

IN BREACH OF INTERNATIONAL LAW:

**UKRAINIAN DRUG LEGISLATION
AND THE EUROPEAN CONVENTION
FOR THE PROTECTION
OF HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS**

Written by Mikhail Golichenko, Canadian HIV/AIDS Legal Network
Simona Merkinaite, Eurasian Harm Reduction Network



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Introduction: Conformity of Resolution No. 634 with the European Convention

Ukrainian Ministry of Health Resolution No. 634 dated 29 July 2010 “On amendments to Ukrainian Ministry of Health Resolution No. 188 dated 01.08.2000” (hereinafter “Resolution No. 634”) was registered by the Ukrainian Ministry of Justice on 7 October 2010 under registration number 900/18195. The Resolution brought into force amendments that significantly reduce the legal threshold for “small,” “large” and “extra large” quantities of certain types of illegal drugs, including those most commonly used by people who use drugs in Ukraine.

The threshold for criminal liability for possession of acetylated opium,¹ for example, was reduced by a factor of 20, a situation that means that first and foremost Resolution No. 634 will have substantial negative impacts on people possessing illegal drugs. Anyone detained for the possession of between 0.005 and 1 gram of acetylated opium or heroin faces criminal prosecution and a possible penalty of up to three years incarceration or other restriction of freedom. Before the Resolution was introduced, individuals incurred criminal liability if they were detained with 0.1 gram or more of acetylated opium. A quantity of 0.005 grams is approximately the amount that can be found from residue in several used syringes.

Based on the experiences of drug law enforcement in other countries in the region, we predict that Resolution No. 634 may have the following effects:

- It will endanger needle and syringe exchange programs (NSPs) that have been the cornerstone of Ukraine’s effective HIV prevention efforts, because outreach staff and people who use drugs who collect or return used syringes will face the threat of criminal prosecution if they are detained with used syringes containing drug residue.²
- Higher rates of incarceration for petty drug offenses will lead to further overcrowding in Ukraine’s already strained prison system, and subsequently will lead to higher prevalence of communicable disease such as HIV, hepatitis and tuberculosis (TB) among prisoners.³

¹ Acetylated opium, locally known as “shirka,” is the most widely-used illegal injected drug in Ukraine (European Centre for Monitoring of Drugs and Drug Addiction. Countries overview: Ukraine, available at: <http://www.emcdda.europa.eu/publications/country-overviews/ua#pdu>).

² On 11 November 2010, the Ukrainian Cabinet’s National Council on Combating HIV/AIDS advised the Ukrainian Ministry of Health to amend Resolution No. 188 dated 01.08.2000 and revoke the provisions on small quantities of drugs.

³ The Committee on Economic, Social and Cultural Rights has noted its concern about the high incidence rate of tuberculosis among prisoners and the fact that tuberculosis is the main cause of death among people with HIV/AIDS. See the Concluding

- More stringent criminal liability will make people who use drugs even harder for health and social services to reach, undermining HIV prevention, care and treatment, drug dependency treatment, and other vital services. ⁴
- The mandate to investigate, prosecute, and imprison a significantly larger number of petty drug offenders will reduce the criminal justice system's ability to deal with more serious offenses, and will necessarily increase government spending at the expense of other national priorities such as health care.
- The authority to impose severe criminal penalties for possession of very small quantities of illegal drugs creates a substantial opportunity for corruption among law-enforcement officers and judicial bodies.

According to the laws of Ukraine, regulatory acts issued by the ministries should conform to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter 'the European Convention'),⁵ the practice of the European Court, and international treaties to which Ukraine is a signatory.⁶

Our analysis of Resolution No. 634 indicates that it does not conform to the European Convention or the practice of the European Court with respect to the application of Article 5(1)(a) (on the right to liberty and security of person), Article 7 (no punishment without law) and Article 14 (prohibition of discrimination) of the European Convention. The Resolution should be repealed in favour of a human rights-based and public health-oriented approach.

On 27 April 2011 the International HIV/AIDS Alliance in Ukraine filed a complaint with the Circuit Administrative court of the city of Kyiv, Ukraine, challenging Resolution No. 634 on the basis that it does not conform to the European Convention and other international treaties of Ukraine. The International HIV/AIDS Alliance is implementing the National HIV/AIDS Response Program. The implementation of the Resolution directly affects the possibility to efficiently implement the program, as the people who use drugs are put at increased risk of HIV and the needle and syringe programs are reluctant to provide needle exchange. The complainant claims that Resolution No. 634 as establishing the "small amount" for acetylated opium and "large amounts" of precursors such as "acetic anhydride", "ephedrine" and "pseudoephedrine", must be quashed

Observations of the Committee on Economic, Social and Cultural Rights, Ukraine, E/C.12/UKR/CO/5, 2008, § 29.

⁴ Jürgens R, Csete J, Amon J, Baral S, Beyrer C. *People who use drugs, HIV, and human rights*. Lancet 2010 Jul 20. Wolfe D, Cohen J, "Human Rights and HIV Prevention, Treatment and Care for People Who Inject Drugs: Key Principles and Research Needs", Journal of Acquired Immune Deficiency Syndrome. 55 (2010): S56-S62. Burris S, Blankenship KM, et al, "Addressing the "risk environment" for injecting drug users: the mysterious case of the missing cop." Milbank Q82(1): 125-156.

⁵ Ukraine ratified the European Convention under Law No. 475/97-VR dated 17 July 1997, which recognizes the jurisdiction of the European Court of Human Rights in all matters pertaining to the interpretation and application of the Convention.

⁶ The Statute on the State Registration of Regulatory Acts of Ministries and Other Executive Agencies was approved by Resolution No. 731 of the Ukrainian Cabinet of Ministers dated 28 December 1992. Paragraph 2 of the Resolution requires that Paragraphs 13 and 17 of the Statute on State Registration provide that a regulatory act's non-conformity with the judicial practice of the European Court constitutes grounds for denying or revoking state registration. Similar grounds are also provided for by Ministry of Justice Resolution No. 32/5 dated 31.07.2000 "On the procedures for revoking state registration of regulatory acts entered into the state register".

Article 5 (1)(a) of the European Convention: the right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: a) the lawful detention of a person after conviction by a competent court;

Scope of application of Article 5(1)(a)

Article 5 protects the individual's right to liberty from arbitrary interference by the state.⁷ "It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5(1) and the notion of "arbitrariness" in Article 5(1) extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention."⁸

The interpretation of the notion of "arbitrariness" varies, depending on the grounds for restricting the right to freedom as specified in Article 5(1).

"Arbitrariness" for the purposes of Article 5(1)(a) occurs in cases where "despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities,"⁹ or the order to detain and the execution of the detention do not genuinely conform with the purpose of the restrictions permitted by the sub-paragraph (a) of Article 5(1).¹⁰ For the purposes of Article 5(1)(a), the word 'conviction' has to be understood

⁷ *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, § 37.

Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A no. 145-B, § 58

⁸ *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008

⁹ *Ibid.* §69, 71

¹⁰ *Ibid.*

as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence,¹¹ and the imposition of a penalty or other measure involving deprivation of liberty.¹²

In the absence of bad faith or deception, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Article 5(1).¹³

How does Resolution No. 634 provide for arbitrary detention?

Resolution No. 634 was adopted for the purpose of imposing criminal and administrative liability for drug offenses and applying punishments in the form of detention and administrative arrest. The application of these punishments is consistent with Article 5(1)(a) “the lawful detention of a person after conviction by a competent court”.

In this connection it is necessary to assess whether Resolution No. 634 provides, in a good faith manner free of deception, for the establishment of guilt and the imposition of penalties for crimes stipulated in Article 309 of the Criminal Code of Ukraine.

Criminal Code of Ukraine (adopted on 5 April 2001)

Article 3 (3)

Criminality of action as well as its punishability and other criminal and legal consequences are defined exclusively by the Criminal Code of Ukraine

Article 305 (note)

Large and extra large quantity of narcotic drugs and psychotropic substances shall be defined by the specially designated executive power body in charge of public health.

¹¹ *Guzzardi v. Italy*, 6 November 1980, § 100, Series A no. 39

¹² *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50

¹³ *T. v. the United Kingdom* [GC], no. 24724/94, § 103, ECHR 2000-I ; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV

Code of Administrative offences of Ukraine (adopted on 7 December 1984 as amended by 17 February 2011)

Article 44 (note)

Small amount of narcotic drugs and psychotropic substances shall be defined by the specially designated executive power body in charge of public health.

The Ukrainian Ministry of Health Resolution No. 188 dated 01.08.2000, which was amended by Resolution No. 634, was adopted as a consequence of the note to Article 305 of the Criminal Code and the note to Article 44 of the Code of Administrative offences. Legislators delegated the authority to define the threshold amounts of drugs for the purpose of administrative and criminal liability to the Ministry of Health because drug offences, as stipulated in Article 309 and Chapter 13 of the Criminal Code, are deemed to be “crimes against public health.”

Resolution No. 188 does not define criminality or other legal consequences of criminal action but rather serves to clarify what quantities of illicit drugs may be considered “small,” “large” and “extra large” for the purpose of imposing criminal or administrative liability. Therefore Resolution No. 188, as amended by Resolution No. 634, serves as the basis for legal interpretation of the Criminal Code by law enforcement and criminal justice actors when they deal with drug offences.

