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Meeting: 1390th meeting (1-3 December 2020) (DH)

Communication from NGOs (27/10/2020) and reply from the authorities (02/11/2020) in the case of NEVMERZHITSKY v. Ukraine (Application No. 54825/00)

Information made available under Rules 9.2 and 9.6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1390^e réunion (1-3 décembre 2020) (DH)

Communication d'ONG (27/10/2020) et réponse des autorités (02/11/2020) relative à l'affaire NEVMERZHITSKY c. Ukraine (requête n° 54825/00) **[anglais uniquement]**

Informations mises à disposition en vertu des Règles 9.2 et 9.6 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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Mr Pavlo Pushkar

**Head of Division
Department for the execution of
judgments of the European Court of
Human Rights
Directorate of Human Rights
Directorate General Human Rights
and Rule of Law**

Council of Europe
F-67075 Strasbourg Cedex

*As to the communication submitted by the European Prison
Litigation Network and the Kharkiv Human Rights Protection Group*

Dear Mr Pushkar,

On behalf of the Government of Ukraine please let me assure the Committee of Ministers in our commitment to solving the problems identified by the European Court of Human Rights in *Nevmerzhtsky and Others* group of cases (No. 54825/00).

The Government would like to express appreciation to the European Prison Litigation Network (the “EPLN”) and the Kharkiv Human Right Protection Group (the “KHPG”) for their genuine interest to the issues on reforming the penitentiary system in Ukraine, especially aspects related to the health care system in penitentiary facilities and material conditions of detention.

The Government of Ukraine would like to underline that the EPLN and the KHPG’s submission regarding the information presented by the Government of Ukraine in their Updated Action Plan of 20 October 2020¹ on measures to be taken for implementation of the Court’s judgments in the cases included in *Nevmerzhtsky and Others* group relates to the issues on the penitentiary system in Ukraine.

As it was indicated in the Government of Ukraine communication, the Ministry of Justice shall submit a bill “On Establishment of a Double System of Regular Penitentiary Inspections” to the Parliament

¹ [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2020\)986%22%5D%2C%22%22%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2020)986%22%5D%2C%22%22%7D)



UB
Міністерство юстиції України
№8929/5.2.1/25-20 від 30.10.2020
Ліщина І.Ю. (Заступник Міністра юстиції
України - Уповноважений у справах
Європейського суду з прав людини)
30.10.2020 18:53

of Ukraine by November (according to para. 677 of the “Plan of Priority Actions of the Government for 2020”).

To date, at the request of the Minister of Justice of Ukraine, the Council of Europe provided an expert opinion on the Bill. The draft law was designed to establish and operate a system of regular internal (administrative) and external penitentiary inspections of the pre-trial detention facilities and penitentiary institutions and to ensure compliance of their activities with the requirements of the Constitution of Ukraine, international and domestic legislation, observance of legal rights and interests of convicted persons and those held in pre-trial detention, as well as the staff of penitentiary and pre-trial detention facilities. The opinion examines the compatibility of the provisions of the Draft Law with the Council of Europe and other international standards and provides recommendations in this regard. It will contribute to the Parliament of Ukraine examination with a view of the adoption of the Law.

This activity was organised within the EU and Council of Europe Joint Project “Support to Prison Reform in Ukraine – SPERU”, which is designed to promote human rights compliant management of prisons, including better alignment of prison healthcare provisions with European standards.

On 18 September 2020, a working meeting of the Ukrainian Parliament Commissioner for Human Rights, Lyudmila Denisova, and the Public Prosecutor’s Office was held. It concerned the Pilot Project on the joint inspection of places of deprivation of freedom, in particular the institutions of the State Penitentiary Service of Ukraine under the Memorandum on Cooperation between the Ombudsperson and the Prosecutor General’s Office.

The Guidelines developed by the Office of the Ombudsperson for monitoring the observance of human rights in places of deprivation of freedom and children's rights will serve as the basis for such inspections. These inspections will be conducted with the participation of representatives of the Ombudsperson's Office, the Prosecutor General's Office and members of public. Appropriate training sessions will be held for all participants of the process.

As to the Pilot Project on introducing paid service for improved conditions in detention of the State Penitentiary Service of Ukraine, the Government would like to provide updated information. 1 cell for 5 places was renovated for UAH 5,100 in Zaporizhzhya SIZO. Another 4-places cell was equipped for UAH 3,200 in Vilnyanska penal institution. Repair works in Khmelnytsky SIZO is pending (the amount allocated for repairs is UAH 12 500).

The photos given in the Annex describes the material conditions in Kyiv SIZO before and after the repairs.

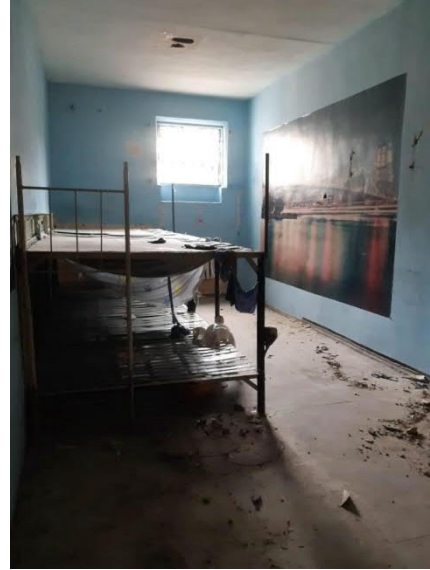
The Government of Ukraine will inform the Committee of Ministers with detailed information in the improvement of issues regarding the health system and material conditions in penitentiary facilities as soon as possible.

Yours sincerely,

Ivan LISHCHYNA
Deputy Minister – Agent
before the European Court of Human Rights

ANNEX

Repairing works in Kyiv SIZO





**KHARKIV HUMAN RIGHT
PROTECTION GROUP**

COMMUNICATION

in accordance with Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and the terms of friendly settlements

Group of cases NEVMERZHITSKY v. Ukraine (No.54825/00)

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EPLN holds participatory status with the Council of Europe

Plan of the present communication

General presentation

- (i.) Description of the Nevmerzhitsky group of cases*
- (ii.) Presentation of KHPG and EPN*
- (iv.) Aims of the present submission*

Introduction

I.I. An inconsistent health policy in prison, which accentuates the difficulties of the system

- (i.) A purely formal adherence to the international standard of independence of prison health service*
- (ii.) The worsening of the situation due to the non-completion of the reform*
- (iii.) Changing and opaque reform orientations*
- (iv.) An erratic budgetary policy, seriously affecting drug procurement and human resources*
- (v.) Synergies between international organisations should be developed*

I.II A health system facing major systemic and structural difficulties

- (i.) Structural failure of care within the penitentiary medicine system*
- (ii.) Ethical breaches ruining any possibility of a therapeutic relationship.*
- (iii.) A largely insufficient recourse to the general health system, which does not compensate for the shortcomings of prison medicine*
- (iv.) The issue of the management of infectious diseases*
- (iv.) The situation of psychiatry in prison*

II. Material conditions of detention

II.1 Lack of a coherent strategy to combat overpopulation

- (i.) Statistics*
- (ii.) Normative aspects and performance targets*
- (iii.) Longer term orientations*

II.2 Overview of the most acute problems in prison conditions

- (i.) Nutrition of prisoners*
- (ii.) Cell and dormitory occupancy conditions*
- (iii.) Other material and household conditions of the prisoners*

II.3 Difficulties exacerbated by the COVID-19 crisis

III. Procedural mechanisms without effectiveness

III.1 remedies for poor conditions of detention and insufficient care

III.2 Failure of the medical release mechanism

Recommendations

General presentation

1. This submission by the (hereinafter EPLN and KHPG, respectively) is addressed to the Committee of Ministers of the Council of Europe, in accordance with Rule 9.2 of the Rules of the Committee of Ministers, in the context of the supervision of the execution of the judgment of the ECtHR (hereinafter, "the Court") in the group of cases NEVMERZHITSKY v. Ukraine (No.54825/00).

(i.) Description of the Nevmerzhitsky group of cases

2. This group of cases brings together all cases concerning, among other prison issues, violations of Articles 3 and 13 of the Convention due to overcrowding and poor material conditions and lack of access to adequate medical care in places of detention (problems with treatment of viral diseases, use of handcuffs in civilian hospitals, lack of palliative care, access to specialised medical care, replacement therapy, etc.), as well as lack of preventive and compensatory measures in relation to these issues.
3. On 30 January 2020, the Court delivered a pilot judgment in the case of *Sukachov*. It found that the structural problems of overcrowding and poor conditions of detention in pre-trial detention facilities, as well as the absence of effective remedies, remained unresolved and thus indicated under Article 46 that the respondent State must: (i) take measures aimed at reducing overcrowding and improving material conditions of detention, and (ii) introduce preventive and compensatory remedies not later than 18 months after the judgment becomes final, that is by 30 November 2021.
4. As to access to health care in detention, the Court has pointed in a number of occasions that the problems arising from the lack of proper medical treatment in Ukrainian places of detention were of a structural nature and no effective remedy was available in this respect¹.

