



CCPE(2011)Final

Strasbourg, 24 November 2011

**CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS
(CCPE)**

**Opinion No. 6 of the CCPE
on the relationship between prosecutors and the prison administration**

**adopted by the CCPE at its 6th plenary meeting
(Strasbourg, 24-25 November 2011)**

I. Introduction

1. The Consultative Council of European Prosecutors (CCPE) was established by the Committee of Ministers of the Council of Europe in 2005 with the task of rendering Opinions regarding the functioning of prosecution services and promoting the effective implementation of Recommendation Rec(2000)19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system.

2. The Committee of Ministers instructed the CCPE¹ in 2011 to examine the issues of the relationship between public prosecutors and the prison administration in the light of Recommendation Rec(2006)2 of the Committee of Ministers to the member states on European Prison Rules.

3. The CCPE drafted this Opinion following the 25 replies received from member states to the questionnaire². It clearly shows that the relationships between public prosecutors and the prison administration vary mostly in their objectives, content and structure, from no interaction to a rather detailed and structured one, sometimes controlled by the public prosecution service. Legal history, national culture and developments within the various institutions of justice explain the present variety.

Scope of the Opinion

4. All the provisions of this Opinion concern the states where public prosecutors have a specific role as regards prison matters. In States where prosecutors do not have such powers, another authority should always be able to protect the rights of persons deprived of their liberty.

5. This Opinion concerns the relations between prosecutors and institutions in charge of “persons who have been remanded in custody by a judicial authority or who have been deprived of their liberty following a conviction” as defined by Recommendation Rec(2006)2.

Aim of the Opinion

6. The confinement of persons who are detained will always entail the risk, in a closed entity, of their most basic human rights being infringed.

7. The CCPE aims to define guidelines concerning public prosecutors in exercising their duties vis-à-vis persons deprived of their liberty, and in particular:

- to determine the fields of activity which involve supervising detention conditions, ensuring that the law and human rights are respected as well as encouraging prisoners’ improvement and their reintegration into society in the best possible conditions;
- to increase awareness of all the relevant authorities, including the members of prosecution services about the detainees’ conditions, in order for them to effectively fulfil the role entrusted upon them by national legislation on the subject matter;

¹ 1099th meeting of the Deputies Ministers (23 November 2010).

² See the Appendix to this Opinion as well as replies of member States to the questionnaire on the same topic on the CCPE’s website: www.coe.int/ccpe.

- to highlight the fundamental principles and some concrete measures defined in the Recommendation Rec(2006)2 in order to improve awareness and facilitate compliance with these principles by all authorities concerned.

General principles

8. It is necessary in any State governed by the Rule of Law that a well coordinated system of checks and balances, execution and control mechanisms is established with regard to deprivation of liberty enforced by the State. This implies that both in the context of custody and in the context of enforcement of sentences, appropriate monitoring and control mechanisms should be in place.

9. In this respect, all member states must set up an impartial, objective and professional authority for monitoring and controlling periodically and in a structured way the enforcement of the deprivation of liberty. In some member states, this can be realised by charging public prosecutors with all powers needed to exercise these tasks in the most effective way. In other states, these tasks may be fulfilled by other judicial instances or independent bodies outside the prison administration.

10. Therefore, special attention is to be paid to the goals and tasks of penal institutions and to the functions and powers of prosecution services, where they have such a role, regarding the legality of the enforcement of punishments and observance of rights and fundamental freedoms of persons who are serving their sentence and who are held in pre-trial detention.

11. Public prosecutors, when they are enforcing or ordering the enforcement of a sentence or a taking into custody decided by any competent authority, are directly concerned with the deprivation of liberty of the individual. In the framework of these activities, public prosecutors must always be governed by the principles of legality, impartiality and independence of undue influence. In fulfilling their functions they must avoid any discrimination on any ground such as sex, race, colour, language, religion, sexual orientation, political or other opinion, national or social origin, association with a national minority, property, birth or other status (principle of non-discrimination).

