front-door” policies to reduce the input of prisoners into the system and “back-door” policies to limit their length of stay in prison’.<sup>25</sup> The 2012 Recommendation builds upon previous Council of Europe recommendations<sup>26</sup> by advocating a reductionist policy specifically for non-nationals

From the early stages, the PC-CP decided that the recommendation should deal not only with persons in custody but should also address the situation of foreign persons who could be remanded into custody or imprisoned.<sup>27</sup> Contrary to human rights law, remand in custody tends to be the norm, rather than the exception, for foreigners accused of crimes. Placed in the context of heightened public and political anxiety about foreign nationals, immigration and crime, detention is a highly probable outcome, particularly if an individual’s offence history is unknown.<sup>28</sup> The number and percentage of non-nationals in pre-trial detention has steadily risen over the last decade,<sup>29</sup> to the extent that in 2011, foreigners represented, on average, 38 per cent of the regional pre-trial detention population.<sup>30</sup>

This over-representation is due to the fact that foreigners are not benefitting from alternatives to pre-trial detention.<sup>31</sup> The new Recommendation therefore urges judges to consider the full range of custodial sanctions and measures and the impact of imposing custodial sanctions on foreign offenders and their families.<sup>32</sup> To ensure equal treatment and reduce the number of foreigners in pre-trial detention, national authorities should apply legal requirements flexibly or implement special measures that enable foreigners to meet pre-conditions for

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<sup>24</sup> See Recommendation 3 in Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I); CPT Report on the visit to Greece 2013, CPT/Inf(2014) 26, para. 94.

<sup>25</sup> Sonja Snacken, “A Reductionist Penal Policy and European Human Rights Standards” *European Journal on Criminal Policy and Research* Vol. 12, 2006, 143-164, pp. 144-5, 151-2.

<sup>26</sup> Recommendation Rec (92) 16 on the European rules on community sanctions and measures; Recommendation Rec (99) 22 concerning prison overcrowding and prison population inflation; Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse; Recommendation (92)17 concerning consistency in sentencing; Recommendation Rec (2003) 22 on conditional release (parole); Recommendation CM/Rec (2010) 1 on the Council of Europe Probation Rules.

<sup>27</sup> Para. 9, Summary Meeting Report of the PC-CP’s 65<sup>th</sup> Meeting, Strasbourg, 27-29 September 2010 (pc-cp/docs 2010\pc-cp (2010) 19 e) 21.10.10. See Rule 2 CM/Rec (2012) 12.

<sup>28</sup> Banks, “Foreign National Prisoners in the UK: Explanations and Implications”, p. 195.

<sup>29</sup> See Table 4.2.1.5 ‘Prison Population: % of aliens in pre-trial detention in the total STOCK’ in *European Sourcebook of Crime and Criminal Justice Statistics*, 2010 (4<sup>th</sup> ed.) (2003-2007) (Den Haag, WODC, 2010), p. 299.

<sup>30</sup> See Table 4: Foreign Inmates on 1<sup>st</sup> September 2013 in Council of Europe Annual Penal Statistics, *SPACE I Prison Populations* (Survey 2013), PC-CP(2014) 11, 15 December 2014, p. 90.

<sup>31</sup> Para. 12 *European Sourcebook of Crime and Criminal Justice Statistics*, 2010 (4<sup>th</sup> ed.) (2003-2007) (Den Haag, WODC, 2010), pp. 292-293.

<sup>32</sup> See Rule 14 CM/Rec (2012) 12; Commentary to Rule 14 CM(2012)108.

non-custodial measures.<sup>33</sup> In addition to front door policies, the 2012 Recommendation also supports back door policies by advocating that foreigners be considered for release as soon as they become eligible and stating that the outcome of release decisions should not be unduly influenced or prolonged by delays caused by the finalisation of immigration status decisions.<sup>34</sup>

Foreigners are regularly excluded from (consideration for) alternatives to imprisonment or release pending trial on the basis of their legal status or associated factors (lack of a permanent address, job or family links in the detaining State). This denial is often based on an assumption that foreigners pose a greater flight risk.<sup>35</sup> The 2012 Recommendation calls on States to ensure that an individual's residence status is not an automatic bar to eligibility for non-custodial measures in practice and that all custody-related decisions are based on individual-specific and objectively verified fact.<sup>36</sup> As for national suspects and offenders, custody should only be used when strictly necessary and as a measure of last resort after an assessment of the individual's circumstances.<sup>37</sup>

In addition to advocating the use of alternatives to custody and early release, the 2012 Recommendation also supports a reduction in the number of non-nationals subject to criminal and community sanctions and measures through transfer mechanisms. The Recommendation notes the availability and potential benefits of systems that facilitate transfers to countries with which the offender has ties.<sup>38</sup> Such mechanisms may enhance the likelihood of alternate sanctions and early release on probation for foreigners.<sup>39</sup>

The 2012 Recommendation therefore advocates a reductionist approach using front, mid and back door policies. Its provisions are not designed to encourage the grant of automatic rights to such measures to foreign prisoners, but rather to ensure that foreign nationals are not discriminated against in practice and that each individual is properly considered for all available and approach measures.<sup>40</sup> It represents an attempt to avoid discrimination currently resulting from the application of seemingly neutral criteria and, thereby, reduce the number of foreigners behind bars in Europe.

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<sup>33</sup> These pre-conditions may include requirements to reside at an approved address, surrender a passport, report to authorities or be electronically monitored. See Section 12 Recommendation R(99)22; Rule 2(1) Recommendation (2006)13.

<sup>34</sup> Rules 6, 36 CM/Rec (2012) 12.

<sup>35</sup> See Rule 13.2b CM/Rec (2012) 12 (see also Rule 9.2 Recommendation Rec(2006) 13); Commentary to Rule 5 CM(2012)108; A. Van Kalmthout et al., *Pre-Trial Detention in the European Union: an analysis of minimum standards in pre-trial detention and the grounds for regular review in the member States of the EU* (Nijmegen: Wolf Legal Publishers, 2009), p. 95.

<sup>36</sup> Commentary to Rules 4 and 36 CM(2012)108.

<sup>37</sup> See Rules 5, 13.1 CM/Rec (2012) 12. See also Rule 3.3 Recommendation Rec(2006) 13.

<sup>38</sup> See Preamble and Rules 10, 14.2, 15.3 CM/Rec (2012) 12; Commentary to Rule 4 CM(2012)108.

<sup>39</sup> See Recommendation 71 in Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I).

<sup>40</sup> See Rule 4, CM/Rec (2012) 12; paras. 10, 12 Summary Meeting Report of the PC-CP's 1<sup>st</sup> Plenary Meeting, Strasbourg, 8-10 November 2011 (pc-cp/docs 2011\pc-cp(2011)18e) 19.11.11; para. 8, Summary Meeting Report of the PC-CP's 2<sup>nd</sup> Plenary Meeting, Strasbourg, 28-30 March 2012 (pc-cp/docs 2012\pc-cp(2012)4e) 16.04.12.



#### 4. Improving the Regime for Foreign Prisoners in Europe

While this reductionist policy is a key contribution, the 2012 Recommendation focuses on the improvement of regimes experienced by foreign detainees.<sup>41</sup> National penal law does not typically distinguish regimes on the basis of nationality. A recent study notes, however, that the lack of specialised regulation can generate unequal opportunities for foreigners on account of their social isolation, religious and cultural differences and communication barriers.<sup>42</sup> To improve regimes, the 2012 Recommendation identifies key areas of specific need where there is scope for positive discrimination. In addition, it addresses the need to have specialised staff, reduce language barriers and alleviate isolation.