If the justification for the specified quantities of drugs contains elements of bad faith and deception, these elements transfer over to officials’ actions when deciding to impose criminal liability. Therefore, deprivation of liberty as a form of penalty based on the quantities set forth in Resolution No. 634 would contravene Article 5(1)(a) of the European Convention.

The framework of threshold drug quantities for criminal and administrative liability

Ukrainian Ministry of Health Resolution No.188 establishes a table describing the weight of illegal drugs considered to represent a ‘small’, ‘large’, and ‘extra large’ amount for the purpose of criminal and administrative liability. The threshold amounts set by the Resolution No. 634 for heroin and acetylated opium are cited below:

Narcotic drug	Small amount (g)	Large amount (g)	Extra large (g)
Heroin	Less than 0.005	From 1 to 10	More than 10
Acetylated opium	Less than 0.005	From 1 to 10	More than 10

Comparison of the new version of the Tables of Small, Big and Particularly Big Amounts of Drugs, Psychotropic Substances and Precursors in Illicit Circulation¹⁴ to previous Resolution is below:

Drug, psychotropic substance/ precursor	Criminal liability starting from (g) (Resolution 634)	Criminal liability starting from (g) (Resolution No. 188)
Acetylated opium	From 0.005	From 0.1
Heroin	From 0.005	From 0 g

It is important to note that possession of a ‘small’ amount of drugs (less than 0.005 gram in the case of acetylated opium or heroin) with no intent to supply is an administrative offence punishable with up to 15 days of administrative arrest. Possession of any amount from 0.005 to 0.99 gram is a criminal offence with a maximum penalty of three years’ imprisonment.

Justification for changes introduced by Resolution No. 634

Ukrainian authorities justified the reduced threshold quantity of drugs in Resolution No. 634 with a reference to the international practice namely the concept of the “defined daily dose” (hereafter “DDD”) as provided by the International Narcotics Control Board (INCB). According to the Resolution No. 634, the threshold between a “small amount” of drugs and the amount of drugs for criminal liability was defined as the result of the DDD multiplied by a factor of 10. By using such a formula the threshold amount for acetylated opium was calculated as not exceeding 0.005 grams.

First, the amount defined by the Resolution is significantly lower and does not correspond to the one identified by INCB. A daily dose of opium is defined in the INCB’s tables as 0.1 grams and the daily dose of heroin as 0.03 grams.¹⁵ Based on these amounts, multiplied by a presumed ten-day supply of a drug, and applying the methodology set forth in Resolution No. 634, a small amount of heroin should not exceed $0.03 \times 10 = 0.3$ grams; or a small quantity for opium $0.1 \times 10 = 1$ gram.

Second, this approach by Ukrainian policymakers represents a gross misunderstanding of the DDD concept. As the INCB has stated, “defined daily doses represent technical units of measurement for the purpose of statistical analysis and are not recommended prescription doses. Their definitions are not free of a certain degree of arbitrariness. Certain narcotic drugs may be used in certain countries for different treatments.”¹⁶ In other words, the INCB

¹⁴ The Resolution sets the threshold for 25 different substances, the whole list can be found at: <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=z0512-00>.

¹⁵ INCB, Tables of reported statistics, 2009. P. 166 http://www.incb.org/pdf/technical-reports/narcotic-drugs/2009/tables_of_reported_statistics.pdf.

¹⁶ Ibid. at. p.167.

is not in any way implying that the DDD is a standard prescribed dose of a drug to be used for legal medical purposes, much less for the purpose of defining prosecution of people for illicit drug use.

The purpose of the DDD is purely as a means of normalizing statistics on narcotic drugs between different countries and medical systems. It is explicitly *not* intended as guidance on either medical practice or as an estimate of the quantity of an illegal substance that a person might use. It may also be pointed out that acetylated opium is not used in medical practice in any country, and defining the daily dose of this substance using INCB's statistical units is not possible. It is obvious that the reasoning for Resolution No. 634 was done in bad faith and misleads the public and legal practitioners by lending artificially-established drug quantities an air of legitimacy and conformity with international practice.

Correspondence of the Resolution No. 634 to healthcare goals?

The bad faith or deceptive nature of the approach to defining drug quantities under Resolution No. 634 is further evidenced by the resolution's incompatibility with its implied public health goals.

Resolution No. 634 was developed and approved by the Ukrainian Ministry of Health, which is the lead agency in the government's system for ensuring the implementation of policy in the sphere of health care¹⁷. Chapter 13 of the Criminal Code is called "Drug crimes and other crimes against public health". This suggests that establishing certain acts as crimes under Chapter 13 of the Criminal Code should promote the public health.

Reducing the threshold for quantities of drugs for criminal prosecution focuses the efforts of law-enforcement agencies and judicial bodies on people who use drugs rather than drug dealers. Repressive measures against people who use drugs impede their access to medical and social services and HIV prevention and care programs, and hinder the work of HIV prevention programs among people who inject drugs.¹⁸

Due to the risk of being arrested and detained if their drug using status is known, people who use drugs often avoid social and health service workers, and are often forced to engage in risky practices that increase the risk of

¹⁷ Resolution No. 1542 of the Ukrainian Cabinet of Ministers dated 02.11.2006 "On approving the Statute on the Ukrainian Ministry of Health".

¹⁸ Jürgens R, Csete J, **Amon J**, Baral S, Beyrer C. *People who use drugs, HIV, and human rights*. Lancet 2010 Jul 20; Wolfe D., Cohen J., "Human Rights and HIV Prevention, Treatment and Care for People Who Inject Drugs: Key Principles and Research Needs". Journal of Acquired Immune Deficiency Syndrome. (55): S56-S62, December 1, 2010. Burris S., K.M. Blankenship, et al, "Addressing the "risk environment" for injecting drug users: the mysterious case of the missing cop." Milbank Q82(1): 125-156; UN General Assembly, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2010. A/HRC/15/L.28; OSI, *The Effect of Drug User Registration Laws on People's Rights and Health: Key Findings from Russia, Georgia, and Ukraine*, Open Society Institute, New York, 2009.

overdose or of contracting HIV, hepatitis, or other injection-related disease.¹⁹ Increasing the number of people in detention increases the frequency of prison overcrowding and the spread of infectious disease between inmates.²⁰ By impeding access to medical and social services and creating the conditions for otherwise preventable morbidity and mortality, Resolution No. 634 undermines the public health goals that are otherwise the very reason for the existence of the Ministry of Health.²¹

Lack of conformity with international law

The European Court has repeatedly stated that one must take into account the standards and principles of international law when interpreting the provisions of the Convention.²² On this basis, Resolution No. 634 should be assessed in light of its conformity with international law regarding the deprivation of liberty for possession of drugs without intent to distribute, and for its compatibility with the right to health. Implementation of both the UN Conventions on drugs and national drug laws must also be consistent with human rights obligations.²³ The following summarizes recent interpretations of international law relevant to the health and human rights aspects of Resolution No. 634:

- The International Committee on Economic, Social and Cultural Rights sees the adoption of laws that hinder people from exercising their right to health and that lead to unnecessary morbidity and preventable deaths as a violation of Article 12 of the Covenant on Economic, Social and Cultural Rights.²⁴
- In 2007, the Committee on Economic, Social and Cultural Rights interpreted the availability of harm reduction services to be a necessary condition for meeting the obligation to ensure each person's right to the highest attainable level of physical and mental health. The Committee expressed its concern over

¹⁹ European Monitoring Centre for Drugs and Drug Addiction, Annual report 2007: the state of the drugs problem in Europe. Luxembourg, 2007; Bernstein KT, Bucciarelli A, Piper TM, Gross C, et al. "Cocaine- and opiate-related fatal overdose in New York City, 1990-2000." *BMC Public Health*. (2007); Farrell M, Marsden J. "Acute risk of drug-related death among newly released prisoners in England and Wales." *Addiction*. 103(2) (2008):251-5; Eurasian Harm Reduction Network, "Overdose: the main cause of death among IDU and PLWH in Central and Eastern Europe and Central Asia. Recommendations and overview of the situation in Latvia, Kyrgyzstan, Romania, Russia and Tajikistan", 2008; Eurasian Harm Reduction Network, Open Society Institute, "Why Overdose Matters for HIV, 2010.

²⁰ Among other things, the incidence of HIV is higher in prisons than among the general population – Jurgens R, Ball A, Verster A (2009). Interventions to reduce HIV transmission related to injecting drug use in prison. *The Lancet*. (2009). pp. 57 - 66.

²¹ For example of how health care is interconnected with law-enforcement, judicial and penitentiary activities, see Open Society Institute, "Harm Reduction: Public Health and Public Order. http://www.aidslex.org/site_documents/DR-0048R.pdf

²² *Al-Adsani v. the United Kingdom*, [GC] no. 35763/97, § 55, ECHR 2001-XI; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-III.

²³ INCB, Annual Report, 2007. *Commentary on the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, 1988* (New York: United Nations, 1998), p. 49.