Reference instruments

12. As regards detention conditions, the CCPE underlines the importance of referring to the Convention on Protection of Human Rights and Fundamental Freedoms (ECHR) and the case-law of the European Court on Human rights (the Court). Namely, the CCPE stresses the importance of respecting Article 3 of the ECHR stating the prohibition of torture³ and inhuman and degrading treatment⁴, Article 8 (right to respect for private and family life)⁵ and Article 13 (right to an effective remedy)⁶.

³ See in particular *Selmouni v. France* (n°25803/94), *Aksoy v. Turkey* (18 December 1996) and *Aydın v. Turkey* (25 September 1997).

⁴ See in particular *Jalloh v. Germany* (n°54810/00), *Olszewski v. Poland* (13 November 2003), *Labita v. Italy* (n°26772/95), *Kantayev v. Russia* (21 June 2007), *Orchowski v. Poland* (n°17885/04) and *Nazarenko v. Ukraine* (29 April 2003).

⁵ See in particular *Vlasov v. Russia* (12 June 2008), *Ostrovar v. Moldova* (13 September 2005) and *Enea v. Italy* (17 September 2009).

⁶ See in particular *Kaya v. Turkey* (19 February 1998) and *Melnik v. Ukraine* (28 March 2006).

13. The CCPE took in particular into consideration the Recommendations Rec(2000)19 on the role of public prosecution in the criminal justice system and Rec(2006)2 on the European Prison Rules, which enumerates the rules to be applied when a member State puts an individual in detention (basic principles, conditions of imprisonment, health, good order, management and staff, inspection and monitoring, untried prisoners, sentenced prisoners), and other Council of Europe instruments⁷.

14. The CCPE also took into account the relevant documents of the United Nations⁸, as well as some other international legal instruments⁹.

II. The role of public prosecutors

A. Remand in custody

15. Remand in custody in criminal cases shall always comply with reasonable grounds provided for by the law and in accordance with the requirements of the ECHR and the relevant case law of the Court.

16. In States where prosecutors have a role in prison matters, they should be able to:

- supervise that the investigative bodies observe the rights of the detainee, envisaged by the ECHR and by the domestic law (for instance, the right to know about the reasons of detention, the right to notify the relatives about his/her detention, the right to defence, including the right to have a lawyer etc.), take steps to terminate the violations of such rights and also to hold persons, who are guilty of such violations, liable;
- take appropriate steps for an immediate release of a detainee, when the conditions for deprivation of liberty are not met (e.g. when detention is without warrant or where less intrusive measures are considered sufficient);
- control the legality of how pre-trial custody decided by a judge is executed.

⁷ See also the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Recommendations No. R(89)12 on education in prison, No. R(93)6 concerning prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison, No. R(97)12 on staff concerned with the implementation of sanctions and measures, No. R(98)7 concerning the ethical and organisational aspects of health care in prison, No. R(99)22 concerning prison overcrowding and prison population inflation, Rec(2003)22 on conditional release (parole) and Rec(2003)23 on the management by prison administrations of life sentence and other long-term prisoners.

⁸ See in particular the International Covenant on Civil and Political Rights (1966), the Standard Minimum Rules for the Treatment of Prisoners (1955), the Guidelines on the Role of Prosecutors (1990), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990).

⁹ See in particular the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted by the International Association of Prosecutors in 2005.

B. Enforcement of sentences

17. Enforcing a prison sentence leads to depriving the individual of a fundamental right: that of liberty.

18. This consequence gives justification for taking measures, including by public prosecutors where they have such a role, so that:

- the sentence is enforced for a period of time that is not yet statute-barred, following a final conviction by an impartial and independent judicial authority;
- the nature and/or the length of the sentence be precisely set in accordance with the decision taken;
- the grounds for the sentence and its terms are brought to the attention of the sentenced person.

