Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level

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Introduction

On 19 April 2001, a major turn took place in the European Court of Human Rights’ case law. In response to the case of *Peers v. Greece*, the Court declared that miserable prison conditions – in this case consisting of a high level of overcrowding resulting in poor living space, inadequate ventilation and a lack of hygiene – could constitute a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and this without any “positive intention of humiliating or debasing the applicant” (*Peers v. Greece*, 2001). This judgment made clear that many more Member States of the Council of Europe run the risk of being convicted if they fail to take steps to tackle the problem of overcrowding. Despite this European case law, overcrowding remains a major problem in many European prisons.

This paper discusses European policies that aim to reduce prison overcrowding, with particular attention to non-custodial sanctions and measures as alternatives to imprisonment. The paper is divided into four sections. The first section provides a brief overview of the extent of the problem. Both overcrowding rates and figures on the use of non-custodial sanctions and measures are presented. The second section deals with the nature of prison overcrowding and its causes. The third, and most important, section covers a wide range of existing measures that are intended to reduce the prison population. With respect to these measures, we first look at alternatives to imprisonment in the phase of pre-trial and post-trial detention, and then we mention other measures that may reduce prison population. The next section provides an overview of the role of victims in this context. Finally, we discuss measures that exceed the scope of criminal justice proceedings and establish the link between penal and social policies in Europe.

For the purpose of this report, the focus is primarily on European regulations, both the legally binding legislation and so-called soft-law. At the level of the Council of Europe, the legally binding legislation consists of conventions that are ratified by the Member States. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is ratified by all Member States of the Council of Europe, since this ratification is a
requirement for membership (Council of Europe Treaty Office, 2014; Snacken, 2010). As will be discussed below, the rights contained in this Convention are guaranteed by the European Court of Human Rights. In addition, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987) is of particular importance with regard to overcrowding and is also ratified by all Member States. Other conventions (indirectly) relating to prison overcrowding are the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964), the European Convention on the International Validity of Criminal Judgments (1970) and the Convention on the Transfer of sentenced Persons (1983).

With regard to the so-called soft law of the Council of Europe, the following four recommendations are of particular importance with respect to prison overcrowding and alternatives to imprisonment: Rec(92)16 on the European Rules on community sanctions and measures, Rec(99)22 concerning prison overcrowding, Rec(2000)22 on improving the implementation of the European rules on community sanctions and measures and Rec(2010)1 on the Council of Europe Probation Rules. Even though these recommendations are not legally enforceable, we will pay particular attention to them for at least two reasons. First, the vision of the Council of Europe on prison overcrowding is reflected in it, and second, the European Court refers to these recommendations in its case law, giving them indirectly a binding character and generally strengthening their authority.

Besides the Council of Europe regulations, the case law of the European Court of Human Rights on the one hand, and the Annual General Reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the other hand, are valuable instruments with regard to prison overcrowding. As already mentioned, the European Court is established to ensure that the ECHR is complied with. Since this Convention can be invoked by all inhabitants of the Council of Europe, including prisoners, the case law of the European Court has not only an enormous geographical scope but also a significant impact on the living conditions in European prisons (Snacken, 2006, 2012).

A crucial provision in relation to prison overcrowding is Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Not only the European Court, but also the CPT ensures compliance with this article. The CPT was set up in 1987 under the European Convention for the Prevention of Torture and Inhuman or
Degrading Treatment or Punishment. The Committee is authorized to visit (periodically or ad hoc) all places of detention in all Member States without any restriction (CPT, 2014). The reports on these visits complement the judicial work of the European Court. In addition to these national reports, the CPT has also published Standards for the Treatment of Prisoners and Annual General Reports (CPT, 2014).

At EU level, the mutual recognition to judgments can be considered a measure related to prison overcrowding. This mutual recognition to judgments is regulated by a 2009 Framework Decision and two 2008 Framework Decisions – EU instruments by which Member States are required to achieve the expected results: (1) Framework Decision of 2009 on the Application, between Member States of the European Union, of the Principle of Mutual Recognition to Decisions on Supervision Measures as an Alternative to Provisional Detention; (2) Framework Decision of 2008 on the application of the Principle of Mutual Recognition to Judgements in Criminal Matters imposing Custodial Sentences or Measures Involving Deprivation of Liberty for the Purpose of their Enforcement in the European Union and (3) Framework Decision of 2008 on the Application of the Principle of Mutual Recognition to Judgements and Probation Decisions with a View to the Supervision of Probation Measures and Alternative Sanctions. As a non-binding EU document, the Green Paper on the application of EU criminal justice legislation in the field of detention (COM(2011) 327 final) is noteworthy because it reflects EU ideas on prison overcrowding and alternatives to imprisonment.

At UN level, finally, both binding and non-binding instruments were adopted and are also relevant for the European context. Regarding the legally binding instruments, we can refer to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2006). Subsequently, four non-binding instruments are interesting: the Standard Minimum Rules for the Treatment of Prisoners (1977), the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (1988), the Basic Principles for the Treatment of Prisoners (1990) and, most important in this context, the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules, 1990).

Finally, it is useful to consult NGO reports on this topic. The most influential NGOs working on this issue are the Association for the Prevention of Torture, the International Centre for
Prison Studies, Amnesty International, the Confederation of European Probation, Penal Reform International and the Howard League for Penal Reform.

1. Prison overcrowding in Europe and its alternatives: facts and figures

The SPACE I and SPACE II reports provide annual data concerning, prison population (together with useful information concerning the conditions of detention) and non-custodial sanctions and measures, respectively. Both reports are part of the SPACE project and provide an overview of custodial and non-custodial activities in the Member States of the Council of Europe. Forty-seven out of the 52 Prison Administrations of the 47 Member States filled in the latest standard SPACE questionnaire¹, the annual survey of the SPACE project, in order to collect national data and comments (Aebi & Delgrande, 2014a). The reports contain recent (2011-2012) figures from all the participating Member States, as well as some calculated averages covering the general situation in the Member States. The figures discussed below only concern European averages. For more information concerning the different participating countries, the more detailed reports can be consulted².

1.1 Some socio-demographic characteristics of prisoners

According to the SPACE I 2012 report (and therefore relating to the 47 Member States of the Council of Europe who completed the 2012 survey), on the first of September 2012, the average prison population rate per 100 000 population was 149.9, ranging from 3.0 (San Marino) to 516.4 (Georgia) (Aebi & Delgrande, 2014a). Although the report does not provide clear data on the presence of specific categories, like pre-trial and post-trial prisoners, internees, it does state that 26.3% of the prisoners is not serving a final sentence (e.g. when they are found guilty at trial, but did not receive their definitive sentence yet, for example because they appealed). This number has to be distinguished from the number of unconvicted (untried) prisoners: for 18.7%, no court decision has yet been reached.

