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**OMBUDSPERSON'S OPINION RELATED TO REQUESTS FOR RELEASE OF
CERTAIN CATEGORIES OF PRISONERS AT THE TIME OF GLOBAL CORONA
VIRUS (COVID -19) PANDEMIC**

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OMBUDSPERSON'S OPINION RELATED TO REQUESTS FOR RELEASE OF CERTAIN CATEGORIES OF PRISONERS AT THE TIME OF GLOBAL CORONA VIRUS (COVID -19) PANDEMIC

This Opinion is based on the complaints of some prisoners who addressed the Ombudsperson with the request for early release or parole based on the situation in the country after the outbreak of Covid-19 infection cases, which was declared a global pandemic by the World Health Organization (WHO). WHO required undertaking of severe measures from states governments in order to prevent spreading of COVID-19. Such measures have been taken by the Government of the Republic of Kosovo as well. The Kosovo Correctional Service has taken a number of measures in accordance with the recommendations of the health authorities to prevent COVID-19 in prisons and detention centers. These measures involve prohibition of visits to prisoners, transfers, transport of prisoners to court hearings solely in certain cases, etc. Prison Healthcare Department also undertook various medical measures.

Current situation in Prisons and Detention Centers

Ombudsperson's National Preventive Mechanism of Torture, upon occurrence of the first cases with COVID-19 and measures taken by the Government of Kosovo for its prevention, has temporarily suspended visits to Prisons and Detention Centers, based on the principle of "not causing greater damage" recommended recently by the European Committee for the Prevention of Torture and the UN Subcommittee on the Prevention of Torture. However, monitoring of respect of the rights of persons deprived of their liberty has continued intensively through contacts with the authorities as well as admission of complaints from prisoners by phone and other means of communication.

On 13 March 2020, Prison Healthcare Department informed the Ombudsperson that it has drafted an Operational Plan to prevent COVID-19, which foresees a number of measures and which was delivered to all Prisons Healthcare Units and Detention Centers. Until now, no cases of COVID-19 infection have been reported. There were cases of COVID-19 infection among correctional officers and medical staff at the Mitrovica Detention Center. In cooperation with the National Institute of Public Health (NIPH), necessary measures were taken in testing officials and prisoners, and those resulted positive were sent to quarantine and isolation. NIPH tested a number of prisoners who turned out to be negative. So far, the relevant authorities, through official documents, notified the Ombudsperson that the situation is managed without any particular problems.

Statement of Principles of the European Committee for the Prevention of Torture (CPT) and Advices of the UN Organization Subcommittee on Treatment of Prisoners in the Time of COVID-19

The European Committee for the Prevention of Torture is Council of Europe's mechanism which monitors implementation of the European Convention against Torture in states member of Council of Europe. Based on the agreement signed with UNMIK and NATO in 2004 and 2006, this Mechanism undertakes also visits the Republic of Kosovo, assesses the respect of the rights of prisoners and provides recommendations to competent authorities to

improve treatment of prisoners in accordance with international standards.¹ The CPT so far has visited Kosovo three times and submitted to the Government of the Republic of Kosovo a report on its findings through UNMIK. Upon submission of the Report with findings and recommendations, the response is requested from the Government of the Republic of Kosovo concerning each issue and recommendation.

On 20 March 2020, the CPT issued a Statement of Principles relating to the Treatment of Persons Deprived of Liberty in the Context of Global COVID-19.² On the occasion of publication of these principles the CPT, among others, points out: *“The CPT has sent this statement to all Council of Europe member states, asking them to transmit it to all Ministers concerned, as well as to any other authority (including the Judiciary and the Parliament) responsible for the situation of persons deprived of their liberty. In its letter, the CPT requests the authorities to send, by 30 April, an account of the concrete measures taken by the relevant authorities in the context of the coronavirus disease (COVID-19) pandemic with respect to the treatment of persons deprived of their liberty in prisons as well as in other types of establishment, in particular, health and social welfare institutions and immigration detention centres.”*³ The Ombudsperson is not aware whether or not such a letter has been addressed to Republic of Kosovo, as stated in this CPT Statement, given that the Republic of Kosovo is not a member of the Council of Europe.

