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Meeting between CDAP Participants and European judges and prosecutors to discuss prison overcrowding and ways of reducing prison inflation

Mauro Palma
Vice- chair of the European Council for Penological Co-operation (PC-CP)

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Thank you very much for the opportunity to discuss this crucial issue with this distinguished audience.
We are here today to exchange our views in order to tackle a problem that is extremely detrimental for the implementation of any programme in the prison system. Because overcrowding in prison is not only matter of material conditions, it affects the possibility of a prison treatment aimed at rehabilitating offenders while assuring them conditions respectful of the dignity of each of them. It affects the possibility of a treatment aimed at reducing the risk of recidivism.

I presume that everybody in this room fully shares the content and the significance of the principles listed and the measures recommended by the Council of Europe in its Recommendations. Here we are to discuss how to make them effective, after a number of years since the adoption of some of them.
Because we all are aware that important steps have been taken in a number of countries, on the way defined in the Recommendations, but there is still room for improvement as the global result so far achieved cannot be seen as satisfactory.

The present scenario

Overcrowding is still a problem affecting a large number of the European prison systems; I would say the majority of them. The situation that the CPT finds in the course of its visits to the States members of the Council is often far from confirming the rather positive picture given by the authorities on occasion of conferences and also the commitment officially expressed when adopting documents and recommendations.

To achieve a significant result, the reduction of the overcrowding in prison should be perceived as goal by <u>all</u> those who work in the justice system as overcrowded conditions of detention may easily evolve to conditions which fall within the scope of that inhuman and degrading treatment, which is forbidden – without any possible derogation – by article 3 of the European Convention on Human Rights.

The Council of Europe's Recommendations should be read as a whole designing the profile of a prison system in a democratic society. The system they design is aimed at achieving results in a variety of directions. Firstly they are aimed at:

- combating prison population inflation;
- increasing imposition and implementation of community sanctions and measures;
- reducing the length of prison sentences; and
- accompanying a prisoner in his/her reintegration process by resorting to conditional release as one of the most effective and constructive means of preventing re-offending and promoting resettlement.

Moreover they aim at:

- limiting the remand in custody – which should never be used for punitive reasons – to the period strictly necessary and as a measure of last resort, with appropriate and effective safeguards.

Finally, they aim at:

- offering conditions of detentions fully respectful of the fundamental rights and the dignity of the person concerned.

This panoply of purposes I mentioned is only part of the set of basic principles that are listed in the respective preambles of the Committee of Ministers Recommendations. Therefore these Recommendations are not at all addressed only to those who have responsibility of prisons: they are not matter only for the Prison Administrations.
On the contrary, they question the political responsibility of our European countries requesting the adoption of law fully respectful of the above principles. And they should be seen as a basis of discussion to be developed also with prosecutors and judges who have the actual responsibility of adopting restrictive measures during the investigation as well as of deciding a sanction, either imprisonment or of a different type, whenever provided for by the national law. Moreover the judges of the execution of sentences, in full cooperation with the Probation services, have the responsibility of the adoption of alternative measures, provided for by the national law, after a period of execution of a prison sentence.

The present panorama in Europe is rather different from one jurisdiction to another.
In 2000, immediately after the adoption of Recommendation (1999)22 on overcrowding the maximum density for 100 official places was 166 (Greece) and the three countries at the top of the list of overcrowded prisons were Greece, Hungary (161) and Romania (148). In 2008, at the time of the XV Conference of the Heads of Prison Administration focussed on overcrowding in prisons in Edinburgh the maximum density was 150.5 (Cyprus) and immediately after this country there were Serbia (146.3) and Spain (State Administration, 141.9). In the last SPACE Report (related to September 2010) the maximum is 172.3 (Serbia) followed by Italy (153.2) and Cyprus (150.8). During this period of about 10 years the density increased in a number of countries, while in others like Albania and Spain decreased.