The European average age of the prison population is 35.7 (national averages ranging from 31 to 60). One per cent of the prisoners is under 18 years old, 4.7% is between 18 and 21 years old. Whereas 4.3% of all prisoners in 2001 was female and 17.2% was foreign, this was the case for 5.4% and 20.5%, respectively, of all prisoners in 2012. Although this means an

¹ Five countries did not fill in the questionnaire: Bosnia and Herzegovina, Georgia, Greece, Malta and the Russian Federation (Aebi & Delgrande, 2014a).
² These can be consulted online: http://www3.unil.ch/wpmu/space/space-i/annual-reports/.
increase in the presence of both groups in prison, the increase is too small to state that they would be responsible for the increase in overcrowding. The main offences of the convicted prisoners (for their final sentence) are: (attempted) homicide 13%, assault and battery 8.2%, rape 7.2%, other types of sexual offences 3.3%, robbery 12.9%, other types of theft 20%, economic and financial offences 3.4%, drug offences 17.1%, terrorism 0.3%, organized crime 1% and others 15.5%. Hence, theft and drug offenses are in general the most represented offences amongst prisoners.

In general, 22.4% of the post-trial prisoners serves a sentence of less than one year and 25.7% of these prisoners a sentence of one to three years. This means that across the Member States, almost half of all post-trial prisoners serve a short-term sentence of less than three years. Sentences of three to five years and of five to ten years are each served by approximately 20% of the prisoners, whereas 10% serves a prison sentence of ten to twenty years. Finally, less than 5% serves a sentence of 20 years and over or life imprisonment. Although the composition of the European prison population does not seem to have fundamentally changed over the last ten years, we can identify some changes when it comes to the average length of the sentences. The most important difference between 2002 and 2012 is that, in 2002, 15.6% of the post-trial prisoners served a sentence of less than one year (Aebi, 2002), which means, compared to 2012, an increase of almost 7%. Although these figures do not indicate anything about the possible reasons for these changes, they indicate that an increase in the use of alternatives in order to replace shorter prison sentences might have an important influence on prison rates.

### 1.2 Overcrowding rates

The SPACE I 2012 report indicates that, on the first of September 2012, the average\(^3\) prison density per 100 places is 97.7, with a maximum of 159.3 (Aebi & Delgrande, 2014a). Ten years earlier, the average density was 94.3 (Aebi, 2002). The prison density is the ratio between the number of prisoners and the number of places available in penal institutions. An average density of 97.7 means, in other words, that there is no prison overcrowding at a general level. There is, however, a great variety between the different Member States. In 21 of the participating countries this prison density is more then 100, which indicates prison overcrowding. The ten countries with the highest overcrowding rate are: Serbia (prison density of 159.3), Italy (145.4), Cyprus (140.1), Hungary (138.8), Belgium (131.7), Croatia

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\(^3\) The average over the participating Member States of the Council of Europe.
(120.9), Romania (118.9), France (117.0), Portugal (112.7) and Montenegro (111.7). These numbers indicate that there are five countries with more than 130 prisoners per 100 places, which is, according to the SPACE I 2012 report, similar to previous years.

A closer look at the movements to and from prison suggests that in 2011, there were 206.8 new prison entries per 100.000 inhabitants (the 'flux') (of which 51% entries ‘before final sentence’) and (only) 170.6 releases per 100.000 inhabitants (of which 28.9% pre-trial releases), suggesting an increase of the prison population during that year. The average duration of detention in 2011, based on the total number of prisoners (stock) of 2011, was 9.5 months (ranging from 1.2 to 45.1 months), which shows an increase of 2.7 months compared with data of 2001 (Aebi, 2002). For pre-trial prisoners, the average length is 5.7 months. 63.9% of the releases concern definitively sentenced prisoners, of which 41.8% was released under conditions and 56.6% was released unconditionally (at the end of their sentence).

Based on these figures, it is very difficult to identify the main categories of prisoners or the main factors contributing to overcrowding. It seems that these categories and factors differ from country to country. When looking at the countries mentioned above, with the highest overcrowding rates, we can conclude that in some of these countries there is an overrepresentation of certain categories, compared to the average, and in some of them, there is not. For example, in Cyprus there are 52.9% foreigners (mean = 20.5) and 39.6% of untried prisoners (mean = 18.7%), but the prison length is 2.7 months (mean = 9.5 months). In Romania, 0.6% is foreign, 6.3% is untried, but the average length is 28.3 months. These differences indicate that overcrowding has to be handled at a national level, depending on the specific groups or categories of prisoners that are overrepresented in prison.

1.3 Non-custodial sanctions and measures

Fergus McNeill (2013) states that, despite the high number of offenders in prison, there has been a significant growth in the average number of offenders under supervision in the community (alternatives to prosecution or sentence, community sentences in their own right as well as post-custody licenses). Moreover, in most European jurisdictions, the offenders under supervision outnumber the ones in custody. The SPACE I and SPACE II 2012 reports confirm McNeill’s statement. Whereas the average prison population rate per 100 000 population was 149.9 on the first of September 2012 (Aebi & Delgrande, 2014a), on the first of December 2012, the average number of persons under supervision or care of Probation Agencies per 100 000 population was 214.3 (Aebi & Delgrande, 2014b).
2. Understanding the widespread problem

A thorough understanding of the phenomenon of prison overcrowding is the first step in finding solutions for this problem. Following the example of Beyens, Snacken and Eliaerts (1993), the problem of prison overcrowding can be considered both in quantitative and qualitative terms. Quantitatively, prison overcrowding can be defined as “the mismatch between prison capacity and the number of prisoners to be accommodated” (Kuhn, Tournier & Walmsley, 2000). Although this operationalization in terms of spatial density is most frequently used (Kuhn, Tournier & Walmsley, 2000; Pitts, Griffin & Johnson, 2014; Steiner & Wooldredge, 2009), the qualitative aspect of prison overcrowding is equally important to assess the severity and the effects. Beyens, Snacken and Eliaerts (1993) describe the qualitative aspect of overcrowding with respect to the prisoners as a subjective feeling of insecurity and insufficient living space, and with respect to the staff as a sense of overload and uncontrollable situations. According to these authors, the feelings of insufficient living space or uncontrollable situations can also occur in the absence of the quantitative aspect of overcrowding.

2.1 Harmful effects

The harmful effects of overcrowding are reflected at four different but interconnected levels: prison administration, prisoners, prison staff and society. Firstly, as suggested in Recommendation Rec(99)22 concerning prison overcrowding of the Council of Europe, prison overcrowding and prison population growth “represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions.” The most obvious problems at the level of prison administrations relate to a lack of space. In this context, the European Prison Rules of 2006 indicate that the provided accommodation must allow for respect of human dignity and, as far as possible, privacy.

With respect to adequate space, Gaes (1985) distinguishes five aspects to be taken into account: (1) spatial density, which refers to the amount of space per prisoner; (2) social density, which refers to the number of prisoners per cell; (3) personal space, which refers to the amount of space that does not need to be shared; (4) privacy, which is considered as the proportion of time a prisoner can be alone; and finally (5) perceived crowding the experience of prisoners concerning overcrowding. Besides the lack of adequate space, prison overcrowding also leads to a number of other challenges such as ensuring a good level of
hygiene and internal order, providing adequate nutrition and health care, and implementing an adequate range of programmes, including outdoor exercise (Clements, 1982; CPT/Inf (2013)29; Kuhn, Tournier & Walmsley, 2000; Pitts, Griffin & Johnson, 2014). In addition to these material shortages, policy decisions are hampered by overcrowding (Haney, 2006).