Further, through this Statement, CPT points out that the outbreak of Corona virus disease (COVID-19) pandemic, for Council of Europe member States has created extraordinary challenges, in all places where persons deprived of their liberty are held. Furthermore, CPT in the Statement:

“Whilst acknowledging the clear imperative to take firm action to combat COVID-19, the CPT must remind all actors of the absolute nature of the prohibition of torture and inhuman or degrading treatment. Protective measures must never result in inhuman or degrading treatment of persons deprived of their liberty.”

Until now, the Ombudsperson, through telephone lines available to persons deprived of their liberty, has not received any complaint of inhuman or degrading treatment. All complaints received so far refer to early release and parole.

The Ombudsperson notes that in Principle no. 5 of the Statement of Principles, the CPT explicitly stipulates:

“As close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding. Further, authorities should make greater use of alternatives to pre-trial detention, commutation of sentences, early release and probation; reassess the need to continue involuntary placement of psychiatric patients; discharge or release to community care, wherever appropriate,

¹ For additional information on visits, reports and agreements of the European Committee on Prevention of Torture with UNMIK and NATO visit: <https://www.coe.int/en/web/cpt/kosovo>

² CPT, Statement of Principles related to the Treatment of prisoners deprived of liberty in the context of COVID-19 pandemic, English version at: <https://www.coe.int/en/web/cpt/-/covid-19-council-of-europe-anti-torture-committee-issues-statement-of-principles-relating-to-the-treatment-of-persons-deprived-of-their-liberty->

³ Ibid.

residents of social care homes; and refrain, to the maximum extent possible, from detaining migrants”

Through this Principle, CPT calls upon responsible authorities to implement alternative measures to deprivation of liberty, specifically in cases when they face **congestion**. During the monitoring visits in all places of deprivation of liberty during 2019 and in the beginning of 2020, the Ombudsperson, through Recommendation Reports, has pointed out that these institutions are not overcrowded. While according to KCS, since the outbreak of COVID -19 in Kosovo, the number of prisoners has decreased. .

UN Subcommittee on Prevention of Torture (henceforward CPT)

This UN Subcommittee mandate is to conduct visits to the signatory countries of the Optional Protocol to the UN Convention against Torture. The purpose of the visits is to assess treatment of persons deprived of their liberty in the signatory states of the above-mentioned protocol. On 25 March 2020, the UN Committee adopted the document entitled “**Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms relating to the Coronavirus Pandemic**”.⁴

The Republic of Kosovo is not a signatory to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to this Convention, since it is not yet a member of the United Nations. However, Article 22 of the Constitution of the Republic of Kosovo stipulates that human rights and freedoms guaranteed by international agreements and instruments are guaranteed by the Constitution of the Republic of Kosovo. These agreements and international instruments are directly implemented in the Republic of Kosovo and have priority, in case of conflict, over the provisions of laws and other acts of public institutions. One of the conventions incorporated in this Article is the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

Being aware of the challenges that the competent authorities are facing in managing the situation created by COVID-19, the necessity of restriction of certain rights and freedoms, the measures undertaken in places deprived of their liberty and beyond, this Committee determined the measures which should be undertaken by authorities in all places deprived of liberty, including prisons and detention centers, immigration detention centers, closed cafes for refugees, psychiatric hospitals and other health institutions.

These measures are included in the following 20 points:

- 1) To undertake urgent assessment in order to identify persons within the population in prisons and detention centers who face the greatest risk as well as to conduct assessment of all vulnerable groups.
- 2) To reduce population in prisons and other institutions wherever such action is possible by implementing temporary and early release schemes of prisoners for whom it is safe to do that, taking into account alternative measures to imprisonment provided for in the Tokyo Rules.
- 3) Special attention to be paid to prisons and detention facilities in which the official accommodation capacity is exceeded (overcrowded) and where the official capacity is

⁴ Document in English can be found at:

<https://www.ohchr.org/Documents/HRBodies/OPCAT/AdviceStatePartiesCoronavirusPandemic2020.pdf>.

