

“COVID-19 related measures and safeguards”

**Keynote speech by Mr Mykola Gnatovskyy, President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,
at the 25th Council of Europe Conference of Directors of Prison and Probation Services**

“COVID-19: Challenges, Lessons and Strategies for the Future”

Strasbourg, 9 November 2020 (by videoconference)

Mr Chairperson,

Dear Colleagues, Ladies and Gentlemen,

Let me express my gratitude for the invitation to speak before you today at this seminal 25th Council of Europe Conference of Directors of Prison and Probation Services “COVID-19: Challenges, Lessons and Strategies for the Future”. It is indeed regrettable that we could not meet in person, thereby having been deprived of the precious opportunity to talk to each other informally, which has always been extremely helpful to exchange experience, frankly discuss difficult issues, build connections and partnerships.

The challenge of the COVID-19 sanitary crisis has certainly put to the test the functioning of the entire system of criminal justice in every country in Europe and beyond. The entire chain, including police, investigators, prosecutors, courts, penitentiary and probation services had to face new challenges. The latter two – prison and probation services, which have always been ‘at the receiving end’ of penal policies adopted by parliaments and implemented by the judiciary, felt these challenges most acutely as they actually have to deal with the life and health of numerous persons sentenced for having committed a crime.

From the perspective of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT), we have witnessed the pandemic crisis taking place inside a pre-existing criminal justice crisis. The pre-pandemic reality was plagued by chronic prison overcrowding in many European countries, which occurred as the result of the inability – or indeed lack of will and responsibility – of states to modulate their prison population.

The European Court of Human Rights (ECtHR) has been overwhelmed with applications from prisoners in many Council of Europe member States about the inhuman and degrading conditions of detention. The Court has issued a great number of judgments establishing the international legal responsibility of

States for violating Article 3 of the European Convention on Human Rights (ECHR) – the article which recognised an absolute right not to be subjected to torture, inhuman or degrading treatment or punishment. Some of those judgments were of a pilot or ‘quasi-pilot’ nature and prescribed detailed general measures to stop such violations and not to repeat them in the future.

The Committee of Ministers of the Council of Europe adopted the European Prison Rules (EPR) as well as clear recommendations as how to avoid overcrowding in prisons, both as regards remand and sentenced prisons. To follow up on the brilliant presentation by Professor Van Zyl Smit, let me reiterate that the CPT has consistently supported EPR and also supports the revised EPR. I would also like to mention that solitary confinement remains a concern in many jurisdictions and the CPT will continue to monitor its de jure and de facto use closely.

The CPT has examined prison conditions in every single Council of Europe member State, issued numerous recommendations, both general and very concretely tailored to the situation at particular penitentiary institutions, and established and maintained ongoing dialogue with the relevant authorities to ensure that the execution of prison sentence complies with the obligations of States under the ECHR. As the CPT has reiterated time and again, persons are sent to prison as punishment, not for punishment – all the more so, for punishment with inhuman conditions of detention.

And yet, member States continued to imprison thousands of persons in conditions contrary to the ECHR, and, in particular, its Article 3. As the sanitary crisis caused by the COVID-19 pandemic unfolded, it became obvious that it hit the hardest where the long-standing issues had not been addressed satisfactorily. As I had a chance to underline on several occasions, problems that had given rise to concerns related to Article 3, such as prison overcrowding and lack of the necessary healthcare for prisoners, in the context of the pandemic became truly deadly, potentially amounting to violation of Article 2. The pandemic also affected the staff of places of deprivation of liberty, most of whom had already worked under difficult conditions and for some of whom those conditions had been extremely challenging.

As you are certainly aware, already in March 2020 the CPT issued its Statement of Principles relating to the treatment of persons deprived of their liberty, in the context of the coronavirus disease (COVID-19) pandemic. In adopting the Declaration of Principles, the CPT acknowledged the clear imperative to take firm action to combat COVID-19 and felt obliged to remind all actors of the absolute nature of the prohibition of torture and inhuman or degrading treatment. It logically follows then that protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty.

In the CPT's view, as expressed in its Statement of Principles, the basic principle must be to take all possible action to protect the health and safety of all persons deprived of their liberty. At the same time, any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of COVID-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time. Persons deprived of their liberty should receive comprehensive information, in a language they understand, about any such measures.