(ii.) Presentation of KHPG and EPN

5. The Kharkiv Human Rights Protection Group (KHPG) is one of the oldest and most active Ukrainian human rights organizations. As a legal entity, it was established in 1992, but it has been working as a human rights protection group since 1988 under the Society "Memorial", a first official human rights organization in the former USSR. KHPG is particularly active in the field of the protection of persons deprived of their liberty, whether in the field of prison monitoring, legal protection or strategic litigation. Among a very large number of cases before the ECtHR, KHPG brought the case which led to the pilot judgment in *Sukachov v. Ukraine*.
6. EPLN is an international non-governmental organization granted participative status with the Council of Europe. EPLN was founded in 2013 by a group of NGO jurists, lawyers and researchers active in the penitentiary field in different countries, with the aims of heightening the judicial protection of prisoners' fundamental rights in the Member States of the Council of Europe.

(iv.) Aims of the present submission

7. The present submission aims to assist the Committee of Ministers in its examination of this group of cases and to draw attention to the continuing problems regarding the lack of access to adequate medical care in Ukraine and the need for a much stronger commitment of the authorities to

¹See, among other authorities, *Petukhov v. Ukraine*, no. 43374/02, §§ 76-78, 21 October 2010; *Komarova v. Ukraine*, no. 13371/06, §50

effectively protecting the right of prisoners to health protection, which requires a massive reform plan. The Communication also reports that there have been no significant developments with regard to conditions of detention or remedies. It invites the CM separate the examination of groups of cases concerning access to health care in prison from those concerning material conditions of detention, as the necessary reforms involve distinct responses, actors and timeframes.

Introduction

8. The present group of cases, which covers a wide range of issues, highlights the magnitude and complexity of the challenges facing the Ukrainian penitentiary system, despite a significant drop in the prison population. Between 1 January 2015 and 1 January 2020, the prison population fell from 73,431 to 52,863, a decrease of 28 percent. Paradoxically enough, despite this very significant easing of the burden on the prison system and the rise of international cooperation programmes in the penal and penitentiary field, the situation inside prisons has not significantly improved, at least in terms of health protection and prison conditions.
9. Let it be said at once: the problem of prison care in Ukraine it is of such exceptional gravity as to represent one of the most problematic situations in the field of penitentiary care at the European level. since In its last published visit report, the Committee for the Prevention of Torture (CPT) stated it very clearly: *“the situation observed in most of the establishments visited was such that it posed a considerable threat to the health and even life of prisoners”*². This situation has not improved since then, the Ukrainian NPM having noted that *“there was no significant improvement in 2019”*³. The failure of the prison care system is all the more dramatic as the general state of health of the prison population is particularly poor (see below). In January 2020, the Prosecutor General expressed alarm at the 7% annual increase in deaths in custody⁴. The mortality rate of 90.7/10,000 places Ukraine far behind other CoE countries in this respect (Space 1, 2019).
10. From the point of view of the signatory organisations, the health issue thus requires prompt and forceful intervention by the Committee of Ministers. The present Communication focuses on the issue of access to health care in Ukrainian prisons as it is the more pressing one.
11. While less directly endangering the integrity of persons, detention sentences, in particular in SIZOs, are of great concern, to the extent that, despite a favorable trend in prison statistics, the Court decided on a pilot judgment in January 2020⁵. Recourse to the Article 46 proceedings is also justified by the complete lack of effectiveness of the appeals. From this twofold point of view – condition of detention and effectiveness of remedies - the current situation does not call for long developments, as the picture depicted in the pilot judgment remains broadly unchanged.

I.I. An inconsistent health policy in prison, which accentuates the difficulties of the system

12. The problem at stake is a multifaceted one, of considerable magnitude and complexity, which requires a strong political will, an open and transparent process involving all relevant stakeholders,

² CPT/Inf (2018) 41, §82

³ *“Lack of necessary licenses for medical practice, incomplete vacancies of doctors, lack of medicines, negligent medical examinations, improper medical records characterize the state of realization of [medical care] in most institutions.”*http://www.ombudsman.gov.ua/files/marina!/zvit_eng_web.pdf

⁴⁴ Press release, 15.01.2020, https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=264711

⁵ Sukachov v. Ukraine, no. 14057/17

with clearly stated objectives, for example on the model of a consensus conference. Given the method used by the Government and the lack of clear direction, the scattered measures taken to improve care and strengthen the linkage of penitentiary health with civilian medicine are not likely to be successful. At the opposite, the measures taken in recent years have tended to aggravate existing problems.

(i.) A purely formal adherence to the international standard of independence of prison health services

13. In the CPT's view, the resolution of structural deficiencies in access to health care in Ukrainian prisons requires the transfer of prison medicine to the general health care system. The CPT made recommendations to this effect as early as its first visit to the country⁶. In the report for its visit in 2017, the CPT has directly indicated to the government of Ukraine the necessity *"to transfer the responsibility for prison health-care services to the Ministry of Health"*.⁷ Indeed, there is now an international consensus that *« prison health services should be fully independent of prison administrations and (...) should be integrated into national health policies and systems »*⁸.
14. The *Concept for the Reform of the Penitentiary System until 2020* adopted the objective of transferring prison medicine to the Ministry of Health⁹. However, the process remained at what was to be only an intermediate stage: the creation of the "Centre for Health Protection of the Prison Service" (hereinafter *"the Prison health centre"*) and its regional entities (20 branches), a body under the supervision of the Ministry of Justice. In application of this reform, prison medicine became theoretically independent from the central penitentiary administration, as well as its local subsidiaries¹⁰.
15. In reality, as the Ombudsman pointed out in a report specifically devoted to the issue of health in prison, *"it is not yet possible to speak of the "independence" of the head of the medical unit from the leadership of the penitentiary institution"*¹¹. This state of affairs is confirmed by the observations made by KHPG during its monitoring visits, as well as by the analysis of exchanges between the prison administration and the medical units in health-related cases. Alleged independence of medical staff is a mere declaration.

(ii.) The worsening of the situation due to the non-completion of the reform

16. The reform is a shaky compromise (health personnel keep their penitentiary status) and has to some extent worsened the situation. A report released in June 2020 by the EU-CoE programme on prison points out that the new institution *"has led to a number of problems. Medical care turned out to be disorganized due to administrative problems. This is referring to a shortage, and sometimes the lack of medical personnel, and about (non) provision of medicines and equipment. The issue of interaction between medical units and administration of penitentiary institutions still remains uncertain and*

⁶<https://rm.coe.int/1680698393> , para. 141.

⁷<https://rm.coe.int/16808d2c2a>, para. 84.

⁸*Good governance for prison health in the 21st century – A policy brief on the organization of prison health*, World Health Organization, 2013

⁹Order of 13 September 2017 № 654-R

¹⁰In order to strengthen their independence, the medical units in prisons have been removed from the authority of the prison directors and doctors no longer have a rank in the prison hierarchy. The Prison Medical Center also has budgetary autonomy.

¹¹ Special Report of the Ukrainian Ombudsman on the State of the Observance of the Right on Healthcare and Medical Assistance in the Pretrial Detention Facility and Penitentiary Facilities of the State Penitentiary Service of Ukraine. <http://www.ombudsman.gov.ua/files/marina/PRISONHEALTH%20REPORT.pdf>, p. 48.

leads to various, sometimes distorted, practices of cooperation and coordination".¹² In addition, heads of the penitentiary institutions feel free from the responsibility for the prisoner's health, notwithstanding that it continues to be placed on them according to law. In their turn, a medical staff shift responsibility to the prison administration for not providing the prisoners, in a case of real necessity, with vehicles and/or the escort for transportation from the place of detention to civil health care institutions.

17. The gravity of the situation on the ground is such that in January 2020, the General Prosecutor warned the Prime Minister in very alarmist terms: *"the process of the planned transfer of medical care functions to prisoners [to the Ministry of Health] has not yet been completed. (...) In recent times, the responsible central executive bodies have not been sufficiently active and have in fact slowed down the process, which has had an extremely negative impact on the state of respect for the constitutional rights of prisoners to medical care and has led to systematic violations of the legislation in this field"*¹³.