²⁴ Committee on Economic, Social and Cultural Rights, General Comments No. 14: The right to the highest attainable standard of mental and physical health: Art 12, E/C/12/2000/4, August 11, 2000.

limited access to OST for people who use drugs in Ukraine and advised the government to adopt measures to make it more readily available.²⁵

- A UN General Assembly resolution on international cooperation against the world drug problem states that “countering the world drug problem is a common and shared responsibility that must be addressed in a multilateral setting, requires an integrated and balanced approach and must be carried out in full conformity with the purposes and principles of the Charter of the United Nations and other provisions of international law.”²⁶
- The Political Declaration and Plan of Action on International Cooperation toward an Integrated and Balanced Strategy to Counter the World Drug Problem calls for a balanced approach toward reducing demand for drugs, in which countering drug abuse is seen as a medical and social problem and in light of protecting human rights.²⁷
- The Political Declaration on HIV/AIDS calls for states to adopt legislation ensuring that members of vulnerable groups have access to health care, social and medical services, HIV prevention and treatment, and information and legal protection.²⁸
- The Human Rights Commission and subsequent Human Rights Council have repeatedly called on governments to ensure that their domestic legislation is consistent with human rights obligations so that criminal penalties are not used in bad faith against groups vulnerable to HIV, in full accordance with the International Guidelines on HIV/AIDS and Human Rights.²⁹
- The UN Commission on Narcotic Drugs has called on UN member states to eliminate potential barriers to achieving universal access to HIV prevention, care and treatment, so that people living with HIV or at higher risk of HIV infection, including people who use drugs, have access to appropriate services.³⁰ This also includes recommendations regarding the prevention of other infectious diseases among people who inject drugs, such as TB and hepatitis.

According to international standards and principles, the imposition of criminal penalties as part of efforts to reduce demand for drug – particularly the deprivation of liberty – should not create obstacles to exercising the right to health. Resolution No. 634 does not meet this criterion.

²⁵ Committee on Economic, Social and Cultural Rights, Concluding observations. Assessment of reports presented by participating states in accordance with Articles 16 and 17 of the Covenant on the: Ukraine. 4 January 2008. E/C.12/UKR/CO/5. Paras 28 and 51: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/400/45/PDF/G0840045.pdf?OpenElement>.

²⁶ UN General Assembly, Resolution A/Res/62/176, 17 March 2008. Para 14.

²⁷ E/2009/28E/CN.7/2009/12. A Russian version of the Declaration can be found on the UNODC website at <http://www.unodc.org/documents/commissions/CND-Uploads/CND-52-RelatedFiles/V0984965-Russian.pdf>.

²⁸ UN General Assembly Resolution 60/262, 2 June 2006.

²⁹ Human Rights Council Resolution 12/27: Protection of Human Rights in the Context of HIV/AIDS. A/HRC/RES/12/27, October 2, 2009

³⁰ Commission on Narcotic Drugs, Resolution 53/9: Achieving universal access to prevention, treatment, care and support for drug users and people living with or affected by HIV. March 10, 2010.

Lack of conformity with scientific research

The results of scientific studies have played an important role in the interpretation and application of the European Convention, including the re-examination of previous court decisions when new scientific information comes to light, such as information regarding the application of criminal law.³¹

According to the European Court, “the need for appropriate legal measures should be kept under review having regard particularly to scientific and societal developments.”³² In this connection, Resolution No. 634 must be assessed in terms of the scientific justification for applying penalties for possession of small quantities of narcotic drugs.

According to data from numerous studies, increasing arrests and other repressive measures against people who use drugs does not have any discernible effect on the level of drug use among the population³³ nor do they reduce access to illegal narcotic drugs; the availability of and access to narcotic drugs is unaffected by extensive use of punishment.³⁴ The results of “deterrence” appear even less significant in light of the amount of spending on the justice and incarceration system, together with the negative effects of overcrowding in prisons and the negative impact on health care in community and in prisons.³⁵ Research shows that alternatives to criminal prosecution and detention for minor drug offences are highly effective.³⁶

The United Nations Office on Drugs and Crime has noted the ineffectiveness of deterrent criminal penalties and, on the basis of scientific analysis, recommends no detention for insignificant drug crimes.³⁷ A report by the Special Rapporteur on the Right of Every Person to the Highest Attainable Level of Physical and Mental Health

³¹ *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 112, 4 December 2008); *I. v. the United Kingdom*, [GC] no. 25680/94, §72, 11 July, 2002

³² *Rees v. the UK*, no. 9532/81, 17 October 1986, §47, Series A106.

³³ Friedman, Samuel R., Pouget et al, “Drug Arrests and Injecting Drug Deterrence”, *American Journal of Public Health*. (2011) 101: 344-349; Werb, D., G. Rowell, et al, “Effect of drug law enforcement on drug-related violence: evidence from scientific review”, *International Center for Science in Drug Policy*, 2010; L. Degenhardt, W-T Chiu, N. Sampson et al., “Toward a global view of alcohol, tobacco, cannabis, and cocaine use: Findings from the WHO World Mental Health Surveys,” *PLOS Medicine* (2008).5:1053-67; “Consultation paper on sentencing for drug offences”, UK Drug Policy Commission., July, 2009.

³⁴ United States Office of National Drug Control Policy; *The Price and Purity of Illicit Drugs: 1981 through the Second Quarter of 2003*; Reuter P., “Ten years after the United Nations General Assembly Special Session (UNGASS): assessing drug problems, policies and reform proposals”, *Addiction* 2009;104:510-7.; Peter Reuter (RAND) and Franz Trautmann (Trimbos Institute), “A report on Global Illicit Drugs Markets 1998-2007”, *European Communities*, 2009.

³⁵ D. Bewley-Taylor, C. Hallam and R. Allen, “The incarceration of drug offenders: an overview”, *The Beckley Foundation Drug Policy Program*, March 2009.

³⁶ Canadian HIV/AIDS Legal Network: *Mandatory minimum sentences for drug offences. Why everyone loses. Briefing paper.* April, 2006. P. 4.
<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=1455>

³⁷ *World Drug Report 2009*. See the Preface by the Executive Director, and pp. 166-169.

in accordance with Resolution 6/29 of the Human Rights Council also cites evidence of the ineffectiveness of penalties for the use and possession of narcotic drugs without intent to sell/supply.³⁸

If Resolution No. 634 is intended to have any public health value at all, one wonders what the rationale could be: no medical or public health body recognizes incarceration as a ‘treatment’ for drug dependency. Assuming that one major indicator of the public health efficacy of drug policy is a reduction in illegal drug use, Resolution No. 634 is not supported by evidence. Comparing incarceration to various community-based drug treatment options, no study has ever found drug treatment outcomes to be improved by incarceration, or the threat of incarceration through ‘drug courts’ or similar mechanisms.³⁹

From an economic perspective, alternatives to incarceration options are considerably more viable than increasing the prison population. Extensive cost-benefit research from the United States and elsewhere has consistently found that, compared to incarceration, community-based drug treatment produces cost savings and other benefits. A recent systematic review found that studies estimated that every 1 USD invested in drug treatment produced savings between USD 1.33 and USD 23.33 (depending on the kind of program evaluated) for health and criminal justice systems.⁴⁰ Similarly, research has not found an association between prison or the threat of incarceration and reduced recidivism for crimes related to drug dependency. A review of evidence in the United States found that probation-supervised drug treatment and standard community-based drug treatment both reduced recidivism as much or even more than programs using the threat of incarceration, and did so at significantly lower cost.⁴¹

Research on law enforcement practices in European Union member states conducted by the European Monitoring Centre for Drugs and Drug Addiction shows a trend toward not using incarceration for the possession of quantities of drugs that suggest intent for personal use.⁴²

³⁸ Note by the Secretary General. General Assembly, A/HRC/15/L.28, 6 August 2010.

³⁹ California Society of Addiction Medicine, “Proposition 36 Revisited” <<http://www.csam-asam.org/prop36article.vp.html>>; Goldkamp et al., “Do Drug Courts Work?”; Hepburn, John R., and Angela Harvey, “The Effect of the Threat of Legal Sanction on Program Retention and Completion: Is That Why They Stay in Drug Court?” *Crime and Delinquency* 53, no. 2 (2007): 255-280.

⁴⁰ Ettner, Susan L. et al., “Benefit-Cost in the California Treatment Outcome Project: Does Substance Abuse Treatment Pay for Itself?” *Health Services Research* 41, no. 1 (2006): 192-213.

⁴¹ Drake, Elizabeth, Steve Aos, and Marna G. Miller, “Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State,” *Victims and Offenders*, 4:170-196 <www.wsipp.wa.gov/rpt-files/09-00-1201.pdf>.

⁴² European Monitoring Centre for Drugs and Drug Addiction: Illicit drug use in the EU: legislative approach, 2005. pp. 13, 22.

Use of daily doses in laws of other countries

It is worth noting that, in some countries, a daily dose (not the DDD of INCB) is used as one criterion for defining the nature and degree of liability for drug possession. However, daily doses are not calculated on the basis of the arbitrary INCB estimates of medical use, but based on actual average doses of street drugs for non-medical use by persons with varying degrees of tolerance and taking into account variation in the purity of street drugs.

For example, ten daily doses of heroin is defined as 1 gram in Portugal.⁴³ In the Czech Republic, a small quantity is 1.5 grams or less of heroin,⁴⁴ and people found in possession of this amount of the drug are not subject to criminal liability.⁴⁵ The quantity was established with due regard for the Czech drug scene, corresponding to two daily doses for “hardcore/addicted” users and daily doses for seven days for “non hardcore” users, thus also making it possible to approach the possession of illegal substances in an individualized manner.⁴⁶ By contrast, the INCB’s DDD concept used to justify changes made through Resolution No. 634 does not reflect the realities of drug use and does not account for varying street drug purity or different levels of tolerance among people who use drugs. As such, they cannot justifiably be used as criteria for the criminality and punishability of an act.