A list of challenges

Although these figures highlight only part of the problem, because they should be read together with the flux of the prison population rates and the outcome of the criminal policy adopted in each country, we can deduct from them some points to be discussed.

First, imprisonment is not a measure of last resort in many European countries; on the contrary in a number of them is the main, if not the only, sanction provided for in their respective Criminal Codes. Discussion for the introduction of different sanctions – for some less serious crimes – that could be imposed directly by the Court, without requesting the offender to enter the prison, is underway in a number of European countries: this discussion is important and should be developed and sustained. Good practices in the area of alternative sanctions included in the Criminal Code, concerning some specific crimes and the relevant results, in terms of reduction of recidivism, should be made known to the European partners.
The guiding principles of Recommendation (2000) 22 on the *Implementation of Community Sanctions* go in such a direction, when affirming (principles 1 and 2):
1. Provision should be made for a sufficient number of suitably varied community sanctions and measures (followed by a list of examples). And
2. In order to promote the use of non-custodial sanctions and measures, and in particular where new laws are created, the legislator should consider indicating a non-custodial sanction or measure instead of imprisonment as a reference sanction for certain offences.

Second, the general principle affirmed in the Recommendation (2006) 13 on the *Use of Remand Custody* (principle 3[2]), says:

- There shall not be a mandatory requirement that persons suspected of an offence (or particular classes of such persons) be remanded in custody

However, contrary to this principle, this measure is still mandatory in some countries for persons suspected of specific offences. I think that the automatic detention on remand of persons charged with some crimes deprives the judge of his/her professional autonomy when assessing each individual case. Therefore I strongly suggest that such a provision be reviewed, in line with the above mentioned principle. Moreover remand custody of a suspect should be scrupulously limited to the situations where there are substantial reasons for believing that, if released, he or she would either abscond, or commit a serious offence, or interfere with the course of justice. In addition, and this the added value of the Recommendation, only whenever there is no possibility of using alternative measures to address the concerns referred to in the previous four points.
This is not the case in the practice observed in some jurisdictions.

Third, the legal exclusion of some categories of prisoners from acceding to alternative measures, even after a very long detention, is very problematic. This situation deprives – *de jure* and *the facto* – the Prison Administration and the Probation Service of the possibility of graduating their

intervention in a process of treatment of the prisoner during the execution of the sentence. This is an open discussion and it will be very useful to have the opinion of this audience.
In particular, special attention has to be paid to the problem of the so called “actual lifers” (i.e. lifers without possible access to conditional release). The problem of an imprisonment without hope, of a life sentence without any possible review after a number (even a very high number) of years is becoming serious in the European scenario and could easily lead to inhuman treatment. The European Court of Human Rights considered this issue in the case *Kafkaris v. Cyprus* and will reconsider the same situation in a case presently at its scrutiny.

The three points above mentioned, concerned legislative improvements to be adopted. The support of judiciary to the adoptions of legislative acts in line with the above points is crucial. Even more crucial is the effectiveness of their implementation, once the acts are adopted by the Parliament. This opens open to a second type of concerns.
In fact, in a few countries some measures are provided for by the law; nevertheless they are rarely implemented. For instance, the conditional release is a measure foreseen by the national legislation of many European jurisdictions, but resorting to it is rare in the majority of them. The replies to the questionnaire in 2008, at the 15th Conference of Directors of Prison Administrations, focussed on the steps taken to reduce the overcrowding in prison, designed a picture characterised by a rather small incidence of alternative measures in some countries, after a number of years since their legal inclusion in the system. This is the consequences of various reasons, including the pressure of the media as well as a substantial ignorance of the general society about role and content of these measures. The ignorance of both the punitive and the rehabilitative profiles of these measures determine a perception of ineffectiveness of the sanctions and a continuous request of more prison. Such a request is invariably reported by the media and is easily serviceable in electoral competitions.

