DETENTION CONDITIONS THAT RESULT IN ILL-TREATMENT AND CREATE A STRUCTURAL PROBLEM IN UKRAINE AND HUNGARY

by Iryna Pozhydaieva

LLM/MA Capstone Thesis
SUPERVISOR: Professor Eszter Polgari
Central European University

07 June 2020

Acknowledgments

I would like to thank the Legal Department at CEU for the opportunity to study the field I am the most passionate about. I am grateful for your support and efforts to create a program that prepares students well to become experts in the field.

I would like to thank my supervisor, professor Eszter Polgari for her guidance and meaningful recommendations during the process of writing my thesis. I appreciate her approach and professionalism so that I took valuable knowledge from her classes and consultations.

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List of Abbreviations

CoM	Committee of Ministers
CPT	Committee for the Prevention of Torture
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPR	European Prison Rules
HHC	Hungarian Helsinki Committee
KHRPG	the Kharkiv Human Rights Protection Group
NPA	National Prison Administration
PJP	pilot-judgment procedure
SIZO	pretrial detention center
ZCF	Zhovtovodska correctional facility

Introduction

1. Background and the research question

This Capstone project is going to review the issue of detention conditions that result in ill-treatment and create a structural problem in Ukraine and Hungary. The *research questions* of the thesis are the following: "What are the conditions identified by domestic human rights organizations and the European Court of Human Rights [hereinafter: the ECtHR or the Court] that result in ill-treatment in places of detention in Ukraine and Hungary and create a structural problem? What are the main recommendations to improve the situation?" The topic of the research is highly important both for Hungary and Ukraine as it shows the gap in penal systems that causes the violation of the absolute right under the scope of Article 3 of the European Convention on Human Rights [hereinafter: the ECHR or the Convention] by the States. The research will mostly focus on the examples that illustrate the structural problem in both States and on the pilot-judgment procedure [hereinafter: PJP] with further development of recommendations on possible effective remedies.

The thesis includes the review of the case-law that helps to identify the main standards used for the assessment of such issues as overcrowding and inadequate material conditions of detention that might constitute a violation of Article 3 of the ECHR. The reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment [hereinafter: the CPT], ombudsman and domestic human rights organizations give an overview of the current state and the changes that the States have implemented in order to improve the situation. The review of general principles under Article 3 and academic articles present other critical points of view for the assessment of the described issue.

2. Methodology

The research is based on doctrinal and comparative methods. The doctrinal method will help to review the main regional and domestic legal regulations together with the ECtHR case-

law in order to understand the core legal standards. The comparison between two jurisdictions, Ukraine and Hungary, will help to observe the main differences and similarities in systems.

The examination of two pilot judgments *Varga and Others v. Hungary*[1] [hereinafter: *Varga and Others*] and *Sukachov v. Ukraine*[2] [hereinafter: *Sukachov*] will show the approach and standards applied by the ECtHR that are assessed in a comparative perspective, the existence of the structural problem related to poor conditions of detention and the absence of effective remedies that could grant relief for detainees who face instant violations of their rights. The comparative analysis of both pilot judgments has not been done yet, the capstone thesis is an original contribution to the academic discourse. Therefore, the result of the project is not only the comparative analysis of the two jurisdictions and the Court's case-law but also it develops a set of recommendations that the Ukrainian government could use based on the existing Hungarian practice of the implementation of the pilot judgment. Due to the fact that *Sukachov* is a new judgment and Ukraine has not prepared any particular action plan to implement it; this question should be further explored.

3. Structure of the thesis and limitations

The first chapter will describe the applicable human rights provisions that contain the main regulations on countering ill-treatment caused by inadequate conditions of detention. It also includes the relevant standards that have been developed by the ECtHR and other interpretations provided by researchers. The chapter will analyse the limited number of cases in order to show relevant standards and examples.

The second chapter will assess conditions of detention in Hungarian and Ukrainian prisons emphasizing overcrowding as a separate important issue and other material conditions of detention. The analysis of different reports will help to illustrate the main problems at stake for further research on effective applicable remedies.

[1] Varga and Others v. Hungary (Application nos.14097/12 et al.), 2015.
[2] Sukachov v. Ukraine (Application no.14057/17), 2020.

The third chapter will show the ECtHR rules concerning the application of general measures, in particular, preventive and compensatory remedies, according to Article 13 and 46 of the ECHR. The chapter focuses on the Court's main standards on the regulation of general measures and identifies how they are applied in Ukraine and Hungary, especially in *Varga and Others* and *Sukachov* judgments.

The fourth chapter analyses the PJP with the reference to *Varga and Others* and *Sukachov* cases. The critical analysis of these cases and possible remedies will show effective ways to redress the structural problem. It will allow making a conclusion on what actions should be done by the Ukrainian government in order to solve the existing structural problem using lessons from the implementation of the Hungarian pilot judgment.

Finally, the practical component will include recommendations addressed to the Ukrainian NGO, the Kharkiv Human Rights Protection Group [hereinafter: the KHRPG], on the further Government's actions to implement *Sukachov* and new effective remedies developed from the critical analysis of both pilot judgments.

Referring to the possible *limitations* I would like to mention that I am not fluent in the Hungarian language that limits me from the comprehensive assessment of materials written in Hungarian, particularly the reports drafted by the Hungarian Helsinki Committee [hereinafter: the HHC] on conditions of detention that are used in the current research project. I have to use existing reports and case-law on prison conditions as I do not have personal access to detention facilities neither in Ukraine nor in Hungary due to the absence of necessary license or permission.

Chapter 1. The general principles identified in the case-law of the ECtHR on ill-treatment resulting from conditions of detention

The ECtHR practice and various reports show that permanent poor conditions of detention can be qualified as ill-treatment proscribed by Article 3 in certain cases.[3] Under conditions of detention researchers define the general environment where persons are detained, prison regime and other specific conditions and circumstances where inmates are kept.[4] The ECtHR assesses the minimum level of severity in the identification of ill-treatment that depends on the circumstances of the case, the duration of treatment, its physical and mental influence, sex, age, state of health of the person affected.[5] Some prisoners have special needs for example due to their health condition or disability and failure to meet them would amount to ill-treatment in certain circumstances.[6] Ill-treatment that attains the minimum level of severity usually involves actual bodily harm or intense physical or mental suffering.[7]

The ECtHR considers treatment to be *inhuman* when it "was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering".[8] Treatment is *degrading* "when it was such as to arouse in its victims' feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience". [9]

The dynamic approach to the ECHR resulted in lowering the "minimum level of severity" in relation to prison conditions and treatment by the ECtHR for the past years. As a commentary on the ECHR notes: "(t)he ECtHR has become more demanding of states under

[3] J. Merdok, V. Yirichka, "Combating inhuman treatment in detention centers" (2016), CoE, p.27.
[4] Masa Marochini, 'The Ill-Treatment of Prisoners in Europe: A Disease Diagnoses but Not Cured' (2009) 30 Zb Prav Fak Sveuc Rij 1108, p.7.
[5] Csüllög v. Hungary (Application no. 30042/08), 2011, para.28.
[6] Kudła v. Poland (Application no.30210/96), 2000, paras.92-94.
[7] Ibid, paras.92-94.
[8] Gafgen v. Germany (Application no.22978/05), 2010, para.89.
[9] Pretty v. the United Kingdom (Application no.2346/02), 2002, para.52.