- based on square meters per person and which does not allow social distancing in accordance with standard guidelines for the entire prison population as a whole.
- 4) To review all detention cases in order to determine whether the measure of detention is strictly necessary in the light of public health urgency and to expand imposition of on bail measure in all cases except serious cases.
 - 5) To consider the use of detention facilities for foreigners and closed refugee camps in order to reduce the population in these institutions to the lowest possible level.
 - 6) Release from imprisonment must be assessed in order to ensure that appropriate measures are taken against those who are positive or particularly vulnerable to infection.
 - 7) To ensure that any restrictions on existing regimes are kept to a minimum, proportionate to the nature of the health emergency and in accordance with the law.
 - 8) To ensure that existing complaint lodging mechanisms are functional and effective.
 - 9) To respect the minimum standard for daily exposure to fresh air, taking into account at the same time the necessary measures to prevent and treat pandemics.
 - 10) To ensure that there is sufficient space and supplies (provided free of charge) for all persons who remain in prisons and detention centers in order to keep the hygiene at the same level as the population as a whole.
 - 11) Where visits are prohibited for health reasons, to provide other ways of communication of prisoners with their families and contacts with the outside world, for example, by telephone, internet / email, video communication and other appropriate electronic devices. Such contacts should be facilitated and encouraged and be frequent and free of charge.
 - 12) To enable family members and relatives to continue bringing food and other supplies to the prisoners, in accordance with local practices and with due respect for protection measures.
 - 13) To accommodate those who pose a great risk to the rest of the prison population while fully respecting their rights.
 - 14) To prevent that health isolation takes the form of a disciplinary measure of solitude, the measure of health isolation should be based on independent medical evaluation, be proportionate, time-limited, and be subject to procedural guarantees.
 - 15) To provide medical care for inmates in need and if necessary outside prisons and detention centers whenever possible.
 - 16) To ensure that basic procedural guarantees against ill-treatment (including the right to independent medical counseling, legal assistance and to ensure that third parties are notified of imprisonment) remain available and operational regardless restriction of access.
 - 17) To ensure that all prisoners and staff receive reliable, up-to-date and accurate information on all measures being taken, their duration and the reason for taking such measures;
 - 18) To ensure that appropriate measures have been taken to protect the health of medical and correctional staff and that they are properly equipped and supported in the performance of their duties.
 - 19) To ensure access to appropriate psychological services for all inmates and staff affected by these measures, and

- 20) To ensure that the above recommendations, if applicable, are taken into account in relation to patients who have been admitted involuntarily to psychiatric hospitals

Conditional release by Parole Panel and the powers of the Ombudsperson

Law No. 05/L-129 on Amending and Supplementing the Law No. 04/l-149 on the Execution of Penal Sanctions determines the composition of Parole Panel (PP). According to Article 18 paragraph 2, PP now is composed as follows: one (1) judge from Supreme Court delegated by the President of the Supreme Court; one (1) judge from the Court of Appeals, delegated by the President of the Court of Appeals, and one (1) judge from the Basic Court in Prishtina, delegated by the President of the Basic Court. With aforementioned amendments, the PP now has a fully judicial composition. The Ombudsperson has no jurisdiction over court decisions, except in cases of lengthy court proceedings.⁵ Furthermore, the Regulation on the Functioning and Organization of the PP explicitly stipulates that the decisions of the PP cannot be appealed.

Pardon from the President

Pardon by the President means the extraordinary executive power of the President to forgive a convicted person of his or her criminal offence and to relieve him or her of the punishment imposed by a court's judgment and sentence.⁶ Based on the Law on Pardon, Pardon is President's right intended not as a routine remedy, but as a seldom-used tool to reward extraordinary displays of character and conduct or to address serious humanitarian concerns.⁷ The Ombudsperson received complaints from convicts regarding the President's pardon. He also received complaints from women convicts because no convicted woman has been pardoned by the President. In 2019, the President promulgated Decree 250/2019 declaring pardon to three prisoners. Among them was not any convicted woman. The Ombudsperson, being aware of President's full discretion in deciding on the issue, notwithstanding considers that in the case of pardon, the principles of gender equality and non-discrimination provided by the Law on Gender Equality and the Law on Protection from Discrimination, should be taken in consideration.

Temporary suspension of execution of sentence

Law No. 05/L-129 on Amending and Supplementing the Law No. 04/l-149 on the Execution of Penal Sanctions stipulates as follows: "*Temporary suspension of the execution of any sentence shall mean any release of a convicted person from the correctional facility, during which the time of serving the sentence of imprisonment is not counted*". Further, this Law stipulates that the president of the competent basic court decides on the basis of the criteria set out in this law. An appeal is allowed against the decision of the President of the Basic Court, according to the law in force.⁸

⁵ Law No. 05/L-019 on Ombudsperson, Article 16.8.