19. Before enforcing the sentence, it is essential that an authority independent of the prison administration concerned should ensure the legality of such enforcement.

20. The authorities competent to enforce a sentence must:

- especially verify that both the legal conditions are fulfilled in order to enforce a sentence and the sentence is enforced in a way that respects human dignity. Unless special circumstances arise on the basis of emergency (risks of absconding or security reasons), they should ensure to give a swift response to all questions by the prisoner, his/her lawyers or the prison administration regarding the enforcement of the sentence and provide any document to justify his/her position;
- process and transfer to the competent authority, without delay, any claim that may affect the enforcement of the sentence (for example, application for pardon, request for release).

21. Depending on the national legal systems, public prosecutors may play an important role in the process of conditional release of offenders as well as of their reintegration into society.

C. Detention regime

22. Although the European Prison Rules do not specify the role and position neither of public prosecutors, nor of any other control organ in the context of detention, public prosecutors, where they have such a role, should strictly supervise the execution of the national laws implementing these Rules. It is in particular essential that they, within their competencies, ensure the full and effective protection of the rights of the persons detained in order to allow a consistent application of human rights and freedoms within prisons.

23. Detention must respect the dignity of the persons deprived of their liberty and limit the negative effect of detention, while protecting society.

24. If public prosecutors have responsibilities to supervise compliance with legal regulations in detention facilities, they should be entitled to:

- regularly inspect the detention facilities at any time,
- have access to and retain documents, files, written orders and decisions of the prison administration,
- meet freely the persons deprived of their liberty without the presence of other persons,
- request relevant explanations from employees of the respective detention facility,
- verify the legality of procedures and resolutions issued by the educational bodies with respect to institutional care or protective education, or orders and resolutions of the Prison Service with respect to the pre-trial custody or the sentence,
- order that compliance with the applicable legal regulations be ensured with respect to the respective detention,
- take the necessary steps for a person to be immediately released, provided the person's detention is without warrant.

25. In case of any breach of legal regulations within the process of detention, public prosecutors, where they have such a role, should respond by requesting strict compliance with the applicable legal provisions, irrespective of the fact that additional costs may be incurred. Where appropriate, public prosecutors initiate disciplinary or criminal proceedings against those responsible among prison staff.

D. Reactions to offences committed in prisons (criminal and disciplinary matters)

26. The CCPE recalls that public prosecutors are “public authorities who, on behalf of society or in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”¹⁰. States should take appropriate measures to ensure that public prosecutors can perform their duties with regard to all places of deprivation of liberty.

27. Individuals who are deprived of their liberty are living in a specific relationship of subordination and vulnerability. Owing to this situation, it is of particular importance that places of deprivation of liberty be protected from violations of criminal law and basic rules regarding human rights and freedoms.

28. As an instrument of crime prevention within prisons, all criminal offences committed in these places should be considered with specific attention.

29. It is in the public interest that public prosecutors, where they have such powers, initiate proper investigation when an offence has been committed, especially in cases of corruption or unjustified pressure on the person detained, or in cases of violations of human rights perpetrated by the staff of the detention facility.

30. In all cases of breach of law in prisons, member States should take appropriate measures to ensure that investigating authorities get all necessary information to conduct, direct or supervise the investigation, in order a decision can be made whether to initiate or continue prosecution before the court.

¹⁰ See paragraph 1 of Recommendation Rec(2000)19 of the Committee of Ministers to the member states on the role of public prosecution in the criminal justice system.