Article 3".[10] Additionally, Article 3 allows no qualification due to its absolute character and any attempts to connect inadequate conditions of detention with certain economic, organizational or other factors cannot justify a failure to safeguard rights.[11] For instance, the ECtHR ruled in *Poltoratskiy v. Ukraine* that even the State's socio-economic problems or the lack of resources cannot serve as a proper justification of poor prison conditions that are contrary to Article 3.[12]

In general, the State should guarantee that prisoners are kept in conditions that are "compatible with respect for human dignity, that the measure of detention does not subject prisoners to distress or suffering, and that, given the practical demands of imprisonment, health and well-being are adequately secured".[13] The State should organize its penitentiary system in the way of providing a guarantee to respect prisoners' rights regardless of financial problems.[14] Even if there is no intent to debase or humiliate a person by placing him/her in poor conditions of detention it does not rule out a finding of the violation of Article 3.[15]

First of all, the ECtHR requires evidence to be provided in order to prove the existence of poor material conditions of detention. When assessing the evidence the Court applies the high standard of proof "beyond the reasonable doubt".[16] In the case of *Rodzevillo v. Ukraine,* the ECtHR accepted the applicant's complaints about SIZO[17] no. 3 as evidence since they were very detailed and specific.[18] In *Ananyev and Others v. Russia* the Court stated that due to the restrictions imposed by the prison regime, detainees cannot be expected to provide such evidence as photographs of cells and precise measurements of space.[19] However, the Court notes that the applicant must elaborate on the specific elements of his detention that would give

10 Harris, O'Boyle & Warbrick: "Law of the European Convention on Human Rights", Oxford University Press, 2014, p.237.
11 Marochini (n 4) p.7.
12 Poltoratskiy v. Ukraine (Application no. 38812/97), 2003, para.148.
13 Beketov v. Ukraine (Application no.44436/09), 2019.
14 Varga and Others (n 1) para.103.
15 Peers v. Greece (Application no.28524/95), 2001, para.74.
16 Ireland v. UK (Application no.5310/71), 1978, para.161.
17 Pre-trial detention center.
18 Rodzevillo v. Ukaine (Application no.38771/05), 2016, para.45.
19 Ananyev and Others v. Russia (Applications nos.42525/07 and 60800/08), 2012, para.122.

judges a chance to conclude that the complaint is not manifestly ill-founded.[20] Detainees should provide a detailed description of the allegedly poor conditions that lead to their ill-treatment.[21]

When questionable conditions of detention are contrary to Article 3 the applicants tend to rely on the findings of the CPT in such cases as: a) the necessity to establish the factual background related to conditions of detention; b) to persuade the Court that treatment violates Article 3 as the CPT gives an independent evaluation of conditions observed.[22] The ECtHR heavily relies on the CPT reports on visits in the assessment of the circumstances of the case.

Referring to *overcrowding* the ECtHR established in a number of pilot and leading judgments a minimum standard of personal space at 3 sq.m per detainee in multi-occupancy accommodation.[23] Even though the CPT established in its recommendations the standard that personal space should amount to 4 sq.m per prisoner, the ECtHR does not consider it that extreme to amount to the violation of Article 3 in itself.[24] Generally, following the principle of legal certainty, foreseeability and equality before the law the ECtHR does not depart from the practice established in leading cases and pilot judgments without cogent reasons.[25]

Regarding the general standards laid down in its case-law the ECtHR in the case of *Ananyev and Others v. Russia*[26] established a special test on whether the detainee's lack of personal space can result in the violation of Article 3. The test included: 1) each detainee has to have a personal sleeping space in the cell; 2) a detainee should have 3 sq.m of floor space; and 3) the overall surface of the cell must allow a detainee to move freely between furniture.[27] Extreme lack of space weighs heavily in the assessment of whether conditions of detention are in violation of Article 3.[28] However, a violation might be found if the lack of individual space is coupled with other existing inappropriate conditions, in particular, access to outdoor

[20] Ibid, para.45.
[21] Ibid, para.122.
[22] J. Murdoch, "The treatment of prisoners, European standards" (2006) Council of Europe Publishing, p.47.
[23] Idalov v. Russia (Application no.5826/03), 2012, para.101.
[24] Florea v Romania (Application no.37186/03), 2010, para 51.
[25] Muršić v. Croatia (Application no. 7334/13), ECtHR (20 October 2016), para.110.
[26] Ananyev and Others (n 19) para.148.
[27] Ibid, para.148.
[28] Sukachov v. Ukraine (n 2) para.86.

exercises, natural light and air, sufficient ventilation, heating, possibility to use a toilet and to have privacy, the fulfillment of hygienic and sanitary requirements.[29]

Another important rule includes sufficient *access to outdoor activities*. If prisoners' personal space in cells is slightly less than the standard space and they spend almost the whole day indoors, the lack of outdoor activities would be identified as one more further condition culminating in a violation of prisoners' rights under Article 3. The European Prison Rules [hereinafter: EPR] foresee that prisoners should have a balanced program of activities. They should spend as many hours outside per day as necessary for a normal level of human and social interaction.[30] A prisoner should spend at least one hour per day for exercises in the open air even if conditions in the cell are satisfactory.[31]

The next chapter will cover specific examples of other material conditions of detention that do not correspond to the standard. Additionally, the thesis will review the conclusions made by the ECtHR, CPT and national institutions on the current situation with material conditions of detention in Ukraine and Hungary.

[29] Ananyev and Others (n 19) para.149.
[30] European Prison Rules (2006) Council of Europe Publishing, 25.2, p.13.
[31] Ibid, 27.1, p.15.

Chapter 2. Issues that show improper conditions in Ukrainian and Hungarian places of detention as ill-treatment

2.1. Overcrowding

In the recent ECtHR jurisprudence on Ukraine, particularly in *Beketov v. Ukraine*[32] and *Malyy v. Ukraine*,[33] the Court stated that the lack of space in prison cell weighs heavily as a factor that should be considered while establishing whether conditions of detention were degrading within the meaning of Article 3.[34] The latest case-law on prison conditions in Ukraine and Hungarian case-law before 2015 mentioned the standard established by *Muršić v. Croatia.*[35] It states that if personal space available to a detainee is less than 3 sq.m of floor space in multi-occupancy accommodation there is a strong presumption of Article 3 violation and the lack of personal space is deemed to be severe.[36] The presumption is going to be rebutted only in case if the following conditions are cumulatively met: 1) reduction of space of 3 sq.m. is short and minor; 2) reduction of space is accompanied by the possibility to move freely outside the cell; and 3) there were no other aggravating aspects of his detention.[37]

In *Malyy* the applicant stayed in cell measured 1.9 by 3.7 meters almost the whole day and lacked outdoor activities.[38] Regarding the *Beketov* case, in addition to the lack of space measuring from 2.5 to 2.8 sq.m., the Court considered the claims on unsanitary conditions and the lack of respect for hygiene as aggravating aspects.[39] In *Istvan Gabor Kovacs v. Hungary*, the Court recognized that overcrowded conditions of detention amounted to degrading treatment and included the lack of living space per inmate according to the CPT standard of 4 sq.m in conjunction with the fact that he was locked in cells almost the whole day.[40] Thus, I

[32] Beketov v. Ukraine (Application no.44436/09), 2019.
[33] Malyy v. Ukraine (Application no.14486/07), 2019, para.84.
[34] Beketov (n 32) para.126.
[35] Muršić (n 25) para.76.
[36] Ibid, para.76.
[37] Ibid, para.138.
[38] Malyy (n 33) para.84.
[39] Beketov (n 32) para.127.
[40] Domjan v. Hungary (Application no.5433/17), 2017, para.18.