⁶ Law No. 03/L-101 on Pardon, Article 2.

⁷ Law No. 03/L-101 on Pardon, Article 3, paragraph 1.

⁸ Law No. 05/L-129 on Amending and Supplementing the Law No. 04/l-149 on the Execution of Penal Sanctions, Article 94. See at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8867>.

Early release

Law No. 05/L-129 on Amending and Supplementing the Law No. 04/l-149 on the Execution of Penal Sanctions, in Article 1 stipulates as follows: “*Upon the request of the convicted person, the competent Court may release a convicted person before the completion of his or her service of the sentence of imprisonment if he or she has demonstrated good behaviour, success in his or her work and other activities*”. Based on the provisions of this Article, it derives that the competency rests with competent court.⁹

Conclusion

The Ombudsperson received complaints from some prisoners who have requested to be released from further serving their sentences, referring to the situation created by the outbreak of the global COVID-19 pandemic. The Ombudsperson, in accordance with Law no. 05 / L-019 on the Ombudsperson and relevant legislation at effect has no jurisdiction over the decisions of the Parole Panel, as well as decisions of the competent courts which are related to early release and temporary suspension of the execution of the sentence.

Recognizing clear liabilities for undertaking decisive actions to combat COVID-19, the Ombudsperson reminds all responsible bodies of the Republic of Kosovo, responsible for persons deprived of their liberty, on the absolute nature of prohibition of torture, cruel, inhumane or degrading treatment, which is foreseen by the Constitution of the Republic of Kosovo, relevant national legislation, as well as international human rights standards.

Protection measures should never result in inhuman and degrading treatment of persons deprived of their liberty. Any restriction of fundamental rights and freedoms must be indispensable, proportionate, for a certain period of time, based on the Constitution of the Republic of Kosovo, in law, as well as international legal acts on human rights enshrined in the Constitution.

Also, responsible authorities of the Republic of Kosovo, in this period, must act fully in compliance with Statement of Principles announced by the CPT on 20 March 2020 and the Advices of the UN Subcommittee on the Prevention of Torture for treatment of persons deprived of their liberty in the context of the fight against the COVID-19 pandemic declared on 25 March 2020. The Ombudsperson recommends the Government of the Republic of Kosovo that these two important documents of the above-mentioned international organizations for the treatment of persons deprived of liberty in this period of global pandemic are sent to all relevant ministries, as well as any other authority (including the Judiciary and Parliament) responsible for the state of persons deprived of liberty.

Furthermore, the Ombudsperson encourages the competent authorities to submit a comprehensive report to the CPT by 30 April 2020 on the concrete measures taken in the context of global pandemics (COVID-19) regarding the treatment of persons deprived of their liberty in prisons, as well as in other institutions, in particular, healthcare and social welfare institutions as well as immigration detention centers.

In cases where family visits are prohibited for health reasons, to provide other ways to prisoners to maintain contacts with their families and with the outside world, for example, by

⁹ Law No. 05/L-129 on Amending and Supplementing the Law No. 04/l-149 on the Execution of Penal Sanctions, Article 127. For more info visit: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=8867>.

telephone, internet / email, video communication and other appropriate electronic devices. Such contacts should be facilitated, encouraged, be frequent and free of charge.

Persons deprived of their liberty to be guaranteed the level of health care available to other community. Competent authorities, if necessary, to provide medical care to prisoners outside prisons and detention centers, whenever possible.

The Ombudsperson urges competent authorities to impose alternative sanctions on remand detention in order to prevent an increase in the number of prisoners and not to risk the principle of maintaining social distance, which is one of the measures proclaimed by the WHO in the fight against COVID -19.

Pursuant to Article 132, paragraph 3, of the Constitution of Republic of Kosovo (*“Every organ, institution or other authority exercising legitimate power of the Republic of Kosovo is bound to respond to the requests of the Ombudsperson and shall submit all requested documentation and information in conformity with the law”*) and Article 28 of the Law No.05/L-019 on Ombudsperson, (*“Authorities to which the Ombudsperson has addressed recommendation, request or proposal for undertaking concrete actions, including disciplinary measures as well, must respond within thirty (30) days. The answer should contain written reasoning regarding actions undertaken about the issue in question”*), You are kindly asked to inform us on steps to be undertaken regarding this issue.

Warmly submitted,

Hilmi Jashari
Ombudsperson