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Have prisons learnt from Covid-19?

How the world has reacted to the pandemic behind bars

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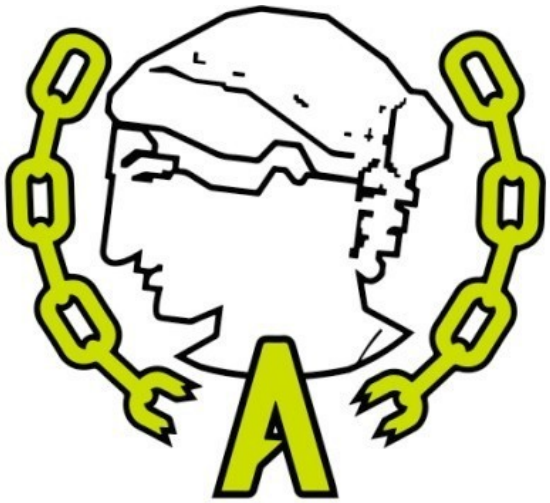

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N. 1/2020 HAVE PRISONS LEARNT FROM COVID-19? HOW THE WORLD HAS REACTED TO THE PANDEMIC BEHIND BARS

edited by Susanna Marietti and Alessio Scandurra

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Policy responses to Covid-19 in prison. Testing the (in)action of European institutions during the pandemic

Adriano Martufi[1]

1. Introduction

The present contribution provides a tentative inquiry into the way European institutions have responded to Sars-CoV-2 (Covid-19) in prisons during the early months of the pandemic in 2020. This article deals with two distinct sets of institutions, as it covers both the initiatives adopted within the Council of Europe and the measures taken by the European union. The response of these institutions is assessed in light of their respective competences with regard to the prison system. While the Council of Europe has a long history of penal activism, with an extensive record of standard setting in the area of prison law and policy (D. van Zyl Smit, S. Snacken, 2009; P. Poncela, R. Roth, 2006), the European union has been a much less proactive player in this field. The reasons for its limited focus on prison matters lie in a dubious legal basis within the Treaties and the subsequent difficulty to adopt policy and legislative measures impacting the prison system.

The notion of *response* to the pandemic is borrowed from the burgeoning literature on Covid-19 and prisons (C. Heard, 2020; L. Abraham, T. Brown, S. Thomas, 2020, p. 742). It includes both mitigation strategies to reduce the spread of the disease within prisons (such as the suspension of visits and other activities to enhance social distancing) as well as preventive strategies, such as the adoption of early or provisional release schemes to reduce prison density and prison population (P. Tournier, 2000, p. 6; A. Maculan, D. Ronco, F. Vianello, 2013, p. 42). Significantly, most of the scholarly analyses have developed along the lines of the World Health Organization's guide – published in March 2020 – which called for "strong infection prevention and control measures, adequate testing, treatment and care" (Who, 2020, para 1). These guidelines are underpinned by the idea that "prisons and other custodial settings are an integral part of the public health response to Covid-19" (S. Kinner *et al.*, 2020, p. 188).

Arguably, Who's guidelines (along with similar instructions issued by national bodies such as the Center for disease control and

prevention in the Usa) provided a first and authoritative guidance to orient institutional responses within the prison system. This goes to show the relevance of studying institutional approaches to prison policy, especially in the context of a significant upheaval such as Covid-19 pandemic. Accordingly, this article does not take stock of single correctional measures taken by prison administrations in the member states. Rather, we stress the importance of studying the overarching patterns in a policy response to the pandemic. In doing so, this article contributes to the literature on European prison policy (S. Snacken, D. van Zyl Smit, 2013, p. 1; G. Cliquennois, H. De Suremain, 2017, p. 165) by pointing out the specific features underpinning the European response to Covid-19 in prison. Our hypothesis is that emergence of a serious public health crisis might reshape the patterns of policymaking. The pandemic can therefore be characterised as an exogenous variable which may steer or alter the development of such policies.