It also must be pointed out that according to the European Monitoring Centre for Drugs and Drug Addiction the utilization of daily doses in member countries of the European Union over the past 15 years (in Belgium, Greece, Germany, The Netherlands, Portugal and Finland) has served as a method for differentiating between criminal liability for drug supply and actions related to drug use itself, including possession for personal use. Liability for drug supply is an area for the application of criminal law, but there is no legitimate rationale for criminal liability if drug use and dependency are to be considered a public health issue.⁴⁷

⁴³ Ibid pp. 14, 26

⁴⁴ Smallest quantity of the active psychotropic substance which a substance designated as a drug must contain in order for the quantity thereof under examination to be deemed greater than small – 0.2 g of base (0.22 g hydrochloride) Ref.: extract from the Government Decree # 467/2009 coll., stipulating for the purposes of the criminal code those substances deemed to be poisons and what quantity is deemed to be a quantity greater than small for narcotic substances, psychotropic substances, preparations and poisons: http://www.drogy-info.cz/index.php/english/czech_drug_related_legislation_2010_summary_of_relevant_information_and_full_texts (assesses Nov 24, 2010).

⁴⁵ (Act No. 40/2009 Coll., the Criminal Code, as amended by Act No. 306/2009 Coll)

⁴⁶ Petros, O., Mravcik, V. and Korcisova, B. (2005) Spotreba drog problémovými uživateli [The amounts of drugs consumed by problem drug users]. *Adiktologie* 5 (1), 49-59.

⁴⁷ EMCDDA (2003). *The role of quantity in the prosecution of drug offences*. Portugal: EMCDDA.

Portugal - a notable example

Background: In the mid and end of nineties Portugal had the highest rate of drug-related deaths due to HIV in the European Union and the second-highest HIV prevalence among injecting drug users⁴⁸. Drug-related deaths had increased by 57 per cent from 1997 to 1999⁴⁹. There was also growing concern over the social exclusion and marginalization of people who use drugs and a perception within many areas of society, including the law enforcement and health sectors, that the criminalization of drug use was increasingly part of the problem, not the solution⁵⁰.

It was within this context that in 1998 a government-appointed Commission for the National Anti-Drug Strategy recommended decriminalization with the goal to reduce drug abuse and use⁵¹. Data show that prior to this time a key challenge was the provision of health services for people who use drugs, including access to drug treatment without fear of arrest and prosecution⁵². There was a need to formulate more efficient and proportionate sanctions for drug offences than the prevailing policy, which treated drug possession for personal use as a criminal offence punishable by up to one year of imprisonment (Decreto-Lei no. 15/93, de 22 de janeiro 1993).

A legislative plan for decriminalization was subsequently adopted, and in 2001, when Law 30/2000 went into effect, drug possession and acquisition became an administrative offence (Lei n. 30/2000, de 29 de novembro 2000).

Decriminalization: The decriminalization law applies to possession and use of all illicit drugs—including cannabis, heroin and cocaine—but it is restricted to possession of up to ten days' worth of a drug. Daily doses are set to 0.1 g heroin, 0.1 g ecstasy, 0.1 g amphetamines, 0.2 g cocaine or 2.5 g cannabis. Consequently, the possession of 1 gram or less of heroin is not criminalized.

⁴⁸ EMCDDA (2000), Annual Report on the State of the Drugs Problem in the European Union. Lisbon: European Monitoring Centre for Drugs and Drug Addiction.

⁴⁹ Instituto Portugues da Droga e da Toxicodependencia 2000.

⁵⁰ Hughes, C. E. (2006), 'Overcoming Obstacles to Reform? Making and Shaping Drug Policy in Contemporary Portugal and Australia', Department of Criminology, PhD thesis, Department of Criminology, The University of Melbourne.

⁵¹ Mirjam van het Loo, Ineke van Beusekom, and James P. Kahan, "Decriminalization of Drug Use in Portugal: The Development of a Policy," *Annals of the American Academy of Political and Social Science* 582, Cross-National Drug Policy (July 2002), p. 54.

⁵² Greenland, Glenn Drug Decriminalization in Portugal. Lessons for Creating Fair and Successful Drug Policies. CATO Institute, 2009. Online: http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf.

The comprehensive approach: The new offences are sanctioned through specially-devised Commissions for the Dissuasion of Drug Addiction (CDTs). These are regional panels made up of three people, including lawyers, social workers and medical professionals. Alleged offenders are referred by the police to the CDTs, which then discuss with the offender the motivations for and circumstances surrounding their offence and are able to provide a range of sanctions, including community service, fines, suspension of professional licenses and restrictions on movement within designated places. However, their primary aim is to dissuade drug use and to encourage drug dependent people to seek treatment.

Individualized approach: Article 10 of the Decriminalization law directs the CDT to hear from the alleged offender and to “gather the information needed in order to reach a judgment as to whether (s)he is an addict or not, what substances were consumed, the circumstances in which (s)he was consuming drugs when summoned, the place of consumption and his/her economic situation.”⁵³

Effects:

- Since the adoption of the reform, the prevalence of problematic drug use (PDU) in Portugal is estimated to have declined. In addition, the estimated prevalence of injecting drug use has fallen from 3.5 to 2.0 injecting drug users per 1,000 population aged 15–64⁵⁴.
- The proportion of drug-related offenders in the Portuguese prison population — that is, offences committed under the influence of drugs and/or to fund drug consumption — has dropped from 44 per cent in 1999 to 21 per cent in 2008⁵⁵. Consequently it can be argued that decriminalization has reduced the burden on the criminal justice system and enabled police to refocus attention on more serious offences, namely drug trafficking-related offences.
- The overall number of people who use drugs who are in treatment grew from 23,654 to 38,532 between 1998 and 2008, an increase of 62.8%.
- The number of people who use drugs who are newly infected with HIV has also declined⁵⁶. For example, between 2000 and 2008, the number of cases of HIV reduced amongst drug users from 907 to 267 and the number of cases of AIDS reduced from 506 to 108.

⁵³ Greenland, Glenn Drug Decriminalization in Portugal. Lessons for Creating Fair and Successful Drug Policies. CATO Institute, 2009. Online: http://www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf.

⁵⁴ Caitlin Elizabeth Hughes, Alex Stevens What Can We learn from the Portuguese Decriminalization of Illicit Drugs? BRIT. J. CRIMINOL. (2010) 50, 999–1022

⁵⁵ Instituto da Droga e da Toxicodependencia 2009, Relatorio anual 2008: A situacxao do pais em materia de drogas e toxicodependencias, Vol. I—Informacxao estatistica. Lisboa: Instituto da Droga e da Toxicodependencia.

⁵⁶ Ibid.

Implications for prison policy

The application of Resolution No. 634 will lead to an increase in the number of minor criminal cases and a consequent rise in the number of inmates.

At the UN level, the Minimum Standard Rules for Non-Custodial Measures call on member states to develop non-custodial measures within their legal systems, thus reducing the use of imprisonment; and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation of the offender. The Rules also state that “The use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction.”⁵⁷

⁵⁷ UN Minimum Standard Rules for Non-Custodial Measures (Tokyo Rules adopted under Resolution 45/110 of the General Assembly dated 14 December 1990 (paragraphs 1.5 and 2.7)

Conclusion with regards to Article 5.1(a)

In summary, Resolution No. 634 was justified through the arbitrary application of INCB's defined daily dose concept, which are intended to be used for statistical purposes and not as guidance for national policies. Resolution No. 634 does not correspond with international good practice, public health goals, international law, or other countries' use of daily dose schedules for the purpose of differentiating between drug possession for personal use and drug trafficking or sale.

We thus conclude that in drafting Resolution No. 634 the Ukrainian Ministry of Health was either ignorant of international good practice, international law and scientific evidence, or developed the Resolution in bad faith and in a deliberate attempt to mislead law enforcement and the general public. Based on these circumstances, Resolution No. 634 facilitates the arbitrary use of incarceration as a form of penalty and, in this sense, contradicts Article 5(1)(a) of the European Convention.

Article 7 of the European Convention: no punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Scope of application of Article 7

Article 7 must be interpreted and applied taking into account that its purpose is “to provide effective safeguards against arbitrary prosecution, conviction and punishment... It also embodies... the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance, by analogy.”⁵⁸ According to the European Court, “in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or international agreements. The Court’s role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention.”⁵⁹

It is therefore important to assess whether Resolution No. 634 violates this principle and creates the conditions whereby criminal law is extensively construed to the detriment of an accused contrary to the purpose of Article 7: to “provide effective safeguards against arbitrary prosecution, conviction and penalty.”

⁵⁸ *Korbely v. Hungary*, no 9174/02, § 69, 70, ECHR 2008

⁵⁹ *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 54, ECHR 1999-I

What should be taken into account to properly construe the criminal law of Ukraine?

The Criminal Code consists of two parts: a General Part and a Special Part. The latter includes provisions that define the offences and the penalty. Provisions of the General Part are equally applicable to all the clauses of the Special Part. They reflect the true will of legislature when the definitions and the penalties of the Special Part have been implemented. Some provisions of the General Part are of utmost importance because they prevent criminal law from being applied beyond its intended limits. These are the provisions that describe which laws provide for criminal liability (Article 3 of the Criminal Code), what should be understood as a criminal offence (Article 11 of the Criminal Code) and what circumstances should be considered when applying punishment (Article 65 of the Criminal Code).