E. Prison administration

31. In the States where public prosecutors have a role to play in prison matters, they should:
- take into account the instruments of the Council of Europe including recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and in particular with respect to the conditions of detention¹¹. Whenever public prosecutors notice the non-compliance with these recommendations, they may address this issue to the competent authorities. Where appropriate, the Prosecutor General, for instance on the occasion of his/her annual report to the Parliament or a similar event, may propose appropriate measures to ensure compliance with such recommendations;
 - ensure the Rule of Law from two different aspects. On the one hand they have to ensure the rights of the detainees, so that in their special position they should not face more detriment than prescribed by the law; on the other hand they have to provide for the protection of the society through ensuring that the sentence is enforced in full compliance with the law;
 - ensure an effective protection since they have access to the places of detention, can visit them on a regular basis, and act immediately while enjoying appropriate means and a specific experience.

III. Conclusions

32. Whatever the system in place within each member States of the Council of Europe, the observance of human rights inside the detention places should be an essential concern for the public prosecutors who have to ensure compliance with the law and the fundamental principles stated in the ECHR.

33. The CCPE noted that, in a number of member states, public prosecutors play an important role in the enforcement of sentences and in the supervision over the legality of detentions and of the living conditions of the detainees within prisons. However, in other States prosecutors have no powers as regards prison matters, this role is entrusted to other authorities, who should always be able to protect the rights of persons deprived of their liberty.

34. The CCPE deems it necessary that penitentiary institutions have at their disposal sufficient resources, material and human, in order to ensure adequate detention conditions as well as favourable conditions for resocialisation of offenders.

35. The following conclusions are made in respect of member States where prosecutors have a role concerning prison matters:

- a) Public prosecutors engaged in this sphere of activities should have at their disposal the necessary financial and human resources to adequately fulfil their responsibilities;

¹¹ According to the Recommendation Rec(2006)2 (paragraph 4), "Prison conditions that infringe prisoners' human rights are not justified by lack of resources." In compliance with the policy and the practices derived from the recommendation, the act to seriously deviate from the law is unacceptable. If such violations of the law are noticed, according to paragraphs 92 and 93 of this Recommendation, action should be taken to put a stop to it (through the prosecutor's inspections).

- b) Depending on the workload, prosecution services are recommended to have specialised units within their organisational structure to deal with prison administration;
- c) Where necessary, guidelines summarising best practices and recommendations aimed at harmonising, within each system, the general or specific approaches to the activities of prosecutors in relation of prison administration should be issued;
- d) Member States or prosecution services should develop special training of prosecutors engaged in the activities in relation to prison administration;
- e) In executing their responsibilities, public prosecutors should establish and develop, where appropriate, cooperation or contacts with an ombudsman or ombudsman-like institutions, authorities concerned with rehabilitation and reintegration as well as with representatives of civil society, including non-governmental organisations concerned.

36. The CCPE considers that all competent authorities, including public prosecutors, should take all necessary steps to improve the situation of detainees and facilitate their reintegration in the society.

37. Member States should ensure that the appropriate authorities competent to enforce sentences must ensure that all legal requirements are met in regard to their execution while fully respecting human dignity and ensuring that the rights and conditions of detained persons are monitored.

38. Member States shall ensure that an appropriate investigation takes place in respect of allegations made of the commission of offenses relating to the violation of legal provisions during the detention.

APPENDIX

Description of the different legal systems and various competences of public prosecution in prison matters (analysis of replies to the questionnaire)

1. In almost half of the 25 members States that replied to the relevant questionnaire, the supervision over the penal institutions is part of the functions of the prosecution services. At the same time, in many states the prosecutors have only limited powers in protecting the rights of the persons who are being kept in the places of deprivation of liberty.

2. The sphere of competence of public prosecutors in the relevant sphere differs significantly from one state to another: starting from overwhelming supervision over penal institutions to no controlling powers in respect of deprivation of liberty or detention. Taking this into account, the members-states may be divided into three main groups: 1) those in which the prosecution services supervise over penal institutions; 2) the ones where the public prosecutors have limited powers to control the places of deprivation of liberty and detention; 3) the ones where the prosecution services do not have any rights in the above mentioned sphere.