conclude that the ECtHR case-law shows the importance to consider other physical conditions of detention in addition to overcrowding.[41]

As a result of monitoring visits in Ukraine taken by Ombudsman in 2018, it was concluded that conditions in detention facilities did not correspond to the UN Standard Minimum Rules for the Treatment of Prisoners in relation to sanitary requirements, climatic conditions, cell space, light, heating and ventilation.[42] The last CPT report on Ukraine in 2018 also stated that the material conditions of detention were generally poor or appalling.[43] The report indicated the problem of overcrowding stating that there were cells with fewer beds than the number of inmates. Thus, prisoners had to sleep in shifts.[44] The CPT identified that cells in Lviv SIZO, Lviv Colony no.30 have been overcrowded as well. [45] The case of *Rodzevillo v. Ukraine* shows a real example of that the applicant had to share a ten-bed cell with nineteen inmates which proves severe overcrowding.[46] Monitoring visits provided by the KHRPG[47] have recently recorded overcrowding in Zhovtovodska correctional facility no.26 [hereinafter: ZCF no.26] and Mykolaiv Correctional Center in 2019.[48]

The 2018 CPT report on Hungary confirmed generally satisfactory conditions. However, some particular negative comments such as established window shields or inadequate material conditions in the so-called "ranging cells" were made in the report.[49] The situation with conditions of detention in Hungary was comparable to that of in Ukraine, however, it has been gradually improved since 2015. The problem of overcrowding and poor material conditions in some detention facilities still exists and was defined by the Comprehensive report

[41] Malyy (n 33) para.84.
[42] UN Standard Minimum Rules for the Treatment of Prisoners (2015), A/RES/70/175.
[43] CPT, "Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 21 December 2017" (2018), p.36.
[44] Ibid, p.36.
[45] Ibid, p.36.
[46] Rodzevillo (n 18) para.11.
[47] Kharkiv Human Rights Protection Group.
[48] KHRPG, "Monitoring visit to Mykolaiv Correctional Center no.50" (2019) <http://khpg.org/index.php?id=1577374913&w=моніторинг>.
[49] CPT, "Report to the Hungarian Government on the visit to Hungary carried out by the CPT" (2018), p.7.

by the Commissioner for Fundamental Rights on the activities of the OPCAT (Optional Protocol to the Convention against Torture) National Preventive Mechanism in 2018 [hereinafter: OPCAT report] and the HHC reports that the project analyses. As overcrowding is the major problem in Hungary there are more statistical data on the percentage rates of overcrowding and how it has been changed since the implementation of the pilot judgment *Varga and Others v. Hungary*.[50]

The OPCAT report on the visit to Márianosztra Strict and Medium Regime Prison reported that the holding capacity of the prison facility was 524 detainees but the actual number of detainees held in prison was 624 that is 119.08% of overcrowding.[51] In the Unit I of the Budapest Remand Prison the overcrowding rate was 168%.[52] Visits of the HHC recorded that the smallest personal moving space per person was 2.3 sq.m in Somogy County Penitentiary Institute.[53] 1.39 sq.m of personal space per inmate together with 143% of overcrowding was reported in the Vác Prison.[54]

Communication from the HHC from April 2020 states that even though the occupancy rate has decreased, the actual improvement cannot be accurately assessed due to the absence of necessary data.[55] According to the original plans from 2018/2019 new prisons should have started to operate. However, currently, there are no new prisons that have been built.[56]

It is worth mentioning that according to the data provided by the National Prison Administration [hereinafter: NPA] in Hungary the average occupancy rate in 2018 was 119% and in 2019 the occupancy rate decreased to 94%. Comparing these data to 2014 occupancy

[50] Varga and Others (n 1).
[51] Office of the Commissioner for Fundamental Rights, "Summary of case No. AJB-474/2018 OPCAT visit to the Márianosztra Strict and Medium Regime Prison" (2017), p.1.
[52] Office of the Commissioner for Fundamental Rights, "Summary of Case Report № AJB-501/2018 of the OPCAT Visit to Unit 1 of the Budapest Remand Prison" (2017), p.1.
[53] HHC, "Report on the visit to the Somogy County Penitentiary Institute" (2017), p.10.
[54] HHC "Report on the visit to the Vác Prison and Prison" (2016), p.2.
[55] Communication from an NGO (HHC) in the cases of Istvan Gabor Kovacs and Varga and Others v. Hungary (Applications No. 15707/10, 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13) (21/04/2020), Council of Europe, p.2.
[56] Ibid, p.2.

rate that was 143% it follows that even though the Hungarian system still should do many improvements, some success has been reached.[57]

The modern Hungarian system has introduced certain measures to eradicate overcrowding that will be discussed further. However, here it is necessary to mention a new calculation method of the space per inmate that has been introduced in 2017. As a result, more detainees can be lawfully placed in the cells of the same size even though it does not correspond to the standard.[58] It means that before 2017 the space occupied by beds, tables, lockers and chairs was not included in the space measuring. From that time even if a detainee had much less actual space for moving than 3 sq.m it can be now said that it corresponds to the standard living space required by the law due to the new calculation method.[59]

2.2. Access to outdoor activities

The ECtHR observed in the *Beketov* case that although the applicant did not specify the exact time that he spent in the cell, the ECtHR observed that detainees spend most of the time in cells every day, considering the general SIZO [hereinafter: pre-trial detention center] regime in Ukraine.[60] Thus, the ECtHR found that the lack of personal space, together with state of health and unsanitary conditions, lack of outdoor exercise that lasted over 5 years, were qualified as ill-treatment.[61]

If material conditions of detention are generally poor the lack of outdoor exercises is a significant aggravating factor. During the 2016 visit to Márianosztra Penitentiary the HHC reported that according to legal requirements the detainees were allowed to be outside of their cells for one hour per day. The temperature in cells in springtime was significantly colder than

[57] Ibid, p.4.
[58] Response no.30500/490/2020 issued by the NPA to the HHC's FOI request (2020), p.4.
[59] Communication HHC 2020 (n 55) p.4.
[60] Beketov (n 32) para.129.
[61] Ibid, para.130.

outside. In some cells, windows cannot be properly closed and cold air filters inside the cell.[62] These factors if considered cumulatively raised concern about adequacy of detention conditions.

2.3. Other material conditions that result in ill-treatment proved by monitoring reports and ECtHR case law

In the assessment of other material conditions both in Ukraine and Hungary the aim is to identify the common features that further led to the pilot judgment procedure in relation to both States.

According to the Ukrainian Ombudsman's visit to some of the detention facilities, it has been observed that some cells do not have windows at all and prisoners do not have access to *daylight* (Vinnitsa detention facility no.1, Kharkiv detention facility no.27, Lviv SIZO).[63] The EPR state that "windows should be large enough to let prisoners read or work having natural light in normal conditions and shall allow the entrance of fresh air in case there is no artificial air conditioning".[64] Artificial light should be provided according to established technical standards.[65] The *Rodzevillo*[66] and *Beketov*[67] cases identified that in the cells there was hardly any daylight and the artificial light was dark. At the same time, in *Smilyanskaya v. Ukraine*[68] and *Beketov* cases, artificial light was on the whole day that is also against the standard as detainees might have a sleeping disturbance. Some detention facilities in Hungary such as the Miskolc Penitentiary have problems with insufficient daily light or artificial light that is instantly switched on.[69]

[62] Hungarian Helsinki Committee, "Report on the visit to the Márianosztra Prison" (April 26-27, 2016 and May 5, 2016), p.16.
[63] Ministry of Justice of Ukraine, "Annual Report about the Results of Actions of Ombudsman in 2018" (2018), p.88.
[64] EPR (n 30) 18.2 (a), p.9.
[65] Ibid, 18.2 (b), p.9.
[66] Rodzevillo (n 18) para.11.
[67] Beketov (n 32) para.123.
[68] Smilyanskaya v. Ukraine (Application no.46196/11), 2019, para.17.
[69] Office of the Commissioner for Fundamental Rights, 'Comprehensive Report by the Commissioner for Fundamental Rights on the Activities of the OPCAT National Preventive Mechanism in 2018' (2019), p.75.