##### *a. Specific Needs and Positive Discrimination*

The EPR state that ‘imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisons shall not aggravate the suffering inherent in imprisonment’.<sup>43</sup> While the 1984 Recommendation noted the importance of preventing and counteracting the disadvantages faced by foreigners in detention,<sup>44</sup> the 2012 Recommendation provides greater guidance to enable prison authorities to prevent de facto discrimination.<sup>45</sup> To ensure the individual and equal treatment of foreign prisoners and the accommodation of their welfare needs,<sup>46</sup> the 2012 Recommendation identifies a range of aspects of prison life that require special attention. Numerous provisions advocate a culturally-sensitive application of rules relating to hygiene, clothing, nutrition, recreation, freedom of belief and healthcare.<sup>47</sup> For example, prison uniforms must not offend the cultural or religious sensibilities of prisoners and if they are not provided, prisoners should, subject to safety and security, be allowed to wear attire required by their religion or culture<sup>48</sup> (such as a turban or head scarf<sup>49</sup>). Where possible, religious dietary requirements should be accommodated,<sup>50</sup> by, for example, providing Kosher food or meals at appropriate times during Ramadan.<sup>51</sup> Steps should be taken to ensure foreign prisoners receive equivalent medical care to nationals and that healthcare professionals are trained and provided with resources to work with the specific needs of foreigners.<sup>52</sup> It was during the drafting of some of these provisions that the lengthiest debates

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<sup>41</sup> Of the recommendation’s 41 rules, 20 rules are devoted to conditions of imprisonment (Section V, Rules 15-34).

<sup>42</sup> Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 18.

<sup>43</sup> Rule 102.2 EPR.

<sup>44</sup> Preamble and Rule 13 Recommendation No. R (84) 12.

<sup>45</sup> Rule 7 CM/Rec (2012) 12.

<sup>46</sup> Rule 9 CM/Rec (2012) 12.

<sup>47</sup> See rules 18, 19, 20, 28, 30, 31, 33 CM/Rec (2012) 12.

<sup>48</sup> Rule 19 CM/Rec (2012) 12.

<sup>49</sup> See Recommendation 25 in Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I).

<sup>50</sup> Rule 20 CM/Rec (2012) 12; Commentary to Rule 20 CM(2012)108. See also Rule 22.1 EPR.

<sup>51</sup> Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 28.

<sup>52</sup> Rules 31, 33.2-3 CM/Rec (2012) 12.

occurred, as States were cautious about approving rules that may be perceived as creating preferential treatment.<sup>53</sup> The aim is to ensure equal, not preferential, treatment, and in many cases the provisions highlight or provide detail on existing obligations. The assertion is not that national prison systems are deliberately treating detained foreigners in a lesser manner but that equality in law has proven inadequate to ensure equality in practice. Positive discrimination is necessary to ensure that foreign prisoners have the same quality of life as nationals.

#### *b. Specialisation*

Regime improvement requires the implementation of the 2012 Recommendation by specifically recruited, suitably trained and specialised staff.<sup>54</sup> Accordingly, the Recommendation urges that persons that work with foreign prisoners should be selected on the basis of their cultural sensitivity, interaction skills and linguistic abilities.<sup>55</sup> Moreover, all authorities, agencies, professionals and associations that have regular contact with foreign suspects and offenders should receive training on relevant rules, as well as the underlying cultural and ethical bases for treating such persons appropriately.<sup>56</sup> All persons that work with foreign prisoners should receive training to ensure respect for cultural diversity, understanding of the problems faced by such prisoners and to enhance their linguistic abilities.<sup>57</sup> Specific training should be provided to staff involved in the admissions process<sup>58</sup> and medical and healthcare staff should be trained on the specific diseases and conditions which foreign prisoners may have and culturally appropriate methods of interaction.<sup>59</sup> Training should be regularly reviewed to ensure it reflects contemporary standards and enables staff to deal with current populations and the difficulties they face.<sup>60</sup> In addition to general training, the 2012 Recommendation advocates the creation of posts or roles for specialists responsible for working with foreign prisoners specifically<sup>61</sup> and liaising with relevant persons and bodies on matters related to such prisoners.<sup>62</sup> A more focused approach to recruitment, training and specialisation can have a positive impact on improving communication within prisons.

#### *c. Overcoming Language Barriers*

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<sup>53</sup> See para. 9, Summary Meeting Report of the PC-CP's 2<sup>nd</sup> Plenary Meeting, Strasbourg, 28-30 March 2012 (pc-cp/docs 2012/pc-cp(2012)4e) 16.04.12.

<sup>54</sup> See Rule 81.3 EPR; Rules 25-6 Recommendation No. R(84) 12; Recommendation Rec (97) 12; Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), pp. 43, 46.

<sup>55</sup> Rule 38 CM/Rec (2012) 12.

<sup>56</sup> Rule 12 CM/Rec (2012) 12; Commentary to Rule 12 CM(2012) 108.

<sup>57</sup> Rules 39.2-3 CM/Rec (2012) 12; See also Rule 87.2 EPR.

<sup>58</sup> Rule 39.1 CM/Rec (2012) 12.

<sup>59</sup> Rule 31.3 CM/Rec (2012) 12; Commentary to Rule 32 CM(2012) 108.

<sup>60</sup> Rules 39.4-5 CM/Rec (2012) 12; Commentary to Rule 39 CM(2012) 108. See also rules 81.2, 81.4 EPR.

<sup>61</sup> See CPT Report on the visit to Cyprus 2013, CPT/Inf (2014) 31, para. 86; CPT Report on the visit to the UK (Scotland) 2012, CPT/Inf (2014) 1, para. 86.

<sup>62</sup> Such as probation services, consular representatives, volunteers and family members. See Rule 40 CM/Rec (2012) 12; Commentary to Rule 40 CM(2012) 108.

The inability to communicate in the language most commonly spoken in a prison reduces a foreign prisoner's ability to cope with their situation.<sup>63</sup> Indeed, language difficulties 'permeate and exacerbate almost all other problems' faced by foreign prisoners.<sup>64</sup> The EPR advises prison authorities to ensure special arrangements are in place to meet the needs of prisoners who belong to linguistic minorities.<sup>65</sup> The 2012 Recommendation builds on this direction by advocating that prison authorities aim to ensure that foreigners can communicate effectively, whether through learning, access to competent interpreters or translation services.<sup>66</sup> Provisions relating to the facilitation of communication can be found throughout the Recommendation. For example, on admission, foreign prisoners should be greeted by staff with linguistic abilities and provided with information about their rights, the regime and procedures in a language they understand.<sup>67</sup> Some States have information packs available in the major languages spoken by foreign prisoners.<sup>68</sup> In most countries, however, this is not available, and even where it is, there is often a residual population not provided for.<sup>69</sup> While it is recognised that it may not be possible to have pre-prepared materials in all languages, linguistic support can help foreigners through what is often 'one of the most delicate phases of imprisonment'.<sup>70</sup> It is therefore imperative that information is provided orally in a language the prisoner can understand when it is not available in writing.

Linguistic support should go beyond the provision of legal and technical information to include social and cultural aspects of prison life. An inability to communicate can prevent participation in purposeful activities<sup>71</sup> and lead to deep moral distress and self-harm.<sup>72</sup> Prisons should therefore provide opportunities for prisoners and staff to learn a common language.<sup>73</sup> Access to papers, books, radio and television programmes in a native language can help to reduce isolation and contribute towards the facilitation of reintegration for prisoners that will return to their home country.<sup>74</sup> Foreign prisoners that will be deported should be provided with opportunities to learn the language of the country that will receive them if they do not know it.<sup>75</sup> Communication is

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<sup>63</sup> Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 17.

<sup>64</sup> Barnoux and Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country", p. 242.

<sup>65</sup> Rule 38.1 EPR.

<sup>66</sup> Rules 8, 39.3 CM/Rec (2012) 12; Commentary on Rule 8 CM(2012)108.