Secondly, prison overcrowding has a direct impact on prisoners. Indeed, both the objective shortage of cells as the feelings of insecurity are linked with health problems, mortality, violence and mental damage (Beyens, Snacken & Eliaerts, 1993; Kuhn, Tournier & Walmsley, 2000). One of the serious detrimental effects related to prison overcrowding is prison suicide (Huey & McNulty, 2005). According to the data of SPACE I 2012, the average suicide range per 10 000 prisoners was 7, ranging from 0 to 31.1. In five Member States of the Council of Europe, this suicide range was over 15: Luxembourg (31.1), Montenegro (22.6), Finland (21.5), Slovenia (15.7) and France (15.6) (Aebi & Delgrande, 2014a).

Thirdly, since prison staff has to work in overcrowded conditions, monitoring and other activities are to be organized with less staff in proportion to the number of prisoners (Kuhn, Tournier & Walmsley, 2000; Beyens, Snacken & Eliaerts, 1993). This can affect prison staff both psychologically and physiologically (Pitts, Griffin & Johnson, 2014) and can subsequently lead to more staff sickness (Kuhn, Tournier & Walmsley, 2000). And lastly, also the society bears the consequences of prison overcrowding. Indeed, the overuse of prison is highly expensive for society (and its taxpayers) (CPT/Inf (2013)29, 21). In 2011, the average amount spent per day for the detention of one person was 95 euro, while the average total budget spent by the Prison Administration in 2011 was 462.073.435 euro (Aebi & Delgrande, 2014a).

2.2 Prison overcrowding considered as inhuman and degrading treatment

The CPT was the first to consider prison overcrowding as a valuable source of inhuman and degrading treatment and consistently reminds the Member States that the combination of overcrowding and a lack of services and activities constitute a violation of Article 3 of the ECHR (CPT/Inf (92)3; Snacken, 2009; Snacken, 2006). In its most recent General Report, the CPT states that “prison overcrowding implies not only very poor conditions of detention, combining lack of privacy and violence, but also deprives prisoners of certain fundamental rights. Further, prison overcrowding involves considerable human and budgetary costs. Finally, prison overcrowding is one of the reasons frequently invoked by prison staff when they go on strike.” (CPT/Inf (2013)29, 21). Since 2001, the ECtHR has been following this
reasoning of the CPT, stating that prison overcrowding can constitute inhuman and degrading treatment even without there being any “positive intention of humiliating or debasing the applicant” (Peers v. Greece, 2001). This was for instance the case in the judgments of Dougoz v. Greece (6 March 2001), Kalashnikov v. Russia (15 July 2002) and Sulejmanovic v. Italy (16 July 2009).

Likewise, the EU considers prison overcrowding as a pressing problem. In her speech concerning the future of European criminal justice under the Lisbon Treaty, Vice-President of the European Commission and Justice Commissioner Viviane Reding pointed strongly to the problem of overcrowded European prisons (Reding, 2010). According to the Vice-President, the transfer of prisoners is hampered by prison conditions that are considered to be degrading punishment: “what judicial authority would authorise the transfer of a detainee to a place where he or she would face a substantial risk of being ill-treated?” (Reding, 2010: 4). For this reason, she advocates the use of alternatives to imprisonment and the improvement of prison management. One year later, these ideas were reflected in the Green Paper on the application of EU criminal justice legislation in the field of detention (European Commission, 2011). This European Commission publication aims to stimulate discussions on probation, alternative sanctions and detention conditions.

2.3 Causes of prison overcrowding: looking beyond the prison system

Before discussing the measures taken against overcrowding, we will briefly discuss the causes of overcrowding. Indeed, a long-lasting solution requires these causes to be addressed instead of implementing short-term solutions. Prison overcrowding has a variety of causes, both within and outside the criminal justice system (Kuhn, Tournier & Walmsley, 2000; Pitts, Griffin, Johnson, 2014; Snacken, 2002, 2010). Beyens, Snacken and Eliaerts (1993) distinguish three categories of influencing and interrelated factors: (1) internal mechanisms, which are factors internally operating to the criminal justice system, e.g. on legislation, police, prosecution, remand custody, sentencing and release practices, (2) interfering factors, e.g. the role of the media, public opinion and the political climate, and (3) external factors, related to e.g. demographic and economic evolutions. Figure 1 presents the relationships between these factors (Beyens, Snacken & Eliaerts, 1993; Snacken, 2010).
The diversity in influencing factors is also recognized by the Council of Europe recommendation concerning prison overcrowding: “the overall crime situation, priorities in crime control, the range of penalties available on the law books, the severity of the sentences imposed, the frequency of use of community sanctions and measures, the use of pre-trial detention, efficiency of criminal justice agencies and not least public attitudes towards crime and punishment.” (Rec (99)22 concerning prison overcrowding). Hence, it should be noted that the main causes can be situated outside the prison system (Kuhn, Tournier & Walmsley, 2000; Snacken, 2002; Snacken, 2010), which needs to be taken into account when formulating measures against overcrowding.

2.4 Internal mechanisms

Since prison overcrowding is often associated with prison population inflation (which means: a very fast growth of the prison population) (Kuhn, Tournier & Walmsley, 2000), attention should be given to the factors that are at the root of this inflation. First of all, it is important to note that crime does not determinate the prison population as much as is often claimed (Beyens, Snacken & Eliaerts, 1993). In fact, research shows that crime rates of a particular
country are not related to the detention rates in that country in a linear way, on the contrary, “each rises and falls according to its own laws and dynamics” (Lappi-seppälä, 2012: 43).

In a 1998 study, the Member States of the Council of Europe were asked to indicate the main causes of changes in prison population over the last ten or fifteen years (Kuhn, Tournier & Walmsley, 2000). In the light of the foregoing, it is remarkable that the most cited cause was the “increase in crime or the number of offences reported to the police and, consequently, in the number of convictions”. Two other frequently cited causes were the “increase in the length of sentences handed down by judges or in the length of imprisonment” and the “increase in crimes committed by foreigners or immigrants”. It should be noted that respondents were given eleven response options, all situated within the criminal justice system.

Beyens, Snacken and Eliaerts (1993) illustrate that decriminalizing certain offences can reduce prison population strikingly. Finland is probably the best-known example. By decriminalizing public drunkenness and decreasing certain maximum sentences, prison population decreased enormously. Also Denmark and England reduced the prison population by decriminalizing certain offences. By contrast, prison population increased in several countries as a result of new drugs regulations (Beyens, Snacken and Eliaerts, 1993).