The problem of sufficient *ventilation* was questioned in *Smilyanskaya* case.[70] Apart from the lack of ventilation, most of the detainees smoked. Thus, the applicant (asthma sufferer) had breathing difficulties and was limited in having access to outside walks (30 minutes per day).[71] Ukrainian Ombudsman also recorded that some cells in Lviv SIZO were stuffy and humid.[72] The thesis observed that humidity, lack of ventilation and smoke can lead to the negative outcome of spreading diseases. The Ombudsman concluded that none of SIZOs or other detention places can provide the full isolation of persons with an open form of tuberculosis from other detainees.[73]

The problem with ventilation in Hungarian detention facilities is either the result of view-blockers installed on windows that obstruct natural air[74] or the general insufficient condition of the ventilation system. That can also lead to the problems with the heating system. The air temperature on the top level of Váci Prison building was uncomfortably high at the time of the visit in 2016. The ventilation in toilets was problematic as separately ventilated toilets were available in 11 cells (47 people), 66 cells including 451 people had separate toilets without proper ventilation. The rest of the 145 cells that included 326 people did not have separate of separately ventilated toilets.[75]

In relation to the *quality of food* and *water*, the EPR states that "prisoners should be provided with a necessary nutritious diet that corresponds to their health, age, physical condition, culture, religious beliefs, nature of their work. Clean drinking water should be provided at any time according to the prisoners' needs."[76] The monitoring visit to ZCF no.26 confirmed a violation of the mentioned standard since the food given to prisoners was of bad quality, drinking water was not provided and prisoners had to drink water from the pipe that

[70] Ibid, para.17.
[71] Ibid, para.17.
[72] Ombudsman Report (n 63) p.96.
[73] Ibid, p.96.
[74] Communication 2020 (n 55) p.13.
[75] Vác Prison and Prison (n 54), p.2
[76] EPR (n 30) 22.1, 22.5, p.11.

was dirty and full of bacteria.[77] Access to cold water was limited and available only 2 hours per day.[78] Issues with the water supply, in particular access to hot water, has been reported in Vác Prison and Márianosztra Prison in Hungary. In the last one, detainees had to rent a kettle in order to heat water for sanitary needs.[79] To conclude, the mentioned facts are not only the indicative of existing ill-treatment, but they might inevitably lead to numerous health problems.

Sanitary conditions are not always satisfactory either. For instance, premises of ZCF no.26 are full of fleas and cockroaches [80] and in the case of *Rodzevillo* the cell was not disinfected from rats. [81] In Hungarian prisons bedbugs are generally widespread and constitute a recurring problem. There was no systemic pest control and detainees reported that disinfection in Márianosztra Prison was provided only in case of separate requests by the detainees. However, it cannot prevent the bug infestation spread from other cells.[82]

The KHRPG reported that toilets, showers and cells in general in ZCF no. 26 are currently in critical condition. *Toilets* are not sufficiently partitioned with walls and it is also commonly observed in Hungarian Prisons, giving rise to new concerns of degrading treatment due to the lack of privacy in such an intimate aspect.[83] Only in 36 out of 101 cells in Márianosztra Prison lavatory was partitioned.[84] Furniture and equipment were deteriorated and could cause physical damages to inmates.[85] Monitors of ZCF no.26 also observed bare cables in cells and showers that are dangerous for health.[86] Poor detention conditions in the mentioned prison facilities in Ukraine are connected with the lack of financial resources to provide repairs.

[77] KHRPG, "Monitoring visit to Zhovtovodska correctional facility no.26" (2019).
[78] Ibid.
[79] Márianosztra Prison (n 62) p.18.
[80] ZCF (n 77).
[81] Rodzevillo (n 18) para.11.
[82] Ibid, p.19.
[83] ZCF no.26 (n 77).
[84] Márianosztra Prison (n 62) p.3.
[85] Ibid, p.16.
[86] Ibid.

With regard to *working conditions* for prisoners, a monitoring visit to Ihrensk Correctional Center no.113 in Ukraine proved that those were improper as prisoners had to work with toxic chemical materials without having any protection.[87] In Márianosztra Prison in Hungary working conditions became questionable as employees working at the paper factory reported that although they were provided with dust filters and masks, those were of insufficient quality and did not preserve their health.[88] According to the EPR, "if prisoners are required to work, conditions of such work should follow the standards" and those factors that can negatively affect health should not be ignored .[89]

To summarize, the monitoring observations in Ukraine and Hungary identified that poor and degrading conditions in prisons have a structural character and are related to the fact that some of the detention facilities are old and need to be renovated or new prison facilities should be built. For this purpose, the States should reform the system, introduce new regulations and allocate separate funds. The case-law shows that none of the previous judgments in Ukraine on prison conditions, especially *Nevmerzhitsky v. Ukraine*, has been fully implemented and has triggered any significant changes in the national system.[90] In relation to Hungary, it is proved that some improvements related to overcrowding have been made since 2015. However, poor material conditions in some of the detention facilities have been observed for the last several years.

[87] KHRPG, "Monitoring visit to Ihrensk Correctional Center no.133" (2019).
[88] Márianosztra Prison (n 62) p.28.
[89] EPR (n 30) 105.3.
[90] Nevmerzhitsky v. Ukraine (Application no.54825/00), 2005.

Chapter 3. Remedies applied by the ECtHR referring to conditions of detention and structural problem in Ukraine and Hungary

The thesis observes that the ECtHR established a set of standard rules concerning the application of individual and general remedies covered by Article 13 of the ECHR in the Court's case-law. A particular remedy should be available and effective in law and practice and the effectiveness does not depend on the certainty of the result for the applicant.[91] Article 13 requires the domestic remedy to deal with the substance of the complaints and grant relief.[92]

The ECtHR defined that with respect to Article 3 complaints concerning conditions of detention there are two possible types of relief: improvements of poor conditions and granting compensation for the sustained damage.[93] Where prisoners' fundamental rights are concerned under the scope of Article 3 there should be preventive and compensatory remedies that will ensure effectiveness.[94] The effectiveness of the remedy in relation to the complaint on ill-treatment is closely connected with an important question of whether the complainant can raise a claim before the domestic court and can receive a redress on time.[95]

In order to file an application to the ECtHR, all the effective domestic remedies should be exhausted. [96] The rule of using domestic remedies should be applied without excessive formalism and must be flexible.[97] However, if there is an established effective preventive remedy, detainees should not have obstacles to use it.[98]

The Committee of Ministers [hereinafter: CoM] should take into account the State's discretion to choose ways that will help to comply with the judgment. But the CoM should ensure whether *individual measures* have been taken in order to cease the violation and that the

