# LEGISLATIVE MEASURES ON THE ISSUE OF PRISON OVERCROWDING AND IMPROPER MATERIAL CONDITIONS OF DETENTION, FOLLOWING THE ECtHR PILOT-JUDGMENT REZMIVEȘ AND OTHERS AGAINST ROMANIA

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**Abstract**

*This paper deals with the issue of prison overcrowding and improper material conditions of detention.*

*The first part of the study is developed based on the national standards, followed by a presentation of the international standards (United Nations, Council of Europe, European Union), dwelling especially on the provisions of the European Convention of Human Rights and of the European Prison Rules.*

*An analysis is made based on the ECtHR judgements regarding prison overcrowding and the infringement of the art. 3 of the European Convention of Human Rights regarding the prohibition of torture or inhuman or degrading treatment or punishment.*

*Further, the paper focuses on the main ECtHR pilot judgements on overcrowding and material conditions of detention, especially those against Romania.* Iacov Stanciu case and *Rezvimeș and others case.*

*We will also evaluate the current and possible solutions to solve the issue of prison overcrowding and improper material conditions of detention, namely solutions that will, in the future, avoid convictions in front of the ECtHR: different compensatory remedies for prisoners executing the penalty in overcrowding prisons.*

*Concluding, the study will attempt to express some recommendations in drafting future legislative measures in order to limit the problem of prison overcrowding.*

**Keywords:** *prison overcrowding; material conditions of detention; ECHR; ECtHR; Romanian legislation.*

## 1. Introduction

According to art. 3 (prohibition of torture) from the European Convention of Human Rights, ”No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The unconditional terms of article 3 also mean that there can never, under the Convention or under international law, be a justification for acts which breach the article. In other words, there can be no factors which are treated by a domestic legal system as justification for resort to prohibited behaviour – not the behaviour of the victim, the pressure on the perpetrator to further an investigation or prevent a crime, any external circumstances or any other factor[1].

While measures depriving a person of his liberty may often involve an inevitable element of suffering or humiliation, nevertheless, the suffering and humiliation involved must not go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment[2].

The ECtHR has emphasized that a detained person does not, by the mere fact of his incarceration, lose the protection of his rights guaranteed by the Convention. On the contrary, persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under art. 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured[3].

If the problem of prison overcrowding amounts to a structural problem, in many cases already acknowledged by the domestic authorities or by regional commitees, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (C.P.T.), then the ECtHR will give a so-called ”pilot judgment” by which the Court concludes that the overcrowding in prisons from a certain Member State revealed a structural problem consisting of “a practice that is incompatible with the Convention”[4].

It should be stressd out that in such cases, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned the sums awarded by way of just satisfaction under Article

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[1] A. Reidy, *The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights* (Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002), 19, available at: https://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook06_en.pdf, accessed 12.03.2018.

[2] ECtHR, judgment from 20.10.2011, in the case of *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10, para. 73.

[3] ECtHR, *Valašinas v. Lithuania*, no. 44558/98, § 102, ECHR 2001-VIII; Kudła v. Poland [GC], no. 30210/96, § 94, ECHR 2000-XI.

[4] ECtHR, judgment from 22.10.2009, in the case of *Orchowski v. Poland*, no. 17885/04, para. 147.

41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment[5].

## 2. Prison overcrowding

### 2.1. Relevant internal legislation

By depriving a person of his or her liberty the authorities assume responsibility for providing for that person's vital needs. The deprivation of liberty in itself bears a punitive character. The state has no authority to aggravate this by poor conditions of detention that do not meet the standards the state has committed itself to upholding[6].

The right to life, as well as the right to physical and mental integrity of persons is guaranteed by article 22 of the Romanian Constitution, which also provides that no one may be subject to torture or to any kind of inhuman or degrading punishment or treatment. Death penalty is prohibited.

The execution of criminal custodial penalties is subordinated to two principles; according to the provisions of Law no. 254/2013 on enforcement of custodial penalties and of measures ordered by the judicial bodies during the criminal proceedings[7] (Law no. 254/2013), art. 4 and 5, the custodial sentences shall be enforced under conditions that ensure the respect for human dignity and it shall be forbidden to subject any prisoner to torture, inhuman or degrading treatment or other ill-treatment. The violation of such provisions shall be punishable under the Criminal Code[8].

According to the provisions of Law no. 254/2013, the execution of the imprisonment or life imprisonment sentences are executed in designated places, called prisons. The execution of sentences in prisons is made by classifying the person into one of the execution regimes provided by Law no. 254/2013: maximum safety, closed, semi-open or open.

The legal provisions regarding the accomodation of the prisoners are set out in art. 34-38:

- the convicted persons serving the sentence in a maximum security regime shall be accommodated, as a general rule, individually;
- the convicted persons that serve the sentence in a closed regime shall be accommodated, as a general rule, together with other prisoners (from the same regime);
- the convicted persons that serve the sentence in a semi-open regime shall be accommodated together and may go unattended to pre-determined areas inside the premises of the penitentiary;
- the convicted persons that serve the sentence in a open regime are accommodated together and may go unattended to pre-determined areas inside the premises of the penitentiary.

The minimum standards regarding the accommodation of the prisoners are regulated in art. 48 para. (3), (4), (7) of Law no. 254/2013. In this sense, the law stipulates that the prisoners are accommodated individually or toghether with other convicted persons. The rooms for accommodation and other rooms intended for prisoners shall have natural lighting and

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[5] ECtHR, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII.

[6] Association for the Prevention of Torture (APT), *Monitoring places of detention. A practical guide*, (Geneva, April 2004), 139, available at: http://www.apt.ch/content/files_res/monitoring-guide-en.pdf, accessed 12.03.2018.

[7] Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings, published in the *Official Journal of Romania, Part I, no. 514 of August 14, 2013*.

[8] Art. 281. Submission to ill treatment

(1) Submission of an individual to serve a sentence, security or education measures otherwise than as provided by the legal provisions shall be punishable by no less than 6 months and no more than 3 years of imprisonment and the deprivation of the right to hold a public office.

*(2) Submission of an individual who is being withheld, detained or serving a custodial sentence, or security or education measures to degrading or inhuman treatments serve a sentence, security or education measures otherwise than as provided by the legal provisions shall be punishable by no less than 1 and no more than 3 years of imprisonment and the deprivation of the right to hold a public office.*

*Art. 282. Torture*

*(1) The act of a public servant holding a public office that involves the exercise of state authority or of other person acting upon the instigation of or with the express or tacit consent thereof to cause an individual pain or intense suffering, either physically or mentally:*

*a) to obtain from that person or from a third party information or statements,*

*b) to punish him/her for an act perpetrated by him/her or by a third party or that he/she or a third party is suspected to have perpetrated,*

*c) to intimidate or pressure him/her or a third party,*

*d) for a reason based on any form of discrimination, shall be punishable by no less than 2 and no more than 7 years of imprisonment and a ban on the exercise of certain rights.*

*(2) If the act set out in par. (1) resulted in bodily injury, the penalty shall consist of no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights.*

*(3) Torture that resulted in the victim's death shall be punishable by no less than 15 and no more than 25 years of imprisonment and a ban on the exercise of certain rights.*

*(4) An attempt to perpetrate the offenses set out in par. (1) shall be punished.*

*(5) No exceptional circumstance, regardless of its nature or of whether it involves a state of war or war threats, internal political instability or any other exceptional state, can be called upon to justify torture. The order of a superior or of a public authority cannot be called upon to justify torture either.*

*(6) The pain or suffering that result exclusively from legal sanctions and which are inherent thereto or caused by them do not constitute torture.*

the facilities necessary to ensure appropriate artificial lighting. Every prisoner shall be provided with a bed and the bedding set.