Moreover, certain policy decisions concerning prosecution, remand, sentencing and release can have a profound impact on the prison population, and in particular on certain categories of prisoners. For example, both policy decisions relating to the use of remand custody and prosecution priorities applied by the Public Prosecutor can influence the prison population since a substantial proportion of prison population consists of remand prisoners – who are technically still considered innocent (Beyens, Snacken and Eliaerts, 1993; Morgenstern, 2009). The same goes for legislative or administrative decisions concerning conditional and other types of early release. Because it is difficult for certain categories of prisoners (e.g. sexual delinquents) to meet the conditions, they stay ever longer in prison (Daems, 2014; Snacken, 2002) and, for example in Belgium, time conditions for conditional release became more stringent (law of 17 March 2013). Furthermore, sexual delinquents not only have difficulties to be conditionally released but also to receive alternative sanctions such as electronic monitoring (Snacken, 2002).
2.5 Interfering factors and external factors

As mentioned above, interfering factors such as the way in which crime and the functioning of the criminal justice system are presented by the media, evolutions in public opinion, and the political climate, and external factors related to demographical developments (e.g. the age structure of the population and migration movements) and economic influences (e.g. income discrepancies and unemployment) are at least as important as factors directly linked to the criminal justice system to understand changes in prison population. A complete study of these factors is beyond the scope of this paper but the following two examples can indicate the importance of these elements. The first example of a factor outside the criminal justice system that influence the prison population relates to the nature of the political decision-making process. Several studies have shown that the number of prisoners in relation to 100 000 inhabitants is associated with characteristics of political decision-making processes. Countries with majoritarian democracies tend to have higher detention rates than consensual democracies (Snacken, 2010, Lappi-Seppälä, 2007, 2008; Green, 2012; Lacey, 2008). The other example worth mentioning relates to social inclusion and welfare expenses (Snacken, 2010; Tonry 2012; Body-Gendrot, Hough, Kerezsi, Lévy & Snacken, 2014; Lappi-Seppälä, 2014; Downes & Hansen, 2006). Lower levels of income inequality and higher welfare investments seem to correlate with lower incarceration rates. The Scandinavian countries are the classic example in this context.

3. Measures to prevent and/or to combat overcrowding

Ever since the problem of prison overcrowding exists, there have been attempts to decrease prison population. The number of attempts is as high as the number of causes, which is, according to Pitts, Griffin and Johnson (2014, p. 129), obvious, “since a multifaceted problem typically requires a multifaceted solution”. Although there are several possible measures and strategies (for example the use of custodial and non-custodial sanctions and measures, shortening the length of imprisonment and enhancing the possibilities for early release), every single measure has its own shortcomings (Kuhn, Tournier, & Walmsley, 2000; Snacken, 2006). This makes it necessary to combine strategies and approaches according to the specific causes for overcrowding in each Member State (Kuhn, Tournier, & Walmsley, 2000). In addition, reducing prison overcrowding is not possible without embedding these appropriate measures within a coherent and national crime policy directed towards the prevention of
crime and criminal behavior, effective law enforcement, public safety and protection, the individualization of sanctions and measures and the social reintegration of offenders (Rec (99)22 concerning prison overcrowding; Snacken, 2006). Moreover, such measures need support, not only by the political leaders, but by judges, prosecutors and the general public as well.

Since the main focus of this paper lies on the use of community sanctions as a means to reduce overcrowding, these alternative sanctions will be discussed more comprehensively than the other possible measures.

3.1 Non-custodial measures

For some decades now, several countries have been making use of community sanctions in order to decrease the use of imprisonment, which is shown by the comments on non-custodial sanctions in a variety of official documents and reports (for example, of the United Nations and the Council of Europe). When it comes to preventing and/or combating prison overcrowding, non-custodial measures can be used within two different strategies, a front-door and a back-door strategy.

When using a front-door strategy, prison populations are kept low by making a selection of offenders to imprison and by keeping the door closed for others, in other words, by limiting the input of offenders. This can be done, for example, by decriminalization, by adopting certain prosecution policies and sentencing priorities, by legally limiting the length of prison sentences or by an effective replacement by non-custodial sanctions and measures. Imprisonment is then used as a last resort, as ‘ultimum remedium’, what also entails that imprisonment is not used as a threat in cases of noncompliance with alternative measures, and that, therefore, the legal connection between noncompliance with alternative sanctions and the prison sentence is to be avoided (Snacken, 2002; 2006). This idea corresponds to the CoE Committee of Ministers’ statement that: “Deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided for only where the seriousness of the offence would make any other sanction or measure clearly inadequate.” (Rec (99)22 concerning prison overcrowding). The front-door strategy can also be used during the pre-trial phase, by reducing pre-trial detention to a minimum: “the application of pre-trial detention and its length should be reduced to the minimum compatible with the interests of justice” and “the widest possible use should be made of alternatives to pre-trial
detention” (Rec (99)22). According to Snacken (2002), a front-door strategy is no easy way to reduce prison population, but, in the long term, it is the only satisfactory way.

Back-door strategies, on the other hand, aim at reducing prison overcrowding by releasing prisoners as soon as possible, in other words, to keep the prison sentences as short as possible (Snacken, 2006). Using a back-door strategy can lead to an immediate decrease of prison population and it can be done by stimulating an early release of prisoners, for example through parole, electronic monitoring, house arrest, and so on (Pitts, Griffin, & Johnson, 2014).

Except for front-door and back-door strategies, measures can be taken to reduce the amount of time in prisons during the detention period (e.g. through semi-liberty, prison leave for educational or other reasons, halfway houses and other types of gradual transition to society). Although in many of these cases there is still a cell needed for the offender, which means that these measures are not contributing to overcrowding in a direct manner, it can reduce the population pressure, especially in shared cells. In addition, the measures contribute to the reintegration of the offender and they facilitate the process of preparation for release (Kuhn, Tournier, & Walmsley, 2000).

As discussed above, non-custodial measures can be implemented as part of a front-door as well as a back-door policy towards the reduction of overcrowding in prisons. The Council of Europe’s most important recommendation concerning prison overcrowding (Rec (99)22), explains more than once how community sanctions and measures need to be promoted, and this by using a multilayered strategy: In first instance, the third principle states that an “appropriate array of community sanctions and measures” should be made available to prosecutors and judges. In line with this provision, principle nine advocates the use of alternative modalities for the enforcement of prison sentences, such as “semi-liberty, open regimes, prison leave or extra-mural placements”. In addition, regarding the trial stage it is recommended making efforts to “reduce the recourse to sentences involving long imprisonment […] and to substitute community sanctions and measures for short custodial sentences.”

In this paper, community sanctions and measures will be discussed without distinction between front-door and back-door strategies, except when this is explicitly mentioned. The reason for this is the multilayered approach suggested by the Committee of Ministers on the one hand and the lack of this distinction in literature on the other hand.
3.1.1 Defining community sanctions

When reading about community sanctions, there are clearly various terms that are being used in international literature, like offender supervision, community supervision, alternative sanctions, intermediate sanctions, community sanctions, community corrections, and so on. According to McNeill (2013), it concerns a penal subfield with rather vague boundaries, which is described and labeled differently in different places or by different actors. Considering our focus on the European level, we agree with McNeill to adopt the definition of the Council of Europe. Their definition succeeds in integrating the front-door as well as the back-door measures (as discussed here above), which makes it even more fitting (McNeill, 2013). Various European Regulations, such as the Council of Europe Probation Rules (Rec (2010)1), adopted this definition.