[91] Suckachov (n 2) para.112.
[92] Ibid, para.112.
[93] Benediktov v. Russia (Application no.106/02), 2007, para.29.
[94] Torreggiani and Others v. Italy (Application nos.43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10), 2013, para.50.
[95] Mandić and Jović v. Slovenia (Applications nos.5774/10 and 5985/10), 2011, para.107
[96] Varga and Others (n 1) para.45.
[97] Selmouni v. France (Application no.25803/94), 1999, para.77.
[98] Sukachov (n 2) para.113.

injured party is put in the same situation as was before the violation occurred (*restitutio in integrum)*.[99] Individual measures may be required for "striking out of an unjustified criminal conviction from the criminal records, the reopening of domestic proceedings, the release of those have been found illegally."[100] Usually, the Court indicates what measures should be applied in a particular case.[101] Under the supervision of the CoM, the State is responsible for ensuring that the existing or new remedy meets the Convention requirements.[102]

The effective domestic remedy in relation to conditions of detention is the one when the court or authority has to review acts or omissions that were in violation of Article 3 according to the principles and standards expressed in the Court's case-law.[103] With regard to *preventive remedies*, there can be individual relief granted to the detainee concerned or wider measures covering massive and concurring violations of detainees' rights including overcrowding or other inadequate material conditions of detention.[104] If the person is detained in conditions that are incompatible with Article 3, the best form of redress would be ending the violation.[105]

A *preventive remedy* in relation to the conditions of detention will be effective if the proceeding administrative authority is: "independent of penal authorities, ensures the detainee the possibility to participate in the examination of the complaint," guarantees a speedy and diligent complaint revision, uses various legal tools in order to eradicate the problem and can render "binding and enforceable decisions within reasonable time limit".[106]

The complaint to a prosecutor that does not ensure the protection of the person's absolute right not to be ill-treated or to the ombudsman who does not have a capacity to grant

[99] The execution of the Court's judgments. In: D. J. Harris – M. O'Boyle – E. P. Bates – C. M. Buckley, Harris, O'Boyle & Warbrick – Law of the European Convention on Human Rights (3rd ed., OUP, 2014), p.185.
[100] Ibid, p.185.
[101] Elisabeth Lambert Abdelgawad, "The execution of judgments of the European Court of Human Rights" (2008), CoE, p.19.
[102] Torreggiani and Others (n 94) para.98.
[103] Neshkov and Others (Applications nos.36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13), 2015, paras.185-87.
[104] Sukachov (n 2) para.117.
[105] CoE, "Guide to Article 13 of the European Convention on Human Rights" (2019), p.31.
[106] Neshkov and Others (n 103) paras.182-83.

binding decisions cannot be considered as effective remedies.[107] However, if there is a judicial review by the judge who is responsible for the decisions on the execution of sentences it would be effective.[108] Referring to preventive remedies in cases of *Stella and Others v. Italy*[109] and *Torreggiani and Others v. Italy*[110] the Court agreed that a "complaint to the judge responsible for the execution of sentences" who can issue binding decisions concerning conditions of imprisonment "satisfied the requirements of its case-law".[111] *Domján v. Hungary*[112] judgment proved that a "complaint to the governor of a penal institution" who could "order the relocation of a detainee within the institution or transfer to another institution" that was further reviewed by the judge was "compatible with the requirements of the Court's case-law".[113]

Once the person has been placed in poor conditions, he/she should have the right to receive *compensation* for any breach that has occurred regardless of whether the person is still detained or has been released.[114] Compensation may include monetary compensation or *reducing the sentence* of the person in proportion to every day spent in poor conditions of detention. It can be applied only to current detainees.[115] The reduction of the sentence should be made in an express and measurable way.[116]

It should be taken into consideration that if an Article 3 claim has been raised and the finding of the competent authority confirms inhuman and/or degrading conditions, there should be a presumption those caused a detainee non-pecuniary damages.[117] Additionally, detainees

[107] Ananyev and Others (n 19) paras.102-106.
[108] Domján v. Hungary (Application no. 5433/17), 2017, paras.21-23.
[109] Stella and Others v. Italy (Application no.49169/09), 2014, paras. 46-55.
[110] Torreggiani and Others (n 94).
[111] Ulemek v. Croatia (Application no. 21613/16), 2019, para.73.
[112] Domján (n 108) paras.21-23.
[113] Ibid, para.21.
[114] Sukachov (n 2) para.113.
[115] Neshkov and Others (n 103) para.287.
[116] Varga and Others (n 1) para.109.
[117] Neshkov and Others, para.190.

should have a chance to exhaust domestic remedies without fear that they will be subjected to punishments or any other negative consequences after doing that.[118]

An exclusively compensatory remedy cannot be considered as a sufficient response to the existence of poor conditions of detention that give rise to ill-treatment.[119] It would not have a necessary preventive effect without stopping the continuation of the alleged violation and would not facilitate placing in adequate material conditions of detention.[120] If the only redress available for detainees is compensation, it would make the legal obligation of the State to ensure adequate conditions of detention in line with the Convention standards weaker.[121] The preventive and compensatory remedy should be guaranteed as a complex redress in order to guarantee an effective redress.[122]

The ECtHR in its case-law, particularly in *Ulemek v. Croatia*, established the relationship between preventive and compensatory remedies in case of detention conditions in violation of Article 3.[123] In this case the Court revised the structural reforms held by different countries on the system of remedies that were connected with conditions of detention. The Court proved by its existing case-law once again that preventive and compensatory remedies have to be complementary. [124]

[118] Ibid, paras.188-191.
[119] Guide to Article 13 (n 105) p.30.
[120] Mandić and Jović (n 95) para.116.
[121] Ananyev and Others (n 19) para.98.
[122] Ibid, para.221.
[123] Guideline on Article 13 (n 105) p.30.
[124] Ulemek (n 111) para.72.

Chapter 4. Pilot judgment procedure and general measures to deal with the structural problem in Ukraine and Hungary

In this chapter, I would like to review the application of the PJP to such cases as *Varga and Others v. Hungary*[125] and *Suckachov v. Ukraine*.[126] The ECtHR reiterated that in order to implement the line of judgments that identify the structural problem in the State, the Court may adopt PJP spelling out measures to be taken by the respondent State.[127] Another aim of the PJP is to call on the State to resolve a large number of cases that appear to stem from the same structural problem and, thus, to apply the principle of subsidiarity in an effective way.[128] The PJP has a function of facilitating the most effective and fast resolution of the domestic dysfunction that leads to instant and repeated violations. [129]

At this point, the thesis describes the case-law and the particularities of the PJP in cases of inadequate conditions of detention in Ukraine and Hungary. The analysis of the implementation of judgment *Varga and Others* will help to define what actions should or should not be done in Ukraine.

The applicant in the *Sukachov* case complained about the lack of personal space as he spent a lengthy period in the cell that is less than 3 sq.m.[130] Moreover, he spent 23 hours in a cell on a daily basis having insufficient access to outside activities. Other factors constituting poor prison conditions were improper isolation of toilets, lack of fresh air and poor ventilation, dampness and insects inside the cell.[131] The ECtHR accepted the applicant's claims based on photographs and the applicant's cellmates statements about the conditions where they have been detained.[132] The applicant's submissions were also supported by the CPT report in 2014,

[125] Varga and Others (n 1).
[126] Sukachov (n 2).
[127] Varga and Others, para.95.
[128] Ibid, para.96.
[129] Rule 61 – Pilot-judgment procedure. Rules of Court (2018), p.31.
[130] Sukachov (n 2) para.79.
[131] Ibid, para.79.
[132] Ibid, para.90.

and these reports were instrumental for the Court's assessment.[133] The ECtHR further established poor prison conditions in other applications that had been submitted during the applicant's detention[134] that also supports the conclusion that the structural problem in Ukraine was proven by recent ECtHR case-law.

