Additional information to the Report to the Human Rights Committee
On the implementation by Ukraine of the International Covenant on Civil and Political Rights as it relates to protection of people who use drugs from arbitrary arrest, disproportionate punishment on discriminatory grounds, torture and ill-treatment.

This communication was prepared by International AIDS Alliance in Ukraine, the Eurasian Harm Reduction Network and the Canadian HIV/AIDS Legal Network. This is a supplement to the Report submitted by the same NGOs for the Committee’s 106th Session. For contacts: Mikhail Golichenko, mgolichenko@gmail.com
Introduction

During the Human Rights Committee’s 106th session the aforementioned NGOs informed the Committee about the steps taken by Ukraine to significantly toughen the punishment for petit drug offences, thus subjecting people who use drugs, especially drug dependent people, to arbitrary arrest and detention, torture and other cruel, inhuman or degrading treatment, disproportionate punishment and discriminating sentencing.

In its List of issues to be taken up in connection with the consideration of the seventh periodic report of Ukraine, adopted by the Committee at its 106th session (15 October–2 November 2012), the Human Rights Committee (HRCttee) requested Ukraine:

With regards to right to life, prohibition of torture and other cruel, inhuman or degrading treatment or punishment, liberty and security of person, treatment of persons deprived of their liberty (arts. 6, 7, 9 and 10)

Para 12. Please provide information on the measures taken to ensure that people who use drugs are not subjected to arbitrary arrest, disproportionate punishment on discriminatory grounds, torture and ill-treatment by law enforcement officials, especially in light of the amendments introduced by the Ministry of Health Order No. 634 of 29 July 2010 to the Ministry of Health Order No. 188 of 2 August 2000.

In its Replies to the List of Issues of May 16, 2013 (CCPR/C/UKR/Q/7/Add.1) the Government of Ukraine addressed the HRCTtee’s request only in a part by referring to the general regulations provided for in the Criminal Procedural Code of Ukraine regarding the arrest and pre-trial detention and with no specific information regarding the measures taken to prevent arbitrary arrest, disproportionate punishment on discriminatory grounds, torture and ill-treatment by law enforcement officials, especially in light of the amendments introduced by the Ministry of Health Order No. 634 of 29 July 2010 to the Ministry of Health Order No. 188 of 2 August 2000 (paras 95-103 of the Replies.). The only comment with regard to this Order was as following:

Para 104. With regard to the Orders of the Ministry of Health of Ukraine, we should note that the established threshold amounts of narcotic drugs, psychotropic substances, and precursors thereof have been established based on the existing practice of counteraction of illicit drugs and taking into account the international practices which is based on the Defined Daily Dose established by the International Narcotic Control Board.

With help of this additional report we would like to highlight why the Ministry of Health Order No. 634 of 29 July 2010 to the Ministry of Health Order No. 188 of 2 August 2000 is arbitrary and how it facilitates arbitrary arrests and detention, ill treatment, disproportionate punishment and discriminative sentencing.

No one shall be subjected to arbitrary arrest or detention: The scope of application.

According to the Ukrainian law the criminality of action as well as its punishibility and other criminal and legal consequences are defined exclusively by the Criminal Code of Ukraine (Art 3(3)). The Ministry of Health Order No. 634 of 29 July 2010 to the Ministry of Health Order No. 188 of 2 August 2000 (hereinafter – Order No 634) 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 the Order No 634 proves to be a source of interpretation and application of the Article 3 (3) of the Criminal Code.

The jurisprudence of the European Court of Human Rights (ECHR) is helpful in understanding what is arbitrary in the context of Order No 634. In particular, in the narrow
context of “the lawful detention of a person after conviction by a competent court”, the ECHR established that “arbitrariness” 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,” or the order to detain and the execution of the detention do not genuinely conform with the purpose of the restrictions permitted by the European Convention.

In this connection it is necessary to assess whether the Order No. 634 provides, in a good faith manner free of deception, for the establishment of guilt and the imposition of detention for the possession of drugs with no intent to supply.

**Why the Order No 634 is arbitrary and consists of elements of bad faith and/or the deception by the authorities?**

There are three main reasons for the conclusion that the Order No 634 was adopted by the Ministry of Health in the most arbitrary manner.

1. **The authorities exercised gross misunderstanding or misused of 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. However, 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. 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 0.03x10=0.3 grams; or a small quantity for opium 0.1x10=1 gram. Moreover 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.” In other words, the INCB 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.

2. **The Order No 634 is failing the goal of “protecting the public health” for promotion of which it was adopted.** The Order was developed and approved by the Ukrainian Ministry of Health which leads on the implementation of the state health care policy. 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 protect the public health. However, 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. According to the International AIDS Alliance in Ukraine, the number of used syringes brought for exchange by people who inject drugs dropped almost three times from 27% to 11% since the date the Order No 634 came into effect. 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 overdose or of contracting HIV, hepatitis, or other injection-related disease. Increasing the number of people in detention increases the frequency of prison overcrowding and the spread of infectious disease between inmates. 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.

3. The Order No 634 has lack of conformity with international law and recommendations. 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. 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. 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. This also includes recommendations regarding the prevention of other infectious diseases among people who inject drugs, such as TB and hepatitis. 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.