The European label ‘community sanctions and measures’ is described as: “those sanctions and measures which maintain the offender in the community and involve some restriction of his liberty through the imposition of conditions and/or obligations, and which are implemented by bodies designated in law for that purpose. The term designates any sanction imposed by a court or a judge, and any measure taken before or instead of a decision on a sanction as well as ways of enforcing a sentence of imprisonment outside a prison establishment (Council of Europe, Rec (1992)16)”.

Both at the pre-trial and the post-trial level, there is a variety of community sanctions and measures. These sanctions and measures can differ between the different Member States. The same is true for the concrete interpretations given to them. In the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) of 1990, following alternatives to pre-trial detention are included: verbal sanctions, conditional discharge, status penalties, economic sanctions and monetary penalties, confiscation or an expropriation order, restitution to the victim or a compensation order, suspended or deferred sentence, probation and judicial supervision, community service order, referral to an attendance center, house arrest, any other mode of non-institutional treatment, some combination of the measures listed above. At a post-trial level, community sanctions and measures can be one of the following: fully or partially suspended custodial sentence with or without probation, conditional pardon or conditional discharge (with probation), community service, electronic monitoring, home arrest, semi-liberty (including weekend imprisonment and imprisonment on separate days), treatment (outside prison), conditional release/parole with probation, furlough
and halfway houses, work or education release, various other forms of parole, remission, pardon, mixed orders and others (Aebi & Delgrande, 2014b; Tokyo Rules). Definitions of some of these community measures and sanctions can be found in European regulation, for example in the Council Framework Decision of 2008 (2008 909 JHA) or in the Council of Europe Probation Rules (Rec(2010)1).

3.1.2 European regulations concerning community sanctions: an overview

During the last decades, in most European countries the scale, reach and intensity of supervisory sanctions have been increasing. Besides the traditional rehabilitative measures at post-trial level, there has been an increase in pre-trial and/or pre-sentence supervisory sanctions as well as an emergence of supervision under civil law and in administrative forms (McNeill, 2013). At European level, the development and implementation of these non-custodial sanctions and measures, at pre-trial as well as at post-trial level, have been influenced and stimulated by several European institutions, more specifically, by studies carried out by the European Committee on Crime Problems and the resolutions prepared by the Committee of Ministers of the Council of Europe (Van Kalmthout, 2000).

The Council of Europe has a history of many years of developing instruments concerning Human Rights in general (e.g. the European Convention of Human Rights in 1950), as well as developing more specific instruments and standards regarding the treatment of offenders. A well-known example are the European Prison Rules concerning Prisoners’ Rights (Rec (87)), developed in the 1970s but updated in 2006 (Morgenstern & Larrauri, 2013). In 1976, the Committee of Ministers adopted Resolution R(76)10 on alternative penal measures to imprisonment, based on the report ‘Alternative penal measures to imprisonment’. This Resolution promotes the further development of existing alternatives and encourages the development of promising new alternatives to imprisonment by the Member States (more specifically, of deferral, community service and semi-detention), as well as an investigation of the advantages and opportunities of community work (Van Kalmthout, 2000, p. 121).

In the early 1990s, the United Nations and the Council of Europe tried to reduce the use of imprisonment by strengthening community sanctions (McNeill, 2013). Meanwhile, it was internationally recognized that alternative sanctions, just as imprisonment, restrict and potentially violate personal liberties and rights (Morgenstern & Larrauri, 2013). Therefore, in order to ensure the observance of human rights, the United Nations and the Council of Europe also tried to set out some minimum rules for alternative sanctions, by involving national
stakeholders, NGO’s and scientific experts. This resulted in the realization of two formal but nonbinding documents for the Member States: the ‘United Nations Standard Minimum Rules for Non-Custodial Measures’ (Tokyo Rules) in 1990 and the ‘European Rules on Community Sanctions and Measures’ (European Rules, Rec(92) 16) in 1992 (McNeill, 2013). The main concerns of these recommendations were the offenders’ rights and guidelines for good practices. The main objective of the Tokyo Rules was, for example, to set of basic principles to promote the use of non-custodial measures (in order to reduce the use of imprisonment), as well as minimum safeguards for persons subject to alternatives to imprisonment. Non-custodial measures were seen as in accordance to the principle of minimum intervention and as part of a movement towards depenalization and decriminalization. Pre-trial detention had to be seen as a mean of last resort and alternatives had to be employed as early as possible. On the other hand, the European Rules focus not so much on the implementation of community sanctions and measures as such, but rather on how they need to be worked out and executed. Their aims are to establish common principles regarding penal policy amongst the Member States in order to strengthen international co-operation in this field, to establish a set of standards to provide a just and effective application of community sanctions and measures (e.g. proportionality) and to furnish Member States with basic criteria in order to protect the fundamental human rights of offenders subject to such sanctions and measures.

Despite their non-binding character, the Tokyo rules and the European Rules were adopted unanimously by representatives of all of the Member States (Morgenstern & Larrauri, 2013). Almost all European countries reformed their sanction system to a certain extent (Van Kalmthout, 2000). In addition, they received the support of experts, academics and several NGOs active in the field of offender supervision - including the European Probation Organization (Conference Européenne de la Probation, CEP) (Morgenstern & Larrauri, 2013).

In addition to the European Rules, in 2000 the Committee of Ministers of the Council of Europe provided guidelines on improving the implementation of the European rules on community sanctions and measures (Rec (2000)22). In appendix 2 of these guidelines, there are some guiding principles for achieving a wider and more effective use of community sanctions and measures. These guidelines concern (inter alia) legislation, the sentencing practice (e.g. the establishment of rationales for sentencing), the effective implementation (e.g. setting up adequate services) and the improvement of the credibility of community

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4 Today, the Confederation of European Probation.
sanctions and measures with judicial authorities, complementary agencies, the general public and politicians (e.g. by dissemination of the European Rules in the national language of each Member State).

While other topics were prioritized on the international agenda during the following years, and especially after 2001, alternative sanctions (and probation) gained renewed attention in more recent years. In 2008, the European Union adopted a Framework Decision on ‘supervision of probation measures and alternative sanctions’ (2008/947/JHA), which requires Member States to supervise offenders sentenced in another state (McNeill, 2013; Morgenstern & Larrauri, 2013). The Framework Decision aims at ‘facilitating the social rehabilitation of sentenced persons, improving the protection of victims and of the general public, and facilitating the application of suitable probation measures and alternative sanctions, in case of offenders who do not live in the State of conviction’ and tries to achieve this by laying down some rules for the Member States. They also dictate several types of alternatives which are common in all the Member States and of which the supervision is obligatory. A second instrument of the European Union is the ‘Framework Decision on the European Supervision Order’ (ESO), adopted in 2009 (2009/829/JHA). This instrument concerns the transfer of pre-trial supervision measures (e.g. bail conditions) (Morgenstern & Larrauri, 2013) and aims at ensuring the due course of justice, promoting non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place and improving the protection of victims and of the general public. These two European Union Framework Decisions are legally binding, in that sense that the Member States are required to implement them into national legislation.

In 2010, the Council of Europe adopted its Probation Rules (Rec (2010)1). These Rules complement all Recommendations mentioned above and others. As the name reveals, they focus on probation work and try to inform about and promote good practices (Morgenstern & Larrauri, 2013).