(iii.) Changing and opaque reform orientations

18. Although the reform of penitentiary medicine and the reform of the health care system¹⁴ in Ukraine took place at the same time, they were designed independently of each other. However, the authorities have stopped referring to the objective of transferring care to the Ministry of Health. In particular, the Government's 2019 response to the CPT report says nothing about this.
19. On this subject, the information provided by the Ukrainian Government to the Committee of Ministers is particularly confused. The updated action plan communicated on 6 July 2020 makes no mention of it. The updated action plan transmitted on 25 August 2020 reports the creation in May 2020 by the Ministry of Health of an interdepartmental working group on medical care in prison (see p.17). In the light of this assertion, EPLN and KHPG pointed out in a submission sent on 4 September 2020, the fact that *"its mandate is not specified, and the way in which its missions relate to the priorities set out in the past is unclear"*. The reply from the authorities (24/09/2020) to this communication no longer mentions the issue of the transfer of prison medicine to the Ministry of Justice. Nor does the latest government communication make any reference to it.
20. These missteps are all the more problematic since the CPT warned in its last report that *"it will be extremely difficult to address all the serious problems [reported during the visits] unless prison health-care services are placed under the responsibility of the Ministry of Health"*.

(iv.) An erratic budgetary policy, seriously affecting drug procurement and human resources

21. As the Government has reiterated in its updated action plan, *"the financial support is one of the core problems of functioning of the penitentiary system"*¹⁵. Indeed, the under-funding of the medical system is a serious threat to the health and life of prisoners¹⁶. In 2016, 2017, 2018, the budget of

¹²Analysis of implementation of the recommendations [of the CPT to Ukraine], EU-CoE Programme on Prison Reform, June 2020

¹³ https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=264711.

¹⁴Decree No. 1013-r of the Cabinet of Ministers on approval of the concept of reforming the health care system, 30/11/2016; Decree No. 1002-r of the Cabinet of Ministers on approval of the concept of development of the public health system, 30/11/2016

¹⁵ Reply from the authorities (24/09/2020) to a communication from EPLN and KHPG (04/09/2020).

¹⁶The approved expenditures for 2019 were UAH 5 887 281, and from them only UAH 253 556,4 were allocated as expenditures for development. For the year 2020, the approved expenditures amounted to UAH 6 525 443, 3, and from them only UAH 208 107 were allocated (Action Plan updated, 06/07/2020).

penitentiary medicine was financed only for an average of 27% of the required amount, and no funding was allocated at all for the purchase of medical equipment¹⁷. The budget for the procurement of medicines in 2016-2018 was financed for an average of only 14% of the required amount¹⁸. The NPM indicated the lack of medicines in sufficient quantities, which was caused, among other things, by the reform of penitentiary medicine¹⁹.

22. Although the Government in the latest Action Plan has indicated a number of positive changes to cumulate additional funds for the penitentiary system²⁰, it does not provide any explanation for the budgetary trade-offs that have resulted in this under-financing, it being furthermore recalled that the state of public finances cannot justify failure to comply with Article 3 ECHR. More broadly, it has not provided any information on the action in relation to dramatic under-funding of more than seventy percent of the penitentiary medicine in Ukraine and the ways to solve this systemic problem.

(v.) Synergies between international organisations should be developed

23. The prison reform process in Ukraine is characterised by the active intervention of a large number of international actors. Beyond the mobilisation of international expertise, these actors can provide leverage on the orientations of prison policies. The European Union and the Council of Europe jointly run the programme “European Union and Council of Europe working together to strengthening human rights in Ukraine”. One of its three component is the programme “*European Union and Council of Europe working together to support the Prison Reform in Ukraine*”. Health issues deserve to be placed at the top of the agenda in this framework.

24. In addition, the EU monitors and evaluates the application and implementation of the association agreement (AA²¹). EU instruments to support the completion of the required processes.

Recommendations

EPLN and KHPG call on the Committee of Ministers to:

- request the Government of Ukraine to initiate, possibly in the form of a consensus conference, a transparent process for the transfer of prison medicine to the Ministry of Health, comprising a national debate involving all the actors concerned, including civil society and international organizations, to identify the main difficulties and the means of resolving them, and to define the main stages of the reform;**
- act with the Directorate General for Human Rights to ensure that prison health issues are given greater priority in cooperation programmes and find synergies with relevant EU instruments to support the completion of the required processes.**

¹⁷ Action plan (12/10/2018), p.4

¹⁸Ibid, p. 4.

¹⁹Special Report of the Ombudsman, Op. cit., pp. 17, 18, 34.

²⁰Updated action plan (20/10/2020) pp. 5-6.

²¹ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, in force since 1 September 2017

I.II A health system facing major systemic and structural difficulties

(i.) Structural failure of care within the penitentiary medicine system

25. The authorities report a marked improvement in the provision of care in prison, whether in terms of the delivery of treatment, the equipment of medical units or access to specialist care. However, the authorities do not explain the discrepancy between this positive conclusion and the very unfavourable budgetary indications they give at the same time. Nor do they discuss the alarmist conclusions issued in 2020 by the Prosecutor General, the experts of the joint EU-CoE programme on prisons or the NPM according to which “*there was no significant improvement in 2019*”²².
26. As a matter of fact, as the Ombudsperson warned in her report analyzing the impact of the reform of penitentiary medicine, “*health care remains at an extremely low level*”²³. The KHPG’s monitoring programme showed that “*a year and a half after the launch of the penitentiary healthcare reform the state of healthcare in prisons is catastrophic, and in some institutions, healthcare is simply non-existent*”²⁴. The medical units in prisons are under-equipped and understaffed. Patients have to wait for weeks to be examined by a doctor, let alone for their treatment; moreover, they are told to buy medicines at their own expense. Prisoners are often forced to carry out nursing acts by themselves. In addition to the lack of the required number of doctors, the hired medical personnel does not have the proper qualifications, as the head of the PrisonHealth Center has noted: “*The category of people we hired is not sufficient for middle-level medical personnel in this area. For a long time, none of the doctors went to improve their qualifications, they lost their categories, they became trainees.*”²⁵. Another recurring problem is that of drug management. In 2018²⁶ and 2019²⁷, the authorities recorded the widespread practice of storage of expired drugs, including antiviral and painkillers, as well as violations of storage requirement.

“In February 2019, during [a monitoring visit of the Zhovtovodsk facility no. 26], it was discovered that the medical unit there lacked the most essential medicines; one of the convicts complained that they did not even have bandages. Diabetes patients there are not receiving insulin and convicts with fractured bones get no splints. Although [facility] has a medical laboratory specialist, the laboratory itself has neither the reagents nor the equipment for on-site tests. In order to examine a convict, specialized examinations or dental care included, they must be taken outside the colony, but this is only done for those who can afford the cost of gasoline. There has been no fluorography specialist for over a year at the colony, so the convicts have not been undergoing fluorography, while it was later discovered that a person released from the institution had an open form of tuberculosis. According to the institution’s therapist, not all medicines are provided free of charge under state programs. As a result, those convicts who can afford their own medication are prescribed more expensive drugs, which are not available at the medical unit, while those who can’t are treated with whatever is available”

“In September 2016, we visited an interregional hospital (...) in Kyiv Region and found (...) poor nutrition for sick convicts, virtual lack of walks in the open for them, especially for those unable to move around on their own, poor organization of medical care, and most importantly, lack of proper medical treatment (...) Thus, it is the convicts, not medical personnel, that administer medical injections and even intravenous therapy to each other. In one particular case, a convict with obvious signs of a mental disorder had been kept with other convicts and died shortly after our visit. We sent a petition to

²² “*Lack of necessary licenses for medical practice, incomplete vacancies of doctors, lack of medicines, negligent medical examinations, improper medical records characterize the state of realization of [medical care] in most institutions.*” http://www.ombudsman.gov.ua/files/marina!/zvit_eng_web.pdf

²³ Special Report of the Ukrainian Ombudsman, Op. cit., p.7

²⁴ KHPG Shadow report, op. cit., p.45

²⁵ <https://www.slidstvo.info/articles/ochilnyk-tyuremnoyi-medytsyny-kerivnyky-kolonij-zvykly-shho-medyk-povnyen-buty-rabom/>.

²⁶ https://inspections.gov.ua/subject/view/inspections?subject_id=250459&tab=2018&page=1.

²⁷ https://inspections.gov.ua/subject/view/inspections?subject_id=250459&tab=2019.

the MoJ regarding these violations, yet the Ministry essentially chose to ignore it, deeming the above shortcomings to be minor, and refused to conduct a formal inquiry into the matter. Following the reform of penitentiary healthcare in July 2018, our monitors once again visited this hospital(...), and found the same problems, only compounded by a catastrophic shortage of doctors and medicines”.