Criminal code of Ukraine (adopted on April 5, 2001)

Article 3. Legislation of Ukraine on the criminal liability

1. The Legislation of Ukraine on the criminal liability is a Criminal Code of Ukraine, which shall be based on Constitution of Ukraine and the generally accepted principals and norms of international law.
2. Laws of Ukraine on the criminal liability which are adopted after the Criminal Code becomes effective, shall be included into this Code upon their entrance into power.
3. The criminality as well as punishability and other criminal-law consequences of an action shall be defined only by this Criminal Code.
4. Application of criminal liability with use of analogy is prohibited.

Article 11. Definition of the Criminal Offence

1. The criminal offence is a socially dangerous action (act or failure to act) stipulated in the Criminal Code and committed by the subject of the criminal offence.
2. There is no criminal offence if an act or a failure to act, although formally consist the elements of the action stipulated by the Criminal Code, but because of its insignificancy do not present social danger i.e. have not caused and could not have caused significant harm to person or organization or civil society or state.

Article 65. General principles of application of the punishment

1. The Court shall apply the punishment:

- 1) Within the limits, stipulated by the clause of the Special Part of the Criminal Code, which provides for the liability for the committed criminal offence;
- 2) In correspondence to the General Part of the Criminal Code;
- 3) Taking into account the degree of the seriousness of the committed criminal offence, the personality of an accused and circumstances which shall mitigate or increase the punishment.

The existence of these standards is very significant for cases involving illegal drug trafficking, considering that the Criminal Code is based on the general principles and standards of international law (Article 3 of the Criminal Code). It is important to emphasize that Article 3 of the Criminal Code derives from the Constitution of Ukraine and is echoed in other documents related to drug control and interpretation of criminal law.

Constitution of Ukraine (adopted on June 28, 1996)

Article 9.

"The effective international treaties which are agreed upon by the Verkhovna Rada of Ukraine shall be the part of the national legal system of Ukraine"

Law of Ukraine 60/95-VP of 02.15.1995 "On narcotic drugs, psychotropic substances and precursors"

Article 3. Legislation on narcotic means, psychotropic substances and precursors

Para 3. If the international treaty sets up rules which are different then those stipulated in national legislation on drug means, psychotropic substances and precursors, the rules of international treaty shall prevail.

Resolution No. 4 of the Ukrainian Supreme Court's Plenum of 04.26.2002 "On judicial practice in cases involving offences related to trafficking in narcotic drugs, psychotropic substances, and their analogs and precursors" (as amended by the Supreme Court's Resolution of 12.18.2009).

Para 2. "[courts] shall pay attention that according to Article 3 of the Law 60/95-BP, if the international treaty of Ukraine sets up rules which are different then those stipulated in legislation on drug means, psychotropic substances and precursors, the rules of international treaty shall prevail"

The international treaties of Ukraine

Interpreting criminal law, including Article 309 of the Criminal Code, the courts and law enforcement should adhere to the standards and principles of international law and the provisions of Ukraine's international treaties. The country has been a member of the United Nations since 1945 and is a party to the UN Charter, the three UN Drug Conventions, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Resolution No. 634 affects the application of criminal law to cases of possession of drugs in minor amounts with no intent to supply. The international treaties of direct relevance in this context are the UN Drug Conventions and the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988

Article 3, para. 2

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention as amended or 1971 Convention.

Article 3, para. 4 (d)

The parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with para. 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

Article 14, para. 4

The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, inter alia, on the recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization (...).

The UN's Official Commentary on the 1988 UN Convention draws attention to three accounts with regard to the Article 4 paras 2 and 4 (d) of the 1988 UN Convention:

1. Article 36 (1) of the 1961 UN, which provides for penalization of drug offenses, is among the provisions which deal with drug trafficking, notably Article 35 "Action against the illicit traffic" and Article 37 "Seizure and confiscation". This fact, as well as the fact that in the body of the draft of the 1961 UN Convention the current Article 36 was under the chapter "Measures against illicit traffickers," provides grounds to consider that Article 36 (1) of the 1961 UN Convention does not provide for penalization of possession for personal consumption.⁶⁰
2. Those who do not share the view with regard to Article 36 (1) of the 1961 UN Convention "may undoubtedly choose not to provide for imprisonment of persons found in such possession, but to impose minor penalties such as fines or even censure. Possession of a small quantity of drugs for personal consumption may be held not to be a 'serious' offence under Article 36 (1) of the 1961 UN Convention, and only a 'serious' offence is liable for 'adequate punishment particularly by imprisonment or other penalties of deprivation of liberty'."⁶¹

⁶⁰ Commentary on the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (New York: UN, 1998). Paragraph 3.87.

⁶¹ Ibid.

3. “Penalization of the possession of drugs for personal consumption amounts in fact also to a penalization of personal consumption.”⁶²

The meaning of the above provisions may be further revealed with help of interpretation according to some particular rules of the Vienna Convention on the Law of Treaties.

Vienna Convention on the Law of Treaties, 1969

Article 31. General rule of interpretation

3. There shall be taken into account, together with the context:
 - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

Following from this provision of the 1969 Vienna Convention, subsequent practice in applying the treaty can be identified in the documents adopted by the UN General Assembly or the international treaty bodies.

General Assembly or treaty body documents have value for the interpretation of international treaties because they derive from the UN Charter and are dedicated to issues that might be addressed by provisions of several different international treaties.

Many such documents either call for the use of non-custodial sanctions or the non-use of criminal laws by way of obstructing access to health services for people who use drugs.

The Political Declaration and Plan of Action on International Cooperation Towards an Integrated and Balanced Strategy To Counter the World Drug Problem (adopted by CND and endorsed by the UN Resolution in 2009).⁶³

Para. 16 (a) Member States should: Working within their legal frameworks and in compliance with applicable international law, consider allowing the full implementation of drug dependence treatment and care options for offenders, in particular, when appropriate, providing treatment as an alternative to incarceration;

⁶² Ibid.

⁶³ E/2009/28E/CN.7/2009/12.

The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), Adopted by UNGA Resolution 45/110 of 14 December 1990

Para 1.5 Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

One task of the Tokyo Rules which should be read in conjunction with para. 1.5 is to “*to provide greater flexibility consistent with the nature and gravity of the offence*” (para. 2.3.)

Declaration of Commitment on HIV/AIDS (adopted by the UNGASS Resolution S-26/2 of the on 27 June 2001)

Para 64. Call to develop and/or strengthen national strategies, policies and programmes, supported by regional and international initiatives, to promote and protect the health of most vulnerable to new infection as indicated by such factors as drug-using behaviour;

Political Declaration on HIV/AIDS (adopted by the UNGA Resolution 60/262 of 2 June 2006)

Para 24. Calls for intensifying efforts to enact legislation to ensure that members of vulnerable groups have access to health care, social and medical services, prevention and treatment, information and legal protection⁶⁴.

The Human Rights Council has repeatedly called on governments to ensure that their domestic legislation is consistent with their human rights obligations so that criminal penalties are not used in bad faith against population groups vulnerable to HIV, in full accordance with the International Guidelines on HIV/AIDS and Human Rights.⁶⁵

⁶⁴ UN General Assembly Resolution 60/262 dated 2 June 2006.

⁶⁵ Human Rights Council: Resolution 12/27: Protection of Human Rights in the Context of HIV/AIDS. A/HRC/RES/12/27, 22 October 2009.

The UN Commission on Narcotic Drugs has called on UN member states to eliminate barriers to achieving universal access to HIV prevention, care and treatment, so that people living with HIV and people at high risk of HIV infection, including people who use drugs, have access to appropriate services.⁶⁶ This includes recommendations regarding the prevention of other infectious diseases among people who inject drugs, such as TB and hepatitis.

It is also worth noting that the UN's Official Commentary on the 1988 UN Convention explicitly states that when national authorities elaborate procedures to implement Article 3(2) of the 1988 UN Convention (possession for personal use without intent to sell) the practices of other countries should be taken into consideration.⁶⁷ As such, states should consider the practices of many countries that utilize the principle of proportionality when imposing penalties for drug offences, as well as practices in defining daily dose schedules in order to differentiate between drug possession and drug supply.

The European Monitoring Centre for Drugs and Drug Addiction has documented that, in most European Union countries, the thresholds for imposing liability for the possession of drugs without intent to sell, when these thresholds are specified in regulatory acts or instructions, are approximately one gram for heroin.⁶⁸ Furthermore, studies show that cases involving the possession of small amounts of drugs (averaging around one gram of heroin) without intent to sell very rarely result in the imposition of incarceration.⁶⁹

The European Union Charter of Fundamental Rights enshrines as part of the principle of lawfulness and proportionality the notion that "The severity of penalties must not be disproportionate to the criminal offence" (Article 49(3)).⁷⁰

Similarly, the INCB (an official body created by the Convention) holds that the imposition of disproportionately severe penalties against individuals who use drugs, especially the deprivation of liberty, contradicts the goals of the UN Drug Conventions.⁷¹ The INCB has stated that the practice of exempting people from criminal prosecution for small quantities of narcotic drugs is consistent with international drug control treaties.⁷²

⁶⁶ Commission on Narcotic Drugs: Resolution 53/9: Achieving universal access to prevention, treatment, care and support for drug users and people living with or affected by HIV, March 2010.