Lastly, the European Commission published the ‘Green Paper on the application of EU criminal justice legislation in the field of detention’ in 2011 (COM(2011) 327). With this Green Paper, the Commission wants to explore the extent to which detention issues impact on mutual trust, mutual recognition and judicial cooperation generally within the European Union. It covers the interplay between detention conditions and mutual recognition instruments as well as pre-trial detention. Mutual confidence is crucial, since circumstances as poor treatment and prison overcrowding (for pre-trial prisoners as well as for convicted
prisoners) can undermine the necessary trust in order to strengthen judicial cooperation within the European Union. Without this trust, Member States might be reluctant to recognize and enforce the decision taken by another Member State's authorities.

3.1.3 Objectives of community sanctions: divided opinions

Although community sanctions are promoted in all Member States, important differences exist between countries concerning the aims and purposes of community sanctions (Snacken & McNeill, 2012). Moreover, this lack of unity amongst Member States can be (partly) responsible for the failure to minimize the use of prisons within penal policies. According to McNeill (2013), these differences arose because of the fact that, in many jurisdictions, community sanctions emerged as measures imposed instead of punishment or as a form of suspended punishment and thus not as an actual punishment. The nature and sentencing aim of community sanctions is still very unclear. They can be seen as punitive sanctions with a retributive aim, or they can be aimed primarily at rehabilitation and re-socialization. Although in a lot of countries the legislature and the judiciary prefer the retributive purpose, probation services and community organizations often prefer the rehabilitative and victim-oriented approach (Van Kalmthout, 2000). In addition, some Member States refer explicitly to the aims of the community sanctions, like rehabilitation or the prevention of recidivism, whilst others leave this decision to the court (Snacken & McNeill, 2012).

Another possible objective of community sanctions arises from the concern about the costs of imprisonment. According to McNeill (2013), the reduction of these costs became of key interest within contemporary penal policies (an example from the Netherlands shows that the cost of community sanctions can be 5 to 8% of the cost of imprisonment). In addition, some argue that community sanctions lead to a lower reoffending rate then imprisonment, but this statement is rather controversial and at least over-generalising (McNeill, 2013).

Because of this lack of unity concerning the objectives of community sanctions, Snacken and McNeill (2012) compared some of the European guidelines and recommendations concerning probation. For example, the Probation Framework Decision of 2008 (2008/909/JHA) states that the aims of community sanctions and measures are: “facilitating the social rehabilitation of sentenced persons, improving the protection of victims and the general public, and facilitating the application of suitable probation measures and alternative sanctions in cases of offenders who do not live in the state of conviction”. In the Probation Rules R1 (Rec (2010)1), similar objectives are described: “Probation agencies shall aim to reduce re-
offending by establishing positive relationships with offenders in order to supervise (including control where necessary), guide and assist them and to promote their successful social inclusion. Probation thus contributes to community safety and their fair administration of justice.”. Finally, the CEP Statement on Probation Values and Principles states that “Social inclusion is a requirement of social justice and a key guiding principle in probation practice”.

This overview can be completed with information provided in Resolution 76(10) on alternative penal measures to imprisonment, the Tokyo Rules, the European Rules on community sanctions and measures (Rec (92)16) and the recommendation on improving their implementation (2000). The Resolution 76(10) on alternative penal measures to imprisonment indicates that “prison sentences have to be avoided because of their many drawbacks and out of respect for individual liberty, whilst alternatives to prison sentences can serve the object of rehabilitating offenders and are less costly than imprisonment”. In the Tokyo Rules, a lot of objectives of non-custodial measures are described. They aim to “reduce the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender”, to “provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society”, to “avoid unnecessary use of imprisonment”, to “avoid institutionalization and to assist offenders in their early reintegration into society” and to “reduce reoffending”. The European Rules (Rec (92)16) state that “these sanctions and measures constitute important ways of combating crime and that they avoid the negative effects of imprisonment”, whereas the Recommendation improving the implementation of the European rules on community sanctions and measures aims particularly at the reintegration into the community.

Snacken and McNeill (2012, p. 562) concluded their limited comparison by arguing that there exists a consensus at European level. It seems that the general aim of a penal sanction is the prevention of recidivism and the protection of the community (including the victims). In addition, “a particular characteristic of probation measures is their emphasis on working with offenders in the community and fostering their social rehabilitation and inclusion”. This objective seems to be transferable to community sanctions in general. With regard to other European regulation, other objectives can include: avoiding detention because of their negative consequences, reducing the costs, providing greater flexibility in the search for offender customized sentences, and better serving the needs of the victims.
3.1.4 Implementation of community sanctions

Whether these European guidelines and recommendations are implemented as planned, is still a question. Several opinions exist on this matter. According to an extensive survey conducted by Van Kalmthout and Durnescu (2008), there is a considerable expansion of the use of community sanctions in most European jurisdictions. However, McNeill (2013) argues that, since prisoners are often released under some form of supervision and prison sentences thus also involve community-based sanctions, this expansion is rather relative and does not per se indicate a decrease in the use of custodial sanctions. Indeed, notwithstanding the conclusion drawn in several reports of the Council of Europe that since 1976 more than twenty alternative penal measures have been introduced, alternatives like periodic detention, semi-detention, semi-liberty, weekend detention, work release and the (partly) suspended sentence substitute a part of the custodial sentence and are not imposed instead of imprisonment. The other community sanctions, the true alternatives to imprisonment, have only been used on a limited scale, only community service seems to be applied on a greater scale (Van Kalmthout, 2000).

Also, the implementation of the binding European Union Framework Decisions (2008/909/JHA, 2008/947/JHA and 2009/829/JHA) concerning offender supervision is not going too well (Morgenstern & Larrauri, 2013). After the European Commission adopted the Green Paper (COM(2011) 327) in 2011, they received 81 replies to the document, from various actors (national governments, practitioners, international organizations, NGOs, academics). They summarized these replies and published the summary on their website. This comprehensive and very clear analysis reveals that a majority of Member States argues for an assessment of the implementation of Framework Decision 2008/247/JHA. The Framework Decision is seen as very important in the promotion of alternatives to imprisonment, the more because it facilitates the social reintegration of offenders. In addition, alternatives to imprisonment (post-trial) should be promoted. Concerning the pre-trial alternatives, the analysis uncovers that a large majority of Member States is not fond of developing new legal measures in the area of mutual recognition before the implementation of the Framework Decision 2009/829/JHA is assessed. They agree on the idea that it was an important step in the promotion of pre-trial detention alternatives, but it is necessary to first evaluate the paper’s functioning and the possible needs. In addition, some respondents

5 Analysis of the replies to the green paper on the application of EU Criminal Justice legislation in the field of detention: http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/summary_gpreplies_ms_ongs_en.pdf
criticized the limited use of non-custodial sanctions across Member States, implying an overuse of pre-trial detention. According to these respondents, the overuse of pre-trial detention can be a direct cause of prison overcrowding. Judges often automatically opt for detention instead of an alternative sanction, especially when it comes to foreigners (because of the flight risk). Hence, a majority of international organizations, NGO’s and professional associations advocate for the promotion of alternatives to pre-trial detention.