Furthermore, according to the Order of the Minister of Justice no. 2772/C/2017 for the approval of the Minimum Rules for the accommodation of persons deprived of their liberty[9], the areas intended to accommodate persons deprived of their liberty must respect human dignity and meet minimum sanitary and hygienic standards, taking into account the living area, air volume, lighting, heating and ventilation sources, observing, also, the climate conditions. The setting out of the accommodation rooms in the existing buildings in the places of detention shall be achieved by maximizing the holding spaces, depending on the structural configuration of the buildings, in order to allocate more than 4 square meters (sq.m.) space for each prisoner. In the case of collective accommodation, the ensurance of a personal space of more than 4 square meters shall be carried out with priority for the maximum safety regime and the closed regime.

The accommodation rooms in the prisons to be built, as well as those to be subject to major repairs, upgrades, transformations shall provide a larger area of 4 sq.m. for each prisoner in the case of joint accommodation and 6 sq.m., respectively, where the accommodation is made individually.

In addition, regarding the conditions of accommodation in the Romanian prisons, the Ombudsman, in its special report, pointed out the existence of the following: inadequate accommodation conditions caused by the age of the buildings; infiltrations, moisture, mold in the walls of the rooms; poor ventilation; high-wear of the bedding sets; damaged sanitary facilities; insufficient quantity and inadequate quality of personal hygiene products distributed to prisoners; reduced number of showers and toilets in opposition with the number of prisoners housed in the rooms, and, in some cases, lack of privacy to meet physiological needs; insects and pests; the reduction of the electricity and water supply program in some prisons due to budget constraints; dimensions, arrangements, and sometimes the inappropriate location of walking courts; washing and drying personal belongings in the rooms; the lack of furniture for the preservation of personal belongings[10].

### 2.2. International standards

a) We note[11] that the issue of prison overcrowding is well covered at the level of universal and regional instruments, the message of international bodies being directed to the effort that Member States need to develop in order to reduce the phenomenon, including by developing alternative sanctions for imprisonment:

- by the Economic and Social Council Resolution from 1997[12] it is requested to the Secretary-General to assist countries, at their request, and within existing resources or, where possible, funded by extrabudgetary resources if available, in the improvement of their prison conditions in the form of advisory services, needs assessment, capacity-building and training and it urges Member States, if they have not yet done so, to introduce appropriate alternatives to imprisonment in their criminal justice systems;
- the Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation[13] highlights the problem of prison overcrowding as a generalized problem, which requires the need for action plans from the point of view of the prison administrations, as well as from the point of view of the criminal system as a whole, the basic principle being that deprivation of liberty must be applied only as a last resort when the seriousness of the act is so great that any other measure would be ineffective, requiring that national non-custodial sanctions to be put in place. The text contains a number of pertinent advices and suggestions for practical steps to be taken at all levels - legislative, judicial and executive.

Also, the *White Paper on Prison Overcrowding*[14] highlights points that could be of interest for a dialogue that should be initiated and maintained by the national authorities in order to agree on and implement efficiently long-term strategies and specific actions to deal with prison overcrowding as part of a general reform of their penal policies in line with contemporary academic research and realistic expectations of the role criminal law and crime policy should play in society. Also, the national authorities should keep under review to what extent imprisonment is playing an appropriate role in tackling crime and to what extent those who are released are prepared for reintegrating society and for leading crime-free life.

- at European Union level, the direct impact that detention conditions can entail on the proper functioning of the principle of mutual

[9] Order of the Minister of Justice no. 2772/C/2017 for the approval of the Minimum Rules for the accommodation of persons deprived of their liberty, published in the *Official Journal of Romania, Part I, no. 822 of October 18, 2017.*

[10] Romanian Ombudsman, *Annual activity report* 2015 (Bucharest, 2016), 416, available at: http://www.avp.ro/rapoarte-anuale/raport_2015_avp.pdf, accessed 12.03.2018.

[11] R. F. Geamănu, *Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate* (Ph. D. Thesis, Faculty of Law, "*Nicolae Titulescu*" University, 2017, available at the Library of the University), 96-97.

[12] The Economic and Social Council Resolution no. 1997/36 from 21.07.1997 on *International cooperation for the improvement of prison conditions*, available at: http://www.un.org/documents/ecosoc/res/1997/eres1997-36.htm, accessed 12.03.2018.

[13] Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804d8171, accessed 12.03.2018.

[14] European Committee on Crime Problems (CDPC), *White Paper on Prison Overcrowding* (PC-CP\docs 2016\PC-CP(2015)6_e rev7, Strasbourg, 30 June 2016), 5, para. 8, *available at:* https://rm.coe.int/16806f9a8a, accessed 12.03.2018.

recognition of judicial decisions is understandable. Prison overcrowding and allegations of ill-treatment to prisoners can undermine the mutual confidence needed to strengthen judicial cooperation within the European Union.

b) Acknowledging the fact that the persons deprived of their liberty are in a fragile position, it is the duty of the states to ensure the full respect of their fundamental rights, in accordance with their own national legislation and, also, respecting the international standards.

Human rights protection is of paramount importance in the present days. In this respect, special attention needs to be given to the protection of the persons deprived of their liberty as they are in a fragile position and it is the duty of the state to ensure the full respect of their fundamental rights. The European system established by the Council of Europe constitutes a bulwark in protecting the fundamental rights and freedoms of the persons deprived of their liberty[15].

According to the well-established case-law of the Court, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, *inter alia*, *Price v. the United Kingdom*, no. 33394/96, § 24, ECtHR 2001-VII). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECtHR 2000-IV) [16].

While there may have been certain past shortcomings in the Court`s jurisprudence on what can be termed "passive" ill-treatment (rather than the actual infliction of physical or psychological ill-treatment), the traditional reluctance of the Court (and of the former Commission) to accept that art. 3 applied to poor material conditions of detention has been shed in favour of a more critical approach to prison regimes[17].

In order to infringe the provisions of art. 3 of the Convention, the **material conditions of detention**[18] must attain a superior level of humiliation or degradation to what is normally implied by the deprivation of liberty.[19] The European Court of Human Rights has not established abstract criteria or standards to qualify a particular act as contrary to art. 3, but rather the assessment of compliance with the provisions of the Convention shall be made according to the circumstances of each case: the duration of the treatment, the physical or psychological effects, the sex, the age, the state of health of the person concerned[20]. The assessment of these conditions is present, for example, in the *Trepashkin* case[21], in which the ECtHR deals with the existing relationship between the recommendations of some international bodies on the minimum space and the analysis made by the Court in its cases. Thus, the Court recognized that violations of art. 3 are to be found in its case-law because of the lack of personal space for persons deprived of their liberty, but it emphasized that it can not establish, as a rule, how much personal space is needed for a prisoner in order to be in accordance with the Convention. Moreover, although the Court takes into account general standards developed by other international institutions (such as the C.P.T.), this can not be a decisive argument in finding a violation of art. 3 of the Convention. Concerning the conditions of detention, ECtHR applies the protection standard offered by art. 3 for all Member States to the Convention, irrespective of the economic or other conditions existing in a State; the lack of resources can not justify detention conditions that are so poor that they can be considered as contrary to art. 3[22]. In other words, the lack of financing of the penitentiary system, even based on real circumstances, is not a cause of non-punishment or irresponsibility for the Member States.