“In August 2019, our monitors visited the Dnipro Multidisciplinary Hospital no. 4 (...) no treatment was being provided to sick convicts, including those who had survived myocardial infarction. According to the doctors, they do not even have enough basic medicines, let alone specialized ones. If a convict has relatives, they are often the ones to buy the medicines. (...) It is impossible for the convicts to get examined by a doctor, and their complaints to the administration are useless. If a convict requires additional tests that cannot be performed at the institution, this is either not done at all or done after a considerable delay (...) According to the convicts, this way the hospital makes room for those who pay for their stay and remain there for months even when they have no need for treatment¹⁸⁰. According to a lawyer who provides legal assistance to two seriously ill convicts held at this facility, both of these convicts are kept in regular cells and are not getting any medical help. One of the inmates, disabled since childhood, had his spleen removed as a child and suffers from hepatitis C as well as liver cirrhosis; 1.80 m tall, he cannot eat and weighs 50–55 kg. In spite of this, he is still unable to get a place at the prison hospital. Another inmate, with a temporary orthopedic plate inside his tibia, has developed a purulent process that could result in abscess and loss of limb or even death. Our organization has appealed to the MoJ, PG and the Ombudsman regarding this, but to no avail.”²⁸

(ii.) *Ethical breaches ruining any possibility of a therapeutic relationship.*

27. The fact that healthcare staff belong to the prison administration means that they are close to prison staff and adhere to the security and management approach, to the detriment of the care and interests of their patients. This proximity prevents the relationships of trust necessary for patients to openly confide in their doctors, thus impairing the latter's diagnostic capacities. What is more, medical confidentiality is poorly respected.
28. There are many examples of these ethical breaches. The presence of guards during a medical examination, as well as the use of handcuffs during a visit to a civilian hospital, are common practices. The 2018 NPM report observed that *“a medical examination of newly arrived prisoners was carried out through metal bars in the presence of other prisoners and police officers who escorted the latter to the institution, [...] a direct violation of the human right to respect for his dignity and right to privacy”*²⁹. During the treatment of the prisoners in civilian hospitals, their hands are handcuffed to the bed, regardless of their health condition³⁰.
29. The problem of dependency of a medical staff becomes especially sharp in case of abuse of force by the administration, when doctors, as a rule, follows to orders of a penitentiary institution concerning both of recording the injures and providing medical assistance, excluding the cases with gravity consequences.

Following the rapid Reaction Group in Oleksiivka colony (no.25) in January 2020, the medical unit recorded injures only of the inmates which had been recorded as those who having been subjected to use of physical force because of their resistance to lawful orders of the administration³¹.

²⁸ KHPG shadow report to the CAT, op. cit.

²⁹ Special Report of the Ombudsperson, Op. cit. p. 14.

³⁰ CPT/Inf (2012) 30, §8 and 53; Logvinenko v. Ukraine, no. 13448/07, §57, 14 Oct. 2010; SalakhovandIslyamova v. Ukraine, no. 28005/08, §§ 104, 14 March 2013; Kushch v. Ukraine, no. 53865/11, § 97, 3 Dec. 2015; Korneykov v. Ukraine, no. 56660/12, §§ 115, 116, 24 March 2016; <http://KHPG.org/files/docs/1578753822.pdf>, p. 71.

³¹ <https://2day.kh.ua/zhgut-kostry-na-lyudyakh-v-kharkovskoy-kolonii-no25-primenyali-pytki-k-zaklyuchennym>

(iii.) A largely insufficient recourse to the general health system, which does not compensate for the shortcomings of prison medicine

30. The need for treatment outside the prison facility or for civilian medical examinations arises quite frequently, since the penitentiary healthcare system is often incapable of carrying out examinations and treatment required. However, prisoners' access to the general health care system faces multiple barriers that do nothing to compensate for the inadequacies of the prison system. In the first place, the relationship between prison medicine and civilian hospitals is not organised in a functional way and the scheduling of examinations and operations is in itself problematic. In addition, according to the KHPG's observations, most often, specialized medical care in civilian hospitals is available only to financially secured convicts who can pay for such services. Those who cannot pay for it receive such medical care with a considerable delay, or even very frequently are not treated.
31. Transportation to civilian hospitals is carried out by ordinary transport for convicts, which does not have any conditions for transporting patients, and moreover, is in a terrible state. According to the Ombudsperson, *"Given the length of stay of detained and convicted persons in such conditions (for example, following the Vinnytsia-Cherkasy route for almost four days), they cannot be regarded as anything other than cruel and such that diminishes the human dignity of treatment and punishment"*³².

(iv.) The issue of the management of infectious diseases

32. The situation with regard to the management of infectious diseases is particularly problematic, given the weakness of specialised care, the under-resourcing of prison medicine and the insalubrity of many institutions. The government's self-satisfaction in this area is highly problematic in that it demonstrates an inability to appreciate the scale of the problem.
- Hepatitis
33. The existing system of viral hepatitis epidemiological surveillance in Ukraine and limited access to diagnostic and treatment services do not make it possible to fully assess the level of the burden of these diseases³³. As to prison system, in its report of 2014, the CPT expressed its concern regarding *"the lack of systematic screening and treatment for blood-borne viral hepatitis in the Ukrainian prison system"*, explaining *"there was no National Programme for detecting and treating hepatitis in Ukraine (and no national standard for treatment), and that penitentiary establishments were not provided with any specific hepatitis medication"*³⁴. The CPT has recommended taking *"measures to ensure systematic screening and treatment for blood-borne viral hepatitis in the Ukrainian prison system"*³⁵. In its Report of 2018, the CPT noted the absence of significant changes on this issue and reiterated its previous recommendations³⁶. The action plan updated mentions *"as of 1 October 2020, treatment of viral hepatitis C was prescribed to 758 patients"* (p.7). However, the government does not explain this figure and on what criteria patients are selected.

³² Ombudsman of Ukraine's report, 2013, p.55 http://www.ombudsman.gov.ua/files/Dopovidi/Dopovid_NPM.pdf,

³³ <http://aph.org.ua/uk/novyny/5-000-patsiyentiv-otrimali-suchasne-bezkoshtovne-likuvannya-virusnogo-gepatitu-s-v-innovatsijnij-programi-alyansu-gromadskogo-zdorov-ya/>., The WHO data indicate that Ukraine is the only country in the European region that was included in the list of 28 states that have the largest burden of viral hepatitis in the world. According to estimates, up to 5% of the population of Ukraine is infected with viral hepatitis C, ranging from 1 to 2 million citizens who need treatment.

³⁴ CPT/Inf (2014) 15, para. 161.

³⁵ Ibid., p. 103.

³⁶ CPT/Inf (2018) 41 para. 93.

- HIV
34. The prevalence of HIV in prison is 7 577.5 per 100 thousand, which is 22 times higher than the incidence rate among the population of Ukraine (342.6 per 100 thousand). The report of the NPM states that *“in most institutions the level of work of medical workers to provide prisoners with HIV testing is not enough, keeping records and medical notes are going not in a proper way”*³⁷.
35. ART drugs are procured from the state budget based on the estimated need in the country. However, in many cases, ART is interrupted on remand due to both organisational defects and negligence from medical staff, or intentionally, due to a negligible attitude towards the health of convicts. Cases of opportunistic infections of HIV-positive people pose a specific problem. In particular, if such prisoners have tuberculosis and their anti-tuberculosis drugs are incompatible, it is necessary to change the ART regimen, which is possible only after a comprehensive inpatient examination, which in practice leads to long breaks in ART. Disclosure of HIV status is common, and despite the criminal liability for this, in fact, all prisoners and all prison staff may know that a patient is HIV-positive.
36. According to the law, it is possible to deliver opioid substitution therapy(OST) for a period of up to 30 days in a pre-trial detention centre, or detoxification is carried out, which cannot be carried out with a large dose of the drug in compliance with the rules of medical protocols. OST is not carried out in colonies. The continuity of OPTs for those patients who are detained in connection with criminal proceedings is still an issue. Occasionally, fatal outcomes occur to OST patients after they are placed in pre-trial detention and interrupted OST. In one case, the ECtHR found a violation of Article 3 in a case where a patient was detoxified too quickly³⁸.

- Tuberculosis (TB)
37. According to the 2018 NPM report, *“contrary to international recommendations, a preventive medical examination is not carried out for all convicts twice a year; type of fluorographic equipment which can be used (must be digital for image clarity) is not regulatory defined; diagnostics by genetically molecular tests (...) of convicts with the return of tuberculosis, pulmonary tuberculosis, convicts living with HIV is not guaranteed for the timely detection of an active form. The issue of identifying contact persons among convicts has also not been settled. At the same time, almost all the visited PDFs and CFs in the medical units do not have enough Isoniazid preparation for the prevention of tuberculosis among prisoners living with HIV/AIDS, as well as among persons who have been in contact with a person suffering from an active form of tuberculosis. As a result, there is an increased risk of tuberculosis contagion for others.”*³⁹

(iv.) The situation of psychiatry in prison

38. As the CPT has emphasised in its report in 2017, *“the access to psychiatric care [in Ukrainian penitentiary establishments is] highly insufficient for prisoners”*.⁴⁰ The CPT also noted that no psychotropic medication is provided for the detainees in some prisons due to the license-related constraints and that such situation should be remedied urgently.⁴¹ Face à ce problème aigu, le gouvernement ukrainien se contente dans son dernier plan d'action mis à jour d'indiquer, sans aucune précision de date ou de contenu, que *« the Ministry of Health of Ukraine is underway to*

³⁷Special Report, Op. cit., p. 37.