<sup>67</sup> Rules 15.1, 41.1 CM/Rec (2012) 12. See Recommendation 4 UNRTFP; Rule 30.1 EPR. See also CPT Report on the visit to Ireland, CPT/Inf (2015) 38, paras. 66, 104.

<sup>68</sup> Commentary to Rule 15 CM(2012)108.

<sup>69</sup> Barnoux and Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country", p. 242.

<sup>70</sup> Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 20.

<sup>71</sup> See CPT visit to Denmark 2014, CPT/Inf (2014) 25, para 43.

<sup>72</sup> See CPT visit to Denmark 1990, CPT/Inf(91)12, para. 107; Barnoux and Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country", p. 242.

<sup>73</sup> Rule 29.1 CM/Rec (2012) 12.

<sup>74</sup> Rules 23.1, 23.2, 29.3 CM/Rec (2012) 12. See Rule 3 Recommendation No. R (84) 12.

<sup>75</sup> Commentary to Rule 29 CM(2012)108.

particularly important when it comes to medical care.<sup>76</sup> The 2012 Recommendation highlights the need to ensure access to competent interpreters who understand medical terminology and cultural approaches to illness and respect confidentiality (irrespective of the formality of the arrangement).<sup>77</sup> Even where it is not mentioned explicitly, the facilitation of communication is a fundamental underlying principle that should inform all interaction.<sup>78</sup> This is because of the key role such measures can play in alleviating isolation.

#### *d. Alleviating Isolation*

Prison authorities should aim to place prisoners in facilities 'close to their homes or places of social rehabilitation'.<sup>79</sup> This is difficult to achieve for non-national, non-resident prisoners who will, more likely than not, be expelled following the completion of their sentence. Foreign prisoners are more likely to become isolated, and thereby face increased risks of mental health problems, self-harm and suicide.<sup>80</sup> The 2012 Recommendation, therefore, directs prison authorities to make allocation decisions on the basis of the need to alleviate the potential isolation of non-nationals and to facilitate their contact with the outside world.<sup>81</sup> To achieve these goals, it is important to utilise social support mechanisms that are both internal and external to the prison estate.

Prison authorities can reduce isolation by placing prisoners from the same country or cultural, linguistic or religious background in the same wing or prison.<sup>82</sup> Such an allocation policy enables prisoners to work and spend leisure time with prisoners it may be easier to communicate or associate with. Such decisions, however, require careful consideration of the individual needs and social reintegration requirements of each prisoner and must be balanced against safety and security factors.<sup>83</sup> The danger exists that this approach will create hierarchies, sub-cultures and tension.<sup>84</sup> Moreover, it can lead to the further isolation of foreigners within the prison estate. Not only will they be separated from detaining State nationals (which may hinder reintegration if the prisoner remains in the country)<sup>85</sup> but some prisoners may be placed with foreigners who are more different to them than detaining State nationals. For example, Irish prisoners housed in the UK may have more in common with British rather than

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<sup>76</sup> See CPT Report to the Government of Austria, CPT/Inf (2015) 34, paras. 90-91 and CPT Report to the Government of the Czech Republic, CPT/Inf(2015) 18, para. 80.

<sup>77</sup> Rule 31.4 CM/Rec (2012) 12; Commentary to Rule 31 CM(2012)108. See also Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 32; Recommendation 7 UNRTFP.

<sup>78</sup> Commentary on Rule 8 CM(2012)108.

<sup>79</sup> Rule 17.1, EPR.

<sup>80</sup> See David Scott and Helen Codd, *Controversial Issues in Prison* (Maidenhead: Open University Press, 2010) at 86; Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 32.

<sup>81</sup> Rule 16.1 CM/Rec (2012) 12.

<sup>82</sup> Rule 16.3 CM/Rec (2012) 12.

<sup>83</sup> Rules 16.3, 17 CM/Rec (2012) 12.

<sup>84</sup> See Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 19.

<sup>85</sup> Commentary to Rule 17 CM(2012)108.

Somali prisoners.<sup>86</sup> This is why it is important that allocation is not based solely on nationality grounds but on the social and reintegration needs of individuals.<sup>87</sup> Care must also be taken when creating specialist facilities to house foreign prisoners. While the concentration of non-nationals allows for specialisation and the use of resources for specifically tailored programmes, recent regional practice has demonstrated that such facilities can focus, instead, on fast-tracking the removal of non-nationals.

In addition to alleviating isolation within the prison, it is also vitally important to ensure the maintenance of contacts with the outside world. It has been shown that non-national, non-resident prisoners often lost contact with their families during imprisonment, causing isolation and hindering the likelihood of successful reintegration.<sup>88</sup> The 2012 Recommendation therefore suggests that prison authorities take steps to facilitate the maintenance of relations between foreign prisoners and their families living abroad. These include placing prisoners in prisons close to major airports, enabling prisoners to inform their families of their location, adopting a flexible approach to rules relating to the time of calls,<sup>89</sup> length and scheduling of visits,<sup>90</sup> the language to be spoken during visits, assisting indigent prisoners with costs and providing prisoners' families with information and support wherever possible.<sup>91</sup> Special measures should be taken to facilitate visits from and contact with children.<sup>92</sup> This is especially important for female prisoners who were the primary carers of children living abroad, who often experience extreme anguish and distress due to the separation.<sup>93</sup> If it is in the best interests of the child and suitable conditions are available, infants should be allowed to remain with their mother.<sup>94</sup> For other children, visits should be planned to take account of the child's availability and be implemented in a child-friendly manner that permits open contact.<sup>95</sup> Costs and school commitments may make it necessary to consider the use of video-links.<sup>96</sup>

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<sup>86</sup> See Van Kalmthout, Hofstee-van der Meulen and Dünkler, *Foreigners in European Prisons* (Vol I), p. 19; Barnoux and Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country", p. 244.

<sup>87</sup> See Rule 1, Recommendation No. R(84)12; Recommendation 1 UNRTFP; UNODC *Handbook on Prisoners with Special Needs*, pp. 92-3.

<sup>88</sup> See Barnoux and Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country", p. 243.

<sup>89</sup> See CPT Report on visit to Cyprus 2013, CPT/Inf (2014) 31, para. 85.

<sup>90</sup> Ibid, para. 86.

<sup>91</sup> Rules 15.2, 16.2, 21.11, 22.2-6, 22.9-10, CM/Rec (2012) 12; Commentary to Rule 22 CM(2012)108. See UNODC *Handbook on Prisoners with Special Needs*, p. 93; Van Kalmthout, Hofstee-van der Meulen and Dünkler, *Foreigners in European Prisons* (Vol I), p. 36; Barnoux and Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country", p. 242.

<sup>92</sup> Rules 22.7-8, CM/Rec (2012) 12.

<sup>93</sup> Rule 33.1 CM/Rec (2012) 12; Commentary on Rule 33 CM(2012)108; Barnoux and Wood, "The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country", p. 243.

<sup>94</sup> Rules 34.1-2 CM/Rec (2012) 12. See also rule 36.1 EPR.

<sup>95</sup> Rules 26-28, UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Resolution 2010/16).

<sup>96</sup> Rule 22.3, CM/Rec (2012) 12; Commentary to Rule 22 CM(2012)108. See CPT Report on visit to Cyprus 2013, CPT/Inf (2014) 31, para. 85.

Probation agencies, consular representatives, NGOs, and volunteers can also provide support. The 2012 Recommendation highlights their importance by advocating that prison authorities enable prisoners to contact such groups and facilitate their visits.<sup>97</sup> Just as the role of community agencies and volunteers was encouraged in the 1984 Recommendation,<sup>98</sup> the new Recommendation acknowledges the role these groups can play in the support and reintegration of foreign prisoners.<sup>99</sup> Volunteers working with the Dutch Probation Service's Foreign Liaison Office, and NGOs, such as British Prisoners' Abroad, the Irish Commission for Prisoners Overseas and the Swedish Bridges to Abroad, often provide the social support, legal advice and financial assistance to nationals detained abroad that prison authorities cannot.<sup>100</sup> The aim is to optimise and normalise contact through the adoption of a flexible and accommodating approach and, ultimately, to reduce isolation and facilitate reintegration.