3. In the states where the public prosecutors have full powers in respect of supervision over the execution of laws by the administrations of the penal institutions and places of detention and custody, pre-trial detention, in places of deprivation of liberty and other bodies which enforce punishment and coercive measures, they also observe the rights and duties of the detainees, those taken into custody, the convicted and the persons subjected to coercive measures.

4. To detect and terminate violations of the law in respect of the persons who are serving their sentence in the form of deprivation of liberty or who have been taken into custody in the timely manner, public prosecutors in some States have rather wide powers: to conduct independent checks of penal institutions; to request the administration to create conditions which ensure the observance of the rights of the detainees, the persons taken into custody, the convicts, and the persons who are subjected to coercive measures; to check the compliance of the orders, regulations, decisions of the penal institutions' administration with the domestic law.

5. The legislation of some member States requires that the public prosecutors should conduct regular checks of penal institutions. The frequency of such checks varies in different countries from daily visits to one visit in three months. Some states do not regulate the number of checks and these countries limit themselves only by the recommendation to public prosecutors to eventually conduct an inspection. Such a check may result in a report, a brief official report (statement) or filing petition (submission) on the detected violations which are to be sent to the director of the institution under scrutiny and if necessary, to the relevant competent body.

6. In many countries, the main solution to ensure legality is to grant a right to a prosecutor to visit the places of deprivation of liberty and custody at any time. In the course of these visits, public prosecutors have an opportunity to familiarize with the documents, to check the conditions of detention of the persons and to communicate with the convicts freely and confidentially.

7. In most States the frequency of the checks of the conditions of imprisonment is defined by law and this frequency varies from weekly control to scheduled visits four times a year in

different States. In other States, the public prosecutors have a duty to conduct individual meetings with the convicts on a regular basis. At the same time, the complaint of the convicts or the detainees about the conditions of imprisonment in most states is viewed as a reason to initiate an ad hoc check of the penal institution concerned. And in some third group of States the reason for meeting is a claim or a statement of the convicts. The subject-matter of the applications from the convicts to public prosecutors may be claims on violation of their rights as detainees, but the requests can also be of another nature, for instance, the transfer of the convicts to another prison in order to ensure their safety.

8. In the States which entrust public prosecutors with limited powers in the sphere of control over penal institutions, the opportunity of cooperation of the convicted person with the public prosecutor is not excluded. In such States, the initiator of such an application is often the convict or the person in custody; they submit their claims on cruel treatment or any other violation of human rights to the public prosecutor. As a rule, the absence of the legislative regulation of such meetings does not exclude the right for the public prosecutor to communicate with the convict in confidentiality, if necessary.

9. Upon detection of the facts of violations of human rights, mostly in all responding States, where the prosecution service is supervising over the places of deprivation of liberty and custody, public prosecutors may demand explanations from officials, suspend execution of illegal orders and decisions of the administration, cancel sanctions, which were applied to the detainees in violation of the law. In many States, where the prosecution services are given wide powers, public prosecutors have a right to immediately release any person who was kept without legal reasons in the institutions which enforce punishment or who was subjected to arrest or pre-trial detention in violation of the law.

10. Violation of human rights during the serving of a sentence or a pre-trial detention justifies the public prosecutor's intervention to put a stop to it. The efficiency and the nature of the intervention of public prosecutors following the acts of prison administration may vary from one member State to the other. In many States, violation of human rights in the places of deprivation of liberty or custody gives public prosecutors power to initiate an independent investigation, according to the results of which the decision is taken, to arraign the guilty officials to disciplinary, administrative or criminal liability. It is noteworthy that the opportunity to react to the cases of violations of human rights in penal institutions is granted to the prosecutors also in States where there is no prosecutor's overwhelming supervision over the places of deprivation of liberty or custody.

11. In most member States, the prosecutors do not have any powers to independently arraign the guilty officials to disciplinary liability. When the signs of a disciplinary violation are detected in the course of the investigation, public prosecutors may apply to the state body which is authorized to impose the relevant sanction on the employees of the places of deprivation of liberty and custody. Only in some States public prosecutors have the right to arraign those guilty to the disciplinary liability.