³⁸Serzhantov v. Ukraine, Application No. 57240/14, 11 July 2019

³⁹Special Report of the Ombudsperson, Op. cit., p. 39.

⁴⁰CPT/Inf (2018) 41, para. 90.

⁴¹Ibid.

implement the integration of psychiatric care into the general network. This activity envisages increasing the efficiency of outpatient psychiatric care for convicts and detainees.” (p.7).

39. The government says nothing about the envisaged responses to the many extremely serious problems observed in the field of psychiatry in prison. At the first place, the problem of understaffing of psychiatrists. In some cases, their roles are executed by therapists⁴². Such a shortage of medical personnel, according to Ukrainian Ombudsperson, leads to “*massive violations of the rights of prisoners to health care*”⁴³. In line with the conclusions of the CPT, the general recommendation to the Ministry of Justice is to ensure adequate conditions for isolation and observation of prisoners with situative mental disorders⁴⁴ and improve the provision of psychiatric treatment by professional psychiatrists. Prisoners with acute mental disorders should be promptly hospitalised to specialised hospital facilities⁴⁵. Some facilities do not have any special wards for persons with mental disorders. Such persons are placed in a cell-type room and not in a separate isolation ward of the medical unit⁴⁶. This contradicts the legal prescriptions⁴⁷.
40. The restraining techniques also raise concerns. According to the report of the Ombudsman, the law allows for persons in pre-trial detention to be placed in a cell to calm violent behaviour. It is also allowed to subject a prisoner to isolation measures in cases of situational mental disorders, namely, placement in a separate isolation ward of the medical part of the investigation facility⁴⁸. As the Commissioner has indicated in the report, “*such wards look like "cement boxes", they neither have windows, nor forced ventilation and no access to fresh air. The walls and floor do not have a special synthetic coating that would prevent self-harm, and therefore lose their functional purpose*”⁴⁹.

Recommendations

EPLN and KHPG respectfully call on the Committee of Ministers to request the Government of Ukraine to:

- **urgently fill the vacancies for health care workers and the need for equipment and medicines;**
- **implement public control for use of medical drugs for prisoners;**
- **clarify as soon as possible the chain of responsibility within the medical units and designate those responsible for the quality of care.**

II.3. Difficulties exacerbated by the COVID-19 crisis

41. Inadequate material conditions of detention, healthcare system problems, the lack of adequate funding, disregard for the need to release certain convicts, and inappropriate testing of the prison population is a serious threat to the penitentiary system, given the increase in the overall incidence of COVID-19 in Ukraine. Despite these particularly high-risk factors, the authorities have refrained from following the example of many countries and reducing the prison population to ease the

⁴²Special Report of the Ombudsperson, Op. cit., p. 30.

⁴³ Ibid., p. 29.

⁴⁴ CPT/Inf (2018) 41, para. 90.

⁴⁵ Ibid.

⁴⁶ Ibid., p. 30.

⁴⁷ Order No. 1348/5/572 of 15.08.2014 on approval of the "Procedure for organizing the provision of medical care to persons sentenced to imprisonment". <https://zakon.rada.gov.ua/laws/show/z0990-14#Text>.

⁴⁸ Section X, paragraph 3, of the Internal Regulations of Investigations Detention Facilities approved by Order of the Ministry of Justice of Ukraine, № 1769/5, of 14 June 2019. <https://zakon.rada.gov.ua/laws/show/z0445-13#Text>.

⁴⁹Special Report of the Ombudsperson, Op. cit., p. 17.

pressure on the prison system. Four bills have been submitted on the issue of amnesty of detainees in 2020.⁵⁰ Three were withdrawn. One (№ 3765) is currently under examination, however, it does not explicitly provide for amnesty of the persons particularly vulnerable to COVID-19. Therefore, no mechanism for amnesty and release of convicts due to COVID-19, which could have released about 4 thousand convicts, had been adopted⁵¹.

42. According to the data available as of 16 October 2020, 1 207 persons have been tested, of which 198 cases of COVID-19 infection were confirmed for 7 detainees, 6 convicts, 147 SPSU employees and 38 medical workers⁵². One convict, one SPSU employee and one medic died, 125 persons recovered, of which 98 are SPSU employees, 17 are medics, 6 are detainees, 4 are convicts⁵³. However, the Deputy Minister of Justice stated that they actually do not have objective statistics on the incidence of COVID-19 in the penitentiary system⁵⁴. Additionally, as has been indicated by human rights activists and the OHCHR, “the collected information about the spread of COVID-19 disease is not very reliable” and “the actual number of COVID-19 cases may be underreported due to low rates of testing”⁵⁵.
43. The lack of integration of prison medicine into the general health system means that prisons are not included in the national response plan to COVID-19, with repercussions in terms of access to equipment and testing capacity. Prison directors are often left to their own devices. It is not uncommon for international humanitarian organisations to receive direct requests for equipment from prison directors who have no solution.
44. The information about the non-compliance with the sanitary measures was reported by human rights activists⁵⁶, who collected their data using cellphones and online surveys, and the National Preventive Mechanism⁵⁷. In particular, the courts tend not to have hearings in the video conference mode, the staff members of the institutions do not use the personal protective equipment, and the used protective equipment is not properly collected and disposed of, detainees and convicts do not receive personal protective equipment. In many SIZOs, the disinfection of cells and administrative premises is not carried out, temperature screening and daily review of prisoners are also not carried out in all institutions⁵⁸.
45. The recent data obtained by KHPG demonstrates large unpreparedness of the system faced with COVID-19 pandemic. Certain restrictions for the quarantine period have already been introduced in

⁵⁰ Draft Law No. 3765 “On the grounds and the range of persons to whom the amnesty applies in 2020” http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69318; Draft Law № 3396 “On amendments to some legislative acts of Ukraine concerning the prevention of appearance and spread of coronavirus disease (COVID-19) in the penitentiary institutions and the places of pre-trial detention” http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68675; Draft law No. 3181 “On Amnesty in 2020” https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68676; Draft law No. 3181 “On Amnesty in 2020” http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68322.

⁵¹ <https://www.ukrinform.ua/rubric-politics/3047268-komitet-vr-zavernuv-dva-zakonoproekti-pro-amnistiu.html>

⁵² Health Centre, Statistics on COVID-19 spread in the penitentiary system. <https://coz.kvs.gov.ua/?p=911>

⁵³ Ibid.

⁵⁴ <http://komzakonpr.rada.gov.ua/documents/zasid/74890.html> (video: 1h 07min 45sec – 1 h 07 min 59 sec)

⁵⁵ Report on the Human Rights Situation in Ukraine, 16 February – 31 July 2020, Office of the United Nations High Commissioner for Human Rights.

https://reliefweb.int/sites/reliefweb.int/files/resources/30thReportUkraine_EN.pdf, p. 15.

⁵⁶ The position of the Kharkiv Human Rights Protection Group on the release of prisoners as a means of preventing the spread of COVID-19 in penitentiary institutions. <http://KHPG.org/index.php?id=1586543664>

⁵⁷ <http://www.ombudsman.gov.ua/ua/page/npm/provisions/ongoing-performance/>

⁵⁸ <http://www.ombudsman.gov.ua/ua/all-news/pr/upovnovazhenij-nad%D1%96slala-m%D1%96n%D1%96struyusticz%D1%96%D1%97-podannya,-u-yakomu-vimaga%D1%94-usunuti-porushennya-karantinnix-pravil-u-%D1%96zo-ukra%D1%97ni/>

the institutions of the SCES⁵⁹. In particular, transportation between penitentiaries and PTDCs has been stopped. In this regard, in some PTDCs in Volyn, Dnipropetrovsk, Kherson and Khmelnytsky regions, the set limit of people was exceeded by 256 people. Overall, the total number of prisoners in PTDCs in Ukraine has increased by almost 530 due to the ban on transfer to the correctional colonies.⁶⁰ Such restrictions create serious risks to seriously ill convicts who require medical care in other specialized institutions. Probably the best illustration of the problem is the death of a convict⁶¹ on 1 July 2020, whose oncology has not been diagnosed and treated on time because of the quarantine.