In the *Marian Stoicescu case*[23], the applicant was imprisoned in a penitentiary cell in which he had about 1,35-1,60 sq.m. (perhaps even less, observing the furniture found in the room), personal space inferior to that recommended by the C.P.T. to the Romanian authorities. The lack of adequate personal space, correlated with the applicant's obligation to share the bed with other inmates, the non-drinking water, the fact

[15] R. F. Geamănu, *Use of force and instruments of restraint – an outline of the Romanian legislation in the European context* (The International Conference CKS-CERDOCT Doctoral Schools, Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011), 112, available at: http://cerdoct.univnt.ro/index.php?option=com_content&view=article&id=54&Itemid=63&dir=JSROOT%2FCKS%2F2011_15_16_aprilie&download_file=JSROOT%2FCKS%2F2011_15_16_aprilie%2FCKS_CERDOCT_2011_eBook.pdf, accessed 12.03.2018.

[16] ECtHR, judgment from 20.11.2012, in the case of *Ghiurău v. Romania*, para. 52-53.

[17] J. Murdoch, *The treatment of prisoners. European standards*, (Council of Europe Publishing, Strasbourg, 2006, reprinted 2008), 200.

[18] See R. F. Geamănu, Condițiile materiale de detenție ale persoanelor private de libertate în lumina art. 3 din Convenția Europeană a Drepturilor Omului și Libertăților Fundamentale (Dreptul Magazine, no. 12/2009, C.H. Beck Publishing House, Bucharest, 2009), 178-190.

[19] Fr. Sudre, *Article 3* in L.-E. Pettiti, E. Decaux, P.-H. Imbert, *La Convention Europeenne des droits de l'homme: Commentaire article par article* (2e edition, Economica Publishing House, Paris, 1999), 171.

[20] See ECtHR, judgment from 16.06.2000, in the case of *Labzov v. Russia*, para. 41; ECtHR, judgment from 24.07.2001, in the case of *Valasinas v. Lithuania*, para. 101; ECtHR, judgment from 09.06.2005, in the case of *II v. Bulgaria*, para. 66.

[21] ECtHR, judgment from 19.07.2007, in the case of *Trepashkin v. Russia*, para. 92.

[22] See ECtHR, judgment from 29.04.2003, in the case of *Aliev v. Ukraine*, para. 151; ECtHR, judgment from 29.04.2003, in the case of *Poltoratski v. Ukraine*, para. 148; ECtHR, judgment from 06.12.2007, in the case of *Bragadireanu v. Romania*, para. 84.

[23] ECtHR, judgment from 16.07.2009, in the case of *Marin Stoicescu v. Romania*, para. 24-25.

that he was entitled to less than an hour's walk per day constitutes, in the opinion of ECtHR, a violation of art. 3 of the Convention.

Regarding the phenomenon of overcrowding and the possible violation of the provisions of art. 3 of the European Convention, it is necessary to highlight the relatively recent approach in the matter - in a decision rendered by the Grand Chamber of ECtHR (the *Muršić case*[24]) it confirmed the standard predominant in its case-law of 3 sq.m. of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under art. 3 of the Convention. When the personal space available to a detainee falls below 3 sq.m. of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of art. 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space. The strong presumption of a violation of art. 3 will normally be capable of being rebutted only if the following factors are cumulatively met: the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor; such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention.

Also, the Court ruled that in cases where a prison cell – measuring in the range of 3 to 4 sq.m. of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of art. 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements. The Court also stressed that in cases where a detainee disposed of more than 4 sq.m. of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention referred to above remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under art. 3 of the Convention.

c) From the *procedural point of view*, where an individual raises an arguable claim that he has been seriously ill-treated in breach of article 3 of the Convention, the member state has an obligation to initiate a thorough, prompt, independent and effective investigation, which should be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible. This means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence etc. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or to identity the persons responsible will risk falling foul of this standard. For an effective investigation into alleged ill-treatment by state agents, such investigation should be independent[25]. In considering all these aspects, the Court found a violation of article 3 of the Convention under its procedural head in several cases against Romania, as the national authorities failed to fulfilll their obligation to conduct a proper official investigation into the applicant's allegations of ill-treatment, capable of leading to the identification and punishment of those responsible[26].

Concluding, it can be noted that the jurisprudential rules set out by ECtHR with regard to the treatment of detained persons, although simple, are harsh for the authorities. Positive obligations find here a fertile ground for development: not only the procedural obligation to conduct an effective investigation but also the obligations to prevent violations of art. 3 against persons in custody due to their high vulnerability to such treatments[27].

d) *Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules*[28] contains provisions on the accommodation of the prisoners (rule 18): the accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.

[24] ECtHR, judgment from 20.10.2016, in the case of *Muršić v. Croatia*, para. 91-177, esp. 136-141.

[25] ECtHR judgement from 26.01.2006, in the case of *Mikhenyev v. Russia*, para. 107-108 and 110.

[26] ECtHR judgement from 12.10.2004, in the case of *Bursuc v. Romania*, para. 110; ECtHR judgement from 26.04.2007, in the case of *Dumitru Popescu (no.1) v. Romania*, para. 78-79; ECtHR judgement from 26.07.2007, in the case of *Cobzaru v. Romania*, para. 75; ECtHR judgement from 05.10.2004, in the case of *Barbu Anghelescu v. Romania*, para. 70; ECtHR judgement from 21.07.2009, in the case of *Alexandru Marius Radu v. Romania*, para. 47, 52; ECtHR judgement from 22.06.2010, in the case of *Boroancă v. Romania*, para. 50-51.

[27] B. Selejan-Guțan, *Spațiul European al drepturilor omului. Reforme, practici, provocări* (C. H. Beck Publishing House, Bucharest, 2008), 121.

[28] Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers'Deputies.

In all buildings where prisoners are required to live, work or congregate: the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system; artificial light shall satisfy recognised technical standards.

Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation. Accommodation shall only be shared if it is suitable for this purpose and shall be occupied by prisoners suitable to associate with each other.

e) *The Standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (C.P.T.), as they have been mentioned in the General Reports, contain a number of principles with regard to accommodation conditions of the persons deprived of their liberty. According to C.P.T., the issue of what is a reasonable size for a police cell (or any other type of detainee/prisoner accommodation) is a difficult question. Many factors have to be taken into account when making such an assessment. However, C.P.T. delegations felt the need for a rough guideline in this area. The following criterion (seen as a desirable level rather than a minimum standard) is currently being used when assessing police cells intended for single occupancy for stays in excess of a few hours: in the order of 7 sq.m., 2 metres or more between walls, 2.5 metres between floor and ceiling[29].

It should be stressed out that the C.P.T. standards are frequently mentioned by ECtHR in its case law, when referring to the relevant international instruments in the analized cases[30].

### 2.3. ECtHR pilot-judgement

In view of the significant influx of requests against Romania over overcrowding and material conditions of detention, the European Court of Human Rights considered it necessary in 2012 to address the Romanian authorities under art. 46 of the Convention[31], but without using the pilot-judgment procedure[32].