⁶⁷ Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (New York: UN, 1998). Para. 3.96. p. 83.

⁶⁸ European Monitoring Centre for Drugs and Drug Addiction (EMCDDA): Threshold quantities for personal possession of fences. Last changes – 25 June 2010. <http://eldd.emcdda.europa.eu/html.cfm/index99321EN.html>

⁶⁹ European Monitoring Center on Drugs and Drug Addiction. Insights 5. Prosecution of drug users in Europe. June 2002. pp. 9-17, 74-78.

⁷⁰ Charter of Fundamental Rights of the European Union, 18.12.2000, Official Journal of the European Communities. C 364/3.

⁷¹ "The principle of proportionality and drug-related offences", Report of the International Narcotics Control Board for 2007, E/ INCB/2007/1, p. 1-61

⁷² INCB Report for 2004, E/INCB/2004/1 § 538

UNODC, based on an analysis of international human rights standards, also emphasizes the principle that the severity of penalties must not be disproportionate to the criminal offence and that imprisonment should only be used as a penalty of last resort.⁷³ UNODC points out that creating conditions for severe penalties for insignificant offences serves as a catalyst for corruption among law-enforcement officers.⁷⁴ It is important to note that, according to para 2.2.(a) of the UN Secretary General Bulletin ST/SGB/2004/6 of 15 March 2004, UNODC serves as the repository of technical expertise in international drug control for the UN organs, as well as Member States, and in this capacity advises them on questions of international and national drug control.

The foregoing allows one to conclude that the generally-accepted principles of international law, including the UN Drug Conventions as applicable to penalties for the possession of small quantities of drugs for personal use without intent to sell, do not favour the imposition of criminal penalties, especially in the form of incarceration, for these types of offences. Moreover, the threshold quantities chosen by many states for the purposes of criminal liability are approximately one gram for heroin (which under Ukrainian law has the same daily dose schedule as the more common acetylated opium). Considering the requirement of Article 3 of the Constitution of Ukraine, Article 3 of the Law of Ukraine (“On narcotic means, psychotropic substances and precursors”), and Article 3 of the country’s Criminal Code, when construing Article 309 of the Criminal Code in conjunction with Article 11(2), as well as Article 65(1)(3) of the Criminal Code, Ukrainian courts and prosecutors must take into account these facts regarding the interpretation of international law.

The role of the Resolution No. 634 in the process of construing criminal law

Resolution No. 634 and the Resolution of the Ministry of Health No. 188, as amended, have an important role to play in construing Ukrainian criminal law.

As follows from its preamble, Resolution No. 634 was adopted to support the application of Article 44 of the Code of Ukraine on administrative offences; Article 305 of the Criminal Code; Article 5 of the Law of Ukraine (“On narcotic means and psychotropic substances”) (60/95-BP); and Article 3 of the Law of Ukraine (“On measures for counteracting the drug trafficking and drug abuse”) (62/95-BP). These Articles entrust the Ministry of Health as the authority to define the small, large and extra large amounts of narcotics and other psychotropic substances for the purpose of criminal and administrative liability.

Such an approach is perfectly justified because the Ministry of Health is the state body that possesses a wealth of information about the implications of illicit drugs on the health of a human being and the health of the general public. In defining the threshold amounts of drugs for the purpose of criminal and administrative liability, the

⁷³ “Drug control, crime prevention and criminal justice: A Human Rights perspective”, Note by the Executive Director for the Commission on Narcotic Drugs 53rd Session and Commission on Crime Prevention and Criminal Justice 19th Session. Para. 21. E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1

⁷⁴ *Ibid*, Para 24.

Ministry of Health should have taken into account the general principles that guide the application of the criminal liability under the criminal law, (i.e., Articles 11 and 65 of the Criminal Code) as well as the general constitutional requirement to follow the principles of international treaties. Thus, the thresholds should reflect the following:

1. The requirement that only actions of significant danger to society fall under the criminal law (part 2 of Article 11 of the Criminal Code) while drug possession without the intent to supply does not present a threat to public health;
2. The requirement of proportionality of punishment (Article 65 of the Criminal Code);
3. The practice of application of international law, which suggests that imprisonment should be a punishment of last resort;
4. The criminal laws shall not obstruct prevention of HIV and other infectious diseases among people who use drugs; and
5. The threshold amount for criminal liability for heroin tends to be approximately one gram in European practice.

In other words, the threshold amounts shall leave the court and other law enforcement agencies enough room for manoeuvre to take into account the above-mentioned points in order to properly construe the criminal law.

Does the Resolution No. 634 leave enough room for courts and prosecutors to construe the criminal law?

The grounds for criminal liability consist of a person's committing a socially-dangerous act that contains elements of a crime provided for by the Criminal Code (Article 2). For the purposes of establishing the elements of a crime, the factors that need to be proven include, among other things, circumstances that influence the degree of seriousness of the crime as well as circumstances characterizing the personality of the accused (Article 64(3) of the Criminal Procedure Code). The definition of a small quantity is very important when categorizing acts under Article 309(1) of the Criminal Code.

If we follow the logic of defining a small quantity based on 10 times the daily dose, then the definition of the daily dose itself should take into account variations in the degree of tolerance for drugs and in the purity of drugs. That is why, while setting the threshold, Portugal, and more recently the Czech Republic, assessed their respective drug scenes with the goal of reflecting typical drug use patterns. No such assessment was done in Ukraine before setting the threshold. However, existing evidence allows reflecting on possible thresholds.

A long-term study of 1,035 heroin users participating in a medical heroin prescription program in Switzerland found that the average daily dose of pure pharmacy heroin among patients was 491.7 milligrams. Moreover, the dose for persons with minimum tolerance was about five milligrams, while the dose for persons with maximum

tolerance was 500 milligrams (a ratio of 1:100).⁷⁵ Other studies in Europe also show that a therapeutic dose of heroin ranges from between 400 and 600 milligrams a day.⁷⁶ It should also be noted that these doses are for pure heroin. UNODC data for 2007 show that the purity of wholesale heroin in Ukraine varies widely, from 20-75%.⁷⁷ The purity of drugs at street level is usually much lower. According to data presented in research conducted in 2009 by the Russian National Research Center of Drug Addiction and UNODC, the typical Russian dependent heroin user consumed 1.87 grams per day.⁷⁸ UNODC data, received from official Russian sources for 2006, show that the purity of retail heroin in Russia ranges from 3% to 27%,⁷⁹ which is comparable to the purity of heroin in Ukraine. It must be noted that these figures do not reflect the purity or average consumption of acetylated opium – a different substance than heroin – in Ukraine, though Ukrainian authorities likely have the means to make such estimations through the investigation of seized acetylated opium and other means.

In complying with the requirements of Article 11(2) and Article 65(1)(3) of the Criminal Code, and taking into account Article 64(3) of the Criminal Procedure Code, law enforcement should be able to take into account the level of tolerance for drugs of a person found in possession of drugs without intent to sell, the variation in the purity of a drug in a particular location and other factors that might enable them to draw an objective conclusion as to whether a quantity of drugs is small, and thus to determine the seriousness of the offence and possible penalties. In short, the criminal justice system should approach petty drug cases individually, and not rely on rigid legal prescriptions that ignore what is known from public health research about variation in the circumstances of drug use and dependency.

The thresholds established by Resolution No. 634 do not allow for this. They simply subject all persons who possess even residual amounts of drugs in a used syringe to punishment under criminal law, leaving the court with the sole option of choosing the term of incarceration —between one and three years' imprisonment. There is no doubt that even a minimum sentence under the Article 309 (1) of the Criminal Code is too severe if the threshold amount is as small as 0.005 grams of heroin. It is worth recalling that, as demonstrated in the analysis with regard to Article 5 of the European Convention, Resolution No. 634 has indicators that are considered arbitrary (i.e. not in good faith or deceptive).

⁷⁵ Uchtenhagen, Ambros, "Prescription of Narcotics for Heroin Addicts: Main Result of the Swiss National Cohort Study (Medical Prescription of Narcotics, Vol. 1)", S. Karger Publishing. July 1999.

⁷⁶ Tom Carnwath, "Heroin prescription: a limited but valuable role," *Psychiatric Bulletin* (2005), 29. P. 126-127

⁷⁷ Heroin: Retail and Wholesale Prices and Purity: UNODC. World Drug Report 2010. <http://www.unodc.org/documents/data-and-analysis/WDR2010/AllPrices.pdf>.

⁷⁸ UNODC: Addiction, crime and insurgency: the transnational threat of Afghan opium. Vienna, 2009. Page. 27

⁷⁹ Heroin: retail and wholesale prices and purity: UNODC. World Drug Report for 2008. http://www.unodc.org/documents/wdr/WDR_2008/WDR2008_Statistical_Annex_Prices.pdf.

Conclusion with regard to Article 7

By establishing minimum quantities for imposing criminal liability for the possession of narcotic drugs without intent to distribute, Resolution No. 634 effectively voids standards of Articles 11(2) and 65(1)(3) of the Criminal Code and Article 64 of the Criminal Procedure Code. Therefore, the Resolution conflicts with Article 7 of European Convention as its implementation calls for heavier penalties than those set out in the Criminal Code for drug possession offences. It also is in conflict with the standards and principles of international law and international treaties to which Ukraine is a signatory.