II. Material conditions of detention

II.1 Lack of a coherent strategy to combat overpopulation

46. In *Sukachov v. Ukraine*, the Court stressed that “the most appropriate solution to the problem of overcrowding would be to reduce the number of detainees by more frequent use of non-custodial measures and by minimising the recourse to pre-trial detention” (§146). The Court notes that “the problem of overcrowding during pre-trial detention is closely linked to another problem frequently found in its judgments against Ukraine (...), namely the excessive length of pre-trial detention.” (§147).

(i) Statistics

	Total number of persons in penitentiary institutions	Evolution of the number of persons held in penitentiary institutions as a percentage of the previous year
01.01.2005	188 465	- 1,68
01.01.2013	147 112	- 4,49%
01.01.2014	126 937	- 13,71%
01.01.2015	73 431 (89 000.*)	- 42,15% (-30%*)
01.01.2016	69 997 (80 000.*)	- 4,68% (- 10%*)
01.01.2017	60 399	-13,17%
01.01.2018	57 100	- 5,46%
01.01.2019	55 078	- 3,54%
01.01.2020	52 863	- 4,02%

* indicative data including institutions in the occupied territory of Donbass.

⁵⁹Joint Order of the State institution "Health Centre of the State Penitentiary Service of Ukraine" and the Department for the Execution of Criminal Punishment, of 12.03.2020 № 57/ОД/8/ОД-20.

⁶⁰https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=270150

⁶¹<https://www.slidstvo.info/news/u-dniprovskij-tyurmi-pomer-onkohvoryj-v-yazen-yakomu-ne-nadaly-likuvannya-cherez-karantyn/>

47. As at 1 January 2020, 1,7502 people (1,830 a year before, i.e. -2.93%) were being held in remand centres, including 1,014 women (1,032 a year ago), 138 minors (133 people two years ago). In 2019, 9369 people were released from remand centres (a year before - 8788 people). Among the main reasons why people were released from remand centres in 2019 were the change of the preventive measure to a milder one - 4998 people (4,571 people a year ago), the imposition of imprisonment, but for a relatively short period of time - as a rule, The number of people who have already served their sentence in a pre-trial detention centre is 546 (511 people), as well as non-custodial penalties - 1001 (1,005 people a year ago) and 31 (41 people a year ago) in connection with the termination of cases by courts and acquittals.
48. The number of convicted persons in 2019 decreased from 37,048 to 35,361, i.e. by 1,687 (2,465 a year ago), or by 4.55% (6.2%). The number of life prisoners as of 1 January 2020 was 1,536 (1,541 a year ago, 1,572 two years ago and 1,579 three years ago), including 23 women. 33 life prisoners died in 2017, 27 in 2018 and 27 in 2019. In 2019, 4,895 people out of a total of 13,109 were released on parole, which is 37.34% of the number of people formally subject to parole. It should be noted that this figure was in 2018 - 37.8%, 2017 - 38.22%, 2016 - 41.15%, 2015 - 47.2% and 2014 - 53.5%. The negative trend is obvious.

(ii.) Normative aspects and performance targets

49. As noted by the Government, the authorities adopted a number of concepts, programmes, decrees and other regulatory documents directing at the reforming of the penitentiary system in accordance with the European standards, which is definitely a positive step. However, many changes in the administrative organisation of the prison system, working groups and action plans have not led to significant changes in the concrete situation of the prisons.
50. In particular, the Programme of activities of the Cabinet of Ministers (hereafter – CMU) for 2020 referred to by the Government in its additions, indicates the decrease in the level of recidivism to no more than 10 % as the aims of the penitentiary reform (the percentage from the total number of convicts who at the moment of the commission of crime had an outstanding or unexpunged criminal record⁶², which can be achieved purely statistically and would not influence the actual conditions of detention of the convicts). As for the by-laws adopted by the Government which were developed for the improvement of the detention conditions, those acts improve the detention conditions only declaratively. It is related to the State’s lack of funds for the arrangement of improved conditions.
51. Amendments to part 5, Art. 72 CC made it so one day of pre-trial detention counts as two days of imprisonment. Over the year and a half after the adoption of this provision, over ten thousand convicts have been released. Thus, the number of convicts has decreased sharply. That norm was changed by the Law of 18.05.2017 No. 2046-VIII.
52. Beyond these regulatory or programmatic aspects, the Government states the amount of funds spent on the improvement of detention conditions[ref]. It informs in the addition that in 2019 and the first half of 2020 there were minor repairs in 1169 cells, which constitutes 28 percent of the total number of cells. Relying on its many monitoring visits, KHPG notes that in most of the cells with minor repairs such repairs consisted of painting the walls and floor, which almost does not improve

⁶²<https://zakon.rada.gov.ua/laws/show/188-20#Text>para. 12.3

the conditions of detention in such cells, it is only made for implementing the maintenance plan. The maintenance is often carried out with the use of low-quality materials which are quickly spoiled.

53. The repairs of sleeping quarters of common use, bath and laundry complexes, canteens and other objects have to be noted positively. However, at the same time, the repair rate is low, the premises are repaired separately, provoking varying level of detention conditions for the prisoners in the same facility. As a result, a small number of convicts is held in well repaired premises, while the majority serve their sentence in the old premises, where the walls are often covered in mould and fungus, with appalling bathrooms, bunk beds.

(ii.) *Longer term orientations*

54. From the point of view of penal and penitentiary policy, the government's strategy to combat prison overcrowding is based on four axes: (i.) the development of probation; (ii.) the suspension of the activity of facilities that do not meet the standards; (iii.) the sale of land in the city centre; (iv.) the introduction of a cell rental system that meets European standards.
55. On the first point, while the probation development strategy is to be welcomed, it should be pointed out that the probation development strategy alone is not sufficient to combat overcrowding. As noted in the White Paper on prison overcrowding adopted by the Committee of Ministers (PC-CP (2015) 6 rev 7), *“Some recent research based on SPACE statistics shows that despite the introduction of new alternatives to custody this has not contributed or has contributed very little to the reduction of the use of deprivation of liberty. It seems that there is a net widening of the criminal justice system. Such possible effects should be carefully evaluated and any negative impact should be avoided”* (para. 65).
56. In order to avoid this penal net widening, and the tightening of social control aimed at people who would not have been imprisoned in any case, the authorities must develop an integrated strategy, simultaneously mobilizing all the levers of penal policy (decriminalization, reduction of the quantum of sentences, reduction of the area of pre-trial detention, strengthening the credibility of alternatives to imprisonment, reinforcement of social support, etc.). In this perspective, as the White paper express it, *“There should be constant dialogue and common understanding and action involving policy makers, legislators, judges, prosecutors and prison and probation managers in each member state in order to deal with execution of penal sanctions and measures in a humane, just and efficient manner and to avoid among others prison overcrowding and net widening of the criminal justice system.”*(§161).
57. In this respect, the national consultation held on 25 October 2020 during which the public was asked to vote for or against life imprisonment for corruption is an example of highly worrying penal populism, which gives rise to fears that criminal policy issues will be instrumentalized, thus ruining any possibility of a rational and reductionist policy in this area, as required by the Court.
58. On the second point, the choices made by the authorities must be questioned. In 2018 the Government decided to suspend the activity of 17 facilities. The selection was based on the number of inmates, even though the criterion here should have been material conditions of the premises.
59. Shostkivskacolony no. 66 was among those to be suspended. It was designed for 14 blocks, all of which had already been renovated shortly before the suspension. It should be noted that there are plenty of facilities in Ukraine with much worse conditions of detention. Those prisons are still working while all inmates of the Shostkivskafacility had been relocated, leaving the institution

empty⁶³. Over the past two years, several facilities with satisfactory conditions of detention have been suspended while many institutions with poor conditions have been ignored⁶⁴.

60. On the third point, the Ministry of Justice has long been engaged in selling prison land to finance the upgrading and/or construction of new facilities. In 2020 the Ministry of Justice reported the sale of the suspended complexes of penal colonies in the nearest future⁶⁵. Such statements contradict the former plans to temporarily suspend the facilities that would resume functioning if necessary. Given that the suspended penitentiaries were far from being the worst in terms of detention conditions, the wish of the Ministry of Justice to sell them raises a reasonable concern. In general, it is planned to close and sell up to a third of the penal colonies⁶⁶. The Minister of Justice also stressed the plans to move the pre-trial detention centres outside of the cities and sell the building complexes of the pre-trial detention centres that are often located on the central streets. Experience shows the limits of such a policy. In addition, the prison administration should not lose sight of the need to locate prisons in places connected to urban transport and embedded in an economic fabric, as otherwise, the administration is merely postponing problems.