In July 2012 the ECtHR renderred a ”semi-pilot” judgment in the case of Iacov Stanciu33 in which it pointed out that, despite efforts of the Romanian authorities to improve the situation of the conditions of detention, there is a structural problem in this field. The Court did not imposed a time limit to remedy the deficiencies found[34].

Following the Iacov Stanciu case, on 25 April 2017 the ECtHR gave a pilot-judgment in *Rezvimeș and others v. Romania case*[35] in which it stated that, within six months from the date on which the judgment became final, the Romanian State had to provide, in cooperation with the Committee of Ministers, a precise timetable for the implementation of the appropriate general measures to solve the problem of prison overcrowding and of poor detention conditions, in line with the Convention principles as stated in the pilot-judgement. The Court also decided to adjourn the examination of similar applications that had not yet been communicated to the Romanian Government pending the implementation of the necessary measures at domestic level.

The source of the case is represented by four applications against Romania, by which four Romanian nationals, namely Daniel Arpad Rezmiveș, Laviniu Moșmonea, Marius Mavroian, Iosif Gazsi, seized the Court on 14 September 2012, 6 June 2013, 24 July 2013 and 15 October 2013, relying on Article 34 *of the Convention for the Protection of Human Rights and Fundamental Freedoms*. The case concerned the violation of art. 3 of the Convention concerning the conditions of detention in various prisons and in detention facilities attached to police stations – Police detention facility Baia Mare and the prisons Gherla, Aiud, Oradea, Craiova, Târgu-Jiu, Pelendava, Rahova, Tulcea, Iași, Vaslui (the applicants complained, among other things, of overcrowding in their cells, inadequate sanitary facilities, lack of hygiene, poor-quality food, dilapidated equipment and the presence of rats and insects in the cells). On 15th September 2015 a Chamber with the Third Section of the Court informed the parties that, given the fact that it was a structural deficiency, the Court intended to apply art. 61 of the Regulation and invited them to provide observations in this respect. In accordance with art. 41 and art. 61 § 2 lit. c) of the Regulation, the Court also decided to examine the above mentioned applications with celerity. Both the

[29] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *2nd General Report on the CPT's activities, covering the period 1 January to 31 December 1991* [CPT/Inf (92) 3], Strasbourg, 13 April 1992, para. 43, available at: https://rm.coe.int/1680696a3f, accessed 12.03.2018.

[30] See, for example, ECtHR judgement from 08.11.2005, in the case of *Khudoyorov v. Russia*, para. 98; ECtHR judgement from 01.06.2006, in the case of *Mamedova v. Russia*, para. 52-53; ECtHR judgement from 02.06.2005, in the case of *Novoselov v. Russia*, para. 32.

[31] Art. 46. Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. (…)

[32] R. Pașoi, D. Mihai, *Hotărârea pilot în cauza Rezmiveș și alții împotriva României în materia condițiilor de detenție*, 28.04.2017, available at: https://www.juridice.ro/507966/hotararea-pilot-cauza-rezmives-si-altii-impotriva-romaniei-materia-conditiilor-de-detentie.html, accessed 12.03.2018.

[33] ECtHR, judgment from 24.07.2012, in the case of *Iacov Stanciu v. Romania*, no. 35972/05.

[34] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, adopted by the Romanian Government on 17th February 2018, p. 6, available at:* http://www.just.ro/wp-content/uploads/2018/01/calendar-masuri.pdf, accessed 12.03.2018.

[35] ECtHR, judgment from 25.04.2017, in the case of *Rezvimeș and others v. Romania*, nos. 61467/12, 39516/13, 48231/13 and 68191/13.

Government and the applicants provided observations concerning the application of the pilot-judgment procedure[36].

The Court found that, despite the fact that the measures taken by the authorities up to that date could contribute to the improvement of the living and sanitation conditions in Romanian prisons, coherent and long term measures, such as the implementation of additional measures, had to be put in place in order to ensure the full compliance with art. 3 and 46 of the Convention. The Court also held that, in order to comply with the obligations emerging from its previous judgments in similar cases, **an appropriate and efficient system of internal means of redress had to be created.** When the judgement was delivered the Court found that the applicants' situation was part of a general problem originating in a structural dysfunction specific to the Romanian prison system which affected and can affect in the future numerous persons. Despite the legislative, administrative and budgetary measures taken at domestic level, the systemic character of **the problem identified in 2012 persisted, so the situation found represents a practice which is not compatible with the Convention**[37]**.**

Prison overcrowding is a recurring problem for many prison administrations in Europe. Many of the 47 Council of Europe member states have overcrowded prisons and in many states where the total number of prisoners is lower than the available accommodation places still specific prisons may often suffer from overcrowding. According to SPACE I statistics, in 2012 there was overcrowding in 22 out of the 47 countries of the Council of Europe. In 2013, the number of countries with overcrowding went down to 21, and in 2014 to 13. In 2013, 19 of the prison administrations having overcrowded prisons were the same as in 2012. According to the C.P.T. published reports on visits the number of countries suffering from prison overcrowding is estimated to be higher. This difference is explained by the fact that each country used its own standards to calculate overcrowding when filling in the questionnaire on which SPACE is based. On the contrary, the C.P.T. uses its own standards to calculate overcrowding[38].

Romania's situation regarding prison overcrowding and material conditions of detention is not singular. Thus, with regard to the other member states of the Council of Europe, it should be noted that until now, ECtHR has issued several judgments, finding a structural and systemic problem with regard to material conditions of detention and, thus, an infringment of the provisions set out in art. 3 of the Convention:

- **Poland, following** *Orchowski case*[39]. In 2016, the Committee of Ministers, under the terms of art. 46, paragraph 2, of the ECHR, which provides that the Committee supervises the execution of final judgments of the ECtHR, having examined the action report provided by the government indicating the measures adopted in order to give effect to the judgments including the information provided regarding the payment of the just satisfaction awarded by the Court decided to close the examination thereof[40].
- **Slovenia, following** *Mandić and Jović case*[41] (envisaging only Ljubljana prison), in which the Court encourages the State to develop an effective instrument which would provide a speedy reaction to complaints concerning inadequate conditions of detention and ensure that, when necessary, a transfer of a detainee is ordered to Convention compatible conditions. The case is under the supervision of the Committee of Ministers.
- **Russia, following** *Ananyev and others case*[42], in which the Court encourages the State to produce, in co-operation with the Council of Europe Committee of Ministers, within six months from the date on which the judgment became final, a binding time frame for implementing preventive and compensatory measures in respect of the allegations of violations of Article 3 of the Convention. The case is under the supervision of the Committee of Ministers.
- **Italy, following** *Torreggiani and others case*[43], in which the Court requested Italy to put in place, within one year from the date on which the judgment became final, an effective domestic remedy or a combination of such remedies capable of affording, in accordance with Convention principles, adequate and sufficient redress in cases of overcrowding in prison. In 2016, the Committee of Ministers, under the terms of art. 46, paragraph 2, of the ECHR, which provides that the Committee supervises the execution of final judgments of the ECtHR, having noted with satisfaction the establishment of a system of computerised monitoring of the

[36] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 3.*

[37] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 3*.

[38] See European Committee on Crime Problems (CDPC), *White Paper on Prison Overcrowding*, 4, 6, 7, para. 1, 17, 19.