In the first section we outline the policy response within the context of the Council of Europe. This is articulated in a number of legal and policy documents issued by some key Council of Europe's institutions. We carry out an analytical reading of the guidelines and principles they lay down, by placing them against the background of the European convention on human rights. In the second section, we provide an overview of the policy reactions developed within the context of the European union. While discussing the limited contribution offered by Eu institutions, the article analyses critically the effects of the pandemic response on Eu cooperation in criminal matters. We conclude by highlighting the pandemic as a key variable for European policy. Arguably, while having transformative effects for standard setting in the field, the impact of the pandemic also highlights the endurance of some key patterns within European prison policy.

2. The Council of Europe: key texts and principles

The Council of Europe has a long history of standard setting in the penal field. Since the late 1960s its organs have been issuing a long string of non-binding texts in order to steer the penal policy in the member states. The key actors in this development are the Committee of ministers and the Parliamentary assembly of the Council of Europe. The Committee of ministers, in particular, has been the real motor of Council of Europe's policymaking during the last few decades, by promoting the adoption of international conventions, including the all-important European convention for the prevention of torture (Ecpt). The Committee of ministers has also actively contributed to European penal policy by enacting recommendations. These are non-binding instruments addressing member states' governments and national bureaucracies. Recommendations, albeit deprived of legal effects, have proved truly influential as they are adopted unanimously by representatives of member states (usually civil servants and national experts) and thus reflect a European consensus within a given area (P. Poncela, R. Roth, 2006, p. 37).

The policy making process in the penal field relies heavily on the work of specific advisory bodies. The Committee of ministers is advised by the European

committee on crime problems (Cdpc) which oversees and coordinates all Council of Europe's activities in the field of crime prevention and crime control. In recent years, the Cdpc has entrusted a group of appointed experts, the Council for penological cooperation (Pc-cp or the Council), the task of proposing and drafting recommendations in the field of penal policy. The nine members of this organ have come to play a crucial part in fleshing out the key tenets of European policy, by providing detailed rules to guide the action of prison and probation administrations across Europe. Similarly, the Committee on the prevention of torture (Cpt) builds on the work of experts with diverse backgrounds to carry out its visits in the member states and ensure the respect of the Ecpt. The Cpt's tasks include the adoption of reports laying out standards concerning the treatments of prisoners (J. Murdoch 1999, p. 105; D. van Zyl Smit, S. Snacken, 2009, p. 13).

Unsurprisingly, the Pc-cp and the Cpt have been among the first bodies of the Council of Europe to enact guidelines focussing on the effects of the pandemic in prison. The activity of both organs reflects a distinctive feature of European prison policy, namely the combined influence of human rights law and evidence-based findings (S. Snacken, D. van Zyl Smit 2013, p. 12). The initiatives taken by the aforementioned institutions constitute the backbone of Council of Europe's policy response to Covid-19 in prison and therefore warrant a closer scrutiny. After looking into the specific provisions included in the selected texts, one should reflect on the principles underpinning them. This requires a short digression through the case law of the European Court of human rights (Ecthr) and its key findings on the role of human rights in prison.

2.1 An evidenced-based approach to the crisis: the Pc-cp

The Pc-cp can be credited for adopting the most comprehensive set of initiatives to address the spread of Covid-19 across European prisons. By late April, the nine Council's experts had published a first statement with an overview of relevant documents and best practices to deal with the pandemic. The statement provides important advice to prison and probation services (as well as other relevant stakeholders) in the member states (Pc-cp Wg, 2020a). Two aspects are worth considering. Firstly, the document has a normative component in that refers to existing statements by other Council of Europe's bodies (including the Secretary general, the Commissioner for human rights and the Cpt) and draws extensively on some key principles and recommendations expressed in the European prison rules and other Committee of minister's recommendations concerning the right to health of prisoners. Secondly, the statement is underpinned by a preliminary survey of existing practices, in a way that reveals the pragmatic disposition of the Council's members (*what works* attitude).