61. On the fourth point, it should be recalled that there is a positive obligation on State Members to ensure conditions of detention consistent with human dignity. This obligation is intangible and the State cannot demand any retribution for it. The assurances of the Ukrainian government that this policy is in conformity with the prohibition of discrimination in domestic law does not in any way release it from its international commitments under Articles 3 and 14 ECHR and manifests the doubts within the State administration itself as to the legitimacy of this orientation. The introduction of paid cells in SIZO leads to the discrimination of the convicts who do not have the possibility to obtain the service of being held in a paid cell because of their financial condition. Such convicts constitute the majority.

II.2 Overview of the most acute problems in prison conditions

(i.) Nutrition of prisoners

62. In most facilities, the food has bad organoleptic properties; cooked meals don't have enough meat; food supplies get spoiled because of poor storage conditions yet are still used in cooking. In addition, problems occur with food deliveries.

At the Dnipro colony no. 4, rations have had no meat for a month now, and there are no potatoes in stock. At the Chornomorskacolony no. 79, female convicts had to eat nothing but fish for every meal for almost a month, as there were no meat deliveries, while neighbouring facilities from the very same city (Odessa) did have a supply of meat. In some cases, facilities were getting food of poor quality (Voznesenska Correctional Colony no. 72).

63. The Ombudsperson mentions poor food⁶⁷. In many facilities, inmates get no fresh vegetables at all. The Ombudsperson also emphasizes that food substitution, which by law should only be used in the event of temporary shortages of certain food products, is treated as a general rule, which has resulted in a virtual absence of natural food products, particularly protein-rich food, vegetables and fruits. As a result, some convicts essentially rely on the food that they receive from their families to

⁶³<http://KHPG.org/index.php?id=1537528588>

⁶⁴<https://zakon.rada.gov.ua/laws/show/396-2017-%D0%BF>

⁶⁵<https://ua.interfax.com.ua/news/general/656562.html>

⁶⁶<https://www.radiosvoboda.org/a/news-maluska-pro-tiurmy/30211378.html>

⁶⁷2017 annual report, paras. 196, 227–229

survive. Some, particularly those held in pretrial detention, refuse any food distributed by the administration.

64. When brought to court hearings in regional centres, people get no dry food rations and are therefore forced to go hungry on these days. Nutritional standards for detained persons, approved by the Resolution of 27 December 2018 (No. 1150) still have not entered into force. CMU postponed the date of the entry into force of the new nutrition norms, the next announced date is 1 January 2021. The new norms do not contain a calculation of the energy value of prison food products. In addition, they state that food substitution is done in order to diversify the prisoners' menu, to comply with doctors' advice or in the absence of other food products in stock. This could open the door to all sorts of abuses, allowing to change the menu constantly. In addition, funding for prison nutrition under new standards is done based on what is left in the budget, which is bound to have an adverse effect on the availability and quality of food.

(ii.) Cell occupancy conditions

65. There is no quantitative limit for filling the SIZO cells and living units of the penal institutions. In other words, the law does not accompany a transition from collective to individual or even cellular accommodation. The existing norms establish the size of the mandatory square for one person; however, they do not limit the number of places in a detention unit. Theoretically, provided that the ratio of equity holdings to available surface area is respected, a room can be designed for the simultaneous holding of hundreds of people⁶⁸. The transition from the collective holding system to the small capacity (or individual) system implies the allocation of significant financial resources. Such reformatting requires structural changes to the construction of the existing buildings or the new buildings. As for SIZO, the decrease in the occupancy of the cells requires not so much restructuring (which is often impossible), but the decrease in the number of people in custody⁶⁹.
66. In 2010, the norm of the living space for the convicts in the colonies was increased from 2,5 to 4 sq.m ⁷⁰. However, this norm is still rarely met. During his monitoring visits, KHPG found overcrowding and use of bunk beds in more than 14 facilities⁷¹.
67. At the same time, the SIZOs still adhere to the norm of 2,5 sq.m. for one person⁷². A draft law was adopted in the first reading with the aim of increase of living space in SIZO. However, it was never submitted to the second reading⁷³. Later, another draft law on the increase of norm of living space in SIZO was registered which provided for the change of the norm of space in SIZO for women and their children based on the standards of CPT, as well as the norm of space for men in the amount of 3 sq. m. However, on 29.08.2019 that draft law was revoked in connection with the end of the parliamentary mandate. Although some measures to prevent the overcrowding were taken, they were not adopted in the scale sufficient for overcoming that problem in general, and their influence remains minimal.

⁶⁸http://KHPG.org/index.php?id=1591169185#1591169185_6point1.1,para.9

⁶⁹http://KHPG.org/index.php?id=1591169185#1591169185_6point1.1,para.10

⁷⁰<https://zakon.rada.gov.ua/laws/show/1828-17#Text>

⁷¹<http://KHPG.org/index.php?do=search&w=%D0%B4%D0%B2%D0%BE%D0%BF%D0%BE%D0%B2%D0%B5%D1%80%D1%85%D0%BE%D0%B2%D1%96&x=11&y=23>

<http://KHPG.org/index.php?do=search&w=%D0%B4%D0%B2%D0%BE%D0%BF%D0%BE%D0%B2%D0%B5%D1%80%D1%85%D0%BE%D0%B2%D0%B8%D1%85&x=0&y=0>

⁷²Art. 11 of the Law of Ukraine“On Pre-Trial Detention”

⁷³http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55900

(iii) Other material and household conditions of the prisoners

68. On September 13, 2019, The Ministry of Justice approved the amendments to the provision on the organisation of bath and laundry services in detention, which increase the number of washings of the convicts and the changes of their underwear and bedding to two times a week. Those changes bring the current rules in accordance with para. 19.4 of the European Prison Rules. Unfortunately, the entry of those changes into force was postponed to January 1, 2021.

69. There is still a number of other separate problems concerning conditions of detention:

- the lack of forced ventilation, night lighting; dampness, the lack of fresh air (unpleasant odours, suffocation), natural and artificial lighting; fungus on walls and ceilings; improper temperature regime, a sanitary condition in living quarters and bathrooms;
- too small size of bathrooms and the lack of partitions between the bathroom and the rest of the cell or the lack of partitions between the toilets in the dorms;
- the lack of separate premises for drying clothes, the lack of bathrooms in the dorms;
- the interruptions in the electricity and water supply, the unsatisfactory condition of the engineering networks and communications, household and plumbing equipment;
- obsolete soft inventory and dirty bedding, the lack of bedding for some prisoners;
- the violations of rules of fire safety, rodents in living quarters;
- the lack of necessary household appliances, sufficient quantity of furniture and inventory, in particular, stools, rubber mats in the bath, as well as the lack of one’s possibility to regulate the water temperature during bathing;
- secret use of the premises unfit for holding which are not used officially;
- insufficient number of multi-occupancy premises for the convicts sentenced to life imprisonment who have already served 10 years of imprisonment;
- improper equipment of industrial areas which violates the industrial safety rules and non-provision of safety equipment to the convicts during hazardous works;
- impaired access to drinking water⁷⁴.

70. One of the main factors of the above-mentioned improper detention conditions is corruption. For example, two deputies governors and an intermediary were arrested in Kharkiv, who, according to the investigation, illegally sold food procured for the convicts at the expense of the budget⁷⁵, and the head of a facility in Sumy was arrested for embezzlement of 250 thousand hryvnias⁷⁶. The low efficiency of the control over the financial and economic activities of facilities due to the lack of an independent control body in this area should be noted. In the PI that are directly subordinate to State Criminal Executive Service (SCES) the control was carried out by the higher governing bodies and officials of SCES⁷⁷, the direct control over SIZO is also carried out by SCES or its interregional divisions⁷⁸.