In the March Statement of Principles, Principle 5 reads: "As close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation /.../".

Coming back to the Statement of Principles, the CPT also emphasised on the importance of screening of the prison population for COVID-19 and the existence of pathways to intensive care as required. It also acknowledged that it is legitimate and reasonable to suspend non-essential activities to prevent the spread of infection in the prisons (subject to the already mentioned principles of legality, necessity, proportionality and restriction in time). At the same time, it insisted that the fundamental rights of detained persons during the pandemic must be fully respected. This includes the right to maintain adequate personal hygiene (including access to hot water and soap) and the right of daily access to the open air (of at least one hour). Further, it insisted that any restrictions on contact with the outside world, including visits, should be compensated for by increased access to alternative means of communication (such as telephone or Voice-over-Internet-Protocol communication). In support to what has been said by Professor Van Zyl Smit, I also need to mention a clear position of the CPT that in cases of isolation or placement in quarantine of a detained person who is infected or is suspected of being infected by the SARS-CoV-2 virus, the person concerned should be provided with meaningful human contact every day.

Following the adoption of these ten principles, the CPT requested all member States to provide an account of the concrete measures taken in prisons as well as in various other types of establishment. I know that many participants of this Conference have personally contributed to the constructive and detailed written responses received from almost all member States. On behalf of the Committee, I would like to thank you very much indeed for this.

The information provided suggests that, in many States, steps have been taken promptly to protect persons deprived of their liberty from possible infection and to introduce measures to compensate for restrictions imposed for public health reasons.

In particular, most member States refer to the increased use of non-custodial measures as alternatives to detention, such as suspension or deferral of the execution of sentences, advancement of conditional release, temporary release, commutation of imprisonment into house arrest or extended use of electronic monitoring. Measures of this nature can clearly have a positive impact on the widespread phenomenon of prison overcrowding.

While welcoming these developments, the CPT stressed, in its July follow-up statement on COVID-19 in the places of deprivation of liberty, that these are policies which – in the interests of the prevention of ill-treatment – should remain central elements of any healthy criminal justice system. The action of governments to reduce overcrowding in response to the pandemic also made it clear that some of their previous arguments that they could not decongest prisons were not always fully sincere.

In addition, there remains a concern that much of the decrease in the prison population in many countries is due to courts not operating criminal trials and persons not being placed in pre-trial detention. However, the systemic changes to prevent overcrowding re-occurring once the pandemic ends have often not been put in place. To give you a positive example: Spain is one of few countries to have taken systemic measures to reduce the prison population: from 75,000 in 2010 to 57,000 April 2020 to 47,500 in September 2020.

Further, many responses reference steps taken to facilitate detained persons' contact with the outside world in order to counter-balance restrictions imposed for public health reasons. Such measures include providing access to video calls over the Internet or granting more frequent and longer access to the telephone for as long as a ban on visits is being imposed.

The responses received by the CPT from the member States also indicated that medical screening upon admission has reportedly been significantly improved, with a view to identifying detained persons infected with COVID-19 and providing them with health care that respects the principle of equivalence of care. This is also an essential means of reducing the risk of ill-treatment, through the accurate recording and proper reporting of injuries on arrival.

Since the CPT resumed its visiting activities, it carried out nine visits, most of which dealt with the situation in prisons, also in light of the restrictions imposed by the relevant prison administrations to

prevent the spread of COVID-19. It adopted some of reports on those visits during its last week, including the report on the July ad hoc visit to France which dealt almost exclusively with issues related to the sanitary crisis. In its future visits planned for this and the next year, the CPT will continue to pay due attention to COVID-19 related measures and applicable safeguards.

Mr Chairperson,

Let me conclude by another quote from the CPT's follow-up Statement regarding the situation of persons deprived of their liberty in the context of the ongoing COVID-19 pandemic. In the CPT's view, the ongoing crisis demonstrates the clear need to put human rights first, in decision-making in the context of the pandemic and beyond. Each measure taken by the authorities of member States should be based on a thorough assessment of its concrete implications for the human rights of all persons concerned. In short, respect for human rights should become a reflex for all officials. I am certain that this two-day Conference, despite its online format, will allow us to discuss many key aspects of ensuring these precepts in the crucial work carried out by the penitentiary systems and probation services of all member States of the Council of Europe.

Thank you for your attention and I am looking forward to the panel discussion after the coffee break.