In its statement, the Pc-cp appears keen to underscore the continuity with the *acquis*, by recalling some overarching principles of European penal policy. The principle of normalisation is key in this respect (D. van Zyl Smit, S. Snacken, 2009, p. 105), as European recommendations advise against the isolation of inmates suspected of

infectious or contagious conditions, when the same measure would not be taken outside the prison environment. The Pc-cp emphasises the notion of proportionality by stating that any limitation to family visits, as a means to reduce the risk of infection, should allow for a minimum level of contact. After all, as confirmed by the recently updated version of the European prison rules, restrictions of a prisoner's rights should always be "necessary and proportionate to the legitimate objective for which they are imposed": rule 3 stipulates the principles of minimum necessity and proportionality, thereby emphasising the Ecthr's finding, under Article 3 of the European Convention on human rights (Echr), that the suffering involved by deprivation of liberty must not go beyond the inevitable element of humiliation connected with detention. The Pc-cp also reiterates that prison administrations have a special duty of care *vis-à-vis* prisoners placed in solitary confinement on sanitary or safety grounds. This group should continue to receive adequate and meaningful treatment to prepare their release and subsequent reintegration into society. This rule embodies the overarching principle of social rehabilitation, enshrined by the jurisprudence of the Ecthr (A. Martufi, 2018, p. 672; S. Meijer 2017, p. 145). The statement also reminds that, in case of death or transfer to a hospital, prison authorities have an obligation to inform a person's closest relatives in order to guarantee the respect of their right to family life (Article 8 Echr).

Interestingly, the normative component of these standards is complemented by a *what works* attitude. Accordingly, the Pc-cp identifies some important best practices as they appear from information submitted by member states and by pan-European organisations like EuroPris (see below). Unfortunately, one can lament the fact the statement fails to mention the jurisdictions from where these practices are sourced. These are however meant to assist prison and probation administrations across Europe "in dealing with the Covid-19 pandemic while respecting the principles of the rule of law and of human rights" (M. Aebi, M. Thiago, 2020, p. 4). The approach of some national authorities illustrates attempts at coping with the pandemic through, among other things, regular and transparent communication (orally or in writing) about restrictions and sanitary measures being taken, establishment of free-of-charge phone or video-calls to replace family visits, financial compensation for prisoners' loss of income in case of inability to work, replacement of recreational or sport activities by additional Tv or other electronic entertainment options and additional out-of-cell activities (C. Heard, 2020, p. 10) and, finally, strict limitation of transfers to be executed only for "carefully estimated security reasons".

More recently, in a follow-up statement, the Pc-cp, while acknowledging some positive trends (e.g. the increased use of technology or the greater involvement of inmates and their families in the enforcement of safety measures), has expressed criticism about what it sees as worrisome tendencies that the pandemic might have triggered or exacerbated. While the use of new technologies in prison should be regarded as a positive development for maintaining contacts

with the outside world, the Pc-cp warns that remote training and educational activities as well as remote visits with family, lawyers and others should only be regarded as *complement* to face-to-face contacts. In other words, virtual means of contact should not be used as a substitute to meaningful in-person interactions. Although some of the new technologies adopted during the crisis are likely to be placed on a permanent footing (C. Heard, 2020, p. 12), arguments like security or cost-effectiveness in the use of such tools should be weighed against "the importance of preserving direct positive human contact and interaction between staff and offenders for helping achieve desistance from crime" (Pc-cp Wg, 2020b, p. 2).

In a similar vein, the Pc-cp has called for a limited use of solitary confinement on health and safety grounds (e.g. as a means of quarantining prisoners infected with the disease). Any such measure should be temporary and proportionate to the severity of the crisis, its impact and time span. Periods of solitary confinement should be ended as soon as the cause for their introduction has ceased to exist. Besides recalling the principle of proportionality, the Pc-cp has invited prison authorities to accompany the adoption of confinement-like measures with "counterbalancing activities", including in-cell educational training and recreational activities. The Council's stance seems to build on empirical evidence confirming the harms of solitary confinement, which affects physical and mental health through social isolation and sensorial deprivation (C. Haney, 2018, p. 285; S. Shalev, 2014, p. 27). It is a well-documented fact that the negative implications of solitary confinement may hamper rehabilitation efforts and reduce chances of a prisoner's reintegration into society (F. Coppola, 2019, p. 222). The Pc-cp thus keeps faith to the Council of Europe's commitment towards a penal policy underpinned by social rehabilitation as a key rationale for punishment.