⁷⁴<https://ukrajina.fnst.org/sites/default/files/uploads/2020/02/12/analitichnyyzvitmonitvivyty2019.pdf>

⁷⁵<https://www.unian.ua/incidents/10770752-u-harkovi-kerivniki-koloniy-krali-u-v-yazniv-jizhu-ta-prodavali-jiji-u-magazini.html>

⁷⁶<http://sumy.today/news/crime/7927-nachalnyka-sumskoi-kolonii-pidozriuiut-u-pryvlasnenni-chverti-miliona-hryven.html>

⁷⁷Art. 23 of the Criminal Executive Code

⁷⁸p.1 art. 5 Section 1 of the Law of Ukraine “On Pre-Trial Detention”

Recommendations

EPLN and KHPG respectfully call on the Committee of Ministers to request the Government of Ukraine to:

- ensure that the prosecuting authorities only request pre-trial detention and its extension as a last resort;**
- increase funds for prison repairs, if necessary by developing a long-term strategy in conjunction with international donors;**
- set up an independent body responsible for monitoring the financial and economic activities of penitentiary establishments with a view to detecting corruption and referring criminal acts to investigative bodies; ensure that the civil organisations to be visited can exercise vigilance over the proper functioning of this body, in particular by giving them free access to SIZOs**
- check that the location of prisons guarantees respect for the rights of the defence and the maintenance of family ties; to this end, check whether the decisions to suspend the activities of prisons are genuinely based on criteria relating to the conditions of detention;**
- in line with the CoE White paper on prison overcrowding, develop a global strategy to reduce the prison population by organising consultation with all the actors concerned, organisations and international donors;**
- accordingly, review the rules governing pre-trial detention and the scale of penalties.**

III. Procedural mechanisms without effectiveness

III.1 remedies for poor conditions of detention and insufficient care

71. According to the previous communications from Ukraine⁷⁹, the Parliament approved in principle the Draft Law “*On Prevention and Compensation Measures in connection with Torture, Inhuman or Degrading Treatment or Punishment of Convicted and Detained Persons and the Introduction of Penitentiary Judges*” (No. 4936 dated 8 July 2016). It is noteworthy, however, that according to the Parliament website⁸⁰, this proposed law was withdrawn on 29 August 2019. It does not appear that the establishment of the appeal mechanism has therefore been seriously considered. In any event, the Government once again hides behind a working group and draft law, without giving any concrete elements. The situation thus remains unchanged in relation to the finding in the *Sukachov* judgment as regards remedies.
72. General criminal statistics show that in 2018 and 2019, no one was convicted for acts of “improper performance of professional duties by a medical or pharmaceutical worker” (Art. 140 of the Criminal Code)⁸¹. In 2019, there was not even a single prosecution on this basis. This shows that the acts of prevarication for which some healthcare personnel are responsible are not prosecuted.
73. In comparison, it should be noted that France was the subject of a quasi-pilot judgment on account of its conditions of detention, delivered on the same day as the *Sukachov v. Ukraine judgment*. In this case, the Court found the structural nature of the violation of Article 3 on account of the conditions of detention and noted the lack of effectiveness of French preventive remedies. France's supreme courts have already drawn the consequences of the European Court's judgment, either

⁷⁹ DH-DD(2017), Action plan (26/10/2017), p. 14, Action plan (03/04/2017), p. 19

⁸⁰ Draft Law on Preventive and Compensatory Measures in Relation to Torture, Inhuman or Degrading Treatment or Punishment of Convicts and Detainees and the Establishment of the Institution of Penitentiary Judges.
http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59613.

⁸¹ Prosecutor General's Office of Ukraine, Statistical Data.

http://old.gp.gov.ua/ua/stst2011.html?dir_id=113277&libid=100820&c=edit&c=fo.

overturning a landmark case law or invalidated legislative provisions leading to a result contrary to the Convention. Recalling that any national judge, as the person responsible for applying this Convention, must take account of the decisions of the ECtHR without waiting for any amendment to the texts, the Court of Cassation (the Judiciary Supreme Court) states in a judgment of 8 July 2020⁸² that it is up to the judicial judge to have the allegations of unworthy conditions of detention made by a detainee verified, provided that they are credible, precise, current and personal. In cases where the verifications thus undertaken establish the reality of the alleged violation of the principle of dignity of the detained person without having been remedied since then, the judge must order the release of the person by imposing, possibly, house arrest with electronic surveillance or judicial control. In a decision of 2 October 2020⁸³, the Constitutional Council required the legislator to guarantee that persons placed in pre-trial detention have the possibility to bring before a judge conditions of detention that are contrary to human dignity, in order to put an end to them.

III.2 Release on medical grounds

74. The failure of the medical release mechanism means that prison medicine must assume responsibility for the care of patients for whom it is not equipped. It leads to the maintenance over time of situations which are manifestly contrary to Article 3 of the Convention. The problems are at different levels: the shortcomings of the special medical commissions in charge of determining whether a convict has an illness that makes him or her eligible for such release; administrations' reluctance to refer inmates to these commissions; corruption in the system. Another issue is the approach of judges toward such release, since, after receiving the conclusion of a special medical commission on whether a convict has an illness from the appropriate lists, they apply the same criteria as for conditional release, even when the convicts are at the final stage of a terminal illness or have lost the ability to live on their own (such as in the case of full blindness or loss of limbs).
75. When deciding whether to release a person on the grounds of a serious illness, Ukrainian courts still use the guidelines (amended⁸⁴) of the Plenum of the Supreme Court of 1973, which requires, in addition to the opinion of a medical commission, to consider the gravity of the convict's crimes, his behavior in detention, his attitude toward labour, as well as how well he has been reformed, rather than the criteria set up in ECtHR's case law⁸⁵.
76. Also, according to the ECtHR, "*it is not acceptable that the compatibility of the applicant's state of health with his detention was assessed solely by reference to an exclusive list of diseases and without any appropriate review by national judicial authorities.*" (ibid., para. 61). In fact, however, a person has no concrete chance of being released if his or her pathology is not on the established list. As a result, it frequently happens that inmates suffering from serious illnesses die in prison, while those fortunate enough to be released do not live long afterwards.⁸⁶
77. A systematic analysis of the rulings in national Register of Judicial Decisions from 1 January 2010 till 30 September 2020, shows that only in 1.5% of the 4072 judgments, delivered by trial courts, and 311 judgments delivered by appellate courts refers to the relevant case law of the ECtHR. Such the

⁸² Crim. 8 juill. 2020, FS-D, n° 20-81.739, Crim. 8 juill. 2020, FS-P+B+R+I, n° 20-81.739

⁸³ Ruling n° 2020-858/859 QPC, 2 Octobre 2020

⁸⁴ Decree of the Plenum of the Supreme Court of Ukraine №8, of 28 September 1973 "On the practice of application by courts of the legislation on release from serving of punishment of the convicts who fell ill with a serious illness". <https://zakon.rada.gov.ua/laws/show/v0008700-73>.

⁸⁵ See for instance, *Yermolenko v. Ukraine*, Application № 49218/10, 15 February 2013.

⁸⁶ KHPG StrategicLitigationDatabase.

approach of domestic courts deteriorated problems of prison medicine in Ukraine and makes impossible the only way for prisoners suffering from incurable diseases (eg. cancer of high stages, AIDS) to leave the penitentiary alive.

Recommendations:

EPLN and KHPG respectfully call on the Committee of Ministers to request the Government of Ukraine to:

- make without delay the legislative changes needed to meet the requirements of effective remedies, both preventive and compensatory, drawing on the experiences of other European States where appropriate;**
- issue a normative act defining precisely the substantive and procedural conditions for the examination of applications for release on medical grounds**

List of recommendations

EPLN and KHPG respectfully call on the Committee of Ministers to request the Government of Ukraine

- regarding health issues, to:

- urgently fill the vacancies for health care workers and the need for equipment and medicines;**
- clarify as soon as possible the chain of responsibility within the medical units and designate those responsible for the quality of care;**
- initiate, possibly in the form of a consensus conference, a transparent process for the transfer of prison medicine to the Ministry of Health, comprising a national debate involving all the actors concerned, including civil society and international organizations, to identify the main difficulties and the means of resolving them, and to define the main stages of the reform.**

- regarding issues related to conditions of detention, to:

- ensure that the prosecuting authorities only request pre-trial detention and its extension as a last resort;**
- increase funds for prison repairs, if necessary by developing a long-term strategy in conjunction with international donors;**
- set up an independent body responsible for monitoring the financial and economic activities of penitentiary establishments with a view to detecting corruption and referring criminal acts to investigative bodies; ensure that the civil organisations to be visited can exercise vigilance over the proper functioning of this body, in particular by giving them free access to SIZOs**
- check that the location of prisons guarantees respect for the rights of the defence and the maintenance of family ties; to this end, check whether the decisions to suspend the activities of prisons are genuinely based on criteria relating to the conditions of detention;**
- in line with the CoE White paper on prison overcrowding, develop a global strategy to reduce the prison population by organising consultation with all the actors concerned, organisations and international donors;**

-accordingly, review the rules governing pre-trial detention and the scale of penalties.

-regarding procedural obligations, to:

-make without delay the legislative changes needed to meet the requirements of effective remedies, both preventive and compensatory, drawing on the experiences of other European States where appropriate;

-issue a normative act defining precisely the substantive and procedural conditions for the examination of applications for release on medical grounds

In addition, EPLN and KHPG also call on the Committee of Ministers, to:

-separate the examination of groups of cases concerning access to health care in prison from those concerning material conditions of detention, as the necessary reforms involve distinct responses, actors and timeframes;

-act with the Directorate General for Human Rights to ensure that prison health issues are given greater priority in cooperation programmes and find synergies with relevant EU instruments to support the completion of the required processes.

Done in Kyiv, 27 October 2020