## 5. Reintegrating Foreign Prisoners

The EPR make rehabilitation the sole aim governing the implementation of sentences of imprisonment<sup>101</sup> and state that 'all prisoners shall have the benefit of arrangements designed to assist them in returning to free society after release'.<sup>102</sup> Whether the term rehabilitation, reintegration, re-entry or resocialisation is used, the goal is to ensure that the penal process prepares prisoners for release and enhances their ability to function in society when they are free.<sup>103</sup> The 1984 Recommendation noted that the social resettlement of foreign prisoners may require the adoption of particular measures that take account of factors such as nationality, language, religion, culture, length of sentences and the likelihood of expulsion.<sup>104</sup> The Committee of Ministers highlighted the need for the new recommendation to cover the social reintegration of foreign prisoners. It therefore states that the prison regime should focus on preparing foreign prisoners for release and social reintegration.<sup>105</sup> While this is true for all prisoners, the implementation of this principle poses challenges when applied to foreign prisoners. The new Recommendation outlines steps that can be taken to prepare prisoners for release (both within and outside of the detaining State) and to facilitate transfers to the prisoners' country of origin to serve their sentences. The 2012 Recommendation tries to deal with reintegration from a range of potential

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<sup>97</sup> Rule 23.3, CM/Rec (2012) 12.

<sup>98</sup> See rules 20-23 Recommendation No. R (84) 12.

<sup>99</sup> Commentary to Rule 23 CM(2012)108. See also Rules 63-65 Probation Rules, Recommendation CM/Rec (2010) 1.

<sup>100</sup> See Commentary to Rule 22 CM(2012)108; Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 34; UNODC *Handbook on Prisoners with Special Needs*, p. 93.

<sup>101</sup> Rule 102.1 EPR.

<sup>102</sup> Rule 33.3 EPR.

<sup>103</sup> Steven De Ridder, Kristel Beyens and Sonja Snacken, "Does reintegration need REHAB? Early release procedures for prisoners without a legal permit of residence in Belgium" *European Journal of Probation* Vol. 4, No. 3, 2012, 21-36, p. 27.

<sup>104</sup> Preamble Recommendation No. R (84)12.

<sup>105</sup> Rule 9 CM/Rec (2012)12.

scenarios. The difficulty lies with the fact that prison authorities often do not know whether an individual will remain in the detaining State, be transferred to another State to serve his sentence or be removed from the country at the end of his sentence.

*a. Preparing Foreign Prisoners for Release*

Foreign prisoners face difficulties in accessing work and education and are often denied prison leave<sup>106</sup> and placement in more relaxed regimes. While they are not formally excluded, they often cannot access places due to language barriers or the prioritisation of places for nationals who will be reintegrated into the detaining State.<sup>107</sup> Leave is often denied due to assumptions about an increased risk of absconding and progression is unlikely due to the current focus on removal.<sup>108</sup> These denials not only reduce the chances of foreign prisoners receiving conditional release, but they also result in a failure to prepare them for release. To overcome this de facto discrimination, the 2012 Recommendation asks prison authorities to take positive measures to ensure that foreign prisoners have access to a balanced programme of activities, and, in particular, that access is not restricted on the basis of the likelihood of transfer, extradition or expulsion.<sup>109</sup> Positive measures can include help with language requirements or the provision of alternative programmes which focus on reintegration in other States.<sup>110</sup> The 2012 Recommendation specifically requests that foreign prisoners have equal opportunities when it comes to access to and consideration for income-producing work, training and education.<sup>111</sup> To enhance the effectiveness of education and training, it also states that prison authorities should facilitate the achievement of qualifications that are recognised in the country the individual will live in following release.<sup>112</sup>

To prepare foreign prisoners for release, the 2012 Recommendation advocates that foreign prisoners be granted prison leave where appropriate and be assisted with making or re-establishing contact with family, friends and relevant support agencies.<sup>113</sup> Leave decisions should be based on objective facts about the individual in question and should not be based on generalised perceptions of risk.<sup>114</sup> The flexible application of requirements in relation to a permanent address and the assistance of NGOs can help to improve the likelihood of temporary leave being granted.<sup>115</sup> The present reality is, however, that many countries focus on the rehabilitation of their own nationals to the

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<sup>106</sup> See for example CPT Report on the visit to Greece 2009, CPT/Inf (2010) 33, para. 146.

<sup>107</sup> See Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), pp. 19, 24, 39.

<sup>108</sup> Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), pp. 13, 18, 40.

<sup>109</sup> See Rule 26 CM/Rec (2012) 12.

<sup>110</sup> Commentary to Rule 26 CM(2012)108.

<sup>111</sup> See Rules 27.1-2 CM/Rec (2012) 12. See also Recommendation 2 UNRTFP.

<sup>112</sup> Rule 29.3 CM/Rec (2012) 12. See also Rule 28.7 EPR.

<sup>113</sup> Rules 35.2b-c, 35.4 CM/Rec (2012) 12. See Rules 19, 23 Recommendation No. R (84) 12; Rule 107.4 EPR.

<sup>114</sup> See Rule 7 Recommendation No. R(84) 12; Recommendation 3 UNRTFP.

<sup>115</sup> See Commentary to Rule 35 CM(2012)108.

neglect of non-nationals. Moreover, the focus of regional instruments seems to suggest that the rehabilitation of non-nationals is best served by transferring them to their own country to serve their sentences.

*b. Transferring Foreign Nationals to their Country of Origin to Serve their Sentence*

The 2012 Recommendation draws its provision on the transfer of sentences from existing instruments promulgated by the COE, EU and UN.<sup>116</sup> While the number of provisions on transfers was reduced during the drafting process following comments from the CDPC Bureau, transfer remains one of the core aspects of contemporary penal policy for dealing with foreign prisoners. According to the 2012 Recommendation, prisoners should only be transferred to a country with which they have links, if the move would be in line with their fundamental human rights and facilitate their social reintegration.<sup>117</sup> The social reintegration focus reflects the importance placed on it by current regional mechanisms<sup>118</sup> and extends the use of transfer beyond those already sentenced to terms of imprisonment to include those remanded in custody and subject to conditional measures, probation or alternative sanctions.<sup>119</sup> To increase the likelihood of transfer mechanisms being used, the 2012 Recommendation urges that foreign prisoners be provided with information about them in a language they understand<sup>120</sup> and that national judiciaries be provided with reports about the possibilities and desirability of transferring individuals before sentencing.<sup>121</sup> Transfer to a country with which a person has legal and social links should enhance the chances of successful reintegration, at the very least by making preparation for release less complicated. Whether a prisoner will be allowed to remain, be transferred, or indeed, be expelled, ultimately depends on decisions about the individual's immigration status.

*c. Status Decisions*

All prisoners should benefit from sentence plans that outline the work, education and steps that should be taken in order to prepare for release with a view to their successful reintegration,<sup>122</sup> irrespective of which country the prisoner will live in after release.<sup>123</sup> The 2012 Recommendation follows the UN direction to ensure the existence of strategies to deal with the preparation for release of the

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<sup>116</sup> Convention on the Transfer of Sentenced Persons (ETS No. 112) (hereafter CTSP); Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167); European Union Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (hereafter EUFWD); United Nations Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners (1985) (hereafter UNMA).

<sup>117</sup> Rule 10 CM/Rec (2012) 12; Commentary on Rule 10 CM(2012)108.

<sup>118</sup> Preamble CTSP; para 9 Preamble EUFWD.

<sup>119</sup> Commentary on Rule 10 CM(2012)108.

<sup>120</sup> Rule 15.3 CM/Rec (2012) 12.