Rule 61 § 6 says that "the Court can adjourn the examination of all similar applications pending implementation by the respondent State of the measures set out in this pilot judgment".[135] If the State does not adopt the measures following the PJP the Court will have no other choice but to review further cases on similar facts that are normally suspended by the pilot judgment pending its implementation.[136] However, it is interesting to note that in *Varga and Others* the Court did not adjourn the pending cases arguing that "continuing to process all conditions of detention cases in the usual manner will remind the respondent State on a regular basis of its obligation under the Convention".[137] In *Sukachov* the Court also decided referring to the principles established in *Ananyev and Others*[138] that it would not be appropriate to adjourn the examination of similar pending or impending cases.[139] According to the Court's management database, there are "around 120 prima facie meritorious applications against Ukraine" related to conditions of detention pending before the Court.[140]

At the point when *Varga and Others* case was decided, 450 pending applications awaited their first examination. [141] The prison facilities where the applicants have been detained were located in geographically diverse regions. However, the facts that led to finding the violation of Article 3 in different detention facilities were relatively similar.[142] They illustrated

[133] Ibid, para.90.
[134] Ibid, para.90.
[135] Ibid, para.161.
[136] Ibid, para.138.
[137] Varga and Others (n 2) para.116.
[138] Ananyev and Others (n 19) para.236.
[139] Sukachov (n 2) para.161.
[140] Ibid, para.138.
[141] Varga and Others (n 1) para.99.
[142] Ibid, para.99.

the malfunctioning of the Hungarian penitentiary system and the weak legal and administrative safeguards against ill-treatment. In some cells where the applicants were detained toilet was separated from the living area by a curtain; the living space was full of insects; no adequate ventilation was provided that led to reaching 40˚C in summer; there were no proper sleeping facilities; inmates had very limited access to shower and could spend only limited time out of cells (from 30 min to 1 hour per day).[143] The living space per inmate varied from 1.5 to 3 sq.m which is in itself insufficient and it was aggravated by other poor material conditions. The findings on overcrowding were also supported by the CPT report from 2013.[144]

As a result, the ECtHR noted in both *Sukachov* and *Varga and Others* that the lack of living space available to detainees and other aggravating circumstances amounted to "degrading treatment" constituting a violation of Article 3.[145] Considering the circumstances and the cumulative effects the Court held that "hardship endured by the applicants exceeded the unavoidable level of suffering inherent in detention".[146] Moreover, In *Sukachov* the Court concluded that there are no available remedies in Ukraine that guaranteed compensation in cases of inadequate conditions of detention.[147]

Before the *Sukachov* was decided the State had attempted to make positive steps in order to address the issue and to implement a number of reforms. Thus, according to the Government's statement, prison reform in Ukraine had started in 2016.[148] It included amendments to the 2003 Code that has introduced changes to the conditions of detention in accordance with the European Prison Rules.[149] In 2016 the Parliament has adopted several laws "aimed at improving access to justice for detained and convicted persons; the execution of

[143] Ibid, para.90.
[144] Ibid, para.86.
[145] Ibid, para.91.
[146] Ibid, para.92.
[147] Sukachov (n 2) para.124.
[148] Ibid, para.128, Varga and Others, para.97.
[149] Sukachov, para.128.

sentences and exercise by convicted persons of their rights; humanization of the procedure for and conditions of execution of sentences; and the application of new incentives and penalties to convicted persons".[150]

Prison reform included a plan for building new pre-trial detention facilities and renewing old ones.[151] However, the reform was not successful as there was no clear strategy for its implementation. This bill did not introduce any significant changes in the penitentiary system except the liquidation of the stable organ, State prison service, transferring the power of control to the Ministry of Justice and ensuring the social rights of the prison guards.[152] Even though the government noted that in 2016 889 objects belonging to penal facilities have been repaired, the adopted mechanism did not correspond to the principle of impartiality, effectiveness and transparency.[153]

The Government did not deny the existence of the structural problem and the Concept of Reform of the Prison System in Ukraine of 2017 confirmed that some penal institutions were in unsatisfactory conditions and some of them were in a critical state.[154] Thus, the Court reiterated that even though the Government has tried to make some positive changes within the framework of the prison reform, the actual problem of poor conditions in the places of detention remained in place.[155] Similarly, in *Varga and Others*, the State neither disputed the existence of the problem nor provided any documents about the applicants' conditions of detention.[156]

Since the ECtHR decided the first case on conditions of detention in *Nevmerzhitsky v. Ukraine*[157] the Court has made 55 decisions against Ukraine where the violation of Article 3

[150] Ibid, para.128.
[151] "Some issues of optimizing the activities of the central executive bodies of the justice system" (2016), the Supreme Rada < https://zakon.rada.gov.ua/laws/show/343-2016-%D0%BF>.
[152] DW, "Planned reform of the penitentiary system: problems remain" (2018) <https://www.dw.com/uk/запланована-реформа-пенітенціарної-системи-проблеми-залишаються/a-42456641>.
[153] Sukachov (n 2) para.130.
[154] Ibid, para.142.
[155] Ibid, para.142.
[156] Varga and Others, para.79.
[157] Nevmerzhitsky (n 90).

was connected with poor conditions of detention.[158] The identification of the systemic problem is dependent not only on the actual number of pending cases in the Court but on the potential flow of similar applications in the future as well.[159] The Court noted that the CPT in its most recent report welcomed the steps to reform the system. However, it reiterated that the reform did not have a meaningful impact on the situation with holding persons in pre-trial detention.[160]

The CoM strongly encouraged Ukraine to introduce a long-term strategy leading to the resolution of the structural problem.[161] The following resolution CM/ResDH(2018)472 took into consideration cases of *Nevmerzhitsky*, *Yakovenko*, *Logvinenko*, *Isayev and Melnik,* and underlined the structural problem appearing from the judgments.[162] The CoM called Ukrainian authorities to take action to establish preventive and compensatory remedies as it has been recommended by the ECtHR in *Varga and Others*.[163] According to the data from the State Penal Service (SSES) from 1 April 2019, SIZOs held 20,346 persons detained and the number has increased since 2017 (19,516).[164]

Returning to the Court's practice, the ECtHR stated that Article 46 in the line with Article 1 imposes on the States the obligation to implement individual and general measures to protect violated Convention rights.[165] The Court referred to individual measures neither in the *Varga and Others* nor in the *Sukachov* judgments but mentioned a list of *general measures* under Article 46 that are aimed to prevent new violations or cease the continuing ones [Rule 6(2)(b)(ii)].[166]

[158] Sukachov, para.135.
[159] Neshkov and Others (n 103) para.270.
[160] Sukachov, para.140.
[161] H46-24 Nevmerzhitsky, Yakovenko, Logvinenko, Isayev and Melnik groups v. Ukraine (Application No. 54825/00) (2018), CoE. CM/Del/Dec(2018)1310/H46-24.
[162] Interim Resolution Execution of the judgments of the European Court of Human Rights Nevmerzhitsky, Yakovenko, Logninenko, Isayev and Melnik groups against Ukraine" (2018), CoE, CM/ResDH(2018)472**.**
[163] Sukachov, para.41.
[164] Ibid, para.76.
[165] Scozzari and Giunta v. Italy (Application nos.39221/98 and 41963/98), 2000, para.249.
[166] Harris, O'Boyle & Warbrick (n 99) p.188.