Although the Member States should have implemented the Framework Decisions by now, many of them did not. By the end of 2014, it will be possible to start a so-called ‘infringement procedure’ for the European Court of Justice in cases of non-compliance and the European Commission will be able to initiate such procedure (Morgenstern & Larrauri, 2013). Consequently, it is to be seen how the implementation of both Framework Decisions by the Member States will proceed in 2015.

3.1.5 Community sanctions: disadvantages and risks

Besides the advantages associated with community sanctions, a number of disadvantages and risks can be identified as well. First, it is not clear to what extent and under what circumstances community sanctions succeed in reducing prison overcrowding. It is possible that they are only used to replace short prison sentences, while often the longer sentences and the extending duration of the detention contribute more directly to the problem of overcrowding. Second, the possibility and existence of non-custodial sentences do not necessarily imply that they are actually applied by judges (Beyens, Snacken & Eliaerts, 1993). There seems to be a strong under-utilisation of the potential of community sanctions in many countries. Finally, community sanctions can imply several disadvantages and possible counter-effects.

As mentioned before, the objective or aim of alternative sanctions is often unclear, resulting in an undeveloped ideological base. As a consequence, community sanctions are often not perceived as a real punishment, but as an alternative that is secondary to ‘the real sanction’, imprisonment. In legal, political or academic discussions, little has been said about the potential punitive character of community sanctions. However, Rule 6 of the European Rules on Community Sanctions and Measures states that the nature and duration of the community sanction or measure must be determined “in proportion to the seriousness of the offence”. Proportionality is one of the basic judicial principles in sentencing, indicating that the
European Rules consider alternative measures to be punitive (Beyens, Snacken, & Eliaerts, 1993; Van Kalmthout, 2000).

In contrast to prisons and other institutions, in most Member States community sanctions still lack sufficient financial support and organizational infrastructure. What is more, according to Van Kalmthout (2000), required financial means are often taken from other probation activities instead of providing additional means. This imbalance shows that politicians do not always consider community sanctions as suitable sentence, in contrast to prison sentences. In addition, the lack of means also implies a shortage of trained professional staff, which can have negative consequences for the supervision of the offender and thereby for the success of the measure.

Subsequently, Van Kalmthout (2000) discusses three ways in which community sanctions can even be counter-productive and lead to an increase of custodial sentences. First, it is possible that judges who are not fond of community sanctions (because they see these as ‘softer’ options) impose pre-trial detentions in cases where they normally would not have done that. When deciding on the sentence, a custodial sentence cannot be avoided, since the sentence has to ‘cover’ the pre-trial detention time. Pre-trial detention can then be used (or abused) as a pre-trial custody penalty, which is to be avoided by developing strict criteria. Second, many of the community sanctions are imposed not as an alternative to imprisonment, but as an alternative to another community sanction, or they are combined with a suspended sentence. In cases of noncompliance with the community sanction, a custodial sentence is often imposed (this is the case in most European countries, although both the United Nations’ and the Council of Europe’s Standard Minimum Rules (Rule 86) on non-custodial sanctions reject the idea of imprisonment as an answer to noncompliance), leading to an increase of imprisonment population instead of a decrease. Lastly, the so-called net-widening effect is discussed, which arises when community sanctions are imposed in cases where, if they were not that popular and widely accepted by the community, no sanction (or a ‘softer’ sanction, such as a fine) would have been imposed (Beyens, Snacken, & Eliaerts, 1993; Van Kalmthout, 2000).

Finally, the use of community sanctions can result in stigmatization and discrimination. Although Rule 20 of the European rules prohibits discrimination in the imposition of community sanctions (on grounds of race, color, ethnic origin, nationality, gender, language, religion, political or other opinion, economic, social or other status, or physical or mental condition), it is obvious that they are always imposed to certain categories of offenders. This
dualisation in sentencing, whereby less ‘dangerous’ offenders are ‘favored’ with a community sanction and more ‘severe’ cases are ‘punished’ with a harsher prison sentence, was already addressed in 1980 by King and Morgan. The offenders performing a community sanction need to have certain characteristics in order to be able to fulfill the requirements, which leads to a systematic exclusion of certain categories (such as drug addicts, homeless people or recidivists). There are no non-custodial alternatives for these groups of offenders, which not only leads to stigmatization, but also to a prison population that is seen as dangerous, unmanageable and incorrigible (Van Kalmthout, 2000).

3.2 Other measures to decrease prison overcrowding

Besides the use of non-custodial sentences, whether used as a front-door or a back-door strategy, there are several other measures to reduce prison overcrowding. A very popular measure in various Member States, for example, is increasing prison capacity by building new prisons or expanding existing prisons. Although this seems like an obvious measure against prison overcrowding, various authors and researchers conclude it is not. This opinion finds support in the Council of Europe’s Recommendation concerning prison overcrowding (Rec (99)22), by explicitly rejecting the “expansionist policy”: “The extension of the prison estate should rather be an exceptional measure, as it is generally unlikely to offer a lasting solution to the problem of overcrowding.” (second basic principle). Indeed, according to Beyens, Snacken and Eliaerts (1993), the available prison capacity can determine the prison population according to the double hypothesis that (1) the additional capacity will lead to an increase of the prison population (by analogy with Parkinson’s law, it is to be assumed that every bureaucratic system expands itself until it reaches its limits, leading to a priming effect when it comes to prison population), and that (2) limiting the capacity will lead to a decrease in prison population (because overcrowded prisons can cause caution in judges to imprison offenders). The sixth principle of the Council of Europe’s recommendation concerning prison overcrowding, which recommends setting a maximum capacity for penal institutions, reflects the same idea.

Another way to reduce overall prison overcrowding is to focus on the exclusion of specific categories of prisoners, where possible. As mentioned earlier, pre-trial prisoners can be kept out of prison by making more use of pre-trial alternatives and by using pre-trial imprisonment only as a last resort. In addition, mentally retarded persons and psychiatric patients (internees), sex offenders and drug addicts can be kept out of prison by providing specific assistance and/or specific institutions more adjusted to their specific problems. Lastly, by
decriminalizing certain types of offences, these offenders can be excluded from prison as well. The Committee of Ministers’ recommendation concerning prison overcrowding raises in this respect: “the possibility of decriminalizing certain types of offence or reclassifying them so that they do not attract penalties entailing the deprivation of liberty.”

As Pitts, Griffin and Johnson (2014, p. 136) suggest, there are several actors and factors contributing to prison overcrowding: “The courts contribute through sentencing, police contribute through arrests, and state legislatures contribute due to their unwillingness to depart from tough on crime policies that have damaging budgetary effects.” A collaborative, multifaceted approach, including all associated agencies, will be necessary in order to accomplish an actual decrease in prison population.