[39] ECtHR, judgment from 22.10.2009, in the case of *Orchowski v. Poland*, no. 17885/04.

[40] *Resolution CM/ResDH(2016)254 Execution of the judgments of the European Court of Human Rights. Seven cases against Poland*, a*dopted by the Committee of Ministers on 21 September 2016 at the 1265th meeting of the Ministers' Deputies, available at:* https://hudoc.echr.coe.int/eng#{"itemid":["001-167361"]}, accessed 12.03.2018.

[41] ECtHR, judgment from 20.10.2011, in the case of *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10.

[42] ECtHR, judgment from 10.01.2012, in the case of *Ananyev and others v. Russia*, nos. 42525/07 and 60800/08.

[43] ECtHR, judgment from 08.01.2013, in the case of *Torreggiani and others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10.

living space and conditions of detention of each detainee and an independent internal mechanism of supervision of detention facilities which will allow the competent authorities promptly to take the necessary corrective measures and welcoming the establishment of a combination of domestic remedies, preventive and compensatory, and noted the information provided on their functioning in practice confirming that these remedies appear to offer appropriate redress in respect of complaints concerning poor conditions of detention, decided to close the examination thereof[44].

- **Belgium, following** *Vasilescu case*[45], in which the Court recommended that the respondent State consider adopting general measures. On the one hand, measures should be taken to guarantee detainees conditions of detention in accordance with art. 3 of the Convention. On the other hand, an appeal should be available to detainees to prevent the continuation of an alleged violation or to allow the person concerned to obtain an improvement in his conditions of detention. The case is under the supervision of the Committee of Ministers.
- **Bulgaria, following** *Neshkov and others case*[46], in which the Court held that the respondent State must, within eighteen months from the date on which this judgment becomes final in accordance with art. 44 paragraph 2 of the Convention, make available a combination of effective domestic remedies in respect of conditions of detention that have both preventive and compensatory effects, to comply fully with the requirements set out in this judgment. The case is under the supervision of the Committee of Ministers.
- **Hungary, following** *Varga and others case*[47], in which the Court held that the respondent State should produce, under the supervision of the Committee of Ministers, within six months from the date on which this judgment becomes final, a time frame in which to make appropriate arrangements and to put in practice preventive and compensatory remedies in respect of alleged violations of art. 3 of the Convention on account of inhuman and degrading conditions of detention. The case is under the supervision of the Committee of Ministers.

## 2.4. Current and possible solutions to tackle the issue of prison overcrowding and improper material conditions of detention

### 2.4.1. General comments[48]

Based on the current legal framework, there is no possibility of granting compensatory damages by the judge in charge of the supervision of deprivation of liberty where prisoners complain about overcrowding and material conditions of detention. Such complaints will not be admissible because, on the one hand, the judge cannot grant compensations in the special procedure provided in art. 56 of Law 254/2013, and, on the other hand, the supervising judge can only control the measures of the prisons and not of the National Administration of Penitentiaries (N.A.P.). Thus, in this respect, if the judge's analysis reveals that overcrowding is not determined by any measure of the prison administration, but is a structural problem of the system, which is the sole responsibility of N.A.P., the prisoner's request will be rejected.

According to the legal provisions in force [art. 48 para.(8) Law no. 254/2013], in case the legal capacity of accommodation of the prison is exceeded, its director shall be required to inform the Director General of the N.A.P. with a view to transfer sentenced persons to other prisons. The Director General of the N.A.P. shall determine whether the transfer is required, by specifying the prisons to which the transfer of sentenced persons shall be carried out. It follows that the only measure that the prison administration can take in case of overcrowding is the notification of the director of the N.A.P., the only one able to decide the transfer of prisoners in order to avoid overcrowding and return to legal capacity of the prison.

In such cases, as those mentioned above, for the purpose of compensatory damages, prisoners have the option of appealing to the civil court on the basis of civil liability for damages caused by unlawful acts or, if the offending deeds have the form of criminal actions, the civil action may be joined to the criminal one. For example, a court[49] ruled in favour of a prisoner and decided that the Romanian State (through the Ministry of Public Finance) should pay the applicant the amount of 4,500 lei as civil damages. Specifically, in the present case, the court held that the applicant was subjected to detention conditions (in a police detention

[44] *Resolution CM/ResDH(2016)28 Execution of the judgments of the European Court of Human Rights*, a*dopted by the Committee of Ministers* on 8 March 2016 at the 1250th *meeting of the Ministers' Deputies, available at:* https://search.coe.int/cm/Pages/result_details.aspx ?ObjectID=09000016805c1a5b, accessed 12.03.2018.

[45] ECtHR, judgment from 25.11.2014, in the case of *Vasilescu v. Belgium*, no. 64682/12.

[46] ECtHR, judgment from 27.01.2015, in the case of *Neshkov and others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13.

[47] ECtHR, judgment from 10.05.2016, in the case of *Varga and others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.

[48] R. F. Geamănu, Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate, 252-255.

[49] Vrancea District Court, 1st Civil section, judgment no. 96/2012.

center, but the findings of the court are valid, *mutatis mutandis*, in the case of prisons) contrary to art. 3 of the European Convention (only 2.5 sq.m. of personal space in the detention room, the lack of separation of the non-smokers from the smokers, the toilet did not meet the minimum requirements regarding privacy, the lack of access to the toilet during the night). These conditions were judged by the court as having a strong impact on the state of health and dignity of the person, so it was necessary to award compensating damages.

Regarding the compensatory damages that need to be awarded to prisoners for overcrowding and on the account of the material conditions of detention, the ECtHR ruled[50] that as to the domestic law on compensation, it must reflect the existence of the presumption that substandard conditions of detention have occasioned non-pecuniary damage to the aggrieved individual. Substandard material conditions are not necessarily due to problems within the prison system as such, but may also be linked to broader issues of penal policy. Moreover, even in a situation where individual aspects of the conditions of detention comply with the domestic regulations, their cumulative effect may be such as to constitute inhuman treatment. As the Court has repeatedly stressed, it is incumbent on the Government to organise its prison system in such a way that it ensures respect for the dignity of detainees. The level of compensation awarded for non-pecuniary damage by domestic courts when finding a violation of art. 3 must not be unreasonable taking into account the awards made by the Court in similar cases. The right not to be subjected to inhuman or degrading treatment is so fundamental and central to the system of the protection of human rights that the domestic authority or court dealing with the matter will have to provide compelling and serious reasons to justify their decision to award significantly lower compensation or no compensation at all in respect of non-pecuniary damage.

**2.4.2. Measures put in place after the date on which the pilot-judgment was delivered**

Regarding the measures put in place by the Romanian state, following the judgment in the Iacov Stanciu case, the Romanian Government adopted in 2012 a Memorandum by which the main lines of action were approved with a view to remedy the issues acknowledged. Also, at the beginning of 2016, the Romanian Goverment approved the Memorandum with the topic *ECHR's intention to apply the pilot-judgment procedure in cases dealing with detention conditions*, followed by the elaboration of the *Plan of Measures attached to Recommendation no. 2 of the Memorandum which aims at improving the conditions of detention and reducing the overcrowding*. Against this background, the National Prison Administration initiated measures for increasing and modernization of the accomodation capacity, according with the timetable approved, and the National Probation Department took measures for strengthening the probation system in order to allow for the implementation of community measures and sanctions[51].