The application of the aforementioned standards is an important guarantee that the use of criminal sanctions will be proportionate to the seriousness of the offence and that the arbitrary incarceration of persons who have committed minor offences will be prevented. Thus, Resolution No. 634 creates conditions for the interpretation of criminal law to the detriment of the accused and the arbitrary imposition of severe penalties, which contradicts Article 7 of the European Convention.

Article 14 of the European Convention: prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Scope of application of Article 14

- Following from the definition of Article 14, discrimination is contrary to the European Convention if it is based on the grounds of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- Based on the practices of the European Court, Article 14 complements other substantive provisions of the Convention and the protocols thereto. It does not exist independently, since it only operates in relation to the enjoyment of rights and freedoms set forth in the European Convention. Although the application of Article 14 does not presume the violation of other provisions of the European Convention, Article 14 cannot be applied unless the facts of the matter to be considered fall under one of the substantive provisions of the European Convention.⁸⁰
- Discrimination means treating persons differently, without an objective and reasonable justification, in relevantly similar situations.⁸¹

⁸⁰ *Zarb Adami v. Malta*, no 17209/02, § 42, 2006.; *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I; *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II.

⁸¹ *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV.

- “A difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”⁸²
- “The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment... A wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy... While in principle a similar wide margin of appreciation applies in questions of prisoner and penal policy, the Court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful.”⁸³

Drug use as “other status” for the purpose of Article 14

The application of Article 14 is not limited to cases of discrimination based on individual characteristics (sex, race, skin color, religion, social background, etc.). According to the Court’s interpretation, the meaning of “other status” could embrace:

- Characteristics that, like some of the specific examples listed in Article 14, can be said to be personal in the sense that they are innate.⁸⁴ For example, the Court has found that sexual orientation was “undoubtedly covered” by Article 14,⁸⁵ as well as physical disability⁸⁶.
- Characteristics that may not be innate and thus “personal” in the meaning described above. Based on such an approach, the Court held that violations of Article 14 could be a result of a distinction based on military rank,⁸⁷ a difference in treatment between the applicants and other holders of planning permissions in the same category as theirs,⁸⁸ and a distinction between tenants of the State on the one hand and tenants of private landlords on the other.⁸⁹ The Court’s practice demonstrates that a convicted prisoner,⁹⁰ a former

⁸² *Clift v. the United Kingdom*, no. 7205/07, §73, July 2010

⁸³ *Ibid.*

⁸⁴ *Clift v. the United Kingdom*, no. 7205/07, §57. July 2010; *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 64, Series A no. 222; *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII, ECHR 2004-VIII; *Larkos v. Cyprus* [GC], no. 29515/95, ECHR 1999-I; *Shelley v. the United Kingdom*, no. 23800/06, 4 January 2008

⁸⁵ *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 28, ECHR 1999-IX

⁸⁶ *Glor v. Switzerland*, no. 13444/04, § 80, ECHR 2009

⁸⁷ *Engel and Others v. the Netherlands*, 8 June 1976

⁸⁸ *Pine Valley Developments Ltd and Others v. Ireland*, 29 November 1991, § 64, Series A no. 222

⁸⁹ *Larkos v. Cyprus* [GC], no. 29515/95. ECHR 1999-I

⁹⁰ *Shelley v. the United Kingdom*, no. 23800/06, 4 January 2008

KGB officer⁹¹ or a father whose paternity had been established by judicial determination⁹² could fall within the notion of “other status” in Article 14.

According to the European Court, “the question whether there is a difference of treatment based on a personal or identifiable characteristic in any given case is a matter to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”⁹³

There are many reasons why people start using drugs despite the prohibition of non-medical, non-scientific possession, supply and trafficking of narcotic substances.⁹⁴ This question, along with that of whether the prohibition of and liability for illegal drug trafficking without intent to sell is justified, falls within the sphere of competence of national authorities and is therefore not assessed for compliance with the European Convention.

However, the characteristic of “a person who uses drugs” in the context of criminal law clearly falls under “other statuses” for the purpose of applying Article 14 of the European Convention for three reasons:

1. Because narcotic drugs are legally prohibited, all people who use illicit drugs are in a group at high risk of experiencing legal sanctions because of their habit. This feature distinguishes people who use drugs from the rest of society, especially from those who use licit psychoactive substances such as alcohol.
2. The regime of sanctions for possession of illicit drugs is different from the regime of sanctions for other offences. This distinguishes people who use drugs from other offenders.
3. Many people who use illicit drugs have developed some degree of addiction. Addiction is classified by the World Health Organization as a disease⁹⁵. Possession of illicit drugs is part of drug use, which is a symptom of addiction. Thus, addiction is the only disease that has a strong link with potential sanctions for showing its symptoms. This distinguishes people who use drugs with addiction from other people who suffer from any other form of chronic disease, such as obesity, diabetes, allergies, alcoholism or addiction to smoking.

⁹¹ *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 47, ECHR 2004-VIII

⁹² *Paulík v. Slovakia*, no. 10699/05, ECHR 2006-XI

⁹³ *Artico v. Italy*, 13 May 1980, § 33, Series A no. 37; and *Cudak v. Lithuania* [GC], no. 15869/02, § 36, 23 March 2010; *Clift v. the UK*, no. 7205/07, 13 July 2010, § 59.

⁹⁴ See scientific data on drug use and drug addiction. US National Institute on Drug Abuse (NIDA). <http://drugabuse.gov/info-facts/infofactsindex.html> Rolles, S, “An Alternative to the War on Drugs”, *British Medical Journal*, 2010; 341:p3360; R. Bluthenthal R. and others, “Collateral damage in the war on drugs: HIV risk behaviours among injection drug users”, *International Journal of Drug Policy*, vol. 10, No. 1 (1999).

⁹⁵ F10-119. International Statistical Classification of Diseases and Related Health Problems 10th Revision Version for 2007, WHO.

Could the Resolution No. 634 be accessed under Article 14 of the European Convention?

On the one hand, and contrary to Article 5.1(a) of the European Convention, Resolution No. 634 creates conditions for the arbitrary deprivation of liberty for a broad category of people: those who use illicit drugs, including more than 58,000 people registered as opiate addicts by the Ukrainian Ministry of Health. On the other hand, and contrary to Article 7 of the European Convention, Resolution No. 634 makes it more difficult to apply the standards regarding the insignificance of the act (Article 11 of the Criminal Code) and the proportionality of the penalty (Article 65 of the Criminal Code) to the same category of persons.

The Constitution establishes equal rights for all (Article 21). The Criminal Code does not contain any provisions that justify abrogating the standards of Article 11 and 65 of the Criminal Code for any particular group of persons when determining the criminality and punishability of an act or its categorization, as well as the imposition of penalties.

Therefore, the problems with regard to Resolution No. 634 fall under one of the substantive provisions of the European Convention and could therefore be assessed under Article 14 of the European Convention.⁹⁶

Assessment of Resolution No. 634 under Article 14 in conjunction with Article 5 of the European Convention

The European Court states that freedom from discrimination and the enjoyment of rights guaranteed by the Convention are infringed if a state treats particular individuals differently from others in relatively similar situations without objective or rational grounds.⁹⁷

In contravention of Article 5(1)(a) of the European Convention, Resolution No. 634 singles out people who use illicit drugs for the application of severe penalties in the form of incarceration on the basis of arbitrarily defined, negligible quantities of narcotic drugs and other psychotropic substances. The quantities for acetylated opium or heroin are so small that they make it possible to prosecute someone even for possession of leftover injecting

⁹⁶ *Zarb Adami v. Malta*, no 17209/02, § 42, ECHR, 2006.; *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports of Judgments and Decisions* 1997-I; *Petrovic v. Austria*, 27 March 1998, § 22, *Reports* 1998-II.

⁹⁷ *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.

solution in a syringe. There is judicial precedent for this.⁹⁸ The Ukrainian Supreme Court⁹⁹ recommended imposing criminal liability under Article 309(1) of the Criminal Code “even with a minute quantity” of heroin.¹⁰⁰

In other words, the gradation selected by lawmakers for the severity of penalties depending on the quantity of the narcotic drug or psychotropic substance has been levelled by a bylaw, namely, Resolution No. 634, which amended the Resolution 188 of the Ukraine Ministry of Health. No other act in respect of which the Criminal Code provides for a stiffening of penalties depending on the seriousness of the offence is subject to such enforcement.

Resolution No. 634, which contains elements of bad faith or deception, sets the stage for the arbitrary detention of a large category of people, since the provisions of Article 309(1) of the Criminal Code and Article 44 of the Ukrainian Code of Administrative Procedure apply to the majority of people who use drugs, including those who are addicted to them. The fact that narcotic drugs such as acetylated opium and heroin are prohibited from distribution is irrelevant in this context. People who violate the prohibition on distributing narcotic drugs may be contrasted with those for whom lawmakers have made the imposition of penalties in the form of detention dependent on the seriousness of the offence. In contrast to other offenders, people who use drugs are singled out for severe punishment irrespective of the seriousness of the offence.

Consequently, there is different, even discriminatory, treatment for a particular group of persons. The International Committee on Economic, Social and Cultural Rights has explicitly mentioned discrimination against people who use drugs in Ukraine.¹⁰¹ On this basis, it is justified to assess discrimination in relation to Article 5(1)(a).