<sup>121</sup> Rule 14.2 CM/Rec (2012) 12.

<sup>122</sup> Rules 103.2, 103.4 EPR.

<sup>123</sup> Commentary to Rule 35 CM(2012)108.



different categories of foreign prisoner: those who will remain in the country, those who will be deported and those who have immigration decisions pending.<sup>124</sup>

For prisoners allowed to remain in the detaining State after release, the 2012 Recommendation notes that they must be provided with the same care and support from prison, probation and social welfare agencies as nationals.<sup>125</sup> Studies have shown that national probation services often cannot and do not cater for foreigners.<sup>126</sup> In Europe, the focus is often on the removal of foreign prisoners following their sentence. At present, 'communication and collaboration between the authorities of the country of imprisonment and the home country for the purposes of post-release support is usually non-existent'.<sup>127</sup> When a decision has been taken to expel or transfer an individual, the 2012 Recommendation requires that efforts be made to contact and liaise with the relevant authorities in the receiving State to ensure both immediate support upon their return and the facilitation of their reintegration into society.<sup>128</sup>

The effectiveness of sentences plans depends, however, on measures being put in place in good time.<sup>129</sup> In order for prison authorities to implement effective sentence plans, it is crucial that they know where the prisoner will go. Foreign offenders may have been in the country illegally or may lose their right to remain during their time in prison or as a result of their criminal conviction. De Ridder, Beyens and Snacken note that 'the dynamic character of the foreigner's residence status [means that] the geographical character after... release is often uncertain during imprisonment'.<sup>130</sup> The 2012 Recommendation therefore asks that decisions on legal status and the prisoner's situation after release be determined as early as possible during their sentence.<sup>131</sup>

## **6. Gaps and Limitations of the 2012 Recommendation**

As this paper has so far demonstrated, the 2012 Recommendation has developed regional penal policy by providing detailed suggestions that practitioners can use to improve the situation of detained foreign offenders. Despite the progressive nature of the Recommendation in many regards, it contains gaps and limitations. Opportunities were missed during drafting to ensure the effectiveness and comprehensiveness of reintegration measures for foreign prisoners. An overly deferential approach to existing legal regimes resulted in a failure to adopt provisions outlining the role and duties of consular representatives (towards nationals detained abroad) and procedural safeguards in the international transfer process.

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<sup>124</sup> UNODC *Handbook on Prisoners with Special Needs*, pp. 96-7.

<sup>125</sup> Rule 35.3 CM/Rec (2012) 12.

<sup>126</sup> See Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), pp. 44-46.

<sup>127</sup> UNODC *Handbook on Prisoners with Special Needs*, p. 86.

<sup>128</sup> Rules 35.4-5 CM/Rec (2012) 12.

<sup>129</sup> Rule 35.1 CM/Rec (2012) 12. See Rule 107.1 EPR.

<sup>130</sup> De Ridder, Beyens and Snacken, "Does reintegration need REHAB? Early release procedures for prisoners without a legal permit of residence in Belgium" p. 22.

<sup>131</sup> Rule 35.2a CM/Rec (2012) 12.

### *a. Consular Representatives*

The 2012 Recommendation recognises that authorities that deal with foreign suspects and offenders require access to a 'coherent set of guiding principles in line with Council of Europe standards'.<sup>132</sup> This includes authorities that work outside, but with, criminal justice and carceral systems. The 1984 Recommendation focused on two sources of support for foreign prisoners; community agencies and consular representatives.<sup>133</sup> Rather than have a separate section dealing with community agencies, the 2012 Recommendation refers to a wide range of bodies (competent authorities, approved associations, relevant support agencies, probation bodies, community agencies, volunteers) and explicitly deals with rights of access to and the role they can play in relation to admissions, contact with the outside world and preparation for release.<sup>134</sup>

In contrast, a narrow approach was adopted with regards to consular representatives. The 1984 Recommendation contained several substantive provisions that stated that consular authorities should assist their detained nationals, visit them regularly, offer resettlement assistance, provide reading materials and produce information leaflets outlining possibilities for assistance.<sup>135</sup> The Committee of Ministers instructed that the new Recommendation should address foreign prisoners' relations with the national authorities of their country of origin including embassies and consulate services.<sup>136</sup> In earlier drafts, the section on consular representatives was organised around the foreign prisoner's right to communicate with consular representatives, the prison authorities' obligation to facilitate such communication and the role of consular representatives.<sup>137</sup> This latter group of provisions was removed, however, because of the CDPC Bureau's view that they were not necessary due to the 1963 Vienna Convention on Consular Relations (VCCR).<sup>138</sup> The PC-CP Working Group revised the draft, leaving only provisions that mirrored the functions established by this treaty.<sup>139</sup> While these reduced provisions survived the first PC-CP Plenary intact, this section and other provisions discussing the role of consular representatives were completely removed in Spring 2012.<sup>140</sup>

It is unfortunate that the drafting process resulted in the removal of provisions dealing with a key source of support for foreign prisoners both during their detention and following release. The decision to remove these provisions was surprising given that the previous Recommendation directly addressed consular representatives and the Committee of Minister's terms of reference had

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<sup>132</sup> Preamble, CM/Rec (2012) 12.

<sup>133</sup> Sections III-IV Recommendation No. R(84) 12.

<sup>134</sup> Rules 15.2, 22.1, 23.3, 35.2c, 35.3 CM/Rec (2012) 12.

<sup>135</sup> Rules 15-18 Recommendation No. R (84) 12.

<sup>136</sup> PCCP Terms of Reference.

<sup>137</sup> PCCP (2010) 14 Rev 3, 17 January 2011.

<sup>138</sup> PCCP (2011) 5 w CDPC Bureau Comments, 4 April 2011.

<sup>139</sup> PCCP (2011) 5, 18 May 2011.

<sup>140</sup> See para. 8, Summary Meeting Report of the PC-CP's 2<sup>nd</sup> Plenary Meeting, Strasbourg, 28-30 March 2012 (pc-cp\docs 2012\pc-cp(2012)4e) 16.04.12.

expressly requested that their role be included in the new recommendation.<sup>141</sup> The 2012 Recommendation focuses only on the foreign prisoner's right of access to consular representatives and the duty of prison authorities to facilitate such communication.<sup>142</sup> While it does suggest that visits from consular representatives can reduce social isolation,<sup>143</sup> this provision is directed at prison authorities. The only express direction contained in the new Recommendation suggests that a consular representative can assist with the provision of assistance for return to a State with which the prisoner has links upon release.<sup>144</sup>

#### *b. Nationals Detained Abroad*

The lack of political will to include provisions addressed to consular representatives means that an opportunity was missed to establish minimum standards of care towards nationals detained abroad. The VCCR does not set out any duties or standards of care in relation to the provision of support to prisoners. Rather it is restricted to a pronouncement of the rights of consular officers to be informed about, visit, communicate with and organise legal representation for nationals in detention.<sup>145</sup> The UNODC has recommended that consular officials produce information leaflets setting out details of the services they can provide to nationals in detention or seeking transfer home that should be made available upon admission.<sup>146</sup> The 2012 Recommendation also advocates the provision of such information.<sup>147</sup> However, it is not addressed directly to consular representatives and does not create any expectations in relation to the (quality of) services they should provide to their detained nationals. Despite calls from the European Organisation for Probation (CEP) for the new recommendation to include rules that would 'stimulate or maintain consular interest in the welfare of their citizens imprisoned abroad,'<sup>148</sup> States opted to remove draft rules discussing the role of consular representatives. While some consular representatives provide a 'proactive, helpful and caring' source of support, many are indifferent to the needs of their nationals and are unwilling to provide any assistance.<sup>149</sup> This missed opportunity is unfortunate given that consular representatives are often a prisoner's 'only life-line'.<sup>150</sup> The 2012 Recommendation could have contributed to the development of minimum

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<sup>141</sup> These points were brought to the attention of State representatives. See para. 14, Summary Meeting Report of the PC-CP's 1<sup>st</sup> Plenary Meeting, Strasbourg, 8-10 November 2011 (pc-cp/docs 2011\pc-cp(2011)18e) 19.11.11.