By Law no. 169/2017 on the amendment and supplementation of Law no. 254/2013 a compensatory remedy was created for granting a benefit[52], meaning 6 days to be considered served for a number of 30 days of confinement in improper spaces of detention. Out of the total number of accommodation spaces, namely 187, the Justice Minister's Order established 156 as being improper, that is 83%. Between 19 October and 30 December 2017 a number of 912 persons deprived of their liberty were released on term from the prisons managed by the National Prison Administration, following the application of the provisions of Law no. 169/2017. A number of 2,718 persons deprived of their liberty benefitted of conditional release according with court decisions, following the application of the provisions of Law no. 169/2017[53].

The current regulation of compensatory mechanism leads to different solutions for persons in similar legal situations and raises from this perspective problems of incompatibility with fundamental law, which will probably be considered by the Constitutional Court at the right time. In the same line of reasoning, application of benefits of the law only to persons executing punishments (and as a consequence exclusion of those who served full sentence or were released on probation) creates the appearance of a constitutional conflict, in absence of another compensatory mechanism available to these categories, such as, for example, pecuniary compensation[54].

Of course, the problems tackled in Iacov Stanciu were stredded out in the following pilot-judgment, as the Court gave indications to the national authorities in order to put an end to the overcrowding in prisons problem. The Court, in *Rezvimeș and others case*,

[50] ECtHR, judgment from 24.07.2012, in the case of *Iacov Stanciu v. Romania*, no. 35972/05, para. 196-199.

[51] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 6, 7*.

[52] For an analysis of the new legal provisions see M. A. Hotca, Un bun început pentru respectarea hotărârii-pilot în cauza Rezmiveș și alții împotriva României – adoptarea Legii nr. 169/2017 privind modificarea și completarea Legii nr. 254/2013, 16.07.2017, available at: https://juridice.ro/essentials/1328/un-bun-inceput-pentru-respectarea-hotararii-pilot-in-cauza-rezmives-si-altii-impotriva-romaniei-adoptarea-legii-nr-1692017-privind-modificarea-si-completarea-legii-nr-2542013, accessed 12.03.2018.

[53] Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, 9*.

[54] See, in the volume of this conference, C. N. Magdalena, Compensatory action - a new legislative action imposed on national authorities as consequence of recent case-law of the European Court of Human Rights (The International Conference CKS 2018 Challanges of the Knowledge Society, Bucharest, May 11-12, 2018, 12th Edition, CKS eBook 2018, "Nicolae Titulescu" University Publishing House).
In the study the author analyses some of the problems arising after entry into force of the Law no. 169/2017 and tries to find practical answers based on systemic, teleological and literal interpretation of substantive and procedural provisions.

requested the following measures from the Romanian authorities: to introduce measures to reduce overcrowding and improve the material conditions of detention.; to introduce remedies (a preventive remedy – which had to ensure that post-sentencing judges and the courts could put an end to situations breaching art. 3 of the Convention and award compensation – and a specific compensatory remedy – which had to ensure that appropriate compensation could be awarded for any violation of the Convention concerning inadequate living space and/or precarious material conditions).

**2.4.2. Possible legislative measures to ensure an efficient remedy for the damage caused such as a compensatory remedy**

I. As provided in the *Timetable* mentioned above, *Romania will asess the prison overcrowding issue by exploring the* possibility of adopting some legislative amendments with a view to **awarding a financial compensation** to persons who have applications pending with the ECtHR or who have the grounds to lodge an application with the ECHR.

II. The study of the legislations of other E.U. member states on prison overcrowding reveals different solutions in terms of awarding financial compensation for the prisoners executing the penalty in conditions that infringe art. 3 ECHR:

- In *Slovenia*, a measure provided by the law for obtaining compensatory remedy for inadequate conditions of detention is available under general civil law provision of art. 179 of the Obligations Code[55] in respect of damage sustained by prisoners. The procedure in which damage can be awarded to prisoners is a judicial (civil) procedure.

As regards prisoners who are still serving their terms, these prisoners can avail themselves of the avenue also provided in art. 84 of the Enforcement of Penal Sanctions Act to claim compensation directly from the person who inflicted the damage, as well as the general civil law avenue provided in art. 179 (in relation to art. 147) of the Obligations Code. Article 84 of the Enforcement of Penal Sanctions Act governs the possibility of obtaining compensation for violation, related to torture or other cruel, inhuman or degrading treatment, as defined in Article 83 (see Paragraph 52) also directly from the person, who caused the damage. The purpose of the provision of Article 84 is to expose direct liability for damages from an individual, who is responsible for violation (torture or other forms of cruel, inhuman or degrading treatment) against the prisoner, in this respect the provision acts as a deterrent. Article 84 is a subsidiary remedy, as in accordance with the general rules of compensation (art. 147 of the Obligations Code on legal persons' liability – meaning the civil law liability of the Republic of Slovenia) – therefore the employee of the prison that caused the damage, as well as his employer - the state - are liable for damages[56].

- In *Bulgaria*, Section 3 of the 2009 Execution of Punishments and Pre-Trial Detention Act prohibits torture, cruel, inhuman or degrading treatment, provides that detention in poor conditions also amounts to such treatment, and gives a nonexhaustive list of circumstances which represent such treatment. The aim of this definition is to serve as clear guidance to the prison administration, the prosecutors and the relevant courts as to when conditions of detention go beyond the normal degree of suffering inherent in detention. The newly introduced procedures, which serve as remedies, clearly refer to that definition. As to the existence of a compensatory remedy, a new procedure has been introduced for awarding compensation. It contains explicit rules for shifting the burden of proof to the prison administration once a *prima facie* case is submitted to the court, a presumption that non-pecuniary damage have occurred due to the poor conditions of detention, and examination of the cumulative effect of the conditions on the detainee. The new provisions respond to the criticism of the Court and are in line with the requirements identified in its case-law[57].
- In *Hungary*, a new compensation procedure has been introduced in the Act No. CCXL of 2013 for the compensation for the grievances caused

[55] (1) Just monetary compensation independent of the reimbursement of material damage shall pertain to the injured party for physical distress suffered, for mental distress suffered owing to a reduction in life activities, disfigurement, the defamation of good name or reputation, the curtailment of freedom or a personal right, or the death of a close associate, and for fear, if the circumstances of the case, particularly the level and duration of distress and fear, so justify, even if there was no material damage.

(2) The amount of compensation for non-material damage shall depend on the importance of the good affected and the purpose of the compensation, and may not support tendencies that are not compatible with the nature and purpose thereof.

[56] Action report. *Communication from Slovenia concerning the Mandić and Jović group of cases v. Slovenia (Application No. 5774/10)*, DH-DD(2017)686, 1294th meeting (September 2017) (DH), para. 56, 63, *available at:* https://rm.coe.int/1680727da8, accessed 12.03.2018.

[57] Action report. Communication from Bulgaria concerning the cases of Kehayov and Neshkov and others v. Bulgaria (Applications No. 41035/98, 36925/10), DH-DD(2018)13, 1310th meeting (March 2018) (DH), 6-7, *available at:* https://rm.coe.int/1680727da8, accessed 12.03.2018. The penitentiary judge shall oblige the state to pay the awarded compensation amount; the organisational unit of the Ministry of Justice shall make arrangements for the payment within 60 days upon the service of the decision.