### 3.3 Community sanctions and the role of victims

The last decades, there has been widespread growing attention towards victims of crimes and their potential role in criminal justice proceedings. Already in 1985, the Council of Europe published a recommendation concerning the position of the victim in the framework of criminal law and procedure (Rec (85)11). Although this recommendation does not entail guidelines concerning the role of the victim when it comes to community sanctions and measures, it provides some general guidelines concerning the approach towards victims by the police, during prosecution, when questioned by the court, and so on. The EU Council Framework Decision on the standing of victims in criminal proceedings (2001/220/JHA) deals with a variety of victim-related topics, such as their right to receive information, their right to protection, penal mediation and practical conditions regarding the position of victims in proceedings. Although these are, again, general guidelines, they of course apply to community sanctions and measures as well. This Framework Decision was replaced by the ‘Directive of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime’ (Directive 2012/29/EU). It strengthens victims’ rights when it comes to information, support and protection, as well as their procedural rights. Relevant to the applicability of community sanctions is the right for victims to receive information on the prisoner’s release at pre- and post-trial level, as stated in article 6.5 and 6.6 of the Directive:

6.5. Member States shall ensure that victims are offered the opportunity to be notified, without unnecessary delay, when the person remanded in custody, prosecuted or sentenced for criminal offences concerning them is released from or has escaped detention. Furthermore, Member States shall ensure that victims are informed of any
relevant measures issued for their protection in case of release or escape of the offender.

6.6. Victims shall, upon request, receive the information provided for in paragraph 5 at least in cases where there is a danger or an identified risk of harm to them, unless there is an identified risk of harm to the offender which would result from the notification.

Although not providing specific information on the victims’ place in the implementation of community sanctions, most of the recommendations or Framework Decisions regarding community sanctions explicitly mention the rights of victims. For example, the Probation Rules explicitly prescribe that probation agencies need to provide services to victims of crime and if necessary, to work together with victim support services. Every intervention has to take place with respect to the rights of victims. In addition, both the European Rules and the Tokyo Rules advocate the need to develop alternatives to imprisonment that “ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention”. By means of a balanced approach, it should be possible to avoid a merely punitive influence of victims as a result of their reinforced role within the criminal justice system. After all, some of the new instruments or regulations for the purpose of victims could lead to a stricter criminal justice process or a longer period of detention. It is absolutely possible that the participation by the victim, or even the mere increased attention for victims, results in a more restraining attitude of (judicial) authorities when it comes to assigning an early release.

A balanced criminal justice approach, respecting everyone’s interests, can be promoted by introducing some of the restorative justice principles, for example by creating and offering appropriate forums in every phase of the process (from pre-trial to post-sentence) where participation and communication between all stakeholders is possible. In addition, restorative justice values and principles can guide the way in which community sanctions are applied in general (Marshall, 1999). Finally, research concerning the application of victim-offender mediation and other restorative justice practices (such as family-group conferencing) shows that this type of alternative approach is very suitable when handling more serious crimes. In more serious crimes, victims often have a greater need for an explanation from the offender or for communicating with, and expressing their feelings to, the offender. Also, the effect of the use of restorative justice practices on re-offending is larger for more serious crimes than it is for less serious crimes (Sherman & Strang, 2007). This means that, when considering the
rights and needs of victims, it is not necessary to limit the use of alternatives to imprisonment to minor offences.

3.4 Measures exceeding the scope of criminal justice proceedings

Although not the scope of this paper, it is necessary to mention the importance of the broader, societal context when it comes to reducing prison overcrowding, in particular the field of social policies of Member States. Several researchers point at the negative relationship between welfare investment and prison rates, with the Scandinavian countries as the biggest example of this mechanism (Snacken, 2010). Without further exploring this topic, we can indicate that it is important to consider this relationship as intermediate factor, playing a possible role in the problem of prison overcrowding. At the least, further research is recommended to gain further insight in this macro-perspective, in order not to limit dealing with prison overcrowding at a micro-level.

Conclusion

In this paper, we have tried to present a broad picture on how community sanctions and measures, as promoted by various types of regulations at the European and international level, can contribute to dealing with three important prison related issues in an effective way: overcrowding, offender reintegration, and victims' needs and rights. Relying on the observation that prison overcrowding is not only a widespread problem in geographical terms, but has also a wide range of causes – (1) factors internal to the criminal justice system, (2) factors external to the criminal justice system and (3) interfering factors – we have argued that a collaborative, multifaceted approach is needed to accomplish an actual decrease in prison population. Taking into account the complexity of the phenomenon and its influencing factors, each country should develop its own strategy.

However, measures taken to reduce prison overcrowding should meet certain common requirements. Firstly, and perhaps most importantly, alternatives to imprisonment should be a true replacement of imprisonment instead of being used in addition to incarceration. This requires a good follow-up and ongoing monitoring of the application of both non-custodial and custodial sanctions at the national level. Secondly, in order to implement non-custodial sanctions, there is a need for sufficient financial support and organizational infrastructure as well as well-trained staff. The quality of personal support and guidance (by probation
workers, by community volunteers, ...) seems to be of utmost importance. Thirdly, non-custodial measures should be embedded within a coherent, national crime policy directed towards the prevention of crime, effective law enforcement, public safety, the individualization of sanctions and measures, and the social reintegration of offenders. Fourthly, such measures need support, not only by the political leaders, but also by judges, prosecutors and the general public. Finally, this approach of criminal justice should be situated in a context of broader social policies with due regard for the offender, and his social reintegration, and for the victim, and his needs and rights. We hope that all the elements as listed here can offer a framework to further study and develop the practices and policies (of CSMs) in the respective countries.
References


**Overview of relevant regulations**

**United Nations**


**Council of Europe**


Resolution (62)2 Electoral, civil and social rights of Prisoners (1st February 1962).

Resolution (70)1 Practical organisation of measures for the supervision and after-care of conditionally sentenced or conditionally released offenders (26 January 1970).

Recommendation Rec (79)14 of the Committee of Ministers to member states concerning the application of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (14 June 1979).

Recommendation Rec(82)16 of the Committee of Ministers to member states on Prison Leave (24 September 1982).

Recommendation Rec(85)11 of the Committee of Ministers to member states on the position of the victim in the framework of criminal law and procedure (28 June 1985).

Recommendation Rec(92)16 of the Committee of Ministers to member states on the European rules on community sanctions and measures (19 October 1992).

Recommendation Rec(92)18 of the Committee of Ministers to member states concerning the practical application of the convention on the transfer of sentenced persons (19 October 1992).

Recommendation Rec(99)22 concerning prison overcrowding and prison population inflation (30 September 1999).

Recommendation Rec(2000)22 of the Committee of Ministers to member states on improving the implementation of the European rules on community sanctions and measures (29 November 2000).


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

Recommendation Rec (2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules (20 January 2010).


Recommendation Rec(2014)4 of the Committee of Ministers to member states on electronic monitoring (19 February 2014).

**European Union**


Case law

ECHR, *Dougoz v. Greece, ECHR 2001-II*


ECHR, *Kalashnikov v. Russia, ECHR 2002-VI*

ECHR, *Sulejmanovic v. Italy, 2009*

NGOs

Association for the Prevention of Torture, http://www.apt.ch/

International Centre for Prison Studies, http://www.prisonstudies.org/


Confederation of European Probation (CEP), http://www.cep-probation.org/


Howard League for Penal Reform, http://www.howardleague.org/