Therefore we should act in two directions: (i) make the alternative measures better known outside our world of persons engaged in this area, also explaining their effectiveness in the process of positive rehabilitation; and (ii) giving support to those who are in charge for the decision of their adoption. This should be a kind of educational support we are requested to give to the system of alternative sanctions and measures.
In the above mentioned Recommendation 2000 (22) on the *Implementation of Community sanctions* a long list of possible sanctions and measures is included in principle 1, but their adoption is still too limited. They are:

- alternatives to pre-trial detention such as requiring a suspected offender to reside at a specified address, to be supervised and assisted by an agency specified by a judicial authority;
- probation as an independent sanction imposed without pronouncement of a sentence to imprisonment;
- suspension of the enforcement of a sentence to imprisonment with imposed conditions;
- community service (i.e. unpaid work on behalf of the community);
- victim compensation/reparation/victim-offender mediation;

- treatment orders for drug or alcohol misusing offenders and those suffering from a mental disturbance that is related to their criminal behaviour;
- intensive supervision for appropriate categories of offenders;
- restriction on the freedom of movement by means of, for example, curfew orders or electronic monitoring imposed with observance of Rules 23 and 55 of the European Rules;
- conditional release from prison followed by post-release supervision.

The list is far from being exhaustive. Now we can add what is foreseen by the recently adopted Recommendation 2012(12) on *Foreigner prisoners* we discussed during the past two days. In particular, the information to the judicial authorities about the foreigner's desirability of being transferred after sentencing (point 14.2), the information to be given to the foreigner of international transfer possibilities (point 15.3) and the subsequent support in seeking legal advice about the consequences of such a transfer (point 35.6). Obviously within the limits of basic principle 10 that says:
(10) Decisions to transfer foreign prisoners to a State with which they have links shall be taken with respect for human rights, in the interests of justice and with regard to the need to socially reintegrate such prisoners. Yesterday the Italian minister of justice recalled the necessity to take also into account the detention conditions of the receiving country: I fully support the emphasis on this point.

A different awareness of the problem

So, we see that the principles are clear in the Council of Europe system of Recommendations. However, as I already said, the gap between the principles enshrined in Conventions and solemnly re-affirmed and the practice is significant. To use the words of the Council of Europe Parliamentary Assembly "the gap between standards on paper and the actual situation in Europe is striking".

As we know, overcrowding is not only a problem of individual living space, because it has negative effects on the rehabilitation process and consequently on the recidivism and the safety of the external community.
This is a paradox: overcrowding is often the consequence of a never satisfied request of security coming from a fearful society that looks at the closed doors of a prison as a response to its alarm and its own social difficulties and, on the contrary, such a request results in a less secure situation. Because the resources are not invested for a limited target of prisoners, really potentially dangerous for the society, but are wasted in a generalized system of detaining people as a sort of territory control measure.
This consideration concerns the crime policy adopted by a number of European governments and implies political decisions. It is not my role to make comments on this.
However one point as to be underlined. Many assume that prison overcrowding results from rising crime rates or improving effectiveness in investigating crimes and sanctioning perpetrators. This is not fully true; there are countries having a lower imprisonment and a lower criminal rate. The problem is much more complicated and is more related to other factors, including the role – often a

symbolic role – given by the community to penal sanctions and in particular to detention; it is related to the lack of investment in non-custodial measures, to the excessive length of proceedings and the subsequent pre-trial detention, to the exposure of vulnerable categories of inmates (in particular foreigners and drug-users), during their detention, to contacts with and support by criminal networks. In addition it strongly depends on the lack of prevention and resources in social and care outside the prison.