The right to submit a compensation claim was necessary, for reasons of equity, to be extended for inmates having suffered injury earlier, provided that less than one year has elapsed from the termination of the injurious placement condition to the entry into force of the right to file a compensation claim. Moreover, the right to file a compensation claim shall also be ensured to inmates whose applications complaining about placement conditions allegedly violating the Convention are already registered by the Court, except where the inmate filed his application at a date later than 10 June 2015 and by the date of the submission of the application more than one year has elapsed from the termination of the injury. In respect of such applications the six-month absolute time limit started to run from the day of the entry into force of the amendment, which is 1 January 2017.

by the placement conditions violating fundamental rights, amending the procedures of the penitentiary judge. In elaborating the rules pertaining to this remedy, special attention has been paid to the effectiveness and efficiency requirements specified by the Court: decision shall be taken within a short time, on an objective basis; the decision shall be duly reasoned; the decision shall be enforced without delay; the compensation award shall not be "unreasonable", that is, shall not be too low – but may be lower than the compensation amount likely to be awarded by the Court. Post-conviction inmates and inmates detained on other grounds are entitled to compensation for not having been provided with the inmate living space specified in the law and for any other placement conditions violating the prohibition of torture or cruel, inhuman or degrading treatment, in particular for violations caused by unseparated toilets, lack of proper ventilation or lighting or heating and disinsectisation (henceforth together: placement conditions violating fundamental rights). Compensation shall be granted for the number of days spent in placement conditions violating fundamental rights. The daily compensation tariff shall be minimum HUF 1,200 but maximum HUF 1,600. The proceedings shall be conducted by the penitentiary judge having jurisdiction at the place of the detention or, in case the inmate has already been released, at the place where the penal institution having released the inmate is seated.[58]

- In *France*, although there is no specific legislation regulating on various compensation mechanisms due to prison overcrowding, still art. 22 of the Penitentiary Law of 24 November 2009 states that "***the prison administration guarantees to every detained person the respect of his dignity and his rights".***

To obtain compensation in the case of conditions of detention contrary to human dignity, it is necessary to proceed in two stages: **administrative and then judicial.** The detainee must first make a written request to the director of the prison. Then in case of refusal, appeal to the administrative court. The conditions for the State's responsibility for the conditions of detention have recently been clarified by case law[59] - the detainee has to demonstrate that his conditions of detention are so bad that they disregard the principle of human dignity. In that case, the judge will automatically conclude that there is "moral damage" that the State has to compensate.

III. The drafting of the future legislation should bare in mind the following topics that have to be regulated:
   - the categories of prisoners that may benefit of the compensatory remedy for poor conditions of detention;
   - the institution that can award the compensation;
   - the procedure to be followed (an admistrative one or rather a judicial procedure) and means of appeal;
   - the institution competent to implement the measure;
   - if the case of retroactivity, the past time frame in which compensations may be awarded;
   - the amount of money (or other advantages) that may be awarded as a compensatory remedy.

Also, the future law on compensatory remedy can be developed following the principles and approach set out in Law no. 169/2017: the amount of money to be awarded to a person who served the penalty under improper conditions (and in relation to which the person did not earn any extra days according with art. $55^1$ of Law no. 254/2013) shall be determined by multiplying these extra days earned with an amount of money established for each extra day earned.

Another option, just as valid, and, perhaps, more simple to be put in practice is the determination of the total number of days in wich a person served the penalty under improper conditions and then multiply the number with a fixed amount of money.

In any case, the procedure should allow the free access to a court in order for the prisoner to obtain a financial compensation for the execution of the custodial penalty in conditions that infringe art. 3 ECHR. Such a procedure will respect the requirements set out in art. 13 (right to an effective remedy) ECHR: *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

## 3. Conclusions

Regarding the activity of executing the custodial criminal penalties, in the doctrine[60] it was considered

[58] Action report. Communication from Hungary concerning the cases of Varga and Istvan Gabor Kovacs v. Hungary (Applications No. 14097/12, 15707/10), DH-DD(2017)1012, 1294th meeting (September 2017) (DH), *available at:* https://rm.coe.int/16806b942c, accessed 12.03.2018.

[59] See The Rouen Administrative Court (TA Rouen, March 27, 2008), *available at:* https://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/AJDA2008-668.pdf, accessed 12.03.2018.

See, also, Administrative Court of Appeal (CAA) of Douai (1st ch.) 12th November 2009, no. 09DA00782; ord. pdt. [order by the presiding judge] CAA Douai, 26th April 2012, no. 11DA01130, in *Opinion of 22nd May 2012 of the French Contrôleur général des lieux de privation de liberté concerning the number of prisoners, available at:* http://www.cglpl.fr/wp-content/uploads/2012/12/AVIS_surpopulation_20120522_EN.pdf, accessed 12.03.2018.

[60] M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român* (C.H. Beck Publishing House, Bucharest, 2008), 380-381.

that the regulation proposed by the Romanian legislator regarding the general conditions for the execution of the custodial measures satisfies the European requirements in the matter. The assessment of a violation of the rights guaranteed by art. 3 ECHR is, however, made in relation to the effective rights and facilities enjoyed, in particular, by the persons deprived of their liberty and not by the abstract rights provided for in domestic law. In fact, there are many places of detention in Romania where overcrowding makes it impossible to secure a bed for every person deprived of liberty or the minimum space for cells where there are more prisoners; providing adequate food, products for body hygiene, access to natural light, ventilation is still a problem.

It should be stressed out that the Romanian legislator makes efforts to comply with the standards imposed at European level, especially in the case where we make a comparative analysis with the provisions of the previous law on the execution of punishments - Law no. 23/1969, which generically stipulated the right of prisoners to rest and walk, without any provisions regarding the accommodation of convicted persons, the dimensions of a room, access to air, ventilation, heat, etc[61].

However, as shown in the paper, efforts need to be pursued in the legislative field in order to raise the standard at the minimum CoE requrements in terms of minimum space required for a person deprived of liberty and prison overcrowding.

Also, observing the ECtHR judgements on overcrowding and material conditions of detention against Romania (*Iacov Stanciu case and Rezvimeș and others case*), it is clear that the Romanian legislator needs to intervene in order to set up a financial compensatory mechanism, which will function along with the already in place mechanism granting a benefit for prisoners, meaning 6 days to be considered served for a number of 30 days of confinement in improper spaces of detention.

In this sense, the study proposes some minimum requirements that have to be observed when adressing the problem of a financial compensatory mechanism for prisoners executing the custodial penalty in overcrowding conditions that infringe art. 3 ECHR.