The practice of different treatment by the state in connection to different types of offences, selected according to lawmakers’ opinions as to their seriousness, is recognized by the European Court as consistent with Article 14 of the European Convention.¹⁰² In assessing Resolution No. 634, the system selected by lawmakers for imposing various penalties for offences depending on their seriousness — which, for the purposes of Article 44 of the Ukrainian Code of Administrative Procedure and Article 309 of the Criminal Code, are defined according to the size of small and large quantities of narcotic drugs and psychotropic substances — is not in doubt.

In light of Article 5(1)(a) and Article 14 of the European Convention, the use of a ministerial bylaw to nullify the system adopted by the Parliament for imposing penalties depending on the seriousness of the offence, which is

⁹⁸ See, for example, the sentence issued by the Kyivsky District Court of Simferopol on 24 March 2008 in Case No. 1-209/2008.

⁹⁹ Supreme Court of Ukraine: Overview of judicial practice in considering cases involving offences related to trafficking in narcotic drugs, psychotropic substances, and their analogs and precursors, 2008

¹⁰⁰ The old version of Ukrainian Ministry of Health Resolution No. 188 dated 01.08.2000 “On approving the tables for small, large and especially large quantities of illegally trafficked narcotic drugs, psychotropic substances and precursors” did not establish small quantities for heroin at all.

¹⁰¹ *Committee on Economic, Social and Cultural Rights: Concluding Observations on, Ukraine*, E/C.12/UKR/CO/5, 2008, § 28

¹⁰² *Akbaba v. Turkey*, no. 52656/99, § 28, 17 January 2006; and *Tanrikulu and Deniz v. Turkey*, no. 60011/00, § 37, 18 April 2006

enshrined in the provisions of the Ukrainian Code of Administrative Procedure and the Criminal Code, needs to be analyzed.

Resolution No. 634 creates conditions for the arbitrary and unjustified imposition of severe penalties¹⁰³ such as incarceration of people who use drugs and those addicted to drugs, contrary to the will of legislature. In this sense, the differential treatment of this group on the basis of Resolution No. 634 is not grounded on the seriousness of the offence. Therefore, it is fair to conclude that Resolution No. 634 falls under Article 5(1)(a) of the European Convention and creates the conditions for treating a large group of people who are united by the common attribute of “drug use” differently from other offenders for whom the severity of penalties, as in the case of penalties under Article 44 of the Code of Administrative Procedure and Article 309 of the Criminal Code, is made contingent upon the seriousness of the offence.

“Different treatment” is discriminatory if it does not have an objective reason or rational explanation — in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship between the means employed and the aim sought.¹⁰⁴

The Ukrainian Ministry of Health issued Resolution No. 634. It may only issue resolutions within the limits of its powers, which are aimed at “ensuring the implementation of government policy in the sphere of health care.”¹⁰⁵ Based on the titles of Chapter 5 of the Code of Administrative Procedure and Chapter 13 of the Criminal Code, the object of the offences provided for by Article 44 of the Code of Administrative Procedure, as well as the crimes provided for by Article 309 of the Criminal Code, are related in the sphere of health care. Therefore, there is every reason to believe that Resolution No. 634, as such, is aimed at ensuring public health. This is a legitimate aim, since Article 34 of the Constitution allows for restricting human rights in the interests of public health. In order to resolve the question of whether Resolution No. 634 conforms to the standards of Article 14 of the European Convention, one must establish the extent to which the differential treatment of people who use drugs on the basis of the Resolution serves the aim of ensuring public health, and to what extent the powers allocated to law enforcement agencies under Resolution No. 634 support the explicit aim of ensuring public health.

Significantly reducing the threshold quantities of narcotic drugs for criminal prosecution leads to an increase in the number of prisoners in Ukraine; hinders people who use drugs from turning to medical and social services, and seeking medical assistance; facilitates an increase in frequency of overdose and risky drug taking practices in terms of HIV infection; significantly complicates the work of HIV prevention programs among people who

¹⁰³ It is important to note that the European Court sees the deprivation of liberty for any amount of time as a severe penalty. Therefore, even the seven-day administrative arrest provided for by the Ukrainian Code of Administrative Procedure is “without a doubt” seen by the European Court as a criminal penalty and not an administrative one. See *Hurepka v. Ukraine* no 61406/00, § 55, 6 September 2005.

¹⁰⁴ *Clift v. the UK*, no. 7205/07, § 73, 13 July 2010; *Thlimmenos v. Greece* [GC], no. 34369/97, § 46, ECHR 2000-IV

¹⁰⁵ Paragraphs 3 and 8 of Ukrainian Cabinet of Ministers Resolution No. 1542 dated 02.11.2006 “On approving the Statute on the Ukrainian Ministry of Health”

use drugs; increases the number of new cases of HIV, hepatitis and TB; and leads to a rise in corruption and the inefficient use of budget resources. At the same time, scientific studies show that repressive policies against people who use drugs have no significant impact on the level of drug use. On this basis, the measures provided for by Resolution No. 634 are not only disproportionate to the pursued aim of ensuring public health, they run directly counter to it. Therefore, Resolution No. 634 violates the prohibition of discrimination established by Article 14 of the European Convention in relation to the right to freedom.

Assessment of Resolution No. 634 under Article 14 in conjunction with Article 7 of the European Convention

In contravention of Article 7 of the European Convention, Resolution No. 634 impedes the application of the provisions of the Criminal Code that pertain to minor criminal acts and the proportionality of penalties, thereby creating conditions for the arbitrary or imprecise interpretation of these standards to the detriment of the accused. All of the aforementioned reasons why it is possible to analyze Resolution No. 634 through the prism of Article 14 of the European Convention in conjunction with Article 5(1)(a) of the European Convention are also reasons why it is possible to analyze Resolution No. 634 in conjunction with Article 7 of the European Convention.

By preventing law enforcement agencies and courts from taking into account individual circumstances, such as a person's level of tolerance for a drug, Resolution No. 634 creates conditions whereby a person with greater drug dependency ends up in the worst situation. As indicated above, the correlation in a daily dose between the minimum and maximum tolerance levels can be as much as 1:100. As a rule, regular users who already have some degree of addiction have a higher tolerance. For such persons, one daily dose, never mind ten daily doses, will exceed the quantities established by Resolution No. 634 by hundreds of times. The application of Article 11(2) and Article 65(1)(3) of the Criminal Code and Article 64(3) of the Criminal Procedure Code, when categorizing acts under Article 309 of the Criminal Code, should take into account the level of tolerance and purity, and especially whether the person is addicted to drugs. It is obvious that the situation of people who use drugs regularly, and especially those who are addicted, differs substantially from the situation of other people who use drugs. The prohibition of discrimination is violated not only when states treat differently persons in analogous situations without providing an objective and reasonable justification, but also "when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."¹⁰⁶ Discrimination on the basis of "state of health" is expressly prohibited by international law.¹⁰⁷ Thus, Resolution No. 634 violates Article 14 of the European Convention in interaction with Article 7 of the European Convention.

¹⁰⁶ *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV.

¹⁰⁷ International Covenant on Economic, Social and Cultural Rights, Articles 2.2 and 3. See also the International Committee on Economic, Social and Cultural Rights: General Comments No. 14. The right to the highest attainable standard of health. E/C.12/2000/4, § 18.

Conclusions with regards to Article 14

The Resolution No. 634 provides for different treatment of large group of people. The discriminatory measures provided for by the Resolution No. 634 do not pass the criteria of being “necessary in the democratic society”. Thus, the Resolution No. 634 violates Article 14 of the European Convention in interaction with Article 7 and Article 5 of the European Convention.

Conclusion

When assessing the obligations of the Ukrainian Ministry of Justice and the Ukrainian Ministry of Health, both in relation to Resolution No. 634 and in relation to other similar documents, it must be noted that the European Court “is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions.” To do otherwise “would amount to an abdication of the Court’s responsibility ... to ensure the observance of the engagements undertaken” by states under the European Convention.¹⁰⁸ The European Court has never ruled out the possibility of declaring national legislation to be in direct contravention of the European Convention.¹⁰⁹

In light of the foregoing, the following measures should be taken immediately:

1. The Ukrainian Ministry of Justice should revoke the registration of Resolution No. 634 and suspend the operation of the Resolution in the territory of Ukraine until such time as it is revoked.
2. The Ministry of Health should develop a Resolution on Amendments to Resolution 188 that would ensure that law-enforcement practice in Ukraine under Article 44 of the Code of Administrative Procedure, under Article 309 of the Criminal Code and the Constitution of Ukraine is consistent with international practice, the European Convention, the UN Charter, the Universal Declaration of Human Rights and other UN documents that have been ratified by Ukraine.
3. In performance of the obligations assumed by Ukraine in connection with its signing of the 2001 Declaration of Commitment on HIV/AIDS, as well as the Millennium Declaration, it should ensure that representatives of groups of people living with HIV/AIDS and groups of people who are vulnerable to HIV/AIDS — especially people who use drugs — participate in the development, discussion and adoption of the Resolution regarding state drug policy in Ukraine.

¹⁰⁸ *Open Door and Dublin Well Woman v. Ireland*, no. 14234/88; 14235/88, §69, 29 October 1992,.

¹⁰⁹ *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III).