<sup>142</sup> See Rules 24 and 25 CM/Rec (2012) 12.

<sup>143</sup> Rule 22.1 CM/Rec (2012) 12.

<sup>144</sup> Rule 37.2 CM/Rec (2012) 12; Commentary to Rule 37 CM(2012)108.

<sup>145</sup> Article 36(1) VCCR.

<sup>146</sup> UNODC *Handbook on Prisoners with Special Needs*, p. 101.

<sup>147</sup> See Rules 15.1a and 15.3 CM/Rec (2012) 12.

<sup>148</sup> CEP SIG Conference 'Prisoners Abroad' Utrecht 2011, Sub-Group Report on the Council of Europe Recommendation concerning foreign prisoners (Brian Hanley) 'Developing the Council of Europe Recommendation Concerning Foreign Prisoners' at [http://www.cepprobation.org/uploaded\\_files/Prisoners\\_Abroad\\_Conf\\_Utrecht\\_Subgroup\\_report\\_Hanley.pdf](http://www.cepprobation.org/uploaded_files/Prisoners_Abroad_Conf_Utrecht_Subgroup_report_Hanley.pdf) (Date accessed: 2 February 2016).

<sup>149</sup> Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I), p. 33.

<sup>150</sup> Recommendation 29 in Van Kalmthout, Hofstee-van der Meulen and Dünkel, *Foreigners in European Prisons* (Vol I).

standards on the social, legal and financial support that consular representatives should provide to their detained nationals and their families.<sup>151</sup> Instead, States adopted a legalistic approach which merely restates rights and duties already established in the EPR.<sup>152</sup>

Not only, therefore, does the 2012 Recommendation fail to add anything of value to regional penal policy in this regard, it actually drops the direct guidance to consular representatives contained in the 1984 Recommendation. Moreover, there was absolutely no discussion of the role diplomatic representatives could play in facilitating transfers and providing legal documents. While this cautious approach was justified on the basis of deference to an existing treaty, this argument is weak. The VCCR was in effect when the 1984 Recommendation was adopted and the 1984 Recommendation was applicable to practice in member States when the 2012 Recommendation was being drafted. The failure to provide the consular representatives of European States with guidance on how to support their nationals detained abroad is not only unfortunate but strange given that a majority of European prisoners detained abroad are detained within Europe, often in neighbouring countries.<sup>153</sup> This deliberate omission points towards the reality that this is really a recommendation for European States on how to deal with non-European prisoners. For European nationals, the focus seems to be on transferring them back to their country of origin.

### *c. Transfer to the Prisoner's Country of Origin*

The 1984 Recommendation noted that transfers should be considered due to the advantages for prisoners' social resettlement.<sup>154</sup> The Committee of Ministers advised that the new recommendation should deal with the 'legal systems and management policies' in member States that deal with preparation for release, including mechanisms used to transfer prisoners to their country of origin during detention or after release.<sup>155</sup> During the drafting process, however, the inclusion of a separate section on transfers met with strong reactions from the CDPC Bureau. It felt that the Recommendation should not address transfers given that there was an existing legal framework in operation.<sup>156</sup> This contrasted

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<sup>151</sup> Recommendation 68 in Van Kalmthout, Hofstee-van der Meulen and Dünkkel, *Foreigners in European Prisons* (Vol I).

<sup>152</sup> Rules 37.1-3 EPR.

<sup>153</sup> Van Kalmthout, Hofstee-van der Meulen and Dünkkel, *Foreigners in European Prisons* (Vol I), p. 72.

Within the Council of Europe in 2013, EU citizens represented, on average, 37.4% of the prison population. See Table 4: Foreign Inmates on 1<sup>st</sup> September 2013 in Council of Europe Annual Penal Statistics, *SPACE I Prison Populations* (Survey 2013), PC-CP(2014) 11, 15 December 2014 at 90.

Similar figures are evident within the EU. Between 2007 and 2011, EU citizens typically represent 30-40% of the prison population. See 'Table 4.2.1.6 Prison population as percentage of aliens, stock: EU citizens' in *European Sourcebook of Crime and Criminal Justice Statistics*, 2014 (5<sup>th</sup> ed.) (2007-2011) (HEUNI, Helsinki, 2014) at 275.

In both cases, there were significant variations between countries.

<sup>154</sup> Rule 30 Recommendation No. R (84) 12.

<sup>155</sup> PC-CP Terms of Reference.

<sup>156</sup> PCCP (2011) 5 with CDPC Bureau Comments, 4 April 2011.

with the views expressed by the CDPC's other standing committee (PC-OP) that the proposed provisions were not contrary to current treaty law. The CDPC's deferential position prevailed again and was supported by PC-CP State representatives. The section was reduced at the first PC-CP Plenary to two provisions (on State cooperation for justice and reintegration purposes and the need to take prisoners' views into account<sup>157</sup>), only to be removed in its entirety at the second PC-CP Plenary.<sup>158</sup> What remains are references to transfer scattered throughout the Recommendation and a basic principle.

The basic principle states that 'decisions to transfer foreign prisoners to a State with which they have links shall be taken with respect for human rights, in the interests of justice and with regard to the need to socially reintegrate such prisoners'.<sup>159</sup> While this goes some way to ensuring that States consider the individual's ties, possibilities for social reintegration and potential for human rights violations, these basic safeguards do not go far enough. Transfers can violate prisoners' rights on several grounds, including the right to family life, being sent to a prison with poor conditions and/or a regime that does not facilitate social reintegration or results in treatment that constitutes torture, inhuman or degrading treatment.<sup>160</sup> The 2012 Recommendation fails to ensure that rehabilitation remains the primary justification for transfers. This is particularly worrying given the movement from a consensual system under the Council of Europe Convention<sup>161</sup> and the UN Model Agreement,<sup>162</sup> to a compulsory system under the COE Additional Protocol<sup>163</sup> and the EU Framework Decision.<sup>164</sup>

A fast-track procedure for compulsory transfers under the EU Framework Decision entered into force in December 2011.<sup>165</sup> Despite delays in operationalising the system on account of the need for States to introduce implementing legislation, the political priority accorded to transfers could mean that it will be used as an efficient mechanism for transferring European prisoners back to their country of origin.<sup>166</sup> While social reintegration is the stated goal for such transfers,<sup>167</sup> a recent study highlighted that the system is likely to undermine this goal due to problems associated with ensuring prisoner

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<sup>157</sup> See para. 17, Summary Meeting Report of the PC-CP's 1<sup>st</sup> Plenary Meeting, Strasbourg, 8-10 November 2011 (pc-cp/docs 2011\pc-cp(2011)18e) 19.11.11.

<sup>158</sup> Para. 8, Summary Meeting Report of the PC-CP's 2<sup>nd</sup> Plenary Meeting, Strasbourg, 28-30 March 2012 (pc-cp/docs 2012\pc-cp(2012)4e) 16.04.12.

<sup>159</sup> Rule 10 CM/Rec (2012) 12.

<sup>160</sup> Commentary on Rule 10 CM(2012)108; Art. 19(2) EU Charter of Fundamental Rights of the European Union (2000/C 364/01).

<sup>161</sup> See article 3(1)(d) CTSP.

<sup>162</sup> See article 7 UNMA.

<sup>163</sup> See article 3 APCTSP.

<sup>164</sup> See article 6(2) EUFWD.

<sup>165</sup> See article 29(1) EUFWD.

<sup>166</sup> See Report of the European Organisation of Prison and Correctional Services (EuroPris) Expert Group on Framework Decision 909, January 2013 at 6, 14 (hereafter EuroPris Report).