That said, we should remind all the European authorities that accommodation in cramped conditions in overcrowded prisons may be an inhuman treatment.
Opening the Conference, the Vice-President of the European Court of Human Rights, recalled some cases, in particular the case *Kalashnikov v. Russian Federation*, in 2002, when the Court affirmed again what it already had affirmed in the case *Kudla v. Poland*, i.e. that the State must ensure in any case 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 should not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that his health and well-being should be in any case adequately secured. In the Kalashnikov case the Court went further on, and having considered the particularly overcrowded and insane conditions of detention of the applicant, stated that «although there is no indication that there was a positive intention of humiliating or debasing the applicant, his conditions of detention, in particular the severely overcrowded and unsanitary environment and its detrimental effect on his health and wellbeing, combined with the length of the period during which he was detained in such conditions, amounted to degrading treatment». So the Court made it clear that prison overcrowding may evolve in degrading treatment of the persons accommodated in a given situation. Other cases, over the last ten years, were considered under this perspective.

How to look for solutions for the present situation in Europe?

To address the problem of overcrowding, some countries have taken the route of increasing the number of prison places. For its part, the Council of Europe affirmed that providing additional accommodation as the only measure to reduce overcrowding will not offer a lasting solution.
The answer to overcrowding does not lie only with building new prisons, as prison population tend to rise in tandem with new facilities. Indeed, a number of European States have embarked on extensive programmes of prison building, only to find their prison populations rising in tandem with the increased capacity acquired by their prison estates. By contrast, the existence of policies to limit or modulate the number of persons being sent to prison has in certain States made an important contribution to maintaining the prison population at a manageable level. This is precisely the approach advocated in the above mentioned Committee of Ministers Recommendation (1999) 22.

The first line of a possible solution concerns: (i) the necessary reforms of the criminal law policy adopted by some states and (ii) the functioning of the criminal justice system.

Detention is still the “normal” penal sanction in many European countries; the proportion between sanctions to be served in the community whenever provided for by the national law, and the total number of sanctions, is very low. Deprivation of liberty seems to be not a measure of last resort, to be provided only when the seriousness of the offence would make any other sanction or measure clearly inadequate. On the contrary, it often seems to be seen as the first option in a context that sees resorting to penal sanctions, and in particular to imprisonment, as the most attractive and easily visible response to problems that are not tackled using other available tools, as education, prevention, more social services.

The <u>second line</u> of a strategy to tackle the present situation lies in the necessity to fix a workable threshold of gradual reduction of the prison population, in the context of a coherent strategy covering both admission to and release from prison. Such a strategy – a sort of working plan, having tangible form and practical guidelines for its application – should include a variety of steps to be adopted at all stages of the criminal justice system, from pre-trial to the execution of all sentences, whatever their length. Further, the plan should include measures to facilitate the reintegration into society of persons who have been deprived of their liberty – both prior to and after their release – aimed at reducing the rate of re-offending and the “revolving-door” phenomenon.

I recall that in its Recommendation on *Conditional release*, the Committee of Ministers stressed in particular that "the financial cost of imprisonment places a severe burden on society and that research has shown that detention often has adverse effects and fails to rehabilitate offenders"; in addition it stresses that "conditional release is one of the most effective and constructive means of preventing re-offending and promoting resettlement, providing the prisoner with planned, assisted and supervised reintegration into the community”.

This opens to an important <u>element of the strategic plan</u>: an improved quality of the training offered to prison staff at any level – from the officers to the senior officials. A training to be offered not only initially, but during the entire development of the staff career; and having, within other topics, the specific topic concerning the process of reintegration of a prisoner into the community.

In such a process of adoption and implementation of a strategic plan limiting the resort to detention, the monitoring bodies can play an important role. Their role can be not limited to identify difficulties and discrepancies between the plan and the practice, but it should be expanded to disseminate solutions and good practices adopted in some countries and to give advice in the process of the implementation of the Council of Europe’s Recommendations s well as of the gradual achievement of the objectives listed in the adopted plan.

In such a process, the responsibility of all the actors of the justice system is requested. The responsibility of each of us is requested: together – from various and different perspectives.
Because overcrowding in prison is an issue that questions all of us, our roles, our professions.
Thank you for your attention.