The ECtHR mentioned in both *Varga and Others* and *Sukachov* cases that, first of all, the States have to solve the problem of overcrowding. Overcrowding is also linked to the issue of the excessive length of pre-trial detention previously described in pilot judgments of *Kharchenko v. Ukraine*[167] and *Ignatov v. Ukraine*.[168] However, even though national courts have made positive steps in order to control requests on the length of detention, the number of detainees in Ukraine increased in 2019 in comparison with the data in 2015-17.[169]

Referring to the existing Ukrainian practice there was a so-called "Savchenko Law" created in 2015 aimed to reduce the prison population. [170] It included the regulation where one day spent in SIZO should have been counted as two days of imprisonment.[171] This way seemed to be one of the ways to deal with overcrowding but the law was abolished in 2017 due to the recorded increase of the crime rate and did not reach any success. [172]

In *Sukachov* the Court reviewed that lodging a complaint to the prosecutor cannot be expected to involve an independent and impartial review.[173] That was the only possible remedy that detainees could use but it could not lead to preventive or compensatory redress. Even though a prosecutor has the capacity of securing appropriate conditions of detention, the complaint procedure to the prosecutor has significant procedural shortcomings as there is no requirement for the complaint to be examined with the participation of a concerned detainee.[174] The Court also stated that even if the detainee receives an order requiring a redress, the structural character of the situation shows that the administration would not be able to satisfy a large number of simultaneous requests.[175]

[167] Kharchenko v. Ukraine (Application no. 40107/02), 2011, para.99.
[168] Ignatov v. Ukraine (Application no. 40583/15), 2016, para.40.
[169] Sukachov, para.149.
[170] "About modification of the Criminal code of Ukraine concerning the improvement of the procedure for crediting by court of term of pre-trial detention in term of punishment" (2015), the Supreme Rada, part.1. <https://zakon.rada.gov.ua/laws/show/838-19>.
[171] Ibid, part.1.
[172] Ibid, part.1.
[173] Sukachov, para.119.
[174] Ibid, para.120.
[175] Ibid, para.121.

The Court noted in *Sukachov* that the draft law from 2016 on the reforms of the penal system in Ukraine contained the appointment of post-sentencing judges responsible for the preventive and compensatory remedies and the adoption of binding decisions in this respect. Even though the creation of that body corresponded to the requirements of a "preventive remedy" the draft law was withdrawn in 2019 and the Government did not present any alternatives.[176]

In relation to the general measures to deal with the structural problem, the Court stated that in both pilot judgments the ECtHR refers to the "*margin of appreciation*" and decided to grant the States a discretion to choose effective measures to comply with Article 46 of the ECHR. The State can either modify the existing remedies or introduce the new ones that correspond to Conventional terms in order to regulate violations.[177] In *Varga and Others*, the ECtHR stated that in exceptional cases the Court agreed to indicate possible measures that could be taken in order to eradicate the structural problem.[178]

Even though the Court refrained from giving precise indications on general measures that should be implemented by the Ukrainian government in order to bring conditions of detention to the satisfactory level in line with Article 3, it found that "the position in relation to the general measures required to redress the systemic problem underlying the breach of Article 13 found in the present case is different".[179]

After the Court issued the judgment *Varga and Others*, in its communication the Hungarian government listed the number of general measures that had been introduced to solve the problem of prison overcrowding. In 2015 there was an introduction of the "reintegration custody" that is further described in the Annex (section (e)).[180] "Reintegration custody" was

[176] Ibid, para.156.
[177] Torreggiani and Others (n 94) para.98.
[178] Varga and Others, para.102, Sukachov, para.144.
[179] Sukachov, para.153.
[180] H46-16 Varga and Others + István Gábor Kovács group v. Hungary (Applications No. 14097/12, 15707/10) (2017), CoE, 1288th meeting, CM/Notes/1288/H46-16.

implemented after the Court's recommendation on the reduction of the prison sentence. The results showed that since the corresponding changes in the domestic system were made the overcrowding rate has decreased from 43% in 2014 to 31% in 2016.[181] Thus, this measure helped to decrease the prison occupation rate that serves as a positive example for the Ukrainian implementation practice.

In addition, Hungary introduced preventive and compensatory remedy that is a mechanism for complaints about conditions of detention. This measure includes affording compensation for the detention period spent in such conditions. However, some alternative measures proposed by the HHC have not been taken into consideration by the authorities. [182]

Domjan v. Hungary shows preconditions in the law for the use of the compensatory remedy that were: 1) a detainee would previously refer to preventive remedies if the number of days spent in poor conditions of detention did not exceed thirty (if longer the further complaint was not needed to be lodged within three months); 2) a detainee should comply with the period of six-month time-limit established from the date when poor material conditions were no longer in place or if the person is not detained the time limit was set by law.[183] The existing Hungarian practice of implemented remedies after the pilot judgment serves as an example for further adoption of effective remedies in Ukraine. More specific remedies recommended by the Court in Sukachov will be mentioned in an Annex together with the list of newly introduced measures. All the facts and the ECtHR judgments related to the current situation in Ukraine have been taken into consideration together with the existing Hungarian practice of the pilot judgement's implementation. They were analyzed aiming to develop the list of recommendations for the Ukrainian government on the ways of effective implementation of Sukachov and overcoming the structural problem of ill-treatment caused by detention conditions.

[181] CM/Notes/1288/H46-16 (n 180).
[182] Ibid.
[183] Ulemek (n 111) para.74.

Conclusion

The Capstone Project illustrated those conditions of detention that led to ill-treatment of prisoners in Ukraine and Hungary, identified specific features of the structural problem in both States, analyzed and developed the set of possible effective remedies that the Ukrainian Government could use.

In the first chapter, the thesis identified the general principles developed through the ECtHR case-law and regional human rights documents discussing ill-treatment that results from inadequate conditions of detention. Those general principles served as a basis for the further evaluation of specific material conditions of detention described in the next chapter.

The second chapter reviewed the main issues that are emblematic of the existence of a real structural problem both in Ukraine and Hungary. The project identified that there are such problematic material conditions in both States as overcrowding, lack of access to outdoor activities, insufficient ventilation, daylight or artificial light that is not turned off, the absence of proper toilet partition, issues with a water supply and quality of food, obstacles to have proper sanitary conditions and the possibility to take shower, the existence of insects such as bedbugs. It has been proved by numerous reports provided by independent monitoring bodies on conditions in many detention facilities and by the existing ECtHR case-law. Those particular examples and evidence of problematic material conditions of detention both in Ukraine and Hungary supported the argument that the structural problem related to inadequate conditions of detention exists in both States and needs to be reviewed.

In the third chapter, the thesis examined general measures that should be applied in cases of overcrowding or other problematic material conditions of detention. It identified that there should be a set of preventive and compensatory remedies that would stop a continuing violation.[184]

[184] Torreggiani and Others (n 94) para.50

Particular examples of effective preventive and compensatory remedies appeared in the fourth chapter. The thesis concluded that Ukraine lacks effective criminal policy and reform of the penal system, the set of effective remedies and, thus, has gaps in the law. There were various unsuccessful attempts of the Ukrainian government to deal with the problem as it has been questionable by the CoM for many years. None of the proposed reforms of the system appeared to be feasible. Thus, the project aimed to present a set of recommendations for the Ukrainian government to implement the new pilot judgment *Sukachov*.