<sup>167</sup> Recital 9, Preamble and article 3(1) EUFWD.

opinions are informed, deciding where the prisoner 'lives' and the lack of judicial review.<sup>168</sup>

Although a draft rule requiring States to take prisoner's views into account was removed from the 2012 Recommendation, this is required under the EU Framework Decision.<sup>169</sup> However, the EU Framework Decision's procedure is problematic given its sequence and the lack of accessible information. Prisoners will have to give their opinion (typically without legal advice) before they have been given information about the regime, conditions of detention, sentence adaptation or release procedures in the proposed receiving State.<sup>170</sup> Moreover, this information is often unavailable.<sup>171</sup> This means that the prisoner's view will be uninformed. Although the 2012 Recommendation advocates that authorities provide prisoners with information on conditions of imprisonment, prison regimes and possibilities for release and assist prisoners to seek independent advice about the consequences of transfers,<sup>172</sup> it does not state at which point in the process this information or advice should be provided. It does however outline that the assessment of any potential risks should be made by appropriately trained persons with access to objective and independent information about the human rights situation in relevant countries.<sup>173</sup> States should therefore consider creating and maintaining a regional database to hold this crucial information and apply the Recommendation's provision at an appropriate point, i.e. before the prisoner has to give his opinion.

Compulsory transfers under the EU Framework Decision are justified by the fact that the prisoner will be sent to where he 'lives'.<sup>174</sup> However, the lack of guidance on how to define or determine where an individual lives (or for how long they need to have lived there for) may result in such assessments being 'totally arbitrary'.<sup>175</sup> The UN believes that transfers should not aggravate a prisoner's situation.<sup>176</sup> Yet it is likely that the EU system will be used to transfer large numbers of citizens back to less affluent countries with prison systems already under strain from a lack of investment, overcrowding and poor conditions, prospects for rehabilitation and resettlement may be reduced rather than enhanced.<sup>177</sup> While the Framework Decision pays lip service to the notion of rehabilitation, States cannot refuse to accept a prisoner on the ground that the transfer will not be conducive to his or her reintegration.<sup>178</sup> This mechanism

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<sup>168</sup> EuroPris Report. See also EU Fundamental Rights Agency project, 'Rehabilitation and Mutual Recognition – Practice concerning EU law on transfer of persons sentenced or awaiting trial' – findings due to be published in 2016.

<sup>169</sup> Article 6(3) EUFWD.

<sup>170</sup> EuroPris Report at 10.

<sup>171</sup> EuroPris Report at 9, 14.

<sup>172</sup> See Rule 35.6-7 CM/Rec (2012) 12.

<sup>173</sup> Commentary on Rule 10 CM(2012)108.

<sup>174</sup> See recital 9 Preamble and article 6(2) EUFWD.

<sup>175</sup> EuroPris Report at 10.

<sup>176</sup> Article 19 UNMA.

<sup>177</sup> EuroPris Report at 6-7, 14.

<sup>178</sup> See UNODC, *Handbook on the International Transfer of Sentenced Persons* (New York; UN, 2012) at 33.

prioritises sending prisoners to where they previously 'lived' or more precisely, to remove them from the detaining State.

The 2012 Recommendation did not go far enough on transfers. It omits safeguards in relation to the right to participate in, and to appeal the outcomes of, the decision-making process to ensure compulsory transfers are not abused. It should have advocated guarantees to information and access to legal aid and judicial review. There is an increasing risk that transfers will be used as a managerial tool to reduce the number of prisoners in one State, often by sending prisoners back to countries ill-equipped to receive or deal with them. Rather than being regarded as a rehabilitation tool, transfer is increasingly being viewed and used as a removal tool.<sup>179</sup> Despite the fact that the 2012 Recommendation encourages the facilitation of continuity of treatment by sending information about activities and programmes participated in,<sup>180</sup> the chances of successful reintegration are limited if the prisoner has limited links with the country in question and does not want to go.

## **7. International Penal Law, Policy and Practice**

Up to this point, this paper has analysed the 2012 Recommendation concerning foreign prisoners in light of the goals established by the Committee of Ministers for the renewal of policy on this issue and human rights law. Before concluding, however, it is important to note the unintended and unforeseen consequence that the 2012 Recommendation may, and is likely, to enhance the regime persons convicted by international criminal courts are subject to.

Across Europe, numerous States have entered into bilateral enforcement agreements with international criminal courts and tribunals, whereby they undertake to consider enforcing sentences of imprisonment imposed on individuals found guilty of committing international crimes.<sup>181</sup> At present, Norway, Sweden, Finland, Denmark, Poland, Austria, Italy, France, Spain, Portugal, Belgium, Estonia and the United Kingdom have and/or are implementing international sanctions imposed by the UN Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) within their domestic prisons.<sup>182</sup> Albania, Slovakia and Ukraine may do so in the future for the ICTY, as might Serbia, the UK, Denmark, Belgium, Finland and Austria for the International Criminal Court (ICC).<sup>183</sup> The reality is that there is a distinct and distinctive sub-category of foreign prisoner being housed in European prisons.

The 2012 Recommendation should directly impact upon the regime international prisoners housed in Europe experience. All of the enforcing states

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<sup>179</sup> See Róisín Mulgrew, "The International Movement of Prisoners" *Criminal Law Forum* Vol. 22, No. 1, 2011, pp. 103-143.

<sup>180</sup> Rule 35.5 CM/Rec (2012) 12.

<sup>181</sup> See Róisín Mulgrew, *Towards the Development of the International Penal System* (Cambridge: CUP, 2013), pp. 33-102 for a discussion of this decentralised model of enforcement.

<sup>182</sup> See Article 27 ICTY Statute; Article 26 ICTR Statute; Article 22(1) SCSL Statute.

<sup>183</sup> See Article 103(1)(a) ICC Statute.

listed above are member States of the Council of Europe. In adopting the 2012 Recommendation, the Committee of Ministers recommended that the governments of member States be guided in their legislation, policies and practice by the rules therein.<sup>184</sup> While recommendations are not legally binding, they represent an expression of political consensus across the 47 member States of the Council of Europe,<sup>185</sup> and, consequently, constitute 'legal instrument[s] with legal significance'.<sup>186</sup> They represent a common policy drafted and adopted specifically to give clear guidance to national governments on the basis of expert advice, regional jurisprudence and advocated best practice.<sup>187</sup> Accordingly, recommendations 'send a strong political message to national authorities regarding their policy and practice'.<sup>188</sup>

Over time, therefore, the rules contained in Recommendations (should) become part of domestic law, policy and practice. Though international criminal courts retain a supervisory role over both their sentences and the welfare of international prisoners, domestic penal law governs the day-to-day implementation of international custodial sanctions.<sup>189</sup> Having access to regional soft law guidance for dealing with foreign prisoners based on contemporary standards and best practice is particularly helpful in the context of international punishment, given that enforcing States seldom receive any advice from the convicting court in relation to the manner in which international sentences should be implemented. While some elements of the 2012 Recommendation are not applicable to the enforcement of international punishment (for example, provisions on reducing numbers), many of its rules are pertinent and useful for designing regimes and sentence plans for international prisoners. The 2012 Recommendation will be particularly helpful for enforcing States that do not have significant foreign prison populations and therefore have less experience of dealing with the issues that affect them.

In addition to having a direct influence over the penal law, policies and practices of the States enforcing international sentences of imprisonment, the 2012 Recommendation may also form part of the benchmark used to assess the conditions of detention international prisoners are subject to. As stated previously, the international courts remain responsible for the welfare of international prisoners. One means by which these courts oversee the treatment of international prisoners is to ask enforcing States to nominate an independent inspection body.

The ICRC oversees the implementation of international imprisonment in the majority of enforcing States (and detention at the international remand

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<sup>184</sup> Preamble CM/Rec(2012)12.