2.2 An authoritative guide to coping with the pandemic in prison: the Cpt

Contrary to the far-reaching framework designed by the Pc-cp, the Cpt's stance is narrower and reflects this organ's mandate as the watchdog of the Ecpt (J. Murdoch, 2006b, p. 125) with a particular focus on enhancing the condition of prisoners. Yet famously the Cpt's supervisory activity has contributed to flesh out the prohibition of inhuman and degrading treatment stemming from Article 3 Echr by providing valuable findings to the Strasbourg Court when adjudicating on claims of ill-treatment (G. Cliquennois, S. Snacken, 2018, p. 7). It is against this background that one should read the *statement of principles* issued by the Cpt on 20 March 2020. The influential role of the Cpt in providing substance to Convention's guarantees should be borne in mind as the stance taken in respect to the pandemic in prison will most likely orient future recommendations to the member states and may impact the Court's interpretation of Article 3 Echr.

To begin with, the Cpt reiterates the broad scope of its intervention which applies to all places of deprivation of liberty, including police detention facilities, penitentiary institutions, immigration detention centres, psychiatric hospitals and social care homes. Interestingly, the Cpt includes among the settings where deprivation of liberty may

take place "various newly-established facilities/zones where persons are placed in quarantine" (Cpt, 2020, p. 1). Arguably, the lawfulness of this form of detention can be derived from Article 5.1(e) Echr which refers to deprivation of liberty in order "to prevent the spreading of infection diseases". This provision should however be interpreted strictly so as to allow detention only when the disease in question is dangerous for public safety and in so far as deprivation of liberty is the "last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest" (Ecthr, judgment 25 January 2005, Enhorn v. Sweden, 56529/00, § 43). When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist.

More substantially, the Cpt reminds the absolute nature of the right not to be tortured or subjected to inhuman and degrading treatment. As has been noted (N. Mavronicola, 2015, p. 721), despite its absolute nature, the Ecthr has consistently accepted that (custodial) punishment may carry an unavoidable level of suffering. Whether detention inflicted in specific circumstances would amount to inhuman or degrading treatment ultimately depends on the conditions which may exacerbate the suffering inherent in detention. These include an individual's state of health, age, or other circumstances. The outbreak of Covid-19 poses new threats to the legitimacy of custodial sentences and measures, which should be carried out in a way that respects the person's dignity. This illustrates the importance of analysing the Cpt's statement in that it provides new criteria to assess specific circumstances where the incarcerated person's dignity may be put under strain.

In this connection, the Cpt highlights that all restrictions imposed on detained individuals to prevent the spread of Covid-19 should have a legal basis and be necessary, proportionate and respectful of human dignity. The Cpt places particular emphasis on the need for these measures to be restricted in time. In addition, while restating the importance of Who's guidance in dealing with the disease in prisons (e.g. by enforcing physical distancing and providing Ppe to members of the staff), the Cpt takes a more holistic approach. Especially in instances where prison facilities are overcrowded, it is *imperative* that relevant authorities consider the use of alternatives to deprivation of liberty (such as of alternatives to pre-trial detention, commutation of sentences, early release and probation). National authorities should also reassess the need to continue involuntary placement of psychiatric patients, discharge or release to community care, wherever appropriate, residents of social care homes and refrain as much as possible from detaining migrants. The approach taken by the Cpt deserves to be highlighted. In effect, the Ecthr has never gone so far as to recognise an obligation to grant early release and/or alternatives to detention on health grounds as a corollary of Article 3 Echr (P. Voyatsis, 2014, p. 178). This, in contrast, seems to be the orientation taken by Cpt to deal with a prison system hit by the pandemic as "close personal contact encourages the spread of the virus". The Cpt's authoritative stance is amenable to influence the Court's understanding of this Convention's guarantee whenever called

upon to rule on complaints of alleged violations in the context of Covid-19 pandemic.

Conclusively, the Cpt calls on the member states to pay attention to vulnerable and/or at-risk prisoners, such as older persons or prisoners with pre-existing conditions, by conducting Covid-19 screening and securing rapid referral to intensive care units when needed. In the context of its mandate, the Cpt also reiterates the importance of some fundamental safeguards to avoid the risk of ill-treatment of persons in custody. These include key procedural guarantees such as access to a lawyer, access to a doctor, and notification of custody. Importantly, the Cpt reminds that states should continue to grant access to independent monitoring bodies (such as National preventive mechanisms and the Cpt itself) to carry out prison oversight, even in places where persons are kept in quarantine. It is understood that monitoring bodies observe the *do no harm* principle, in particular when dealing with older persons and persons with pre-existing medical conditions.