4. Lack of conformity with the scientific research. 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 population nor do they reduce access to illegal narcotic drugs; the availability of and access to narcotic drugs is unaffected by extensive use of punishment. 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. Research shows that alternatives to criminal prosecution and detention for minor drug offences are highly effective. 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. A report by the Special Rapporteur on the Right to the Health also cites evidence of the ineffectiveness of penalties for the use and possession of narcotic drugs without intent to sell/supply. 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.

How the Order No 634 facilitates arbitrary arrest and detention.

As demonstrated above there were elements of bad faith and deception exercised by the Ministry of Health when drafting and adopting the Order No 634. As the Order No 634 is in use for interpreting the Criminal Code as part of drug law enforcement, the elements of bad faith and deception, transfer over to officials’ actions when deciding to impose criminal liability. Therefore, detention in any form (arrest, pre-trial detention, or incarceration upon conviction), based on the quantities set forth in the Order No 634 would become arbitrary, contrary to Art 9 of the Covenant, especially if such detention is triggered by possession of trace amounts of illicit drugs.

However, it is important to emphasize that by significantly reducing the threshold quantities of illicit drugs for the purpose of criminal liability, the Order No 634 subjected virtually any
person who use opioids, especially drug injectors, to arrest by police, as often these people carry some trace amounts of drugs on them, including in the used syringes. The court statistics for 2011 and 2012 suggest that the number of people convicted under the Art 309(1) of the Criminal Code is slightly increasing against the overall trend in reducing the number of criminal convictions in Ukraine. The unleashed police power for arbitrary arrests of people who use drugs is an important pre-condition for torture and ill-treatment of drug dependent people.

**How the Order No 634 facilitates torture, or cruel, inhuman or degrading treatment.**

After being arrested by police in the state of intoxication drug dependent people starts feeling the acute withdrawal syndrome in the first 3 to 5 hours. According to the Ukrainian Ombudsman, “widespread are the complaints about the use of threats and coercion to testify using morbid state of consciousness where the person being in a state of intoxication, forced to sign the procedural documents without knowing their content and the consequences of signing” xxix.

The special vulnerability of drug dependent people to torture, especially in the context of detention has long been recognized by the UN Special Rapporteur on Torture: “Drug users are particularly vulnerable when deprived of their liberty. One of the questions in this context concerns withdrawal symptoms and to what extent they may qualify as torture or ill-treatment. There can be no doubt that withdrawal symptoms can cause severe pain and suffering if not alleviated by appropriate medical treatment, and the potential for abuse of withdrawal symptoms, in particular in custody situations, is evident. In a 2003 case, without specifically stating that the woman died from withdrawal, the European Court of Human Rights found a violation of the prohibition of inhuman or degrading treatment or punishment based on “the responsibility owed by prison authorities to provide the requisite medical care for detained persons”. Moreover, if withdrawal symptoms are used for any of the purposes cited in definition of torture enshrined in article 1 of the Convention against Torture, this might amount to torture.” xxx

By subjecting people who use drugs, especially drug dependent people, to arbitrary arrest by police the Order No 634 also increase their vulnerability to become victims of torture and other ill-treatment whilst in police custody. This is especially the case due to the fact that despite the creation of the legal framework for providing opioid substitution therapy in the places of detention, there is a significant lack of access to opioid substitution therapy in police custody, as was attested by the Ombudsman of Ukraine xxii,xxiii.

**Why the Order No 634 provides for disproportionate punishment and discriminating sentencing?**

The Order No 634 subjects anyone in possession of as little as 0.005 grams of acetylated opium regardless of purity to up to 3 years imprisonment. There could be no justification for such excessively harsh use of criminal laws, especially taking into account the principle of proportionality. Moreover, the Order No 634 inevitably affects the most vulnerable group of people who use drugs – drug dependent people, whose special vulnerability due to health conditions shall put them under the special protection by the state when fulfilling its positive obligations related to prevention of torture and ensuring the right to health. The Order No 634 does not respect such a vulnerability thus contradicting the states obligation under Art 2(1) of the Covenant on Civil and Political Rights.

**Recommendation to the Government:**

Introduce amendments to criminal laws and ministerial regulations to stop subjecting people who use drugs to tough punishment, especially incarceration, for possession of illicit drugs with no intent to supply. In particular, repeal the Ukrainian Ministry of Health Order No.
188, dated 2 August.2000, as amended by the Ukrainian Ministry of Health Order No. 634, dated 29 July 2010, and develop new framework regarding the threshold quantities to make sure that people who use drugs are not subjected to arbitrary arrest and detention, torture and other forms of ill-treatment, disproportionate punishment and discriminating sentencing.

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1 Saad v. the United Kingdom [GC], no. 13229/03, § 43, 69, 71 ECHR 2008
2 Ibid.
3 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
4 Ibid. at p.167
6 Resolution No. 1542 of the Ukrainian Cabinet of Ministers dated 02.11.2006 “On approving the Statute on the Ukrainian Ministry of Health”.
11 UN General Assembly Resolution 60/262, 2 June 2006.
13 Commission on Narcotic Drugs, Resolution 539: Achieving universal access to prevention, treatment, care and support for drug users and people living with or affected by HIV, March 10, 2010.
19 World Drug Report 2009. See the Preface by the Executive Director, and pp. 166-169.
20 Note by the Secretary General. General Assembly, A/HRC/15/L.28, 6 August 2010.