**References**


- Criminal Code of Romania
- Law no. 254/2013 on enforcement of penalties and of measures ordered by the judicial bodies during the criminal proceedings
- Order of the Minister of Justice no. 2772/C/2017 for the approval of the Minimum Rules for the accommodation of persons deprived of their liberty
- CoE, Recommendation No. R (99) 22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation
- CoE, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers'Deputies
- A. Reidy, The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights. Human rights handbooks, No. 6, Directorate General of Human Rights, Council of Europe, 2002
- B. Selejan-Guțan, Spațiul European al drepturilor omului. Reforme, practici, provocări, C. H. Beck Publishing House, Bucharest, 2008
- C. N. Magdalena, Compensatory action - a new legislative action imposed on national authorities as consequence of recent case-law of the European Court of Human Rights, The International Conference CKS 2018 Challanges of the Knowledge Society, Bucharest, May 11-12, 2018, 12th Edition, CKS eBook 2018, "Nicolae Titulescu" University Publishing House
- Fr. Sudre, *Article 3* in L.-E. Pettiti, E. Decaux, P.-H. Imbert, *La Convention Europeenne des droits de l'homme: Commentaire article par article*, 2e edition, Economica Publishing House, Paris, 1999
- J. Murdoch, *The treatment of prisoners. European standards*, Council of Europe Publishing, Strasbourg, 2006, reprinted 2008
- M. A. Hotca, Un bun început pentru respectarea hotărârii-pilot în cauza Rezmiveș și alții împotriva României – adoptarea Legii nr. 169/2017 privind modificarea și completarea Legii nr. 254/2013, 16.07.2017
- M. Udroiu, O. Predescu, *Protecția europeană a drepturilor omului și procesul penal român*, C.H. Beck Publishing House, Bucharest, 2008
- R. F. Geamănu, Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate, Ph. D. Thesis, Faculty of Law, "Nicolae Titulescu" University, 2017
- R. F. Geamănu, *Use of force and instruments of restraint – an outline of the Romanian legislation in the European context,* The International Conference CKS-CERDOCT Doctoral Schools, Challenges of the Knowledge Society, Bucharest, April 15-16, 2011, CKS-CERDOCT eBook 2011, Pro Universitaria Publishing House, 2011


[61] R. F. Geamănu, Mijloace de protecție a persoanelor condamnate la pedepse privative de libertate, 374.

- R. F. Geamănu, Condițiile materiale de detenție ale persoanelor private de libertate în lumina art. 3 din Convenția Europeană a Drepturilor Omului și Libertăților Fundamentale, Dreptul Magazine, no. 12/2009, C.H. Beck Publishing House, Bucharest, 2009
- R. Pașoi, D. Mihai, Hotărârea pilot în cauza *Rezmiveș și alții împotriva României* în materia condițiilor de detenție, 28.04.2017
- Action report. Communication from Slovenia concerning the Mandić and Jović group of cases v. Slovenia (Application No. 5774/10), 1294th meeting (September 2017)
- Action report. Communication from Hungary concerning the cases of Varga and Istvan Gabor Kovacs v. Hungary (Applications No. 14097/12, 15707/10), 1294th meeting (September 2017)
- Action report. Communication from Bulgaria concerning the cases of Kehayov and Neshkov and others v. Bulgaria (Applications No. 41035/98, 36925/10), 1310th meeting (March 2018)
- Association for the Prevention of Torture (APT), Monitoring places of detention. A practical guide, Geneva, April 2004
- European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 2nd General Report on the CPT's activities, covering the period 1 January to 31 December 1991, Strasbourg, 13 April 1992
- European Committee on Crime Problems (CDPC), White Paper on Prison Overcrowding, Strasbourg, 30 June 2016
- Resolution CM/ResDH(2016)254 Execution of the judgments of the European Court of Human Rights. Seven cases against Poland, a*dopted by the Committee of Ministers on 21 September 2016 at the 1265th meeting of the Ministers' Deputies*
- Resolution CM/ResDH(2016)28 Execution of the judgments of the European Court of Human Rights**,** a*dopted by the Committee of Ministers* on 8 March 2016 at the 1250th *meeting of the Ministers' Deputies*
- Romanian Ombudsman, Annual *activity report* 2015, Bucharest, 2016
- The Economic and Social Council Resolution no. 1997/36 from 21.07.1997 on International cooperation for the improvement of prison conditions
- Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot-judgment *Rezmiveș and others against Romania, delivered by the ECtHR on 25 aprilie 2017, adopted by the Romanian Government on 17th February 2018*
- ECtHR 2001-VIII; Kudła v. Poland [GC], no. 30210/96, ECHR 2000-XI
- ECtHR, judgment from 16.06.2000, in the case of *Labzov v. Russia*
- ECtHR, judgment from 24.07.2001, in the case of *Valasinas v. Lithuania*
- ECtHR, judgment from 29.04.2003, in the case of *Aliev v. Ukraine*
- ECtHR, judgment from 29.04.2003, in the case of *Poltoratski v. Ukraine*
- ECtHR judgement from 12.10.2004, in the case of *Bursuc v. Romania*
- ECtHR judgement from 05.10.2004, in the case of *Barbu Anghelescu v. Romania*
- ECtHR judgement from 02.06.2005, in the case of *Novoselov v. Russia*
- ECtHR, judgment from 09.06.2005, in the case of *II v. Bulgaria*
- ECtHR judgement from 08.11.2005, in the case of *Khudoyorov v. Russia*
- ECtHR judgement from 26.01.2006, in the case of *Mikhenyev v. Russia*
- ECtHR judgement from 01.06.2006, in the case of *Mamedova v. Russia*
- ECtHR, judgment from 19.07.2007, in the case of *Trepashkin v. Russia*
- ECtHR, judgment from 06.12.2007, in the case of *Bragadireanu v. Romania*
- ECtHR judgement from 26.04.2007, in the case of *Dumitru Popescu (no.1) v. Romania*
- ECtHR judgement from 26.07.2007, in the case of *Cobzaru v. Romania*
- ECtHR, judgment from 22.10.2009, in the case of *Orchowski v. Poland*, no. 17885/04
- ECtHR judgement from 21.07.2009, in the case of *Alexandru Marius Radu v. Romania*
- ECtHR, judgment from 16.07.2009, in the case of *Marin Stoicescu v. Romania*
- ECtHR judgement from 22.06.2010, in the case of *Boroancă v. Romania*
- ECtHR, judgment from 20.10.2011, in the case of *Mandić and Jović v. Slovenia*, nos. 5774/10 and 5985/10
- ECtHR, judgment from 10.01.2012, in the case of *Ananyev and others v. Russia*, nos. 42525/07 and 60800/08
- ECtHR, judgment from July 24, 2012, in the case of *Iacov Stanciu v. Romania*, no. 35972/05.
- ECtHR, judgment from 20.11.2012, in the case of *Ghiurău v. Romania*
- ECtHR, judgment from 08.01.2013, in the case of *Torreggiani and others v. Italy*, nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10
- ECtHR, judgment from 25.11.2014, in the case of *Vasilescu v. Belgium*, no. 64682/12.
- ECtHR, judgment from 27.01.2015, in the case of *Neshkov and others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13.
- ECtHR, judgment from 10.05.2016, in the case of *Varga and others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.
- ECtHR, judgment from 20.10.2016, in the case of *Muršić v. Croatia*
- ECtHR, judgment from 25.04.2017, in the case of *Rezvimeș and others v. Romania*, nos. 61467/12, 39516/13, 48231/13 and 68191/13
- Administrative Court of Appeal (CAA) of Douai (1st ch.) 12th November 2009, no. 09DA00782
- Rouen Administrative Court (TA Rouen, March 27, 2008)
- Vrancea District Court, 1st Civil section, judgment no. 96/2012

- https://actu.dalloz-etudiant.fr/
- http://www.apt.ch/
- http://www.avp.ro/
- http://www.cglpl.fr/
- https://www.echr.coe.int/
- https://hudoc.echr.coe.int/eng#
- https://www.juridice.ro/
- http://www.just.ro/
- https://rm.coe.int/
- https://search.coe.int/
- http://www.un.org/