3. The European union: coordination and judicial cooperation

The European union has long been a marginal actor in the area of penal and prison policy. Arguably, this inaction has less to do with a lack of interest than with some serious legal hurdles restricting the exercise of a legislative competence in the field of criminal sentencing. While the Treaty of Lisbon has finally enabled the Eu to enact legislation in the area of criminal procedure and substantive criminal law, it did so by placing a certain number of constraints on the Eu legislator. Article 82(2) of the Treaty on the functioning of the Eu (Tfeu) attributes the power to adopt, by means of directives, minimum rules to facilitate the mutual recognition in a number of pre-determined areas. These concern the rights of victims, the admissibility of evidence and the rights of individuals in criminal procedure. This provision seems to rule out any power to adopt rules with respect to post-trial/post-sentencing phase (according to a narrow understanding of the notion of criminal proceeding). In addition, Article 83 Tfeu stipulates the competence for the Eu legislator to adopt minimum rules regarding "the definition of criminal offences and sanctions" (P. Asp, 2013, p. 56; H. Satzger, 2019, p. 115), thereby excluding the power to lay down rules on the administration of sanctions. The term *definition* seems to refer exclusively to the statutory indication of the sanctions incurred *in abstracto.*

Despite these significant hurdles, recent case law of the Court of justice of the Eu (Cjeu) has shown that prison conditions are relevant in shaping the relationship of mutual trust between judicial authorities in the different member states (Cjeu, decision 5 April 2016, Aranyosi-Căldăraru, C 404/15 et C 659/15 Ppu). Arguably, the lack of minimum rules on the treatment of prisoners may negatively affect the functioning of *mutual recognition* instruments such as the European arrest warrant (T. Marguery, 2018, p. 706). Unsurprisingly, the European Commission has recognised that detention issues come within the purview of the Eu as "they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust", but also in that the "Eu has certain values to uphold"

(European Commission, 2011, p. 3). Accordingly, the European Parliament has called the Commission and other Eu institutions to take the necessary measures in their fields of competence to ensure respect for and protection of the fundamental rights of prisoners "including the adoption of common European standards and rules of detention in all member states" (European Parliament, 2017). The Council of the Eu, in turn, has recently invited member states to rely on an increased use of non-custodial sanctions and measures (Council of the Eu, 2019).

More broadly, the role played by the Eu has been mostly one of coordination and support. The Eu institutions (spearheaded by the Commission) have sought to enhance their cooperation with the relevant bodies of the Council of Europe in the field of prison policy by financially supporting their activities, for instance via direct grants under the Justice programme aimed at the operation of an Eu Forum of independent prison monitoring bodies (National preventive mechanisms) or financing the collection of the Council of Europe's annual penal statistics (Space). In addition, the Eu Commission has been supporting prison-related initiatives through its financial programmes and sustained the establishment of pan-European professional organisations such as the European organisation of prison and correctional services (EuroPris) and the Confederation of European probation (Cep), while increasing the dissemination of best practices.

Throughout the early months of the pandemic in 2020, the professional organisations funded by Commission (along with other independent groups like the European prison observatory) have offered a relevant input by sourcing useful information on the measures taken at the national level. EuroPris, in particular, has established itself has a reliable source of information, by issuing several reports on prison administrations' responses to Covid-19 and through regular updates and country-specific overviews on their website. The existence of a previously established network of professionals across the member states has arguably facilitated the exchange of information. Similarly, the Secretariat of the European judicial network (Ejn) has been compiling information regarding international cooperation in criminal matters and the repercussions of the Covid-19. The information provided by these organs and agencies has been consistently relied upon by other Eu institutions while designing their response.