<sup>185</sup> Snacken, "A Reductionist Penal Policy and European Human Rights Standards", p. 151.

<sup>186</sup> George Puppink 'Status of the recommendations of the Committee of Ministers in the legal field of the Council of Europe – Synthesis' European Centre for Law and Justice, 27 March 2012.

<sup>187</sup> See Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: OUP, 2009), p. 371.

<sup>188</sup> Para. 7, Summary Meeting Report of the PC-CP's 1<sup>st</sup> Plenary Meeting, Strasbourg, 8-10 November 2011 (pc-cp/docs 2011\pc-cp(2011)18e) 19.11.11.

<sup>189</sup> See Article 106(1)-(2) ICC Statute; Mulgrew, *Towards the Development of the International Penal System*, pp. 45-83.



facilities of the international courts<sup>190</sup>). It is important to note, however, that several European States deviated from this usual practice: the UK, Albania, Ukraine, Portugal and Germany (in the case of Galić) opted instead to nominate the CPT. While the CPT was already able to access the prisons holding international prisoners due to the States pre-existing obligations<sup>191</sup> under the European Convention for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment,<sup>192</sup> these decisions have resulted in the CPT being responsible for overseeing the enforcement of international sentences imposed by the ICTY, the SCSL and the ICC.

The CPT draws from contemporary human rights law and its findings in the field to create its own CPT Standards.<sup>193</sup> The CPT's Standards and their use in monitoring international punishment help to uphold standards governing the deprivation of liberty by both the European Court of Human Rights through its jurisprudence and, importantly for this discussion, the Committee of Ministers through their recommendations. Moreover, these standards, used as benchmarks for assessments during visits, are not static. Rather they evolve in line with contemporary law and practice. The content of the Standards is taken from the annual General Reports. These General Reports have begun to include references to the CPT's monitoring role on behalf of the ICTY.<sup>194</sup>

Through the CPT's use of recommendations as benchmarks and the possible inclusion of insights from the supervision of international punishment in their Standards, the 2012 Recommendation may have an influence on the enforcement of international sanctions beyond the countries that have selected the CPT as a monitor. The ICRC refers to CPT Standards when conducting inspections on behalf of international courts in both States and the remand facilities of the courts<sup>195</sup> based in Europe.<sup>196</sup> While the ICRC tends to refer to UN soft law on prison conditions,<sup>197</sup> it may also refer to the 2012 Recommendation for guidance in its oversight of international punishment in non-European countries<sup>198</sup> if it considers that it forms part of the body of international standards governing conditions of detention and the treatment of prisoners.

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<sup>190</sup> See for example, Agreement between the ICC and the ICRC on Visits to Persons Deprived of Liberty Pursuant to the Jurisdiction of the ICC, ICC-PRES/02-01-06, 13.04.06.

<sup>191</sup> See Article 2.

<sup>192</sup> European Treaty Series, No. 126, 26 November 1987.

<sup>193</sup> See CPT/Inf/E (2002) 1-Rev. 2015 at <http://www.cpt.coe.int/en/docsstandards.htm> (Date accessed: 2 February 2016).

<sup>194</sup> See 11<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 23<sup>rd</sup> CPT General Reports.

<sup>195</sup> The UN Detention Unit (ICTY) and the ICC's Detention Centre are both based in the Scheveningen Prison Complex in The Hague.

<sup>196</sup> See Mulgrew, *Towards the Development of the International Penal System*, p. 51.

<sup>197</sup> United Nations Standard Minimum Rules (although the 1957 version are referred to in most enforcement agreements, it is likely that the 2015 revision (The Mandela Rules) will be used in practice. See ECOSOC Resolution 21 May 2015, E/CN.15/2015/L.6/Rev.1); Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, GA Res 43/173(1988); Basic Principles for the Treatment of Prisoners, GARes 45/111 (1990).

<sup>198</sup> Mali, Benin and Rwanda are currently enforcing international sentences for the ICTR and SCSL. Swaziland, Senegal, Columbia have entered into agreements with the ICTR, SCSL and ICC so may do so in the future.

## 8. Conclusion

The Committee of Ministers serves as a forum for government representatives<sup>199</sup> to discuss the problems facing European society and to formulate responses to them. One of the tools at its disposal is the adoption of recommendations to member States upon matters for which it has agreed a common policy.<sup>200</sup> Conscious of the growing difficulties faced by national prison administrations in relation to the management of increasingly diverse populations, the Committee of Ministers decided that it was necessary to introduce regional policy that would provide humane and tangible long-term solutions based on contemporary standards and best practice.

The 2012 Recommendation concerning foreign prisoners has made a significant contribution to regional penal policy by advocating reductionist policies, regime improvements, enhanced reintegration programmes and specialist staff. Its provisions seek to prevent and reduce the de facto discrimination and isolation faced by many foreign offenders. Adopting a human rights approach, the Recommendation aims to ensure the equalisation and individualisation of the treatment of foreign offenders throughout the criminal justice and penal process. It attempts to translate these broad socio-humanitarian goals into practical guidance for the practitioners that must implement its rules. In so doing, this form of soft law has the potential to have a significant positive impact on the detention regime experienced by a sizeable and vulnerable proportion of the European prison population.

Drafting a recommendation is, however, an inevitably political process and each potential rule is subject to significant discussion. A difficult balance must be struck between identified objectives, empirical and statistical evidence and the aspirations of the international legal imagination on the one hand, and the practical constraints and costs involved in managing large and diverse groups of prisoners in estates struggling with overcrowding and budget cuts on the other. The need to overcome political sensitivities and ensure the creation of feasible solutions means that the 2012 Recommendation contains gaps and has some limitations. The flipside to the fact that the Recommendation is a product of political compromise is, however, a very positive one.

Each provision of the 2012 Recommendation was adopted on the basis of consensus reached following discussions by three levels of government representatives from 47 nations.<sup>201</sup> Every rule was therefore the product of rigorous debate and formed on the basis of input from the national authorities responsible for implementing domestic law, policy and practice. From a

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<sup>199</sup> Foreign Affairs Ministers of member States or their permanent diplomatic representatives in Strasbourg.

<sup>200</sup> Article 15.b Council of Europe Statute.

<sup>201</sup> See para. 13, Summary Meeting Report of the PC-CP's 1<sup>st</sup> Plenary Meeting, Strasbourg, 8-10 November 2011 (pc-cp/docs 2011\pc-cp(2011)18e) 19.11.11.

practitioner perspective, regional prison directors welcomed the 2012 Recommendation and affirmed their commitment to its implementation.<sup>202</sup>

Given this support, it seems that the Recommendation can contribute towards the development of a more humane and rehabilitation orientated approach for foreign offenders throughout their detention experience. Previous recommendations have had significant impact on regional law and policy through references to them in the decisions and recommendations of the ECtHR and CPT, and on national law, due to the incorporation of such standards in domestic legislation and training programmes.<sup>203</sup> This Recommendation also has the potential to influence international penal law, policy and practice through its impact on the regimes international prisoners are subject to and the assessment of such regimes by international inspectorates.

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<sup>202</sup> Press Release 'Equal rights for foreign prisoners and prison overcrowding are central issues at a Council of Europe international conference in Rome' DC124 (2012) Strasbourg, 15.11.2012, available online at <https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR124%282012%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE> (Date accessed: 2 February 2016); CONCLUSIONS of the meeting of representatives of European prison and probation services, judges, prosecutors and experts in the penitentiary field, dedicated to prison overcrowding (Rome, 24 November 2012) 24/11/2012, 17th Conference of Directors of Prison Administration with the participation of Directors of Probation Services "Foreign Prisoners" Rome, 22-24/11/2012.

<sup>203</sup> Van Zyl Smit and Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights*, pp. 372-3, 376.