12. Public prosecutors have considerably wider powers when the signs of the criminally punishable action in the penal institution are detected. In such a situation, in most States, public prosecutors have a right to initiate a criminal case and conduct an independent investigation. Should there be any cases of sudden death, crimes committed against the convicts or by the convicts against some other convicts or against the personnel of the prison, public prosecutors

must interfere. The legislation in most States grants public prosecutors a right to conduct an independent investigation or transfer of the criminal case to the investigative bodies with a right to supervise this investigation.

13. When the facts of violation of human rights of the convicted or persons in custody by the administration of the institution are defined, then in some countries it is regarded as grounds for public prosecutors to file a lawsuit seeking compensation of damage in the civil process.

14. In the States which grant the prosecution service the right to supervise over the penal institutions, the public prosecutors play a significant role in controlling the compliance of the conditions of imprisonment with the international law standards and the recommendations of the Council of Europe.

15. In some states, public prosecutors have additional powers, for instance, he/she takes a decision about the calculation of the term of imprisonment in the sentence; he/she participates in discussions about the transfer of the convicted; he/she sets restrictions on the conditions of living of the convicted in order to ensure security; he/she decides whether the convict should have an opportunity to leave the penal institutions in cases of emergency; he/she invites doctors of the relevant specializations if it is necessary to examine the person who is deprived of liberty or taken into custody. In a number of states, which grant public prosecutors limited powers in the sphere of control over penal institutions, public prosecutors have a right to examine the issues in order to define the conditions of treatment of persons who have been taken into custody, including the level of the isolation, limit the contacts and use of means of communication.

16. In several States, the powers of public prosecutors in the sphere of control over penal institutions cover only the places where the detainees and those in custody are kept. In such a case public prosecutors have power to check the documents which confirm the legality of pre-trial detention, to visit the above mentioned institutions at any time, to freely communicate with persons who are kept in custody. Moreover, in some States public prosecutors have a right to adopt decisions about arrest and taking into custody and also to participate in decision-making about the expediency of application of special measures to the persons who are under risk due to their role in the criminal communities in the course of the pre-trial detention.

17. In most States, while controlling the legality of imprisonment of the persons, public prosecutors are independent in their activities from other state bodies. However, in almost all of the member States the prosecution service is a unified centralized system and public prosecutors who are fulfilling their powers are subordinated to the prosecutor general.

18. Some prosecution services participate in decision-making about pardon. Very often when this procedure is conducted, the prosecutors express their opinion on the expediency of pardon for the convicted. In a number of States, the powers of prosecutors also include the supervision over the legality of execution of the decisions on amnesty and pardon.

19. The great significance is attributed to the activities of the prosecution service in the sphere of decision-taking about conditional release of the convicted from the places of imprisonment. In such cases the function of the prosecutor, as a rule, is not limited only to the request (motion) on conditional release and preparation of the statement for the court on the possibility of conditional release of the person concerned. In some states public prosecutors may participate in the

sessions of a special commission and court hearings on conditional release and also may control the legality of such a release.

20. The prosecution services of many member States have a right to appeal against the decisions which are adopted on the issues of enforcement of the sentence (conviction). In the course of examination of such cases the public prosecutors have a right to participate in court hearings with a possibility to submit materials, to file motions etc.

21. In some states Prosecution Services are in contact with public bodies, which supervise and control the observance of human rights in the places of deprivation of liberty. The laws in a number of countries regulate the issues of cooperation of the representatives of the prosecution services with the ombudsman (on human rights). In most States this cooperation has two dimensions: first, the information presented in the reports of the ombudsman, which may serve as grounds for conducting prosecutors' checks, and secondly, the results of the work of public prosecutors in their effort to eliminate the infringements of human rights in the places of deprivation of liberty are submitted to the ombudsman.