The European Parliament has recently adopted a resolution calling the member states "to safeguard the rights and health of all persons in prisons, in particular their rights to medical assistance, visitors, time in the open air and educational, professional or leisure activities" (European Parliament, 2020, p. 16). While this act is obviously devoid of legally binding effects, it builds on the Parliament's long-standing commitment to promote the protection of fundamental rights of prisoners (G. Cliquennois, S. Snacken, p. 8). The adoption of the Resolution draws on the analysis provided by the Parliament research service (C. Cirlig *et al.*, 2020, p. 1) and acknowledges the high risk of Covid-19 outbreaks as a result of the difficulty to enforce social distancing and sanitation rules in prisons. The Commission and Council's efforts in

designing an overall policy response have been much more limited, thus reflecting a strict adherence to competence hurdles described above. Didier Reynders, the Eu Commissioner for justice, has however called on the member states to draw on Who's guidance to tackle the spread of the disease in prisons (European Commissioner for justice, 2020). The impact on the penitentiary system has also been a topic of formal discussion during the last Justice and home affairs Council of the Croatian presidency in June 2020.

Conversely, both the Commission and the Council have been quick to react in order to reduce the impact of Covid-19 on judicial cooperation in criminal matters. As reported by Eurojust and the Ejn (Eurojust, Ejn, 2020) by late March the combined effect of lockdown measures and the suspension of judicial proceedings had brought judicial cooperation to a halt. More worryingly, however, the deteriorating conditions of prisons and health systems across the member states may expose individuals subject to surrender or transfer proceedings to inhuman or degrading treatment. As indicated above, the guidelines issued by both the Pc-cp and the Cpt seek to discourage the transfers of prisoners. To tackle this new reality the Commission has established – in close cooperation with Eurojust, the European judicial network and the General secretariat of the Council – an European arrest warrant (Eaw) Coordination group to enable a swift and efficient exchange between member states in surrender proceedings. Arguably, as suggested by Commissioner Reynders, this new instrument, while created to face the Covid-19 crisis, might also be "useful for other situations where a fast exchange between member states is required, for example in reaction to judgments of the Cjeu, having a direct impact on the smooth functioning of the Eaw" (European Commissioner for justice, 2020).

The Council, in turn, has included the impact of Covid-19 in its current reflection on the future of the European arrest warrant. A current draft of Council conclusions titled "The European arrest warrant – current challenges and the way forward" contains a section on strengthening Eaw surrender procedures "in times of crisis". This document, unlike previously mentioned texts on the status of persons deprived of liberty, seems less concerned with the rights of arrested and detained individuals and more with the effectiveness of judicial cooperation instruments. In this respect, it proposes to further a "profound and prompt" digitalisation of cross-border judicial cooperation. It also proposes to institutionalise the exchange of information facilitated by the Eaw coordination group through the creation of an ad hoc electronic platform. One can lament, however, an alarming lack of scrutiny of the negative repercussions of transfer and surrender proceedings in the course of a generalised health crisis. As recently pointed out by a number of Members of the European Parliament within the Parliament's Libe committee while proposing amendments to a motion of resolution on this subject, the lack of common rules on detention conditions across the Eumay only be further exacerbated during the pandemic, with detrimental impact for mutual trust between judicial authorities in the member states.

4. Conclusion

This paper has sought to assess the policy response to Covid-19 in prisons at the European level by means of an in-context reading of legal and policy documents issued by the institutions, respectively, of the Council of Europe and the Eu. We conceptualised the pandemic as an exogenous variable to current policymaking in Europe, thereby addressing its impact on the existing patterns thereof. This analysis partially confirms the existence of consolidated features of what could be described as European prison policy. As far as the Council of Europe's bodies are concerned, the outbreak of a public health crisis confirms the long-standing attitude to combine a normative approach based on human rights with evidence-based knowledge as means to improve the treatment of prisoners. Institutions of the Eu, in turn, have been more reluctant to take action on this front. Such reticence can be thought to reflect the stringent limitations posed by the lack of a clear legal basis to enact policy and legislation with regard to prisons. In both settings, however, the crisis has provided useful opportunities to expand on the existing set of principles and norms. The Pc-cp and the Cpt have made the bold move to affirm a human rights-based obligation of enforcing alternatives to detention as a way to reduce the risk of contracting the disease in prisons. The emergence of the public health crisis may have also triggered a development within the Eu, with a more ambitious role played by the Parliament and new institutional arrangements to facilitate exchange of prison-related data between Eu institutions and the member states.

Notes

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