Finally, the thesis focused on the comparative analysis of pilot judgments *Varga and Others v. Hungary*[185] and *Sukachov v. Ukraine*[186] that allowed to identify the main features of the existing structural problem and effective measures to deal with it. It concluded that domestic remedies in Hungary and Ukraine did not demonstrate how they could effectively secure prisoners' rights. The thesis established in both judgments what were the shortcomings in both domestic systems that should be properly redressed.

[185] Varga and Others (n 1).
[186] Sukachov (n 2).

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Annex

Practical Component

Recommendations addressed to the Kharkiv Human Rights Protection Group on the implementation of Sukachov v. Ukraine

With reference to the judgments of the ECtHR and comparing the pilot judgments in *Varga and Others v. Hungary* and *Sukachov v. Ukraine,* the project provides a list of recommendations on the future implementation of *Sukachov* judgment by the Ukrainian Government and new remedies in order to redress the structural problem that currently exists in the country.

The implementation of the *Sukachov* judgment should lead to the adoption of effective preventive and compensatory remedies in cases of placing prisoners in inadequate conditions of detention. Building the link between the Hungarian practice to implement *Varga and Others* and recommendations that the Court gave in *Sukachov*, the thesis introduces the following additional recommendations:

1. Preventive remedies

a) The Government should amend the domestic law to offer adequate and effective remedies to deal with Article 3 violations, particularly with those that are the consequences of poor conditions of detention.[187] According to the existing domestic regulations, the minimum personal space in SIZO cells is 2.5 sq.m which does not correspond to the Convention standards.[188] This rule should be amended in accordance with the CPT standard. The Government should make all the possible steps to provide a minimum of 4 sq.m of personal space per detainee in detention facilities. The State should not try to avoid responsibility for breaching the standard by lowering it;

[187] Sukachov, para.153
[188] Sukachov, para.46.

b) The Government should ensure that conditions in all Ukrainian detention facilities are not inhuman or degrading and are not in violation of Article 3. If there are unnecessary restrictions on contact with the outside world, the Government should take necessary measures to remove them. Especially if there are poor conditions of detention the Government should increase the number of hours spent outside the cells and time for visits;[189]

c) In order to reduce overcrowding in certain penitentiary institutions the Government should ensure the relocation of detainees to less crowded penal institutions;[190]

d) The Government should ensure building new detention facilities, the renovation of the old ones in order to increase the number of places for inmates and improve material conditions of detention.[191] The lack of financial resources for renovation or building new detention places could not serve as a justification if those conditions are inadequate. [192]

e) The Government should create a long-term strategy for crime prevention and changing the national penal system in order to prevent overcrowding that leads to the worsening of material conditions.[193] The Government should adopt new criminal policy reform that will ensure reviewing Ukrainian penal policy and will help to focus on the most pressing issues.[194]

Prosecutors and other law-enforcement authorities should be encouraged to decrease the number of requests for detention and their continuation excluding serious cases.[195] Frequent requests for detention and their continuation is another structural problem that can be combined with the issue of poor conditions of detention. The Government should take both into consideration to ensure a remedy for these issues in complexity.

[189] Communication HHC 2020 (n 55) p.31.
[190] Communication from Hungary concerning the case of István Gábor Kovács group and Varga and Others against Hungary (Applications No. 15707/10, 14097/12), 2015, p.3.
[191] Sukachov (n 2) para.151.
[192] Orchowski v. Poland (Application no. 17885/04),2009, para.153.
[193] Ibid, p.31.
[194] Ibid, p.31.
[195] Jurliga, "The European Court insists on improving the conditions of Ukrainian prisons" (2020).

The Government should introduce the system of the "reintegration custody" that would allow eradicating overcrowding in prisons in Ukraine.[196] It means that those detainees convicted for minor offenses could serve the rest of their sentence (last 6 months of detention) at home with the help of special electronic devices for control.[197] This measure would help to reintegrate a detainee to social life by developing family and microsocial, labor relations.[198]

The Government could also introduce the system of fines for petty crimes instead of ordering detention in prison facilities.[199]

f) The Government should encourage prosecutors and judges to use alternatives to detention (non-custodial punitive measures) in their decision-making process and minimize recourse to pre-trial detention.[200]

g) The Government should create a special independent authority aimed to control detention facilities. The revision of complaints by this special authority would produce results more speedily in comparison with the ordinary court proceedings. [201] It should be able to review the cases of violation of the detainees' rights, be independent of other penal bodies and should have the power to investigate complaints involving the complainant and have the power to rule in binding decisions indicating appropriate redress.[202] An independent authority could be a new body that is not dependent on the state penal authorities. However, Ukraine could ensure providing effective remedies with existing authorities if they complied with the same principles that are established by the Court in case with the independent authority;[203]

[196] 1288th meeting, 6-7 June 2017 (DH), CM/Notes/1288/H46-16.
[197] Communication from Hungary concerning the István Gábor Kovács group of cases and the case of VARGA v. Hungary (Applications No. 15707/10, 14097/12) (2019), Council of Europe, p.14.
[198] Communication 2015 (n 191) p.7.
[199] Communication from the Hungarian Helsinki Committee concerning the cases of Istvan Gabor Kovacs and Varga and Others v. Hungary (Application nos. 15707/10, 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13) (2017), CoE, p.2.
[200] Ananyev and Others (n 19) para.197
[201] Ibid, para.154.
[202] Ibid, para.154.
[203] Ibid, para.155.

h) The Government should regularly collect data related to overcrowding and material conditions of detentions and make them accessible to the interested public.[204] As the responsibility for penal institutions has been transferred to the Ministry of Justice, [205] it should ensure that the relevant data are regularly published in the form of a report, website post, or other types of published information with free access.

i) The Government should monitor the effective implementation of the *Sukachov* judgment. In order to do that, the Government should initiate "effective, politically neutral and professional way to debate on how to implement pilot judgment";[206]

2. Compensatory remedies

a) The Government should order granting compensations to current detainees or those who have been released but were subjected to ill-treatment. The Government should provide additional financial and human resources to the penitentiary system in order to ensure such a remedy.[207] Persons could receive pecuniary and non-pecuniary damages, the latter type of damages should be automatically considered if there is a violation of Article 3 that can result in degrading treatment.

Monetary compensation is the only option for those who are no longer in detention.[208] Provisions on the compensatory mechanism should ensure that even if the moving space in detention corresponds to the standard a detainee can claim compensation if other material conditions (access to fresh air, proper ventilation, natural light, toilet partitions, absence of insects) are inadequate;[209]

[204] Communication 2020 (n 55) p.32.
[205] Sukachov (n 2) para.130.
[206] Communication 2020 (n 55) p.32.
[207] Ibid, p.32.
[208] Sukachov, para.159.
[209] Communication 2020, p.31.

b) The Government should reduce the sentence period of the person in proportion to the number of days spent in inadequate conditions of detention. This measure is applied only to those who are detained;[210]

These remedies should be adopted by the Government within 18 months after the decision becomes final.[211]

[210] Neshkov and Others, para.287

[211] "The European Court insists on improving the conditions of Ukrainian prisons" (2020), Jurliga <https://jurliga.ligazakon.net/ua/news/192798_vropeyskiy-sud-napolyaga-na-polpshenn-umov-ukranskikh-vyaznits>.